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R. v. Bottomley

2023 BCSC 406

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2023 BCSC 406 R. v. Bottomley

IN THE SUPREME COURT OF BRITISH COLUMBIA

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R. v. Bottomley,

2023 BCSC 406

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Rex

v.

Jordan Robert James Bottomley and Munroop Singh Hayer

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Before: The Honourable Madam Justice Devlin

Reasons for Judgment re: Admissibility of Discreditable Conduct and After the Fact Evidence

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Introduction

- [1] On November 11, 2019, Andrew Baldwin was stabbed to death inside a residence in Surrey, BC. The accused Munroop Hayer, Jordan Bottomley, and Jagpal Hothi are charged with the first-degree murder of Andrew Baldwin. A fourth accused, Jasman Basran, is charged with being an accessory after the fact.
- [2] On this application, the Crown seeks a ruling regarding the admissibility of discreditable and after-the-fact conduct evidence of the four accused. The source of this evidence is primarily the anticipated evidence of several civilian witnesses, as well as electronic communications among the accused both prior to and after the alleged murder.
- [3] The Crown submits the evidence is necessary and probative for a variety of reasons. These include to demonstrate: the structure and function of a relevant drug-trafficking organization; threats made to Mr. Baldwin and others; and the accused's motives for participating in the murder. In addition, the Crown says some of the after-the-fact conduct evidence demonstrates the accused's efforts to avoid detection. Finally, they say some of the evidence will serve to establish the identity of the user of certain relevant phone numbers. As a whole, the Crown submits this evidence will provide the jury with critical insight into the unfolding of events and the roles of each accused. The Crown argues that any prejudicial effect of the evidence is overborne by its probative value in relation to the issues at trial, and can be alleviated by a proper limiting instruction to the jury.
- [4] Mr. Hayer and Mr. Bottomley participated in the voir dire. They both agree that the evidence of their participation in drug trafficking together with Mr. Hothi is admissible. They also agree that evidence indicating that Mr. Hayer was supplying drugs to Mr. Baldwin, and that Mr. Baldwin owed Mr. Hayer a debt, is admissible. However, they challenge the admissibility of much of the proposed evidence on the basis that it is neither relevant nor probative of an issue at trial. In particular, they say evidence regarding the history of the alleged drug trafficking operation and the roles of those involved is irrelevant and time consuming. They also oppose the admission of call detail records for the period after the offence, saying that they would require the jury to engage in impermissible speculation as to the content of the calls which the records disclose. Finally, Mr. Hayer challenges the admissibility of incomplete digital communications on the encrypted messaging application Wickr, on the basis that they are without context and would lead to impermissible speculation by the jury.

Background Facts

- [5] For the purposes of this application--in addition to the facts summarized below from the Crown's written submissions--I rely on the background facts described in my prior ruling on the admissibility of ante mortem statements, indexed as R. v. Bottomley, 2023 BCSC 267 [Ante Mortem Ruling]: see paras. 8-18.
- [6] The Crown's theory is that Sean Kelly was the head of a drug trafficking organization, and that both Mr. Hayer and Mr. Baldwin worked for Mr. Kelly. After Mr. Kelly was killed in 2016, Mr. Hayer took over Mr. Kelly's drug operation and Mr. Baldwin continued to work for him. By 2019, Mr. Baldwin was addicted to drugs and in debt to Mr. Hayer. Mr. Baldwin was unable to pay his debts to Mr. Hayer and went into hiding. Mr. Hayer threatened Mr. Baldwin, his family, and his friends over the debts.
- [7] The Crown says that Mr. Bottomley was Mr. Baldwin's friend and roommate. He was also a drug user who sold drugs for Mr. Hayer. Mr. Hothi also worked for Mr. Hayer but in a more senior position than either Mr. Baldwin or Mr. Bottomley.
- [8] On November 11, 2019, the Crown's theory is that Mr. Hayer directed his employees, Mr. Bottomley and Mr. Hothi, to murder Mr. Baldwin. Mr. Hothi, acting as the middle-man between Mr. Hayer and Mr. Bottomley, arranged for his friend Mr. Basran to drive him and Mr. Bottomley to the vicinity of A.B.'s residence, where Mr. Baldwin was staying. After Mr. Bottomley stabbed Mr. Baldwin to death, he was driven away from the vicinity of the scene by Mr. Basran and Mr. Hothi. After directing Mr. Bottomley to get out of the truck, Mr. Hothi and Mr. Basran attempted to clean blood from the truck and to dispose of the murder weapon. Mr. Hothi was in communication with Mr. Hayer throughout the events on November 11, 2019. The accused also continued to communicate and associate with each other after the incident, including after Mr. Hothi was arrested and detained in custody.
- [9] In sum, the Crown's theory is that the deteriorating relationship between Mr. Baldwin and Mr. Hayer culminated in Mr. Hayer directing his employees--Mr. Bottomley and Mr. Hothi--to murder Mr. Baldwin. According to the Crown, Mr. Bottomley committed the murder because he was an impoverished drug addict wanting to win favour with Mr. Hayer, and to retire some of his own drug debts. The Crown further alleges that Mr. Hothi participated in the murder to win favour with Mr. Hayer and to receive a promotion within Mr. Hayer's drug trafficking organization.

Governing Legal Principles

- [10] The general framework for the admissibility of evidence was recently addressed in R. v. Schneider, 2022 SCC 34 [Schneider]. That framework involves a three-part test, asking whether: (1) the evidence is relevant; (2) the evidence is subject to an exclusionary rule; and (3) the trial judge should exercise their discretion to exclude the evidence: Schneider at para. 36.

Relevance

- [11] Relevance in the context of the Schneider framework is often referred to as "logical relevance": Schneider at para. 38. This is because, at this stage, relevance is ascertained "by asking whether, in light of all the other evidence, the at-issue evidence logically tends to make a fact in issue more or less likely": Schneider at para. 45. "Other evidence" includes evidence that the parties have already adduced and evidence that a party indicates they intend to adduce: Schneider at para. 41.
- [12] Relevance is determined by applying logic and human experience. The threshold for relevance is low, and permits the admission of evidence that has modest probative value. See *R. v. R.G.S.*, 2023 BCCA 52 at paras. 27 and 29 [R.G.S.], referencing Schneider at para. 39. The trial judge, acting in their gatekeeper role, must take care not to usurp the role of the finder of fact, although the evaluation of logical relevance necessitates some weighing of the evidence: Schneider at para. 39.

Exclusionary Rule

- [13] As discussed below, discreditable conduct evidence is subject to a general exclusionary rule, whereas evidence of an accused's post-offence conduct is not.

Discretion to Exclude

- [14] The final stage of assessing the admissibility of evidence requires the trial judge to determine if they should exercise their discretion to exclude the evidence by balancing its probative value and prejudicial effect: Schneider at para. 59. This stage is sometimes described as a "cost benefit analysis": e.g., Schneider at para. 60 and *R. v. Sipes*, 2011 BCSC 640 at para. 72 [Sipes].
- [15] Probative value refers "to the degree of relevance to trial issues and the strength of inference that can be drawn from the evidence". Prejudicial effect refers "to the likelihood that a jury will misuse the evidence". See Schneider at para. 60.
- [16] Our Court of Appeal recently discussed the nature of balancing probative value and prejudicial effect in *R.G.S.*:
- [51] However, the process is not that of weighing one against the other. As articulated in Handy at paras. 148-149:
- [148] One of the difficulties, as McHugh J. pointed out in Pfennig, supra, at p. 147, is the absence of a common basis of measurement: "The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial." The two variables do not operate on the same plane.

[149] As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved.

[Emphasis added.]

[17] This weighing exercise "must be performed in respect of a particular issue": *R. v. Badyal*, 2020 BCCA 127 at para. 37. To that end, a proper consideration at this stage, among others, is whether the Crown can prove its point with less prejudicial evidence: *R. v. Handy*, 2002 SCC 56 at para. 83 [Handy].

Discreditable Conduct Evidence

[18] As stated earlier, evidence of discreditable conduct is subject to an exclusionary rule, as it is presumptively inadmissible: see *Handy* at para. 55 and *Sipes* at para. 45. Courts have variously called such evidence bad character evidence, propensity evidence, extrinsic misconduct evidence, and similar fact evidence: *Sipes* at para. 46. To be clear, these terms can refer to theoretically distinct concepts (in particular, similar fact evidence). However, the same rules apply to their admissibility, as they all ultimately refer to evidence of an accused's discreditable conduct falling outside of the indictment: e.g., *R. v. Mahalingan*, 2008 SCC 63 at paras. 160-161 [Mahalingan].

[19] As a matter of principle, an accused "has only to answer the specific charge contained in the indictment": *Handy* at para. 43, quoting *Leblanc v. The Queen*, [1977] 1 S.C.R. 339 at 345, 1975 CanLII 190. Put differently, "[n]obody is charged with having a 'general' disposition or propensity" for committing crime: *Handy* at para. 31.

[20] That said, discreditable conduct evidence is "exceptionally" admissible: *Handy* at para. 51. Indeed, the law does "not exclude evidence that is relevant just because it tends to show an accused is of bad disposition, but only if it shows nothing more": *R. v. Roks*, 2011 ONCA 526 at para. 89 [emphasis added], citing among others *Handy* at para. 71.

[21] Several exceptions have been recognized in respect of the rule against discreditable conduct. The exception that may apply in this case is that such evidence is admissible where the Crown demonstrates on a balance of probabilities that:

- (1) The evidence is relevant and material to a live issue at trial, other than to simply demonstrate the accused's bad character or general disposition; and
- (2) The probative value of the evidence outweighs its prejudicial effect.

(*Sipes* at para. 49; see also *Handy* at para. 55 and *R. v. Luciano*, 2011 ONCA 89 at para. 227 [Luciano]).

Relevance and Materiality

- [22] Relevance is "not an inherent characteristic of any item of evidence"; rather, relevance exists as a relationship between the proposed item of evidence and the fact the proponent seeks to establish by its admission: Luciano at para. 204. Evidence is relevant where "it renders the fact it seeks to establish slightly more or less probable than it (the fact) would be without the evidence, through the application of everyday experience and common sense": Luciano at para. 204.
- [23] There is no "closed list of purposes for which discreditable conduct may be relevant". Commonly-cited examples "include proof of motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident". See Sipes at para. 51.
- [24] Materiality is also a relative concept. Evidence is material if it is offered to prove or disprove a matter in issue in the case: Luciano at para. 207.
- [25] Evidence is prohibited if it merely shows that the accused is the kind of person who is likely to have committed the offence charged. In other words, discreditable conduct evidence will be inadmissible where it is adduced only to show that the accused is a bad person or has the propensity to commit crime: Sipes at para. 45, citing Mahalingan at para. 159; Handy at para. 31.
- [26] Moreover, it bears emphasizing that "[g]eneral issues such as 'credibility', 'narrative' or 'nature of the relationship' are not 'portals'" to introducing discreditable conduct evidence: R.G.S. at para. 32, citing R. v. M.R.S., 2020 ONCA 667 at para. 72 and R. v. Gareau, 2016 NSCA 75 at para. 51. Even where narrative is an appropriate rationale for admission, the trial judge must avoid the "real risk of forgetting to perform the necessary balancing exercise between probative value and prejudicial effect", to which I now turn: R. v. Taweel, 2015 NSCA 107 at para. 123.

Probative Value

- [27] Like relevance and materiality, probative value "does not exist in the abstract": Luciano, at para. 230. Namely, probative value must be assessed in relation to a particular "issue in question" in the case: Handy at para. 69.
- [28] To that end, assessing the probative value of discreditable conduct evidence requires the trial judge to consider, among other things: the strength of the evidence that the extrinsic acts in question occurred; the connection between the accused and those acts; and the extent to which the evidence supports the inference the Crown seeks to make. See R. v. Z.W.C., 2021 ONCA 116 at para. 98 [Z.W.C.] and R. v. Capewell, 2020 BCCA 82 at paras. 81-82, leave to appeal to SCC ref'd, 39161 (13 August 2020).
- [29] Fairburn A.C.J.O. and George J.A. recently discussed this point as follows in R. v. King, 2022 ONCA 665, leave to appeal to SCC filed, 40467 (30 November 2022):

[118] While the ultimate assessment of credibility is always for the jury, the strength and believability of the evidence establishing that the alleged discreditable conduct in fact occurred can be an important consideration in evaluating the probative value of proposed extrinsic discreditable conduct evidence: *R. v. Aragon*, 2022 ONCA 244, 413 C.C.C. (3d) 79, at para. 40. Indeed, when performing their gatekeeping function as it relates to prior discreditable conduct evidence, trial judges will frequently have regard to whether the subject evidence is "reasonably capable of belief": *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 134 (emphasis in original). This is particularly true where the prejudicial impact of admitting the evidence is high: *Handy*, at para. 134; see also *Aragon*, at para. 40; *R. v. MacCormack*, 2009 ONCA 72, 241 C.C.C. (3d) 516, at para. 54; *R. v. Johnson*, 2010 ONCA 646, 262 C.C.C. (3d) 404, at para. 93; and *R. v. J.W.*, 2013 ONCA 89, 302 O.A.C. 205, at para. 43.

