

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

B E T W E E N:

**HIS MAJESTY THE KING**

APPLICANT /  
RESPONDENT ON CROSS-APPEAL  
(Respondent)

- and -

**JENNIFER PAN**

RESPONDENT /  
APPLICANT ON CROSS-APPEAL  
(Appellant)

-and-

**DAVID MYLVAGANAM, DANIEL CHI-KWONG WONG,  
and LEONARD CRAWFORD**

RESPONDENTS  
(Appellants)

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**RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL  
AND APPLICATION FOR LEAVE TO CROSS-APPEAL  
(JENNIFER PAN, RESPONDENT)**  
(Pursuant to Rules 27 and 29 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### OVERVIEW

1. In *R. v. Pan*, the Ontario Court of Appeal conducted a meticulous application of a settled, straightforward legal test to a tome-like trial record. In its judgement, a unanimous court concluded that the trial judge had erred in failing to leave the lesser and included offences of Second-Degree Murder and Manslaughter to the jury. As a result, the court correctly remitted one count of First Degree Murder for re-trial. The lower court’s highly fact-driven, error-correction analysis raises no issue of public importance.

2. The test for determining which routes and verdicts should be left to a jury – the “air of reality” test – has been “unaltered in substance for at least a century”.<sup>1</sup> The test has been considered by this court in a series of cases. Since the early 2000s, its content has been definitively articulated,<sup>2</sup> its constitutionality has been confirmed,<sup>3</sup> and it has been repeatedly affirmed over the last twenty years.<sup>4</sup> There is simply no reason to re-visit it. This is a good thing. As this court recently observed in *Kirkpatrick*, consistency on core criminal law principles is desirable.<sup>5</sup> Consistency enhances the stability and legitimacy of the Canadian legal system. Law is not meant to be capricious.

3. The Applicant also asks this court to grant leave on the issue of the standard of review for the air of reality test. This matter was determined by this court, following argument, just last year in *Alas*.<sup>6</sup> The Applicant does not cite *Alas*, nor does the Applicant provide any basis for this court to re-visit or overturn *Alas*.

### THE FACTS

4. Ms. Pan and three co-accused were convicted on December 13, 2014 of first degree murder of Ms. Bich-Ha Pan (her mother) and attempted murder of Mr. Hann Pan (her father). The Crown theory of the case was that Ms. Pan hired assailants to murder her parents and conspired with them

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<sup>1</sup> *R. v. Fontaine*, [2004 SCC 27](#), at para. 13.

<sup>2</sup> *R. v. Cinous*, [2002 SCC 29](#).

<sup>3</sup> *R. v. Osolin*, [\[1993\] 4 S.C.R. 595](#).

<sup>4</sup> See, e.g., *R. v. Abdullahi*, [2023 SCC 19](#).

<sup>5</sup> *R. v. Kirkpatrick*, [2022 SCC 33](#).

<sup>6</sup> *R. v. Alas*, [2022 SCC 14](#), at para. 3.

to cover up the murder through a staged home invasion robbery. Ms. Pan's participation in the offences related entirely to the planning process.<sup>7</sup> In fact, it is non-controversial that during the execution of the offence, Ms. Pan was restrained at gunpoint by the intruders, and her hands were subsequently bound and affixed to a railing on the second-floor staircase.<sup>8</sup>

5. Ms. Pan and her co-accused were convicted and sentenced to life imprisonment with parole ineligibility for 25 years for the first degree murder of her mother. For the attempted murder of her father, they were each sentenced to life imprisonment, to be served concurrently.

6. Ms. Pan appealed her convictions. One of the primary issues before the court of appeal was whether the trial judge had erred by instructing the jury that only two possible scenarios were available on the evidence, either: (i) Ms. Pan planned to kill both her parents, or (ii) the killings arose out of a plan to commit a home invasion and Ms. Pan was not involved in the plan. The trial judge further instructed the jury that on the first scenario, Ms. Pan should be found guilty as charged, to first degree murder and attempted murder. On the second scenario, Ms. Pan would be acquitted of both charges.<sup>9</sup> On appeal, the defendants argued that there was, in fact, an air of reality to the inference that Ms. Pan planned to murder her father, but not her mother.

