



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Snelgrove*, 2023 NLCA 12

Date: April 18, 2023

Docket Number: 202101H0078

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BETWEEN:

CARL DOUGLAS SNELGROVE

APPELLANT

AND:

HIS MAJESTY THE KING

RESPONDENT

Coram: D.E. Fry C.J.N.L., L.R. Hoegg and W.H. Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201601G2389

Appeal Heard: November 3, 2022

Judgment Rendered: April 18, 2023

Reasons for Judgment: By the Court

Counsel for the Appellant: Janani Shanmuganathan & Owen Goddard

Counsel for the Respondent: Kathleen O'Reilly

Authorities Cited:

CASES CITED: *R. v. Goforth*, 2022 SCC 25; *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521; *R. v. Barrow*, [1987] 2 S.C.R. 694; *R. v. Simon*, 2010 ONCA 754; *R. v. E.(F.E.)*, 2011 ONCA 783; *R. v. Burnett*, 2021 ONCA 856; *R. v. Esseghaier*, 2021 SCC 9; *R. v. T.(L.W.)*, 2008 SKCA 17; *R. v. Iyamuremye*, 2017 ABCA 276; *R. v. Cole*, 2012 ONCA 347; *R. v. Noseworthy*, 2021 NLSC 115; *R. v. J.D.*, 2022 SCC 15; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Sansregret*, [1985] 1 S.C.R. 570; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Stavroff*, [1980] 1 S.C.R. 411; *R. v. Snelgrove*, 2018 NLCA 59, aff'd 2019 SCC 16, [2019] 2 S.C.R. 98; *R. v. Miljevic*, 2011 SCC 8, [2011] 1 S.C.R. 203; *R. v. Pope*, 2021 NLCA 47, 7 C.A.N.L.R. 39, aff'd 2022 SCC 8; *R. v. Henderson*, (1999) 44 O.R. (3d) 628 (Ont. CA); *R. v. Chacon-Perez*, 2022 ONCA 3; *R. v. Olbey*, [1980] 1 S.C.R. 1008; *R. v. Ostrowski*, [1990] 2 S.C.R. 82; *R. v. Keegstra*, [1996] 1 S.C.R. 458.

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46, sections 273.1(2), 650(1), 650.01, 650.1, 686(1)(b)(iv).

TEXTS CONSIDERED: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022).

BY THE COURT:**INTRODUCTION**

[1] Carl Douglas Snelgrove was convicted by a jury of sexually assaulting a female complainant in the early morning hours of December 21, 2014. At the time, Mr. Snelgrove was on-duty and in uniform working as a Royal Newfoundland Constabulary (RNC) police officer in downtown St. John's, Newfoundland and Labrador.

[2] The complainant had been drinking in a downtown bar. After leaving the bar, near 3 a.m., she was walking along Water Street when she saw Mr. Snelgrove sitting in his marked police car. She approached him and asked for a drive home — “[I]n the drunken state I was in, it was a better option to go with a police officer than a cab driver”.

[3] The complainant testified she was very drunk, and her evidence of inebriation was corroborated by other witnesses. She testified that Mr. Snelgrove drove her home and helped her get into her basement apartment through a window because she did not have her key. Mr. Snelgrove did not leave after he dropped the complainant at her home, and they both ended up together inside the apartment. When inside the apartment the complainant remembered standing in her living room and kissing Mr. Snelgrove, "I don't know who initiated it or what happened, but we did kiss". She recalled sitting down on her loveseat but then a gap and, "the next thing after that I recall is that I came to and none of my clothes were on and he was standing above me having anal sex with me". She testified she was "highly intoxicated [and] wasn't really sure what I was doing". She said she had blackout periods, and did not recall parts of the sexual encounter, and had no recall of consenting. She said that she had approached the officer to get a safe ride home because of her intoxicated condition, and that she had no intention of having sexual relations with the officer.

[4] Mr. Snelgrove testified that he agreed to drive the complainant home to her apartment even though it was located outside of his assigned work jurisdiction. He testified that he did not notify his dispatcher that he was going to drive outside of his work jurisdiction or that he was driving a lone female, which he acknowledged he was expected to do under practices or policies of the RNC. Mr. Snelgrove said that the complainant invited him into her apartment and not only consented to having sexual relations with him, but initiated and actively participated in them. He said that he did not suspect that the complainant was impaired.

[5] The sole issue at trial was whether the complainant consented to the sexual activity. The jury was instructed on section 273.1(2) of the *Criminal Code*, which stipulates that no consent is obtained from a complainant if the complainant is unconscious (273.1(2)(a.1)), or incapable of consenting for any other reason (273.1(2)(b)), or if the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority (273.1(2)(c)).

[6] The jury convicted Mr. Snelgrove of the charge.

ISSUES ON APPEAL

[7] Mr. Snelgrove raises three issues on appeal.

[8] First, he argues that the Judge violated section 650(1) of the *Code* by conducting discussions respecting his jury charge and the jury questions in his chambers, when Mr. Snelgrove was not present. He maintains that a verdict which results from a trial that takes place in violation of section 650(1) must be set aside.

[9] Second, Mr. Snelgrove argues that the Judge erred in how he answered the questions the jury asked in the course of their deliberations. Mr. Snelgrove maintains that the Judge's answers to the jury's questions were insufficient and amounted to misdirection, requiring the verdict to be set aside.

[10] Third, Mr. Snelgrove submits that if this Court finds error, that the appropriate remedy is to stay further proceedings rather than remit the matter for a new trial. He argues that because the within trial was his third, it would be an abuse of process to order a fourth trial on this criminal charge.

STANDARD OF REVIEW

[11] Whether section 650(1) of the *Code* is violated is a question of law. Accordingly, the standard of review is correctness.

[12] The standard of review respecting jury instructions, which includes answers to questions the jury asked in the course of its deliberations, was recently summarized in *R. v. Goforth*, 2022 SCC 25. Côté, J., writing for the majority, stated:

[20] The alleged errors in this case pertain to the trial judge's charge to the jury. As I stated above, this court has long held that an accused is entitled to a jury that is properly — and not necessarily perfectly — instructed. ...

[21] Trial judges are not held to a standard of perfection in crafting jury instructions (*Daley*, at para. 31). Rather, an appellate court must take a functional approach when reviewing a jury charge by examining the alleged errors in the context of the evidence, the entire charge, and the trial as a whole It is the substance of the charge — and not adherence to or departure from a prescriptive formula — that is determinative ... As Bastarache J. instructed in *Daley*, at para. 30:

... it is important for appellate courts to keep in mind the following. The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not

whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case. [Emphasis added.]

[22] Indeed, trial judges must be afforded some flexibility in crafting the language of jury instructions, as their role requires them to "decant and simplify" the law and evidence for the jury ...

[Citations omitted.]

[13] In *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521 at page 537, Cory J., writing for the majority, stated that instruction given in response to questions the jury asked in the course of its deliberations must be correct and comprehensive.

ANALYSIS

ISSUE 1: Did the Judge violate section 650(1) of the *Code* by communicating and conducting discussions with counsel in the absence of Mr. Snelgrove?

Mr. Snelgrove's Position

[14] Mr. Snelgrove argues that section 650(1) was violated several times in the course of email communications and in-person discussions among his counsel, Crown counsel, and the Judge respecting the jury charge, and discussions between the Judge and counsel pertaining to questions the jury asked during its deliberations. Mr. Snelgrove was not involved in any of the email communications and he was not present when the Judge and counsel discussed the jury charge or the jury's questions and the Judge's answers. Mr. Snelgrove maintains that these communications and discussions were in breach of section 650(1).

[15] Mr. Snelgrove's argument is based on the wording of section 650(1) of the *Code*, which requires an accused's presence in court during the whole of their trial, subject to subsections 650(1.1) to (2), and section 650.01. He maintains that section 650.01 does not alter the section 650(1) requirement that he be present in court during the whole of his trial.