[Emphasis as in the original.]

Prejudicial Effect

[30] With respect to prejudicial effect, it is well-recognized that discreditable conduct evidence presents particular risks to trial fairness and the truth-seeking process. The primary dangers of such evidence are often called "moral" and "reasoning" prejudice, respectively. See *Handy* at para. 31.

[31] Reasoning prejudice includes the risk that the jury will be confused or distracted from the charge against the accused: *Handy* at para. 100. Discreditable conduct generates reasoning prejudice by "distract[ing] jurors from their proper focus on the charge particularized in the indictment and lengthen[ing] the trial process": *Luciano* at para. 220. It also creates a risk "that the discreditable conduct may result in such condemnation or disgust by the jury so as to prevent it from assessing the evidence rationally and dispassionately": *Sipes* at para. 62.

[32] Moral prejudice is "the potential stigma of 'bad personhood'": *Handy* at para. 100. It concerns the risk "that the [trier of fact] will convict an accused for his or her conduct on other occasions rather than the occasion for which they are charged" (*Sipes* at para. 63) or "punish the accused for prior misconduct by finding him or her guilty of the offence charged" (*Luciano* at para. 116). In other words, it is the risk that a "trier of fact may follow a chain of reasoning the law forbids - inferring of guilt from general disposition or propensity", leading the accused to be "convicted because of what he is, rather than what he did": *Luciano* at para. 219.

[33] In light of those dangers, assessing the prejudicial effect of discreditable conduct evidence can involve a consideration of a variety of factors. These may include (*Z.W.C.* at para. 104):

- (a) How discreditable the conduct is--the more inflammatory and egregious, the greater the likelihood of moral prejudice;
- (b) The extent to which the evidence may support an inference of guilt based solely on bad character;

- (c) The extent to which the evidence may confuse the jury; and
- (d) The ability of the accused to respond to the evidence.

Balancing

- [34] Once I have assessed the probative value and prejudicial effect of the evidence, the final stage of the analysis involves balancing (or a "cost-benefit analysis"): Sipes at para. 72; Luciano at paras. 226-235. Evidence of discreditable conduct is only admissible where the benefit outweighs the cost of its admission.
- [35] In balancing the probative value and prejudicial effect of discreditable conduct evidence, the trial judge should remain mindful of the following caution, expressed in Handy (at para. 150):

Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded and where evidence whose probative value exceeds its prejudice (albeit an exceptional circumstance) is admitted. Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process. A criminal justice system that has suffered some serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence.

- [36] Finally, the trial judge must also remain mindful of the cumulative effect of admitting multiple pieces of discreditable conduct evidence, or of "piling on". The whole of such evidence can be greater than the sum of its parts, and can cumulatively generate significant prejudice. Thus, the court must be careful not to admit more discreditable conduct evidence than is necessary, and may exclude evidence with some probative value where less prejudicial evidence could provide a similar benefit. See *R. v. Coban*, 2021 BCSC 1855 at para. 26, citing Sipes at paras. 82 and 147.

Evidence of Drug Trafficking

- [37] One issue arising on this voir dire is the extent to which the Crown may adduce evidence of the accused's discreditable drug trafficking activities both before and after the homicide. In particular, the Crown seeks to introduce evidence of the history and structure of a drug trafficking operation in which the accused and the victim allegedly participated. This includes proposed evidence respecting the evolution of the operation over time and the roles of various persons. The Crown says that this evidence provides essential background and context for the alleged crime and for the motivations and knowledge of the accused, without which the trier of fact will be unable to meaningfully assess the allegations at bar. As well, they submit that it cannot be controversial that the accused participated in drug trafficking. Thus, the Crown says that the prejudicial effect of this evidence will be minimal.

- [38] As stated earlier, Mr. Hayer and Mr. Bottomley do not challenge the admissibility of general evidence demonstrating that they both engaged in drug trafficking, including that Mr. Hayer supplied his co-accused and the victim with drugs. However, they take issue with more specific evidence proposed by the Crown that they say will be needlessly distracting and prejudicial. Mr. Hayer submits that introducing such evidence will create a "collateral slideshow" with which the accused will be forced to engage: citing *R. v. Riley*, 2017 ONCA 650 at para. 222, leave to appeal to SCC ref'd, 38918 (19 March 2020) [Riley].
- [39] Courts have previously considered the admissibility of drug trafficking and criminal organization evidence in other cases. The Crown refers to several of these authorities, including: *Sipes*; *R. v. Hiscock*, 2002 BCSC 1833 [Hiscock]; *R. v. Haevischer*, 2012 BCSC 1641 [Haevischer]; and *Riley*. With the exception of *Hiscock*, each of these cases involved multiple accused charged with murders allegedly committed in the context of disputes or interests arising from drug trafficking activities. *Hiscock*, an aggravated assault case, similarly concerned violence allegedly incidental to a dispute between rival gangs over drug trafficking territory. In all of these cases, the court permitted the introduction of various pieces of evidence going to the roles and structure of the trafficking operations at issue.
- [40] What emerges from these authorities is that in circumstances like these, "[t]he Crown's case cannot be sanitized" and "[t]he jury must have sufficient context to decide the case": *Sipes* at para. 366. In other words, it may be, as was the case in *Sipes*, that "the hierarchy of the group and the role or job description of the accused" can be probative and necessary: *Sipes* at para. 367. Per *Haevischer*, such evidence may go to, among other things, the motives of the accused: at para. 55.
- [41] Indeed, on the Crown's theory in this case, the histories, roles, and aspirations of the various accused (as well as the victim) with respect to the trafficking operation are clearly interwoven with the accused's alleged participation in the homicide. To prevent the Crown from leading evidence on the evolution and dynamics of the trafficking operation--and the changing positions, interests, and roles of the accused and victim within that organization--may risk rendering the Crown's case "sterile" and may require the jury to decide "the question of guilt in a vacuum": *Hiscock* at para. 12.
- [42] That said, none of these comments should be understood as displacing the overarching principles set out above concerning my role on this application, the presumptive inadmissibility of discreditable conduct evidence, and the analysis that I must undertake in determining whether the Crown's proposed evidence should be admitted.
- [43] Having set out the relevant principles governing the admissibility of discreditable conduct evidence, I will now turn to the admissibility of post-offence conduct evidence.

Post-offence Conduct

- [44] The term "post-offence conduct" is a non-neutral term of art referring to behaviour by an accused that is probative of guilt and which occurs after a crime has been committed: *R. v. Turcotte*, 2005 SCC 50 at para. 37 [Turcotte]. This type of evidence is also sometimes called "after-the-fact" evidence, or traditionally "consciousness of guilt" evidence: see *R. v. Calnen*, 2019 SCC 6 at para. 106 (per Martin J., dissenting not on this point) [Calnen][1] and Turcotte at para. 38. Common examples of post-offence conduct probative of guilt include flight, hiding or destroying evidence, or other deceptive behaviour directed at evading detection: *R. v. Zouaoui*, 2014 BCCA 316 at para. 28.
- [45] Evidence of post-offence conduct is circumstantial evidence, and is not subject to a presumptive exclusionary rule like discreditable conduct evidence. Its use is also not subject to a special warning. Instead, it is generally left to the trier of fact to decide whether evidence of an accused's post-offence conduct is related to the charged offence, rather than to something else. See *R. v. J.A.T.*, 2012 ONCA 177 at paras. 142-143, adopted in *R. v. Berry*, 2022 BCCA 389 at para. 375.
- [46] Justice Martin discussed the permitted use of circumstantial post-offence conduct evidence in Calnen:
- [111] After-the-fact conduct is circumstantial evidence. Like other forms of circumstantial evidence, after-the-fact conduct allows a fact finder to draw particular inferences based on a person's words or actions. This process of inductive reasoning is a cornerstone of the law of evidence, and is used frequently to draw inferences from circumstantial evidence, as well as to assess credibility and to determine the relevance and probative value of evidence.
- [112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn "must be reasonable according to the measuring stick of human experience" and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence. That there may be a range of potential inferences does not render the after-the-fact conduct null. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them.
- [47] As a form of circumstantial evidence, post-offence conduct evidence will be relevant and admissible where it has some tendency--as a matter of logic, common sense, and human experience--to help resolve a live issue in the case: *R. v. White*, 2011 SCC 13 at para. 140. More precisely, the proposed after-the-fact evidence must be relevant to a live, material issue; its admission must not offend an exclusionary rule of evidence; and its probative value must exceed its prejudicial effect: Calnen at para. 107. To that end, where the post-offence conduct in issue engages the discreditable conduct rule, it remains presumptively inadmissible: e.g., Luciano at para. 218.

[48] Naturally, the relevance and probative value of post-offence conduct must be determined on a case-by-case basis: e.g., *R. v. Davies*, 2022 BCCA 172 at para. 117 and *Calnen* at para. 108. The assessment of the relevance of such evidence was recently discussed by the Ontario Court of Appeal in *R. v. Gaetan*, 2023 ONCA 114 at para. 41:

The question is whether the evidence is capable of supporting the inference sought to be drawn about the accused's state of mind. It will be irrelevant to this issue if the conduct is "equally consistent" with the proposed inference and the alternate inference, such that the conduct no longer allows the trier of fact to choose between available inferences as a matter of common sense, experience, and logic: *Calnen*, at para. 124. When this is the case, a trial judge must provide a limiting or no probative value instruction to the jury: *White*, at para. 60. However, the mere fact that after-the-fact conduct can support a range of inferences does not render it irrelevant: *Calnen*, at paras. 112, 144.

Admissibility of Incomplete Digital Communications

[49] Finally, one issue arising on this voir dire is the admissibility of an incomplete series of communications attributed, on the Crown's theory of the case, to the accused Mr. Hayer and Mr. Bottomley. The digital conversation is comprised of 108 Wickr messages, of which investigators could only extract 64.

[50] An accused's out-of-court statements, other than those made to persons in authority, are admissible under the party admission exception to the rule against hearsay, as long as they are relevant and adduced against the accused: e.g., *R. v. Bridgman*, 2017 ONCA 940 at para. 11 [*Bridgman*]. The Court in *Schneider* provided the following review of the principles governing this traditional hearsay exception:

[53] In criminal trials, a party admission will be evidence that the Crown adduces against an accused. As explained in *Evans*, the common law justifies allowing party admissions into evidence on the basis that a party cannot "complain of the unreliability of his or her own statements" Unlike many other exceptions, justification for allowing party admissions does not relate to necessity or reliability This is one aspect in which party admissions do not conform to general rules.

[57] In this appeal the party admission was something the accused said, that the witness overheard, and that the Crown tendered as evidence of the accused's guilt However, party admissions can constitute more than words; the common law has held party admissions to include, inter alia, silence, actions, and demeanour As noted by Professor I. Younger, a rule of thumb is that "[a]nything the other side ever said or did will be admissible so long as it has something to do with the case" (*An Irreverent Introduction to Hearsay* (1977), at p. 24, cited in *Paciocco*, *Paciocco* and *Stuesser*, at pp. 191-92).

[Emphasis as in the original.]

- [51] Although they are generally admissible in the manner set out above, party admissions can be significantly prejudicial. It is well-recognized that juries in particular "are likely to give significant weight to confession-like evidence", including party admissions "akin to a confession": *Schneider* at para. 81; see also *R. v. Merritt*, 2023 ONCA 3 at para. 61 [Merritt].
- [52] Moreover, where a statement offered as a party admission is incomplete or partial such that there is insufficient context for its words to be given meaning, it is irrelevant, lacks probative value, and is inadmissible: *Merritt* at para. 63. The defence relies on this well-settled proposition to say that the incomplete series of communications offered by the Crown on this application is inadmissible.
- [53] A leading authority on this point remains the Alberta Court of Appeal's decision in *R. v. Ferris*, 1994 ABCA 20, aff'd [1994] 3 S.C.R. 756, 1994 CanLII 31 [Ferris]. In *Ferris*, the Crown sought to adduce a statement of the accused overheard by a police officer following the accused's arrest for murder. Specifically, the accused made a phone call to his father at the police station. During the call, the officer overheard the accused say "I killed David".
- [54] At trial, the Crown was permitted to adduce this evidence as a party admission. The Alberta Court of Appeal held that the trial judge erred in admitting the evidence, reasoning that a properly-instructed jury would not be able to ascribe meaning to the impugned statement. The court described the multiple meanings arising from the statement "I killed David" in the following terms (at para. 17):

It is uncontradicted that the words could have come at the beginning of a sentence or at the end of a sentence. In fact, the words may have been a part of a question such as "You don't think I killed David?" or a statement such as "They think I killed David" or "They think I killed David but I didn't". His father could have asked him what the police think he did and he could have replied "I killed David". Those utterances do not prove any fact in issue and are not an admission of guilt. Indeed, on the basis of the uncontradicted evidence, the possibility of statements with the words "I killed David" contained therein are numerous. There is no way of determining the meaning or thought to be attributed to the words.

