

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

BETWEEN:

**ADRIAN JOHN WALLE**

Appellant (on appeal)

- and -

**HER MAJESTY THE QUEEN**

Respondent

- and -

**CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO**

Intervener

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**FACTUM OF THE RESPONDENT**  
**ATTORNEY GENERAL OF ALBERTA**  
PURSUANT TO RULE 42 OF *RULES OF THE SUPREME COURT OF CANADA*

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# **FACTUM OF THE RESPONDENT**

## **PART I – OVERVIEW AND FACTS**

### **Overview**

1. The Appellant wants to have a new trial, though it is not clear what for.
2. He has framed a carefully abstracted argument about the common sense inference that a person intends the consequences that naturally flow from his or her acts. But though he argues the law of intent, his position on the facts is involuntariness: whether, in the words of his trial counsel, there was “a physical mechanical malfunction of [his] person, that his finger pulled the trigger, but without the brain actively telling the finger to pull the trigger.”<sup>1</sup>
3. Significantly, the Appellant has never attempted to argue that he did not foresee the consequence of his own act. On the stand, he never claimed any failure to understand that firing a rifle at a man’s chest from close range was likely to be lethal. At trial, his counsel conceded that his ability to form intent was not impaired by alcohol, and did not argue any lack of foresight of consequences. Even now, on his proposed “fresh” evidence, he does not argue that he was “incapable of appreciating the consequences of firing a rifle.” In other words, he does not argue that any construction of any evidence could have affected the verdict.
4. All the evidence points to one conclusion: the Appellant intended to murder Jeff Shuckburgh. When Mr. Shuckburgh kicked him out of his bar, the Appellant felt it was unfair. During a prolonged stand-off, he pointed a sawed-off rifle at Mr. Shuckburgh, saying “This isn’t just a BB gun.” He must have removed the safety and cocked the rifle before he fired it at Mr. Shuckburgh’s chest from less than ten feet away. He ran home but did not call 911. Afterward, he threatened to kill himself by various means, including the use of the very same rifle. The Appellant understands that firing that rifle at a person’s body is likely to cause death.
5. The Trial Judge did not err in finding murderous intent. He properly considered evidence of the Appellant’s alcohol consumption and properly did not consider “developmental deficit”, which was not before him in evidence or in argument. The Alberta Court of Appeal’s tactful

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<sup>1</sup> Appellant’s Record at p. 212/29-32

observation that “developmental deficit” had no air of reality was accurate in fact and in law. The appeal should be dismissed.

### **Statement of Facts**

6. The Respondent is unable to accept the Appellant’s statement of facts.

7. The first problem with the Appellant’s statement of facts is his reliance on his own testimony. The Trial Judge found that the Appellant is “a habitual liar, whose evidence is unworthy of belief.”<sup>2</sup> He specifically found the accidental discharge theory to be “a false theory, contrived and concocted by the [Appellant] to save himself from the full consequences of his criminal conduct.”<sup>3</sup> He “reject[ed] it as an untruth.”<sup>4</sup> Since paragraphs 9 through 29 of the Appellant’s factum are drawn almost exclusively from his own evidence,<sup>5</sup> they must be disregarded.

8. Next, the Respondent must clarify the meaning of “accidental discharge” and unintentional discharge,” as these terms were used by firearms expert Bruce Gunn. Mr. Gunn defined an “accidental discharge” as “any mechanical problem that can cause [a] firearm to discharge, without someone applying the correct amount of pressure on the trigger.” An accidental discharge would never be attributed to a gun in good working order. By contrast, an “unintentional discharge” is a discharge from a gun that has no mechanical problems. A firearms expert may use this phrase when he doesn’t know what happened to the gun. Mr. Gunn hesitated to use it, since as a firearms examiner, he would have “no idea what the intent of the person” was when he or she fired the gun. He had worked on cases that were *reported* to be unintentional, but he believed that decisions on intent were for the courts to make.<sup>6</sup>

9. Finally, in some of the remaining sections of his statement of facts, the Appellant has omitted significant details. The Respondent supplements the facts as follows.

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<sup>2</sup> Respondent’s Record at p. 113/15-16

<sup>3</sup> Respondent’s Record at p. 113/30-33

<sup>4</sup> Respondent’s Record at p. 113/33

<sup>5</sup> The first two sentences of paragraph 9 are drawn from the agreed statement of facts and are therefore valid. The last sentence of paragraph 16 is drawn from the evidence of Michael Stewart. At trial, defence counsel said Mr. Stewart’s evidence was of “no value”, while Crown counsel said he testified well, within his limitations: See Appellant’s Record at p. 200/17-40 [Tab 4(K)], Appellant’s Record at p. 227/24-44 [Tab 4(L)]

<sup>6</sup> Appellant’s Record at pp. 124/40-125/21 [Tab 4(I)], Respondent’s Record at pp. 102/1-105/22

### **The Appellant's conduct before he shot Mr. Shuckburgh**

10. On January 7, 2004, Rob Ferguson was tending bar at Shuckaluck's Pub. He didn't notice the Appellant come in. At some point he saw him cross to another table, talk to a woman, and return to the table where he was sitting with two other men. Later, Mr. Ferguson saw the Appellant get up to go to the washroom. He noticed a bulge under his jacket, and a metal tube protruding out of the jacket and into the Appellant's pants pocket. It looked like the barrel of a gun.<sup>7</sup>

11. Bartender Mike Oleniuk wasn't on shift that night, but he had stopped into Shuckaluck's for dinner. He was sitting with bar owner Jeff Shuckburgh when Mr. Ferguson told Mr. Shuckburgh about his observation of the Appellant. When the Appellant came out of the washroom, Mr. Shuckburgh asked him what he had in his coat. In a conversational tone, the Appellant said, "Nothing." Mr. Shuckburgh asked him to show them, if he had nothing to hide. They started walking toward the door. In the doorway, Mr. Shuckburgh asked again what it was. The Appellant said that it was just a BB gun, and that he still had beer on his table that he had paid for. Mr. Shuckburgh told the Appellant that he needed to get the gun out of the pub, but then he could come back and finish his beer before leaving. The Appellant agreed.<sup>8</sup>

12. The Appellant returned a few minutes later and allowed Mr. Shuckburgh to search him. He rejoined his friends, had a few sips of beer, and chatted with bar patrons Cari McKearney and Kelly Clayton. Ms. McKearney said the Appellant's demeanour was "just normal;" he didn't look drunk or high. Mr. Ferguson did not believe the Appellant was intoxicated, but he thought the girls looked uncomfortable, so he asked the Appellant to finish his beer and leave. The Appellant said, a little nervously, that he didn't see why, since he wasn't doing anything wrong. He left without incident.<sup>9</sup>

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<sup>7</sup> Respondent's Record at pp. 12/40-13/37, Appellant's Record at pp. 27/27-37, 28/21-33 [Tab 4(A)]

<sup>8</sup> Appellant's Record at pp. 27/38-45, 29/25-44, 31/27-32/19, 49/10- 50/47 [Tab 4(A)], Respondent's Record at pp. 14/1-7, 15/37-47, 16/27-35, 17/16-18/42, 26/4-46, 40/4-43/6

<sup>9</sup> Appellant's Record at pp. 30/31-46, 32/24-34/8, 50/3-28, 51/1-53/8 [Tab 4(A)], Respondent's Record at pp. 18/44-21/38, 27/37-28/43, 43/24-44/46, 45/12-30, Appellant's Record at p. 83/25-39 [Tab 4(C)], Respondent's Record at pp. 50/18-23, 55/24-34, 56/39-59/21, Appellant's Record at pp. 86/32-88/11 [Tab 4(D)], Respondent's Record at pp. 60/8-10, 60/44-61/16

13. Surveillance video from a nearby Mac's store showed the Appellant entering, waiting in line, buying something, and leaving.<sup>10</sup>

14. Minutes later, the Appellant returned to Shuckaluck's. Ms. McKearney could see a shape under his jacket. She said the Appellant's demeanour was different: he was pacing and seemed nervous. He headed back toward his table, but Mr. Shuckburgh and Mr. Ferguson stood in his path. Mr. Ferguson told the Appellant to leave. The Appellant just looked at him blankly and didn't move. Mr. Ferguson put one hand on the Appellant's shoulder and one on his midsection. He felt the gun under the Appellant's coat. Mr. Ferguson took the Appellant to the door. At the doorway, the gun fell to the ground.<sup>11</sup>

15. By the time the Appellant picked up the gun, Mr. Shuckburgh and Mr. Oleniuk had also come to the doorway. The Appellant held the rifle like a handgun, with his fingers near the trigger. He pointed the gun toward the three men, waving the muzzle back and forth.<sup>12</sup>

16. At Mr. Shuckburgh's request. Mr. Ferguson went back into the bar. The Appellant backed slowly across the patio, with Mr. Shuckburgh and Mr. Oleniuk following about six to ten feet behind. Mr. Shuckburgh said, "Just go home, we don't need this." The Appellant said, "I don't want to disrespect you."<sup>13</sup>

17. Mr. Shuckburgh continued to ask the Appellant why he brought the gun into the bar. The Appellant was swearing and name-calling, shakily insisting that he didn't do anything wrong. By the time the stand-off reached the breezeway, Mr. Ferguson had come out of Shuckaluck's rear exit. The Appellant worked his way to the top of a ramp at the back of the breezeway, his agitation increasing. The ramp was bounded by a waist-high wall. From behind the wall, the

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<sup>10</sup> Respondent's Record at pp. 106/4-32, 107/16-108/41

<sup>11</sup> Appellant's Record at pp. 34/19-35/4, 35/32-37, 53/21-55/17 [Tab 4(A)], Respondent's Record at pp. 21/44-23/36, 24/34-25/27, 29/42-33/3, 45/32-48/33, Appellant's Record at pp. 83/32-84/31 [Tab 4(C)], Respondent's Record at p. 51/19-28, Appellant's Record at p. 88/23-90/1 [Tab 4(D)], Respondent's Record at p. 61/13-27

<sup>12</sup> Appellant's Record at pp. 35/5-8, 36/5-37/6, 55/27-56/13 [Tab 4(A)], Appellant's Record at pp. 66/44-67/24, 80/43-81/7 [Tab 4(B)]

<sup>13</sup> Appellant's Record at pp. 37/9-20, 56/38-40, 57/1-5 [Tab 4(A)], Appellant's Record at pp. 67/26-68/9, 69/21-31 [Tab 4(B)], Respondent's Record at p. 33/31-42, Appellant's Record at p. 81/23-46 [Tab 4(B)], Respondent's Record at pp. 34/23-28, 48/35-47, 52/13-53/7, 54/35-42

Appellant continued to point the gun back and forth between Mr. Oleniuk and Mr. Shuckburgh, and sometimes at Mr. Ferguson as well.<sup>14</sup>

18. The Appellant backed partway down the ramp and came back up a couple of times. Mr. Shuckburgh continued to tell him to go home, and added, “I know your face, you’re not allowed in my bar.”<sup>15</sup>

19. As the Appellant retreated farther down the ramp, Mr. Oleniuk thought that the confrontation was over, and started walking back to the bar. But the Appellant advanced up the ramp again. He rested the rifle on top of the wall, sniper-style, pointed it at Mr. Ferguson, and said sternly, “This isn’t just a BB gun.”<sup>16</sup>

20. The Appellant progressed toward the bottom of the ramp. Mr. Ferguson and Mr. Oleniuk had fallen back, but Mr. Shuckburgh continued to walk toward the Appellant. The Appellant would not take a step away unless Mr. Shuckburgh took a step forward. As the stand-off moved onto the sidewalk, someone shouted from the bar, “Should I call the cops?” Mr. Ferguson turned toward the bar and said yes.<sup>17</sup>

21. When Mr. Ferguson turned around again, he heard a gunshot and saw Jeff Shuckburgh fall to the ground. At autopsy, a bullet was extracted from Mr. Shuckburgh’s heart.<sup>18</sup>

