SCC FILE NO.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

MARIE-EVE MAGOON

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICANT FOR LEAVE TO APPEAL
VOLUME I (TABS A – D2)
(MARIE-EVE MAGOON, APPLICANT)

Pursuant to sections 691(1)(b) and 691(2)(c) of the *Criminal Code of Canada*, RSC 1985, c C-46, Rule 40 of the *Supreme Court Act*, RSC 1985, c S-26, and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156
Publication Ban pursuant to section 486.5 of the *Criminal Code*

MICHAEL BATES
Counsel for the Applicant

RUTTAN BATES
Barristers & Solicitors
#600, 630-6th Avenue SW
Calgary, Alberta T2P 0S8

Tel.: (403) 237-0025
Fax: (403) 237-0566
Email: mb@ruttanbates.com

MARIE-FRANCE MAJOR
Ottawa Agent for the Applicant

SUPREME ADVOCACY LLP
#100, 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

CHRISTINE RIDEOUT
Counsel for the Respondent

Justice and Solicitor General
3rd Flr. Centrium Pl.
300-332 6 Ave. S.W.
Calgary, Alberta T2P 0B2

Tel.: 403-297-6005
Fax: 403-297-3453
Email: christine.rideout @gov.ab.ca

D. LYNNE WATT
Ottawa Agent for the Respondent

GOWLING WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Tel.:(613) 786-8695
Fax:(613) 563-9869
Email: lynne.watt@gowlingwlg.com

TABLE OF CONTENTS

TAB **PAGE**

PART I OVERVIEW & STATEMENT OF FACTS

Overview and Procedural History

[1] "[O]ur justice system is not infallible and…a meaningful review process is essential to maintain public confidence in the administration of justice. Thus, there is a broader public interest in reviewability that transcends an individual's interest in any given case." [1]

[2] Marie Magoon [**Applicant**] seeks leave to have all issues that could impact her murder conviction heard by the Supreme Court of Canada in part due to the failure of the Alberta Court of Appeal **[Court of Appeal]** to address its jurisdiction to hear a Crown appeal that resulted in her acquittal for first degree murder being replaced with a conviction. Where the court below has made no reference to two separate challenges to its jurisdiction it calls into question whether meaningful appellate review has truly occurred in that court.

[3] If meaningful appellate review did not occur at the Court of Appeal, then public confidence in the administration of justice generally, and in the murder conviction of the Applicant in this case specifically, requires review by this Court of all of the Applicant's grounds of appeal.

[4] This application must be considered in the context that an oral hearing will take place before a panel of this Court to examine whether the Court of Appeal erred in concluding the Applicant is guilty of first degree murder. If leave to appeal is required to argue "any question of law" on the Applicant's appeal as of right, then it should be granted to avoid the potential injustice of this Court being limited in its ability to correct only certain errors underpinning a first degree murder conviction, notwithstanding it may see others.

[5] On June 3, 2015 the Applicant was convicted at trial of second degree murder in the death of Meika Jordan [**Meika**]. She appealed this conviction to the Court of Appeal and the Crown appealed her "acquittal" of first degree murder. The Court of Appeal dismissed the Applicant's conviction appeal and granted the Crown appeal, substituting a verdict for first degree murder.

---

[1] ***R v Oland***, 2017 SCC 17 at para 45, [2017] SCC No 17.

[6] On January 23, 2017 the Applicant filed her notice of appeal to this Court as of right pursuant to section 691(2)(b) of the *Criminal Code*,[2] from the judgment of the Court of Appeal overturning her "acquittal" for first degree murder.[3] The Applicant listed four main grounds of appeal and is of the position that given her appeal as of right on "any question of law" as specified in section 691(2)(b), no leave is required.

[7] On February 28, 2017 the Crown applied to strike grounds three and four of the Appellant's notice of appeal. The Applicant submitted her response to the application on March 13, 2017. On April 12, 2017, it was ordered that the Crown's motion to strike would be heard at the commencement of the hearing on these matters and that the Applicant could file an application for leave to appeal if she so wished to do so.

[8] The Applicant now applies for leave to appeal pursuant to sections 691(1)(b) or 691(2)(c) of the *Criminal Code*, in the event that this Court determines leave is required to pursue grounds three and four set out in the Applicant's notice of appeal such that she may have this Court review the validity of her being convicted of murder.

[9] A hearing will be held before a full panel of this Court regardless if leave is granted. If leave is required it should be granted to allow the Applicant to truly argue any issue of law during that hearing to avoid a scenario of this Court having to determine the issue of first versus second degree murder, without considering whether murder was properly made out at all.

