File Number: 41434

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

BUDDY RAY UNDERWOOD

Appellant
(Respondent)

- and -

HIS MAJESTY THE KING

Respondent
(Appellant)

FACTUM OF THE RESPONDENT
HIS MAJESTY THE KING

RULES 36 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE RESPONDENT

PART I – OVERVIEW AND FACTS

Overview

1. Buddy Underwood and three accomplices robbed, confined, and assaulted Nature Duperron over the course of several hours. During that time, they drove hundreds of kilometres west of Edmonton with Ms. Duperron confined on the floorboards of their truck. She was injected at least twice with doses of fentanyl that ultimately contributed to her death.

2. Ms. Duperron was still alive when the group turned off the highway into the bush north of Hinton. There, the appellant produced a shotgun, handing it to one accomplice to shoot Ms. Duperron in the head. The gun did not fire. The appellant tried to fix it, but it misfired again. Instead, the group beat Ms. Duperron, forced her to consume pills, waited until she began to lose consciousness from the fatal dose of fentanyl they had administered, and then left her—handcuffed and alone—in the woods to die.

3. The trial judge, Graesser J., found that the appellant was "calling the shots" throughout. Indeed, he described the appellant as the "director of events."[1] He found that the appellant told the others, before leaving Edmonton, that Ms. Duperron knew too much and they had to "get rid" of her. He accepted that early in their journey, the group discussed dumping her body in a lake outside Edmonton. He further found that the appellant coerced his cousin, Bret Desjarlais, to keep driving the group, telling him this was a "with us or against us" situation. Ultimately, Graesser J. found that the appellant directed Mr. Desjarlais to turn off the highway north of Hinton because he "had made a decision to end the journey" – that is, to kill Ms. Duperron there. Everything done in the woods was done for the purpose of killing her.[2]

4. Despite making these findings of fact, the trial judge acquitted the appellant of first-degree murder, convicting him of the lesser included offence of second-degree murder. With respect, that acquittal rested on legal errors concerning the element of planning in s 231(2), and a

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[1] ***R v Underwood***, 2022 ABKB 709, at para 362 ("Trial Reasons"), [Appellant's Record, vol I, p. 52].
[2] Trial Reasons, para. 358 [Appellant's Record, vol I, p. 51].

misapplication of the causation standard in s 231(5). The unanimous Alberta Court of Appeal was right to substitute the conviction for first-degree murder that ought to have been entered on the facts found by the trial judge.

5. The appellant protests that the decision of the Court of Appeal has broadened the scope of liability for first-degree murder, suggesting that any intentional killing would be first-degree murder if its judgment stands. Such concerns are misplaced. The appellant was an active participant in confining the deceased for hours before her death while deciding when and where she would be killed, and he was instrumental in bringing about her death. As the trial judge found, this was a *deliberate* murder. As the Court of Appeal confirmed, it also met the legal standard for *planned* murder.

6. This appeal should be dismissed.

Statement of Facts

7. The prosecution's case depended almost entirely on the evidence of Bret Desjarlais, the appellant's cousin. Mr. Desjarlais was a party to the offence and confessed his involvement to RCMP officers within days of the killing. He entered a formal immunity from prosecution agreement and testified for the prosecution. He had also acted as a police agent and engaged in recorded conversations with the appellant and his co-accused, Tyra Muskego.[3] Mr. Desjarlais was obviously a *Vetrovec* witness, and the trial judge gave extensive reasons for accepting his evidence on most, but not all, points. The essential parts of that narrative, which the trial judge accepted, were as follows.

8. Mr. Desjarlais and the appellant had grown up together but lost touch after high school. They had begun to reconnect in the months leading up to the offence. Mr. Desjarlais had been a regular user and sometimes dealer of hard drugs (meth, cocaine and heroin) since the age of 19 or 20. At the time of the offence, Mr. Desjarlais worked as a welder in and around Edmonton.[4]

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[3] Ms. Muskego was tried together with the appellant and convicted of manslaughter.

[4] Transcript, 56/4–35, 57/11–59/18 [A.R., vol. II, pp. 64–67]

9. On Saturday, April 6th, 2019, he finished work in the afternoon and contacted the appellant. Mr. Desjarlais was looking to sell some heroin and thought the appellant might be able to help. The appellant declined to help but invited him to a house in central Edmonton. There, Mr. Desjarlais met Grayson Eashappie (whom he knew as "Rex"), Kala Bajusz, and Tyra Muskego (whom he knew as "Tall Girl") for the first time. He spent the night at the house, got high on meth—using a "normal" amount by his standards—and did not sleep at all.[5]

10. The next morning, he and Mr. Eashappie went out to McDonald's to get breakfast for the group. On the drive, Mr. Eashappie got a phone call from Nature Duperron, who needed a ride to complete some drug sales. Mr. Desjarlais had never met her, but she was willing to pay, so he agreed to drive her. He picked her up on the way to the McDonald's. After getting the food and bringing it back to the house, Mr. Desjarlais drove Ms. Duperron to her aunt's house to drop off some pills. He then spoke by phone with the appellant, who sounded upset to learn that he was with Ms. Duperron. The appellant insisted they come back to the house, which they did.[6]

11. At the house, the appellant and Mr. Eashappie got in the truck along with another man. The appellant entered the front passenger seat, where he would remain until after the group left Edmonton. After another drug drop and some time looking for a third location, Mr. Desjarlais drove back to the house, where Mr. Eashappie and the other man went back inside. A few minutes later, Mr. Eashappie returned with Ms. Bajusz and Ms. Muskego.[7]

The robbery and kidnapping

12. One of the women said they needed a ride down the street to a friend's house.[8] Mr. Desjarlais drove for a few minutes before being directed to turn down an alley. As he did so,

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[5] Transcript, 61/1–24; 64/1–67/23, 68/13–19. [A.R., vol. II, pp. 69, 72–76] Grayson Eashappie and Kala Bajusz were scheduled to be tried together with the appellant and Ms. Muskego but both pled guilty to second-degree murder on the first day of trial.

[6] Transcript, 69/16–70/40, 73/27–77/10 [A.R., vol. II, pp. 77–78, 81–85]

[7] Transcript, 77/12–18, 78/17–82/12 [A.R., vol. II, pp. 85–90]

[8] Transcript, 83/32–41 [A.R., vol. II, pp. 91].

the appellant (still sitting in the front passenger seat) sent him a text message warning him that the others were going to rob Ms. Duperron.[9]

13. Mr. Desjarlais stopped the truck in the alley, and the others got out. Ms. Bajusz and Ms. Muskego pulled Ms. Duperron out of the truck and onto the ground, where they kicked and punched her. The appellant remained in the truck with Mr. Desjarlais. The others jumped back in the truck with Ms. Duperron's bag, and they drove off, leaving her behind.[10]

14. After searching the bag, Ms. Bajusz and Ms. Muskego were unhappy with the take. Ms. Muskego told Mr. Desjarlais to circle back to find Ms. Duperron. They found her walking on the side of the road near a credit union. Mr. Desjarlais pulled around to park behind the credit union, and Ms. Bajusz and Ms. Muskego went running around the building. When they came back, they had Ms. Duperron with them and got into the backseat of the truck with her. Mr. Desjarlais was told to drive and drove around for about half an hour while the others searched Ms. Duperron's person and her bag.[11]

