SCC 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)

FACTUM OF THE APPELLANT IN REPLY

(Filed Pursuant to the Court's Order of September 10, 2021)

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INDEX

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The appellant files this factum in reply to the jury question issue the respondent has raised in his factum on appeal.[1] In the Court below, there was no dissent on this issue. The Court unanimously found that (1) the jury's question (upon which the trial judge and counsel quickly reached consensus) did not require clarification; and (2) the response (which the defence had advocated for and all agreed on) was correct. This Court should reach the same conclusions.

A. OVERVIEW OF APPELLANT'S ARGUMENTS IN REPLY

2. During deliberations, the jury asked the trial judge to "expand on the definition of bodily harm […] (intent required for murder) *versus* bodily harm […] for manslaughter"[2]. The judge and counsel agreed on what the jury was asking, and the judge gave the jury the answer the defence had advocated for (and that all involved agreed was responsive and correct). The judge also told the jury they could return with additional questions if they had any but, ultimately, they did not.

3. Despite this, the respondent subsequently argued on appeal, and argues again now, that the question was so ambiguous that the judge ought to have clarified it with the jury. The Court below unanimously and correctly concluded that there was **no ambiguity to resolve with the question**. The record shows that the defence, Crown and trial judge rapidly reached a consensus. The respondent's efforts to obscure that consensus by selective reliance on decontextualized portions of the transcript should not succeed.

4. Contrary to his position at trial, the respondent also now argues that the trial judge's answer to the jury's question was incorrect. He is mistaken. The judge, asked to "expand on the definition of bodily harm", gave the jury the definition set out in s. 2 of the *Criminal Code* and correctly instructed the jury (as the defence had encouraged her to do) that the term "bodily harm" had the same meaning in both contexts the jury had inquired about. As the Court below unanimously found, **the correct definition of bodily harm** in both contexts *is* the definition in s. 2 of the *Code*.

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[1] See Order dated September 10, 2021 (Brown J.) granting the appellant a right of reply.
[2] Emphasis added, Ex. J5: Handwritten document, Question from the Jury / AR, Vol. IV, p. 221.

5. Crucially, there is no reasonable possibility of the jury having convicted the respondent on a diminished or erroneous form of intent. The jury had to assess whether he committed the only act of bodily harm particularized in the evidence – smothering, by covering the victim's nose and mouth. Then, it had to assess whether he intended to kill her or knew that this act likely would. If yes, he was guilty of murder. If not, then manslaughter. The judge's instructions made this clear.

B. STATEMENT OF FACTS

(1) The Jury's Question

6. Before it deliberated, the judge instructed the jury, among other things, on the elements of the offences of both murder and manslaughter. The murder instructions included reference to "bodily harm" because s. 229(a)(ii) of the *Criminal Code* provides that culpable homicide is murder where the accused "means to cause [the victim] **bodily harm** that he knows is likely to cause [the victim's] death, and is reckless whether death ensues or not"[3] [emphasis added]. The manslaughter instructions also included reference to "bodily harm" because that offence requires, *inter alia*, "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**"[4] [emphasis added].

7. The jury eventually returned with the following question: "Could you please expand on the definition of bodily harm in Q 3 (intent required for murder) versus bodily harm as described in para 109/111 for manslaughter."[5]

(2) Colloquy and Response

8. Apparently focusing on the question's parenthetical reference to "(intent required for murder)", the trial judge initially said that she was considering providing the jury an "expanded definition of "intent"' and "perhaps" an "expanded definition of manslaughter."[6] However,

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[3] Oral Charge to the Jury / AR, Vol. I, pp. 95 (line 27) – 96 (line 6), 106 (line 37) – 107 (line 7); Ex. J4: Written Charge to the Jury, at paras. 110, 132 – 133 / AR Vol. IV, pp. 203, 206; *Criminal Code*, s. 229(a)(ii).

[4] Oral Charge to the Jury / AR, Vol. I, p. 95 (lines 37 – 45); Ex. J4: Written Charge to the Jury, at para. 109 / AR, Vol. IV, p. 203.

