Date: 20240124
Docket: CR 22-01-39318
(Winnipeg Centre)
Indexed as: R. v. Skibicki
Cited as: 2024 MBKB 11

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Christian A. Vanderhooft
	)	Renée D. Lagimodiere
respondent,	)	Charles P. R. Murray
	)	for the Crown
- and -	)	
	)	
JEREMY ANTHONY MICHAEL SKIBICKI,	)	Leonard J. W. Tailleur
	)	Alyssa B. Munce
(accused) applicant.	)	Brittney J. Hoyt
	)	for the accused
	)	
	)	JUDGMENT DELIVERED:
	)	January 24, 2024

JOYAL C.J.

I. INTRODUCTION

[1] The applicant (the accused) is charged with four counts of first degree murder. He is scheduled to be tried by judge and jury on April 29 to June 6, 2024. The accused does not want a jury trial.

[2] The scheduled trial will put the Crown to its legal burden respecting what it alleges are the horrific murders of four Indigenous women whose remains were or are believed to still be in a local municipal landfill.

[3] Prior to the commencement of his trial, the accused has raised a number of preliminary issues and challenges all of which resulted in the scheduling of various and distinct applications, motions and *voir dires*. Most of these matters have now been either adjudicated or abandoned.

[4] One of the preliminary matters that was scheduled for determination prior to trial, involves the accused's constitutional challenge to the existence of the Attorney General's discretion as found in s. 473(1) of the ***Criminal Code***. That discretion permits the Crown to consent (or not) to a re-election to a trial by judge alone. Without that consent and indeed, the accompanying consent of an accused person, a trial for murder must proceed by judge and jury. The accused alleges that s. 473(1) and the existence of a de facto Crown veto — where the accused consents — violates ss. 7 and 11(d) of the ***Charter***.

[5] This judgment and its reasons address the above-mentioned constitutional challenge.

[6] For the reasons set out in this judgment, I have determined that the Attorney General's discretion that resides in s. 473(1) is not violative of either ss. 7 or 11(d) of the ***Charter*** and that the accused's constitutional challenge should be dismissed. More specifically, the reasons herein will explain why, in disposing of this motion, I have come to the following connected determinations — determinations that are all consequential for the accused's constitutional challenge:

a) there is no ***Charter*** right to a judge-alone trial;

b) courts have already upheld s. 473 in relation to similar challenges;

c) s. 473(1) is not arbitrary;

d) the accused has not established that s. 11(d) of the ***Charter*** is engaged;

e) the discretion in s. 473(1) is in some circumstances reviewable; and

f) notwithstanding the above determinations, the accused's acceptance that a remedy short of one fashioned pursuant to s. 52(1) of the ***Constitution Act, 1982*** will suffice in the circumstances of this case, suggests that the accused's underlying claim can be resolved on more narrow grounds than those asserted by the accused and that this court could have refrained from making constitutional pronouncements.

II. FACTUAL BACKGROUND

[7] The accused was directly indicted on November 25, 2022. The indictment charges the accused with four counts of first degree murder.

[8] By operation of law (***Criminal Code***, s. 471), the mode of trial in the present case is by judge and jury. As earlier noted, a jury trial has already been scheduled.

[9] The accused by way of a notice filed on October 15, 2023, advises that he wishes to re-elect to a trial by judge alone. To be able to change the mode of trial, the law requires both an accused and the Attorney General to consent to a trial by judge alone (see ***Criminal Code***, s. 473(1)). The Attorney General's consent as to re-election has not been forthcoming.

[10] It would appear from the affidavit evidence and the submission of the accused that he objects to the fact that s. 473(1) requires anyone's consent but his own and as a result, he brings this constitutional challenge based upon the existence of the Attorney General's discretion, which the accused says is constitutionally "arbitrary".

[11] The Crown is correct when it states that there is little in the way of adjudicative facts supporting the accused's challenge.

[12] The accused has not led evidence suggesting that his right to a fair trial will be prejudiced in this case in the event that he is tried by judge and jury. The accused has also confirmed that he does not allege that the Attorney General's withheld consent amounts to an abuse of process.

III. STATUTORY AND CONSTITUTIONAL FRAMEWORK

[13] Set out immediately below are those statutory or ***Charter*** provisions in respect of which part of the accused's constitutional argument is based.

[14] The provisions set out below include ***Criminal Code*** sections 471, 473(1), 565(2) and (3), and sections 7 and 11(d) of the ***Charter***. Also included is section 469 of the ***Criminal Code***.

[15] The provisions ought to be read mindful of the accused's position (further explained in the next section of this judgment) that s. 473(1) violates ss. 7 and 11(d) of the ***Charter*** both because s. 473(1) is arbitrary when compared to similar sections in the ***Criminal Code*** (see ss. 565(2) and (3)) and because it is arbitrarily connected to s. 469. With respect to these provisions, the accused insists that the only explanatory distinction relating to why consent is required to re-elect under s. 473(1) as compared to ss. 565(2) and (3), is the reliance on s. 469 of the ***Criminal Code***. In other words, if an accused falls under the purview of s. 469 — as in the case at bar — they lose the sole discretion (as would be otherwise present under ss. 565(2) and (3)) of how to be tried. The accused contends that this is unreasonable and not justifiable with respect to ss. 7 and 11(d) of

the ***Charter*** insofar as the Crown should not have veto power over an accused's discretion based simply on what he argues is the arbitrary connection of s. 469 to s. 473(1).