### **The Appellant’s conduct after he shot Mr. Shuckburgh**

22. The Appellant ran.<sup>19</sup> He arrived at Adina Stewart’s house as she was still cleaning up from dinner. He seemed dazed, as if he didn’t know what to do next. He grew more agitated as he told his story. He said he had been kicked out of the bar for doing something wrong, and someone from the bar was following, or had said that he would follow him home. The

<sup>14</sup> Appellant’s Record at pp. 37/30-38/34, 39/4-10, 45/41-46/12, 57/19-25, 58/10-20 [Tab 4(A)], Appellant’s Record at pp. 69/13- 70/20, 70/32-39, 72/1-5, 82/7- 16 [Tab 4(B)], Respondent’s Record at p. 36/36-47

<sup>15</sup> Appellant’s Record at pp. 72/10-73/5 [Tab 4(B)], Respondent’s Record at pp. 35/41-36/12

<sup>16</sup> Appellant’s Record at pp. 223/14-224/38 [Tab 4(L)], Appellant’s Record at pp. 39/20-40/15, 59/39-61/1 [Tab 4(A)], Appellant’s Record at pp. 72/10-75/17, 82/37-45 [Tab 4(B)], Respondent’s Record at pp. 35/41-36/12, 37/20-32

<sup>17</sup> Appellant’s Record at pp. 40/32-36, 41/38-42/7, 43/38- 41 [Tab 4(A)], Appellant’s Record at pp. 75/26-78/2 [Tab 4(B)], Respondent’s Record at pp. 38/28-39/13

<sup>18</sup> Appellant’s Record at pp. 43/38-47, 64/45-65/2 [Tab 4(A)], Appellant’s Record at p. 78/4-35 [Tab 4(B)], Respondent’s Record at p. 109/37-41

<sup>19</sup> Appellant’s Record at p. 44/5-6 [Tab 4(A)], Appellant’s Record at p. 79/2-18 [Tab 4(B)]

Appellant felt stressed or threatened. He pointed his gun at the person and told him to leave him alone. As the person continued to advance, the Appellant said he panicked: “something went crazy in my head.” He pulled the trigger.<sup>20</sup>

23. The Appellant produced the rifle from under his jacket and showed Ms. Stewart. He moved toward his bedroom, saying that he had one bullet left and was going to shoot himself. He felt sure the other person was dead.<sup>21</sup>

24. When Michael Stewart arrived, the Appellant immediately said, “Michael had nothing to do with this.” Michael asked the Appellant why he did it. The Appellant had no answer. Ms. Stewart got the impression that the shooting was an accident, that the Appellant had not intended to pull the trigger. He commented that the gun was meant for shooting objects, not people. Throughout, the Appellant held the gun, gesturing with it as he spoke.<sup>22</sup>

25. The Appellant continued to speak of suicide, saying he would rather kill himself than spend years in jail.<sup>23</sup>

26. Cst. Chris Sudu located the Stewart residence just as the Appellant and Michael Stewart came out the door. They were smoking and arguing. Cst. Sudu heard the Appellant say, “There was a dozen of them. The guy was not backing off.” When the Appellant walked out onto the roadway, Cst. Sudu identified himself as a police officer and ordered the Appellant to get on the ground and show his hands. The Appellant turned and started walking away from Cst. Sudu. He was holding a rifle. Cst. Sudu continued to order him to the ground, but he kept walking through the Stewarts’ gate and into the yard. Cst. Sudu ran closer to the yard. The Appellant stopped and looked at him emotionlessly. Still ignoring Cst. Sudu’s orders, he walked backward up the walkway to the house.<sup>24</sup>

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<sup>20</sup> Appellant’s Record at pp. 99/23-100/44, 101/17-102/1, 108/43-112/20 [Tab 4(E)]

<sup>21</sup> Appellant’s Record at pp. 102/27-103/21, 110/33-47 [Tab 4(E)]

<sup>22</sup> Appellant’s Record at pp. 103/25-33, 105/19-31, 111/18-33 [Tab 4(E)]

<sup>23</sup> Appellant’s Record at pp. 104/13-21, 113/15-24 [Tab 4(E)]

<sup>24</sup> Respondent’s Record at pp. 62/25-63/34, 64/41-65/11, 65/30-38, 66/7-69/8

27. Fearing a hostage situation, Cst. Sudu rushed the Appellant. The Appellant's eyes grew wider. He tossed the rifle aside. He was silent and cooperative as Cst. Sudu placed him under arrest.<sup>25</sup>

28. Cst. Filzi assisted in handcuffing the Appellant. He recognized him, and said "You again". The Appellant responded, "Whatever." He asked the Appellant some questions in the course of reading him his rights; again the Appellant responded, "Whatever." Then he told Cst. Filzi, "You're an idiot." As they walked back to the police car, the Appellant would periodically spit on the sidewalk. When they passed several police cars, the Appellant looked around at all of it. He spotted a television camera and said, "What the fuck do these guys want?" His demeanour was cool and collected. When he spit at Cst. Filzi, Cst. Filzi put a mesh mask over his mouth. Cst. Filzi could tell the Appellant had been drinking, but said he was not staggering or slurring and appeared to understand what was going on around him. In Cst. Filzi's opinion, he was not impaired.<sup>26</sup>

29. At the police station, Cst. Filzi re-read the Appellant's *Charter* rights. The Appellant asked to speak to a lawyer. He dialled the toll-free Legal Aid number a couple of times but got a busy signal. By then, Cst. Filzi had learned that Mr. Shuckburgh had died. He re-arrested and re-*Chartered* the Appellant for murder. The Appellant said "I wish I was dead right now. See that gun in your holster? Shoot me. Be a man. Give me your gun. I'll shoot myself." He sniffled as his eyes welled up.<sup>27</sup>

30. The Appellant continued: "I didn't mean to kill him (pause) on purpose." As they passed a window in the hallway, he said "I want to jump out that window... I didn't mean to shoot anybody." The Appellant dialled Legal Aid again and got through. Afterward, he was interviewed by homicide detectives.<sup>28</sup>

31. The interview was ruled voluntary. The Trial Judge found, *inter alia*, that the Appellant "appeared to know what was going on." He understood his jeopardy "in a general layperson's way" and maintained a "careful and, indeed, wary approach to the questioning from beginning to

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<sup>25</sup> Respondent's Record at pp. 69/36-44, 70/39-71/7, 72/22-31

<sup>26</sup> Respondent's Record at pp. 73/7-39, 74/31-78/3, 78/40-81/32

<sup>27</sup> Respondent's Record at pp. 82/1-87/10

<sup>28</sup> Respondent's Record at pp. 87/12-88/17

end.” Though the Appellant’s breath continued to smell of alcohol, the Trial Judge found he was not impaired.<sup>29</sup>

### **The rifle**

32. The rifle the Appellant used to shoot Jeff Shuckburgh was a .22 calibre semi-automatic Ruger. If loaded with bullets instead of a magazine, it effectively becomes a single-shot rifle. This rifle is equipped with a “safety” – a bolt that crosses in front of the trigger to prevent it from firing. To pull the trigger, the safety must first be pushed to the right. When the safety is off, a red ring appears, signifying “danger.” In addition, before the trigger can be pulled, the rifle must be “cocked” – that is, the hammer mechanism must be drawn back into a position from which it can apply force to the firing pin. If the gun is not cocked, it will not fire.<sup>30</sup>

33. Bruce Gunn, the Crown’s firearms expert, test-fired the Appellant’s rifle. He found no problems with the action, extraction, ejection or discharge. He took it apart to examine the action, and found it to be clean and in normal condition.<sup>31</sup>

34. He tested the rifle to see if it was prone to accidental discharge. Several times, in several positions, he cocked it and dropped it onto a rubber mat from a height of three feet. He also cocked it and hit it with a rubber mallet. He could not make it discharge by jarring.<sup>32</sup>

35. The amount of pressure required to pull the trigger was between 6.33 and 6.41 pounds.<sup>33</sup>

### **The defence position at trial**

36. At trial the defence conceded that the facts established manslaughter. Defence counsel said the only issue was whether, at the moment the trigger was pulled, the Appellant had the requisite intent for murder.<sup>34</sup>

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<sup>29</sup> Respondent’s Record at p. 86/16-39

<sup>30</sup> Respondent’s Record at pp. 90/46-47, 91/1-13, Appellant’s Record at pp. 120/37-121/4, 122/27-34, 124/26-32 [Tab 4(I)]

<sup>31</sup> Respondent’s Record at pp. 100/8-33, 101/14-30

<sup>32</sup> Appellant’s Record at p. 122/1-25 [Tab 4(I)], Respondent’s Record at p. 105/24-38

<sup>33</sup> Appellant’s Record at p. 123/13-37 [Tab 4(I)]

<sup>34</sup> Reasons for Judgment of Justice Hart at pp. 2/27-3/10, Appellant’s Record [Tab 2(A)]; Appellant’s Record at p. 197/25-39 – [Tab 4(K)]

37. Defence counsel accepted that the law permits an inference that a sane and sober person intends the consequences of his actions.<sup>35</sup> However, he asked the judge not to apply that inference, because the Appellant is “an immature, unsophisticated, inarticulate, simple individual.”<sup>36</sup> The defence did not lead any evidence of, nor raise in argument, any issue of developmental deficit.

38. Defence counsel asked the Court to consider alcohol consumption as “something that goes into the mix” of the Appellant’s emotional state. He disavowed any suggestion that the Appellant “had reached a state of intoxication that made him incapable of forming intent. Not at all. The evidence doesn’t support that submission.”<sup>37</sup> Rather,

the only possible explanation is there was, ... a physical mechanical malfunction of the person of Mr. Walle, that his finger pulled the trigger, but without the brain actively telling the finger to pull the trigger. There was a lack of communication between the brain and the finger.<sup>38</sup>

### **The Trial Judge’s reasons**

39. The Trial Judge identified the sole contested issue as intent. He accepted the Crown’s evidence, noting some insignificant discrepancies. He found that the Appellant’s evidence was “unworthy of belief ... contrived and concocted,” and incapable of raising a reasonable doubt. He rejected the “accidental discharge theory”.<sup>39</sup>

40. In concluding that the Appellant had the intent for murder, the Trial Judge highlighted the following circumstances:

- (a) The Appellant was familiar with, and had previously used, the rifle;
- (b) He knew that the safety was off;
- (c) He had the gun pointed at the victim’s chest;
- (d) He fired from a distance of only five or so feet;
- (e) He knew the gun was loaded;

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<sup>35</sup> Appellant’s Record at p. 199/25-34 [Tab 4(K)]

<sup>36</sup> Appellant’s Record at p. 199/37-38 [Tab 4(K)]

<sup>37</sup> Appellant’s Record at p. 217/2-21 [Tab 4(K)]

<sup>38</sup> Appellant’s Record at p. 212/27-35 [Tab 4(K)]

<sup>39</sup> Reasons for Judgment of Justice Hart, Appellant’s Record at pp. 3/42-6/10 [Tab 2(A)]

- (f) Moments earlier, he had said “this isn’t a BB gun”;
- (g) He was not impaired.<sup>40</sup>

He expressly turned his mind to the inference that “a sane and sober person intends the reasonable and probable consequences of his acts,” and concluded that “this inference applies on the facts of this case.” He found that the Appellant deliberately pulled the trigger and murdered Jeff Shuckburgh.<sup>41</sup>

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<sup>40</sup> Reasons for Judgment of Justice Hart, Appellant’s Record at pp. 6/17-7/2 [Tab 2(A)]; Memorandum of Judgment, Appellant’s Record at para. 10 [Tab 2(C)]

<sup>41</sup> Reasons for Judgment of Justice Hart, Appellant’s Record at p. 7/3-45 [Tab 2(A)]

## **PART II – ISSUES**

41. The Appellant has stated one issue:

*Whether the Court of Appeal erred in failing to find that the Appellant's developmental deficits and alcohol consumption must be considered before relying on the common sense inference that a sane and sober person intends the natural and probable consequences of his actions.*

42. This issue contains a number of implicit premises that must be examined explicitly:

(a) *Must a trial judge consider all evidence, including any evidence of developmental deficit or alcohol consumption, before making a finding of intent?*

**Response:** Yes, a trial judge must consider all evidence before ruling. The key word, however, is “evidence.” An accused’s claim that something prevented him from foreseeing, or that he did not foresee, the consequences of his act must have a foundation in the record. Finders of fact must not speculate.