7. With the exception of the testimony of a single witness of dubious credibility, the evidence that the Crown relied upon to argue that the plan targeted both parents was circumstantial in nature. At its core, the evidentiary foundation for planning consisted of a pattern of voice calls and text message communication between the accused. The Crown relied on circumstantial evidence related to the timing and frequency of communication, the existence of prior abandoned plan to kill, and evidence of motive to ask the jury to infer that the unrecorded voice calls and heavily coded text messages related to a plan to kill both parents.

8. The only direct evidence<sup>10</sup> that the pattern of communications related to a plan to kill both parents came from Andrew Montemayor, a former friend of Pan, who claimed to have had a conversation with Ms. Pan just prior to the murder where she confessed to a plan to kill both

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<sup>7</sup> *R. v. Pan*, [2023 ONCA 362](#), paras. 63-64.

<sup>8</sup> *R. v. Pan*, [2023 ONCA 362](#), paras. 35-41.

<sup>9</sup> *R. v. Pan*, [2023 ONCA 362](#), para. 46.

<sup>10</sup> The evidence from the out of court statement of Wong at paragraph 17 of the Crown's memorandum is inadmissible against Jennifer Pan.

parents.<sup>11</sup> At trial, Mr. Montemayor was shown to have been materially inconsistent on this very point.<sup>12</sup> In prior statements he either claimed not to have spoken to Ms. Pan that night or that his memory of the phone call at issue was “vague”. He denied that he had learned information about assailants coming to the home from a news article he read a week after the events of November 8, prior to his statement to police.

9. If the jury rejected the evidence of Montemayor, the only evidence that the communications pertained to a plan to kill both parents was purely circumstantial. In her testimony, Ms. Pan denied that the communication related to a plan to kill her parents.

10. There was evidence before the jury of text message communications between the defendants, however, those conversations did not address the issue of the target of the plan. The Crown placed heavy reliance on the “ten stacks” message, which it argued was evidence of a plan to kill two people. This interpretation, while technically available, is hardly a compelling inference on the evidence.

11. In its memorandum, the Applicant Crown suggests that in the “ten stacks message”, “Carty said it was to be “10 stacks” (\$10,000) for the job, or \$5,000 for “each ting” (each murder).”<sup>13</sup> The Crown has used paraphrasing to alter the syntax of the messages in a manner that assists their suggested interpretation. The actual text messages state:

Carty: Ten stacks  
Mylvaganam: Ya.  
Mylvaganam: Wen u ready k  
Carty: Ya 5each ting  
Mylvaganam: Me u  
Carty: Ya bt u all da way and all ten 4u<sup>14</sup>

12. There is a clear and compelling interpretation of these messages, where Carty is telling Mylvaganam that if they do the job together they will split the fee (“5each ting” = “it’s a \$5000 each kind of thing”), but if Mylvaganam does it alone he can receive the whole fee (“bt u all da way and all ten 4 u” = “if you do it alone, then you will get the whole \$10,000”). The idea that

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<sup>11</sup> Applicant’s Application Record on Leave, *A. Montemayor Excerpts*, Tab 10, pp. 397-402.

<sup>12</sup> Applicant’s Application Record on Leave, *A. Montemayor Excerpts*, Tab 10, pp. 419-425.

<sup>13</sup> Applicant’s Memorandum on Leave, at para. 9(c).

<sup>14</sup> Applicant’s Application Record for Leave, Tab 14, p. 505.

the “Seach” refers to splitting the fee is reinforced by the portion of the exchange where Mylvaganam says “Me u” and Carty replies “Ya”.

13. In light of the paucity of evidence regarding the target of the planning in the text messages adduced, the Crown relied on circumstantial evidence which might allow the jury to infer that the communication related to a plan to kill both parents. The primary circumstantial evidence relied upon related to allegations of a prior plan to kill both parents and evidence of Ms. Pan’s alleged motive and *animus* against both parents.