The Crown's Position

[16] The Crown argues that the email communications to which Mr. Snelgrove was not party and the discussions respecting the jury charge and the jury's

questions, when Mr. Snelgrove was not physically present, did not violate section 650(1). The Crown maintains that section 650(1) is specifically subject to section 650.01, which permitted Mr. Snelgrove's designated counsel to appear for him in court during his trial. Because Mr. Snelgrove had executed a valid Designation of Counsel, and because communications and discussions respecting the jury charge and the jury's questions are not parts of a trial excluded from the operation of section 650.01(1) by section 650.01(3), his designated counsel were permitted to engage in the communications and discussions with the Judge and counsel in Mr. Snelgrove's absence.

[17] The Crown also argues that section 650.1 specifically provides that a judge may conduct a pre-charge conference with "the accused or counsel for the accused and the prosecutor", so the Judge's communications and discussions with counsel for Mr. Snelgrove and the prosecutor respecting the jury charge and the jury's questions were specifically authorized by the *Code*, and did not violate section 650(1).

[18] For the reasons that follow, we are of the view that the wording and interrelationship of sections 650(1), 650.01, and 650.1 authorized Mr. Snelgrove's counsel to communicate and discuss the jury charge and the jury's questions in Mr. Snelgrove's absence.

Legislation

[19] Section 650 reads:

650 (1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of his or her trial.

(1.1) If the court so orders, and if the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken.

(1.2) If the court so orders, an accused who is confined in prison may appear by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken, as long as the accused is given the opportunity to communicate privately with counsel if they are represented by counsel.

(2) The court may

(a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;

(b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or

(c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.

(3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

[20] In pertinent part, section 650.01 reads:

650.01(1) An accused may appoint counsel to represent the accused for any proceedings under this Act by filing a designation with the court.

(2) The designation must contain the name and address of the counsel and be signed by the accused and the designated counsel.

(3) If a designation is filed,

(a) the accused may appear by the designated counsel without being present for any part of the proceedings, other than

(i) a part during which oral evidence of a witness is taken,

(ii) a part during which jurors are being selected, and

(iii) an application for a writ of *habeas corpus*;

(b) an appearance by the designated counsel is equivalent to the accused's being present, unless the court orders otherwise; and

(c) a plea of guilty may be made, and a sentence may be pronounced, only if the accused is present, unless the court orders otherwise.

[21] Section 650.1 reads:

650.1 A judge in a jury trial may, before the charge to the jury, confer with the accused or counsel for the accused and the prosecutor with respect to the matters that should be explained to the jury and with respect to the choice of instructions to the jury.

Jurisprudence

[22] Section 650(1) of the *Code* has been judicially considered. In *R. v. Barrow*, [1987] 2 S.C.R. 694, the Supreme Court of Canada held that it was a

violation of section 650(1) for the Judge to have considered claims by prospective jurors for exemption from jury duty out of earshot of the accused. In so doing, the Court interpreted the word “trial” in section 650(1) to include a judge’s examinations of prospective jurors, and reasoned that accused persons must be present during jury selection because the selection of jurors involves the vital interests of an accused which bear on the substantive conduct of the trial (*Barrow*, at 707-710).

[23] Mr. Snelgrove relies on three Ontario Court of Appeal cases to support his position: *R. v. Simon*, 2010 ONCA 754, *R. v. E.(F.E.)*, 2011 ONCA 783, and *R. v. Burnett*, 2021 ONCA 856.

[24] In *Simon*, the allegation on appeal was that the Judge violated section 650(1) of the *Code* by conducting a preliminary discussion about his jury charge with counsel in his chambers in the accused’s absence. The Judge had conducted several subsequent pre-charge discussions in open court in the presence of the accused. The appellate court declined to rule on whether the preliminary discussion about the jury charge was part of the trial for the purposes of section 650(1). However, it reasoned that even if it were, the circumstances were such that the *curative proviso* in section 686(1)(b)(iv) of the *Code* would apply to save the jury’s verdict, and dismissed the appeal (*Simon*, at paras. 126-132).

[25] The same court considered the same issue in a somewhat different context in *E.(F.E.)*. The judge in *E.(F.E.)* had held a pre-charge conference with counsel in his chambers in the absence of the accused. No record had been made of the conference and no details respecting it had been put on the record. The appellate court found that these circumstances violated section 650(1) of the *Code*, and that the *curative proviso* could not save the verdict. In so ruling, the court emphasized the importance of transparency and the appearance of fairness in court proceedings, and also stated that the chambers discussions were at odds with the open court principle.

[26] In *Burnett*, the same court ruled that the judge’s pre-charge discussions with counsel via email, followed by a pre-charge conference held in open court, were found to be a violation of section 650(1) of the *Code*. However, in accordance with the Supreme Court of Canada decision *R. v. Esseghaier*, 2021 SCC 9, the appellate court applied the section 686(1)(b)(iv) *curative proviso* because the accused had suffered no prejudice as a result of the procedural irregularity, and denied the appeal.

[27] Some years earlier, in *R. v. T.(L.W.)*, 2008 SKCA 17, the Saskatchewan Court of Appeal considered section 650(1) in the context of an accused's pre-trial application to sever charges. The application was heard by way of a conference call among the Judge and counsel when the accused was not present. The appellate court ruled that the application to sever was part of the trial for the purposes of section 650(1) and that it involved the accused's vital interests. The court also ruled that because the application was heard when the accused was not present, section 650(1) was violated. However, because the accused had no special information or knowledge on the issue of severance which might have advanced his case if he had been present, and because he was unable to demonstrate that he was prejudiced by the application being heard in his absence, the court applied the *curative proviso* and dismissed the appeal.

[28] The Alberta Court of Appeal also considered an alleged violation of section 650(1) as a ground of appeal. In *R. v. Iyamuremye*, 2017 ABCA 276, the appellant argued that his conviction for second-degree murder had to be set aside because the Judge and counsel had email communications respecting the jury charge to which the appellant had not been a party. The appellate court did not agree, saying:

102 Our review of the emails confirms that they did not contain substantive submissions to the trial judge. In any event, all the emails were marked as exhibits the following morning. All the discussions and decisions about the jury charge took place on the record. Iyamuremye was present for all discussions about the jury instructions. He has not demonstrated any prejudice as a result of the email exchanges. What happened was the use of a modern convenience to transmit information to facilitate further discussion in open court. It was not part of the trial as such ...

103 There was no breach of s. 650 of the *Criminal Code*. Even if there were, s. 686(1)(b)(iv) of the *Criminal Code* is available to cure the defect: *Simon, supra* at paras 118-123.

[29] As well, the Ontario Court of Appeal considered whether a Designation of Counsel made pursuant to section 650.01 impacted the section 650(1) requirement for an accused to be present during their trial. In *R. v. Cole*, 2012 ONCA 347, the respondent failed to appear (due to a misunderstanding with her counsel) to enter her plea on a charge of operating a motor vehicle with a prohibited concentration of alcohol in her blood. However, she had designated counsel to appear on her behalf under section 650.01, and her designated counsel was present. The Judge entered a plea of not guilty, the Crown elected to proceed by summary conviction, and the Judge set the matter for trial. The trial ultimately proceeded in the presence of the respondent, and she was

convicted. She appealed to the Summary Conviction Appeal Court (SCAC), arguing that her section 650(1) right to be present at her trial was violated when the Judge entered the plea on her behalf. The SCAC accepted her argument, and ruled that the Judge had erred in exercising his discretion under section 803(2) of the *Code* to enter a plea in her absence, because it violated her section 650(1) right to be present at her trial. The Crown appealed the SCAC decision to the Court of Appeal.