Statement of Facts

[10] On November 14, 2011 at 1:47 p.m.,[4] Meika died in hospital as a result of cerebral edema (brain swelling) caused by multiple blunt force trauma to her head,[5] and the effects of internal injuries to her pancreas and liver caused by a hard blow to the abdomen.[6] In the week before her

---

[2] *Criminal Code of Canada*, RSC 1985, c C-46 ["*Criminal Code*"]
[3] Notice of Appeal of Marie-Eve Magoon, Appellant, filed January 23, 2017 **[TAB D1].**
[4] Agreed Statement of Facts, Exhibit 1 at para 2 **[TAB D3a].**
[5] Evidence of Dr. Christopher Milroy, Transcript at 419/1 – 420/16; 424/4 – 425/40 **[TAB D2c].**
[6] Evidence of Dr. Christopher Milroy, Transcript at 429/5-26 **[TAB D2c];** Expert Reports of Dr. Milroy, Exhibit 14 **[TAB D3b]**; Note: Dr. Mahoney said the abdominal injuries "were not

death Meika was in the care of her biological father, Spencer Jordan [**Jordan**], and stepmother, the Applicant, who, on Sunday, November 13, 2011 at 7:16 p.m.,[7] called 911 after Meika had fallen down a flight of stairs and was found unconscious and in cardiorespiratory arrest.[8]

[11] Due to extensive injuries that were indicative of physical abuse the death was ruled a homicide and Jordan and the Applicant were the only potential suspects. With no other witnesses or evidence capable of telling who caused what injuries to Meika the police needed statements from one or both of these suspects to advance a criminal case.[9] In the investigation that followed, 17,534 private communications were intercepted; some 158 different police officers were involved.[10] From February 8, 2012 to October 7, 2012, police conducted 106 scenarios in a "Mr. Big" sting called Operation SASH.[11]

[12] No evidence implicated the Applicant in conduct that could have caused Meika's fatal injury until after police scenarios created "powerful reasons for each accused to maximize their own involvement or overstate the injuries each may have inflicted…" [12]

Mr. Big Background

[13] Jordan and the Applicant were living in their vehicle when police used their relationship with Meika's grandfather and employed him as an agent to have them move into a rental property for $750.00 per month (the actual monthly rent value being $1,500.00). There was a detached garage that was not part of the rental and was to be used to introduce police officers

---

acutely life-threatening and were likely not contributing to her instability that day", Evidence of Dr. Meaghan Mahoney, Transcript at 623/9-25 **[TAB D2d].**

[7] Evidence of Harold Krenz, Transcript at 194/3-10 **[TAB D2b].**

[8] *R v Magoon,* 2015 ABQB 351 at para 136; 594 AR 272: Written Reasons for Judgment of Madame Justice R.E. Nation, Court of Queen's Bench [**"Court of Queen's Bench Judgment"**] **[TAB B1];** Evidence of Harold Krenz, Transcript at 204/26-30 **[TAB D2b];** Transcript of Interview Between Constable D.M. and Ms. Marie Magoon, Exhibit 33 ["**Magoon Mr. Big Statement"] [TAB D3e].**

[9] Evidence of M.C., Transcript at 1038/40 – 1040/2 **[TAB D2h].**

[10] Evidence of M.C., Transcript at 1117/7-18; 1110/36-38 **[TAB D2h].**

[11] Evidence of M.C., Transcript at 1049/3-10 **[TAB D2h]**; Court of Queen's Bench Judgment, *supra* at para 15 **[TAB B1].**

[12] Court of Queen's Bench Judgment, *supra* at para 121 **[TAB B1].**

posing as individuals running legitimate and criminal businesses from that location. In spite of the deal Jordan and the Applicant were late paying rent every month.[13]

[14] The perceived criminal business included sophisticated fraud such as credit card skimming, bank fraud and trafficking in illegal goods.[14] Principles of truth, honesty and loyalty were conveyed as paramount to the organization. Criminal activity was acceptable but being dishonest would lead to being removed from the organization and its people or 'crew'. The organization was prepared to use violence to achieve its goals.[15] Constable D.M. [**V**] was the boss and had power and influence such that he could manipulate the justice system and save his crew from being prosecuted for criminal offences, including a hit and run by Detective R.H. [**S**] where the victim was in a coma and Constable J.M. [**J**] having killed two people in an arson of a house.[16]

[15] Jordan was paid $15,000.00 cash for his work for the organization; which was becoming progressively more per week. Dream building, including Jordan and others counting a perceived $250,000.00 in cash in a hotel room, was a major element of the operation.[17] It was conveyed that V would soon pay Jordan a salary of $2,000.00 per week.[18] "The elaborate constellation of scenarios played out, designed to culminate in the 'big job' at the border, which if successful, would result in $20,000.00 to each member of the crew."[19]