[16] Section 469 of the ***Criminal Code*** states as follows:

> **Court of criminal jurisdiction**
>
> 469 Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than
>
> (a) an offence under any of the following sections:
>
> (i) section 47 (treason),
>
> (ii) [Repealed, 2018, c. 29, s. 61]
>
> (iii) section 51 (intimidating Parliament or a legislature),
>
> (iv) section 53 (inciting to mutiny),
>
> (v) section 61 (seditious offences),
>
> (vi) section 74 (piracy),
>
> (vii) section 75 (piratical acts), or
>
> (viii) section 235 (murder).
>
> **Accessories**
>
> (b) the offence of being an accessory after the fact to high treason or treason or murder;
>
> (c) an offence under section 119 (bribery) by the holder of a judicial office;
>
> **Crimes against humanity**
>
> (c.1) an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;
>
> **Attempts**
>
> (d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii); or
>
> **Conspiracy**
>
> (e) the offence of conspiring to commit any offence mentioned in paragraph (a).

[17] Section 471 of the ***Criminal Code*** states:

> **Trial by jury compulsory**
>
> 471 Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

[18] Section 473(1) of the ***Criminal Code*** states:

> Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.
>
> [Emphasis added]

[19] Sections 565(2) and (3) of the ***Criminal Code*** reads:

> (2) If an accused is to be tried after an indictment has been preferred against the accused on the basis of a consent or order given under section 577, the accused is, for the purposes of the provisions of this Part relating to election and re-election, deemed to have elected to be tried by a court composed of a judge and jury and not to have requested a preliminary inquiry under subsection 536(4) or 536.1(3), if they were entitled to make such a request, and may re-elect to be tried by a judge without a jury without a preliminary inquiry.
>
> [Emphasis added]
>
> (3) If an accused intends to re-elect under subsection (2), the accused shall give notice in writing to a judge or clerk of the court where the indictment has been filed or preferred. The judge or clerk shall, on receipt of the notice, notify a judge having jurisdiction or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or clerk any indictment, appearance notice, undertaking or release order given by or issued to the accused, any summons or warrant issued under section 578 and any evidence taken before a coroner that is in the possession of the first-mentioned judge or clerk.

[20] Sections 7 and 11(d) of the ***Charter*** are as follows:

> 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11(d) Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

IV. POSITIONS OF THE PARTIES

[21] The accused desires to have a trial without a jury and now objects to the fact that the Attorney General's consent is required in cases of murder. The accused contends that such a requirement is arbitrary and as part of the constitutional remedy, it should be removed.

[22] There are two aspects to the accused's challenge as confirmed at paragraphs 28 and 29 of his supplemental motion brief.

[23] The first aspect of the accused's argument alleging violations of his ss. 7 and 11(d) ***Charter*** rights, points to the requirement for Crown consent in s. 473(1) both as compared to similar sections in the ***Criminal Code*** and with respect to its connection with s. 469 of the ***Criminal Code***. In respect of what the accused describes as the "special treatment" accorded to murder and the requirement of Crown consent, the accused identifies what it says is an objectional Crown veto. The accused contends that there is no articulable purpose for this veto — a veto that does not apply or exist in respect of a multitude of other serious offences that involve death or which are punishable by significant custodial sentences. Accordingly, the accused insists that the requirement for Crown consent with respect to murder in s. 469 is an "abrogation of the rights of fundamental justice and procedural fairness" insofar as it arbitrarily interferes with an accused's right to solely determine how the case is to be tried.

[24] In what he calls a second or collateral aspect to his argument, the accused submits that the Crown discretion in s. 473(1) is a matter of pure "tactics and conduct" and as such, is a prosecutorial discretion that is both reviewable and "reviewable on a lower

standard". It is the accused's position that in light of what should be seen as a reduced deference or a lower standard of review attaching to a purely tactical Crown discretion, the tactical nature of s. 473(1) affects its constitutionality. Accordingly, and building upon the first aspect of his argument, the accused says that a similar constitutional determination ought to be made — that the requirement for Crown consent in s. 473(1) is violative of ss. 7 and 11(d).

[25] As part of its relief, the accused urges the court to either read down s. 473(1) to exclude the requirement for Crown consent or to read in murder as an exclusion to those offences requiring Crown consent by virtue of the operation of s. 469.

[26] It is the position of the accused that as s. 52 of the ***Constitution Act, 1982*** works in tandem with s. 24(1) of the ***Charter***, the court could in this case dispense with the requirement for Crown consent. Alternatively, the accused suggests that the court could override what he characterizes as the Crown's tactical decision to withhold consent and allow a re-election in order to prevent a ***Charter*** violation.

[27] The Crown for its part, rejects any suggestion that the Attorney General's discretion as found in s. 473(1) violates either ss. 7 or 11(d) of the ***Charter***. In urging this court to dismiss the accused's challenge and in responding to the accused's general position, the Crown suggests that the accused's argument can be summarized in one thought: an accused ought to be the one to decide, unilaterally, the mode of trial. The corollary of the accused's position according to the Crown, is that anything short of an accused being able to unilaterally decide the mode of trial, is unconstitutional.

[28] The Crown contends that the accused's constitutional challenge involves an argument (and related relief) that the Supreme Court of Canada has already rejected. According to the Crown, an accused has no constitutional right to a judge-alone trial. Absent such a right says the Crown, the accused can have no unilateral or overriding right to decide the mode of trial. Similarly, without such a right, the accused has no legitimate complaint that the Attorney General has a say (by way of its consent) as to the mode of trial. Simply put, the Crown insists that the accused's constitutional challenge to the existence of the Attorney General's discretion in s. 473(1) of the ***Criminal Code*** mirrors challenges that both trial and appellate courts have already dismissed. It urges this court to do the same.

