
CANADA / JUDGMENT

R. v. Jessup

2019 BCSC 2043

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 2043 R. v. Jessup

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Jessup,

2019 BCSC 2043

Date: 20190621

Docket: 105530-2

Registry: Kamloops

Regina

v.

Nathaniel David Jessup

Before: The Honourable Madam Justice Donegan

Oral Reasons for Judgment

Counsel for the Crown:

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M. Fras

Counsel for the Accused:

J. Jensen

J. Michi

(appearing by teleconference)

M. Putnam

Place and Date of Trial:

Kamloops, B.C.

May 27-31, 2019 and

June 3, 4, 6, & 7, 2019

Place and Date of Judgment:

Kamloops, B.C.

June 21, 2019

INTRODUCTION

- [1] During the night of November 9 and 10, 2014, Dylan Judd and Nathaniel Jessup were locked together inside a cell at Kamloops Regional Correctional Centre ("KRCC"). Sometime during the night, Mr. Judd died by asphyxiation. Initially thought to have been a suicide, Mr. Jessup now stands charged with second degree murder in relation to his death.
- [2] The central issue in this case is whether the Crown has proven beyond a reasonable doubt that Mr. Jessup committed an unlawful act that caused Mr. Judd's death. The Crown acknowledges that its case is based entirely on circumstantial evidence, but submits that when the evidence is viewed as a whole, logically and in light of human experience, that there is no other reasonable inference to be drawn, other than that Mr. Jessup committed the unlawful act causing Mr. Judd's death and is guilty as charged. The defence submits that the evidence permits another very reasonable inference, that Mr. Judd took his own life that night, and says that Mr. Jessup must be found not guilty.
- [3] I think it would be helpful to first set out the legal framework and principles that will ultimately inform my analysis.

STANDARD OF PROOF AND CIRCUMSTANTIAL EVIDENCE

- [4] The Crown must prove the elements of the offence in the Indictment beyond a reasonable doubt. In this case, the Crown must prove that Mr. Jessup committed an unlawful act, that his unlawful act caused Mr. Judd's death, and that he had the intent required for murder. The focus in this case is on the first of these, whether the Crown has proven Mr. Jessup committed an unlawful act. The unlawful act alleged in this case is that Mr. Jessup choked or strangled Mr. Judd, asphyxiating him.

- [5] It is important to keep in mind that it is only the elements of the offence that are subject to the criminal standard of proof, not individual pieces of evidence. Individual pieces of evidence can be proven on a balance of probabilities. A trier of fact, rather than examining pieces of evidence in isolation, must consider the total body of evidence and assess whether, taken as a whole, that evidence proves the elements of the offence beyond a reasonable doubt.
- [6] The British Columbia Court of Appeal discussed these different standards of proof in the context of circumstantial evidence in *R. v. Collin*, 2008 BCCA 431 at paras. 17-18:
- [17] There is no requirement, however, that all of the circumstantial evidence relied upon for a finding of guilt must be proven beyond a reasonable doubt. Nor is there a requirement that a certain amount of the circumstantial evidence must be proved beyond a reasonable doubt. The requirement is that all elements of the alleged offence, including the element of identity of the offender, must be proved beyond a reasonable doubt: see *R. v. Morin*, [1988] 2 S.C.R. 345 at 360-362. The applicable standard was articulated in *R. v. Khan* (1998), 129 C.C.C. (3d) 45 (B.C.C.A.), as follows:
- [9] The Crown need not prove beyond a reasonable doubt each fact which is said to support the inference of guilt. Each fact may be a link in the chain of ultimate proof. Sopinka J. made it clear in *R. v. Morin* that it is the jury's duty to consider the evidence as a whole and determine whether guilt has been established by the prosecution beyond a reasonable doubt.
- [18] Hence, it was not an error of law by the trial judge to consider circumstantial evidence proved on a balance of probabilities in reaching his conclusion that the whole of the evidence established the guilt of Mr. Collin beyond a reasonable doubt. This does not derogate from the principle that guilt must be proved beyond a reasonable doubt.
- [7] As the Crown's case against Mr. Jessup is circumstantial, counsel referred me to *R. v. Villaroman*, 2016 SCC 33, a decision where Justice Cromwell set out the law regarding drawing inferences from circumstantial evidence and the relationship between proof by circumstantial evidence and proof beyond a reasonable doubt. The Court held at paras. 35-42:
- [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts" . . . However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts . . . Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

- [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
- [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt . . . the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" . . . "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
- [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
- [39] I have found two particularly useful statements of this principle.
- [40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:

In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]

- [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage -- that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative -- a helpful way of describing the line between plausible theories and speculation.
- [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
- [8] In *R. v. Wiwchar*, 2017 BCCA 9, our Court of Appeal considered the principles articulated in *Villaroman* and summarized them succinctly:

- [37] When assessing circumstantial evidence, inferences of fact consistent with innocence no longer have to be drawn from proven facts. Such inferences may be drawn from "reasonable possibilities" arising from the evidence or lack of evidence that are inconsistent with guilt
- [39] The critical requirement is that the alternat[ive] theory or possibility arising from the circumstantial evidence or lack of evidence, when viewed objectively, is a "plausible" or "reasonable" inference, other than the accused is guilty
- [9] With these principles in mind, I turn now to finding the facts established by the Crown. I will endeavour to set them out in chronological order. Other than in a few areas, which I will identify and resolve in the course of the narrative, many of the facts in this case are uncontroversial.

FINDINGS OF FACT

- [10] Following his arrest on October 13, 2014, 20-year-old Dylan Judd was held in custody at KRCC facing allegations of involvement in a robbery and assault in British Columbia. On November 8, 2014, he spoke to his mother on the phone from KRCC and, in her opinion, he sounded happy. However, he did not tell her about his increased criminal jeopardy arising from the allegations that he faced.
- [11] On November 9 and 10, 2014, the accused before the court, Mr. Jessup, was also an inmate at KRCC. Mr. Judd and Mr. Jessup were cellmates, having been both assigned to Cell #2 in "H Unit" at KRCC ("Cell 2"). The evidence does not disclose how long they had been cellmates at this time.
- [12] One of about 28 cells in that particular unit, Cell 2 is located on ground level, about 20 feet away from the guard station desk located in the common area of the unit. With a bunkbed, a desk, a storage cupboard, toilet, and sink, their space in Cell 2 can fairly be described as cramped. Inmates at KRCC are assigned to a particular bunk in each cell, but they have been known to switch. The evidence does not reveal the particular bed assignments for Mr. Judd and Mr. Jessup in Cell 2 at the relevant time.
- [13] Cell 2, like every other cell, contains a call button for inmates to use if they need assistance. Inmates are to be instructed on its use and location, but the evidence does not reveal whether Mr. Judd and Mr. Jessup actually received that instruction or where the call button is located in that particular cell.
- [14] H Unit has surveillance cameras that record the common areas of the unit from different angles. There are no surveillance cameras in any of the individual cells or in the shower area.
- [15] Dean Coles, a correctional officer of about six years experience at the time, worked the 6:00 p.m. to 6:00 a.m. nightshift on November 9 and 10, 2014, supervising H Unit. When he started his shift, he reviewed the guards' common log book and spoke to the officer he was relieving to determine if there were any issues for which he should be aware. He learned

that the day had been good and no issues had arisen. Mr. Coles followed his usual routine that night and evening, including conducting several visual accounts of the inmates in their cells throughout the night. Nothing out of the ordinary occurred.

- [16] Mr. Coles found that from the start of his shift at 6:00 p.m. until lockup for the night at about 9:50 p.m., the inmates in H Unit were calm and occupied, playing cards or otherwise doing activities. He did not notice or sense from any of the inmates that anything was wrong or that something might happen.
- [17] From about 9:00 p.m. until lockup, the video surveillance shows that Mr. Jessup went in and out of Cell 2 several times, before entering it for a final time shortly before lockup. During that same timeframe (9:00 p.m. until about 9:50 p.m.), the video surveillance also shows that Mr. Judd left Cell 2 once at 9:05 p.m., and then re-entered the cell for a final time at about 9:25 p.m.
- [18] Moments after Mr. Jessup entered Cell 2 at about 9:50 p.m., the cell door locked from the outside. I am satisfied that when the cell door locked, Mr. Jessup and Mr. Judd were the only occupants inside Cell 2.
- [19] After the cell doors locked, Mr. Coles immediately began his first visual account of each cell in H Unit, a process that took him a little over two minutes. Mr. Coles looked through the window on the door of each cell, ensuring that inmates were in their assigned cell and the doors were secure. He recalled that the lockup process on this particular night was straightforward and that no re-counts were required. He entered his completed count in the log book at the guard station.
- [20] Following this visual count and at approximately 9:55 p.m., the main lights in H Unit were turned off and the lights inside each cell went into what is called "night mode", which means the light inside the cell is dimmed to about half strength. The night mode illumination inside each cell varies and is dependent on the particular tint of the light and the extent of any light that may be coming in from the cell's exterior window. The evidence does not disclose the extent of the illumination inside Cell 2 when the lights were dimmed to night mode that particular night.
- [21] Mr. Coles had regular duties or breaks during the balance of his shift that saw him leave the guard desk or the unit from time to time. However, as part of his regular duties, he completed visual counts of each cell and each unit periodically throughout the night. In total, 11 visual counts were conducted that night. They occurred at approximately 10:51 pm, 11:32 pm, 12:05 am, 12:49 am, 1:28 am, 2:18 am, 3:01 am, 3:48 am, 4:36 am, 5:20 am, and 6:12 a.m. Each count took between two and three minutes to conduct.
- [22] During these counts, Mr. Coles was looking for a few things. He was looking to see that the right number of people were in the cell and that there were no signs of foul play, escape or damage. He observed nothing out of the ordinary during any of his checks that night. Mr. Coles was also looking for changes in an inmate's position in bed. In this regard, he recalled

body positions changing in Cell 2 throughout the night. No one deployed any call buttons or otherwise brought anything to his attention that night. In short, from Mr. Coles' perspective, this shift was unremarkable.

[23] At 7:06:26 a.m., the main lights in H Unit were illuminated. Beginning at 7:32:45, a guard started unlocking the cells, and at 7:33:30, Cell 2 was unlocked. About five minutes later, video surveillance shows that Mr. Jessup left Cell 2 for the first time that morning. From the video surveillance evidence, I am satisfied that no one entered or exited Cell 2 between lockup at 9:50 p.m. and when Mr. Jessup exited at about 7:38 a.m.

