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Cases of interest to the Defence Bar

By David Rose C.S. of the Ontario Bar

#1 The Supreme Court clarifies the offence of disobeying a Court order.

The Appellant was charged under s. 127 of the *Criminal Code* with disobeying a Court order, namely a Superior Court injunction which barred the Appellant and anyone else, from demonstrating near an abortion clinic. She argued that the *Criminal Code* offence of disobeying a court order was not applicable where, as here, she was concurrently exposed to a contempt of court proceeding under the Ontario Rules of Civil Procedure. That, she argued, ousted the criminal law jurisdiction under s. 127. The argument was rejected by the Ontario Court of Appeal. On appeal to the Supreme Court of Canada, that Court found that s. 127 is only ousted where Parliament or the legislature created an express statutory alternative to s. 127, defined the circumstances when the other form of enforcement is engaged, and provided for a specific penalty or mode of proceeding. The common law contempt powers of a superior court judge articulated in the rules of civil procedure did not satisfy that test. Speaking for the majority of the Court, Deschamps J. said:

> [9] The fact that rules of court provide for punishment or a mode of proceeding is not sufficient to trigger the exception if the order is issued pursuant to the court's inherent common law power. With respect for the opinion of my colleague Fish J., this case cannot be distinguished from *Clement* on the ground that the Ontario Rules provide a more detailed procedural framework than the Manitoba Rules did and are, in his view, "expressly provided by law" within the meaning ascribed to s. 127 in that case. I agree with the Court of Appeal (2010 ONCA 77, 100 O.R. (3d) 248) in the case at bar that, while the Ontario Rules provide a much more detailed procedure than did the rules at issue in *Clement*, the former are as dependent on the common law for their legal foundation as the latter were (para. 41). The adoption of rules of procedure governing the exercise of a superior court's inherent jurisdiction will not preclude the application of s. 127 unless Parliament or a legislature has explicitly authorized the court to sanction failures to obey the court order.

R. v. Gibbons, 2012 SCC 28

#2 Ontario Court of Appeal orders a new trial where police arbitrarily detained a motorist and found cocaine.

The police were investigating a drug transaction at a hotel, when they ordered the detention of the Appellant's vehicle on the suspicion that one of the occupants was a person involved in the drug deal. The police had no reasonable suspicion to believe that, and the vehicle was found at trial to have been arbitrarily detained. The vehicle was searched and cocaine found. The Appellant was the driver. The trial judge found that the evidence of cocaine should not be excluded from the trial in part because there were exigent circumstances at play. This was rejected by the Court of Appeal, who ordered a new trial. The Court summarized it this way:

> 13. Counsel for the appellant argues that the finding of exigent circumstances made by the trial judge is unsupportable on the law of exigent circumstances as most recently described in *R. v. Kelsy*, 2011 ONCA 605. We agree with this submission. The police had no safety concerns and they had no reasonable grounds upon which to believe that there were drugs in the car before they stopped the car and identified Hyatt as one of the occupants.
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> 14. The trial judge's finding of exigent circumstances was an important consideration in his ultimate determination that the evidence discovered as a result of the unlawful detention was admissible. That finding must be set aside.

R. v. Bruyere, 2012 ONCA 329, 2012 CarswellOnt 6085

#3 The Ontario Court of Appeal explains the reasonableness assessment of appellate review.

The Appellant had been convicted by a jury of two count of sexual assault and one count of sexually touching a person under 14. The conviction was entirely dependent on the evidence of the young person, who had significant credibility problems. After assessing the trial evidence, the Court of Appeal overturned the convictions and entered acquittals. The Court said that the credibility problems were insurmountable, and their experience allowed them to find the conviction unsafe. Doherty J.A. said:

