NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Smith***, 2007 NSCA 19

Date: 20070213
Docket: CAC 206002
CAC 206003
Registry: Halifax

Between:

Neil William Smith and Wayne Alexander James

Appellants

v.

Her Majesty the Queen

Respondent

Judges:	Cromwell, Hamilton and Fichaud, JJ.A.
Appeal Heard:	September 21 and 22, 2006, in Halifax, Nova Scotia
Held:	Appeals dismissed per reasons for judgment of Cromwell, J.A.; Hamilton and Fichaud, JJ.A. concurring.
Counsel:	Donald Murray, Q.C., for the appellant, Wayne A. James Jim O'Neil, for the appellant, Neil Smith James A. Gumpert, Q.C., Peter Craig and Jennifer A. MacLellan for the respondent

Reasons for judgment:

I. INTRODUCTION:

[1] Sean Simmons was shot to death in the entrance area of a Dartmouth apartment on October 3, 2000. The appellants, Neil Smith and Wayne James were charged with conspiring with Steven Gareau and Dean Kelsie to murder him and with his first degree murder. After trial by MacAdam, J. and a jury, Smith and James were convicted of both offences. They appeal, raising a host of issues concerning hearsay evidence, jury instructions, trial fairness and the rule against multiple convictions for the same wrong. They also tender fresh evidence which they say shows that the Crown failed to make proper disclosure before trial and that a miscarriage of justice has occurred.

[2] I would dismiss the appeals. The fresh evidence does not establish any failure by the Crown to make proper disclosure and falls far short of showing that any miscarriage of justice may have occurred. As for the multitude of alleged legal errors advanced by the appellants, they are without merit except for two related instructions to the jury. While the judge erred in two respects in his instructions to the jury about the use they could make of one brief out of court statement, these errors, in the context of this trial, could not possibly have affected the jury's verdict.

II. THE EVIDENCE:

[3] As noted, the appellants tendered fresh evidence in an attempt to show that a miscarriage of justice has occurred in this case. I will, therefore, provide a fairly full account of the trial evidence as this is necessary to assess the potential importance of the proposed fresh evidence.

A. Overview of the Crown and Defence Theories of the Case:

[4] The Crown alleged that Smith and James conspired with Dean Kelsie and Steven Gareau to murder Sean Simmons and further that Smith and James were guilty of his first degree murder. The Crown, however, did not allege that either Smith or James had actually carried out the killing. According to the Crown, Smith ordered the killing, James and Paul Derry arranged it and Kelsie and/or Gareau, carried it out. There was evidence that Smith was a member of the Hell's Angels and may have wanted Simmons killed because of an affair Simmons had some years before with the girlfriend of the head of the local chapter. There was also evidence that James and his associate in the drug business, Paul Derry, had been eager to please Smith because they owed him a lot of money.

[5] The Crown's position on first degree murder was this. Smith was guilty of murder because he counselled James to commit or to be a party to Simmons' murder. James was guilty of murder because he either counselled or aided the person who actually shot Simmons. The murder was a first degree murder because it was planned and deliberate or because the killing had been carried out pursuant to an arrangement to kill Simmons.

[6] The Crown's case rested principally on the evidence of Paul Derry and Tina Potts. They had been involved in Simmons' killing and attempts to cover it up. Afterwards, as the police moved in, they co-operated with the authorities. They were granted immunity in exchange for their assistance and both were enrolled in the witness protection program. Derry became a police agent. His phone was tapped and he wore a body pack to intercept his conversations after the killing with James, Smith and others.

[7] At trial, there was no issue that Simmons had been murdered and that Derry and Potts had been involved. Neither appellant testified or called evidence. The defence focussed on attacking Derry's and Potts' credibility. Defence counsels' submissions to the jury was that Derry and Potts, to save themselves from prosecution, had manufactured their evidence about Smith's and James' involvement: offering up Smith and James, who were admittedly relatively high level drug dealers, enhanced Derry's and Potts' bargaining power.

B. <u>Overview of the Evidence</u>:

[8] In brief overview, the Crown alleged that Simmons' killing unfolded as follows.