The plot to "get rid" of Nature Duperron

15. At some point in this process, the appellant said something to the effect that Ms. Duperron "knew too much. And [they] had to get rid of her."[12] Mr. Desjarlais testified he was stunned. He believed he said something but did not remember exactly what. The appellant then told him that "you're either with us or you're not," which Mr. Desjarlais understood to be a threat. He recalled Ms. Bajusz complaining that they did not have their regular driver.[13]

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[9] Transcript, 85/34–86/31. [A.R., vol. II, pp. 93–94]
[10] Transcript, 86/33–89/2. [A.R., vol. II, pp. 94–97]
[11] Transcript, 90/13–91/41, 92/28–93/26 [A.R., vol. II, pp. 98–101]
[12] Transcript, 94/23–36 [A.R., vol. II, p 104]. This statement was referred to as the appellant making 'the call' by all parties and the trial judge below. Whether the appellant had said this, and the exact words used was a point of much contention at trial. The trial judge found that the appellant had said something to this effect: Trial Reasons, paras 194–198, 294, 342, 362 [A.R, vol. I, pp 26-27, 40, 50, 52].
[13] Transcript, 95/4–17, 95/38–96/3. [A.R, vol. II, 103–104]

16. The appellant then directed Mr. Desjarlais onto Stony Plain Road, a major roadway going west out of the city. By this time, Ms. Duperron was lying on the floor of the back seat. She had been handcuffed, using handcuffs found in her bag. Mr. Eashappie, Ms. Bajusz, and Ms. Muskego were seated in the backseat, with their feet on top of her.[14]

17. They continued driving on a combination of back roads and Highway 16, heading generally west. Near the turn off to Alberta Beach, Ms. Bajusz suggested they should dump Ms. Duperron's body in the lake there, but someone else said that was a bad idea as that location was too busy. Around that time, Hinton was proposed as a destination.[15]

18. The group made a number of stops just outside Edmonton. First, at a gas station where the appellant went in to pay for gas, and told Mr. Desjarlais not to leave the truck. Next, they stopped at a liquor store where Mr. Desjarlais went in and bought vodka and coolers. They stopped again for gas in Edson, then continued west to Hinton, where they stopped to use an ATM. Mr. Desjarlais recalled that he and the appellant took turns driving.[16]

19. Mr. Eashappie injected Ms. Duperron with what Mr. Desjarlais believed to be fentanyl at least twice—once before the Alberta Beach turn off, and once more before they reached Edson. After that first injection, Ms. Duperron was in and out of consciousness for the rest of the drive.[17]

The drive north of Hinton and the events in the woods

20. After leaving Hinton, they turned onto Highway 40, heading north towards Grande Cache. Mr. Desjarlais testified the purpose of driving that way was "to get rid of Nature."[18] After

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[14] Transcript, 96/5–30, 97/6–98/1 [A.R., vol. II, pp. 104–106]

[15] Transcript, 99/9–35, [A.R., vol. II, p 107]. The turn off Highway 16 towards Alberta Beach is approximately 40 km outside Edmonton, so this conversation took place early in the drive.

[16] Transcript, 98/35–99/3, 100/5–105/23 [A.R., vol. II, pp. 107–112]. Mr. Desjarlais's financial records showed the liquor store stop took place at around 11:15 am, and the ATM transaction in Hinton at 2 pm.

[17] Transcript, 102/2–19, 116/4–8, 117/19–21, 273/6–18, 339/31–34 [A.R., vol II, pp. 110, 124, 125, 281, 347].

[18] Transcript, 121/31–39. [A.R., vol. II, p 129]

ten or twenty minutes driving north, the appellant told Mr. Desjarlais to turn left into a clearing near a gravel pit. Mr. Desjarlais then drove about a hundred yards up a quad path until the muddy conditions prevented him from going further.[19]

21. Once stopped, everyone got out of the truck, leaving Ms. Duperron inside. Mr. Desjarlais was handed a syringe filled with what he understood to be fentanyl, and was told to inject Ms. Duperron with it so she would overdose. He pretended to inject her, but instead broke the needle off in her sweater. Ms. Bajusz and Mr. Eashappie were taunting Ms. Duperron, telling her "Nature [is] going to be left to nature, this is your home now." She woke up and was taken out of the truck.[20]

22. Mr. Desjarlais testified that the appellant and Mr. Eashappie then got some pills from Ms. Bajusz and gave them to Ms. Duperron, ordering her to eat it, which she did. He recognized them to be fentanyl. The trial judge did not accept that the appellant personally fed Ms. Duperron these pills, but he accepted that the appellant had aided whoever did.[21]

23. The appellant then retrieved a shotgun from a duffel bag he had brought to the truck that morning. He handed the firearm to Mr. Eashappie, who pointed it at Ms. Duperron's head and pulled the trigger, but nothing happened. Mr. Eashappie handed the gun back to the appellant, who released the safety and handed it back. Mr. Eashappie pointed it at Ms. Duperron and pulled the trigger once more, but again nothing happened.[22]

24. Mr. Desjarlais then told Mr. Eashappie to hit her with the gun, because she had "suffered enough." Mr. Eashappie swung the gun like a baseball bat, hitting her in the side of the head and

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[19] Transcript, 122/13–41. [A.R., vol. II, p 130]

[20] Transcript, 123/18–125/19, 129/6–14. [A.R., vol. II., pp. 131–133, 137]

[21] Trial Reasons, para 310 [A.R., vol. I, p 43], ("Mr. Desjarlais' testimony as to Mr. Underwood forcing Ms. Duperron to eat some fentanyl was undermined by cross-examination and I cannot and do not conclude beyond a reasonable doubt that he did so.") and 365 [A.R., vol. I, p 52] ("Mr. Underwood avoided doing any of the dirty work himself. He got Mr. Eashappie to do that for him. But he clearly aided Mr. Eashappie by at least being beside him when Ms. Duperron was fed the fentanyl.").

[22] Transcript, 130/14–132/18. [A.R., vol. II, pp. 138–140]

knocking her over.[23] They stayed watching her for a short time until she began to nod off, and Mr. Eashappie said they could leave:

> […] Grayson was stating that he seen this before, that he knows she's on -- he knows that she is on her way out, that we're good to leave. She's not going to survive.[24]

25. Mr. Desjarlais saw Ms. Bajusz put an ID card in Ms. Duperron's pocket, and they all returned to the truck and drove away, leaving her propped against a tree, still alive but not awake.[25] The group returned to Edmonton. They made a number of stops on the way, but nothing turns on those for the appeal.

26. Mr. Desjarlais continued using drugs heavily when he returned to Edmonton, and he called in sick for work the next day. When he did return to work, he caused an accident and was told he would have to take a drug test. He confided in his boss that he would fail the drug test and told him that he had witnessed a murder near Jasper. Mr. Desjarlais was fired, and his boss phoned police. Police followed up with Mr. Desjarlais, who disclosed the murder in a series of statements over the following weeks.[26]

The forensic evidence

27. On April 23, 2019, Mr. Desjarlais brought police to the location of the body.[27] The body was found lying on the ground, off a quad path and about 20 meters into the trees. The deceased's hands were cuffed behind her back, and, as Mr. Desjarlais had described, she had an Alberta ID card (in the name of "Brook Lizotte") in her jacket pocket.

