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JUDICIAL CENTRE	CALGARY
PLAINTIFF/RESPONDENT	COMPEER FINANCIAL PCA
DEFENDANTS/APPLICANTS	SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA ENTERPRISES INC., RAY PRICE , DEBBIE UFFELMAN, CRAIG THOMPSON, DAVID PRICE, ARTHUR PRICE and GLEN PRICE
DOCUMENT	**BRIEF OF THE APPLICANTS, SUNTERRA FARMS LTD. ET AL**
PARTY FILING THIS DOCUMENT	APPLICANT
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BOOK OF AUTHORITIES OF THE APPLICANT, SUNTERRA FARMS LTD ET AL, REGARDING OBJECTIONS MADE DURING ORAL SUBMISSIONS ON DECEMBER 4, 2025

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[FROM THE COURT OF APPEAL, ENGLAND]

BROWNE *v.* DUNN

1893, *November* 28

Defamation – Privilege – Solicitor and Client – Retainer – Malice – Practice – Evidence – Cross-examination of Witness – Point not raised at Trial argued on Appeal.

If a solicitor reasonably believes that his services may be required by a possible client who does afterwards retain him, all communications passing between the solicitor and the client, leading up to the retainer and relevant to it, and having that, and nothing else, in view are privileged.

If the retainer is a genuine proceeding, the fact that the solicitor is not well disposed to the person said to be defamed is not evidence of malice.

Per Lord Bowen: Whether, when a professional relation is created between a solicitor and a client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. *Quare.*

If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it be otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story or (*per* Lord Morris) the story is of an incredible and romancing character.

If one party at a trial deliberately elects to fight one question on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence.

Martin v Great Northern Railway[1] approved.

APPEAL from the judgment of the Court of Appeal ordering that a verdict for the plaintiff be set aside and that judgment be entered for the defendant.

The action was brought by the appellant against the respondent, who is a solicitor, for a libel contained in the following document, which the respondent had drawn up by his clerk and had

[1] 16 C.B. 179; 24 L.J.C.P 209; 3 W.R. 477.

exhibited to the persons who signed it, for the purpose of obtaining their authority to take proceedings against he plaintiff:–

> "TO MR. CECIL W. DUNN,
>
> "The Vale, Hampstead.
>
> "We, the undersigned residents in the Vale of Health, Hampstead, N.W., hereby authorize and request yon to appear before the magistrates sitting at the Hampstead Police Court on Wednesday, the 5th day of August, 1891, and apply, on our behalf, respectively, in whatever way may seem proper and best, against James Loxham Browne, of Woodbine Cottage, The Vale, Hampstead, for a summons and order *that the said James Loxham Browne, for the reason that he has continuously for many months past, both by acts and words, seriously annoyed us, and each of us, and other residents in the Vale aforesaid, whereby he has endeavoured to provoke a breach or breaches of the public peace or whereby a breach or breaches of the public peace has been in danger of being committed.* That the said James Loxham Browne be bound over for such time as the said magistrates shall think fit, to keep the peace, or for such other order as the said magistrates shall deem proper to make."

The document was dated 4 August, 1891, and was signed by the following persons: Samuel Hoch, S. Jones, E. Cooke, George McComhie, Thomas Henderson, William Schröder, Benjn. Paine, R. Henderson, H. King.

At the time this document was made the defendant and plaintiff were not on friendly terms, and the defendant knew that two summonses were to be heard the next morning before the local magistrates, one taken out by the plaintiff against Paine, one of the above signatories, for assault, the second taken out also by the plaintiff against Mrs. Hoch, the wife of another signatory, for abusive language. On the morning appointed for the hearing of these summonses, and before the hearing, the defendant mentioned his application to the magistrates, but, at their request, postponed it until the summonses had been heard, and, on the hearing of a cross-summons by Paine, the plaintiff was bound over to keep the peace.

The plaintiff subsequently discovered the document and brought, or threatened, actions of libel against all the parties to it.

At the hearing of the action against the defendant, which was tried before Mathew, J., it appeared that S. Jones and E. Cooke were a mother and daughter living together, and that Mrs. Jones, the mother, had died before the trial. Mrs. Cooke gave evidence for the plaintiff. All the rest of the signatories, except H. King, who was not called, gave evidence for the defendant.

At the trial, in the language of Lord HERSCHELL, the case made on behalf of the plaintiff appears unquestioningly to have been this, that the whole thing was a sham, that Mr. Dunn did not draw up this document having information that people had this ground of complaint, and would desire to retain him as solicitor; but that it was a gratuitous affair, and merely carried out, without any honest or legitimate object, for the purpose of annoyance and injury to Mr. Browne.

The rest of the signatories who were called gave evidence which showed that they really had employed the defendant. McComhie and Hoch, whose evidence is set out in Lord HALSBURY'S judgment, were not cross-examined as to the merits of the various quarrels they had had with the plaintiff. The only evidence as to King was that he had signed the document.

The jury found a verdict for the plaintiff, and assessed the damages at 20*l*.

The defendant appealed. The Court of Appeal set aside the verdict and entered judgment for the defendant. From this judgment the plaintiff now appealed.

Willis, Q.C. and *Blake Odgers, Q.C.* (*Lincoln Reed* with them) for the plaintiff, in support of the appeal, urged that the document was really a sham, that it was not couched in ordinary language, and contained much that was unnecessary, and on this point they particularly complained of the words printed in italics in this report.

That the document was not privileged, because the fact that each person to whom it was shown signed it eventually was immaterial. Even supposing that all the persons signing knew what the document was, and desired thereby to retain the defendant to apply on their behalf for a summons against the plaintiff, that was not a circumstance rendering the publication privileged, as the relation of solicitor and client must exist at the moment of publication between the publisher and the person to whom the publication is made.

The unnecessary words were inserted maliciously.

Murphy, Q.C., and *Hugh Fraser*, for the respondents, were not called upon.

LORD HERSCHELL, L.C.: [after reading the document, stated the facts from which it arose, and said that it was hopeless for the appellant to contend, with regard, to the six signatories who had given evidence for the defendant, that the document was not perfectly genuine, drawn up in a perfectly legitimate way, and really intended by the parties to be what it appeared on the face of it to be. On this subject his Lordship added:]

These witnesses all of them depose to having suffered from such annoyances; they further depose to having consulted the defendant on the subject, and to having given him instructions which resulted in their signing this document; and when they were called there was no suggestion made to them in cross-examination that that was not the case. Their evidence was taken; to some of them it was said, "I have no questions to ask;" in the case of others their cross-examination was on a point quite beside the evidence to which I have just called attention.

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

It seems to me, therefore, that it must certainly be taken that these witnesses, whether they were exaggerating somewhat Mr. Browne's acts towards them or not (that is immaterial), were telling the truth when they said, "We did bring before Mr. Dunn the fact that we had these causes of complaint;" – that at all events was the impression which they produced on his mind; – "we did consult him about them, we did want him to act for us, and we did sign this document because we wanted him to act for us."

Now, my Lords, as regards all these persons, except the three whom I will deal with presently, the case is all one way. Having regard to the conduct of the case, it was not open to the learned counsel to ask the jury to disbelieve all their stories, and to come to the conclusion that nothing of the kind had passed. If that is so, there is an end of the case so far as it rests upon the whole of this transaction being a sham, and we start with this, that, as regards all these persons except three, it was a genuine transaction, because their solicitor was really asked to act by people who really felt themselves aggrieved.

Now my Lords, how is it possible to dispute that a communication of that sort was privileged. It seems to me, further, that there is no evidence of malice, because malice means making use of the occasion for some indirect purpose, that the transaction was not genuine, and was not really directed to that to which it appeared to be directed.

Now it has been ingeniously argued that, as regards these persons, this document was shown to them before they signed it, and therefore before they retained Mr. Dunn; that at that time he was not acting as their solicitor, and that therefore, although it was shown to them with a view to his acting, and although it resulted in their retaining him to act, yet there was a publication before any such relation existed between them. My Lords, of course that would not be true as regards the first signatory, and I refer to that because, as I threw out in the course of the argument, I am by no means prepared to adopt the view that was suggested and was said to extend even to the case of a shorthand writer, that a person to whom another communication by word of mouth defamatory matter, and who wrote it down and merely handed it back to the person who made the communication, would by so doing publish the defamatory matter. I am not prepared, as at present advised, to lay down such a proposition.

But then it is said, as regards all except the first signatory (and no doubt with more plausibility in their case), that the document was shown signed already by certain people and that when so shown at that moment there was publication, and at that moment there could be no privilege. Now, my Lords, I will assume that showing it under those circumstances was sufficient publication; but I cannot for a moment accede to the argument that the occasion was not a privileged one. I do not think that it was a point taken at the trial, because, as I say, the only point taken at the trial, as far as I can see, was that the whole thing was a sham; but it seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest. Therefore, my Lords, as regards this transaction the occasion appears to me to have been very clearly privileged, and I can see no evidence of malice. If the occasion was privileged in the sense to which I have alluded, and if the transaction was a genuine one, and what passed between people who were really desirous of retaining a solicitor, and that solicitor was retained, it seems to me that the fact that that solicitor was not particularly friendly in his disposition towards the person against whom proceedings were to be taken does not take away the privilege or make the action a malicious action on his part in the eye of the law.

Then it was said that the language of the document may be so extravagant and so much in excess of the necessities of the occasion that that of itself is evidence of malice. My Lords, I should not for a moment dispute that proposition; but in the present case I do not see anything in this document which was not strictly relevant to the purpose and object of the document. It may be that there were some unnecessary words in it, that a shorter form might have sufficed to serve the purpose; but the fact that the document is more full in its terms than is necessary would not in itself be any indication of malice, unless you come to the conclusion that the words are put in such a way, or have such an effect, as to point to the conclusion that they were not put in for a legitimate purpose, but were put in with the object of defaming the plaintiff. I can see no evidence of that kind here.

Now, my Lords, I for my own part conceive that when once that conclusion is arrived at there is an end of the case; because I do not think that any separate case was made at the trial as regards showing the document to Mrs. Cook, Mrs. Jones or Mr. King. Nevertheless, that point having been made here, I will deal with it and will sat a few words upon it. As regards Mr. King, I will dismiss it at once; I see nothing in the point as regards Mr. King. All that we know with respect to Mr. King is that on the morning of the trial, or rather of the proposed application to the magistrates, Mr. King signed this document at Court. There is no suggestion that his reason for signing it was not that he was anxious to retain Mr. Dunn. There is no evidence that he had never previously made any complaints or that he had not been a person who to Mr Dunn's knowledge would be likely to sign such a document, because he had represented himself as an aggrieved person. Having no evidence of that, we must take the document and the signature; and I cannot see the slightest ground for supposing that Mr. King's position is in the least different from that of the other signatories.

As regards Mrs. Cook and Mrs. Jones, we have certain facts proved by Mrs. Cook. Mrs. Cook's case, as stated in her evidence, is that she did not know what was in this document at all, that she never read it, that something was said to her about Mr. Browne, but that as to the terms of the document and as to her assenting to them she did not assent to them because she did not read them. As regards Mrs. Cook's case, I confess that the dilemma seems to be complete. If she read this document and signed it, she has not even herself said that she did not mean what she signed. Her only case is that she did not read it. If she signed it, she must be taken to have understood it, and to have meant what she said. If she did not read it, then there was no publication. Therefore it seems to me that, as regards her case, there is this absolute dilemma: either it was not published to her, or if it was published to her, she is in exactly the same position as the other signatories, and she is not a person who can be regarded as a stranger to the entire transaction, because she herself admits that she had brought it home to Mr. Dunn's mind, not that she had been annoyed – she will not use that word – but that she had been at least worried, because she had informed the neighbours that Mr. Browne had been in the habit of haunting her house, and she thought that it might prejudice her if her lodgers came to know of it. Therefore it is natural, as it seems to me, and in no way improper, that Mr. Dunn having had that communication from her, and finding that other people thought that the nuisance had grown too intolerable to be submitted to, he should go to see Mrs. Cook to ascertain whether she also would desire to put the matter into his hands, and to have the same steps taken. In that view of the case, as regards Mrs. Cook, it seems to me that there is either no publication, or that her case is the same as that of the other signatories with whom I have already dealt. And so as regards Mrs. Jones. We do not know the circumstances under which Mrs. Jones signed. She was the mother of Mrs. Cook, and living in the same house she would be certain to go and talk to her daughter about it; and, if she was confined to the house, she was at least as likely as any other inmate of the house to be annoyed. Under those circumstances she signs this document, and I say that she must be taken to have intended Mr. Dunn to act for her. What passed in relation to her signing the document was strictly confined to matter relevant to the question of her employing him, as others had employed him, to act for her on account of Mr. Browne's proceedings.

Therefore, my Lords, I cannot see anything here to entitle the plaintiff to rest his case upon the transactions with Mr. King, Mrs. Cook, and Mrs. Jones, unless it be a fact which would eat away the whole foundation for his case by showing that there was no publication.

Under the circumstances, I submit to your Lordships that the judgment appealed from ought to be affirmed and the appeal dismissed.

Lord HALSBURY: My Lords, I am entirely of the same opinion. [His Lordship then referred to a misdirection by the learned Judge at the trial, which does not call for report, and continued:]

My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions, I think it raises a question as to the conduct of the trial itself, and the position in which people are placed, when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined, they come afterwards and strive to raise totally different questions, because, upon the evidence, it might have been open to the parties to raise those other questions.

My Lords, it is one of the most familiar principles in the conduct of causes at Nisi Prius, that if you take one thing as the question to be determined by the jury, and apply yourself to that one thing, no Court would afterwards permit you to raise any other question. It would be intolerable, and it would lead to incessant litigation, if the rule were otherwise. I think *Dr. Blake Odgers* has, with great candour, produced the authority of *Martin v. Great Northern Railway*[2], which lays down what appears to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another questions, and have fought it, and have been beaten upon it.

My Lords, so far as regards the conduct of the trial, it appears to me that nothing could be stronger than what the learned Judge himself said at the very commencement of his remarks in the presence of learned counsel, who, if it was not accurate, were bound then and there to intervene and say so. The learned Judge says at the commencement of his summing up, after he had introduced the facts to the jury: "We have to deal with the law in this matter, and the case is fairly put by *Mr. Willis* in the only way in which he could out it. He cannot ask you to treat this as a libel, unless you are satisfied that the whole thing was a sham got up by the defendant for the mere purpose of disparaging the character of the plaintiff." My Lords, after that statement by the learned Judge, which is at the commencement of his summing up, the learned counsel, not intervening at all, but allowing the learned Judge to leave that as the one question to the jury, it appears to me that it is absolutely hopeless, in any other Court, afterwards to attempt to raise any other question than that which the learned counsel deliberately elected to allow the learned Judge at all events to leave to the jury as the only one which was to be put to them.

My Lords, with regards to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not

[2](1855) 16 CB 179; 139 ER 724.

one question has been directed either to their credit or to the accuracy of the facts they have deposed to. In this case I must say it would be an outrageous thing if I were asked to disbelieve what Mr. Hoch says, and what Mr. McCombie says, after the conduct of the learned counsel when they were examined at the trial. Mr. George McCombie is called and asked: "(Q.) Did you give him any instructions? – (A.) I said, could nothing be done to prevent Mr. Browne annoying us as he was every night? (Q.) Did you receive advice from him as to what could be done ? – (A.) Yes. (Q.) Will you look at this document? Is that your signature? – (A.) (Looking at the document.) Yes, sir. (Q.) Was that document brought to you by Mr. Dunn? – (A.) I went round to his house. (Q.) There you saw the document. Did you read it? – (A.) I did. (Q.) And signed it? – (A.) Yes, I signed it. (*Mr. Willis*.) I have nothing to ask you." My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

My Lords, the same course was pursued with regard to Hoch. He says: "Ever since the year 1888 he has constantly annoyed and insulted me, but only when there were no witnesses by – when I have been walking quietly out. He has sneered, grunted, sputtered, and occasionally burst into a brutal guffaw. That has been going on until the time when he was bound over to keep the peace, when it ceased. But since that time he has tried to resume these performances, only for a whole years and more I have persistently avoided meeting him, and so I have not given him any opportunity of insulting me. (Q.) Did you give instructions to Mr. Dunn to act for you. – (A.) On that account. (Q.) That was before the month of August, 1891? – (A.) I forget the date. (*Mr. Willis*) I have nothing to ask you, sir." Therefore, here are two witnesses, who may be taken as examples of others, as to both of whom it cannot be denied that, if their evidence is true, they went to Mr. Dunn and gave him instructions, and that the retainer was drawn up for the purpose of embodying the authority to Mr. Dunn to act. Under those circumstances what question of fact remains? What is there now for the jury after that? If *Mr. Willis* admits before the jury – as I say, by the absence of cross-examination, he does admit – that these statements are true, what is there for the jury? It is impossible, as it seems to me, therefore, to dispute for a moment that, in the manner in which this cause was conducted, that absolutely concluded the question. [His Lordship then expressed concurrence with the Lord Chancellor's view as to the signatories who had not been called.]

Now, with all the materials before us, what has been suggested as otherwise than proved by these facts? As I have already said, the conduct of the cause seems to me to amount practically to an admission that there was, I will not call it a retainer, but an employment, of Mr. Dunn; I will not use any technical phrase, because I think *Mr. Willis*, rightly enough, abandoned any argument derived from any particular force in the word "retainer," and used the word "employment." I think there was an employment, because those witnesses, if they speak truly, did employ Mr. Dunn to do the thing he did, and he did nothing but what he was employed to do, and if so, then, as *Mr. Willis* very candidly admitted yesterday, if he was really employed, there was an end of the case. That was the question on which the whole case turned at the trial, and if your Lordships be sending it to be tried again with the direction to the Judge that he must not, upon this evidence (for that is the test which we must apply, not upon any new evidence, but upon this evidence), leave the question of malice to the jury. I am of the opinion that, if he did that, he would do wrong. That there was actual employment was admitted at the trial, because the learned counsel for the plaintiff refused to cross-examine the witnesses, who proved that which, if proved and correctly stated, did amount to employment.

Therefore, my Lords, I entirely concur in the motion that this appeal be dismissed.

Lord MORRIS: My Lords, I entirely concur with the judgment of the Lord Chancellor and of my noble and learned friend opposite. There are only one or two points upon which I should like to offer a few observations.

In the first place, it appears to me that the learned Judge put the real question to the jury as to whether this alleged employment of Mr. Dunn was a real and *bona fide* employment, or an unreal and sham employment in order to enable him maliciously to libel the plaintiff. That appears to me to have been the point which was put by the learned Judge, and it appears to me to have been the point upon which the whole trial went, and upon which the trial properly went, because, when one publication is proved that goes to the root of the entire controversy: the question was, was the employment a real one? If so, Mr. Dunn was privileged. If it was an unreal one, he had no privilege – the whole thing was a sham and he was acting maliciously.

My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down and hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of the opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that these witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.

Lord BOWEN: [His Lordship agreed that the case made at the trial seemed to have been that there had been no genuine employment of the defendant, and that the document was a sham concocted for the purposes of malice; that the verdict, if supported, could only be supported on that ground: but that, on the evidence of six of the signatories, taken in conjunction with the evidence of Mrs. Cooke, it was impossible to deny that there had been a real and genuine employment of the defendant; and that on the issue so presented to the jury judgment must be entered for the defendant. His Lordship added:] And I think, as the Lord Chancellor and my noble and learned friends who have preceded me have said, that it would be *pessimi exempli*, and contrary to all one's experience at Nisi Prius, and contrary to the best interests of justice, if a plaintiff, who had obtained a verdict from a jury upon one issue which he had presented to them, were allowed to sustain it by fishing out various causes of action, which he had not presented to the jury, and upon which their verdict was not asked for, and upon which damages unquestionably were not given. [His Lordship added that, although this was enough to end the case, he would consider the reasons which it was urged might sustain a verdict, though not the one given by the jury. He expressed concurrence with the Lord Chancellor as to the signatories who had not given evidence for the defendant, and continued:] I myself have no doubt at all, in the absence of authority, that if a solicitor has reason to believe that his services may be required by a possible client who does afterwards retain him, what passes between the solicitor and the client on the subject of the retainer, and relevant to the retainer, is covered by professional privilege.

Then it is said that there is some evidence of malice which would oust that privilege, if the privilege exists. With reference to that I have only two observations to make. The first is, that I entirely concur with what the noble and learned Lords who have preceded me have said. I can find no scintilla of evidence which would justify a jury in finding malice so as to oust that privilege.

My Lords, there is another and more serious point, a point of law, which I desire to keep open so far as my opinion is concerned. I very much doubt whether, when a professional relation is created between a solicitor and client, and communications pass between the solicitor and the client with reference to the prosecution of him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, pro-

-vided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. I very much doubt whether malice destroys that kind of privilege unless it is shown that what passed was not germane to the occasion. But it is not necessary to decide that point, for it does not arise here. I only desire to keep it open in case it should arise in some other case.

Ordered, that the judgment appealed from be affirmed and the appeal dismissed with costs.

Solicitors: *White & De Buriatte*, for the Appellant.
Newson & Dunn, for the Respondent

Court of King's Bench of Alberta

Citation: R v Cormier, 2023 ABKB 543

Date: 20230928
Docket: 220093991S1
Registry: Calgary

Between:

His Majesty the King

Crown/Respondent

\- and –

Brian Cormier

Accused/Appellant

Reasons for Judgment
of the
Honourable Justice M.A. Marion

Appeal from the Conviction by
The Honourable Judge M.T.C. Tyndale
Convicted on the 11th day of December, 2022
(Docket 220093991P1)

I. Introduction

[1] Brian Cormier appeals his summary conviction for assault under section 266 of the *Criminal Code*, RSC 1985, c C-46. He asserts two main grounds of appeal, namely:

(a) misdirection or mistakes in the application of the rule in ***Browne v Dunn*** (1893), CanLII 65 (FOREP), 6 R 67 (UKHL); and

(b) misapprehension of evidence, leading to concerns about uneven scrutiny in the assessment of witness evidence and a reasonable apprehension of bias.

[2] For the reasons set out below, the appeal is dismissed.

II. Background

[3] The amended January 27, 2022 Information alleged that Mr. Cormier, on or about the 13th day of January 2022, at or near Rocky View County, Alberta, did unlawfully assault Ms. Kenesha LeFaivre contrary to section 266 of the *Criminal Code*.

[4] The one-day trial proceeded on August 5, 2022, before the Honourable Judge Tyndale (**Trial Judge**). The Crown called two witnesses: Ms. LeFaivre and Anthony Boucher, an RCMP officer. Mr. Cormier testified in his own defence. The Trial Judge reserved his decision. The parties provided written submissions in September (Mr. Cormier's submissions), October (Crown's submissions) and November (Mr. Cormier's reply submissions). No final oral submissions were made. On December 11, 2022, the Trial Judge delivered oral reasons and convicted Mr. Cormier of assault.

[5] Sentencing was adjourned to May 3, 2023, and included a 6-month Conditional Sentence Order (which will be completed on November 3, 2023 if this appeal is not allowed) along with 6 months of probation. Mr. Cormier only appeals his conviction.

III. Standard of Review

A. Rule in *Browne v Dunn*

[6] The question of the definition of the rule in ***Browne v Dunn***, and whether it is engaged, is a question of law reviewable on a standard of correctness: ***R v RJM***, 2023 MBCA 28 at para 23; ***R v Abdulle***, 2016 ABCA 5 at para 10 .

[7] However, as stated by the Alberta Court of Appeal in ***R v Sawatsky***, 2017 ABCA 179, at para 21 (and as reconfirmed in ***R v SCDY***, 2020 ABCA 134 at para 80 (footnote 82)):

> The "rule in *Browne v Dunn*" is not absolute. The trial judge is best suited to determine whether a party has failed to comply with the rule and whether the failure to cross-examine a witness on a certain point was unfair to the other side. The trial judge's decision about whether the rule was violated, and whether any unfairness resulted, is entitled to considerable deference: *R v Quansah*, 2015 ONCA 237 at para 90, 125 OR (3d) 81. The extent of the rule's application "is within the discretion of the trial judge after taking into account all the circumstances of the case": *R v Lyttle*, 2004 SCC 5 at para 65, [2004] 1 SCR 193. When the rule has been breached, the remedy lies within the discretion of the trial judge: *R v Werkman*, 2007 ABCA 130 at para 9, 404 AR 378.

[8] The trial judge must be allowed to decide what is an appropriate remedy for breach of the rule, and deference is owed to the trial judge's exercise of discretion in doing so unless error in principle is shown: ***SCDY*** at para 69; ***R v Lyttle***, 2004 SCC 5 at para 65, [2004] 1 SCR 193; ***R v Dexter***, 2013 ONCA 744 at para 22. However, the question of whether a trial judge's approach led to trial unfairness is reviewed on correctness standard: ***RJM*** at para 22; ***Abdulle*** at para 10; ***R v Schmaltz***, 2015 ABCA 4 at para 13.

B. Misapprehension of Evidence

[9] The standard of review for a misapprehension of evidence giving rise to a miscarriage of justice is high. The misapprehension must be "readily obvious" from the plain language of the reasons, go to substance rather than detail, be material rather than peripheral, and must play an essential part in the reasoning process leading to conviction: ***R v SEB***, 2023 ABCA 162 at para 20; ***R v Bowers***, 2022 ABCA 149 at para 28; ***R v CLY***, 2008 SCC 2 at para 19; ***R v Lohrer***, 2004 SCC 80 at paras 1-2; ***R v RSF***, 2019 ABCA 224 at para 13.

C. Findings of Fact

[10] The standard of review for findings of fact is palpable and overriding error. An appellate court may not overturn a trial verdict based on a "lingering or lurking doubt based on its own review of the evidence": ***R v Wray***, 2022 ABCA 1 at para 10; ***Housen v Nikolaisen***, 2002 SCC 33 at para 10, [2002] SCR 25; ***R v AKB***, 2022 ABCA 170 at para 7, citing ***R v Biniaris***, 2000 SCC 15 at paras 24, 37 and 38, [2000] 1 SCR 381.

D. Credibility Findings

[11] Credibility findings are owed great deference and should only be interfered with if they are clearly wrong, unsupported by the evidence, otherwise unreasonable, or display palpable and overriding error: ***R v Sylvester***, 2021 ABCA 312 at para 50; ***R v SMC***, 2020 ABCA 19 at paras 18-19; ***R v Fuhr***, 2018 ABCA 15 at para 30. The ascribed error must be plainly identifiable and must have affected the result: ***Fuhr*** at para 31; ***R v Clark***, 2005 SCC 2 at para 9. An appeal court is not entitled to interfere with credibility assessments unless they cannot be supported on any reasonable view of the evidence: ***R v Ibrahim***, 2023 ABCA 94 at para 14; ***Bowers*** at para 27; ***R v Strathdee***, 2020 ABCA 306 at para 8.

[12] If the credibility assessment is based on a wrong legal principle or derived from the misapprehension of a legal principle, such an error of law is reviewable on the standard of correctness: ***Bowers*** at para 27; ***R v Paulos***, 2018 ABCA 433 at para 16; ***R v Wanihadie***, 2019 ABCA 402 at para 23; ***Fuhr*** at para 30.

E. "Uneven Scrutiny"

[13] Engaging in "uneven scrutiny", by applying a stricter standard of scrutiny to the evidence of the accused than a Crown witness, is an error of law that undermines the fairness of a trial and can give rise to a miscarriage of justice: ***R v Coreman***, 2021 ABCA 107 at para 20; ***Strathdee*** at para 6; ***Wanihadie*** at para 22; ***R v Quartey***, 2018 ABCA 12 at para 42, aff'd 2018 SCC 659.

F. Reasonable Apprehension of Bias

[14] The standard of review where apprehension of bias is alleged is whether a fully informed observer, considering the context of the entire proceedings, would reasonably conclude the judge was not impartial: ***Karri v University of Calgary***, 2022 ABCA 338 at para 12; ***R v Wilson***, 2019 ABCA 502 at para 9. The standard of review for the appearance of a fair trial is whether the accused might reasonably consider that the accused had not had a fair trial or whether a reasonably minded

person who had been present throughout trial would consider that the accused had not had a fair trial: ***Wilson*** at para 9, ***R v Switzer***, 2014 ABCA 129 at para 5.

IV. Issues

[15] The issues on this appeal are:

(a) did the Trial Judge err by misdirecting himself or misapplying the rule in ***Browne v Dunn***?

(b) did the Trial Judge err by misapprehending the evidence, leading to the uneven scrutiny of evidence or a reasonable apprehension of bias?

V. Analysis

A. Did the Trial Judge Err in Respect of the Rule in *Browne v Dunn*?

1. The Parties' Positions

[16] Mr. Cormier's ***Browne v Dunn*** argument has several components. First, he asserts that the Trial Judge erred by relying on the rule in ***Browne v Dunn*** when the Crown did not object at trial to Mr. Cormier's evidence allegedly given in breach of the rule, but rather waited until written submissions some months later. Second, he asserts the Trial Judge relied on ***Browne v Dunn*** violations that were not raised by the Crown or were not matters of substance. Third, he asserts that the Trial Judge erred by failing to recall Ms. LeFaivre to address the ***Browne v Dunn*** concerns.

[17] The Crown argues that it was open to the Trial Judge to find that Mr. Cormier breached the rule in ***Browne v Dunn***, and to consider Mr. Cormier's failure to confront Ms. LeFaivre on material aspects of his defence in assessing Mr. Cormier's credibility. The Crown submits that Mr. Cormier did not apply to recall the witness, it was not an error for the Trial Judge to fail to do that on his own initiative, and in any event would not have been appropriate in this case or would not have changed the credibility findings because they were otherwise well-founded.

2. Legal Framework

[18] The rule in ***Browne v Dunn*** requires counsel to give notice to witnesses when the cross-examiner intends to challenge a part of the witness' evidence and to give the witness an opportunity to answer the challenge: ***SCDY*** at para 70; ***R v Neilson***, 2019 ABCA 403 at para 41; ***Lyttle*** at para 64. It is not some "ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to the evidentiary abyss": ***Neilson***, citing ***R v Quansah***, 2015 ONCA 237 at para 39. The evidence in question must relate to matters of substance, not every "scrap" of evidence or points of "little significance": ***R v Cupid***, 2021 ABCA 386 at para 16; ***Sawatsky*** at para 25; ***Quansah*** at para 81; ***RJM*** at para 53.

[19] Where the rule has been breached by the defence, the Crown is obligated to make a timely objection, and has been criticized for not doing so: ***RJM*** at para 27; ***Quansah*** at paras 124, 130-131; ***Sawatsky*** at para 28.

[20] The failure of the Crown to object at the time the accused is testifying may, in some cases, compromise trial fairness, but the timing of raising the rule is one of several factors the trial judge may consider in exercising the court's discretion in determining an appropriate remedy for a breach of the rule: ***Quansah*** at paras 117-124, 131; ***Dexter***, at paras 20-21; ***SCDY*** at para 134; ***R v Werkman***, 2007 ABCA 130 at para 9; ***Lyttle*** at para 65; ***RJM*** at paras 28-29; ***R v Dowd***, 2020 MBCA 23 at para 27.

[21] If a trial judge finds there has been a breach of the rule in ***Browne v Dunn***, there are various permissive options available in the exercise of the court's broad discretion, including (1) taking into account the breach in assessing a witness' credibility (or providing an appropriate instruction to the jury about the jury's ability to do so); (2) placing less weight on the impeachment evidence of a witness called by the party that breached the rule (or providing an appropriate instruction to the jury about the jury's ability to do so); (3) putting more weight on the evidence of the party who was not properly confronted; (4) re-calling the witness who was not properly confronted; (5) granting leave to call the witness in reply; or (6) directing counsel not to challenge the credibility of a witness on a point not covered in cross-examination: ***SCDY*** at paras 68-69; ***Werkman*** at para 9; ***Dexter*** at para 40; ***Quansah*** at paras 117-124, 126-128; ***RJM*** at para 29. The court might also choose not to provide any remedy: ***R v Cadotte*** (unreported, Action No 190403964S1, Transcript of Proceedings dated April 1, 2021).

[22] However, if the court has concerns about a potential breach of the rule, it is generally required, in the interests of trial fairness, to raise the issue with the parties before rendering its decision: ***Cupid*** at para 16; ***RJM*** at para 28; ***Abdulle*** at paras 14-19. It is up to the appeal court to decide whether a judge's failure to do so creates a substantial wrong or miscarriage of justice: ***Abdulle*** at paras 17-19; ***R v Ahmad***, 2021 ABQB 518 at para 52.

3. Did the Trial Judge Err in Concluding that Mr. Cormier Breached the Rule in *Browne v Dunn*?

[23] The Trial Judge noted 21 specific aspects of Mr. Cormier's evidence that he found had not been brought to Ms. LeFaivre's attention during cross-examination. The Trial Judge then said:

> In his written reply to Crown's submissions, Mr. Moldofsky cites the *Quansah* case and submits that only matters of substance need to be put to the witness rather than "every scrap of evidence". In my opinion, the matters itemized above are indeed matters of consequence rather than scraps. One only has to consider the decimated state of the defence case if the above items were not in evidence.
>
> Essentially, Mr. Moldofsky neglected to ask [Ms. LeFaivre] about the entire core of his client's defence evidence. [...]

[24] In written argument, Mr. Cormier argues that the 21 instances cited by the Trial Judge were "largely peripheral", and then in oral argument only acknowledged that two of the instances were material or possibly material: that Mr. Cormier rolled back over and tried to go back to sleep after he laughed at her and made a specific remark "Bitch, you have no idea" (in response to his evidence that she had raised up with a clenched fist above him appearing to punch him), and that Ms. LeFaivre kept poking and jabbing at Mr. Cormier asking to be driven home. The Crown argues

that all 21 instances, when reviewed collectively, are material and the Trial Judge committed no error in finding that Mr. Cormier had breached the rule in ***Browne v Dunn***.

[25] The assessment of what is of substance and gives rise to an obligation to put contrary evidence to the witness will depend on the circumstances of each case. In my view, each side's precise narrative of "what happened" is critical for assessing credibility in a case involving one event that takes place over a short time-frame, where there is no photographic or video evidence, no other eyewitnesses of the event, and limited (if any) physical evidence. The fact that some of the narrative involves smaller details does not necessarily mean those details are mere "scraps" of evidence or immaterial.

[26] Further, the 21 instances cited by the Trial Judge cannot be viewed in isolation. They were the Trial Judge's way of particularizing his main finding: that the "core" or substance of Mr. Cormier's evidence, that was contrary to her testimony, was not put to Ms. LeFaivre. I agree that the matters the Trial Judge noted involved core elements of Mr. Cormier's evidence, including:

(a) how Mr. Cormier woke up at 4 a.m.;

(b) the conversation they had after he woke up;

(c) when and how Ms. LeFaivre asked to be driven to Airdrie, what she paid him $40 for, and why she asked for the $40 back;

(d) why Mr. Cormier did not drive her to Airdrie and Ms. LeFaivre's reaction to Mr. Cormier's refusal to drive her to Airdrie;

(e) Ms. LeFaivre's looking like she was going to punch Mr. Cormier while near him on the bed, and his reaction to it, including specifically laughing at her and saying "Bitch, you have no idea" and rolling over to go back to sleep, and then whether she continued to poke him to drive him to Airdrie;

(f) the circumstances involving when and how Ms. LeFaivre hit Mr. Cormier with a heater (the fact she hit him with a heater was agreed) and Mr. Cormier's location and position at the time;

(g) the circumstances surrounding how and why Ms. LeFaivre left the house;

(h) the circumstances surrounding when, where, how and why Mr. Cormier pinned Ms. LeFaivre (which he admitted doing).

[27] The nature of Mr. Cormier's evidence provided a completely different narrative of what happened between the parties at and after 4 a.m. on January 13, 2022, was core to his defence and was material. I do not take the Trial Judge as suggesting that the exact wording of every instance he cited had to be put to Ms. LeFaivre in precisely the manner he cited. He found that core elements of Mr. Cormier's evidence were not put to Ms. LeFaivre, and I agree. It was unfair to Ms. LeFaivre not to squarely address Mr. Cormier's evidence with her so she could respond to it.

[28] I find that the Trial Judge committed no error in concluding that Mr. Cormier had breached the rule in ***Browne v Dunn***.

4. Did the Trial Judge Err in Exercising his Discretion in the Face of the Breach of the Rule in *Browne v Dunn*?

[29] The Crown concedes that it did not object or raise the rule in ***Browne v Dunn*** at the time Mr. Cormier was testifying. The Crown clearly failed in its duty to raise the issue promptly. That is a serious matter, and as noted earlier is an important consideration in fashioning an appropriate remedy for the accused's failure to observe ***Browne v Dunn***.

[30] The Trial Judge's decision of what to do in the face of the breach, and in the face of the Crown's dilatory raising of it, was discretionary and is owed deference. Rather than recalling the witness, the Trial Judge decided to include the reality of the breach as one factor in assessing Mr. Cormier's credibility and evidence.

[31] Mr. Cormier has not shown any error in principle in the Trial Judge's exercise of discretion. This is not a case, like ***RJM***, ***Abdulle*** or ***Dowd***, where the trial judge decided credibility based on a breach of the rule in ***Browne v Dunn*** without giving the offending party the right to address it. The Trial Judge ordered a sequence of written argument. The Crown squarely raised the substance of the breaches of the rule in ***Browne v Dunn***, which the Trial Judge later relied on, in its argument, and Mr. Cormier provide his response in his written reply submissions. The Crown did not request to recall Ms. LeFaivre or re-open its case. Mr. Cormier argued in his reply that it was open to the Trial Judge to recall Ms. LeFaivre, but he did not apply for him to do so. Further, Mr. Cormier did not request further argument, or oral argument, on the point. The breach of the rule in ***Browne v Dunn*** was one of several factors the Trial Judge considered in assessing Mr. Cormier's credibility and evidence.