- [55] The affirmation of *Ferris* by the Supreme Court of Canada was nuanced, and so the decision must be read carefully. This is so because the Court did not determine that the evidence in *Ferris* was inadmissible on the basis of relevance. Instead, the Court found that even if the testimony was relevant, it should have been excluded on balancing its probative value and prejudicial effect. Thus, although *Ferris* is good law, it does not mean that the exclusion of partial conversations is automatic. The analysis, above all, is contextual. See *Schneider* at paras. 69 and 72.
- [56] To that end, the Ontario Court of Appeal recently summarized in *Merritt* the principles emerging from *Schneider's* discussion of *Ferris*. In *Paciocco J.A.'s* words:

- [73] There can be no question then that Schneider permits the admission of an incomplete statement where there is sufficient context to enable the jury to give the overheard words meaning.
- [75] I do not read Schneider as holding that partial statements can be admitted into evidence as admissions even where there is not sufficient context to enable meaning to be given to the identified words. Indeed, I read Schneider as holding the contrary. As I have explained, Rowe J. made clear in Schneider that the admissibility of incomplete statement evidence requires relevance, which is determined as a matter of logic and human experience by inquiring whether the evidence tends to increase or decrease the probability of the existence of a fact at issue: Schneider, at paras. 39, 76. If the meaning of a statement offered as an admission cannot be determined, it cannot logically increase or decrease the probability of the existence of a fact in issue and therefore does not meet even the low threshold of relevance.
- [78] As the foregoing quote from Hunter makes clear, and as affirmed in Schneider at paras. 64 and 69, there are two mechanisms in the law of evidence for excluding incomplete statements that have been offered as admissions. First, if it is found by the trial judge that there is insufficient context to enable meaning to be given to identified words, such statements are not admissible because they fail to meet the basic rule that to be admissible evidence must be relevant. Second, incomplete statements may lack sufficient probative value to admit, and therefore require exclusion through the application of the exclusionary discretion that Sopinka J. relied upon in Ferris to exclude the overheard words extracted from the incomplete statement, "I killed David".
- [Emphasis added.]
- [57] With these principles in mind, I wish to address a specific point raised by counsel for Mr. Hayer in relation to this issue. In oral submissions, Mr. Hayer argued that a partial statement of an accused relevant to an offence other than the charged offence is inadmissible. In particular, Mr. Hayer says that Wickr text messages he allegedly sent to Mr. Bottomley following the murder (discussed below) only possibly go to a charge of manslaughter, not murder, and should thus be inadmissible. Counsel for Mr. Hayer rely on Merritt for this proposition.
- [58] I do not read Merritt as supporting this view. In Merritt, Melissa Merritt appealed her conviction for the murder of her ex-husband. The Crown alleged that she committed the murder in concert with her common law spouse, the appellant John Fattore. Ms. Merritt was charged but ultimately acquitted of the murder of her former mother-in-law, and was suspected but not charged in the murder of her former father-in-law. At trial, the Crown adduced a surreptitiously-recorded conversation between Ms. Merritt and Mr. Fattore while in custody as they awaited air transport. At one point, Mr. Fattore advised Ms. Merritt that he had confessed to killing the ex-husband and mother-in-law. During the exchange that followed, Ms. Merritt said "(unintelligible) the audio tapes would've fucked us anyway":

Merritt at para. 38. It was undisputed that in making the statement, Ms. Merritt referred to audio tapes police had secured prior to her arrest: at para. 101. The Crown's position at trial was that the statement constituted an admission by Ms. Merritt of her guilt in the murder of her ex-husband.

- [59] On appeal, Ms. Merritt did not challenge the admissibility of the intercepted statement. Instead, she argued that the trial judge erred in failing to direct the jury that if they found the statement partially unintelligible (as indicated in the transcript), they could not treat it as an admission of guilt by Ms. Merritt unless they could determine its meaning from its context: Merritt at para. 60. The Ontario Court of Appeal agreed. The court first noted that, like the impugned statement in Ferris, the possibly unintelligible portion of the statement could have rendered its meaning innocuous (e.g., "they think that the audio tapes would've fucked us"): at para. 99. Moreover, at the time the statement was made, Ms. Merritt was suspected in three murders, and had been arrested for two. These circumstances rendered her alleged admission ambiguous, as the jury could not determine to which specific charge the admission related: at para. 100. Finally, at the time the statement was made Ms. Merritt faced liability not only for murder but also as an accessory after the fact. Even accepting that the statement related only to the death of her ex-husband, since the Crown alleged the statement was an admission of guilt, the question remained as to the extent of culpability to which Ms. Merritt was admitting: at para. 101.
- [60] Thus, in my view Merritt is clearly distinguishable. First, as stated above, the case did not concern the issue of admissibility (i.e., the concern of this *voir dire*), but merely the issue of instructing the jury on the impugned statement. Second, unlike in Merritt, in the present case Mr. Hayer faces a single charge arising from one transaction. There is therefore no danger that the trier of fact will be unable to determine which charge any the statements of Mr. Hayer may go to. Finally, in this case the impugned statements of the accused are written, and thus do not raise the same intelligibility issues as Merritt's recorded audio statement. This avoids the issues engaged in Merritt of requiring the trier of fact to determine the words contained in the statement. In light of these factors, I do not accede to Mr. Hayer's submission with respect to Merritt.

Incomplete Digital Communications

- [61] Moving to the nature of the particular statements on this *voir dire*, I note that courts have previously considered the discrete issue of incomplete digital communications by an accused. Courts have recognized that text messages give rise to circumstances distinct from those engaged in both Ferris and Schneider, where the statement attributed to the accused was audible and introduced through the recollection of a witness. The Ontario Court of Appeal discussed this point in Bridgman:

- [52] Although the appellant advances the incontrovertible position that in some situations, where parts of conversations are missing, statements may be taken out of context, this is not one of those cases: *R. v. Ferris*, 1994 ABCA 20 (CanLII), [1994] A.J. No. 19, 149 A.R. 1 (C.A.), at paras. 17-23, *affd* 1994 CanLII 31 (SCC), [1994] 3 S.C.R. 756, [1994] S.C.J. No. 97.
- [53] Standing alone, many of the text messages are clear and open to little interpretation. For instance, questions like "do you want those things the p", "you don't sell harder than oxy's right", and "can I buy a few sleeping pills off you tomorrow", require little effort by way of interpretation. When considered in context, others also take on clarity.
- [54] It is hard to imagine how a cross-examination would probe any serious issues about perception, memory, narration or sincerity in relation to the above statements. They were committed to a permanent electronic record. Although the expert acknowledged that there could be text messages missing, there was no evidence that the messages retrieved were anything but an accurate reflection of the statements made.

[Emphasis added.]

- [62] In *R. v. Mootoo*, 2021 ONSC 5984 [Mootoo], the court characterized the above passage in *Bridgman* as support for the following proposition (at para. 79):

text messages are different than oral statements. A text message is an accurate record of what was said. If the meaning of a text message is clear on its own, the message can be admissible even if it was part of a longer conversation that was not all captured

- [63] With these legal principles in mind, I now turn to my analysis of the proposed evidence.

Analysis

- [64] I will conduct my analysis with reference to the topics identified by the Crown in their written submissions. Unless otherwise stated, paragraph references are pinpoints to the Crown's written submissions, provided for the benefit of the parties. The headings for each item are also taken from the Crown's submissions, and do not reflect my findings on the admissibility of the evidence to which they refer. As a result of my *Ante Mortem* Ruling, some of the evidence referred to by the Crown has been deemed inadmissible. I will therefore not refer to those portions in my analysis.

I. Discreditable Conduct

A. Hayer headed a drug trafficking organization which the accused and victim were a part of

- (i) Hayer took over Kelly's drug-trafficking organization

- [65] The Crown seeks to rely on evidence from Daniel Griffiths (para. 40), Randeep Randhawa (para. 41), Nicole Wagner (para. 42), and electronic communications Mr. Hayer is alleged to have had with Ms. Wagner (para. 43), to establish that after Sean Kelly's death Mr. Hayer took over the drug trafficking organization.

- [66] At para. 40, the Crown sets out the evidence of Mr. Griffiths regarding his dealings with Sean Kelly, Mr. Baldwin and Mr. Hayer ("Manny or Roop") before Mr. Kelly's death. Mr. Griffiths met Mr. Hayer 50-60 times and said, "he liked to play tough and threaten people who messed with him or his money". Mr. Griffiths will also provide evidence regarding reconnecting with Mr. Baldwin in 2019 and the position of Mr. Hayer within the drug world.
- [67] Mr. Hayer does not challenge the admissibility of Mr. Griffiths' evidence regarding what he knew about Mr. Hayer's position within the drug world upon his reconnecting with Mr. Baldwin in 2019. However, Mr. Hayer argues that details regarding Mr. Griffiths working for Sean Kelly are irrelevant narrative. I discuss this submission below.
- [68] At para. 41, the Crown sets out the anticipated evidence from Mr. Randhawa regarding his and Mr. Baldwin's role within Sean Kelly's drug organization in 2014 and 2015. Mr. Randhawa will also say Mr. Kelly brought Mr. Hayer and another individual, Kam Waraich, into his organization, and that they operated their own drug lines with Mr. Hayer using "kids" to deliver his drugs and other details about their drug trafficking activity. Mr. Hayer says that other than the evidence that Mr. Hayer supplied Mr. Baldwin with drugs to sell, the evidence is irrelevant and inflammatory, and particularly the reference to Mr. Hayer using "kids". I discuss this below.
- [69] At para. 42, the Crown sets out the anticipated evidence from Ms. Wagner about Mr. Baldwin's work with Sean Kelly and his association to Mr. Hayer and Mr. Waraich, including the fact they would meet together and that sometimes Mr. Hayer and Mr. Waraich spoke in Punjabi so they were not understood. Mr. Waraich was shot dead in January 2017.
- [70] The fact that Mr. Hayer and Mr. Waraich sometimes spoke Punjabi is not, in my view, evidence of any discreditable conduct. Even if they did so, per Ms. Wagner's observations, for the purpose of not being understood, inferring that this purpose was discreditable would be speculative. That said, the Crown's submissions did not identify the material "question in issue" to which the proposed evidence would be relevant. It is therefore inadmissible. Similarly, the fact that Mr. Waraich was killed in January 2017 is of no relevance, and the prejudicial effect of such evidence outweighs any probative value it may have. It is therefore also inadmissible.
- [71] At para. 43, the Crown refers to several communications in which Mr. Hayer (using a phone number ending in -0521) threatened Ms. Wagner and made references to Sean Kelly. I agree with the Crown that these communications are relevant and material as they reveal Mr. Hayer's animus towards Mr. Baldwin, going to motive. As communications directly sourced from Mr. Hayer, they also offer significant probative value, which in my view outweighs their prejudicial effect. These threatening communications are therefore admissible.
- [72] I further agree with the Crown that the background of Mr. Hayer's relationships with Mr. Baldwin, Mr. Griffiths, and Mr. Randhawa, and the history of their drug trafficking, is material, relevant, and probative. Given that Mr. Hayer and his associates' drug trafficking was inextricably intertwined with the circumstances of the alleged murder, I find this is

essential background and context. This background information will permit the jury to understand the evolution of Mr. Hayer's role in the drug trafficking group and his changing relationship with Mr. Baldwin. It is also not particularly prejudicial as relatively straightforward evidence on a point that I anticipate will be largely uncontroversial at trial (i.e., that the accused engaged in drug trafficking).