[24] About 15 minutes after Mr. Jessup left his cell for the first time that morning, he approached a correctional supervisor, Devon Pageau, about his cellmate's well-being. During those roughly 15 minutes, Mr. Jessup went in and out of Cell 2 five times. Video surveillance captured his movements in and out of Cell 2 during that timeframe as follows:

- 7:38:18 a.m. - Mr. Jessup first left Cell 2, closing the door behind him slightly ajar. He walked across the common area and off screen out of view.
- 7:39:09 - Mr. Jessup returned to Cell 2 with food. He left the door open.
- At 7:39:21 - Mr. Jessup left Cell 2 carrying something in his left hand. He shut the door behind him, walked across the common area, and off screen out of view.
- 7:40:23 a.m. - Mr. Jessup returned to Cell 2 empty-handed and left the door open.
- 7:40:33 - Mr. Jessup left Cell 2, shut the door behind him, walked across the common area and off screen out of view.
- 7:43:28 - Mr. Jessup returned to Cell 2 and shut the door behind him.
- 7:44:13 - Mr. Jessup left Cell 2, shut the door behind him, looks to be stretching his arms, then walks across the common area and off screen out of view.
- 7:45:17 - Mr. Jessup returned to Cell 2.
- 7:45:35 - Mr. Jessup left Cell 2 and shut the door behind him.
- 7:49:08 - Mr. Jessup returned to his cell and left the door open.
- 7:49:55 - Mr. Jessup shut the door of Cell 2 while inside the cell.
- 7:52:48 - Mr. Jessup left the cell and walked to the guard desk to speak with Mr. Pageau.

[25] In addition to viewing the video recording in court, I have also watched the video recording a few other times. It shows Mr. Jessup's movements as I have described. While the recording only shows one angle and does not capture all of his movements around the common area of H Unit during this timeframe that morning, what it does capture does not reveal anything noteworthy or unusual in Mr. Jessup's pace or any other of his movements. He does not stop, talk or interact with anyone. What he did off screen is, of course, unknown.

- [26] Mr. Pageau, a correctional supervisor of many years experience at the time, worked the day shift on November 10, 2014. He was the officer who first saw Mr. Judd deceased in Cell 2 and took steps in relation to what he found. Mr. Pageau made a number of observations inside Cell 2 that morning. There are a few areas of controversy in his evidence. I will identify those areas as they arise in the course of the narrative.
- [27] Mr. Pageau was a shift supervisor that day. He started work at 6:00 a.m. and arrived at H Unit at about 7:45 a.m. as part of his rounds. At about 7:52 a.m., Mr. Pageau was behind the guard station desk when he had an interaction with Mr. Jessup. This interaction caused him to enter Cell 2 where he discovered Mr. Judd's body. The details of Mr. Pageau's interaction with Mr. Jessup that caused him to enter Cell 2 are at issue.
- [28] Mr. Pageau testified that while he stood behind the guard station desk, he noticed Mr. Jessup come out of Cell 2 and put the cell door "on the pin" (closing the door as far as one can without closing it entirely). He testified that he noticed Mr. Jessup was "wide-eyed" and that something was not right in his demeanour and body language. Mr. Pageau explained that, with his experience, he could easily tell if someone is stressed, angry, or upset. As a result of what he saw of Mr. Jessup, he asked him what was going on and if he was okay. He testified that Mr. Jessup said something like, "We need to go and look at this." Mr. Pageau then walked out from behind the guard station desk and directly to Cell 2.
- [29] In cross-examination, it was revealed that Mr. Pageau gave two statements to police, one on November 10, 2014, the day these events occurred, and another about a year later in October 2015. He also prepared what has been referred to as a critical incident report on the day the events occurred, detailing what he saw and did.
- [30] In his critical incident report and first statement to police, Mr. Pageau said that Mr. Jessup approached him at the guard station. He said that when Mr. Jessup was in front of him, he could see that Mr. Jessup was very distraught and very wide-eyed. He asked him what was up and if he was okay. Mr. Jessup began to stutter, he said, and then said he needed Mr. Pageau to come look at this, that he thought his roommate was dead, or words to that effect. Mr. Pageau's version of this interaction changed in October 2015 when he gave his second statement to police. Rather than Mr. Jessup approaching him at the desk, Mr. Pageau now, that is October of 2015, said that as he stood at the guard station desk, he picked Mr. Jessup "out of a crowd" as he stood about 15 feet away from the desk. He said that Mr. Jessup had a "look about him", so he called him over to the desk and made inquiries. Mr. Pageau conceded that at the time he gave the second statement to police, he now believed that Mr. Jessup had killed Mr. Judd.
- [31] The controversy on this particular point is fairly easily resolved through the video surveillance evidence. While the video surveillance has no audio, it does clearly show that Mr. Jessup left Cell 2 and walked directly over to the guard station desk. There are no other inmates near him or even in the general area as he walked. As he walked to the desk, Mr. Pageau stood behind it looking down at something he was writing on the desk. Mr. Pageau's

head does not lift from the surface of the desk as he was writing, until Mr. Jessup was in front of him and they spoke. It is clear from the video surveillance evidence that Mr. Pageau's account of how Mr. Jessup approached him that morning, as related in his second statement to police, is incorrect. I am satisfied that Mr. Pageau's most reliable recollections of how it was Mr. Jessup came to talk to him that morning were as he recorded on the day the events occurred when his memory was freshest, and as it is supported by what can plainly be seen in the video surveillance evidence.

- [32] On this particular point, I find that Mr. Jessup left Cell 2 at about 7:52 a.m. and walked over to Mr. Pageau as he stood behind the guard station desk. Mr. Pageau had his head down and was writing something at the time. When he looked up, Mr. Jessup was standing in front of him. I accept Mr. Pageau's evidence that Mr. Jessup appeared "wide-eyed" and distraught, and that Mr. Pageau asked him words to the effect of, "What's up? Are you okay? Looks like you have something to say." Mr. Jessup began to stutter and said that he needed Mr. Pageau to come "look at this", that his "roommate might be dead", or words to that effect. Mr. Pageau then walked out from behind the desk and immediately went to Cell 2.
- [33] The video surveillance evidence shows that at 7:53:16 a.m., both Mr. Jessup and Mr. Pageau went to Cell 2. Mr. Jessup went in first, but then waited outside. Some of Mr. Pageau's observations inside Cell 2 are at issue, some are not.
- [34] When he entered the cell, Mr. Pageau saw a person, later identified as Mr. Judd, lying on the bottom bunk, mostly covered by a blanket. The blanket was pulled up to just above his eyebrows, such that only the top part of his forehead and his hair was visible. He had an ankle and foot outside the bottom of the blanket. Mr. Pageau testified that the blanket, as he saw it over Mr. Judd's body when he entered the cell, was creaseless. The reliability of this particular observation is one of the points in issue.
- [35] Mr. Pageau then called out to Mr. Judd and grabbed and shook his exposed foot in an attempt to rouse Mr. Judd. When Mr. Pageau did this, he quickly realized Mr. Judd was deceased, because he could tell his whole body was in "rigor mortis stage". Mr. Pageau then lifted the blanket. He saw Mr. Judd was lying on his back. He saw that Mr. Judd wore pants, but no shirt. In his description, Mr. Judd was purple and blue in colour and appeared deceased.
- [36] Mr. Pageau also noticed that Mr. Judd's hands were, "kind of up, above his chest" with his thumbs turned inward. The reliability of this description of the precise positioning of Mr. Judd's arms and hands is another of the points at issue.
- [37] Mr. Pageau also saw a red sweatshirt tied very tightly in a knot around Mr. Judd's neck. Mr. Pageau described the knot as one, "with the ends crossed over", "like when you tie your shoelaces, you cross one over the other and underneath and pull it tight". The reliability of this description of this knot is also at issue.

- [38] At about 7:53:31, about 15 or 20 seconds after he entered Cell 2 and discovered Mr. Judd, Mr. Pageau directed that H Unit be locked down and he called a "Code Blue" (medical emergency call). Another guard can be seen on the video recording motioning for inmates to return to their cells. Inmates can be seen to comply.
- [39] Mr. Jessup waited against the wall outside of the cells until he was led away from the area by another guard. Mr. Pageau then ensured no one else entered Cell 2 and waited for KRCC nursing staff to arrive. More guards arrived, along with the nursing team, including registered nurse Megan Allard, who arrived in less than two minutes at 7:55:04 a.m.
- [40] Mr. Pageau took the nursing staff into the cell. Ms. Allard went in first. She told Mr. Pageau they would have to conduct CPR on Mr. Judd. Mr. Pageau testified that he and Ms. Allard then worked to remove the sweatshirt from around Mr. Judd's neck. As he recalled it, he tried to "work on it" first, then Ms. Allard "worked on it", and then they finally got it undone and off of Mr. Judd's neck. Whether Mr. Pageau was involved in untying the sweatshirt from Mr. Judd's neck is another area of controversy.
- [41] After the knot was removed, the sweatshirt was placed on the bed and Mr. Pageau and another correctional officer moved Mr. Judd to the floor. Nursing staff performed CPR until paramedics arrived about 20 minutes later and Mr. Judd was pronounced deceased. The nursing staff left Cell 2 at 8:11:25 a.m., the door to Cell 2 was shut at 8:11:30, and no one entered the cell again until RCMP officers arrived at 8:57:49 a.m.
- [42] Before continuing this chronological narrative of my factual findings, I will first resolve the issues raised in Mr. Pageau's evidence.
- [43] I will first address the state of the blanket covering Mr. Judd.
- [44] Mr. Pageau testified when he first saw Mr. Judd, the blanket covering him was creaseless. The defence submits this evidence is unreliable and should not be accepted. The defence emphasizes that Mr. Pageau did not disclose this important detail until his second statement to police in October of 2015, nearly a year after Mr. Judd's death, and at a time when Mr. Pageau now believed Mr. Jessup had killed him. They also identify that in this same statement, Mr. Pageau included other "new" details, such as the manner in which Mr. Jessup approached him at the guard station desk, that have been shown through the video surveillance to be incorrect.
- [45] I find that I do have concerns about the reliability of this aspect of Mr. Pageau's evidence. I reach this conclusion for a few reasons.
- [46] First, only about 15 or so seconds passed from when Mr. Pageau first entered Cell 2 and when he directed lockdown of H Unit. Only some of these seconds would have passed before he disturbed the blanket from where it rested over Mr. Judd. In those seconds, Mr. Pageau was trying to determine, through verbal and physical means, if a young man had lost his life in that cell. He touched and shook Mr. Judd's foot and quickly felt the effects of rigor mortis on Mr. Judd's body. These events, I accept, would have been stressful. Details like the

precise state of the blanket would not, I am satisfied, be top of mind in those seconds.