[9] James and Derry, along with Derry's wife, Potts, were in the drug business, selling drugs supplied by Smith and the Hell's Angels. In the fall of 2000, Derry had met Sean Simmons at a residence at 12 Trinity Avenue in Dartmouth and was thinking about involving him in the business. Before proceeding, Derry spoke to James who said that he thought the clubhouse (i.e, the Hell's Angels in Halifax) was looking for Simmons. James agreed to check this out. That led to a conversation between James and Smith, but in Derry's presence, in which Smith said he wanted Simmons "whacked." Derry had told Gareau to keep an eye out for Simmons and, after the conversation with Smith, he told Gareau to call Simmons' wife and tell her that they had work for him (transcript of evidence, pp. 1711-19; 1722-27).

[10] On October 3, 2000, Gareau, acting on Derry's instructions, found Simmons and telephoned Derry and James to advise of his location at an apartment house on Trinity Avenue in Dartmouth. James and Derry, along with Potts and Kelsie, then drove there together, James armed with a handgun which he had originally obtained from Derry and Potts. En route, Derry said that James should not do the shooting as he was a tall, black man who would be too visible in the middle of the afternoon. James then passed the gun to Kelsie and mentored him on how to kill Simmons. They met Gareau at a muffler shop near the apartment. James told Gareau to go to a bar later. Gareau and Kelsie went to the apartment house. The others waited.

[11] Within minutes, Kelsie came back to the car saying that he had shot Simmons. Potts found that three rounds had been fired from the gun. Derry and Potts took steps to dispose of the clothing Kelsie had been wearing, of the gun used in the shooting and other items. A drug debt owed by James and Derry to Smith was allegedly reduced as a result of the killing. The day after the shooting, Derry and James went to see Smith. He was happy and hugged them both.

[12] Derry quickly became a suspect. He then became a police agent and permitted his telephones to be tapped and wore a body pack to intercept communications with others. He and Potts were given immunity, money and entered in the witness protection program.

[13] While the Crown's case at trial rested largely on the testimony of Derry and Potts, there was a considerable body of other evidence that the jury could reasonably have found supported their evidence. This included some forensic evidence, evidence of eye witnesses, evidence of telephone records, evidence of motive, and intercepted communications by Derry with James, Smith and others while Derry acted as a police agent. I will briefly outline this evidence.

[14] Simmons was killed by a gunshot wound to the head. As the judge pointed out to the jury, this supported an inference of an intentional killing. Gareau's fingerprint was found on a door casing at the apartment building. Eye witness evidence tended to support a finding that Gareau had used a telephone at the muffler shop before the killing and had left the building shortly after shots were heard. Derry led the police to a location where they retrieved a gun that could have fired the fatal shot. Items of clothing allegedly worn at the time of the killing were similarly recovered on instructions from Derry and Potts from the location at which they claimed to have disposed of them. Telephone records showed communication among the alleged co-conspirators including calls bracketing the time of the killing.

[15] Simmons' widow provided evidence of a possible motive for Smith and the Hell's Angels to want Simmons dead. She also testified that she had received calls in the days before the murder from someone calling himself Steve (Gareau's first name) who was trying to contact her husband. The caller left a call back number that matched one of the cell phones that Gareau had been using.

[16] There was also evidence relating to a so-called "kite" – that is, a secret letter passed from one inmate to another. The Crown contended that while James and Gareau were both in the Correctional Centre – James as a result of an alleged parole violation and Gareau as a result of being charged with Simmons' murder – James had authored and given a "kite" to Gareau. The Crown invited the jury to draw an inference that James was trying to reassure Gareau and also urge him not to say anything that might incriminate them. The text of the letter was:

> "What's up my Brother. Keep the Faith. They got me here for association. Oh Well. I've been trying to write you a letter but it is very hard. At least if I get back out I'll be able to write you a letter. Listen my friend. I will never abandon you. We all are supportive of you. It is really rough out there right now. But things will get better. Watch what you say on the phones. They are listening to all your calls (daily). Me & Paul are close again, so things will be good. I am on Parole so I can't come to see you. You are my Friend alway (sic) remember that. Take care, I will talk to you soon. Watch who you Talk too and really watch the phones. They will probably try to put a spy in with you. Take care and Mom sends her love. Your Friend Always, The Big Guy".

[17] There was also evidence of intercepted communications which the Crown relied on as tending to confirm Derry's evidence. I will come to those later in my reasons.