14. On appeal, the defendants pointed to circumstantial evidence that would allow the jury to make an alternate inference regarding the content of the unrecorded voice calls and heavily coded text messages: that they related to a plan to kill Ms. Pan’s father, but not her mother. The defendants relied on three main categories of evidence, which were directly responsive to the categories of circumstantial evidence the Crown relied upon to ask the jury to infer that the pattern of communication related to a plan to kill both parents.

15. First, the appellants relied upon evidence that the previous plan to kill in the summer of 2008 was a plan to kill Hann Pan only.<sup>15</sup>

16. Second, the appellants relied on strong and corroborated evidence that, during the relevant time period, Ms. Pan had motive and *animus* in relation to her father, which was not present vis-à-vis her mother.

17. Finally, the appellants relied on corroborated evidence of Ms. Pan’s good relationship with her mother.

18. The following is a list of evidence the jury could have relied upon to come to the conclusion that there was a plan to kill Hann Pan only:

- a) ***Animus against father:*** Jennifer Pan testified that her father had strict expectations which did not align with her personal goals and expectations. She and her father had a particularly strained relationship after she confessed that she had lied about her education and about being in a relationship with Daniel Wong.

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<sup>15</sup> A mid-trial ruling was made regarding this evidence, see *R. v. Pan*, [2023 ONCA 362](#), para. 55.

Hann Pan corroborated her evidence that he had issued her an ultimatum, demanding she either stay at home and go back to school, or go with Wong and never return.

- b) **Absence of *animus* towards mother:** Ms. Pan testified that her relationship with her mother was better than her relationship with her father. She described a close emotional connection with her mother. She believed her mother supported her father's strict rules and restrictions to simply conform to cultural expectations regarding parental unity. Her mother was more lenient, for instance, she made an effort to integrate Wong into the Pan family and would give Jennifer access to her phone when her father confiscated it. Ms. Pan testified that she had spoken to her mother about moving out together and getting their own place.

Felix Pan corroborated that his mother would protect Ms. Pan from his father during family arguments. He believed that if his parents ever broke up, he and his sister would live with their mother.

Other witnesses corroborated Ms. Pan's lack of motive or *animus* towards her mother. Ms. Pan's friend Edward Pacificodor and cousin Michelle Luong both indicated that Ms. Pan had a loving relationship with her mother.

- c) **Earlier plan to kill father:** Ms. Pan testified that she had never – at any point – planned or wanted to have her mother killed. The same was not true about her father. Ms. Pan testified that in the spring of 2010, she planned with Andrew Montemayor and Ricardo Duncan to have her father killed. This plan ended when she paid Duncan and he disappeared with her money. The evidence of this plan was admitted by the court in a mid-trial ruling, and the Crown conceded that this evidence was admissible. Ricardo Duncan gave conflicting evidence about whether Ms. Pan wanted to kill “her parent” or both parents.
- d) **Actions of the perpetrators in the house:** The way the perpetrators conducted themselves in the house suggests there was not a plan to kill both parents. Hann Pan testified that the perpetrators repeatedly asked him for money throughout his interaction with them. Hann Pan also testified that he saw Jennifer Pan paraded through the home at gun point. Subsequently, Jennifer Pan's hands were bound and she was tied to an upstairs railing. If

the plan had been to kill both parents and keep Jennifer Pan alive (who was allegedly part of the plan), there would have been no reason to put on a charade of robbery.

- e) **Evidence of spontaneous decision to kill:** Hann Pan testified that right before the shooting, the following exchange occurred between his captors: “should we tie them up or tape them up? To exit by the front door or the rear door?,” the other replied, “shoot and exit by the front door.” This evidence comes from the only witness who was present during the shooting. This exchange is inconsistent with the idea that there was a plan to kill both parents from the outset.

19. The defendants argued that the jury could have relied upon this evidentiary foundation to conclude that the Crown had met the criminal standard of proof regarding a plan to kill Hann Pan, while having a reasonable doubt that the unrecorded voice calls and heavily coded text messages contained any discussion of a plan to kill her mother. The court of appeal agreed.<sup>16</sup>

20. It is non-controversial that a finding by the jury that there was a plan to kill her father, but doubt on the existence of a plan to kill her mother, would open up routes of liability for second-degree murder and manslaughter in relation to the death of Bich-Ha Pan.