[16] Portrayed as an "upper-middle" member, J described the suspects as living out of their vehicle, unemployed, enduring hardship and very receptive to build new relationships. The

---

[13] Evidence of M.C., Transcript at 1055/37-38 **[TAB D2h].**
[14] Court of Queen's Bench Judgment, *supra* at para 14 **[TAB B1];** Evidence of M.C., Transcript at 1047/8 – 1048/28 **[TAB D2h];** Evidence of J.M., Transcript at 536/21-33 **[TAB D2e].**
[15] Evidence of J.M., Transcript at 764/38 – 765/40 **[TAB D2e].**
[16] Court of Queen's Bench Judgment, *supra* at para 18 **[TAB B1].**
[17] Evidence of D.M., Transcript at 912/27-34 **[TAB D2g];** The trial judge erroneously uses the figure $100,000.00 which may have been the actual money in the room. The remainder was perceived money. The $250,000.00 was also portrayed as the day 2 take where day 1 had brought in $680,000.00.
[18] Evidence of J.M., Transcript at 780/8-14 **[TAB D2e].**
[19] Court of Queen's Bench Judgment, *supra* at para 16 **[TAB 1B].**

Appellant presented to him as quite timid and sheepish.[20] It became clear to him the suspects were in desperate financial circumstances to the extent that during the final scenario in Vancouver Jordan advised him the Appellant was at home with no food and in desperate need of assistance.[21] J agreed he knew the Appellant was completely dependent on any income that Jordan brought in.[22]

[17] S was portrayed as J's girlfriend who did not know about his criminal activity,[23] although she was later in a hit and run scenario where it was portrayed J assisted her to fabricate an alibi and V assisted her in dishonestly passing a polygraph test. S described the Appellant as always friendly but quiet at first until she got to know her a bit better. The Appellant treated her like a friend and was "kind and supportive and protective" of her.[24] A number of the scenarios with the Appellant also involved social outings.

[18] S observed Jordan to control the money and that was how the Appellant got any money she had. The Appellant had no driver's license or friends or family within the City of Calgary.[25] The Appellant made it clear to S that because of the relationship with her and J the Appellant and Jordan's life had turned around from a couple of months previous.[26]

[19] On October 3, 2012, when the Appellant was told Jordan was going to be arrested for murder and that Detective M.C. would be back for her **[Arrest Stim]**, S heard her on the phone saying to Jordan "We have bigger problems than Meika because Detective [C] is asking who [J] is". The Appellant was worried about getting J in trouble,[27] and expressed she was more scared of not seeing her children and Jordan than she was of going to jail and that she could not live without Jordan and was worried he would go to jail.[28] The Appellant said it seemed V might be

---

[20] Evidence of J.M., Transcript at 535/18-21; 538/20-40; 539/19-23 **[TAB D2e].**
[21] Evidence of J.M., Transcript at 760/19-28 **[TAB D2e].**
[22] Evidence of J.M., Transcript at 761/3-12 **[TAB D2e].**
[23] Evidence of R.H., Transcript at 809/8-18 **[TAB D2f].**
[24] Evidence of R.H., Transcript at 809/37 – 810/10 **[TAB D2f].**
[25] Evidence of R.H., Transcript at 882/2-20 **[TAB D2f].**
[26] Evidence of R.H., Transcript at 884/8-12; 895/32-36 **[TAB D2f].**
[27] Evidence of R,H., Transcript at 864/7 – 865/4 **[TAB D2f].**
[28] Evidence of R.H., Transcript at 866/2-3; 871/6-5 **[TAB D2f].**

able to help get their kids back and when S expressed worry, the Appellant said she would protect Jordan even if he had killed her child but she would not love him again.[29] S told the Appellant that she trusted V "completely" and if it wasn't for V she would be in jail for the hit and run.[30]

[20] V was portrayed as deserving of respect from the others in the organization. During the money counting scenario V gave Jordan permission to share criminal discussions about S with the Appellant and indicated he didn't have a problem helping with S's situation because J and S had been honest right from the start and honest the whole time. V observed Jordan to refer to some money as "a big pile of freedom." V said that after the border job he would look at getting Jordan a vehicle since he didn't have any wheels.[31]

Jordan's statement to Mr. Big

[21] On October 3, 2012, Jordan met with V on what was portrayed as his boat in the Vancouver marina. The meeting resulted from the Arrest Stim and the context was that Jordan was a valuable 'earner' of the criminal organization and therefore V was willing to help him escape the murder charges like had had done for others in the crew. Jordan tells V at the outset he and his wife would probably be homeless if it were not for J.[32] V makes clear that lies to him will mean Jordan is done with J and the organization and he will be out the door.[33]