C. **Derry and Potts**:

[18] Derry and Potts were the type of witnesses for whom the unsavoury witness directions were designed. Both admitted a series of criminal convictions, many of which involved offences of dishonesty. They had lived by committing fraud and dealing drugs. Derry, by his own admission, actively participated in the search for Simmons before he was killed. Derry and Potts had originally given James the weapon used, Derry drove the others to the scene of the killing and both assisted in disposing of evidence afterwards. In assisting the police, Derry had been looking to make money and to obtain immunity for himself and Ms. Potts. Both were given immunity from prosecution in return for co-operating with the police. Derry was paid $500.00 a week for working as a police agent and he and Ms. Potts had been provided with an apartment. Mr. Derry's drug debt was paid off. Both he and Ms. Potts were relocated and entered into the Witness Protection Program.

1. Derry's evidence:

(a) background:

[19] Derry testified that he had known Steven Gareau since about 1998, James since about 1991 and that James was married to Derry's cousin and was Dean Kelsie's uncle. Derry said that he met Smith at a party in Uniacke Square at the home of one of James' friends.

[20] Derry testified that he and James dealt drugs together. He explained that James would get kilos of cocaine on credit from Smith and that James and Potts would "rock it up" (p. 1701). Derry and James would sell a certain amount in 100 gram lots while Gareau and Kelsie and others would sell individual rocks. As a result of fronting the kilos of cocaine from Smith, James and Derry would have a drug debt to Smith which would fluctuate over the days, weeks and months that they were in business (p. 1704).

[21] Derry testified that he first met Sean Simmons about a month before the killing. Derry had picked up a hooker on Windmill Road and she took him back to her apartment. Sean Simmons was there with another man doing crack cocaine (pp. 1705-06). Derry and Simmons discussed the possibility of Simmons dealing in drugs.

[22] After this encounter, Derry discussed the meeting with James and testified that James indicated that he thought the Hell's Angels Clubhouse was looking for Simmons. It was agreed between them that James would check with the Clubhouse. In the meantime, Gareau, on Derry's instructions, moved to the same apartment complex in which Derry had met Simmons (pp. 1709-10). James reported back that the Clubhouse was interested in finding Simmons because he had slept with Mike McCrea's girlfriend (p. 1843). (It appears that this incident had happened, if at all, in 1994, roughly six years before the killing.) Derry identified Mike McCrea as the President of the Hell's Angels Clubhouse in Halifax (p. 1999).

[23] Derry testified about a meeting at a private bar called the Corner Pocket some time in September, only a few weeks before the killing. He and James went

there to see Smith about Sean Simmons. Derry's evidence was that Smith put his fingers to his throat, motioned with his fingers across his jugular and told James that he wanted Simmons whacked (p. 1718). In response, James said to Derry, "You heard him" and the two of them left (p. 1718). Derry told Gareau to call Simmons' wife and to tell him that they had work for him.

(b) The killing:

[24] Derry testified that on October 3, 2000, the day of the killing, he and Potts drove to James' residence in Uniacke Square. Derry's evidence was that as of that date, he and James had a drug debt to Smith somewhere around $85,000.00 (p. 1735). Gareau had called from Dartmouth to say that Simmons was at the Trinity Avenue residence. (Gareau had called Derry but he handed the phone to James. He took the call on one of two cell phones that had been rented by Gareau and used by Derry and James (p. 1730).) Immediately after speaking with Gareau, James went over to his girlfriend's apartment or house, got a gun and some gloves and came out to the car. The gun was a .32 revolver which Derry and Potts had given to James (p. 1732). Derry then drove Potts, James, and Kelsie to Trinity Avenue in Dartmouth. Derry testified that on the way to Trinity Avenue, he had told James that he should not be the one to commit the murder telling him that he was 6 feet tall, he was black and it was the middle of the afternoon. James then turned around and gave the gun to Kelsie. Derry testified that James gave Kelsie advice on how to kill Simmons, although at trial he could not recall anything specifically that James had said on this subject (p. 1743).

[25] Derry estimated that they arrived at Trinity Avenue about 20 minutes to three in the afternoon based on his understanding that school gets out at 3 o'clock. They met up with Gareau at a Midas Muffler dealer close to Trinity Avenue. James met with Gareau and gave him $20.00. Derry testified that Gareau and Kelsie then went off on foot towards Trinity Avenue while Derry drove the others around and parked on the street closer to the building.

