Court File No.: 38129

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPLICANT
(Respondent)

-and-

DEAN DANIEL KELSIE

RESPONDENT
(Appellant)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

Lockyer Campbell Posner
Barristers and Solicitors
30 St. Clair Avenue West, Suite 103 Toronto,
Ontario M4V 3A1

Philip Campbell
Tel: (416)847-2560
Fax: (416)847-2564
Em: pcampbell@lcp-law.com
Counsel for the Respondent

Gowling WLG (Canada) LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3

Matthew S. Estabrooks
Tel: (613)786-0211
Fax: (613)788-3573
Em: matthew.estabrooks@gowlingwlg.com
Ottawa Agent for Counsel for the Respondent

Public Prosecution Service
1505 Barrington Street
Suite 1225, Maritime Centre
Halifax, Nova Scotia B3J 3K5

Jennifer A. MacLellan, Q.C.
Tel: (902)424-4923
Fax: (902)424-4484
Em:james.gumpert@novascotia.ca
Counsel for the Applicant

Gowling WLG (Canada) LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Tel: (613)786-8695
Fax: (613)788-3509
Em: lynne.watt@gowlingwlg.com
Ottawa Agent for Counsel for the Applicant

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Respondent's position is that the errors at trial were patent and prejudicial. The Judgment of the Nova Scotia Court of Appeal rested on prominent, long-standing authorities from this Court**.** The application is, in substance, an extended plea to apply the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* based on unsupportable claims of the national importance of routine legal issues. There is no error that needs correction or controversy that needs resolution.

2. The Applicant urges on the Court a three-tiered line of reasoning as the basis for granting leave. First, it says, the conspiracy conviction was wrongly reversed because there was no error in the charge on the use of out-of-court acts and declarations of others involved in the killing of Sean Simmons. Then, if that is accepted, the errors regarding the conviction for first degree murder can be deemed moot and cured through the proviso. Finally, if the conviction for first degree murder can be upheld on this basis, it negates the error related to manslaughter as an included offence.

3. The Respondent's position is that the charge to the jury on the murder count was fatally flawed in three basic respects:

- First, the judge failed to leave manslaughter with the jury when it clearly arose on the Respondent's statement to the police – adduced by the Crown – and the Crown's own theory about it. If the Respondent gave the gun to Steven Gareau, his level of culpability for the murder that ensued depended entirely on what he believed Gareau would do with the gun. There was no escaping the need to leave manslaughter and the failure to do so was fundamentally the *judge's* idea, pressed by him on counsel.

- In addition, if the Respondent did what his statement alleged – and what the Crown theorized – then the jury had to be properly instructed on how that conduct would be assessed under the law regarding planning and deliberation by a *party* – an aider to a killing.

There was literally *no direction* on this most critical of issues, which means that a first degree murder conviction cannot possibly stand.

- Third, the charge invited the jury to consider the out-of-court acts and declarations of all the other participants in the murder plot without regard to any of the criteria for considering such evidence. These acts and declarations were crucial to the question of whether the murder was planned and deliberate and whether the Respondent participated in the planning and deliberation. For this reason as well, the first degree murder conviction is unsustainable.

4. The jury instruction on conspiracy, and the use of co-conspirators' acts and declarations, was also wrong in two other key respects going to both the first degree murder conviction and the conspiracy conviction:

- It included the basic error of allowing the jury to use the acts and declarations of Paul Derry – who was said *not* to be a conspirator – as evidence against the Respondent on *both* the conspiracy charge and the planning and deliberation element of first degree murder.

- More fundamentally, it left the jury with the understanding that in all of the scheming and planning, surveillance and recruitment that preceded the murder, there might be something that implicated the Respondent in the conspiracy and could be used against him at this third stage of the *Carter* analysis or in finding planning and deliberation. This was incorrect and seriously misleading to the jury. There certainly was a conspiracy to kill Sean Simmons but there was not the slightest evidence that the Respondent was part of it, at least until Wayne James handed him a gun in Dartmouth, minutes before the shooting. The Crown was not entitled to suggest otherwise. This meant that the lengthy, lurid evidence about James, Derry, Smith and Gareau meeting in bars, making phone calls to Simmons' spouse, surveilling the Trinity Avenue apartment, and reporting on the wishes of the Hells Angels "clubhouse" was *not* properly part of the case against the Respondent.