[22] After hours of questioning V says he knows Jordan is lying to him because "I got this fuckin' report that says you're lying"[34] and he needs an explanation for what a pathologist report says are five impacts to the head of Meika on a relatively hard surface. In fact, V literally reads the head injury portion of Dr. Milroy's report to Jordan.[35] Jordan says he is "scared to death" he is "about to ruin seven lives" because he does not have the answers and that "I've told you more

---

[29] Evidence of R.H., Transcript at 871/8-24 **[TAB D2f].**
[30] Evidence of R.H., Transcript at 872/2-18 **[TAB D2f].**
[31] Evidence of D.M., Transcript at 911/6-26 **[TAB D2g].**
[32] Transcript of Interview Between Constable D.M. and Spencer Jordan, Exhibit 30 **["Jordan Mr. Big Statement"]**, at 3/9-22 **[TAB D3d].**
[33] Jordan Mr. Big Statement at 19/4-24 **[TAB D3d].**
[34] Jordan Mr. Big Statement at 110/7 – 111/22 **[TAB D3d].**
[35] Jordan Mr. Big Statement at 121/20 – 122/13 **[TAB D3d].**

than I've talked [to] Marie about this."[36] The suggestion was raised that the Appellant may have been the one responsible.[37] V then directs Jordan to call the Appellant, which he does.

[23] In this intercepted call, Jordan tells the Appellant that V has a report from a doctor and he needs to know how all of Meika's injuries actually happened so he can help them make this "just be gone" so they can be together and live in peace; and that he can help them get their kids back.[38] Asked if he had picked up Meika and dropped her on her head, the Appellant says, "No," and "You never dropped her on her head," and then asks "Where's this coming from?" Jordan then expressly tells her of the report that describes at least five significant blows to different parts of the head, to which the Appellant replies, "You're kidding." [39] The Appellant later states, "I don't know what could have done that, Spence."

[24] Both Jordan and the Appellant then agree they do not recall the Appellant having done anything that would cause a head injury.[40] But Jordan then says to V that hearing the Appellant's voice "unlocked something in [his] head" and suggests he doesn't know what day it was but he has a vague memory of the Appellant holding Meika by the arms off the tile floor and dropping her.

[25] V directs Jordan to call the Appellant to question her about this dropping on the tile. In the intercepted conversation, the Appellant says "No, I, I didn't do that. And why are you…Spencer, what are you trying to do here?" A short time later she said, "…trying to do this and trying to like, like invent things is not gonna help either," and took offence to the suggestion and repeated, "No, I have never done that." [41]

[26] Jordan tells V that the Appellant said she doesn't remember doing it but she is not ruling it out. V then directs Jordan to further question the Appellant in person and states, "for your sake

---

[36] Jordan Mr. Big Statement at 119/1-13 **[TAB D3d].**
[37] Jordan Mr. Big Statement at 144/16 **[TAB D3d].**
[38] Transcripts of Selected Intercepted Communications, Exhibit 35, Intercepted conversation on October 3, 2012, Tab 13 [**"October 3, 2012 Intercept Tab 13]** at 2/13 – 3/3 **[TAB D3f].**
[39] October 3, 2012 Intercept Tab 13 at 4/10-21 **[TAB D3f].**
[40] October 3, 2012 Intercept Tab 13 at 14/3-9 **[TAB D3f].**
[41] October 3, 2012 Intercept Tab 13 at 3/3 – 4/3 **[TAB D3f].**

I hope your wife's memory improves…'cause we're talking about your freedom and your employment, right?...I hope she has a little snap of reality and…her memory improves a little bit 'cause it could, could ultimately help you big time."[42]

The Applicant's Statement to Mr. Big

[27] Before the Appellant gave her Mr. Big Statement, Jordan is heard on an intercept describing to the Appellant everything he had done to Meika on the Sunday, including how in the kitchen, which had ceramic tile floor,[43] Meika was on her back and he was "picking her up" and "throwing her down" some "six or seven" times.[44] The Appellant wrote out her understanding of Jordan's descriptions of what he had done to Meika.[45] Jordan elaborated as to the force he used:[46]

> I was over top of her. I didn't just do this six or seven times. (Indiscernable) like I was over her and I was like throwing her down, not just she was falling backwards. You know what I mean?