(b) *In the case at bar, did the Trial Judge err in failing to consider “the Appellant’s developmental deficits and alcohol consumption”?*

**Response:** No. He expressly considered the latter. The former had no foundation in the evidence and was not advanced in argument at trial.

(c) *Did the Court of Appeal err in failing to find that the Trial Judge erred?*

**Response:** No. See above.

## **PART IIIA – ARGUMENT ON THE APPELLANT’S ISSUE**

### **I. The issue is moot**

43. The Appellant has framed only one legal issue, and has done so in carefully abstracted terms. He alleges that the court below erred in

...failing to find that the Appellant’s developmental deficits and alcohol consumption **must be considered** before relying on the common sense inference that a sane and sober person **intends the natural and probable consequences** of his action. (emphasis added)

44. This issue is moot for three reasons, relating to the words emphasized above.

#### **Moot Issue, Part 1: The Appellant pleads involuntariness, not lack of intent**

45. The Appellant’s factum is a bait and switch, from *mens rea* to *actus reus*. He has focused his legal argument on the inference that he intended the consequences of his act. This is a *mens rea* inference. When he discusses the facts of the case, however, he turns to “accident” or “mishap”<sup>42</sup> – in other words, to involuntariness. Involuntariness is an *actus reus* issue. Though he has developed a *mens rea* argument, he has not applied it. On the Appellant’s own argument, his stated issue is moot.

#### **Distinguishing intent from involuntariness**

46. The basic elements of a criminal offence are the physical element, or *actus reus*, and the mental element, or *mens rea*. The *actus reus* is the act or omission prohibited by legislation. The *mens rea* is the mental state required for a finding of criminal responsibility.<sup>43</sup>

47. For present purposes, *mens rea* means intentionality. To be found guilty of second degree murder, an accused must have intended to cause one of two consequences: death, or bodily harm likely to cause death (being reckless whether death ensues).<sup>44</sup>

<sup>42</sup> Appellant’s Factum at paras. 81-83

<sup>43</sup> Kent Roach, *Criminal Law*, 4<sup>th</sup> ed., (Toronto: Irwin Law, 2009) at p. 8-9 [Tab 1]

<sup>44</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 229(a)

48. Because intent cannot be directly observed, it is almost always a matter of inference.<sup>45</sup> The law permits the inference that a sane and sober person intends the natural consequences of his acts.<sup>46</sup> That is, if a person does something that would naturally cause death, the law permits the conclusion that he intended to cause death. In the case at bar, the Trial Judge concluded that when the Appellant fired a rifle round into Mr. Shuckburgh's chest from less than ten feet away, he intended to cause Mr. Shuckburgh's death, or bodily harm likely to cause death.<sup>47</sup> In short, he possessed the *mens rea* for murder.

49. *Actus reus* has its own minimal mental element: voluntariness. "[T]here can be no *actus reus* unless it is the result of a willing mind at liberty to make a definite choice or decision."<sup>48</sup> The opposite of voluntariness can be either accident or automatism.<sup>49</sup>

50. Accident carries its ordinary meaning. It has typically not been defined except through synonyms such as "involuntary" or the less precise "unintentional." Accident has been pled where a bullet ricocheted in an unexpected direction, a gun went off when its handler was struck and stumbled, and gasoline exploded without any manual ignition.<sup>50</sup> Whether an occurrence is accidental is a question of fact.<sup>51</sup>

51. Automatism is "a state of impaired consciousness ... in which an individual, though capable of action, has no voluntary control over that action."<sup>52</sup> Expert evidence will typically be required to establish automatism.<sup>53</sup> To avoid placing on the Crown an impossible burden, voluntariness is presumed. An accused may displace this presumption by proving involuntariness on a balance of probabilities.<sup>54</sup>

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<sup>45</sup> *R. v. Mitchell*, [1964] S.C.R. 471 (S.C.C.) at p. 483 [Tab 33]

<sup>46</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at paras. 19-20 [Tab 39]

<sup>47</sup> Reasons for Judgment of Justice Hart, Appellant's Record at p. 7/3-45 [Tab 2(A)]

<sup>48</sup> *R. v. Theroux*, [1993] 2 S.C.R. 5 (S.C.C.) at pp. 17-18 [Tab 46]; *R. c. Bouchard-Lebrun*, 2001 CarswellQue 12785 (S.C.C.) at paras. 45-49 [Tab 7]; *R. v. King*, [1962] S.C.R. 746 (S.C.C.) at p. 749 [Tab 21]

<sup>49</sup> A third "opposite", not pled in this case, can be mental disorder: See *R. c. Bouchard-Lebrun*, 2001 CarswellQue 12785 (S.C.C.) at paras. 39, 59-62 [Tab 7]

<sup>50</sup> Respectively, *R. v. Sutherland*, 1993 CarswellSask 294 (C.A.) at paras. 12-13 [Tab 44]; *R. v. Tennant*, 1975 CarswellOnt 31 (C.A.) at para. 10 [Tab 45]; *R. v. Zezze*, 1983 CarswellAlta 129 (Q.B.) at para. 14 [Tab 50]

<sup>51</sup> *R. v. Lelievre*, 1962 CarswellOnt 5 (C.A.) at paras. 37, 39 [Tab 23]; *Housen v. Nikolaisen*, [2002] S.C.R. 235 (S.C.C.) at paras. 10; 19-25 [Tab 3]

<sup>52</sup> *R. v. Stone*, 1999 CarswellBC 1064 (S.C.C.) at para. 156 [Tab 42]

<sup>53</sup> *R. v. Stone*, 1999 CarswellBC 1064 (S.C.C.) at para. 192 [Tab 42]

<sup>54</sup> *R. v. Stone*, 1999 CarswellBC 1064 (S.C.C.) at para. 180 [Tab 42]; see also paras. 192, 220 [Tab 42]

**The defence misapplies the label of “intent” to an argument of involuntariness**

52. Ever since the Appellant’s second trial, the defence has been confusing the issues of *mens rea* and *actus reus*. In closing argument, the Appellant’s trial counsel identified the sole issue as intent.<sup>55</sup> Intent was a misnomer, however, since the defence’s actual position was involuntariness:

[T]he only possible explanation is there was ... a physical mechanical malfunction of the person of Mr. Walle, that his finger pulled the trigger, but without the brain actively telling the finger to pull the trigger. There was a lack of communication between the brain and the finger.<sup>56</sup>

53. The argument that the Appellant’s finger moved without his voluntary control is an argument of automatism.<sup>57</sup> At trial, literally no support was offered for this argument. The Appellant did not even speculate<sup>58</sup> on any agent of automatism, like an epileptic seizure or extreme intoxication.<sup>59</sup> He merely theorized that the finger acted alone.

54. In this Court, the Appellant continues to suggest that he could have pulled the trigger involuntarily, though now he uses the language of “mishap” or “accident”.<sup>60</sup> But again, he offers no support. He does not even speculate on any agent of accident, like a collision or a fall. He merely asserted that he didn’t mean to pull the trigger.<sup>61</sup>

55. In this sense, the case at bar parallels *R. v. Hartridge*:

The only reference to accident is in the evidence of the appellant when he said it was an accident as far as he was concerned. This was no more than a rationalization by the appellant as he stated he did not remember firing the rifle. It was **merely an hypothesis of innocence, unsupported by evidence, and the**

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<sup>55</sup> Defence Closing Submissions at Appellant’s Record at pp. 196/45-197/14 [Tab 4(E)]; see also Trial Judge’s Reasons at Respondent’s Record at p. 112/20-30

<sup>56</sup> Appellant’s Record at p. 212/2-35 [Tab 4(K)]. See also the Defence Closing Submissions at Appellant’s Record at pp. 197/44-199/5 [Tab 4(K)]; Trial Judge’s Reasons, Respondent’s Record at pp. 111/20-35, 112/36-39, 113/28-35

<sup>57</sup> Defence counsel conceded that the rifle would not have discharged accidentally: Appellant’s Record at p. 212/5-11 [Tab 4(K)]

<sup>58</sup> Stress doesn’t count: *R. v. Stuart*, 2007 CarswellQue 5786 (C.A.) at paras. 31-32 [Tab 43]. Nor does anger: *R. v. Walle*, 2007 ABCA 333 at paras. 22, 29 [Respondent’s Record – pp. 7, 8]; *R. v. Cudjoe*, 2009 CarswellOnt 3726 (C.A.) at para. 108 [Tab 13]

<sup>59</sup> *R. v. Daviault*, [1994] 3 S.C.R. 63 (S.C.C.) at pp. 16-17, 45-46 [Tab 16]

<sup>60</sup> His position may be occluded by his inapt adoption of the phrase “unintentional discharge”: See para. 8 above.

<sup>61</sup> Appellant’s Record at p. 179/6-32 [Tab 4(J)]

**learned trial judge should not have submitted the defence of accident for the jury's consideration.**<sup>62</sup> (emphasis added)

56. In the case at bar, the issue of submitting the defence to a jury does not arise. Rather, the Trial Judge specifically rejected the Appellant's evidence as it related to the theory of accident.<sup>63</sup> No error is alleged in the Trial Judge's assessment of credibility or finding of fact.

57. Whether framed as automatism or as accident, there is no credible evidence capable of supporting the theory that the Appellant's finger may have pulled the trigger without instructions from his brain.

58. More to the point, whether framed as automatism or as accident, the Appellant's theory is *involuntariness*. All discussion of using the common sense inference to find *intent* is moot.

**Moot Issue, Part 2: The Appellant does not claim that the verdict may be affected**

59. The Appellant complains about procedure, but not substance. He asserts only that the Trial Judge should have considered certain evidence. He does not attempt to unseat the Trial Judge's conclusion that he intended death or serious bodily harm when he fired his rifle at Jeff Shuckburgh's chest. At no point in his factum has he suggested that any different approach to any of the trial evidence could have affected the verdict.

60. Nor does he suggest that consideration of his proposed "fresh" evidence could have affected the verdict. In a memorandum on his motion to adduce evidence of his Asperger's diagnosis, he wrote:

**The Appellant does not argue that he was insane or incapable of appreciating the consequences of firing a rifle** because he suffers from Asperger's syndrome. The Appellant's position is quite simply: the common sense inference is a conclusion that may be drawn after considering "all the evidence."<sup>64</sup> (emphasis added)

61. Thus, the Appellant only argues the procedural point that certain evidence should have been considered in drawing the inference that he intended the consequence of his act. At no

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<sup>62</sup> *R. v. Hartridge*, 1966 CarswellSask 22 (C.A.) at para. 89 [Tab 20]. In other cases, courts have concluded that defences of accident should have gone to the jury even if the only evidence of accident came from the accused: See *R. v. Culliton*, 2000 CarswellOnt 80 (C.A.) at paras. 7-8 [Tab 14]; *R. v. Mathisen*, 2008 CarswellOnt 6489 (C.A.) at paras. 87-88 [Tab 30]

<sup>63</sup> Trial Judge's Reasons, Respondent's Record at p. 113/24-35

<sup>64</sup> Memorandum of Argument – Reply to Response to Motion to Adduce Fresh Evidence at para. 3 [Appendix A]

point has he argued that, on any evidence, a different inference could be drawn. The procedural issue is moot.

**Moot Issue, Part 3: The Trial Judge considered everything that should have been considered**

62. The Appellant’s essential contention is that the Trial Judge *should have considered* evidence of his “developmental deficits and alcohol consumption”. The Appellant thus implies, without stating, that the Trial Judge *did not consider* evidence of developmental deficits and alcohol consumption. This implied assertion is false. The Trial Judge considered everything he should have.