28. A considerable volume of surveillance videos, receipts, banking and telephone records were tendered as corroborative of Mr. Desjarlais's testimony. Those records established the following rough timeline for the events: the group had left Edmonton by 10 am and stopped in Edson around 1 pm; they stopped at the ATM in Hinton (their last stop prior to the killing) at 2 pm, and had returned to Hinton by 3:20 pm.

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[23] Transcript,. 132/20–39, 133/5–10. [A.R., vol. II, pp. 141–141]
[24] Transcript, 134/40–41 [A.R., vol II, p. 142]
[25] Transcript, 133/12–134/10 [A.R., vol II, pp. 141-142].
[26] Transcript, 161/37–162/9, 163/1–165/23 [A.R., vol. II, pp. 169–173].
[27] Transcript, 420–421. [A.R., vol. II, pp. 428–9]

29. The medical examiner identified the cause of death as fentanyl and methamphetamine toxicity. The autopsy identified multiple blunt force injuries, including abrasions and bruising to the head, face, and body, including bleeding under the cornea of the right eye and under the scalp over the left ear.[28] Some of these injuries were about 24 hours old at the time of death, while others were nearer to time of death. Compression markings around the wrists, consistent with having been in handcuffs, were also observed, as were needle marks. None of these injuries caused her death. There were no physical signs of hypothermia, but the possibility that exposure played a role in the death could not be ruled out.[29]

30. The chief toxicologist testified that fentanyl and norfentanyl (a fentanyl metabolite) were detected in the deceased's body in levels well above that seen in other cases where fentanyl was known to have caused death. Fentanyl was detected in her blood, in the vitreous fluid of the eye, and in gastric fluid (the stomach). The concentrations of fentanyl, including in the stomach, was more consistent with injection than other modes of consumption such as oral ingestion.[30] Methamphetamine was also detected in concentrations that could be fatal to some users, and the combination of methamphetamine and fentanyl would have increased the toxicity of each. That concentration of methamphetamine was not consistent with exposure solely by second hand smoke.

The reasons of the trial judge

31. The bulk of the trial judge's lengthy reasons are devoted to a review of Mr. Desjarlais's evidence and the application of the principles in *Vetrovec* and *Khela* to that evidence.[31]

32. There were some points in that evidence, noted above, which the trial judge did not accept and some unresolved inconsistencies: the details of when Ms. Duperron was put in handcuffs, and whether they were ever removed, exactly when he and the appellant switched off

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[28] Transcript, 451–9. [A.R., vol. II, pp. 459–67]
[29] Transcript, 460. [A.R., vol. II, p. 468]
[30] Fentanyl was detected in a stomach fluid sample, but the concentration was lower than if the drug had been swallowed. Where fentanyl is injected, some will be detected in stomach contents as the drug diffuses throughout the body: Trial Transcript, 462. [A.R., vol. II, p. 470]
[31] ***R v Vetrovec***, [1982] 1 SCR 811; ***R v Khela***, 2009 SCC 4, [2009] 1 SCR 104

driving between Darwell and Hinton, who loaded the shotgun, and who told Ms. Duperron to eat the fentanyl. In all other respects, the trial judge accepted Mr. Desjarlais's evidence with "no hesitation."[32]

33. The trial judge then began his legal analysis with constructive first degree murder under s 231(5)(e). He noted that a conviction pursuant to s 231(5) requires proof that death was "caused by" the accused, and cited the "substantial cause" test set out in *R v Harbottle* and *R v Nette*.[33] He next concluded that the cause of death was fentanyl and methamphetamine toxicity, and found that the appellant had not participated in injecting her with fentanyl. He also found he could not accept that the appellant had forced Ms. Duperron to eat fentanyl in the woods. He therefore concluded the appellant was not a significant contributing cause of death, and therefore could not be found guilty of constructive first degree murder.[34]

34. The trial judge then turned to planned and deliberate murder. He found that the evidence did not implicate the appellant as a principal in the killing—that was Eashappie.[35] He then reviewed the law on party liability. Turning to his analysis of these facts, the trial judge concluded that "A finding of planning and deliberation hinges to a large degree on the 'call'".[36] He concluded that, based on Mr. Desjarlais's evidence, there was not a plan. Mr. Desjarlais believed the plan was to kill Ms. Duperron, but Mr. Desjarlais did not know when or where that might happen. The trial judge concluded the appellant's statements about getting rid of Ms. Duperron might have been intended to scare her, and he concluded there was no evidence the rear seat occupants had heard the remarks.[37]

35. Ultimately, the trial judge concluded there was "really no plan and no discussion as to how, when or where Ms. Duperron would be killed." He found that was "obvious" from the discussion of dumping her body in Alberta Beach.[38] He did find that a "purpose" coalesced at the time the appellant directed Mr. Desjarlais to turn off the highway. Based on that change in

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[32] Trial Reasons, para 273 [Appellant's Record, vol I, p. 36].
[33] ***R v Harbottle***, [1993] 3 SCR 306; ***R v Nette***, 2001 SCC 78, [2001] 3 SCR 488.
[34] Trial Reasons, paras 305–313 [Appellant's Record, vol I, p. 43].
[35] Trial Reasons, para 315 [Appellant's Record, vol I, p. 44].
[36] Trial Reasons, para 342 [Appellant's Record, vol I, p. 50].
[37] Trial Reasons, paras 352–356 [Appellant's Record, vol I, p. 50-51].
[38] Trial Reasons, para 354 [Appellant's Record, vol I, p. 51].

purpose, the trial judge concluded the murder was "deliberate" but not planned and that the appellant had aided and abetted Mr. Eashappie in the commission of that murder.[39]

36. The trial judge pointed to, as the acts making out aiding, the fact that the appellant was "calling the shots" – he made the original call that Ms. Duperron knew too much, he directed Mr. Desjarlais to turn off into the bush where Ms. Duperron was to be killed, he aided Mr. Eashappie through his presence at the scene as an "intimidating force" and preventing Ms. Duperron from going anywhere. He came up with the plan to shoot Ms. Duperron and provided the shotgun and ammunition, and gave it to Mr. Eashappie who used it to assault her.[40] He concluded that, by acting "as the director of the events," the appellant had abetted the murder.[41]

The reasons of the Alberta Court of Appeal

37. The appellant appealed his conviction for second-degree murder, and the prosecution appealed the acquittal of first-degree murder. The Alberta Court of Appeal unanimously dismissed the conviction appeal and allowed the acquittal appeal.

38. The Court of Appeal found that the trial judge committed two distinct legal errors in acquitting the appellant of first-degree murder. First, the trial judge erred in law in concluding that the facts as found did not constitute constructive first-degree murder for the purpose of s 231(5). Second, the trial judge erred in law in concluding that the facts as found did not constitute planning for the purpose of s 231(2).