[32] Mr. Cormier relies on the unreported appeal decision of Justice Labrenz in ***Cadotte***. In ***Cadotte***, the trial judge found that where there was a breach of the rule in ***Browne v Dunn***, it was the court's job to decide whether to give the testimony of the accused less weight or no weight. The trial judge did not explore with counsel whether the Crown wished to recall the witness. Justice Labrenz held that the trial judge made an error of law in determining that the trial judge only had two options in the face of the breach, and in failing to recognize that another option was not to provide any remedy. He also held that the trial judge failed in the exercise of its discretion by not considering the option of recalling the witness. In my view, ***Cadotte*** is distinguishable. The Trial Judge's options in this case were provided to him by counsel, and the Trial Judge was aware of those options as he expressly relied on ***Quansah***. Further, while the Trial Judge did not expressly articulate that he considered recalling the witness, given that it was expressly raised with him as an option, it is implicit in his reasons that he considered and decided not to recall Ms. LeFaivre at that stage. I do not think the Trial Judge's reasons can be interpreted to suggest that the Trial Judge erred because he felt he was legally required to provide a remedy, or a particular remedy, or to use the breach of the rule in assessing Mr. Cormier's evidence or his credibility.

[33] I find that, in the circumstances, the Trial Judge did not err in the exercise of his discretion. He was in the best position to decide what to do in the face of the breach of the rule, and the Crown's failure to make a timely objection. His decision is owed deference.

[34] I have also considered whether the Trial Judge's approach created trial unfairness, and find that it did not – unlike other cases where an accused is ambushed by a trial judge relying on the rule in ***Browne v Dunn*** without addressing it with the parties, in this case the Trial Judge did not need to proactively raise it on his own motion because the issue was already squarely on the table: the Crown had expressly relied on it with a general assertion that Mr. Cormier's version of events was not put to Ms. LeFaivre, citing several particulars, and then Mr. Cormier had a meaningful opportunity to address the court on what to do about the alleged breaches of the rule. There was no trial unfairness, substantial wrong, or miscarriage of justice.

B. Did the Trial Judge Err by Misapprehending the Evidence, Leading to Uneven Scrutiny or a Reasonable Apprehension of Bias?

1. Parties' Positions

[35] Mr. Cormier relies on several findings or conduct of the Trial Judge which he asserts collectively give rise to concerns over uneven scrutiny of evidence and a reasonable apprehension of bias. In particular, Mr. Cormier points to the Trial Judge's:

(a) comments about Mr. Cormier's counsel using leading questions or misquoting evidence;

(b) findings relating to whether the night in question was "very cold";

(c) findings relating to whether a heater was thrown, or not, plugged in or not;

(d) findings relating to whether Ms. LeFaivre was on top of Mr. Cormier on their bed;

(e) findings relating to whether Ms. LeFaivre gave Mr. Cormier $40 to drive her to Airdrie; and

(f) raising his voice with Mr. Cormier's counsel at trial.

[36] I address these arguments below.

2. Did the Trial Judge Err in his Comments About Leading Questions and Misquoting Evidence?

[37] Mr. Cormier argues that the Trial Judge's finding that Mr. Cormier's counsel used leading questions and misquoted evidence supports his argument that the Trial Judge misapprehended the evidence at the trial.

[38] The Trial Judge made these comments in his reasons:

> Another problem arose concerning the assessment of Mr. Cormier's evidence. On several occasions Mr. Moldofsky, his lawyer, asked Mr. Cormier leading questions in examination in chief. That continued despite warnings from the court that answers given in response to leading questions would be given little weight.

> Further, in addition to asking a number of leading questions by his own witness…Mr. Moldofsky repeatedly misstated the evidence when asking them.
>
> [...]
>
> The Crown properly objected that Mr. Cormier had made no mention of anything of that nature in his testimony. As a result of Mr. Moldofsky's persistence in leading his own witness, I have no choice but to afford little weight to those parts of Mr. Cormier's evidence thereby elicited.

[39] I have reviewed the transcript of the trial. In the instances where the Trial Judge commented on Mr. Cormier's counsel asking leading questions, I agree they were leading questions and, at times, counsel misstated or incorrectly summarized the evidence. There were also other instances where leading questions were asked and not objected to by the Crown or commented on by the Trial Judge.

[40] It is trite law that leading questions may receive less weight: ***R v AMR***, 2019 ABCA 421 at para 24; ***Siemens v Howard***, 2018 BCCA 197 at para 27. The Trial Judge did not err in giving leading questions little weight.

[41] I have considered the Trial Judge's comment that he had "no choice" but to afford little weight to the parts of Mr. Cormier's evidence elicited by leading questions. Had the Trial Judge been referring to a belief that he was, at law, *required* to give little weight to questions elicited by leading questions, that would have been a legal error because it is up to the Trial Judge to weigh the evidence and a leading question is not a legal bar to the Trial Judge giving the answer weight.

[42] However, when the Trial Judge's comment is reviewed in context, and in particular with his other comments during the trial when leading questions or misquoted evidence were discussed, and in his reasons when he discussed the principles of assessment of credibility, it is clear that he did not feel legally bound to give the answers little weight. Rather, his comment about having "no choice" was made in his overall assessment of the evidence, and in light of counsel's questioning in the face of the court's admonition not to lead the witness or misstate the evidence in his questions. He was not stating or suggesting that he was legally bound to give those answers little weight, but that upon the assessment of all the evidence he was giving them little weight. He did not err in doing so.

[43] This aspect of Mr. Cormier's appeal is rejected.

3. Did the Trial Judge Err in Respect of His Finding that the Night Was "Very Cold"

[44] Mr. Cormier impugns the Trial Judge's finding that the night was very cold. Both parties testified that it was cold. In direct examination, Mr. Cormier testified that it was "really, really cold" and confirmed his testimony was that it was "very cold". The Trial Judge did not find that it was minus 30 as asserted by Mr. Cormier in his argument. There is no palpable and overriding error.

4. Did the Trial Judge Err in respect of his Findings about the Heater?

[45] Mr. Cormier impugns the Trial Judge's "apparent" finding that the heater was not plugged in. In fact, the Trial Judge described Mr. Cormier's evidence about the heater being plugged in as problematic, because if it was plugged in when Ms. LeFaivre threw it, the heater could not reach Mr. Cormier's head, yet he testified that Ms. LeFaivre threw it at him. Trial judges are entitled to use their common sense in assessing evidence. The fact the Trial Judge, when addressing this evidence in his reasons, did not specifically mention Mr. Cormier's evidence that the heater may have been plugged in and come unplugged in the process of it being thrown does not establish an overriding and palpable error.

5. Did the Trial Judge Err in respect of his Findings About Whether Ms. LeFaivre was on Top of Mr. Cormier?

[46] Mr. Cormier did not articulate in his argument any particular error on this issue, but rather used it to highlight that the Trial Judge raised his voice (a matter discussed below). The Trial Judge made no overriding and palpable error in not accepting Mr. Cormier's evidence that Ms. LeFaivre was near him looking like she was going to punch him.

6. Did the Trial Judge Err in respect of his Findings about the $40?

[47] Mr. Cormier argues that the Trial Judge misapprehended Mr. Cormier's evidence about whether the $40 he alleged Ms. LeFaivre gave him was to drive him to Airdrie that night. I have reviewed the transcript and I find that Mr. Cormier has not shown a readily obvious misapprehension of evidence, or one that would give rise to a miscarriage of justice. The Trial Judge's comments were supported by Mr. Cormier's testimony.

7. Did the Trial Judge Err by Raising His Voice at Trial?

[48] During the trial, on one occasion, Mr. Cormier's counsel requested that the court refrain from raising its voice. The Trial Judge acknowledged that he had probably expressed frustration due to the number of times the Trial Judge had to caution counsel. This does not create a misapprehension of the evidence. I address this point further under Mr. Cormier's argument that there was a reasonable apprehension of bias.

8. Did the Trial Judge Err by Giving the Evidence Uneven Scrutiny?

[49] In addition to the above points, Mr. Cormier also takes issue with the Trial Judge's comments about Mr. Cormier's evidence as to whether he was upset about being hit by a heater (Mr. Cormier initially denied being angry but later acknowledged he was upset). Mr. Cormier then contrasts this with the Trial Judge's comments about Ms. LeFaivre's evidence and her credibility. Neither of these comments show a misapprehension of evidence or error in the assessment of credibility.

[50] Effectively, Mr. Cormier bundles all his arguments together and suggests they are indicative of the Trial Judge falling into the error of giving the witnesses' evidence "uneven scrutiny".

[51] Allegations that trial judges engage in uneven scrutiny of the accused's evidence compared to the Crown's witnesses are common in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's credibility assessments: ***Bowers*** at para 30. The argument asserts that the trial judge applied a different standard of scrutiny in assessing the credibility of witnesses, and is, therefore, a difficult argument to make given that credibility findings attract a high degree of deference: ***Bowers*** at paras 30 and 33-34. Courts are often skeptical that raising uneven scrutiny is a thinly-veneered invitation to reassess credibility: ***Bowers*** at para 30 and 34-35; ***R v LRS***, 2016 ABCA 307 at para 29; ***Wanihadie*** at para 34.

[52] To be successful on the argument of uneven scrutiny, the appellant must establish an error that falls within section 686(1)(a) of the *Criminal Code*, namely unreasonable verdict, error of law, or miscarriage of justice: ***Bowers*** at para 29; ***R v Sheppard***, 2022 ABCA 88 at para 11; ***Strathdee*** at para 6. Uneven scrutiny arguments which are based on allegations about what *might* have been in the trial judge's mind or that the trier of fact *might* have slipped on the foundational burden and standard, cannot be successful because they take the appeal court outside of its jurisdiction: ***R v SDH***, 2023 ABCA 145 at paras 6-8. The appeal court must be of the *opinion* that the trier of fact unreasonably departed from the criminal law burden and standard of proof: ***SDH*** at para 6.

[53] Further, the Court of Appeal has recently held that uneven scrutiny cannot be used as a stand-alone ground of appeal, in the absence of any other error. In ***Bowers***, Justice Paperny, in Reasons for Judgment Reserved (concurred in by Rowbotham and Strekaf JJA), stated at paras 45-46:

> There are legitimate, principled bases for appellate intervention. Uneven scrutiny in the absence of any other error is a dubious argument at best. Bundling grievances about credibility findings under the rubric of uneven scrutiny does not promote the prospect of a successful appeal in the absence of legitimate error. Resort should not be had to an argument of uneven scrutiny where other, principled, arguments are not sustainable on the record.
>
> It is, accordingly, unnecessary and, in my view, contrary to the principles governing appellate review, to rely on uneven scrutiny as a stand alone ground of appeal. It comes down to a question of first principles: deference is owed to the credibility findings of the trial judge, which cannot be interfered with on appeal as long as they can be reasonably supported by the evidence: [***R v CAM***, 2017 MBCA 70] Other courts have stated that this argument can only succeed where the reasons, or the record, demonstrate that there is "something sufficiently significant" (*R v Phan* at para 34) that establishes the trial judge employed a "faulty methodology" in deciding credibility (*Paulos* at para 17): *Wanihadie* at para 36. Since there is no prescribed methodology to use in assessing credibility, in my view the alleged error, in order to succeed on appeal, must relate back to the bases for overturning a verdict: unreasonable verdict, error of law, or miscarriage of justice.

[54] This approach has been followed by the Court of Appeal since ***Bowers***: ***R v Bennetts***, 2022 ABCA 245 at para13; ***Ibrahim*** at para 46; ***R v Clarkson***, 2023 ABCA 212 at para 23.

[55] I agree with the Crown that Mr. Cormier is effectively asking this court, on appeal, to re-assess the credibility of the witnesses. I have rejected all the grounds he has raised to support the uneven scrutiny argument, and he has not pointed to anything else that would support it. In the circumstances, his reliance on uneven scrutiny cannot stand and is rejected.

9. Is there a Reasonable Apprehension of Bias?

[56] Conduct on the part of a trial judge which gives rise to a reasonable apprehension of bias renders the trial unfair and the verdict cannot stand: ***R v Stephan***, 2021 ABCA 82 at para 5; ***R v SRD***, 1997 CanLII 324, [1997] 3 SCR 484, at paras 94, 99-100.

[57] As noted earlier, the standard of review where apprehension of bias is alleged is whether a fully informed observer, considering the context of the entire proceedings, would reasonably conclude the judge was not impartial: ***Karri*** at para 12; ***Wilson*** at para 9.

[58] The onus is in the appellant to provide substantial evidence to establish the allegations – mere suspicion is insufficient; ***Karri*** at para 9, citing ***Cojocaru v British Columbia Women's Hospital and Health Centr***e, 2013 SCC 30 at para 22, where the Supreme Court of Canada stated:

> The basic framework for assessing a claim that the judge failed to decide the case independently and impartially may be summarized as follows. The claim is procedural, focussing on whether the litigant's right to an impartial and independent trial of the issues has been violated. There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.

[59] In most circumstances, and within justifiable limits of reasonableness, a lack of nicety, a raised voice, expressing impatience, dissatisfaction, irritation, stubbornness, annoyance, or anger, or reasonable criticism or censure of counsel, while at times unsatisfactory, are insufficient to establish a reasonable apprehension of bias on their own: ***R v Chui***, 2021 ABCA 137 at paras 57-58 (including cases cited at footnote 83); ***R v Ibrahim***, 2019 ONCA 631 at paras 99-112.

[60] The Trial Judge's frustration and admonition of counsel in this case comes nowhere near rebutting the high presumption of judicial integrity. The Trial Judge's overall approach was measured and fair, and no reasonable person would conclude that he failed to decide the issues impartially and independently.

[61] This ground of appeal is rejected.

VI. Conclusion

[62] The appeal is dismissed.

Heard on the 8th day of September, 2023.
Dated at the City of Calgary, Alberta this 28th day of September, 2023.

M.A. Marion
J.C.K.B.A.

Appearances:

Efrayim Moldofsky
for the Appellant

Geea Atanase
for the Crown

In the Court of Appeal of Alberta

Citation: R v Sawatzky, 2017 ABCA 179

Date: 20170614
Docket: 1601-0122-A
Registry: Calgary

Between:

Her Majesty the Queen

Appellant

\- and -

Nathan Randy Sawatzky

Respondent

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment

Appeal from the Acquittal by
The Honourable Judge T.C. Semenuk
Dated the 15th day of April, 2016
(2016 ABPC 85, Docket: 150674299P1)

Memorandum of Judgment

The Court:

INTRODUCTION

[1] The Crown alleged that the respondent possessed cocaine, fentanyl, and other controlled substances for the purpose of trafficking. An undercover police officer saw the respondent put a bag into the trunk of a car. The bag was filled with drugs. At issue was whether the respondent was aware the drugs were inside the bag. He testified and claimed he did not know about the drugs. The trial judge did not believe the respondent, but was left with a reasonable doubt, and so acquitted the respondent. The Crown now appeals from these acquittals.

[2] The appellant argues that the trial judge made two legal errors that affected the trial judge's decision to acquit the respondent. First, the appellant asserts that the trial judge erred by failing to draw an adverse inference against the respondent when the respondent's counsel did not comply with the rule in *Browne v Dunn*, (1893) 6 R 67 (HL). Second, the appellant submits that the trial judge erred by relying upon the respondent's out-of-court statement for the truth of its contents when the Crown had only introduced the respondent's statement to impeach him during cross-examination.

[3] We find no merit to either ground of appeal. For the reasons that follow, the appeal is dismissed.

FACTS

[4] The trial judge reviewed the evidence in some detail: *R v Sawatzky*, 2016 ABPC 85, [2016] AJ No 383. A brief overview is provided here.

[5] Calgary police received a tip suggesting that the respondent's brother, Timothy Sawatzky, was a drug trafficker. The police placed Timothy Sawatzky under surveillance and began an undercover operation. The police saw the respondent driving his brother around Calgary. Timothy Sawatzky also told an undercover police officer that the respondent was involved in the drug trade. As a result, the police identified the respondent as a second suspect in their investigation and placed him under surveillance. The police learned that the respondent drove a white Chevy Malibu.

[6] Timothy Sawatzky agreed to sell a kilogram of cocaine to an undercover police officer. He arranged to meet the undercover officer in the parking lot of the Black Bull Pub on 64th Avenue NE, just off Deerfoot Trail. The Black Bull Pub is located within a larger commercial development that also contains a strip mall, restaurants, and a gas station. In the late afternoon of March 26, 2015, surveillance officers and the police tactical unit staked out the parking lot and the surrounding area, in anticipation of arresting Timothy Sawatzky when he arrived with the cocaine.

[7] Cst. Hinchey of the Calgary Police Service was the lead investigator and part of the team conducting surveillance on Timothy Sawatzky that day. He surreptitiously followed Timothy Sawatzky to the arranged meeting place. Cst. Hinchey testified that as he pulled off Deerfoot Trail and onto 64th Avenue, he saw a white Chevy Malibu in his rear-view mirror, tailgating him. He testified that he recognized the respondent as the driver of the white Malibu. He claimed that he saw the white Malibu pull into the parking lot near the gas station close to the Black Bull Pub. Cst. Hinchey then lost sight of the Malibu.

[8] Cst. Hinchey testified that the police officers on the scene spent approximately four minutes looking for the respondent and his white Malibu. Cst. Hinchey was worried that the respondent might tip off his brother about his impending arrest. Cst. Hinchey said the police looked, but could not find the white Malibu. They arrested Timothy Sawatzky as planned at 5:49 pm. Police found a kilogram of cocaine sitting on the passenger's seat of Timothy Sawatzky's vehicle.

[9] Cst. Kelm of the Calgary Police Service was also conducting surveillance on the day Timothy Sawatzky was arrested. He staked out the pub parking lot, watching from about 5:30 pm until Timothy Sawatzky was arrested. He did not remember hearing anything over the police radio about a Chevy Malibu arriving near the scene. During cross-examination Cst. Kelm agreed that, based on his understanding of the undercover operation, he would have expected that the respondent's presence would have been announced over the police radio if someone had seen the respondent or his white Malibu in the area. He agreed that, for officer safety reasons, it would have been important for other officers to know about the respondent's presence.

[10] Defence counsel did not cross-examine any of the other police officers about whether Cst. Hinchey announced the respondent's presence over the radio. Although the Crown had asked other officers about what happened before Timothy Sawatzky's arrest, none of those officers mentioned anything about Cst. Hinchey announcing the respondent's presence over the radio. Similarly, none of the other officers said anything about looking for a white Malibu.

[11] After the arrest, Cst. Kelm drove to Timothy Sawatzky's residence to conduct more surveillance. At about 6:30 pm he saw the respondent pull up in front of his brother's house, driving the white Chevy Malibu. About 15 minutes later, Cst. Kelm observed the respondent reach into the Chevy Malibu, take out a black bag, and carry the bag to a Buick Riviera parked nearby. The respondent placed the black bag inside the Riviera's trunk. The respondent drove away a few minutes later.

[12] The police towed the Buick Riviera, obtained a search warrant, searched the car and discovered the black bag filled with drugs inside the trunk. The trunk also contained stolen firearms.

[13] The respondent gave a warned statement to the police after his arrest. The statement was exculpatory: the respondent claimed he was unaware the bag contained drugs, and he denied knowing anything about the firearms found in the trunk. The Crown did not introduce the respondent's statement as part of its case, but instead established the voluntariness of the statement so it could use the statement to impeach the respondent during cross-examination.

[14] The respondent testified that he did not know or suspect that his brother was selling drugs. He provided innocent explanations for the suspicious comings-and-goings the police observed during their surveillance operation.

[15] The respondent claimed he gave his brother a ride in the Chevy Malibu about a week before his brother's arrest. The respondent's brother had a black bag with him, which he told the respondent contained tools. His brother threw the bag on the floor of the Malibu behind the passenger's seat. His brother did not take the bag with him when he left, and the respondent claimed he had simply forgotten that his brother left the bag in the back of his car. The bag stayed in the Malibu for the rest of the week.

[16] The respondent testified that earlier on the day of his brother's arrest, his brother had reminded him about the bag full of tools. The respondent claimed his brother asked him to leave the bag of tools in the trunk of the Buick Riviera.

[17] The respondent testified that he left a friend's house at about 5:55 pm that day. He drove straight from his friend's house to his brother's house, arriving around 6:30 pm. The respondent denied exiting Deerfoot Trail onto 64th Avenue and driving towards the Black Bull Pub or pulling into any parking lot near the pub.

[18] The respondent claimed that he did not suspect that the bag contained anything other than tools. He denied looking in the bag or looking in the trunk of the Buick. He said he simply put the bag in the trunk and then slammed it shut, locking the trunk.

[19] The trial judge did not believe the respondent's story. However, the respondent's evidence, when considered in light of all the evidence at the trial, left the trial judge with a reasonable doubt. In the course of his reasons, the trial judge explained why he did not accept Cst. Hinchey's evidence that he saw the respondent driving the white Malibu (at para 333):

> I do not accept the evidence of Constable Hinchey that on March 25, 2015, at or about the time of the takedown of the accused's brother, Timothy Sawatzky, in the parking lot of the Black Bull Pub, he saw the accused driving the white Malibu into a perimeter parking lot near the [gas station] in the same strip mall. As well, I do not accept his evidence that a 4 minute search by the surveillance team took place prior to the takedown, to find the white Malibu and that the car just disappeared. It is reasonable to expect, because the accused could have been arrested as a secondary target, that he would have announced the presence of the accused, and the white Malibu in the area over the radio to the other members of the surveillance team. None of the other surveillance officers on the team in the area gave any evidence as to any such radio announcement by Constable Hinchey at the time, or participating in a 4 minute search prior to the takedown, for the accused and the white Malibu.

GROUNDS OF APPEAL

[20] The appellant advances two grounds of appeal:

1. The trial judge erred in law by "failing to apply the rule in *Browne v Dunn* to diminish the weight accorded to the Respondent's evidence"; and

2. The trial judge erred in law by using the respondent's out-of-court statement to "bolster the credibility of the accused."

STANDARD OF REVIEW

[21] The "rule in *Browne v Dunn*" is not absolute. The trial judge is best suited to determine whether a party has failed to comply with the rule and whether the failure to cross-examine a witness on a certain point was unfair to the other side. The trial judge's decision about whether the rule was violated, and whether any unfairness resulted, is entitled to considerable deference: *R v Quansah*, 2015 ONCA 237 at para 90, 125 OR (3d) 81. The extent of the rule's application "is within the discretion of the trial judge after taking into account all the circumstances of the case": *R v Lyttle*, 2004 SCC 5 at para 65, [2004] 1 SCR 193. When the rule has been breached, the remedy lies within the discretion of the trial judge: *R v Werkman*, 2007 ABCA 130 at para 9, 404 AR 378.

[22] Unless admissible pursuant to a hearsay exception, a trial judge may not rely on an out-of-court statement for the truth of its contents. When a witness's prior out-of-court statement is used to impeach the witness during cross-examination, any portions of the statement put to the witness are not in evidence unless the witness adopts his or her prior statement. It is an error of law, reviewable on a correctness standard, for the trial judge to rely on any facts contained in the out-of-court statement as though they formed part of the witness's in-court testimony: *R v Youvarajah*, 2013 SCC 41 at para 26, [2013] 2 SCR 720; *R v Kelly*, 2011 ONCA 549 at para 41, 88 CR (6th) 371.

ANALYSIS

Failure to Apply the Rule in *Browne v Dunn*

[23] Where a party intends to impeach a witness who was called by his or her opponent, or present evidence contradicting that witness, the party should direct the witness's attention to the contradictory evidence. The contradictory evidence should be put to the witness during cross-examination, so that the witness has an opportunity to address or explain the contradictory evidence. If the witness is not cross-examined on any such matters of significance, the trier of fact may consider the failure to cross-examine the witness when assessing the witness's credibility or the credibility of any contradictory evidence: *Lyttle* at paras 64-65; *R v Paris* (2000), 150 CCC (3d) 162 (Ont CA) at para 22; *Werkman* at para 7; *Quansah* at paras 75-86.

[24] This is the well-known "rule in *Browne v Dunn*." The rule is rooted in concerns about fairness – specifically, fairness to the witness (who should have an opportunity to address the contested point), fairness to the opposing party (who should understand what aspects of its witness's evidence are contested), and fairness to the trier of fact (who otherwise might not have the information necessary to properly assess the witness's credibility): *Quansah* at para 77; S.C. Hill, D.M. Tanovich and L.P. Strezos, eds, *McWilliams' Canadian Criminal Evidence*, 5th ed (Aurora, ON: Canada Law Book, 2013) (loose-leaf, release 2016-2) at pp 21-107 to 21-108.

[25] The rule is not an "ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss": *Quansah* at para 90. Any failure to cross-examine a witness must relate to a matter of substance, not an issue of little significance: *Paris* at para 23; *Quansah* at para 81; *R v Abdulle*, 2016 ABCA 5 at para 11, 609 AR 396. Before inviting the trier of fact to make an adverse credibility finding, the trial judge may also consider less drastic remedies, such as granting leave to recall witnesses: *Werkman* at para 9; *Quansah* at paras 119-120.

[26] Even if a party has violated the rule, it is up to the trier of fact to determine how much weight, if any, should be placed upon counsel's failure to cross-examine a witness about a particular matter: *R v Palmer*, [1980] 1 SCR 759 at pp 782-783; *R v MacKinnon* (1992), 72 CCC (3d) 113 (BCCA); *Paris* at para 27. Failure to cross-examine the witness about an issue does not require the trier of fact to accept the witness's evidence on that point: *R v Scheideman*, 2001 ABCA 94 at para 2, 277 AR 331. An adverse inference is not mandatory.

[27] Here, the trial judge considered whether the respondent had breached the rule in *Browne v Dunn*. Crown counsel raised the issue for the first time during closing submissions: Transcript at pp 350-353. The prosecutor suggested the respondent should have asked Cst. Hinchey what (if anything) he told the other officers via the police radio after he noticed the respondent's white Malibu was tailgating him. The trial judge's ensuing discussion with Crown counsel reveals that the trial judge turned his mind to the question of fairness. Even though the respondent's counsel did not specifically cross-examine Cst. Hinchey about whether he made any such radio transmissions, the trial judge was satisfied that Cst. Hinchey had a reasonable opportunity to explain what happened, including whether he made any radio transmissions to the surveillance team. The trial judge implicitly concluded that the failure to cross-examine Cst. Hinchey on this point caused no unfairness to the witness, the Crown, or himself as the trier of fact. Other judges may have reached a different conclusion, but we owe his conclusion deference. We detect no error of law.

[28] Even if the rule in *Browne v Dunn* was breached, the Crown did not seek leave to recall Cst. Hinchey or any other witnesses. If the appellant believed the Crown was unfairly surprised by the respondent's contradictory evidence (such as his testimony that he was nowhere near the Black Bull Pub that day, implying Cst. Hinchey was either lying or mistaken), it had the option of applying to recall witnesses or asking to introduce rebuttal evidence. Similarly, when Cst. Kelm testified that he did not remember any radio transmission about the respondent or any search for a white Malibu, the Crown had yet to close its case. At this stage, it would have been even easier for the appellant to recall Cst. Hinchey

or the other officers to clarify these points. Instead, the appellant said nothing until closing submissions. The appellant's failure to make a timely objection to what it says was a breach of the rule weighs against granting the appellant relief on appeal: *Quansah* at para 124.

[29] Finally, even if the trial judge *could* have drawn an adverse inference against the respondent's evidence due to the respondent's failure to cross-examine Cst. Hinchey, the weight (if any) placed on a breach of the rule in *Browne v Dunn* was a question reserved for the trial judge, in his role as trier of fact. The trial judge was well aware of the Crown's position regarding *Browne v Dunn*, and he declined to draw any adverse inference. In our view, this was not an error of law, but a credibility finding that is not properly the subject of a Crown appeal.

Use of Statement Tendered for Cross-Examination

[30] The appellant did not seriously press its second ground of appeal during oral argument. In our view, there is no merit to the contention that the trial judge improperly made substantive use of the respondent's out-of-court statement to police. In the impugned portion of his reasons (para 334), the trial judge appears to explain why he placed relatively little weight on the purported contradictions between the respondent's out-of-court statement and his evidence at trial. The trial judge was entitled to consider the circumstances in which the out-of-court statement was made when deciding what effect it had on the respondent's in-court credibility, and doing so was not making improper substantive use of the statement.

CONCLUSION

[31] The appellant has not demonstrated that the trial judge made any error of law. We dismiss the appeal.

Appeal heard on April 13, 2017

Memorandum filed at Calgary, Alberta
this 14th day of June, 2017

Paperny J.A.

Veldhuis J.A.

Crighton J.A.

Appearances:

B. Mercier
for the Appellant

C. Wilson
for the Respondent

Court of Queen’s Bench of Alberta

Citation: SSG v SKG, 2022 ABQB 130

Date: 20220214
Docket: 4801 171124
Registry: Calgary

Between:

SSG

Plaintiff

- and -

SKG

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice N.E. Devlin

I. Introduction

[1] The mother and the father are intelligent, charismatic, and driven lawyers, at the top of their fields. They married in 2009 and had two lovely, gifted children, A and E, now ten and eight years-old respectively. They separated in September 2016. A five-year ordeal of acrimony has followed.

[2] After years of case management and a Practice Note 8 Report (the “PN8"), their dispute culminated in what was supposed to be a 10-day trial to determine parenting and child support. This trial ultimately consumed 26 days of Court time over a 14-month period and has generated 300 pages of written submissions. Despite the voluminous and destructive litigation process, things will end much as they began: the mother and father, both good and loving, albeit stylistically different, parents will have shared parenting of their children, as recommended by the PN8 assessor more than three years ago.

[3] This case is an archetype of how needlessly high-conflict divorces devour judicial and personal resources, along with the lives of the parties, with little or no benefit to the children.

II. The nature of the trial

[4] Both the PN8, and a subsequent PN8 Update which I ordered during the trial, concluded that shared parenting was in the best interests of the children. These comprehensive reports, prepared by Ms. Nancy Rohatinsky, and informed by extensive input from the children's Court-appointed psychologist Dr. Terry Pezzot-Pearce, confirmed that both parents provide safe, loving environments, with sound care, and that the children have strong, safe and secure bonds with both their mother and father. I have no difficulty finding as a fact that this is the case and that a shared parenting scheme is in the best interests of the children.

[5] Moreover, both parents now ask for shared parenting in their closing arguments. The father advocates for a 5/5/2/2 scheme, and the mother an 8/6 regime, with her as the majority parent. Therefore, the scope of decision required from this Court is, on the surface, narrow and focused. Unfortunately, this ostensible simplicity belies the true nature of this trial and the task before me.

[6] From her opening statement, the mother attempted to frame this trial as being about the father perpetrating domestic violence through 'coercive control'. This species of intimate partner violence, now expressly recognized in s 16(3)(j) of the newly amended *Divorce Act*, is often characterized as the most severe form of emotional, psychological, and financial abuse. The mother's position, a relatively recent development in the litigation, was advanced throughout most of the trial as the basis for granting her primary parenting and decision making, with modest access for the father. This culminated in an unsuccessful mid-trial motion for a change of custody to the mother that followed certain dramatic events with the children in September 2020.

[7] After a lengthy interruption of the trial due to the arrival of the Covid pandemic, Dr. Pezzot-Pearce took the stand and described that the mother had recently brought the children to a late-scheduled appointment at which they presented very differently than before. They were suddenly very unhappy and wanting nothing to do with their father, in stark contrast to their previously consistent presentation that they were happy spending time with each parent.

[8] This dramatic change led to a rapid therapeutic intervention and the PN8 Update. The things the children said, and the way they said them, gave rise to the pressing question of whether they had been masking their true feelings about their father or whether they were being coached and conscripted into the litigation by their mother.

[9] Toward the end of the proceedings, as it became clear that the mother would not be able to marshal expert evidence to contradict or critique the conclusions of the Court-appointed professionals, and that her abuse-narrative was unlikely to gain traction, her counsel wrote to the Court advising that she was accepting shared parenting and anticipated the trial would resolve on that basis. It did not. The father's counsel characterized this as an attempt to 'live to fight another day' by avoiding adverse findings on the abuse allegations and the issue of alienation. The trial therefore ran to conclusion.

[10] The unusual arc of these proceedings places the Court in a peculiar decision-making position at the end of trial. The basic fitness of both parents and the health of their relationships with their children are core premises of the PN8 and PN8 Update, both of which I accept as reaching correct recommendations, and which reflect the parties' final positions.

[11] In her final submissions, the mother no longer urged a finding of coercive control, but rather reframed her evidence as showing that the children would benefit from more time with her

as the more responsive and needs-receptive parent, and that she should have greater decision-making authority as a result. This presentation of her case was a more realistic take on what conclusions her evidence might have been capable of sustaining.

[12] Most of the trial, however, was driven by the mother's assertion that the father was an uncaring and abusive person in whose care the children 'could not last another day'. A further curious feature of this trial was that the mother put virtually nothing of the allegation that the father had committed, and continued to perpetrate, the most severe form of domestic abuse to him in cross-examination. This breathtaking breach of the principles of fairness articulated in ***Browne v Dunn***, (1984) 6 R 67 (HL) is likely explained by the fact that most of the mother's evidence of coercive control came from a large body of self-serving emails, many of which contained repeated responses from the father asking that she desist in sending inaccurate and self-serving emails.

[13] Moreover, the father never reciprocally suggested that the mother shouldn't co-parent with him, save for a request that he be given certain decision-making powers. As a result, assessment of his credibility plays little to no role in this decision.

[14] Structurally, these reasons therefore begin with the bottom line. Thereafter, I deal in more detail with the trial evidence and the developments which consumed the last 9 months of this proceeding. While now somewhat tangential, these factors influence the allocation of parenting time and decision-making authority. More importantly, the best interests of the children require long term stability and a move away from conflict and litigation. This requires that these unfortunate chapters of the parental conflict be put to bed, so that the focus can return to where it always properly should have been – namely creating as harmonious an upbringing as these children's disparate but equally valuable families can afford.

III. The Bottom Line

(i) Parenting

[15] The professionals charged with assessing the family and tending to the children's psychological wellbeing concluded, and I accept and find as a fact, that A and E are deeply loved, properly cared-for, and physically and emotionally safe in both of their parents' households. The children, in turn, love their parents and feel comfortable with each of them. The only caveat to this conclusion is that the mother has become vested in continuing the conflict as proof of her position that co-parenting cannot work and has involved the children in a manner that has caused them distress. This is the only facet of this family dynamic that causes ongoing concern. The father has committed no abuse against either the mother or the children.

[16] I am satisfied that the difficulties the children have experienced with the father are exactly those struggles and conflicts that arise normally in the parent-child relationship with stricter and more traditional models of parenting. Both parents appear to have been raised in that mold. The mother has radically rejected it in favour of a much more laissez-faire and, as she would term it, "child-centric" approach, whereas the father has had to work to soften the edges of his innate parenting style and often rigid thinking. I find that he has done so sincerely and with some success and has evolved as a parent over the course of this ordeal.

[17] The dissonance between the parenting styles causes stress for A and E. This is common in many "two-household" families. I agree with the professionals, however, that A & E have done surprisingly well despite this dissonance. I find that shared parenting was correctly recommended by the PN8 assessor initially and remains the structure most consistent with the children's best interests.

[18] Transitions are the hardest feature of shared parenting for A and E. These are the points at which they must switch from one household paradigm to the other, and are fertile ground for conflict over items, activities, and other matters of necessary interaction between the parents. Minimizing transitions is in the children's best interests.

[19] I find, however, that the burdens of transitioning between the houses, and the inevitable extent to which A and E live a somewhat 'split' existence, are outweighed by the benefits of continuing to have extensive, regular, day-to-day lives with both of their parents. The mother provides a more emotionally open, socially connected, and creative household, whereas the father provides a more stable and structured environment, with an elevated level of academic expectations together with the support for it, and a broader extended-family milieu.

[20] The mother may remain more 'attuned' to the children, and have more time for hands-on parenting, but I find that this does not make it better for the children that she be the primary or majority parent. I find that the children derive a great deal of good, albeit through somewhat different modalities, from being with each parent.

[21] Moreover, I find that if the mother were made the primary parent, there is a material risk of her damaging the children's relationship with their father and his side of their family, to the children's great ultimate detriment.

[22] For these reasons, parenting will take place on a week-on/week-off basis. This scheme was reported to work reasonably well in the summers, minimizes transitions, and permits the children to spend regular and meaningful time with each parent. Decision making and choice of extracurricular activities will be addressed in more detail below. A detailed Parenting Plan, aimed to minimize points of ambiguity and conflict, is attached as Appendix "A". The parents, as always, remain free to vary this Order by consent.

(ii) Child Support

[23] Applying the principles of section 9 of the *Federal Child Support Guidelines* (the "*Guidelines*"), the father will pay a total of $367,007.50 in retroactive child support, after the application of appropriate set-offs. Going forward, he will pay monthly section 9 support of $13,000 per month. This amount is set purposely high to allow each parent to pay their own section 7 extracurricular and education related expenses, without any interaction between them. Peace will be purchased on discretionary section 7 expenses through this large and generous section 9 award, which is in the children's best interests.

IV. The history

(i) Before trial

[24] The parents met in Vancouver, the mother's hometown, in the fall of 2008. Both were already successful lawyers in their early 30s, with extensive cultural similarity. On paper they were a compelling match. They married the following July and ultimately settled in Calgary, the father's hometown. A was born in 2011 and E in 2013.

[25] The seeds of discord and distrust were mutually sewn early in the marriage and grew over time. The specific details need not be recited here as they do not concern either party's fitness to parent. The one feature I find to have later taken on relevance is that the mother was under exceptional, even traumatic, parental pressure to remain in the marriage.