5. Moreover, the Applicant misconceives the effect of the conspiracy conviction on the murder conviction even if it had been properly reached. An accused enters a conspiracy at the instant when agreement is reached; at that point, the crime is complete. Here, despite the almost complete temporal and factual overlap between the Crown's theories of conspiracy and planning and deliberation by the Respondent, the Crown chose to charge both offences. The conspiracy could, as a matter of law, have been entered by the Respondent at the moment he took possession of the gun, discussed the mechanics of the shooting, and left to perform it. If he *did* perform it, which was the Crown's primary theory, then he was guilty of conspiracy. However, if the Respondent entered the agreement, took the gun, and then backed out – as the statement led by the Crown suggests – then the conspiracy conviction does *not* mean that he was inevitably guilty as an aider of Gareau's murder of Simmons. His guilt of conspiracy would be fixed at the moment of agreement in the car but his guilt of murder (and of planned and deliberate murder) would depend on his state of mind in the minutes that followed, as he backed out of the plan. The conspiracy conviction, which had its own irreparable defects, was in any event not a cure for the flaws in the murder conviction.

B. SUMMARY OF FACTS

6. It is important to appreciate the facts in greater detail than they are set out in the *Applicant's Memorandum* (hereinafter cited as "*AM*") paras. 5-19. The facts are recounted in greater detail in the Court of Appeal's Reasons for Judgment (paras. 4-55). Of particular importance are the details of the statement given by the Respondent when first questioned by the police on April 17, 2001, six months after the homicide, which are incompletely summarized in the *Applicant's*

Memorandum (see *AM* paras. 49-51). This spontaneous statement, given when the Respondent was unexpectedly confronted by the police, was not an obvious attempt to at self-exculpation since the Respondent placed himself in the car, driving to Dartmouth, and coming into possession of the murder weapon. Yet he also said that he had qualms about his sudden recruitment into the murder and that Gareau took the gun from him and shot the man he had been hunting.

7. The most important aspects of evidence at trial are the following:

- Derry, Potts and Gareau came to Nova Scotia together, from Ontario. They had a long and close personal relationship that went beyond their drug-dealing and frauds.

- Gareau became addicted to drugs in Halifax and was eventually asked to leave the home he shared with Derry and Potts. However, he remained a friend and part of their drug-dealing enterprise. The Respondent was also a low-level participant in the drug-dealing but not a friend or ally of Derry and Potts.

- When Neil Smith announced that the Hells Angels clubhouse wanted Simmons killed, there was a good deal of meeting, planning and organizing by James and Derry. The Respondent was not involved in this, on anybody's account.

- Gareau, however, was deeply involved in the plot, for a long time. His assignment from Derry was to locate Simmons and report where he could be found in order to be murdered.

- Gareau called Derry on October 3, 2000 to tell him that Simmons was at the Trinity Avenue apartment. He did this with the knowledge that it would lead to his murder.

- When the four people crossed the bridge to Dartmouth in the car, the Respondent had *no* role in the plan. He could not be found guilty of conspiracy at this point because there was literally no evidence of his agreement to do anything.

- Only when Derry encouraged James to back out did James draw the Respondent into the plan and, according to Derry, receive his assent. The Respondent said to the police that his

purpose was just to frighten Simmons, but the jury could also believe that, at least for the moment, he had agreed to kill him. Later, he said, he came to "coward out".

- Gareau appeared on the scene, from the Respondent's standpoint, out of nowhere. The Respondent was not aware that Gareau had spent many days tracking down Simmons in order for him to be killed and had evinced a much greater commitment to the project than the Respondent's short, startled agreement to do the job after James withdrew.

- The Respondent told the police that "the gun was taken from me" by Gareau but he did not say it was taken by force or stealth and it was obviously open to the jury to infer (as the Crown alleged) that the "taking" was accompanied by a "giving" of the gun, or at least a volitional surrender of it, by the Respondent.