[26] Within minutes, Kelsie came running back to the car. James asked him if he had shot Simmons. Kelsie replied that he thought he had emptied the whole chamber into him. Potts checked the rounds on James' advice and indicated that

three rounds had been fired. Derry testified that the plan had been for them to sit around the corner and wait for Kelsie to come back while Gareau, as instructed by James, was supposed to go to the Ship Victory, a bar, and then take a cab back to Uniacke Square. After Kelsie returned to the vehicle, they drove off and headed for Derry's residence on Albro Lake Road (p. 1760).

[27] Derry said that James had told them to go down to the bridge, to drop Potts' off at the beginning of the bridge, have her walk across, throw the gun away and then for Derry to pick her up on the other side. Derry did not follow these instructions, however, and instead went with Potts to Lawrencetown and buried the handgun.

[28] Derry eventually met James and Kelsie at the Players Club. Kelsie had a "bag full of stuff to get rid of" (p. 1773). Derry and Potts drove to Beechville, stopping in an Irving Store to get some flammable fluid, took the material that Kelsie had given them into the woods and lit it on fire. Derry testified that Gareau had cut off his ponytail on James' instructions and that Gareau had given Derry the jacket and asked him to get rid of it. Derry threw it in a garbage bin in Dartmouth (p. 1782).

[29] Sometime in the next days, James and Derry went to see Smith at the Corner Pocket. Derry said that Smith seemed happy and that he had hugged them both.

(c) After the killing:

[30] Derry testified that in the days after the killing, he, James and Potts went to Prince Edward Island to supply drugs to a friend. When they returned to Nova Scotia, he received a telephone call from James' wife indicating that Derry's apartment had been raided by the police, that Gareau had been arrested for Simmons' murder and that there was a warrant out for Derry. Derry, Potts and James then went back to James' wife's apartment (p. 1785). Derry's evidence was that James then called around and got him a lawyer and made arrangements for him to turn himself in (p. 1786). This occurred on October 12th. Derry's evidence was that he saw a lawyer as had been arranged by James and that James had

provided $1,000.00 to take with him to the appointment for a retainer (pp. 1786-87). Derry then went to the police station in Dartmouth and was arrested for murder. On the day of the raid, his children had been taken into custody by the Children's Aid Society where they remained until Christmas of 2002.

[31] Derry spent the night in jail, was charged with a weapons offence and the next day was released on bail on his own recognizance (p. 1793). James and a Willie Freeman picked him up at the Dartmouth Court House and they went back to Uniacke Square. On the way, James had Willie throw his phone out the window. James did this after Derry told him that the police had questioned him about cell phone use. Either that day or the next, James and Derry went to see Smith. James had told Smith that $29,000.00 had been taken from Derry's apartment during the police raid. (This was not the case.) Smith asked Derry about this and after Derry confirmed it, Smith took that amount off the drug debt and, in addition, took $1,000.00 off the debt by way of reimbursing the retainer that James had provided for counsel.

[32] Derry testified that in early 2001 he had met with Smith and others to discuss various issues. His evidence was that Smith was angry because he had found out that James had taken credit for Simmons' killing but had not actually done it. Smith told Derry that he had taken money off the debt for that and that he was upset about it. Smith also indicated to Derry that he knew that it was Kelsie who had actually done the killing. Smith told Derry that $25,000.00 had been taken off the drug debt meaning that the sums of $25,000.00, $29,000.00 and $1,000.00 for the retainer had been deducted from James and/or Derry's drug debt.

[33] Derry also testified that he had discussed with Kelsie that he was supposed to get $5,000.00 from Wayne James as a result of his involvement in the killing but that Kelsie, in fact, had only got three 8 balls of cocaine worth between $250.00 and $300.00 each from James. (The admissibility of this evidence and the judge's charge in relation to it are at issue on appeal.)

(d) Derry as a police agent:

[34] Derry started working as a police agent around the 1st of January, 2001. He signed a letter of agreement and then an immunity agreement. These documents provided that Derry would receive a weekly salary, payment of certain bills and immunity from prosecution. In exchange, he was expected to do what the police told him to do and, in particular, to go out, wear a wire and gather information as directed. He also allowed intercepting devices to be put into his phones. In general, he was told to keep on acting as if nothing had happened and follow the direction of the police officers as they went about their investigation (p. 1820). This role continued until April 17th, 2001, the day that Smith was arrested and Derry went into the Witness Protection Program.