[26] The marriage reached an untenable state in April 2016, and the father moved out of the master bedroom. On September 9, 2016, the parties formally separated, and the mother asked for a divorce. Within a month, the father had filed the Statement of Claim for divorce. The parents then briefly attempted to mediate an amicable ending.

[27] Regrettably, they both insisted on remaining in the matrimonial home. This was a multi-generational home in which the father's father ("the grandfather") and younger adult sister also resided. The matrimonial home was large and comfortable, though not opulent. It was a dream home, purpose built to accommodate the father's extended family; they did not wish to leave it.

[28] For her part, the mother also did not wish to leave. Over the following months, the parties' continued proximity and cohabitation created a fever-pitch of conflict and enmity between them. They both described this period as "total chaos". These people needed to not live together any longer. However, in a theme that would come to repeat itself throughout their conflict, their mutually strong and dominant natures gave rise to an immovable-object-meets-irresistible-force dynamic.

[29] The mother, then unemployed, had assumed the primary care of the children. She was without family in Calgary, did not wish to surrender the children to shared parenting, and at times threatened to move with them back to Vancouver. For his part, the father was terrified of losing his children.

[30] Both parents dug in. Each isolated themselves to different parts of the house. Tension prevailed. The children's beloved, life-long nanny, Chari, was caught in the middle as the mother perceived her as the father's proxy. The mother felt outnumbered, observed, and unwanted, while the father felt systematically excluded from parenting the children. Neither party yielded, compromised, or extended an olive branch. Police were called to the home several times to separate the parents.

[31] Even though case management commenced, and the PN8 was ordered in November 2016, no interim parenting or support regime was put in place. The father made reasonable financial offers to achieve physical separation, but these were neither accepted nor countered. Neither party asked the Case Management Judge to make interim orders in 2016 or 2017.

[32] Arbitration with Gary Kirk was attempted, but his awards brought little clarity. The father believed that the parents had agreed to a *de facto* shared parenting regime and were following a 2/2/3 schedule to that effect. The mother at least passively resisted this and, at times, parented in

a manner the father took to be an interference with his parenting time. Again, neither side compromised. The conflict arising from their continued cohabitation ossified into the mutual distrust and dislike that prevails to this day.

[33] Eventually, in early 2017, the father yielded to the inevitable and began to spend much of his parenting and personal time at his other sister's home. He eventually rented a condo in June 2017, and subsequently a house near the children's school in September 2018.

[34] The mother remained in the matrimonial home but testified that she had obtained access to a friend's condominium and lived there from June to December 2018. The time at which she moved out, and the condition of the home at that point, are contentious and will be addressed later in these reasons.

[35] The matrimonial home was extensively damaged in the summer of 2018. It was repaired and sold in the fourth quarter of 2018. The father provided an initial uncharacterized advance of $25,000 to the mother in 2017, and a further $80,000, together with uncharacterized monthly support of $7,500, commencing concurrently in December 2018. The mother moved into a rental home near the children's school in January 2019.

[36] In practical terms, the parents stopped having direct contact in early 2017 and mostly sparred by email, vast quantities of which were entered into evidence. The PN8 report was released in May 2018 and recommended shared parenting. This was formally ordered by the Case Management Judge, on an interim and without prejudice basis in December 2018.

[37] The parties settled property and spousal support through lump-sum payments made to the mother in early 2020.

(ii) <u>The trial process</u>

[38] This trial was set for two weeks and began on March 9, 2020. After the first five days, Court proceedings were adjourned by Master Order #1 due to the Covid-19 pandemic. An Interim Without Prejudice Order was made to govern summer 2020. The trial resumed on September 23, 2020. Two further weeks were reserved due to the slow progress made in March. Midway through the resumption, it became clear that the children were in crisis. The trial was paused and an intensive intervention by Dr. Pezzot-Pearce was ordered and undertaken. Information from that process resulted in the Court ordered PN8 Update, which was delivered in March 2021.

[39] Further witnesses and twists, together with delays to the PN8 Update caused by the pandemic, led to the trial continuing over eight further days into May 2021. The parties exchanged written submissions of 100 pages each in late August and replies of 50 pages in late September.

[40] The children have been on a 2/2/3 shared parenting arrangement throughout, save and except for the summers, in which a 7/7 weekly schedule prevailed to permit the parents to each take vacations with the children.

V. The PN8 Baseline

(i) Findings regarding the court-appointed experts

[41] Both Ms. Rohatinsky, the PN8 assessor, and Dr. Pezzot-Pearce, the children's court-appointed psychologist, have performed a great service to the Court in this difficult case. Both did their jobs in an exemplary manner and the Court is grateful for their unblinking focus on A and E's best interests. These experts remained resolutely and admirably objective thorough what has no doubt been one of their most challenging retainers.

[42] I find that the court-appointed experts carried out their duties objectively, professionally, and with a correct focus on the well-being of the children. Both testified in an objective, neutral, and appropriate manner. I find that both conducted their professional duties with an open mind to the situation, considered all the relevant factors and evidence before them, and reached reasoned, factually supported, and correct conclusions on the principal questions.

[43] I found both to be credible witnesses, in the substance of their evidence and in their demeanour presenting it. I accept their observations as factually truthful and their opinions and conclusions as well-founded. Apart from a slight divergence on final parenting terms, I accept their evidence, particularly where it differs from that of either parent.

[44] The conclusion of the professionals parallel my own observations in Court and my assessment of the evidence and of the parents. I do not merely accept the experts' reports, but actively and independently concur with their overall conclusions.

[45] The PN8 was comprehensive, included many meetings, interviews, and periods of observation with the family and its collateral supports. It concluded with the following findings and recommendations, which I accept as valid and accurate:

> When I met with A and E, they both indicate that they enjoyed spending time with each parent and that they are comfortable in both homes. In my observations of the children with each of the parents I have found each parent to be attentive and responsive to their children, albeit, A and E would like to be able to love and spend time with both parents and not be placed in the middle of any conflict that is occurring amongst any of the adults, especially their parents….A and E love and are loved by their parents.

[46] Ms. Rohatinsky recommended shared parenting and decision making on a 50/50 basis, together with a proposed comprehensive parenting plan. She made the following insightful observations on parenting styles seen in this case:

> These parents have different parenting styles. One is not necessarily better or worse than the other, they are simply different and each is relatively effective in its own way. [The mother] presented a more lenient, flexible and responsive approach to the children's behaviour compared to [the father] who presented as being less tolerant of departures from his expectations.

[47] Nevertheless, she found merit in his approach and summarized her in-home observational visits as follows:

> Overall, the children seemed comfortable with [the father] and there was a sense of calm in the home. [The father] was patient with the children. Each child initiated interactions with and responded appropriately to him. [The father] initiated interactions with each child and was responsive to their behaviours and provided appropriate guidance and direction to them.
>
> …
>
> Interactions between [the father] and each daughter were comfortable, easy and relaxed.

[48] In the PN 8, A was reported to have talked happily about the favourite things she did with her father, which included trips and visits with family. She reported that "daddy days" and mommy days" are "working… Just fine." Quite age appropriately, she proposed having time alone with mom while her sister would be with dad and then switching, as this would allow her to have time with each parent all to herself. A's reports to Ms. Rohatinsky gave the impression of dad being stricter and mom being more laissez-faire. In terms of A's relationship with her parents, the original PN8 concluded that A:

> …stated that she loves both parents and knows they each love her because they each have said 'I love you' "a hundred times."

[49] For her part, E also told Ms. Rohatinsky that she likes "mommy days" and "daddy days" and being able to spend time with both parents. Ms. Rohatinsky reported that E told her that "she would change nothing about her father, and she likes "everything" about him." She said the same about her mother.

[50] The PN8 contained input from the children's physician. The information he provided is telling, and was reported as follows:

> Dr. B explained that he had "seen them [mom and dad] together when they were married, it was a different dynamic" but since they separated "it's not good, actually, they don't get along with each other… It's very hostile." He continued, "if you say anything, one will bicker with the other … They are lost in their argument… Obviously the kids are watching and they don't like that… The kids are affected." He added, "the only time I've ever seen the kids shut down" is when their parents are arguing in his office "<u>alone [with either parent but not both] the kids are totally different, no concerns" with either parent's behaviour individually</u> "the problems arise when the parents are together." [emphasis added]

[51] The report continued, quoting the physician further:

> I know that both parents are interested in the welfare of their kids and from what I've seen they are good parents – I have no concerns about their parenting ability on their own, for sure – they just don't like each other – it's gotten really bad…. I have to emphasize that both are good parents, it's just [their interactions] are toxic…

[52] The doctor's assessment accords entirely with the PN8 conclusions, and my own.

[53] The PN8 sensibly and correctly concluded that shared parenting should continue, in a 2/2/3 or 5/5/2/2 arrangement initially, evolving into a 7/7 routine when E began Grade 1.

(ii) The PN8 correlated with my assessment of the parents

[54] The father is reserved, stoic, attached to systems and methods, and determined. These characteristics, when combined with what is obviously a deep analytical intelligence, account for his success as a deal lawyer. In a parenting or relationship context, however, these traits likely manifest as being rule-oriented, strict, and intransigent. He wanted clarity and boundaries around his parenting time during the separation, wanted to strictly follow what he believed to be the rules and agreements and, at least initially, showed little inclination to be flexible or accommodating.

[55] In testimony, his answers were precise and spare. With a few exceptions, he was emotionally restrained, even cold in a highly rational way. These same characteristics led him initially to underestimate the emotional states and concerns of the children, as reported in the PN8.

[56] On the positive side, the father provides a stable, secure, and predictable parenting environment. This is confirmed by the degree to which the professionals observed the children to be calm, happy, and well regulated in his care. On the downside, he was likely less able to accommodate the emotional lability of children and added to the conflict with the mother through his general posture of intransigence, ranging at times into insensitivity.

[57] I derived from the evidence that pragmatic compromise and initial gestures of gratuitous goodwill are not his reflex positions in his relationship with the mother. This is his primary mechanism of contribution to the parental conflict. Examples include delaying the children's therapy because commencing it did not fit with his understanding of the process and structures in place, failing to buy presents 'from' the girls to the mother (a common act of parenting), delaying promised payments for certain things, and not facilitating calls from the children to the mother when these were not strictly required.

[58] For her part, the mother presents in many ways as the polar opposite. In the words of Dr. Pezzot-Pearce, "dad is not psychologically super sophisticated, but mom is." The mother is highly emotionally attuned and verbal. She is a powerful and prodigious communicator, connector, and persuader. As with the father, it is easy to understand her professional and personal success.

[59] The following observations in the PN8 proved to be spot-on as the trial unfolded, as the mother's answers often ran to pages of monologue:

> …there were times [the mother] became distressed relating experiences. She provided lengthy and sometimes tangential responses to questions asked. She provided copious amounts of verbal and written information regarding events that occurred during the marriage and since the separation and earnestly sought to have her position understood and appreciated.

[60] Unsurprisingly, the mother has historically been more emotionally available for the children. She was their primary caregiver in their early years and is deeply bonded with them as their mother. Her emotional attunement does, however, seem to carry somewhat beyond healthy bounds. In contrast to the father, she consistently overestimates the emotional distress and

psychological state of the children, quite significantly so by the time of the PN8 Update. Her urge to emotionally accommodate also resulted in the children being observed by the professionals to be comparatively poorly regulated in her presence.

[61] Dr. Wendy Froberg, who had worked with the parents in the period following separation, observed that, “while [the mother] is maybe a little bit… an over-functioning mother, in her mind she needs to be that way.” This observation makes perfect sense in the context of her relationship with the father, who is very much the opposite.

[62] Whereas studied intransigence is the father’s mode of self-assertion, the mother seeks to shape and control her environment through communication, in particular email. In contrast to the father’s instransigence, she is passive aggressive. This manifested in examples such as her boundless emails containing subtle jabs at the father and constant narrative-shaping, up to her intentional sabotage of his and his new partner’s participation in a very significant family wedding by simply going off-grid with the children and showing up with them too late before long-planned flights.

[63] The parents’ incompatibility and the mechanisms of their conflict were easily discernable. They each have individual weaknesses and offsetting strengths. Fundamentally, however, both are good and loving parents. This is reflected in the positive relationship the children have with each of them.

VI. Evidence and events at trial

[64] This trial was lengthy and voluminous evidence was heard. Though I have reviewed the entirety of the transcript and exhibits in preparing these reasons, only a précis of the evidence is provided, save for the most salient points.

(i) Phase one of the trail

[65] The mother, as defendant, was invited to make an opening statement at the outset of trial. It was here that the trial veered away from the relatively straightforward landscape described in the PN8. Mother’s counsel began to speak immediately about family violence and alleged that the father had perpetrated coercive control against the mother. This was offered as the reason to reject the PN8’s parenting recommendation and give the mother primary parenting and decision making.

[66] The trial proceeded with the father’s evidence, which was interrupted to hear from the PN8 assessor, Ms. Rohatinsky and Dr. Fong, who had briefly served as parenting coordinator.

[67] Ms. Rohatinsky’s evidence was consistent with her PN8 report. She aptly diagnosed the conflict between the parents but made no attempt to determine who was ‘right’. Indeed, she discerned that the “majority of the conflict is not about the children”, but rather about the breakdown of their relationship.

[68] She described having seen positive interaction between the children and both parents and that the children had good attachments to both parents. Her core conclusions remained the same:

> I saw two parents who seemed to be capable parents. [The mother] has a very nurturing, gentle sensitive, hands on kind of approach with her kids, and they have their own relationship. [The father] has a different approach. He’s – he is

> more structured, more organized more – more predictable in what he does and the way that he interacts with the kids, but they seemed equally comfortable with him as well.

[69] Ms. Rohatinsky testified that she felt both parents could benefit from therapy to deal with their own issues of loss and trauma, and in the case of the father to interpret and apply what the children's therapists were saying. She also emphasized the need for a high level of detail in their parenting plan to minimize areas open to interpretation and conflict.

[70] In terms of the allegations of coercive control and the email dynamic, she testified as follows:

> My impression -- sort of my overall impression from [the father] was not so much that he was trying to control [the mother] as he was trying to control the situation and - and create - create something that he thought would be workable. And then when [the mother] didn't agree with his perspective that's when the emails would go into the defensiveness, the arguments, the justifying and it would be - it would be completely separate from whatever the issue was originally provoked the email. It went off into -- one of the things that I know about these two people, they're very intelligent, and - and I know that they are by profession, both lawyers. And I grew up in a family of lawyers, so I - I know what can happen when lawyers get on the other side of arguments, and I felt that a lot of times that these emails were about trying to make their case with each other and - and neither one of them wanted to back down because they felt very strongly about their positions but they were losing sight of what the point of the whole email was for.

[71] Nothing in the cross-examination of Ms. Rohatinsky undermined the quality of her work or the credibility of her conclusions.

[72] Dr. Fong briefly acted as a parenting coordinator under an Order of Justice Jones. He only met with the parents a handful of times and made three consent awards. Despite his limited role, he spent an undue amount of time on the stand. This appeared to be a result of the parties, in particular the mother, wanting to prove who was to blame for his failed efforts. The only salient points I took from his evidence were his insightful conclusions that:

> I think this is a unique family, strong cultural roots, some semblance between the two of them, that I tried to address with them. A bit of betrayal in the marriage. Failure. Emotions like that hurt and one thing I know about certain cultures, and I did discuss that with them a bit, was the concept of shame, because shame in certain cultures is very deep. It doesn't go away very easily and hurts can reverberate and stick like Velcro for a long period of time….we talked about our cultures a bit and the concept of shame. Shame can drive people to a lot of anger that you're just never going to forget….they're not bad people. I think that they're just hurt.

[73] The mother, in particular, 'lawyered' Dr. Fong through a lengthy series of emails. His insight into this diagnosed the conflict dynamic between the parents in a helpful and accurate manner:

> I wish these parents would just be parents and talk to me and not talk to each other like lawyers. They behave strategically in how they talked to each other. Their emails to me were incredibly strategic in relation to most other clients I see. There is a level of sophistication here that most other parents don't have. It was intriguing, both of them. As I said there is lots of amius between them, but I thought that some of their stuff written was strategic….without indicating someone is at fault I am simply saying these two can be strategic with each other and others around them.
>
> …one would assume they are excited about attending. The difficulties with this, these two coming to sessions, and the kind of – if you take a look at the amount of emails that I have, and I only saw these people maybe four times, and I got my whole binder box of emails here between them…
>
> …I would say that the emails from the mother led to an impediment whereby the sessions were not timely…

[74] I accept Dr. Fong's evidence that his awards were consent awards. To the extent the mother suggested otherwise, I prefer his evidence. I share his assessment of the parties' dynamic and dysfunction.

[75] The trial was adjourned after the first week and the father's evidence did not resume until the fall of 2020.

(ii) <u>Phase two of the trial</u>

[76] Considering the mother's opening statement, cross-examination of the father promised to be dramatic and potentially definitive. It was neither. Rather, it confirmed facets of the father's personality and habits, but never suggested he was guilty of coercive control or any domestic abuse. No allegations of physical abuse were put to him, and virtually nothing to suggest coercive control. I will discuss the evidentiary problem this raised in the section on the rule in ***Browne v Dunn***, below.

[77] After hearing from the grandfather, the father's new partner SW, and the father's sister-in-law SD, the mother took the stand. Her evidence-in-chief went longer than expected and was paused to allow Dr. Pezzot-Pearce to testify. Her initial testimony changed the complexion of the trial. However, at the outset of her evidence, she said the following, which corroborated Ms. Rohatinsky's conclusions:

> …these are very, very bright children….I'm not really sure how they're doing as well as they're doing, other than they have two parents who really love them and they really love their parents.

[78] Her evidence then took a dramatic turn. Dr. Pezzot-Pearce testified that she had seen the children in the summer of 2020 and that things were going very well. On September 14, however, the mother brought the children in for an unplanned session. In an abbreviated meeting, the children gave significantly different accounts of the summer than they had before. Dr. Pezzot-Pearce testified that, at this session, A was very firm in saying she did not want to go to her father's house except for the holidays. Dr. Pezzot-Pearce reported that E also indicated resistance in returning to their father:

> They seemed to have managed that period through when they weren't at school and whatever fairly well. And when I saw them in I think it was mid-July, I can check and see, July 17th, both girls said that the summer was going really well and A really liked the week on/week off but E still thought, like she had the summer before, that it was a bit too much. So they were -- they were relaxed, they were really quite fine. They were looking forward to their summer and looking forward to going back to school.
>
> When I saw them in September, it was -- and that was not a planned session for the kids, that's where [the mother] brought them to the session that she had asked to speak with me, A was completely upset with the summer and really had completely changed her demeanour about what was going on from -- about 2 months, a month and a half earlier; and E, as well, voiced concerns that she wasn't voicing in July.

[79] Dr. Pezzot-Pearce’s testimony caused the father’s counsel to move for an Order that the trial be paused, and the children taken to be seen by her immediately. This prompted a *voir dire* on which both parents testified. The *voir dire* evidence was subsequently made part of the trial proper, on consent.

(iii) Mid-trial *voir dire*

[80] The father took the stand and testified that he had the children in his care the weekend before the trial resumed (September 19-20). He had put the children to bed and later checked on them. He found A awake and sitting on her bed. He asked her what was wrong, and she asked to come sleep in his room. He talked to her further and testified that she said the following:

> So she opened up to me. Ultimately, I asked her a few times and she said to me that, mommy said that daddy's a very bad person and that she said we, and it was referring to, I believe, her and E, that we shouldn't -- we shouldn't be sleeping here anymore. So she repeated that a few times and then went on to say -- went on to say that she felt that mommy was going to say that again to her Monday when back to her care on the Monday.

[81] He described going home the next day and noticing the children were a bit off when he took them to get dinner. He testified that he later spoke to both children in their bedroom and recounted the following:

> So I sat down with the both of them on A’s bed and I asked her what's wrong. After a bit, she -- and E’s still in the room, she communicated the same -- basically the same thing, that mommy keeps saying to me that daddy's a very bad person and that we -- that we shouldn't be sleeping here. I tried to reassure them again and said that daddy loves you and she went one step further and said that mommy said that very bad things are going to happen to us if we tell you. So, A communicated that to me. I spoke to E and I asked her whether similar communication had been had with -- had been had with E and E -- it didn't appear that that communication had been had with her. I asked A when last these comments were made and she said -- she just referenced last mommy time.

> She indicated that they'd been made continuously and that -- including up to dropping off A at school and repeated the same things to her and said that she should continue to think about it.
>
> A broke down and started crying. I was able to eventually settle her and she went to sleep and then I put E to sleep as well.

[82] The father testified that A told him that the mother kept repeating these things to her "over and over" and told her that very bad things would happen to her and her sister.

[83] The father was not cross-examined on this evidence.

[84] The mother then took the stand. She was asked about the children's resistance to go to the father's care and the recent events. Her initial answer was perplexing. Instead of immediately denying having said these things to the children, she criticized the father for how he handled these supposed disclosures from the children. After I asked her to answer the question, she unequivocally denied coaching them or saying bad things about the father. Two facets of her lengthy answer were notable, as she said:

> …I've absolutely never ever said to the children that daddy is a bad man….in fact, I've <u>twisted myself into a pretzel</u> to say the opposite….I've gone out of my way to find good qualities about dad to be able to share with the kids. <u>That's a struggle at times</u>. [emphasis added]

[85] The mother then went on to describe that, just prior to making the appointment with Dr. Pezzot-Pearce in September, A had tearfully told her that "Mommy, I never want to go to daddy again." She testified that A then unloaded her feelings on the subject, saying that "daddy is mean. Daddy is so mean", and that her father doesn't understand her feelings, that if she shares her problem with him they become worse, and that he doesn't let her see her friends.

[86] The mother testified that she then asked A what she would do if she had a magic wand, and that the child responded as follows:

> And she says, well, if I had a magic wand, I would make it so that without me saying it, the bossy helper [a term used by Dr. Pezzot-Pearce to describe the role of the judge in this trial] would already know that I never want to go to daddy. If you had three wishes, what would they be? That would be the first wish, the second wish, if the bossy helper doesn't already know by magic, then that Dr. Terry would tell the bossy helper without daddy knowing that I said it. Okay. And what would your third wish be? Then I would wish that I had long hair. Because my concern about daddy would be gone, then I'm hearing, you know, that's a kid kind of thing. Then I can focus on being a kid, I want long hair. So, those are her three wishes

[87] The mother testified that it was this supposed disclosure this prompted her to book the unscheduled appointment with Dr. Pezzot-Pearce. She further testified that the following day E heard her talking about this with A and came out of her bedroom crying, saying: "You guys are ignoring me, you think I don't have these problems. I have these problems too." E then told her she doesn't want to go back to her father either.

[88] The mother further testified that A expressed an urgency that the father be told that they did not want to go to his house anymore.

[89] In cross-examination, the mother was asked why she had not mentioned any of these events in her two-and-a-half days on the stand immediately preceding Dr. Pezzot-Pearce's testimony. She responded by saying: "I don't choose when that is given, that my lawyer choses that…" I found that answer remarkable, given that the mother entirely controlled the presentation of her evidence, despite my having cautioned her counsel to lead her evidence rather than merely invite monologue.

[90] The mother went on to say that the children had been "anxious, plucking at their clothing, chewing, pulling hair, anxious, tearful, sad, and maybe a little hopeful too" when going to see Dr. Pezzot-Pearce in September. She agreed that no teacher at school had alerted her to any change in the children's behaviour, and she had not asked for their observations on their children's wellbeing.

[91] After the mother testified, I asked Dr. Pezzot-Pearce if she would see the children immediately. She agreed and I ordered that they be picked up from school by Chari and taken to see her. The trial was adjourned pending a report by Dr. Pezzot-Pearce about this intervention.

(iv) Dr. Pezzot-Pearce's further evidence

[92] Dr. Pezzot-Pearce returned the following day to give evidence about her emergency session with A and E. She reported that both of the children "talked her ear off" when she asked what had changed for them between July and September. This evidence is of particular significance and merits being quoted in detail:

> And so we talked a little bit first about school and school is going very well for both of them and then we went into this confusion about their different reports.
>
> So E started -- I asked what had happened on the weekend with A being upset. And she -- E launched into that her dad had gone to dinner with his helpers and not really answering the question, and I -- I said, what helpers? Anyway, she knew that his helper were Nicole and she called her Dev, and -- and -- but she didn't want me -- she said her mom had told her that there were these helpers with these names; and that she wasn't to tell dad. [emphasis added]

[93] "Nicole and Dev" is clearly a reference to the father's counsel. The significance of E telling Dr. Pezzot-Pearce that her mother had told her about them, and their names, becomes significant in light of the mother's February 2020 email to the therapist, addressed later in these reasons. She continued with the following recounting of E's interview:

> A: …And she said dad knows something is wrong. And I said, well, it's a little hard for him to know because they haven't wanted to share anything with dad. And she just affirmed that dad knows something wrong; and that dad was just like Trump, he was selfish, and mean. And she got on quite a rant about that. I asked how she knew about Trump, and she said she'd heard it on the news.

And then she said, mom wants to take care of me, dad's too selfish. And dad has low love, and mom has high love.

….

And then she came back to Dev and Nicole saying that they are lying to the bossy helper because they are saying dad is the best dad, and that they are having so many people coming to say that he is the best dad, and he isn't, that they are not helping.

And then she continued on with, dad is making my life harder, he's mean and selfish, and he doesn't play with me. He makes me eat things I don't want to, it's not fair. It's better not to see him. And that A would not last another day.

Q: Were those her words?

A Yes. I was a little surprised. She is very bright, and very articulate. But they are sort of unusual words for a seven-year-old. And she felt her dad was not trying to fix things at all; and that E and A couldn't -- couldn't stand it anymore. She just wanted to have a normal life with a happy ending and not be yelled at. And be under the control of another person.

Q: Sorry, say that again.

A: She wanted -- she wanted her life to be normal, to have a happy ending, and not be yelled at and not be under the control of another person. And I was making notes at the moment. In fact, she was checking my notes to make sure I was writing it down right.

I asked, you know, what would happen if she could be given a magic wand and change the situation. And she said she would want to not see her dad unless she wanted to. She would like to choose her own clothes at dad's house. She would like to be with mom all the time, and she would like to be normal.

…

So she -- then she talked a bit about A crying again, and how she likes to get tickles from Chari. And then went into Chari writing a letter saying dad is great and is awesome. And she has always spoken very positively of Chari, but she said Chari doesn't care for me, she's only in it for the dollars. She doesn't care that I'm trapped in the middle.

Q: Were those the words of the seven-year-old?

A: Yes, they are. I wrote them as she talked. And she was quite -- quite insistent I take notes. She said I could take notes at the end and read them out to the bossy helper and to mom and dad and Nicole and Dev.

…

And then she asked me, why am I in this situation? Because of this situation, my life is bad. And if -- if dad were kinder and more respectful, it would be normal, and I wouldn't be sitting here. My friends have normal lives, and I don't.

And I asked how she thought things could be made better. She said she wanted her father to understand and respect her ground rules, not to yell, to play sometimes at least with her, not to care only about money, to be mindful of me, and to don't hurt me and my family. She felt he didn't care.

Q: Sorry, not to hurt her and her family?

A: Yes. She was just -- I had to slow her down a few times because she was talking so fast so that I could make notes.

…

And then she said, that's it, I am done. She was done.

Q: Sorry, say that again?

A: Then she said, that's it, I am done. And she was done. She was ready to leave. It was quite the interview. She is a very bright articulate girl. I haven't heard, though, some of these things before.

[Emphasis added]

[94] Dr. Pezzot-Pearce noted what was obvious, namely that some of the things said were unusual for a child of E's age. She then went on to describe her session with A. The elder child gave a slightly different story, saying the events with their father had begun because she wanted to sleep in his bed because there was no night light in their room. They were mad at dad when he came in and told them both to go to sleep.

[95] A then told Dr. Pezzot-Pearce that "mom said that it was bad sleep at his house". [emphasis added] When queried on this she recanted and said that her mother didn't say that but that rather she, (A), made it up. She did, however, confirm that she had said what the father had attributed to her.

[96] A also parroted that "Nicole and Dev… are mean and they are not helping." A then went on to say that she will "never forgive him for his choices". She then repeated almost verbatim what her sister had said that "Chari cares about dollars and doesn't care for us." [emphasis added]

[97] Interestingly, A said that the father never let her talk about mom at his house and did not denigrate the mother, saying: "He doesn't say that mom is a bad person, but he thinks mom is a bad person."

[98] As with her sister, once A was finished, she, in the words of Dr. Pezzot-Pearce, "sort of stop talking. When asked if she had anything more to say, she said no and was ready to go."

[99] Dr. Pezzot-Pearce described the children's presentation by saying, "It was very pressured. And the words were very sophisticated, particularly for E." When she was asked whether the children had used virtually the same words about Chari, the father and SW, Dr. Pezzot-Pearce confirmed this, saying: "They were essentially the same words."

[100] Dr. Pezzot-Pearce testified that what the children told her was consistent with their September statements, but completely inconsistent with what they previously said throughout the therapeutic relationship. In particular, they always seemed comfortable with Chari and had only said positive things about her. Indeed, that very day they were excited that she was making them

banana bread. Similarly, as recently as a couple of months ago, they had asked for more time with their father. Dr. Pezzot-Pearce agreed that what the children were saying about dad, SW and Chari, as well as about the father's lawyers, were "essentially the same words." [emphasis added]

[101] Asked by the father's counsel whether the quick and pressured speech gave Dr. Pezzot-Pearce the impression that the children felt the need to get something out, she agreed that they certainly seemed eager to do that.

[102] When further questioned, Dr. Pezzot-Pearce reaffirmed that both children told her that it was their mother from whom they had heard about Dev and Nicole. The therapist had been talking to the kids about the trial process and her participation in it. She described to them, in age-appropriate terms, that their parents were going to see a "bossy helper" (the judge).

[103] Dr. Pezzot-Pearce testified that she had spoken to the mother about using the "bossy helper" construct with the children. She testified that the children told her they had never told their father about the "bossy helper". This is consistent with the children having been more reluctant to talk to their father about certain things.

[104] It came to light that the mother had sent an email to Dr. Pezzot-Pearce on February 24, 2020, just before the trial commenced. She began by stating that the children had returned to her care greatly dysregulated and she had soothed them. She then went on to state the following:

> As they fell asleep, they told me that daddy has talked to them about the bossy helper and is forcing them to lie and say they don't like the way mommy takes care of them, especially the food and snacks she gives them. A said she's just going to tell the truth. E said she's going to lie and do what daddy said because she believes that daddy hears everything they say to Dr. Terry and will know if she doesn't do what he asks. [emphasis added]

[105] Regrettably, I am compelled to find on a balance of probabilities that the contents of this email are a contrivance. I find that the children likely did not speak to their father about the "bossy helper", whereas the mother knew that they had heard this term. Her attribution of this conversation about lying to the bossy helper to the father would, therefore, be false.

[106] Independently, this email (Exhibit 93) is of limited significance. However, examined in the context of the possibility that the mother was attempting to manipulate the children's interactions with Dr. Pezzot-Pearce to bolster her position in the litigation, it takes on a different complexion. When read in conjunction with the children's September statements to Dr. Pezzot-Pearce about "Dev and Nicole" lying to the "bossy helper", a pattern emerges.

[107] After hearing Dr. Pezzot-Pearce's testimony, the mother moved for interim sole parenting. In reasons delivered at the time, I dismissed this application and ordered that the PN8 Update be prepared.

(v) The mother's evidence

[108] The mother began by describing the couple's early life together, and that she was the primary parent of the children when they were young. She painted an unhappy portrait of their early married years and made an allegation of a physical altercation in 2010. This portion of her

evidence provoked the first ***Browne v Dunn*** objection, as little or none of this narrative had been put to the father.

[109] The mother went on to describe the period immediately following separation, their failed attempts at counselling with Dr. Froberg, and the instances in which the police were called to the home. She confirmed the father's evidence that the period of cohabitation following separation was chaotic and difficult for everyone.

[110] The mother testified that she very much wanted to move out but had no money to do so. She testified that the financial offers the father made to provide her funds to find another home were all contingent on her agreement to his proposed parenting schedule, which she found unacceptable. When asked if she had ever received an offer from the father that was not expressly contingent on acceptance of a specific parenting regime, she stated: "None ever."

[111] She testified that she viewed the continued employment of the children's life-long nanny Chari as a form of surveillance over her, because she [the mother] was unemployed at the time and did not require any childcare. This was obviously the source of significant conflict, as the mother viewed Chari as the father's proxy and resented her presence.

[112] The mother was asked about her relationship with the grandfather and testified that there had been no conflict with him before the marriage ended, but that conflict arose thereafter. Interestingly, she phrased it in the following terms:

> Prior to our marriage ending, I didn't have conflict with [the father's] dad. I had conflict with [the father], but I didn't have conflict with [the father's] dad. And part of that was that I followed the rules as they were explained to me for that household, but once our marriage ended, <u>I no longer followed the rules that I thought were unreasonable even at the time I was following them</u>. Suddenly I'm not part of this agreement anymore. [emphasis added]

[113] I found this evidence to be revelatory. I accept that the mother devoted her not-insubstantial personal, emotional, and psychological resources to making the marriage work, including an attempt to 'fit in' with the father and his family's way of life. When that failed, her mode of relating to the father and his family also changed. Definitionally, however, the mother's clearly articulated decision to live as she decided, and not according to what she perceived as 'rules' within the father's family, demonstrates an absence of control over her.

[114] The mother alleged that the grandfather had tried to push her out of parenting the children and had told her, in front of the children, that he could parent better than she could. She further alleged that he began to surveil her constantly, including taking photos and videos of her. None of this had been put to the grandfather in cross-examination, prompting further objection.

[115] The father's counsel made an omnibus objection to every specific instance of misconduct the mother alleged that had not been put to the father in cross-examination. In the interests of completing the trial, I received the mother's evidence in its totality, subject to later submissions on the admissibility/fairness objections.

[116] The mother's evidence then turned to the contents three large binders, which her counsel had described by saying "These are now [the mother's] evidence". Certain of the pages and tabs in the three binders that the mother wished to present as her case were pages from her own journal, or things she had previously written down, purporting to confirm her experiences and

perceptions of events. I ruled that those materials were all prior consistent statements, and hearsay, and thus inadmissible.

[117] Of the matters the mother testified to from the binders, one of the first included further allegations of aggressive behaviour by the father which had not been put to him, prompting a further objection. The mother also testified that she believed she had been under surveillance “every minute of every day”. She also described herself as having been in dire straits financially from the separation in 2016-2018. She testified about not having money for food. She borrowed approximately $300,000 from friends and family during this period.

[118] The balance of the mother’s evidence consisted of describing at length her version of the three binders full of emails and other correspondence as her evidence of coercive control, the father’s parenting deficiencies, and their inability to co-parent. The points the mother sought to establish through these materials broadly fell into the following categories: financial dealings between the parties post-separation; the struggle over parenting time prior to Justice Jones formally ordering 2/2/3 per the PN8 in late 2018; difficulties in co-parenting; conflict over healthcare for the children; alleged surveillance of the mother; control over and attendance of the parents at extracurricular activities; the failure of external interventions such as parent-coordination; and the involvement of other third parties in their conflict, such as schools, activity organizers, and other members of the legal community.

[119] The emails followed a similar pattern. The mother would narrate a history of certain events, including subtle, often implied allegations of some sort against the father or his family. The father would respond with an objection, asking the mother to stop what he characterized as lies or false statements, and asking the mother to stop barraging him with such emails. This pattern repeated itself countless times in the hundreds of pages of emails in the mother’s binders.

[120] I have no difficulty finding that the father’s description, quoted above, of the parents’ dispute being driven by this email dynamic is precisely correct.

[121] As the mother was the only parent alleging unfitness of the other parent, and seeking a marked deviation from the PN8 recommendations, her evidence requires a detailed assessment of credibility. The contents of her cross-examination will be treated under that analysis.

(vi) <u>Other witnesses</u>

[122] As mentioned above, the father called the grandfather, SW, and SD as witnesses. I will address the grandfather’s evidence later in these reasons.

[123] The mother called several friends and community acquaintances as witnesses, including CK, SF, SB, and SD.

a. Evidence of SW

[124] SW was the father’s new partner. They had been together in a committed relationship since October of 2016. At the time of trial, SW and the father had put their relationship on hold because they had been unable to see one another throughout Covid and it was unclear if any romantic relationship between would continue.

[125] SW is every bit as potent a personal and professional presence as the mother and father. I found her to be a very direct, forthright, and objective witness. I believe her evidence and accept its salient points in their entirety.

[126] She testified, consistently with what she had told the PN 8 Assessor, that she had considered having children with the father and had thus actively evaluated his parenting. She described the father as a loving, encouraging, supportive, kind, and intellectually stimulating partner and father. SW testified that she had never witnessed the father speak negatively about the mother to the children or ask them about her parenting.

[127] SW was categorical that the father was never abusive to her verbally, physically, emotionally, or in any other way. She testified she would never be with someone who behaved in a controlling manner towards the mother of his children. I accept this to be true.

[128] In one of the most potent moments in the trial, it was put to SW that the mother had stated in questioning that the kids reported to her having seen SW being abused by the father in the same way he had abused the mother. The dynamic and exchange of energy within the courtroom between the parties, together with the substance of SW's answer, lead me to accept beyond doubt that she has never been the subject of any abuse or intimate partner violence by the father.

[129] No evidence of any abuse by the father against anyone was put to SW in cross-examination.

b. Evidence of SD

[130] The father called his sister-in-law, SD, who is also a lawyer. She gave evidence that she had never seen the father act inappropriately towards the mother. She was also asked about the mother's professional network in Calgary and gave the following answer:

> She immediately built a very extensive network [after arriving in Calgary]. She was on the board of everything. She was at all the meet-and-greets and wine and cheese and putting together huge functions. Even after the birth of her second child, she put together the [large event]. Which is – you know she did a great job, and you, she was recognized for – she invited my husband and I to go there. She was very involved, and she ran a marathon, so she must have trained for that. She – yeah, she had a big network.