> 32. This court has the obligation to review the reasonableness of convictions: *Criminal Code*, s. 686(1)(a)(i). In exercising that authority, the court must, to some extent, review both credibility assessments and factual findings made at trial. It does so, however, bearing in mind both the advantaged position of the trier of fact and the limited scope of review. The question for the appellate court is not what it would have decided, but whether a properly instructed trier of fact could reasonably have rendered a guilty verdict: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 36-42.
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> 33. The reasonableness review provides an important safeguard against miscarriages of justice. In *Biniaris*, at para. 42, the court described the nature of that review in these terms:
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> > To the extent that it [appellate review] has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That in turn requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her personal experience and insight.
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> 34. I understand *Biniaris* to instruct that the knowledge gained through the reviewing court's broad exposure to the criminal process provides insights into credibility assessments and fact-finding not available to jurors whose experience is generally limited to a single case. Those insights must inform the reasonableness assessment.
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> 35. My reasonableness assessment begins with the observation that this jury obviously had difficulty with M.R.'s credibility. The jury acquitted on two of the three charges. The three verdicts, considered together, indicate to me that the jury was not prepared to accept M.R.'s evidence with respect to the second alleged incident. As far as the first incident was concerned, the jury did accept M.R.'s evidence to the extent of

finding that something improper of a sexual nature had occurred between her and the appellant. However, the jury was not prepared to accept M.R.'s description of that encounter.

R. v. N.M., 2012 ONCA 296

#4 The Alberta Court of Appeal overturns a conviction because the Crown improperly cross-examined the accused.

At his trial on sexual assault charges, the accused was cross-examined by the Crown on the basis that a Crown witness had no motivation to lie, as the accused asserted. He had been asked the following questions:

> Q. So what you're saying is that when your father told us under oath that he talked to you at 11 PM and that's when you disclosed that she had two coolers and four shots, that that's not true?
>
> A. My father can't even remember my age.
>
> Q. Mm-hmmm. And you're telling us that you told your father that at 9:00 that, oh, dad, we just got back from Tony Roma's, but you're saying you didn't tell him that; is that correct?
>
> A. That was a cover story he told V. on my behalf to keep me out of trouble and granted, being him, and after what A. had accused me of doing, he can't go back on that, can he, without serious ramifications from V.?
>
> Q. Okay, let me understand this. You're telling me that your dad concocted a cover story about you coming back from Tony Roma's at the 9 PM phone call and that was to appease his ex-wife; is that what you're saying?
>
> A. You don't know him and (INDISCERNIBLE) —
>
> Q. Yes or no, sir?
>
> A. Yes, that's what (INDISCERNIBLE) —
>
> Q. And you're saying you dad stood here under oath with the promise to tell the truth in court and told that exact same story and you're saying that's not true?
>
> A. Yeah, and so did W..
>
> Q. You're suggesting now that the other witness — Crown witness — the neighbour also said something that was untrue?
>
> A. Yes. I never said that she kicked me out, 'cause if she kicked me out, why would she allow me to call a cab first?

This exchange prompted rebuttal evidence, was referred to in oral argument, and had an effect on the verdict. The Alberta Court of Appeal overturned the convictions and ordered a new trial. The Court explained:

> 51. The trial judge adopted this reasoning and went on to find, in addition, that the father's evidence was crucial to the Crown's case. To reiterate, the trial judge stated:
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> > Where the evidence of [the father] conflicts with the evidence of the accused, I prefer the evidence of [the father], to the accused who is also the father of the complainant. He has no reason to lie or to mislead the Court. He is, as the Crown put it, in a very difficult position dealing with both of his children being key players in this particular case. Given that fact, there are key elements then of the case that the Crown has established, if nothing else, through the evidence of [the father]. [SAR 209/18-24]
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> 52. This is not a case, therefore, like this court's decision in *Brown*, where the impugned questioning played an insignificant role in the ultimate finding of guilt. As the Crown fairly conceded in its factum (para 94), the cross-examination in question "had an effect on the trial and on the verdict". Indeed, the trial judge expressly relied upon the evidence of the father and adopted the Crown's line of reasoning that he had no reason to lie or to mislead the Court. It follows we are unable to conclude that no substantial wrong or miscarriage of justice has occurred, with the result that this ground of appeal must succeed.

R. v. B. (M.E.), 2012 CarswellAlta 708 (C.A.)

#5 The Ontario Court of Appeal orders a new trial on murder charges where the trial judge gives improper exhortation to a deadlocked jury.