39. With respect to constructive first-degree murder, the trial judge erred in law in focusing his causation inquiry solely on the injection of fentanyl. Causation in homicide is not limited to the direct, medical cause of death, and the Court of Appeal found the trial judge erred in law in failing to consider whether, on the facts he found, the appellant's own conduct was a substantial

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[39] Trial Reasons, paras 357–359 [Appellant's Record, vol I, p. 51].
[40] Trial Reasons, para 365 [Appellant's Record, vol I, p. 52].
[41] Trial Reasons, para 366 [Appellant's Record, vol I, p. 52].

and integral cause of Ms. Duperron's death.[42] The trial judge found that the appellant actively participated in controlling Ms. Duperron's movements, preventing her resistance or escape:

> The injections would not have been possible had Ms. Duperron not already been subdued and confined. The truck, the motions of which were directed by Mr. Underwood, provided space and concealment. Mr. Eashappie acted after Mr. Underwood said Ms. Duperron knew too much and they had to get rid of her. It would be irrational to conclude Mr. Underwood was not a party to the fentanyl injections when the trial judge found he was a party to, and director of, all prior and subsequent events.
>
> Fentanyl was the direct medical cause of Ms. Duperron's death, but it was not the only contributing cause. The beatings before and after, the confinement, and the abandonment in the bush were all part of an ongoing transaction in which Mr. Underwood participated. He was "calling the shots". The result was a "clearly... deliberate killing". We have no difficulty concluding that, had the trial judge applied correct law to his findings of fact, he would have found Mr. Underwood's acts were a substantial and integral cause of Ms. Duperron's death.[43]

40. With respect to planning and deliberation, the Court of Appeal found that the trial judge applied an incorrect legal test for what constitutes a "planned" murder within the meaning of s 231(2) of the *Code*. The trial judge's analysis focused solely on whether a plan existed at the moment the appellant made "the call" that Ms. Duperron knew too much and had to be gotten rid of. The trial judge found the "call" was not reflective of a plan to kill because it did not reflect a specific method of killing – the "how, when or where" of the act.

41. The trial judge similarly erred in relying on the group's discussion of disposing of Ms. Duperron's body at Alberta Beach as the absence of plan, because it did not reflect a decision as to where she would be killed. The Court of Appeal concluded that this discussion of when and where to kill itself constituted planning, in law, not the absence of planning. The trial judge therefore erred in law in his treatment of his evidence.

42. Finally, the Court of Appeal found that the trial judge erred in law in acquitting of first-degree murder despite his conclusion that, once the group began driving North from Hinton, they were looking for a place to kill. The trial judge's finding that the decision to turn into the bush

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[42] ***R v Underwood***, 2024 ABCA 267 ("CA Reasons") at paras 43–47 [Appellant's Record, vol I, pp 64-65].
[43] CA Reasons, at paras 57–58 [Appellant's Record, vol I, p. 67].

was done for the "purpose" of killing Ms. Duperron there "inexorably show[s] planning."[44] But for these errors of law, the trial judge would have convicted the appellant of first-degree murder. The Court of Appeal therefore allowed the appeal, substituted the conviction that ought to have been entered at trial, and sentenced the appellant to life without parole for twenty-five years.[45]

43. The appellant's appeal against conviction was unanimously dismissed. No appeal from that decision is before this Court.

[44] CA Reasons, para 76 [Appellant's Record, vol I, p 70].
[45] CA Reasons, paras 81, 98 [Appellant's Record, vol I, pp 72, 75].

PART II – ISSUES

Question in Issue Did the Court of Appeal err in law in convicting Mr. Underwood of first degree murder by concluding that his actions satisfied the elements of sections 231(5)(e) and 231(2) of the Criminal Code?

Respondent's Position with regard to Question in Issue **No.**

PART III – ARGUMENT

The Crown's right of appeal against acquittal

44. Section 676(1)(a) of the *Criminal Code* permits acquittal appeals on questions of law alone, for which the standard of review is correctness.[46] While first degree murder is largely a sentencing provision, the prosecution may appeal an acquittal of first degree murder where the accused is convicted of the lesser offence of second-degree murder.[47]

45. Errors of law include: (a) questions or statements of law;[48] (b) misapplication of legal standards;[49] and (c) incorrect appreciation of the legal significance of fact because of an erroneous approach to, or treatment of evidence, particularly when coupled with misapprehension of a legal principle.[50] In *JMH*, this Court confirmed that the legal effect of findings of fact or undisputed facts, and an assessment of evidence based upon a wrong legal principle are grounds upon which the prosecution may appeal an acquittal.[51] As this Court stated in *R* v *JMH*, appellate intervention is warranted "where a reasonable doubt is tainted by a legal error."[52]

46. Respectfully, that was the case here, and the Court of Appeal was right to intervene and substitute a conviction for first-degree murder. The trial judge erred in law in his assessment of the evidence of planning and deliberation, and also in his consideration of the legal effect of his findings of fact as they related to that issue. The trial judge further erred in law by applying the wrong legal test for causation when he found that the appellant was not a significant contributing cause of Ms. Duperron's death because he did not personally inject her with fentanyl. Either ground standing alone would have been a sufficient basis on which to substitute a conviction for first-degree murder.

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[46] ***Housen* v *Nikolaisen***, 2002 SCC 33 at paras 8, 10-12; ***R* v *Kipnes*** (1970), 15 DLR (3d) 449, 1970 CanLII 841 (Alta SC, App Div).
[47] ***R v Magoon***, 2018 SCC 14, [2018] 1 SCR 309 at para 56.
[48] ***Housen***, *supra*, note 46 at paras. 8, 31, 36.
[49] ***Housen***, *supra*, note 46 at para 27; ***R* v *Shepherd***, 2009 SCC 35, para 20.
[50] ***R* v *B(G)***, [1990] 2 SCR 57 at paras 28-31.
[51] ***R v JMH***, 2011 SCC 45 at para 43.
[52] ***JMH***, *ibid*, at para 39.

Nature Duperron's killing was a planned and deliberate murder

47. Murder is first degree murder where it is planned and deliberate.[53] Planning and deliberation are distinct elements that must each be proven.[54] Parliament's intention in adding this element to the definition of first-degree murder was to exclude murders "committed on the spur of the moment."[55]

48. The classic definition of planning is as follows:

> I think that in the *Code* "planned" is to be assigned, I think, its natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed. But that does not mean, of course, to say that the plan need be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate.[56]

49. Deliberate means "considered, not impulsive."[57] It requires something more than the intention to kill or cause serious bodily harm required for all murder. The trial judge here was satisfied Ms. Duperron's death was a deliberate killing, but acquitted on the basis of his reasonable doubt as to whether it was planned.[58]

50. His conclusion was founded on a legal error as to what constitutes planning for the purposes of s 231(2). As the Court of Appeal found, the trial judge erred in:

a. Requiring proof of a plan to kill prior to leaving Edmonton, rather than prior to the actual killing;

