Court File No. 38129

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

-and-

DEAN DANIEL KELSIE

Respondent
(Appellant)

FACTUM OF THE APPELLANT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The Hells Angels wanted Sean Simmons dead. On October 3, 2000 Simmons was shot in the head and arm and died of his injuries. On March 2, 2003 Dean Kelsie was convicted of conspiring with Steven Gareau, Neil Smith and Wayne James to murder Sean Simmons and first degree murder. More than fourteen years later, the Nova Scotia Court of Appeal overturned those convictions and ordered a new trial.

2. Proof of Kelsie's guilt came from Crown witnesses Paul Derry and Tina Potts (both of whom attracted *Vetrovec* warnings). Derry described the plan to have Sean Simmons "whacked" for infidelity with a Hells Angels member's mistress, and efforts to locate him. Derry and Potts described the call from Gareau when Simmons was located. Each described the car ride to Dartmouth with James and Kelsie. On that drive the decision was made by James to have Kelsie do the hit, and he was given instructions on how to use the peculiar revolver. The group rendez-voused with Gareau near Simmons' location, 12 Trinity Avenue; Kelsie and Gareau walked there. Shortly thereafter Kelsie returned to the pre-arranged location where the car was running, and told the others he shot Simmons three times. Kelsie handed the revolver with three spent casings to Potts.

3. Wiretaps containing admissions by Kelsie were also introduced as was Kelsie's statement to police which confirmed the majority of what Derry and Potts described; but, he denied being the shooter, or being part of a plan to kill Simmons.

4. The NSCA overturned the convictions and ordered a new trial. It concluded that:

- The trial Judge erred in his instructions on party liability to first degree murder and the proviso could not be applied;
- The trial Judge erred in law by failing to leave manslaughter as a possible included offence;
- The curative proviso could not be applied on the manslaughter issue because of *R. v. Jackson*;[1] and,

[1] *R. v. Jackson*, [1993] 4 S.C.R. 573

- The trial Judge erred by instructing the jury to use evidence of Derry, and acts and declarations of co-conspirators that occurred before Kelsie joined the conspiracy, at the third stage of the *Carter* analysis.

5. The Appellant Crown says that the appeal should be allowed because:

- The NSCA decision upends conspiracy law. It is clearly wrong and inconsistent with other appellate decisions on point;
- There was no air of reality to manslaughter;
- *Jackson* either does not apply or was overstated by the NSCA to prevent application of the proviso;
- The conspiracy verdict, which was untainted by legal error, would have provided a clear pathway to uphold the first degree murder conviction.

Facts

(i) The plan to kill Simmons

6. The murder of Sean Simmons was ordered by Neil Smith, a "full patch" member of the Hells Angels. Dean Kelsie's uncle, Wayne James, was a drug dealer whose supplier was Smith. Paul Derry and James had recently become partners in the drug dealing business. Kelsie and Derry's wife, Tina Potts were also involved in James and Derry's drug business. Kelsie served as the armed guard at the door when Derry, Potts and James "cooked" cocaine into crack.[2]

7. When Smith told James he wanted Sean Simmons "whacked", Derry was present.[3] Derry tried to alert an RCMP officer who had once been his handler to attempt to stop the murder. His efforts were unsuccessful.[4]

[2] A.R., Part I, tab 2, NSCA Decision (NSCA Decision), paras. 14, 16; A.R., Parts II-V, vol. III, p.1004.
[3] NSCA Decision, paras. 17-21.
[4] NSCA Decision, para.37.

8. Steven Gareau, who had come to Nova Scotia with Potts and Derry, was tasked with tracking down Simmons.[5]

(ii) The hit

9. Gareau eventually found Simmons at 12 Trinity Avenue in Dartmouth on October 3, 2000. Gareau alerted Derry and James. After speaking with Gareau, James went into his girlfriend's house and returned with a handgun and Kelsie.[6]

10. Kelsie, Potts, James and Derry drove to the Trinity Avenue area in Dartmouth. On the way, Derry dissuaded James from killing Simmons himself. James gave the handgun to Kelsie and told him: "You're going to have to do it then". James gave Kelsie directions on how to kill Simmons. He was told he would have to pull the hammer back on the gun before firing each round. Kelsie agreed and asked for gloves. Potts gave him a pair of latex gloves from a hair dye kit she had purchased earlier that day. Kelsie also took her vest to help keep the hood of his sweatshirt up over his head.[7]

11. Potts testified that she did not know of the plan before getting in the car, but that she knew someone was going to get shot: taking a gun and asking for gloves in the circumstances, and within the lifestyle they all led, made this obvious.[8]

12. The group met Gareau at a muffler shop near 12 Trinity Avenue. James told Gareau to leave 12 Trinity Avenue through the back door after the murder and to go to a bar. He gave Gareau twenty dollars.[9]

13. Kelsie and Gareau left together. Kelsie was armed with the murder weapon. James, Potts and Derry drove to a prearranged location to wait for Kelsie's return.[10]

14. Minutes later, Kelsie returned to the car. He was very excited. Kelsie said he shot Sean Simmons three times and that one shot creased his head like a "watermelon".[11]

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[5] NSCA Decision, paras. 22-24.
[6] NSCA Decision, para. 25.
[7] NSCA Decision, paras. 26-28.
[8] A.R., Parts II-V, vol. IV, pp. 1052, 1059-1060, 1404-1405.,
[9] NSCA Decision, para. 29.
[10] A.R., Parts II-V, vol. V, pp. 2104-2106.
[11] NSCA Decision, para. 30.

15. Potts checked the gun Kelsie passed her and confirmed that there were three empty bullet casings.[12]

16. Potts and Derry later disposed of the gun, Kelsie's shoes and other clothes[13], Potts' vest that Kelsie wore (it had blood spatter on it when Kelsie returned)[14] and Potts' Tigercats jacket that Gareau had worn[15]. Many of these items were recovered when Potts and Derry assisted the police investigation.[16]

17. Dr. Vernon Bowes, Medical Examiner, testified that Simmons died from a gunshot wound to the back of his head. This was the second of two shots that entered Simmons' body. The first struck Simmons in the forearm – a defensive gesture by Simmons while he faced the shooter. The second shot corresponded with Simmons turning from the shooter.[17] The size of the entry wounds was interpreted to be from a gun fired at least one and a half feet from Simmons.

18. Sgt. T. Sharkey testified that there was burn/gunshot residue on the entry site of Simmons' shirt sleeve, meaning that the gun was fired from close range, likely less than three feet.[18]

(iii) The intercepts after the killing

19. Derry subsequently became a police agent. He allowed his phones to be tapped and wore a body pack recording device. He intercepted communications involving Kelsie which were played at trial.[19] Derry and Potts were granted immunity, paid and upon the completion of the operation, placed in witness protection.[20]

20. About three months after the murder, Kelsie admitted to Potts that he could not believe that "… I shot him and, you know, Wayne's taking credit for it."[21]

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[12] NSCA Decision, para. 30; A.R., Parts II-V, vol. IV, p. 1063.
[13] NSCA Decision, paras. 31-32.
[14] NSCA Decision, para. 31; A.R., Parts II-V, vol. IV, pp. 1065, 1454.
[15] NSCA Decision, para. 3.
[16] A.R., Parts II-V, vol. IV, pp. 1068-1070, 1095-1096, 1099-1100, 1634-1673.
[17] A.R., Parts II-V, vol. III, pp.981-982.
[18] A.R., Parts II-V, vol. V, pp. 2007-2009.
[19] NSCA Decision, paras. 42-46.
[20] NSCA Decision, paras. 38-39.
[21] NSCA Decision, para. 35.

21. In an intercepted phone call on March 2, 2001, Kelsie reported that his co-conspirator, Gareau, housed in the same jail "still seemed kosher". Derry and Kelsie also discussed "credit" for the shooting, in particular who was getting it. [22]

22. Smith reduced the drug debt owed by Derry and James as a result of the murder.[23] James paid Kelsie with two or three 8-balls of cocaine.[24] Gareau was given $20.00 at the muffler shop by James, who also promised, "I'll get you later".[25]

23. On March 5, 2001 Derry recorded a conversation he had with Kelsie in person at the Halifax County Correctional Centre. Kelsie discussed his payment for the murder and said he had to demand it from James. He told Derry to tell Smith "Tell him what's up . . . he told me, man, you can have it all right now", which Derry said was a reference to Kelsie's role in the hit.[26] Derry and Kelsie discussed the burning of items after the murder. In regard to Gareau:

> … Derry suggested, "He's the only one that seen you" and the appellant answered, "I don't even think he did." The appellant said, "The first one went" and Derry replied, "Right after the first shot he was gone?" The appellant answered, "He left then. Chicken".[27]

24. In the same conversation, Derry described Kelsie as putting a finger to his head like a gun at the point that the intercept captures Kelsie saying, "…I just walked right up, you know what I mean."[28]

25. On March 6, 2001, Kelsie spoke to Derry by telephone from the Halifax Correctional Centre. Kelsie told Derry that he wanted him to tell James that he just called him to hear his uncle's voice. Kelsie stated that he was not calling for money from James for the "hit".[29]

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[22] NSCA Decision, para. 44.
[23] A.R., Parts II-V, vol. V, pp. 2148-2149.
[24] A.R., Parts II-V, vol. V, p. 2205; vol. VI, pp.2315-2316.
[25] A.R., Parts II-V, vol. V, p. 2109.
[26] NSCA Decision, para. 45.
[27] NSCA Decision, para 45.
[28] A.R., Parts II-V, vol. VII, p. 3048.
[29] NSCA Decision, para. 46.

