**S.C.C. File No. 39559**

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**APPELLANT**
**(Respondent)**

**- and -**

**WILLIAM VICTOR SCHNEIDER**

**RESPONDENT**
**(Appellant)**

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# RESPONDENT'S FACTUM

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

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## PART 1 – OVERVIEW AND STATEMENT OF FACTS

### A. OVERVIEW

1. The respondent submits that the trial judge erred by permitting the jury to consider words that Warren Schneider, Jr. ("Schneider Jr." or "Warren") attributed to his brother, William Schneider ("the respondent"), on September 27, 2016, when his brother was on the phone to someone else. Schneider Jr. could not recall exactly what his brother stated. He could only convey an "impression" or "feeling" about what was stated.

2. The respondent accepts that, in *limited* circumstances as identified below, a witness to a conversation may later recall the "gist" of the conversation. If, however, a witness cannot even recall what words he or she heard, the witness may not give in effect *an opinion* about what was stated, even about the gist of the conversation. The trial judge permitted Schneider Jr. to do this—to give his impression or feeling about a conversation, the very words of which he could not recall. Canadian law should not permit a lay witness to provide this type of opinion or impression about the meaning of indefinite words, certainly not to establish that the words amount to an admission. An impression or opinion cannot equate to 'the gist' in these circumstances.

3. Moreover, Schneider Jr. only overheard fleeting words of one-side of a phone call. In this respect *R. v. Ferris*, 1994 ABCA 20 ["*Ferris* (CA)"], aff'd [1994] 3 SCR 756 ["*Ferris* (SCC)"], applies to whatever Schneider, Jr. felt he overheard. *Ferris* (CA) and *Ferris* (SCC) are rooted in sound principles. By bringing this appeal, albeit as of right, the appellant asks this Court to reverse itself on matters of legal principle. There is no compelling reason for this Court to do so.

4. The respondent contends that the trial judge's ruling was inherently flawed and that the jury instructions were inherently confusing, amounting to misdirection. The appellant contends that the trial judge correctly admitted the respondent's "statement" and properly left the meaning of the "impugned words" with the jury, but neither the appellant nor the trial judge knows what the "statement" is or what the "impugned words" are: see appellant's factum [AF], paras. 2-3. The jury was asked to decide if they believed Schneider, Jr. about what the respondent meant by the overheard words, but if it was for the jury to decide what the respondent had meant, then

Schneider, Jr.'s opinion was irrelevant in the first instance, as Goepel, JA rightly concluded for the majority in the Court of Appeal (AR Vol I, 62, para. 182; and Vol IV, 198, para. 80).

5. Moreover, because Schneider, Jr. did not even know what the respondent had said, the trial judge invited the jury to decide if the respondent even made a "particular remark" or "statement" and if they decided negatively, not to use the remark against him: AR Vol IV, 198, para. 81. Again, however, Goepel, JA correctly found that "there was **no way** the jury could determine" what the accused said because the witness could not recollect what was said, and for this reason the evidence was inadmissible: AR Vol I, 62, para. 181 (emphasis added). In other words, speculation was not allowed.

6. The respondent contends further that when the Crown wishes to tender ambiguous words or an ambiguous statement *as constituting an admission*, it must first establish in a *voir dire* that the words are *in fact* an admission on a criminal standard or alternatively minimally on a civil standard. The test for the admissibility of ambiguous words as admissions is not and cannot simply be whether the words are *capable of meaning*. There are no first principles of evidence that permit words to go before a trier of fact as an admission just because they are *capable of meaning*. Any word is capable of meaning.

7. Should the Court not agree with the respondent's position on the admissibility of Schneider Jr.'s evidence, the respondent submits that the order of the Court of Appeal should be sustained nonetheless. The trial judge failed to respond to a jury question adequately, thereby causing a miscarriage of justice. The jury question in this case was arguably about the *mens rea* and *actus reus* for murder and manslaughter. The trial judge responded simplistically and erroneously by providing the jury with the definition of bodily harm in section 2 of the *Criminal Code*.

## B. STATEMENT OF FACTS

### The Defence Theory

6. The defence theory was that the respondent was with the deceased when she died and that she had consumed drugs (either with him or beforehand) that caused her death: AR Vol III, 1503, l.12-14. The respondent told a detective, "I actually don't know if she had died, if her heart went

out or if it was her breath…I don't know…I w-, actually wasn't certain that she passed … at the moment she did. It was five minutes later. I stepped out for, or s-, gone out of the tent for a smoke…": AR Vol III, 182, l.26-31 and l.41; AR Vol IV, 244, l.11-15. The respondent probably felt morally responsible for her death and panicked by placing her body in a suitcase and transporting it to the location where it was found: AR Vol III, 301, l.15-17 and 318, l.27-32.

7. Her remains contained Zopiclone and Lorazepam. It is not clear whether she had been affected by these drugs or alcohol at the time of her death: AR Vol III, 18, l.26-47. Dr. Carol Lee, the pathologist, opined that the deceased could have died from an overdose of the medication: AR Vol III, 158 l.43 – 159, l.2; and 159, l.27-47. She did not know if the deceased had cardiac arrhythmia, which can occur during physical exertion and sexual relations: AR Vol III, 151, l.30-43. Dr. Lee could not determine the time or cause of the deceased's death: AR Vol III, 132, l.27-29; 145, l.28-32; and 161, l.13-16. She testified that the deceased's brain did not show signs of being in a low oxygen state, which can be associated with suffocation: AR Vol III, 147, l.45 – 148, l.3.

**The Crown Theory**

8. The Crown theorized that the respondent asphyxiated or smothered the deceased by pinching her nostrils shut and covering her mouth, presumably having first supplied her with alcohol, Lorazepam and Zopiclone so that she would be less capable of resisting his homicidal efforts: AR Vol I, 110, l.23-30. The Crown proposed that the respondent had applied "sufficient pressure" to the deceased's "airways for a sufficient duration" to render her unconscious, knowing that death was likely. He proposed that death "takes time" and recalled that the respondent had told the police that he was not certain that she passed at the moment she did: AR Vol III, 279, l.6-10; and 280, l.3-10.

**Crown Opening Statement about the Overheard Words**

9. At the opening of the trial on September 24, 2018, Crown counsel told the jury,

> The accused placed a call, in Warren Schneider's presence, and Warren Schneider Jr. heard the accused say to his wife, words to the effect of, "Have you heard the news in relation to Natsumi's death?" and "I did it" or "I killed her." AR Vol. II, 42, l.3-8

10. Three days later the respondent's trial counsel raised the issue of the admissibility of Schneider Jr.' evidence relating to the phone call: AR Vol II, 97, l.21-32. Crown counsel expressed concern that he had mentioned the phone call in his opening: AR Vol II, 99, l.26-30.

**Schneider Jr.'s Trial Evidence**

11. Schneider Jr. testified that on September 27, 2016 he received a call from his daughter who texted him a photograph in relation to a news article about a missing Japanese student. His daughter asked if the person in the photo was the respondent, "Willie." AR Vol II, 109, l.24-38; and 110, l.11-12. Schneider Jr. called the respondent and asked him about the photograph. The respondent hung up. AR Vol II, 112, l.6-25.

12. Later that evening in Vernon, Schneider, Jr. and his brother engaged in a normal conversation. The respondent said, "it's true." When the Crown asked Schneider, Jr., "what did you understand he was referring to" by "it's true", the respondent's trial counsel objected: AR Vol II, 113, l.12-20, and l.30-32. The trial judge initially allowed the question and Schneider Jr. testified that he understood his brother to be referring to the article on the missing Japanese student: AR Vol II, 113, l.38-44. However, upon reflection, the trial judge reversed her ruling. She reasoned,

> I should not have allowed that question. ***What [Schneider, Jr.] thought*** is really – unless [the respondent] actually said something about what he was talking about there's some basis for that, and I'm going – I'm of the view that I should give a mid-trial instruction on that, as well, that the jury should disregard the evidence ***of what …Warren Schneider Junior thought Mr. Schneider was talking about*** and should not consider it further. AR Vol II, 133, l.39 – 134, l.1. [Emphasis added.]

The trial judge instructed the jury as follows: (AR Vol II, 94, l.3-10)

> … I allowed a question about what Warren Schneider Jr. thought his brother was talking about when he said it's true on their walk up the hill from the beer store on the evening of September 27th, 2016. I should not have allowed that question. **You must disregard the evidence of what Warren Schneider Jr. thought Mr. Schneider was talking about and not consider it further.**
> [Emphasis added.]

13. The respondent also told Schneider, Jr. that "they" (inferentially, he and the deceased) had had "internet conversation about having sex in a tent" in Stanley Park: AR Vol II, 115, l.19-22. The Crown asked if the respondent had said anything "about why he did it?" Defence

counsel objected. AR Vol II, 115, l.38-41. The Crown directed Schneider, Jr. to a statement, to assist him with the question, "why it was brought up?" but defence counsel objected again: AR Vol II, 116, l.7-10 and l.24-25.

14. Schneider Jr. testified that the next morning, after going to a bank machine with his brother and father, his father departed, then the respondent told Schneider Jr. that he planned to commit suicide in the bush. He and Schneider Jr. went to a beer store, after which the respondent bought heroin: AR Vol II, 123, l.16-38. The respondent injected the heroin at the back of Polson Park: AR Vol II, 124, l.22-31. Schneider Jr. secretly dialed 911. The police went to his father's house: AR Vol II, 124, l.41-42; and 125, l.4-6. Later that day Schneider Jr. told his sister that the respondent had told him where the body of the missing Japanese student was: AR Vol II, 128, l.45 – 129, l.3; and 129, l.33-38. Schneider Jr. recalled further events of that day until the trial judge decided to hold a *voir dire* regarding where Warren was and what he heard of "the conversation that Mr. Schneider may have had with his wife". AR Vol II, 133, l.4-13.

**Schneider Jr's *Voir Dire* Evidence**

15. In ***direct examination*** in the *voir dire* Warren Schneider Jr. testified that his brother made the call at approximately 11:00 am: AR Vol II, 135, l.9-17. He heard his brother say, "Did you see the news of the missing Japanese woman, student?" He also heard his brother say "I did it" and "I killed her": AR Vol II, 135, l.18-25. The call lasted "several minutes". Warren stood about ten feet away: AR Vol II, 135, l.26-28 and l.33-35. He testified, "I could only hear one side of the conversation, but seemingly a two-way conversation, but I think [the respondent] he was speaking more than she was." AR Vol II, 135, l.39-41. Warren believed that the respondent was speaking to his wife on the phone because the respondent had told Warren that "he was gonna phone her…long-distance." AR Vol II, 136, l.47 – 137, l.3.