The jury deliberating on a murder case was deadlocked after 6 days of deliberations. One juror had sent a note to the trial judge explaining why she was at an impasse with the other 11 jurors. She had explained it in terms of reasonable doubt and presumption of innocence. In reply the trial judge gave a strongly worded exhortation which called on the lone juror to disabuse her mind of erroneous legal instructions and re-consider the whole case again. The Court of Appeal found that this had the effect of pitting one juror against the other 11. As McPherson J.A. said:

> 55. On the appellant's second point, the starting point is Martin J.A.'s caution in *R. v. Littlejohn* (1978), 41 C.C.C. (2d) 161 (Ont. C.A.), at p. 168:
>
> > The trial Judge equally must avoid the use of language which is likely to convey to a juror that, despite, his own doubts, genuinely entertained, he is, none the less, entitled to give way and agree with the majority of his colleagues in the interest of achieving unanimity.
>
> 56. In a similar vein, in *R.M.G.* at para. 40, Cory J. stated that "it would be preferable for a trial judge to avoid putting the situation in confrontational terms of opposing sides."
>
> 57. With respect, I do not think that the trial judge heeded these cautions. In his third exhortation, he said that further deliberations of only 90 minutes after the second exhortation are not acceptable "because the one juror who disagrees with the rest of you clearly had an incorrect understanding of the onus on the Crown to prove its case beyond a reasonable doubt." In his third exhortation, the trial judge went on to state that it was "important for the one juror, with the assistance of the rest of you, to disabuse her mind of her erroneous understanding of the burden on the Crown, to firmly fix her mind on a correct understanding of it, and to review the entire case."
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> 58. In my view, the likely interpretation of this by all members of the jury is fairly clear: juror No. 11 is wrong in her understanding of the crucial legal principle in this trial; the other jurors have a proper understanding of the principle; juror No. 11 must "disabuse her mind" of her error; and the other jurors should assist her in doing this. Since the court knew from a previous note that the tentative vote was 11-1, with only juror No. 11 leaning towards acquittal, the language chosen by the trial judge in his third exhortation, read in a common sense way, did pit the majority and minority against each other. The trial judge was saying, quite bluntly, that 11 jurors were right and juror No. 11 was wrong.

Accordingly, the convictions were quashed and a new trial ordered.

R. v. Vivian, 2012 CarswellOnt 6023 (C.A.)

#6 The Supreme Court acquits on a Dangerous Driving charge.

The Appellant was convicted at trial of Dangerous Driving causing death after his vehicle collided with a truck on the way home from work. His passenger was killed, and the accident left him with permanent memory loss of the accident. The area had fog, and the road was unpaved, steep, snow covered and slippery. On a steep grade, he had stopped at the entrance and then entered a highway into the path of an oncoming tractor trailer. The issue for the Court of Appeal was the trial judge's finding that the Appellant's conduct had the required fault element required for a conviction in the absence of an explanation from the Appellant. The Supreme Court agreed with the British Columbia Court of Appeal that it was a legal error to simply infer the fault element of dangerous driving. Since the error was not harmless, the Court overturned the conviction and acquitted the Appellant. Cromwell J. spoke for the Court:

> 41. In other words, the question is whether the manner of driving which is a marked departure from the norm viewed in all of the circumstances, supports the inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited.
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> 42. Driving which, objectively viewed, is simply dangerous, will not on its own support the inference that the accused departed markedly from the standard of care of a reasonable person in the circumstances (Charron J., at para. 49; see also McLachlin C.J., at para. 66, and Fish J., at para. 88). In other words, proof of the *actus reus* of the offence, without more, does not support a reasonable inference that the required fault element was present. Only driving that constitutes a marked departure from the norm may reasonably support that inference.
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> 43. I now turn to the question of whether the trial judge committed reversible error in this case.
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> *(6) Did the Trial Judge Err With Respect to the Fault Element?*
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> 44. The Court of Appeal found that the trial judge erred by equating the fault component of the offence with the question of whether there was an explanation for the accused's conduct (para. 21). I agree. But I also agree with the appellant that the trial judge's error goes beyond that. In my respectful view, the trial judge erred in law by failing to conduct any meaningful inquiry into whether the appellant displayed a marked departure from the standard of care to be expected of a reasonable person in the same circumstances. Specifically, he inferred the marked departure simply from the fact that the driving was, objectively viewed, dangerous: trial judge's reasons, at paras. 27-28. This is precisely what all of the members of the Court held in ***Beatty*** must not be done.