[30] The Court of Appeal allowed the Crown's appeal, ruling that there had been no violation of section 650(1) because the respondent had executed a valid Designation of Counsel prior to her non-appearance, and her designated counsel had been present. The appellate court reasoned that the respondent, though physically absent herself, was "present" through the operation of section 650.01(3)(b) of the *Code* (*Cole*, at para. 17), and held that the SCAC erred in concluding that the physical absence of the respondent on the date of arraignment and entry of a plea of not guilty contravened her right under section 650(1) of the *Code*. The appellate court further explained that even if the respondent's physical presence had been required to comply with section 650(1), in other words even if there had been no Designation of Counsel, what transpired would be "plainly" cured under the *curative proviso* (*Cole*, at para. 18).

[31] In *R. v. Noseworthy*, 2021 NLSC 115, the Supreme Court of Newfoundland and Labrador, General Division, sitting as a SCAC, also considered whether section 650(1) of the *Code* was violated when the Judge had asked the accused to leave the courtroom while he (the judge) discussed an evidentiary issue with counsel. The appellate judge found this to be a violation of section 650(1), as none of the exceptions in section 650(1) applied. However, she applied the *curative proviso* because the accused had suffered no prejudice and there was no impact on trial fairness, and dismissed the appeal.

Principles of Statutory Interpretation

[32] In this case, determining whether section 650(1) was violated involves interpreting sections 650(1), 650.01, and 650.1, and how these sections interrelate. The modern principle of statutory interpretation governs the analysis. It was succinctly summarized by Côté J. in *R. v. J.D.*, 2022 SCC 15, at paragraph 21:

[21] Statutory interpretation involves reading the words of a provision in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of

the Act, the object of the Act, and the intention of Parliament (E.A. Driedger, *Construction of Statutes* (2nd. ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[33] Reading the provisions of the *Code* in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Code* and Parliament's intention in enacting the provisions, requires being mindful of certain presumptions and maxims about how, and perhaps why, Parliament enacted the provisions in question. In this regard, Parliament is presumed to be knowledgeable about the subject matter to which its statutory provisions relate, and to competently convey its intention through the wording of the provisions in issue.

[34] Parliament is also presumed to use language carefully and consistently, and not to speak in vain by using meaningless words and phrases. This presumption, known as the presumption against tautology, informed the Supreme Court of Canada's ruling in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, wherein Lamer C.J. stated at paragraph 28:

... It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplussage ...

[35] As well, Parliament's legislation is presumed to be coherent. Parliament is presumed to have intended the provisions in its legislation to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together to form a rational internally consistent framework; because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022), at 323-325).

[36] The Crown's argument respecting section 650.1 is that a pre-charge conference is not one of the parts of a trial during which accused persons must be present (section 650.01(3)(a)), so Mr. Snelgrove's designated counsel was authorized to communicate with the Judge respecting the jury charge in Mr. Snelgrove's absence. The Crown also argued that the word "or" as it appears in section 650.1, means that a judge may conduct a pre-charge conference with an accused person, or alternatively, with counsel for an accused person.

What Happened at Trial

[37] The following is an account of the communications and discussions that took place in Mr. Snelgrove's absence at trial.

[38] On May 7, 2021, defence counsel asked the Judge whether there would be a pre-charge conference. The Judge agreed, and on May 10, 2021, he emailed counsel and asked them to meet with him in his chambers the following afternoon to discuss. Defence counsel responded by email, asking if the Judge could email a copy of his draft jury charge to them. The Judge agreed, and at 4:00 p.m. on that date, the Judge emailed a copy of his draft jury charge to counsel, with a note saying that he looked forward to meeting them in his office the following day at 2:30 p.m.

[39] Mr. Snelgrove describes the following sequence of events in his factum:

67. The following afternoon, on May 11, 2021, prior to the pre-charge conference in chambers, the defence sent an email to ask whether they could email a copy of the charge with proposed revisions that they intended to ask for during the pre-charge conference that afternoon. After the trial judge advised that this was acceptable, the defence emailed a draft with proposed revisions. The pre-charge conference took place in the trial judge's chambers later that afternoon in the absence of the appellant.

68. Later that evening, several emails were exchanged between the trial judge and the Crown and defence about the jury charge, including submissions on proposed revisions:

- May 11, 2021 at 6:10 p.m. – email from the trial judge attaching a revised charge “in accordance with our discussions [at the pre-charge conference]”.
- May 11, 2021 at 7:35 p.m. – email from the trial judge in response to an email from defence counsel. The trial judge canvassed the possibility of a second pre-charge conference in chambers the following morning on May 12, 2021.
- May 11, 2021 at 9:12 p.m. – email from the trial judge responding to and incorporating submissions from the Crown on the revised charge.
- May 11, 2021 at 9:15 p.m. – email from the trial judge advising counsel that he is going to contact the Sheriff's officer to ask him to contact the jury to have them come in at 2:30 p.m. the following afternoon (May 1[2]) and a request to counsel to attend his office at 10:00 a.m. the following morning.

The following morning, on May 12, 2021, another pre-charge conference took place in chambers in the absence of the appellant. The Crown and defence gave their closing submissions to the jury that afternoon.

69. Later that day, the trial judge sent counsel a further revised version of the charge. In response, both the defence and Crown emailed the trial judge with submissions on the charge, including on a proposed corrective instruction to a comment made by the Crown in closing submissions:

- May 12, 2021 at 4:24 p.m. – email from the trial judge advising of further revisions to the charge and to advise of any further errors or problems prior to 9:00 p.m. that evening.
- May 13, 2021 at 7:29 a.m. – email from the trial judge responding to a request for changes by the defence.
- May 13, 2021 at 8:53 a.m. – email from the defence with submissions on an aspect of the Crown’s closing submissions, and a request for a “bad character” instruction.
- May 13, 2021 at 9:17 a.m. – email from the Crown advising that a “bad character” instruction was “absolutely unnecessary”, and submissions on an alternative instruction.

70. After the two pre-charge conferences in chambers, and the email exchanges about the charge, the trial judge charged the jury on May 13, 2021. The content of the two pre-charge conferences that took place entirely in the absence of the appellant was not put on the record in any systematic or meaningful way. Nor were any of the email exchanges made an exhibit at the trial. As in *R. v. E.(F.E.)*, this is a case where section 650(1) of the *Code* was violated, the appearance of fairness was impaired, and the transparency of the trial and the open court principle were compromised.

(Appellant’s Factum, at paras. 67-70)

[40] In the course of their deliberations, the jury submitted questions in writing to the Court. According to Mr. Snelgrove’s factum, the Judge and counsel discussed the jury’s questions and potential answers, although in oral argument during the appeal hearing Mr. Snelgrove’s counsel (not the same as trial counsel) submitted that they were unsure whether such discussion occurred. It is clear that there were no detailed discussions about the questions on the record. The only discussion that occurred on the record was after Court resumed when the Judge proposed to counsel that he would read each question into the record and provide an answer, and then inquire at the end whether the jury still required the evidence replay that was raised in one of the questions. When the jury

returned to the courtroom, the Judge read each question and his response, in sequence, into the record.

The Appeal

[41] We begin by saying that although there may or may not have been discussions between the Judge and counsel respecting potential answers to the jury's questions, to the extent that they may have occurred, we see them as akin to discussions between a judge and counsel respecting a jury charge.

[42] A jury charge comprises a judge's initial, and most comprehensive, instructions to the jury on the relevant law and the jury's duties. While the answers given to a jury in response to questions are separated in time from the jury charge, they are, like mid-trial instructions or instructions given in relation to a specific issue that has arisen during a criminal trial, a judge's instructions to a jury. A judge's instructions must be considered as a whole. They must be plain and understandable (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523), and need not be perfect (*Goforth*, at para. 20). They cannot mislead the jury or cause it to deliver an unsafe verdict. There is nothing qualitatively different, for the purposes of sections 650(1) and 650.01, between the instructions given in a jury charge and instructions given at another point during the trial. It follows that the analysis respecting whether discussions about the jury charge violate section 650(1) applies equally to Mr. Snelgrove's argument respecting discussions about the jury's questions.