16. In ***cross-examination***, Warren Schneider Jr. recalled that the phone call lasted for about 13 minutes: AR Vol II, 138, l.6-8. He did not hear anything that the recipient of the call (presumably the respondent's wife) said: AR Vol II, 138, l.27-31. He had ***no idea*** what she was saying: AR Vol II, 138, l.34-36.

17. About six or seven minutes into the phone call he heard the respondent say "I did it. I killed her." AR Vol II, 138, l.20-23. He maintained that he heard the respondent say, "I did it" until he was confronted with his preliminary inquiry evidence: AR Vol II, 138, l.43 – 139, l.2. At the preliminary inquiry he had testified that the respondent said into the phone that he was "responsible", because he *believed* that the respondent had used the words, "I did it" or "I killed her," but he was *not sure* what words the respondent had used: AR Vol II, 885, l.11-17 and 21-23. The following exchange occurred at the preliminary inquiry:

> Q Okay. What else did you hear him say?
> A Hmm. ***That he's responsible for her death.***
> Q Did he actually say those words?
> A ***Word-for-word, I'm not exact***.
> Q Okay. But what did he actually say? See AR Vol II, 887, l.13-17.
> [Emphasis added.]

Schneider Jr. was pressed at least twice more: What did the respondent *actually say*? He conceded, "***I don't know the exact words***": AR Vol II, 143, l.17 and l.28-31 (emphasis added).

18. In the trial *voir dire* Schneider Jr. testified that this preliminary inquiry evidence was *true*. He did not know the exact words the respondent had used – "not word-for-word" – but ***the message*** he got from overhearing the respondent was that the respondent was claiming 'responsibility' for the missing student: AR Vol II, 143, l.31-40. He agreed that this was only his ***feeling*** about it: AR Vol II, 143, l.39-40.

19. Prior to the phone call, the respondent had told Schneider Jr. that he knew where the body was, that they had shared medication, that she had died, and that she was in a suitcase, but Schneider Jr. could not recall if the respondent had told him, "I did it." Again, he testified, "***I don't know the exact words.***" AR Vol II, 144, l.6-23 and l.27.

20. At the preliminary inquiry he had testified that "the first time" he ever heard anything *like* "I did it" or "I killed her" was when the respondent was on the phone at the park, but he agreed, "***I don't know the exact words***": AR Vol II, 144, l.45 – p.145, l.10. In the trial *voir dire*, he was asked if this was true and he replied,

> A ***Word-for-word, I don't know the exact words***.
> Q Well, you don't know the words at all, do you?

A ***Word-for-word, no***. AR Vol II, 145, l.12-15.

21. The respondent's trial counsel asked Schneider Jr. what he meant by "word for word". Schneider, Jr. replied, "***it seemed like***" the respondent was admitting to the missing student's death: AR Vol II, 145, l.16-19. Schneider, Jr. was unsure of whether he heard "I did it" ***or*** he heard "I killed her", he had overheard only "***part of*** a conversation", what he overheard was merely "***along [the] lines***" of "I did it. I killed her", and he did not know the exact words of the "whole conversation": AR Vol II, 145, l.18-31. He was asked the following question and gave the following answer:

> **Q It was your feeling about the impression you got, isn't that really it?**
> **A Yeah. Yes.** AR Vol II, 145, l.32-34.

**The *Voir Dire* Submissions & Oral Ruling**

22. Submissions on the admissibility of Schneider Jr.'s evidence were informed by *Ferris* (CA), *Ferris* (SCC), *R. v. O'Reilly*, 2017 BCSC 276, and *R. v. Bennight*, 2012 BCCA 190, which distinguished itself from *Ferris*: see AR Vol II, 167, l.19-20.

23. That afternoon the trial judge ruled that Warren Schneider Jr's evidence was admissible. She construed *Ferris* (CA) as establishing that a trial judge need only be satisfied that "there is some evidence upon which a jury could conclude the meaning of the uttered words": AR Vol II, 5, para. 19. She reasoned that, according to *Bennight*, "the possibility of incompleteness is a matter of weight for the jury", and she found that Warren Schneider, Jr. had testified that "***the gist*** of the conversation was that Mr. Schneider was taking responsibility for Ms. Kogawa's death": AR Vol II, 5, paras. 19-20. Emphasis added. Critically, however, Warren Schneider, Jr. *never* testified to ***the gist*** of the conversation in the *voir dire*. The trial judge must have pulled this expression—"the gist"—from *Ferris* (CA) at para. 25 or *Bennight* at para. 92.

**The Resumption of Schneider Jr's Trial Evidence**

24. When Warren Schneider, Jr. resumed his testimony before the jury, the Crown asked him to recall "the gist of the conversation your brother had with his wife": AR Vol II, 170, l.31-32. The respondent's trial counsel objected. He wanted the witness to recall "what the conversation was, as opposed to the gist of it": AR Vol II, 170, l.33-36. When the Crown asked Warren

Schneider, Jr. if he could say whether the respondent's "***exact words***" were "I killed her" or "I did it," the witness replied, "***No***": AR Vol II, 170, l.41 – 171, l.4. Yet, the Crown persisted with the use of the expression, "the gist." Presumably referring to the proposition that the respondent was taking responsibility on the phone to having killed Ms. Kogawa, the following exchange occurred:

> Q Are you able to say that that was the gist of the conversation?
> A Perhaps…
> Q What do you mean by perhaps?
> A Well, I only heard one side of the conversation.
> Q Okay. I'll rephrase that. That was the gist of the conversation you heard from your brother?
> A Yes.

25. In ***cross-examination*** Warren Schneider, Jr. testified that he had stated fairly in-chief that he ***did not know the exact words*** that the respondent had spoken: AR Vol II, 189, l.13-17. The following exchange occurred:

> Q He may have just said something like "I did it"?
> A Yeah.
> Q And you don't know if he was being asked a question about this or about something else, do you?
> A ***I have no idea***.
> Q Could be completely unrelated to –
> A True.
> Q -- the missing woman, correct?
> A Correct.
> Q And he may have responded, "I did it," correct?
> A Yes.
> Q ***And you have no idea, do you***?
> A No.
> Q And during this call, did it seem to be sort of – was your brother talking more or did the ex-wife seem to be talking more or – or what?
> A Almost 50/50. I'd say 60/40, William speaking more.
> …
> Q And whatever he did say, do you know what he did before and after he said those words or do you not because you weren't listening – you were trying not to listen?
> A Yeah, I don't – I didn't hear any other –
> Q So you don't know if that –if it was, "I did it" or whatever it was, whatever the phrase was, you don't know whether that was in the middle of a sentence or the start of a sentence or the end of a sentence, do you?
> A No.
> AR Vol II, 189, l.18-36; and 190, l.19-29. [Emphasis added.]

**Closing Submissions on the Overheard Fragment**

26. The respondent's counsel urged the jury to consider that Schneider, Jr. could not recall exactly what he heard, that he did not know what he heard, that it was a very "undependable bit of conversation" and that there was "no context" because they had not heard from the person speaking to the respondent. He told the jury, "you can't affix any value to [utterances], even if you did know what [Schneider, Jr.] overheard," and "you can't be convinced what he overheard." AR Vol III, 308, l.6-15; and 310, l.16-20 and l.25-29.

**The Jury Instructions**

<u>On the Overheard Statements</u>

27. The trial judge instructed the jury as follows:

> Warren Schneider Junior could not hear the other side of the conversation. He testified he only heard parts of the conversation and was trying not to eavesdrop. He did not hear what was said before or after the words he overheard and could not remember the exact words spoken by Mr. Schneider. This is something you need to bear in mind when you consider what, if any, weight can be given to Warren Schneider's evidence about the overheard conversation.
>
> As well, Warren Schneider Junior testified that at the time Mr. Schneider phoned his wife he had drunk a mickey of vodka and had taken some heroin. You should consider whether Mr. Schneider's drug and alcohol use may have affected what he said. It is up to you to decide whether you believe Warren Schneider Junior about what Mr. Schneider said and what Mr. Schneider meant by the overheard words. If you are in doubt about any of that, you should ignore the evidence. *Unless you decide that Mr. Schneider made a particular remark or statement, you must not use it against him in deciding this case.* AR Vol IV, 197-198, paras. 79-80. [Emphasis added.]

28. The trial judge further instructed the jury:

> *Warren Schneider Junior gave evidence about overhearing a conversation between Mr. Schneider and his wife in which he said "I did it" or "I killed her."* ***Warren Schneider Junior could not remember the exact words or hear the other side of the conversation***. As well, he testified he only heard parts of the conversation and was trying not to eavesdrop. Warren Schneider Junior agreed in cross-examination that Mr. Schneider may have said "I did it," and he did not know if the comment was related to the missing woman. This is something you need to bear in mind when considering what weight, if any, can be given to Warren Schneider Junior's evidence about the overheard conversation.

> ***The Crown says the overheard conversation amounts to a confession on the part of Mr. Schneider*** that he caused Ms. Kogawa's death. The defence says his evidence is ambiguous, untrustworthy, and should be given no weight. As I indicated earlier, it is up to you to decide whether you believe Warren Schneider Junior about what he overheard Mr. Schneider say and what Mr. Schneider meant by his words. If you are in any doubt about any of that, you should ignore the evidence. AR Vol I, 99, l.37 – 100, l.15. [Emphasis added.]