26. In that same conversation, Derry described Kelsie looking for a gun. Derry said Kelsie referred to the murder weapon, "…it'd never feel the same in my hand as that did that night. That's like I was married to that motherfucker."[30]

(iv) Kelsie's statement to police

27. On April 17, 2001, Kelsie met with the police and gave a statement regarding the murder.[31] Kelsie had already seen Gareau's disclosure for the charges.[32] Kelsie told police that Gareau was reported to have been edgy in the days leading up to the shooting, saying that he had to do "it" to be of value to "them".[33]

28. In his statement Kelsie claimed he got a phone call from Derry on October 3, 2000. Derry and Potts picked him up to go to Dartmouth.[34] Kelsie claimed that he thought everyone headed to Dartmouth to scare someone. He was selected on the way to approach this person and was given the gun.[35] He was told that, if he needed to use the gun, he had to cock the hammer back before firing each round.[36] Regardless, he said he had no intent on hurting anyone.[37]

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[30] NSCA, Decision, para. 46.
[31] NSCA Decision, paras. 47-48.
[32] A.R., Parts II-V, vol. I, tab 21, p. 15.
[33] A.R., Parts II-V, vol. I, tab 21, p. 4.
[34] He intentionally omitted any reference to his uncle, Wayne James' presence.

[35] Kelsie originally denied that Wayne James was in the car. He further denied that James had any involvement in providing a gun, or instructing him how to use it. He eventually conceded that James was in the vehicle. [A.R., Parts II-V, vol. I, tab 21, pp. 3-8, 18.]

[36] The Appellant has discovered a discrepancy in transcription: the Application for Leave to Appeal suggests that Kelsie was told he *would* use the gun (and how). This is how the transcript of the audio-recorded statement reads. In preparation of the factum, however, the Appellant noticed that the transcript of proceedings, when the audio-recording was played before the jury, included the word "if" before comments about use of the gun (A.R., Parts II-V, vol. VII, tab 21, pp. 2913-2914). As a result, the Appellant listened to its copy of the audio-recorded statement, and confirms that the inclusion of "if" is an accurate transcription of what Kelsie said to the police. The Appellant sincerely apologizes for any confusion this may have caused.

[37] A.R., Parts II-V, vol. I, tab 21, pp. 3, 15-16.

29. Kelsie told the police that he did not know the target of the scare. On the walk to 12 Trinity, Gareau told him that it was some guy named "Simmons". Kelsie said he could not go through with it because Simmons was a friend. Gareau said they were in it together and that it was just another day. Kelsie repeated himself. Gareau took the gun. The two continued to the building.

30. Kelsie said he did not run away for fear that Gareau might shoot him.[38]

31. Kelsie told police Gareau entered the apartment building first while Kelsie and Simmons hugged. Kelsie began to follow Gareau up the stairs in the foyer, but heard two gunshots. As he turned to see Simmons on the lower landing, Gareau fired a third (beside Kelsie's head).[39] Gareau tossed the gun to him and fled. Kelsie claimed to have been in shock, and returned to the car where Derry, Potts and James were waiting. There, he gave the gun to Potts.[40]

32. When asked by the police if he had any doubt that Gareau knew what he went to the apartment building for that day, Kelsie had none. He said he approached Gareau about it in jail, to which Gareau repeated that it was just another day, and did not feel anything.[41]

(v) History of proceedings

33. The original Information had Kelsie charged jointly with Smith, James and Gareau for murder and conspiracy to commit the murder of Sean Simmons. A severance application led to Smith and James being tried together and Kelsie and Gareau each being tried separately. Kelsie's trial went first.[42]

34. Kelsie's 35-day trial was held before the Honourable Justice Felix A. Cacchione, sitting with a jury. The Crown called 19 witnesses. The defence called no evidence.[43]

35. After six days of deliberations, the jury found Kelsie guilty of conspiracy to murder Sean Simmons and first degree murder. He was convicted March 2, 2003.[44]

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[38] A.R., Parts II-V, vol. I, tab 21, p. 6.
[39] A.R., Parts II-V, vol. I, tab 21, pp. 13-14.
[40] A.R., Parts II-V, vol. I, tab 21, p. 3.
[41] A.R., Parts II-V, vol. I, tab 21, pp. 15-16.
[42] A.R., Parts II-V, vol. II, p. 467.
[43] A.R., Parts II-V, vol. VII, p. 2994.
[44] NSCA Decision, para. 1.

36. On November 3, 2003, Kelsie filed a prisoner Notice of Appeal against conviction and sentence. He went through various counsel before the appeal was eventually heard.

37. In a decision dated December 8, 2017, the NSCA overturned both convictions and ordered a new trial seventeen years after the death of Sean Simmons.[45] The Court concluded that the trial judge erred: in his instruction on party liability for first degree murder; by refusing to leave the included offence of manslaughter with the jury; and in his instructions on the law of conspiracy. The NSCA refused to apply the curative proviso, concluding: the case was not overwhelming because much of the evidence came from unsavoury witnesses; and, there was a serious risk of miscarriage where party liability put manslaughter in play.

PART II – QUESTIONS IN ISSUE

38. The Crown appeals on the following questions:[46]

1. The NSCA erred in law in holding that Derry's evidence was not admissible against Kelsie at step 3 of the *Carter* test.

2. The NSCA erred in law in finding the acts and declarations of co-conspirators made prior to Kelsie joining the conspiracy could not assist the jury to find Kelsie to be a member of the conspiracy beyond a reasonable doubt at step 3 of the *Carter* test.

3. The NSCA erred in law in finding that there was an air of reality to the included offence of manslaughter.

4. The NSCA erred in law in declining to invoke the curative proviso.

[45] A.R., Part I, tab 3.
[46] The Appellant takes no issue with the NSCA's conclusion of error on the trial Judge's instruction on party liability.

PART III – STATEMENT OF ARGUMENT

39. Dean Kelsie was charged with unlawfully conspiring with James, Gareau, and Smith (separately indicted co-conspirators) to murder Sean Simmons, and the first degree murder of Sean Simmons. The jury found him guilty on both counts. The Appellant contends that the NSCA got both basic evidence law and conspiracy law wrong in upending the conspiracy conviction. These errors, in turn, prevented the NSCA from using the conspiracy conviction to trace the reasoning path of the jury. The ultimate conclusion should have been that any errors on party liability, or failure to leave manslaughter, had no effect on the first degree murder verdict. The curative proviso should have been applied.

The Conspiracy Verdict Was Reached Following a Correct Instruction

(i) The NSCA wrongly limited admissible evidence at step 3 of the Carter test

40. The first NSCA error concerned basic evidence law. The NSCA found that the trial testimony of witness Paul Derry was inadmissible hearsay:

> [161] Step 3 of the *Carter* analysis allows the trier of fact to consider hearsay acts and declarations of co-conspirators made in furtherance of the objects of the conspiracy. Derry was not a member of the conspiracy. He was not charged as a conspirator or named as an unindicted co-conspirator. So nothing he said or did could be in furtherance of the conspiracy. There was no basis in law upon which his acts and declarations could be evidence against Kelsie.
>
> [162] I appreciate that the trial judge indicated the potential members of the alleged conspiracy were Neil Smith, Wayne James, Gareau and Kelsie. However, he never instructed the jury that they could not use the acts and declarations of Derry as admissions against Kelsie because Derry was not a co-conspirator. He did the opposite. He invited the jury to use Derry's acts and declarations to prove Kelsie was a member of the conspiracy. In doing so he erred.[47]

41. These paragraphs display a misunderstanding both of hearsay in general and of the co-conspirator's exception to the hearsay rule.

[47] NSCA Decision, paras. 161-162.

42. The *Carter*[48] test determines whether out of court statements by a co-conspirator will be admissible against another alleged co-conspirator. The jury must first be satisfied beyond a reasonable doubt on all the evidence that the conspiracy charged in the Indictment existed. The jury next determines whether, on the balance of probabilities, and using only evidence directly admissible against the accused, the accused was a member of that conspiracy. If these two findings are made, the jury may then use the out of court statements of co-conspirators *along with the other admissible evidence*, to determine whether the Crown has proved guilt beyond a reasonable doubt.[49] The trial Judge correctly instructed the jury on this point.[50]

43. The NSCA found the trial Judge erred in directing the jury to consider the acts and declarations of Derry, a witness for the Crown in the prosecution of Kelsie. In doing so, the Court seemed to think Derry's evidence could only be considered at step 3 if it came within the four corners of the co-conspirator's exception. This was incorrect. *Carter* does not limit jurors to only consider the acts and declarations of co-conspirators at step 3. If steps 1 and 2 are met, the hearsay exception may apply, allowing such evidence to be considered, along with the rest of the trial evidence, to determine if the accused was a member of the conspiracy.

44. Derry's testimony about his own acts and declarations was direct evidence against Kelsie, not hearsay. If it was relevant, it was admissible. It did not invoke the co-conspirator's exception to the hearsay rule. Derry's testimony would only raise hearsay issues if he disavowed a statement he made outside of Court which the Crown then sought to introduce for the truth of its contents. That did not happen.