[43] Section 650(1), as well as sections 650.01 and 650.1, are in Part XX of the *Code*. Part XX of the *Code* is a scheme to govern the conduct of criminal trials involving a judge and jury. Mr. Snelgrove was being tried by judge and jury on the indictable charge of sexual assault, so section 650(1) applies to him.

[44] Mr. Snelgrove's argument rests on the requirement in section 650(1) that an accused shall be present in court during the whole of his or her trial. The word "shall" denotes that the accused's presence in court is mandatory. In other words, an accused's presence at trial is not simply a right that may or may not be exercised, it is an imperative. The words "in court during the whole of his or her trial" have been held to include pre-charge discussions and communications during the course of a trial because they involve an accused's vital interests (*E.(F.E.)*, *Burnett*, *T.(L.W.)* and *Iyamuremye*), and there is no challenge to that interpretation in this case. Accordingly, we agree with Mr. Snelgrove that section 650(1), understood in its grammatical and ordinary sense in the context of Part XX and the *Code*, means that an accused must be present when

discussions or communications respecting a jury charge and answers to a jury's questions take place, unless subsections (1.1) and (2) and section 650.01 lead to a different conclusion.

[45] Section 650(1) provides that the mandated presence of an accused during their trial is "subject to subsections (1.1) and (2) and section 650.01" of the *Code*. The term "subject to" is ordinarily understood to qualify the predicate which precedes the term. It has not been suggested, nor is it otherwise apparent, that the term "subject to" is ambiguous or that it means anything different from what those words are ordinarily understood to mean. Parliament's use of "subject to" therefore specifically qualifies the mandated presence of an accused at trial in the circumstances where technology can assist (section 650(1.1)), when it is neither necessary nor feasible for an accused to be present (section 650(2)), or when section 650.01 is in play, that being when a Designation of Counsel has been filed.

Designation of Counsel

[46] Mr. Snelgrove executed a Designation of Counsel on April 26, 2016, shortly after he was indicted. His Designation of Counsel designated the law firm of Kelly, Piercey, lawyer Randolph J. Piercey, Q.C., and any other lawyer who acts as an agent so long as he or she is specifically instructed to do so by either Kelly, Piercey or Randolph Piercey, Q.C., to represent him in connection with the proceedings relating to the charge of sexual assault against him where his attendance was not required by law or directed by a Supreme Court Justice. The Designation also included Mr. Snelgrove's undertaking to remain in communication with his appointed counsel and to appear before the Court on any date requested by the Court, as well as his agreement "that notice of such date to [his] counsel [was] notice to [him] of that date" (Designation of Counsel, Appeal Book, Tab 4).

[47] Mr. Snelgrove does not dispute the validity of his Designation of Counsel, although he argued that it was old, having been filed "all the way back in 2016". The named law firm, Mr. Piercey, and Jonathan Noonan from the named law firm, represented Mr. Snelgrove consistently and without interruption respecting all proceedings related to this matter from the date Mr. Snelgrove executed the Designation of Counsel up to and including his conviction and sentencing respecting the within matter. These proceedings included two completed trials, one mistrial, an appeal to this Court, and an appeal to the Supreme Court of Canada. In this regard, we note that on June 7, 2021, designated counsel appeared to set dates for sentencing specifically pursuant to the 2016

designation. We also note that a Designation of Counsel does not have an expiry date. Accordingly, there is no merit to the insinuation that the Designation of Counsel executed in 2016 was of diminished effect due to age.

[48] We observe that there is no suggestion that Mr. Snelgrove's counsel were acting inappropriately or against Mr. Snelgrove's interests by participating, without complaint, in the impugned communications. There is also no suggestion that communication between Mr. Snelgrove and his counsel was compromised, or that his counsel acted outside of his instructions. Indeed Mr. Snelgrove's appellate counsel made clear at the appeal hearing that Mr. Snelgrove had no complaint with the representation provided by his previous counsel. Therefore, it can be fairly stated that defence counsel consented to communicating with the Judge by email and having in-person discussions respecting the jury charge and the jury's questions when the accused was not present. When counsel consent to a procedure, absent evidence to the contrary, it is presumed they are making intentional choices, as Côté J. explained in *J.D.* at paragraph 19.

[49] In saying the above, we do not suggest that a court should look behind a Designation of Counsel by conducting an independent inquiry into its effect in a particular case. We merely observe Mr. Snelgrove's submission that he was content with his previous counsel's representation, and that he had no complaint about his counsel participating in pre-charge and other discussions in his absence until the issue was raised on appeal.

[50] Mr. Snelgrove did not argue that he was prejudiced by his counsel's communications and discussions without him, and neither is any prejudice apparent. In this regard, we note that the Judge acceded to all of Mr. Snelgrove's counsel's requests for amendments to the proposed jury charge, and advised in his May 12, 2021 email, "I am going to make all of the changes that you [defence counsel] have requested ..." (Appeal Book, Tab 6, at 150). The jury charge, the pre-charge email communications, the questions from the jury, and the Court's answers are a matter of record.

[51] Section 650.01 acknowledges that it is not always necessary for an accused to be personally present in court during every part of their trial. Should accused persons so choose, they may execute a Designation of Counsel under section 650.01 authorizing their counsel to appear in court on their behalf without them during their trials when the law permits. In this regard, we note that accused persons may not always want to personally appear in court during every part of their trials, including those parts of a trial during which legal issues

like the jury charge are discussed. By executing a Designation of Counsel, such accuseds signify that they are content to let their counsel represent their interests unless they are required by law to attend personally. By enacting section 650.01, Parliament has respected and enabled this choice by permitting counsel to appear without their clients except during certain parts of a trial during which Parliament has decided that accused persons must be present.

[52] The wording of section 650.01 conveys Parliament's intention in the above regard by qualifying section 650.01(1) by section 650.01(3), which identifies those parts of a trial where designated counsel cannot appear in court without their accused clients. Said another way, Parliament has stipulated that there are some parts of a trial during which accused persons must be personally present. These parts, set out in section 650.01(3), are 1) when oral evidence of a witness is taken, 2) when jurors are being selected, and 3) during the hearing of an application for a writ of *habeas corpus*. Designated counsel are also unable to appear for an accused client when he or she enters a guilty plea or is being sentenced, although these two exceptions can be overridden by court order. In other words, a judge has no discretion to permit designated counsel to appear without their accused clients when oral evidence is given, when jurors are being selected or when *habeas corpus* is applied for, but a judge does have discretion to permit designated counsel to enter a guilty plea on the behalf of an accused client and to appear without an accused client to receive the accused client's sentence. Communications and discussions among a judge and counsel respecting a judge's instructions to a jury are not identified as parts of a trial that are excluded from the operation of section 650.01.

[53] Mr. Snelgrove relies on *Simon, E.(F.E.)*, and *Burnett* to ground his assertion that section 650(1) was violated. Neither of these cases considered the effect of a section 650.01 Designation of Counsel on the section 650(1) requirement for an accused to be present during the whole of their trial. Accordingly, *Simon, E.(F.E.)*, and *Burnett* are of no assistance to Mr. Snelgrove's argument, and are distinguishable from this case. What is pertinent to this case, although factually different, is *Cole*, wherein the same appellate court as in *Simon, E.(F.E.)*, and *Burnett* made clear that when counsel appear pursuant to a Designation of Counsel, it is as if their accused client personally appears. We agree with this ruling, especially considering section 650.01(3)(b), which stipulates that "an appearance by the designated counsel is equivalent to the accused's being present...". Accordingly, when Mr. Snelgrove's counsel appeared on his behalf to communicate and discuss the jury charge and the jury's questions, Mr. Snelgrove was effectively present.