[29] As part of its argument, the Crown notes that courts have found that in appropriate cases, the Attorney General's refusal to consent to re-election may be reviewable. This reviewability says the Crown works to reinforce the constitutionality of s. 473(1).

[30] In addition to the above arguments made by the Crown, it also asks the court to note that based on parts of the accused's written submission, it would appear that the accused accepts that in the present case, a remedy short of a legislative remedy (reading down or striking down) under s. 52(1) of the ***Constitution Act, 1982***, can provide any needed relief. As such, consistent with the proposition that generally, courts should decide matters on the narrowest grounds (and refrain from making unnecessary constitutional pronouncements), it is the Crown's position that this court ought to summarily dismiss the accused's constitutional challenge.

V. ISSUES

[31] The accused's constitutional challenge in the present case requires this court to determine whether the Attorney General's discretion in s. 473(1) violates ss. 7 and 11(d) of the ***Charter***.

[32] Based on the governing jurisprudence, the applicable tests and the submissions of the parties, the issues that arise in the present case in respect of the alleged ss. 7 and 11(d) ***Charter*** breaches can be reduced to the following relevant questions:

1. ***Is there a Charter right to a judge-alone trial?***
2. ***Have courts upheld s. 473 against similar challenges?***
3. ***Is s. 473(1) arbitrary?***
4. ***Has the accused established that s. 11(d) of the Charter is engaged?***
5. ***Is the s. 473(1) discretion already in some circumstances reviewable?***
6. ***Has the accused accepted that a remedy short of one fashioned pursuant to s. 52(1) of the Constitution Act, 1982 will suffice and if so, is there any need to address the constitutionality of the impugned provision?***

VI. ANALYSIS

1. *Is there a Charter right to a judge-alone trial?*

[33] Much of the accused's argument in alleging violations of ss. 7 and 11(d) of the ***Charter*** suggests directly or indirectly that there is a constitutional right to a judge-alone trial. For the reasons that follow, I have determined that the current state of law in Canada does not support that position.

[34] There is no question that an accused charged with an offence that carries a punishment of five years or more has a constitutional right to a trial by jury (see s. 11(f) of the ***Charter***). That said, the Supreme Court of Canada in ***R. v. Turpin***, [1989] 1 S.C.R. 1296, held that while there may be a constitutional right to a trial by jury, the reverse is not true. In other words, a constitutional right to a jury trial does not "[confer] on the accused a choice or an election between trial by judge and jury and trial by judge alone" (see para. 32). The court noted that the mandatory jury trial provisions of the ***Criminal Code*** could only be overridden if the accused had such a right to a trial by judge alone (at para. 32):

> I agree with the Alberta Court of Appeal that s. 11(f) does not make trial by jury obligatory. It merely confers a right to a jury trial on the accused. The accused may repudiate that right. He may say that he does not wish to exercise his constitutional right to a jury trial. However, s. 429 of the *Criminal Code* does make trial by jury mandatory for those offences listed in s. 427. Section 429 then can only be overridden if there is a constitutional right to have a trial by judge alone. With all due respect I cannot agree with the Alberta Court of Appeal and Professor Hogg that s. 11(f) can be read as conferring on the accused a choice or an election between trial by judge and jury and trial by judge alone. The purpose of s. 11(f) is to give an accused the right to a jury trial and to ensure that, if a jury trial is not a benefit to the accused, the accused may waive the right to a jury trial.
>
> [Emphasis added]

[35] Although the court in ***Turpin*** acknowledged that an accused may waive their right to a jury trial, that waiver does not translate to the entitlement to a particular procedure. Again in ***Turpin***, at paragraphs 32 and 34, the court noted as follows:

> . . . Once the right is waived, however, reliance on the Constitution ceases and the provisions of the *Criminal Code* govern. There is, in my view, nothing in s. 11(f) to give the appellants a constitutional right to elect their mode of trial or a constitutional right to be tried by judge alone so as to make s. 11(f) inconsistent with the mandatory jury trial provisions of the *Criminal Code*.
>
> . . .
>
> Simply put, waiver does not confer rights, it repudiates them. If you waive your right to A, it does not mean that you are entitled to B. It means only that you are

> no longer entitled to A. What you are entitled to may then have to be found elsewhere, as in this case, in the *Criminal Code*. The fact that the *Criminal Code* undoes the effect of the accused's waiver because it reflects collective or social interests in a trial by jury should not surprise us.
>
> [Emphasis added]

[36] I am in agreement with the Crown's characterization that the applicant is asking for what the Supreme Court of Canada has determined he cannot have, an absolute right to choose. Pointing to paragraph 30, the Crown relies upon what it says is the baseline proposition that emerges from ***Turpin***:

> . . .There is no constitutional right to a non-jury trial. There is a constitutional right to a jury trial and there may be a "right", using that term loosely, in an accused to waive the right to a jury trial. An accused may repudiate his or her s. 11(f) right but such repudiation does not, in my view, transform the constitutional right to a jury trial into a constitutional right to a non-jury trial so as to overcome the mandatory jury trial provisions of the *Criminal Code*.

[37] The Crown is well to remind the court, that the accused is not challenging s. 471 of the ***Criminal Code***. That section provides that trial by jury is compulsory, "except where otherwise expressly provided by law". In other words, the presumptive trial procedure for an indictable charge in a superior court is trial by judge and jury. Despite the accused's argument, there does not exist an unfettered right to choose a mode of trial as an aspect of "controlling the defence". Instead, any choice in the matter as granted by the ***Criminal Code*** is indeed an exception to the rule in s. 471. Section 473(1) constitutes one of those exceptions.