- The Respondent, according to his statement, did not flee the scene but accompanied Gareau to the building where Gareau shot and killed Simmons, thrust the gun (which belonged to Derry and Potts) back upon him and then bolted.

- In the car, if the jury believed Derry and Potts – a large caveat – the Respondent spoke about the shooting and returned the gun to Potts who confirmed it had been fired. Potts would also say that the Respondent later expressly admitted the shooting to her, though no one else saw or heard this.

- The Respondent spoke about a "hit" to Derry while in custody and especially about "credit" for it which James was said to be claiming. It appeared that Hells Angels would look approvingly on the killer and disapprovingly on someone – such as James – who was falsely claiming credit. If the Respondent did indeed "coward out" at the last minute, he had every reason not to admit this and to let Derry and Potts believe he had done the job (though it is hard to know what those two cunning criminals might have believed and what they might have pretended to believe to protect their friend Gareau).

8. At trial, the jury asked an explicit question premised on party liability. They wanted to know if it was incumbent upon them to agree upon the accused's role as principal or party in order to return a verdict. That astute question could only mean that some of the jury were prepared, at that stage and possibly throughout, to credit the statement's essential claim that Gareau was the shooter but obtained the gun from the Respondent who gave it to him willingly.

9. The jury also asked a later question about killing by "arrangement" under s. 231(3) of the *Criminal Code*. Since the jury is not a unitary entity, and is told it does not have to look at the evidence in the same way, it is possible that some jurors rested their votes for conviction on party liability and others on liability as a principal. It is also possible that the "principal" faction persuaded the "party faction" to vote for conviction precisely because of errors in the charge on party liability, included offences and planning and deliberation. These are matters of speculation. What is not speculative is that party liability had to be correctly left with the jury in light of the statement. The Crown would have been justly outraged if the judge led the jury to believe that if the statement was accepted, they should just acquit the Respondent. The Applicant can hardly claim the irrelevance now of a theory of liability introduced at the trial by the Crown and based on evidence led at the trial by the Crown. This is even more the case when there is cogent reason to believe some of the jury accepted the theory.

PART II: QUESTIONS AND ISSUE

10. This memorandum addresses the issues set out in para. 24 of the *Applicant's Memorandum.*

PART III: STATEMENT OF ARGUMENT

A. THE CO-CONSPIRATORS EXCEPTION

(i) The Charge on Derry's Evidence under the *Carter* Rules

11. There seems to be no disagreement that the jury was told it could consider acts and declarations in the absence of the Respondent, including those of Paul Derry, not only to prove there *was* a conspiracy (step 1 of the *Carter* analysis) but to place the Respondent *in* the conspiracy (step 3) – the latter being the more significant step and especially so in this case. Although the Applicant argues that the Court of Appeal fell into error about "basic evidence law", this is an apt description of the argument it seeks to advance on appeal. (*AM* para. 29).

12. The co-conspirator's exception to the hearsay rule is, crucially, an *exception*. In virtually no other setting can the Crown call evidence that A and B did acts or spoke words in the absence of the accused, and without the assent or adoption of the accused, in order to prove the guilt of the accused. This rule does not apply any differently when the Crown calls the person who performed the acts or spoke the words out of court to relate them in court. It is the in-court testimony that forms the substantive evidence against the accused, not the out-of-court words or conduct. If, for example, an ordinary witness, A, in a murder trial were to testify that he told B that the accused, C, kept a gun in his dresser, it would be a serious error to instruct the jury that what A said to B constituted evidence against C—the sole admissible evidence would be that A had seen a gun in C's dresser. Similarly, if A were to testify that he believed that C planned to commit the murder and so went to a meeting with B to try to prevent the murder, the attendance of both A and B at the meeting would not be, in itself, evidence of C's guilt in the murder and it would be error to suggest it was. The admissible evidence would be what A saw or heard the accused do or say – not what he, A, did as a result. The question is not how the inadmissible out-of-court words or acts

are placed in evidence (by a conspirator, a witness, a third party or a wiretap); it is how, once before the jury, they could properly be used and how they should not be *misused*. Witnesses, absent an exception, are not entitled to create evidence against an accused by relating what they did or said out-of-court that supports the theory of the party calling them. Such out-of-court acts and declarations will sometimes be placed in evidence but only for their value in following the narrative, not as direct evidence of guilt, unless there is an operative exception.