[5] Ex. J5: Handwritten document, Question from the Jury / AR, Vol. IV, p. 221. See also: Ex. J4: Written Charge to the Jury, at paras. 109 – 111, 133 – 134 / AR, Vol. IV pp. 203, 206; see also Oral Charge to the Jury / AR, Vol. I, pp. 95 (line 37) – 96 (line 10), 106 (line 37) – 107 (line 7).

[6] AR Vol. III, pp. 326 (lines 35 – 47), 327 (line 18) – 328 (line 47).

defence counsel subsequently noted that the question did not ask for an expanded definition of intent, but rather an expanded definition of "bodily harm" and specifically whether there was any difference between the "bodily harm" in paragraph 133 (under "Q3") of the written jury charge (second intent for murder) and paragraph 109 (fault element of manslaughter).[7]

9. The judge agreed with defence counsel that the jury was asking whether bodily harm had the same meaning in both contexts and also said that she had initially misread the question, presumably referring to when she had proposed giving the jury an expanded definition of intent.[8]

10. The defence said "bodily harm" in both paragraphs 109 and 133 meant the same thing. The Crown did too. The defence, the Crown and the trial judge all agreed that that the definition of "bodily harm" in s. 2 of the *Code* be read to the jury and that they be told it applied to "bodily harm" in both sections of the charge they had inquired about (and anywhere else it was used).[9]

11. The trial judge recalled the jury and instructed them accordingly. She also told the jury that if they had any additional questions, the Court would assist with those too.[10] Apparently responding to a juror's request that the definition be read "one more time", the trial judge then repeated the *Code* definition of bodily harm and that it applied whenever the term was used.[11] The jury did not return with other questions and subsequently returned verdicts of guilt on both counts.

(3) The BCCA Unanimously Concluded the Jury Had Been Properly Instructed

12. Despite the fact it was *his own trial counsel's position* that had formed the basis for the answer to the jury's question, and despite the fact his trial counsel had endorsed the formulation of that answer, the respondent alleged on appeal that the trial judge had erred, first, in not clarifying the jury's question and, second, in giving an incorrect response.[12] The BCCA did not agree.

13. Writing for a unanimous court on this point, DeWitt-Van Oosten J.A. concluded first that there had been no need to seek clarification from the jury . The question's meaning was plain, the

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[7] AR Vol. III, p. 329 (line 18) – 330 (line 47).
[8] AR Vol. III p. 331 (lines 40 – 47).
[9] AR Vol. III p. 331 (line 1) – 332 (line 2).
[10] AR Vol. III, p. 332 (lines 10 – 26).
[11] AR Vol. III, p. 332 (lines 30 – 44).
[12] BCCA Reasons, at para. 121.

judge and counsel had reached consensus on it, that consensus reflected the defence position, and the jury had not returned with additional questions, suggesting the response had resolved any confusion.[13] Second, the response itself was correct in that the s. 2 definition of "bodily harm" *did* apply in both contexts the jury had inquired about and there was no reasonable possibility the jury convicted the appellant of second degree murder based on a diminished form of intent.[14]

PART II – QUESTIONS IN ISSUE IN REPLY

14. The appellant's position on whether the judge adequately addressed the jury's question is: (a) the jury question was not ambiguous and did not require clarification before responding; and (b) the judge's response to the jury's question was correct in law and supported by defence and Crown counsel. Further, there is no possibility the jury did not understand that to convict the respondent for murder under s. 229(a)(ii) it had to be satisfied he had the requisite subjective intent.

PART III – STATEMENT OF ARGUMENT

A. THE JURY'S QUESTION WAS NOT AMBIGUOUS

15. The unanimous decision from the appellate court that the trial judge did not err in not seeking clarification of the jury's question should not be disturbed. It was not ambiguous. This conclusion is supported not only by the plain wording of the question itself, but also by the discussions between the judge and counsel, and the jury's conduct after receiving the response.

16. The jury's question asked the judge to "expand on the definition of bodily harm in Q3 (intent required for murder) […] ***versus*** bodily harm […] in para 109/11 for manslaughter"[15] [emphasis added]. The term "versus", combined with (1) the repetition of the term "bodily harm" before and after it and (2) reference to that term as it appeared "**in** Q3" and "**in** para 109/11" make clear that the jury was asking precisely the question the trial judge answered: namely, whether the definition of bodily harm in both contexts ("in Q 3 […] ***versus*** […] in para 109/111") was different. The court below merely stated the obvious in finding that the question's meaning was plain.

