Court File No. _____

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

BETWEEN:

HER MAJESTY THE QUEEN

Applicant
(Respondent)

-and-

DEAN DANIEL KELSIE

Respondent
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
Section 693(1)(b) of the *Criminal Code of Canada*

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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). Their evidence was corroborated by much of Kelsie's statement to police. Wiretaps containing admissions by Kelsie were also introduced. Contrary to this formidable evidence, Kelsie, in his statement to police, denied being the shooter, or any plan to kill Simmons.

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

- The trial Judge erred in 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,
- 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.

4. The Applicant says that leave to appeal should be granted because:

- The NSCA decision upends conspiracy law. It is clearly wrong and inconsistent with other appellate decisions on point;
- The repercussions are significant, both for conspiracy prosecutions across the country, and for the case against Kelsie;
- There was no air of reality to manslaughter;
- *Jackson* either does not apply or was overstated by the NSCA. Otherwise the decision must be re-considered. The conspiracy verdict, which was untainted by legal error, would

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

have provided a clear pathway to uphold the first degree murder conviction with the proviso;

- Even if an order for a new trial is confirmed, the NSCA's clear errors in law on proof of conspiracy would hobble the Crown's case.

Facts

(i) The plan to kill Simmons

5. 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.

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

7. Steven Gareau, who had come to Nova Scotia with Potts and Derry, was tasked with tracking down Simmons.

(ii) The hit

8. 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.

9. 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. Kelsie agreed and asked for gloves.

10. The group met Gareau at a muffler shop near 12 Trinity Avenue. James told Gareau to go to a bar later and gave him twenty dollars.

11. 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.

12. 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".

13. Potts checked the gun Kelsie passed her and confirmed that there were three empty bullet casings.

(iii) The intercepts after the killing

14. 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. He and Potts were granted immunity, paid and upon the completion of the operation, placed in witness protection.

15. 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."

16. 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.

17. Evidence at trial was that Smith reduced the drug debt owed by James as a result of the murder. James paid Kelsie with two or three 8-balls of cocaine. Gareau was given $20.00 at the muffler shop by James, who also promised "I'll get you later".

18. 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. Derry and Kelsie discussed the burning of items after the murder. In regard to Gareau, the other possible shooter:

> … 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".[2]

19. 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".

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[2] *R. v. Kelsie,* 2017 NSCA 89 ["NSCA Decision"], para 45.

(iv) History of proceedings

20. Kelsie was originally charged jointly on an information, along with Smith, James and Gareau, with murder and conspiracy to commit the murder of Sean Simmons. Following a severance application Smith and James were tried together and Kelsie and Gareau were each tried separately. Kelsie's trial went first.

21. 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.

22. 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.

23. 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. 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.

PART II – QUESTIONS IN ISSUE

24. The Applicant seeks leave to appeal on the following questions:

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 jury could not use the acts and declarations of co-conspirators made prior to Kelsie joining the conspiracy 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.

25. These are important questions of law not only for justice in this case but also for the state of criminal law in this country. The decision is clearly wrong on conspiracy law and contradicts other appellate decisions. Its application of this Court's decision in *R. v. Jackson*[3] is misguided. If not, then it is time for this Court to reconsider that case and revisit the proviso.

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

PART III – STATEMENT OF ARGUMENT

26. Dean Kelsie was charged that he unlawfully conspired with James, Gareau, and Smith, separately indicted co-conspirators, to murder Sean Simmons contrary to s.465(1)(a) of the *Criminal Code*. He was also charged with the first degree murder of Sean Simmons. The jury found him guilty on both counts. The Applicant contends that the NSCA got both basic evidence law and conspiracy law wrong in upending the conspiracy conviction. That verdict was not tainted by legal error.

27. The conspiracy conviction should have been used by the NSCA to trace the reasoning path of the jury. This would show that any errors on party liability, or failure to leave manslaughter, had no effect on the first degree murder verdict. The NSCA's clear errors, in part, determined why they refused to invoke the curative proviso.

The Conspiracy Verdict Was Reached Following a Correct Instruction

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

28. The NSCA found the charge to the jury was incorrect based on their faulty hearsay analysis. Their reasons will confuse conspiracy law going forward. The NSCA also invigorated a rift between provinces as to the application of the *Carter* test.