<u>On the Elements of Murder and Manslaughter</u>

29. The trial judge instructed the jury that,

> …for murder the *Criminal Code* requires an accused must intend to cause death or intend to cause bodily harm that he knows is likely to cause death and to be reckless whether or not death ensues. Those words are not part of the definition of the offence of manslaughter.
>
> The criminal fault in manslaughter is the commission of an unlawful act which is objectively dangerous in the sense that a reasonable person in the same circumstances as the accused would recognize that the unlawful act would subject another person to the risk of bodily harm. Bodily harm is any hurt or injury that interferes with a person's health or comfort and is more than just brief or of a minor nature.
>
> In the offence of murder there is an addition to the unlawful act, the ingredient of either an intention to cause death or an intention to cause bodily harm that the accused knows is likely to cause death and is reckless as to whether death ensues. These are the legal differences between the offences of second degree murder and manslaughter.
>
> Therefore what distinguishes murder from manslaughter is the mental state or what we describe in criminal law as the intent of the person causing the death. AR Vol I, 95, l.31 – 96, l.10. See also AR Vol IV, 203, paras. 108-111.

30. The trial judge also instructed the jury,

> To prove that Mr. Schneider had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:
>
> 1. that Mr. Schneider meant to cause Ms. Kogawa's death, or,
>
> 2. that Mr. Schneider meant to cause Ms. Kogawa bodily harm that he knew was likely to cause her death and was reckless as to whether her death ensued or not.
>
> In other words you must decide whether the Crown has proved beyond a reasonable doubt either that Mr. Schneider meant to kill Ms. Kogawa or that Mr. Schneider meant to cause Ms. Kogawa bodily harm that he knew was so dangerous and serious it was likely to kill

Ms. Kogawa and proceeded despite his knowledge of that risk. AR Vol I, 106, l.39 – 107, l.7; and Vol IV, 206, paras. 132-133.

**The Jury Question, Discussion and Answer**

31. After deliberating for more than a day, the jury presented the court with the following question and notations:

> Could you please EXPAND ON THE DEFINITION OF BODILY HARM in ~~Part~~ Q 3 (INTENT Required FOR MURDER) versus Bodily HARM AS DESCRIBED IN PARA 109./111 FOR MANSLAUGHTER.
>
> *BODILY HARM
> ANY HURT OR INJURY…..
> INTERFERES HEALTH…
> MORE THAN Just Brief /MINOR.
>
> * CONCEPT OF BODILY HARM
> THAT THE ACCUSED KNOWS IS "LIKELY" TO
> CAUSE DEATH AND RECKLESS…. See AR Vol 4, 215.

32. The trial judge first suggested giving the jury "the expanded definition of 'intent' from *CRIMJI*" and "an expanded definition of manslaughter" because they appeared to be "really caught up in the intent issue." AR Vol III, 326 l.37-46; 327, l.30-32. The Crown agreed but surmised that the jurors,

> *seem* to be caught up that with bodily harm there must be some injury or bruising or something of that nature. That *may* be what they're thinking. And in my submission, rendering someone unconscious constitutes bodily harm. This is a –but *I'm not sure that that is what they're asking on the basis of their question*. AR Vol III, 327, l.34-41.

33. The trial judge said, "*Perhaps – that's why I'm not quite clear on* – it *may* be helpful to them to hear what assault is, that it's force..." The trial judge proposed to "go through the force, and did they consent," but suggested that they "both do the manslaughter in *CRIMJI* and the definition of manslaughter and the definition of murder." AR Vol III, 328, l.10-42.

34. The Crown suggested that it might be "safest" to read the definition of bodily harm in the *Criminal Code*. He submitted that "rendering someone unconscious… constitutes bodily harm" and added, smothering someone "not only constitutes assault, but also constitutes bodily harm": AR Vol III, 328, l.43-47; and 329, l.3-4 and l.10-12.

35. The respondent's trial lawyer initially focused on the jury's request, "please EXPAND ON THE DEFINITION OF BODILY HARM in Question 3?" Question 3 was, "Did Mr. Schneider Have the Intent Required for Murder?": AR Vol III, 329, l.19-24; AR Vol IV, 216. The respondent's trial lawyer drew attention to paragraph 133 of the instructions: AR Vol III, 329, l.28-40; and AR Vol IV, 206, para. 133. He also noted that the jury asked about the "INTENT Required FOR MURDER" yet surmised that the jury was seeking a definition of bodily harm that related to paragraphs 109 and 133 of the instructions: AR Vol III, 329, l.30-32; and AR, Vol IV, 203, para. 109, and 206, para. 133. He proposed that the jury was asking in relation to bodily harm, "is it that he knew it was so dangerous and so serious it was likely to kill her or is it – is it what's described in 109 as any hurt or injury that interferes with a person's health or comfort and is more than just a brief or minor nature." AR Vol III, 330, l.5-12.

36. He emphasized that paragraph 109 of the instructions addressed (in his words) "any hurt or injury that interferes with the person's health or comfort and is more than just brief or of a minor nature," and that paragraph 133 addressed (in his words) "bodily harm he knew was so dangerous and serious it was likely to kill her." AR Vol III, 330, l.23-27. He proposed that the jurors might "see a difference" between these paragraphs but acknowledged that he "could be wrong." So, he wondered if they were really looking for a definition of bodily harm, which was in "s. 2 of the *Code*." The trial judge suggested reading out this definition to the jury and the respondent's trial lawyer added, "whether you're looking at 109 or 133," bodily harm "means the same thing" in both paragraphs: AR Vol III, 330, l.23-30 and l.37-41; 330, l.45 – 331, l.4. The Crown prosecutor asked the trial judge to tell the jury that there was "no difference" between the meanings of bodily harm in paragraphs 109 and 133: AR Vol III, 331, l.22-29. He had already told the jury that s.2 of the *Criminal Code* applied to murder: see AR Vol III, 278, l.38 – 279, l.4.

37. The trial judge called the jury in and instructed them as follows:

> …you have asked us to expand on the definition of "bodily harm" in question 3 of intent required for murder versus bodily harm as described in paragraph 109 and 111. The bodily harm in both is the same. Bodily harm is defined in the *Criminal Code* in the following manner:
>
> > Bodily harm means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

> And for paragraph 109, when bodily harm is mentioned in paragraph 109 and 110, and then in paragraph 134 under question 3, that is the definition of bodily harm. All right? AR Vol III, 332, l.10-26.

38. A juror asked an indiscernible question, so the trial judge repeated the definition of bodily harm in s.2 and said, "whenever the words 'bodily harm' are used in the charge, that is what is being referred to. All right?" AR Vol III, 332, l.33-44.

**The Appellant Inaccurately Attributes Verbatim Testimony to Schneider Jr.**

39. The appellant's recitation of the evidence at paragraph 52 of its factum infers that the phrases in quotations came from Schneider, Jr., but the quotes noted are from Crown Counsel's closing submissions. This is a critical distinction and oversight by the appellant. The actual phrases used by or put to Schneider Jr. are crucial in assessing the use that can be put to the evidence.

## PART II – QUESTIONS IN ISSUE

A. Did the trial judge err in admitting statements made by the respondent during a phone conversation, overheard by the respondent's brother?

B. Did the trial judge adequately address a jury question?

## PART III – ARGUMENT

### A. The trial judge erred in admitting statements made by the respondent during a phone conversation, overheard by the respondent's brother

#### 1. Gist as Inadmissible Opinion or Impression

40. The respondent's trial counsel objected when the Crown prosecutor asked Schneider, Jr. to provide "the gist" of whatever he had overheard the respondent say into the phone. By offering his own impression of what the respondent had said, without even knowing what words the respondent had uttered, Schneider, Jr. was permitted to speculate and provide an inadmissible opinion. The majority decision in the Court of Appeal directly reflects this concern, observing that "this case is more problematic than *Ferris* because, in this case, the witness does not recall the actual words the accused is alleged to have spoken": AR Vol I, 60, para. 177.

41. It is important here, however, to enucleate exactly where the depth of the problem lies, for it is more than a problem of 'context' (e.g. a lack of "micro-context"): see AR Vol I, 68-69, paras. 203 and 205. It is a problem of admissibility.

42. The trial judge and counsel knew from the *voir dire* that in real time, at Polson Park, Schneider, Jr. did not hear the exact words that the respondent said into the phone. This evidence alone places this case outside the established common law rule that permits a witness to recall the gist of a relevant statement that he or she has heard.

43. Traditionally, the common law permits a witness to recall the gist of statements or words that he or she heard, *assuming that he or she heard certain or exact words*. The issue typically arises when a witness has heard certain or exact words but later has an imperfect *recollection* of what he or she originally heard. In limited circumstances, this witness may recall the gist of the words that he or she heard exactly. Conrad, JA observed in *Ferris* (CA) at para. 25 that when the Crown seeks to tender an admission or confession made directly to a Crown witness, the witness:

> generally testifies as to ***the gist*** of the words spoken, notwithstanding the fact that the evidence may not be fully recorded, or that it cannot be repeated word for word. [Emphasis added.]

44. Note the different order of magnitude of uncertainty in the case at bar from the traditional case.

45. In an incomplete recollection case, the Crown witness has either not recorded the words he or she heard or the witness cannot *recall* the words precisely at the time of trial. These are called 'incomplete recollection' cases because they are about *recollection*, not firsthand experience. By contrast, Schneider, Jr. could recall perfectly what he had heard but he admittedly *never heard anything precise or exact in the first instance*. His evidence did not bring him within the scope of the 'incomplete recollection' or 'gist' jurisprudence, yet he was allowed *against a compelling objection* to give his feeling, impression (or *feeling of an impression*)—in effect, his *opinion*—about what the respondent was saying into the phone. In the Oxford Dictionary a feeling is defined as a "belief or opinion." An impression is defined as "An idea, feeling, or opinion about something or someone, especially one formed without conscious thought or on the basis of little "evidence". Oxford Dictionary

46. The Crown had asked Schneider, Jr. in effect to give his opinion that the respondent had made an admission during the phone call to having killed Ms. Kogawa. If, for the sake of argument, Schneider, Jr. had recalled precisely what his brother had said—for example, "I did it" or "I killed her"—then it was for the jury, not Schneider, Jr., to form a conclusion that those words were a material admission. The jury did not need any *help* or a 'second opinion' from Schneider, Jr. in this regard (*but it did need to know the words*). This is precisely what Goepel, JA concluded: AR Vol I, 62, para. 182. So, Schneider, Jr.'s opinion that his brother was taking responsibility for Ms. Kogawa's death was superfluous (i.e. irrelevant) and should have been inadmissible for this reason alone, which is also why Schneider, Jr.'s *understanding* of the "it's true" statement was inadmissible, as noted above. Schneider, Jr.'s opinion about the meaning of the phone call was also purely speculative, which rightly concerned Goepel, JA. He observed that Schneider, Jr. was "*necessarily* speculating" as to the inculpatory meaning of "I did it" or "I killed her": see AR Vol 1, p.66, para. 198 (emphasis added).