45. This situation was discussed in *R. v. Khelawon*:[51]

> 37 The previous example, namely where the witness tells the court what A told him, is the more obvious form of hearsay evidence. A is not before the court to be seen, heard and cross-examined. However, the traditional law of hearsay also extends to out-of-court statements made by the witness who does testify in court when that out-of-court statement is tendered to prove the truth of its contents. This extended definition of hearsay has been adopted in Canada: *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740, at pp. 763-64; *Starr*, at para. 158. It is

[48] *R. v. Carter*, [1982] 1 S.C.R. 938.
[49] *R. v. Smith*, 2007 NSCA 19, paras. 54, 196-197, aff'd 2009 SCC 5.
[50] A.R., Part I, tab 4, pp.147-155 for the *Carter* test instruction. See p.153 specifically for the instruction that the jury may consider "all the evidence".
[51] *R. v. Khelawon*, [2006] 2 S.C.R. 787

> important to understand the rationale for treating a witness's out-of-court statements as hearsay.
>
> 38 When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. . . .
>
> [Emphasis added.]

46. Derry's testimony about the acts and declarations of Kelsie was admissible as admissions against interest by the accused Kelsie. Again, the co-conspirator's exception to the hearsay rule was not engaged.

47. It was only when Derry testified about the acts and declarations of the alleged co-conspirators (Gareau, Smith, and James) that the co-conspirator's exception to the hearsay rule was engaged. Derry was merely the conduit by which the hearsay statements of those co-conspirators were presented to the Court. He did not, himself, have to be a co-conspirator to testify to that information. As long as the declarant is a co-conspirator it matters not whether the witness is also co-conspirator, as the NSCA seemed to imply.

48. For example, the jury was told they could consider the following evidence as "in furtherance": "Derry and James making efforts through Gareau to locate Simmons by having Gareau call the home of Sean Simmons. Mr. Gareau leaving a message with Mrs. Simmons saying that Paul had work for Sean . . .".[52]

49. Derry's evidence of what he said and did is admissible in-Court testimony.

50. Derry's evidence of what James or Gareau said is admissible if the declarant (be it James or Gareau) is found to be a co-conspirator with Kelsie. The witness to the declaration does not have to be a co-conspirator. If that was the case, the exception could not operate unless a co-conspirator turned on the others and testified against them.

51. Similarly the evidence of Jylene Simmons that Gareau (declarant/co-conspirator) called her (recipient/witness) looking for Sean Simmons was admissible if the jury found Kelsie and

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[52] A.R., Part I, tab 4, p.155.

Gareau to be co-conspirators. Jylene Simmons was not required to be a co-conspirator to testify in Court.[53]

52. The *Carter* framework is a rule of admissibility, an exception to the hearsay rule which permits reception of evidence of what co-conspirators said outside of court in furtherance of the conspiracy. Conspiracy may well be proved without reliance on the co-conspirators' exception to the hearsay rule. The *Carter* framework allows the evidence of co-conspirators to be admitted at step 3. It does not exclude other evidence given at trial from consideration on the ultimate issue of the guilt of the accused.

53. The NSCA found fault with the nine pieces of evidence it said the trial Judge put to the jury in step 3 of *Carter*, because it included "hearsay evidence and Derry's evidence".[54]

54. The NSCA list is not an exact reproduction of the evidence the trial Judge actually put to the jury at step 3. The charge reads as follows:

> Let me give you some examples of acts and declarations that can be viewed as being in furtherance of the object of this conspiracy. Mr. James allegedly saying that the clubhouse was looking for Sean Simmons, or that he wanted to know when Sean returned to 12 Trinity. Mr. James and Derry directing Gareau to go to notify them when Simmons returns to the apartment. Derry and James making efforts through Gareau to locate Simmons by having Gareau call the home of Sean Simmons. Mr. Gareau leaving a message with Mrs. Simmons saying that Paul had work for Sean. Gareau attending the premises of 12 Trinity. Gareau notifying Derry and James on October 3rd as to the presence of Mr. Simmons at 12 Trinity. James retrieving the pistol from his residence before driving to Dartmouth. Gareau meeting with James outside the muffler shop before the shooting. Gareau proceeding to the residence in the company of Mr. Kelsie just before the shooting.
>
> Members of the Jury, these examples are not exhaustive, but merely serve to give you an indication of the statements and actions which can be considered as being in a furtherance of a conspiracy to murder Sean Simmons.
>
> When deciding which statements were made in furtherance of the conspiracy, and which were not, remember that it is the agreement that is the basis of the conspiracy. If the agreement has been terminated, or a probable member of the conspiracy has left the association, then his actions and statements cannot be used to prove the guilt of the co-conspirator, or the conspirators.[55]

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[53] See *R. v. Connolly*, 2001 NFCA 31, paras. 21-25, in which that Court dealt with a similar argument.
[54] NSCA Decision, paras.156-158.
[55] A.R., Part I, tab 4, p. 154.

55. The jury was, as the NSCA acknowledged, properly instructed that the alleged co-conspirators were Dean Kelsie along with James, Gareau and Smith. They were also told they were to decide what evidence was actually "in furtherance".

56. The charge was correct. The testimony of Paul Derry was admissible at step 3 of *Carter*. That he was involved or present when acts or statements of con-conspirators were made does not mandate that he be a conspirator or change the basis on which his in-Court testimony was admissible. The NSCA wrongly identified Derry's testimony about the acts and declarations of the co-conspirators as Derry's personal acts and declarations. The jury was not instructed to mishandle this evidence by the trial Judge.

(ii) Acts and declarations in furtherance of the pre-existing conspiracy were also admissible

57. The NSCA further erred when it concluded:

> [163] . . . All of the hearsay evidence relates to a period of time when Kelsie could not, on this record, have been part of the conspiracy. Kelsie was not a member of the conspiracy when these acts and declarations occurred; they could not prove his membership in the conspiracy. The hearsay evidence could not possibly assist them to determine his membership beyond a reasonable doubt. He is not implicated in any way by that evidence.
>
> [164] The only evidence upon which the jury could come to the conclusion that Kelsie was involved in the conspiracy starts with the car ride to Dartmouth. It consists of direct evidence and admissions by the appellant.
>
> [165] From the instructions given by the trial judge, the jury would be left with the impression that there was something in the extensive hearsay evidence that was likely to take them from the appellant's probable membership in the conspiracy to his membership beyond a reasonable doubt when it could not. Again, this was in error.
>
> [166] In these circumstances, the determination of Mr. Kelsie's involvement in the conspiracy depended entirely on the evidence of his own acts and declarations.[56]

58. The NSCA concluded that the acts and declarations made by Kelsie's co-conspirators prior to October 3, 2000 could not be used as evidence against him because it did not directly implicate him. The Court cites no case law nor does it rely on any particular interpretation of the co-conspirators' exception to the hearsay rule. In so finding, the NSCA erred.

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[56] NSCA Decision, paras. 163-166.

(a) Could the evidence of Kelsie's co-conspirators' acts and declarations prior to when he joined the conspiracy assist the jury in finding him guilty beyond a reasonable doubt?

59. The law of conspiracy emphasizes the ongoing nature of the crime.[57] Members of a conspiracy may come and go and do not need to play equal roles.[58]

60. In *R. v. Murphy and Douglas*,[59] the Court of Queen's Bench stated:

> If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, "Had they this common design, and did they pursue it by these common means–the design being unlawful?" . . .
>
> It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. You are to say whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in this matter. If you are satisfied that there was concert between them, I am bound to say, that being convinced of the conspiracy, it is not necessary that you should find both Mr. Murphy and Mr. Douglas doing each particular act, as, after the fact of a conspiracy is once established in your minds, whatever is either said or done by either of the defendants in pursuance of the common design, is, both in law and in common sense, to be considered as the act of both.[60]

61. One member of the conspiracy does not need to know all the other members of the conspiracy, nor be aware of every individual act done to achieve the ultimate goal. The evolution of the law has prevented criminal conspiracies from isolating individual members, be it the directing mind or a foot soldier.

62. Evidence of the agreement will often have to be determined by inferences drawn from circumstantial evidence. To determine membership, the trier of fact can consider the acts and declarations of each conspirator, how they all worked, possibly separately, toward a common goal.

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[57] *Bell v. R.*, [1983] 2 S.C.R. 471, at para.29.
[58] *R. v. F.(J.)*, 2013 SCC 12, at para.58; *R. v. Simmonds* (1967), 51 C.R.App.R. 316.
[59] *R. v. Murphy and Douglas*, 173 E.R. 502 (1837).
[60] *Supra*, at p.311

This is not just limited to step 1 when the jury is trying to make a determination of whether the conspiracy alleged existed. It is equally applicable to step 3 when the membership of the individual accused is being determined beyond a reasonable doubt.

63. In *F.(J.,)*, this Court confirmed that both direct and circumstantial evidence can be used to find an accused guilty at step 3 beyond a reasonable doubt:

> . . . acts, which aid or abet the furtherance of the unlawful object, provide circumstantial evidence from which membership can be inferred.[61]

64. Kelsie should not be insulated from evidence of the conspiracy, and the actions of the co-conspirators prior to his joining. This is not to say he would, for example, be liable if some other criminal offence were committed prior to his joining the conspiracy. But certainly that which came before his criminal agreement to join the existing conspiracy on October 3, 2000 is relevant, to assist the jury in determining what kind of conspiracy he joined and whether he was a member beyond a reasonable doubt.

65. Kelsie did not seriously dispute there was a conspiracy to kill Sean Simmons (step 1). His argument was that he did not understand the true nature of that conspiracy. When he acted in concert with James and Gareau, he thought the object of the conspiracy was to scare an unknown person, not to kill Sean Simmons. As such at step 3, evidence relevant to the nature, scope and extent of the conspiracy was relevant to Kelsie's claim as to the nature of the conspiracy he joined and to his overall credibility.