[35] Derry testified that he met with Smith at a bar in Dartmouth on the day of Smith's arrest. (This meeting was the subject of Intercept 99). He handed Smith a phony warrant in relation to the murder of Sean Simmons and it had Smith's name on it. Derry testified that he handed Smith the warrant, that he was nervous and that his hands were shaking and that this was the only time that Derry had ever seen Smith nervous.

[36] Derry's cross-examination by defence counsel explored his criminal activities and his motives for becoming a police agent. He admitted that:

- in around 1996 he had floated a proposal to the police to infiltrate the Hell's Angels in Halifax and supply information about their activities. Derry was proposing to work as an agent for the police and was interested in being paid for this work (p. 2520);

- in and around 1996 he had started selling drugs for a Hell's Angel member whose name was Greg Brushett (p. 2492);

- he had been on parole following his release from prison from November of 1996 to April 2000 and that he had violated his parole conditions by possessing weapons, associating with persons that he knew to have a criminal record and by dealing drugs;

- he had been charged criminally on a number of occasions and that he had gone to prison (pp. 2579-80) and that those were experiences he never wanted to repeat (p. 2580);

- for 16 or 17 years he had been involved in theft, fraud and drugs and that over the past several years he had regularly carried guns on his person for protection from his enemies (pp. 2592-2596);

- Potts was involved in the credit card frauds and that when they had come to Nova Scotia, she was an addict and that her drug use included speed, heroine and crack cocaine (p. 2599);

- the immunity agreement had helped him to have a new life; he had been a police agent many times over the years and that it was usually at his own initiative (p. 2603);

- saying to the police in his October 12th statement "I'm a criminal, you're a cop, we both know that, let's cut through the fucking bullshit, and you tell me what you want, I tell you what I want."; (p. 2604)

- on some of the occasions in which he has acted as a police agent he continued to commit crimes (p. 2605) and that to be an agent one had to be able to deceive people (p. 2606);

- sometimes when he had "rocked-up" crack cocaine at his residence on Albro Lake Road, his children had been present (pp. 2641-42);

- he had said to the police (in his statement of October 25th, 2000) "I'll give you fucking anything you want" (p. 2725) and also at the same place "find out what you guys are going to give me, and I'll find out what I'm going to give you." He also said (p. 2726), "Let me get my fucking kids back, let me get my fucking woman back, and let me get the fuck out of here, and ... I don't give a flying fuck who goes to prison around here.".

2. Potts' evidence:

[37] Potts' evidence largely mirrored Derry's, although there were some inconsistencies in detail. Her testimony added one possibly significant matter of detail which was not in Derry's evidence. She said that Gareau was talking to James just before the killing and that Gareau wanted a fix because he was "basically dope-sick". James gave him twenty dollars and said, "... you know, I'll get you later. Basically, like, I'll do something for you later, but here's 20 bucks." (p. 957).

[38] As with Derry, the defence cross-examination of Potts highlighted her criminal activity. She admitted that:

- a good percentage of her adult life had been supported by criminal activity (p. 1138,) mostly fraud or involvement in the sale of narcotics (p. 1139);
- she had committed many more crimes than she had been convicted of (p. 1184) and that she had been successful in not getting caught a lot of other times (p. 1184);
- she had acquired "quite a bit of knowledge" about bank fraud, that this was the most significant activity of a criminal nature that she had been involved in, that such crimes are based on dishonesty and deceit (p. 1139) and that her life through those criminal activities has been supported by lies (p. 1140);
- she used to be a very violent person and that she'd carried a gun on her person in the past (p. 1143) and that she had three guns while she lived in Nova Scotia (p. 1143);
- her children had been taken away from her for 26 months because she "was a horrible mother and ... a junkie" (p. 1167);
- when Gareau was arrested on October 11, 2000, he was arrested in her apartment at 31 Albro Lake, that the children were there when the police raided the house and that there was a bunch of guns in the

apartment which they had brought from Ontario to Nova Scotia and which she knew were “going to the street” (pp. 1168 - 1170);

› on an earlier occasion, she had been convicted of being an accessory after the fact to murder and got a three month sentence. She had “cut a deal” for herself (p. 1186) and was a Crown witness. She also admitted that she had been involved in attempting to influence the evidence of other witnesses as to the whereabouts of her then boyfriend, who was one of the accused; she agreed that she received a lighter sentence because of her willingness to testify against one of the accused and acknowledged that that was part of the agreement (p. 1198);