47. The admissibility ruling further suffered from the fact that it assumed what was precisely in issue. The trial judge determined that "a jury could conclude the meaning of the uttered words," *but neither the trial judge nor anyone else knows what the uttered words were*: see AR Vol I, 4-5, para. 16. The jury could *not* properly be asked to interpret what certain words meant when neither Schneider, Jr. nor the trial judge could tell them what words they were supposed to interpret. The admissibility ruling was thus palpably illogical.

48. Further, the trial judge's instruction to the jury was contradictory (emphasis added):

> Warren Schneider Junior gave evidence about overhearing a conversation between Mr. Schneider and his wife <u>in which he said</u> "I did it" or "I killed her." Warren Schneider Junior <u>could not remember</u> the exact words or hear the other side of the conversation. AR Vol I, 99, l.37

49. The instruction opened with the statement that Schneider *actually stated* the words in issue but then went on to say, immediately after, that Schneider Jr. could not recall the exact words. This juxtaposition illustrates the misdirection that occurred and the confusion that likely arose in the minds of jury as to how to evaluate the trial judge's instructions.

1.a. Incomplete Recollection Cases are Not Overheard Word Cases

50. A witness who participates in a conversation or who overhears both sides of a conversation may in limited contexts and for limited purposes later testify to the gist of what he or she heard. The imperfect *recollection* of what he or she originally heard, *which comprises the gist*, is a matter of weight for the jury: *Bennight*, *supra* at para. 92. *Ferris* (CA) was not concerned with incomplete recollections so it did not lay down a "rule of inadmissibility (or zero weight)" for them, which is what *R. v. Alcantara*, 2015 ABCA 259, at paras. 137 and 140, actually says. *Ferris* was concerned with relevance, as is the case at bar, so incomplete recollection cases such as *Bennight* ("by contrast"); and *R. v Reierson*, 2010 BCCA 381 ("not analogous"), do not apply: *contra* AF, para. 101.

1.b. Direct vs. Overheard Statements

51. Arguably, the gist rule does not apply to cases where a Crown witness overheard one-side of a conversation in which he or she played *no* part, which is the case at bar. *Ferris* (CA), *aff'd* in *Ferris* (SCC), is the leading case in this common law train of authority. Cases involving incomplete or complete recollections of *overheard* utterances are "quite different" from cases involving incomplete recollections of conversations in which the witness participated ("gist" cases): see AR Vol I, 63-65, paras. 189 and 192; and *Ferris* (CA) at para. 25.

52. Cases that involve overheard statements made by *all* parties to the conversation are also distinguishable from *Ferris* and the case at bar: e.g. *R. v. Buttazzoni*, 2019 ONCA 645 at para. 56 (the listener heard *both* speakers, one of whom testified); *R. v. Yates*, 2011 ABCA 43 (sheriff's van driver listening to conversations *between* prisoners); *Charron c. R.*, 2020 QCCA 1599 (police listening to conversation *between* Charron and Mireault); *Alcantara*, *supra*; and *Reierson*, *supra* (Reierson made statements directly to the driver-listener of a vehicle and to another passenger): see AR Vol I, 65-66, paras. 194-196.

53. One principled distinction between such cases and *Ferris* is that a Crown witness who directly converses with an accused person or who overhears all sides of a conversation "can swear positively to the fact that the essence of the accused's words were the admission." see *Ferris* (CA) at para. 25. See also *R. v. Herntnier*, 2020 MBCA 95 at para. 233; *R. v. Cador*, 2010 ABCA 232 at paras. 3, 4 and 16; *Bennight*; and *R. v. Blackman*, 2008 SCC 37.

54. A defence witness who participates *directly* in a conversation with a third-party may be called to testify to the gist or essence of what that third-party told him or her: see *R. v. Underwood*, 2002 ABCA 310. In *Underwood* Conrad, JA likely saw no need to consider *Ferris* (CA) because the statements recalled by Mr. Underwood's witnesses were made directly to them and tended to exculpate, not incriminate, Mr. Underwood: see *Underwood*, *supra* at para. 24.

55. In the case at bar, Goepel, JA properly applied the distinction "between a third-party overhearing part of one-side of a conversation and the incomplete recollections of a party to the conversation": AR Vol I, 66, at para. 198. The law *should* distinguish between a third-party listener who must necessarily speculate as to the meaning of the words he or she overhears, and a listener who is able to recall what he or was told *directly*, however imperfect his or her recollection might be: AR Vol I, 66 at para. 198.

56. This distinction is implicit in *Blackman*, *supra*. A mother had spoken *directly* to her son by phone before he died. This Court held that she (Ms. Freckleton) could recall what her son (Mr. Ellison) had told her for its truth. He had told her that the black one shot him but he did not identify the black person. So, Ms. Freckleton was factually unable to provide this missing detail of identity, but she could recall everything else that she and her son had talked about, albeit imperfectly. She had an imperfect recollection of a complete conversation in which she directly participated. The gist rule permitted her imperfect recollection of her direct conversation to go to the jury: see *Schneider* (CA) in AR Vol I, 63-64, paras. 188-191; and 66, para. 198. Like the jail guard in *Bennight*, Ms. Freckleton was not asked to *speculate* in court about what she *overheard* someone say: AR Vol I, 66 para. 198. By contrast and by his own admission, Schneider, Jr. could not swear positively that the respondent and the other person on the phone were talking about the missing student, well into the 13-minute phone conversation. He could not provide "reliable evidence" of the essence of whatever he had heard: *contra* AF, para. 19.

57. Moreover, in the case at bar *the jury* was asked *to guess what the person who spoke to the respondent had said or asked*. In Mr. Blackman's case, by contrast, the jury was asked simply to infer *a mere detail* from Ms. Freckleton's fulsome conversation with her son, based on other evidence. In effect, the jury in Mr. Blackman's trial heard *everything* Ms. Freckleton said to her son and *everything* he said to her because Ms. Freckleton recalled this for them, assuming she did so credibly and reliably.

58. Mr. Blackman's case is further distinguishable from *Ferris* and the case at bar because Ms. Freckleton was not asked to recall an admission by the accused. Her dying son had had an eyewitness experience of being shot. Had he survived, he would have been required to describe firsthand the person who shot him. His mother would have been barred from recalling what he had told her for its truth. Her evidence was an item of circumstantial evidence from which inferences tending to implicate Mr. Blackman could be drawn. *It would not have had the distinctively dispositive potential that an admission by an accused person has*.

59. The appellant concedes that the distinction between incomplete recollection ("gist") cases and overheard utterance cases is "valid" but avoids it by repeatedly and incorrectly observing that Schneider, Jr. could testify to *the gist* of what the respondent said into the phone: AF, paras. 2, 7, 9, 11 (the "gist" did not need to be "a complete account of the one-side of the conversation"), 19, 20, 78, 79, 84, 90, 93 ("valid"), 98 and 109.

60. The distinction is *not* overstated. The appellant argues in effect that the distinction should not create or entail a presumption of inadmissibility for isolated statements that are overheard by third parties: AF, paras. 93-95 and para. 109. As a case in point, the Ontario Court of Appeal concluded in *R. v. Curran*, 2004 CanLII 10434, that the Crown could tender a peace officer's recollection of what he had overheard Mr. Curran say into a phone in a mall, *but this was because Mr. Curran did not make any self-incriminatory statements*: see *Curran*, at paras. 16-20. The Crown did not seek to use the overheard statements as admissions to the murder charge Mr. Curran faced, directly or inferentially. No principled concern arose from the use of such evidence that would necessitate it being presumptively inadmissible.

61. The respondent contends, however, that the distinction between overheard utterances and incomplete recollections may properly create a presumption of inadmissibility depending upon the *use* that the Crown wants the trier-of-fact to make of the overheard utterances. *Curran* itself demonstrates that the purpose of the evidence is the animating feature of the analysis, consistent with *R. v. H.(L.), infra*.

**2. When Admissions are Presumptively Inadmissible**

62. A principled concern arises when the Crown seeks to tender an overheard utterance *as an admission* by the accused person. Not all admissions are presumptively admissible. The common

law holds the Crown to certain standards of proof when it wishes to tender words or statements into evidence as admissions, when the reliability of those words or statements is doubtful. This Court has identified at least two situations in which putative admissions are presumptively inadmissible.

63. In *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740 ["*K.G.B.*"], this Court determined that the Crown had to meet certain criteria before it could tender into evidence admissions attributed to a young accused person, K.G.B., by three witnesses, for their truth: see *K.G.B.* at paras. 96, 100-101, 104, and 106. The witnesses had recanted at trial, so the reliability of their out-of-court evidence that K.G.B. had admitted to the homicide in question was a pressing issue. In *R. v. Hart*, 2014 SCC 52, this Court established that Mr. Big admissions are presumptively inadmissible: *Hart*, at para. 85. This Court referred to Mr. Big admissions as "confessions" although they are admissions, which is why they are not subject to voluntariness *voir dires*. The reason for presumptive inadmissibility in both contexts is that the words in question are *circumstantially unreliable as admissions, which was precisely the case in Ferris and is precisely the case at bar*.

2.a. Circumstantially Unreliable Admissions must be Proven on a Civil Standard as a Pre-Condition for Admissibility

64. In *K.G.B.* circumstances, the threshold reliability of an admission attributed out-of-court to an accused person must be established on a balance of probabilities: *K.G.B.* at paras. 114-115. This is the "ordinary" standard required for the admissibility of the statement for its truth, as distinct from the "special" or "higher burden" required for a confession: *K.G.B.* at paras. 114-115. This Court confirmed, "In most cases, as in this case, the party seeking to admit the prior inconsistent statements as substantive evidence will have to establish that these [reliability] requirements have been satisfied on the balance of probabilities": *K.G.B.* at para. 122. Similarly, the Crown must establish on a balance of probabilities that the probative value of a Mr. Big admission outweighs its prejudicial effect, as a precondition for admissibility: *Hart* at para. 85.