66. Consider the following evidence. Kelsie was handed the murder weapon in the car, told he was going to have to do it and coached on how to shoot the gun. Gareau was at the muffler shop and spoke with James. Kelsie asked for a vest to keep his hood up and gloves. Kelsie left for 12 Trinity with Steven Gareau. The getaway car was driven to another, pre-arranged location. After the murder, Kelsie fled to the getaway car, jumped in and told the others that he shot Sean Simmons.

67. The co-conspirators' hearsay, along with the other evidence, showed that Smith had ordered the murder of Sean Simmons and that James and Gareau had made extensive efforts to locate him. Gareau called Simmons' wife. Gareau located Simmons at 12 Trinity on October 3,

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[61] *R. v. F.(J.)*, 2013 SCC 12, at para.62.

2000 and called Derry and James. James retrieved the gun and Kelsie, and went to meet Gareau in Dartmouth.

68. The prior acts and declarations of Smith, James and Gareau show these men were desirous of and working diligently toward the murder of Simmons. Would James really have given the murder weapon to Kelsie without ensuring that he knew what he was supposed to do with it? Would one of the directing minds of a conspiracy entrust the ultimate act, the murder, to someone who had not been told what was required of him? The evidence of all that James had done in advance helped the jury understand what James meant when he told Kelsie: "You're going to have to do it then". It explained what "it" was and whether Kelsie's claim that he was never told what "it" was, was credible.

69. James gave instructions to Kelsie in the car, just as James had previously given instructions to Gareau. Those instructions, the jury could infer, were in keeping with the plot that had been progressing to this point and which was about to culminate in the murder of Simmons.

70. That instructions were given was confirmed by Kelsie's statement and his subsequent actions. After the murder Kelsie ran to the getaway car, which was no longer at the muffler shop, but at a new location. The car was running. He told the occupants he had shot Simmons. He did what Wayne James told him he was going to have to do. It was a hit, not a scare.

71. The co-conspirator's evidence of the efforts prior to October 3, 2000 also helped explain why Gareau was at the muffler shop, why the group (including Kelsie) went there to meet him and the significance of Gareau accompanying Kelsie to 12 Trinity. What happened before October 3, 2000 helps put all this evidence of that day in context and puts lie to Kelsie's claims. What happened before provided circumstantial evidence going to whether Kelsie's claim that he was never aware of what was going to happen at 12 Trinity until told by Gareau on the walk there was at all credible.

72. Returning again to *F.(J.)*:

> [52] In my view, where a person, with knowledge of a conspiracy (which by definition includes knowledge of the unlawful object sought to be attained), does (or omits to do) something for the purpose of furthering the unlawful object, with the knowledge and consent of one or more of the existing conspirators, this provides powerful circumstantial evidence from which membership in the conspiracy can be inferred. To be precise, it would be evidence of an agreement, whether tacit or

> express, that the unlawful object should be achieved. Ultimately, that issue is one for the trier of fact, who must decide whether any inference other than agreement can reasonably be drawn on the evidence. But, as I will explain, the case at hand illustrates how a constellation of such facts can make a finding of membership a virtual certainty.
>
> [53] In so concluding, I note that conspiracies are often proved by way of circumstantial evidence. Direct evidence of an agreement tends to be a rarity. However, it is commonplace that membership in a conspiracy may be inferred from evidence of conduct that assists the unlawful object. Justice Rinfret made this basic point in *Paradis v. The King*, 1933 CanLII 75 (SCC), [1934] S.C.R. 165, some eight decades ago:
>
> > Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. [p. 168]
>
> [54] Furthermore, it is not necessary that all members of a conspiracy play, or intend to play, equal roles in the ultimate commission of the unlawful object. Indeed, members in a conspiracy need not personally commit, or intend to commit, the offence which each has agreed should be committed: *R. v. Genser* (1986), 39 Man. R. (2d) 203 (C.A.), aff'd 1987 CanLII 5 (SCC), [1987] 2 S.C.R. 685. Any degree of assistance in the furtherance of the unlawful object can lead to a finding of membership as long as agreement to a common plan can be inferred and the requisite mental state has been established.

73. The evidence of the acts and declarations of his co-conspirators prior to October 3, 2000 was capable, along with the other admissible evidence, of assisting the jury to infer that Kelsie had indeed agreed to become a member of the common plan to kill Sean Simmons. It helped to explain the different roles of each of the players. It helped fit the puzzle together.

74. The jury was told at step 1 to determine whether or not a conspiracy to kill Sean Simmons existed. They were then told at step 2 to determine whether Kelsie was a probable member of that specific conspiracy: to murder Sean Simmons. The argument of the defence was that they should doubleback and find that the Crown had not actually proved Kelsie was a member of that conspiracy (to kill Sean Simmons); he thought he was joining a conspiracy to scare someone. Kelsie's defence mandated the jury consider the nature of the conspiracy and Kelsie's knowledge of it when he agreed to do all he did on October 3, 2000.

75. The evidence did not have to establish guilt on its own to be admissible, it simply needed to be relevant. It was capable of assisting in establishing a fact in issue. The NSCA found that

unless some piece of evidence from prior to October 3, 2000 directly implicated Kelsie, it was irrelevant and therefore inadmissible. This is not how either relevance or admissibility works. The evidence of the acts and declarations of Kelsie's co-conspirators prior to October 3, 2000 was relevant at step 3 to assist the jury in finding him guilty beyond a reasonable doubt.

(b) Are the acts and declarations of co-conspirators pre-existing the accused's membership admissible at step 3 of *Carter*?

76. Although the NSCA cited no case law in support of its conclusion, it inadvertently invigorated a rift in Canadian law. Canadian jurisprudence was settled that acts and declarations in furtherance of the conspiracy, but prior to the accused joining the conspiracy, were admissible at step 3 of the *Carter* test. There was one contrary decision, that of the Quebec Court of Appeal in *Proulx c. R.*[62] that was a result of a misreading by that Court of two prior decisions.

77. The Quebec Court of Appeal in *Proulx c. R.* stated:

> [46] The second series of challenges concerns the co-conspirators' exception. Here again the appellant's argument can be broken down as follows:
>
> 1) The judge could not use the co-conspirators' statements from the electronic surveillance in 2005 (conversations between Bourassa and Cabana) to establish the appellant's knowledge of the scope of the conspiracy because, according to *Loewen* and *Container Materials*, the acts prior to an accused's participation in a conspiracy cannot be used.[63]

78. The Quebec Court of Appeal continued:

> [69] However, while the co-conspirators' statements from 2005 are admissible to establish the origin, nature, object, and general scope of the conspiracy involving the most important members of the gas cartel, they cannot be used against the appellant to establish her participation in the conspiracy in 2006.[64]

79. This is incorrect.

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[62] *Proulx c. R.*, 2016 QCCA 1425.
[63] *Proulx c. R.*, 2016 QCCA 1425, at para. 46.
[64] *Proulx c. R.*, 2016 QCCA 1425, at para. 69.

80. In *R. v. Loewen*,[65] the Manitoba Court of Appeal held that the acts and declarations of co-conspirators made in furtherance of the conspiracy after the agreement has been reached, but before the accused joined the agreement, are admissible against the accused.[66] The rationale is that an accused joining an ongoing conspiracy is said to ratify or adopt its prior acts and declarations.[67]

81. In *Loewen*, the MBCA found evidence of acts and declarations by a co-conspirator made before the accused became involved in the conspiracy could be used at both step 1 and step 3 of the *Carter* test:

> [19] The accused raises a further argument that the only evidence that can be tendered is evidence in furtherance of a common design involving the accused and that there is nothing to indicate that the accused was involved in the money laundering scheme at the time of the initial meetings between Haslett and Seman. There is certainly evidence that he became involved shortly after the first $25,000 was delivered to Seman.
>
> [20] In my view, it makes no difference that the accused joined in the common design after the first meetings between Haslett and Seman. The conversations between the two were in furtherance of the common design which the accused was quick to join. In their text, *Drug Offences in Canada* (3rd Ed. 1996), at p. 8-32, Bruce A. MacFarlane, Q.C., Robert J. Frater, and Chantai Proulx write as follows:
>
> > "It should also be observed that, as a rule, the acts or declarations done in furtherance of a conspiracy at a time when a particular accused was not a party to the conspiracy are admissible against that accused to show the 'origin, nature and object' of the conspiracy. In this respect, the courts have emphasized that a conspiracy is a continuing offence, with the parties to the offence constantly changing …"
>
> [21] Consequently, the trial judge was right in considering the evidence of Haslett as to what he said and did and the statements which he attributed to Seman in the initial meetings to come to the conclusion that there was indeed a common design.

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[65] *R. v. Loewen* (1999), 134 Man.R. (2d) 234 (CA).
[66] *R. v. Loewen* (1999), 134 Man.R. (2d) 234 (CA), at paras.20-21.
[67] See also Ewaschuk: *Criminal Pleadings and Practice in Canada,* Part VI – Inchoate Offences, c.19 Conspiracy; *R. v. Container Materials Limited*, [1940] 4 D.L.R. 293, affirmed [1941] 3 D.L.R. 145 (C.A.), affirmed [1942] S.C.R. 147; and *R. v. Simmonds* (1967), 51 C.R.App.R. 316, at p.696.

82. The Court in *Loewen* found that the acts and declarations of Seman were in furtherance and admissible to determine whether there was a common design and whether Loewen was a member of the conspiracy to launder money beyond a reasonable doubt. This is apparent from para.22:

> . . . Moving to the third rule emerging from *Carter*, when the testimony of Haslett, including the hearsay comments of Seman, are added, there is no room for reasonable doubt that the accused was a party to an illegal attempt to launder the sting money.