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[53] ***Cr. Code***, s 231(2).
[54] ***R v Aalders***, [1993] 2 SCR 482 at 502–4.
[55] ***More v The Queen***, [1963] SCR 522 at 531 per Fauteux J, dissenting but not on this point.
[56] ***R v Nygaard***, [1989] 2 SCR 1074 at 1084, quoting from ***R v Widdifield***, (1961), Supreme Court of Ontario, Gale J., unreported, as excerpted in 6 Crim LQ 152 [not reproduced]; see also ***R v Jacquard***, [1997] 1 SCR 314 at para 26 (approving of a jury charge that defined "planned" as "something that is arranged beforehand on the basis of a 'design' or 'scheme'").
[57] ***More***, supra note 55 at 533–4, ***R v MMK***, 2006 ABCA 284 at para 9.
[58] Trial Reasons, para. 359 [Appellant's Record, vol I, p. 51].

b. Dismissing evidence of planning on the basis that it did not show a decision as to precisely how, when and where the victim would be killed; and

c. Failing to convict of first-degree murder despite his findings of fact that, once the appellant directed Mr. Desjarlais to turn off the Grande Cache highway, the appellant and his accomplices were acting in accordance with their shared plan to kill, having deliberated on that choice for several hours.

Section 231(2) requires proof of a plan to kill

51. A plan to kill need not exhaustively detail every step in the commission of the offence and its aftermath. As the classic *Widdifield* instruction suggests, the plan need not be complicated. What is essential is the plan to *kill* or cause serious bodily harm knowing death will likely result. As this Court noted in *Nygaard*, "the idea that one human being could cold bloodedly plan and deliberate upon the killing of another has been repugnant to all civilized societies" and is what warrants the imposition of the harsher sentence.[59]

52. The point is illustrated by *R v Droste*.[60] There, the accused had planned to kill his wife by setting fire to their car and driving into a bridge embankment. In fact, his wife survived the crash but their two children died in the fire. On appeal, it was argued that he could not be convicted of first-degree murder because he had not planned to kill the children. This Court rejected the argument and affirmed his convictions.

53. Planning and deliberation were held to be not inconsistent with liability for murder under s 229(b). That section provides that culpable homicide is murder where the accused intends to kill one person, but by mistake or accident causes the death of another. Dickson J (as he then was) found that liability under s 229(b) could be reconciled with the requirement of planning and deliberation in s 231(2): "… the element of planning and deliberation must be related to the specific *mens rea* of the applicable section."[61] Where a killing is murder by operation of s 229(b), the requirement of planning and deliberation "is a requirement that relates to the

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[59] ***Nygaard***, *supra* note 56, at 1087.
[60] ***R v Droste***, [1984] 1 SCR 208.
[61] *Ibid.* at 222.

intention *to take a human life*."[62] The higher sentence for first degree murder is justified by the heightened moral culpability of planning to kill another person, and is present whether or not that person or (by mistake) another is the ultimate victim.

54. Similarly, in *Nygaard*, this Court considered whether planning and deliberation are also possible where the *mens rea* for murder in s 229(a)(ii) applies – intention to cause serious bodily harm the accused knows is likely to cause death, and recklessness as to whether death ensues. Cory J., for the majority, found that there could be "no doubt" that a person can plan and deliberate upon causing serious bodily harm that he knows is likely to cause death.[63] Again, the requirement of planning related primarily to the *intention* to cause bodily harm likely to cause death, and not to the particular mechanism of death.

55. As the majority of the Alberta Court of Appeal held, in *R v Wallen*, precise adherence to the plan to kill is not essential for a conviction:

> It is the objective of the planning and deliberation, rather than the exact performance of details of the original plan that must be examined. It is, for example, untenable to find that if a person plans to kill another with a gun, but finds that the gun malfunctions and consequently strangles his victim, the killing is not planned and deliberate.[64]

56. This Court reversed *Wallen* on other grounds, but in the respondent's submission, this point remains valid. The Saskatchewan Court of Appeal reached a similar conclusion in *R v Petrin*. There, the offender was convicted of first-degree murder after having directed the murder of a suspected police informant. He arranged for two associates to kill the intended victim. In carrying out that plan, one of the associates shot through the window of a house, killing not the intended target but another resident of the home.

57. On appeal, Petrin argued that the associates, in killing the deceased, did not act precisely in accordance with the plan, and therefore he should not have been convicted of first-degree murder. The Saskatchewan Court of Appeal dismissed the appeal, finding that "the essential element of s 231(2) is the objective of the planning and deliberation" and relying on the Alberta

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[62] *Ibid.*, at 222–3 (emphasis added).
[63] ***Nygaard***, *supra* note 56, at 1088.
[64] ***R v Wallen***, 1988 ABCA 52 at para 7 (*per* Lieberman JA), rev'd on other grounds [1990] 1 SCR 827.

Court of Appeal's comments in *Wallen*. There was ample evidence that Petrin had formed a plan to kill the deceased, and the killing that actually took place was in accordance with the "overall plan," even if the shooter had deviated from its particulars in the exigencies of the moment.[65]

58. The essence of offence of first-degree murder, under s 231(2), is the killing of another person pursuant to a fixed, purposeful, and settled intention. It excludes killings which, though intentional, are committed on sudden impulse. Contrary to the appellant's suggestion, the decision of the Court of Appeal in this case does not render every intentional killing a planned and deliberate murder. The appellant and his accomplices held the deceased in their custody for *hours* while they considered what to do with her and her body. After this prolonged deliberation, the appellant himself made the decision to end their journey and directed Mr. Desjarlais to turn off the highway so that they could kill her without being discovered. They made various attempts at killing her there, stopping only when it became obvious to them that she was dying.

59. On the trial judge's findings of fact, the appellant's direction of and participation in the killing was anything but impulsive; this was a cold-blooded and deliberate murder, and the Alberta Court of Appeal rightly entered the verdict that should have been rendered at trial.

The trial judge erred in law in his assessment of the evidence of planning

60. Under the heading of "Planned and Deliberate Murder," the trial judge focused exclusively on the meaning of "the call," considered in isolation, and specifically whether the rear seat passengers heard it. He framed the issue of planning and deliberation as "hing[ing] to a large degree on 'the call.'"[66]

61. The trial judge then made the following findings of fact:

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[65] ***R v Petrin***, 2018 SKCA 100 at paras 81–89, leave to appeal refused [2019] 3 SCR ix.
[66] Reasons for Decision, para 342 [Appellant's Record, vol I, p. 50].

a. The appellant had said words to the effect that Ms. Duperron "knew too much" and "we need to get rid of her." It was possible this meant kill her, but might have been intended to scare her so she would lead them to her anticipated cache of money or drugs.[67]

b. There was no evidence of a "clear plan" or discussion as to how, when or where she would be killed. The discussion of dumping her body in the lake showed a plan to kill her had not crystallized by the time the group passed Alberta Beach.

c. The appellant directed Mr. Desjarlais to turn off the highway north of Hinton intending to kill Ms. Duperron there, and everything done from that point was in fact aimed at killing her.[68]

62. Despite these findings, the trial judge found the killing was not planned. But this conclusion was tainted by legal error. First, he misapprehended the requirements of "planned" within the meaning of s 231(2). Second, he failed to consider all the evidence relevant to planning, stopping his analysis after "the call".