65. A trial judge in Newfoundland and Labrador applied the very same logic to a case that is comparable to the case at bar. In *R. v. Parsons*, 2017 NLTD(G) 160, the Crown sought to tender into evidence an audio recording of 11 minutes of an hour-long conversation in which the accused (Mr. Parsons), the complainant, her sisters and her parents, participated. The Crown specifically sought to tender the 11-minute segment "to prove that the Accused made a statement

that he committed a sexual assault and that admission should be admitted for its truth": *Parsons*, para. 21.

66. The recording accurately captured the 11-minutes of conversation it recorded, but the Crown witnesses could not recall in the *voir dire* what was spoken about in the other 49 minutes or so of the hour-long conversation: see *Parsons*, paras. 5-7 and 10. Critically, therefore, the trial judge required the Crown to prove *on a civil standard* that the recording contained with any substantial accuracy or fairness *an admission*: *Parsons*, paras. 10, 11 and 44. The Crown failed in this respect so the recording was ruled inadmissible.

67. In *K.G.B.*, *Hart* and *Parsons*, the common law is concerned about allowing the Crown to tender statements attributed to an accused person *as an admission* when the circumstances surrounding the statements present a *prima facie* or *inherent* cause for concern about their reliability *as an admission*. In all three situations the Crown must prove threshold reliability on a *balance of probabilities* as a precondition for admissibility.

68. The logic of *K.G.B.*, *Hart* and *Parsons* is in direct conformity with this Court's broader observation in *R. v. H.(L.)*, 2008 SCC 49 at para. 70:

> The common law rule relating to the admissibility of evidence is that the party seeking to admit the evidence must establish on the balance of probabilities preliminary matters governing ***the use of that evidence***: *R. v. Evans*, [1993] 3 S.C.R. 653 (S.C.C.), at p. 668, *R. v. Carter*, [1982] 1 S.C.R. 938 (S.C.C.), at pp. 947-48 and *R. v. Arp*, [1998] 3 S.C.R. 339 (S.C.C.), at para. 70. [Emphasis added.]

69. Sopinka, J similarly observed in *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 29:

> The general rule is that preliminary questions which are a condition of admissibility are for the trial judge in his or her capacity as the judge of the law rather than as the trier of fact. See *R. v. B. (K.G.)*, supra, at pp. 783-84. If factual questions must be resolved, a voir dire may be required. The applicable standard of proof in both civil and criminal cases is on a balance of probabilities: *R. v. B. (K.G.)*, supra, at p. 800.

70. The trial judge in the case at bar accepted that the meaning of "I did it" or "I killed her" was *uncertain*. She was not sure that the words were *in fact an admission*. The Crown's desired interpretation, *that the words were in fact an admission*, presented the trial judge with a preliminary factual question that had to be resolved at least on a standard of probabilities, according to *H.(L.)* and *Evans*. Conrad, JA rightly concluded in *Ferris* (CA) that *minimally* the

Crown had to prove on a balance of probabilities that "I killed David" *in fact* meant that Mr. Ferris killed David: *Ferris* (CA) at paras. 38 and 40. In the case at bar the trial judge abdicated her gatekeeper role by not requiring the Crown to prove at least on a civil standard that "I did it" or "I killed her" were *in fact* admissions as a precondition for their admissibility.

71. Authorship of a statement is another preliminary fact that the Crown must establish on a balance of probabilities in a *voir dire*, when the Crown wishes to use the statement as an admission: *Evans* at paras. 15 and 33-37. So again, when the reliability of a statement *as an admission* is in any way doubtful, the Crown must provide some indicia of reliability that the statement is an admission on at least a civil standard as a precondition for admissibility.

2.b. Confessions are also Presumptively Unreliable

72. The voluntariness of a confession must also be established as a precondition for admissibility, on a standard of proof beyond reasonable doubt: *Ward v. R.*, [1979] 2 S.C.R. 30 at 40; *R. v. Rothman*, [1981] 1 S.C.R. 640 at 670, 674-675, and 696; and *R. v. Arp*, [1998] 3 S.C.R. 339 at para. 71. Voluntariness assures the justice system that a confession is reliable: *Arp* at para. 71; and *R. v. Oickle*, 2000 SCC 38 at paras. 32, 47.

2.c. The Dispositive Nature of a Putative Admission or Confession

73. The reliability of a confession must be established beyond a reasonable doubt as a preliminary matter because of a confession's likely dispositive effect. As Cory, J wrote in *Arp* at para. 71:

> …evidence [of a confession] may of itself, if accepted as true, provide conclusive proof of guilt. Since doubt about the statement's voluntariness also casts doubt on its reliability, proof beyond a reasonable doubt is warranted. See *R. v. Ward*, [1979] 2 S.C.R. 30 (S.C.C.). If this were not the rule, the jury would be permitted to rely on evidence which it could accept as extremely cogent even though the inherent reliability of that evidence was in doubt.

74. This Court has the same concern with both confessions and admissions that are of dubious reliability (internally or externally): their *potentially dispositive character*. In *Arp*, Cory, J expressed this Court's wish to preclude wrongful convictions, just as Iacobucci, J emphasized "the criminal justice system's overriding concern not to convict the innocent" in *Oickle* at para. 68, a confessions case. Moldaver, J. emphasized in *Hart*, which addressed Mr. Big admissions,

that "Putting evidence before a jury that is both unreliable and prejudicial invites a miscarriage of justice": *Hart* at para. 77.

75. Conrad, JA applied this logic in *Ferris* (CA), calling it "foolhardy" to attach the label of "reliability" to "I killed David": *Ferris* (CA) at para. 35. And McGrath, J characterized the isolated recording of Mr. Parson's conversations as "potentially seriously misleading" with a "significant potential" to "distort the truth-seeking process if it is put to the jury": *Parsons* at paras. 41 and 43. In *K.G.B.*, Cory, J (concurring in the result) proposed that proof beyond a reasonable doubt was the appropriate admissibility standard for the videotaped statement at issue: *K.G.B.* at para. 188. The isolated nature of the words that the Crown sought to introduce in the case at bar raise similar reliability concerns to all of these situations.

2.d. Evidence that Comprises a Substantial Part of the Crown's Case

76. The Crown must establish contested facts on a criminal standard of proof beyond a reasonable doubt when the facts in dispute comprise a substantial part of the Crown's case. This Court observed in *R. v. White*, [1988] 2 S.C.R. 72, at para. 55:

> In the rare case where evidence of flight or concealment is the only evidence or constitutes substantially all of the evidence of the Crown, it follows that such evidence must be proven beyond a reasonable doubt in order to support a conclusion of guilt, and it would not be error for the trial judge to make this clear to the jury. In addition, where evidence of post-offence conduct is so crucial to the Crown's case that the final determination of guilt necessarily turns upon it, and the evidence is subject to two directly conflicting interpretations, the trial judge would be justified in telling the jury that in choosing which theory to believe with respect to that evidence, they should consider the record as a whole and give the benefit of the doubt to the accused.

77. This observation qualifies the general rule from *R. v. Morin*, [1988] 2 S.C.R. 345, that the Crown is not obliged, post-admissibility, to prove facts in a piecemeal fashion beyond a reasonable doubt. It makes an exception to the rule where the circumstantial evidence in question could realistically determine the outcome of the case ("constitutes substantially all of the evidence" and "is so crucial to the Crown's case").

78. Such logic and concerns are shared by the confessions rule and the admissibility requirements for K.G.B. statements and Mr. Big admissions because of the distinctively dispositive nature of this type of evidence. When the Crown seeks to use certain words or

statements as conclusive or substantially conclusive proof of its allegations—i.e. as material admissions—then the Crown should be required to establish in a *voir dire* that the statements or words are *in fact* an admission on a criminal standard or, alternatively, minimally on a civil standard, especially when the words or statements might otherwise be *logically irrelevant*. This is how the majority decision in *Ferris* (CA) approached the admissibility of "I killed David." Conrad, JA wrote at paragraph 40:

> ***It is essential that it be found as a fact that when the accused said the words "I killed David", he meant exactly that—that he killed David. Those words are a significant part of the Crown's case.*** I am of the view that it is essential that ***the inculpatory nature of those words be proven beyond a reasonable doubt before that fact can be given any weight***. However, having said that, it is my view no jury, acting reasonably, could come to that conclusion on the basis of the evidence here *on the balance of probabilities*, much less on the basis of proof beyond a reasonable doubt. [Emphasis added.]

Conrad JA was stating that, if the jury could not conclude on a balance of probabilities that the statement meant that he killed David, it was inadmissible.

2.e. An 'Air of Reality' Standard Does Not Apply to Doubtful 'Admissions'

79. Thus, the appellant's contention that the trial judge in the case at bar did not have to be satisfied "beyond a reasonable doubt" in the *voir dire* that whatever Schneider, Jr. overheard was an admission is contrary to *Ferris* (CA) and the weight of this Court's jurisprudence: see AF, para. 74. Depending upon what the contended evidence is and the use to which the Crown wishes to put it, the criminal standard of proof beyond a reasonable doubt can apply at the *voir dire* stage.

80. The trial judge in the case at bar incorrectly held the Crown to an air of reality standard from *Ferris* (CA) at para. 31 that Conrad, JA clearly rejected: *Ferris* (CA) at paras. 37, 38 and 40. The dissenting judge in the case at bar, DeWitt-Van Oosten, JA, did the same thing. She wrote:

> To meet its burden on logical relevance, the Crown was required to show that those words were capable of interpretation as an admission. In assessing whether the Crown met that burden, the question for the judge to decide was whether there was "some evidence upon which [the] jury could conclude the meaning of the uttered words": *Alcantara* at paras. 138–139. AR Vol I, 27-28, para. 72.

81. The appellant also cites *Alcantara* for this incorrect proposition of law: AF, para. 74. *Alcantara* incorrectly attributes this ratio to *Ferris* (CA). The ratio of *Ferris* (CA) was provided above: *Ferris* (CA) at para. 40. It is that the Crown must prove at least on a balance of probabilities—and arguably beyond a reasonable doubt—that Mr. Ferris meant "exactly" that he killed David for "I killed David" to be admissible as an admission, *because these three words were a significant part of or were potentially dispositive of the Crown's case.* This Court implicitly accepted this logic in *Ferris* (SCC).