- [73] However, I agree with counsel for Mr. Hayer that Mr. Randhawa's proposed evidence regarding the history of the drug operation dating back to 2014 is unnecessary. The Crown will be permitted to lead evidence to establish that Mr. Hayer assumed his role in the drug trafficking operation after the death of Sean Kelly, as this will provide necessary context for the references to "SK" and "Sean" in the evidence. However, the Crown must streamline the evidence it leads regarding the evolution of the trafficking operation's leadership from Sean Kelly to Mr. Hayer.
- [74] I agree with counsel for Mr. Hayer that there is no support in the evidence to suggest the reference to "kids" means Mr. Hayer was actually employing children to sell drugs. Rather, when considered in the proper context, I find it is simply a reference to young men like Mr. Baldwin and Mr. Bottomley who sell drugs on Mr. Hayer's behalf. Therefore, the Crown will not be permitted to argue before the jury that any reference to "kids" in the context of Mr. Hayer's trafficking activities specifically concerns underage children. To do so would not only invite undue speculation but also risk engendering significant moral prejudice.
- (ii) After taking over, Hayer occupied a leadership role, directing and supplying others with drugs for processing, distribution and sale
- [75] The Crown submits the proposed evidence referred to in paras. 45 to 55 will show that in 2019 and 2020, Mr. Hayer was in a leadership role of the drug trafficking organization. As such, he directed his associates to test, buff, package, and distribute drugs on his behalf.
- [76] At para. 45, the Crown refers to evidence of Ms. Wagner. Mr. Hayer does not challenge the admissibility of Ms. Wagner's evidence pertaining to Mr. Hayer supplying Mr. Baldwin and Mr. Bottomley drugs, although he submits the details about the drug trafficking operation--such as Mr. Hayer being a poor supplier--are irrelevant. I agree that Ms. Wagner's view of Mr. Hayer's ability as a drug supplier is irrelevant and immaterial to any issue in question in this case. It is therefore inadmissible.
- [77] At para. 46, the Crown refers to evidence of Mr. Randhawa that Mr. Baldwin would often take calls in the bathroom when in the presence of Mr. Randhawa. The Crown submits that this demonstrates that Mr. Baldwin took steps to ensure others did not know he was with Mr. Randhawa. I do not consider this evidence to be discreditable conduct and, although it is of questionable relevance, Mr. Randhawa will be permitted to describe what he observed. However, the Crown will not be permitted to argue that the referenced behaviour demonstrates that Mr. Baldwin was concealing his association with Mr. Randhawa from Mr. Hayer. In my view drawing this inference would not be reasonable given the numerous plausible explanations for why Mr. Baldwin took calls in the bathroom (e.g., it may be that

he intended to conceal the particulars of his trafficking activities from Mr. Randhawa, rather than his association from Mr. Hayer).

- [78] Mr. Hayer takes no issue with the contents of paras. 47 and 48, which refer to the anticipated evidence of Mr. Griffiths and Mr. Foran regarding Mr. Baldwin working for Mr. Hayer in the drug trade.
- [79] Paras. 48 to 53 refer to recordings of calls in November 2019 from Ford Mountain Institution ("FMI"), in which Mr. Hayer is recorded speaking to Mr. Gill, an inmate at FMI. The Crown submits these calls demonstrate: the plan to expand Mr. Hayer's drug business after Mr. Gill is released; that Mr. Hayer supplied drugs to his associates; and that Mr. Hothi worked for Mr. Hayer and was being promoted. In general, Mr. Hayer takes no position on the information relating to Mr. Hayer supplying and employing Mr. Hothi, but does challenge the relevance of the majority of the contents of each call.
- [80] At para. 50, the Crown sets out the November 6, 2019, FMI call in which Mr. Hayer and Mr. Gill appear to be having conversations with other people on the line about drug trafficking in both Kelowna and Surrey. At the start of the call, Mr. Gill asked Mr. Hayer if he "got a hold of baldy", which the Crown says is a reference to Mr. Baldwin, and then Mr. Gill requested the number for "Jagpal", which is a reference to Mr. Hothi. The Crown submits that pages 4 to 6 of the transcript of the call are relevant because they disclose a discussion of the drug business in Kelowna, which demonstrates that Mr. Hayer operates his drug business in both Kelowna and Surrey. In turn, the Crown says this evidence supports their theory that Mr. Hayer promised to set Mr. Hothi up in Kelowna after the murder. At the bottom of page 6, the conversation switches to "S-town", which the Crown says is a reference to Surrey. At page 8, Mr. Hothi is linked into the call and both Mr. Hayer and Mr. Gill talk to Mr. Hothi about the need for him to obtain his driver's licence. In this call, Mr. Hayer encourages Mr. Hothi to obtain his driver's licence so that he can get others working for him. On page 19, Mr. Hayer says, "I already told you I put that *White guy* under you, that's it. Bro at night time when you're sleeping, you'll be making money". He is also recorded saying, "I'm giving you a lottery ticket", and that once Mr. Hothi gets his licence, he will "never live life the same", with reference to making profit from drug trafficking. The Crown submits the reference to the "white guy" concerns Mr. Bottomley, who Mr. Hayer arranged to work for Mr. Hothi in the drug operation.
- [81] I agree with the Crown that these FMI calls are relevant to the issue of identification, as they connect Mr. Hayer to the phone number ending in -0521. I also agree with the Crown that the November 6, 2019, FMI call is probative as it demonstrates that Mr. Hayer is in a superior position to that of Mr. Hothi, and is recruiting him to take on a more significant and profitable role within the drug operation. This intercept provides necessary context and narrative which will assist the jury in understanding the nature of the relationship between Mr. Hayer and Mr. Hothi.

- [82] However, I agree with counsel for Mr. Hayer that it is purely speculative for the Crown to suggest that the reference to "finding baldy" and finding a "kid" to drive is evidence of premeditation and planning for the murder alleged in this case. I agree with counsel for Mr. Bottomley that it is also not possible to determine if the "white guy" is a reference to Mr. Bottomley, and that inviting such an inference would be unduly speculative. That said, the reference is generally relevant as further evidence of Mr. Hayer's efforts to elevate Mr. Hothi's role in the operation, which in my view provides essential narrative for the allegations at bar. With that purpose in mind, counsel can argue the meaning and weight to be attributed to the reference to the "white guy" at trial.
- [83] Para. 52 refers to the November 8, 2019, FMI call between Mr. Hayer and Mr. Gill in which they have further discussions about their drug trafficking business. This call is heavily redacted. The majority of the call at pages 15 to 17 concerns Mr. Hayer and Mr. Gill's plans once Mr. Gill is released from custody. The Crown submits this call is relevant because it demonstrates that Mr. Hayer is in a position to promote Mr. Hothi to work in Kelowna. At the start of the conversation on page 4, there is also a brief reference by Mr. Gill to speaking to "Jagpal" about wanting to go to "K town". Mr. Gill tells Mr. Hayer "I don't know I'll talk to you when I am out" and Mr. Hayer says he will speak to Mr. Hothi.
- [84] As I understand the Crown's position, they say this brief exchange is further evidence of the planning Mr. Hayer engaged in to have Mr. Hothi participate in the murder of Mr. Baldwin. I do not agree. At best, this exchange is further evidence of Mr. Hothi's association with Mr. Hayer in drug trafficking--a fact that will be readily available for the jury to determine from other, less prejudicial evidence. I agree with counsel for Mr. Hayer that the discussion between Mr. Hayer and Mr. Gill is not relevant to a material issue at trial, and that even if it were, it is more prejudicial than probative. In my view, this call would only distract the jury from the material issues at trial. Therefore, this call is inadmissible.
- [85] At para. 53, the Crown refers to a November 10, 2019, call between Mr. Hayer, Mr. Gill and Mr. Hothi. At the beginning of the call, Mr. Hayer provides Mr. Hothi with directions to his house. I agree that this is evidence that goes to establishing the identity of the user of the phone number ending in -0521 as Mr. Hayer. In my view, this issue is clearly material in this case given the essential role that digital communications involving the -0521 phone number (among others) has in the Crown's case.
- [86] However, during the call Mr. Gill also questions Mr. Hothi about his capacity to sell various types of drugs (at pages 14-15). In my view, the volume and price at which Mr. Hothi said he could sell drugs would be significantly distracting to the jury. I do not view this exchange as relevant to a material issue, other than the fact that Mr. Hothi was being entrusted to sell drugs for Hayer, which will already be apparent to the jury from less prejudicial evidence. Therefore, this portion of the call is inadmissible, and the Crown will have to edit this call before tendering it at trial.

- [87] At para. 54, the Crown refers to a number of electronic messages from September 2019 to January 2020 with Mr. Hothi, Mr. Bottomley, and others discussing drug trafficking. The Crown submits these calls demonstrate Mr. Hayer's leadership role within the drug trafficking organization, as well as establishing Mr. Hayer's use of Wickr. At tab 34 of Exhibit #6 of the material the Crown filed on this voir dire, there is a 156-page chart of electronic communications between persons the Crown says are Mr. Hayer, Mr. Hothi, Mr. Bottomley, and others. These communications include phone call records (without content), texts, and Wickr messages. There is no challenge to the admissibility of the messages pre-dating the November 11, 2019 offence in which the user of the number ending -0521 discusses supplying Mr. Bottomley with drugs. However, defence counsel submit the messages that post-date the offence are irrelevant. In particular, Mr. Hayer submits messages in January 2020 about drug trafficking are both prejudicial and irrelevant.
- [88] With respect to the time-frame preceding the incident on November 11, 2019, and immediately after, I agree that communications between Mr. Hayer using various phone numbers and the co-accused are admissible as they provide background and context regarding the nature of their relationships and roles within the drug trafficking operation. However, the Crown is not permitted to tender the entirety of the records. Rather, the Crown may select certain sequences of communications containing text messages in which the parties discuss obtaining drugs and/or money or related topics. As well, I agree with counsel for the accused that records showing phone calls between the parties is only relevant to show association. Without the content of these calls, it is purely speculative to conclude what was discussed. Therefore, the Crown must streamline the sequence of communications they seek to rely on so that the jury is not overwhelmed by the bulk of communications. The Crown can provide counsel and the Court with a revised version of the records they seek to tender before the commencement of trial and, if necessary, counsel will be permitted to make further submissions. I will discuss the admissibility of the November 2019 Wickr messages later in these reasons.
- [89] With respect to the January 2020 messages, these occur after the offence and should properly be considered as part of the body of after-the-fact evidence sought by the Crown, which I discuss below. However, I will deal with these particular messages at this stage as the Crown referred to them at para. 54 of their original submissions.
- [90] The specific messages at issue are January 2020 Wickr messages between users with the names moosewala01 and wiggles9, retrieved from Mr. Hayer's phone which was seized incident to his arrest. The Crown submits these messages are relevant as they provide evidence of the identity of the user of a third Wickr username, yella01, a suspected username of Mr. Hayer. As I understand their position, the Crown submits that the fact that both yella01 and moosewala01 include the suffix "01" indicates a connection to Mr. Hayer's other social media user names.

- [91] Also, they submit the conversation between moosewala01 and wiggles9 indicate that the user of moosewala01 was prepared to discuss drug trafficking activity over Wickr, an encrypted text messaging platform. They further submit the messages are relevant as they serve to establish the digital identity of Mr. Hayer, in part because moosewala01 discusses needing to attend a specialist appointment for his leg the day after the message was sent.
- [92] The messages generally dealing with ongoing drug trafficking by a user believed to be Mr. Hayer are not relevant to a material issue at trial, and even if they were in my view they pose a significant risk of distracting the trier of fact. These general trafficking messages are therefore not admissible. However, I do agree that the fact that the user of moosewala01 discussed "coming down today for a week or so and got specialist appointment with my leg tomorrow" is admissible evidence relevant to establishing the identity of Mr. Hayer as the user of the phone seized incident to his arrest, and as the user behind moosewala01. Indeed, surveillance evidence extrinsic to these communications observed Mr. Hayer attending a medical appointment the next day, as indicated in the relevant message. Therefore, the Crown can rely on this evidence for that limited purpose.
- [93] At para. 55, the Crown refers to results of the search of Mr. Hayer's residence in West Kelowna. The Crown seeks to rely on the fact that drugs were seized inside a safe in the residence, together with various identification documents. As well, the Crown seeks to rely on the fact that an "ornate black and gold Gucci bathrobe", as described by the Crown, was located in a closet in the home, and that photographs of Mr. Hayer in the robe were seized off his phone. I agree with counsel for Mr. Hayer that it is irrelevant in this case that drugs were seized inside Mr. Hayer's West Kelowna residence. There is ample evidence to establish, and Mr. Hayer candidly admits on this voir dire, that he was engaged in the drug trade both before and after the Baldwin murder. There is no probative value in the fact that drugs were seized. I also fail to see any relevance to the evidence relating to the Gucci bathrobe, and find its admission could cause significant prejudice to the reasoning of the jury.
- [94] That said, I acknowledge there is some probative value offered by the mere fact that that there were pictures of Mr. Hayer located on the phone seized in his West Kelowna home. Namely, the fact of this picture is relevant to and probative of the live issue of identification in relation to the various cellphones identified by police in this matter. There is minimal prejudicial effect arising from the mere presence of a photo of Mr. Hayer on his phone. Thus, evidence that a photo of Mr. Hayer was found on the phone seized from his West Kelowna home is admissible, but the Crown is not permitted to adduce the photo itself. None of the remaining evidence identified at para. 55 of the Crown's written submissions is admissible.
- (iii) Hayer promised to promote Hothi to a leadership role where he would earn significant money