[28] On arriving to meet V, the Appellant is advised that both she and Jordan have been told the same thing – if they lie to V they are out of the organization as well as J, M and J. The Appellant is told that the reason she is there is her husband had a lot of "I don't remembers" in his interview and "that doesn't work" for V, so he has her there "because there's some injuries and stuff Spence couldn't account for that um, I think maybe you can fill in some blanks for me…"[47] In her own words, the Appellant described the consequences of lying to V would be they would be thrown out on their asses and "Spencer will lose his job and he'll lose everything, his friends, or his everything yeah…"

[29] After telling Mr. Big that dropping Meika onto the tile floor "wasn't me, it was [Jordan]",

---

[42] Jordan Mr. Big Statement, *supra* at 206/4-15**[TAB D3f].**
[43] Evidence of M.C., Transcript at 1037/32-40 **[TAB D2h].**
[44] Court of Queen's Bench Judgment, *supra* at para 62 **[TAB B1]**; Transcripts of Selected Intercepted Communications, Exhibit 35, Intercepted conversation on October 6, 2012, Tab 13 **["Blackfoot Hotel Intercept Tab 14"] [TAB D3f].**
[45] Two-page Handwritten Letter Seized from Ms. Magoon at the time of her arrest, Exhibit 18 **[TAB D3c].**
[46] Blackfoot Hotel Intercept Tab 14, *supra* at 28/5-9 **[TAB D3f].**
[47] Magoon Mr. Big Statement, *supra* at 6/4 – 7/9 **[TAB D3e].**

that she had "not once" hit her on the tile, that she "didn't do that" and Jordan was saying it was him,[48] the Appellant would ultimately say, "I pushed her on the tile too…"[49] The Appellant went on to describe a repetitive fast shaking of Meika while holding her hands.

[30] These admissions came after V told the Appellant [emphasis added]:

(a) Well **I'll help you out**. Spence said that you were dropping her on the tile onto her head;[50]

(b) That the blows to the head from the tile dropping was probably something that was fairly important;[51]

(c) That the "one issue" he's having is the injuries to the head and that "Spencer is saying…that you did it and you're saying that…you didn't…one of you are lying and it's not really sitting well with me…**ultimately it comes up to you because I've talked to Spencer** and he basically said you did some stuff so you're saying you didn't so one of you is lying. So **I'm…giving you the opportunity to…tell me if…you did something to cause some of the…injuries to her head** because in the report there's a lot of stuff in her head.";[52]

(d) "Like if you pushed her to the floor and she hit her head on the tile then that's fine. That's, **that's what, what I'm trying to get at**;"[53]

(e) He thought she was holding back and not telling about her head injury which if that was the case he considered it lying, "So I'm gonna give you one last opportunity just to…because otherwise you're not gonna want my help…";[54]

(f) "I'm just going off what…I remember that…[Jordan] mentioned…If you're gonna not be truthful about that part of it, if there's something that you just don't wanna say, and I don't know why, then there's the door. This, this shouldn't require this much thinking so that, **that tells me you're lying so you may as well leave**."[55]

---

[48] Magoon Mr. Big Statement, *supra* at 40/5-11; 41/1; 42/1-15 **[TAB D3e].**
[49] Magoon Mr. Big Statement, *supra* at 73/10 **[TAB D3e].**
[50] Magoon Mr. Big Statement, *supra* at 40/5-7 **[TAB D3e].**
[51] Magoon Mr. Big Statement, *supra* at 43/19 - 44/2 **[TAB D3e].**
[52] Magoon Mr. Big Statement, *supra,* at 63/22 – 64/14 **[TAB D3e].**
[53] Magoon Mr. Big Statement, *supra,* at 65/5-8 **[TAB D3e].**
[54] Magoon Mr. Big Statement, *supra,* at 68/1-6 **[TAB D3e].**
[55] Magoon Mr. Big Statement, *supra,* at 69/6-15 **[TAB D3e].**

[31] At this point the Appellant makes the first admission that implicated her in any head injury to Meika.

Decision of the Trial Judge

[32] The trial judge found that "[c]learly the circumstances in which the confessions were made raise a real concern that either or both of the accuseds may have falsely confessed."[56]

[33] Applying the test from ***R v Hart***,[57] the trial judge found markers of reliability in that the death of Meika could not have been accidental, in various statements by the accuseds from wiretap intercepts and the fact that it could not be true that "each did nothing wrong", that the accuseds were alert to their jeopardy and the need to stick to the same story, that they did not know medical evidence as to the timing of injuries, and the reflex opinion regarding the burn to Meika's hand.[58] The trial judge did not accept the Crown argument that disclosure of motive, admissions of general child abuse, and the Appellant's callousness were also confirmatory evidence.[59]

[34] The trial judge ultimately admitted the Mr. Big statements in part finding that the accuseds did not just go along with whatever V said and that their descriptions of injuries and events were supported by medical evidence.