- [47] Other details understandably eluded him. For example, Mr. Pageau could not recall if Mr. Judd's head rested on a pillow when he found him. In fact, he did not include the use of a pillow when he posed a police officer during a re-enactment some 18 months later. Rather, he believed that there may have been a rolled-up brown blanket on the bed. His recollection of this detail is questionable, because we know from Ms. Allard's evidence and the scene photographs that there was a pillow on the bed. In any event, like the presence of a pillow or a rolled-up brown blanket, I am satisfied that whether there were any creases in the blanket would not have been Mr. Pageau's focus in those few stressful seconds before he pulled it back from Mr. Judd.
- [48] Second, KRCC officials initially believed and communicated to police that Mr. Judd's death was suicide. Mr. Pageau is a very experienced correctional officer. Given the potential significance of a creaseless or wrinkle-free blanket covering a person believed to have killed himself in such a manner, I am satisfied that had Mr. Pageau noted such a thing at the time, he would have told police that day or at least included it in his critical incident report, which he did not.
- [49] Third, the circumstances under which Mr. Pageau recalled such a detail also undermine its reliability. He disclosed this detail for the first time during his second statement to police, taken nearly a year after the event occurred, a time when his memory would not be as fresh. As well, I consider that this detail is one that had the potential to undermine the theory of suicide and negatively impact Mr. Jessup's position. That it was disclosed for the first time at a time when Mr. Pageau now believed that Mr. Jessup killed Mr. Judd is concerning. Adding to this concern is my finding that the other "new" detail provided by Mr. Pageau in his second statement regarding Mr. Jessup's interaction with him that morning, was incorrect.
- [50] Fourth, I also consider that when Mr. Pageau was pressed in cross-examination about the lateness of this important recollection and disclosure, Mr. Pageau offered that he actually spoke to Corporal Starr, one of the RCMP officers that attended the scene that day. This answer left the impression that he had spoken with the officer about the blanket being creaseless on the day of the events. However, when pressed further, he conceded that he did not actually recall speaking to the officer specifically about the blanket, but rather recalled communicating to her that he felt the incident was suspicious.
- [51] These answers undermine the reliability of his evidence in this area. I am not satisfied that Mr. Pageau communicated such a feeling of suspiciousness to the officers. If he would have communicated something as significant as that, Constable Merrick was clear, and I have no doubt, that the officers would have noted it and conducted their investigation differently.
- [52] It is for all of these reasons, considered together, that cause me to have concern about the reliability of Mr. Pageau's evidence on this particular point. I find I cannot accept his evidence that the blanket covering Mr. Judd had no creases when he first saw it.

- [53] Turning now to how the sweatshirt was found tied around Mr. Judd's neck, how it was removed, and the positioning of Mr. Judd's arms and hands when he was found. Only two people testified about these things - Mr. Pageau and Ms. Allard. Their evidence differs.
- [54] Ms. Allard is a registered nurse and was one of the first responders to the Code Blue that morning. Her evidence was not challenged, nor was its reliability undermined.
- [55] Mr. Pageau directed Ms. Allard inside Cell 2 and, as the registered nurse in charge, she took the lead role in handling the medical situation. When she went into the room, she drew back the blanket and observed that Mr. Judd appeared to be deceased. She saw that he had some facial bloating, mottling of the skin, and that his body was "in rigor" or stiffened after death. She observed his arms and hands in a certain position. She explained that when Mr. Judd was moved to the floor, his arms and hands remained in the same position. She was shown scene photographs taken by Constable Merrick and confirmed that that was the position that she saw Mr. Judd's arms and hands. Ms. Allard also saw a red piece of clothing, later determined to be a sweatshirt, tied around Mr. Judd's neck.
- [56] Policy at the time required that Ms. Allard take steps to preserve life, even if she believed that death had already occurred. She followed policy. She had to remove the ligature tied around Mr. Judd's neck in order to check for a carotid pulse. She testified that she removed the sweatshirt herself, without assistance. Once removed, she dropped the sweatshirt on the bed and did not pay attention to it any longer. She identified the red sweatshirt seen on the lower bunkbed lying on a pillow, as seen in photograph 3 of the scene photographs, as the sweatshirt she removed from Mr. Judd's neck. Correctional officers then moved Mr. Judd to the floor and she and her staff performed CPR until Emergency Health Services ("EHS") personnel arrived at 8:09 a.m.
- [57] Ms. Allard described that the sweatshirt was tied around Mr. Judd's neck, with at least two knots, in the front of his neck. She believes this because it did not freely come open for her. She had to use her fingers to pull it away. She described that the sweatshirt was tied so tightly that one of her co-workers went to retrieve a pair of scissors in order to cut it away. The scissors were ultimately unnecessary, as she was able to undo it herself.
- [58] Ms. Allard's evidence about the number of knots and who undid them conflicts with the evidence of Mr. Pageau. I accept Ms. Allard's evidence. By saying this, I do not mean to be critical of Mr. Pageau. In stressful situations, people can and sometimes do see things differently. Given that I found other aspects of Mr. Pageau's evidence to be unreliable and have no concerns about Ms. Allard's reliability, I prefer her evidence where it conflicts with that of Mr. Pageau.

- [59] I find the Crown has established that the red KRCC-issued sweatshirt that was found around Mr. Judd's neck that morning was tied very tightly with at least two knots in the front of Mr. Judd's neck. Ms. Allard eventually removed the sweatshirt by using her fingers, but it had been tied so tightly that using scissors to cut it away from Mr. Judd's neck had been considered.
- [60] I am also satisfied that when Ms. Allard first saw Mr. Judd on the bed, his arms and hands appeared in the position that they are seen in photographs 3 through 6 inclusive of the scene photographs contained in exhibit 4. Both of Mr. Judd's arms are bent at the elbow. His right forearm and hand is slightly elevated from his chest, with his fingertips either slightly touching or slightly elevated from an area beneath his right shoulder. His left arm, while bent at the elbow, is further down his body with his left hand and fingers resting on his lower chest near the middle of his torso. Mr. Pageau's evidence about the positioning of Mr. Judd's arms and hands differs slightly from Ms. Allard's evidence and from what is shown in the scene photographs. The way that Mr. Pageau had placed a police officer's hands in a re-enactment done about 18 months later is different. His positioning reflects that both arms and hands are elevated about chest level, not resting against Mr. Judd's body. Again, to the extent the evidence differs on this particular point, I accept the evidence of Ms. Allard.
- [61] EHS stayed only a short time inside Cell 2 and pronounced Mr. Judd deceased. At 8:11:25 a.m., the nursing staff left, including Ms. Allard. Mr. Pageau then shut the door to Cell 2 at 8:11:28. He ensured no one else entered the cell until RCMP officers arrived.
- [62] RCMP officers, Constable Merrick and Corporal Starr, attended the call to KRCC that morning. They arrived shortly before 9:00 a.m. and stayed on scene for a little over two hours. In that timeframe, they spoke to the deputy warden and Mr. Pageau, took the scene photos, obtained Mr. Judd's fingerprint, took a recorded statement from Mr. Pageau, waited for the coroner to arrive, seized a red sweatshirt, and interviewed Mr. Jessup.
- [63] The officers first spoke to the deputy warden and Mr. Pageau. Constable Merrick was told that an inmate, Mr. Judd, died overnight while locked in his cell and that it was a suicide. That these first officers approached this matter as a sudden death suicide case rather than a potential homicide seems evident from their investigation initially.
- [64] Mr. Pageau took the officers to Cell 2 and its door was opened at 8:58:12, the first time it had been opened since it had been closed at 8:11:28. The officers entered the cell.
- [65] At 9:01 a.m., Constable Merrick started taking photographs of the inside of the cell and of Mr. Judd as he remained lying on the ground. Although the photographs are not of optimal quality and Constable Merrick fairly conceded that he could not be absolutely sure the photographs were all of the photographs taken, I accept they are the photographs he took that day, and accept his evidence that they accurately depict the scene as he saw it that day.

- [66] Constable Merrick explained the less-than-optimal quality of the photographs and his lack of certainty on this point was as a result of the camera he used to take the photographs. His RCMP-issued camera was not working that day, so instead of perhaps calling for another suitable camera or perhaps calling for the Forensic Identification Section of the RCMP to attend, he chose instead to use Mr. Pageau's cellular telephone camera. After he took the photographs with the cellphone, he returned the cellphone to Mr. Pageau and did not take steps himself to retrieve the photographs.
- [67] In any event, the coroner arrived at Cell 2 at about 10:13 a.m. and entered the cell at about 10:20 a.m. The video surveillance evidence shows that someone that appears to be from the Coroners Service took photographs of the exterior of the cell and then entered the door of the cell and went inside. I can see a flash, which appears to be from photography, once the photographer is inside.
- [68] At about 10:25 a.m., Mr. Judd's body was removed from the cell, in Constable Merrick's presence, by the coroner. About a minute later, the video surveillance evidence shows Corporal Starr standing at the doorway of Cell 2 passing something to Constable Merrick.
- [69] Constable Merrick testified that this item was an article of clothing, a red KRCC sweatshirt. He believed it to be the sweatshirt on the lower bunk inside Cell 2. When Constable Merrick took custody of the sweatshirt from Corporal Starr, it was placed in a clear plastic bag. Constable Merrick explained that this bag was not an RCMP-issued exhibit bag. Rather, it was a large clear plastic garbage bag that he obtained from on top of the guard station desk.
- [70] I will say here just a brief word about this garbage bag. This bag had been torn from the end of a long sheet of detachable garbage bags available for inmate use. The video surveillance shows that at about the time Mr. Pageau was entering Cell 2 for the first time that morning and about to discover Mr. Judd's body, another correctional officer was standing behind the guard desk station in the common area. This officer, who does not appear to be wearing gloves, was handling or manipulating this long sheet of plastic garbage bags when he got the lockdown call from Mr. Pageau. This was the officer that was immediately gesturing for inmates to get back into their cells. As this officer was doing this, he tore the first garbage bag from the long sheet and placed it on top of the guard desk counter in the common area. This bag remained in that position for the next roughly two and a half hours while other officers worked around it and placed things on or near it. It is not a sealed bag.
- [71] The sweatshirt placed in this garbage bag and now marked as exhibit 7 in this trial was later sent to the RCMP forensic lab for testing and DNA results were obtained.