## PART II – STATEMENT OF ISSUES

21. Ms. Pan raises two points in response:

### **Issue One:**

**What is the test a trial judge must apply in determining whether there is an “air of reality” to an included offence or alternative route to liability?**

### **Respondent’s Position:**

The Applicant raises no issue of public importance. The air of reality test is settled law, well-articulated in *Cinous*. The evidentiary threshold (“some evidence”) and the issue of “weighing of evidence” were definitively resolved in *Cinous*.

The Applicant has not asked this court to overrule *Cinous* and has not raised any argument which would permit this court to do so pursuant to the test articulated in *Kirkpatrick*.

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<sup>16</sup> *R. v. Pan*, [2023 ONCA 362](#), paras. 47-50.

### **Issue Two:**

**What is the standard of review an appellate court must apply when reviewing a trial judge’s “air of reality” ruling?**

### **Respondent’s Position**

This issue was considered and decided by this court in its 2022 decision of *Alas*. The Applicant provides no justification for this court to revisit *Alas*.

## **PART III – STATEMENT OF ARGUMENT**

### **ISSUE 1: THE AIR OF REALITY TEST**

22. Ms. Pan agrees with the analysis of this issue put forward by the Respondent Wong in his response to the Crown’s application for leave.

23. Ms. Pan argues that the air of reality test for included offences was first “examined” in *Aalders*,<sup>17</sup> and that the court in *Aalders* articulated a standard of ““sufficient evidence,” with limited weighing of evidence” for leaving included offences with the jury.<sup>18</sup> The Applicant goes on to suggest that since the standard was set in *Aalders*, the Ontario Court of Appeal has diluted the *Aalders* standard, apparently lowering the test from one that requires “sufficient evidence” to one that requires “some evidence.”<sup>19</sup> The Applicant relies on this purported discrepancy in the law to argue that this court should re-visit the air of reality test.

24. The Applicant’s reliance on *Aalders* is perplexing.

25. *Aalders*, an as of right appeal, does not establish the air of reality test or contain any meaningful analysis of the test. It simply applies the air of reality test to the facts of that case. The term “sufficient evidence” is never used in the decision.

26. Moreover, *Aalders* is both preceded *and* followed by an unbroken line of caselaw from this court which use the “some evidence” standard to describe the air of reality test. For example, the “some evidence” language was used in *Papajohn* (1980),<sup>20</sup> *Bulmer* (1987),<sup>21</sup> *Osolin* (1993),<sup>22</sup> and,

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<sup>17</sup> *R. v. Aalders*, [1993] 2 S.C.R. 482.

<sup>18</sup> Applicant’s Memorandum of Argument on Leave, at para. 2.

<sup>19</sup> Applicant’s Memorandum of Argument on Leave, at para. 2.

<sup>20</sup> *Papajohn v. The Queen*, [1980] S.C.R. 120, at pp. 127-128.

<sup>21</sup> *R. v. Bulmer*, [1987] 1 S.C.R. 792, at para. 22.

<sup>22</sup> *R. v. Osolin*, [1993] 4 S.C.R. 595.

notably, in *Cinous* (2002),<sup>23</sup> which is the controlling authority on the interpretation and application of the “air of reality” test.

27. As the Respondent Wong argues, the *Cinous* decision is the leading authority on the “air of reality” test, which is used to determine whether a route to a particular verdict is open to the jury. *Cinous* establishes that the evidentiary standard to be applied under the air of reality test is “some evidence.”