[35] The trial judge found neither of the Appellant or Jordan intended to kill Meika and in relation to Meika's Condition on Sunday she held:[60]

(a) her presentation may not have been so acute to alert either accused to the fact she had internal injuries;

(b) it is difficult to establish what symptoms Meika may have displayed after the repetitive hits to her head; and

(c) the last steps of her life were on the stairs and it is possible neither accused saw her take those steps before her final loss of consciousness.

---

[56] Court of Queen's Bench Judgment, *supra* at para 75 **[TAB B1].**
[57] ***R v Hart***, 2014 SCC 52, [2014] 2 SCR 544.
[58] Court of Queen's Bench Judgment, *supra* at paras 81-88 **[TAB B1].**
[59] Court of Queen's Bench Judgment, *supra* at para 94 **[TAB B1].**
[60] Court of Queen's Bench Judgment, *supra* at para 135, 136 **[TAB B1].**

[36] The trial judge ultimately admitted the Mr. Big statements in part finding that the accuseds did not just go along with whatever V said and that their descriptions of injuries and events were supported by medical evidence.

[37] The trial judge based her finding that the Appellant caused bodily harm that she knew was likely to cause death on the common sense inference that there were "predictable consequences (repetitive head injury that will likely cause death)" to each accused continuing to assault Meika after her physical condition was compromised when "[t]he diminution of her level of function, starting with the abdominal injury in the morning and culminating in the eventual total loss of consciousness, could not fail to be noticed." [61]

[38] As to the issue of confinement, the trial judge held as follows:[62]

> In contrast, in the case before me, it is proven that one or the other of the accuseds, or potentially both, delivered a blow or blows in the house, which resulted in a fatal head injury causing death. It cannot be determined exactly what blow or blows caused the death or exactly the circumstances in which they were delivered. All that can be said is when they were delivered, Meika was in the house.
>
> Although each accused had clearly overstepped any authority they had to discipline Meika, I do not find that her mere presence in the house at the time the assaults occurred means the Crown has proven beyond a reasonable doubt that Meika was confined. The Crown has failed to demonstrate two of the elements discussed in Harbottle, namely, the underlying crime of domination and that crimes of unlawful confinement and murder were part of the same transaction.

The Decision of the Appellate Court

[39] The Court of Appeal found that the trial judge was alive to all the concerns and correctly applied the legal test in admitting the Applicant's statement.[63]

[40] The Court of Appeal further held that the trial judge did not rely on the doctrine of willful blindness in concluding that both appellants had the requisite intent for murder, and that the term "willful blindness" was used as a factual description regarding the appellant's reaction to

---

[61] Court of Queen's Bench Judgment, *supra* at para 171 **[TAB B1].**
[62] Court of Queen's Bench Judgment, *supra* at paras 201, 202 **[TAB B1].**
[63] Memorandum of Judgment of the Court of Appeal of Alberta, filed December 22, 2016 ["Judgment of the Court of Appeal"] at para 51 **[TAB B2].**

Meika's neurologic deterioration.[64]

[41] The Applicant's appeal against conviction was thus dismissed.

PART II STATEMENT OF ISSUES

[42] The question to be determined in this application is whether the issues for which leave is sought are of such public importance, nature or significance to warrant a decision by this Court.[65]

[43] The manner in which the presumptively inadmissible evidence of a Mr. Big confession was found admissible, in spite of the evidence raising real concerns the Applicant may have falsely confessed, elevates this issue to one that warrants review by this Court.

[44] Further, where an accused is found not to have actually intended to kill a victim, reference to that accused being wilfully blind to what a reasonable adult would have known raises profound questions about the validity of the finding of the requisite intent for murder.

[45] Finally, the risk of an invalid conviction for murdering a child based on a misapprehension of expert evidence regarding the victim's neurological symptoms itself raises concerns of such importance this Court's resolution of that issue is necessary.