[38] It follows in my view that if it is constitutional for Parliament to compel a jury trial in all cases save where it legislates an exception, then it certainly cannot be unconstitutional for Parliament to place parameters on those exceptions. As noted at paragraph 30 of ***Turpin***, whatever the demarcation may be for the scope of the right to

control the defence, on a constitutional basis, it will not "overcome the mandatory jury trial provisions of the ***Criminal Code***."

2. Have courts upheld s. 473 against similar challenges?

[39] As I will explain below, a number of trial and appellate courts have already dismissed challenges to the existence of the Attorney General's discretion in s. 473(1) of the ***Criminal Code***. Most of those courts have determined that the Supreme Court of Canada's decision in ***Turpin*** is both applicable and dipositive of the issue. In examining the reasoning of those cases and the results, I am of the view that the accused's challenge in the present case cannot succeed.

[40] In ***R. v. McGregor***, [1992] O.J. No. 3040, 1992 CarswellOnt 730 (Gen. Div.), the Crown refused to consent to a re-election. It was in that context that the accused brought a constitutional challenge to s. 473(1) invoking ss. 7, 11(d) and 11(f) of the ***Charter***. In that case, the accused argued that s. 473(1) of the ***Criminal Code*** — insofar as it requires Crown consent before the accused can elect trial by judge alone with respect to certain offences including murder — in and of itself, contravenes the identified ***Charter*** rights and should thus be declared unconstitutional.

[41] In dismissing the challenge, the court in ***McGregor*** determined that the reasoning in ***Turpin*** applied equally to s. 473 (at para. 20):

> Since the decision in *Turpin*, s. 473 of the *Criminal Code* was enacted and an accused charged with murder may be tried by Judge alone provided that both the accused and the Crown consent. The reasoning in *Turpin* applies to s. 473 since, in the same way, it cannot be argued that the requirement of Crown consent before an accused charged with murder can elect trial by judge alone contravenes his right to a jury trial under s. 11(f). As in *Turpin*, it is only if the accused's power to waive that right could be elevated to a constitutionally protected right to trial by Judge alone that such argument could be made. Nor can it be said that s. 473, in and of itself, restricts the accused's right to be tried by an independent and

> impartial tribunal under ss. 11(d) and s. 7 of the *Charter*. It cannot be said that a trial by judge and jury in any way presumes a person to be guilty, or that he will not have a fair and public hearing, or that there will not be an independent and impartial tribunal. Indeed, the Courts have always presumed the opposite. It is presumed that jurors will carry out their duties in accordance with their oath. Therefore, the fact that the Crown has the discretion to refuse to consent to a trial by judge alone does not, in and of itself, contravene any of the accused's rights under the *Charter*.
>
> [Emphasis added]

[42] I adopt the reasoning in ***McGregor*** as being obviously applicable to the present case.

[43] I similarly adopt the Alberta Court of Appeal judgment in ***R. v. Sobotiak***, 1994 ABCA 177. The challenge in ***Sobotiak*** was similarly impugning the Crown discretion set out in s. 473(1). The argument alleged a violation of s. 7 of the ***Charter***. The appellant in ***Sobotiak*** as in the present case, did not allege that the exercise of discretion in that particular case was abusive, but instead, argued that the mere existence of the discretion was violative of the ***Charter***. In rejecting that position, the court noted as follows (at paragraph 8):

> A simple answer to this attack was offered by La Forest, J. said in *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387 at 410-411:
>
> > The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.
> >
> > This Court has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice; See *R. v. Lyons, supra*, at p. 348; see also *R. v. Jones*, 1986 CanLII 32 (SCC), [1986] 2 S.C.R. 284, at pp. 303-4. The Court did add that if, in a particular case, it was established that a discretion was exercised for improper or arbitrary motives, a remedy under s. 24 of the *Charter* would lie, but no allegation of this kind has been made in the present case.

[44] In ***Regis c. R***., 2012 QCCS 4776 (CanLII), an accused who was charged with murder, sought to have a judge-alone trial and brought a challenge pursuant to s. 7 of the ***Charter*** to both ss. 471 and 473 of the ***Criminal Code***. As in the present case, it was noted that there was no real evidence that would provide support for the constitutional challenge. The court's judgment in ***Regis*** provided a number of instructive insights synthesizing some of the relevant Supreme Court of Canada and appellate jurisprudence (see paras. 39, 40, 52-55 and 59):

> [39] Jury trials are the backbone of our criminal justice system. A trial is not unfair for the sole reason that it proceeds before judge and jury.
>
> [40] The exercise of Crown discretion in refusing to consent to a trial by judge without a jury does not, considered alone, breach an accused's *Charter* rights; *R. v. NG, supra*, par. 42, 45, 62.
>
> . . .
>
> [52] Sections 7 and 11 (d) entitle the accused to a fair hearing. He is not entitled "to the most favourable procedures that could possibly be imagined"; *R. v Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, par. 88; *R. v. Stephen*, [1989] B.C.J. No. 241 (B.C.S.C.), par. 16-20; *R. v. Rose, supra*, par. 99. As the Alberta Court of Appeal stated in *R. v. NG*, *supra*, par. 136, there is no *Charter* guarantee to be tried by a "comfortable court".
>
> [53] The right to make full answer and defence does not imply an entitlement to those rules and procedures most likely to result in an acquittal; the right entitles an accused to fair rules and procedures enabling him or her to defend against and answer the case for the prosecution; *R. v. Rose, supra*, par. 99; *Dersch v. Canada (Attorney General)*, *supra*, p. 1515.
>
> [54] The Supreme Court has recognized that, in a criminal trial, the fairness of the process must be assessed primarily from the accused's perspective. The Supreme Court held however, that an assessment of the fairness of the trial process must also be looked at "'from the point of view of fairness in the eyes of the community and the complainant' and not just the accused"; *R. v. Mills*, *supra*, par. 72; *R. v. E. (A.W.)*, 1993 CanLII 65 (SCC), [1993] 3 S.C.R. 155, p. 198.
>
> [55] Moreover, the state has a legitimate interest in the jury system which plays a role in maintaining public confidence in the administration of justice. Parliament has determined that the public interest in section 469 offences does not warrant leaving the decision as to the mode of trial with the accused alone as in such case the decision would be restricted to an assessment as to what is in his or her self-