28. Without saying so, the Crown now asks this court to overrule the test put forward in *Cinous*. It does so without making any argument that *Cinous* is *per incuriam* or otherwise engages the test recently put forward in *Kirkpatrick* governing horizontal *stare decisis* in this court.<sup>24</sup>

29. There is no basis to revisit *Cinous*. It is considered, compelling, and correct. Both issues raised by the Applicant — the evidentiary threshold of “some evidence” and the prohibition against engaging in credibility analysis or other form of evidentiary weighing — are considered and determined in *Cinous*. These two aspects of the test are equally essential to ensure that the air of reality test does not permit the trial judge to usurp the role of the jury. Pursuant to this court’s ruling in *Osolin*, but for these limits (later analyzed and affirmed in *Cinous*) the air of reality test would offend s. 11(f) of the *Canadian Charter of Rights and Freedoms*.

30. Moreover, there is no conflict between the use of the term “some evidence” and the use of the term “sufficient evidence,” which are both used to describe the air of reality standard. This court has already explained how to interpret references to the term “sufficient evidence” in the “air of reality” jurisprudence in its comprehensive decision in *Cinous*. As the *Cinous* majority explained:

The key point about “sufficiency” is rooted not in a legal text, but in ordinary language. The statement that “the evidence is sufficient” on its own is meaningless, in the same way that the statement “two dollars is sufficient” is meaningless. The question arises: sufficient for what purpose? Evidence, or anything else for that matter, is sufficient or insufficient in relation to a specific standard or criterion. In the criminal law, evidence is measured against two distinct standards, corresponding to two distinct issues. First, evidence can be sufficient or insufficient to meet the evidential burden imposed by the air of reality test. Second, evidence can be sufficient or insufficient to establish guilt beyond a reasonable doubt or to warrant an acquittal. The first issue, which is the subject matter of the evidential burden (or “minor burden”) relating to defences, is reserved for the judge. The second

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<sup>23</sup> *R. v. Cinous*, [2002 SCC 29](#), at paras. 62-83.

<sup>24</sup> *R. v. Kirkpatrick*, [2022 SCC 33](#), at para. 202.

issue, which is the subject matter of the persuasive burden (or “major burden” or “primary burden” or “legal burden”) is reserved for the jury.<sup>25</sup>

31. The court in *Cinous* went on to explain that the evidentiary threshold for the air of reality test is “some evidence” on each essential element required in law to support the route and verdict proposed. In the context of defences, for example, this means some evidence on each essential element of the defence. Where the threshold of “some evidence” is met, there will be “sufficient evidence” to put the route and verdict to the jury.

32. Justice Fish explained this idea again, almost twenty years ago, in *Fontaine*:

Again, the ultimate issue is whether the jury is persuaded that the accused probably perpetrated the alleged criminal act in a state of automatism. For the issue to reach the jury, there must be some evidence upon which that finding could reasonably be made by a properly instructed jury acting judicially. If there is, the evidence is said to be “sufficient”—the evidentiary burden has been discharged and automatism is “in play” before the jury.<sup>26</sup>

33. This is a simple idea, and this court need not grant leave only to explain it yet again.

34. The idea that the “some evidence” test must be applied to every element required to leave the route and verdict under consideration to the jury dates back to *Osolin* (1993). *Osolin* and the other cases cited by the Applicant at paragraphs 32 and 33 of its memorandum, are concerned with clarifying this distinction, which was not as clear in law thirty years ago as it is today. When the majority stated in *Osolin* that the determinative question was not “whether there is some evidence, but rather, whether there is some evidence capable of supporting the particular defence alleged by the accused [emphasis added],” it was not commenting on the evidentiary threshold, it was directing future courts to always ensure that there is some evidence *on every element of the offence* before leaving the defence with the jury. This is clear on a plain reading of the passage from *Osolin* excerpted above. It is reinforced by the example from the defence of provocation which follows this statement in the *Osolin* decision. As the court explained, provocation ought not to be left with the jury where the defendant merely says that he or she acted in a heat of passion, the court must also turn the air of reality analysis to the requirements for wrongful act or insult and the reasonable

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<sup>25</sup> *R. v. Cinous*, [2002 SCC 29](#), at para. 70 [Emphasis Added].

<sup>26</sup> *R. v. Fontaine*, [2004 SCC 27](#), at para. 90 [Emphasis Added].

person test, which are essential elements of provocation. Only where there is “some evidence” on each of these requirements, will the evidence be “sufficient” to leave the defence with the jury.