**The Trial Judge expressly considered evidence of alcohol consumption**

63. When the Appellant now argues that “the Trial Judge improperly dismissed the evidence of the Appellant’s state of sobriety by requiring him to prove he was intoxicated to the degree required to establish a defence of intoxication”,<sup>65</sup> he is misreading the Trial Judge’s reasons and, to some extent, contradicting his own position at trial.

64. The Trial Judge expressly considered the Appellant’s alcohol consumption in assessing his intent: “It is also clear from the evidence, as a whole, that, while the [Appellant] had been drinking, he was not impaired.” The Trial Judge did not “dismiss” evidence of the Appellant’s consumption; he described it.

65. Significantly, the Trial Judge’s treatment of the alcohol evidence responded specifically to the defence position. In closing, defence counsel conceded that the Appellant’s alcohol consumption did not preclude the formation of intent:

I am not for a moment suggesting that Adrian Walle had reached a state of intoxication that made him incapable of forming intent. Not at all. The evidence doesn't support that submission. But ... alcohol is something that goes into the mix.

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<sup>65</sup> Appellant’s Factum at para. 68

66. The defence position was that intent must be assessed by considering “all the circumstances”, including the Appellant’s alcohol consumption.<sup>66</sup> That is precisely what the Trial Judge did.

**Properly, the Trial Judge did not speculate about developmental deficits**

67. The Trial Judge did not expressly consider evidence of the Appellant’s “developmental deficits”. There was no such evidence worthy of consideration, and no one asked him to consider it.

68. The evidence fell far short of establishing that there was any “developmental deficit”. It indicated nothing at all about the nature of any such deficit, or how it could possibly have affected the formation of intent. Adina Stewart offered a lay opinion that the Appellant “had some developmental difficulties,” apparently based on her observation that he was socially awkward. There was evidence of the bare fact of committal on a mental health warrant, but no evidence that could relate the committal to any purported “developmental deficit” or to the Appellant’s formation of intent.<sup>67</sup>

69. In his closing submissions, defence counsel described the Appellant as “an immature, unsophisticated, inarticulate, simple ... childlike individual.”<sup>68</sup> He neither identified, nor asked the Trial Judge to consider, any kind of “developmental deficit.”

70. The Trial Judge could only have “considered” a “developmental deficit” by speculating. Had he done so, he would have erred. The Trial Judge considered what he was supposed to consider – no more and no less.

**There was nothing that the Trial Judge “should have” considered but didn’t**

71. The Trial Judge was not required to review every point of evidence or to articulate every possible strand of reasoning, no matter how peripheral. He was required to resolve the live issues between the parties.<sup>69</sup> He did.

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<sup>66</sup> Defence Closing Submissions at Appellant’s Record at p. 217/1-21 [Tab 4(K)]

<sup>67</sup> Appellant’s Record at pp. 97/12-20, 107/11-36 [Tab 4(E)], 128/17-41 [Tab 4(J)]

<sup>68</sup> Appellant’s Record at p. 199/35-44 [Tab 4(K)]

<sup>69</sup> *R. v. M. (R.E.)*, 2008 CarswellBC 2037 (S.C.C.) at paras. 16, 19, 20, 35 [Tab 26]

72. The Appellant’s ground of appeal is premised on the implication that the Trial Judge should have considered certain evidence, but did not. The premise fails. The Trial Judge did not err. In this sense, too, the ground of appeal is moot.

**On mootness alone, the appeal should be dismissed.**

73. The Appellant alleges a procedural error in the Trial Judge’s consideration of intent. No such error was committed: the Trial Judge considered everything he should have, or could have. The Appellant has not alleged that any approach to intent could have made any substantive difference. That is, he does not argue, from any view of the evidence, that the Appellant did not foresee that firing the rifle at Mr. Shuckburgh’s chest would likely cause his death. Instead, he raises the theory of involuntariness – but cannot find even a speculative support for it.

74. No treatment of the “common sense inference” issue is capable of affecting the verdict. If necessary, the curative proviso should be applied and the appeal should be dismissed.<sup>70</sup>

**II. There is no error in the lower court’s judgment**

**The Appellant’s “air of reality” complaint**

75. The Appellant’s primary complaint about the Court of Appeal’s reasons seems to relate to its use of the words “air of reality” and “defence”.<sup>71</sup>

76. First, it must be noted that any issue around “air of reality” is, once again, moot. This was not a jury trial. “Air of reality” was not mentioned in the trial judgment, nor in counsel’s submissions at trial. Rather than pause at the lower threshold of air of reality, the Trial Judge made a finding at the higher threshold of absence of a reasonable doubt. Therefore, whatever the Court of Appeal may have said about air of reality can have no bearing on the outcome of the case.

**Tact is not an error**

77. The Court of Appeal’s use of the phrase “air of reality” was more tactful than legal. Twice, it observed that the evidence at trial was “insufficient, in and of itself, to lend an air of

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<sup>70</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii); *R. v. Van*, 2009 CarswellOnt 2897 (S.C.C.) at paras. 35-36 [Tab 47]

<sup>71</sup> Appellant’s Factum at paras. 58-62

reality to the argument that he may therefore have lacked the requisite intent to kill.”<sup>72</sup> The point of these observations was to comment on the absence of relevant evidence, not to apply a legal test.

78. The Court’s third and final use of the phrase was the more generalized statement that “[e]vidence of mental illness, developmental delays or drinking short of impairment, either alone or in combination, is insufficient, without more, to lend an air of reality to the defence of diminished capacity.” It went on to quote the Ontario Court of Appeal:

While it is clear that the burden of proving guilt beyond a reasonable doubt always rests on the Crown, there must be some point in a trial where absent any evidence in the existing trial record, the accused must submit evidence to form some factual basis for a defence of diminished capacity or capability based on intoxication. **This is an evidentiary burden .... It is not the responsibility of the trial judge to conjure up defences which have no basis in fact in the evidence.**<sup>73</sup> (emphasis added)

79. The Alberta Court of Appeal made its ultimate point in its next paragraph: “There was simply no evidence of any type in this case to suggest the appellant’s mental disability or alcohol consumption interfered with his ability to form the intent to murder.”<sup>74</sup>

80. The “air of reality” test was not an issue before the Court of Appeal. Its use of the phrase was only a professionally worded observation that there was no evidence capable of undermining intent.

**If an “air of reality” test had been applied, it would not have been an error**

81. The term “defence” is not restricted to statutory defences. It also signifies the defence strategy. In particular, it is the label applied to a defence position that an element of an offence has not been made out for a specific reason. For example, courts refer to the “defence of accident” as the position that, due to accident, there is a reasonable doubt about voluntariness. Similarly, the “defence of intoxication” is the position that, due to alcohol consumption, there is a reasonable doubt about intent. The standard evidential burden applies to all such defences.

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<sup>72</sup> *R. v. Walle*, 2010 ABCA 384 at para. 2 [Appellant’s Record - Tab 2(C)]; see also Appellant’s Record at p. 12 - para. 6 [Tab 2(C)]

<sup>73</sup> *R. v. Walle*, 2010 ABCA 384 at p. 14 - para. 16 [Appellant’s Record - Tab 2(C)], citing *R. v. McKinnon*, 1989 CarswellOnt 88 (C.A.) at para. 24 [Tab 31]

<sup>74</sup> *R. v. Walle*, 2010 ABCA 384 at p. 14 - para. 17 [Appellant’s Record - Tab 2(C)]

The trier of fact need only be instructed on defences “for which a foundation of fact appears on the record” – in other words, defences possessing an air of reality.<sup>75</sup>

82. The requirement for a foundation of fact in the record applies with equal force to a “rolled-up” defence – that is, to the position that intent was reduced by a combination of factors. A “rolled-up” instruction is essentially a reminder to the finder of fact that, in assessing intent, all evidence relevant to intent must be considered.<sup>76</sup>

83. The key word is “evidence.” As the Ontario Court of Appeal recently wrote,

**Evidence** that supplies the air of reality required to get a defence, justification or excuse before the jury may also be relevant for the jury to consider in deciding whether the prosecutor has proven the mental or fault element in murder beyond a reasonable doubt.

...[J]urors must understand ... [that] they are to consider all the **evidence** that sheds light on that issue, even if they have rejected the specific defences, justifications or excuses in play to which that **evidence** also relates.<sup>77</sup> (emphasis added)

84. No part of a rolled-up defence can be founded on speculation. If an evidential foundation is required for a defence based 100% on intoxication, it cannot be that the evidential burden vanishes for a defence based 50% on intoxication and 50% on something else. Put another way, an accused cannot escape his evidential burden on one defence simply by asserting some other defence in addition.

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<sup>75</sup> *R. v. Hartridge*, 1966 CarswellSask 22 at para. 87 [Tab 20]; *R. v. Gunning*, 2005 CarswellBC 1181 (S.C.C.) at para. 32 [Tab 19]; *R. c. Cinous*, 2002 CarswellQue 261 (S.C.C.) at paras. 49-50, 60 [Tab 10]. On air of reality and the defence of accident, see also *R. v. Mathisen*, 2008 CarswellOnt 6489 (C.A.) at paras. 87-88, 93, 95 [Tab 30]; *R. v. Lelievre*, 1962 CarswellOnt 5 (C.A.) at para. 37 [Tab 23]. On air of reality and the defence of intoxication, see *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at paras. 16, 17, 19 [Tab 24]; *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at para. 52 [Tab 38]; *R. v. MacKinlay*, 1986 CarswellOnt 124 (C.A.) at para. 23 [Tab 27]; *R. v. Canute*, 1993 CarswellBC 492 (C.A.) at para. 51 [Tab 9]

<sup>76</sup> *R. v. Cudjoe*, 2009 CarswellOnt 3726 (C.A.) at paras. 104, 109 [Tab 13]; *R. v. Flores*, 2011 CarswellOnt 1211 (C.A.) at para. 75 [Tab 17]; *R. v. Walle*, 2007 ABCA 333 at para. 27 [Respondent’s Record - p. 8]

<sup>77</sup> *R. v. Cudjoe*, 2009 CarswellOnt 3726 (C.A.) at paras. 103, 109 [Tab 13]. See also *R. v. Flores*, 2011 CarswellOnt 1211 (C.A.) at paras. 75, 76, 81, 86 [Tab 17]; *R. v. Fraser*, 2001 CarswellOnt 3913 (C.A.) at paras. 21, 25 [Tab 18]

85. In the case at bar, there was no error in lower court’s observation that there was “no evidence that the Appellant had a diminished capacity to form intent, or either did not or could not foresee the consequences of his actions.”<sup>78</sup>

### **The Appellant’s miscellaneous complaints**

86. The Appellant alleges or implies various other flaws in the Court of Appeal’s judgment. These criticisms are based on a selective view of the judgment and of the existing law.

#### **“Mere possibility” is irrelevant in the process and insufficient in the result**

87. The Appellant launches a circular argument that “[t]he mere possibility [he] did not have the requisite intent to kill precludes the trial judge from relying on the common sense inference [of intent to kill] without proper consideration of the evidence.”<sup>79</sup> The concept of “possibility” plays no part in the reasoning process. The finder of fact must consider all evidence and decide whether the Crown’s case has been proved beyond a reasonable doubt – not beyond a mere possibility.<sup>80</sup>

#### **Even circumstantially, intent need not be proved beyond a “mere possibility”**

88. The Appellant further asserts that a “mere possibility” that he lacked murderous intent would lead to an acquittal on murder “if such possibility raised a reasonable doubt that guilty intent was the only rational inference to be drawn from the circumstantial evidence.”<sup>81</sup>

89. If the Appellant’s point is that an acquittal should result where a reasonable doubt exists, he is absolutely correct. The Appellant is not correct, however, if his point is that an acquittal must result from circumstantial evidence on intent unless intent is “the only rational inference”. He alludes to the “rule in Hodge’s case”, which originally applied to an inference of identity. It has been extended to apply to circumstantial proof of *acts reus*. But this Court has expressly held that “*it [has] no application to a case turning upon the intention of the accused*” (emphasis in original).<sup>82</sup> Evidence of intent

<sup>78</sup> *R. v. Walle*, 2010 ABCA 384 at p. 14 – para. 16 [Appellant’s Record - Tab 2(C)]

<sup>79</sup> Appellant’s Factum at para. 73

<sup>80</sup> *R. v. Lifchus*, 1997 CarswellMan 392 (S.C.C.) at para. 39 [Tab 25]

<sup>81</sup> Appellant’s Factum at para. 74

<sup>82</sup> *R. v. Cooper*, [1978] 1 S.C.R. 860 (S.C.C.) at p. 874 [Tab 11]

will seldom, if ever, be wholly consistent with only one conclusion as to [an accused's] mental state and yet the weight of evidence on the issue may be such as to satisfy the jury, beyond a reasonable doubt, as to the guilty intent of the accused. **The [rule in Hodge's case] does not apply and was never intended to apply to an issue of this kind.**<sup>83</sup> (emphasis added)

**The courts below found an actual murderous intent**

90. The Appellant suggests that the Court of Appeal erred in considering his capacity to form intent, but not considering his actual intent. This suggestion is inaccurate. The Appellant quotes the Court of Appeal as referring to "capacity to form intent".<sup>84</sup> The entire relevant passage reads: "the trial judge was presented no evidence that the appellant had a diminished capacity to form intent, or either **did not** or could not foresee the consequences of his actions."<sup>85</sup> Through a double negative, the emphasized words are a consideration of actual foresight and actual intent.