13. The co-conspirator's rule is just such an exception, resting on the premise that one conspirator becomes an agent of the other and his words or actions are admissible as if they were those of the others. Absent this exception, evidence must come from what a witness saw or heard that directly or through circumstantial reasoning implicates the accused in the offence charged. Derry was not a genuine conspirator but a would-be police agent trying not to effect the conspiracy's objects but thwart them. On unquestioned authority from this court, his own acts and declarations were not admissible under the *Carter* formulation. For this reason, the argument at paras. 28-35 of the *Applicant's Memorandum* does not merit a grant of leave to appeal.

> *The Queen v. O'Brien*, [1954] SCR 666
> *United States of America v. Dynar*, [1997] 2 SCR 462 at paras. 86-88

14. The Applicant's reliance on *R. v. Connolly*, from the Newfoundland and Labrador Court of Appeal, is, with respect, misplaced on this issue. (*AM* para. 35). *Connolly* was a case in which the accused misunderstood the law but the two courts which heard the case did not. Myles Connolly, the appellant, was charged in a drug trafficking conspiracy. His brother, Raymond, was a Crown witness. However, Raymond had also been a conspirator in the trafficking scheme. Raymond's testimony was simply that Myles had made damaging admissions to him. On appeal, Raymond's counsel argued that even though the evidence about what Myles had said was not about the acts and declarations of other conspirators, but rather an admission by Myles against his own

interests, it still had to satisfy the *Carter* criteria to be admitted. The Court of Appeal was correct to reject this argument but its doing so has nothing to do with this case. In this case, Derry was *not* a conspirator (because he never genuinely agreed to join in the murder) and he was *not* testifying about out-of-court acts and declarations of the Respondent but about his *own* acts and declarations, which the jury charge said could be used as evidence of the Respondent's guilt, in the same way as the acts and words of the real conspirators. The cases are far apart and the Newfoundland and Labrador Court of Appeal's comments are not apposite to the issues here.

15. Much of Paul Derry's gripping story about his contacts with Smith, his planning with James, and his enlistment of Gareau, was not admissible evidence to prove the Respondent was part of the conspiracy to kill Simmons. It could not, in law, implicate him in the conspiracy at all (though it could help establish the existence of the conspiracy at the first stage of *Carter*). Leaving Derry's words and actions, as he related them, to the jury as substantive evidence that the Respondent was a member of the conspiracy violated fundamental evidentiary principles and required appellate correction.

(ii) <u>The Admissibility of the Acts and Declarations of Actual Conspirators</u>

16. The Applicant has misinterpreted the Court of Appeal's decision and drawn from it a controversy that does not arise (*AM* paras. 36-45). When the Court of Appeal mentioned that "the hearsay evidence relates to a period of time when Kelsie could not, on this record, have been part of the conspiracy", it was not laying down a rule of law that co-conspirator hearsay that precedes an accused's possible membership in the conspiracy is inadmissible. That argument was not made at trial or on appeal.

17. The point put to the Court of Appeal in argument, and accepted in its judgment, was simply that *on the facts of this case* there was nothing in the whole body of the co-conspirators' out-of-court acts and words that tended to prove the Respondent's membership in the conspiracy. This was an accurate submission and the Appellant has pointed to nothing in the record that suggests otherwise. There was no dispute at trial as to whether acts and declarations that took place before the accused's putative membership in the conspiracy could be used to prove the membership. This is not a proposition he would have to contest on an appeal. For example, if, in a drug case, a buyer gave an accused's address to a supplier, before the evidence suggested the accused had actually assented to the conspiracy, this might well be a proper building block in proving membership in a conspiracy, even if it took place before there was any other reason to believe the accused was a member. That, however, is not the issue in this case. Derry had a bird's-eye view of the development of the conspiracy and he did not give a word of evidence that the Respondent was a member of it before he crossed the bridge to Dartmouth and was handed the gun. Indeed, his evidence was explicitly to the contrary: he agreed that the Appellant was unaware, before the trip to Dartmouth, of *any* plan to find and kill Simmons.