63. As noted above, the essential element of "planning" is simply a plan to kill. The plan may be more or less detailed; the precise mechanism is of secondary significance. Where an individual plans to kill another human being, deliberates on that choice for long enough "to eliminate sudden decisions produced by impulse, passion or emotion," and then acts on that plan, their moral culpability warrants the imposition of the harshest sentence available.[69]

64. The trial judge concluded that the discussion about dumping the body at Alberta Beach showed the absence of a plan, because it showed no decision had been made as to how, when or where Ms. Duperron would be killed. But the fact the group were working out these details did

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[67] Para 352 [Appellant's Record, vol I, p. 50]. The trial judge expressed some doubt whether the backseat occupants heard the appellant say this (Reasons for Decision, at para 345) [Appellant's Record, vol I, p. 50]; that was obviously irrelevant to the statement's value as evidence of the *appellant's* state of mind.

[68] Para 358 [Appellant's Record, vol I, p. 51].

[69] ***R v Haevischer***, 2014 BCSC 1863 at para 646.

not negate the existence of a plan to kill her. Indeed, the fact that the group discussed what to do with the body plainly implied that there would *be* a body to dispose of. As the Court of Appeal noted, this discussion itself constituted planning, and the trial judge erred in concluding otherwise.[70]

The trial judge's findings of fact make out first degree murder

65. The choice of a secluded location, the comments made at that scene by Ms. Bajusz and Mr. Eashappie about "returning Nature to nature," the direction to Mr. Desjarlais to inject her with more fentanyl, the decision to force feed her pills, Mr. Eashappie's two attempts to shoot her in the head, and the generally coordinated nature of their actions in the woods are all consistent only with a plan to kill. The trial judge made all these factual findings but failed to consider them in relation to s 231(2), having concluded there was no settled plan to kill prior to leaving Edmonton. However, as the Court of Appeal noted, these findings themselves establish a planned and deliberate killing.

66. In concluding the section of his reasons devoted to planning and deliberation, the trial judge noted that the group's unsettled intentions eventually became certain:

> That changed when Mr. Underwood directed the turn onto Highway 40. Mr. Desjarlais testified that after 10 to 20 minutes of driving on that Highway, he appeared to get angry and then directed Mr. Desjarlais to turn into the clearing and up the quad road. I am satisfied that was a turning point. *Aimlessness turned into purpose.*
>
> *At that point, at least Mr. Underwood had made a decision to end the journey. It is obvious that from that point, everything done was aimed at killing Ms. Duperron in a remote location.*[71]

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[70] CA Reasons, at para 71 ("It is indeed obvious there was discussion about dumping Ms. Duperron in a lake, and that option was rejected. That was evidence of planning and deliberation, not evidence of its absence. At the time, there had been no decision as to how, when or where the killing would occur, but the method was being discussed. Planning was underway.") [Appellant's Record, vol I, p. 69].

[71] Trial Reasons, paras 357–358 (emphasis added) [Appellant's Record, vol I, p. 51].

67. The events summarized here as "everything done" and "aimed at killing" the deceased included:

a. Directing Mr. Desjarlais to inject her with fentanyl.

b. Forcing her to eat fentanyl in pill form.

c. The appellant retrieved the firearm he had brought, someone in the group loaded it, and Mr. Eashappie attempted to shoot Ms. Duperron in the head. When that failed, the appellant took the gun and released the safety before handing it back to Mr. Eashappie to try again.

d. The group stood around waiting until Ms. Duperron began to nod off, and abandoned her in a remote location where no help would come.

68. The appellant suggests that the trial judge found this ultimate decision to have been impulsive, and incapable of supporting a finding of planned and deliberate murder. But this is contradicted by the trial judge's conclusion that this was "clearly a deliberate killing," albeit not one planned with the meaning of s 231(2).[72] The trial judge was well aware of the evidence of intoxication, yet he drew a specific distinction between the group's earlier "aimlessness" and their later purposeful actions aimed at causing Ms. Duperron's death. The evidence here made clear that the appellant and his accomplices were capable of, and were in fact, acting in accordance with fixed goals.

69. The trial judge's assessment of the appellant's actions in relation to his decision to convict of *second-degree* murder makes this plain. Having found the killing to be deliberate, but not planned within the meaning of s 231(2), he described the appellant's involvement as follows:

> It is very clear from the evidence that Mr. Underwood was calling the shots. He had made the original call. He then made the final call to turn off into the bush where Ms. Duperron was to be killed.
>
> […]

[72] *Ibid.*, para 359 [Appellant's Record, vol I, p. 51].

> Mr. Underwood avoided doing any of the dirty work himself. He got Mr. Eashappie to do that for him. But he clearly aided Mr. Eashappie by being at least being beside him when Ms. Duperron was fed the fentanyl. He was not an idle bystander but was an intimidating force assisting Mr. Eashappie and preventing Ms. Duperron from going anywhere if she could. He then came up with the plan to shoot Ms. Duperron and provided his gun and ammunition. As I said, it doesn't matter who loaded it. The gun didn't work so he tried to fix it and handed it back to Mr. Eashappie. It was ultimately used to assault Ms. Duperron. She was knocked down with it and never got up. *Satisfied that the purpose had been accomplished, they walked away.*[73]

70. None of this suggests an impulsive intention to kill in the heat of the moment. While the trial judge referring to these actions only as proof of the appellant's intent to facilitate the commission of a murder, on a proper application of the law, these findings establish that the killing was not only deliberate but also planned. The appellant "called the shots," and made both the original "call" as well as the "final call" to turn off into the bush to complete the killing. Once there, he "came up with the plan to shoot" her, and stood by preventing her escape until his "purpose had been accomplished."

71. Planning and deliberation must precede the act of killing, but a plan may be formulated and deliberated upon in a fairly short amount of time.[74] The act of killing was not complete until the group left, certain that she would not survive. Even assuming there was no plan to kill until the decision to turn off the highway north of Hinton, the findings of fact show both planning and deliberation in that interval and before she was further assaulted, poisoned, and abandoned in the woods to die.

72. The appellant's floodgates argument should be rejected. The appellant appears to suggest that if he is convicted of first-degree murder, then virtually any murder would be first-degree. But on the facts as found by the trial judge, the appellant and his accomplices had Nature Duperron in their control for hours while they deliberated on what to do with her. They drove hundreds of kilometres, making multiple stops, before their plan to kill her crystallized. As the trial judge found, however, that plan did crystallize before she was killed. Periods of

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[73] Trial Reasons, paras 362 and 365 (emphasis added) [Appellant's Record, vol I, p. 52].

[74] ***R v Ruptash***, 1982 ABCA 165 at para 5; ***Aalders***, *supra* note 54, at 503 (approving a jury instruction that defined planning and deliberation as the "carefully thought out design that precedes the carrying out of an unlawful act").

"deliberation time" far shorter than that seen here have been held to suffice.[75] The Alberta Court of Appeal correctly substituted a conviction on this basis, and the appeal should be dismissed.

The appellant's actions were an essential and integral cause of death

73. The trial judge also erred in law in his conclusion that the appellant had not caused Nature Duperron's death in the course of her kidnapping and unlawful confinement.