› she had been in violation of her bail conditions and had tried to mislead her probation officer in connection with the accessory after murder conviction (pp. 1191-93); she also acknowledged that part of her sentence was that she would not possess firearms and that she signed a document to that effect essentially promising the Court as part of her sentence that she would not possess firearms for 10 years and that she completely ignored that promise to the Court (p. 1200);

› while living in Ontario and committing the type of frauds described in the evidence, she continued to collect welfare and that meant that she continued to deceive the welfare people as to whether she had any source of income (p. 1215);

› she gave Kelsie her vest so that he would not be recognized (p. 1228); and that, even after she saw the blood on the vest, she wanted to keep it so that she could wear it in the future (p. 1230).

D. <u>Interceptions</u>:

[39] During Derry's examination-in-chief, a number of interceptions of conversations were played for the jury. The Crown's position at trial was that these provided significant confirmation of Derry's and Potts' evidence. Of course, it is a matter of interpretation what is actually being discussed on these intercepts and, at times, even the words being said are difficult to make out. It was for the jury to interpret and draw inferences from the various intercepted communications. Important context for their work, however, was the involvement in the drug business by Smith, James, Derry and others. In short, it was clear that they had other illegal schemes to discuss and the jury had to pick its way through the various intercepted communications and decide what was actually being discussed.

[40] It is also important to remember that all of the intercepted communications occurred after the killing. As I shall discuss later in my reasons, none of these statements was made in furtherance of the conspiracy and, therefore, out of court hearsay statements by either Smith or James are admissible only against the party making the statement and not against the co-accused.

[41] It was conceded by Smith's trial counsel that he was "a drug dealer of some significance" and that he was "a drug supplier to Mr. James and Mr. Derry" (p. 3012). Counsel at trial did not take any issue with the proposition that Mr. Smith was referred to in some of the intercepts as "the big guy" (p. 3012). Similarly, Mr. James' counsel was frank with the jury that his client had a long standing role in drug dealing in Halifax and used intimidation or force in his drug dealing (p. 3064). James' counsel emphasized in his address to the jury that the intercepted communications were principally and predominantly about drug dealing.

[42] I mention all this because many of the intercepted communications are capable of various interpretations. On one reading, some conversations may plausibly be thought to relate to the murder while on another reading, they may relate to other criminal activities. I will refer to interpretations that could reasonably have been open to the jury while recognizing that the text of the words spoken and the inferences to be drawn from them were matters exclusively for the jury.

[43] I will first set out extracts from three of the intercepts involving James. I have drawn on three sources for my transcription of these extracts. The trial transcript reproduces what was transcribed from a recording of playing the intercepts at trial. There is, secondly, a transcript of the intercepts prepared by the police which was given to the jury to assist it, but which it was agreed was not an official transcription and not evidence. (Police transcription of Intercept 81 was not made available to us.) Finally, the actual recordings were marked as exhibits and were available for our review. In what follows, the trial transcript is in regular font, the police transcription version is in **bold font** and what has been transcribed from the recordings themselves by the Court is in *italics*.

1. Intercept 58:

[44] This is a body pack interception in Paul Derry's apartment on March 14, 2001 and it records conversation among Derry, Potts and James. Derry said this intercept records a conversation about where he talked James out of doing the murder himself and how James had given the gun to Kelsie. According to Derry, James also says that if Gareau had listened to what James told him the day of the murder, he would not be in jail.

> [pp. 2075 - 2077]
>
> **Transcript of Intercept 58, p. 22 -**
>
> [DERRY] Yeah, but, still, I told you, don't fucking middle of the day, six foot fucking tall.
> [JAMES] **[Actually]** yeah, **[you didn't tell me not to but ...]** [inaudible]
> [DERRY] **[... I was goin' like ... the fuckin ...]** I was thinking all the way over there, are you fucking retarded? *[You are going to]* He will stand out like a fucking sore thumb.
> [JAMES] six four.
> [DERRY] Yeah, but who cares about him I wasn't worried about losing him at the time. I was worried about losing you.
> **[JAMES] ... He's what, six (6) foot ...**