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[13] BCCA Reasons, at para. 124.
[14] BCCA Reasons, at paras. 125 – 148.
[15] Ex. J5: Handwritten document, Question from the Jury / AR, Vol. IV, p. 221, emphasis added.

17. When the defence was invited to make submissions, counsel expressed the strong view that "based on the way the question is worded", [16] an expanded definition of intent required for murder was "not what they're asking",[17] but rather that the jury members were "wishing to have the definition of bodily harm explained to them."[18] He explained the basis for his position by taking the judge to the wording of the question and to the specific paragraphs from the charge the jury itself had referenced in its question.[19]

18. The respondent nevertheless asks this Court to focus instead on the judge's *initial* query – later clarified - about whether the question might call for an expanded definition of the intent for murder (presumably focusing on the question's parenthetical reference to "(intent required for murder)" next to the jury's reference to "Q 3"). However, the judge made her initial query before receiving counsel's submissions. Upon receiving them, she frankly acknowledged that she had initially "misread"[20] the question. That is, her initial query was not a function of confusion arising from the question itself, but rather a function of *her* initial misreading of it.

19. This view is also supported by the tenor and content of counsel's submissions on the question, and the rapidity with which consensus was achieved on an appropriate response. To this end, the appellant takes issue with the respondent's use of rhetorical hyperbole[21] and selective excerpting[22] to characterize those discussions as exhibiting confusion on (and ambiguity in) the jury's question. In fact, a reading of the colloquy on this issue presents a very different picture.[23]

20. What occurred in this case was a typical exchange of views to discern the meaning of a jury's question and to formulate a correct answer. A trial judge is duty bound to ask counsel for their input and must be careful not to intrude into a jury's deliberations by asking for unnecessary clarification.[24] Clarification should be sought only if it is necessary to make a clear, careful and

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[16] AR, Vol. III, p. 329 (lines 20 – 21).
[17] AR Vol. III, p. 331 (lines 38 – 39); see also p. 330 (lines 17 – 20).
[18] AR Vol. III, p. 330 (lines 37 – 38); see also p. 330 (lines 17 – 20).
[19] AR Vol. III, pp. 329 (line 19) – 330 (line 41).
[20] AR Vol. III, p. 331 (line 43).
[21] See e.g. Respondent's Factum at paras. 108, 109 & 111.
[22] See e.g. Respondent's Factum, at paras. 107 – 111.
[23] AR Vol. III, pp. 326 (line 35) – 332 (line 2).
[24] *R. v. Bradshaw*, 2020 BCCA 97, at paras. 26, 39.; *R. v. Reeves*, 2013 BCCA 250 at [36],[42].

correct response. If the discussion that took place here is found to bolster the case for ambiguity, the routine discussions that occur whenever a jury poses a question would (in most cases) as well.

21. The jury's response to the answer it was given also confirms that its question was unambiguous and that the judge's answer was responsive. After asking that the definition be read out "one more time"[25] the jury did not return with further questions, despite being told it could do so.[26] This is an important consideration in assessing whether the trial judge fell into error and demonstrates that any confusion was resolved.[27]

B. THE JUDGE'S ANSWER WAS CORRECT AND DID NOT MISLEAD THE JURY

22. Not only was the judge's answer to the jury's question responsive, it was legally correct and complete, leaving no reasonable possibility that the jury was misled.[28] It bears emphasizing that the trial judge answered the jury's question in precisely the terms the defence had advocated for, and the Crown had agreed with.[29] The respondent is mistaken when he says (1) that the judge erroneously failed to assist the jury on the relationship between "bodily harm" and subjective foreseeability of death in the context of s. 229(a)(ii); and (2) that the "bodily harm" referred to in s. 229(a)(ii) of the *Criminal Code* is different than "bodily harm" as defined in s. 2 of the *Code*.