83. *Proulx* was correct that prior acts and declarations of co-conspirators are admissible to establish the origin, nature, object and general scope of the conspiracy. *Proulx* was incorrect to rely on *Loewen* for the proposition that the same evidence could not be used to prove an accused's membership in the conspiracy beyond a reasonable doubt.

84. *Proulx* also misinterprets *Container Materials*.[68] The lower Court in *Container Materials* discussed the relevant law to a conspiracy case as follows:

> Again, as Phipson in his 7th ed. at p. 89 puts it: "On charges of conspiracy, the acts and declaration of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the existence of the conspiracy, or the participation of the defendants be proved first, though either element is nugatory without the other." (*Reg. v. Frost*, 9 Car. & P. 129 at p. 150, 173 E.R. 771).
>
> The above rule holds, although the acts and declarations proceeded from conspirators not charged ; or were done in the absence of the party against whom they were offered; or without his knowledge; or even before he joined the combination. (*Reg. v. Murphy*, 8 Car. & P. 297, 173 E.R. 502).
>
> The possession of one conspirator is that of all. (*R. v. Charles*, 17 Cox C.C. 499).
>
> The acts and declarations of other conspirators, before any particular defendant joined the Association, are only receivable against him to prove the origin, character and object of the conspiracy, and not his own participation therein. (*R. v. Dwyer*, 24 Ir. L.T.R. 111) ; and if they were not in furtherance of the common purpose, (e.g. were mere narratives, descriptions, or admissions of past events), or were done or made after his connection with the conspiracy had ceased, they will not be admissible against him.

[68] *R. v. Container Materials*, [1940] 4 D.L.R. 293.

85. The words "…and not his own participation therein" are confusing. The case predates *Carter*, but is clearly considering how the acts and declarations of each conspirator made in furtherance of the conspiracy can be used. In the quotation above, the Judge seems to be simply summarizing conflicting lines of authority.

86. *Container Materials* did, in fact, rely on the evidence after a common design had been proven (what is now step 1) to determine whether there was in fact a meeting of the minds between the accused and the co-conspirators (now step 3). This becomes more apparent when para.9 of *Container Materials* is considered:

> [9] It is well established that liability in damages for acts committed before joining or after resignation from, does not extend to a person joining after the conspiracy is on foot, or resigning during its continuance as the case may be. But it is equally clear in law that once common design is proven, then evidence of what has been done as antecedent to his joining may be received in evidence against a person so joining subsequently to indicate the nature of the agreement. . . .

87. This is what the Crown sought to introduce as evidence in this case, to show what the agreement was that Kelsie entered into at step 3.

88. The Appellant does not allege that the evidence from prior to October 3, 2000 implicates Kelsie as being involved in the conspiracy to kill Simmons prior to that date. However evidence from that period is relevant at step 3 to show the nature, object and scope of the conspiracy of which he became a member beyond a reasonable doubt.

89. In *R. v. Simington*,[69] Justice Macdonald stated a similar proposition:

> An act of a co-conspirator, even prior to the time that he and the accused came together is evidence against the accused if it is part of the same transaction. If you find one of the accused or other of those charged combined together for the same illegal purpose then any act, done by one of the party in pursuance of the original concerted plan and with reference to a common object, is in contemplation of the law the act of the whole party and therefore the proof of such act would be evidence against any of the others who were engaged in the same conspiracy and declarations made by one of the party at the time of doing such illegal act are not to be considered as evidence against him only as determining the quality of the act but the rest of the party are as much responsible as if they themselves had done the act.
>
> It is the principle of agency which when once established binds the conspirators together and makes them mutually responsible for the acts and declarations and

[69] *R. v. Simington* (1926), 45 C.C.C. 249 (B.C.S.C.)

> deeds. Anyone concerned in the criminal parts of a transaction alleged as conspiracy may be found guilty although there is no evidence that such persons joined in concerting a plan or that they ever met the others; and it is probable they never did; and although some of them only join in the latter part of the transaction and probably did not enter the matter until some of the prior parts were complete—when two or more persons conspire together to do any actionable wrong anything said or written or done by any one of them in the execution or furtherance of their common purpose is deemed to be so written, said and done by either one of them and is deemed to be a relevant fact against each of them.
>
> The evidence is admitted on the ground that an act or declaration of one is an act or declaration of one and all when done with one common object. It is on this basis that letters written and documents passing between one and other of the co-conspirators are evidence against one and all.

90. Here, the evidence of the conspiracy prior to Kelsie's involvement assisted the jury in determining what the conspiracy was that he agreed to join. Kelsie's account of October 3, 2000 was that, if he was part of any agreement, it was only to scare someone (despite being taught that he had to pull back the hammer on the antique weapon before firing each round).

91. The evidence of the co-conspirators' acts and declarations prior to Kelsie's joining further provided context to Gareau's involvement in the murder (as a co-conspirator and either principal or aider). All of this was relevant to a determination of whether Kelsie was a member of the conspiracy to murder Simmons.

92. With respect, *Proulx* was based on a misreading of *Loewen* and *Container Materials*. The decision takes the law in the wrong direction. If evidence can be shown to be relevant to a fact in issue it is admissible.

93. Imagine James had said to Smith in early September: "I have a nephew, Dean Kelsie, who is a good shot. He might be useful to us". If Kelsie is insulated from any evidence of what his co-conspirators did or said to advance the conspiracy to the point where he joined it, that evidence would be inadmissible under the *Proulx* formulation of the co-conspirators' exception because

Dean Kelsie had not yet joined the conspiracy. Relevant circumstantial evidence would artificially be rendered incapable of being considered with all of the later evidence pointing to his guilt.[70]

94. A further example: what if the date a person joined an ongoing conspiracy was uncertain? Would the Court be hamstrung by virtue of the fact that it could not fix a date on which the co-conspirator joined? If the exact date an accused joined midstream was not known, what evidence could be used against him pursuant to the exception?

95. At step 3 of *Carter*, if an act or declaration of a co-conspirator is "in furtherance" of the conspiracy it is admissible. The key issue is whether the act or declaration was made by a co-conspirator in furtherance of the conspiracy. What was said or done to advance the independently existing conspiracy to the point where the accused joined must be relevant. It is when the ongoing conspiracy first came into being that is relevant, not the precise date on which the accused joined. It is the life of the conspiracy, independent from the dates on which later members joined, that is relevant.

96. In *R. v. Mapara*,[71] this Court stated at para.8:

> The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object" (J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 303).

97. There is no requirement that such statements be post the involvement of any particular co-conspirator to be admissible against him.[72]

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[70] In his Response to Application for Leave to Appeal, at para.17, Kelsie concedes that <u>in law</u> evidence of acts and declarations made before an accused joined may be used to prove his membership

[71] *R. v. Mapara*, 2005 SCC 23

[72] On occasions courts have gone even further. In *R. v. Central Supply Association Limited*, (1907), 12 C.C.C. 371, the Ontario Court of Appeal found that evidence from prior to the existence of the conspiracy itself could, in certain circumstances, be relevant under the co-conspirators' exception to the hearsay rule. In his concurring judgment, Moss, C.J.O. stated:

(iii) The NSCA's treatment of step 1 of the Carter test also merits correction

98. The NSCA also decided, unbidden, to wade into step 1 of the *Carter* test. The phrase "all the evidence" in step 1 of *Carter*[73] has been the subject of significant judicial consideration.[74] Two approaches have resulted: one that allows hearsay to be admitted at the first stage and one that does not. Although the trial Judge's approach to step 1 was not criticized by Kelsie, the NSCA commented negatively on the trial Judge's instruction to consider co-conspirator's hearsay at step 1. It did not acknowledge that the trial Judge's more liberal approach has become the more widely accepted.

99. While the NSCA disapproved of the trial Judge's (correct) approach on this point, it does not appear to have provided a basis for overturning the verdict. It was not made an issue by Kelsie during his appeal. Kelsie conceded in his Response to Leave that the hearsay was admissible at step 1.[75]As such, the Appellant will make no further argument on this point.

<u>There was no Air of Reality to the Included Offence of Manslaughter</u>

(i) Summary of the Appellant's position

100. The Appellant says that the NSCA was wrong to rely on *Jackson* in this case, both to conclude an error of law by failing to instruct on manslaughter, and to conclude that the proviso was not to be applied. The Appellant recognizes that murder cases involving party liability, particularly where it constitutes the Crown's sole theory or a truly competing alternate, will rarely permit a refusal to leave manslaughter. But this case falls into an exception.

> But in weighing and estimating these acts and endeavouring to arrive at a proper conclusion as to their purpose and effect, I think we may look at the immediately or proximately antecedent acts of the individuals who now comprise the corporation and direct its operations. We may thus be aided in forming a judgment as to the motives which led to the incorporation and the ends and purposes intended to be accomplished by it.

[73] *R. v. Carter* , [1982] 1 S.C.R. 938, at para 11.
[74] *R. v. Smith*, 2007 NSCA 19, at paras.225-235, aff'd on other grounds 2009 SCC 5; *R. v. Tran*, 2014 BCCA 343, at paras.101-107; *R. v. Yumnu*, 2010 ONCA 637, at para.338, aff'd on other grounds 2012 SCC 73.
[75] Response to Application for Leave to Appeal, para.18.

101. Should this Court disagree, the Appellant says that the air of reality to manslaughter was marginal at best, and was not requested by counsel after thoughtful consideration and questions from the trial Judge. Therefore, either the trial Judge had a recognized narrow discretion to refuse to leave manslaughter; or, the failure to leave it *in this case* should not operate to prevent the application of the proviso – particularly where second degree murder was a compromise verdict to which the jury did not default.