Of course, the trial judge did not have the Court's decision in *Beatty* .

R. v. Roy, 2012 SCC 26

#7 New litigation privilege ruling in a criminal trial. The lawyer need not disclose preparatory notes, but must read them before testifying.

As part of the ongoing Nortel fraud trial, the Crown subpoenaed lawyers for each accused who had been present when Nortel's corporate lawyers interviewed them in 2004 in connection with audit issues. At those meetings, each accused appeared as a senior executive, and was represented by several litigation counsel who were concerned about future litigation over Nortel accounts. At the criminal trial against the executives, the Crown sought the notes made by the executives' lawyers at the audit interviews in preparation for their testimony at trial. This was rejected by the trial judge, who found that the concern about future litigation clearly protected the lawyer's notes. But did that mean that the lawyers could review the notes prior to testifying? The trial judge Marocco J. ordered the lawyers to review their notes prior to testifying so that there could be no inadvertent waiver of the litigation privilege. His Honour explained:

> 84. Barristers are not ordinary witnesses; they are also officers of the court. They do not cease to be barristers because they become witnesses in a proceeding. I recognize that the *Rules of Professional Conduct* distinguish between the lawyer as an advocate and the lawyer as a witness. However, Rule 4.02, which virtually prevents a barrister from offering his or her own evidence in a proceeding in which he or she is appearing as counsel, is directed at the conflict between the roles of the barrister as a witness and as an advocate. This conflict has to be balanced or the barrister's conduct when testifying will be unbecoming a member of the profession.
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> 85. The commentary that accompanies Rule 4.02 makes it clear that, when the barrister appears as a witness, the barrister should not expect any preferential treatment. Rule 4.02 does not imply the reverse; namely, that the barrister when testifying can do so with the same degree of partisanship that one finds quite often in civilian witnesses.
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> 86. For a barrister to deliberately refrain from taking reasonable steps to refresh his or her memory prior to testifying and thereby deliberately deprive the court of his or her best evidence is conduct that obstructs the court's truth-finding function. It is, therefore, conduct unbecoming a member of the profession.
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> 87. It is equally unacceptable to require a barrister, who is required to testify, to jeopardize a lawful privilege to which a present or former client is entitled.
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> 88. Balancing these two competing considerations is the challenge.
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> 89. In attempting to balance these two considerations, one has to bear in mind that

this is a case of litigation privilege; it is not a case of involving solicitor-client privilege. Litigation privilege ends, absent closely-related proceedings, upon the termination of the litigation that gave rise to the privilege. Solicitor-client privilege, on the other hand, has evolved to become a rule of substantive law; it survives the death of the client (see: *Blank*, *supra,* at paras. 24 and 36).

Conclusion concerning the use of the barristers' notes in this trial

90. Taking all this into account and in order to avoid both of the unacceptable alternatives to which I referred, I am ordering the barrister witnesses, who acted for Mr. Dunn, to read the interview notes in respect of which Mr. Dunn claims litigation privilege. I am ordering the barrister witnesses, who acted for Mr. Beatty, to read the interview notes in respect of which Mr. Beatty claims litigation privilege. Because this "refresh of memory" is ordered, any suggestion that their clients' litigation privilege has thereby been waived will not be possible. At the same time, such an order eliminates any suggestion that the barristers are deliberately depriving the court of their best evidence. If any barrister witness determines that reading their respective file notes will not refresh his or her present recollection of the interviews with which we are concerned, the barrister is relieved of any further obligation to comply with this order.

R. v. Dunn, 2012 ONSC 2748

#8 An obstruction charge against a defence lawyer is quashed.