[54] Mr. Snelgrove argues that a Designation of Counsel has no effect on the legal imperative in section 650(1). He submits that Canadian courts proceed on the basis that section 650(1) overrides the effect of a Designation of Counsel. He provides no support for this notion, saying simply that this is the way that Canadian trials work. We disagree. We see no legal conflict between Parliament qualifying the mandated personal appearance of an accused in a jury trial by permitting designated counsel to appear during parts of such a trial, with how Canadian jury trials work. Neither do we see any conflict with *Charter* values, or the fairness of Canadian justice.

[55] In our view, the wording of sections 650.01 and 650(1) is straightforward and unambiguous. The two sections work together rationally, coherently, and in harmony with each other, within the scheme of Part XX of the *Code*, to achieve Parliament's objective of permitting counsel to lawfully appear without their accused clients, during parts of jury trials that are not excluded by section 650.01(3). Accepting Mr. Snelgrove's argument would offend the presumption against tautology and render the "subject to" words in section 650(1) mere surplussage, and amount to a ruling that Parliament spoke in vain by making section 650(1) "subject to" section 650.01. We see no reason why Parliament ought not to be presumed to have meant what the ordinary words of sections 650(1) and 650.01 convey.

Section 650.1

[56] The Crown also argues that section 650.1 specifically provides that a judge may meet with an accused's counsel to discuss the jury charge. Section 650.1 provides that judges may conduct pre-charge conferences; it is permissive, not mandatory. In other words, a judge is not required to confer with an accused or counsel with respect to matters involving the jury charge, but they may do so.

[57] The Crown's argument respecting section 650.1 rests on the wording that the judge may confer "with the accused or counsel for the accused and the prosecutor". In the Crown's submission, the word "or" should be interpreted disjunctively, meaning that a judge may confer with an accused alone (or by implication with counsel) or, alternatively, with the accused's counsel in the absence of the accused. This argument has not been considered in the jurisprudence, save for the brief comment in *Simon* that the wording "the accused or counsel for the accused" may have been used "to ensure that these conferences are also [able to be] conducted in cases where the accused is self-represented" (*Simon*, at para. 136).

[58] While the wording of section 650.1 permits a judge to conduct a pre-charge conference, it does not speak to the manner in which it is to be conducted, nor the venue. Neither does the wording preclude a judge from meeting with defence counsel in the absence of the accused. In other words, the word “or” in section 650.1, on its face, simply means that a judge may conduct a pre-charge conference with an accused and the prosecutor, or alternatively, with counsel for an accused and the prosecutor.

[59] Mr. Snelgrove argues that section 650.1 should be interpreted to mean that a judge may conduct a pre-charge conference with counsel but the accused must also be personally present. That interpretation must be viewed in light of Mr. Snelgrove’s Designation of Counsel. It does not matter in this case if section 650.1 is interpreted to mean that an accused must always be present at a pre-charge conference, because Mr. Snelgrove was present at the pre-charge conference by virtue of his designated counsel’s presence under section 650.01(3)(b). Just as there is no conflict between sections 650(1) and 650.01, there is no conflict among sections 650(1), 650.01 and 650.1 within the scheme governing jury trials in Part XX of the *Code*.

[60] Whether section 650.1 permits an accused’s counsel who is not designated under section 650.01 to appear without their client is an issue for another case.

[61] In the result, we are of the view that the participation of Mr. Snelgrove’s counsel in the communications and discussions respecting the jury charge and the answers to the jury’s questions in Mr. Snelgrove’s absence, did not violate section 650(1) of the *Code*. Even if section 650(1) had been violated, the *curative proviso* would save the verdict as Mr. Snelgrove has not demonstrated that he was prejudiced or that a miscarriage of justice occurred. (See *Esseghaier* where the Court applied the *curative proviso* in section 686(1)(b)(iv) to cure procedural errors in the jury selection where there was no prejudice to the accused resulting from the errors).

[62] Accordingly, we dismiss this first ground of appeal on the basis that section 650(1) was not violated.

ISSUE 2: Did the Judge err in answering the questions the jury asked during its deliberations?

[63] There are no allegations of error in the jury charge. The allegations of error in jury instructions relate to the way in which the Judge responded to specific jury questions.

[64] Jury deliberations began on the afternoon of May 13, 2021. The jury was sequestered and provided with a written copy of the jury charge. The following day the jury sent a note to the Judge with several questions. The three questions discussed below are those that Mr. Snelgrove maintains the Judge erred in answering.

Question 1 – Recklessness and Wilful Blindness

[65] The jury’s question, and the Judge’s response, were as follows:

Q. Can you provide guidance to help us understand what constitutes “reckless” and “wilfully blind” conduct with regard to his obligation to ensure [the complainant’s] consent (p. 27 – second paragraph from the bottom section – Position of the Crown)?

A. The next question, can you provide guidance to help us understand what constitutes reckless and wilfully blind conduct with regard to his obligation to ensure [the complainant’s] consent. And, you reference page 27, second paragraph from the bottom, in the section Position of the Crown.

An honest belief cannot be grounded in recklessness or wilful blindness. If you find that Mr. Snelgrove knew that [the complainant] was so intoxicated that she could not consent, but engaged in sexual relations anyway, he would be reckless. If you find that Mr. Snelgrove engaged in sexual relations with [the complainant] without determining whether she was sober and consenting, he would be wilfully blind because he would be ignoring what might be obvious. Mr. Snelgrove could not have an honest belief — sorry, could not have an honest but mistaken belief in [the complainant’s] consent if he was reckless or wilfully blind.

[66] Mr. Snelgrove says that the Judge erred in his answer in two respects.

[67] First, he says that the answer incorrectly suggested that recklessness is engaged only if Mr. Snelgrove had knowledge that the complainant lacked capacity to consent – “If you find that Mr. Snelgrove knew that [the complainant] was so intoxicated that she could not consent ...”. He submits that this is incorrect because recklessness is engaged even if Mr. Snelgrove only had a subjective perception of a risk, rather than actual knowledge that the complainant was so intoxicated that she could not consent.

[68] Second, he says that the answer incorrectly suggests that wilful blindness would exist if Mr. Snelgrove engaged in sexual relations without determining whether the complainant was sober and consenting. He submits that this is incorrect because wilful blindness would not exist in that scenario unless the jury first made a determination that Mr. Snelgrove subjectively perceived a need to inquire regarding the complainant's sobriety.

[69] To give this answer context, one must refer back to the section of the jury charge headed, Position of the Crown, where the words "reckless and wilfully blind" appear. The Position of the Crown was read to the jury by the Judge at the conclusion of the jury charge, and it included three references to the words "reckless and wilfully blind", as follows:

Position of the Crown

...

[I]f Doug Snelgrove engaged in sex with [the complainant], either knowing she was unconscious or was reckless and wilfully blind to the fact she was unconscious and not able to consent, then you should find him guilty as charged.

...

[I]f Doug Snelgrove engaged in sex with [the complainant], either knowing she was too drunk to legally consent or he was reckless or wilfully blind to the fact that she was so intoxicated that she was not able to consent, then you should find him guilty as charged.

Third, as an on-duty uniformed police officer, Doug Snelgrove was in a position of trust and authority in relation to [the complainant]. The evidence reveals that Doug Snelgrove abused his position of trust and authority to take advantage of her. She was highly intoxicated, young and vulnerable. Doug Snelgrove used the personal feelings and confidence engendered by their relationship to induce and secure her apparent consent to sexual activity. There is no legal consent in these circumstances. Doug Snelgrove knew or was reckless and wilfully blind to the fact that she could not legally consent in these circumstances.

[70] Recklessness or wilful blindness as to whether the complainant consented or whether she had the capacity to consent can satisfy the *mens rea* (the guilty intention) for sexual assault. The *actus reus* (the sexual activity) was admitted, and *mens rea* was the only element of the crime that the Crown had to prove for a conviction. Accordingly, this question, touching on the *mens rea*, was an important question.