(ii) The Courts below

102. The trial Judge alerted counsel that he would be seeking their direction in charging the jury on included offences. He observed that he could see no air of reality to manslaughter on the facts of the case. He made it clear, however, that he was open to persuasion to the contrary. He did not press counsel at that juncture.[76]

103. Five days later, at the close of the Crown's case, various aspects of liability were discussed. Defence counsel suggested that there was no evidence that anyone was going to *use* the gun on October 3rd. He said that the evidence showed it was normal for people living the lifestyle of the witnesses and Kelsie to carry guns for intimidation but that it was not normal for them to use the gun.[77] (He repeated this in his closing arguments to the jury.[78])

104. The trial Judge asked counsel if there was any change from the preceding week about whether to leave manslaughter with the jury. Initially, defence counsel said, "I make no comment on that".[79] When asked by the trial Judge if he had "any inkling"[80] that manslaughter is available on the evidence, defence counsel responded:

> I don't, My Lord. And I appreciated that comment you had made the other day and certainly have thought it through and looked at it.[81]

105. Nothing subsequently changed in the evidence or positions of the parties, and manslaughter was not left with the jury.

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[76] A.R., Parts II-V, vol. VII, pp. 2933-2934.
[77] A.R., Parts II-V, vol. VII, p. 2981.
[78] A.R., Parts II-V, vol. VII, p. 3089.
[79] A.R., Parts II-V, vol. VII, p. 2991.
[80] A.R., Parts II-V, vol. VII, p. 2991.
[81] A.R., Parts II-V, vol. VII, p. 2991.

106. The NSCA concluded that manslaughter was available because of the Crown's alternate theory of liability as an aider (even if it involved somewhat "tortured reasoning"). It teased out a pathway as follows:

> If the jury concluded that the appellant voluntarily gave the gun to Gareau on their walk to 12 Trinity Avenue (as the trial Crown alleged and the trial judge left open as a possibility), then his guilt for what ensued depended entirely on his state of mind as he did so. If he believed Gareau would do nothing with the gun, he would not be a party to any offence no matter what Gareau actually went on to do. But the appellant could be convicted of manslaughter if he intended to aid or abet Gareau in assaulting Simmons, and if a reasonable person would have appreciated that bodily harm was the foreseeable consequence of giving Gareau the gun. [Emphasis added][82]

107. The NSCA relied on *Jackson* to conclude that manslaughter had to be left in order to prevent a "grave miscarriage of justice".[83]For the same reasons, and, again, relying on *Jackson*, the NSCA refused to apply the curative proviso to this error.[84]

(iii) Manslaughter in firearms cases

108. An air of reality to manslaughter must be derived from more than just "some" or "any" evidence. There must be evidence "reasonably capable of supporting the inferences required for the [included offence] to succeed".[85]A convoluted process of cobbling bits and pieces of evidence, even where the source of denial of intent is the accused, will not give rise to an air of reality where a consideration of the whole of the evidence renders it too remote.[86]

109. Manslaughter attaches liability for:

(i) An unlawful act;

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[82] NSCA Decision, para. 124.
[83] NSCA Decision, paras.109-131.
[84] NSCA Decision, paras. 132-134.
[85] *R. v. Gauthier*, 2013 SCC 32, para. 60.
[86] *R. v. Lawrence* (1989), 52 C.C.C.. (3d) 452 (Ont.C.A.), paras. 26-27; *R. v. Aalders*, [1993] 2 S.C.R. 482, paras. 51-54; *R. v. Chalmers*, 2009 ONCA 268, paras. 52-53, 58, 66; *R. v. Moir*, 2013 BCCA 36, paras. 5, 67, 69; *R. v. Ariaratnam*, 2018 ONCA 1027, paras. 11-12.

(ii) Where there is objective foreseeability of non-trivial bodily harm (short of death[87]); and,

(iii) The unlawful act is a not insignificant cause of death.[88]

110. Manslaughter is *generally* left in a murder case where the Crown's theory is premised on party liability. This is particularly so in cases where the unlawful act involves assaultive behavior.[89]

111. Manslaughter has not been left some in cases where the murder involved use of a firearm at close range, execution-style. In the absence of intoxication or provocation, anything less than intent to commit murder has been found to be unrealistic.[90]

112. In cases where firearms are used, but the Crown relies heavily on party liability, manslaughter is left because the Crown theory concedes that there can be a realistic doubt about the party's own intent or knowledge of the shooter's intent. A spontaneous shooting on the heels of an argument would be an example.[91] Where there is evidence that the party was involved in the planning of the killing, intent or knowledge becomes much less of an issue.[92]

(iv) Application

113. Here, the Crown asked the judge to instruct the jury on party liability as a far secondary theory of liability. It argued that the totality of evidence overwhelmingly proved that Kelsie was the shooter. Further, this alternate theory of liability was argued within the maintained context of a conspiracy to kill[93].

114. The NSCA critically undersold the evidence in this regard when it concluded that a finding of *only* objective foreseeability of non-trivial bodily harm was realistically available. Kelsie's statement revealed a subjective knowledge that if Gareau got the gun, he was going to fire it – and

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[87] *R. v. Kirkness*, [1990] 3 S.C.R. 74, para. 20 (other parts of *Kirkness* have been altered by subsequent jurisprudence.)
[88] *R. v. Maybin*, 2012 SCC 24, paras. 13-16, 35-37.
[89] For example, *Jackson*; *R. v. K.K.P.*, 2006 ABCA 299, paras. 2, 6-8, 18, 21; *R. v. Cribbin* (1994), 89 C.C.C. (3d) 67 (Ont.C.A.), paras. 1, 3-6, 16-18, 25.
[90] See, for example, *R. v. Le*, 2011 MBCA 83, paras. 217-219; *Aalders*, 482, paras. 51-54.
[91] See, *R. v. Chambers*, 2016 ONCA 684, paras. 63, 68-69.
[92] *R. v. Johnson*, 2017 NSCA 64, paras. 52, 71, 80, 147.
[93] A.R., Parts II-V, vol. VII, pp. 3018-3019; A.R., Part I, tab 4, pp. 193-194.

not to simply scare or injure. The NSCA's assessment stripped the Crown's secondary theory of extremely important context.

115. The sole source of anything less than first degree murder was Kelsie's statement to police. In essence, it asserted that there was only talk of "teaching someone a lesson", which Kelsie interpreted as showing the gun he was given to scare the target.[94] He said that once he chickened out, Gareau *took* the gun from him. Gareau was paged and showed up according to plan, knowing the target to be Simmons.[95] There was no doubt Gareau was part of the plan to kill Simmons.[96]

116. Therefore, an air of reality to manslaughter required the following untenable mental gymnastics:

> (i) Reject the evidence of Derry and Potts regarding Kelsie's participation and admissions;
>
> (ii) Reject Derry's interpretation of some intercepts, and the more clear wording of others;
>
> (iii) Accept, or be left in doubt, by Kelsie's statement that the plan in the car was only to scare the target (despite the instructions *how* to use the gun before *firing each* round);[97]
>
> (ii) Reject Kelsie's statement that Gareau grabbed the gun from him;
>
> (iii) Infer (in the absence of any evidence or suggestion by counsel) that it was *only* objectively foreseeable that Gareau was going to do more than just show the gun; but, *only* go so far as to fire it with intent to cause non-trivial bodily harm short of death;
>
> (v) Accept that, although Kelsie accompanied Gareau to 12 Trinity Avenue out of fear that Gareau would shoot him,[98] it did not occur to him Gareau would shoot Simmons.

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[94] A.R., Parts II-V, vol. I, tab 21, pp. 3, 16.
[95] A.R., Parts II-V, vol. I, tab 21, pp. 6, 11-12.
[96] A.R., Parts II-V, vol. I, tab 21, pp. 15-16.
[97] Kelsie said Derry told him this; Derry testified James gave Kelsie directions. In his statement Kelsie tried to avoid implicating James before eventually admitting he was in the vehicle. A.R., Parts II-V, vol.I, tab 21, pp.6-7, 18-19.
[98] A.R., Parts II-V, vol. I, tab 21, p. 6.

117. In a scenario of using a loaded gun to scare someone, with such precautions as wearing gloves, wearing a vest to keep a hoodie up and reconvening at a pre-arranged pick up location, there was a startling *lack of evidence* to *not* use the gun to either kill or cause bodily harm knowing that death was likely:

(i) Kelsie never said he was cautioned or instructed to only fire into the air, or just wing the target;

(ii) There was no conversation with Gareau on the way to the apartment building about why Kelsie had a gun, or whether it was loaded;

(iii) He never warned Gareau to be careful, because the gun was loaded;

(iv) He never tried to render assistance to his friend who had just been shot, but was still conscious;[99]

(v) He never called 911;[100]

(vi) He returned to the car and never remarked with horror or outrage that Gareau shot his friend in the head.[101]

118. Of course, the intercepted communications put flight to any suggestion that Gareau was the shooter. Rather, everything went as planned.

119. At bottom, manslaughter was fanciful because Kelsie's lame efforts to extricate himself just do not give rise to an air of reality in the context of the whole case.[102] In a theoretical world, it would require that the jury: (a) reject the vast majority of the Crown's case that implicated Kelsie as the shooter and (b) be at least left in doubt by Kelsie's statement to police (c) *but for* his insistence that Gareau took the gun. This is fanciful. It is unrealistic to suggest that (c) would have occurred and anything less than an acquittal would follow. There would be nothing unpalatable about acquitting Kelsie and letting the justice system deal with those who duped him.