74. Murder is first degree murder where the accused causes the victim's death while committing the offence of kidnapping or unlawful confinement.[76] To obtain a conviction for first degree murder by this route, the prosecution must prove that:

> (1) the accused was guilty of the underlying crime of domination or of attempting to commit that crime;
>
> (2) the accused was guilty of the murder of the victim;
>
> (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim;
>
> (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and
>
> (5) the crimes of domination and murder were part of the same transaction; that is to say, the death was caused while committing the offence of domination as part of the same series of events.[77]

75. The trial judge here found the appellant guilty of kidnapping.[78] He found him guilty of murder.[79] There was no question that the kidnapping and murder were part of the same transaction: Nature Duperron was injected repeatedly with the fentanyl that caused her death during the kidnapping, her movements remained controlled by the group (including by the appellant) after she exited the truck in the woods, where she was assaulted and force-fed pills. At some point, her hands were cuffed behind her back. The appellant and his accomplices

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[75] ***R v Plewes***, 2000 BCCA 278 at paras. 35–38; ***R v Fraser***, 2016 BCCA 89; ***R v Henderson***, 2012 MBCA 93, and ***R v Kahsai***, 2022 ABCA 12 at paras 147–155, leave to appeal on this issue refused SCC No. 40044 (September 1, 2022).
[76] ***Cr. Code***, s 231(5)(e).
[77] ***Harbottle***, *supra* note 33 at 325; ***R v Sundman***, 2022 SCC 31.
[78] Reasons for Decision, paras 290-4 [Appellant's Record, vol I, p. 39-40].
[79] Reasons for Decision, paras 359–367 [Appellant's Record, vol I, p. 51-52].

maintained control over her movements until she was obviously unable to rouse herself, at which point they left her to die.

76. At issue here is whether the trial judge erred in his analysis of the third element of the *Harbottle* test—that the appellant's actions formed "an essential, substantial and integral part of the killing of the victim."[80] The trial judge found they were not, but he erred in considering only the medical cause of death and ignoring the appellant's active participation in Ms. Duperron's murder.

The trial judge erred in law in his causation analysis

77. In his causation analysis, the trial judge focused exclusively on who injected Ms. Duperron with the drugs that, according to the medical evidence, caused her death. In assessing causation, he referred to the evidence of the medical examiner and toxicologist, noting that the medical cause of death was fentanyl and methamphetamine toxicity, and that the appellant was not directly responsible for administering either drug.[81] He stated that the medical evidence did not establish the other physical injuries nor Ms. Duperron's abandonment in the bush to be contributing factors in the death.[82] On that basis, the trial judge concluded that the appellant's actions were not a substantial contributing cause of death. As the Court of Appeal found, however, the trial judge erred in law in his assessment of this evidence.

78. There are two steps in the causation inquiry for first degree murder under s 231(5). The first—applicable to all forms of homicide—is the *Smithers* standard: the "beyond *de minimis*" or "significant contributing cause" test.[83] This test requires consideration of two principles: factual causation and legal causation.

79. Factual causation can be understood as the "but-for" cause of death, whereas legal causation is directed at whether the accused should be held criminally responsible for the consequences that occurred.[84] An accused's unlawful actions need not be the only cause of death

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[80] ***Harbottle***, *supra* note 77 at 324
[81] Reasons for Decision, paras 306–310 [Appellant's Record, vol I, p. 43].
[82] *Ibid*., para 311 [Appellant's Record, vol I, p. 43].
[83] ***R v Smithers***, [1978] 1 SCR 506; ***Nette***, *supra* note 33, at paras 44–45; ***R v Maybin***, 2012 SCC 24, [2012] 2 SCR 30 at paras 13–17.
[84] ***Maybin***, at paras 13-14.

or even the direct cause of death.[85] An unlawful act may be a legal cause of a person's death even if that act, by itself, would not have caused that person's death.[86] Legal causation is a "narrowing concept" which restricts legal liability, from the wide range of factual causes, to those which are "sufficiently connected to a harm to warrant legal responsibility."[87]

80. This Court has made clear that it is an error of law to stop with an assessment of medical cause of death and not consider whether the deceased would have died "but for" the actions of the accused.[88] Respectfully, the trial judge fell into that error here. In his analysis of cause of death, he accepted only the administration of fentanyl (either alone or in combination with methamphetamine) to have been a factual cause of death, based on the medical evidence. On that basis, the trial judge found the appellant had not caused her death in the *Smithers* sense, and he ended his s 231(5) analysis there.[89]

81. In doing so, the trial judge overlooked a number of facts that made out factual causation:

a. The appellant threatened Mr. Desjarlais to ensure his cooperation as driver (and the continued use of his vehicle);

b. The appellant himself drove for some part of the trip and paid for gas, thus continuing the kidnapping that enabled Mr. Eashappie and Ms. Bajusz to inject Ms. Duperron with fentanyl;

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[85] ***Maybin***, *supra* note 83 at para 1.
[86] ***Maybin***, *supra* note 83 at para 14, citing ***Smithers***, *supra*, note 83.
[87] ***Maybin***, *supra* note 83 at para 16.
[88] ***Maybin***, *supra* note 83 at para 21. ("For these reasons, I agree with the Court of Appeal that the trial judge erred in the factual causation inquiry in this case. He stopped with his assessment of the medical cause of death and did not consider the contribution of the appellants to that result by asking whether the deceased would have died "but for" the actions of the appellants.").
[89] Reasons for Decision, paras 306–313 [Appellant's Record, vol I, p. 43].

c. The appellant directed Mr. Desjarlais where to drive, ultimately selecting the secluded area to bring the deceased, where they could kill her without fear of discovery;

d. His presence at the scene in the woods prevented her resistance or escape.

82. But for any of these actions, Ms. Duperron would not have died. Further, the chain of causation was not broken by any intervening act—Mr. Eashappie's actions were at least reasonably foreseeable.

83. Had the trial judge found the appellant's actions to be a significant contributing cause of death, he would have gone on to consider the higher threshold applicable under s 231(5). That section provides that murder is first degree murder only where death is "caused by" the accused. This requires satisfaction of the "substantial cause" test articulated in *R v Harbottle*.[90]

84. In *Nette*, this Court clarified that the *Harbottle* substantial cause test does not require proof that the accused "caused more the death of the victim," but that "his participation in the killing be sufficiently immediate, direct and substantial to warrant the greater stigma and sentence attached to first degree murder."[91]

85. The substantial contributing cause test will usually, but not always, require some physical contribution to the death.[92] In *Harbottle*, this Court affirmed a conviction for first degree murder where the accused held the victim's legs, preventing her resistance, while the perpetrator strangled her. Cory J. gave two other hypothetical examples of liability under this section: an accused who, with intent to kill, locks the victim in a cupboard while the accomplice sets fire to it, or an accused who fights off rescuers in order to allow the accomplice to complete strangling the victim.[93] As the Court of Appeal held here, the appellant's actions in controlling the

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[90] ***Harbottle***, *supra* note 33.
[91] ***Nette***, *supra* note 33, at para 62 (emphasis original).
[92] ***Harbottle***, *supra* note 77 at 324-5.
[93] *Ibid*.