[71] In *R. v. Esau*, [1997] 2 S.C.R. 777, McLachlin J. gave a simple and uncontroversial explanation of how recklessness or wilful blindness can factor into the crime of sexual assault, and what possible defences come into play:

[52] The crime of sexual assault, like most other crimes, consists of two elements. The first element is a criminal act, or *actus reus*. The criminal act is the act of sexual contact without the consent of the other person. The second element is a guilty mind, or *mens rea*. The *mens rea* of sexual assault consists of knowledge that the complainant did not consent or that she lacked the capacity to consent, or alternatively, wilful blindness or recklessness as to whether or not she consented or whether or not she had the capacity to consent. These elements lead to several possible defences. One is that the complainant in fact consented to the act, negating the *actus reus*. Another is that, although the complainant did not consent, the accused honestly and mistakenly thought she did, depriving him of the necessary guilty mind.

...

[70] ... The term wilful blindness connotes a deliberate avoidance of the facts and circumstances. It is the legal equivalent of turning a blind eye, of not seeing or hearing what is there to hear or see. It is the making of an *assumption* that the complainant consents without determining whether, *as a matter of fact*, the complainant consents. Blindness as to the need to obtain consent can never be raised by an accused as a defence, since the need for consent is a legal requirement which the law presumes the defendant to know. ...

[72] Justice McLachlin was writing in dissent in *Esau* but her explanation of how recklessness and wilful blindness can factor into the crime of sexual assault was not in controversy with the majority judgment. As she stated at paragraph 56 of her reasons, there was no disagreement on that proposition.

[73] Recklessness and wilful blindness are also discussed in *R. v. Sansregret*, [1985] 1 S.C.R. 570 at pages 582 and 584:

... In accordance with well established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. ...

...

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who

has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. ...

[74] Mr. Snelgrove says the Judge erred in the answer given for recklessness because it would require the jury to find that he had knowledge that the complainant lacked capacity to consent, rather than just a subjective perception of a danger or risk that the complainant lacked capacity to consent. Mr. Snelgrove argues that the Judge overstated the requirement for recklessness by suggesting that the jury would have to find that he had knowledge that the complainant lacked the capacity to consent, rather than just a subjective perception of a risk that the complainant lacked capacity to consent. If the Judge did overstate the requirement, it was an overstatement that benefitted Mr. Snelgrove; it would have had no impact on the verdict. If the jury found a path to recklessness based on Mr. Snelgrove knowing that the complainant was too intoxicated to consent, then the jury would have found a path to recklessness based on the lower threshold of Mr. Snelgrove subjectively perceiving a risk that the complainant was too intoxicated to consent.

[75] Wilful blindness is discussed in *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at paragraph 98, *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paragraph 21, and *Sansregret*, at pages 584 to 585.

[76] Wilful blindness exists where an accused's suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. Mr. Snelgrove says that the Judge erred in the answer given because he failed to instruct the jury that it must first determine whether he subjectively perceived a need to inquire further regarding the complainant's sobriety. We do not agree that this added instruction was necessary in these circumstances, and we do not agree that there was any misdirection.

[77] The Judge's answer to this jury question gave a correct example of what would be wilful blindness, namely, failing to determine whether the complainant was sober and consenting. Making an assumption that the complainant was sober and consenting without determining whether, as a matter of fact, she was sober and consenting, is wilful blindness. McLachlin J. made this same point at paragraph 70 of *Esau*, "[Wilful blindness] is the making of an assumption that the complainant consents without determining whether, as a matter of fact, the complainant consents".

[78] The Judge’s answer continued by correctly relating wilful blindness to “ignoring what might be obvious”. This is consistent with *Sansregret* where the Court stated at page 587, when addressing wilful blindness, “Where the accused is deliberately ignorant as a result of blinding himself to reality the law presumes knowledge...”. It is also consistent with *Morrison* where the Court stated at paragraph 98, “Wilful blindness has been characterized as "deliberate ignorance" because it connotes "an actual process of suppressing a suspicion": D. Stuart, *Canadian Criminal Law: A Treatise* (7th ed. 2014), at p. 261”.

[79] It was correct, in this context, for the Judge to advise jurors that engaging in sexual activity without determining whether the complainant was sober and consenting would amount to wilful blindness.

[80] Mr. Snelgrove testified that he could detect a smell of alcohol coming from the complainant but he had no concern and no suspicion that she might be impaired. If the jury accepted Mr. Snelgrove’s evidence that he made a determination that the complainant was sober and consenting, then recklessness would not be engaged, and there would be no path to a guilty verdict based on wilful blindness. The Judge’s answer was clear that wilful blindness is only in play “If you find that Mr. Snelgrove engaged in sexual relations with [the complainant] without determining whether she was sober and consenting”.

[81] Judges are expected to decant and simplify the law and evidence for the jury (*Goforth*, at para. 22). That is what the Judge did in responding to the jury question in this instance.

[82] We are not persuaded that the Judge erred in his response to this first question concerning recklessness and wilful blindness. If he did, by overstating the requirement for recklessness, then the *curative proviso* in section 686(1)(b)(iv) could be applied to cure the error as there was no prejudice to Mr. Snelgrove.

Question 2 – Section 273.1(2)(c) - Inducement

[83] The jury asked a four-part question relating back to the part of the jury charge dealing with ‘inducement’ to sexual activity, as contemplated under section 273.1(2)(c). That section states “no consent is obtained if ... the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority”.

[84] The jury's question, and the Judge's response, were as follows:

Q. With regard to "induce", what would be needed to demonstrate inducement? Can you provide examples of explicit and implicit inducement? How does his being a uniformed police officer influence her ability to provide consent "without the influence of force, threats fear, fraud or abuse of authority" (para. 98)? How does his being in her apartment without a valid reason influence her ability to provide consent?

A. So, first question was, with regard to induce, what would be needed to demonstrate inducement? Can you provide examples of explicit and implicit inducement? And now, I'll - the question is in three pieces. The third one was how does his being a uniformed police officer influence her ability to provide consent without the influence of force, threats, fear, fraud or abuse of authority. How does his being in her apartment without a valid reason influence her ability to provide consent? And I'll try and answer those for you in the same section that you gave them to me.

So, first of all, with regard to induce, what would be needed to demonstrate inducement? You must decide, on the whole of the evidence, whether Mr. Snelgrove's actions on December the 21, 2014, were calculated to entice [the complainant] to engage in sexual relations with him. If you find beyond a reasonable doubt that his actions were so calculated you must find him guilty as charged. If you are unsure whether his actions were so calculated, then you must find him not guilty.

The second part of the question was, can you provide examples of explicit and implicit inducement. My answer is, use your common sense to determine what Mr. Snelgrove did or didn't do - I'm sorry, I'll start again. Use your common sense to determine whether what Mr. Snelgrove did or didn't do, amounted to behavior that was calculated to entice [the complainant] to engage in sexual relations with him.

The third part of your question, how does his being a uniformed police officer influence her ability to provide consent without the influence of force, threats, fear, fraud or abuse of authority? There is no evidence in this case of force, threats, fear or fraud. You have to determine whether Mr. Snelgrove abused his position as a police officer. It is your job to determine whether his actions improperly enticed her to engage in sexual relations. His being uniformed is only one factor that you would consider in making that determination. It is not the only factor. The uniform establishes that he is in a position of authority. It does not, of itself, have any bearing on her consent. You must determine whether she did or did not consent. And if she did consent, whether that consent is negated because of what Mr. Snelgrove did or didn't do.

The third [sic], the last part of your question was, how does his being in her apartment without a valid reason, influence her ability to provide consent. I am not going to answer that. You have to answer whether he had a valid reason or whether he didn't have a valid reason. That's your function as the jury, not mine.

[85] Mr. Snelgrove says that the Judge erred in his answer to parts one, two and four of this question.

[86] First, he says the Judge erred, when responding to part one of the question, by failing to explain that the ‘inducement’ must arise by abusing a position of trust, power or authority.

[87] Second, he says the Judge erred when responding to part two of the question, by failing to provide examples of explicit and implicit inducement.

[88] Third, he says the Judge erred by not responding to part four of the question.