- [95] In this section, the Crown refers to both the FMI calls and some electronic messages. They say the FMI calls demonstrate that Mr. Hayer was actively recruiting Mr. Hothi to assume a more senior and profitable role within the drug operation.
- [96] At paras. 57-59, the Crown refers to the contents of the November 6, 2019, FMI call in which Mr. Hayer and Mr. Gill link Mr. Hothi into the call. I have already determined that aspects of this call are admissible as they demonstrate, among other things, the role of Mr. Hayer within the drug organization and his efforts to promote Mr. Hothi.
- [97] At para. 60, the Crown refers to the November 8, 2019, FMI call between Mr. Gill and Mr. Hayer. I have already determined that this call is not admissible.
- [98] At para. 61, the Crown refers to a series of electronic messages between September 26 and November 14, 2019, which they say demonstrate that Mr. Bottomley was getting drugs for sale from Mr. Hothi and Mr. Hayer, and that Mr. Bottomley owed them money. There are also messages exchanged between Mr. Hothi and Mr. Basran on November 11, 2019, in which Mr. Hothi says "I make money when I sleep". The Crown says this message is related to Mr. Hayer telling Mr. Hothi in the November 6, 2019 FMI call that he put a "white guy" under him so he could make money.
- [99] In their supplemental submissions, the Crown indicates that they seek to rely on the sequence of electronic messages occurring on: September 26, 27; October 3, 6-15, 24, 25, 28, 29; and November 9 and 11. I agree with the Crown that these text messages have probative value to a material issue inasmuch as they demonstrate the nature of the relationship among Mr. Hayer, Mr. Hothi, and Mr. Bottomley, and their respective roles in the hierarchy of the drug operation. Namely, I agree that the nature of those relationships before the murder of Mr. Baldwin, and how they evolved after the murder, are important components of the narrative that the jury will require in order to understand the dynamics of the relationship among the co-accused. As well, I do not agree with Mr. Hayer that reference to Mr. Bottomley owing a debt is irrelevant. As counsel for Mr. Bottomley agrees, the existence of the debt is admissible to show the relationship between the parties. I find the probative value of this evidence outweighs its prejudicial effect, which is attenuated by the uncontroversial nature of the accused's drug trafficking and the availability of jury instructions on its use.
- [100] That said, I also agree with Mr. Bottomley's submission that the existence of his drug debt is not presently admissible--without the benefit of knowing how the evidence will unfold at trial--as probative of a purported and specific motive for committing the murder of Andrew Baldwin. In other words, I agree that there is nothing presently in the evidence on this application to support the Crown's assertion that Mr. Bottomley's alleged murder of Andrew Baldwin was directly motivated by a desire to eradicate a drug debt owed to either Mr. Hayer or Mr. Hothi.

[101] Moreover, as I have already stated earlier in these reasons, records showing that there were phone conversations devoid of the content of those calls are not relevant other than if they appear relevant to contextualizing the text communications at issue in this case. The Crown should provide a revised set of records to counsel for the accused and the Court prior to the commencement of trial, and if necessary further submissions on admissibility will be heard.

(iv) Hothi and Bottomley held different roles in Hayer's drug-trafficking organization

[102] The Crown seeks to adduce evidence to demonstrate that Mr. Hothi and Mr. Bottomley worked together in the drug trade for Mr. Hayer. The parties agree that such evidence is admissible for the purpose of providing narrative and context. Mr. Hayer does not object to the messages establishing that Mr. Bottomley was supplied drugs from Mr. Hothi and himself. However, he argues that the fact that Mr. Bottomley owed them money is inadmissible because it is irrelevant. My findings above regarding the admissibility of the text communications at issue, and the use that can be made of Mr. Bottomley's debt, applies here.

[103] The Crown is no longer pursuing the items discussed in relation to Mr. Hothi's statement at para. 63, nor Mr. Randhawa's evidence at para. 64. The admissibility of the evidence of A.B. at para. 65 and Mr. Nair at para. 66 regarding what they knew about Mr. Baldwin and Mr. Bottomley is not challenged by the defence. In my view, there is nothing controversial in this proposed evidence. It simply represents observations made and related by the witnesses. This evidence is admissible.

[104] At paras. 67 to 70, the Crown seeks admission of Mr. Baldwin's ante mortem statements made in July and August 2019 in the form of text messages with Mr. Bottomley under the principled exception to the hearsay rule. The Crown advises that they inadvertently neglected to include these messages in their earlier application regarding ante mortem statements. The Crown seeks to rely on the content of the messages to demonstrate that in the summer of 2019, Mr. Bottomley and Mr. Baldwin worked together in the drug trade selling Mr. Hayer's drugs. In their supplemental submissions, the Crown identifies the sequence of messages that occurred on July 18 and August 1, 3, 4, 6, 9, 11, 21, and 22 of 2019.

[105] For the purposes of this analysis, I adopt my discussion of the law applicable to the admissibility of ante mortem statements as set out in my prior Ante Mortem Ruling. To that end, I agree with the Crown that Mr. Baldwin's messages are necessary (given that he is deceased) and that they are reliable. Indeed, the statements were spontaneous and made in a natural manner, bolstering their substantive reliability. The messages also simply reflect the nature of the relationship between Mr. Baldwin and Mr. Bottomley in the summer of 2019, when they lived together and worked for Mr. Hayer selling drugs. As I have already discussed, the evidence that Mr. Bottomley engaged in drug trafficking for Mr. Hayer is the backdrop against which the events in this case unfolded. The probative value of these

messages outweighs the prejudice they may cause, as they amount to relatively straightforward evidence of Mr. Baldwin and Mr. Bottomley's uncontroversial drug trafficking activities. I am satisfied that these messages are thus admissible under the principled exception to the hearsay rule and are also admissible as discreditable conduct evidence regarding Mr. Bottomley trafficking for Mr. Hayer.

- [106] At para. 72, the Crown refers to evidence from Ms. Wagner regarding a phone conversation she had with Mr. Hayer where he encouraged her to obtain her drugs from Mr. Bottomley. Ms. Wagner will also describe text messages she exchanged with Mr. Bottomley from September 27 to November 9, 2019, to purchase drugs. This evidence is relevant because it demonstrates the evolution of Mr. Hayer's drug operation during this time period, and in particular the rise of Mr. Bottomley as a trusted worker for Mr. Hayer. As with the other evidence regarding the drug trafficking operation, this evidence is intertwined with the circumstances of this case, and refers to illicit activities that the parties do not dispute the accused engaged in. It is therefore relevant to a material issue at trial, and is more probative than prejudicial. It is admissible. However, the Crown is required to provide counsel for the accused and the Court a copy of the communications they are seeking to tender before the commencement of the trial and, if necessary, the Court may hear further submissions.
- [107] At paras. 73 and 74, the Crown refers to Mr. Bottomley's text messages to Mr. Hothi and Mr. Hayer to demonstrate that he was engaged with them in drug trafficking. These messages are similar to those referred to in para. 61 of the Crown's submissions. As I have said, the relationship among Mr. Hayer, Mr. Hothi and Mr. Bottomley and their drug trafficking operation forms the backdrop against which events in this case unfolded, and are therefore necessary for both narrative and context. As with similar evidence reviewed above, the probative value of this evidence exceeds its prejudicial effect, and it is admissible.
- [108] However, given my findings on the admissibility of the text messages referred to at para. 61 of the Crown's submissions, together with the messages at issue here, I am concerned that the sheer volume of trafficking-related messages may amount to "piling on", as discussed in Sipes. Therefore, the Crown must streamline their selection of text messages and provide counsel for the accused and the Court a copy of the communications they are seeking to tender before the commencement of the trial, in order to ensure there is no issue regarding their admissibility.
- [109] At para. 75, the Crown refers to the FMI calls described earlier. As above, the Crown says these calls demonstrate that Mr. Hothi was trafficking drugs for Mr. Hayer. They also say the calls indicate Mr. Hayer put a "white guy" under Mr. Hothi and promised him more work and a "leader" role and enough money to move his family out of the "hood" once he obtained his driver's licence. I have already discussed the reasons for the admissibility of some of these FMI calls when discussing paras. 49-60 of the Crown's submissions. In sum, I found portions of the FMI calls on November 6 and 10 admissible, but have excluded the November 8 call.

(v) Baldwin accrued drug debts to Hayer

- [110] The Crown seeks to rely on evidence from Mr. Griffiths (paras. 77-79), Ms. Macdonald (para. 81), A.B. (para. 82), and Ms. Wagner (portion of para. 83, para. 84) to establish that Mr. Baldwin had accrued drug debts owing to Mr. Hayer. I agree that this evidence is probative, as it establishes the cause of the conflict that arose between Mr. Hayer and Mr. Baldwin. I also agree that the animus Mr. Hayer displayed towards Mr. Baldwin goes to motive. The risk of prejudicing the jury's reasoning as a result of this evidence is, in my view, outweighed by its strong probative value to the issues of Mr. Hayer's deteriorating relationship with Mr. Baldwin and ensuing threats, which I consider central to the issue to be determined by the jury. Therefore, this evidence is admissible.
- [111] At para. 85, the Crown refers to approximately 82 communications (including phone calls and text messages) between Mr. Hayer and Ms. Wagner from August to November 2019. At Appendix A of their original written submissions, the Crown sets out a summary of the communications involving: Ms. Wagner and Mr. Hayer (using the -0521 phone number); Ms. Wagner and Ms. Macdonald; and Ms. Wagner and Mr. Bottomley.
- [112] These text messages, together with the call records showing corresponding phone contact, are admissible. They are all relevant to the threats allegedly made by Mr. Hayer about Mr. Baldwin prior to November 11, 2019. These threats are clearly material to the adjudication of this matter, as they relate to, among other things, any motive or animus Mr. Hayer may have had towards Mr. Baldwin. Although they present the risk of engendering both moral and reasoning prejudice, the fact that these threats are, in large part, directly attributable to Mr. Hayer greatly enhances their probative value. This value outweighs the prejudice, if any, generated by the communications.
- [113] As I understand their submissions, at paras. 86 and 87 the Crown seeks to rely on a statement by Ms. Wagner that I have determined inadmissible in my Ante Mortem Ruling. The remaining portions of those paragraphs relating to the admissibility of communications by moosewala01 are addressed earlier in these reasons.
- [114] At para. 91, the Crown refers to Mr. Foran's statement in which he said Mr. Baldwin told him about the debt he owed to Mr. Hayer. As discussed in my Ante Mortem Ruling, Mr. Foran's statement is admissible, subject to editing.

B. The accused threatened the victim before he was killed

(i) Hayer threatened Baldwin, his family and associates

- [115] The Crown seeks to tender evidence from Ms. Macdonald (paras. 93-94), Ms. Wagner (para. 95), Mr. Griffiths (paras. 96-98), and A.B. (para. 99) regarding threats made by Mr. Hayer concerning Mr. Baldwin. The parties do not challenge the admissibility of this evidence. I agree with the Crown that this evidence is highly probative as it relates to Mr. Hayer's animus towards Mr. Baldwin; his motive to have Mr. Baldwin killed; pre-meditation and planning; and the identity of Mr. Hayer as a party to the homicide. This strong probative

value in relation to essential issues at trial outweighs the prejudicial effect, although not insignificant, of these threatening communications. Therefore, this evidence is admissible.

(ii) Bottomley threatened Baldwin during a conversation with Wagner

[116] At para. 100, the Crown refers to a series of text messages exchanged between Mr. Bottomley and Ms. Wagner between October 13 to 15, 2019, following an encounter between Mr. Bottomley and Mr. Baldwin at Ms. Wagner's residence. The conversation culminated with Mr. Bottomley sending Ms. Wagner the following message at 14:50 on October 15, 2019:

Just so i can all sudden feel like iv now fucked up in some way because of the lil goofs TRUE GRIMY BEHAVIOUR MOVES FUCK UPS BEING THE TREASO HES NOT TO B RIUBD WITOUT GETINGVHIS FUCKING FINGER CHOPPED N SLAMMED DOWN HIS OWN DISLOYAL GREASY FUCKING THROAT

[117] The Crown submits that the above text is a threat and demonstrates, through a party admission, that the relationship between Mr. Bottomley and Mr. Baldwin had broken down. They say this is probative of animus and motive. In particular, the Crown submits that this text demonstrates Mr. Bottomley's animus towards Mr. Baldwin in relation to: their romantic conflict over Ms. Wagner; Mr. Baldwin and Mr. Bottomley's altercation at Ms. Wagner's residence; and Mr. Baldwin's perceived disloyalty towards Mr. Hayer. The Crown further says this message "foreshadows" that something violent will happen to Mr. Baldwin with a blade, and indeed suggests that in his "highly emotional state", Mr. Bottomley "let slip plans to have Baldwin violently attacked". They thus submit the message also "goes to premeditation and planning" in the context of the first-degree murder charges at bar.