[131] SD testified the children never seemed distressed while in the father's care, and that she had never heard the father speak negatively about the mother in front of them or permit anyone else to do so.

[132] She confirmed that the father had felt very stressed and threatened during the separation at the prospect of the mother taking the children away to British Columbia. She also gave evidence of the mother acting in a manner that discouraged the relationship between the children and their paternal cousins.

[133] No allegations regarding the father's behaviour were put to SD. I found her to be a straightforward and believable witness, though with an obvious interest in supporting the father.

c. Evidence of CK

[134] CK met the mother when she (the mother) coached children's soccer. She described the mother as an excellent coach and very attentive parent, who is attuned to the needs of children and devoted to meeting them. She had little in the way of insights into the parental conflict.

d. Evidence of SF

[135] SF is an involved parent-community member and knew the mother through their mutual service on local school-related boards. He testified about being brought into the parent's dispute through emails regarding soccer and the mother having stepped down from a board to avoid it being negatively impacted by the parental conflict.

e. Evidence of SB

[136] SB is a mother in the community and acquaintance of the mother. She described the mother as a dedicated volunteer in the community, always willing to help with events and activities related to the children. She also described her as caring and nurturing towards all the children she interacted with, and "well and truly more organized than most". She testified that she had not seen the father much before the separation, but that he was around more thereafter.

[137] SB also provided evidence of uncomfortable interactions she observed between the mother and father, that I will discuss further below.

f. Evidence of SD

[138] SD came to know the mother because they had children of the same age in the community, and both served on a school-related board together. She described the mother as loving, patient and very active with her children. She described having seen the father at pickups at the school, almost every time he had the kids, in the current year, whereas previously the nanny was there to pick them up about half the time. She testified that he mostly kept to himself. Her children go to the mother's new home regularly for playdates and she spoke positively of that home environment. She also re-iterated how active the mother was in school and community activities.

(vii) The PN8 Update

[139] The PN8 Update was also impressively thorough. It found that the father was not perpetrating any abuse against the children and remained a fit parent. Indeed, it detailed his efforts to address the children's actual concerns with Dr. Pezzot-Pearce's help and guidance.

[140] The PN8 Update dealt with a further traumatic event that had taken place in the days following the conclusion of the mother's cross-examination. The father found disturbing writings, done by A, at his home. This included part of a story in which A had written that Chari had burned her hand on purpose, asking for help, and saying she did not want to see her father.

[141] The father spoke to A about this and recorded the conversation. The recording is in evidence. In it, the father deals sensitively with the child's worries and asks why she wrote it after the child says it's not true. A replied: "So daddy, on mommy time she keeps telling me to do this. I don't know why." The father asks her who "she" is and A replies "mommy". [emphasis added]

[142] This incident came up in Ms. Rohatinsky's update interviews with the children. She reported as follows:

> I explained to E that my job was to write to the bossy helper and asked if there was anything she needed me to write. She stated "right now nothing's wrong…seriously, there's nothing bothering me…I just feel happy…I'm happy with my dad." When asked about what A had written, E stated, "A told our dad [that] our mom was making her write these things…bad things about our family…I don't think A meant to write." She continued, "our mom doesn't say that to me, ever…or say anything bad about anyone…but she did to A…that's not fair to A…that's all I can tell you about that 'cause that's all I know." She added, "this is the first time she's ever done this…when I found out she had written this letter…A has never done anything like that, it's just not like her, I don't know what my mom wanted."
>
> When asked to describe that incident, E stated that they had gone for dinner at the Calgary Tower, A was not eating, [the father] asked her if she was okay, he found the letter the next day and "A told the truth" that [the mother] had told her to write it. She explained that she and A had slept in [the father's] bed that night "to make A feel cozy, it's pretty normal for us to sleep in our dad's room but on weekdays it's not," so it was an exception that time and "I think it was to make A feel good…I think it makes A feel really relaxed and cozy" to sleep in their dad's room.
>
> [emphasis added]

[143] In one interview with Ms. Rohatinsky, conducted at the father's home, A played happily, talked of her Christmas plans with both parents, and told Ms. Rohatinsky that the father "is a good snuggler" and how she and her sister like cozying up together with him when they watch movies. Shortly after, as the session was ending, she was asked if she could make a one wish, what would it be. She initially said she did not know, and then offered "maybe not to see my dad anymore…he's mean". She then said, "he's not always mean" adding he didn't yell as much, and finally concluding with "I meant to say not really at all."

[144] In her earlier testimony, Dr. Pezzot-Pearce reported that she perceived that the children "sense some pressure to report different things," and, in terms of E's use of sophisticated words, "she likely uses them because she's heard them without truly understanding what they mean."

[145] She also found that their negatives about their father had little detail behind them when further inquiry was made, and are incongruent with the children's presentation in their father's company. She also found their occasional strong complaints about Chari and SW to be at odds with the repeated expression of affection for both of these people in their lives. Dr. Pezzot-Pearce stated that "for some reason I don't believe most of this", going on to conclude that the children were:

> "...clearly caught between the parents… They have few complaints in the last few months." She added "I don't see him [the father] as being mean to these girls…[he] is not an abusive dad… He just isn't… I know mom's experience with him wasn't good… I've seen it many times with these kids… He is never harsh,

> he's always very supportive with them… And he seemed pretty content with him."

[146] This view mirrored that of Ms. Rohatinsky, who concluded:

> [I]n general, A and E appear to have close, comfortable, and loving relationships with both parents. They only seem to be guarded at times they are reporting complaints about [the father]. A made contradictory statements about [the father] during her interviews and sometimes in consecutive sentences. Complaints about [the father] were banal, for example that he made them eat healthy food. These complaints also tended to lack substance or explanation…

[147] The PN8 Update also re-affirmed that the children presented as better regulated with the father, and that the mother continued to overestimate and overstate the children's emotional condition. Similarly, it found that while the mother continued to voice concerns about the adequacy of the father's parenting, he "steadfastly refrained" from expressing similar concerns about her.

[148] In blunt terms, Ms. Rohatinsky concluded that:

> While [the mother] has consistently asserted that [the father] poses a threat to the children and that they are fearful of him that is not the conclusion of this assessor. The problems the children are experiencing would seem to be better explained by the degree of conflict between these parents of which the children are aware, the significant differences in the parenting styles, the children being the source of information between homes because of the lack of effective communication between the parents and a parenting schedule that includes an excessive number of transitions…"

[149] In short, the PN8 Update confirmed the impression this court had already formed upon hearing the evidence of Dr. Pezzot-Pearce some months earlier, namely that the negative reports being made by the children about the father, Chari, SW, and the father's counsel, were the product the mother expressing her feelings and beliefs to them about the parents' conflict and going so far as to pressure them to repeat these to the relevant professionals.

[150] I have no difficulty accepting the conclusions and findings of the PN8 Update and accept them as matters of fact in this trial. I find that the children's' statements about not wanting to live with their father, or him being mean, are the product of coaching and prompting by the mother, and do not reflect their true feelings.

VII. Analysis of the Evidence

(i) <u>The father as witness</u>

[151] The father was, overall, a fair and responsive witness, cautious to be accurate in his answers. He generally accepted propositions that may have been unhelpful to him without undue argument and made some reasonable concessions about his role in the parental conflict. Speaking of the period of marital breakdown, the father expressed regret and embarrassment for some of his emails to the mother and testified that has since tried to lower the emotional content and tone

of his communications, although the underlying tension persists. He had hoped the parents could resolve their matters through mediation.

[152] What emerged from his evidence was the struggle between the parents for parenting time while they continued to both nominally live at the matrimonial home, together with escalating conflict expressed in the endless emails. The following exchange encapsulates both the tenor of the father's cross-examination and the parental relationship itself with striking acuity:

> Q: You were trying to control the situation, weren't you?
>
> A: No, I wasn't trying to control anything, Ms. Lenz.
>
> Q: Do you agree that you and [the mother] were in and remain in a high-conflict parenting situation?
>
> A: I believe that there's situational conflict related to the divorce, and I believe that some of it is of the engineered variety. And I believe that with a very detailed parenting plan, a lot of that would dissipate. But the conflict is not, it's this email-based exchange that happens, sometimes over reasonably inconsequential matters, and that's where it is. And it creates stress and all kinds of other things. But is it, for the most part, trickling down to the girls? I would say no, it's not.
>
> Q: Okay. But that didn't answer my question. Do you agree that you and [the mother] have been and continue to be in a high-conflict parenting situation?
>
> A: It's high-conflict, but informed by my views that I just stated.
>
> Q: Yes. So your views are it's not your fault?
>
> A: No, I'm not saying it's not my fault. I don't think I'd be here today if it wasn't also my fault.
>
> Q: Okay.
>
> A: That's not what I'm saying at all. I'm saying that it's predominantly driven off this email-based, what I believe to be, situational conflict.

[153] One would not have been left with any impression at the end of the father's evidence that this was anything other than a run-of-the-mill divorce in which the parents did not get along, distrusted one another, and sent a lot of unhelpful emails.

(ii) <u>Assessment of the mother's evidence</u>

[154] The unique structure of this trial requires a much closer examination of the mother's evidence. This is for three reasons. First, virtually none of the meat of the mother's allegations was put to the father. Therefore, there is a paucity of evidence from him to evaluate the coercive control issue and his fitness to parent. The core finding of his fitness as a parent turns more on the evidence of the professional and collateral sources than his own.

[155] Second, he did not allege that the mother was an unfit parent or otherwise denigrate her in his testimony. On the other hand, the mother made scores of allegations and aspersions against the father that struck at the core of his suitability as a parent.

[156] Finally, the father also relies heavily on the mother's presentation of evidence, though to argue that her manipulated and mischaracterized description of the parental relationship demonstrates why giving her a dominant parenting role, and any unilateral control over key decision-making, would not be in the children's best interests.

[157] Therefore, a more detailed and critical assessment of the mother's evidence is required than that of the father. It is not that he gets a free-pass – though I found him to be a generally credible witness as described above – but that his original evidence in-chief is simply not what this case turns on as it was argued by the parties.

[158] Assessment of the mother's evidence requires first a consideration of the problem raised by her systematic failure to put her case to the father and his witnesses, followed by an analysis on traditional measures of credibility.

(iii) The ***Browne v Dunn*** problem

[159] Effectively nothing of the mother's allegation that the father had committed the most insidious form of intimate partner violence, and thus should be relegated to an access-parent role, was put to him in cross-examination. This included the examples she offered in support of these allegations in her evidence.

[160] As indicated above, the father's counsel made an omnibus objection to every specific instance of misconduct the mother alleged that had not been put to him in cross-examination. There were parallel objections made with respect to the mother's testimony about the grandfather and SW, and the testimony of the mother's acquaintance, SB.

[161] SB provided the only corroborating or independent evidence of inappropriate behaviour by the father. She testified that she had seen several interactions between the mother and father that concerned her. In the period following the separation, she described how the father would hover over her interactions with the mother and would seem to be more concerned with what the mother was doing or saying around other parents than with the children (if they were present). Unfortunately, nothing about these events was put to the father in cross-examination.

a. ***Browne v Dunn*** in family law

[162] The rules of evidence apply in family law. Basic fairness dictates that, when a party plans to contradict, impeach, or malign a witness with later evidence in its own case, it must first put that evidence to the witness, so they have a chance to respond: ***R v Lyttle***, 2004 SCC 5, paras 64-65; ***R v Werkman***, 2007 ABCA 130 at para 7; ***R v Podolski***, 2018 BCCA 96 at para 145. ***R v Dexter***, 2013 ONCA 744 at para 17. This principle has come to be known as the 'rule' in ***Browne v Dunn*** and applies in family law proceedings as much as anywhere else in law: for examples of its application see ***AE v TE***, 2018 ABQB 449 at para 241; ***Liu v Huang***, 2018 ONSC 3499 at paras 60-63.

[163] The practical application of this principle was succinctly summarized by Justice Healy in ***R v Chandroo***, 2018 QCCA 1429 at para 13*ff*, and applies with equal force in this case:

> [13] The principle in *Browne v. Dunn* is typically, but misleadingly, described as a rule. It is misleading because the principle is not absolute and, where a breach is found, invites the exercise of judicial discretion in its application. The application of the principle requires attention to two questions. The first is a

question of law that is reviewed on a standard of correctness while the second, which concerns the exercise of judicial discretion, requires considerable deference on appellate review:

a) Is a party leading evidence in chief that would contradict or impeach the evidence of the opposing party's witness on a significant matter without having first cross-examined the opponent's witness on the same matter?

b) If yes, what can be done about it to ensure the fairness of the trial?

[14] The first question requires the judge to identify whether the evidence being led is properly characterised as falling within the principle. This includes an assessment of the relative significance of the evidence being led in chief to the evidence previously led by the opposing party and not challenged in cross-examination. If that evidence is relatively insignificant, the judge may decide not to invoke the principle in *Browne v. Dunn*.

[15] A breach of that principle might occur either because counsel chose to do it deliberately or inadvertently through ignorance of its content and purpose. In either case, if the judge does invoke the principle, the second question affords various answers to address the breach. These lie within the discretion of the judge and should be the subject of representations by counsel. One possibility is to recall the witness for cross-examination (or further cross-examination). The judge has no obligation to suggest this remedy, or to recall the witness, although such a suggestion is commonly made. A second is to admit some or all of the evidence tendered in breach and thereafter ensure that the trier of fact is specifically instructed that in assessing the whole of the evidence careful consideration should be given to the probative value of any testimony on both sides that is concerned with the breach. A third option is to enforce the principle in *Browne v. Dunn* by disallowing the party in breach to lead contradictory evidence. [footnotes omitted]

[16] The first two options are remedial measures to rectify a breach. The third forecloses such a remedy and may be fully justified, to ensure the fairness of the trial, by refusing to afford an opportunity to a party in breach to correct a self-inflicted error or to profit from impeachment by surprise. But this drastic third option cannot be applied in a manner that would deprive the accused in a criminal trial of the right to make full answer and defence. Obviously, the discretion of the trial judge in responding to a breach of the principle in *Browne v. Dunn* will be governed chiefly by the relative importance of the evidence in question in the outcome of the case.

b. Question #1 – was there a breach of this principle in this case?

[164] Answering the first question is easy in this case. It is insufficient that a party 'know', in general terms, that his or her behaviour, parenting ability, or other facet of character will be attacked by the opposing party. It is neither fair, nor judicially efficient, to require witnesses to anticipatorily defend and explain themselves against as-of-yet unmade allegations. I appreciate that there may be cases:

> …where it is clear or apparent, on considering all the circumstances, which may include the pleadings and questions put to the witness in examination for discovery, that the witness or opposite party had clear, ample and effective notice of the cross-examiner's position or theory of the case. Therefore, where the other party, the witness, and the court are not caught by surprise because they are aware of the central issues of the litigation, the rule in *Browne v. Dunn* is not engaged: ***North America Construction (1993) Ltd v Yukon Energy Corporation***, 2018 YKCA 6 at para 20.

[165] An allegation of severe domestic violence is not such an instance. It is difficult enough to prove a negative, much less one for which you do not know what examples will be highlighted and interpreted by the other side. Evidence of the abusive conduct, or at least examples of it, must be put to the alleged perpetrator. While isolated failures to cross-examine on every facet of one's case may have little overall significance, a complete failure to put a large series of inflammatory accusations and alleged examples of bad conduct to a witness may well lead the Court to give diminished weight to that evidence: ***Zahn v Tauber***, 2012 ABQB 504 at para 169.

[166] Equally, broad and general statements by a witness during their evidence in-chief that they are of good character and have not committed certain types of behaviour, do not suffice as an opportunity to address specific allegations and examples of misconduct that the opposing side knows it will be leading later in evidence.

[167] In this case, the mother relies on the fact that her version on many facets of the case was contained in her statements to Ms. Rohatinsky, thus were known to the father, and his failure to address/deny/explain those in his evidence lies at his own feet. This submission misses the mark for two reasons. First, it is quite clear that Ms. Rohatinsky related the mother's positions/versions of events neutrally and without necessarily accepting them. Indeed, her conclusions and recommendations make clear that she did not accept much of what the mother had conveyed.

[168] Second, observing the witness being confronted with bad evidence about themselves is very useful to the fact finder. Confrontation is the crucible in which findings of fact are made. This litigation reality underwrites the 'rule' in ***Browne v Dunn***. The act of confrontation both gives the witness the opportunity to reply and allows the Court to draw credibility conclusions from the nature and quality of the witness' response: ***R v Nicolitis***, 2018 ONCJ 934 at para 71.

[169] In her written submissions on the ***Browne v Dunn*** issue, the mother argues that the father's counsel did not object to many of the examples of the alleged infringement of the principle which they later catalogued in their submissions on the point. That forbearance was a result of my guidance during the trial that we would receive the mother's evidence contingently and deal with the ***Browne v Dunn*** issue at the end. I made that ruling as a matter of trial management, because the pervasive nature of the problem had become evident and the overlength of the trial was becoming a critical problem. Any lack of continuing objections must be understood in this light and cannot be held against the father.

[170] The principle in ***Browne v Dunn*** is engaged.

c. Question #2 – What is the remedy for the ***Browne v Dunn*** breach?

[171] The Court has a broad discretion to determine the appropriate remedy for a failure to confront the other side with key allegations and versions of events later led in one's own case.

There 'is no fixed consequence' for an infringement of this rule of fairness: ***R v Poole***, 2015 BCCA 464 at paras 43-44. Rather, the remedy should follow from the nature of the unfairness and the circumstances in which it arose. In ***R v Quansah***, 2015 ONCA 237 at para 117, the Court listed the following factors that may inform the appropriate remedy (albeit in the context of a jury trial):

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

[172] Early in the mother's case I expressed the view that recalling the father to get his version of the disputed evidence said to show his bad character/actions might best fit the Court's focus on the substantive interests of the children in a parenting trial. I have re-considered that view in light of the following circumstances:

- the breach was pervasive – the father's list of alleged infringements of the principle in relation to his evidence alone ran to 78 items, of which I find the majority of complaints are well founded;
- the breach was serious – the allegations not put to the father included supposed instances of physical violence and intimidating behaviour, instances of alcohol abuse, financial mismanagement and excess; his alleged absence from large tracts of the children's lives due to work and travel; covert surveillance; acts of disrespect both personally and professionally; improper behaviour regarding the children's clothing and exchanges of items; failing to provide appropriate medical attention; lying in communication; drugging the children; and more specific acts of cruel or unkind behaviour;
- the breach extended to other witnesses – the mother testified about allegations of abusive behaviour by the grandfather and never put those to him, and never confronted SW about any abuse she may have experienced or witnessed;
- the father's counsel objected immediately when this pattern began, and repeated their objections until I made it clear that the mother's evidence would all be contingently received;
- it was not practicable to recall the father, as well as other witnesses potentially, to answer the entirety of these allegations – this may well have consumed a further week or more of trial time; and

- the nature of the emails used as proof of bad conduct – rather than comprising direct, independent evidence of bad conduct (no email from the father contained abusive language), the emails were comprised mostly of the mother's description and interpretation of supposed events, and in many the father's contemporaneous responses contained express denials about those facts, or disagreement about the mother's interpretation of them.

[173] I find that this is a case where it would have been "highly impracticable to have the witness recalled": ***R v McNeill***, [2000] OJ No 1357 (CA) at para 49. Recalling the father and grandfather (and potentially SW) would have had the effect of re-doing virtually the entire plaintiff's case. Questions then would have arisen about how much further cross-examination, and *sur*-re-examination would have been required or permitted after the witnesses' initial reply evidence. This trial ran 260% overtime as it was. Adding this further time to the trial may well have pushed the completion of evidence into the fall of 2021, over 18 months after it began. This would not have been acceptable or in the children's best interests.

[174] In the emails the father repeatedly replies with phrases such as "stop lying", and things to that effect, disputing the mother's narrative. With the instances of duelling emails, I am not certain that recall would have much enhanced the Court's appreciation of the situation: ***R v SCDY***, 2020 ABCA 134 at para 75.

[175] For all these reasons, I conclude that the appropriate remedy to the unfairness in this case is to draw an adverse inference against the credibility of the mother's narration and interpretation of the contentious events, when necessary for me to resolve any issues in this case. I find this applies to her allegations that the father or another witness *did* something, such as a physical assault or the installation of surveillance devices. Similarly, the mother claimed that the children had witnessed "overt abuse". To the extent I am asked to find such abuse in allegations or instances not put to the father, I view those with scepticism.

[176] Similarly, having had no opportunity to hear the father's account of the events described by SB, I am unable to give them much weight. These encounters took place in the early parts of the separation, reasonably close in time to the mother having made extremely inflammatory posts on social media, which could be read as implying they were about the father, containing terms and hashtags such as "narcissist", "sociopath", "conartist", "pornaddict", "abuse recovery", and so on (Exhibit #7).

[177] Given the mother's deep network of connections within the local community, it is entirely plausible that the father may have been very concerned as to what was being said about him. Without his evidence on these issues, I place reduced weight on SB's testimony, because its significance is ambiguous at best, by direct consequence of the mother's litigation choices.

[178] The emails largely speak for themselves. The mother would narrate a history of certain events, including subtle, often implied allegations of some sort against the father or his family. The father would respond with an objection, asking the mother to stop what he characterized as lies or false statements, and asking the mother to stop barraging him with such emails. This pattern repeated itself countless times in the hundreds of pages of emails in the mother's binders. Rather than being objective evidence about the conflict, the emails *are* the conflict.

[179] The principle in ***Browne v Dunn*** has a limited application to the emails, effectively highlighting their already apparent nature as disputed and irresolvable exemplars of a pervasive parental conflict.

(iv) General assessment of the mother's evidence

[180] The mother's evidence suffered a number of serious problems.

a. A curated monologue

[181] Much of the mother's evidence took the form of a lengthy, self-directed monologue. Cautions from the Court that examination should be properly led had little impact on the running of the narrative train. This structure of testimony did not enhance its credibility. At many points it had the feel of a curated and annotated memoir, rather than a factual telling of events. While I would not disbelieve or reduce the weight of the mother's evidence solely for this reason, this discursive and single-minded pursuit of the mother's themes in her testimony proved consistent with a lack of overall objectivity.

b. Overstatement

[182] The mother's evidence was punctuated with overstatement. This was most particularly true in respect of her financial situation. Her evidence and submissions portray her as having been in dire financial straits and at the father's financial mercy. I find this portrayal to be inaccurate. For instance, she asserts in her submissions that:

> As a result of [the father's] ongoing refusal to pay proper amounts of child support, the children's resources for food, shelter, bedding, dental care, professional parenting resources like sleep coaching, grooming, car seats, bike or skates, and travel, once all met without issue, have been dramatically and punitively reduced but only while in the care of their mother.

[183] Similarly, at questioning in February 2019, she at one point stated, "I haven't had money to buy groceries over the last three years. I would like now to be able to buy groceries." This statement stands in contrast to the reality that the father had been paying $7,500 a month to the mother in uncharacterized support since December 2018, together with $105,000 in uncharacterized advances to that point and that she had lived rent-free for almost two years in the matrimonial home and had access to its resources and the children's items. A month after this questioning she purchased a $1,200 Canada Goose jacket.

[184] In January 2020, shortly after receiving a $1.2m property and spousal support settlement, and while continuing to receive monthly support and a significantly salary as in-house counsel to a national law firm, the mother wrote the following in an email to the father in relation to Dr. Pezzot-Pearce having inquired about an update account:

> If [it has not been paid], please let me know and I will see <u>if I can find a way to have them paid</u> so that our family can continue to access her professional services.
>
> [emphasis added]

[185] Similarly, the mother's bank statements reflected that she had significant assets and cashflow when she was telling Dr. Fong that she had no money. For all these reasons, I find that the mother's attempt to paint a picture of privation does not accord with the evidence or objective reality. While unemployed, she accessed (mostly though loans) and expended over $300,000. During this period, she also received a $200,000 inheritance from her mother. When employed thereafter, she was paid a six-figure income as corporate counsel.

[186] Undoubtedly, the mother has faced significant legal expenses and has had to budget carefully. However, to suggest that her children were materially deprived is an exaggeration. As Dr. Pezzot-Pearce observed, these are very privileged children in both homes by any conventional measure. The theme of financial privation began in the emails to the father and was repeated throughout the mother's evidence and submissions. I find that she consistently overstated this in a manner which negatively impacts her credibility.

[187] Finally, the mother filed a budget that was a work of fantasy, calculated to justify maximum Guideline child support. It posited $40,000 per month in after tax spending. This also speaks to her willingness to shape a financial narrative divorced from reality to advance her position.

[188] In a similar vein, the mother repeatedly stated that she believed herself to be under constant surveillance by the father, including through cameras he had installed to monitor her throughout the matrimonial home. She testified:

> And so [the father] had lots of rules, lots of restrictions. There were, as you say, locks and chains installed. I was convinced based on what he said and what I did was under surveillance every minute of every day that I was in that house…
>
> I believe there was surveillance my bedroom, in my bathroom, everywhere….

[189] This evidence led me to ask her directly what she had done about this. Her answer was: "nothing". There is a significant misalignment between her claim and her contemporaneous actions that flavours the description of her experience as exaggerative.

c. Insistence that financial offers were contingent on parenting

[190] The mother repeatedly insisted in her evidence that the reason she had not accepted any of the father's offers to fund her finding alternate accommodation was because these offers were contingent on her accepting equal shared parenting. This belief is not consistent with the documents and case management record. The first "With Prejudice" offer made by the father makes no mention of parenting. There was no response or counter to this offer. The offer was re-iterated in case management a month later. The judge was prepared to order payments along the lines of what the father had proposed, but the mother's counsel raised a separate and new issue of spousal support, and the matter was adjourned without result.

[191] The mother's evidence that the father never made an offer that was not contingent on a specific parenting regime is not accurate. I find that the mother was so firmly attached to her version of staying in the matrimonial home because she was being controlled by the father that she has difficulty acknowledging straightforward legal correspondence.

[192] Indeed, it appears that the mother did not even respond to a subsequent offer in which the father offered to accept weekend access parenting for the time being. A further “With Prejudice” offer made by the father to provide an advance of $250,000 in December 2016 stated as follows:

> The current situation of both parties residing in the matrimonial home is not in the best interests of the children. Our client’s foremost position is to protect the children from bearing witness to the ongoing conflict between the parties. So important is this that [the father] is making an immediate concession to limit his access to weekends to provide your client with the majority of mid-week time with the children…. Ultimately [the father] will be seeking more time with the girls…

[193] While this offer did include specific parenting terms, those represented a significant compromise by the father. The mother appears not to have countered this offer. The portrait she tried to paint of being under the father’s financial thumb, and thus having to stay in the “torture chamber” of the matrimonial home is inaccurate and misleading. I find that the decision to continue the unhealthy *status quo* was hers.

d. Non-responsiveness

[194] The mother was at times non-responsive to questions in cross-examination, preferring to repeat certain facets of her narrative. For instance, when directly asked whether she (through counsel) had ever asked the father if his first offer to fund her moving out was in anyway contingent on a particular parenting regime, the mother instead spoke about how she had, “no money to buy food for our children…no place for our children to live”.

[195] She was then shown a passage from the transcript of the November 2018 case management hearing, in which Justice Jones expressly invites emergency applications by either party if they find themselves in an untenable position before the next hearing. When Counsel put to her that she never made such an application, her answer was long, unresponsive, and again contained the assertion that she lived in poverty, stating that she, “had no money at all… no place to live, no food, didn’t have a car, like nothing.”

[196] The mother was also non-responsive when it was put to her that she never counter proposed a specific parenting schedule when the father raised this in December 2016, and to other simple questions, such as whether the PN8 assessor had recommended that the parties continue parenting coordination with Gary Kirk.

[197] I also found her evasive on a direct question as to whether she appealed Dr. Fong’s awards, after claiming she had not consented to them.

[198] Finally, when the Court asked the mother very directly for an instance in which the father caused the children harm, she did not give a specific answer but reverted to speaking about “this entire pattern over the entirety of our separation” and went on to repeat several generalized allegations. When asked a further specific question as to the last instance on which a form of ill-treatment of the girls (sleep deprivation) had occurred, she once again gave a long, rambling, and general answer, wavering into a multiplicity of other general categories of alleged wrongdoing by the father.

[199] These kinds of unresponsive answers to questions seeking specificity in the allegations made them sound much less real. The mother resisted answering straight-forwardly where the answer would be in tension with her narrative. This undercut her credibility.

e. Inconsistencies regarding the W family wedding

[200] When asked to explain her side of the story regarding why the children almost missed their flight to SW's family out-of-town wedding, she gave a lengthy, general answer which included the statement that:

> [The father] didn't share with, me the details of his plans…..<u>he certainly didn't tell me the flight times or anything like that</u>. [emphasis added]

[201] In cross-examination she was taken to a series of emails in which the father provided the flight times and dates directly to her, well in advance of the departure.

> Q: So you did have the flight times; correct?
>
> A: For the children, not for S. I was accused of making S miss her flight.
>
> Q: No, your evidence was that you did not know when the children would be travelling. That was your evidence in September, that you did not have the flight times.
>
> A: We hadn't agreed to the children spending this weekend with [the father] but –
>
> ….
>
> Q: … The question is whether or not you understood when the flights were to occur for the children.
>
> A: I did and --

[202] I find that the mother was untruthful in her evidence in chief, and evasive when confronted with this in cross-examination. While I think she likely believed her initial version when she said it, which is the best-case scenario for her credibility, this nevertheless demonstrates her dedication to her own narrative and version of events, irrespective of its objective accuracy. Her evasiveness when confronted with the reality of the situation further erodes her credibility.

f. Inconsistencies on damage to the matrimonial home

[203] Early in the trial, the father presented a video he had taken in the matrimonial home in August 2018. It showed an unspeakable scene of filth and destruction. Flies propagated in discarded fast food containers, feces sat unflushed in the toilets, walls, carpets and furniture were defaced with marker. Audio visual equipment had been damaged. The kitchen was overflowing with filth and dirty dishes. The house was in shambles. The father testified that Servpro disaster services were called to do the cleanup. Sections of carpet, hardwood flooring, and drywall had to be replaced. The home had to be fumigated and ventilated under pressure to remove the stench.

[204] The mother denied that she caused the damage seen in the video and vaguely suggested that third parties might have had access to the home. In her evidence in chief, the mother was

asked by both her counsel and the Court when she moved out of the matrimonial home and where she lived during this time. She consistently answered that she left in June 2018.

[205] The contemporaneous correspondence record, from the mother's binders of emails contains contradictory information. On September 2, 2018, the father emailed the mother advising that he was moving from his rented condo to a rented home near the children's school. The mother responded as follows:

> Thanks [father] for sharing that information with me. I hope the girls enjoy the new space. <u>Will your father and sister be moving to the rental house with you or do you require them to remain living with me</u>? [emphasis added]

[206] There appears to have been no reply from the father, and the mother emailed again on September 26, 2018, asking:

> You have not responded to my email below. Will your father and sister be moving in with you at your rental house <u>or do you require them to remain living with me</u>? [emphasis added]

[207] While I appreciate that the father deposed earlier in this case that the mother at times during this period appeared to be living elsewhere, the contradiction between the evidence in the trial and her emails at the time is concerning. There are two possibilities: either she continued to live at the matrimonial home in September 2018, in which case her evidence was untrue, or she was writing gratuitously false and inflammatory emails at the time, consistent with her narrative of being controlled by the father but inconsistent with reality. Neither option assists her credibility.

g. Lack of objectivity

[208] The father readily acknowledged that he played a role in the parents' conflict, and that the mother was a good parent from whom the children benefitted. By contrast, the mother gave the following answer about the father:

> Q: …what observations have you made about [the father's] caregiving instinct?
>
> A: From my observations, I don't see any caregiving instinct in [the father], not towards me.
>
> …
>
> A: Sorry, I don't see any caregiving instincts not towards me when I was his wife, he certainly doesn't owe me care now, but then. Not towards our children during the entirety of their lives, not towards our family pets or anyone other than himself….

[209] This unmitigated and extreme view of the father is not supported by the objective evidence in this case. I found the evidence and information about the father and his relationship with the children from Ms. Rohatinsky, Dr. Pezzot-Pearce, SW, and Dr. B to be credible and persuasive. I accept that evidence and find as a fact that the father has a caring relationship with his children, notwithstanding the ways in which parenting younger children has been a challenge for him.

[210] The mother's total failure to apprehend and acknowledge this, even in the face of a very bad personal history and relationship with him, bespeaks a real loss of objectivity. I agree with the Court in ***LeBlanc v Khallaf***, 2010 NSSC 219 at para 9 that this level of negativity and lack of measure calls into question a parent's reporting and interpretation of events.

[211] A similar loss of perspective was evident in the mother's response when she took the stand in the mid-trial *voir dire*, mentioned above. Instead of immediately denying the obvious implication that she had been coaching the children against their father, her immediate and lengthy response was to criticize the father for contacting his counsel about these events (which occurred 72 hours before the trial was to resume).

[212] While my request that she answer the question did bring forth the expected denial, her reflexive turn to characterize the dramatic and emotionally laden evidence the Court had just received as further evidence of poor parenting by the father was contextually jarring. No one in the room could have missed that the father was either tearfully dissembling about events of the utmost importance or had just given shocking evidence that the mother was engaging in severe alienating behaviour. The mother's instinct to answer as she did demonstrates a singular focus on finding fault with the father that is inconsistent with an objective view of the situation.

[213] Overall, I was most troubled by the extent to which the mother structured her evidence to suggest the father was an all-controlling figure, only to be contradicted by the contemporaneous facts. The PN8 assessor made the following insightful remark:

> The manner in which [the father] presented for this assessment remained consistent throughout the process. However, I noted that as the assessment progressed [the mother's] reporting of her own and the children's complaints about [the father] seem to shift. Whether it occurred intentionally or not, it appears that [the mother] adjusted how she characterized these concerns so they aligned with her belief of the presence of serious intimate partner violence and its deleterious effects on the children.

[214] This finding mirrors my own observations and aptly describes the overall tenor of the evidence of both parties at trial.

[215] Finally, the mother significantly over-reports the children's emotional distress and dysfunction, as measured by the professionals through validated standard instruments. While the father initially under-rated these concerns, the mother is significantly out of step with how objective outside parties assess the children now (as healthy and normal). I find that this is a function of the mother's heightened emotional activation, which was even evident in the courtroom. Objectively, she has two delightful, creative, bright, healthy and (surprisingly) well-adjusted children. The fact that she does not perceive this, but rather seems to promote a narrative of their distress, demonstrates a lack of objectivity (and is harmful to the children).

VIII. Findings of Fact

[216] I make the following findings of fact:

(i) Both the mother and father are capable parents, who love their children deeply and take proper care of them;

[217] I accept the evidence of the PN8 assessor, the children's therapist, SW and SD that the father is a fit, loving parent, with whom the children are safe, happy, and comfortable. Nothing undercut the work or conclusions of the professionals in this case. I find that the PN8 and PN8 Update conclusions that the children are doing relatively well in shared parenting, and that this model is in their ongoing best interests, are supported by the facts and were reached through a proper and credible process, by a qualified and committed assessor.

[218] I find as a fact that the children love and feel safe with both parents and that the children gain significantly from their relationships with both sides of their family. The parents have different and contrasting parenting styles. The children suffer some dissonance transitioning between them, but I find that they gain significant benefit from their time with both the mother and the father.

[219] I find that the assembly of people the father brings to the children's lives are overwhelmingly a positive influence. Chari has cared for the children since their birth. I accept that they love and feel safe with her and that she cares for them well. Her continued involvement as an active parental figure in the father's home is a positive factor. The way the father introduced SW to the children was cautious and appropriate. She was a positive influence in the children's lives and would continue to be if her relationship with the father continues. The father's extended family includes cousins of roughly similar age and many aunts and uncles who care for them. Lastly, I am satisfied that the grandfather is also a positive figure in their lives with whom they are fortunate to have a relationship.

[220] I have no reason to believe that the mother's extended family are any less of a loving and beneficial influence in the children's lives. It was never suggested otherwise.

(ii) The father has improved as a parent over the course of the trial

[221] It appears that, during the early years of the children's lives, the mother was the more involved parent, with her efforts being supplemented by Chari's assistance. The father had a clear focus on his career as a rising corporate lawyer and prioritized work and networking above child-rearing. However, as time passed his approach to parenting evolved. When Covid arrived, the father began to spend unprecedented amounts of time with the children and became deeply involved in their learning.

[222] In September 2020, the father was subjected to the ultimate shock when he learned that his children had made statements to their psychologist that they did not wish to see him ever again. This precipitated the crisis in which I requested that the psychologist meet with him and express directly what she ascertained to be the children's needs. This meeting took place. Based on all the evidence, particularly that of Dr. Pezzot-Pearce, I find that the father leaned-in to becoming as good and responsive a parent as he could be. I find that he overcame his proud and stoic nature and really opened himself to advice on how to be with his girls.

[223] As conveyed in the PN 8 Update, Dr. Pezzot-Pearce reported the following:

> ... Although [the father] was initially guarded about meeting with her, "once he met me… he has been quite engaged, asks questions, ask for suggestions. He

> implements suggestions and is focused on what he needs to do." She explained that [the mother] tends to be more focused on the children's distress and on how [the father] is not doing his job. She described [the mother] as "quite a natural with kids" and while she acknowledged that [the father] lacks the same intuitive style, "<u>if I make a suggestion, he is always good at following through.</u>" She characterised the types of questions [the father] asks as "on the ball" and appropriate. [emphasis added]

[224] The father has worked to ameliorate his parenting weaknesses. He is commended for doing so, and the Court urges both parents to continue following the guidance of Dr. Pezzot-Pearce and other professionals.