- [72] Why Constable Merrick did not take custody of this exhibit in accordance with standard RCMP practice was not explored in detail, but he did agree that he failed to use an RCMP exhibit bag, in particular a brown paper exhibit bag (as opposed to the plastic one), which he agreed was more suitable for handling and storing exhibits that may be wet or have DNA on them. He agreed that utilizing RCMP exhibit bags is best practice, because it prevents cross-contamination and allows for proper labelling.
- [73] One of the factual issues for my determination is whether the Crown has established that the sweatshirt seized and placed in the garbage bag by Constable Merrick that morning, now marked as exhibit 7 in this trial, is the sweatshirt that Ms. Allard found tied tightly around Mr. Judd's neck. I am not satisfied that it is.
- [74] Constable Merrick's scene photographs show what appears to be a red sweatshirt lying across the pillow on the lower bunk. Ms. Allard testified this was the sweatshirt she removed from Mr. Judd's neck. I am satisfied, on her evidence, that it was. However, this was not the only red article of clothing in Cell 2 that morning. Constable Merrick's scene photographs also show another red article of clothing, or perhaps more than one article, on the floor immediately next to the lower bunk where Mr. Judd had been found and next to a brown blanket such as the one Mr. Pageau believed may have been under the head or near Mr. Judd. The red sweatshirt lying across the pillow on the bed can actually be seen to be draping onto the floor and appears to be touching this other red article or articles of clothing on the floor. Constable Merrick agreed the red article of clothing or clothing could be another KRCC sweatshirt or pants.
- [75] These red articles of clothing are standardly issued KRCC garb. Nothing distinguishes them as unique and nothing identifies them as belonging to any particular inmate. Nothing stops inmates from sharing or trading clothing.
- [76] Constable Merrick testified that the coroner directed him to seize the red sweatshirt on the bed. He is unsure if Corporal Starr was present for this conversation. The coroner was not a witness in this trial. Constable Merrick testified that he did not seize the sweatshirt from Cell 2, that Corporal Starr did, he was not present when she did so, and that he only took the item she passed him at the door. This is borne out by the video surveillance evidence. Constable Merrick believes Corporal Starr seized the right sweatshirt because he trusts she would have done so, but clearly he cannot confirm that she actually did because he did not witness the seizure.
- [77] Corporal Starr is the only witness who can say from where she retrieved the sweatshirt she handed Constable Merrick that day. The difficulty faced by the Crown in this case is that Corporal Starr has no memory of this investigation or these events. By admission, Corporal Starr's evidence is before me in the form of her handwritten and typed notes and a transcript of her preliminary inquiry evidence on September 24, 2018, all collectively marked as exhibit 13 in this trial. At the preliminary inquiry, Corporal Starr testified that she has absolutely no memory of the events in question. Reviewing her notes did not refresh her

memory. Unfortunately, her notes reveal confusion and do not disclose any details about her seizure of the sweatshirt or even that she actually seized it.

- [78] Corporal Starr's notes reveal that she attended Cell 2 at 8:52 a.m. and saw Mr. Judd on the ground, fully clothed and in full rigor. At the preliminary inquiry, she agreed that fully clothed, as written in her notes, would mean that Mr. Judd wore a shirt and pants. We know this was not the case, which does cause some concern about the reliability of either her observations or her notes.
- [79] Corporal Starr also recorded that Constable Merrick seized a red sweater on behalf of Coroner Dixon. She did not record a time or any other details about this seizure. At the preliminary inquiry, she testified that she had no memory of Constable Merrick seizing the red sweater, so she did not know if she saw him seize it or if someone just told her that he seized it. The video surveillance does show Corporal Starr passing Constable Merrick a red article at the door, and Constable Merrick testified and I accept this was the red sweatshirt that is now in evidence. Given Corporal Starr's complete absence of memory, however, there is simply no evidence before me about where she got the red sweatshirt from that she is seen passing to Constable Merrick.
- [80] Again, the scene photographs taken by Constable Merrick show a red sweatshirt draped on a pillow on the bed, hanging off the bed, but they also show a red article or perhaps articles of clothing that Constable Merrick agreed could be another red KRCC-issued sweatshirt right beside the bed on the floor. The articles on the floor are so close to the part of the red sweatshirt hanging off the bed that they appear to be touching.
- [81] There are other aspects of Corporal Starr's evidence that are confusing. For example, Corporal Starr was clear when she testified at the preliminary inquiry that she had a complete absence of memory about these events. Nevertheless, she was asked if the red sweater she noted as being on the bed had any relation to her notation that "Cst. Merrick seized red sweater". She testified that they were the same item. How she could testify this was the case when she has no memory of the seizure, not even that she seized it, causes concern about the reliability of her evidence at the preliminary inquiry.
- [82] In the end, I simply cannot be satisfied that the sweatshirt Constable Merrick took from Corporal Starr that day was the same red sweatshirt that Ms. Allard left on the lower bunk after she removed it from Mr. Judd's neck. Even if I was so satisfied, for reasons I will discuss more in detail later, the possibility of transfer DNA or cross-contamination is such that it would, in my view, be unsafe to attempt to draw any inferences from the presence of Mr. Jessup's and Mr. Judd's DNA on the sweatshirt.
- [83] Both Constable Merrick and Corporal Starr looked inside Cell 2 for signs of a struggle. They found none. Corporal Starr noted that Mr. Judd's fingernails had no blood or skin underneath them, and that his hands and face did not show signs of injury. She noted that there were no scratch marks on the walls or items damaged that might suggest any struggle.

- [84] The officers did not conduct an actual physical, detailed search of Cell 2. Constable Merrick testified that he looked around the interior of the cell and took photographs, and they are before me. Although he did not readily see any writings that he might consider a suicide note, he agreed that he did not actually search the cell for one. He further agreed that his photographs show a few locations where papers were kept and agreed that he did not look in those locations.
- [85] Constable Merrick interviewed Mr. Jessup in Corporal Starr's presence around 10:30 a.m. that morning. Neither officer saw any signs of injury on Mr. Jessup's face, neck, or hands that might be indicative of a fight or altercation.
- [86] The RCMP concluded their file as a suicide in February 2015.
- [87] Dr. James Stephen conducted an autopsy on the body of Mr. Judd on November 12, 2014, at the request of the coroner. He is an experienced forensic pathologist who was qualified as an expert witness able to give opinion evidence in the area of forensic pathology, including related and incidental fields of determining the cause of death, the identification, cause, and mechanism of injuries, and the collection of evidence during autopsies.
- [88] Dr. Stephen was not provided with any scene photographs, either from the police or the coroner, but was provided with a summary of how Mr. Judd was found. He conducted his autopsy of Mr. Judd on November 12, 2014 and prepared a final report outlining his findings and his opinion about the cause of Mr. Judd's death on March 27, 2015.
- [89] As is his normal practice, Dr. Stephen first conducted an external examination of Mr. Judd's body. He noted that Mr. Judd's neck showed no visible abnormalities. In fact, he called Mr. Judd's neck "pristine". He noted that his face was floridly congested with a pink appearance, that the outer portion of his eyelids were congested. The inner surface of his eyelids showed marked congestion with focal petechial hemorrhages, and that the conjunctiva was congested or bloodshot. He agreed that petechial hemorrhages are not specific or restricted to cases of asphyxia. In other words, he opined that while they can be indicative of asphyxia, they are not diagnostic of it.
- [90] Following his external examination, Dr. Stephen conducted an internal examination. Here, he noted petechial hemorrhages on the epicardial surface of Mr. Judd's heart. Upon neck dissection, he observed "occasional small hemorrhages present on the thyroid" and that the hyoid bone was intact. Sections of the thyroid gland, he observed, showed a small petechial hemorrhage present beneath the capsule of the thyroid. He also noted the thymus gland showed some small petechial hemorrhages, and that the epicardial surface of the heart showed small petechial hemorrhages as well. The lungs, he observed, showed congestion and a few small hemorrhages present beneath the pleural surface.

- [91] Dr. Stephen was told that on the morning of November 10, 2014, Mr. Judd was found supine on his bunk with a sweatshirt looped around his neck and knotted tightly by the sleeves. He was also told a blanket was pulled over his head and that full rigor mortis was present. In his report, he identified his principal pathological findings as follows:
1. Petechial hemorrhages present on eyelids, thymus gland and epicardial surface of the heart.
 2. Pulmonary congestion
 3. Toxicology screen - no alcohol or drugs detected
- [92] From all of this information, Dr. Stephen opined that Mr. Judd died due to asphyxia - a lack of oxygen going to the brain. He explained that, in general, asphyxia can be from either closing off the airway (through choking or suffocation) or from closing off the blood flow to the brain (through strangulation, either manual or ligature).
- [93] In Mr. Judd's case, Dr. Stephen was told that he had been found lying supine in his bed with a soft ligature tied tightly around his neck. Dr. Stephen opined that the cause of death was asphyxia and that the physiologic process (the mechanism of death or the physiologic derangement that led to death) was low blood flow to Mr. Judd's brain.
- [94] In his opinion, the physiologic derangement was produced by a ligature. He explained that as his autopsy findings did not establish any other cause of death, and that his findings of petechial hemorrhages are ones that are associated with asphyxia type deaths, that he considered the cause of death to be asphyxia due to soft ligature. His opinion that a soft ligature was used was supported, he said, by the absence of any visible markings or abnormalities on Mr. Judd's neck and the presence of a soft ligature around his neck when he was found.
- [95] In his examination-in-chief, Dr. Stephen was asked about manual strangulation, or strangulation with the hands, and he was asked about ligature strangulation. Dr. Stephen indicated that in cases of manual strangulation, one generally sees some form of marking on the deceased's neck and sometimes sees fractures of some of the small bones inside the neck, notably the hyoid bone and sometimes the thyroid cartilage. Dr. Stephen found no markings on Mr. Judd's neck and found no fractures of his hyoid bone or thyroid cartilage.
- [96] Dr. Stephen explained that ligature asphyxia means causing a lack of blood flow to the brain as a result of wrapping something around the neck like a cord, rope, or cloth - anything that could be used to cause pressure on the neck. He was asked about two time periods following the application of a ligature to one's neck - the time from application to unconsciousness, and the time of unconsciousness to death.