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[99] *R. v. Campbell*, 2018 ONCA 837, paras. 1, 3, 10, 12-13
[100] *Campbell*.
[101] *R. v. S.B.1*, 2018 ONCA 807, paras. 45, 63, 72, 75-76, 85-86, 89, 92.
[102] *Aalders*, paras.51-54

120. With respect, the NSCA's reasoning could only be the product of parsing bits and pieces of the evidence, coupled with speculation, rather than assessing the totality of the evidence in the context of the case as a whole. This is not how an air of reality arises.[103]

(v) Narrow discretion exists to remove included offences

121. Older cases stated that manslaughter had to invariably be left on a charge of murder, in order to prevent grave injustice. The law has developed, however, to grant a trial judge a narrow discretion to not leave an included offence to the jury, depending on the evidence led, the issues raised and the positions of the parties.[104] This approach, while admittedly rare, is consistent with the modern, functional approach to jury instructions, which enables juries to focus on "truly pertinent issues".[105]

122. The Appellant says that, even if there was a means by which to contemplate manslaughter, it was so remote from the issues and positions of the parties that it was reasonable for the trial Judge to not leave it with the jury. Therefore, the NSCA was wrong to have determined this ground of appeal on a correctness standard. The standard was one of reasonableness, where the position of defence counsel at trial was entitled to deference. Here, the considered position by defence counsel could only be seen as a concession that, if Kelsie's account was rejected, he was guilty of murder, whether shooter or not.[106] The contrary position taken on appeal should have been approached with caution.[107]

123. Should this Court disagree, then the air of reality to manslaughter must be marginal at best, and considered with respect to the curative proviso.

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[103] *R. v. Dupe*, 2016 ONCA 653, at para. 78*; R. v. Hill*, 2015 ONCA 616, at para. 68.
[104] *Chalmers*, paras. 51, 52-53, 58; *R. v. Wong* (2006), 209 C.C.C. (3d) 520 (Ont.C.A.), paras. 11-12; *R. v. Smith*, [1979] 1 S.C.R. 215, at p. 216; *R. v. Matchett*, 2018 BCCA 117, paras. 22-23.
[105] *Moir*, para. 69.
[106] *Chalmers*, paras. 52, 62-63.
[107] *R. v. Moore*, 2017 ONCA 947, paras. 14-15.

The First Degree Murder Verdict Should Be Upheld by Virtue of the Proviso

(i) R. v. Jackson was wrongly relied on in refusing to invoke the proviso

124. The NSCA considered this Court's decision of *R. v. Jackson*[108] as a blanket prohibition against invocation of the proviso in a case in which manslaughter was not left with the jury. This is incorrect.

125. *Jackson* is often cited as an example of the "unpalatable acquittal" argument. In *Jackson* the accused was charged with first degree murder. Second degree murder and manslaughter were also left with the jury; but, there were errors in the jury instruction on manslaughter. The Court refused to reason back from the finding of guilt on second degree murder out of concern over a stark choice between over-convicting or acquittal, positing that a compromise verdict will be reached.

126. In *Sarrazin*,[109] this Court did not treat *Jackson* as creating an absolute prohibition on the use of the proviso in such circumstances. Rather, it maintained that the availability of the proviso involved an assessment on a case-by-case basis. The Court's refusal to invoke the proviso in *Sarrazin* was not based on the stark choices concern, as in *Jackson* but on the reliance by the defence on attempted murder as an included offence.[110] This does not detract from *Sarrazin*'s statement on the case-by-case consideration of the proviso.

127. The verdict in this case cannot be viewed as a compromise verdict from stark choices. That would only follow if there were acquittals on both conspiracy and first degree murder, but a conviction on second degree murder. As discussed in *R. v. Haughton*:[111]

> The application of s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C., 1985, c. C‑46, requires the Court to consider whether a jury properly instructed could, acting reasonably, have come to a different conclusion absent the error. In applying this test the findings of the jury in the case under appeal may be a factor in determining what the hypothetical reasonable jury would have done, provided those findings are not tainted by the error. In cases in which an included offence is not left with the jury, a conviction by the jury of the more serious offence cannot generally be relied on by reason of the fact that it may very well be a reaction against a complete

[108] *R. v. Jackson*, [1993] 4 S.C.R. 573.
[109] *R. v. Sarrazin*, 2011 SCC 54
[110] *R. v. Sarrazin*, 2011 SCC 54, at paras. 31-40.
[111] *R. v. Haughton*, [1994] 3 S.C.R. 516, at para.2.

> acquittal. There is an apprehension that the jury convicted because they had no other alternative than acquittal and acquittal was unpalatable. In this case, the jury had an alternative: they could have convicted of manslaughter. It cannot be said that it did not do so by reason of the failure to charge them by reference to the objective standard of liability with respect to manslaughter. In convicting of murder the jury must have found that the appellant had subjective foresight of death. It is impossible to hold that they came to this conclusion because they were unable to conclude that the appellant had subjective foresight of bodily harm.[112]

128. In *R. v. Elkins*,[113] the Ontario Court of Appeal stated:

> In considering the application of the curative proviso, I am entitled to take into consideration findings of fact made by the jury to the extent that those findings are unambiguously revealed by their verdicts and are not tainted by the error: *R. v. Haughton* [cite omitted]. Having regard to both verdicts returned by the jury, it is clear that the jury was satisfied beyond a reasonable doubt that the appellant intended to kill the deceased and Hanna. That finding was not affected by the error with respect to s. 34(2). In so finding, the jury clearly must have totally rejected the appellant's express evidence to the contrary.

129. In *R. v. Sarrazin*, both the majority and the minority agreed that, depending on the circumstances, implicit findings of fact by the jury can be relied upon to trace whether errors of law had any effect on the verdict.[114]

130. If, however, the NSCA was correct in applying *Jackson*, then clearly it is time to revisit the proviso in this regard. If manslaughter as an aider could be said to have a whiff of reality in a case in which the accused is recorded on a wiretap referring to the killing as a "hit", and saying Gareau ran away after the first shot, it is a labored rasp at best. Manslaughter played no role in the theory of the defence at trial and defence counsel expressly rejected any suggestion that it be left with the jury.[115]

131. In these circumstances, the notion of a re-trial for this 17-year old murder harkens the words of this Court in *R. v. Jolivet*:

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[112] *R. v. Haughton*, [1994] 3 S.C.R. 516, at para.2.
[113] *R. v. Elkins* (1995), 26 O.R. (3d) 161 (C.A.), at para.29; leave denied (1996), 203 N.R. 396 (S.C.C.)
[114] *R. v. Sarrazin*, 2011 SCC 54, at paras.31, 47.
[115] *Chalmers*, at paras. 45-68; *R. v. Flynn* [1996] B.C.J. No. 2155 (C.A.), paras. 18-23; *Smith*, p. 216.

> . . . Ordering a new trial raises significant issues for the administration of justice and the proper allocation of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.[116]

(ii) Any errors were harmless

132. Once the NSCA's errors are corrected on the conspiracy count, the verdict can be used to trace the effect of two other errors found by the NSCA: the error in the charge concerning secondary participation in a first degree murder; and, the failure to leave manslaughter. It could only be concluded that they had no impact on the first degree murder verdict.

(a) A direct finding of intent

133. Although the NSCA cited both *R. v. Maciel* and *R. v. Johnson,* it repeatedly asserted that, for Kelsie to be guilty of first degree murder as an aider, he would have had to have known Gareau planned and deliberated the murder.[117] These cases establish, however, that the murder needed to have been planned and deliberated by either Gareau or Kelsie.

134. Having found that Kelsie conspired to murder Simmons, it is obvious the jury rejected his statement on what he intended and knew of the others' intent, either as a principal or as aider. He was working toward the common goal of killing Sean Simmons. If, for the sake of argument, Gareau was the shooter and Kelsie did not know whether Gareau planned and deliberated the murder (a stretch, given the size of the conspiracy and the evidence of their interaction on October 3, 2000), Kelsie's own planning and deliberation of the murder would have been sufficient to find him guilty as an aider to first degree murder.[118]

(b) Murder for hire worked in tandem with conspiracy

135. The NSCA found there were two possible pathways to first degree murder on the evidence before the jury:

> 1. The appellant could have been guilty of planned and deliberate murder if he found out that Simmons was to be killed when Wayne James handed the gun to him

[116] *R. v. Jolivet,* 2000 SCC 29, at para. 46.
[117] NSCA Decision, paras.84, 88-90.
[118] *R. v. Maciel,* 2007 ONCA 196, para. 89; *Johnson,* para.77.

> in Dartmouth, minutes before the shooting took place. This would require the jury to conclude that the appellant formulated or participated in a plan to kill Simmons and, in the minutes between being given the gun and the shooting, planned and deliberated on the murder before personally committing it;
>
> 2. The second pathway to liability for first degree murder through planning and deliberation is as a party to that offence. This would require that the events described in the appellant's statement are substantially true, and the Crown's argument about them is also correct: the appellant gave Gareau the gun as they approached 12 Trinity Avenue, aware that it would be used by Gareau to carry out the planned and deliberate murder of Simmons.[119]

136. In fact, there were *three* pathways to first degree murder. In addition to planning and deliberation (as either a principal or a party), the jury was correctly instructed that murder by arrangement was an alternate route to a verdict of first degree murder.

137. Murder by arrangement is defined in s.231(3) of the *Criminal Code*.[120] It is also known as a contract killing or, to use Kelsie's term, a "hit".