(iii) <u>The mother has become the primary driver of the conflict</u>

[225] The evidence reveals that while, as Ms. Rohatinsky observed, the father has done less to de-escalate the conflict than he may believe, the mother is now the primary driver of the conflict between the parents.

a. The mother was the reason the toxic cohabitation continued

[226] The mother's position is that she had no choice but to stay in the matrimonial home because she could not acquiesce to the father's parenting demands in exchange for funds to find alternate housing. The objective evidence belies this. The father's first offer for her to find her own home was reasonable and contained no explicit strings. It assumed some co-parenting, but that was reasonable, and its scope was never queried or negotiated. The offer was simply ignored.

[227] The father made a second reasonable offer in December 2016, in which he offered to temporarily relegate himself to weekend access. This was never explored or countered by the mother. The mother's evidence that she would not accept the father's offers because the parenting arrangements he was suggesting were not in the children's best interest must be examined in this light.

[228] Logically, if the modest parenting sought by the father in his December 2016 offer was not in the children's best interests, the mother's position could only have been that virtually *no* meaningful access was acceptable. She chose to continue living, with the children, in "total chaos" in a "torture chamber" rather than accept that the father should have even such limited access by agreement.

[229] Ms. Rohatinsky was asked if it would concern her if the mother had been given a reasonable path to live elsewhere, without the father and his family members, but had chosen not to. She answered that she would indeed be curious to know why that choice was made.

[230] I find that this curious choice has but one explanation: the mother prioritized resisting any recognition of the father's right to parenting time over a reduction in their conflict, notwithstanding the negative environment this was creating for the children. By contrast, the father was offering to compromise his parenting position for the benefit of his children.

b. The Wedding

[231] I have no difficulty finding that the mother intentionally sabotaged the father's participation in his partner's family wedding. The circumstances vested this event with unique importance. The mother had travelled with the children the weekend before, with the father's consent. I find that her choice to go out-of-contact with the children until the very last minute, knowing full-well the timing of their scheduled flights, was a calculated act of passive aggression meant to hurt the father and cause him stress. The severity of this act, and the hurt it caused, did long-lasting damage to the parents' ability to trust one another and work together.

c. Damage to the matrimonial home

[232] On a balance of probabilities, I find that the mother was responsible for the damage to the matrimonial home depicted in Exhibit 21. It makes no sense that the father or his family would have done this. The house was their family dream. The father became visibly and unusually emotional when viewing and describing the video. I find that his distress at the home's desecration was genuine.

[233] The same is true for the grandfather. He gave evidence about what it was like for him and his daughter to continue living in the matrimonial home with the mother after the father had effectively moved out. He became quite emotional relating instances in which the mother was verbally abusive to his daughter and testified that when the mother is angry everyone feared her. He was very clear about how much the matrimonial home had meant to him, and that he and the father played no part in defiling it. I found the grandfather to be a modest, pious, and entirely credible witness, though one with an obvious personal interest in supporting his son. I am certain that neither he nor any member of his family were responsible for the damage.

[234] On the other hand, the mother described the home as a "torture chamber" and had made a point of saying she no longer lived by the father's family's rules. Chari, who expressed fondness for the mother and regret at the deterioration of their relationship, told Ms. Rohatinsky that the mother:

> …lets the children do what they want "paint on the carpet, markings on the wall, she doesn't care…that's unusual because when the house was built they were very protective then all of a sudden she just let whatever…the house is a mess" since [the father] moved out.

[235] I also note that the volumes of emails the mother provided in her evidence also contain repeated requests by the father that the mother not vandalize the home or continue with actions that damage it or reduce its value.

[236] The mother's emails suggest that she was living, at least in part, at the matrimonial home into August 2018. This is consistent with the father's evidence. These emails contradict her trial evidence and give rise to an inference that she was attempting to avoid the suggestion that she was responsible for the damage to the house by claiming she no longer lived there. I draw that inference. I find that the mother lived, to some extent, in the matrimonial home at least to the beginning of August 2018.

[237] Three things follow from my finding that the mother was responsible for this damage. First, I find that the mother was not honest in her evidence on this issue. Second, these

circumstances demonstrate the extent to which the father and his family members had been driven from the home by the conflict with the mother, demonstrating that she was in control of the dynamic. Third, her choice to wantonly damage the father's once dream-home is evidence she was driving the intensity of the conflict.

d. Constant micro-aggressions in communication

[238] The mother's emails frequently contain inferential attacks on the father. Astonishingly this continued during the trial. A few examples will suffice. In a September 2020 exchange, the mother sent an email (Exhibit 121) on a transition day conveying routine information, but then added: "As you know, each transition, I do ensure they wear the exact clothing they arrived, but as the weather has changed, I will dress them in fall clothing today." This required the father to respond, "I have never asked or demanded that the girls wear the clothing they transition to you in. That is your choice to do so."

[239] In an October 2020 series of emails (Exhibit 116), the mother continually peppers otherwise ordinary correspondence about activities with self-serving and passive-aggressive phrases such as: "I have offered you total control of the children's activities"; "you had instructed me not to host playdates.."; and "I am pleased you have now decided, after 4 years of refusing to allow the girls to attend the music studio…that you are now willing to allow them to return to this community they have been part of since infancy."

[240] These statements caused the father to have to deny the implicit allegations, creating a further cycle of conflict, and serve no purpose beyond self-servingly reenforcing the mother's narrative.

[241] On a Tuesday in October 2020, the mother emailed the father saying she would be flying with the children to Vancouver on Friday and returning Sunday afternoon (Exhibit 117). The father replied, reminding the mother that the Court's interim Order required four days' notice of travel and provision of an itinerary, and asking for flight details and where they would be staying. The father's characterization of my interim Order is correct.

[242] The mother replied with a lengthy email that began by ridiculing the father's justified request for information: "…as you have previously asked for me to provide you with the details such as the license plate number of any car the children might ride in, and criminal record checks for any person they might come into contact with, I can advise you of the following information:" She went on to provide a mocking level of detail, including details about the children getting Halloween candy that included the gratuitous comment that "I understand you believe this to be poison".

[243] The father sent a short, calm, and neutral reply, thanking her for the flight details and stating that this is all the information he required.

e. March 2021 Doctor's appointment

[244] The parents have shared medical decision making by implication of the Order of Justice Jones. As the trial reached its final phase, on the eve of the release of the PN8 Update, the mother unliterally booked appointments for the children at a new medical clinic. There was no medical urgency or emergency. She misnamed the clinic in her communication advising the father of the appointment.

[245] The father objected, out of concern that the mother was attempting to recruit the doctor as a witness to bolster her flagging abuse claims. However, he provided the following response to the mother by email:

> If you are asking that we find a new doctor for the girls, I am in agreement to do that with you, however, it does need to be done together, not unilaterally by one parent. I would suggest that we each provide the other with any options we would want the other parent to consider. We should then be able to meet with the doctor in advance and then we can both agree on who the new family doctor would be.

[246] The father figured out which clinic the mother was taking the children to, and he and his counsel advised that clinic of the ongoing litigation and that he did not consent to the children being treated. The mother attended anyway and, despite knowing that a custodial parent refused consent, the doctor in question saw the children. The father produced an affidavit in which he deposed that the girls were upset at having missed school and were confused because they had been asked a lot of questions by the new doctor when they knew that Dr. B was their doctor.

[247] These events necessitated a hearing and an Order from the Court enjoining such conduct. The doctor in question testified when the trial resumed. She indicated that she had since become the mother's personal physician. I regret to say that I found her evidence as to why she proceeded to treat two children in the absence of parental consent, in the context of highly contentious trial proceedings and the absence of any urgent medical issue, less than satisfactory, and the clinic's conduct unprofessional. I remain suspicious as to what may have transpired to cause the physicians running the clinic to act in this manner.

[248] Ultimately, I do not need to make detailed findings about what exactly happened with this doctor or why, beyond observing that the mother's conduct flagrantly and unnecessarily generated conflict, demonstrated an unwillingness to take-up the father's offer to work collaboratively to find an appropriate new physician for the children, and is consistent with an attempt to recruit further professionals into their conflict.

(iv) <u>The mother involved the children in the dispute, spoke inappropriately with them about the family law proceedings, made derisive comments about the father and his legal counsel to the children, and behaved in a manner calculated to turn the children against spending time with their father</u>

[249] Between my own observation and assessment of the evidence, and the reports of the professionals, I am left with no doubt that the children's statements to Dr. Pezzot-Pearce in September and October 2020, and other similar events, are the product of the mother improperly involving them in the dispute. The children's use of identical, abstract adult language to speak ill of their beloved nanny Chari is particularly telling, and particularly distressing.

[250] I also find that the mother told the children about the court proceedings, named the father's counsel to them, and told them that they were bad people propagating lies. It is deeply troubling that someone would do such a thing to their kids. It is even more troubling to think that a legal professional would do so. This episode graphically illustrates how distorted the mother's perception of reality and sense of judgement becomes when she perceives that her narrative is at risk of being rejected.

[251] I further find that she has told the children that they do not do well at their father's house, that he is mean and cruel, and they should not want to be with him, when these things are neither objectively true, nor the children's true feelings. She has also obviously urged them to express and repeat these concepts to the professionals, orally and in writing.

[252] These behaviours are a form of child abuse. They must stop. The mother's ongoing emotional activation and distress has obviously discernible roots both during and before her relationship with the father. If she continues to be unable to differentiate these from her children's relationship with him, she will cause further serious harm to them. Section 7.2 of the newly amended *Divorce Act* addresses the protection of children from conflict and provides that a party to a proceeding shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding. The mother has intentionally done the opposite, to a very serious extent.

[253] If the mother's negative messaging about the father towards the children continues, the Court may have no choice but to consider a change in parenting to protect the best interests of the children, which is to maintain a strong relationship with their father: ***JLZ v CMZ***, 2020 ABQB 229 at paras 91-104, ***JLZ v CMZ***, 2021 ABCA 200.

(v) The mother has been untruthful to professionals and the Court about events involving the children, in attempts to further her claim for primary or exclusive parenting

[254] It follows from my other findings that the mother has been untruthful to the court and to the professionals involved, in furtherance of her attempt to advance the abuse narrative and seek primary parenting. Her February 2020 letter to Dr. Pezzot-Pearce was a contrivance. So too have been some of her reports in the subsequent processes and to the Court. Consequently, any future Court or professional who is called upon to be involved in this relationship should exercise caution not to be drawn into this dispute through similar devices.

(vi) The father has not committed any abuse against the mother or the children

[255] I fully concur with the conclusion of the professionals in this case and find as a fact that the father has perpetrated no abuse against the children. Moreover, I find as a fact that he has not perpetrated coercive control, or any other species of intimate partner violence, against the mother.

[256] The mother's allegations of coercive control ultimately lacked an air of reality. I find that what the mother considered 'coercive control' was the father's successful resistance to her desire to be the primary or exclusive parent, coupled with his rigid approach to structures, such as parenting arrangements, and his occasionally cold and insensitive approach.

[257] During the trial, the mother introduced into evidence a series of articles in relation to coercive control. One of these (Exhibit 95) provides an inventory of behaviours characteristic of coercive control. Examining those in the context of this case is illuminating.

a. Surveillance and stalking

[258] While the mother felt watched by the other adults in the home, there is no evidence of any actual surveillance, much less covert surveillance or access to the mother's electronic

accounts. Indeed, the evidence overwhelmingly suggests that the father wants as little as possible to do with the mother, and that this has been the case for a long time. Far from stalking or surveilling her, he would like her to just leave him alone.

b. Financial Control

[259] The fact of the father's superior income, and his use of those resources to fight for and facilitate his parenting of the children, does not constitute abuse. There is no evidence the father ever sought to control the mother's finances or banking. The parties maintained separate accounts at the mother's behest. The father paid the household bills but was eager that the mother re-enter the workforce and become financially self-sufficient. Indeed, he was overtly irritated that she had not. There was no evidence of the father seeking accountings from the mother, controlling her spending, placing the mother in debt, or in any other way exerting financial control. He made reasonably generous financial offers to fund their physical separation and has never missed any of the agreed property and uncharacterized periodic payments.

[260] The mother has accessed, earned, or was given significantly more funds throughout the period of separation than most separating parents. Her strained attempts to weave a narrative of privation stand in stark contrast to the actual harsh financial realities faced by most of this Court's family law litigants.

c. Psychological Control

[261] It is suggested that abusers may exert psychological control and coercion through a variety of behaviours. In this case, the evidence suggests that the mother was marginally more guilty of those than the father. He has never threatened her or any of her family. I find that it was the mother who, late in the marriage and early in the separation, threatened to take the children away to British Columbia.

[262] In terms of communicational abuse, it is the mother who has bombarded the father with emails, and who maligned him in her testimony as a human being that manifests no caring for his own children. The father has not published any personal information about the mother, whereas she made hurtful and inflammatory posts on her social media that were transparently about him. The mother defiled the matrimonial home, which was a cherished possession of the father and his family. The father did break a promise to pay the mother's law society fees on one occasion. While neither made false reports to the authorities, the mother involved the police on three occasions, at least one of which was wholly unjustified.

[263] Finally, the father exerted control over the mother's behaviour principally by insisting on shared parenting. After separation, the mother appears to otherwise have done as she chooses. This is most clearly demonstrated by the fact that she effectively drove the father and his family out of the matrimonial home, not the other way around.

d. Control via the children and parenting

[264] Neither parent appears to use the children as a conduit of abusive messages. I have found, however, that the mother has attempted to turn the children against the father, or at a minimum involved them in the conflict in a manner calculated to interfere with his equal parenting.

[265] The mother spent considerable energy attempting to show that the father ignored the children's medical needs and obstructed their extracurricular activities. I assess their differences

on these points as more related to parenting styles and a desire to control activities on their own parenting times. I am satisfied that both parents seek to do what they see as best for the children in these regards.

[266] There has been conflict over the children's possessions as they move back and forth between households. The father has offered to purchase multiple iterations of objects to minimize the conflict. While he may have to show more flexibility in allowing the children to choose what they take between homes, none of the conflict on these issues rises above what is common to separated parents who distrust and dislike one another.

[267] It was the mother who refused to agree to a fixed parenting structure during the early separation and has sought to be involved in what the father perceived to be his time, more than the other way around. This has been a mutual clash of goals and agendas rather than anything resembling control or abuse.

e. Restricting and controlling associations

[268] The evidence showed the mother to be a deeply connected, respected, and influential member in the local parent community. By contrast, the father was a relative outsider. The mother was (and is) a respected and well-connected member of the upper echelons of her profession. The father actively encouraged these connections when they were together. There is no evidence of jealousy, monopolization of her time, or any other socially controlling behaviours. Indeed, the father demonstrated disinterest towards the mother more than control. He did request that the house not be used for her meetings during the separation. Given the level of conflict, this was not unreasonable.

f. Physical violence and sexual abuse

[269] The mother alleged physical encounters early in the relationship. The encounters she described during the separation period were not put to the father and are contradicted by her repeatedly telling police there was no violence between the couple. There is no suggestion of any inappropriate sexual behaviour between the parties.

g. Gaslighting

[270] The primary mechanism of conflict between the parents has been their toxic email exchanges. In these, it is the mother who most frequently lays out historical narratives of events from her perspective. It was the father who would be placed in the position of repeatedly denying these accounts. The mother's inclination to overstatement, together with the credibility factors considered above, lead me to conclude that, if anyone was practicing gaslighting in this parental relationship, it was not the father.

[271] To re-iterate my earlier finding, this is a case of two potently powerful individuals clashing, not a situation of imbalance and abuse of power. I have treated this topic so extensively so that it does not rear its head again in this parenting relationship. The best interests of the children demand that they stop being poisoned with this narrative.

(vii) There is a risk of alienation if the mother were to gain a primary or dominant parenting position

[272] It further follows from my findings that, if given primary or dominant parenting, the mother is likely to continue her attempts to marginalize the father and to damage the children's relationship with him, whether wittingly or not. This is a material concern in relation to decision-making.

[273] There is evidence of a distinct pattern of the mother falsely reenforcing to the children that the father is bad, and that they do poorly at his house. She projects her own feelings on to them. This is manifest in her continuing description of the children as unhappy and dysregulated when they are not. For instance, both children told Dr. Pezzot-Pearce that they were not concerned about the video observation/visit sessions conducted by video by Ms. Rohatinsky. The mother, on the other hand, reported that, A was "highly upset after [the session] …. complaining that it's not natural to be observed" (per Exhibit 131).

[274] In Dr. Pezzot-Pearce's words to Ms. Rohatinsky, "in some ways it's a subtle influence…. I think [the mother] is more attuned to the kids [but] over time she has reinforced this negative commentary… [the mother] has nothing positive to say…5 or 6 things about Dad's [within a half hour appointment] …Dad never does that."

[275] In Dr. Pezzot-Pearce's most recent view, the mother's negative commentary and attitude towards the father "is shaping these kids to be two different people…two different realities…. if they say it often enough, they'll believe it…over time it will erode their relationship with their dad, fortunately it's a strong relationship".

[276] I am compelled to find that the mother poses an ongoing risk to the children's relationship with their father, to their great potential detriment. The parenting Order flowing from this trial must be informed by that reality.

IX. Conclusion on parenting and decision making

[277] A detailed Parenting Plan is attached at Appendix A. The key aspects of that Parenting Plan are set out below. Sample calendars implementing the parenting order for 2022 and 2023 are attached as Appendix B. Those calendars form part of the Order and prevail if there is perceived ambiguity in the written description. The parents are reminded that they may alter the parenting calendar by agreement.

(i) Parenting time and transitions

[278] Parenting time should be shared equally between the mother and father, as it has been for the past several years and as originally recommended in the PN8. But three transitions per week is too many. Dr. Pezzot-Pearce said so expressly to Ms. Rohatinsky, and I agree. Transitions are a flashpoint for conflict between the parents and the paradigm-shift between the homes is too great for the children to move that frequently. I appreciate the logic of the 5/2/2/5 regime, as it gives each parent their own weeknights for activities. On balance, however, I am satisfied that conflict over week-night activities can be mitigated by terms on the parents; the children should not suffer further from their parents' conflict. Therefore, the parenting schedule shall change to alternating weeks with exchanges of parenting time to occur at drop-off at school on Mondays

(or on Tuesdays if Monday is a statutory holiday or a PD Day) or at 9:30 a.m. during holiday periods.

[279] Each parent shall be entitled to two consecutive weeks of parenting time each summer. These two-week blocks shall not be consecutive; rather, they must be separated by at least two weeks of regular weekly alternating parenting time. Summer weeks shall be straight 7-day periods, not adjusted for statutory holidays.

[280] The Christmas School Holiday shall be shared equally between the parents. The Spring Break Holiday shall be shared by alternating years with each parent.

(ii) Decision-making responsibility

[281] Given the mother's tendency to overreport the children's emotional distress and dysfunction and her inappropriate engagement of a medical professional without the father's consent, the father shall have sole and final decision-making for all decisions related to medical care and counselling, in other words, for anything involving physicians or psychologists or other counsellors. The father shall consult the mother about all significant decisions by sending her an email and requesting her input. The father shall take her opinion into consideration in making his decision, but the father alone shall make the decision, having regard to the best interests of the children. The parents shall share joint decision making for other health care such as dental, orthodontist, optometrist, physiotherapy, etc.

[282] The father's sole decision-making authority over medical care and counselling shall be reviewable in three years from the date of this Order. The process for a review shall follow that of a Domestic Special.

[283] In a health emergency, the parent with care of the child at that time will make the treatment decision, on the advice of medical personnel. If a parent makes an emergency health decision, the parent who has made the decision must immediately contact the other parent.

[284] The parents shall have joint decision making over education and religion, however, where there is a school event for the children, the parent who is parenting the children during that event shall decide whether the children participate. There is no notice required to the other parent with respect to the children's attendance and neither parent shall inquire as to the children's attendance, but both parents shall use their best efforts to ensure the children attend their school events.

[285] Neither parent shall volunteer or attend at the children's school during the other parent's parenting time, unless related to an emergency regarding the children. Both parents are entitled to attend school performances, awards ceremonies or sports competitions but shall not interfere in any way with the other parent's parenting time.

[286] Both parents are entitled to obtain directly from the school copies of all communications between the school and parents, including correspondence, updates, school reports, school calendars, etc. Both parents shall arrange to attend their own parent-teacher conferences.

(iii) Parenting Coordination

[287] Where both parents consent, they shall immediately retain the services of a Parenting Coordinator with arbitration powers. The cost of the Parenting Coordinator shall be shared equally between the parties.

[288] The Parenting Coordinator shall be provided with all reports, judgments, prior arbitration awards, and court orders. The Parenting Coordinator shall speak to Dr. Pezzot-Pearce, Ms. Rohatinsky, and Dr. Fong when they are first retained. The Parenting Coordinator shall speak to Dr. Pezzot-Pearce prior to making any arbitrated decision.

[289] The Parenting Coordinator shall resolve day to day conflicts that may arise related to the detailed parenting plan or in relation to any conflict over joint decisions; but the Parenting Coordinator shall not have the authority to re-instate joint decision-making, nor is the Parenting Coordinator permitted to make changes to the parenting schedule outlined herein, unless the parties provide express written consent to provide them with the ability to do so.

[290] Where the mother thinks that a decision made by the father pursuant to his sole-decision making authority was inappropriate and not in the children's best interests she may apply for a review of the decision to the Parenting Coordinator. The Parenting Coordinator's review shall not be a de novo review of the decision related to the children. The Parenting Coordinator shall consider the facts and decision made, to determine whether the decision made by the father was reasonable and in the best interests of the children at the time it was made. The Parenting Coordinator shall award enhanced costs related to such an application.

(iv) Extracurricular activities

[291] Each child may be enrolled in a maximum of four extracurricular activities per school term. If an activity runs more than once per week, the number of activities must be reduced, so that the children have no more than one activity per day. The parents shall attempt to agree on extracurricular activities so the children can take part in the activities they enjoy and from which they benefit, while not being overloaded. The parent exercising parenting time will be responsible for taking the children to all their extracurricular activities during their parenting week.

[292] If the parents cannot agree, the father may choose the children's activities for Monday and Wednesday and the mother for Tuesday and Thursday. A parent may choose to have no activity on their designated day. Unless by mutual agreement, no extracurricular activities shall be scheduled on Fridays. If one parent signs up the child for a weekend activity, it is on the understanding that the other parent is not obliged to take the child on their parenting weekend. This said, if a tournament, recital or other special event falls on a weekend, the parent exercising parenting time that weekend will be responsible for confirming the child's attendance and bringing them to it, and the other parent is permitted to attend, as above.

(v) Therapy

[293] The children shall remain in therapy with Dr. Pezzot-Pearce, attending at whatever interval she recommends. The parents shall alternate in taking the children to see Dr. Pezzot-

Pearce. Both parents shall continue to follow Dr. Pezzot-Pearce's advice regarding the parenting of the children. The father shall pay the full cost associated with Dr. Pezzot-Pearce's services.

(vi) Communication

[294] Each parent shall send a weekly update email about the children at the end of their respective parenting time. The content of this weekly email shall include information related solely to the children and be brief and in a business-like tone. There shall be no opinions, impressions or advice provided to the other parent in these update emails.

[295] Neither parent shall discuss any topic, including planned vacations, activities, or attendance at any other event with the children that occurs on the other parent's parenting time or that requires the consent of the other parent prior to obtaining that consent.

[296] Both parents shall ensure that neither they or nor anyone else discusses parenting issues with anyone while the children are in their respective care to ensure the children do not overhear adult conversations. Neither parent shall discuss adult issues or parenting related matters with either child.

[297] Neither parent shall speak for or on behalf of the other parent to the children. If either child raises a concern about the other parent, the children should be encouraged to discuss this with "Dr. Terry" and with the parent they have a concern with. There should be no further conversation with the child about the other parent.

X. Child Support

[298] In addition to parenting, the Court is required to determine past and ongoing child support. There has been full shared parenting throughout the separation. Thus, calculation of child support obligations is governed by section 9 of the *Guidelines*, which provides a complete code for determining child support in these circumstances: ***Contino v Leonelli-Contino***, 2005 SCC 63. Section 9 provides as follows:

> If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared parenting time arrangements, and
>
> (c) the condition, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[299] From this, it does not follow that a straight set-off of section 3 table amounts is the correct or presumptive outcome. Rather, section 9 charges the Court with considering the "means, needs and other circumstances" of the specific family, with a focus on ensuring that the children experience similar standards of living in each household.

[300] As our Court of Appeal recently held in ***MacDonald v Brodoff***, 2020 ABCA 246 at paras 12-15:

[12] The calculation of basic child support under the *Guidelines* is premised on the number of children and only the payor's annual *Guidelines* income, thus promoting predictability and efficiency. In contrast, s 9 emphasizes fairness and flexibility and adopts a more holistic approach in assessing the economic circumstances of each parent and their ability to meet the needs of the children. *Contino* provides an analytical framework for interpreting the s 9 factors and identifies key principles that are summarized as follows:

- The language of s 9 is imperative. The courts must determine child support in accordance with all three factors;
- No one factor should prevail, but the weight to be given to each factor depends on the particular facts of the case;
- There is no presumption that the *Guidelines* Table amount, or the set-off amount calculated under the Tables will be awarded. Similarly, there is no presumption that something other than the set-off amount should be awarded;
- The analysis is necessarily contextual, so a sound evidentiary foundation, including the parties' budgets and actual expenses of both parents, is critical to the court's analysis. Courts cannot and should not make assumptions about the parties' situation, and courts should demand information relating to s 9(b) and (c) when the evidence filed is deficient;
- The analysis under s 9 reflects a stated objective of the *Guidelines*: to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- A critical inquiry is whether the children experience a difference in the standard of living as they move between the two households, as one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households;
- The goal under s 9(b) is to apportion actual expenses between the parents in accordance with their respective incomes;
- In shared parenting arrangements, the court has great discretion when assessing the three factors. In particular, the court has full discretion under s 9(c) to consider "other circumstances".

[13] ***Contino*** informs us that a simple set-off of each parent's *Guidelines* Table amount of support payable is an appropriate starting point: paras 41 and 49. However, a court, in taking the second two factors into consideration, "retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to another": ***Contino*** at para 51.

> [14] Section 9(b) examines the total cost of raising the children in a shared parenting arrangement (where many expenses are duplicated) as compared to one parent having primary care. This is achieved through examination of the budgets and actual expenditures of both parents toward care of the children. The intent is to identify all of each parent's childcare expenses and compare that amount to that parent's *Guidelines* Table amount of support.
>
> [15] The analysis then moves to consider the factors under s 9(c): the condition, means and needs of each parent and child for whom support is sought. Courts are conferred broad discretion in considering these factors. The analysis is contextual and highly fact dependent. Courts are alive to the standard of living the child experiences in each household and "the ability of each parent to absor[b] the costs required to maintain the appropriate standard of living in the circumstances": ***Contino*** at para 68.

[301] Two further key principles guide the application of section 9. The first is that the policy aim of section 9 is to ensure that the children have reasonably consistent standards of living in each home, thus minimizing the impact of separation on them and alleviating a point of potential conflict between their households. As the Court of Appeal stated in ***Brodoff*** at para 55:

> The over-arching policy behind s 9 and particularly s 9(c) is that in shared parenting arrangements, children should enjoy a reasonably consistent living standard in each home. This policy consideration is underscored in ***Contino***, yet often over-looked in practice. An assessment of the condition, means and needs goes well beyond *Guidelines* income, and considers each party's overall financial position and lifestyle, whether derived independently or from contributions from others such as new partners or parents, and any "other circumstances." *All* parents, whether in a shared parenting arrangement or not, have an obligation to provide for their children. The s 9 framework provides tremendous discretion to a judge in arriving at a support figure they think is fair in all the circumstances. …

[302] The second key principle, which arises in cases involving very high-earning couples such as here, is that child support must not become a form of *de facto* spousal support or property equalization. While an increase in the recipient parent's standard of living may inevitably flow from achieving similar standards of living for the children, the child support amount must not be so excessive as to constitute a functional wealth transfer from one parent to the other: ***Ewing v Ewing***, 2009 ABCA 227 at para 46; ***Francis v Baker***, [1999] 3 SCR 250 at para 41.

(i) <u>Factual findings relevant to child support</u>

[303] I find as a fact that the parents separated on September 9, 2016. While there was a period of them sleeping apart before this, I find that the intention to live apart crystalized on this date. I find that the mother fully and finally moved out of the matrimonial home at some point around August 2018.

[304] I find as a fact that during the marriage the parties enjoyed an upper-middle-class lifestyle, but not an extravagant one. The children have attended public school throughout their lives. They live in an affluent upper middle-class neighbourhood. Their homes are spacious and comfortable, but far from the height of luxury and moneyed extravagance. The children's

extracurricular activities have centered on community sports and local music lessons. The family did not drive or own exotic luxury vehicles. Their vacations, though very nice, involved economy class travel to non-exotic locations like the local Rocky Mountains or Disneyland. While the parents both enjoy nice clothing as part of their professional images, I find that they did not live extravagantly in this respect either.

[305] I find that the lifestyle and values that both parents espouse for their children is one of comfort, in which they are afforded opportunities to explore interests and live well, but that neither believe (notwithstanding the mother's most recent budget filed at trial) in their children being showered with luxury. While not as parsimonious as the lifestyle and values propounded by the father in ***Sirdevan v Sirdevan***, 2010 ONSC 2375, the core ethic of the parents in this case derives from modest, hard-working, immigrant roots.

[306] For the reasons detailed above, I find that the mother's evidence on her financial situation and needs is unreliable. I can place only limited weight on it and the budget she advanced at trial, which was a contrivance designed to justify a full-offset child support payment.

[307] I find that the parents' Guideline incomes for the relevant years in question are as follows. I have accepted the father's numbers, as his figures are higher for his own income in most instances than those provided by the mother.

Year	Mother's Guideline Income	Father's Guideline Income	Monthly Guideline set-off
2016	$105,178	$1,428,382	$17,736
2017	$0	$1,451,864	$20,877
2018	$0	$1,538,001	$22,844
2019	$85,904	$1,667,500	$20,575
2020	$184,438	$1,717,932	$20,242

[308] The child support calculations in this case cover three periods: (i) the mother's post-separation residence in the matrimonial home; (ii) parenting in fully separate homes up to trial; and (iii) support going forward.

(ii) Mother's habitation of the matrimonial home

[309] The father paid no regular child support to the mother until December 2018, four months after she fully moved out of the matrimonial home and was self-supporting. However, he entirely maintained the matrimonial home throughout this period, at an average cost of $8,000/ month. I find as a fact that the home was stocked with ample food and other resources, to which the mother had unrestricted access. I find that the children experienced no privation of any sort during this period.

[310] I have previously found that the mother's decision to remain in the matrimonial home during this period was made in the face of very reasonable offers to assist her in securing her own accommodation. Had she done so, she would have been entitled to child support in relation to the maintenance and finance of that home.

[311] I have further found that her conduct during this period escalated tension and conflict to a point that the father had to rent a condominium in which to conduct most of his parenting time. His cost of parenting was thus increased, a relevant consideration under section 9(b) of the *Guidelines*.

[312] That said, the mother suffered a stretch of unemployment during the initial period of separation and did not have a ready source of funds to independently undertake parenting activities with the children. The father's own estimated monthly expenses for the children at that time included $900 for groceries, toiletries and other sundries, $350 for clothing, $350 for transportation, and $2,850 for recreation and education, totaling $4,450 per month. This amount was premised on already owning a vehicle. While the mother had access to a vehicle, I find it appropriate to add a further sum of $500 that would have allowed her to change or replace that vehicle.

[313] Although the mother painted herself as effectively impecunious during this period, she had very few living and parenting expenses. Exercising my discretion under section 9, I find that the father should have been paying the mother $5,000/month in section 9 child support while she continued to live in the matrimonial home. Any amount of section 9 child support exceeding this amount would have operated exclusively as a form of spousal support, contrary to the purposes of the *Guidelines*.

[314] The mother remained in the matrimonial home from September 2016 through July 2018, for a total of 23 months. Therefore, the father owes a total of $115,000 for this period.

(iii) <u>August 2018 to trial</u>

[315] The mother was fully self-sustaining after August 2018. The question for this period becomes whether, and to what extent, the Court should deviate from the starting point of the table set off amount, which has been in the range of $20,000/month throughout.

[316] In October 2016, the mother presented a total monthly budget of $18,209. This would suggest a child-related monthly cost of somewhere between $9,000 and $12,000, not inclusive of childcare. The father's budget submitted at trial allocated $13,545 per month in expenses to the children, including the nanny's salary of $3,832 per month.

[317] When I examine the mother's trial-budget, and allocate 50% of housing, food and vehicle costs to the children, include those child-related expenses I find to be somewhat reasonable, and add-in a vacation allowance identical to that of the father, I reach a total monthly child expense level of $12,550.

[318] The mother's table child support based on her Guideline income is currently $2,587, was $1,257 in 2019, and $0 in 2018, which provides a reference point for what a parent at her income level would normally spend each month on child related expenses. This is in sharp contrast to the monthly child related expenditures of $12,550 in this case.

[319] I have also closely considered the case law in which courts have considered families in similar circumstances and awarded section 9 support. In ***Sirdevan***, the parents shared custody of their five children. The father lived exceptionally modestly but had an annual income of over $3.5 million. His net worth at trial greatly exceeded that of the parties in this case. The mother sought child support in the mount of $67,635 monthly, on an interim basis. The Court concluded that a total monthly sum of $17,500 per month was appropriate.

[320] In ***Archibald v Archibald***, 2007 ABQB 486, Rowbotham J (as she then was) considered the case of a family with shared parenting where the father's annual income was over $1.2 million, and the guideline set off amount was $15,439 per month. In the final analysis, Rowbotham J ordered support in the amount of $8,000 per month and directed the father to pay all section 7 expenses over and above that. I note that this case is now 15 years old, with significant inflation having taken place in the intervening years, and that the father's income was markedly lower in that case than the father's income here. Nonetheless, it provides some context as to what constitutes a reasonable budget and support for a family at this general level of affluence, with two children and shared parenting.

[321] In ***SRM v NGTM***, 2020 BCSC 468, the payor parent earned an amount comparable to the father in this case. The court awarded $16,000 per month in child support, though notably one of their children appears to have had special needs and disabilities. The recipient parent was also debt-ridden and had no income.

[322] In ***KMR v IWR***, 2020 ABQB 77, the court addressed child support in the context of parties who had signed a settlement in 2012 which specified that the payor would provide $7,000 per month in child support, based on an income of $350,000 per year, for four children in shared parenting. On an application to vary child support upwards, and provide retroactive increases, the payor admitted his income was now, and would continue to be, in the range of $1 million annually. The court found that the claimant's income was deflated by deliberate underemployment. The court varied child support up to $10,000 per month during periods where more of the children remained dependent and reduced it to $6,000 monthly going forward for a single dependent child.

[323] In ***Dyck v Dyck***, 2009 MBQB 112, the court addressed child support for a family with two children in shared parenting. In the final year under consideration, the father's income exceeded $3.6 million. The mother had significant health issues and was receiving generous spousal support. She also was to receive a significant property equalization. The court rejected the set off amount as inappropriate. The court awarded monthly interim support in the amount of $15,000, inclusive of the husband's share of all section 7 expenses.

[324] In ***Saunders v Saunders***, 2014 ONSC 2459, the court considered an application for interim child support based on a payor income of just over $1 million. Child support was ordered in the amount of $12,500 per month for two children. The motions judge in ***Saunders*** appears to have accepted monthly expense budgets premised on a rather lavish lifestyle.

[325] In ***DMD v RLD***, 2015 BCSC 2332, the parents had one child of the marriage and a stepchild, and income ranging from $3.17 million to $2.33 million. The trial judge concluded that the children enjoyed a comfortable but modest standard of living, not dissimilar to what I have found in this case. On the basis that any amount over $9,000 per month for the couple's biological

child would result in a transfer of wealth between the spouses, as opposed to a benefit to the children, the court, at para 212, ordered this amount of support. The court ordered a further $1,500 per month in respect of the stepchild, who had part-time employment and almost no contact with the payor.

[326] In ***SG v KG***, 2012 BCSC 1937, the court considered section 9 child support for three children in shared parenting. The court based its order on the payor's income of $1.256 million. The parents lived beyond their means, at a level far above the parties in this case. The court ordered child support in the set-off amount of $7,500/ month.

[327] It is frustrating that so little of the 26 days of court time expended on this case was spent amplifying and justifying the evidence related to appropriate levels of child support. Unfortunately, this practical, detailed exercise was eclipsed by the parties' focus on their conflict, and conflict-driving behaviour. The assessment of appropriate section 9 child support is, therefore, even more imprecise in this case than usual.

[328] I find that the most important function this Court's child support order can serve for these children is a decrease in conflict: ***GM v JB***, 2019 ABQB 772 at paras 82 and 84, aff'd in ***Brodoff*** at para 56. Decoupling the parents in respect of any spending and reimbursement decisions and interactions is imperative. For that reason, I choose to award a higher amount of section 9 monthly support, but I direct that the parties each pay for their own section 7 extracurricular activities and education related expenses. I have deliberately included a generous amount in the monthly child support award to permit the mother to cover these expenses. Exceptional medical expenses shall be paid proportionately.

[329] Applying the enumerated principles, considering aspects of the proffered budgets that I find to be reasonable, and drawing on the insights offered by roughly similar decided cases, I conclude that monthly support in the amount of $12,500 is appropriate throughout the period of full separation until the present time. This amount is payable from August 2018 to February 2022, inclusive for a total of 43 months. The gross retroactive child support owing by the father for this period is thus $537,500.