- [97] With respect to the former, Dr. Stephen explained that consciousness is determined by the amount of blood flow which carries oxygen to the brain. He opined that in cases where that blood flow is blocked or occluded effectively, unconsciousness can be achieved in as quickly as six to ten seconds. If not done effectively, unconsciousness would be achieved more slowly, in the sense of minutes as opposed to seconds.
- [98] With respect to the time between unconsciousness and death, Dr. Stephen explained that assuming the effective pressure was maintained on the carotid arteries after the loss of consciousness, the brain would continue to be deprived of blood flow and oxygen, and that within three minutes there would be irreversible brain damage. He opined that cessation of the heart, which is when death is said to occur, would then take a little bit longer.
- [99] Dr. Stephen was asked whether an unconscious person is capable of movement and sound. He testified there may be the sound of moaning, but more likely just breathing sounds. He would not expect an unconscious person to move around, but explained that at the very terminal portion, when a person is becoming severely hypoxic and brain damaged, an unconscious person may experience some involuntary reflex movements of the body which can sometimes be, as he described it, "kind of flexor/extensor stiffening of the body".
- [100] Dr. Stephen was also asked what he would expect to see if someone's hands were raised or elevated at the time he lost consciousness. He explained that he would expect the limbs, now without muscle tone, to succumb to the influence of gravity and to fall to the most dependent site, which depends on the person's positioning at the time. If, for example, someone was lying on his back (supine) and became unconscious while tying a ligature around their neck, Dr. Stephen opined that he would expect that person's arms would fall either to his chest or to his sides with gravity.
- [101] Dr. Stephen was also asked about the process of rigor mortis. He explained that rigor mortis is the post-mortem stiffening of the muscles caused by nutrients that the muscles require to contract. He described it as the last contraction of the muscles of the body. It is a process that forms gradually over a period of time, generally beginning, he testified, around two hours after death, reaching its maximum approximately eight to 12 hours after death. When at maximum rigor mortis, there will be a board-like rigidity in the legs, arms, and neck. They will remain fixed in one position. Dr. Stephen further explained that the effects of rigor mortis will gradually disappear once the body's tissues start to break down on a molecular level. This disappearance will occur at about 36 hours after death, he said, but that timeframe is very dependent on the ambient temperature. If stored at a warm temperature, decomposition will occur more quickly.
- [102] Dr. Stephen was also asked about the process of post-mortem lividity. He explained that this process is somewhat analogous to rigidity, in that it occurs after death, as soon as the heart stops. It involves the post-mortem settling of body fluids. After death, he explained that body fluids, including blood, start to settle with gravity, causing the skin in the area of settling to become red in colour. One can start to see some settling sometimes in a half to

two hours and it becomes more pronounced, he said, over time. By about 12 to 24 hours, Dr. Stephen indicated that lividity will become so pronounced that it is said to be fixed, meaning that if the body is repositioned, the fluids will no longer resettle under gravity's influence. Lividity may be excluded if pressure is exerted on an area where such settling occurs.

- [103] Dr. Stephen was also asked several questions about self-strangulation. He opined that it was possible for someone to strangle themselves without assistance from anyone else, but indicated that, excluding situations of hanging where body weight is used to maintain the pressure, he had not been involved in an autopsy where this was believed to have occurred. He had read about such cases in the literature, however.
- [104] He was also asked about the effectiveness of certain mechanisms that might be used for self-strangulation. In terms of a hierarchy of effectiveness for maintaining pressure after loss of consciousness, Dr. Stephen opined that a garrote would be at the top, followed by a type of zip handcuffs used by police agencies that have a ratchet-type locking mechanism when pulled to hold the pressure, with something like toilet paper being the least effective.
- [105] Police later provided Dr. Stephen with a replica KRCC-issued sweatshirt identical (except in size) to the one found tied around Mr. Judd's neck. On the hierarchy of effectiveness described above, Dr. Stephen placed it towards the bottom because it is rather bulky with a stretchy nature to it, making an effective locking knot difficult to make.
- [106] In examination-in-chief, Dr. Stephen was not asked questions about his finding of congestion in Mr. Judd's eyes upon autopsy. In cross-examination, he was asked if he agreed that congestion in the eyes could be indicative that a person was lying on his back at the time of death. He testified this was not usually the case and that congestion is usually due to prone positioning.
- [107] Shortly after Dr. Stephen's final report in March 2015, the RCMP investigation of Mr. Judd's death was assigned to the Kamloops RCMP Serious Crime Unit, to Constable Aaron Penner. From a homicide investigator's point of view, Constable Penner inherited a file with some challenges. In his words, he was somewhat "behind the eight-ball coming in sometime later". I will highlight a few examples of the challenges he faced.
- [108] For example, investigators initially seized video surveillance recordings from four cameras located at H Unit at KRCC. These recordings are before me, identified as four separate video files. They are contained in one DVD and they are marked as exhibit 2. As I indicated earlier, there is no audio with these videos.
- [109] When Constable Penner reviewed these recordings when he was assigned the file, he learned they were not complete, which is apparent when I watch them as well. The first recording captures the dining/common area of H Unit from 9:00 p.m., the relevant time, to 6:50 a.m.; the second covers the common area/guard station/Cell 2 from 9:00 p.m. to 6:50 a.m.; the third covers the same area as the second, but from 6:50 to 10:29 a.m.; and the

fourth is a closer view of the guard station/Cell 2 from 9:00 p.m. to 6:50 a.m. In other words, there is only one recording from only one camera angle that goes past 6:50 a.m. on November 10. Although Constable Penner acknowledged that the other recordings, had they gone past 6:50 a.m., would have shown Mr. Jessup's movements in the other common areas that morning, those video recordings were not obtained.

- [110] Other examples of challenges faced by Constable Penner included the lack of photographs of Mr. Judd as he was found in bed that morning. He agreed that removal of the ligature prior to it being photographed made it difficult to determine if Mr. Judd's death was suicide or homicide. He was not provided with the coroner's scene photographs.
- [111] In the course of his investigation over the next few years, Constable Penner took, or directed other investigators to take, a number of investigative steps. These steps included, but are not limited to, obtaining a witness statement from Ms. Allard, the person who removed the ligature, obtaining a second statement from Mr. Pageau, sending the sweatshirt that had been seized and a sample of Mr. Judd's DNA to the RCMP Forensic Science and Identification Services Laboratory in Vancouver for DNA analysis (December 2015), having Mr. Pageau conduct a re-enactment of what he saw in Cell 2 in that day (April 2016), having a DNA warrant executed on Mr. Jessup and his sample sent to the lab for analysis and comparison (October 2017), and requesting a second opinion from another forensic pathologist (the summer of 2018).
- [112] I will now discuss some of these steps and the evidence that they produced.
- [113] With respect to the DNA evidence, Michelle Leblanc is a reporting scientist and evidence recovery search technologist with Biology Services at the RCMP Forensic Science and Identification Services Laboratory in Vancouver. She is an expert in interpreting body fluid identification test results, interpreting DNA typing profiles and applying those results and profiles to statistical significance to DNA typing results. Her evidence is before me by way of admissions and in her reports.
- [114] Ms. Leblanc received the sweatshirt seized by Constable Merrick and Mr. Judd's DNA sample, analyzed them and prepared a report dated December 29, 2015. She later received a sample of Mr. Jessup's DNA, analyzed it and prepared a second report dated October 10, 2017.
- [115] In short, the lab took samples from four locations on the sweatshirt that had been seized by Constable Merrick. Two of the samples were taken from suspected sources of bodily fluid and identified by the lab as Areas AC and AD. AC is a location on the exterior lower back of the sweatshirt and blood was identified in that location. AD is a location on the exterior middle back of the sweatshirt and blood was not confirmed in that location. The other two samples were taken, identified as Areas AA and AB, from the arms of the sweatshirt at the direction of the investigative team. Additional samples from other locations could have been taken, but lab protocol dictated that only a small number of samples be taken from a given item.

- [116] In Ms. Leblanc's opinion, the DNA typing profiles obtained from AA (which is the exterior right sleeve and cuff) and AB (the exterior left sleeve and cuff) are of mixed origin, consistent with having originated from two individuals. She identified Mr. Judd and Mr. Jessup as possible contributors to these mixed profiles and, based on the Caucasian Canadian population, estimated that one in 1.4 billion individuals is a possible contributor to this mixed profile. She further opined that assuming that Mr. Judd is one of the contributors to the mixed profiles, then the profile of the other contributor matches that of the known sample from Mr. Jessup, and the estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is one in 1.8 sextillion.
- [117] In Ms. Leblanc's opinion, the DNA typing profile obtained from area AC (exterior lower back) matches that of Mr. Judd and the DNA typing profile obtained from area AD (exterior middle back) is of mixed origin, the major component of which matches Mr. Judd and the minor component too weak to compare to another.
- [118] There are a series of admissions found in exhibit 11 regarding Ms. Leblanc's expert opinion evidence at paragraphs 19 through 25:
19. The quality and quantity of DNA in forensic samples can vary significantly. A minimum amount of DNA is required for DNA profile development, below which no further analysis can be performed. An example of this can be seen in the inability to make a meaningful comparison in the minor component of the mixed profile of AD. A number of factors can contribute to the preservation or degradation of a possible sample including the type, age and condition of storage;
 20. While DNA results may provide strong support for association between individuals/exhibits/scenes, they do not provide any information as to how or when the DNA was deposited;
 21. If a person resides in a domicile, it is reasonable to hypothesize that their DNA are likely to be found on surfaces within that domicile, particularly where they have touched the surface with their hand, or from footprints. The DNA is deposited in these cases by skin cells which are constantly being shed and is sometimes referred to as "touch DNA". A floor in a domicile would be more likely to contain touch DNA of an individual where that individual has walked around in bare or socked feet rather than just in shoes. Other environmental factors might promote the preservation or expedite the deterioration of a given sample. Adjusting for these environmental factors, it is reasonable that the smaller the domicile, the more likely it would be to find trace or touch DNA, in any given part of the domicile, belonging to the individual who resides in that domicile. To put it another way, if two individuals reside in a 3000 square foot domicile, and each individual has a separate bedroom and generally keeps to their own part of the domicile, then it stands to reason that it is less likely, although not impossible, that trace or touch DNA belonging to one of the individuals would be found in the bedroom of the other individual, as compared to a situation where two individuals share a room, or cohabitate in a single room domicile;