91. If the Court of Appeal's reasons were weighted more toward capacity, it is because the Appellant's argument was, at its highest, one of capacity. Just as in this Court,<sup>86</sup> the Appellant did not argue that he lacked actual foresight of consequences. He only argued that some alcohol consumption and an *ex post facto* construct of developmental deficit should have been considered. Since the former was considered at trial, the appellate argument focused on the latter. But there was no evidence, *and no claim*, that the Appellant's developmental characteristics actually interfered with his foresight. Viewed in the most charitable light possible, the suggestion of a backdrop of developmental deficit could only go to capacity. The Court of Appeal responded to the issue before it.

92. It bears remembering what the requisite "actual intent" is. The intent for second degree murder is an intent to cause one of two consequences: death, or bodily harm likely to cause death (being reckless whether death ensues).<sup>87</sup> The specific question in the case at bar was whether, when the Appellant fired the rifle at Mr. Shuckburgh's chest from five to ten feet away, he intended to cause either of those consequences.

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<sup>83</sup> *R. v. Mitchell*, [1964] S.C.R. 471 (S.C.C.) at pp. 479-480 [Tab 33]

<sup>84</sup> Appellant's Factum at para. 63

<sup>85</sup> *R. v. Walle*, 2010 ABCA 384 at p. 14 – para. 16 [Appellant's Record - Tab 2(C)]

<sup>86</sup> See above at paragraphs 59 to 61

<sup>87</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 229(a)

93. The natural consequence of the Appellant’s act is, frankly, obvious. Only a truly significant mental disruption could raise a reasonable doubt that when the Appellant fired the rifle he intended, at minimum, to cause potentially lethal bodily harm. By analogy, this Court has held that “in a case where an accused points a shotgun within a few inches of someone’s head and pulls the trigger,” intoxication short of incapacity will be unlikely to raise a reasonable doubt about intent.<sup>88</sup>

94. Of course, intent must be inferred from *all* the evidence, not just evidence of the accused’s state. In *R. v. Lemky*, this Court considered the same issue on similar facts. It began its assessment of air of reality by asking: “was there sufficient evidence to permit a reasonable inference that [Mr. Lemky] might not have known that shooting [the victim] was likely to result in her death?” In answering this question, this Court looked to Mr. Lemky’s actions before and after the shooting,

... actions which ranged from ordering drinks at the dance beforehand to calling his mother and the police immediately afterward. **His conduct before and after the shooting demonstrated an awareness of the consequences of what he was doing.** This demonstrates that he in fact foresaw the consequences of what he was doing immediately before and after the shooting.<sup>89</sup> (emphasis added)

95. This Court next asked whether, despite his state of mind before and after the shooting, there was any evidence that “at the moment of the shooting [he] did not foresee the consequences of that particular act.” It found that there was none. Mr. Lemky never asserted that he did not realize that a shotgun blast would be lethal. The gun required “two separate muscular forces to be exerted in order to discharge a round [cocking and firing]; simply pulling the trigger was not enough.” His conduct before and after pulling the trigger was intentional and purposive. On the evidence, there was no air of reality to “the defence that [Mr. Lemky] lacked the necessary *mens rea* for the offence of murder because intoxication prevented him from foreseeing that the act of shooting was likely to cause [the victim’s] death.”<sup>90</sup>

<sup>88</sup> *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at para. 52 [Tab 38]

<sup>89</sup> *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at paras. 19-20 [Tab 24]. See also *R. v. Flores*, 2011 CarswellOnt 1211 (C.A.) at para. 70 [Tab 17]; *R. v. Bailey*, 2001 CarswellBC 2707 (C.A.) at para. 56 [Tab 5]

<sup>90</sup> *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at paras. 21-22 [Tab 24]

96. In the case at bar, there is no air of reality to any innuendo that the Appellant did not understand that shooting Mr. Shuckburgh was likely to cause his death. His conduct before and after he pulled the trigger was consistently intentional and purposive.

97. He concealed the sawed-off rifle before entering Shuckaluck's Pub. When caught and confronted, he lied to protect himself, claiming it was a BB gun. When asked to leave the bar, he negotiated to be allowed to finish his beer. When asked to leave the bar the second time, he said it was unfair, since he had paid for the beer. He went to a convenience store, waited in line and made a purchase. Then he entered Shuckaluck's a third time. For a third time, he was asked to leave. Again, he said that it was unfair, that he wasn't doing anything wrong. As he was being ejected, the gun fell out of his jacket. He picked it up and pointed it at Mr. Shuckburgh.

98. He continually pointed the gun, first toward Mr. Shuckburgh, then toward Mr. Oleniuk, then back again. He walked backward, around corners and down a ramp. On the ramp, he had put a wall between himself and the bar staff. He pointed the rifle sniper-style, and said, "This is not a BB gun." This statement shows three things: he knew what he was holding; he knew that he had had lied earlier, and he knew that the gun was a threat.

99. He resumed walking backward. He passed the Stewarts' driveway, but did not turn in. He continued to point the muzzle at Mr. Shuckburgh's chest. At some point, he must have taken off the safety and cocked the rifle. Finally, with Mr. Shuckburgh only five to ten feet away, he exerted over six pounds of pressure and pulled the trigger.

100. Then he ran. He concealed the rifle. He said he would rather kill himself with the rifle than go to jail.<sup>91</sup> He did not call 911.

101. After being arrested, he spoke of suicide, including suicide by gun.<sup>92</sup> He said to a police officer, "See that gun in your holster? Shoot me"; "give me your gun and I'll shoot myself"; "I should have shot myself after."<sup>93</sup> These statements show that the Appellant actually understood that firing a gun at a person is likely to cause his death.

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<sup>91</sup> Appellant's Record at p. 104/13-21 [Tab 4(E)]; *R. v. White*, 2011 CarswellBC 485 (S.C.C.) at para. 17 [Tab 49]; Also at paras. 22, 40, 42, 73, 105, 110 [Tab 49]

<sup>92</sup> Appellant's Record at pp. 102/45-103/4, 110/33-40, 113/15-24 [Tab 4(E)]

<sup>93</sup> Appellant's Record at p. 119/5-22 [Tab 4(H)]

102. This clear pattern of intentionality cannot be unseated by mere speculation on incapacity. The Court of Appeal did not err in finding that there could be no air of reality to any claim of lack of intent. The Trial Judge did not err in finding the Appellant guilty of second degree murder.

### **Conclusion**

103. The courts below did not err. The Appellant's issues are incapable of affecting the verdict. The appeal should be dismissed.

## **PART IIIB – ARGUMENT ON THE INTERVENER'S ISSUE**

### **Procedural caveats**

104. In its motion for leave to intervene, the Criminal Lawyers' Association of Ontario ("CLA") proposed to argue that the common sense inference itself should be eliminated or rewritten (though it never indicated precisely how). This argument was not addressed in the courts below and was not raised in the Appellant's factum. Cromwell J., in granting leave to intervene, specifically ordered that the CLA not raise new issues. The CLA has not yet filed its factum.

105. The Respondent maintains her position that the CLA's proposed argument is an impermissible enlargement of the appeal by an intervener. However, because the Respondent does not know if the CLA will continue to advance its issue, she has no alternative but to attempt to respond to what the CLA might argue, based on its intervention motion. The following is that response. It should not be taken as agreement with any attempt the CLA may make to enlarge this appeal beyond that put to this Court or the courts below.

### **Defining common sense**

106. The name "common sense inference" was not bestowed by accident.

**Common sense dictates that people are usually able to foresee the consequences of their actions.** Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person

acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.<sup>94</sup> (emphasis added)

The “common sense inference” is exactly, and only, that.

107. The common sense inference has content beyond the one-line summary that “a sane and sober person intends the consequences of his acts.” To understand the inference, one must understand how it operates.

- *What it isn't:* It is not a presumption. It is a permissible inference. A trier of fact may draw the inference, but is not required to do so.<sup>95</sup>
- *What it applies to:* It applies to the intention to bring about a consequence. That is, it permits the inference that if an act was intended, its naturally-flowing consequences were also intended.<sup>96</sup>
- *What it must be based on:* As always, a trier of fact must consider all relevant evidence.<sup>97</sup>
- *What it must not be based on:* Speculation. A trier of fact cannot be asked to reject the inference on the basis that “anything is possible.” The decision to apply or to reject the inference must be based on evidence, not conjecture.<sup>98</sup>
- *What the accused can do:* It is always open to the accused to argue simply that the Crown has not established intent beyond a reasonable doubt.<sup>99</sup> Alternatively, the accused may argue that he did not foresee the consequence of his act due to a specific inhibitor of intent, such as intoxication or diminished mental capacity. However, the existence of any such inhibitor must have a foundation in the record. That is, the

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<sup>94</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 19 [Tab 39]

<sup>95</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 20 [Tab 39] and *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at para. 14 [Tab 38]

<sup>96</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 19 [Tab 39]

<sup>97</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 23 [Tab 39]; *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at paras. 21-22, 29, 33, 59 [Tab 38]; *R. v. Bottineau*, 2011 CarswellOnt 1520 (C.A.) at para. 33 [Tab 6]

<sup>98</sup> *R. v. McKinnon*, 1989 CarswellOnt 88 (C.A.) at para. 24 [Tab 31]; *R. v. Parks*, [1992] 2 S.C.R. 871 (S.C.C.) at pp. 33-34 [Tab 36]; *R. v. Canute*, 1993 CarswellBC 492 (C.A.) para. 51 [Tab 9]; *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at paras. 11, 16-17 [Tab 24]; *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 14 [Tab 39]; *R. v. Robinson*, 1996 Carswell BC 999 (S.C.C.) at para. 65 [Tab 38]

<sup>99</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 14 [Tab 39]; *R. v. Gunning*, 2005 CarswellBC 1181 (S.C.C.) at para. 30 [Tab 19]

defence must have an “air of reality” before it can be considered by the finder of fact.<sup>100</sup>

- *What the accused need not do:* There is no onus on the accused to prove any inhibitor of intent. Once a particular defence has passed the air of reality threshold, the onus is on the Crown to establish intent beyond a reasonable doubt, based on all the evidence.<sup>101</sup>

108. The common sense inference has a name because it is commonplace, and necessary, but not because it is unique. It is a sub-set of the general instructions that jurors are given in every trial: rely only on the evidence, do not speculate, do not acquit on a mere possibility, and use your good common sense.

### **It would not be prudent to eliminate common sense**

109. The CLA may propose to eliminate the common sense inference.<sup>102</sup> Such a proposal would be inconsistent with principle and devastating in practice.

#### **Inconsistent with principle**

110. The common sense inference sits at the intersection of three fundamental principles of criminal law. Any attack the CLA may make on the common sense inference stands to undermine these three principles as well.