29. The first NSCA error concerned basic evidence law. It will not only hobble further prosecution of Kelsie but will also cause significant confusion in other criminal matters. The NSCA mischaracterized the direct testimony of trial witness Derry as "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.[4]

30. This conclusion misinterprets the test from *R. v. Carter*.[5] The *Carter* 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 whether the alleged conspiracy existed. The jury next determines whether, on the balance of probabilities, and using only evidence independently 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.[6] The trial Judge correctly instructed the jury on this point.

31. 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.

32. Derry's testimony about <u>his own</u> 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.

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

34. 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.

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[4] NSCA Decision, paras. 161-162.
[5] *R. v. Carter*, [1982] 1 S.C.R. 938.
[6] *R. v. Smith*, 2007 NSCA 19, paras. 54, 196-197, aff'd 2009 SCC 5.

35. The Newfoundland Court of Appeal correctly dealt with this issue in *R. v. Connolly*:

> [21] The basis of the exception is the common law position that co-conspirators have implied authority to speak or act for each other.
>
> [22] The co-conspirators exception to the hearsay rule is not concerned with the evidence given at trial by the co-conspirator. Rather it is concerned with whether out-of-court statements by a co-conspirator may be used to prove the charge against the accused. In this case, Raymond Connolly was a witness. The Crown did not seek to have admitted out-of-court statements by him (other than wiretap evidence which is governed by other rules). What Raymond Connolly did was report the hearsay statement of the appellant. As already noted that evidence falls within the admission exception.
>
> [23] Even when there are co-accused, when the confession of one cannot be used against the other, the testimony of that same co-accused to the same effect may be used against the other accused.
>
> [24] In the context of this case Raymond Connolly was giving sworn testimony. He was available and indeed was cross-examined by counsel for the appellant. Even if he were a co-conspirator, his testimony would not be subject to the *Carter* rule as it would have no application in the circumstances.[7]
>
> [Emphasis added]

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

36. The NSCA further erred when it stated:

> [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.[8]

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[7] *R. v. Connolly*, 2001 NFCA 31, paras. 21-25.
[8] NSCA Decision, paras. 163-166.

37. Although the NSCA cited no case law in support of this 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.*[9] that was a result of a misreading by that Court of two prior decisions.

38. 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 *Containers Materials*, the acts prior to an accused's participation in a conspiracy cannot be used.[10]

39. 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.[11]

40. This is incorrect. *Loewen* and *Container Materials* stand for the exact opposite.

41. In *R. v. Loewen*[12], 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.[13] The rationale is that an accused joining an ongoing conspiracy is said to ratify or adopt its prior acts and declarations.[14]

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[9] *Proulx c. R.*, 2016 QCCA 1425.
[10] *Proulx c. R.*, 2016 QCCA 1425, at para. 46.
[11] *Proulx c. R.*, 2016 QCCA 1425, at para. 69.
[12] *R. v. Loewen* (1999), 134 Man.R. (2d) 234 (MBCA)
[13] *R. v. Loewen* (1999), 134 Man.R. (2d) 234 (MBCA), at paras.20-21.
[14] 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*, [1969] 1 Q.B. 685 (C.A.), at p.696.

42. *Proulx* was correct that prior acts and declarations of co-conspirators could go 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.

43. 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 detailing that he was instructed to use the loaded gun; and taught that he had to pull back the hammer on the antique weapon before firing each round).

44. 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.

45. The NSCA decision, combined with the outlier decision from the Quebec Court of Appeal in *Proulx*, is directly contrary to case law from Manitoba and Ontario (as affirmed by the SCC.). This Court must intervene to correct this erroneous development. Accuseds in different provinces should not get different trials. Moreover, where a conspiracy has cross-border elements, liability should be determined on consistent rules of evidence.

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

46. The NSCA also decided, unbidden, to wade into step 1 of the *Carter* test. The phrase "all the evidence" in step 1 of *Carter*[15] has been the subject of significant judicial consideration.[16] 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. While the NSCA disapproved of the trial Judge's (correct) approach on this

[15] *R. v. Carter*, [1982] 1 S.C.R. 938, at para 11.
[16] *R. v. Smith*, 2007 NSCA 19, at paras.225-235, aff'd 2009 SCC 5; *R. v. Tran*, 2014 BCCA 343, at paras.101-107

point, it does not appear to have provided a basis for overturning the verdict. Leave would, however, provide this Court with the opportunity to clarify this thorny issue also.