(iv) Support going forward

[330] Monthly payments of section 9 support, inclusive of all section 7 extracurricular activity and education related amounts will continue from March 1, 2022, in the amount of $12,500. The parties shall not bring any application to vary this amount unless the father's line 150 income deviates upwards or downwards by more than 20%, or if the mother's income increases by more than 50% from its 2020 level. The mother shall not bring an application for variation of this amount based on a decrease in her income. The parties shall exchange their annual tax returns by June 1 of each year but shall not be enrolled in the child support recalculation program.

[331] No retroactive section 7 amount was claimed, and none is payable on a go forward basis pursuant to my reasons above.

(v) Credits towards child support already paid

[332] The father has been paying $7,500 per month since December 2018, for a total of $292,500 (39 months x $7,500). He is further entitled to credit for half of the PN8 assessor's fees for the update report, in the amount of $10,000, and half of Dr. Fong's fees related to trial, amounting to $4,492.50. I decline to deduct the $48,854.01 attributed to the repair of the matrimonial home in August 2018. While I found that the mother was responsible for most of the damage that required remediation, this was a matter of family property, which I take to have been settled to finality prior to trial. In total, the father has credits of $306,992.50. This yields outstanding child support in the amount of $345,007.50 to date ($115,000 + $537,500 - $306,992.50 = $345,007).

XI. CONCLUSION

[333] The petition for the parties' divorce is granted. It is time for each of them to live in peace and enjoy their bountiful blessings, not the least of which are their wonderful children, who have managed to survive their parents' conflict with less damage than one might have thought. It is time for the acrimony, posturing, litigation, and constant conflict to end. A and E deserve nothing less.

Heard on the 9th to 13th day of March, 6th day of June, 6th day of July, 28th to 30th day of September, 1st to 6th day of October, 5th and 6th day of November, 14th and 15th day of December, 2020, 25th day of February, 11th and 26th day of March, 13th and 16th day of April, and 6th day of May, 2021, with written submissions in August and September, 2021.

Dated at the City of Calgary, Alberta this 14th day of February, 2022.

N.E. Devlin
J.C.Q.B.A.

Appearances:

D. L. Shennette and N.L. Dechaine
for the Plaintiff

E.L. Lenz, QC
for the Defendant

Appendix "A"
Detailed Parenting Plan

Day-to-day parenting schedule

1. The parties shall have a shared parenting arrangement for the children of the marriage.
2. Commencing March 2022, the parties shall commence a 7/7 rotation with exchanges of parenting time to occur at drop-off at school on Monday mornings, or on Tuesdays if Monday is a statutory holiday.
3. Where the children do not have school or are not attending at school due to illness or any other reason on a school day, the parents shall transition the children to/from their parenting time curbside to the other parent's home at 9:30 a.m. Neither parent shall enter the property of the other parent.
4. Parenting time shall end by the parent dropping the children off at school following their scheduled parenting week, thus, generally, parenting time will shift at school drop-off on Monday mornings.
5. Neither parent shall be permitted to remove either child from school on the other parent's parenting week without the express written consent of the parent who is scheduled to be parenting the children that week.

Summer Break

6. The Summer Break means the first day the children are released from school (or earlier in the day as previously agreed) until the morning the children are returned for their first day of the new school year.
7. Each parent shall be entitled to up to 2 consecutive weeks of parenting time each summer. In even numbered years, the Father shall have first choice as to his two-week block and in odd numbered years the Mother shall have first choice. The parent whose year it is to choose shall provide their choice to the other parent no later than April 1st each year.
8. The other parent's two weeks of parenting time will commence no less than two weeks before or after the first parent's choice, to ensure the two-week blocks are separated by at least two weeks of regular weekly alternating parenting time.
9. Each parent may, at their sole discretion, enroll the children in camps or activities during their parenting time during the summer break.
10. Where the children are not attending summer camp, the parents shall transition the children to/from their parenting time curbside to the other parent's home at 9:30 a.m. Neither parent shall enter the property of the other parent. Where the children are attending summer camp, the parents shall transition the children at drop-off at camp on Monday morning.
11. Parenting time shall end by the parent dropping the children off curbside or at summer camp following their scheduled parenting week.

Statutory holidays and PD days

12. Each parent shall have the children for any long weekends or holidays that fall on their regularly scheduled parenting time, but where a statutory holiday or school PD Day falls on a Monday, the parent who was scheduled to drop off the children Monday morning will drop them off Tuesday morning instead.
13. If the ordinary operation of the parenting scheme creates a significantly unequal division of long weekends or statutory holidays, the parents shall discuss a cooperative compromise, failing which they may refer the matter to their parenting coordinator.

Christmas School Holiday

14. The Christmas School Holiday means the first day the children are released from school (or earlier in the day as previously agreed) until the morning the children are returned for their first day of school in the new year.
15. The Christmas School Holiday shall be shared equally between the parents. In even years the Father shall have parenting time with the children for the first half of the holiday period and the Mother shall have parenting time for the second half of the holiday period. In odd years, the Mother shall have parenting time with the children for the first half of the holiday period and the Father shall have parenting time for the second half of the holiday period.
16. The transition to the other parent for the second half of the Christmas break shall occur at 9:30 a.m. curbside to that parent's home.

Spring Break and Easter

17. Spring Break means the first day the children are released from school (or earlier in the day as previously agreed) until the morning the children are returned for their first day of school after the break.
18. The parents shall share the Spring Break vacation by alternating years with each parent. In even years the Father shall parent the children over Spring Break and in odd years the Mother shall parent the children. Where Easter does not fall within the children's Spring Break, it shall be celebrated with whichever parent is parenting the children according to the regular weekly parenting schedule.

Professional Development Days

19. Where the children have a Professional Development Day during the school week, they shall have parenting time with whichever parent is regularly scheduled to parent the children that week.

Mother's and Father's Day

20. If Mother's Day falls on the Father's parenting time, the Mother's parenting time for the following week shall begin at 9:30 a.m. on Mother's Day Sunday. The Father shall deliver the children to the Mother at 9:30 a.m. on Mother's Day.

21. If Father's Day falls on the Moher's parenting time, the Father's parenting time for the following week shall begin at 9:30 a.m. on Father's Day Sunday. The Mother shall deliver the children to the Father at 9:30 a.m. on Father's Day.

<u>Children's and parent's birthdays</u>

22. The children's respective birthdays shall be celebrated with the parent who is caring for them on that day. The other parent will find a time to celebrate with the children during their regularly scheduled parenting time. Each parent shall celebrate their own respective birthdays with the children on their own parenting time.

<u>Cancer walk</u>

23. The children shall participate with their Father and his family every year for this walk. If the children are having parenting time with their Mother, they will transition to the Father's parenting time at 8:00 a.m. on Sunday morning curbside, rather than on Monday morning at school. The Father shall confirm via email to the Mother the date of the walk with as much notice as possible.

Travel

24. The Father shall hold and retain the children's passports for safekeeping. Where the Mother has scheduled international travel with the children and has provided the details required by this Order to the Father, the Father shall provide the passports to the Mother within 48 hours of a written request to allow for the passports to be updated as necessary and for travel documents and visas to be obtained. The passports may be requested prior to a final detailed itinerary being available. The passports shall be returned to the Father on the first day the children transition back to the Father for his parenting time following the scheduled holiday time with the Mother.

25. Travel during each parent's respective parenting time within Canada does not require prior consent of the other parent; however, any travel within Canada requires the travelling parent to provide to the non-travelling parent a complete itinerary, in writing, with information that is as specific as possible, including but not limited to the address of the location where they will be staying, and travel details including the mode of travel and itinerary. This information shall be provided prior to the children leaving Calgary on the trip.

26. Where a parent travels to the United States, the official document from the Government of Canada must be used for travel and the parents shall each execute a new travel letter no later than January 15th each year to be used for the entire year for any travel with the children to the United States. No further consent to travel to the United States is required, but the travelling parent shall provide to the non-travelling parent a complete itinerary, in writing, including but not limited to the address of the location where they will be staying, and any flight details. The details of any such travel are to be provided no later than 72 hours in advance of any such travel. https://travel.gc.ca/travelling/children/consent-letter

27. Any travel outside of North America requires the express written consent of the other parent. Where such travel is consented to (consent not to be unreasonably withheld), a full itinerary shall be provided, in writing, including the address of the location where they will be staying and flight details. The full itinerary must be provided no later than 7 days prior to any such international travel.

28. Neither party may travel with the children to a country that is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") or a country that has demonstrated a pattern of non-compliance with the Hague Convention without the prior written consent of the other party or Order of the Court of Queen's Bench.

Decision Making

29. The Father shall have sole and final decision-making responsibility for all major decisions related to the children's health and medical care, including but not limited to medical care and counselling, in other words, for anything involving physicians or psychologists or other counsellors. The Father shall consult the Mother about all significant decisions by sending her an email and requesting her input. The Father shall take her opinion into consideration in making his decision, but the Father alone shall make the decision, having regard to the best interests of the children. The parents shall share joint decision making for other health care such as dental, orthodontist, optometrist, physiotherapy, etc.

30. The Father's sole decision-making authority over medical care and counselling shall be reviewable in 3 years from the date of this Order. The process for a review shall follow that of a Domestic Special.

31. In a health emergency, the parent with care of the child at that time will make the treatment decision, on the advice of medical personnel. If a parent makes an emergency health decision, the parent who has made the decision must immediately contact the other parent.

32. The parents shall have joint decision making over education and religion, however, where there is a school event for the children, the parent who is parenting the children during that event shall decide whether the children participate. There is no notice required to the other parent with respect to the children's attendance and neither parent shall inquire as to the children's attendance, but both parents shall use their best efforts to ensure the children attend their school events.

33. Both parents are entitled to obtain directly from the school copies of all communications between the school and parents, including correspondence, updates, school reports, school calendars, etc. Both parents shall arrange to attend their own parent-teacher conferences.

<u>Sick days</u>

34. Where the children are ill and unable to attend at school, they shall have parenting time with whichever parent is regularly scheduled to be parenting the children. Where it is a transition day (i.e. Monday), the children will be dropped off to the parent whose week it is no later than 9:30 a.m. curbside at their home on notice via email to the other parent with as much notice as possible.

<u>Medical, dental, optometrist and other appointments</u>

35. The parent who is parenting the children where they have a regularly scheduled appointment shall be responsible for taking them to that appointment and providing a comprehensive update by email to the other parent at the conclusion of the appointment, including any comments, recommendation or concerns raised by the professional.

<u>Hospitalization</u>

36. In the event a child is hospitalized, either parent may attend at the hospital, regardless of which parent's parenting time it is. Each parent immediately must notify the other parent if a child is hospitalized during their parenting time.

<u>Therapy</u>

37. The children shall remain in therapy with Dr. Pezzot-Pearce, attending at whatever interval she recommends.
38. The parents shall alternate in taking the children to see Dr. Pezzot-Pearce.
39. Both parents shall continue to follow Dr. Pezzot-Pearce's advice regarding the parenting of the children.
40. The Father shall pay the cost associated with the therapy of Dr. Pezzot-Pearce in full.

Parenting Coordination

41. Where both parents consent, they shall immediately retain the services of a Parenting Coordinator with arbitration powers. The cost of the Parenting Coordinator shall be shared equally between the parties.
42. The Parenting Coordinator shall be provided with all reports, judgments, prior arbitration awards, and court orders. The Parenting Coordinator shall speak to Dr. Pezzot-Pearce, Ms. Rohatinsky, and Dr. Fong when they are first retained. The Parenting Coordinator shall speak to Dr. Pezzot-Pearce prior to making any arbitrated decision.
43. The Parenting Coordinator shall resolve day to day conflict that may arise related to the detailed parenting plan or in relation to any conflict over joint decisions. The Parenting Coordinator shall not have the authority to re-instate joint decision-making, nor is the Parenting Coordinator permitted to make changes to the parenting schedule outlined herein, unless the parties provide express written consent to provide them with the ability to do so.
44. Where the Mother thinks that a decision made by the Father pursuant to his sole-decision making authority was inappropriate and not in the children's best interests she may apply for a review of the decision to the Parenting Coordinator. The Parenting Coordinator's review shall not be a *de novo* review of the decision related to the children. The Parenting Coordinator shall consider the facts and decision made, to determine whether the decision made by the Father was reasonable and in the best interests of the children at the time it was made. The Parenting Coordinator shall award enhanced costs related to such an application.

Extracurricular activities

45. Extracurricular activities should be chosen after consultation between the parents. Both parents shall propose extracurricular activities for the children to the other parent one month ahead of any required registration. The parents shall respond to the other parent by email providing their consent or any concern or objection related to the activity. This email is in addition to the weekly update email and shall address no other issues.

46. The parents shall attempt to agree on extracurricular activities so that children can take part in the activities they enjoy and from which they benefit. Where the parents are unable to agree on the activities two weeks prior to the registration date, each parent shall be permitted to choose a maximum of two activities per child per week per school term, such that each child may be enrolled in a maximum of four extracurricular activities per school term. If an activity runs twice per week, the parent is restricted to choosing one activity for that child. If the chosen activity is once per week, then the parent may choose a second activity for that child that is also once per week. The intention is to limit the children to no more than one activity per day.

47. If the parents are unable to agree, the Father may choose the children's activities for Monday and Wednesday and the Mother for Tuesday and Thursday. Neither parent shall choose an extracurricular activity that regularly occurs on the other nights of the week. Unless by mutual agreement, no extracurricular activities shall be scheduled on Fridays. If one parent signs up the child for a weekend activity, it is on the understanding that the other parent is not obliged to take the child on their parenting weekend. If, however, a tournament, recital or other special events falls on a weekend, the parent exercising parenting time that weekend will be responsible for confirming the child's attendance and bringing them to it.

48. The parent exercising parenting time shall arrange for the children to be brought to their extracurricular activities

49. Neither parent shall volunteer or attend at a child's regularly scheduled activity during the other parent's parenting time.

50. Both parents shall be entitled to attend a year end event or recital but shall not interfere in any way with the other parent's parenting time. The non-parenting parent is entitled to say hello and congratulate the children prior to the parent leaving the event so as not to create any unnecessary tension or conflict for the children. The non-parenting parent shall not use such interaction to interfere with the other parent's parenting time.

51. Refusal of a parent to comply with paragraphs 49 and 50 (the above two paragraphs) of this Order shall permit the other parent to request a full ban on the offending parent from attending at the children's activities during their parenting time. Any such application shall be made to the Parenting Coordinator, if one is engaged, or to the Court of Queen's Bench.

52. Neither parent should discuss extracurricular activities with the children that require the participation of the other parent without first obtaining that parent's agreement in advance.

53. The costs associated with extracurricular activities shall be resolved in a separate child support order.

School

School events and volunteering

54. Neither parent shall volunteer or attend at the children's school during the other parent's parenting time, unless related to an emergency regarding the children.
55. Both parents shall be entitled to attend school performances, awards ceremonies or sports competitions but shall not interfere in any way with the other parent's parenting time. The non-parenting parent is entitled to say hello and congratulate the children prior to the parent leaving the event so as not to create any unnecessary tension or conflict for the children. The non-parenting parent shall not use such interaction to interfere with the other parent's parenting time.

Exchange of school materials

56. The parents shall ensure that on every weekly transition the children have all homework, reading materials, projects, and any other school related information in their respective backpacks.
57. Where a parent receives any paper notice for a child regarding homework, activities, school events or for any other purpose it shall be scanned and emailed for review and consideration by the other parent not later than 24 hours after it was received. This email shall include nothing other than the scanned document; it shall not include any added opinion or commentary.

Exchange of personal belongings

58. The children shall have one backpack each that they take with them between their parent's homes and school. Each parent will ensure that they have lunch containers and water bottles in their respective homes to transition with the children. Each week the parents will return in the children's backpacks any lunch containers or water bottles from the other parent's home.
59. Given the parents' financial positions, they shall each ensure the children have items such as swimsuits, bikes, helmets, winter sporting equipment, including skates, skis, etc. in their respective homes so that this equipment need not transition between homes. Where the children partake in an activity that occurs multiple times per week and requires equipment, the parents shall ensure the equipment bag is dropped off at the other parent's home on the weekly transition day after the children are dropped off at school.
60. Neither parent shall withhold the children's articles of clothing such as winter coats, boots, winter hats, mittens that are required by the children regardless of which home the articles have originated from. Where a parent requires the return of articles of clothing and footwear from the other parent's home, they may request the same in their weekly email to the other parent. Where a request has been made for an item or items to be returned, they shall be returned within 48 hours to the other parent's home in a laundry bag on their front step.
61. Each parent shall ensure E has her epi-pen with her during the parent's parenting time. The parent transferring care of the children shall ensure the other parent is provided with any medication and/or medical or dental devices, appliances, or aids for the children at the time of transfer.

Parents' communication with each other

62. Each parent shall send a weekly update email about the children at the end of their respective parenting time. No response should be provided by the parent receiving the email unless a response is explicitly requested by the sending parent. The email shall be sent no later than Sunday evening at 9:00 p.m. prior to the exchange of parenting time at school the next day. If Monday is a statutory holiday, the update email should be sent by 9:00 p.m. Monday.

63. The content of the weekly email shall include information related solely to the children and be brief and in a business-like tone. It shall include things of interest to the children, accomplishments and challenges, information related to any medical/dental appointments or the outcome of those appointments, any changes to extracurricular activity schedules and anything that the other parent needs to know outside of the children's usual routines.

64. Neither parent shall discuss any topic, including planned vacations, activities, or attendance at any other event with the children that occurs on the other parent's parenting time or that requires the consent of the other parent prior to obtaining that consent.

<u>Birthday invitations</u>

65. Where either parent receives a birthday invitation for the children, either via email or in a paper copy, for a day that is not during their parenting time, they shall within 24 hours provide the full and complete details to the other parent via email. Once the information has been provided no further communication with respect to the birthday party shall occur between the parents.

66. The parent who is parenting the children on the date of the birthday party shall decide if the child or children attend and that parent shall be solely responsible for any required RSVP and gift.

67. The parents shall not discuss the children's attendance at the birthday party on the other parent's parenting time. Where the child knows of a party, the parent who received the invitation will ensure the child knows the information has been provided to the other parent and the decision to attend is theirs alone.

Parents' communication with the children

68. Both parents shall ensure that neither they or nor anyone else discusses parenting issues with anyone while the children are in their respective care to ensure the children do not overhear adult conversations.

69. Neither parent shall discuss adult issues or parenting related matters with either child.

70. The children are permitted to call the non-parenting parent at reasonable times, but the non-parenting parent shall not initiate any communication of any kind with the children when they are with the other parent.

71. Where a child contacts a non-parenting parent that parent shall allow the child to lead the conversation and shall not do anything to extend or lengthen the conversation by asking questions or encouraging a longer exchange.

72. Any child-initiated conversation shall be brief (less than 5 minutes). The parent being contacted is responsible for ensuring this time limit is not exceeded.

73. Neither parent shall speak for or on behalf of the other parent to the children. If either child raises a concern about the other parent, the children should be encouraged to discuss this with “Dr. Terry” and with the parent they have a concern with. There should be no further conversation with the child about the other parent.

74. When the children are old enough to have their own cell phones, they shall be permitted to take such phone with them from one parent’s home to the other. If either parent purchases a cell phone for either of the children, they will advise the other parent. Each parent may set rules regarding use of electronic devices by the children during their parenting time.

Additional requested holidays or events

75. Where a parent has a family event or holiday to which they would like to take the children that is not during their regularly scheduled parenting time, they shall provide the other parent with as much notice as possible but not less than 2 weeks. Where the parent with whom the children would otherwise be parented agrees to the travel or participation in the family event, they shall be provided with make-up time in full for the days missed. The make-up time shall be agreed to and scheduled at the same time as any agreement to vary the schedule.

76. The Children shall not miss more than 2 consecutive days of school for any such additional holidays or family events and shall not miss more than 8 days total during a school year for travel or family events; the means each parent is entitled to have the children miss a maximum of 4 days of school for family related events or holidays.

* * *

APPENDIX “B”
Yearly Parenting Calendar for 2022 and 2023
Mother’s time is indicated in red, father’s time in blue

2022

Detailed Parenting Plan

January

M	T	W	T	F	S	S
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June

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November

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APPENDIX “B”
Yearly Parenting Calendar for 2022 and 2023
Mother’s time is indicated in red, father’s time in blue

2023

Detailed Parenting Plan

January

M	T	W	T	F	S	S
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February

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March

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April

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May

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June

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July

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August

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September

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October

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November

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December

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Court of Queen's Bench of Alberta

Citation: R v Harris, 2019 ABQB 456

Date: 20190621
Docket: 170472963Q1
Registry: Grande Prairie

Between:

Her Majesty the Queen

- and -

Nicholas Richard Harris

Accused

Reasons for Judgment
of the
Honourable Mr. Justice E.J. Simpson

I. Introduction

[1] At about 1:00 am on the morning of October 1, 2014, outside the front entrance of the Canadian Brewhouse bar in Grande Prairie, Alberta, the accused, Nicholas Harris, fired two shots from a handgun which struck the deceased, John Rock, in the right leg and upper left chest.

[2] Mr. Rock collapsed near the northeast corner of a cement pad at the front of the bar.

[3] Taken to the Grande Prairie hospital, Mr. Rock received resuscitative efforts but was pronounced deceased.

[4] The accused, Nicholas Harris, faces a charge of first degree murder with respect to the death of John Rock. He has taken the stand and testified that he acted in self-defence.

II. Issues

[5] Has the Crown proven beyond a reasonable doubt that:

1. Nicholas Harris cannot avail himself of a defence of self-defence;
2. Nicholas Harris had the state of mind required for murder; and
3. Nicholas Harris planned to and deliberately killed John Rock.

III. Decisions

1. The defence of self-defence does not apply;
2. Nicholas Harris meant to cause the death of John Rock or meant to cause him bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not; and
3. Nicholas Harris planned to and deliberately killed John Rock.

IV. Facts

[6] The events before and after the shooting of John Rock do not, for the most part, give rise to any dispute. The following provides the factual context in relation to the killing of Mr. Rock.

[7] Both the accused, Nicholas Harris, and the deceased, Mr. Rock, at the time of the shooting, engaged in the trafficking of cocaine. Mr. Rock up until early July of 2014 would provide one-half or one kilogram amounts of cocaine to Mr. Harris on credit. Mr. Harris then broke the cocaine down into one or two ounce pieces.

[8] Ryan Stanley, 32 years of age at the time of the trial, knew Mr. Harris for about 18 years and worked for him for about two years before the shooting. Mr. Stanley would take the smaller pieces of cocaine from Mr. Harris, deliver the cocaine to another dealer in Grande Prairie, and collect money for Mr. Harris.

[9] Mr. Rock at the time of his death stood 6’4” tall and weighed 234 pounds. At times, he carried a handgun. On the evening of September 30, 2014, he had one in his possession. Sometime that evening prior to the time Mr. Harris shot him on October 1, 2014, he turned a handgun over to an associate, Michael Dier, telling Mr. Dier to put it away.

[10] Shortly after the shooting, the RCMP located Mr. Rock’s abandoned truck. During the search of it, the police found a 9 mm handgun loaded with ten unspent rounds in the magazine, wrapped in a black t-shirt hidden inside the tailgate. Red stains on the inside of the barrel tested positive for blood.

[11] The search also located a can of bear spray in the console of the truck, a knife on the floor in front of the front passenger seat, and a knife holder from a compartment on the driver’s side door.

[12] After the shooting but before the police located the truck, Michael Michaud, an associate of Mr. Rock, drove Mr. Rock's truck away from the Canadian Brewhouse. He did not go far because of damage to the cooling system of the truck which appeared to have resulted from gunshots so he abandoned it. Before leaving it, he took from it guns, drugs, cash and phones.

[13] Mr. Rock had in the past resorted to violence to enforce the collection of money owed to him. About one month before Mr. Rock's death, Mr. Stanley had attended a small social event at a house in Edmonton with four friends. Two other men arrived, one Mr. Stanley knew as Jimmy. The other he did not recognize. Mr. Stanley believed one of them phoned Mr. Rock to tell him of Mr. Stanley's presence in the home.

[14] Mr. Rock arrived shortly thereafter while Mr. Stanley stood in the garage, smoking. Mr. Rock burst into the garage, coming down the four or five steps from the house towards Mr. Stanley. Mr. Rock approached Mr. Stanley, taking out a handgun, which he used to strike Mr. Stanley on the top of his head and on the right side of his mouth. The blow to the top of his head caused a bleeding wound. The one to the right of his mouth split open his lip.

[15] The force of the blows knocked Mr. Stanley back against the garage door. Mr. Rock then stood about six feet away, pointing the handgun at Mr. Stanley. Mr. Stanley asked Mr. Rock, "Are you going to shoot me?" He went on to try to talk his way out of the situation, telling Mr. Rock he no longer worked for Mr. Harris.

[16] Mr. Rock during the attack cursed Mr. Harris regarding money he claimed Mr. Harris owed him. Mr. Stanley told him that he had nothing to do with the debt. Mr. Rock told Mr. Stanley to have Mr. Harris contact him, using words to the effect "to have his fucking bitch friend to get ahold of me". Mr. Rock left and Mr. Stanley went into the house where his friend, Jen, cleaned him up, then drove him home.

[17] Later that evening, Mr. Stanley called Mr. Harris, who took the call while in Grande Prairie. Mr. Stanley related to Mr. Harris what had occurred. Mr. Harris returned to Edmonton and the two men met the day after Mr. Rock's attack on Mr. Stanley. Mr. Stanley discussed the incident with Mr. Harris, receiving from Mr. Harris assurance that the money problem had nothing to do with Mr. Stanley, and Mr. Harris would take it up with Mr. Rock.

[18] Mr. Stanley knew something of the alleged debt prior to the attack on him by Mr. Rock. Mr. Rock had shortly before contacted him about it. Mr. Stanley understood that the debt had arisen back in the spring or summer of 2014. When Mr. Rock called Mr. Stanley, he threatened Mr. Stanley and his family. Of that threat, Mr. Stanley did not provide details.

[19] On the evening of September 30, 2014, Mr. Stanley drove his four door Ram pickup truck from Edmonton to Grande Prairie. Mr. Harris accompanied him. The two made the trip to collect money owed to Mr. Harris. As well, they planned to attend a birthday party for a woman whose name Mr. Stanley could not recall.

[20] Mr. Harris had just days before gained his release from custody on charges arising from his possession of a handgun in Edmonton by posting $35,000 cash bail. As he travelled to Grande Prairie, he breached the terms of his release, a 10:00 pm curfew, and in his possession he had a .380 calibre handgun.

[21] During the drive, about an hour out of Grande Prairie, Mr. Harris received a call which upset him. The two discussed the matter and Mr. Harris understood that two acquaintances, Gary Ritchie, also known as Tommy, another drug trafficker, and Curtis Urbanoski, also known as

Kit, a part-time trafficker now helping Mr. Ritchie (Tommy), had been accosted by Mr. Rock at the Canadian Brewhouse bar in Grande Prairie.

[22] Mr. Stanley understood Mr. Rock had taken all of the money carried by Mr. Ritchie (Tommy) as well as the keys to Mr. Ritchie's (Tommy's) motor vehicle, a pickup truck.

[23] Tara MacDonald, a friend of Mr. Ritchie (Tommy), also at the Canadian Brewhouse that evening, saw three men going through Mr. Ritchie's (Tommy's) vehicle. Thereafter, another of Mr. Rock's associates drove the truck away from the Canadian Brewhouse, parking it at a nearby Holiday Inn.

[24] Mr. Harris had told Mr. Ritchie (Tommy) to avoid public places, such as the Canadian Brewhouse, as Mr. Harris knew Mr. Rock had made a point of finding him.

[25] Upon Mr. Stanley and Mr. Harris arriving in Grande Prairie, they did not go directly to the Canadian Brewhouse. Rather, they drove to an RV park to meet a man known to Mr. Stanley only as Rambo. There, Mr. Harris went into a trailer to speak to Landon Brokowski, also known as Rambo. Mr. Stanley followed a few minutes later. After some discussions, Mr. Brokowski (Rambo) left to obtain the assistance of another or others in support of Mr. Harris at his expected meeting with Mr. Rock at the Canadian Brewhouse.

[26] The meeting lasted about 10 to 15 minutes before Mr. Brokowski (Rambo) left and Mr. Stanley and Mr. Harris drove to a hotel parking lot about two blocks from the Canadian Brewhouse. Mr. Stanley recalls they waited there for another 30 or 45 minutes until Mr. Harris received a text from Mr. Brokowski (Rambo). The two then proceeded to the Canadian Brewhouse.

[27] Mr. Harris recalls waiting until Mr. Brokowski (Rambo) arrived in a pickup truck. Then after a brief discussion while he and Mr. Brokowski (Rambo) remained in the vehicles, both parties left for the Canadian Brewhouse. Nothing turns on whether a text or a meeting caused Mr. Stanley to drive to the Canadian Brewhouse. I make no finding of fact in relation to the difference in the evidence of Mr. Stanley and Mr. Harris on this point. What is important is that both parties then travelled to the Canadian Brewhouse.

[28] The Canadian Brewhouse is a large bar located in a warehouse type building with multiple windows along the front. It faces north with a large parking lot in front. Patrons ordinarily enter through the main entrance located about one-third of the length of the front side of the building from the west end. Within, the bar had numerous security cameras. A camera located outside, above the main entrance, capturing images immediately outside the front door was not functioning properly at the time of the incident. A suspected poor connection caused distorted images from that camera.

[29] Mr. Stanley parked his truck facing the bar in about the third parking stall east of the main entrance.

[30] Mr. Stanley recalls seeing Mr. Brokowski (Rambo) in his pickup truck parked on the Canadian Brewhouse parking lot as he and Mr. Harris drove onto the parking lot. Mr. Stanley could only see one other person in the vehicle. Mr. Stanley noted Mr. Brokowski (Rambo) parked on the far north side of the parking lot approximately 200 feet from the bar entrance.

[31] The bar security camera video system had a date and time stamp display on it. Constable Ekland checked them against his watch or cell phone. The officer found the time display lagged

45 minutes behind actual time. I accept his evidence on that point. He found no problem with the date. The date display I find is correct as it corresponds with the balance of the evidence except for the lag which would delay the date change until 45 minutes after midnight.

[32] Times referred to in this decision will be actual times unless stated as video security system stamp time, which I reference as "video time". The time on the video becomes important for the sequence of events and the time between events.

[33] Mr. Harris entered the bar at 12:02:37 video time. From the entrance, he turned left, walked along some booths, then turned left again going through an opening between booths, and up two or three steps to a raised area where he turned left again. He walked past a booth on his right and approached the last booth, booth number 40, against the wall where he stood speaking to three men.

[34] Mr. Rock sat with his back to the wall in the booth next to the aisle, facing Mr. Harris who remained standing. Mr. Ritchie (Tommy) sat to the left of Mr. Rock. Across from Mr. Rock sat a male connected to Mr. Rock. Shortly thereafter, Mr. Urbanoski (Kit), who had stood back talking to another male in the next booth, a man connected to Mr. Rock, walked over and joined the discussion between Mr. Rock and Mr. Harris.

[35] Mr. Harris and Mr. Rock spoke to each other for about two and a half minutes. The two in times past considered one another friends but problems had arisen between them because of the debt owed by Mr. Harris to Mr. Rock. He owed Mr. Rock $15,000 personally and another $15,000 for a debt he had taken over and partially paid down on behalf of Mr. Ritchie (Tommy).

[36] On the evening of September 30, 2014, Tara MacDonald went to the Canadian Brewhouse with three friends, two women and a man, to celebrate her birthday. From the evidence of Mr. Stanley and herself, she was the birthday girl referred to by Mr. Stanley. At the bar, the four met two other women who formed part of the group celebrating her birthday.

[37] Thereafter, they met up with Mr. Ritchie (Tommy) and Mr. Urbanoski (Kit).

[38] Later, two men, John Rock, also known as Davis, and Michael Dier, also known as Rico, arrived. At the time, Ms. MacDonald only knew John Rock as Davis.

[39] Ms. MacDonald first saw Mr. Rock as he walked past her and Mr. Urbanoski (Kit) while they smoked outside the entrance to the bar. She could not for certain recall the precise words, but he said something about money to Mr. Urbanoski (Kit) as he passed by.

[40] She and Mr. Urbanoski (Kit) followed Mr. Rock into the bar. Mr. Rock had joined Mr. Ritchie (Tommy) and she heard Mr. Rock say something to Mr. Ritchie (Tommy) about owing money.

[41] The arrival of Mr. Rock caused, it appeared to Ms. MacDonald, an atmosphere of tension. She also noted a reaction of fear in Mr. Ritchie (Tommy). The tension she said you could "cut with a knife". Ms. MacDonald considered herself a good friend of Mr. Urbanoski (Kit) and he did not seem as afraid as Mr. Ritchie (Tommy) but she thought him uncomfortable and agitated.

[42] Ms. MacDonald recalls words from Mr. Rock to Mr. Ritchie (Tommy) regarding money to the effect "Do you think you could owe me money and get away with it?"

[43] One of Ms. MacDonald's friends had already left when Mr. Rock told them all to leave. Annoyed at the interruption of her birthday celebration, Ms. MacDonald and her friends left the raised section, going down to the bar area just inside the main entrance. There they ordered some food and drank shots while waiting. Her friend, Mr. Urbanoski (Kit), went back and forth between herself and the table occupied by Mr. Rock. Ms. MacDonald and Mr. Urbanoski (Kit) argued at some length. Ms. MacDonald and her friends left before the shooting.

[44] Mr. Stanley did not enter the bar with Mr. Harris. He followed him in about 30 seconds later. He did not make the second left turn and enter the raised section. Instead, he stopped at a booth on the lower level, just past where Mr. Harris stood talking with the other men at booth 40. After Mr. Stanley passed by that booth to his left on the upper level, he turned and sat in booth 60 from which he could see booth 40 to his right and ahead of him on the upper level. Except for one brief comment, he could not hear the conversation. That one comment came from Mr. Harris who said words recalled by Mr. Stanley as "you think I'm a punk", "you think I'm a bitch".

[45] After Mr. Harris entered the bar at 12:02:37 video time, his conversation with Mr. Rock lasted only minutes. Mr. Rock left the table, then at 12:05:10 video time he left the bar. Mr. Stanley, Mr. Harris, Mr. Urbanoski (Kit) and Mr. Ritchie (Tommy) moved to the area near the interior door of the foyer. A sandwich board held the foyer door open. The men stood there discussing their options with respect to leaving the bar.

[46] While the four men stood there, Mr. Stanley could see Mr. Rock through a window outside of the main entrance to the bar. He made gestures which Mr. Stanley took to mean that he wanted to fight. At 12:07:03 until 12:07:14 video time, on camera 6, Mr. Rock can be seen through the window gesturing.

[47] At 12:09:30 video time, the four men moved towards the door to exit. Shortly before this, Mr. Harris took a handgun from his left side waistband and placed it in the left pocket of the hoodie he wore. Sometime before exiting, he had chambered a round in the handgun.

[48] Mr. Stanley wore a hoodie and by then had pulled the hoodie up over his head. Just after they exited, camera 6 picked up Mr. Stanley as he walked from west to east in front of a window just to the east side of the main entrance. After passing the window, Mr. Stanley stopped and stood near the south end of the first parking stall east of the main door.

[49] Outside, Mr. Rock came at Mr. Harris, punching him in the face. Mr. Harris drew a handgun from his hoodie pocket. He shot Mr. Rock in the right thigh. Mr. Rock came at Mr. Harris again. About one second after the first shot, Mr. Harris shot Mr. Rock in the upper left chest. After the second gunshot Mr. Rock fell to the ground. Thereafter, approximately five more gunshots occurred. These I find came from the parking lot to the northeast of the door of the bar. On the evidence, I cannot make a finding of facts as to the identity of the shooter.

[50] Mr. Rock suffered two gunshot wounds. One struck and exited his right thigh. Another struck his left chest, pierced his heart and liver, then exited his right side just above his waist. The wounds to his heart and liver caused massive bleeding which led to his death.

[51] Mr. Urbanoski (Kit) fled on foot to the northwest. Mr. Stanley, Mr. Harris and Mr. Ritchie (Tommy) ran to Mr. Stanley's vehicle which they entered quickly. Mr. Stanley hurriedly reversed, turned east out onto a street, then drove away to the south.

[52] Mr. Stanley later found bullet holes in the driver's side of his truck. One pierced the side of his truck ahead of the driver's door and entered the engine compartment, striking the firewall. He also found a bullet hole in the driver's side passenger door of his pickup truck.

[53] Not far from the Canadian Brewhouse, Mr. Stanley stopped his vehicle in a residential area where Mr. Harris exited the vehicle.

[54] Mr. Stanley and Mr. Ritchie (Tommy) drove back to the RV park. From there, Mr. Stanley called a female known only as "Jenn", who came and picked up Mr. Stanley. They returned to Jenn's house where Mr. Harris met them shortly thereafter.

[55] Mr. Harris, Mr. Stanley, Jenn and a male friend of Jenn, along with Kayla Simms, drove to Valleyview. Mr. Stanley in his evidence did not include Kayla Simms' travelling with them but from the evidence of Kayla Simms in Exhibit 22, I accept her evidence that she travelled in the vehicle. In Valleyview, the party met Mr. Ritchie (Tommy), Mr. Brokowski (Rambo) and Mr. Brokowski's (Rambo's) girlfriend.

[56] From Valleyview, Mr. Ritchie (Tommy), Mr. Stanley and Kayla Simms continued on to Edmonton, in Mr. Brokowski's (Rambo's) truck. Mr. Brokowski (Rambo), his girlfriend and Mr. Harris left Valleyview, in another vehicle, going in a different direction.

[57] Mr. Stanley left the keys to his truck with Jenn, she parked it on a residential street in Grande Prairie. Two or three days later, Mr. Stanley returned to Grande Prairie, picked up his truck and put duct tape over the bullet holes. He eventually repaired the holes with a filling material and painted over them.