111. The first underlying principle of criminal law is that a trier of fact is entitled to use common sense. Indeed, common sense is the core strength of a jury. It is the task of the trier of law to define the issues to which common sense must be applied. But *how* common sense applies to those issues is the exclusive province of the trier of fact.<sup>103</sup> By analogy, this Court has

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<sup>100</sup> *R. v. Hartridge*, 1966 CarswellSask 22 at para. 87 [Tab 20]; *R. v. Gunning*, 2005 CarswellBC 1181 (S.C.C.) at para. 32 [Tab 19]; *R. c. Cinous*, 2002 CarswellQue 261 (S.C.C.) at paras. 49-50, 60 [Tab 10]; *R. v. Mathisen*, 2008 CarswellOnt 6489 (C.A.) at paras. 87-88, 93, 95 [Tab 30]; *R. v. Lelievre*, 1962 CarswellOnt 5 (C.A.) at para. 37 [Tab 23]; *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at paras. 16, 17, 19 [Tab 24]; *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at para. 52 [Tab 38]; *R. v. MacKinlay*, 1986 CarswellOnt 124 (S.C.C.A.) at para. 23 [Tab 27]; *R. v. Canute*, 1993 CarswellBC 492 (C.A.) at para. 51 [Tab 9]; *R. v. Cudjoe*, 2009 CarswellOnt 3726 (C.A.) at paras. 103, 109 [Tab 13]

<sup>101</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 14 [Tab 39]; *R. v. Gunning*, 2005 CarswellBC 1181 (S.C.C.) at para. 30 [Tab 19]; *R. v. Parks*, 1992 CarswellOnt 107 (SCC) at pp. 33-34 [Tab 36]; *R. v. Willier*, 2007 ABCA 132 at para. 4 [Tab 48] and *R. c. Cinous*, 2002 CarswellQue 261 (S.C.C.) at paras. 39 and 52 [Tab 10]

<sup>102</sup> The Criminal Lawyers’ Association of Ontario –Affidavit of Paul Burstein at para. 10 [Appendix B]

<sup>103</sup> *R. v. Manoukian*, 1996 CarswellOnt 2021 (C.A.) at para. 6 [Tab 28]

held that, on credibility issues, courts cannot prescribe rules that appear to have the force of law.<sup>104</sup>

To inject into the process artificial legal rules with respect to the natural human activity of deliberation and decision would tend **to detract from the value of the jury system**. Accordingly, **it is wrong for a trial judge to lay down additional rules for the weighing of the evidence**.<sup>105</sup> (emphasis added)

112. Just as a judge cannot restrict a jury's use of common sense in deciding credibility, it cannot restrict a jury's common sense in deciding whether intent has been proved on the evidence. This Court highlighted the common sense nature of the inference in *R. v. Daley*: "The collective common sense and knowledge of life possessed by twelve jurors is of fundamental importance to the unique value of juries. [The inference] is not a proposition of law but a proposition of ordinary good sense."<sup>106</sup>

113. For this reason, although this Court has opined that "intoxication short of incapacity will in most cases rarely raise a reasonable doubt in the minds of jurors," it must be left to the jurors to make their own decision.<sup>107</sup> The common sense inference is nothing more than a specific restatement of the principle that triers of fact are to rely on their good common sense.

114. Viewed in another light, it is nothing more than a specific restatement of the second underlying principle of criminal law: the reasonable doubt standard, as set out in *R. v. Lifchus*.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. ...

On the other hand you must remember that **it is virtually impossible to prove anything to an absolute certainty** and the Crown is not required to do so. Such a standard of proof is impossibly high.<sup>108</sup> (emphasis added)

If the trier of fact has a reasonable doubt on an element of the offence, an acquittal must result. But that doubt must be something greater than a mere possibility, and to be reasonable, it must be grounded in the evidence.

<sup>104</sup> *White v. The King*, 1947 S.C.R. 268 (S.C.C.) at pg. 272 [Tab 4]

<sup>105</sup> *R. v. Morin*, [1988] 2 S.C.R. 345 (S.C.C.) at para. 41 [Tab 34]

<sup>106</sup> *R. v. Daley*, 2007 CarswellSask 707 (S.C.C.) at para. 104 [Tab 15], qting. *R. v. Courterelle*, 2001 CarswellBC 37 (C.A.) at para. 32 [Tab 12]

<sup>107</sup> *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at paras. 52, 60 [Tab 38]

<sup>108</sup> *R. v. Lifchus*, 1997 CarswellMan 392 (S.C.C.) at para. 39 [Tab 25]

115. The CLA may argue that intent-based defences need not be grounded in the evidence. Or it may argue that the Crown must prove that there was no possibility that intoxication or mental impairment, of any degree, impacted the accused's decision making. Either way, the CLA's argument would conflict with the fundamental meaning of *proof* beyond a *reasonable* doubt.

116. The third underlying principle of criminal law, related to the second, is that a defence must have a foundation in the record, or in other words, an air of reality.<sup>109</sup> In fairness, the Crown cannot be required to negative "all conceivable defences no matter how fanciful or speculative they may be."<sup>110</sup>

117. In *R. v. Stone* and *R. v. Daley*, respectively, this Court has held that the air of reality rule applies to the defences of insanity and insobriety.<sup>111</sup> That is, there "must be evidence sufficient to permit a reasonable inference that the accused did not in fact foresee" the consequences of his act due to insanity or insobriety, or some combination of factors.<sup>112</sup> If the CLA intends to attack the air of reality requirement, it will be asking this Court to overrule a long line of its own authority.

118. The common sense principle is a specific expression of basic principles of criminal law. Eliminating it could have consequences beyond the inference itself.

### **Devastating in practice**

119. There is a simple practical reason for permitting the inference of intended consequences: without it, the criminal law would not function.

120. Though the common sense inference arises most commonly in homicide cases, it can arise in virtually any criminal case. To cite just a few examples, it has been applied in trials on conspiracy to export drugs, forgery and counterfeiting, fraud, possession of child pornography,

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<sup>109</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para 14 [Tab 39]. See above at paragraphs 81-84

<sup>110</sup> *R. v. Gunning*, 2005 CarswellBC 1181 (S.C.C.) at para. 32 [Tab 19]

<sup>111</sup> *R. v. Stone*, 1999 CarswellBC 1064 (SCC), at paras. 182 [Tab 42]; *R. v. Daley*, 2007 CarswellSask 707 (SCC) at paras. 44-45 [Tab 15]

<sup>112</sup> *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at paras. 16-17 [Tab 24]; see also *R. v. Canute*, 1993 CarswellBC 492 (C.A.) at para. 51 [Tab 9]

preparing false prescriptions, uttering threats, theft, wilfully promoting hatred, and failing to provide the necessaries of life.<sup>113</sup>

121. Intent cannot be seen or touched or smelled. It is not susceptible to direct observation. It is virtually always a matter for inference. Absent an unusually specific confession, it would be impossible for the Crown to tender direct evidence of what consequence a person intended when he performed an act.<sup>114</sup> If triers of fact were not permitted to infer intended consequence from intended act, then many crimes would effectively be rendered unprovable – homicides foremost among them.

122. Any attempt the CLA may make to eliminate the common sense inference should be rejected.

### **It would not be possible to script common sense**

123. Alternatively, the CLA may aim to have the common sense inference rewritten. In its intervention motion, it suggests that (i) evidence of “some level of impairment” should trigger (ii) an instruction that the inference (iii) may only be drawn if the trier of fact “is satisfied that the impairment did not have *any impact* on the accused’s *decision making or intention*.”<sup>115</sup> (emphasis added) In other words, it suggests three changes:

- (i) *A new air of reality threshold*. The CLA would require evidence of “some impairment”. This threshold has been expressly rejected by the British Columbia Court of Appeal: “It cannot be that the common sense inference should not be explained to a jury in any case where there is any evidence

<sup>113</sup> Respectively, *R. v. Martin*, 2010 CarswellBC 3162 (C.A.) at paras. 60-65 [Tab 29]; *R. v. Sommani*, 2007 CarswellBC 620 (C.A.) at paras. 51-53 [Tab 40], l. app. ref’d 2007 CarswellBC 2413; *R. v. Stephenson*, 2006 CarswellBC 88 (C.A.) at paras. 105-108 [Tab 41]; *R. v. Missions*, 2005 CarswellNS 204 at para. 21 [Tab 32]; *R. v. Manoukian*, 1996 CarswellOnt 2021 (C.A.) at para. 6 [Tab 28]; *R. v. Osborne*, 1996 CarswellBC 1202 (C.A.) at paras. 15-21 [Tab 35]; *R. v. Kirincich*, 1994 CarswellNS 406 (C.A.) at para. 29 [Tab 22]; *R. v. Buzzanga*, 1979 CarswellOnt 1502 (C.A.) at paras. 51-52 [Tab 8]; *R. v. Bottineau*, 2011 CarswellOnt 7520 (C.A.) at paras. 34-36 [Tab 6]. The inference has also been applied in family law (eg. *Hosegood v. Hosegood* (1950), 66 T.L.R. 735 (C.A.) at p. 738 per Lord Denning [Tab 2]), civil procedure (eg. *Trooper Technologies Inc. v. Thermo Tech Technologies Inc.*, 1999 Carswell BC 1938 (C.A.) at para 15 [not reproduced]), administrative law (eg. *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, 1997 CarswellNat 213 (F.C.A.D.) at para. 41 [not reproduced]), labour law (eg. *Edinburgh Developments Ltd. v. Vanderlaan*, 1974 CarswellAlta 42 (C.A.) at paras. 14-15[not reproduced]), and torts (eg. *Spelchan v. Long and W. A. Long Contracting & Equipment Co. and General Securities*, 1956 CarswellBC 251 (C.A.) at para. 71[not reproduced])

<sup>114</sup> *R. v. Mitchell*, [1964] S.C.R. 471 (S.C.C.) at p. 479 [Tab 33]

<sup>115</sup> The Criminal Lawyers’ Association of Ontario – Affidavit of Paul Burstein at para. 10 [Appendix B]

of alcohol or drug consumption.”<sup>116</sup> The existing threshold requires “evidence sufficient to permit a reasonable inference that the accused did not in fact foresee” the consequence of his act.<sup>117</sup> The CLA’s proposed threshold is lower, and off-target. Impairment is not the issue. The issue is actual foresight, as reflected in the current threshold.

- (ii) *A new jury instruction.* The CLA would impose a mandatory jury instruction where there is evidence of “some impairment.” This Court has declined to require even a cautionary instruction, even “where there is evidence of a significant degree of intoxication, as this is a matter of common sense.”<sup>118</sup>
- (iii) *A new presumption.* The CLA’s proposal is circular. “Impairment” means “impact on decision making.” Where there is impairment, it must follow essentially as a matter of definition that there was *some* impact on “decision making”, however slight or however loosely connected to foresight of consequences. The common sense inference could only be drawn in cases where decision-making is purely unaffected. In effect, the CLA’s proposal equates to a reverse presumption: where there is some evidence of impairment, the trier of fact must presume an absence of foresight.

An inference shaped around “some” impairment and “any” impact would be an untenable departure from the common law, and from common sense.

124. It seems the CLA’s primary concern is with the words “*sane and sober*”. One phrasing of the inference is: “sane and sober persons intend the natural and probable consequences of their actions.” This is not the only possible phrasing, nor is it the most accurate.<sup>119</sup> It is an understatement in that it does not convey all aspects of the operation of the common sense

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<sup>116</sup> See *R. v. Courterille*, 2001 CarswellBC 37 (C.A.) at para. 31 [Tab 12]

<sup>117</sup> *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at paras. 16-17 [Tab 24]; see also *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at para. 48 [Tab 38]

<sup>118</sup> *R. v. Daley*, [2007] 3 S.C.R. 523 (S.C.C.) at para. 104 [Tab 15]. See also *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at paras. 52-53 [Tab 38]

<sup>119</sup> *R. v. Seymour*, 1996 CarswellBC 1501 (S.C.C.) at para. 19 [Tab 39]

inference, as discussed above at paragraph 107. It is an overstatement in that the words “sane and sober” set the bar too high.