deceased's movements and preventing her escape amounted to "metaphorically holding the victim's legs."[94]

86. Many courts have found that active participation in controlling the deceased's movements, preventing their escape or resistance during the killing, can satisfy the requirements of s 231(5):

a. In *R v Norouzali*, the Ontario Court of Appeal upheld a conviction for first degree murder where, following a robbery, the victim was taken by two men to a remote location, in deep brush and inside a fenced area, where he was shot. There was no direct evidence of which of the two was the shooter, but the Court found that, assuming the appellant to have been the non-shooter, his participation in forcibly escorting the victim to his execution site, and preventing his escape, rendered him guilty of first degree murder.[95] Similarly, here, the appellant coerced Mr. Desjarlais to drive the deceased west towards Hinton, took shifts driving the truck himself, chose where she would be killed, and directed the others in her confinement and beating.

b. In *R v Al Ghazzi*, the Ontario Court of Appeal affirmed a committal for trial on a charge of first degree murder. There, the accused was a taxi driver who drove the principal and the deceased around while the principal administered a fatal beating. There was evidence that the driver, in the course of driving, became aware of a plan to kill the deceased. Continuing to drive, thus preventing the victim's escape during the fatal assault, was evidence capable of making him an integral cause of death.[96] As in that case, similarly here, the appellant having formed a common intention with Ms. Bajusz and Mr. Eashappie to kill Ms. Duperron,[97] drove the truck in which she was being beaten and injected with drugs, chose where she

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[94] CA Reasons, at para 47 [Appellant's Record, vol I, p. 65].
[95] ***R v Norouzali*** (2003), 177 CCC (3d) 383, 2003 CanLII 10348 (Ont CA).
[96] ***R v Al Ghazzi***, 2006 CanLII 34260 (Ont CA).
[97] Trial Reasons, at para 363 [Appellant's Record, vol I, p. 52].

would be abandoned in the woods to die, and abetted her confinement and beating until assured she was dying.

c. In *R v Aravena*, two men stood guard over a group of victims as each was led outside, one by one, to be shot and killed. Their domination of the victims prevented them from escaping or fighting back. The Court of Appeal upheld the decision to leave this route to liability with the jury, finding the appellants' actions constituted active participation in the killing.[98] The trial judge here, likewise, found that the appellant's presence at the scene prevented the deceased's resistance or escape.[99]

d. In *R v Sundman*, the accused was a party to a kidnapping who shot the deceased, non-fatally, during an attempted escape. Those shots incapacitated the deceased, preventing his escape while another man shot and killed him at close range. They sufficed to make the accused a substantial cause of death, though on their own would not have killed him.[100]

87. The appellant's suggestion that his actions were less significant than that seen in these cases ignores the trial judge's factual findings. The trial judge found the appellant to be the directing mind of the group. He not only threatened Mr. Desjarlais to ensure the continued use of his truck to transport her, but also paid for gas and took shifts driving. He chose the remote location for the killing, where Ms. Duperron could be killed with no prospect of escape or aid.[101] He prevented her resistance or escape at that scene. He produced the firearm with which she was assaulted.

88. The conclusion that the external injuries would not in themselves have caused death, or that there were no clinical signs of hypothermia, does not negate the appellant's active participation in the murder. The appellant's actions ensured the deceased would be undiscovered

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[98] ***R v Aravena***, 2015 ONCA 250, at paras 116–119.
[99] Trial Reasons, at para 365 [Appellant's Record, vol I, p. 52].
[100] ***Sundman***, *supra*, note 77 at para 41.
[101] The appellant suggests that "anyone could have" given these directions, but the point is that the appellant *did*.

while she overdosed. His participation in the killing rendered him an integral and essential contributing cause of death, and warranted the increased penalty and additional stigma of first degree murder.

89. Because the trial judge improperly narrowed his causation analysis to the medical cause of death, he failed to consider how the appellant's actions constituted that higher degree of participation sufficient to establish liability for first degree murder. The Alberta Court of Appeal properly found, on applying the relevant principles to the trial judge's findings of fact, that the appellant was guilty of constructive first degree murder.

The Alberta Court of Appeal properly substituted a conviction for first degree murder

90. An appellate court has jurisdiction to allow the appeal, vacate the acquittal, and substitute the conviction that should have been entered at trial.[102] In order to substitute a conviction, "all the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue".[103]

91. But for the trial judge's errors of law, he would have convicted the appellant of first degree murder. Liability for first degree murder flows from the trial judge's findings of fact on at least three legal pathways:

a. As **joint principal** to a planned and deliberate murder – Joint/co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission.[104] The trial judge found that the appellant, together with Mr. Eashappie and Ms. Bajusz, formed an intention in common to kill Nature Duperron.[105] That plan had crystallized, at the latest, by the time the appellant directed Mr. Desjarlais to turn off the Grande Cache highway. The appellant contributed to the commission of the offence as set out above.

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[102] ***Cr. Code***, s. 686(4)(b)(ii).
[103] ***R v Cassidy***, [1989] 2 SCR 345 at 354-55; ***R v AE***, 2022 SCC 4 at para 2.
[104] ***R v Strathdee***, 2021 SCC 40 at para 4.
[105] Trial Reasons, para 363 [Appellant's Record, vol I, p. 52].

b. As an **aider and abettor** to a planned and deliberate murder – If not a co-principal to the killing, the appellant knew of Mr. Eashappie's intention to kill and committed a number of acts with the intention to assisting him. For the reasons set out above, that killing was planned and deliberate, and the appellant had the requisite knowledge to aid a planned and deliberate murder.

c. As a party to a murder committed in the course of an **unlawful confinement** – Nature Duperron was murdered in the course of a kidnapping and unlawful confinement. That offence continued until she was abandoned in the woods to die. The appellant chose the secluded location where she was left to die, produced a weapon used to assault her, prevented her escape or resistance, and was therefore an integral and essential cause of her death.

92. Any of these were sufficient to convict the appellant of first degree murder. The *Cassidy* test is met in this case, and the Court of Appeal was entitled to substitute the verdict that ought to have been rendered at trial: a conviction for first degree murder. This appeal should be dismissed.

PART IV – COSTS

93. The respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

94. The respondent asks that the appeal be dismissed.

95. In the court below, the respondent sought a new trial for first-degree murder only if the appellant's appeal against his conviction for second-degree murder had been allowed; that appeal was dismissed and is not before this Court. Thus, if this Court finds that the Alberta Court of Appeal erred in substituting a conviction for first-degree murder, the conviction for second-degree murder, and the sentence imposed at trial, should simply be restored.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

96. A publication ban, pursuant to s 486.31(1) of the *Criminal Code*, was made at trial, prohibiting publication of the identity of an undercover police officer.[106] The officer testified at trial under a pseudonym and nothing in the appeal record or factums would tend to reveal that officer's identity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 10th day of January, 2025.

MATTHEW W. GRIENER
COUNSEL FOR THE RESPONDENT

MWG/ml

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[106] Transcript, p. 585 [Appellant's Record, vol III, p. 106]

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

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