V. Law – Self-Defence

[58] Section 34 of the *Criminal Code*, RSC 1985, c C-46 as applicable to this case reads as follows:

> **Defence – use or threat of force**
>
> **34(1)** A person is not guilty of an offence if
>
> > **(a)** they believe on reasonable grounds that force is being used against them ...;
> >
> > **(b)** the act that constitutes the offence is committed for the purpose of defending or protecting themselves ... from that use or threat of force; and
> >
> > **(c)** the act committed is reasonable in the circumstances.
>
> **Factors**
>
> **(2)** In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> > **(a)** the nature of the force or threat;
> >
> > **(b)** the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

> **(c)** the person's role in the incident;
>
> **(d)** whether any party to the incident used or threatened to use a weapon;
>
> **(e)** the size, age, gender and physical capabilities of the parties to the incident;
>
> **(f)** the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> **(f.1)** any history of interaction or communication between the parties to the incident;
>
> **(g)** the nature and proportionality of the person's response to the use or threat of force; and
>
> **(h)** whether the act committed was in response to a use or threat of force that the person knew was lawful.

VI. Analysis

Issues of Fact

[59] The defence raised by Mr. Harris requires me to decide some questions of fact.

[60] First, having viewed the video footage, and hearing the evidence of the expert Andrew Fredericks, whose opinion did not exclude Mr. Harris as the shooter, the evidence of Mr. Stanley, and the evidence of the accused, Nicholas Harris, the identity of the shooter is not in question. Mr. Harris shot Mr. Rock.

Evidence of Jason Bucci

[61] Regarding the evidence of Jason Bucci, he testified under two handicaps. He acknowledged his difficulty reading his three statements. His testimony had to be adjourned to allow him the assistance of having it read to him. Moreover, Mr. Bucci appeared to me to be very fearful with respect to involving himself in this matter.

[62] His evidence that two men fought, that someone shot another person and ran away fits with the other evidence. However, in cross-examination he agreed willingly with the defence that essentially his evidence came from what he read in his statement and not his memory. His evidence generally fit with the evidence seen by the other witnesses and as provided by Mr. Harris except that he had the first two shots fired towards the Canadian Brewhouse rather than away from it. Overall, his evidence provides little assistance with respect to resolving the issues before the Court unless the evidence of others or the video footage supports it.

Evidence of Sean Friesen

[63] The evidence of Sean Friesen is quite another matter. Mr. Friesen took the stand, showed no reluctance to testify, and unfortunately showed no reluctance in what turned out to be a reconstruction of the event. Mr. Friesen presented as candid and honest but mistaken on a number of important points. Mr. Friesen correctly testified that the two men faced each other, two shots were fired, and as he ran away other gunshots followed the first two. He also had the

location of Mr. Harris and Mr. Rock close to correct although somewhat further north from the building than described by Mr. Harris and as calculated by the expert, Mr. Fredericks.

[64] The balance of Mr. Friesen's evidence reminds me of the frailty of eyewitness evidence. He did not note any punches by Mr. Rock before the shooting, he placed the firearm in the right hand of the shooter, he noted silver on the firearm, he said the shooter drew the firearm from his left breast pocket area when Mr. Friesen's position behind the shooter would make that virtually impossible to observe, he noted the shooter wearing a North Face puffy black jacket going so far as describing the stitching on it. The rest of the evidence in the trial shows all of this evidence as incorrect.

Findings of Fact

[65] Mr. Friesen, however, is not alone with respect to errors in his observation as Mr. Stanley also testified that Mr. Harris raised his right hand and pointed it at Mr. Rock. Mr. Stanley did not testify to seeing a handgun. Mr. Stanley testified that he thought the firearm came from the right thigh area of Mr. Harris.

[66] Having heard from Mr. Fredericks as to his calculations of the location of Mr. Harris on the cement slab in front of the Canadian Brewhouse, and hearing Mr. Harris's evidence with respect to his location, Mr. Harris is correct. He did not leave the cement slab and moved back from the northeast area of it before firing the shots.

[67] Mr. Harris also testified that he fired with his left hand. Mr. Fredericks, the expert, confirmed that the shooter shot with his left hand. When Mr. Harris marked on an exhibit I noted him writing with his left hand and camera 6 video shows him moving a handgun from his left waistband to his left hoodie pocket with his left hand. The video from camera 6 also shows an object in the left pocket of his hoodie which appears to have a cylindrical shape to it, which Mr. Harris acknowledges as a .380 calibre handgun. Mr. Harris also testified that the handgun was black without any silver and that he was wearing a grey hoodie, not a black jacket.

[68] On the evidence of the expert, the videos and the evidence of Mr. Harris, I accept that Mr. Harris wore a grayish coloured hoodie, in which he carried a .380 caliber handgun in the left pocket, he removed it and fired with his left hand. The shots, although Mr. Stanley thought they occurred about 10 seconds apart, occurred as shown by the muzzle flashes on the video from camera 6 within about one second of each other.

[69] Camera 6 video footage confirms Mr. Stanley's testimony that the first shot went downward and the second shot towards the upper torso of Mr. Rock. Mr. Harris testified that he fired low at first and then fired a second shot.

[70] Because the video from camera 6 shows two flashes which on the evidence of Mr. Harris as to his location, the calculations of the expert, Mr. Fredericks, as to location of Mr. Harris, the movement of an individual that I infer to be Mr. Rock, who eventually falls to the ground, the evidence of Mr. Harris, Mr. Stanley, and the evidence of the autopsy report, I accept that Mr. Harris fired two shots, one towards the right leg of Mr. Rock and then one at Mr. Rock's upper left chest. Mr. Harris fired the second shot about one second after the first shot. Mr. Harris used his left hand and a black .380 caliber handgun to fire the shots.

[71] The police found two .380 calibre spent casings just east of the area where Mr. Harris fired his handgun. These casings support the evidence of Mr. Harris that he had in his possession a .380 calibre handgun. As I infer, his handgun ejected these two casings as he fired.

Possible handgun threat by John Rock

[72] Both Mr. Urbanoski (Kit) and Mr. Harris testified that near booth 40, when Mr. Rock stood up and moved close to Mr. Harris while they spoke, Mr. Rock had his hand in the pocket of his hoodie. Both Mr. Urbanoski (Kit) and Mr. Harris say that Mr. Rock pushed out with his hand, touching Mr. Harris on his side.

[73] Mr. Urbanoski (Kit) remembers Mr. Rock using his right hand. Mr. Harris remembers it as Mr. Rock using his left hand.

[74] Mr. Urbanoski (Kit) assumed Mr. Rock had a firearm in the pocket of the hoodie he wore. Mr. Harris testified that as he approached booth 40 he noticed Mr. Rock wearing a glove on his left hand. Mr. Rock, he says, while wearing a glove on his left hand pulled his left hand slightly out of his left hoodie pocket, allowing Mr. Harris to see something which Mr. Harris thought was the corner of a firearm, black in colour.

[75] Mr. Harris says that after the two of them discussed the debt, Mr. Rock said Mr. Harris was going with him. Mr. Harris told him he was not and added a snide comment to the effect "over my dead body".

[76] Mr. Harris testified that Mr. Rock was now standing by Mr. Harris and responded, "yeah, that's the point", then pushed his left hand still inside his left hoodie pocket forward, contacting Mr. Harris on his right side, just below his rib cage.

[77] On the video from camera 15, Mr. Rock does stand up from the booth and move toward Mr. Harris. When he leaves the booth, he moves in an unusual and awkward manner, leaving both hands in the pockets of his hoodie. Ordinarily, I would expect someone leaving a booth to have both hands or at least one out on top of the table to assist with movement out of the booth.

[78] When Mr. Rock walked up to Mr. Harris, Mr. Urbanoski (Kit) approached Mr. Harris from behind, blocking the view of camera 15 of Mr. Rock's left hand. Mr. Rock did move his left side in a manner similar to that described by Mr. Harris but Mr. Harris showed no reaction of surprise or alarm. This could mean Mr. Harris is fabricating the movement but he may have maintained his composure so as to present a "tough guy" appearance.

[79] I prefer the latter as it is in keeping with Mr. Harris's reaction once he learned that Mr. Ritchie (Tommy) had fallen into the hands of Mr. Rock. Mr. Harris, with Mr. Brokowski (Rambo) as support, went to the bar. He then walked into the Canadian Brewhouse with purpose and self-assurance, directly to booth 40 where Mr. Rock sat. He maintained a "tough guy" appearance.

[80] Mr. Rock kept his hands in his pockets as he made the awkward movement to leave the booth and did push up close to Mr. Harris in a position to use his left hand as described by Mr. Harris.

[81] Mr. Urbanoski (Kit) has the movement correct but his recall of which hand Mr. Rock used does not fit with the rest of the evidence.

[82] Mr. Rock, I find, did push his left hand while in his left hoodie pocket into the right side of Mr. Harris. Whether he had an object in his left hand or pocket I cannot find as a fact.

[83] Mr. Urbanoski (Kit) testified that before exiting the Canadian Brewhouse, he told Mr. Harris that he thought Mr. Rock had a gun. Of all the individuals on camera 15 and camera 6,

Mr. Urbanoski (Kit) behaved in the most animated manner. In his testimony he described himself as animated and loud. The video evidence supports this.

[84] Mr. Urbanoski (Kit) and Mr. Harris spoke at length at the foyer before exiting. I accept that sometime after Mr. Rock moved up to Mr. Harris, nudged him with his left hand, and before Mr. Harris left the bar Mr. Urbanoski (Kit) told Mr. Harris he thought Mr. Rock had a firearm.

[85] No evidence supports a finding that Mr. Rock actually had a firearm in his left hoodie pocket. Mr. Dier took a knife from close to where Mr. Rock fell, and passed it over to another person who turned it over to the police.

[86] Whether Mr. Rock had that knife or any object in his left hoodie pocket, I cannot, on the evidence, make a finding of fact.

Self-Defence

[87] The defence has conceded that unless the defence of self-defence as raised by Mr. Harris succeeds, then he is guilty of murder or manslaughter in the killing of Mr. Rock. Therefore, I will first deal with the application of the evidence to the elements of self-defence.

Air of Reality

[88] Before the Court considers the evidence with respect to the elements of self-defence, in particular as to whether the Crown has disproved any one of the elements of self-defence, the Court must first decide whether the defence has an air of reality.

[89] In this case, the Crown concedes the defence has an air of reality.

[90] Considering the prior threats of Mr. Rock, the actions of Mr. Rock inside the Canadian Brewhouse with respect to Mr. Ritchie (Tommy) and the attack by Mr. Rock on Mr. Harris outside the Canadian Brewhouse, the defence has an air of reality.

Post-2012 Self-Defence Provisions

[91] Our Court of Appeal in ***R v Rasberry***, 2017 ABCA 135, referring to ***R v Bengy***, 2015 ONCA 397, set out the following three basic elements that apply to all self-defence cases:

> (i) Reasonable belief (34(1)(a))**:** the accused must reasonably believe that force or threat of force is being used against him or someone else;
>
> (ii) Defensive purpose (34(1)(b)): the subjective purpose for responding to the threat must be to protect oneself or others; and
>
> (iii) Reasonable response (34(c))**:** the act committed must be objectively reasonable in the circumstances.

[92] For the defence to succeed, the evidence must support each element. Once raised, however, the defence may point to any evidence in the trial in support of the three elements.

[93] The Crown then has the burden on the evidence to prove beyond a reasonable doubt that at least one of the elements fails.

1. Reasonable Belief

[94] For this element, the accused must believe he faces force being used against him. His belief must be objectively reasonable.

[95] The Crown also concedes this element. I agree. Outside the Canadian Brewhouse, Mr. Rock launched an attack with his fists upon Mr. Rock. In addition to the evidence of Mr. Harris, the evidence of Mr. Stanley, Mr. Urbanoski, and the video from camera 6 support the attack.

[96] Accordingly, the evidence satisfies the first element of a reasonable belief.

2. Defensive Purpose

[97] On this element the defence made extensive written submissions citing numerous circumstances known to Mr. Harris before the shooting, including: the attack in the garage on Mr. Stanley, threats of an attack on Mr. Harris and his girlfriend, the threat of violence to the woman known as "Cee Cee" to collect a debt, that Mr. Harris believed and it was reasonable for Mr. Harris to believe, Mr. Rock had a firearm in his hoodie, that a man with a firearm had tried to take Mr. Harris in the green Avalanche, and that Mr. Rock had with him a number of men outside, all in the drug trade and some gang members. From this context, the defence argues:

> These facts present, at minimum, an Air of Reality that the force was used to repel Rock's immediate attack and perceived gesture toward his pocket. Secondly, the force was used to repel any attempt to kidnap him. Harris's belief that he would be kidnapped by Rock and his associates was reasonably held. On the whole of the evidence a reasonable inference can be drawn that Rock would inflict serious violence on the accused if the accused had been forced into the Avalanche and kidnapped.

[98] The Crown, on the other hand, argues Mr. Harris launched a pre-emptive strike against Mr. Rock, stating:

> The second element under self-defence requires that the actions taken by the accused were done with the intent to defend himself from the force or threat or force established under the first element. This means that there must be a "temporal connection" between the attack or threat and the response to it. Engaging in pre-emptive strikes to save from some future threat will not satisfy this element (*R. v. Currie*, 2002 Carswell Ont 1841).
>
> While his actions may have had that additional effect, the accused shot Mr. Rock as a pre-emptive strike, intending to kill him, knowing that anything less would mean "it wasn't going to end".

[99] At this stage, a court considers only "the subjective purpose for responding to the threat must be to protect oneself or others" (***R v Rasberry, supra***). The objective reasonableness of the act does not figure in the assessment until the third stage of the analysis.

[100] Much of the defence argument on this element properly goes to the third element, reasonableness, rather than the subjective purpose. Nevertheless, I agree with the defence that Mr. Harris acted for the purpose of defending himself.

[101] Mr. Harris did not launch a pre-emptive strike. Mr. Rock launched his attack on Mr. Harris with his fists. Mr. Harris knew he had to respond with force to protect himself or possibly suffer at a minimum a beating.

[102] Whether Mr. Rock reached for his left pocket in his hoodie I will deal with when assessing the final element of self-defence.

[103] At this stage, Mr. Harris responded to Mr. Rock's attack because in his mind he feared a beating at the hands of Mr. Rock. He did not launch a pre-emptive strike.

[104] The analysis of the reasonableness of his response follows.

3. Reasonable Response

[105] The evidence measured against the factors in s 34(2) of the *Criminal Code* does not support a reasonable act by Mr. Harris in the circumstances.

Credibility of Nicholas Harris

[106] Determining whether Mr. Harris acted reasonably requires an assessment of his credibility and reliability. His evidence did not at times even generally align with the evidence of his friend, Mr. Stanley.

[107] However, this is not a case where if believing Mr. Harris or at least not rejecting his evidence would necessarily support an acquittal. Whether I accept all, part or none of his evidence still requires consideration of all of the evidence against the s 34(2) factors.

[108] Accordingly, I will deal with his credibility and reliability as it relates to those factors or any other factors when analyzing whether or not he acted reasonably.

History

[109] As Mr. Harris and Mr. Rock had a relationship of some length which had deteriorated from friends to enemies. I begin with their history of interaction and communication.

[110] Mr. Harris told of the two becoming acquainted as far back as 2004 or 2005. They came to know one another through mutual friends. Mr. Harris thought at the time Mr. Rock had reached the age of about 18 years. He understood Mr. Rock belonged to a gang at the time. Mr. Harris knew some of the members.

[111] Thereafter, Mr. Rock spent some time in prison and on his release on parole he and Mr. Harris became better friends.

[112] By 2012, the two carried on business in a criminal venture. Mr. Rock supplied cocaine to Mr. Harris which Mr. Harris understood came from British Columbia. Mr. Rock would provide a kilo or half kilo of cocaine to Mr. Harris on credit. Mr. Harris then would break it down into ounce sized portions. For about two years before the shooting, his friend Ryan Stanley delivered the smaller portions of the drug to street dealers and collected money for Mr. Harris.

[113] In Grande Prairie, Mr. Harris had an associate dealer, Mr. Ritchie (Tommy), who sold the drugs, then paid "dividends" to Mr. Harris. Mr. Harris used this money to pay Mr. Rock.

[114] By July of 2014, Mr. Ritchie (Tommy) had a business arrangement with a woman known to Mr. Harris as Cecilia Wong, also known as "Cee Cee". Those two sold the cocaine in Grande Prairie.

[115] In early July of 2014, Mr. Harris testified he provided an amount of cocaine to Ms. Wong (Cee Cee). She took it, then not long after sent him a text advising that she would keep it without paying. Mr. Harris estimated his loss at about $60,000. From that money, he owed Mr. Rock $15,000.

[116] At first, Mr. Rock did not press Mr. Harris for payment, rather leading Mr. Harris to believe Mr. Rock would collect the money himself.

[117] However, within about four weeks Mr. Rock began to demand the money from Mr. Harris. This angered Mr. Harris because he believed Mr. Rock had started providing cocaine directly to Ms. Wong (Cee Cee) so she could sell to the customers of Mr. Harris and Mr. Ritchie (Tommy). Mr. Rock had now harmed the business of Mr. Harris and still wanted the $15,000. Mr. Harris told Mr. Rock he would pay him when he felt like it. Mr. Harris never paid the $15,000.

[118] Mr. Harris also owed Mr. Rock another $15,000. This came from a larger debt incurred by Mr. Ritchie (Tommy) which Mr. Harris had taken over and paid down to $15,000.

[119] Mr. Rock and Mr. Harris remained at odds over the money with some threats made by Mr. Rock through BlackBerry texting. The two continued to communicate through texting but did not meet.

[120] Matters escalated when Mr. Rock found Mr. Stanley in the garage and beat him with a pistol, demanding information as to the whereabouts of Mr. Harris. By late August to mid-September of 2014, because of the threats and Mr. Rock's treatment of Mr. Stanley, Mr. Harris believed his safety was at risk. Mr. Harris, who often carried a handgun, now did not leave his home without one. In public places he often chambered a round to be ready for any possible attempt on his life.

[121] This evidence from Mr. Harris I accept. Mr. Stanley supported it with his description of the events in the garage. On September 17, 2014, Mr. Harris left a handgun in a Kentucky Fried Chicken/Taco Bell restaurant in Terwillegar. The police, upon finding it, arrested him when he returned to recover it. After raising $35,000 for his bail, he was released on September 26, 2014. Mr. Harris then left for Grande Prairie on September 30, carrying another handgun. Mr. Harris shot Mr. Rock with a handgun. Mr. Urbanoski (Kit) supports the debt and animosity between Mr. Rock and Mr. Harris in his description of Mr. Rock's treatment of Mr. Ritchie (Tommy) at the Canadian Brewhouse. Tara MacDonald heard words from Mr. Rock about money owed to him by Mr. Ritchie (Tommy).

[122] Accordingly, I accept Mr. Harris's version of the deterioration of the relationship between the two men over a debt. I accept that Mr. Harris's concern for his safety caused him to carry a handgun.

[123] Mr. Harris testified as to a number of threats made by Mr. Rock, or of information Mr. Rock provided to Mr. Harris as to Mr. Rock's willingness to visit violence upon other people to show Mr. Harris that he dealt severely with people who did not pay him. Of these various threats, I accept that Mr. Rock made a threat to Mr. Harris that the next time they met, he should hope he was wearing a vest. I take that to mean a bullet resistant vest.

[124] Mr. Rock used a handgun to beat Mr. Stanley. The police found a handgun hidden in the tailgate of Mr. Rock's truck after the shooting. Mr. Rock had a handgun which he turned over to Mr. Dier the evening before the shooting. Mr. Michaud removed guns from Mr. Rock's truck after the shooting. Whether those guns included the one turned over to Mr. Dier or not, I do not know. In any event, Mr. Rock had possession of at least three handguns on the evening of September 30, 2014. Mr. Rock had no hesitation in possessing handguns and I accept that he advised Mr. Harris with respect to wearing a vest the next time they met.

[125] With respect to the testimony of Mr. Harris regarding the threats from Mr. Rock to harm Mr. Harris's girlfriend, Ms. Biglo, or the woman known as Cee Cee, I have no evidence in support thereof and do not find as a fact they occurred.

[126] Nevertheless, from the history and communication of the two men from early July 2014 until October 1, 2014, Mr. Harris had reason to be concerned for his safety at the hands of Mr. Rock.

[127] Mr. Harris knew that the drug trade did not allow for the collection of debt by way of a civil claim. Mr. Stanley testified that bad debtors could expect violence and still expect to pay notwithstanding any violence suffered by the bad debtor. Mr. Harris knew that Mr. Rock had used violence against Mr. Stanley and Mr. Harris had no reason to expect anything less for himself at the hands of Mr. Rock.

[128] Indeed, the hand motions of Mr. Rock outside the window of the Canadian Brewhouse Mr. Stanley took to mean that Mr. Rock wanted Mr. Harris to come outside to fight. To that I would add Mr. Rock also meant "what are you waiting for?" or "you're not coming out so we can deal with this?"

Physical Characteristics

[129] The autopsy report provided a height of 6'4" and 234 pounds for Mr. Rock at the time of his death. Mr. Harris did not testify as to his height and weight at the time of the killing of Mr. Rock. Camera 15 provides the best view of the two men together, but it records from above them, from some distance on an angle downwards. That view makes it difficult to compare their relative height. Whatever their height, it could not change to any degree notwithstanding the passing of four and a half years since the security camera recorded the men on the early morning hours of October 1, 2014.

[130] From my observations of Mr. Harris on the stand, I made an estimate of his height at 5'9". At the end of the defence evidence I asked for clarification on some points. Intending to also put my observations as to the height and weight of Mr. Harris on the record, I overlooked making them.

[131] Therefore, before oral argument commenced about four weeks after the closing of evidence, I placed this evidence on the record notwithstanding that the parties had each closed their case. Counsel agreed with this procedure.

[132] The weight of Mr. Harris could vary since October 1, 2014. On the video images he appeared heavier than at trial. However, Mr. Rock did not look as tall as 6'4" to me on the video and appeared heavier than 234 pounds.

[133] The weight of Mr. Harris at the time of the trial I estimate at 175 pounds. Allowing for some margin of error in my estimate of the height and weight of Mr. Harris, and allowing for a somewhat reduced weight of Mr. Harris at trial from the weight indicated on the video, I have no hesitation in inferring that on October 1, 2014, Mr. Rock stood six to seven inches taller than Mr. Harris and outweighed him by approximately 50 pounds.

Role of Nicholas Harris

[134] Dealing with the events on September 30 to October 1, 2014, Mr. Rock instigated the confrontation. He came to know where he might find Mr. Ritchie (Tommy) and Mr. Urbanoski (Kit). No evidence points to Mr. Rock knowing when he went to the Canadian Brewhouse that

Mr. Harris would soon arrive in Grande Prairie. From the evidence I can only infer that Mr. Rock intended to find Mr. Ritchie (Tommy) in order to collect some of the money owed to Mr. Rock.

[135] From the evidence of Mr. Michaud in Exhibit 22, I accept that sometime after Mr. Rock arrived at the Canadian Brewhouse, Mr. Rock learned Mr. Harris was on his way to Grande Prairie. He knew Mr. Harris might come to the Canadian Brewhouse to discuss the debt.

[136] Mr. Harris for his part had no thought of calling the police to report the confinement, robbery and possible kidnapping of his friend, Mr. Ritchie (Tommy). He knew Mr. Rock wanted his money. Mr. Harris also knew from Mr. Stanley that Mr. Rock was looking for Mr. Harris. Mr. Harris had warned Mr. Ritchie (Tommy) that Mr. Rock would be looking for him too. I accept Mr. Harris's evidence on that point as it is obvious he would warn Mr. Ritchie (Tommy).

[137] Mr. Harris decided to confront Mr. Rock. I accept he had in his previous communications with Mr. Rock made it clear he would not back down from Mr. Rock. The conduct of Mr. Harris at the bar confirmed his willingness to stand up to Mr. Rock.

[138] For that reason, I accept also that Mr. Harris told Mr. Rock sometime before October 1, 2014 that neither of them were "pussies". From that I infer that both of them knew that neither had any inclination to allow the other to intimidate him.

[139] Early in the morning of October 1, 2014 at about 12 minutes before 1:00 am, Mr. Harris walked into the Canadian Brewhouse. Without hesitating, he walked directly up to booth 40, where he spoke with Mr. Rock.

[140] For the next two and a half minutes more or less, the two men spoke with each other. The video footage from camera 15 shows Mr. Harris dealing with Mr. Rock face-to-face. The footage has no audio but nothing indicates Mr. Harris went, as he testified, "with his tail between his legs" begging for his friend's life. The words Mr. Stanley heard, "you think I'm a punk", "you think I'm a bitch", do not show any reluctance on the part of Mr. Harris to confront Mr. Rock on behalf of himself and his friend.

[141] After Mr. Rock left the bar, Mr. Harris and his associates stood at the foyer discussing their options. Somehow, others in the bar came to the conclusion they would have an opportunity to see a fight outside the bar.

[142] Notwithstanding the criminal business Mr. Harris carried on with his associates in Grande Prairie, Mr. Harris, upon leaving the bar, had as much right as any other patron, to walk to a motor vehicle and drive away from the Canadian Brewhouse.

[143] As to Mr. Harris's testimony that he saw Mr. Brokowski (Rambo) driving on the parking lot to the north a short distance from the entrance to the bar, I do not accept it. Mr. Harris testified:

> And by that I mean -- at that time I thought Landon would still be there too, so I figured -- and him and Landon are friends. So when I seen him driving away my heart kind of sank, so I was, you know, a little upset about that.

[144] Regarding this evidence, the Crown submits the defence breached the rule in ***Browne v Dunn***, (1893), 6 R. 67 (UK. H.L.) because this important piece of defence evidence was not put to any Crown witness, particularly Mr. Stanley. It first appeared in the testimony of Mr. Harris.

[145] Our Court of Appeal in ***R v Sawatzky***, 2017 ABCA 179 provided the following guidance with respect to the trial court's application of the rule in ***Browne v Dunn*** at paras 21-26:

> [21] The "rule in *Browne v Dunn*" is not absolute. The trial judge is best suited to determine whether a party has failed to comply with the rule and whether the failure to cross-examine a witness on a certain point was unfair to the other side. The trial judge's decision about whether the rule was violated, and whether any unfairness resulted, is entitled to considerable deference: *R v Quansah*, 2015 ONCA 237 at para 90, 125 OR (3d) 81. The extent of the rule's application "is within the discretion of the trial judge after taking into account all the circumstances of the case": *R v Lyttle*, 2004 SCC 5 at para 65, [2004] 1 SCR 193. When the rule has been breached, the remedy lies within the discretion of the trial judge: *R v Werkman*, 2007 ABCA 130 at para 9, 404 AR 378.
>
> [22] Unless admissible pursuant to a hearsay exception, a trial judge may not rely on an out-of-court statement for the truth of its contents. When a witness's prior out-of-court statement is used to impeach the witness during cross-examination, any portions of the statement put to the witness are not in evidence unless the witness adopts his or her prior statement. It is an error of law, reviewable on a correctness standard, for the trial judge to rely on any facts contained in the out-of-court statement as though they formed part of the witness's in-court testimony: *R v Youvarajah*, 2013 SCC 41 at para 26, [2013] 2 SCR 720; *R v Kelly*, 2011 ONCA 549 at para 41, 88 CR (6th) 371.
>
> **ANALYSIS**
>
> **Failure to Apply the Rule in *Browne v Dunn***
>
> [23] Where a party intends to impeach a witness who was called by his or her opponent, or present evidence contradicting that witness, the party should direct the witness's attention to the contradictory evidence. The contradictory evidence should be put to the witness during cross-examination, so that the witness has an opportunity to address or explain the contradictory evidence. If the witness is not cross-examined on any such matters of significance, the trier of fact may consider the failure to cross-examine the witness when assessing the witness's credibility or the credibility of any contradictory evidence: *Lyttle* at paras 64-65; *R v Paris* (2000), 2000 CanLII 17031 (ON CA), 150 CCC (3d) 162 (Ont CA) at para 22; *Werkman* at para 7; *Quansah* at paras 75-86.
>
> [24] This is the well-known "rule in *Browne v Dunn*." The rule is rooted in concerns about fairness – specifically, fairness to the witness (who should have an opportunity to address the contested point), fairness to the opposing party (who should understand what aspects of its witness's evidence are contested), and fairness to the trier of fact (who otherwise might not have the information necessary to properly assess the witness's credibility): *Quansah* at para 77; S.C. Hill, D.M. Tanovich and L.P. Strezos, eds, *McWilliams' Canadian Criminal Evidence*, 5th ed (Aurora, ON: Canada Law Book, 2013) (loose-leaf, release 2016-2) at pp 21-107 to 21-108.

> [25] The rule is not an "ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss": *Quansah* at para 90. Any failure to cross-examine a witness must relate to a matter of substance, not an issue of little significance: *Paris* at para 23; *Quansah* at para 81; *R v Abdulle*, 2016 ABCA 5 at para 11, 609 AR 396. Before inviting the trier of fact to make an adverse credibility finding, the trial judge may also consider less drastic remedies, such as granting leave to recall witnesses: *Werkman* at para 9; *Quansah* at paras 119-120.
>
> [26] Even if a party has violated the rule, it is up to the trier of fact to determine how much weight, if any, should be placed upon counsel's failure to cross-examine a witness about a particular matter: *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 at pp 782-783; *R v MacKinnon* (1992), 1992 CanLII 488 (BC CA), 72 CCC (3d) 113 (BCCA); *Paris* at para 27. Failure to cross-examine the witness about an issue does not require the trier of fact to accept the witness's evidence on that point: *R v Scheideman*, 2001 ABCA 94 at para 2, 277 AR 331. An adverse inference is not mandatory.

[146] The defence argues that no breach occurred because the defence put questions to Mr. Stanley as to what memory he had of other vehicles or persons on the parking lot around the time of the shooting. Furthermore, the defence argues this evidence does not contradict any other witness so the rule has no application.

[147] The defence did breach the rule because the rule strives for fairness in the trial; fairness not only with respect to a witness the defence may later contradict but also fairness for the trier of fact.

[148] Not every piece of evidence requires cross-examination. The rule is not inflexible. Nevertheless, in this case the evidence related to what Mr. Harris knew of the circumstances as he stood on the cement pad outside the front door of the bar. Mr. Harris did not say that he saw the vehicle leave the parking lot but he said he did not see it again. His testimony "my heart kind of sank, so I was, you know, a little upset about that" Mr. Harris provided to leave the impression that Mr. Brokowski (Rambo) had left him to deal with Mr. Rock without the support of Mr. Brokowski (Rambo).

[149] Not to put that evidence to at least Mr. Stanley, who stood about a car length from Mr. Harris at the time Mr. Harris says he saw Mr. Brokowski (Rambo) driving away from the bar, was unfair. It painted for me, the trier of fact, a much different picture than the one provided by Mr. Stanley that he saw Mr. Brokowski (Rambo) in his vehicle parked on the north side of the parking lot as he and Mr. Harris drove into the parking lot.

[150] By the time this occurred, Mr. Stanley had completed his testimony some days before. I have no evidence as to his present circumstances regarding the question of whether he could return to the stand.

[151] Were it not for other evidence in the trial that persuades me Mr. Brokowski (Rambo) did not drive away as described by Mr. Harris, this would cause me some concern as to whether I should give less weight to this evidence of Mr. Harris.

[152] The relationship between Mr. Brokowski (Rambo) and Mr. Harris along with Mr. Brokowski's (Rambo) eagerness to support Mr. Harris persuades me Mr. Brokowski (Rambo) did not do anything to cause Mr. Harris's heart to sink.

[153] Mr. Brokowski (Rambo) showed no hesitation in agreeing to attend at the Canadian Brewhouse to support Mr. Harris. Later that day the two men met in Valleyview, travelling together from there in another vehicle. That Mr. Brokowski (Rambo) would leave the Canadian Brewhouse parking lot and fail to support Mr. Harris, meet him at Valleyview a short time later, then take Mr. Harris with him, makes no sense. Mr. Brokowski (Rambo) did not drive away as described by Mr. Harris.

[154] Nevertheless, as Mr. Harris stood on the cement slab in front of the Canadian Brewhouse, he could expect little if any help from his associates other than Mr. Brokowski (Rambo) and anyone Mr. Brokowski (Rambo) might have with him in his vehicle. Ryan Stanley had no stomach for violence. He testified that he did not care to fight and never had a fight he won. My observations of him on the stand, on the video and from his testimony confirm he eschewed violence.

[155] As for Mr. Ritchie (Tommy), Mr. Rock had thoroughly intimidated him within the bar, leaving him of little, if any, assistance to Mr. Harris.

[156] This left Mr. Urbanoski, who wanted to go out the back door.

[157] No evidence suggests that any of those three had a weapon.

[158] Accordingly, having no evidence or reason to believe Mr. Brokowski (Rambo) had abandoned him, Mr. Harris knew that although he could expect little from the three men who left the bar with him, some 200 feet away sat Mr. Brokowski (Rambo) and another man in Mr. Brokowski's (Rambo's) pickup, who remained there to support him.

The Green Chevy Avalanche

[159] I do not accept that a man exited a green Chevy Avalanche parked just to the east of the main entrance of the bar, approached Mr. Harris as he exited the bar, told him to come with him and lifted the bottom of the hoodie he wore to display a "silver-ish" object which Mr. Harris "believed to be a gun".

[160] Again, the Crown submits that this testimony breached the rule in ***Browne v Dunn,*** *supra*. Again, for the same reasons with respect to the evidence of whether Mr. Harris saw Mr. Brokowski (Rambo) drive away from the Canadian Brewhouse, the defence breached the rule.

[161] This is a different version of events than to which anyone else had testified. None of the witnesses, particularly Mr. Fredericks or Mr. Stanley, had any opportunity to comment on this possibility as the defence did not put it to any witness in their testimony.

[162] Given an opportunity, Mr. Fredericks might have been able to testify as to the presence of someone or not on camera 6 or camera 15, and may have been able to calculate that person's location and movements.

[163] Mr. Harris described the green Chevy Avalanche parked in a position such that Mr. Stanley would have stood very close to the front of it. Mr. Stanley saw Mr. Rock attack Mr. Harris. No doubt Mr. Stanley was paying attention to his friend as he saw the blows attempted and landed by Mr. Rock. Mr. Stanley would have the best opportunity to observe a man leave a

green Chevy Avalanche and approach Mr. Harris. Accordingly, not having given Mr. Stanley an opportunity to provide his observation means that as a matter of fairness to the trier of fact, the defence breached the rule. Again, however, there is other evidence that persuades me on balance not to accept the evidence of the green Chevy Avalanche and the man with a handgun.

[164] I do not believe that Mr. Harris, after the shooting, ran in the direction of a man who he says had just, while revealing a handgun, told Mr. Harris to come with him, because obviously this man supported Mr. Rock. If this person planned to take Mr. Harris away in the green Chevy Avalanche, the man would not let Mr. Harris, the person who had just shot his associate, go past him without further confrontation. Such a man armed with a handgun and willing, moments before, to threaten Mr. Harris, would not stand aside after the shooting while Mr. Harris ran away.

[165] Mr. Harris did not say where the man went after Mr. Harris declined his invitation to accompany him, but the man could not have gone far as Mr. Rock shortly thereafter struck Mr. Harris. Mr. Harris would not then run towards a location where shortly before stood a man armed with a handgun wanting to take him away. For these reasons, I do not believe the testimony of Mr. Harris with respect to the green Avalanche and the man who told him to come with him. His effort to persuade me a man who exited a green Avalanche, threatening the use of a handgun, wanted to take him away, I reject.

[166] Summarizing the role of Mr. Harris, he went to the Canadian Brewhouse to confront Mr. Rock regarding his friend, Mr. Ritchie (Tommy). He left the Canadian Brewhouse to deal with whatever action Mr. Rock might take. His use of the handgun to shoot Mr. Rock I deal with later in this judgment.

Nature of the Force

[167] When Mr. Rock attacked Mr. Harris, he did so with his fists. Mr. Harris at that time depending on his ability to fight back without weapons, using only his fists, meant he risked a beating. Based on their comparative sizes and with no evidence of any special training or physical ability on the part of Mr. Harris to respond, he would probably suffer to some degree a beating at the hands of the larger man.

Use or Threatened Use of a Weapon

[168] Mr. Harris used a weapon, a handgun, to shoot Mr. Rock, causing his death. The reasonableness of that I will deal with later.

[169] Mr. Harris testified that he saw Mr. Rock reach with his left hand towards his left hoodie pocket; Mr. Harris says he warned him to stop. He did not testify as to his words. He thought Mr. Rock was reaching towards his left pocket so Mr. Rock could shoot him with a handgun.

[170] I do not accept Mr. Rock reached for his pocket as if to reach for a firearm. Mr. Urbanoski (Kit) testified he did not see this because his back was turned while he spoke to persons near the door. Without any evidence in support, I would not accept Mr. Bucci's evidence on this point. Mr. Friesen did not even see the two blows testified to by Mr. Stanley and Mr. Harris. With all of the other errors in Mr. Friesen's evidence, I would not rely on his evidence on this issue without supporting evidence.

[171] Mr. Stanley did not see it but he acknowledged Mr. Rock possibly could have reached for his pocket.

[172] The video is not clear enough to help and the expert, Mr. Fredericks, did not address the movement of Mr. Rock's left hand towards his left hoodie pocket.

[173] Mr. Harris had credibility problems on the crucial details of the green Chevy Avalanche, the man with a firearm who he said exited it, and the driving away of Mr. Brokowski (Rambo) north from the Canadian Brewhouse entrance as Mr. Harris came out of the bar. I did not accept his evidence on these points. Because of the lack of eyewitness evidence on this point, I turn to the evidence in the trial that supports or undermines the evidence of Mr. Harris.