82. By direct implication, a standard of 'some evidence' is too low for the admissibility of whatever was heard in the case at bar. The appellant incorrectly submits that this standard applied, and DeWitt-Van Oosten, JA was wrong to apply it: see AR Vol I, 30, para. 79; and AF, paras. 97-9.

83. Moreover, the threshold test is not some evidence that "meaning was possible" or that "the jury could give meaning" to what Warren Schneider, Jr. overheard: see AF, paras. 11 and 13. Even if there was "some evidence upon which the jury could interpret what the respondent was saying" into the phone (see AF, para. 71), such evidence would not make the overheard words admissible. The logical relevance of whatever the respondent said into the phone turned upon the *only* meaning that the Crown urged the jury to reach, that the words were an admission.

84. The respondent urges this Court to correct this misconstruction of *Ferris* that would substitute well-established civil and criminal standards of proof for ambiguous statements tendered as admissions with an air of reality test intended for defences. There are no first principles of evidence, including the inclusionary principle, that permit words to go before a trier of fact for their truth or as an admission just because they are *capable of meaning*. Any word is capable of meaning. "Red car" or "carrot soup" are not admissible for their truth in a criminal trial just because someone can speculate as to their meaning. Similarly, there is no "general proposition" of law in Canada that says utterances are admissible if there is "sufficient information" about them and their circumstances to understand their "context": see AF, para. 73. "Sufficient" information or context must minimally meet a civil standard that the utterances are admissions.

2.f. Logical and Legal Relevance

85. Conrad, JA reasoned that "I killed David" was inadmissible under the admissions exception to the hearsay rule because "it cannot be found to be an admission", by which she clearly meant that "I killed David" was not *likely, firmly* or *certainly* an admission: *Ferris* (CA) at para. 34. This is precisely what she meant when she earlier wrote at para. 31:

> Certainly, it would be impossible to conclude [that "I killed David"] constituted an admission made by the accused. Therefore the words are not logically probative of a fact in issue, are not relevant, are inadmissible and should not have been left with the jury.

86. Goepel, JA followed this exact logic—and *correctly so*—in the case at bar: AR Vol I, 159, para. 173. Any juror could *speculate* that "I killed David" was an admission, but it is precisely this danger that Conrad, JA, Goepel, JA, and this Court in *Ferris* (SCC) were not prepared to countenance.

87. When words uttered are *undoubtedly* material admissions—i.e. when they are *in fact* admissions—they are logically relevant and have 100% probative value, but any reasonable doubt about them makes them logically irrelevant. *There is no grey area*. As non-admissions they have 0% probative value when the Crown wishes to tender them exclusively as admissions, as in the case at bar. They are not like the circumstantial evidence in *Blackman*. As the Ontario Court of Appeal put it in *R. v. Hunter*, [2001] O.J. No. 2388, the "only possible relevance" of the utterance overheard in this case – "I had a gun but I didn't point it" – "is if it could be found to constitute an admission by the appellant that he had a gun": *Hunter* at para. 20, See also AR Vol I, 67, paras. 200-201. Similarly, having ruled in Mr. Parson's case that the Crown did not establish that the 11-minute segment was an admission, McGrath, J immediately concluded that it had "no probative value": *Parsons* at para. 44. The trial judge must always exclude logically irrelevant evidence.

88. In the case at bar, if the respondent had in fact meant that he bought his son a game or had sent him a letter when he uttered "I did it" into the phone, his words would have in fact comprised part of an "exculpatory" sentence (see AR Vol I, 62-63, para. 185), and the Crown would never seek to tender them into evidence. The appellant does not want this Court to conclude that "I did it" *could reasonably mean* that the respondent had sent his son a game or an innocuous letter: see AF, paras. 11 and 13; and *Ferris* (CA) at para. 178. The appellant calls the

'sent game' possibility a "stretch" that was "conjured" by Goepel, JA in this case: see AF, para. 96.

89. Similarly, the Crown would have never asked the jury to conclude that "I killed her" was *in fact* part of a sentence in which the respondent had said, *"There is no way I killed her," or "My brother might think I killed her but he is totally wrong about that."* Thus, for the appellant to propose that the jury was being asked only to determine the *meaning* of the words is to mischaracterize what is really going on here. The trial judge's admissibility ruling, Justice DeWitt-Van Oosten's dissenting decision in the court below, and the appellant's position are all rooted in the *false premise* that the admissibility of whatever Warren Schneider, Jr. overheard depended upon whether the words were capable of *any* meaning. Such a standard of admissibility is far too low.

2.g. The Principled Approach to the Overheard Words

90. This Court decided *Ferris* (SCC) on principles that are easily distilled from this Court's cumulative jurisprudence addressed to confessions and admissions. Words that cannot be reliably construed as a voluntary statement against penal interest are presumptively inadmissible for their truth (as confessions or admissions) *in principle* because their potential prejudicial effect will *necessarily* outweigh their probative value. This is so because of the uniquely dispositive effect of confessions and admissions.

91. The Ontario Court of Appeal best articulated "the principles derived from Ferris" in *Hunter*, *supra* at para. 21. When a trier-of-fact must "guess at the words that came before and after" words that the Crown seeks to tender *as an admission*, the probative value of the words the Crown wishes to tender *must be* "tenuous" and "the substantial prejudicial effect is obvious." The prejudicial effect is *obvious* precisely because of the dispositive nature of a voluntary confession or an admission. This is why Conrad, JA concluded in *Ferris* (CA) at para. 37 that the probative value of the isolated words, "I killed David," could *never* be greater than its prejudicial effect. Different gatekeepers could not properly reach different conclusions.

92. The respondent disagrees that, because the respondent had discussed the missing student on the phone before Warren Schneider, Jr. overheard "I did it" or "I killed her", these words are more likely to be a positive admission to murder than Mr. Ferris' words, "I killed David": see

AR Vol I, 31, paras. 80-81; and AF, para. 96. The respondent's estranged spouse might well have asked, "If you know about the missing student, why haven't you said anything to the police?" and the respondent might well have replied, "*Because they would think* I killed her" or "*They would think* I did it": see AR Vol I, 61, para. 179. Warren Schneider, Jr. had ***no idea*** (in the *voir dire*) what was being said to the respondent and ***no idea*** (in front of the jury) whether "I did it" was related to the missing woman or was in the middle, the start, or the end of a sentence. The respondent might have stated, "*My brother probably thinks* I did it, *but I didn't*," or "*My brother believes* I killed her, *but he's wrong*." These possibilities are entirely reasonable if the respondent had already told Warren Schneider, Jr. that he did something bad: see AF, paras. 3, 5, and 96. The respondent could well have been referring to the indignity offence to which he later pleaded guilty. Thus, Goepel, JA correctly reasoned that the fact that the police had not yet been involved when the respondent spoke on the phone is immaterial: see AR Vol I, 62-63, paras. 184-185.

93. *Hunter*, *Ferris*, *O'Reilly*, and the majority decision in the Court of Appeal in this case determined that overheard fragments should be excluded out of a concern that the Crown wanted the trier-of-fact to construe the fragments *as admissions*, when this construction was speculative (the "highly speculative" meaning of "I had a gun, but I didn't point it" in *Hunter*) or at least not self-evident: see AR Vol I, 66-68, paras. 199-201. These decisions imply that the potential prejudicial effect of inviting the trier-of-fact to construe overheard, isolated words, as admissions *necessarily* outweighs the probative value of the words: see also *Parsons* at para. 44. So, whether the admissibility problem is construed as one of logical relevance or legal relevance when overheard, isolated words are tendered as statements-against-penal-interest, the distinction makes no practical difference. *To be clear, the respondent submits that if the evidence from Schneider, Jr. was correctly admitted as being logically relevant, it was alternatively inadmissible because its probative value could not have outweighed its potentially prejudicial effect.*

94. Moreover, when a properly admitted item of evidence is potentially determinative *and is subject to competing interpretations* or *theories*, then a trial judge may properly instruct jurors that, after they have considered the evidence as a whole, *they must give the benefit of the doubt to the accused*: *White* at para. 55. *This instruction was never given in the case at bar* even though

there was two contrasting interpretations and theories of what the evidence meant: see AF, paras. 106-108.

2.h. *Arp* and Similar Fact Cases are Anomalous but Instructive

95. Cory, J observed in *Arp* at para. 38 that to be logically relevant, "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue" and that there is "no minimum probative value required for evidence to be relevant": see AR Vol I, 27, para. 71 (emphasis in original). This Court reproduced this observation in *Blackman*, *supra* at para. 30, but Mr. Blackman's case is meaningfully distinguishable from the case at bar, as was demonstrated above.

96. Logical relevance (see *R. v. Abbey*, 2009 ONCA 624 at paras. 75, 82 and 84-85) does not bar a piece of evidence from entering into proceedings just because it does not contribute *much* to the proof of the fact in issue. The low threshold for logical relevance is entirely consistent with the inclusionary principle, but the latter has exceptions based on law and policy: see *R. v. Corbett*, [1988] 1 S.C.R. 670 at para. 51. This factum has identified particular laws and rationales that have led this Court to make exceptions to the inclusionary rule for admissions and confessions in certain circumstances.

97. Similar fact evidence presents an "exception to the exception" of the inclusionary principle: see *Arp*, *supra* at para. 38. It is *inherently* prejudicial and its logical relevance on a case-by-case basis can be suspect, so trial judges must engage in a determination of legal relevance on a case-by-case basis. As gatekeepers, trial judges must weigh the probative value of the similar fact evidence against the prejudicial effect of admitting it.

98. What is relevant to similar fact evidence jurisprudence here is that it provides yet another type of evidence for which a probabilistic degree of proof is required for admissibility. In *R. v. Simpson*, 1977 CanLII 1142 (ON CA), Martin JA wrote that it is for

> the Judge to decide as a question of law whether the evidence on each count was admissible on the other. His decision in that respect, in the circumstances, depended upon his being satisfied that the similarities in the offences were such as to be capable of supporting a reasonable inference that both offences were likely committed by one man.

99. There are two symbiotically related levels of preliminary proof required by the Crown before similar fact evidence is admissible. One level requires objective *possibility* ("capable of supporting a reasonable inference") and the other level requires *probability* ("likely committed by one man"), *but the objective possibility is wedded to the probability*. Cory J. wrote in *Arp*, *supra* at para. 65:

> if the trial judge is satisfied that it is likely that the same person committed both the similar act and the act in question then the probative value of these similar acts will outweigh its prejudicial effect and the evidence will be admitted.