(1) No requirement to repeat instructions on subjective foreseeability of death

23. In her initial charge, the trial judge explained the relationship between "bodily harm" and the subjective foreseeability of death under s. 229(a)(ii) of the *Criminal Code*,[30] including as follows: "you must decide whether the Crown has proved beyond a reasonable doubt […] 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."[31] This was a consensus jury instruction, crafted after much consultation with counsel. The respondent does not

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[25] AR Vol. III, p. 332 (lines 30 – 46).
[26] AR Vol. III, p. 332 (lines 28 – 29).
[27] *R. v. Layton*, 2009 SCC 36, at para. 32.
[28] *R. v. M.R.H.*, 2019 BCCA 39, at para 42; aff'd 2019 SCC 46.
[29] AR Vol. III, pp. 330 (line 45) – 332 (line 31).
[30] Oral Charge to the Jury / AR, Vol. I, pp. 95 (line 27) – 96 (line 10), 106 (line 37) – 107 (line 29); Ex. J4: Written Charge to the Jury, at paras. 108, 110-111, 132 – 135 / AR Vol. IV, pp. 202 - 203, 206 – 207.
[31] Ex. J4: Written Charge to the Jury, at para. 133 / AR, Vol. IV p. 206; see also Oral Charge to the Jury / AR, Vol. I, pp. 106 (line 37) – 107 (line 7).

allege any error in that initial charge, but now says that the judge erred in not *repeating* it in response to the jury's question.[32] This is difficult to understand considering his trial counsel *objected* to any such response being given.[33]

24. Here, the jury asked a specific question about the definition of "bodily harm" in one part of the charge "versus" another. That question was answered. There was no need for the judge to repeat the elements from her initial charge on the subjective intent for murder that the respondent now says should have been repeated, because that was not what the jury was asking about. Indeed, there is no reasonable possibility the jury misunderstood the level of foresight of death the Crown had to prove before they could return a conviction for murder.[34] The judge's initial instruction on that issue was unimpeachable and unchallenged. Then, in answering the jury's question, she "drew the jury's attention back to her written charge, specifically referring to paras. 109-111"[35] (a copy of which the jury had throughout its deliberations). Those paragraphs correctly explained the difference between manslaughter and murder including the differences in intent. Far from detracting from her initial correct instructions, her answer endorsed and recalled them.[36]

(2) The *Criminal Code* s. 2 definition of "bodily harm" applies to the term "bodily harm" as it appears in s. 229(a)(ii)

25. Finally, the respondent says, as he did in the Court below, that the trial judge erred because, in his view, the *Criminal Code* s. 2 definition of "bodily harm" does *not* apply to the term "bodily harm" as it appears in s. 229(a)(ii) of the *Code*. He says that s. 229(a)(ii) imports a "legal requirement for factual proof of a higher degree of bodily harm."[37] In his view, therefore, it was legally incorrect for the judge to tell the jury that the s. 2 definition applied to s. 229(a)(ii) and that "bodily harm" had the same meaning in both sections of the charge it had inquired about.

26. That is not the case. The trial judge's response to the jury's question was correct. To define "bodily harm" in the words specifically set out in the *Code*'s definition section was the only

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[32] Respondent's Factum, at para. 115.
[33] AR, Vol. III, p. 331 (lines 30 – 39).
[34] *R. v. Baker*, 2019 BCCA 199, at paras. 32-34, 45.
[35] BCCA Reasons, at para. 147; see also BCCA Reasons, at paras. 144 – 145.
[36] *R. v. Brydon*, [1995] 4 S.C.R. 253, at para. 19.
[37] Respondent's Factum, at para. 130.

response that could be given. Adopting the respondent's position would require this Court to conclude that Parliament did not intend that the s. 2 definition of "bodily harm" apply to the term "bodily harm" as it appears in s. 229(a)(ii) of the *Code*, *despite not having said so*.

27. It is generally presumed that the legislature uses language carefully and consistently so that within a statute the same words have the same meaning and different words have different meanings.[38] The definition of "bodily harm" in the context of the secondary intent for murder has remained stable since its inception and Parliament has never seen fit to change it.[39] If Parliament had not intended the term "bodily harm" in s. 229(a)(ii) of the *Code* to be defined by the accepted s. 2 *Code* definition, it would have said so.[40] For example, in other sections, Parliament has enacted qualitatively higher standards like "grievous bodily harm"[41] and "serious bodily harm".[42] Yet it has not done so in s. 229(a)(ii).