[46] The Applicant seeks leave to appeal on the following issues:

Issue One: Whether the trial judge erred in law in finding the Appellant had the necessary intent for murder:

(a) By equating willful blindness to what a reasonable adult would have known about the neurologic condition of Meika and by finding the Appellant had knowledge that her conduct was likely to cause death contrary to the evidence

Issue Two: Whether the Mr. Big Confession evidence was admissible against the Appellant:

---

[64] *Ibid* at paras 61-63.
[65] *Supreme Court Act*, 1985, RSC c S-26, s 43(1)(a) [not reproduced]

(a) Whether the statements of the Appellant had any probative value; and

(b) Whether both courts below improperly invoked moral reasoning prejudice, bad character evidence and post offence conduct as ‘markers of reliability’ in the Appellant’s Mr. Big Confession

PART III STATEMENT OF ARGUMENT

Issue One: Whether the trial judge erred in law in finding the Appellant had the necessary intent for murder:

(a) By equating willful blindness to what a reasonable adult would have known about the neurologic condition of Meika and by finding the Appellant had knowledge that her conduct was likely to cause death contrary to the evidence

[47] This case garnered significant public attention and used significant public resources. Given Meika was only with the Applicant and Jordan in the days leading up to her death there was significant scrutiny as to which one or both of the Applicant or Jordan must have caused Meika’s death. There is genuine reason for concern to guard against public opinion influencing sound legal analysis.

[48] In this case there was a clear finding that the Applicant *did not* have the actual intention to kill. Therefore the only way to find the Applicant guilty of murder was to find that she inflicted bodily harm that she knew was likely to cause death and was reckless whether death ensued.

[49] It is submitted there is nothing in the evidence to support the finding that the Applicant *knew* that her actions were likely to cause death. There was also no evidence that the Applicant observed symptoms of neurologic deterioration that caused her to suspect and realize that Meika had suffered a head injury which would elevate any subsequent assaults to ones likely to cause death. By definition one cannot be wilfully blind to a condition she is not alert to.

[50] In fact, the trial judge found the Applicant had skepticism of the genuineness of Meika’s

final state of unconsciousness. In other words, the Applicant subjectively doubted the truth of the neurologic deficiency as it was present before her. This skepticism is incompatible with the Applicant having been wilfully blind to Meika's prior condition but does accord with the applicant being liable for having failed to meet the standard of conduct of a 'reasonable adult'.

[51] The term "wilful blindness" is a legal descriptor. It has a specific legal meaning. Significant mental gymnastics are needed to find that the trial judge's use of the term "wilful blindness" was as a "factual description regarding the appellants' reaction to Meika's neurologic deterioration" and was not therefore a finding whether the Applicant had had the necessary *mens rea* for murder. This reasoning demonstrates such error that a resolution in this Court is required.

[52] There was nothing to indicate that Meika was displaying symptoms of neurologic deficit that were recognized as such by the Applicant and that the Applicant then proceeded to further assault Meika.

[53] Taken together with the various aspects of the expert evidence as to the types and nature of assaults that do not typically cause fatal injury, it was not available to the trial judge to conclude that the Applicant did anything to Meika that she knew was likely to cause death.

[54] There public importance of preventing wrongful convictions is obvious. There is equally great public importance in ensuring those who are guilty of a homicide offence are not improperly held responsible for a level of culpability not supported by the evidence.

[55] The courts below have failed to analyze the actual evidence capable of establishing what the Applicant knew at any time she was found to have assaulted Meika. Wilful blindness was erroneously equated to a standard of what a reasonable adult ought to have known. In the result, the applicant is convicted of murder without the requisite subjective intent.

[56] While the parties are before this Court arguing whether murder is rightfully classified as first or second degree in this case, leave should be granted to allow the Applicant to demonstrate that the record does not support a finding of intent for murder at all.

Issue Two: Whether the Mr. Big Confession evidence was admissible against the Appellant:

(a) Whether the statements of the Appellant had any probative value; and

(b) Whether both courts below improperly invoked moral reasoning prejudice, bad character evidence and post offence conduct as 'markers of reliability' in the Appellant's Mr. Big Confession

[57] In ***Hart*** [66] this Court recognized the law had to respond to the risks inherent in "Mr. Big" confessions. The response was to create a two-pronged approach, where the first prong was to recognize a new common law rule of evidence for assessing the admissibility of these confessions. The rule now is these confessions are presumptively inadmissible and the Crown can only overcome this presumption if it establishes the probative value of the confession outweighs its prejudicial effect.

[58] In this case the Applicant's conviction rests upon her statement to Mr. Big. The trial judge focused her attention towards the probative value of the statement. Yet failed to consider the Applicant's statement to V contained a number of hallmarks of fabrication and inconsistencies and little evidence of true markers of reliability. The markers of reliability analysed by the trial judge were largely irrelevant to the death of Meika or in fact not logically capable of being markers of reliability at all.

[59] If the gatekeeping function of the *Hart* analysis is to have any meaning, it is imperative that trial courts across the country have a clear understanding of what makes a statement probative and what evidence amounts to markers of reliability that are capable of overcoming actual risks of a false confession (not presumed, but as found from the analysis of the way in which the Applicant's confession was procured).