35. This is good law. It has been affirmed many times over. Today, more than thirty years following *Osolin*, it may even be considered trite law, which is routinely applied by trial courts across the nation, without issue or confusion.

36. It is not surprising, therefore, that most of the cases which the Applicant points to as using the terminology “sufficient evidence” are air of reality tests that engage the availability of certain defences.<sup>27</sup> When the air of reality test is focused on defences, the court must ensure that there is “some evidence” on every element of the defence before leaving the defence with the jury. As noted, if there is “some evidence” on each essential element, the evidence is typically said to be “sufficient” to leave the defence with the jury.

37. The “sufficient evidence” language may be used less when the air of reality test is applied to determine whether routes to lesser included offences are available. This is purely a matter of semantics. In lesser included offences cases, the court is applying the air of reality test to a different methodology for arriving at a possible verdict. Instead of focusing the test on the presence of evidence on each essential element of a defence, the trial court is focussing the test on whether the jury could have reasonable doubt on one essential element of a superior offence, while still maintaining the inferences required for each essential element of an inferior offence. In this context, there must be “some evidence” which would allow the jury to infer that an essential element of the superior offence is not present, while at the same time inferring that all essential elements of the inferior offence are present. It is somewhat awkward to use the term “sufficient” when you are considering a deficiency in the evidence that could reduce a count. While this shift may impact a trial judge’s word choice, nothing about this shift could be said to impact the evidentiary threshold expressed by the air of reality test and proper inference-drawing exercise articulated in *Cinous*.

38. Thus, the alleged discrepancy between the use of the term “some evidence” and “sufficient evidence” in the caselaw is, at minimum, a matter of semantics or word-choice. At best, the use of

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<sup>27</sup> *R. v. Osolin*, [\[1993\] 4 S.C.R. 595](#).

both terms could also be viewed as evidence that inferior courts understand the *Cinous* test and are well-versed in its application.

39. There is no reason to revisit the “some evidence” threshold affirmed in *Cinous*.

40. The Applicant also complains that provincial appellate courts are moving away from the “limited weighing” this court has applied in cases such as *Aalders* and *Park*, to dilute the air of reality standard.

41. Air of reality, like its counterpart in the committal test and directed verdict test, is intimately concerned with the availability of inferences. What the Applicant refers to as “limited weighing” in the application of the test is nothing more than recognition that the court’s residual gatekeeper function regarding inference-drawing remains available in this analysis.<sup>28</sup> Thus, where a party puts forward a bald assertion that an essential element is present or absent, without providing a basis on which a jury could reasonably make that inference on the whole of the evidence adduced at a trial, the trial judge may withdraw the inference from the jury’s consideration. For example, if a defendant said in his evidence that he was not at the scene of the crime, but also identified himself in surveillance footage at the scene, unless the defendant offered some explanation which might allow the jury to accept the defendant’s bald assertion of alibi, the inference that the appellant was not at the scene is logically and legal unavailable. Contrary to the Applicant’s assertions, this standard inference-drawing exercise does not import a limited a credibility analysis, or any other form of improper weighing into the air of reality analysis.<sup>29</sup>

42. There is no authority or support in the existing jurisprudence for the Applicant’s position that a limited credibility analysis or any other forms of traditional weighing of the evidence should be considered in the air of reality test.

43. In fact, the opposite is true. The test has been intentionally designed to avoid intrusion by the trial judge into the constitutionally-protected discretion of the jury, as trier of fact, by explicitly eliminating credibility analyses, and other factors from the analysis under the test.<sup>30</sup> This has been clear law since *Cinous*, where the court stated:

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<sup>28</sup> *R. v. Cinous*, [2002 SCC 29](#), at paras. 87- 91, 215.

<sup>29</sup> *R. v. Cinous*, [2002 SCC 29](#), at para. 87- 91, 215.

<sup>30</sup> *R. v. Cinous*, [2002 SCC 29](#), at para. 54; *R. v. Osolin*, [\[1993\] 4 S.C.R. 595](#).