100. Thus, a civil standard of proof is engaged ("likely that the same person committed" both acts) *to a limited extent* ("capable of supporting a reasonable inference") as a preliminary matter of the admissibility of similar fact evidence. This preliminary burden on the Crown is *compounded* by a *further* showing of some evidence that the similar fact evidence the Crown wishes to tender has a 'link' to the accused person: *Arp* at paras. 54 and 56. This 'some evidence' requirement is simply tacked on to the basic requirement of proving the wedded objective possibility / probability issues, if the evidence in question is to be legally relevant. It was never intended to undercut the well-established rule that the standard of proof in cases of preliminary determinations of fact (i.e. at the admissibility stage) is minimally a balance of probabilities. Indeed, in a typical similar fact evidence case, the similar fact evidence is not doubtful or uncertain, like the utterances that Schneider, Jr. overheard in the case at bar.

### 3. Conclusion: The trial judge's Ruling was not Correct and is not entitled to Deference

101. The trial judge's ruling was incorrect. It applied an incorrect standard of proof ("some evidence"); it applied an incorrect test (could the jury conclude the meaning of uttered words?); it incorrectly concluded that Warren Schneider, Jr. testified to "the gist" of the respondent's conversation, and it mistakenly applied the common law of "incomplete" recollections to a complete recollection: see AR, Vol I, 5, para. 19.

102. The trial judge's decision was also unreasonable: *contra* AR Vol I, 35, para. 95; and AF, paras. 104-105. The trial judge unreasonably weighed the probative value of the overheard utterances against their prejudicial effect, as explained above. The utterances could not have

probative value unless the jurors speculated that they were *admissions*. DeWitt-Van Oosten, JA incorrectly relied upon *Buttazzoni*, wherein the listener heard *both* speakers, one of whom testified: AR Vol I, 36, para. 95. The trial judge did not sufficiently consider the "frailties of the evidence": see AR Vol I, 36, para. 95. The frailties were not sufficiently minor to overcome the Crown's need to prove that "I did it" or "I killed her" *were in fact heard* and were probably or certainly admissions. They could not make the probative value of Schneider, Jr.'s evidence greater than its potentially prejudicial effect. They could not make it legally relevant.

**B. Did the trial judge inadequately address a jury question?**

**1. The Jury Question and Response**

103. The jury's question demonstrated that the jury was struggling in assessing whether the respondent was guilty of manslaughter as opposed to murder. The trial judge's approach did not assist with this struggle.

104. Jury questions are highly significant to the proper resolution of a trial: *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 530. Answers to jury questions "carry influence far exceeding instructions given in the main charge." *R. v. Naglik*, [1993] 3 S.C.R. 122 at 139. Trial judges must give "correct and comprehensive" responses to jury question – *no less will suffice* – regardless of "how exemplary the original charge may have been": *S. (W.D.)*, *supra* at 530; see also *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 759-760.

105. The Court of Appeal in this case agreed that a trial judge "has a duty to clarify a question from the jury where there is any ambiguity or room for doubt as to the meaning of the question", but it took the view that the jury's question was not ambiguous: AR Vol I, 44-45, paras. 122 and 124; and 54, para. 151. The respondent disagrees. The court reached this conclusion by oversimplifying the question itself and the degree of confusion about the question's meaning is manifest on the record.

1.a. Oversimplifying the Question

106. The Court of Appeal concluded that the jury was "plainly asking" whether the definition of bodily harm is different for murder than for manslaughter: AR Vol I, 45, para. 124. The respondent disagrees.

107. If this question was *plainly* and exclusively about bodily harm, the trial judge would not have first suggested giving the jury "the expanded definition of ***'intent'*** from *CRIMJI*", which "*may* respond to this question": AR Vol III, 326 l.37-40 (emphases added). This suggestion shows from the very outset that, to the trial judge's mind, the question was *not plainly* about bodily harm. When the trial judge next considered giving the jury an expanded definition of manslaughter and assault, it is even more self-evident that the question was not plainly about bodily harm. *The question is ambiguous*. When Crown counsel surmised, "*I think* the expanded definition from CRIMJI would be helpful" (AR Vol III, 327, l.24-25 (emphasis added)), he too was *unsure* about the question's meaning. It was *not plainly* about bodily harm. When the trial judge next surmised (it "seems") that they're "really caught up in the intent issue" (AR Vol III, 327, l.30-32), the trial judge clearly construed the question as anything but a question about bodily harm. She remained *unsure*. The question is ambiguous.

108. One could continue this demonstration at length. The Crown flatly conceded that the jury's question *was ambiguous* when he suggested that the jury *seemed* "to be caught up that with bodily harm there must be some injury or bruising or something of that nature", when he proposed that "rendering someone unconscious constitutes bodily harm", and when he added, "*I'm not sure that that is what they're asking…*": AR Vol III, 327, l.33-41 (emphases added).

109. The guesswork continued. The trial judge wondered if the jury should be told "what assault is". The trial judge was unclear on this, so the question is *not plainly* about bodily harm. Befuddled, the trial judge suggested giving the jury a definition of "force", but the Crown suggested that it *may* be "safest" for her to read the definition of bodily harm in the *Criminal Code*: AR Vol III, 328, l.10-12, l.23-36, and l.43-47. These suggestions reflected *more uncertainty and speculation*. The Crown next speculated that the jury was struggling with bodily harm as it related to manslaughter and murder ("that *seems* to be the struggle they're having"): AR Vol III, 329, l.16-17 (emphasis added). *The question remains ambiguous*.

110. The respondent's lawyer interpreted the jury question or "the struggle" it reflected "somewhat differently", further demonstrating that the question was open to more interpretations yet: AR Vol III, 329, l.19-20. His personal "read" was that the jury was asking about bodily harm as it related to paragraphs 109 (manslaughter) and 133 (murder) of the instructions: AR Vol III, 330, l.5-12; and AR Vol IV (EXH), 203, para. 109, and 206, para. 133. He pointed out that paragraph 109 referred to "any hurt or injury that interferes with the person's health or comfort and is more than just brief or of a minor nature" and paragraph 133 referred to "bodily harm he knew was so dangerous and serious it was likely to kill her": AR Vol III, 330, l.23-27.

111. The trial judge then suggested that the jury had both intent and bodily harm in mind ("their issue"), but the respondent's lawyer disagreed: AR Vol III, 330, l.13-17. By now the speculatory nature of the different constructions of the jury question is irrefutable. After proposing that the jury was asking *only* for "an *expanded* definition of bodily harm", the respondent's trial lawyer changed his mind and speculated ("it may be") that the jury was "really" looking for the definition of bodily harm in section 2 of the *Criminal Code*: AR Vol III, 330, l.19-20 and l.23-30. "I could be wrong" about the jury "wishing to have the definition of bodily harm explained to them", he conceded: AR Vol III, 330, l.37-41. By now it is self-evident that the Court of Appeal wrongly concluded that the jury question was unambiguous and plainly about bodily harm.

1.b. Shirking the Duty to Clarify an Ambiguous Question

112. The Court of Appeal accepted that the trial judge and counsel "discuss[ed] possible interpretations of the question": AR Vol I, 45, para. 124. This is to say precisely that the question was ambiguous and that there was 'room for doubt' about its meaning: see *R. v. Shannon*, 2011 BCCA 270 at para. 51. "Ambiguous" means that something is open to possible interpretations. So, the trial judge was obliged to clarify the question: AR Vol I, 44-45, para. 122.

113. However, the court reasoned that the question was "understandable" because the trial judge and counsel reached a consensus on what it meant: AR Vol I, 45, para. 124. This is untenable. The trial judge and counsel might have *misunderstood* the jury's question. Indeed, the Court of Appeal concluded *without basis* that the trial judge and counsel reached a "likely" interpretation of the jury question: AR Vol I, 45, para. 124. It acknowledged thereby that the trial judge and counsel's understanding stood a 49% chance of being incorrect. The trial judge could

not have answered such an uncertain jury question clearly and correctly: see *Shannon*, para. 53; and *R. v. M.R.H.*, 2019 BCCA 39, at para. 42, aff'd [2019] S.C.J. No. 46.

114. The trial judge improperly attempted "a short form answer to a problem that is obviously presenting difficulties": see *R. v. Desveaux* (1986), 51 C.R. (3d) 173 at 179, 26 C.C.C. (3d) 88 (Ont. C.A.) at 93; *W.(D.)*, *supra* at para 19; and *R. v. Cudjoe*, 2009 ONCA 543 at para. 134. The discussion with counsel was unduly hurried. The Crown was admittedly thinking on his feet: AR Vol III, 1552, l.33-34.

1.c. The Answer to the Jury Question was Unresponsive

115. The Court of Appeal acknowledged that the words "dangerous" and "serious" that qualify bodily harm in the original instruction on murder were included "***to assist***" the jury "on the *subjective foreseeability of death arising from the bodily harm alleged to have been inflicted*": AR Vol I, 50, para. 139 (emphasis on "to assist" added; remaining emphasis in original). So, if the jury was unclear about this critical *mens rea* element ("KNOWS is "LIKELY" to cause death"), it behooved the trial judge *to assist* the jury by reiterating that the level of bodily harm at issue had to be "dangerous" and "serious". The trial judge did not *assist* the jury by reiterating her instruction from paragraph 133 on murder.

116. The Court of Appeal accepts that the mental component of s.229(a)(ii) is made *clearer* to a jury when the jury is told that the degree of bodily harm inflicted must be dangerous and serious: AR Vol I, 50, para. 139. It reasoned:

> Describing that harm as "grave", "dangerous" or "serious" alerts the jurors to the need to consider the nature of the unlawful act alleged to have been committed when they decide whether the Crown has proved, beyond a reasonable doubt, foreseeability of death.
>
> AR Vol I, 50, para. 140.

So again, if jurors need to be *alerted to* the nature of the bodily harm contemplated by s.229(a)(ii), then trial judge should have so altered them in her re-charge. Indeed, the Court of Appeal's own reasoning demonstrably undermines or is palpably at odds with its own conclusion that the trial judge did not need to re-instruct the jury that the level of bodily harm contemplated by s.229(a)(ii) was serious, dangerous or grave.