There was no Air of Reality to the Included Offence of Manslaughter

47. Manslaughter could only have an air of reality if Kelsie was an aider (not the principal) in the murder. Kelsie could only be an aider on the basis of his statement to the police. The NSCA described the reasoning by which Kelsie could be found to be an aider as "somewhat tortured".[17] The NSCA nonetheless teased a pathway to the included offence of manslaughter 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][18]

48. The sole source of anything less than first degree murder was Kelsie's statement to police. Stripped to its 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.[19] Kelsie's version was, however, internally contradictory: he was told he had to use the gun, and had to cock the hammer before he fired each round.[20] Gareau was paged and showed up according to plan, knowing the target to be Simmons.[21] There was no doubt Gareau was part of the plan to kill Simmons.[22]

49. Therefore, an air of reality to manslaughter required untenable mental gymnastics. The jury would have to:

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[17] NSCA Decision, para. 113
[18] NSCA Decision, para. 124.
[19] Kelsie's statement, pp. 3, 16. [Tab H]
[20] 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. Kelsie's statement, pp.6-7, 18-19.
[21] Kelsie's statement, pp. 6, 11-12. [Tab H]
[22] Kelsie's statement, pp. 15-16. [Tab H]

(i) Accept, or be left in doubt, that the plan in the car was only to scare the target (despite the instruction on using the gun);

(ii) Reject that Gareau grabbed the gun from Kelsie;

(iii) Reject that the plan – to which Gareau was a party—was to only brandish the gun;

(iv) Infer (in the absence of any evidence or suggestion by counsel) that Kelsie knew Gareau was going to do more than just show the gun, but not go so far as to fire it;

(v) Accept that although Kelsie accompanied Gareau to 12 Trinity Avenue out of fear that Gareau would shoot him,[23] it did not occur to him Gareau would shoot Simmons.

50. With respect, this 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.[24]

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

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

52. Once the erroneous reversal is corrected, the conspiracy 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.

53. In *R. v. Elkins*, 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.[25]

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[23] Kelsie's Statement, p. 6. [Tab H]
[24] *R. v. Dupe*, 2016 ONCA 653, at para. 78*; R. v. Hill*, 2015 ONCA 616, at para. 68.
[25] *R. v. Elkins* (1995), 26 O.R. (3d) 161 (Ont. C.A.), at para.29; leave denied (1996), 203 N.R. 396 (S.C.C.)

54. 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.[26]

(i) A direct finding of intent

55. The argument that Kelsie could be liable for manslaughter as a party arose from acceptance of, or a doubt from, parts of his statement to the police: he knew nothing about a plan to kill, and Gareau shot Simmons unexpectedly. Having found Kelsie conspired to murder Simmons, it is obvious the jury rejected his statement on these points and had no concern about his specific intent, either as a principal or as aider.

56. The conspiracy conviction was determinative of Kelsie's requisite intent for a planned and deliberate murder. He was working toward the common goal of killing Sean Simmons. If, for the sake of argument, Gareau was the shooter and Kelsie knew nothing of Gareau's intent (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.[27]

57. Conspiracy and manslaughter, on the facts of this case, would have amounted to inconsistent verdicts. Manslaughter, essentially a killing without intent, could not be the object of a conspiracy. The evidence that provided an air of reality to this included offence must have been rejected by the jury in order to convict of conspiracy (and first degree murder).

58. As such, any error as to the mens rea of a party to first degree murder, and the decision not to leave manslaughter with the jury, were harmless.[28]

59. The NSCA ignored the obvious window it had, choosing instead to speculate and give undue prominence to what it labelled as a "somewhat tortured" route to liability.[29]

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[26] *R. v. Sarrazin*, 2011 SCC 54, at paras.31, 47.
[27] *R. v. Maciel*, 2007 ONCA 196; *R. v. Johnson*, 2017 NSCA 64, *infra*.
[28] *R. v. Sarrazin*, 2011 SCC 54, at para.25; *R. v. Khan*, 2001 SCC 86, paras.28-31.
[29] NSCA Decision, para. 113.

(ii) The omission on party liability equally omitted a damning element

60. The NSCA found that the trial Judge did not explicitly state the *mens rea* for an aider to first degree murder, and that the charge as a whole did not educate the jury as to the *mens rea* necessary for an aider. However, a "proper" instruction would not have benefitted Kelsie.