22. If two individuals shared a desk, and both rested their arms and placed their hands on the same desk, it is probable that that desk would have trace or touch DNA of both individuals upon it, which in turn could result in the finding of a mixed sample;
 23. If two individuals shared an article of clothing, it is probable that a sample taken from that piece of clothing would produce a mixed sample;
 24. Any physical interaction or touching can leave DNA;
 25. Coughing and sneezing can spread an individual's DNA;
- [119] Constable Penner also sought a second opinion from another forensic pathologist, Dr. Jason Doyle.
- [120] Dr. Doyle is a forensic pathologist who was qualified as an expert witness in the same area, in the same fields as Dr. Stephen. Constable Penner asked him to review the autopsy findings of Dr. Stephen and prepare a consultation report, the object of which was to provide an independent opinion as to the cause of death, as well as the possible mechanisms of death. This was the first time Dr. Doyle had been asked to review another's autopsy findings.
- [121] To conduct his review and provide his opinion, Dr. Doyle was given the original and supplemental autopsy reports of Dr. Stephen, the statement of Ms. Allard, the first and second statements of Mr. Pageau, the scene and autopsy photographs, and a red sweatshirt identical (except for size) to that found at the scene. When asked in cross-examination, he testified that he found it unusual that the coroner did not provide Dr. Stephen with any scene photographs. In his experience, if there is any type of criminal activity suspected, the coroner always provides scene photographs.
- [122] Dr. Doyle conducted his review and prepared a report dated July 21, 2018 outlining his findings and opinions. He added an addendum to his report on August 13.
- [123] In short, Dr. Doyle arrived at the same opinion as Dr. Stephen - that the autopsy findings and the scene findings indicate an asphyxia death.
- [124] With respect to some specific autopsy findings, he agreed with Dr. Stephen that the autopsy photographs show clear evidence of epicardial petechiae. He found the petechiae on the eyelids and thymus to be very subtle in the photographs, but agreed they were present. He described that petechiae are fine, pinpoint hemorrhages seen on tissue which are felt to be secondary to the rupture of capillaries or small blood vessels. He explained that they can occur in a variety of situations, including in cases of neck compression and strangulation, but can also occur in cases where an individual was lying prone or face down after death. He said that sometimes there is no good explanation for them.

- [125] Dr. Doyle was asked to provide his opinion about the possible mechanisms of the asphyxia and to specifically consider the possibilities of manual strangulation, ligature strangulation, and an arm chokehold.
- [126] With respect to manual strangulation, Dr. Doyle opined that it was possible, but not highly probable in this case. He explained that manual strangulation is typically a more violent process and very often leaves marks on the skin and on soft tissues of the neck, none of which were present in Mr. Judd's case.
- [127] With respect to ligature strangulation, Dr. Doyle opined that this mechanism was also possible, although not with a typical ligature, such as a rope or an electrical cord, which would leave a well-defined mark in the skin of the structures of the neck, which was not present in this case. Dr. Doyle opined that soft ligature strangulation was possible because of the lack of any marks on the skin and the almost lack of injury in the soft tissues of the neck.
- [128] With respect to soft-ligature strangulation, Dr. Doyle was asked about whether his findings were consistent with either suicidal or homicidal strangulation. He opined that either was possible.
- [129] Dr. Doyle had never seen another case of suicidal soft-ligature strangulation, but allowed for the possibility that this could have occurred. He holds the view that if one tied sweatshirt sleeves tightly knotted around one's neck before losing consciousness, it could be an effective mechanism to cause asphyxia. Although sweatshirt material is stretchy, Dr. Doyle's view is that one can tie it around one's own neck and likely produce enough pressure on the neck veins to obstruct venous return from the head, which is sufficient to cause death if knotted tightly enough that the pressure is maintained for about four to five minutes. He opined that not much pressure, typically only about two kilograms, is required to occlude the veins of the neck. He opined that the KRCC sweatshirt he was given would be capable, if tied tightly enough, of obstructing the structures of the neck, yet would not leave any marks on the neck because of its soft, broad fabric.
- [130] Dr. Doyle also opined that homicidal soft-ligature strangulation with a sweatshirt was possible as well, but qualified this opinion by adding that if this were the case, he would expect more findings consistent with a struggle, meaning markings on the neck's exterior and grossly visible hemorrhages on its interior than was found on Mr. Judd.
- [131] Police asked Dr. Doyle to consider whether an arm chokehold could have caused the asphyxia in this case or if his findings would be consistent with such a thing. Although conceding it would be a more effective strangulation method than a sweatshirt, Dr. Doyle opined that when a chokehold is used, one often sees skin marks and/or hemorrhages into the soft tissue of the neck that would be identified on neck dissection. He observed that Dr. Stephen's neck dissection involving Mr. Judd showed it was free of hemorrhages grossly, but that a small hemorrhage was evident under the capsule of the thyroid when viewed microscopically. For this reason, he opined that an arm-chokehold-induced asphyxia was

also possible in this case, but agreed that other than the suggestion by the police, there was nothing in the findings that would cause him to conclude this was a chokehold-induced asphyxial death.

- [132] Near the end of his examination-in-chief, Dr. Doyle answered questions about the possibility that Mr. Judd was in a prone (or face-down) position at the time of his death. This was not something specifically addressed in his report or his addendum, but he did allow for that possibility and he tied that possibility, that is Mr. Judd being in a prone or face-down position at the time of his death, to three different findings: post-mortem lividity, congestion of the eyes, and petechial hemorrhages in the eyes. In the end, however, he qualified his opinion on each of these findings, allowing for the possibility that Mr. Judd may have been face up when he died.
- [133] Specifically, when asked about the discolouration seen on Mr. Judd's face and neck in the scene photographs, Dr. Doyle first opined that this was the result of post-mortem lividity suggestive of Mr. Judd lying face down or prone at the time he died. However, he later qualified this by saying it was possible Mr. Judd was supine, as well, if perhaps his head and upper torso were slightly lower, causing lividity to form in those areas.
- [134] When asked about the presence of petechial hemorrhages in Mr. Judd's eyes, Dr. Doyle first opined that these can occur in asphyxial deaths, as well as other situations, including when someone is lying prone after death. However, he qualified this opinion as well, by offering that sometimes there is no good explanation for petechiae at all.
- [135] When asked about congestion of the eyes and the confluence of factors that could cause this, Dr. Doyle opined that it could be caused by post-mortem lividity, but later qualified this opinion stating that such congestion could be secondary to the congestion of blood in one's head if a ligature was present. In the end, on the presence of congestion in the eyes, Dr. Doyle opined that it can occur when a person is prone or supine. Each are equally possible.
- [136] On this topic (whether his findings support or suggest that Mr. Judd was prone or supine when he died), Dr. Doyle agreed that it was not fundamental to his findings in his report and was not something he was asked to consider until a non-expert asked him to consider it the day before he testified.
- [137] In cross-examination, Dr. Doyle was asked what, in all of the materials and findings he reviewed, would suggest the asphyxia in this case was caused by a soft-ligature homicide, as opposed to a soft-ligature suicide. He answered "Nothing. I cannot reliably distinguish between the two."
- [138] Constable Penner also obtained records detailing contacts between Mr. Judd and law enforcement agencies for the purpose of determining whether Mr. Judd had any documented police-recorded history of suicidal tendencies. He obtained records from a national database, the Canadian Police Information Centre ("CPIC"), as well as from a

British Columbia database called PRIME. PRIME is used by law enforcement in British Columbia to document police contact, criminal and non-criminal, with the public. CPIC is used nationally by police forces for a variety of reasons, including recording outstanding warrants and identifying certain caution codes. "Caution codes" allow individual officers to tick a certain box to identify certain general behaviours they observed or interpreted with the people they were dealing with, such as "suicidal tendencies", "violent", and "mental instability", to name a few. As a result of policy change in May 2015, "suicidal tendencies" and "mental instability" caution codes are no longer permitted.

- [139] One hundred and four pages from Mr. Judd's CPIC and PRIME records are before me, collectively marked exhibit 1A. Although hearsay, these records were exceptionally admitted, by consent, for the truth of their contents, pursuant the principled approach. The ultimate reliability of these records and the use to which they can be put is in issue. No witness took me through them all, but Constable Pyper of the Sicamous RCMP testified about the few records he produced in amongst them, detailing his interactions with Mr. Judd in mid-October 2014. As well, on my review of them, I found a summary prepared by a criminal intelligence analyst, Alison Tremblay (pages 61 through 78), where she helpfully summarized the results of database searches.
- [140] All told, these records show that Mr. Judd had numerous police contacts over the years, both criminal and non-criminal in nature, that were documented. Ms. Tremblay identified dozens of entries where the author makes no mention of suicidal tendencies or anything along those lines. She identified two entries that mention suicidal tendencies and four entries that specifically mention Mr. Judd was not suicidal or depressed.
- [141] In all, these records show three instances over a five-year period, and many, many interactions, where police reported Mr. Judd as either having engaged in some form of self-harm or threatening suicide.
- [142] The first instance occurred on February 14, 2009, when 14-year-old Mr. Judd was residing at a group home in Ontario. Reportedly one of the workers called police because Mr. Judd threatened to commit suicide and was "out of control". The worker also told police that Mr. Judd had threatened to kill himself about two weeks earlier, as well. According to the report, Mr. Judd cooperated with police and admitted he threatened to harm himself that night, but said that he only did so to make the worker angry. Police took Mr. Judd to hospital where a doctor assessed him and he was later "deemed safe to go home".
- [143] The second incident occurred on January 30, 2013, when Mr. Judd was 18 years old and living in his home in Ontario. He reportedly was smoking marihuana that night and had become "extremely paranoid", believing that people or beings were coming through the walls and out of the floor registers. Said to have been egged on by another person, he picked up a knife and held it to his own throat, making a little "nick" in his neck. Police were contacted and took Mr. Judd to hospital. He was later released with a "clean bill of health after the drugs were flushed out of his system."