117. The trial judge should have *assisted* and *alerted* the jury about the "grave", "dangerous" or "serious" character of bodily harm required by s.229(a)(ii), consistent with the Crown's obligation as stated in *R. v. Nygaard*, [1989] 2 S.C.R. 1074 at para. 29, or later in *R. v. Cooper*, [1993] 1 S.C.R. 146 at para. 32: respectively, the "essential element" of s.229(a)(ii) [then s.212(a)(ii)] is an intention to cause bodily harm of "*such a grave and serious nature* that the accused knew that it was likely to result in the death of the victim", or that "the Crown must demonstrate that the accused intended to cause bodily harm that he knew was so dangerous and serious that it was likely to result in the death of a victim." Instead, the trial judge told the jury a day after her original charge, when the original charge had surely "dimmed in the jury's memory", that the s.2 definition applied to both offences: see *S. (W.D.)* at paras. 18 and 50. The result was a miscarriage of justice. The original 'helpful' instruction was undermined by the unhelpful re-charge. It is of no moment that counsel recommended the s.2 definition. The trial judge, not the lawyers, was responsible for getting the re-charge right.

118. When the charge as a whole is evaluated, the recharge on bodily harm met every test for misdirection established in *R. v. M.R.H.* (CA), *supra* at para. 42; and *R. v. Brydon*, [1995] 4 S.C.R. 253, 1995 CarswellBC at para. 19. See also *R. v. Araya*, 2015 SCC 11, [2015] 1 SCR 581 at para. 39. There is a reasonable possibility that the trial judge's re-charge misled the jury on a critical issue: *M.R.H.* (CA), at para. 42.

1.d. What is the degree of bodily harm required by s.229(a)(ii)?

119. The meaning of "bodily harm" *as it relates to the mental component of s.229(a)(ii)* is not obvious from the black-letter of s.229(a)(ii). Paragraph 229(a)(ii) conjoins the formalistic distinction between the *mens rea* and the *actus reus* of the offence. The Court of Appeal maintains that the element of bodily harm is less significant than mental element in s.229(a)(ii) and that, as a matter *of law*, the trier-of-fact's "focus" under s.229(a)(ii) is on "what the accused *foresaw* at the time the act was committed, not the gradation of the bodily harm at issue": AR Vol I, 50, para. 141. The respondent disagrees that the analysis can be bifurcated as such.

120. As a matter of common sense, a sane person will only know that death is likely to result from the infliction of grave, dangerous or serious bodily harm. A sane assailant *knows* that it takes a lot more violence or bodily harm than slashing an arm, breaking a leg, or cutting off a finger, to make death *likely*, so a jury could never properly conclude that a sane person *knew* that

inflicting such injuries was *likely* to cause death. For this reason, the "focus" under s.229(a)(ii) *must equally be* on "the gradation of the bodily harm at issue", contrary to the view of the court below. Only "grave", "dangerous" or "serious" levels of bodily harm are consistent with subjective knowledge that death is likely, unless the sanity of the accused person is at issue. The degree of bodily harm MUST be likely to cause death. This is why jurors need to be *alerted* to these levels in instructions on s.229(a)(ii).

121. By construing the degree of bodily harm required for s.229(a)(ii) in this way, interpretive absurdity is avoided, which is an objective consistent with the modern rule of statutory interpretation. A sane person who inflicts only *minor* bodily harm of the low range contemplated by s.2 of the *Criminal Code* (i.e. anything that is more than merely trivial or transitory) will never *believe* and certainly not *know* that death will *likely* result from such minor harm. Therefore, to propose that s.229(a)(ii) has these low range types of bodily harm in mind for a murder conviction is an absurd construction of parliamentary intent. The 'more than merely trivial and transitory' definition of bodily harm that applies to manslaughter does not intelligently apply to s.229(a)(ii).

122. This Court made this point in *R. v. Miljevic*, 2011 SCC 8 ("*Miljevic* (SCC)"). Mr. Mijevic's trial lawyer had conceded that Mr. Miljevic committed manslaughter so the trial judge instructed the jury exclusively on second degree murder: see *R. v. Miljevic*, 2010 ABCA 115 ["*Miljevic* (CA)"] at para. 39. However, the jury asked about the difference between murder and manslaughter, and for a specific definition of manslaughter: see *Miljevic* (CA), at para. 81. The trial judge and counsel were perplexed that the jury would want to know about manslaughter when Mr. Miljevic had conceded that he committed that offence. Mr. Miljevic complained on appeal that the trial judge did not instruct the jury on manslaughter: *Miljevic* (CA) at para. 48.

123. At the Alberta Court of Appeal, Mr. Miljevic's lawyer argued that the source of the jury's confusion must have been the fact that the trial judge instructed the jury as follows: 'By "bodily harm," I mean any hurt or injury that interferes with health or comfort, and it has to be more than something that is just brief or fleeting or minor in nature.' See *Miljevic* (CA) at para. 40 and paras. 85-86. *This is the s.2 definition of bodily harm that the trial judge gave in her re-charge in the case at bar*.

124. O'Brien, JA, dissenting, but not on this point, disagreed with Mr. Miljevic that the (above) "brief passage" on the bodily harm element required for s.229(a)(ii) was the source of the jury's question, because the trial judge had made other references to the element of bodily harm element associated with murder in his instructions: see *Miljevic* (CA), *supra* at para. 87. Côté and McDonald, JJA *categorically agreed* with O'Brien, JA that Mr. Miljevic's lawyer, in their language, had simply "yank[ed] one sentence totally out of its context as a definition of one thing only" and had argued *in this respect* that bodily harm was 'misdefined': see *Miljevic* (CA), at para. 1. They did not mean thereby that the s.2 definition of "bodily harm" was the correct definition for s.229(a)(ii). They simply agreed with O'Brien, JA that Mr. Miljevic's lawyer had improperly isolated the s.2 definition of bodily harm from the overall instructions and that the s.2 definition was not the source of the jury's question. The court below misinterprets the majority reasoning in *Miljevic* (CA): see AR Vol I, 48, para. 135.

125. Thus, Mr. Miljevic's appeal in Alberta turned *only* upon the trial judge's decision not to instruct the jury about manslaughter. "*That is the topic on which we must differ from our colleague O'Brien J.A.*", wrote Côté and McDonald, JJA: *Miljevic* (CA), at para. 2 (emphasis added). It is critical to observe, therefore, that O'Brien, JA, made the following comment about the s.2 definition of bodily harm. He wrote at para. 86 (emphasis added):

> *This quality of bodily harm relates to the offence of manslaughter, not murder*, and may have caused some confusion for the jury and caused the jury members to diminish the intent required to establish murder. This is especially so as this erroneous part was repeated to the jury in response to its question.

126. O'Brien, JA makes clear here that the s.2 definition does not apply to murder. Because the majority decision in *Miljevic* (CA) agreed with O'Brien, JA on this point—on "most" grounds except the trial judge's failure to instruct the jury on manslaughter—it implicitly agreed with O'Brien, JA that the s.2 definition of bodily harm "diminish[es] the intent required to establish murder": *Miljevic* (CA) at para. 86.

127. At this Court, Cromwell, J (for the majority) did not address the issue of the level of bodily harm required for murder. He agreed with the reasons of Côté and McDonald, JJA at paras. 21-26 of *Miljevic* (CA), which were addressed *exclusively* to how the trial judge responded to the jury question about manslaughter, and he dismissed the appeal solely on this basis: see

*Miljevic* (SCC) at para. 1. Fish, J, dissenting exclusively on this point, nonetheless noted as a matter of concern at para. 22, that:

> the [trial] judge blurred the lines between murder and manslaughter by defining the bodily harm required for murder under s. 229(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, as "any hurt or injury that interferes with health or comfort, and it has to be more than something that is just brief or fleeting or minor in nature".

128. This observation demonstrates that the trial judge in the case at bar incorrectly re-charged the jury that section 2 of the *Criminal Code* provides the appropriate definition of "bodily harm" for s.299(a)(ii). Fish, J's observation "should be accepted as authoritative" as it was "obviously intended for guidance": see *R. v. Henry*, 2005 SCC 76 at para. 57. It promotes certainty in this critical area of homicide law: see *Henry* at para. 57. It is entirely consistent with *Nygaard*, *supra* at para. 29, and *Cooper*, *supra*, at para. 32 (reproduced above), so there is no "cogent reason" not to accept it as good law: see *R. v. Prokofiew*, 2010 ONCA 423 at para. 21.

129. In *Cooper*, *supra* at para. 4, Lamer, CJC carefully suggested that s.2 of the *Criminal Code* provides "some general guidance" about the meaning of bodily harm in s.229(a)(ii), to make the point that s.2 is not the exclusive or authoritative definition of bodily harm in s.229(a)(ii). A stronger statement would lead to the kind of interpretive absurdity demonstrated above and would be inconsistent with *Nygaard*, *supra*, and *Cooper*, *supra*, at para. 32.

130. Therefore, the court below incorrectly concluded that qualifications of bodily harm such as "grave," "serious" and "dangerous" are not intended as "a legal requirement for factual proof of a higher degree of bodily harm" or a "more serious type of bodily harm" than is required for manslaughter": see AR Vol I, 50, para. 139. *This is their exact purpose*. The Ontario Court of Appeal referred to the "*serious type of bodily harm* contemplated by s.229(a)(ii) of the *Code*", implicitly to distinguish it from the lesser degree of harm contemplated by s.2 of the *Criminal Code*: see *R. v. Monckton*, 2017 ONCA 450, para. 74 (emphasis added).

**PART IV – COSTS**

131. The respondent does not seek costs and asks that no costs be awarded against him.

## PART V – ORDER SOUGHT

132. The respondent seeks an order dismissing the appeal and upholding the order of the Court of Appeal.

## PART VI – SUBMISSIONS ON CONFIDENTIAL INFORMATION

133. There are no orders, bans, classifications of information in the file as confidential under legislation or restrictions on public access to information in the file that could have an impact on the reasons of this Court, if any, in this appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Christopher J. Nowlin
Thomas Arbogast
Counsel for the Respondent

Dated this 7th day of July, 2021
Vancouver, British Columbia.

**PART VII – TABLE OF AUTHORITIES**