Court of Appeal Reasons for Judgment, para. 24

18. What this all meant was that the large body of evidence called at the first stage of the *Carter* analysis had no possible application at the third stage, as evidence of the Respondent's adherence to the conspiracy. It was simply not able to advance the Crown's case that he became a member of the conspiracy. The essence of the Court of Appeal's judgment (and the argument made before them) was not that first-stage evidence had to relate to a time when the accused was *already a member* to be admissible. Rather, its core holding on the point was the following:

> 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.
>
> 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.
>
> In these circumstances, the determination of Mr. Kelsie's involvement in the conspiracy depended entirely on the evidence of his own acts and declarations.
>
> Court of Appeal Reasons for Judgment paras. 164-166

19. That was correct and it reflected a basic unfairness in the entire trial. Not only did the jury hear extensive evidence of a gang-based plot to commit murder-for-hire, but it heard from the trial judge that this evidence could somehow "take them from [the Respondent's] possible membership in the conspiracy to his membership beyond a reasonable doubt when it could not.": Court of Appeal Judgment para. 165. The Court of Appeal did not err in holding that it was wrong to invoke this large body of vivid, repellent evidence against the Respondent as proof of his membership in the conspiracy when none of it was admissible for that purpose.

20. It follows that the conflict in the law alleged to infuse this issue with national importance does not exist (*AM* paras. 37-42) The case against the Respondent for conspiracy to murder and murder both depended wholly on the inferences to be drawn from evidence about the events of October 3, in the car and afterward. The earlier evidence added nothing – not because of when it arose but because it could not contribute to the proof of the Respondent's membership in the conspiracy. If the Appellant succeeded in obtaining leave, there would be no one arguing the point

the Applicant says arises from *R. v. Proulx* and is inconsistent with *R. v. Loewen* and *R. v. Container Materials Limited* because in this case nothing turns on it.[1]

21. There is, accordingly, nothing in these proposed grounds on the co-conspirators hearsay rule that merits the attention of this Court and the granting of leave to appeal. The judgment was an application of established law to a clear set of facts and to patent errors. Nor was the error purely technical – the approach at trial to the evidence of the conduct of the conspirators permitted highly prejudicial evidence that had nothing to do with the Appellant to be placed before the jury as if it implicated him.

B. MANSLAUGHTER AS AN AVAILABLE VERDICT

22. The Crown deliberately placed the Respondent's exculpatory statement before the jury because parts of it that were consistent with the Derry and Potts narrative allowed the Crown to claim its two unsavoury witnesses were corroborated. The jury, however, was entitled to believe the Respondent's denial that he shot Gareau while also concluding that the taking of the gun by

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[1] The Respondent should not be taken to accept that the "rift" in the law posited by the Applicant actually exists (*AM* paras. 37). The judgments in *Proulx*, *Loewen* and *Container Materials* appear to have in common the proposition that evidence to establish the existence of a conspiracy may include acts and declarations that took place "before a particular defendant joined the Association" but "are only receivable against him to prove the origin, character and object of the conspiracy, and not his own participation therein": *R. v. Container Materials Ltd.* [1940] D.L.R. 293 at p. 308; *R. v. Loewen* (1999), 134 Man. R. (2d) 234 (C.A.) at paras. 20-21; *R. v. Proulx*, 2016 QCCA 1425 paras. 46, 69-71. Whatever this Court might think of the consistent holdings in these cases, the issue of their correctness does not arise for resolution where *no* hearsay evidence was capable of supporting the Respondent's membership in the conspiracy and the trial Judge simply erred in suggesting otherwise.

Gareau included a measure of volition by the Respondent. From the jury's question, that is a view some of its members may well have taken. That was a risk the Crown chose to assume when it settled on its trial strategy; it elected to take the bad (for its case) with the good. It decided to ask for a conviction on the basis of party liability from any juror who credited the substance of the statement.