> interest; *R. v. NG*, *supra*, par. 121, 129-31; *Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27)* (Ottawa, 1980), pp. 15-16.
>
> . . .
>
> [59] There is no constitutional right, in Canada, to a trial by judge alone. The constitutional right to a jury trial cannot be transformed into a constitutional right to a non-jury trial so as to overcome the mandatory jury trial provisions of the *Criminal Code*; *R. v. Turpin,* supra, pp. 1321-4. The Supreme Court, in *Turpin*, focused on sections 11 (f) and 15 of the *Charter.* The outcome, in the opinion of this Court, would be no different under section 7; see also, *R. v. NG, supra*, par. 45.
>
> [Emphasis added]

[45] The judgment in ***Regis*** was followed in ***R. c. Gabriel***, 2013 QCCS 7031 (CanLII) (aff'd on other grounds 2020 QCCA 1210) wherein the court faced an almost identical motion to that in ***Regis*** where the accused challenged the constitutionality of ss. 471 and 473. It is clear from the court's reasons in ***Gabriel***, that the court adopted the reasons in ***Regis*** and further found the analysis in ***Turpin*** to be dispositive. The court noted the following (at paragraphs 7 and 8):

> After having considered these arguments, the Court stands entirely behind the reasoning in the very complete Judgment rendered by Justice Stober. Without repeating everything said in that Judgment, it will suffice to cite the *Turpin* decision of the Supreme Court of Canada, in which Justice Wilson underlined that there is no "constitutional right to a non-jury trial":
>
> > There is no constitutional right to a non-jury trial. There is a constitutional right to a jury trial and there may be a "right", using that term loosely, in an accused to waive the right to a jury trial. An accused may repudiate his or her s. 11(f) right but such repudiation does not, in my view, transform the constitutional right to a jury trial into a constitutional right to a non-jury trial so as to overcome the mandatory jury trial provisions of the *Criminal Code*.
>
> In the present case, the arguments raised on behalf of Mr. Regis can be assimilated to a claim that there is indeed such a constitutional right to a non-jury trial, a claim already rejected by this Court in the Judgment and one which runs directly counter to *Turpin*, amongst other decisions.
>
> [Footnotes omitted]

[46] In summary, there is significant Canadian jurisprudence wherein s. 473 of the ***Criminal Code*** has been upheld as against similar constitutional challenges. As noted, in many of those cases, the courts have found that the Supreme Court of Canada's decision in ***Turpin*** is both applicable and dispositive of the issue. After a thorough review of that jurisprudence, I am persuaded that this court should do the same.

3. Is s. 473(1) arbitrary?

[47] In ***Canada (A.G.) v. Bedford***, 2013 SCC 72, at paragraph 111, the Supreme Court of Canada explains that a law is arbitrary when there is no connection between its effects and the object of the law. An arbitrary law is one that limits rights but is not capable of fulfilling or in any way furthering the objectives of that law.

[48] With the above in mind and for the reasons I explain below, I have determined that s. 473(1) is not arbitrary.

[49] The Crown is right to argue that the Supreme Court of Canada has long recognized the importance of the jury trial as a social institution. For example, in ***Turpin***, the court noted (at paras. 12 and 13):

> The jury serves collective or social interests in addition to protecting the individual. The jury advances social purposes primarily by acting as a vehicle of public education and lending the weight of community standards to trial verdicts. Sir James Stephen underlined the collective interests served by trial by jury when he stated:
>
> > . . . trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source.
> >
> > J. Stephen, *A History of the Criminal Law of England* (1883), vol. I, at p. 573.
>
> In both its study paper (*The Jury in Criminal Trials* (1980), at pp. 5-17) and in its report to Parliament (*The Jury* (1982), at p. 5) the Law Reform Commission of

> Canada recognized that the jury functions both as a protection for the accused and as a public institution which benefits society in its educative and legitimizing roles.
>
> . . . [T]he jury serves both individual and societal interests . . .
>
> [Emphasis added]

[50] In ***R. v. Stillman***, 2019 SCC 40, at paragraphs 26 – 28, the Supreme Court of Canada once again recognized the role and significance of the jury as an institution:

> [26] Not long after *Turpin* was decided, L'Heureux-Dubé J. described the role and significance of the jury as an institution in *R. v. Sherratt*, 1991 CanLII 86 (SCC), [1991] 1 S.C.R. 509:
>
> > The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole. [pp. 523-24]
>
> [27] More recently, the majority in *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, emphasized that "[t]he right to be tried by a jury of one's peers is one of the cornerstones of our criminal justice system" (para. 1). This is illustrated by the fact that under s. 471 of the *Criminal Code*, every person charged with an indictable offence shall be tried by a judge and jury unless otherwise stipulated by law.
>
> [28] This brief review reveals that the right to a jury serves two main purposes. First, at the individual level, it protects the accused by giving him or her the benefit of a trial by his or her peers. Since the right is held by the accused, this individual dimension is of utmost importance. Secondly, at the societal level, it provides a vehicle for public education about the criminal justice system and lends the weight of community standards to trial verdicts.
>
> [Emphasis added]

[51] It is significant that the inherent value of a jury trial for more serious offences is recognized and entrenched in the ***Charter*** itself insofar as s. 11(f) guarantees the right to a trial by jury for offences punishable by five years or a more in prison.