- [144] The third instance occurred on October 13, 2014, when Mr. Judd was arrested near Sicamous by now-retired Constable Pyper. Constable Pyper testified that he became involved in an investigation that day as a result of a report of two men seen fleeing from the scene of an overturned vehicle. He responded and ultimately located Mr. Judd and arrested him. He observed that Mr. Judd was very intoxicated by alcohol, and perhaps drugs as well. He had never dealt with Mr. Judd before. He found him to be uncooperative and agitated. He transported him in his police vehicle to the nearby Salmon Arm detachment. On route, he saw Mr. Judd smashing his face on the plexiglas barrier separating the back and the front seat of the police car.
- [145] After lodging him in cells, Constable Pyper filled out a prisoner report, which included a section that allowed various caution codes to be checked off. Constable Pyper confirmed that he ticked the boxes indicating that Mr. Judd was "violent", "suicidal", "escape risk", "drugs", and "mental instability". When he dealt with Mr. Judd about 12 to 14 hours later, and then again the following day, Mr. Judd was sober. Constable Pyper found him to be very polite and cooperative. In short, Mr. Judd was nothing like he had been when Constable Pyper arrested him.
- [146] Constable Pyper was asked about these caution codes. He explained that when he ticked off the boxes, particularly the one involving suicide, he did not actually believe that Mr. Judd was at risk of suicide. Rather, he simply wanted to alert the jailer to the fact that he believed Mr. Judd was capable of self-harm, as he had just seen him, while intoxicated "smash his face against the silent patrolman." Had he actually thought that Mr. Judd was at risk of suicide or had threatened suicide, he would have done things differently, such as removing Mr. Judd's clothing or putting him in restraints. I accept Constable Pyper's evidence.
- [147] The defence called evidence in this trial. In addition to the report of forensic psychologist, Dr. Bodnarchuk, which was admitted by consent, the defence called one witness at trial - forensic pathologist, Dr. John Butt.
- [148] I will first review Dr. Bodnarchuk's evidence. He has had specific experience with assessing and treating suicidal ideation among incarcerated individuals in the course of his practice. In addition to a letter written by Mr. Judd to his mother, Dr. Bodnarchuk was provided with the CPIC and PRIME records found in exhibit 1A and was asked to provide his opinion on two questions: (1) whether it is possible to infer from their contents that Mr. Judd was not experiencing suicidal ideation at the time of the events recorded and towards the date of his death; and (2) whether it is possible for a layperson, without expert qualification, to draw any inferences from the contents of the records.
- [149] Dr. Bodnarchuk answered each question in the negative. He explained that it is not possible to infer from the records that Mr. Judd was not experiencing suicidal ideation at the time of the reported events and towards the date of his death, nor is possible for a layperson to draw any inferences from their contents. He explained this at pages 2 and 3 of his report:

As suicide is a very low rate behavior in British Columbia (and Canada), the reasons for the behavior and not straightforward to predict. There are a number of risk factors for suicide and whether these factors were present or absent for Mr. Judd is missing. Risk factors for suicide are any attribute, characteristic or past behavior that increases the likelihood of future behavior. Risk factors must be thoroughly evaluated and considered in the assessment of suicidal risk.

There are a number of other sources of information for Mr. Judd that are missing that are available for incarcerated adults. These include intake mental health screening, client logs, the health care file, the mental health contact and treatment file, possibly psychological or psychiatric treatment reports, program reports and employment reports. However, these sources are not adequate to assess one's risk for suicide. This risk would have had to been assessed by a qualified and experienced professional (i.e., psychologist or psychiatrist), and would have to include the assessment of recent or current suicidal ideation, possible planning, previous suicide attempts, whether there was a mood disorder (i.e., depression) or a psychotic disorder. The assessment would also need to assess the access to lethal means, substance use disorder, a family history of a mental health or substance use disorder, a history of emotional, physical or sexual abuse, current health status, problems with impulsiveness or aggressive tendencies, and current medical treatment. I note that Mr. Judd had engaged in suicidal behaviour in the past when using drugs.

Regarding the risk for suicide for incarcerated individuals, it is important to note that there are dynamic factors (those that can change, sometimes quickly) that that are important to assess. These include changes in health status (e.g., learning that one has a serious illness such as HIV or Hepatitis), knowledge of upcoming serious charges that could result in lengthy legal proceedings and/or long-term incarceration, the inmate populations' reactions to learning about alleged serious offences (e.g., sexual offences), the arrival into the institution of someone they have offended against or a friend or family member someone one has offended against, that similar information about him was received by someone in the custody center about an offence he committed, one can learn that they will likely be assaulted (e.g., a drug debt), and individual factors (feeling hopeless about being able to stay out of custody, return to a previous level of functioning, or being isolated from family). This is not an exhaustive list, but is to demonstrate that the assessment of suicide risk in custody can change rather quickly and requires expertise to do so competently. When there are indications of suicidal ideation or behaviour in custodial settings, it must be carefully assessed.

[150] Dr. John Butt was qualified to give expert opinion evidence in the same area and fields as the other two forensic pathologists. His CV and his report dated June 4, 2019 are before me. Dr. Butt is a very experienced forensic pathologist. He was asked very generally to provide his opinion in the matter of the death of Dylan Levi Judd, and for that purpose he was provided with Dr. Stephen's autopsy report, the autopsy photographs, the scene photographs taken by Constable Merrick, Dr. Doyle's consultation report and addendum, the DNA results, some preliminary inquiry evidence, and a 2017 letter from Dr. Stephen.

- [151] Dr. Butt opined that this was a difficult case. Despite his decades of experience, he found the case unusual in its absence of indicia and what conclusions could be drawn. He did agree with Drs. Stephen and Doyle that Mr. Judd's was likely an asphyxial death, but he found the physical mechanism of the asphyxia to be elusive. He agreed that manual strangulation was a possibility but, like Dr. Doyle, qualified this opinion by stressing that if this were the case, he would expect to see more marks on the neck and other indicia. He specifically opined that no autopsy findings supported the notion that a chokehold, what he more properly referred to as the "carotid sleeper hold", caused the asphyxia in this case.
- [152] Dr. Butt closely reviewed the autopsy photographs and agreed with Drs. Stephen and Doyle about the presence of petechial hemorrhages in the epicardium of the heart, but he could not see any petechial hemorrhages in the eyes.
- [153] Dr. Butt contradicted the suggestion that the presence of petechiae, congestion in the eyes and discolouration of Mr. Judd's face could indicate that he was prone at the time of his death. First, he did not see petechiae in the eyes but, like Dr. Doyle, he emphasized that even if they were present, they can be found in many situations. Dr. Butt disagreed with the suggestion that congestion in the eyes and discolouration in the face were as a result of post-mortem lividity. Rather, he opined and explained that they were both caused by an active process at the time of death. Supporting this opinion, he observed that if Mr. Judd were indeed prone or face down at the time of his death and discolouration in his face occurred because of lividity, one would expect to see no discolouration (or the lividity excluded) on his nose and chin from the pressure. No such exclusion can be seen.

DISCUSSION

- [154] As I indicated in my introductory remarks, the basic question is whether the circumstantial evidence, viewed as a whole, logically and in light of human experience is reasonably capable of supporting an inference other than that Mr. Jessup is guilty.
- [155] The Crown submits that the evidence in this case allows for no other reasonable inference to be drawn, other than that Mr. Jessup killed Mr. Judd and that he is guilty as charged. Mr. Wiberg submits that the only reasonable inference to be drawn is that Mr. Jessup strangled Mr. Judd, manually or with a ligature, during the night, causing his death by asphyxiation, and that he then staged Mr. Judd's body to have it look like a suicide. He points to the expert evidence that manual or soft-ligature strangulation is a process that can cause loss of consciousness within seconds and death within a few minutes. It is a process that can occur with little to no noise or struggle, given how quickly unconsciousness can be achieved.
- [156] Mr. Wiberg says that Mr. Jessup had the exclusive opportunity and plenty of time between the guard's checks that night to quickly and quietly kill Mr. Judd without any struggle and then stage his body. He argues that the evidence supports a finding that the sweatshirt found tightly around Mr. Judd's neck was either the murder weapon or perhaps a prop used to stage Mr. Judd's death to look like a suicide. In either case, it was Mr. Jessup who was the

one who used it. He says that the mixed DNA profile from Mr. Judd and Mr. Jessup found on the sleeves of the sweatshirt and the position of Mr. Judd's arms and hands when he was found supports an inference that Mr. Jessup took Mr. Judd's hands and placed them around the ends of the tied sleeves after Mr. Judd was deceased, in order to make it seem as though Mr. Judd had pulled the sweatshirt sleeves and the sweatshirt around his neck himself. Because the process of rigor mortis was setting in at this time, Mr. Judd's arms and hands remained elevated in or near this position. Once this was done and Mr. Judd's body was arranged, Mr. Jessup then covered him nearly completely with a blanket. Then, consistent with this series of events, Mr. Jessup went in and out of the cell repeatedly after it was opened in the morning, trying to figure out what to do to get himself out of the jam in which he now found himself.

- [157] The Crown further submits that the evidence, viewed as a whole, logically and in light of human experience, is not reasonably capable of supporting an inference of suicide. Mr. Wiberg argues that the police records indicating that Mr. Judd was suicidal perhaps in the past were unreliable at the time they were made and can say nothing about Mr. Judd's state of mind when he died. He says there is simply nothing to suggest that Mr. Judd was contemplating suicide at the time. In fact, his mother thought he sounded happy when she spoke to him on the phone two days before his death.
- [158] Mr. Wiberg further emphasizes that no alcohol or drugs were found in Mr. Judd's system at autopsy. No suicide note was found at the scene, and there were certainly more effective mechanisms available to Mr. Judd than a sweatshirt, if indeed he was intent on committing suicide. He also submits that the positioning of Mr. Judd's arms and hands is inconsistent with suicide because if Mr. Judd had indeed tied the sweatshirt around his neck himself, both of his arms would have fallen to his chest or his side with the effect of gravity when he lost consciousness. In the end, the Crown submits that suicide is not a reasonable possibility on consideration of the whole of the evidence.
- [159] The defence submits that the evidence in this case, when viewed as a whole, logically and in light of human experience, allows for a very real and reasonable inference to be drawn other than that Mr. Jessup killed Mr. Judd, and that is that Mr. Judd took his own life.
- [160] I find myself in agreement with the position taken by the defence here. When I view the circumstantial evidence objectively, as a whole, logically and in light of human experience, I must conclude that while the Crown theory is certainly possible, the alternative theory or possibility that Mr. Judd committed suicide that night is a plausible or reasonable inference to draw as well.
- [161] First, the general idea or possibility that Mr. Judd might try to harm himself is not entirely speculative. I accept Dr. Bodnarchuk's opinion that the CPIC and PRIME records showing three prior incidents of either self-harm or threats of suicide cannot inform any analysis and say anything at all about Mr. Judd's suicidal or non-suicidal state of mind at the time of the recorded events or at or near the time he died. The records were not adduced nor relied

upon for that purpose. Rather, the records were adduced for the sole purpose of providing an evidentiary basis that Mr. Judd had engaged in self-harm or threatened to commit suicide three times in the past. In other words, as the defence argues, they were adduced for the purpose of showing the possibility of self-harm and suicide as not being speculative in this case. I accept them for that very limited purpose only.