[118] I agree with counsel for Mr. Bottomley that it is speculative to interpret this text message as evidence that Mr. Bottomley intended to kill Mr. Baldwin, or otherwise as an inadvertent disclosure of a premeditated plan to have Mr. Baldwin murdered. However, the message is relevant to and probative of Mr. Bottomley's general animus towards Mr. Baldwin. It reflects--from Mr. Bottomley himself--the degree of animosity that had developed between Mr. Bottomley and Mr. Baldwin arising, it seems, from their mutual interest in Ms. Wagner and their respective roles within Mr. Hayer's drug operation. In my view, the probative value of this exchange--being cogent and directly-sourced evidence of Mr. Bottomley's own feelings towards Mr. Baldwin--exceeds its prejudicial effect. Any prejudice can be addressed through jury instructions.

C. Hayer made and received phone calls using a -2549 phone number after he was stopped at a roadblock

[119] At paras. 101-105, the Crown seeks to lead evidence about a police incident on July 20, 2019, involving Mr. Hayer in Kelowna. The incident concerned Mr. Hayer using a particular phone number, ending in -2549 and registered to Dasheena Gill, to contact a taxi service, as well as providing the phone number as his contact information to police. The Crown also proposed to adduce evidence of an employee of the relevant taxi service company relating

to her observations of Mr. Hayer wearing a leg brace and arriving at the service's office to retrieve lost items. The Crown says this evidence goes to establishing that Mr. Hayer used the -2549 phone number, which formed part of the communications between the accused on, among other things, the day of the alleged murder.

[120] I agree with counsel for Mr. Hayer that it is not necessary, and would be more prejudicial than probative of any material issue, to elicit details regarding why Mr. Hayer was stopped at a police roadblock, or to put before the jury evidence that he was kicked out of a taxi for unruly behaviour. It is also irrelevant that he repeatedly called employees of the taxi company to retrieve a lost item. That said, some of the Crown's proposed evidence under this heading is admissible given the important role that the -2549 phone number seems to have played in communications on the day of the alleged murder, and in turn the materiality in this case of the identity of the phone's user. Therefore, the Crown is permitted to tender general evidence establishing the fact that Mr. Hayer used the phone number ending in -2549 on July 20, 2019, that he wore a leg brace, and that he attended the taxi company to retrieve personal items. If counsel can agree, perhaps an admission of fact regarding this evidence could be tendered at trial.

D. Bottomley was drug dependent in the fall of 2019

[121] At para. 106, the Crown seeks to tender evidence that in the fall of 2019, Mr. Bottomley was dependent on drugs. They say this evidence forms an essential part of the narrative of Mr. Bottomley and Mr. Baldwin's relationship, beginning as friends and fellow drug users to working for Mr. Hayer and culminating in a breakdown of their friendship. They also say the evidence serves to establish Mr. Bottomley's motivation to win favour with Mr. Hayer, on the view that doing so would provide Mr. Bottomley income and a supply of drugs for his own use. The Crown proposes to adduce evidence of Mr. Bottomley's drug dependency from various civilian witnesses, along with Mr. Bottomley's own text messages. At para. 112, the Crown also seeks to rely on intercepted calls Mr. Bottomley made while in jail after his arrest. The Crown no longer relies on an in-custody statement by Mr. Bottomley referenced in their written submissions.

[122] Counsel for Mr. Bottomley acknowledges that evidence of his drug use is admissible as part of the narrative. However, he opposes the Crown's characterization of Mr. Bottomley as being "drug dependent" rather than a "drug user". In my view, the characterization of the scope of Mr. Bottomley's drug problem does not form part of this application.

[123] I have already found that some of the text communications that were exchanged between Mr. Bottomley and others are admissible for both context and narrative. While these communications are admissible, the Crown must streamline the selection of communications so as not to overwhelm the jury with copious amounts of text messages.

[124] However, with respect to the jail calls, evidence of Mr. Bottomley experiencing drug withdrawal is far more prejudicial than it is probative. This evidence goes to further establishing that Mr. Bottomley regularly used drugs--a point readily admitted by Mr. Bottomley and one which will not be lost on the jury. On the other hand, descriptions by Mr. Bottomley of his symptoms, including seizures, vomiting, and defecation, pose a significant risk of distraction and confusion to the jury. Therefore, the jail recordings are inadmissible.

E. Bottomley stole some of Baldwin's belongings from Nair's house

[125] At paras. 113 to 114, the Crown seeks to lead evidence from Ms. Wagner and Mr. Nair to establish that Mr. Bottomley stole items that Mr. Baldwin had left behind when he moved out of Mr. Nair's house.

[126] I agree with counsel for Mr. Bottomley that there is no foundation in the evidence to support the finding that Mr. Bottomley stole Mr. Baldwin's items. I agree that, at best, this evidence demonstrates that when Mr. Bottomley left the Nair residence that he had been sharing with Mr. Baldwin, he moved some of the items Mr. Baldwin had left behind. None of this evidence is probative of an issue at trial and I find its prejudicial effect outweighs its probative value. Therefore, it is not admissible.

II. After-the-fact Conduct

A. Hothi and Hayer got Bottomley drugs for his injuries and during related discussions the accused spoke about Bottomley completing his part of the prearrangement

[127] At paras. 116-119, the Crown seeks to rely on electronic communications among Mr. Bottomley, Mr. Hothi, and Mr. Hayer to establish that in the evening after Mr. Baldwin was killed, Mr. Bottomley contacted both Mr. Hothi and Mr. Hayer requesting drugs. In particular, the Crown seeks to rely on a sequence of electronic communications on November 11, 2019, beginning at 16:15:35 (i.e., before the incident) and concluding at 22:40:08.

[128] At tab 49 of volume 3 of the Crown's book of materials, filed as Exhibit 7 on the voir dire, the Crown sets out only the Wickr communications between yella01 and renatti187 dated November 11, 2019. In the Crown's supplemental materials at Tab II-A (pages 33-54), they provide a sequence of Wickr and text messages together with records of phone calls made between the various accused. Some of these messages were located on the phone Mr. Bottomley dropped at the crime scene, while the bulk of them were extracted from a phone seized from Mr. Bottomley upon his arrest. In addition, counsel for Mr. Hayer filed Exhibit 8, which is a copy of the thumbnail image located on Mr. Bottomley's phone (seized at the scene) containing the yella01 and renatti187 messages between 16:19 and 16:20.

- [129] Before turning to the evidence as a whole, I will first deal with a preliminary issue regarding the Wickr thumbnail recovered from Mr. Bottomley's phone located at the scene. Counsel for Mr. Hayer says there is no evidence upon which one can find that the messages were made on November 11, 2019. While there is no date indicated on the actual thumbnail, the Crown submitted that there is a body of evidence they intend to call at trial that will establish that the thumbnail had a timestamp of November 11, 2019 at 16:22. As well, the jury will hear evidence about how the Wickr program operates, including automatic message expirations. I am satisfied that there is an evidentiary basis upon which it can be argued that the Wickr message between yella01 and rentatti187 were made on November 11, 2019, between 16:19 and 16:20. The authenticity (and thus admissibility) of the Wickr messages is the subject of a pending application at which time these issues will be litigated. For the purposes of this application, while these Wickr messages provide necessary context for my analysis, I need not consider them otherwise as they are neither discreditable nor after-the fact conduct.
- [130] Moving to the entirety of the evidence proposed by the Crown under this heading, the Crown submits that these are all relevant because they establish planning and coordination before the murder and demonstrate significant contact between the accused after the murder, as co-actors. They further submit these communications are probative of the hierarchy of the group and of a "quid pro quo" arrangement between Mr. Hayer and both Mr. Hothi and Mr. Bottomley in relation to the murder. Finally, the Crown says this evidence further establishes the identity of Mr. Hayer as the user of the -2456, -0521, and -2549 phone numbers.
- [131] Counsel for Mr. Bottomley concedes that the text messages are admissible after-the-fact conduct. Mr. Hayer agrees that text messages sent by an accused are admissible under the party admission to the hearsay rule. In particular, neither accused takes issue with the admissibility of the text messages establishing that Mr. Hayer and Mr. Hothi arranged to provide Mr. Bottomley drugs on the evening of the incident.
- [132] However, Mr. Hayer opposes the admission of the messages between the Wickr users yella01 and renatti187, for reasons other than those addressed above. Namely, relying on Merritt, he argues that because the Wickr messages are incomplete, they lack context to enable their meaning to be ascertained. As well, both Mr. Hayer and Mr. Bottomley oppose the reliance on the call records to establish the nature of the communications between the parties absent any evidence as to the content of their calls.
- [133] In order to conduct my analysis, I will begin by setting out the sequence of communications the Crown seeks to rely on with reference to the Crown's supplemental submissions at pages 33-54. The sequence begins with a short call between Mr. Bottomley and Mr. Hayer (-0521) at 16:15:35, followed immediately by a short call between Mr. Hayer (-0521) and Mr. Hothi at 16:16:16. Then, purportedly at 16:19--i.e., prior to Mr. Bottomley allegedly attending at A.B.'s residence--there is the first Wickr message between yella01 and renatti187. The exchange is as follows:

16:19

yella01 to renatti187

Kk hid up (or Kk hld up)

16:19

yella01 to renatti187

Don't be on no camera

16:20

renatti187 to yella01

No i know. Imma cover up to

[134] Between 16:25:11 and 16:57:48, there is a series of phone calls between Mr. Hayer--using the -0521 and -2456 phone numbers--and Mr. Hothi, as well as Mr. Hothi and Mr. Basran. At 17:20:24, there is a phone call between the -2456 number and Mr. Hothi. This places the call shortly after the stabbing of Mr. Baldwin. The records show that after the incident, all calls to -0521 go to voicemail, but that Mr. Hothi and the -2456 number remain in communication. The records further reveal that between 17:35:23 and 18:09:19, there is a sequence of calls in which Mr. Bottomley attempts to contact both Mr. Hothi and Mr. Hayer. At 17:59:07, Mr. Hothi calls Mr. Bottomley for just over one minute, and then Mr. Hothi has a six-minute call with Mr. Hayer using the -2456 number. Mr. Bottomley then calls and texts Mr. Hayer at the -0521 number, stating "bro please get me some work asap" and "I am sick as fuck". Following those text communications, there is the following Wickr exchange between renatti187 and yella01:

18:09:19

renatti187 to yella01

Yo

18:17:14

yella01 to renatti187

Yo

18:17:22

yella01 to renatti187

Super mesy

18:17:34

renatti187 to yella01

Yes I know

[135] The Crown submits "super mes[s]y" is in reference to the stabbing of Mr. Baldwin and the blood Mr. Bottomley brought into Mr. Basran's truck. Shortly thereafter, Mr. Hothi and Mr. Bottomley have the following text exchange:

18:17:50

Hothi to Bottomley

Bro my word ima see you tonight don't you worry

18:18:08

Bottomley to Hothi

I need something asap bro I'm dying

18:18:09

Hothi to Bottomley

Not in the area rn

[136] Following that exchange, renatti187 and yella01 exchange the following messages on Wickr:

18:18:36

renatti187 to yella01

Don't call my other number mber

18:19:26

renatti187 to yella01

Can I get some shit like asap bro please

18:19:37

yella01 to renatti187

Yea get rid of it

18:19:54

renatti187 to yella01

I was hopin he woulda had something on him

18:19:59

renatti187 to yella01

I will

18:20:02

yella01 to renatti187

Still here or uptown he?

18:20:19

yella01 to renatti187

Give a bout hour

18:20:44

renatti187 to yella01

Fuck bro I dunno if I can wait that long

[137] With respect to the message from renatti187 at 18:18:36, it is reasonable to infer that it references the phone Mr. Bottomley dropped at the crime scene.

[138] Immediately following the above Wickr exchange, Mr. Bottomley and Mr. Hothi exchange a series of text messages between 18:22:35 and 18:24:39 in which they discuss how long it will take for Mr. Hothi to bring Mr. Bottomley drugs. Then, there are two brief calls placed from Mr. Bottomley's phone to Mr. Hothi's. At 18:38:40, yella01 sent renatti187 a message stating "He's cleaning the mess you made". The Crown submits this is Mr. Hayer advising Mr. Bottomley that the reason Mr. Hothi is not getting him drugs is because he is cleaning up blood in Mr. Basran's truck. Given the sequence of events, there is an evidentiary foundation for that interpretation. At 18:45:43, there is another short call placed from -2549 to Mr. Hothi.

[139] Between 18:47:19 and 18:54:16, the following sequence of Wickr messages between renatti187 and yella01 occurs:

18:48:51

yella01 to renatti187

Who hit yu

18:49:15

renatti187 to yella01

Both of em. But was limp when I left

18:49:41

yella01 to renatti187

[A.B.] and him?