[52] When examining the long-recognized importance of the jury trial as a social institution that serves both individual and societal interests and when discussing the joint

consent required by s. 473(1) to opt out of a jury trial, it is worth noting that the Attorney General and its Crown counsel are bound by virtue of their role to take public interest concerns into account. Defence counsel representing accused persons are not so obligated. In this connection, it makes perfect sense to repose some discretion in the Attorney General to determine the mode of trial for the ***Criminal Code*'s** most serious offence. With this in mind, it is coherent and logical to suggest, as the Crown does, that the clear purpose of s. 473(1) is to provide a role for both defence and Crown in determining whether an exception to the overriding rule in s. 471 should be given effect in a particular case, with a view to engaging public interest concerns.

[53] The above understanding of s. 471 was confirmed and endorsed in the concurring reasons provided by Fraser C.J. in ***R. v. Ng***, 2003 ABCA 1. In that judgment, she noted as follows (at paras. 121, 128 and 129):

> [121] This historical review reflects Parliament's efforts to balance competing interests – the interests of the accused on the one hand and the interests of society, including those of victims and witnesses, on the other – in order to preserve a fair and impartial criminal justice system. Where s. 469 offences are concerned, Parliament has determined that the public interest in such crimes does not warrant leaving the decision as to mode of trial in the hands of the accused alone, based solely on the accused's assessment of what is in his or her self-interest. As explained by the Supreme Court of Canada in *R. v. Turpin*, *supra*, at 1309-1310:
>
> > The jury serves collective or social interests in addition to protecting the individual. The jury advances social purposes primarily by acting as a vehicle of public education and lending the weight of community standards to trial verdicts....In both its study paper (The Jury in Criminal Trials (1980), at pp. 5-17) and in its report to Parliament (The Jury (1982), at p. 5) the Law Reform Commission of Canada recognized that the jury functions both as a protection for the accused and as a public institution which benefits society in its educative and legitimizing roles.
>
> . . .
>
> [128] First, not all crimes are equal; not all warrant the same level of state resources; and not all attract the same degree of public attention and concern. For

> example, there is no equivalency between theft of cattle and murder. In jurisdictions where either prosecutorial or court consent to trial by judge alone is required, case law typically identifies the seriousness and gravity of the crime as one of the key factors militating in favour of a jury trial: see *State v. Dunne*,124 N.J. 303 (Sup. Ct., App. Div., 1991).
>
> [129] Second, the state too has a legitimate interest in the jury system. The requirements under the *Code* for Crown consent to trial by judge alone in certain circumstances is an explicit recognition of this valid state interest. In fact, the starting point under the *Code* with respect to indictable offences is s. 471 which makes trial by judge and jury mandatory except where otherwise expressly provided by law. Further, as noted, s. 568 of the *Code* contains an overriding right on the part of the Attorney General to require that a trial be by judge and jury in certain cases. Therefore, while the accused enjoys a constitutional right to the benefit of a jury trial under the *Charter*, there continues to be a legitimate state interest in trial by judge and jury.
>
> [Emphasis added]

[54] When one examines s. 473(1), there is an obvious connection between its effects and the objects of the provision. The clear purpose of s. 473(1) (to provide a role for both defence and Crown in determining whether an exception to the overriding rule in s. 471 should be given effect in a particular case) is obviously assisted by the means employed by s. 473(1). Insofar as s. 473(1) includes providing for the consent of the Attorney General, that inclusion is meant to tailor the provision to the purpose of balancing what was identified in ***Ng*** as competing interests — "the interests of the accused on the one hand and the interests of society, including those victims and witnesses, on the other — in order to preserve a fair and impartial criminal justice system" (see ***NG***, at para. 121).

[55] I agree with the submission of the Crown that contrary to the way the accused has formulated his position, the arbitrariness analysis is not a straight exercise in comparison. Accordingly, it is neither meaningful nor determinative that other provisions may operate in other ways in respect of other offences.

[56] There is indeed no constitutional requirement for absolute procedural symmetry in the ***Criminal Code***. The fact that one provision does not work precisely like another does not mean it is arbitrary or unfair. If this were so, every offence would be required to be treated exactly the same and the distinction between indictable and summary offences would disappear just as there would be no elections or re-elections of any sort.

[57] An accused person is entitled to fair procedures, but not the most advantageous trial procedure possible in any given case. I am persuaded by both the submission of the Crown and the discussion in the jurisprudence that as a constitutional principle, fairness must be considered both from the perspective of the accused and of society more broadly. The corollary of this proposition is that absent evidence of an abuse of process by the Crown or a breach of the accused's fair trial rights, there is no requirement that everything be treated the same, that there be absolute procedural symmetry in the ***Criminal Code*** or that the defence have complete control to direct all trial procedure.