61. The NSCA described the liability of a party to first degree murder as follows:

> The liability of an aider of a planned and deliberate murder depends on two things: (i) whether the principal had in fact planned and deliberated on the murder; and (ii) whether the aider knew of the planning and deliberation by the principal . . .[30]

62. There is, of course, another way in which the aider might be found guilty of a planned and deliberate first degree murder: if the aider himself planned and deliberated the murder. This was a highly relevant pathway to liability that was ignored by the NSCA.

63. In *R. v. Maciel*, Justice Doherty stated:

> Before the aider could be said to have the requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate. Whether the aider acquired that knowledge through actual involvement in the planning and deliberation or through some other means, is irrelevant to his or her culpability under s. 21(1).[31]

64. In *R. v. Johnson*, the NSCA found that the aider himself can have the requisite intent for first degree murder:

> The aider may or may not have the requisite intent for murder. If he does, and then undertakes things with the intention that the victim would be killed, that is sufficient. This is the natural result of the principle that a party's liability is independent of that of the principal whether acting through another, perhaps innocent agent, or not.[32]

65. Although the Court cited both *Maciel* and *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

[30] NSCA Decision, para 78.
[31] *R. v. Maciel*, 2007 ONCA 196, para 89.
[32] *R. v. Johnson*, 2017 NSCA 64, para. 77.

and deliberated the murder.[33] The murder needed to have been planned and deliberated by either Gareau or Kelsie.

(iii) Murder for hire worked in tandem with conspiracy

66. 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 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.[34]

67. In fact, there were *three* pathways to first degree murder in this case. 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.

68. Murder by arrangement is defined in s.231(3) of the *Criminal Code*.[35] It is also known as a contract killing or, to use Kelsie's term, a "hit".

69. 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

[33] NSCA Decision, paras.84, 88-90.
[34] NSCA Decision, para. 75.
[35] 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.

> for Kelsie causing or assisting in causing the death of Mr. Simmons, then the Crown has proven murder in the first degree.[36] [Emphasis added]

70. 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.

71. 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.

72. 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?[37]

73. 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.

74. 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.

75. 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.

76. In this context, the significance attributed to a question about party liability five days prior to the verdict is mystifying.

77. 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

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[36] Jury Charge, p.3274. [Tab I]
[37] Jury Question, p. 3351. [Tab I]

Vetrovec witnesses. Indeed, the wiretaps corroborated Derry and Potts, and exposed as lies Kelsie's claims to police of ignorance and innocence.

78. 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.[38] 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 murder. The foursome met with Gareau at the muffler shop. Kelsie was armed with a gun when he left for Simmons' location with Gareau.

79. After the murder Kelsie returned to the others at the prearranged location. 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.[39]. He had blood on the vest he had been wearing.

80. 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".[40]

81. The NSCA described the reasoning necessary to find Kelsie guilty as an aider "somewhat tortured",[41] yet refused to invoke the proviso. It gave four explicit reasons:

> (i) It did not find Potts and Derry credible, and that it would be "extremely dangerous" to rely on their evidence to conclude that the case against Kelsie was overwhelming;[42]
>
> (ii) Intercept recordings of Kelsie, implying Gareau had run away and that Kelsie had shot Sean Simmons, and complaining about receiving insufficient credit for the "hit", were "far from an express admission or acknowledgement that the Appellant committed the murder";[43]
>
> (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 (para.101);

[38] NSCA Decision, para. 67.
[39] NSCA Decision, para. 30.
[40] NSCA Decision, paras.44-46.
[41] NSCA Decision, para.113.
[42] NSCA Decision, para.99.
[43] NSCA Decision, para.101.

(iv) The jury question on day 2 concerning party liability was significant to divine what the jury was thinking.[44]

82. The Applicant disagrees with the NSCA's assessment of the strength of the Crown's case against Kelsie:

(i) Potts and Derry were subject to *Vetrovec* cautions. Kelsie's statement and intercepted admissions provided significant corroboration of their testimony.[45] Their testimony, which the jury clearly accepted, made it clear that Kelsie was the shooter;[46]

(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;

(iii) There is nothing wrong with the Crown relying on alternate routes of liability.[47] 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.

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

(iv) R. v. Jackson was wrongly relied on in refusing to use the proviso

84. The NSCA considered this Court's decision of *R. v. Jackson*[48] as a blanket prohibition against invocation of the proviso in a case in which manslaughter was not left with the jury. This is incorrect.