28. Parliament has also employed the term "bodily harm" in two other statutory definitions of murder (s. 229 (b): transferred intent; and s. 229 (c): unlawful object, distinct dangerous act) and in 52 other sections of the *Criminal Code* covering a wide range of subjects. To be consistent, judicial interpretation of all these sections, including s. 229 (a)(ii), must define the term "bodily harm" in the words of s. 2 of the *Code*, barring legislative indication to the contrary.

29. The respondent nevertheless suggests that the s. 2 definition of "bodily harm" cannot apply to the words "bodily harm" in s. 229(a)(ii) because the lower threshold of that definition merely requires that the harm inflicted be "more than merely transient or trifling". He says that bodily harm achieving only that minimum bar cannot be harm a person knows will be likely to cause death and thus that the definition cannot apply to "bodily harm" in s. 229(a)(ii). That logic is faulty.

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[38] R. Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed., 2002), at p. 162; *R. v. C.D.*, 2005 SCC 78, at para. 72.
[39] See: *Criminal Code*, S.C. 1892, c. 29, s. 227(b) (the then-equivalent of today's s. 229(a)(ii)); *R. v. D. L.W.*, [2016] 1 S.C.R. 402; *R. v. Pootlass*, 2019 BCCA 96, at paras. 17-21; *R. v. A.(J.)*, 2010 ONCA 226, at para. 104; *R. v. Maloney*, [1976] O.J. No. 2447, at para. 15.
[40] *R. v. D. L.W.*, 2016 SCC 22, at paras. 18, 20; *R. v. Pootlas*, 2019 BCCA 96, at para. 21.
[41] See e.g. *Criminal Code*, ss. 25 (3), 25 (4)(d), 25(5)(a), 81(1)(a), 82.3, s. 82.2(c)), s. 83.01(1) 83.02 (b), 715.32 (1); *R. v. McCraw*, [1991] 3 S.C.R. 72, at paras. 19-21.

30. The respondent's position does not give effect to the jurisprudential recognition that although s. 2's definition of "bodily harm" has a low threshold, it covers "a broad spectrum of hurts and injuries".[43] That broad spectrum, by definition, includes hurts and injuries an accused knows are likely to cause death. Contrary to the respondent's submission therefore, there is no "interpretive absurdity" in applying the statute as it has been drafted. Conduct falling within the "bodily harm" definition in s. 2 of the *Code* can be "bodily harm" an accused "knows is likely to cause […] death" as required by s. 229(a)(ii). **The fact that not *all* conduct falling with the s. 2 definition will be, is irrelevant.** The provision does not mandate a finding of guilt so long as death ensues from the intentional infliction of *any* s. 2 "bodily harm". Rather, it contemplates guilt where bodily harm *that the accused knows is likely to cause death* is inflicted.

31. While the words "serious", "dangerous" or "grave" are commonly used in conjunction with the bodily harm requirement when instructing juries on s. 229(a)(ii) (as the trial judge did in her initial instruction), it is not because they form part of the definition of "bodily harm" in s. 229(a)(ii) (i.e. not because of a "legal requirement for factual proof of a higher degree of bodily harm, or a more serious type of bodily harm"). Rather, these words simply "alert the jurors to the need to consider the nature of the unlawful act" in deciding whether it is proven that the accused foresaw a likelihood of death.[44] That is, those words do not define the type of bodily harm factually required for the offence, but emphasize that the accused *must* have foreseen that death was likely.[45]

32. The respondent is also mistaken when he says that *R. v. Miljevic*[46] supports his position. For the reasons set out at paragraphs [127] to [135] of the reasons of the Court of Appeal in this case, *Miljevic* actually supports the appellant's position on this issue. As the majority reasons in *Miljevic* does not assist him, the respondent also invokes the dissenting reasons in that case, suggesting that on the principles set out in *R. v. Henry*,[47] those reasons should be deemed authoritative. However, *Henry* addressed the general question of when *obiter dicta* may be considered authoritative. It does not stand for the proposition that dissenting reasons ought to be treated as such, particularly on points that conflict with the majority view.

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[43] *Cooper*, at 150; *R. v. Gejdos*, 2017 ABCA 227, at para. 63.
[44] BCCA Reasons, at paras. 138 – 139; see also *R. v. Cooper*, [1978] 1 S.C.R. 860 at 159.
[45] BCCA Reasons, at paras. 139 – 140; *R. v. Nygard*, [1989] 2 S.C.R. 1074 at 1088.
[46] 2010 ABCA 115, aff'd 2011 SCC 8.
[47] 2005 SCC 76.