[58] Just as there is no constitutional requirement for absolute procedural symmetry in the ***Criminal Code*** in order to negate an allegation of arbitrariness, neither is it particularly relevant or determinative that the accused in this case would like s. 473(1) to mirror certain other provisions of the ***Criminal Code***. Instead, what is important in the analysis as to arbitrariness is that there be a rational connection between providing discretion to the Attorney General and the object of ensuring that decisions on the mode of trial take into account the public's interest in having a trial by jury (see ***Bedford***, at para. 111).

[59] As part of the accused's submission, he places much emphasis on the statutory entitlement of accused persons to re-elect as found in s. 565(2). He contends that this represents "an unrestricted right to elect their mode of trial". As it relates to this aspect of the accused's argument, I agree with the Crown when he submits that the accused does not explain nor reconcile this so called "unrestricted right to elect their mode of trial" in light of s. 568. As the Crown notes, s. 568 allows the Attorney General to require a jury trial notwithstanding a s. 565(2) re-election. While acknowledging that this decision is distinct from s. 473(1), the Crown is right to suggest that the section shows a broad legislative concern for the public interest in trial by jury in specific cases.

[60] Put simply, the accused's submission in relation to s. 565(2), like the accused's other arguments in relation to arbitrariness, is not persuasive.

3. Has the accused established that s. 11(d) of the Charter is engaged?

[61] For the reasons that follow, I have determined that the discretion to refuse consent to a judge alone re-election does not by itself and/or without something more by way of evidence, engage or offend s. 11(d).

[62] The underlying concern in s. 11(d) is with fairness. That said, that underlying concern does not entitle an accused to a particular procedure or to a particular advantage. As noted in ***R. v. Chouhan***, 2021 SCC 26, it was noted (at paragraph 31):

> . . . [Section] 11(d) does not entitle the accused to any particular procedure. The question is not whether a new process chosen by Parliament is less advantageous to the accused (*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 47; *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77, at para. 14).

[63] The Crown argues that the relevant question that need be posed in respect of s. 11(d) is whether the process in question "deprive[s] accused persons of a fair trial before an independent and impartial tribunal" (see ***Chouhan***, at para. 31). I agree that that is indeed the pertinent question. For example, in the context of that question, a concern could be raised in a situation where an accused is able to demonstrate that a process or the effects of a process, procedure or discretion will result in a hearing before a decision maker in respect of whom there is an attached reasonable apprehension of bias.

[64] In the present case, the accused has in no way provided the court with anything resembling evidence that would suggest that his right to a fair trial is imperiled by his currently scheduled jury trial. Absent something more, it cannot and should not be assumed that a trial by jury is inherently unfair. There are many safeguards that ensure impartiality that accompany the empanelling of a jury. These safeguards have been recognized as constitutionally compliant and those procedures "collectively ensure that each accused receives a fair trial before an independent and impartial jury" (see ***Chouhan***, at para. 36).

[65] Put simply, there is nothing before this court in respect of the accused's constitutional challenge that would support his claim that s. 11(d) is properly engaged by the existence or utilization of the discretion found in s. 473(1).

5. Is the s. 473(1) discretion already in some circumstances reviewable?

[66] The Crown concedes and on a review of the jurisprudence I accept, that numerous courts have found that in appropriate cases, the Attorney General's refusal to consent

under s. 473(1) may be subject to review. In addition, in narrow circumstances, the trial judge may order a trial by judge alone despite the absence of consent. The Crown aptly describes this potential for review in certain limited and narrow circumstances as an "escape valve" for situations where the discretion could work an injustice. In my view, given the potential for this limited review, the availability of such review reinforces the constitutionality of s. 473(1).

[67] The available but constrained basis for an application to review or override the Crown's withheld consent was acknowledged by Watt J.A. in ***R. v. Saleh***, 2013 ONCA 742 (at paragraphs 82 and 83):

> The presumptive mode of trial in cases of first degree murder is trial by jury: *Criminal Code*, s. 471. Section 473(1) of the *Criminal Code* expressly permits an allegation of murder, an offence listed in s. 469(a)(vii) of the *Criminal Code*, to be tried without a jury, provided both the accused and the Attorney General consent to this alternative mode of trial.
>
> The authorities recognize a closely circumscribed jurisdiction in a trial judge, on application by an accused, to direct that the trial of a case of murder be held before a judge sitting without a jury: *R. v. McGregor* (1999), 1999 CanLII 2553 (ON CA), 43 O.R. (3d) 455 (C.A.), at para. 4; see also, *R. v. E. (L.)* (1994), 1994 CanLII 1785 (ON CA), 94 C.C.C. (3d) 228 (Ont. C.A.), at pp. 241, 243. A judge should only override the refusal of the Crown to consent to a judge-alone trial under s. 473(1) <u>in the clearest of cases</u>; *R. v. Kahn*, 2007 ONCA 779, 230 O.A.C. 179, at para. 16.
>
> [Emphasis added]

[68] Other courts have come to similar conclusions to that of ***Saleh***. Those courts have found that the discretion in s. 473(1) is reviewable and an override of the refusal is possible in circumstances of an abuse of process or where a breach of the accused's fair trial rights will result (see ***Ng***; ***McGregor***; ***R. v. Oland***, 2018 NBQB 253; and ***R. v. Lufiau***, 2022 QCCA 508).

[69] The Alberta Court of Appeal in ***R. v. Effert***, 2011 ABCA 134, makes it clear however, that absent an accused establishing an abuse of process (the burden of which is on the accused) the trial court has no jurisdiction to override the Crown's decision to withhold consent. Moreover, ***Effert*** confirms that if an accused has not established an abuse of process, there is no obligation for the Crown to provide reasons for withholding consent nor can an adverse inference be drawn in such circumstances (at para. 10).