85. *Jackson* involved an appeal from a conviction on second degree murder, where manslaughter was not left with the jury. This Court refused to give effect to the proviso. The NSCA took the reasoning to imply that the proviso can never be applied where the jury is not instructed on the accused's possible liability for the included offence.

86. *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 was also left with the jury, but not manslaughter. The thinking holds that if a jury has a doubt about the most serious

[44] NSCA Decision, paras.103-104.
[45] NSCA Decision, para. 61
[46] *R. v. Smith*, 2007 NSCA 19, paras. 245-250, aff'd 2009 SCC 5; *R. v. Johnson*, 2017 NSCA 64, para. 109.
[47] *R. v. Thatcher*, [1987] 1 S.C.R. 652
[48] *R. v. Jackson*, [1993] 4 S.C.R. 573.

offence, but is faced with a stark choice between over-convicting or acquittal, a compromise verdict will be reached. As such, the verdict of second, absent the possibility of manslaughter, could have been the compromise in *Jackson.*

87. In *R. v. Sarrazin*,[49] 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. In *Sarrazin*, the refusal to invoke the proviso 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.[50] This does not detract from *Sarrazin*'s statement on the case-by-case consideration of the proviso.

88. This is not a case in which the jury was left with a stark or unpalatable choice of either convicting of first degree murder or acquittal. Possible verdicts of both first or second degree murder along with conspiracy were left with the jury. As discussed in *R. v. Haughton*:[51]

> 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 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.[52]

89. 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

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[49] *R. v. Sarrazin*, 2011 SCC 54
[50] *R. v. Sarrazin*, 2011 SCC 54, at paras. 31-40.
[51] *R. v. Haughton*, [1994] 3 S.C.R. 516, at para.2.
[52] *R. v. Haughton*, [1994] 3 S.C.R. 516, at para.2.

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.[53]

90. The jury's finding that Kelsie was part of an agreement to kill Simmons shows that an instruction on manslaughter would have been irrelevant to the jury's deliberations. Anything more is an academic exercise.

91. The true travesty is the order by the NSCA requiring a re-trial of a seventeen year old murder. As stated in *R. v. Jolivet*:

> . . . 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.[54]

[53] *R. v. Chalmers*, 2009 ONCA 268, at paras. 45-68.
[54] *R. v. Jolivet*, 2000 SCC 29, at para. 46.

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

92. This is a criminal case and therefore the Applicant is not seeking costs.

PART V – NATURE OF ORDER SOUGHT

93. The Applicant requests an order granting leave to appeal from the Judgment of the Nova Scotia Court of Appeal dated December 8, 2017.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

for Jennifer A. MacLellan, Q.C.

for Mark Scott, Q.C.
Counsel for the Applicant,
Her Majesty the Queen

May 17, 2018
Halifax, Nova Scotia

PART VI

TABLE OF AUTHORITIES

PART VII

STATUTORY REFERENCES

Criminal Code of Canada, R.S.C. 1985, c.C-46 as amended – Sections 231(3), 465(1)(a) and 693(1)(b)

Contracted murder 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.	Entente 231 (3) Sans que soit limitée la portée générale du paragraphe (2), est assimilé au meurtre au premier degré quant aux parties intéressées, le meurtre commis à la suite d'une entente dont la contrepartie matérielle, notamment financière, était proposée ou promise en vue d'en encourager la perpétration ou la complicité par assistance ou fourniture de conseils.

Conspiracy 465 (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy: (a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;	Complot 465 (1) Sauf disposition expressément contraire de la loi, les dispositions suivantes s'appliquent à l'égard des complots : a) quiconque complote avec quelqu'un de commettre un meurtre ou de faire assassiner une autre personne, au Canada ou à l'étranger, est coupable d'un acte criminel et passible de l'emprisonnement à perpétuité;

Appeal by Attorney General 693 (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 or dismisses an appeal taken pursuant to paragraph 676(1)(a), (b) or (c) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada . . . (b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.	Appel par le procureur général 693 (1) Lorsqu'un jugement d'une cour d'appel annule une déclaration de culpabilité par suite d'un appel interjeté aux termes de l'article 675 ou rejette un appel interjeté aux termes de l'alinéa 676(1)a), b) ou c) ou du paragraphe 676(3), le procureur général peut interjeter appel devant la Cour suprême du Canada : . . . b) sur toute question de droit, si l'autorisation d'appel est accordée par la Cour suprême du Canada.