33. The respondent is effectively asking this Court to rewrite s. 229(a)(ii) of the *Code* and introduce a new bodily harm threshold, beyond the s. 2 spectrum identified by this Court: *BCCA at [141]*. There is no valid reason to do so when the *mens rea* description fully captures the essential distinction between murder and manslaughter: "[t]he difference between proof of murder and proof of manslaughter lies not in the degree or type of bodily harm factually inflicted by the accused. Rather, what distinguishes these offences from one another is the *knowledge* that accompanies the harm"[48] [emphasis original]. The definition of bodily harm in s. 229(a)(ii) of the *Code* is the definition in s. 2 of the *Code*.

PART IV – SUBMISSIONS ON COSTS

34. The appellant does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

35. That this Court allow the appeal and restore the conviction for second degree murder.

PART VI – SUBMISSIONS ON CONFIDENTIALITY

36. There are no orders, bans, classifications of information 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.

Dated at Vancouver, British Columbia this 24th day of September 2021.

Mary T. Ainslie, Q.C. Counsel for the Appellant	Liliane Bantourakis Counsel for the Appellant

[48] BCCA Reasons, at para. 138.

PART VII – LIST OF AUTHORITIES

Cases:	*Para. References*
R. v. A.(J.), 2010 ONCA 226	27
R. v. Baker, 2019 BCCA 199	24
R. v. Bradshaw, 2020 BCCA 97	20
R. v. Brydon, [1995] 4 S.C.R. 253	24
R. v. Cooper, [1978] 1 S.C.R. 860	30-31
R. v. C.D., 2005 SCC 78	27
R. v. Gejdos, 2017 ABCA 227	30
R. v. Henry, [2005] 3 S.C.R. 609, SCC 76	32
R. v. Layton, 2009 SCC 36	21
R. v. Maloney, [1976] O.J. No. 2447	27
R. v. McCraw, [1991] 3 S.C.R. 72	27
R. v. Miljevic, 2010 ABCA 115, aff'd 2011 SCC 8	36
R. v. Miljevic, 2011 SCC 8	36
R. v. M.R.H., 2019 BCCA 39	22
R. v. Nygard, [1989] 2 S.C.R. 1074	31
R. v. Pootlas, 2019 BCCA 96	27
R. v. Reeves, 2013 BCCA 250	20
R. v. D. L.W., [2016] 1 SCR 402	27
Other Sources:	
R. Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed., 2002)	27
Legislation:	
Criminal Code (R.S.C., 1985, c. C-46), s. 2, s. 25(3), s. 25(4)(d), s. 25(5)(a), s. 81(1)(a), s. 82.2(c), s. 82.3, s. 83.01(1), s. 83.02, s. 83.231, s. 184.1 (1), s. 184.1(2) s. 184.1 (3), s. 221, s. 229(a)(ii), s. 267, s. 320.14 (2) s. 715.32(1),	4, 6, 22-23, 25, 28
Criminal Code, S.C. 1892, c. 29, s. 227(b), s. 229(a)(ii) (attached)	27
Criminal Law Amendment Act, S.C. 1994, c. 44, s. 2(2)	43

THE

CRIMINAL CODE, 1892

55-56 VICTORIA, CHAP. 29

TOGETHER WITH

AN ACT TO AMEND THE CANADA TEMPERANCE AMENDMENT ACT, 1888
BEING CHAPTER 26 OF THE SAME SESSION

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the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

Causing death which might have been prevented.

225. Every one who, by any act or omission, causes the death of another kills that person, although death from that cause might have been prevented by resorting to proper means.

Causing injury the treatment of which causes death.

226. Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.

PART XVIII.

MURDER, MANSLAUGHTER, &c.

Definition of murder.

227. Culpable homicide is murder in each of the following cases:

(*a.*) If the offender means to cause the death of the person killed;

(*b.*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*c.*) If the offender means to cause death or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;

(*d.*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

Further definition of murder.

228. Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue:

(*a.*) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(*b.*) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(*c.*)