138. In the jury charge, the trial Judge made clear that the section ensnares both those who cause, or assist in causing, the death of anyone for consideration:

> If you are satisfied that the Crown has proven beyond a reasonable doubt that money or anything of value passed or was intended to pass, or was promised by one person in this case, Wayne James, to another, that is, Kelsie, as consideration for Kelsie causing or assisting in causing the death of Mr. Simmons, then the Crown has proven murder in the first degree.[121] [Emphasis added]

139. The trial Judge correctly instructed the jury regarding Kelsie's liability pursuant to murder by arrangement. The section in and of itself captures both aiders and principals. The charge was unaffected by the previous flaw concerning parties to a planned and deliberate first degree murder.

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[119] NSCA Decision, para. 75.

[120] 231(3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.

[121] A.R., Part I, tab 4, p. 182.

140. The murder by arrangement pathway to liability, forgotten by the NSCA, would seem to be the most likely route to guilt chosen by the jury.

141. The jury deliberated for six days. On March 1, 2003 (at the end of day 5 of deliberations) the trial Judge advised counsel that he had received a note from the jury which read as follows:

> The jury, having reviewed your charge to the jury, on the topic of 'an arrangement' as outlined in 231(3) of the Code, remains unclear on one aspect of the law, specifically, must knowledge of payment be known to the accused prior to a murder in order to qualify as an arrangement?[122]

142. The next morning (day 6 of deliberations) the trial Judge instructed the jury that the accused had to know he was going to be paid in some form or fashion for an arrangement to have existed. The jury requested and was provided with a copy of his instruction.

143. Four hours after receiving the trial Judge's clarification on murder by arrangement, the jury returned with verdicts of guilty on conspiracy and first degree murder.

144. In refusing to invoke the curative proviso, the NSCA highlighted the question from the jury on day 2 concerning aiders and principals. The far more relevant jury question would seem to have been the final one, about murder by arrangement.

(iii) The Crown's case was overwhelming.

145. To be clear, the evidence supporting the convictions for conspiracy and first degree murder was abundant. The wiretap evidence from Kelsie was unburdened by the concerns associated with *Vetrovec* witnesses. Indeed, the wiretaps corroborated Derry and Potts, and exposed as lies Kelsie's claims to police of ignorance and innocence.

146. The Crown argued at trial that the overwhelming volume of the evidence in the case against Kelsie was that he was the principal in the murder of Sean Simmons.[123] Kelsie travelled to Dartmouth with his uncle and co-conspirator, James, and Crown witnesses, Derry and Potts, after receiving information from Gareau that he had located Simmons. It was decided in the car that Kelsie, not James, would shoot Simmons. James gave Kelsie directions as to how to carry out the

[122] A.R., Part I, tab 4, pp. 201-202.
[123] NSCA Decision, para. 67.

murder. Kelsie put on gloves and borrowed Potts' vest to keep his hoodie from falling. The foursome met with Gareau at the muffler shop. Kelsie was armed with a gun when he left for Simmons' location with Gareau.

147. After the murder, Kelsie returned to the others at the prearranged location. The car was running. He told those in the car that he had shot Simmons three times. He gave the gun to Potts, who checked the cylinder and confirmed that it had been fired three times.[124]. He had blood on the vest he had been wearing.

148. In wiretap interceptions Kelsie implied that he was the shooter and that Gareau had run away after the first shot was fired. Kelsie complained that he was not getting the credit he deserved for the "hit".[125]

149. The NSCA disagreed that the Crown's case was overwhelming. It gave four reasons:

(i) It found that reliance on Potts and Derry would be "extremely dangerous" in considering whether the case against Kelsie was overwhelming;[126]

(ii) Intercept recordings of Kelsie, complaining about receiving insufficient credit for the "hit", were "far from an express admission or acknowledgement that the Appellant committed the murder";[127]

(iii) The case could not have been overwhelming since the trial Crown introduced the statement of Kelsie, which allowed for the possibility that he was an aider;[128]

(iv) The jury question on day 2 concerning party liability was significant to divine what the jury was thinking.[129]

150. The Appellant says the NSCA overlooked important factors:

[124] NSCA Decision, para. 30.
[125] NSCA Decision, paras.44-46.
[126] NSCA Decision, para.99.
[127] NSCA Decision, paras.100-101.
[128] NSCA Decision, para.101.
[129] NSCA Decision, paras.103-104.

(i) Potts and Derry were subject to *Vetrovec* cautions. Kelsie's statement and intercepted admissions provided significant corroboration of their testimony.[130] Their testimony, which the jury clearly accepted, made it clear that Kelsie was the shooter;[131]

(ii) It is difficult to imagine what more would be required to constitute an admission from the wiretaps, considered in the context of the whole of the evidence. In addition, when asked, "what if Steve turned?"[132], Kelsie explicitly said that Steve chickened out and ran away after the first shot.

(iii) There is nothing wrong with the Crown relying on alternate routes of liability.[133] The alternate theory here was a distant second, and extremely cautious position. Kelsie's statement significantly corroborated the evidence of two *Vetrovec* witnesses. His exculpatory remarks were internally inconsistent;

(iv) The significance attributed to a jury question from day 2 of deliberations, when a question answered prior to verdict on day 6 was ignored, is difficult to understand.

151. Regardless, the conviction on conspiracy removes any need for debate.

Note on Abandonment

152. The Appellant anticipates the Respondent will argue that this appeal must be dismissed or returned to the NSCA to deal with unresolved issues, namely reference to the "undesirability" of being unable to decide on a verdict, and abandonment. The first matter can be dealt with very briefly. The essence of the issues at trial and instructions to the jury would surely have eclipsed any such references. The six days of deliberations were typical of this very diligent jury. The Appellant says, nonetheless, that this does not constitute error, and is not unlike the wording of a proper exhortation. Counsel never complained of this at trial. No prejudice arose.

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[130] NSCA Decision, para. 61
[131] *R. v. Smith*, 2007 NSCA 19, paras. 245-250, aff'd 2009 SCC 5; *R. v. Johnson*, 2017 NSCA 64, para. 109.
[132] A.R., Part I, tab 4, p. 165.
[133] *R. v. Thatcher*, [1987] 1 S.C.R. 652.

153. As for the defence of abandonment, raised for the first time on appeal, the law is clear on its elements. These were listed in *R. v. Gauthier*, 2013 SCC 32.[134] The Appellant says there was no air of reality to abandonment. First, it presupposes a prior intent to commit the offence – a position that was never taken at trial.[135]

154. Second, there was no evidence of an unequivocal communication of abandoning the plan. At best, Kelsie chickened out of brandishing the gun himself. He did, however, continue with Gareau to the apartment building, knowing Gareau's intent. He hugged Simmons. A cold-blooded murder was completed, and his role shifted only nominally.

155. Finally, Kelsie did nothing either to neutralize his role or to prevent the offence from being carried out. He did not try to unload the gun. He did not try to convince Gareau to desist. He continued along and gained access to the building where the execution could be quickly administered. He did nothing to save his friend's life. He did not warn Simmons of Gareau having a gun. In short, abandonment depended on him originally having the requisite intent for murder and doing what he could to stop the killing. Even if he was being truthful in stating that Gareau took the gun from him, he could not rely on abandonment from conspiracy and first degree murder.[136]

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

156. This is a criminal case and therefore the Appellant is not seeking costs.

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[134] *Gauthier*, paras. 50-52.
[135] *R. v. Tingle*, 2016 SKQB 212, paras. 382-387.
[136] *Tingle*, para. 390; *Gauthier*, para. 63.

PART V – NATURE OF ORDER SOUGHT

157. The Appellant requests that the appeal be granted and the convictions for conspiracy to commit murder and first degree murder be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

for: Lynn Watt as Agent
Jennifer A. MacLellan, Q.C.

for: Lynn Watt as Agent
Mark Scott, Q.C.
Counsel for the Appellant,
Her Majesty the Queen

January 7, 2018
Halifax, Nova Scotia

PART VI – TABLE OF AUTHORITIES

CASES (continued) – ii – Paragraph Reference

BOOKS

STATUTORY REFERENCES

Criminal Code of Canada, R.S.C. 1985, c.C-46 as amended – Sections 231(3) and 465(1)(a)

PART VII

IMPACT OF PUBLICATION BAN

158. On January 22, 2003, a partial publication ban was ordered by the trial Judge to prevent an unfair trial for the alleged co-conspirators, who were successful in seeking severance from Kelsie. The publication ban extended to:

(i) the content of Kelsie's statement;

(ii) the fact that Kelsie made a statement;

(iii) the names of James, Smith and Gareau;

(iv) the verdict of guilty (should one be rendered) on the conspiracy count;

(v) Kelsie's testimony, should he testify; and

(vi) the fact that Smith, James and Gareau had been on remand since their arrest.[137]

159. The partial ban was subject to review on motion to the trial Judge assigned to hear the Applicants' trial, by either party.

160. The ban was otherwise in effect until the jury in the Applicants' case retired to consider its verdict; and, extended to include the reasons for the decision to grant a partial publication ban.

161. The trials for all Applicants to this partial ban have been long since completed. Gareau was convicted twice, successful in overturning those convictions twice and successful in obtaining a judicial stay from a third prosecution. While the Crown is appealing the judicial stay, the original ban was ordered because of a short time period between trials. The passage of time, coupled with publication of this case, Gareau's NSCA decisions and Smith and James' appellate decisions would render a further ban ineffectual.

162. Should the Crown succeed in its appeal in Gareau's case, other prophylactic measures can ensure a fair trial.

[137] A.R., pp.(now 732-737)