[60] Properly applying the law, a trial judge would not have found that a statement of this limited probative value met the Crown's burden on a balance of probabilities. There is public importance in ensuring that this two-prong approach developed by the Court is functioning as

[66] ***Hart***, *supra* at paras 81, 84-85.

intended. Otherwise, the presumption of inadmissibility becomes a mere footnote to be referenced as having been considered as trial judges proceed to allow these statements into evidence.

[61] In this case, more than 17,500 intercepts of communications revealed no admission of any kind that the Applicant had done anything capable of causing Meika's death. The confession by the Applicant came only after she was told what Mr. Big wanted her to say and that since her husband had already said she did it anything other than her making a confession would result in their removal from the lifestyle they were being provided, and the opportunity for help getting her other children back. The probative value of the confession was virtually non-existent.

Conclusion

[62] The Applicant is before this Court appealing her conviction for first degree murder. The Applicant's position is that no leave is required to argue "any question of law" on her appeal. However, if leave is required, then it should be granted as the issues raised in grounds three and four of her Notice of Appeal are of sufficient public importance to warrant review by this Court.

PART IV SUBMISSIONS CONCERNING COSTS

[63] The Applicant makes no submissions concerning costs.

PART V NATURE OF ORDER SOUGHT

[64] The Applicant respectfully requests this Court order that no leave is required on any issue of law when appealing under section 691(2)(b) of the *Criminal Code.*

[65] In the alternative, the Applicant respectfully requests leave to appeal be granted pursuant to section 691(1)(b) or 691(2)(c) of the *Criminal Code* as may be required in order that she be able to argue grounds three and four as set out in her Notice of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Calgary, Alberta, this 11th day of May, 2017

MICHAEL BATES
COUNSEL FOR THE RESPONDENT
MARIE-EVE MAGOON

PART VI TABLE OF AUTHORITIES

PART VII STATUTE, REGULATIONS, RULES, ETC

***Criminal Code,* RSC 1985 c C-46**

***Code criminel,* LRC (1985) ch C-46**

Appeal from conviction

691 (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is grant

Appel d'une déclaration de culpabilité

691 (1) La personne déclarée coupable d'un acte criminel et dont la condamnation est confirmée par la cour d'appel peut interjeter appel à la Cour suprême du Canada :

a) sur toute question de droit au sujet de laquelle un juge de la cour d'appel est dissident;

b) sur toute question de droit, si l'autorisation d'appel est accordée par la Cour suprême du Canada.

Appeal where acquittal set aside

(2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents;

(b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person; or

(c) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Appel lorsque l'acquittement est annulé

(2) La personne qui est acquittée de l'accusation d'un acte criminel — sauf dans le cas d'un verdict de non-responsabilité criminelle pour cause de troubles mentaux — et dont l'acquittement est annulé par la cour d'appel peut interjeter appel devant la Cour Suprême du Canada :

a) sur toute question de droit au sujet de laquelle un juge de la cour d'appel est dissident;

b) sur toute question de droit, si la cour d'appel a consigné un verdict de culpabilité;

c) sur toute question de droit, si l'autorisation d'appel est accordée par la Cour suprême du Canada.

Order of Supreme Court of Canada

695 (1) The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

Ordonnance de la Cour suprême du Canada

695 (1) La Cour suprême du Canada peut, sur un appel aux termes de la présente partie, rendre toute ordonnance que la cour d'appel aurait pu rendre et peut établir toute règle ou rendre toute ordonnance nécessaire pour donner effet à son jugement.

***Supreme Court Act,* RSC 1985 c S-26**

***Loi sur la Cour supreme,* LRC (1985) ch S-26**

Appeals with leave of Supreme Court

40 (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Appel avec l'autorisation de la Cour

40 (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

Applications for leave to appeal

43 (1) Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall

(a) grant the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it; (b) dismiss the application if it is clear from the written material that it does not warrant an oral hearing and that there is no question involved as described in paragraph (a); and

(c) order an oral hearing to determine the application, in any other case.

Demande d'autorisation d'appel

43 (1) Malgré toute autre loi fédérale et sous réserve du paragraphe (1.2), la demande d'autorisation d'appel est présentée par écrit à la Cour, qui, selon le cas :

a) l'accueille, s'il ressort des conclusions écrites qu'elle ne justifie pas la tenue d'une audience et, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou de son importance à tout autre égard, qu'elle devrait en être saisie;

b) la rejette, s'il ressort des conclusions écrites qu'elle ne justifie pas la tenue d'une audience et que les questions soulevées ne sont pas visées à l'alinéa a);

c) ordonne, dans les autres cas, la tenue d’une audience pour en décider