18:49:53

renatti187 to yella01

I think yes keep the words low

18:49:56

renatti187 to yella01

Please

18:50:09

yella01 to renatti187

We're you get him

18:50:17

renatti187 to yella01

All over

18:50:38

yella01 to renatti187

Kk once he done he will see you

18:51:26

yella01 to renatti187

Not long bro

18:51:38

yella01 to renatti187

You care through so dw you got my word

18:51:43

yella01 to renatti187

Came

18:54:16

yella01 to renatti187

Once he done he will c yu bro

[140] The records then indicate that there were three additional Wickr messages after 18:54:16, although no details were extracted.

[141] In their submissions, the Crown highlighted the underlined portions of the above exchange. With respect to Mr. Bottomley, they say the reference to "was limp when I left" is an admission by Mr. Bottomley that he killed Mr. Baldwin by getting him "all over". The Crown also submits that Mr. Hayer is confirming the deal or the "quid pro quo" he made with Mr. Bottomley because he "came through". The Crown submits this refers to an arrangement in which Mr. Bottomley killed Mr. Baldwin to receive drugs as promised by Mr. Hayer. I will discuss this submission later in these reasons.

[142] At 19:19:36, Mr. Bottomley placed two calls to Mr. Hothi, and at 19:17:40 texted him "Bro please come thru" and "quick styles". Following those text messages, Mr. Bottomley made two short calls to Mr. Hothi's phone, and at 19:30:14 sent him a text saying "yo man what's the word". Between 19:30:49 and 19:42:41, there are several more text messages between Mr. Hothi and Mr. Bottomley. At one point, Mr. Hothi texted "to many cops there" and "call u in a bit". At 19:42:41, Mr. Hothi texted Mr. Bottomley "Yo ima call of a new number".

[143] At 19:43:46, following the exchange described above between Mr. Hothi and Mr. Bottomley, there are further Wickr messages between yella01 and renatti187. As indicated below, there are some gaps in the sequence. The Wickr messages exchanged are as follows:

19:43:46

yella01 to renatti187

Message you on 20

[one intervening Wickr message not recovered]

19:45:17

yella01 to renatti187

Kk go lay low

[one intervening Wickr message not recovered]

19:46:34

yella01 to renatti187

No prob call you in 20 lay low

19:46:43

yella01 to renatti187

You did it

[two intervening Wickr messages not recovered]

19:48:40

yella01 to renatti187

Kk stay low call yu in 15

[144] Immediately following the Wickr message at 19:48:40, there is a sequence of calls placed between Mr. Hayer using the -2456 number and Mr. Hothi, as well as between Mr. Hothi and Mr. Basran. Mr. Hothi also contacts Surdell Kennedy Taxi, followed by further calls between Mr. Hothi and Mr. Hayer, and Mr. Hothi and Mr. Bottomley. In the midst of these calls, yella01 sent renatti187 a message on Wickr at 20:43:16, asking "Yo wru". There were three additional missing Wickr messages sent between the 19:48:40 and the "Yo wru" messages. However, when viewed in context of the messages occurring immediately before the "Yo wru" message, it is reasonable to infer that yella01 is asking Mr. Bottomley where he is located for the purposes of getting drugs to him.

[145] After the 20:43:16 Wickr message, there are a further 11 Wickr messages over 28 minutes that are not extracted. However, the Crown's records indicate that between 20:46:31 and 21:08:49, there was a series of calls placed between Mr. Hayer and Mr. Hothi, and between Mr. Hothi and Mr. Bottomley. The records also show that Mr. Bottomley called the -0521 number several times. In addition, in the midst of these calls, at 21:05:57 Mr. Bottomley texted Mr. Hothi "Yo bro what's going on". The next Wickr message from yella01 to renatti187 occurs at 21:12:01 as follows:

21:12:01

yella01 to renatti187

Bro I am just chill fuck I'm not no goof

[146] I find that this message at 21:12:01 is entirely devoid of context and that its meaning cannot be ascertained without undue speculation. It is not admissible.

[147] Immediately after the above Wickr message, there is a call placed between Mr. Bottomley and Mr. Hothi at 21:12:03. Then, beginning at 21:12:06, the following Wickr exchange occurred:

21:12:06

yella01 to renatti187

We're u

[two intervening Wickr messages not recovered]

21:12:57

yella01 to renatti187

Can yo I get a way to go by matheson

21:13:05

yella01 to renatti187

Yeah I know

21:13:16

yella01 to renatti187

You gave me your word you have mine

[one intervening Wickr message not recovered]

21:13:37

yella01 to renatti187

Text me you full real name in case of something so my lawyer can track yu

21:13:55

yella01 to renatti187

Ok so I'll tell you exactly to be there for

[148] The Crown submits that "You gave me your word you have mine" and asking for identification details for a lawyer is further evidence of the "quid pro quo" arrangement between Mr. Hayer and Mr. Bottomley.

[149] Immediately after the above exchange, there is a text message from Mr. Bottomley to Mr. Hothi stating "Yo bro", sent at 21:22:05. There are 4 missing Wickr messages between 21:13:55 and the following exchange:

21:24:54

yella01 to renatti187

Ok I'm gonna message you in 15 how long will it take you to get there

[two intervening Wickr messages not recovered]

21:27:36

yella01 to renatti187

He's coming back in cab now had to ditch whip

21:29:51

yella01 to renatti187

I'll ask hold up

21:29:59

yella01 to renatti187

Bro before 10 you will have it

21:30:00

yella01 to renatti187

Ok

[one intervening Wickr message not recovered]

21:36:05

yella01 to renatti187

Hld up

[150] Immediately following this Wickr exchange, there was a call placed from the -2549 number to Mr. Hothi at 21:42:14, followed by a call from Mr. Bottomley to Mr. Hothi at 21:46:20. Then, at 21:46:29 Mr. Bottomley sent a text message to the -0521 number, followed by one to Mr. Hothi stating "Hello". At 21:50:50, a call was placed from the -2456 number to Mr. Hothi. After that call, the following Wickr exchange occurred (set out below). This was the first Wickr exchange to have occurred and whose contents are known since 21:36:05, although there were six intervening Wickr messages that were not recovered. The sequence is as follows:

21:51:37

yella01 to renatti187

Yooyo

21:51:47

yella01 to renatti187

Just got hold of him he's texting me back

21:51:56

yella01 to renatti187

I'll arrange that for you 2 min

[151] Immediately following these Wickr messages, there are calls between the -2456 number and Mr. Hothi. Starting at 21:56:55, the following Wickr messages are sent:

21:56:55

yella01 to renatti187

10:25 he will be there on the dot

[one intervening Wickr message not recovered]

21:57:16

yella01 to renatti187

Mathesosm

[one intervening Wickr message not recovered]

21:57:52

yella01 to renatti187

Yes of course he will pass you 15

[152] The final relevant sequence of communications began at 22:00:44, when Mr. Bottomley placed a call to Mr. Hothi, and then sent him a text stating "Yo bro". At 22:01:17, yella01 sent renatti187 confirmation of the location, saying "the high school yeah". Then, at 22:01:25, Mr. Hothi sent Mr. Bottomley a text saying, "Yo bring a scale" and "Bro". Then yella01 sent renatti187 the following directions:

22:01:27

yella01 to renatti187

Go towards the park closer to 94

22:01:34

yella01 to renatti187

So your off camera

22:01:02

yella01 to renatti187

122 side

22:02:34

yella01 to renatti187

94a and 122

22:02:46

yella01 to renatti187

More towards the park

- [153] The Crown submits this sequence of communications establishes that Mr. Hothi and Mr. Hayer were arranging to get drugs to Mr. Bottomley after he had stabbed Mr. Baldwin to death. I acknowledge there are gaps in the Wickr messages. However, when they are viewed in conjunction with the records of phone calls placed between Mr. Hothi, Mr. Hayer, and Mr. Bottomley, the sequence of communications provides a basis for reasonably inferring that Mr. Hothi and Mr. Hayer (using the -2456 and -2549 numbers, along with the yella01 Wickr handle) arranged to provide a quantity of drugs to Mr. Bottomley in the hours after Mr. Baldwin had been killed.
- [154] Counsel for Mr. Bottomley argues the Crown's intention to rely specifically on the notion of a "quid pro quo" arrangement between Mr. Bottomley and Mr. Hayer in relation to the murder is purely speculative. In my view, the evidence amply supports finding that Mr. Hayer arranged to provide Mr. Bottomley drugs on November 11, 2019--as he had done on previous occasions. Considering all of the evidence presented on this application it would also not be speculative to invite the jury to infer that Mr. Hayer did so in exchange for Mr. Bottomley harming Mr. Baldwin.
- [155] I turn to the remaining issue raised by counsel for Mr. Hayer regarding the admissibility of the Wickr messages, apart from the issue already addressed above in respect of the thumbnail image.
- [156] As mentioned earlier in these reasons, Mr. Hayer argues that because there are gaps in the sequence of Wickr messages, the Crown should not be permitted to tender these partial or incomplete statements. Mr. Hayer says that without being placed in their proper context, the Wickr communications are irrelevant as their meaning cannot be ascertained. As an alternative position, counsel for Mr. Hayer submits only those Wickr messages that occur between 18:09:19 and 18:54:16 are admissible as they flow in sequence without any gaps.
- [157] I do not agree. Counsel for Mr. Hayer invites this court to conduct an analysis of the Wickr messages in a "micro context" (Schneider at para. 76), without any consideration for the numerous other communications which form part of the overall sequence of communications resulting in the delivery of drugs to Mr. Bottomley.
- [158] As I have set out in considerable detail above, when the Wickr messages are examined in conjunction with the other communications adduced in the Crown's materials, there is ample context to understand the meaning of the messages and how they relate to the other

communications. While there may be gaps in the Wickr messages, there are no gaps in the sequence of communications such that the Wickr messages would be taken out of context. As in *Bridgman*, many of the messages are clear and open to little interpretation (para. 53), especially when considered in their broader context.

- [159] As well, the gap in the Wickr messages is not comparable to the admissibility concerns engaged in *Schneider*, or the issue of jury instruction of concern in *Merritt*. As I have discussed earlier, in both of those cases, the question was whether there was sufficient context from which the trier of fact could determine the meaning of an incomplete audio statement. Here, the messages themselves are provided in their entirety, and although some intervening communications are missing, many of the messages' meanings can be readily ascertained when viewed in context.
- [160] Counsel for Mr. Hayer also argued that the Wickr message in which yella01 states "You care [came] through so dw you got my word" is not admissible as a party admission attributable to Mr. Hayer. Relying on *Merritt*, Mr. Hayer submits that it is unclear what offence, if any, the statement is referring to, as the offence of manslaughter is a lesser offence included in the charge of first degree murder.
- [161] As I have already discussed, I do not find support for that proposition in *Merritt*. To reiterate, a key distinguishing feature of *Merritt*, among others, is that in *Merritt* the appellant made a statement characterized as an admission by the Crown while under suspicion for multiple murders. At the time of the utterance, she had also discussed with her co-accused the possibility of facing liability for the largely distinct offence of being an accessory after the fact. Therefore, even if viewed as an admission, the jury in *Merritt* could not determine to which specific charge the admission by the appellant related.
- [162] Those circumstances simply do not arise in this case. Mr. Hayer is charged with one count of first-degree murder with respect to a single incident which occurred on one day. There is no danger that the jury will be unable to determine which charge any statements by Mr. Hayer may go to. The fact that manslaughter is a lesser included offence in these circumstances does not result in the difficulties which existed in *Merritt*.
- [163] One final issue that arises in relation to the above-described sequence of communications is that it contains several phone calls whose contents are not known. While I accept the jury will not be provided with what was said in those calls, the fact that they were placed in the midst of the numerous text and Wickr messages provides ample context for the jury to be able to consider the significance of the calls' making without engaging in impermissible speculation as to what was said. They provide essential context and supportive narrative to the overarching pattern of communications between the various accused on the day of the alleged murder. Although the call records, and more broadly the sequence of communications produced by the Crown on this voir dire, may engender some confusion and distraction for the trier of fact, they are of a high probative value. This value outweighs their prejudicial effect.

[164] However, the four calls set out on page 54 of the Crown's materials occurring between 22:31:13 and 22:40:08, indicating, among other things, that the -2456 number placed an order for pizza and briefly talked with Mr. Hothi, are distracting and irrelevant. They are thus inadmissible.

[165] Finally, at para. 119 the Crown refers to evidence from the Surdell Taxi dispatch records, call recordings, and evidence from the taxi driver which will establish the arrangements Mr. Hothi made to have a taxi pick up Mr. Bottomley. The parties agree that this evidence is probative and therefore admissible.

B. Hothi got directions from Hayer, cleaned blood from the truck and got rid of the murder weapon

[166] On this application, the Crown is no longer pursuing the evidence from Mr. Hothi referred to in paras. 122 to 126.