23. While the Applicant fastens on the Court of Appeal's characterization of the reasoning behind party liability as "tortured", it is the very reasoning the Crown promoted at trial on evidence it adduced. For the Respondent to be liable for the culpable homicide as a party, no more was required than the following:

- Gareau had a commitment of many days duration to the murder of Simmons; the Respondent, by contrast, was pulled into it just minutes before it occurred, when James backed out.
- The Respondent said he would do the job but had no intention of doing so (or intended briefly to do it but then chose to "coward out".)
- Gareau took the gun and committed to the killing but his taking of the gun was accompanied by some degree of "giving" or willful surrender of the weapon on the part of the Respondent. At this point, crucially, the Respondent might reasonably have known *nothing* of Gareau's motivations and intentions with respect to Simmons – whether he was likely to shoot him, scare him with gunshots, scare him by brandishing the gun, or slip away with the gun to protect him. The Respondent was not privy to Hells Angels' desire to see Simmons killed nor to Gareau's efforts to hunt him down.
- Gareau entered the building, shot Simmons and, not wanting to be caught with the gun if he had been seen (which he was), gave it back to the Respondent and bolted.
- Derry and Potts, practiced liars with months to think about it, concocted a story that protected Gareau and left the Respondent exposed as the shooter, simply by embellishing what he said and did in the shooting's aftermath.

- Because there was substantial "credit" to be had with Hells Angels for the shooting and Derry believed (or said he believed) the Respondent was the shooter, the Respondent claimed the credit in their intercepted communications.

24. This is not only a plausible view of the evidence but each aspect of it was promoted by one side or the other at trial. If it is what happened, then it squarely raised the question of the Respondent's state of mind as the gun went from his possession to Gareau's. On that question turned the difference between first degree murder, second degree murder and manslaughter. What Gareau would do could not have been obvious to the Respondent and was purely a question for the jury. It is hard to see how the need to leave manslaughter as a verdict in this case was a serious legal question, much less one of national importance.

C. PLANNING AND DELIBERATION AS A PARTY

25. The Court of Appeal concluded, correctly, that the jury received no instruction of any kind on the mental state required for planning and deliberation by a party – that the alleged aider or abettor must have planned and deliberated on the killing himself or been aware of the principal's planning and deliberation. The jury simply received no direction on this distinct and vital legal issue; all they heard was an instruction on planning and deliberation which was expressly for a *principal* in a murder. Given that some of the jurors credited the Respondent's statement sufficiently to consider party liability – and perhaps to decide on that basis – the failure to instruct on this issue was a major error. The Respondent does not suggest the charge in this regard was correct.

Court of Appeal Judgment, paras. 60-90

D. THE CONSPIRACY CONVICTION AS A CURE

26. The Applicant begins its argument with an attack on the Court of Appeal's judgment related to the conspiracy count because it wishes to invoke this conviction as a cure for otherwise fatal errors on the manslaughter issue and the absence of instruction on planning and deliberation by a party. The argument on the proviso is then developed later in its Memorandum: (*AM* paras. 28-45, 55-59).

27. This argument, it is submitted, must fail from the outset because the jury *was* improperly charged on the conspiracy count. The jury was permitted to use the out-of-court acts and words of a Crown witness as self-corroboration under the guise of *Carter* and it was permitted to use a large body of prejudicial hearsay from acknowledged conspirators as evidence of the Respondent's involvement when it was not. The conspiracy conviction cannot stand and it cannot cure the other errors.