(1) Failing to explain that the ‘inducement’ must arise by abusing a position of trust, power or authority

[89] As noted above, section 273.1(2)(c) provides, “... no consent is obtained if ... the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority”. In his jury charge the Judge read out the wording of section 273.1(2)(c); he gave a definition for ‘abuse of authority’ and a definition for ‘induce’; and he instructed the jury to first determine whether Mr. Snelgrove abused his position of authority and then determine if he induced the complainant by abusing that position of authority. The jury was to consider ‘inducement’ only if satisfied that Mr. Snelgrove abused his position of authority towards the complainant. The jury charge on these points instructed as follows:

First, you should take it as a given that Mr. Snelgrove stood in a position of authority ...

...

The more difficult questions are these: Did he abuse his position of authority towards [the complainant], and if so, did he induce her by abusing his position of authority to engage in the sexual activity that took place between them ...

...

You must consider all of the relevant evidence that you heard during this trial in assessing whether, in his dealings with [the complainant] that evening, Mr. Snelgrove induced her to engage in sexual activity by abusing his position of trust as a police officer.

If you are satisfied that Mr. Snelgrove abused his position of authority towards [the complainant], you may not stop there. But then you must have to go on to consider if he induced her to have sexual activity with him by abusing his authority. If you find that [the complainant] consented to the sexual activity because Mr. Snelgrove induced her to do so, by abusing his authority over her, her consent is vitiated or nullified by the abuse of authority. ...

(Transcript, May 13, 2021, at 49, 50)

[90] In answering this section 273.1(2)(c) question on inducement, the Judge was aware that the jury had been advised by him in the jury charge that the inducement had to arise from an abuse of authority, and that the issue of inducement would not be addressed unless the jury was first satisfied that there was an abuse of authority. As noted above, the jury had a copy of the charge in the jury room. In the jury charge, the Judge used the generic phrase ‘those kinds of inducement’ in reference to any inducement arising from an abuse of authority. While the Judge did not state in the first part of his response that the inducement had to be one arising from an abuse of authority, it was stated in the third part of his response. In that part of his answer the Judge instructed the jury to determine whether Mr. Snelgrove abused his position of authority and determine if his actions improperly induced the complainant to engage in sexual relations. He stated:

You have to determine whether Mr. Snelgrove abused his position as a police officer. It is your job to determine whether his actions improperly enticed her to engage in sexual relations.

(Transcript, May 14, 2021, at 4)

[91] It was clear from the jury charge that ‘inducement’ could not be considered unless the jury was first satisfied that there had been an abuse of authority. In the circumstances, the Judge’s response, considered in the context of the jury charge, and in the context of the full answer, was correct and complete. The jury was not misled.

(2) Failing to provide examples of explicit and implicit inducement

[92] In his response to part two of this question, the Judge told the jury to use common sense to determine whether what Mr. Snelgrove did or did not do amounted to behavior that was calculated to induce the complainant to engage in sexual relations.

[93] In the first draft of the jury charge, circulated to counsel for input, the Judge had included examples, taken from the evidence, for assessing whether Mr. Snelgrove induced the complainant by abusing his position of authority. Defence counsel objected to inclusion of examples and submitted a revised jury charge, which eliminated all of these examples. The Judge accepted those revisions and eliminated the examples.

[94] There is no requirement to give examples and, in this matter, there was the risk that giving examples would take from the jury the right to form their own conclusion on this important fact, namely, whether Mr. Snelgrove had induced the complainant. In *R. v. Stavroff*, [1980] 1 S.C.R. 411, at page 416, McIntyre J. cautioned that a judge who gives examples to assist the jury in understanding the law, “must not in so doing take from the jury the right to form their own conclusion on matters of fact.”

[95] Any explicit example of an inducement given by the Judge, taken from the uncontroverted evidence (such as Mr. Snelgrove helping the complainant gain access to her apartment, Mr. Snelgrove not leaving after he dropped the complainant at her home, or Mr. Snelgrove going inside the apartment) could be seen as an acknowledgement by the Judge that there was an inducement. The determination of that fact, whether Mr. Snelgrove induced the complainant, is the function of the jury alone. It is an error for a judge to step into the realm reserved for the jury (see *R. v. Snelgrove*, 2018 NLCA 59, at para. 26, affirmed on appeal, 2019 SCC 16, [2019] 2 S.C.R. 98). As stated by McIntyre J. in *Stavroff* at page 416, “No authority is needed for the proposition that where a judge sits with a jury it is the function of the jury alone to find the facts and to do so upon the evidence adduced”.

[96] In *R. v. Miljevic*, 2011 SCC 8, [2011] 1 S.C.R. 203, the trial judge answered questions from the jury but elected not to respond to the jury’s request for examples distinguishing between murder and manslaughter. The appeal to the Supreme Court of Canada turned on whether the trial judge erred in his answer to questions. Cromwell J. writing for the majority, at paragraph 2, acknowledged that the judge declined to give the jury examples, but based on the overall answers, found that no legal error was committed.

[97] In *R. v. Pope*, 2021 NLCA 47, 7 C.A.N.L.R. 39, (aff’d) 2022 SCC 8, a trial judge answered a question from the jury by providing an example. Welsh J.A., writing for the majority, found the example to be ambiguous, and noted the difficulty that can arise if a judge gives an example in response to a jury question, “An example too similar to the case at hand may interfere with the

jury's independence; one too far removed may be of little value or may result in confusion” (para. 26).

[98] The potential difficulty of interfering with the jury's independence is present here with the jury seeking examples of inducement taken directly from the evidence. The Judge reasonably elected not to encroach on the jury function by giving examples of explicit and implicit inducement and instead directed the jury to consider all that Mr. Snelgrove did, or did not do, in assessing whether there was behavior calculated to induce the complainant to engage in sexual relations. That was an appropriate answer in these circumstances.

[99] There was no legal error by the Judge declining to provide examples of explicit and implicit inducement.

(3) Not responding to part four of the question

[100] For similar reasons, there was no error in the Judge's response to part four of the jury question – “How does his being in her apartment without a valid reason influence her ability to provide consent?” The question presumes a fact that is part of the jury's fact-finding mission on the issues of inducement and abuse of authority. In simple language, the Judge explained in his response that it was the jury's function, and not a judge's function, to make this type of finding of fact.

[101] A judge instructs the jury on law. A judge may give the jury other relevant information, so long as this is accompanied by a clear instruction in law. However, a judge cannot instruct the jury respecting what to accept as fact and a judge must be cautious to avoid any instruction that has that effect. The Judge appropriately declined to answer part four of the question and explained that it was within the role of the jury alone to determine whether Mr. Snelgrove had a valid reason for entering the complainant's apartment. It was a factual issue for the jury to decide.

[102] The Judge made no error in his response to this second question concerning inducement.

Question 3 – Replaying evidence

[103] The jury's question, and the Judge's response, were as follows:

Q. Can we get a transcript of [the complainant and Mr. Snelgrove's] courtroom statements – we want to confirm some details? (If not written can we get voice transcript).

A. Ladies and gentlemen, I have your questions and what I am going to suggest to you is that I am going to read each question into the record, and provide you with an answer. And at the end of the answers for each of the questions, what we're going to do is vacate the courtroom and leave it to you to decide whether you still want to hear the evidence after I've given you the answers that you asked. Because if you want to hear the evidence you can't pick and choose. You have to listen to all of the evidence, both the examinations that are direct and cross-examinations. You can either listen to one or two or both, but that's up to you. So, you can decide that afterwards, but I'll give you the answers to the questions that you asked first.

.... [Judge answers several unrelated questions]

There is no written transcript of what [the complainant and Mr. Snelgrove] said in court. You can listen to their evidence, but if you listen to their evidence, you have to listen to all of their evidence. So, that means that we make at least a two hour commitment for each one, because they were on the stand for half a day. Okay. And you can decide that afterwards.