[167] At para. 127, the Crown refers to CCTV footage, Cellebrite analysis, and call detail records pertaining to events on November 12, 2019, when Mr. Basran took his truck to Apna Car Care to be cleaned. In the Crown's supplemental submissions at pages 57 to 60, the Crown sets out the sequence of phone contact between Mr. Basran and Mr. Hothi, and between Mr. Hothi and Mr. Hayer, between 13:08:24 and 18:07:43 on November 12, 2019. The Crown submits that in addition to being essential evidence of the charge against Mr. Basran, the sequence of phone contact among Mr. Hayer, Mr. Basran, and Mr. Hothi establishes that they were coordinating and sharing information amidst efforts to destroy evidence. The Crown acknowledges there is no content to the detailed calls but says that, when viewed in context, the jury could infer that the conversations were related to the homicide.

[168] The parties agree that the evidence regarding the actions Mr. Basran took after the incident are relevant to the charge against him. However, Mr. Bottomley and Mr. Hayer submit that the Crown's reliance on the call detail records to establish what it was the parties were discussing the day following the murder would be impermissibly speculative. I agree. The Crown has identified a large body of communications, including call detail records, that establish Mr. Hayer, Mr. Bottomley, and Mr. Hothi were all working together in the drug trade prior to the offence. Indeed, the Crown has argued that the frequency of contact is indicative of their ongoing drug trafficking operation. There is nothing unique or unusual for there to be a series of calls made among these parties on a frequent basis throughout the day. The mere fact that the parties continue to communicate on the phone at the same time Mr. Basran is arranging to have his truck cleaned does not equate with a finding as to the content of the calls. Accordingly, these call records are irrelevant and not admissible.

C. The accused continued to communicate after the murder, including in and around the time the getaway truck was seized

- [169] At para. 129, the Crown seeks to tender a series of communications set out in call detail records between November 13 and 20, 2019. In their supplemental submissions at pages 63 to 73, the Crown sets out the sequence of communications on November 13, 14, 15, 16, 19, and 20, 2019. The Crown submits that these communications demonstrate the accused continued to communicate with each other after the incident in a manner consistent with what occurred before the incident.
- [170] As I have discussed above, the call detail records in the days following the offence showing phone contact between the parties are not admissible as they would require the jury to engage in impermissible speculation as to the content of the calls. As made clear in Merritt and Schneider, serious problems can arise by admitting incomplete statements where the trier of fact is incapable of attaching meaning to the statement. Here, the Crown goes further. Unlike the Wickr messages discussed previously--where the gaps in the sequence of communications did not detract from the overall meaning of the messages, when viewed in their proper context (including the fact that phone calls were made on the day of the alleged murder)--here the Crown argues the jury should be permitted to infer the meaning of a statement despite there being no evidence at all to establish whether any statement was made, let alone its content. In reaching this conclusion, I am mindful of the observation in Merritt that reliance on irrelevant evidence "will bring about a miscarriage of justice rendering the trial unfair if it plays an essential role in the reasoning process that leads to the conviction": at para. 76.
- [171] However, the records adduced by the Crown under this heading also include some text communications between Mr. Bottomley and Mr. Hothi. The Crown submits that the impatience displayed by Mr. Bottomley to Mr. Hothi by his text, "seriously not gonna answer me n shit", is indicative of Mr. Bottomley's feeling that he is owed something in relation to the attack on Mr. Baldwin. The Crown says when one views the text communications together with the pattern of calls--being Mr. Bottomley to Mr. Hothi, Mr. Hothi to Mr. Hayer, and then Mr. Hothi to Mr. Bottomley--the text demonstrates that Mr. Hayer is continuing to employ Mr. Hothi and Mr. Bottomley. The Crown further submits these communications are consistent with Mr. Hayer honouring his alleged arrangement with Mr. Bottomley and Mr. Hothi to grant them elevated roles in his organization. For example, the Crown argues that the tone and content of Mr. Bottomley's text to Mr. Hothi reveals that he can now demand drugs without having to produce "paper", as he did before the incident. The Crown says the jury will be able to compare the tone and content of Mr. Bottomley's communications with Mr. Hothi and others before and after the incident, and may from the purported change in tone infer his elevation within the drug operation, as the "quid pro quo" for his role in Mr. Baldwin's murder.
- [172] I agree with counsel for Mr. Hayer and Mr. Bottomley that these records are not relevant and are accordingly of no probative value. The fact that the accused continued to communicate with each other after-the-fact in relation to their drug trafficking activities is not probative to any issue at trial, since they did so prior to the alleged murder. As well, the

inferences suggested by the Crown with respect to Mr. Bottomley's change in 'tone' and increased 'assertiveness' are speculative and raise issues that may well confuse and distract the jury.

D. Multiple accused are suspected of deleting or attempting to delete their phone data

- [173] At para. 132, the Crown refers to missing data on Mr. Basran's phone and his police statement, in which he admitted he erased messages from his phone. This evidence is admissible as it pertains to Mr. Basran.
- [174] At para. 133, the Crown refers to the analysis of the phone Mr. Bottomley used after dropping his other phone at the crime scene. The Crown seeks to rely on internet searches on the phone regarding, "how to erase lost phone data" and "how to remove Gmail from lost Android device". The records indicate that these searches were made on the evening of November 11, 2019. I agree with counsel for Mr. Bottomley that the existence of this evidence is of limited relevance, but I am not prepared to find it irrelevant. I also acknowledge that the evidence is prejudicial, but I am satisfied that its probative value as after-the-fact evidence outweighs its prejudicial impact.
- [175] At para. 134, the Crown refers to the fact that the -0521 number was utilized up until the alleged murder, but was no longer active shortly after the murder. In addition, the Crown notes that all communications with Mr. Hayer's second phone number, ending in -2549, ended on November 17, 2019. I accept the fact that Mr. Hayer's -0521 phone became inactive shortly after the incident and that the phone number -2549, which had been used frequently during the time frame prior to the incident also became inactive, has some relevance. However, the call records only refer to a specific period of time. Therefore, while I find this evidence is admissible, inferences sought by the Crown in relation to this evidence must be limited to the specific time frame indicated in the call records.

E. Hayer and Hothi closely associated and cooperated after the murder

- (i) Available phone records show communication between Hayer and Hothi right up to Hothi's arrest
- [176] At paras. 138-139, the Crown refers to call detail records pertaining to the calls made to and from the -0521 number by Mr. Hothi. At para. 140, the Crown refers to surveillance and phone tracking data from January 2020 relating to the activity of Mr. Hayer and Mr. Hothi. The Crown submits that all of this evidence establishes the close association between Mr. Hayer and Mr. Hothi--one which predated and continued after the alleged murder. They further say that this evidence demonstrates that Mr. Hothi was promoted after the incident in reward for his participation in the murder. They say this elevation is consistent with what Mr. Hayer told Mr. Hothi during the November FMI calls--i.e., that he would get out of the "hood" and enjoy a prosperous life.

- [177] As discussed earlier in these reasons, counsel for Mr. Hayer does not challenge the admissibility of the calls made by or to Mr. Hothi on November 11, 2019. However, he does challenge the relevance of calls by Mr. Hothi to the -0521 number on November 19 and 20, and the surveillance in January 2020.
- [178] For the reasons I have already discussed, I agree with counsel that none of the after-the-fact call records evidence, other than records pertaining to calls made on the day of the alleged murder, is relevant. To permit the Crown to rely on this evidence would invite the jury to engage in impermissible speculation. The evidence is irrelevant and is thus inadmissible.
- (ii) Hothi and Hayer tried finding Randhawa's phone number in late January 2020, made contact and Hayer threatened him
- [179] At paras. 141 to 147, the Crown seeks to lead testimony from Mr. Randhawa that the windows of his truck were smashed by teenagers in January 2020, and evidence relating to his subsequent contact with Mr. Hayer. In particular, the Crown submits Mr. Randhawa will testify that during a telephone call with Mr. Hayer where Mr. Randhawa confronted Mr. Hayer about the smashed windows, Mr. Hayer stated "I'm gunna get you next". The Crown submits that this statement, attributed to Mr. Hayer, is a party admission akin to a confession that Mr. Hayer killed Mr. Baldwin. The Crown says the threat is also consistent with threats Mr. Baldwin received prior to his murder.
- [180] I agree with counsel for Mr. Hayer that this evidence is inadmissible as it is far more prejudicial than probative. At best, this evidence establishes that Mr. Hayer and Mr. Randhawa did not like each other, which is not probative of any issue at trial. The Crown's submission that Mr. Hayer stating, "I'm gunna get you next", is an admission that he is responsible for Mr. Baldwin's murder is completely speculative. There are several flaws with the Crown's analysis.
- [181] First, this utterance attributed to Mr. Hayer is only referenced in police notes from an unrecorded interview with Mr. Randhawa. Mr. Randhawa did not mention this utterance in his subsequent recorded statement. Additionally, the threat Mr. Baldwin received from Mr. Hayer saying "your [you're] next", which the Crown submits is similar to the one received by Mr. Randhawa, referenced the death of Mr. Baldwin's brother Keith Baldwin--a death that is plainly unrelated to Mr. Hayer. Further, even if Mr. Hayer did make the threat to Mr. Randhawa, the meaning of the phrase is open to multiple plausible interpretations. For instance, it could have been in reference to the broken windows--i.e., Mr. Hayer could simply have conveyed to Mr. Randhawa that he broke his windows, and that Mr. Randhawa will be "next". There is a paucity of evidence and meaning from which to reasonably infer that in making this purported threat, Mr. Hayer was admitting to responsibility for Mr. Baldwin's death. None of this evidence is admissible.

(iii) Jail calls between Hayer and Hothi in February 2020 show that Hayer (a) had an interest in Hothi's case, (b) paid for his canteen and legal fees, (c) told him to keep quiet and (d) talked to Hothi's lawyer on his behalf

[182] At paras. 148 to 153, the Crown refers to phone calls between Mr. Hayer and Mr. Hothi after Mr. Hothi is arrested and held in custody at the Surrey Pretrial Centre. The Crown submits these calls are relevant as they establish the ongoing relationship between Mr. Hothi and Mr. Hayer, as well as Mr. Hayer's concern over what is happening with Mr. Hothi's case. As outlined in the Crown's supplemental submissions, they say this concern, in turn, demonstrates that Mr. Hayer believed his own legal jeopardy was linked to Mr. Hothi's case. The calls also demonstrate that Mr. Hayer was providing financial assistance to Mr. Hothi, including paying for his lawyer. The Crown submits this evidence demonstrates that, as the boss, Mr. Hayer was responsible for his subordinates. In addition, in the calls Mr. Hayer responded to Mr. Hothi by calling him "Roopy". The Crown says that this goes to the identification of Mr. Hayer as the user of the -0521 phone number.

[183] The Crown proposes to edit the calls to remove the particularly vulgar language and disparaging remarks regarding counsel.

[184] I agree with counsel for Mr. Hayer that none of this evidence is relevant. The fact that Mr. Hayer was attempting to assist Mr. Hothi, his friend and associate in the drug operation, does not lend support to the Crown's theory of this particular case. It certainly does not reasonably support an inference that Mr. Hayer paid for the legal fees of his close friend and associate because he was concerned that Mr. Hothi's case would impact on his own legal jeopardy. The Crown's submission in this respect is speculative and does not permit the admission of this evidence. As well, the Crown will have at its disposal a large body of less prejudicial evidence from which to establish Mr. Hayer's role in the trafficking operation and the identity of the user behind the -0521 phone number. Therefore, none of the evidence proposed under this heading is admissible.

Conclusion

[185] My ruling in this application is based on the anticipated evidence and anticipated live issues at trial. I also wish to emphasize that I have reached the above findings remaining mindful of my role at this stage as an evidentiary gatekeeper. I reiterate that the admissibility of all evidence on this application is ultimately governed by three inquiries: (1) whether the evidence is relevant; (2) whether the evidence is subject to an exclusionary rule; and (3) whether its probative value outweighs its prejudicial effect: *Schneider* at para. 36.

[186] To that end, I have found that a significant portion of the Crown's proposed evidence, and in particular its proposed post-offence conduct evidence, would be prejudicial to the jury's determination of this case and/or invite impermissible speculation on the basis of largely irrelevant and immaterial evidence. That said, I have also found some of the Crown's evidence admissible for several important purposes, including establishing the relationships, context, identities, and motivations of various parties in this case.

[187] Given that there are outstanding pre-trial applications, aspects of this ruling may be subject to reconsideration once all the pre-trial applications are completed.

[188] In addition, it may be necessary to revisit some of this ruling depending on how the evidence unfolds at trial. If counsel identify a need to do so, they may raise the issue prior to the commencement of or during trial, as necessary.

"Devlin J."

[1] I note that in his majority opinion, Moldaver J. adopted Martin J.'s articulation of the legal principles applicable to post-offence conduct: Calnen at para. 10.

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