- [162] Although Mr. Judd was not under the influence of any intoxicants at the time of his death, as he was during the 2013 and 2014 incidents, he was nevertheless facing some significant life difficulties. He was incarcerated in an adult institution, facing the most serious charges he had ever faced. He was also facing a number of outstanding charges from Eastern Canada. Although Mr. Judd may have sounded happy to his mother on the phone on November 8, he did not tell her he was happy and he did not tell her about these serious charges.
- [163] Second, all three experts seem to agree that Mr. Judd's death was caused by asphyxiation. Although none was prepared to definitively opine on the mechanism used to cause the asphyxia, all agreed that both manual and ligature strangulation were possibilities. The Crown experts were both more inclined to the possibility of soft-ligature strangulation because of the absence of typical signs and injuries associated with either manual strangulation or ligature strangulation with an item like a rope or a cord. They also noted the absence of any injuries on Mr. Judd suggestive of a struggle. Police also noted the absence of injuries on Mr. Jessup or signs within Cell 2 that might be suggestive of a struggle.
- [164] The Crown experts agreed that, as a general proposition, self-strangulation with a ligature is possible. Although Dr. Stephen placed a KRCC sweatshirt near the bottom of the effectiveness scale for such a purpose, he did not exclude it entirely. Dr. Doyle went much further and opined that the KRCC sweatshirt would be capable, if tied tightly enough, of obstructing the structures of the neck, yet not leave any marks on the neck because of its soft, broad fabric. Ms. Allard, as I have found, found the sweatshirt tied tightly in two knots around Mr. Judd's neck, so tightly that she considered using scissors to cut it free.
- [165] In Dr. Doyle's opinion, the findings in this case could allow for the possibility of either soft-ligature homicide or soft-ligature suicide.
- [166] Third, I am unable to draw the inference that Mr. Judd was prone at the time of his death. If Mr. Judd were prone or face down when he died, the reasonableness of the alternative inference of suicide would be diminished, because it would mean that Mr. Jessup, having exclusive opportunity, would have moved his body to the position it was found. The expert evidence on this topic, which I have discussed in detail on the areas of lividity, petechiae and congestion, conflicted in some of these areas, but was mostly in the end neutral, in the sense that no conclusions could really be drawn one way or the other. I note, as did defence counsel, that the possibility that Mr. Judd may have been prone when he died did not form any part of Dr. Stephen's opinion, was not fundamental to Dr. Doyle's, and could support

either position in any event, and was contradicted by Dr. Butt. In the end, their observations and findings do not assist me in drawing any inferences about the position of Mr. Judd's body when he died.

- [167] Fourth, Mr. Judd's arm and hand positioning when he was found, in light of particularly Dr. Doyle's opinion on this subject, could reasonably support either inference the Crown asks that I draw, or an inference of suicide. Dr. Doyle was asked what would happen to the limbs of a person involved in a strangulation that became unconscious, if those arms and hands had been raised above the person's body. He testified they would fall wherever gravity took them, so it would depend on the position of the unconscious person. He opined that if a hypothetical person was lying on his back and the limbs were flexed and toward the upper portion of the body, the limbs may stay in that position. If he was in a slightly different position, the limbs may fall to the side or down, wherever gravity dictates. The evidence supports an inference that the position of Mr. Judd's arms and hands upon discovery could reasonably be consistent with suicide.
- [168] Mr. Judd would have used both hands to tie the knots and pull the sleeves tightly until he lost consciousness. Ms. Allard found Mr. Judd's hands and arms in the same position as depicted in the scene photographs. Of course, it must be remembered that the bulky sweatshirt tied around Mr. Judd's neck had been removed at the time of the scene photographs. The effects of rigor mortis, which were well-established at that point, would have kept Mr. Judd's arms and hands in the position they were in before the sweatshirt was removed. Within this context, the position of Mr. Judd's arms and hands in these photographs is reasonably consistent with them falling with the effects of gravity, with his right hand dropping and perhaps resting originally on the sweatshirt, and his left hand dropping to his chest with the effect of gravity, as Dr. Doyle opined could happen.
- [169] Fifth, I note the absence of any evidence that would suggest any animus or problems between Mr. Jessup and Mr. Judd, not even any suspicions from guards that anything was wrong. While the Crown is not required to prove motive, its absence strengthens the reasonable alternative inference of suicide.
- [170] Sixth, even if I did find that the Crown had established the sweatshirt seized by Constable Merrick and sent for DNA analysis was the sweatshirt found by Ms. Allard around Mr. Judd's neck that day, I find that I would be unable to draw any inferences from the DNA profiles found on it, including the inference the Crown asks me to draw, which is that the profiles were deposited on the sleeves when Mr. Jessup placed Mr. Judd's hands on the sleeves to stage a suicide. There are several factors which cause me to reach this conclusion. While the two mixed profiles on the back of the sweatshirt sleeves provide strong support for association between the sweatshirt and both Mr. Jessup and Mr. Judd, I accept Ms. Leblanc's unchallenged opinion that these profiles do not provide any information as to how or when their DNA was deposited. I accept her opinion that when two people live together, their DNA are likely to be found on surfaces within their shared space, particularly where they have touched the surface with their hand or from footprints. The smaller the shared space,

the greater the likelihood of finding trace or touch DNA in any given part of the space.

- [171] Cell 2 is cramped, with many surfaces shared by Mr. Jessup and Mr. Judd, increasing the likelihood of the presence of trace or touch DNA in any part of Cell 2 belonging to them both. Ms. Leblanc opines, and I accept, that if two people share a desk and rest their arms and hands on it, it is probable that the desk would have trace or touch DNA of both individuals upon it, which could result in the finding of a mixed sample.
- [172] As well, inmates share clothing at KRCC. If Mr. Jessup and Mr. Judd shared the sweatshirt, it is probable that a sample taken from that piece of clothing would produce a mixed sample.
- [173] In addition to all of that, I am also mindful that the manner in which the sweatshirt was handled could have caused cross-contamination. This is a real concern. When Ms. Allard removed the sweatshirt, and it is no criticism at all, she dropped it on the bed of the lower bunk, and scene photographs show it resting on a pillow, and it somehow ended up partially hanging off the bed onto the floor. It appears to touch the floor or perhaps the red article of clothing or articles of clothing beside it. There is no evidence about which inmate was assigned and regularly slept in the lower bunk or even used that pillow. There is no evidence about the red article or articles of clothing on the floor and whose those might be.
- [174] I have already discussed the less-than-optimal way the sweatshirt was seized, using a garbage bag accessible to inmates and touched by others. In addition, the video evidence shows that Corporal Starr handled the sweatshirt when she gave it to Constable Merrick. Her notes reveal that she and Mr. Pageau also examined a blanket covering Mr. Judd. There is nothing in the evidence to suggest that Corporal Starr used appropriate gloves for handling these items or changed such gloves to prevent cross-contamination.
- [175] As the defence submits, Mr. Jessup's and Mr. Judd's DNA could very likely be found in other untested areas of the sweatshirt as well, undermining the inference the Crown seeks to have the court draw from it, from the mixed presence in only two discrete locations on the sleeves.
- [176] For all of those reasons, in the event I were satisfied the sweatshirt examined for DNA was the sweatshirt found tied around Mr. Judd's neck, I would be unable to draw the inference from the mixed profiles that the Crown seeks to have me draw. Indeed, I find it would be unsafe, in all of the circumstances I have outlined, to draw any inferences from it at all.
- [177] Seventh, Mr. Jessup's movements in and out of Cell 2 that morning could support either inference. The video surveillance evidence showing Mr. Jessup's movements, which I have detailed, only show a portion of what he did that morning, which prevent me from possessing the full context of his movements. His movements in and out of the cell at various times, including bringing in breakfast, could support the inference the Crown seeks, that he was trying to figure out a way to get himself out of a jam, but they could also reasonably support the inference that Mr. Jessup was behaving quite normally that morning, thinking his cellmate was perhaps still asleep.

- [178] Eighth, the absence of a suicide note or any indication to his mother or any other evidence that he was contemplating suicide does not diminish the reasonableness of the alternative inference of suicide in this case. Police did not actually search for such a note, but moreover, as Dr. Bodnarchuk's evidence makes clear, the reasons for suicidal behaviour and predictions of it are not straightforward, make it difficult to predict, and they involve factors that can change quickly, particularly among the incarcerated population.
- [179] Finally, I respectfully disagree with the Crown position that the notion Mr. Judd chose to use a sweatshirt to take his own life could not reasonably have happened. To the contrary, for a person in his position, intent on taking his life, the choice of asphyxia using a sweatshirt could be seen as a reasonable one. Mr. Judd shared a cramped, somewhat lit jail cell with another person and was subject to regular visual checks by the guard. These circumstances provided him with very few options if he was intent on taking his life. Asphyxiation would be a viable option, and in order to prevent his cellmate or the guard from frustrating his goal, he would need to use something available, something that would not attract noise or attention such as what would occur if he pulled out a TV cord or perhaps tried to hang himself, and something that could be used without being seen. In these circumstances, fashioning a tight knot around one's neck with the sleeves of a jail-issued sweatshirt underneath a blanket could be seen as a reasonable method. Given the tightness of the knots found by Ms. Allard, the pressure could have been maintained such that Mr. Judd could have rendered himself unconscious quite quickly and died within only a few minutes, all under his blanket, without attracting any attention.
- [180] For all of these reasons, I find that the circumstantial evidence, viewed as a whole, logically and in light of human experience, is reasonably capable of supporting an inference other than that Mr. Jessup is guilty. This means that the Crown's evidence does not meet the standard of proof beyond a reasonable doubt and that the law requires that I must find Mr. Jessup not guilty. All that remains is to thank counsel for their hard work and thoughtful presentations in this difficult case.

"S.A. Donegan J."

DONEGAN J.

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