... [Judge answers other unrelated questions]

Now, we will leave you. You can decide if you want to hear the evidence and when you've got a decision made just knock on the door and we will come back in.

[104] Mr. Snelgrove says that the Judge erred because his answer discouraged the jury from re-hearing evidence, and caused the jury to abandon the request. He says that the Judge should have sought clarification about what specifically the jury needed, and then responded using his notes, or by replaying excerpts of the evidence.

[105] There were several jury questions submitted, in addition to this evidence replay question. In court, on the record, and before the jury was recalled to hear the responses, the Judge referred to counsel's awareness of the questions, and advised them of his proposed approach. He would answer all the jury questions and then inquire at the end whether the jury still wanted to have the evidence replayed. Experienced counsel for Mr. Snelgrove took no objection to this approach. The Judge proceeded on that basis and ended his response to the jury

questions by asking the jury to decide in the jury room if they still wanted the evidence replayed, and to let the court know once they made that decision. The jury returned to the jury room to consider the matter and, 20 minutes later, advised the Judge that they had decided not to have the evidence replayed. Deliberations continued that day for another four hours, interrupted briefly with a question from the jury seeking clarification on a question previously asked about reasonable doubt.

[106] The following morning the Judge responded to a note received from the jury advising that they were unable to come to a unanimous decision and needed guidance on next steps. The Judge gave the usual exhortation for a deadlocked jury but added two further reminders to the jury of the option to have the evidence replayed:

Yesterday you expressed a desire to hear again the evidence given by [the complainant] and Mr. Snelgrove. If listening to that evidence again will assist you with your deliberations, I am willing to accommodate your request. Please think about it and let me know if that is something that you wish to have done.

(Transcript, May 15, 2021, at 4)

So, go on back to your jury room and let me know if you want to re-hear the evidence and we will arrange that, okay. Thank you.

(Transcript, May 15, 2021, at 5)

[107] Deliberations continued after that exhortation for another four hours. The jury returned with a guilty verdict during the afternoon of that same day.

[108] Mr. Snelgrove relies on *R. v. Henderson*, (1999) 44 O.R. (3d) 628 (Ont. CA) and *R. v. Chacon-Perez*, 2022 ONCA 3, where errors were found because the trial judges improperly responded to a jury request for evidence replay.

[109] In *Henderson*, the jury asked to replay the evidence of the complainant. The trial judge responded that they could, but that it would be time consuming and inconvenient, and that the jury would be required to stay at the courthouse overnight. He sent the jury back to reconsider its request. The jury returned with a guilty verdict. Labrosse J.A. concluded for a five-member panel of the Ontario Court of Appeal that the trial judge had erred and the conviction was set aside:

[47] ... The words of the trial judge may well have discouraged the jury from rehearing and resolving whatever aspect of the complainant's evidence it found

troubling. In my view, the trial judge should have ensured that the jury's concerns were met and that it received the assistance it required. In effect, the jury received no assistance from the trial judge with respect to its request.

[110] In *Chacon-Perez*, the jury asked to rehear the evidence of four witnesses. The trial judge did not offer the jury the option of replaying the evidence, did not ask the jury to be more specific, and instead asked the jury to continue deliberating without the benefit of the replay, “[W]hat we want you to do is first to deal with that in view of the instructions that have been provided and some of the outlines of the issues and the facts that have been discussed in the course of that, at this point in time, all right?” (para. 188). The Ontario Court of Appeal found that the trial judge erred because (i) he gave the jury no assistance; (ii) he failed to ask the jury to be more specific, considering the omnibus nature of the request; and (iii) he failed to remind the jury of its right to ask further questions.

[111] *Henderson* and *Chacon-Perez* are distinguishable from Mr. Snelgrove’s case because the Judge did not discourage the jury from having the evidence replayed; he gave the jury assistance by delivering a clear message that they could listen to a replay of the evidence; he did not discourage the jury from coming back with further questions (and the jury did come back with a further question); and he did not discourage the jury with what seems close to the punitive measure used in *Henderson* at paragraph 43 – “You’d be sequestered overnight and have to stay here hearing all of those tapes and then go back to your deciding.”

[112] In addition, the Judge in the current matter repeated the advice five times, (thrice in his initial response and twice the next day) that the jury could listen to a replay of the evidence of Mr. Snelgrove and the complainant. The jury was not discouraged from exercising the option.

[113] *Chacon-Perez* also suggested that a judge, faced with such a request, should ask the jury to be more specific about the aspects of the evidence that they wished to have repeated. That might be a good option in some circumstances, such as with the omnibus nature of the request in *Chacon-Perez*, where the trial judge stated that the replay would take “days”. In contrast, the Judge in Mr. Snelgrove’s case noted that the replay would only take about two hours for each witness.

[114] It is not an error for a judge, as occurred here, to decide against selecting excerpts of the evidence to respond to specific details. The practical challenges of locating and isolating excerpts for replay would involve the Judge and

counsel replaying the evidence in advance before deciding on the relevant excerpts. Locating and isolating relevant excerpts would be time consuming and fraught with the risk of omitting relevant context.

[115] There can be risks to trial fairness when a judge inquires about the details (isolated excerpts) needed for replay, and then replaying only those isolated excerpts. The dialogue with the jury inquiring about the details they are seeking to confirm will undoubtedly expose aspects of the jury deliberations. The replay of the isolated excerpts addressing those details may give more emphasis and significance to those excerpts. The Judge decided that all the evidence should be played back in response to this request, rather than select excerpts. Moreover, the jury request was for a transcript of all of this evidence.

[116] The Judge's decision that all the evidence should be replayed was reasonable and appropriate.

[117] In *R. v. Olbey*, [1980] 1 S.C.R. 1008, McIntyre J. (for the majority) agreed that it is incumbent on a trial judge not to allow the jury to hear excerpts only of the evidence without also hearing those portions of the evidence of the witness which weaken or qualify the part read. Full replay of evidence from the witness, while not always necessary, eliminates the risk that select excerpts will be taken out of context. McIntyre J. stated at pages 1027 to 1028:

I am in agreement with this proposition, as was Martin J.A. in the Court of Appeal. He said:

I accept, of course, the proposition that where the jury requests that the evidence of a witness be read back it is incumbent on the trial judge not to allow the jury to hear a part only of the evidence of the witness without also hearing those portions of the evidence of the witness, whether given in chief or in cross-examination, which weaken or qualify the part read, even though the jury indicates that it does not wish to hear any more of the witness' evidence. Otherwise, the jury is not hearing the evidence of the witness, but only an incomplete or even an inaccurate account of his or her testimony.

[118] In *R. v. Ostrowski*, [1990] 2 S.C.R. 82, the Supreme Court of Canada found no error in a trial judge's response to the jury's request for a transcript of evidence from seven witnesses, even though the judge did not provide the transcript or offer to replay the evidence. Cory J. (for a unanimous court) noted in his reasons at page 83, that the trial judge was careful not to close the door on the request; the jury was given the option to come back; and experienced counsel at trial took no objection to the response. See also *R. v. Keegstra*, [1996] 1 S.C.R. 458.

[119] In the current matter, the Judge did not discourage rehearing the evidence and he discharged his obligation to assist the jury by offering (and repeating on three occasions in his initial answer) the option to have the evidence replayed. The Judge did not close the door to fulfilling the jury's request, and he reminded the jury by repeating on two more occasions the following day that the option to have the evidence replayed was still available.

[120] The Judge made no error in his response to this third question concerning the replay of evidence.

ISSUE 3: Appropriate remedy

[121] Given that we are not allowing Mr. Snelgrove's appeal on either ground, it is not necessary to decide whether to stay further proceedings or remit the matter for another trial.

DISPOSITION

[122] There were no errors made by the Judge. Accordingly, we dismiss Mr. Snelgrove's appeal.

D.E. Fry C.J.N.L.

L.R. Hoegg J.A.

W.H. Goodridge J.A.