28. Apart from that, however, the Applicant’s argument proceeds on the faulty footing that a sound conspiracy conviction *could* resolve questions of *mens rea* and planning and deliberation by the Respondent. That is simply not so. As the law establishes, a conspiracy is complete at the time agreement is reached. It was entirely open to the jury to find that the Respondent *did* impulsively conspire with the group in the car but also find that he (i) never reached the state of careful reflection required for "deliberation" and (ii) abandoned the intent implicit in the conspiracy as his statement suggests, while walking with Gareau from the car to the apartment building. He expressly told Gareau, according to the statement, that he "couldn't do it". If he then allowed Gareau to take possession of the firearm, his knowledge with respect to what Gareau would likely do became a key issue for the jury, as did his understanding as to whether it was planned and deliberate on Gareau's part. It is an overreach for the Applicant simply to treat a

finding of conspiracy, resting on a momentary agreement, quickly repudiated, in highly fraught circumstances, as a proxy for a finding of planning and deliberation. The two are in no way legally equivalent.

29. The Applicant then suggests that the verdict of first degree murder could have been based on an "arrangement" under s. 231(3) of the *Criminal Code* (*AM* para. 67). Much of this argument rests on the jury's question on the fifth day of its deliberations. This, however, is a most unlikely explanation for the verdict. There was a striking scarcity of evidence that the Respondent even knew of the proposed murder before arriving in Dartmouth much less that he had agreed to commit it for money – James was the designated shooter until the last moment, on every account. That is why the jury wanted to know, in its question, whether a murder could be by "arrangement" if the payment was only arranged *after* the killing. The correct answer was that an arrangement under this section had to *precede* the killing to ground a first degree murder conviction. This inevitably took the air out of any reliance on the contract killing theory, just as it does the submission on appeal that s. 231(3) was the basis for the verdict.

30. This is not a credible argument on its face but even if it were, it could not serve the purpose for which it is cited. What if *some* jurors reached a verdict of first degree murder on the basis of a contract killing and others reached it – with wholly defective instructions – on the basis of party liability? Appellate courts would have no way of deciding whether this did or did not happen. If it did, however, the convictions could not possibly stand. For that reason, the Applicant cannot ask that the failings of the instruction it requested be deemed harmless.

31. The Applicant concludes by arguing that the Court of Appeal should not follow *R. v. Jackson* or that the court should revisit it with respect to the ability of a conviction for murder to cure a failure to leave manslaughter. This argument should fail at three levels.

32. First, the first degree murder conviction, which the Crown says disproves any prejudice from the failure to leave manslaughter, itself is infected by one of the fatal flaws in the charge. As the Court of Appeal rightly notes, the jury could have convicted the Respondent, as a party, on the basis that *Gareau* had planned and deliberated on the murder without regard to whether the Respondent had also done so. This means that the fatally flawed first degree murder conviction cannot salvage the error in excluding manslaughter. If a faction of the jury found that the killing by Gareau constituted murder by the Respondent because an acquittal would be unacceptable, and found that the murder was first degree murder because of Gareau's obvious planning and deliberation, the *Jackson* logic would apply precisely – as it should. The logic of the proviso, even if it could be employed, demands that the jury be properly instructed on the *greater* offence to cure the absence of any instruction on the *lesser* offence. This jury was *not* properly instructed on first degree murder. Nor, as discussed above, can the flaws in the first degree murder conviction be salvaged by the conspiracy conviction. That conviction was itself fatally flawed but even if it were not, it does not cure the errors in the first degree murder conviction; planning and deliberation was in no way inherent in the first degree murder conviction.

33. The inability of the first degree murder conviction to cure the first degree murder conviction is illustrated by a further point. The Court of Appeal was faced with a ground of appeal that it did not elect to address but which it also did not reject. The jury was told that in deciding whether the Respondent planned and deliberated upon the murder, it could consider *all* of the hearsay acts and declarations of Paul Derry, Wayne James, Stephen Gareau and Neil Smith. It was

not told that this was subject to the strictures of the *Carter* analysis, even though in law it had to be. This argument is elaborated upon in paras. 77-80 of the *Appellant's Factum,* filed by the Respondent in the Court of Appeal and appended to these materials. The upshot is that the Crown at trial was permitted to rely, without restriction or qualification, on a large body of hearsay evidence to decide the charge of first degree murder, a conviction which the Crown now argues can cure the error respecting the failure to leave manslaughter. Again, invoking the proviso in this manner requires that the jury have been properly instructed on the greater offence. This jury was not.