125. As this Court has recognized, the common sense inference “does not die with the first drink.” Experience and common sense indicate that “the effect of alcohol on thought processes is a continuum”. A little alcohol may lead to uninhibited conduct, while a great deal of alcohol may lead to unintended conduct.<sup>120</sup> Foresight also lies on a continuum.<sup>121</sup> A very intoxicated person may not foresee death from a single blow in a barroom brawl,<sup>122</sup> while even a very intoxicated person can foresee death from firing a shotgun within a few inches of a person’s head.<sup>123</sup>

126. A person need not be in an unblemished state of sanity and sobriety to foresee the consequences of his or her acts. Therefore, “[i]t is a misnomer to refer to the inference as that of a ‘sane and sober’ person. The common sense inference may be perfectly valid at lower levels of intoxication.”<sup>124</sup>

127. The same holds true for mental conditions, and for a combination of mental condition and alcohol consumption. In *R. v. Rathwell*, the trial judge instructed the jurors that they were “entitled, as a matter of common sense, to draw an inference that a sane and sober person ... intends the natural and probable consequence of his or her voluntary act.”<sup>125</sup> However, the accused was “was manifestly not sober, and his mental capacity was in issue” due to brain damage.<sup>126</sup> Nonetheless, the charge was sufficient because the trial judge made it clear that the accused was not a sane and sober person at the time of the shooting, and that all the evidence relating to intent must be considered.<sup>127</sup> There was evidence from which intent could be inferred, notwithstanding the accused’s brain damage and consumption of alcohol and drugs.<sup>128</sup> The conviction for second degree murder was upheld.

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<sup>120</sup> *R. v. Daley*, [2007] 3 S.C.R. 523 (S.C.C.) at para. 104 [Tab 15]

<sup>121</sup> *R. v. Buzzanga*, 1979 CarswellOnt 1502 (C.A.) at paras. 52-53 [Tab 8]

<sup>122</sup> *R. v. Lemky*, 1996 CarswellBC 998 (S.C.C.) at para. 23 [Tab 24]

<sup>123</sup> *R. v. Robinson*, 1996 CarswellBC 999 (S.C.C.) at para. 52 [Tab 38]

<sup>124</sup> *R. v. Daley*, [2007] 3 S.C.R. 523 (S.C.C.) para. 104 [Tab 15]

<sup>125</sup> *R. v. Rathwell*, 1998 CarswellOnt 4039 (C.A.) at para. 34 [Tab 37]

<sup>126</sup> *R. v. Rathwell*, 1998 CarswellOnt 4039 (C.A.) at paras. 22, 23, 37, 39 [Tab 37]

<sup>127</sup> *R. v. Rathwell*, 1998 CarswellOnt 4039 (C.A.) at para. 39 [Tab 37]

<sup>128</sup> *R. v. Rathwell*, 1998 CarswellOnt 4039 (C.A.) at para. 40 [Tab 37]

128. In *obiter*, Justice Osborne opined that “[c]harges would generally improve if the sane and sober boilerplate were eliminated, or at least adjusted to the particular circumstances.”<sup>129</sup> From the result, however, it is evident that he would still permit the common sense inference to be drawn where the accused is neither sane nor sober. When he criticized the “sane and sober boilerplate”, he must have been targeting the words “sane and sober”. They do not accurately convey the legal issues around intent, and they may unduly restrict the application of common sense.

129. Triers of fact are instructed to use their common sense because they must have the scope to consider the interplay of all the factors before them. To impose legal constraints on the availability of the common sense inference would be to constrain common sense itself. If common sense is legally scripted, it is not common sense any more: it is law, and the role of the trier of fact is usurped by the trier of law.

130. Any attempt the CLA may make to rewrite the common sense inference should be rejected.

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<sup>129</sup> *R. v. Rathwell*, 1998 CarswellOnt 4039 (C.A.) at para. 38 [Tab 37]

**PART IV – COSTS**

131. The Respondent makes no submissions regarding costs.

**PART V – ORDER SOUGHT**

132. The Respondent asks that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 5<sup>th</sup> day of March, 2012.



\_\_\_\_\_  
**JOLAINE ANTONIO**  
COUNSEL FOR THE RESPONDENT



\_\_\_\_\_  
**KYRA KONDRO**  
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JAA/sb

## **PART VI - TABLE OF AUTHORITIES**

<b>TAB</b>	<b>RESPONDENT'S AUTHORITIES</b>	<b>Cited at Paragraph No.</b>
1	Kent Roach, <i>Criminal Law</i> , 4 <sup>th</sup> ed., (Toronto: Irwin Law, 2009) at p. 8-9	46
2	<i>Hosegood v. Hosegood</i> (1950), 66 T.L.R. 735 (C.A.) at p. 738 per Lord Denning	120
3	<i>Housen v. Nikolaisen</i> , [2002] 2 S.C.R. 235 at paras. 10; 19-25	50
4	<i>White v. The King</i> , [1947] S.C.R. 268 (S.C.C.) at pg. 272	111
5	<i>R. v. Bailey</i> , 2001 CarswellBC 2707 (C.A.) at para. 56	94
6	<i>R. v. Bottineau</i> , 2011 CarswellOnt 1520 (C.A.) at para. 33, 34-36	107, 120
7	<i>R. c. Bouchard-Lebrun</i> , 2001 CarswellQue 12785 (S.C.C.) at paras. 39, 45-49, 59-62	49
8	<i>R. v. Buzzanga</i> , 1979 CarswellOnt 1502 (C.A.) at paras. 51-52, 53	120, 125
9	<i>R. v. Canute</i> , 1993 CarswellBC 492 (C.A.) at para. 51	81, 107, 117
10	<i>R. c. Cinous</i> , 2002 CarswellQue 261 (S.C.C.) at paras. 39, 49-50, 52, 60	81, 107
11	<i>R. v. Cooper</i> , [1978] 1 S.C.R. 860 (S.C.C.) at p. 874	89
12	<i>R. v. Courterelle</i> , 2001 CarswellBC 37 (C.A.) at para. 32	112, 123
13	<i>R. v. Cudjoe</i> , 2009 CarswellOnt 3726 (C.A.) at paras. 103, 104, 108, 109	53, 82, 83, 107
14	<i>R. v. Culliton</i> , 2000 CarswellOnt 80 (C.A.) at paras. 7-8	55
15	<i>R. v. Daley</i> , [2007] 3 S.C.R. 523 (S.C.C.) at paras. 44-45, 104	112, 117, 123, 125, 126
16	<i>R. v. Daviault</i> , [1994] 3 S.C.R. 63 (S.C.C.) at pp. 16-17, 45-46	53
17	<i>R. v. Flores</i> , 2011 CarswellOnt 1211 (C.A.) at paras. 70, 75, 76, 81, 86	82, 83, 94

18	<i>R. v. Fraser</i> , 2001 CarswellOnt 3913 (C.A.) at paras. 21, 25	83
19	<i>R. v. Gunning</i> , 2005 CarswellBC 1181 (S.C.C.) at paras. 30, 32	81, 107, 116
20	<i>R. v. Hartridge</i> , 1966 CarswellSask 22 (C.A.) at paras. 87, 89	55, 81, 107
21	<i>R. v. King</i> , [1962] S.C.R. 746 (S.C.C.) at p. 749	49
22	<i>R. v. Kirincich</i> , 1994 CarswellNS 406 (C.A.) at para. 29	120
23	<i>R. v. Lelievre</i> , 1962 CarswellOnt 5 (C.A.) at paras. 5, 37, 39	50, 81, 107
24	<i>R. v. Lemky</i> , 1996 CarswellBC 998 (S.C.C.) at paras. 11, 16, 17, 19-20, 21-22, 23	81, 94, 95, 107, 117, 123, 125
25	<i>R. v. Lifchus</i> , 1997 CarswellMan 392 (S.C.C.) at para. 39	87, 114
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27	<i>R. v. MacKinlay</i> , 1986 CarswellOnt 124 (C.A.) at para. 23	81, 107
28	<i>R. v. Manoukian</i> , 1996 CarswellOnt 2021 (C.A.) at para. 6	111, 120
29	<i>R. v. Martin</i> , 2010 CarswellBC 3162 (C.A.) at paras. 60-65	120
30	<i>R. v. Mathisen</i> , 2008 CarswellOnt 6489 (C.A.) at paras. 87-88, 93, 95	55, 81, 107
31	<i>R. v. McKinnon</i> , 1989 CarswellOnt 88 (C.A.) at para. 24	78, 107
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33	<i>R. v. Mitchell</i> , [1964] S.C.R. 471 (S.C.C.) at pp. 479-480, 483	48, 89, 121
34	<i>R. v. Morin</i> , [1988] 2 S.C.R. 345 (S.C.C.) at para. 41	111
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36	<i>R. v. Parks</i> , [1992] 2 S.C.R. 871 (S.C.C.) at pp. 33-34	107
37	<i>R. v. Rathwell</i> , 1998 CarswellOnt 4039 (C.A.) at paras. 22, 23, 34, 37, 38, 39, 40	127, 128
38	<i>R. v. Robinson</i> , 1996 CarswellBC 999 (S.C.C.) at paras. 14, 21-22, 29, 33, 48, 52, 53, 59, 60, 65	81, 93, 107, 113, 123, 125

39	<i>R. v. Seymour</i> , 1996 CarswellBC 1501 (S.C.C.) at paras. 14, 19-20, 23	48, 106, 107, 116, 124
40	<i>R. v. Sommani</i> , 2007 CarswellBC 620 (C.A.) at paras. 51-53	120
41	<i>R. v. Stephenson</i> , 2006 CarswellBC 88 (C.A.) at paras. 105-108	120
42	<i>R. v. Stone</i> , 1999 CarswellBC 1064 (S.C.C.) at paras. 156, 180, 182, 192, 220	51, 117
43	<i>R. v. Stuart</i> , 2007 CarswellQue 5786 (C.A.) at paras. 31-32	53
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46	<i>R. v. Theroux</i> , [1993] 2 S.C.R. 5 (S.C.C.) at pp. 17-18	49
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48	<i>R. v. Willier</i> , 2007 CarswellAlta 474 (C.A.) at para. 4	107
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**PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW**

*Criminal Code, R.S.C. 1985, c. C-46,*

Federal English Statutes reflect amendments current to February 15, 2012

Federal French Statutes reflect amendments current to February 1, 2012

**229. Murder**

Culpable homicide is murder

- (a) where the person who causes the death of a human being
  - (i) means to cause his death, or
  - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

**229. Meurtre**

L'homicide coupable est un meurtre dans l'un ou l'autre des cas suivants :

- a) la personne qui cause la mort d'un être humain :
  - (i) ou bien a l'intention de causer sa mort,
  - (ii) ou bien a l'intention de lui causer des lésions corporelles qu'elle sait être de nature à causer sa mort, et qu'il lui est indifférent que la mort s'ensuive ou non;

**686(1) Powers**

On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

- (b) may dismiss the appeal where
  - (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

**686(1) Pouvoir**

Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel :

- b) peut rejeter l'appel, dans l'un ou l'autre des cas suivants:
  - (iii) bien qu'elle estime que, pour un motif mentionné au sous-alinéa a)(ii), l'appel pourrait être décidé en faveur de l'appelant, elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit;

SCC File Number: 34080

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

**BETWEEN:**

**ADRIAN JOHN WALLE**

**Appellant  
(APPELLANT)**

**-and-**

**HER MAJESTY THE QUEEN**

**Respondent  
(RESPONDENT)**

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**REPLY TO RESPONSE TO MOTION TO ADDUCE FRESH EVIDENCE  
(ADRIAN JOHN WALLE, APPLICANT/APPELLANT)  
(Pursuant to Rules 50 of the *Rules of the Supreme Court of Canada*)**

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**MEMORANDUM OF ARGUMENT-REPLY TO RESPONSE TO MOTION TO  
ADDUCE FRESH EVIDENCE**

**Evidence Must be Credible - Reasonably Capable of Belief**

[1] The Respondent agrees that the proposed further evidence of Dr. Duska's is reasonably capable of belief. The Respondent argues that this evidence is not the only opinion reasonably capable of belief because Dr. Singh also evaluated the Appellant after his first trial where he was convicted of manslaughter. The fact that there may be other opinions reasonably capable of belief regarding a particular subject does not detract from the Appellant satisfying the Palmer<sup>1</sup> criteria.