The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta, supra*; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Park, supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.<sup>31</sup>

44. This “crucial distinction” from *Cinous* intentionally limits the trial judge’s role within constitutionally appropriate parameters: “the judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence.”<sup>32</sup>

45. The constitutional integrity of the air of reality test is crucial, yet the weighing exercises that the Applicant invites this court to incorporate into the test would undermine it at its core. It is worth noting that in *Osolin*, where this court concluded that the air of reality test does not violate s. 11(f) of the *Charter*, Cory J. (in the majority on this point), explained that a trial judge applying the air of reality test does not usurp the role of the jury because the trial judge “is not weighing the evidence, but is simply examining it to determine what defences are available.”<sup>33</sup>

46. The law in this area is clear: limited weighing in the inference-drawing process (in the nature of the test from *Arcuri*) is permitted; usurping the constitutionally-protected fact-finding role of the jury is not. The Crown has not provided any basis that could compel this court to reconsider these bedrock legal principles, which have wide application across various areas of law.

47. The Applicant also suggests to the court that it may be permissible for a trial judge to decline to leave a lesser included offence with the jury to avoid complex jury charges. This argument is untenable. There is no basis in law for this court to entertain it. A failure to leave an available lesser included offence to the jury is a serious error that requires intervention in all but the most narrow of circumstances. This is because failing to leave an available lesser included offence with the jury can produce a wrongful conviction on the superior offence. The error also has a constitutional dimension, as failing to leave an available verdict on a lesser and included

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<sup>31</sup> *R. v. Cinous*, [2002 SCC 29](#), at para. 54

<sup>32</sup> *R. v. Cinous*, [2002 SCC 29](#), at para. 91.

<sup>33</sup> *R. v. Osolin*, [\[1993\] 4 S.C.R. 595](#).

offence with the jury undermines the possibility that the defendant could be innocent of the superior offence, and guilty of only the inferior offence. The type of judicial action suggested by the Applicant, if permitted, would offend the presumption of innocence enshrined in s. 11(d) of the *Charter*.

**ISSUE 2: THE STANDARD OF REVIEW FOR THE AIR OF REALITY TEST IS CORRECTNESS**

48. As the Respondent Wong correctly points out, in the 2022 decision of *Alas*, this court unanimously held that applications of the air of reality test are reviewed on a standard of correctness.<sup>34</sup> There is no reason to revisit this recent decision. Ms. Pan relies on Mr. Wong's memorandum for this argument.

**PART IV – SUBMISSIONS REGARDING COSTS**

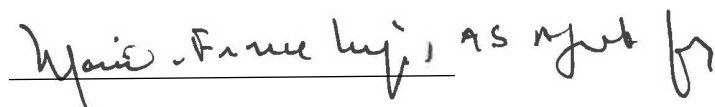
49. Ms. Pan does not request costs.

**PART V – ORDER SOUGHT**

50. Ms. Pan requests that the application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 15th day of September, 2023.

Handwritten signature of Stephanie DiGiuseppe, as noted for Harshi Mann.

**Stephanie DiGiuseppe**  
**Harshi Mann**

*Counsel for Jennifer Pan*

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<sup>34</sup> *R. v. Alas*, [2022 SCC 14](#), at para. 3.

## PART VI – TABLE OF AUTHORITIES

<b>Caselaw</b>	<b>Paragraph No.</b>
<i>Papajohn v. The Queen</i> , <a href="#">[1980] S.C.R. 120</a>	26
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<i>R. v. Abdullahi</i> , <a href="#">2023 SCC 19</a>	2
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<i>R. v. Bulmer</i> , <a href="#">[1987] 1 S.C.R. 792</a>	26
<i>R. v. Cinous</i> , <a href="#">2002 SCC 29</a>	2, 21, 26-31, 37-39, 41-44
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<i>R. v. Kirkpatrick</i> , <a href="#">2022 SCC 33</a>	2, 28
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<b>Legislation</b>	<b>Section(s)</b>
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<i>Charte canadienne des droits et libertés</i>	<a href="#">11</a>