34. In these circumstances, the criteria for invoking the proviso or for reconsidering *Jackson* – which the Court has recently affirmed– are simply absent. The first degree murder conviction is permeated with errors. They are not cured by the conspiracy conviction.

E. OTHER ISSUES

(i) Grounds not Addressed

35. The Court of Appeal heard argument on seven grounds of appeal (with an eighth ground abandoned at the hearing). It ruled on only four, favourably to the Respondent, and elected not to address the other three which, therefore, have never been adjudicated upon. They can be examined in the *Appellant's Factum* from the Court of Appeal.[2] These errors include the one described above, in allowing unregulated hearsay to serve as the basis for finding planning and deliberation; the failure to instruct on the defence of abandonment which was the essence of the Respondent's statement; and the judge's direction to the jury, regarding unanimity in its verdict, that "disagreement is the most undesirable result of all at the conclusion of any legal proceedings".

[2] The Crown's *Respondent's Factum* in the Court of Appeal is also appended.

36. The Respondent urges the court to note especially the last of these unresolved grounds (*Appellant's Factum* paras. 95-100). There is no support or precedent for this direction anywhere in Canadian jurisprudence. It is directly contrary to the rulings of this Court on jury disagreement and the use of exhortations. It suggests an entirely skewed, indefensible hierarchy of priorities for a jury – an unprincipled, erroneous conviction is much less desirable than a hung jury. The potential effect of the instruction on a jury struggling with unbridgeable division (as this jury might have been after six days) is appalling. It would not contribute to the sound administration of justice if, after entering the legal quagmire of the grounds proposed by the Crown, its appeal were ultimately dismissed on this most obvious of bases.

(ii) <u>The Passage of Time</u>

37. The Applicant concludes its argument with this odious submission: "The true travesty is the order by the NSCA requiring a re-trial of a seventeen year old murder" (*AM* para. 91) . This is a bolt from the blue. It is a submission that played no part in proceedings before the Court of Appeal and is introduced with no evidence, no other record and no findings in support of it.

38. The Respondent was able to make the arguments which succeeded in the court below because counsel was appointed for him under s. 684 of the *Criminal Code*. The test for an appointment is that it be "desirable in the interests of justice" that counsel be engaged to advance arguments for an impecunious, unschooled Appellant. The ruling of Justice Farrar is included with these materials. The Crown in 2016 *accepted* that the appointment of counsel was in the interests of justice so that these very grounds could be argued. It made no complaint that bringing the appeal would be contrary to the interests of justice, and that allowing it would be a "travesty". It

acknowledged in 2016 the merit in the proposed grounds. The Court of Appeal made the order under s. 684 without concern for the time that had passed, the reasons for which it knew well. Those reasons include one lawyer who could not find arguable grounds despite their patent existence, another who was appointed to the bench before perfecting, and a legal aid agency that once refused funding, absurdly, on the basis that no arguable grounds existed.

39. It bears remembering that it was *Mr. Kelsie* who was in prison for the seventeen years lamented by the Applicant, not Crown counsel, witnesses or anyone else. One wonders at what point during that painful process the Crown supposes that he forfeited his right to appellate determination of his first degree murder conviction and that granting his appeal became a travesty. This Court might well regard this submission as a gauge of the Crown's commitment to a just result in the balance of its argument.

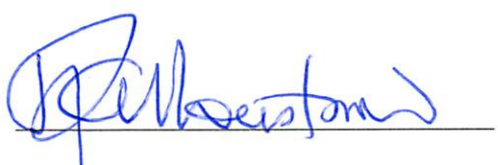
PART IV: COSTS

40. The Respondent does not request costs.

PART V: ORDER SOUGHT

41. The Respondent requests the Court to dismiss the application for leave to appeal.

All of which is respectfully submitted this 27th day of July, 2018.



Philip Campbell
Lockyer Campbell Posner
Counsel for the Respondent

PART VI: TABLE OF AUTHORITIES

PART VII: STATUTES, REGULATIONS

Sec. 231(3) of the *Criminal Code*

Sec. 684 of the *Criminal Code*

Sec. 686(1)(b)(iii) of the *Criminal Code*

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