[174] Some of the evidence supports that Mr. Harris thought Mr. Rock reached for a firearm.

[175] Inside the bar, Mr. Rock, I have found as a fact, moved up beside Mr. Harris and used his left hand in his left hoodie pocket to push into Mr. Harris's right side as if he had a weapon in his pocket.

[176] Mr. Urbanoski (Kit) told Mr. Harris he thought Mr. Rock had a firearm.

[177] Mr. Harris knew Mr. Rock had used a firearm in the past, in particular, to assault his friend, Mr. Stanley. Mr. Harris for some weeks had carried a handgun because of the threats of Mr. Rock.

[178] As the aggressor, Mr. Rock attacked Mr. Harris outside the bar.

[179] However, the balance of the evidence does not support the assertion of Mr. Harris that Mr. Rock reached for his left hoodie pocket as if to reach for a firearm.

[180] Mr. Rock was using his hands to land blows, not reach for his pocket.

[181] No one, specifically Mr. Stanley who stood about a car length away, saw Mr. Rock reach with his left hand. Rather, Mr. Stanley saw Mr. Rock strike Mr. Harris once and try to strike him again, landing only a glancing blow. This fits with Mr. Harris's evidence that Mr. Rock struck him twice in the head.

[182] Nothing in the evidence supports any reason for Mr. Rock to increase the level of violence beyond a fist fight. Mr. Rock stood much taller and outweighed Mr. Harris by a significant amount. Nothing supports any reason for him to think it necessary to use a weapon against Mr. Harris.

[183] Moreover, the fight had barely started with Mr. Rock moving forward to strike Mr. Harris twice, and Mr. Harris backing away. Mr. Harris did not offer resistance by striking back towards Mr. Rock, so Mr. Rock had no reason to reach for a firearm when Mr. Harris had not yet fought back.

[184] The altercation between the two men occurred directly in front of the bar where each of the men would expect a security camera to cover the location. Mr. Rock, facing the camera, would not want a video recording of him reaching for a firearm when he could almost certainly defeat Mr. Harris with his fists.

[185] Accordingly, on the whole of the evidence as to whether or not Mr. Rock reached towards his left pocket of his hoodie as if to reach for a firearm, I reject Mr. Harris's evidence on that point.

[186] Therefore, there is no evidence of imminent use of force by Mr. Rock with a handgun.

Other Means

[187] Taking only the narrow perspective of a fight between two men with their fists, which escalated into the firing of shots from a handgun by Mr. Harris, does not portray the larger picture surrounding the incident. As a drug trafficker, Mr. Harris placed himself in a position where he could not act reasonably in the circumstances as regards other means.

[188] Any other person, not the leader of three other men trafficking cocaine in Grande Prairie, who knew – a larger man waited for him outside the bar, who knew the larger man had possibly threatened him with a handgun by poking him on the right side with his left hand inside a hoodie pocket, the larger man had just robbed his friend of his pickup truck to pay a debt, had previously beaten another friend with a handgun, then gestured outside the window of the bar as if to engage him in a fight, and who had in the Canadian Brewhouse told Mr. Harris that Mr. Harris was coming with him – would call the police.

[189] Mr. Harris in his circumstances could not call the police. To make the call would destroy the criminal business and lifestyle he maintained. The word would go out that he was a coward, a rat and he would face retribution.

[190] Moreover, he had in his waistband, then in his left hoodie pocket a handgun which the police, even without grounds to search him, might somehow notice.

[191] Furthermore, how could Mr. Harris explain to the police why Mr. Rock had robbed his friend, Mr. Ritchie (Tommy), to pay off a drug dealer's debt. Or how could he explain that he, Mr. Harris, had come to the Canadian Brewhouse to help Mr. Ritchie (Tommy) because Mr. Rock had confined him there.

[192] None of this could Mr. Harris do because of the effect it would have on his drug trafficking business.

[193] He decided to walk out of the Canadian Brewhouse knowing the nature of the man who waited to settle a drug debt. When he moved the handgun, with a round in the chamber, from his waistband to his left hoodie pocket, he did so to have it available to use against Mr. Rock as in his opinion the circumstances required. As he testified upon being questioned about moving the handgun from his waistband to his left hoodie pocket, "So if things went wrong, I wanted to be able to walk myself out of there."

[194] As Mr. Harris walked out of the Canadian Brewhouse with a loaded handgun in his pocket to deal with whatever came his way in his dispute with Mr. Rock, including using the handgun, he was not acting reasonably in the circumstances. He had gone too far down the road in his criminal career to act reasonably in the circumstances. He did not resort to other means because in his mind he had no other means. Rather, he meant to deal with the matter while armed with a handgun.

[195] However reasonable he considered his actions as a criminal, a drug trafficker, in responding to another drug trafficker, it fails the reasonableness test. The reasonable law abiding citizen sets the reasonable standard, not a reasonable drug trafficker.

Proportionality

[196] As I have found that Mr. Rock did not reach for his left pocket as if to reach for a handgun and no one from a green Avalanche tried to take him away, the nature of Mr. Harris's reaction is all out of proportion to the threat of Mr. Rock's force. Mr. Harris left the bar knowing

that his left hoodie pocket contained a loaded handgun. His shooting of Mr. Rock shows he had no intention of trying to walk “himself out of there”. He used it within seconds of knowing he had no choice but to fight Mr. Rock. Mr. Harris not only planned to walk himself out of there, he planned to shoot his way out of there. Neither is that reasonable in the circumstances. As regards proportionality, he failed to meet the standard of a reasonable law abiding citizen, as opposed to a reasonable drug trafficker.

Mistake of Law

[197] Even if Mr. Harris only intended to injure Mr. Rock, which I will later address, Mr. Harris was operating under a mistake of law if he did so to prevent a further attack.

[198] Mr. Harris cannot, for the reasons given, avail himself of the defence of self-defence. Therefore, when Mr. Harris left the Canadian Brewhouse to face Mr. Rock with a handgun, in his left hoodie pocket, ready to fire, he could not lawfully use the handgun against Mr. Rock. To do so was not reasonable in the circumstances.

[199] Any thought process by which Mr. Harris determined he could use the handgun to defend himself against Mr. Rock meant Mr. Harris was acting under a mistake of law because he could not benefit from the law of self-defence.

[200] Any use of the handgun, even to only injure Mr. Rock to prevent the attack, would mean Mr. Harris had committed an offence because he could not claim self-defence as to its use.

[201] Although the defence of self-defence fails, the Crown must still prove beyond a reasonable doubt, murder or manslaughter.

Murder or Manslaughter

[202] The defence of self-defence having failed, then Mr. Harris is guilty, as acknowledged by the defence, of murder or manslaughter.

[203] Mr. Harris is guilty of murder.

Cause of Death

[204] He caused the death of Mr. Rock by shooting him in the upper left chest. The wound to the heart and liver of Mr. Rock caused a massive loss of blood, leading to his death.

Unlawful Act

[205] Mr. Harris caused the death by an unlawful act. He had in his possession, in a public place, a loaded handgun which he fired at a human being, an assault with a weapon, at night, in an urban area. This unlawful act caused the death of Mr. Rock.

Requisite State of Mind

[206] The Crown must prove beyond a reasonable doubt that Mr. Harris specifically intended to kill Mr. Rock.

The Law Regarding Intent

[207] Section 229 of the *Criminal Code* defines when culpable homicide is murder:

Murder

229 Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not ...

A trier of fact " ... may draw the inference that sane and sober persons intend the natural and possible consequences of their actions" (***R v Seymour***, [1996] 2 SCR 252 at para 19, 106 CCC (3d) 520).

[208] Following ***R v Seymour***, *supra*, the Supreme Court dealt with this "common sense inference" in ***R v Walle***, 2012 SCC 41. From ***R v Walle***, *supra*, the Supreme Court provided the following guidance with respect to the evidence required to prove the intent for murder beyond a reasonable doubt:

> [3] ... Fundamentally, the appellant maintains that the trial judge erred in applying the "common sense inference" — that a sane and sober person intends the natural and probable consequences of his or her actions — to find that he had the requisite intent for murder, without first having considered the whole of the evidence bearing on his mental state at the time of the shooting....
>
> ...
>
> [63] ... The jurors are admonished that the inference is permissive, not presumptive, and that before acting on it, they must carefully consider the evidence that points away from it....
>
> ...
>
> [65] ...that in assessing the specific intent required for murder, it should consider the whole of the evidence that could realistically bear on the accused's mental state at the time of the alleged offence ...
>
> [66] ... if, after considering the whole of the evidence, they believe or have a reasonable doubt that the accused did not have one or the other of the requisite intents for murder at the time the offence was committed, then they must acquit the accused of murder and return a verdict of manslaughter.
>
> [67] If, however, there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the jury in a state of reasonable doubt about the accused's intent, then the jury may properly resort to the common sense inference in deciding whether intent has been proved.

Defence Position Regarding Intent

[209] The defence submits there is no direct evidence of intent on the part of Mr. Harris showing either that Mr. Harris meant to cause the death of Mr. Rock or that he meant to cause him bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not.

[210] The defence argues because of the downward trajectory of both discharges from the firearm, Mr. Harris only intended to prevent an attack by Mr. Rock. He did not intend to kill him or cause him bodily harm likely to cause his death.

Crown Position Regarding Intent

[211] The Crown counters that the defence position conflates intent with whether the defence of self-defence applies.

The Issue Regarding Intent

[212] When the defence refers to preventing an attack, it does seem to refer to Mr. Harris defending himself. However, if I take the defence to mean that Mr. Harris only meant to injure Mr. Rock to the point of preventing the attack, rather than meaning to cause his death or bodily harm he knew was likely to cause his death, then the defence position properly raises the issue of intent.

[213] The issue for determination I can state as follows. Did Mr. Harris:

(a) mean to cause the death of Mr. Rock; or

(b) mean to cause Mr. Rock bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not, or intended to cause bodily harm to Mr. Rock that is not likely to cause his death; or

(c) did he mean to only injure Mr. Rock so as to prevent an attack continuing?

Decision

[214] The answer is the evidence does not support an intention only to injure. The evidence as a whole proves beyond a reasonable doubt Mr. Rock meant to cause the death of Mr. Rock or meant to cause him bodily harm that he knew would likely cause Mr. Rock's death, and was reckless whether death ensued or not.

Mr. Harris's Evidence

[215] Mr. Harris never testified as to either his intention to kill or injure Mr. Rock. The following from the transcript of evidence provides his testimony as to what he had in his mind when he shot Mr. Rock (p 33, l 28 to p 34, l 22):

> Q Okay.
>
> A He screamed pretty much and said I told you that shit is fucking dead. And then he punched me twice in the head, called me a goof, and then -- I don't know, do you want me to stop there or keep going?
>
> Q Yes, bring us through it, please.
>
> A And then once he punched me in the head twice, I kind of leapt back I guess that you would say. So again, I am still on the concrete slab, and I kind of leapt backwards and then he started -- he started coming towards me and I seen him still have -- I seen him have the one glove on the one hand. I seen him start --
>
> THE COURT: -- sorry, so he was holding up a hand?
>
> A His left hand. It was his left, hundred percent. I know that everybody keep saying right but it was his left. I know without a doubt. But left hand. He started

going into his hoodie and then at this point -- as soon as that guy lifted up his shirt with the, I believed to be a gun, I put my hand in my hoodie and I had a gun in my hoodie.

Q MR. PHYPERS: You had a what?

A I had a gun in my hoodie.

Q Okay.

A So I put my hand right on my gun and then when I seen John Rock stepping towards me and reach into his hoodie, pulled out my gun and -- I just want to clarify, you know this is not something that I wanted to happen.

Q Okay.

A I don't know, it's just hard to talk about this, right, so.

Q What did you do?

A So I obviously warned him to stop and, whatever he was trying to do, like. In my mind I thought he was trying to reach to shoot me. So I aimed as low as I could, and I shot, and I thought I missed because he just kept kind of stepping forward. Like he stopped for a quick second, like a momentary second, I'm not even saying a real second. And then he stepped again towards me and I shot one more time.

A Warning?

[216] As to whether Mr. Harris saw Mr. Rock "reach into his hoodie", I have found as a fact that did not happen. It follows then that I do not believe "So I obviously warned him to stop and, whatever he was trying to do, like. In my mind I thought he was trying to reach to shoot me."

[217] If Mr. Rock did not, as I have found, reach for his pocket, Mr. Harris did not think Mr. Rock reached for a gun to shoot him. Therefore, he did not warn him to stop. I reject that evidence of Mr. Harris.

The First Shot

[218] Mr. Harris did fire downward on the first shot. Mr. Harris testified he "aimed as low as I could". Aiming as low as he could I take it to mean as low as possible and still have the bullet strike Mr. Rock. Obviously, he could have aimed even lower so as to hit the concrete slab, thereby providing a warning to Mr. Rock to stop his attack on Mr. Harris with his fists.

[219] Mr. Stanley also said Mr. Harris fired the first shot downward. The muzzle flash from the first shot shown on camera 6 confirms a downward shot. The autopsy report describes the wound path to Mr. Rock's right leg as downward. On the first shot, I find that Mr. Harris intended to shoot at the legs of Mr. Rock.

[220] The autopsy report describes a muscular injury without large blood vessel or femoral injury. What I take from that is a bullet wound to the thigh could be more severe but in this case a more serious injury did not occur.

[221] Although the bullet could have caused a more serious injury, the reasonable inference I make with respect to the first shot is that Mr. Harris fired at Mr. Rock's legs to injure him. In his mind, this would stop any further attack from Mr. Rock.

[222] Therefore, at this time Mr. Harris's actions show neither that he meant to kill Mr. Rock nor cause him bodily harm that he knew might cause the death of Mr. Rock.

The Second Shot

[223] The defence of self-defence, had it raised a reasonable doubt, would provide a full defence to Mr. Harris even if he meant with the second shot to kill Mr. Rock. As the defence of self-defence failed, the issue is did Mr. Harris have either requisite intent under s 229.

[224] The evidence makes out that he did have that necessary intent.

[225] The Crown submits that Mr. Harris raised the handgun before firing a second time. The defence argues that Mr. Harris again fired downward which finds support in the autopsy report where it describes the path of the bullet through Mr. Rock's body as downward. The defence argues, because he shot downward, this means Mr. Harris did not intend to shoot to kill Mr. Rock.

[226] The evidence does not support the position of the defence. On the contrary, Mr. Harris raised the handgun and fired from close range at the chest of Mr. Rock. In doing so, he either meant to cause the death of Mr. Rock or meant to cause him bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not.

[227] Mr. Harris did not testify he shot low when he fired the second shot. He only said, "I shot one more time". Mr. Stanley's evidence describes a lower first shot and a second shot higher. The muzzle flash on camera 6 shows a downward trajectory the first time, then a more or less horizontal muzzle flash from the second shot.

[228] The video from camera 6 shows the muzzle flashes at 12:10:00, video time. The second bullet did go downward from the chest area of Mr. Rock, then exit his right lower side. This, however, does not mean Mr. Harris shot downwards. From the video, after the first muzzle flash, Mr. Rock bends slightly forward and slightly down at the knees. Mr. Harris then fires the second shot.

[229] From the autopsy report, the bullet struck a rib of Mr. Rock which might, although on balance I cannot find that it did, cause the bullet to deflect downward. Expert evidence might assist on that point but I have none.

[230] Something caused the bullet to take a downward trajectory after striking Mr. Rock's rib, but the muzzle flash indicates a more or less horizontal flash directly at the chest of Mr. Rock.

[231] Moreover, if Mr. Harris shot downwards, striking Mr. Rock in the chest, with his second shot, this would tend to lend support to an intent to kill because it would mean that Mr. Harris shot down at the much taller man who had slumped down considerably or started to fall to the ground. If Mr. Rock had gone that far down towards the ground, it would indicate he had suffered an injury such that he could no longer carry out his attack. Therefore, his condition and position would make the second shot unnecessary. To fire again at Mr. Rock as he went to the ground would indicate an intent to cause his death.

[232] That did not happen. On the evidence from the video, I find as a fact that Mr. Harris, after firing downward on the first shot towards the legs of Mr. Rock, raised his aim and fired more or less horizontally directly at the chest of Mr. Rock, who had started to bend slightly forward. From the video and any other evidence, I cannot find if the position of Mr. Harris placed the handgun somewhat to Mr. Rock's left so as to cause the bullet to exit the right side of Mr. Rock.

Nor can I find as a fact why the bullet travelled downward. On the whole of the evidence, Mr. Harris fired the second shot directly at the chest of Mr. Rock. The bullet then struck Mr. Rock's rib, then his heart and liver, and exited his lower right side.

[233] The view from camera 6 foreshortens the distance between the two men at the time of the firing of the two shots. The autopsy report found no evidence of soot or gunpowder stippling on the body of Mr. Rock. Either of those two indicators would tend to show close range firing. Dr. Weinberg testified because of the variables he could not conclude the bullet did not come from close range.

[234] On the video from camera 6, it appears the men were not more than two to three arm lengths apart at the firing of the second shot. Allowing for some error because of the possible foreshortening from the camera 6 perspective, I find as a fact that a reasonable estimate of distance from the muzzle of the handgun to the chest of Mr. Rock to be about six feet.

[235] Common rifle calibres for the killing of big game are often around .300 calibre. When Mr. Harris fired a .380 calibre handgun from about six feet into a vital body area, the chest of Mr. Rock, the only common sense inference is he meant to cause his death or cause such bodily harm that he knew it was likely to cause the death of Mr. Rock. Nevertheless, Mr. Harris was reckless as to whether or not he caused the death of Mr. Rock. No evidence points to any other possible inference.

[236] The elements of murder having been made out, Mr. Harris is guilty of murder.

Planned and Deliberate

[237] The evidence also supports proof beyond a reasonable doubt that Mr. Harris planned to and deliberately killed Mr. Rock.

[238] In ***R v MMK***, 2006 ABCA 284 at paras 8-10, our Court of Appeal set out the following principles with respect to planned and deliberate murder:

> [8] A planned murder is one that was conceived and carefully thought out prior to being committed: ***Nygaard***, 1989 CanLII 6 (SCC), [1989] 2 S.C.R. 1074, at para. 18. It requires that a design or scheme be arranged beforehand: ***R. v. Jacquard***, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314 at para. 26.
>
> [9] A deliberate murder is one that is considered, not impulsive: ***R. v. More***, 1963 CanLII 79 (SCC), [1963] S.C.R. 522 at para. 35. A person commits deliberate murder when he thinks about the consequences and carefully thinks out the act, rather than proceeding hastily, rashly or impulsively: ***Jacquard***, at para. 26.
>
> [10] A finding of planning and deliberation can be based on circumstantial evidence: ***R. v. Mitchell***, 1964 CanLII 42 (SCC), [1964] S.C.R. 471 at para. 41. A plan can be simple and need not necessarily be in place for a long period of time: ***Nygaard*** at para. 18. If the circumstantial evidence is equivocal or speculative on the issue of planning and deliberation, however, a first degree murder verdict is unreasonable: ***R. v. Duck***, [1993] 85 Man.R. (2d) 91 (C.A.) at paras. 36 - 38.

[239] The accused carried a handgun. Handguns have a number of uses. Some people enjoy collecting them, others use them for sport shooting, at one time trappers could sometimes obtain

a permit to use one for dispatching animals, and a handgun provides a most efficient means for shooting people. Law enforcement officers carry them for that purpose, if necessary.

[240] Mr. Harris inhabited a world which he believed required him to carry a handgun for the purpose of shooting people. That is what he stated in his testimony (p 54, ll 12-36):

> Q [CROWN] Right. I am going to ask you a couple questions about the firearm.
>
> You said that you took it with you, I presume from home, to Grande Prairie?
>
> A M’hm.
>
> Q So you didn't pick it up here?
>
> A No.
>
> Q When you -- well I will ask you. When did you load it?
>
> A When did I load it?
>
> Q Yes.
>
> A I’m not sure.
>
> Q And if it is a situation of it’s more or less always loaded, then I will understand that too, but?
>
> A It depends on the situation. I often do, like for instance when I go into restaurants and stuff like that, or places that I know there could be potential assassination attempts, I often do chamber it.
>
> Q Okay?
>
> A As bad as that may make me sound.
>
> THE COURT: Sorry, it doesn’t what?
>
> A I said as bad as it might make me sound, it’s true though.

[241] The only reason Mr. Harris carried a handgun was to effect his plan to shoot people. Mr. Harris had created a life for himself in which, if he thought it necessary, he would shoot to kill another person.

[242] He had, since late August or early September 2014, conceived a plan with respect to Mr. Rock. This exchange from his evidence supports that conclusion (p 10, l 37 – p 11, l 18):

> Q MR. PHYPERS: And what exactly happened with the arrest; why were you arrested?
>
> A Why was I arrested?
>
> Q Yes?
>
> A I had a man purse, satchel, whatever you want to call it, and I had my handgun in it, and me and Jamie went to go eat in a KFC/Taco Bell in Terwillegar at Edmonton, and I ultimately forgot the bag on a chair and left it there, and then went back to retrieve and got arrested, so.

Q So the KFC?

A KFC/Taco Bell, yeah.

Q Like Kentucky Friday Chicken?

A Yes.

Q Why did you have a firearm in KFC?

A Well I usually -- usually have a firearm on me quite a bit but after the threats from John Rock and then he also, the day before Jamie birthday, threatened her to basically tell him where he I am, or tell him where I am or else he was going to kick in her door, and -- I am just going use the words that she told me because I didn't see the text myself. He threatened to kill her unborn child, because she was pregnant with my child at the time.

[243] I find Mr. Harris planned to use his handgun to specifically shoot Mr. Rock. Apart from that, he would shoot any other person Mr. Harris might consider intended to do him harm or kill him.

[244] I further find Mr. Harris had carefully thought this out. Indeed, he went to Grande Prairie on September 30, just four days into his release, with another handgun in his possession. He had just posted $35,000 to gain his release from custody, after his arrest for possession of a different handgun.

[245] Mr. Harris knew Mr. Rock was looking for him. He planned to use the handgun he carried to shoot Mr. Rock if their dispute rose to a level where in his mind he thought it appropriate.

[246] The ultimate act of Mr. Harris shooting Mr. Rock cannot be viewed only through the lens of camera 6 as to the actions of Mr. Harris in the minutes before the shooting.

[247] Mr. Harris had considered the possibility of shooting his enemy in the world of drug trafficking that the two of them inhabited. The shooting of Mr. Rock, his enemy, did not happen on an impulse. Mr. Harris had planned and considered what he would do when confronted by Mr. Rock or one of his associates. He would shoot that person with his handgun and in the circumstances that person was Mr. Rock.

[248] That circumstances arose on September 30/October 1, 2014 which placed Mr. Harris in a position where he could not reason with Mr. Rock or appeal to their past friendship makes no difference. Mr. Harris did not seek out Mr. Rock at the Canadian Brewhouse to kill him, nevertheless he planned and considered shooting Mr. Rock weeks before that encounter. When faced with circumstances of a confrontation with Mr. Rock for which Mr. Harris had planned and considered, he executed his plan and shot Mr. Rock dead. Therefore, Mr. Harris not only murdered Mr. Rock but he planned and deliberately murdered him. Accordingly, Mr. Harris is guilty of first degree murder.

VII. Criminal Organization

[249] There is a second potential basis on which I might conclude that Mr. Harris was guilty of first degree murder. During oral submissions, I inquired of counsel as to whether they wished to address the matter of whether Mr. Harris participated in a criminal organization.

[250] The defence advised that the defence was not prepared to deal with that argument. As that was not part of the case against Mr. Harris, he had not prepared a response. The Crown also did not intend to advance that possibility.

[251] After oral submissions, I raised with counsel the possible application of s 231(6.1)(a) of the *Criminal Code* as neither had addressed it. This section deems murder first degree murder if it is “for the benefit of, at the direction of or in association with a criminal organization”. Counsel asked for further time to make oral submissions on the issues of criminal organization, whether a criminal organization had any bearing on self-defence or first degree murder.

[252] The *Criminal Code*, in s 467.1(1), defines a criminal organization as follows:

> 467.1 (1) The following definitions apply in this Act.
>
> ***criminal organization*** means a group, however organized, that
>
> > (a) is composed of three or more persons in or outside Canada; and
> >
> > (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

[253] Defence counsel acknowledged that at the time of the killing of Mr. Rock, Mr. Harris was part of a criminal organization. I accept that admission.

[254] The Supreme Court of Canada in ***R v Venneri***, 2012 SCC 33, in considering the definition of ‘criminal organization’ required that to amount to a criminal organization, the organization must have “some form of structure and degree of continuity”. Paragraphs 29 and 40 state:

> [29] I agree with Mackenzie J.A. that a flexible approach favours the objectives of the legislative regime. In this context, flexibility signifies a purposive approach that eschews undue rigidity. That said, by insisting that criminal groups be “organized”, Parliament has made plain that some form of structure and degree of continuity are required to engage the organized crime provisions that are part of the exceptional regime it has established under the *Code*.
>
> ...
>
> [40] It is preferable by far to focus on the goal of the legislation, which is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members. All evidence relevant to this determination must be considered in applying the definition of “criminal organization” adopted by Parliament. Groups of individuals that operate on an *ad hoc* basis with little or no organization cannot be said to pose the type of increased risk contemplated by the regime.

[255] Mr. Harris headed a group in Canada of at least three people. Mr. Harris provided cocaine to Mr. Ritchie (Tommy) via Mr. Stanley, who delivered the drugs. Mr. Ritchie (Tommy) dealt the drugs in Grande Prairie and Mr. Stanley returned with money for Mr. Harris.

[256] The group headed by Mr. Harris trafficked cocaine, a serious offence under the *Controlled Drugs and Substances Act*, SC 1996, c 19.

[257] Mr. Stanley testified that he had worked for Mr. Harris delivering drugs for approximately two years. His duty was to deliver the drugs and collect cash. Mr. Ritchie's (Tommy's) involvement in the dealing of drugs is not clear for the full period of two years but I am satisfied on balance there was continuity in his relationship with Mr. Harris and Mr. Stanley. Mr. Ritchie (Tommy) had managed to incur a large debt to Mr. Rock. Mr. Harris had taken over this debt on behalf of Mr. Ritchie and the balance remained at $15,000 when Mr. Harris shot Mr. Rock. This shows some continuity of the relationship between Mr. Ritchie (Tommy) and Mr. Harris, whether or not Mr. Ritchie (Tommy) had been associated for the entire two years as had Mr. Stanley.

[258] The group had structure and continuity. Accordingly, as acknowledged by the defence, Mr. Harris was a member of a criminal organization at the time he killed Mr. Rock.

Deemed Planned and Deliberate

[259] Section 231(6.1)(a) of the *Code* deems the required additional *mens rea* component, planned and deliberate, as made out if the Crown proves the person who committed the murder in one of the three ways listed in the section.

[260] The section of the *Code* reads as follows:

> (6.1) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when
>
>> (a) the death is caused by that person for the benefit of, at the direction of or in association with a criminal organization...

Mental Element

[261] The Supreme Court in ***R v Venneri***, *supra* at para 57 stated as follows:

> [57] The Crown must also demonstrate that an accused *knowingly* dealt with a criminal organization. The stigma associated with the offence requires that the accused have a subjective *mens rea* with respect to his or her association with the organization (see *Lindsay* (2004 S.C.J.), at para. 64)

[262] Proof of "for the benefit of" and "at the direction of" I conclude also requires proof of a mental element.

For the Benefit Of

[263] Dealing first with "for the benefit of", no evidence persuades me beyond a reasonable doubt that Mr. Harris caused the death of Mr. Rock for the benefit of the criminal organization of which he was the head. The killing occurred as the culmination of a dispute over a drug debt. Mr. Harris owed Mr. Rock $15,000 personally and $15,000 as the balance of a debt for which Mr. Harris had assumed responsibility on behalf of Mr. Ritchie (Tommy). The evidence does not prove beyond a reasonable doubt that Mr. Harris killed Mr. Rock for the benefit of his criminal organization by way of extinguishing the debt. He did indeed extinguish the debt by the killing of Mr. Rock but the evidence does not make out he intended that benefit.

[264] Although Mr. Harris thought that Mr. Rock had begun to deal with the woman Cee Cee by supplying her with cocaine to sell in Grande Prairie and thereby damaging the business of Mr. Harris, the evidence does not prove beyond a reasonable doubt that Mr. Harris killed Mr. Rock to take over the sale of cocaine in the Grande Prairie area.

[265] For about three months Mr. Harris had continued to carry on the sale of cocaine in Grande Prairie after his falling out with Mr. Rock over the payment of the $15,000 for drugs taken by Cee Cee. Apparently, Mr. Harris found another wholesale dealer after his dispute with Mr. Rock arose in July of 2014 as he continued in the business in Grande Prairie.

[266] Mr. Harris had tried to avoid, not find, Mr. Rock, and had told Mr. Ritchie (Tommy) to do likewise. The reason Mr. Harris and Mr. Rock met at the time of the killing was because Mr. Rock found Mr. Ritchie (Tommy) at the Canadian Brewhouse, held him there and robbed him of his motor vehicle. Mr. Harris did not seek out or seize the opportunity to kill Mr. Rock, intending to benefit his criminal organization by eliminating the debt or Mr. Rock as a competitor in Grande Prairie.

[267] Therefore, Mr. Harris did not kill Mr. Rock intending to achieve either of those benefits.

At the Direction Of

[268] Nor is there any evidence that the killing of Mr. Rock by Mr. Harris was at the direction of a criminal organization. The killing arose from the dispute over the debt, the actions of Mr. Rock causing Mr. Harris to go to the Canadian Brewhouse and the fight which commenced outside. No one in the Harris criminal organization directed Mr. Harris to kill Mr. Rock.

In Association With

[269] This leaves only the question of whether the evidence proves beyond a reasonable doubt that when Mr. Harris murdered Mr. Rock, that he did so “in association with a criminal organization”. “In association with” turns on whether the evidence proves beyond a reasonable doubt a connection to the activities of the criminal organization and whether the killing advanced their interest (***R v Venneri***, *supra*, paras 53 & 54).

[270] In ***R v Venneri***, *supra*, the Supreme Court dealt with the phrase “in association with” as it is used in s 467.1(2) of the *Criminal Code*. It makes sense that their interpretation of it there applies to the phrase as used in s 231(6.1) of the *Code*. The Court stated at paragraphs 53 to 56:

> [53] The phrase “in association with” should be interpreted in accordance with its plain meaning and statutory context. It is accompanied here by the terms “at the direction of” and “for the benefit of”. These phrases are not mutually exclusive. On the contrary, they have a shared purpose and will often overlap in their application. Their common objective is to suppress organized crime. To this end, they especially target offences that are connected to the activities of criminal organizations and advance their interests.
>
> [54] Considered in this light, the phrase “in association with” captures offences that advance, at least to some degree, the interests of a criminal organization — *even if they are neither directed by the organization nor committed primarily for its benefit*. As noted by Miles Hastie:
>
>> The phrase “in association with” should capture, like its siblings, an interest of the criminal organization in the predicate offence.

> The accused need not carry out the predicate offence exclusively for the criminal organization: the accused may (and, as an organization member, will usually) entertain other selfish motives. But offences committed for wholly selfish purposes should not generate liability. On some level, the offence must only capture actions with and for the criminal organization. [Emphasis added; emphasis in original deleted; footnote omitted.]
>
> ("The Separate Offence of Committing a Crime 'In Association with' a Criminal Organization: Gang Symbols and Signs of Constitutional Problems" (2010), 14 *Can. Crim. L. Rev*. 79, at p. 91)

[55] The phrase "in association with" requires a connection between the predicate offence and the organization, as opposed to simply an association between *the accused* and the organization: see *R. v. Drecic*, 2011 ONCA 118 (CanLII), 276 O.A.C. 198, at para. 3. In *R. v. Lindsay* (2004), 2004 CanLII 16094 (ON SC), 70 O.R. (3d) 131 (S.C.J.), aff'd 2009 ONCA 532, 245 C.C.C. (3d) 301, the trial judge, correctly in my view, interpreted the phrase "in association with" as follows:

> The phrase "in association with" is not impermissibly vague. The phrase is intended to apply to those persons who commit criminal offences in linkage with a criminal organization, even though they are not formal members of the group. *The Oxford English Dictionary* (10th ed.) defines the phrase "associate oneself with" to mean, "allow oneself to be connected with or seen to be supportive of". The phrase "in association with" requires that the accused commit a criminal offence in connection with the criminal organization. Whether the particular connection is sufficient to satisfy the "in association with" requirement will be for a court to determine, based on the facts of the case. [Emphasis added; para. 59.]

[56] As mentioned earlier, an offender may commit an offence "in association with" a criminal organization of which the offender is not a member. Membership in an organization, however, remains a relevant factor in determining whether the required nexus between the offence and the organization has been made out (see *Drecic*, at para. 3).

[271] The Crown takes the position there is some evidence with respect to "in association with" but it falls short of proof beyond a reasonable doubt. The Crown points to the evidence of the substantial debt owed by Mr. Harris to Mr. Rock, that Mr. Rock started to deal with the woman Cee Cee, thereby hurting Mr. Harris's trade in Grande Prairie, and Mr. Harris testified he had to take steps to protect that trade as Cee Cee knew his clients. These two possible benefits I have dealt with above.

[272] The Crown submits "There is little evidence that Mr. Harris's concern at the time he killed Mr. Rock was for anything other than himself".

[273] Although not obliged to accept the Crown's position (***R v Barabash***, 2015 SCC 9 at para 54), in this case I accept it as correct.

[274] From ***R v Venneri***, *supra*, for the murder to qualify as "in association with", it must be connected with and advance the interests of the criminal organization (paras 54-55). As to the first part of the test, the evidence makes out that the killing was connected to the activities of the criminal organization.

[275] The connection of the criminal organization with the killing of Mr. Rock came from Mr. Rock's position as a wholesaler of drugs to Mr. Harris. Without this connection, Mr. Harris could not have incurred a debt he had to pay off from the activities of the criminal organization.

[276] Without the debt, Mr. Rock would not have confined and robbed Mr. Ritchie (Tommy) at the Canadian Brewhouse. That confinement related to the drug debt, either the amount incurred by Mr. Harris or the amount incurred by Mr. Ritchie (Tommy) and assumed by Mr. Harris, or both. The debt brought Mr. Harris to the Canadian Brewhouse. The fight outside the Canadian Brewhouse related to the debt.

[277] All of these factors related to the activities of the criminal organization pertaining to the sale of drugs and the payment of money from Mr. Ritchie (Tommy) to Mr. Harris, then to Mr. Rock. They connected the murder to the criminal organization.

[278] Turning then to the evidence, if any, which shows the murder advanced "at least to some degree the interest of a criminal organization", they did as a fact advance its interest.

[279] The threats to Mr. Harris ended. No longer would Mr. Harris need to concern himself with wearing "a vest". Nor would he need carry a handgun to deal with an attack from Mr. Rock.

[280] The intimidation of Mr. Ritchie (Tommy) ended. Mr. Harris told Mr. Ritchie (Tommy) to avoid the Canadian Brewhouse but Mr. Rock found Mr. Ritchie (Tommy), confined him, and robbed him. Further acts of intimidation could not happen again.

[281] Mr. Harris would not face an attack from the fists of Mr. Rock.

[282] Mr. Rock could no longer threaten or beat Mr. Stanley.

[283] The threats which Mr. Harris thought could extend to his family ended. Mr. Harris testified that Mr. Rock knew where they lived and therefore this situation would not end by Mr. Harris exiting the Canadian Brewhouse by the back door or otherwise taking steps to avoid facing Mr. Rock that night.

[284] From ***R v Venneri***, *supra*, the three phrases in s 231(6.1)(a) "are not mutually exclusive" and "will often overlap in their application". Although I have found Mr. Harris did not seek out Mr. Rock and murder him for the benefit of the criminal organization to eliminate Mr. Rock as competition in the Grande Prairie drug trade or to eliminate the debt, the killing of Mr. Rock did advance the interests of the criminal organization by eliminating the intimidation of the members by Mr. Rock.

Intention

[285] The Crown must prove Mr. Harris intended both the connection to and the advancement of the interests of the criminal organization by the murder of Mr. Rock.

[286] On the evidence, I am not satisfied he intended both.

[287] The evidence could support he intended both because he testified not facing Mr. Rock that night would only make matters worse. Mr. Rock knew where he lived and where the mother of Mr. Harris lived. Mr. Harris expected further problems even if the four of them managed to make their escape from the Canadian Brewhouse.

[288] Therefore, the evidence could support an intention on the part of Mr. Harris to make an end of the problem.

[289] An equally likely conclusion, though, is that Mr. Harris intended only to respond to the attack of Mr. Rock, which Mr. Rock launched with his fists upon Mr. Harris. Although acting under a mistake of law as to defending himself with the handgun, this reasonable possibility raises a reasonable doubt as to his intention to murder Mr. Rock in association with the criminal organization.

[290] Therefore, the evidence does not make out a deemed planned and deliberate murder under s 236(6.1)(a) of the *Criminal Code*.

VIII. Conclusion

[291] The evidence proves beyond a reasonable doubt that Mr. Harris caused the death of Mr. Rock by an unlawful act and he cannot avail himself of the defence of self-defence. It also makes out he had the requisite intent for murder. Finally, the evidence as to planned and deliberate under s 231(2), proves beyond a reasonable doubt that Mr. Harris committed first degree murder.

Heard on the 25th day of February, 2019 to the 12th day of March, 2019, and the 31st day of May, 2019.
Dated at the City of Grande Prairie, Alberta this 21st day of June, 2019.

E.J. Simpson
J.C.Q.B.A.

Appearances:

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Crown Prosecutors' Office
for the Crown

Andrew Phypers
Barrister and Solicitor
for the Accused