The accused defence lawyer was charged with obstructing justice after a witness told the police that the lawyer had told a witness in an attempted murder case to testify that he did not know the accused by way of his nickname. The accused had gone by the name "Chico" and a witness had said that the lawyer counseled the witness to say that he did not know the accused as "Chico". The Crown evidence came by way of two witnesses, both of which were present at the impugned meeting. One said that the lawyer specifically said to the witness not to identify the accused by his nickname. She did not, however, give evidence about the context of that purported utterance. The other witness testified at the preliminary hearing that he was only told by the lawyer not to use slang in court, and not to refer to the accused by his nickname if that is not the way he knew him. The lawyer was committed for trial on the charge of obstructing justice, but that was quashed in the Superior Court. There, Sproat J. found that the lack of context surrounding the purported utterances rendered their meaning impossible to determine. His Honour framed it this way:

> 36. A central question is whether there is any evidence that would permit the trier of fact to infer that Mattson made the comments he did with the intent to obstruct justice.
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> 37. There are two possible interpretations of what Mattson said.
>
> 38. It would be an attempt to obstruct justice, for Mattson to advise Holmes that, if asked, he should deny that he had ever heard anyone refer to Hinojosa as "Chico".
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> 39. It would, however, not be an attempt to obstruct justice to simply advise Holmes that in giving evidence he should state that he personally only knew Hinojosa by his real name and not as "Chico".
>
> 40. Put differently there is nothing wrong in advising a witness to refer to individuals by their proper name and not by a street name. This is not the same as advising a witness to lie if asked whether the witness had any awareness of the person having a street name.
>
> 41. The question then is whether there is any evidence upon which P. Sheppard J. could have formed the opinion that a properly instructed jury acting reasonably could conclude that the first version, to deny any knowledge that Hinojosa was referred to as "Chico", was correct. What evidence of context, that might illuminate the meaning of the words spoke, do we have?

42. When Green first described the meeting she quoted Mattson as having said "you don't really know him as Chico" and as saying that Holmes should refer to him by his real name and not a nickname. On Green's evidence there must have been something that led Mattson to say "you don't really know him as Chico". Green's evidence does not provide or suggest the context in which "Chico" came to be discussed. Holmes' evidence is that he did not personally know Hinojosa as Chico but he had heard him referred to by others as such.

43. In any event, Green's evidence does not provide the context in which the "Chico" reference was made. More specifically Green did not recall and could not testify to the words which immediately preceded it.

44. At the preliminary hearing, in the course of Mr. Breen's submissions, P. Sheppard J. stated:

> THE COURT: Well, I agree if what you're saying is that the prosecution has some difficulties in this case, to put it at its mildest. I, by way of obiter, am perfectly prepared to agree with you but we do have some context here. We have an unequal conversation. We have a conversation occurring under circumstances of clearly mental anxiety, if nothing else. We have a conversation occurring with a time line, given that he's supposed to testify the next day and is supposed to be at a Crown meeting that day and we have a conversation occurring with someone that he views as his friend as well as his previous legal counsellor. So, we do have that much of a context.

45. On the application before me to quash the committal Mr. Hanbidge conceded, quite correctly in my view, that none of the particulars of the context cited by P. Sheppard J. were relevant to interpreting the words spoken by Mattson.

46. The Crown's factum submits that:

> 9. As one of the local practising criminal defence attorneys, it is reasonable to infer that the Applicant was acquainted with the circumstances of the Crown's case against Mr. Hinojosa and the other accused persons in this other outstanding serious criminal/drug proceedings.

47. It was further submitted that this inference was based on the fact that Mattson had been consulted by one or more of the accused at an early point in the proceeding.

48. Clearly Mattson knew something about the case against Hinojosa and others. There is, however, nothing in the evidence to suggest he knew about the content of Holmes' statements to the police and the significance of the name "Chico" to the prosecution. To draw that inference would require impermissible speculation on the

part of the trier of fact.

In the result, the obstruction charge was quashed.

R. v. Mattson, 2012 ONSC 2381

#9 An accused is acquitted of government benefit fraud because of stress at the time of the benefit application.