**Due Diligence**

[2] The Respondent argues that the Asperger's Syndrome diagnosis is not fresh evidence because the Appellant knew he suffered developmental deficits since his early childhood. The trial evidence also indicated that the Appellant cognitive issues were longstanding, however it was not known that the Appellant suffered from Asperger's syndrome until Dr. Duska evaluated him post conviction. The fact that the Appellant knew that he suffered from a cognitive disorder his entire life does not demonstrate a lack of diligence on his part.

**Relevance of the Evidence**

[3] The Respondent submits that the Asperger's diagnosis is not relevant indicating that "social awkwardness is not insanity." The Appellant does not argue that he was insane or incapable of appreciating the consequences of firing a rifle because he suffers from Asperger's syndrome. The Appellant position is quite simply: the common sense inference is a conclusion that may be drawn after considering "all the evidence."<sup>2</sup> All the evidence includes evidence of his mental functioning.

**Proposed Evidence Could have Affected the Result of the Trial**

[4] The Respondent states that the common sense inference is "only a method" of answering

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<sup>1</sup> *R. v. Palmer* [1980] 1 S.C.R. 759, 17 C.R. (3d) 34 (SCC)

<sup>2</sup> *R. v. Seymour* [1996] 2 S.C.R. 252, [1996] S.C.J. No. 64 at para. 19 -23.

the question: what was the Appellant's actual intent. It is agreed that the inference is such a method. In this case, it was the method relied upon by the trial judge to find that intent had been proven and to convict the Appellant of second degree murder.

[5] The central issue in this appeal is whether a trial judge should consider evidence regarding mental condition and consumption of alcohol if that evidence falls short of establishing the accused was NCRMD or was in a state of advanced intoxication before relying on the common sense inference. The proposed further evidence is some of the evidence that should be considered prior to reflexively applying the common sense inference to find that intent has been satisfactorily proven.

[6] The Appellant respectfully requests that the Affidavit of Heather Dawn Schille sworn on the 8<sup>th</sup> day of September, 2011, with exhibits be received into the record as evidence on the appeal.

Dated at ~~04/20/11~~ this ~~29<sup>th</sup>~~ day of September 2011.

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**IN THE SUPREME COURT OF CANADA**  
**(On Appeal from the Court of Appeal for the Province of Alberta)**

**BETWEEN:**

**ADRIAN JOHN WALLE**

**Appellant**

- and -

**HER MAJESTY THE QUEEN**

**Respondent**

- and -

**THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO**

**Applicant/Intervener**

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**AFFIDAVIT OF PAUL BURSTEIN**

**President of the Criminal Lawyers' Association of Ontario**

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I, **PAUL BURSTEIN**, Barrister and Solicitor, of the City of Toronto, in the Province of Ontario, affirm and say as follows:

1. I am a barrister and solicitor and a member in good standing of the Law Society of Upper Canada. I am the current President of the Criminal Lawyers' Association ("CLA"). The CLA is seeking intervener status in this appeal.

**THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)**

2. The CLA is a non-profit organization founded in November 1971. One of the largest specialty legal organizations in Canada, the CLA is comprised of more than

1000 criminal defence lawyers, most of whom practice in Ontario. The objects of the CLA are to educate, promote and represent the membership on issues relating to criminal and constitutional law.

3. To that end, the CLA presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Program, which often includes guest speakers or participants from outside Canada. Each year, several educational sessions are devoted to issues relating to drinking and driving.

4. The CLA also produces a newsletter which is published five times per year and circulated across Canada. It includes editorials, the President's report, feature articles, regular columns, book reviews, and case commentaries, all of which are directed to highlighting current developments in criminal and constitutional law.

5. The CLA is regularly consulted and invited by both Parliament and its Committees to offer submissions on proposed legislation pertaining to issues in criminal and constitutional law. The CLA is also consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, Legal Aid and various other concerns that involve the administration of criminal justice in the Province of Ontario.

6. The CLA has been granted standing to participate in various commissions of inquiry, including the Commission on Proceedings Involving Guy Paul Morin (the "Kaufman Inquiry") and the Inquiry into Pediatric Forensic Pathology in Ontario (the "Goudge Inquiry").

7. The CLA has been granted leave to intervene in the Supreme Court of Canada and in the Court of Appeal for Ontario in many important criminal law cases. In this Honourable Court, the CLA has been granted leave to intervene in cases such as:

*R. v. Willier*, 2010 SCC 37  
*R. v. McCrimmon*, 2010 SCC 36  
*R. v. Sinclair*, 2010 SCC 35  
*Vancouver (City) v. Ward*, 2010 SCC 27  
*R. v. Conway*, 2010 SCC 22  
*R. v. Cunningham*, 2010 SCC 10  
*R. v. Harrison*, 2009 SCC 34  
*R. v. Suberu*, 2009 SCC 33  
*R. v. Grant*, 2009 SCC 32  
*Miazga v. Kvello Estate*, 2009 SCC 51  
*R. v. McNeil*, 2009 SCC 3  
*Canada (Justice) v. Khadr*, 2008 SCC 28  
*R. v. Kang-Brown*, 2008 SCC 18  
*R. v. A.M.*, 2008 SCC 19  
*Charkoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350  
*R. v. Clayton*, 2007 SCC 32  
*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41  
*R. v. Singh*, 2007 SCC 48  
*R. v. Khelawon*, [2006] 2 S.C.R. 787  
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*R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3  
*R. v. Pires; R. v. Lising*, [2005] S.C.R. 343  
*R. v. Turcotte*, [2005] 2 S.C.R. 519  
*R. v. Mann*, [2004] 3 S.C.R. 59  
*R. v. Jarvis*, [2002] 3 S.C.R. 757  
*R. v. Ling*, [2002] 3 S.C.R. 813  
*R. v. Hall*, [2002] 3 S.C.R. 309  
*R. v. Shearing*, [2002] 3 S.C.R. 33  
*R. v. Brown*, [2002] 2 S.C.R. 185  
*R. v. Pan; R. v. Sawyer*, [2001] 2 S.C.R. 344

*R. v. Find*, [2001] 1 S.C.R. 863  
*R. v. McClure*, [2001] 1 S.C.R. 445  
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*R. v. 974649 Ontario Inc.*, [2001] 1 S.C.R. 575  
*United States of America v. Burns and Rafay*, [2001] 1 S.C.R. 38  
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*R. v. Mills*, [1999] 3 S.C.R. 668  
*R. v. Williams*, [1998] 1 S.C.R.1128  
*Stillman v. The Queen*, [1997] 1 S.C.R. 607  
*A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536  
*R. v. Pearson*, [1993] 3 S.C.R. 665  
*R. v. Morales*, [1993] 3 S.C.R. 711

#### **THE CLA'S BASIS FOR INTERVENTION IN THIS CASE**

##### **CLA interest in the issue to be argued**

8. The issue to be argued on this appeal is whether the trial judge erred in relying on the common sense ("sane and sober") inference instruction to find the intent required for murder in circumstances where there was evidence of the Appellant's lack of sobriety and developmental deficits. The issue is one that transcends the Appellant's particular case. The "sane and sober" inference instruction is one that is an integral part of the "model jury instructions" that have been adopted in Ontario and throughout Canada. In any case where "intent" is a live issue, model jury instructions provide for an instruction that the jury is entitled to conclude, as a matter of common sense, that a sane and sober person naturally intends the consequences of their actions. For example, Canadian Criminal Jury Instructions (CRIMJI) include the following:

31. In deciding whether \_\_\_\_\_ **[THE ACCUSED]** intended or meant to cause the death of \_\_\_\_\_ **[THE VICTIM]**, you are entitled as a matter of common sense to draw an inference that a sane and sober person intends the natural and probable consequences of his or her voluntary actions.<sup>13</sup>

The Canadian Judicial Council includes the following "sane and sober" instruction:

You may conclude, as a matter of common sense, that if a sane and sober person does something that has predictable consequences, that person usually intends or means to cause those consequences. But that is simply one way for you to determine a person's actual state of mind, what s/he meant to do. It is a conclusion that you may *only* reach, however, after considering all the evidence. It is *not* a conclusion you must reach. It is for you to say whether you will reach that conclusion in this case.

Watt's Manual of Criminal Jury Instructions (Thomson Carswell 2005), which is routinely used in Ontario, contains a similar instruction.

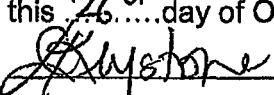
9. Our members are regularly involved in trials and appeals where the appropriateness of a sane and sober jury instruction or the drawing of the common sense inference are at issue. Whether the inference should be drawn in a particular case (and whether the jury should be given such an instruction or not) is regularly an issue for our members particularly in the context of cases where there is evidence of impairment (by drug or alcohol) or evidence of intellectual developmental issues. The CLA has a significant interest in the issue to be raised in Mr. Walle's appeal. Beyond the facts of Mr. Walle's case, the CLA also has an interest in addressing the appropriateness of the sane and sober inference generally.

#### **Arguments to be raised by the CLA on this appeal**

10. It is anticipated that the Criminal Lawyers' Association will argue that the Court should reassess the appropriateness of the common sense inference instruction in circumstances where there is any evidence of mental impairment (whether by intoxication or otherwise). In particular, it is anticipated that the CLA will argue that such an instruction no longer has a place in the context of those cases where the onus is on the Crown to establish the specific intent to commit an offence beyond a reasonable doubt. The sane and sober instruction/inference tends to impute objective assessments into what should be an assessment of what the particular accused intended. Triers of fact will use their common sense in evaluating the evidence. There is no utility in a trier of fact relying on the inference that sane and sober people intend the natural consequences of their actions in circumstances where the evidence is that the accused

was acting under an impairment. Although this Court in *R. v. Seymour* [1996] 2 S.C.R. 252 and *R. v. Daley* [2007] 3 S.C.R. 523 gave direction concerning the context of any jury instruction regarding the inference in the face of evidence of intoxication, the CLA will urge the Court to re-assess the appropriateness of such an instruction. The issue is one that is often raised in the context of appeals to provincial appellate courts (see for example: *R. v. Beausoleil* [2011] O.J. No. 2819, *R. v. Sam* [2008] B.C.J. No. 698 and *R. v. Janvier* [2008] A.J. No. 618 (C.A.)). The "permissible inference" has become, in effect, a legal direction that dilutes an assessment of what was actually going on in the accused's mind at the time of the offence (as demonstrated by the trial judge's analysis in Mr. Walle's case). As Justice Osborne noted in 1998 in *R. v. Rathwell* (1998), 130 C.C.C. (3d) 302 (Ont. C.A.) "charges would generally improve if the sane and sober person boilerplate were eliminated...". The CLA position is that the time has come to follow Justice Osborne's suggestion. Alternatively, the CLA anticipates advocating that if the sane and sober instruction is to be given (or the inference is to be drawn), that there must be a specific instruction that care should be taken in drawing any inference concerning the intent of sane and sober people where there is evidence that the accused was acting under some level of impairment. It should only be in circumstances where the jury is satisfied that the impairment did not have any impact on the accused's decision making or intention that they would be entitled to draw the common sense inference advocated by the instruction.

11. I make this affidavit in connection with an application for intervention and for no other purpose.

**AFFIRMED** before me at the City of )  
Toronto, in the Province of Ontario )  
this 26<sup>th</sup> day of October, 2011. )  
 )  
\_\_\_\_\_)  
A Commissioner, etc.

  
\_\_\_\_\_  
**PAUL BURSTEIN**

**IN THE SUPREME COURT OF CANADA  
(On Appeal from the Court of Appeal for the  
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**BETWEEN:**

**ADRIAN JOHN WALLE**

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