[70] The accused underscores in his argument the suggestion that the Attorney General's discretion in s. 473(1) is a matter of tactics and conduct. The corollary for the accused is that such discretionary decision making is subject to less deference. On the more specific question of how much deference ought to be shown on a review of a refusal to consent, I am in agreement with the position of the Crown that in the circumstances of the present case, this court is not required to resolve that question. Given that the focus of this application is on the constitutionality of s. 473(1) and given the accused's concession that there has been no abuse of process (nor has there been any evidence adduced suggesting anything untoward by the Crown in respect of "tactics and conduct" or in relation to the accused's fair trial rights) that more specific issue is irrelevant as to whether the existence of the discretion in s. 473(1) breaches ***Charter*** ss. 7 and/or 11(d).

[71] It would seem worthy of note that if there does exist the availability of a review in certain limited circumstances, an accused does not need a constitutional challenge or a legislative remedy to obtain a judge-alone trial. Instead, what an accused need do is show either why he cannot have a fair trial before a judge and jury or why the Crown's

refusal to consent is an abuse of process. To repeat, the accused in this case has adduced no evidence as to the former and has conceded the non-existence of the latter.

[72] In my view, the challenge in the present case respecting the discretion in s. 473(1) is analogous to those challenges brought to the discretion to prefer an indictment found in s. 577. The jurisprudence on that point has been clear. Courts have determined that the existence of the discretion to directly indict does not violate per se, the ***Charter***. If however, the discretion is exercised in a way that breaches ***Charter*** rights or amounts to an abuse of process, it is open to review (see for example, ***R. v. Amad***, 2008 CanLII 54311 (ON SC), at paragraphs 4 – 9).

[73] In summary, despite the potential for review (in the clearest of cases) which potential review fortifies the constitutionality of s. 473(1) in the circumstances of the present case, there is nothing before the court that would justify the sort of limited and narrow review contemplated in the jurisprudence.

6. Has the accused accepted that a remedy short of s. 52(1) will suffice and if so, is there any need to address the constitutionality of the impugned provision?

[74] The accused accepts that were he able to demonstrate a prospective ***Charter*** breach relating to his trial by jury or an abuse of process, this court could remedy it without reading down or striking down the legislation. With that concession, the court is able to say that the specific relief he seeks in his application can be dismissed.

[75] The applicant accepts that a remedy short of s. 52(1) of the ***Constitution Act, 1982*** will suffice. He does so at paragraph 72 of his initial brief where he states,

"alternatively, the court could override the Crown tactical decision to withhold consent, in order to prevent a ***Charter*** violation, and allow re-election if the Applicant so chooses".

[76] The identified concession by the accused is significant in that it means that alternative relief (to s. 52) is available and sufficient. Separate and apart from the inaccurate or at least unsupported description by the accused that the decision or discretion in s. 473(1) is necessarily "tactical" in nature, the accused is nonetheless on more solid ground when he argues that some of the jurisprudence (as earlier cited) does indeed support the proposition that the court has, in narrow circumstances, jurisdiction to provide alternative relief to prevent a ***Charter*** violation. It is the Crown's position and I agree, that given that the accused accepts that such alternative relief is available and that it constitutes a viable remedy, such available alternative relief negates the necessity of pronouncing upon the constitutionality of the impugned provisions.

[77] In the unique and particular circumstances of the present case, I have already answered the preceding questions and issues (set out at paragraph 32) that pre-empt the accused's constitutional challenge. Nonetheless, I acknowledge and restate that generally, courts should decide matters on the narrowest grounds available to resolve the dispute between the parties and courts should refrain from making unnecessary constitutional pronouncements. In that spirit, courts should exercise similar restraint when it comes to granting unnecessary constitutional remedies that involve striking down or otherwise altering legislation (see ***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***, [1995] 2 S.C.R. 97, at para. 6).

[78] Leaving aside my foregoing determinations that pre-empt the finding of breaches to either ss. 7 or 11(d) of the ***Charter*** and the granting of any accompanying remedies sought by the accused, there is in any event as I have already determined, no basis to provide what might have been otherwise available and sufficient relief to the accused in order to prevent a ***Charter*** violation had there been one. The accused has provided no evidence that a jury trial will breach his ***Charter*** rights to a fair trial. Neither has the accused relied in any way on an argument in respect of abuse of process. Accordingly, although a remedy short of s. 52(1) may have sufficed on an application such as this, there is no evidentiary basis in this instance that would support any available relief that would involve a review of the Crown's decision or its use of its s. 473(1) discretion.

VII. CONCLUSION

[79] As explained in the foregoing reasons, I have determined the following:

a) there is no ***Charter*** right to a judge-alone trial;

b) courts have already upheld s. 473 in relation to similar challenges;

c) s. 473(1) is not arbitrary;

d) the accused has not established that s. 11(d) of the ***Charter*** is engaged;

e) the discretion in s. 473(1) is in some circumstances reviewable; and

f) notwithstanding the above determinations, the accused's acceptance that a remedy short of one fashioned pursuant to s. 52(1) of the ***Constitution Act, 1982*** will suffice in the circumstances of this case, suggests that the accused's underlying claim can be resolved on more narrow grounds than

those asserted by the accused and that this court could have refrained from making constitutional pronouncements.

[80] Given those determinations, I have concluded that the Attorney General's discretion that resides in s. 473(1) is not violative of ss. 7 and 11(d) of the ***Charter***.

[81] Accordingly, the accused's application is dismissed.

_____C.J.