The accused and her husband were charged with a fraud upon the Canada Pension Plan as a result of a failure to advice CPP of a return to employment, or change in medical condition. The accused's husband had been injured in a work accident, but had attempted to return to self-employment two years after. The accident had been stressful for both husband and wife, and it was that emotional state at the time of the initial application which effectively negated the *mens rea* for the offence. The trial judge O'Neill J. explained:

> [101] *i. The Charge Against Colleen Clelland*
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> [102] In my view, it would be dangerous to convict Mrs. Clelland on the facts and circumstances of this case. I accept her evidence that when she was at the Lyndhurst Hospital in Toronto, she was under deep stress and anxiety. I find that she did sign the forms bearing her signature but given her very real levels of stress, I am not able to conclude that the words "I agree to notify the Canada Pension Plan of any changes that may affect my eligibility for benefits. This includes: an improvement in my medical condition; a return to work (full, part-time, volunteer, or trial period); attendance at school or university; trade or technical training; or any rehabilitation." would have resonated with her. These words appeared in the application for disability benefits.
>
> [103] I make the same finding with respect to the declaration and signature page found in the questionnaire: I am not able to conclude that when Colleen Clelland signed the questionnaire on September 30, 1998 at the Lyndhurst Hospital, that the words, similar to those in the application, would have resonated with her.
>
> [104] There is a possibility on the evidence that when Mr. and Mrs. Clelland returned home The Notice of Entitlement letter, the first cheque or both had already been mailed to her residence. I am not convinced on the evidence that the paragraph on page 2 of the Notice of Entitlement under the heading Disability Pension would have resonated with Mrs. Clelland or would have caused her to consider contacting the Canada Pension Plan when Mr. Clelland began to again operate his self employment business, or indeed when Mr. Clelland began to earn some part-time employment earnings after his self employment business came to an end.

R. v. Clelland and Clelland, 2012 ONSC 3080

#10 Another Ontario jury verdict is overturned because of improper exhortations to the lone hold out juror.

The Appellants had been convicted of importing heroin after a controlled delivery to the apartment of a third party who identified the two accused as the persons responsible for shipping and receiving the drugs. During the course of his charge to the jury, the trial judge said that if there were one juror whose views disagreed with the other 11, that the lone juror should re-consider his position. This was held to be reversible error. Speaking for the Ontario Court of Appeal, Goudge J.A. said:

> [28] The appellants' second argument is that the trial judge erred in inviting a juror faced with 11 colleagues holding the contrary view to reconsider his or her position.
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> [29] The error was described by this court in *R. v. Gabie (D.)* (1997), 98 O.A.C. 75 and most recently in *R. v. Vivian*, 2012 ONCA 324. In *Gabie (D.)* the trial judge said this in exhorting the jury:
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> > If you happen to be in a minority, maybe the -- I don't want to know what size the minority is, large or small, but if you happen to be in a minority, would you be prepared to reconsider your positions in view of the expressed view of the majority? It may be good sense in doing so, and the minority does not have to agree with the majority. There's no question about that.
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> [30] This court held at para. 9, that this constitutes a serious error:
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> > The second exhortation contained the additional serious error of advising only the minority to reconsider their views. In *R. v. G. (R.M.)* (1996), 110 C.C.C. (3d) 26 (S.C.C.) Cory J. explained that such instructions risk introducing irrelevant factors into the jury's deliberations and coercing some members of the jury to agree with the majority despite their own genuinely held doubts.
>
> [31] In this case, albeit in the charge itself rather than an exhortation, the trial judge fell into the same error given Cory J.'s explanation in *R. v. G. (R.M.)* of the problem this kind of language creates. I do not think that the damage is lessened when it occurs in the main charge rather than in an exhortation. The language used in the charge in this case gives rise to this very problem. Indeed it implies that it is abnormal for a juror to maintain a genuinely held view in the face of contrary opinions:
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> > However, on the other side of that is, if 11 normal guys think one way, and you think the other way, have a look in the mirror and see why it is, see if there has got to be some reason for it.

Accordingly, a new trial was ordered.

R. v. Marin-Ariza, 2012 ONCA 385