[DERRY] You're going to stand out like a fuckin sore thumb.
[JAMES] He's six (6) four (4)?
[DERRY] Yeah, but who cares about him? ... Ya know, I wasn't worried about losin' him at the time. I was worried about losin' you.
[JAMES] **[He's lucky the hit isn't worth]** my two cents.
[DERRY] Oh, yeah. No kidding.
[JAMES] No more headaches.
[DERRY] Uh-huh. You know, for sure. **[...mmmm hmmm ... yeah for sure]**
[JAMES] **[Our other friend]** wouldn't be where he's at because **[I told him]**
[DERRY] I wish he'd quit fucking whining so we **[he]** could fucking –
[JAMES] No, **[no, but]** he wouldn't **[be where he's at because even]** [He knew?] what he had [put down?] *[even the way it went down]*
[DERRY] [...mmmm?]
[JAMES] [... even the way it went down ...]
[DERRY] If he had listened --
[JAMES] He wouldn't have went out [inaudible] listened to me anyway, but he didn't -- **[... he woulda went up to ... yeah, well you listen to me anyway but he didn't ...]**
[DERRY] *[He should have]* Stay*[ed]* fucking where he was. **[... You said, stay fuckin where he was]**
[JAMES] [inaudible]
[DERRY] Yeah, stay right where the fuck *[Go into the apartment]* **[because then you're just another fuckin junky ...]**
[JAMES] [inaudible] I thought he said a white guy about six foot tall running. Hood up and everything.
[DERRY] Exactly. ...
[JAMES][All] [inaudible] *[would be able to say is he see]* seriously someone six foot running.
[DERRY] Yeah. Exactly.
[JAMES] You know what I mean?
[DERRY] Exactly.

2. Intercept 79:

[45] This is a body pack interception of conversations between Derry and James on March 26, 2001. Derry's evidence about this intercept was that James told him that he was talking too much and that they discussed Derry's having said too much to Manny Bundy after the Simmons killing.

[pp. 1904 - 1905]

[DERRY] Yeah, but the only thing ("reason", see t. p. 1904, line 7)-- when I fucked up after Sean it was just Bobby and the [only thing?] I thought him and Bobby were fucking [inaudible] *[Yeah, but the only thing - I fucked up after Sean it was with Bobby and it was only because I thought him and Bobby were fucking]*
[JAMES] [... man don't be talkin' about that shit man ...]
[DERRY] [...I know...]
[JAMES] [... I'd be still denying that shit man ...]
[DERRY] [unintelligible]
[JAMES] [... mother fucker, we had somethin' to fuckin' do with it, then I don't about it, he's fuckin' lying...]
[DERRY] Laughs
[JAMES] **[... I'm tellin' you right now. .. I told you right then, don't be talkin' about that shit ... you don't, because then people got no reason to whack ya]** fucking people, [inaudible] I don't know, [but he's?] fucking [lying?] right now.
[JAMES] I told *[you way back man]* now don't be talking about this *[shit]* because *[them]* people got the reason to whack you, didn't I tell you that [way back?]
[DERRY] You told me that after fucking I said something stupid to Manny.
[JAMES] Fuck **[man. Even dummy nuts]** has enough fucking sense **[as bad as he can be, he said tell Paul I love him man,]** *[even as dumb as he can be]* Uncle Paul **[he can hold a knife]** and Deano was -- even he has enough god damn**[ed]** sense to shut up when I told **[tell]** him to shut the fuck up,

3. Intercept 81 (Police Transcription not made available to us):

[46] This is a body pack intercept on March 29, 2001, in a car on the way back from the Correctional Centre involving James, Derry and Potts. They had gone to the Correctional Centre to give Steve Gareau, who was in custody charged with the murder, some money for his canteen. There is conversation about whether or not James told Gareau to run after the murder and a reference to the $20.00 that Derry and Potts said that James had given to Gareau just before the murder.

> [pp. 1856 - 1857]
> [JAMES] *[How is he now?]*
> [DERRY] Same old said *[shit]*, whining and crying, said you told him -- you told him to run and I said -- I got mad at him and said you wouldn't be in -- well, I didn't say it, I mean I wrote it, but I said you wouldn't have been in here if you would have fucking stayed where you were supposed to.
> [JAMES] I didn't tell him that. *[You were sitting there]* I didn't tell him to run, I told him to go the other way.
> [DERRY] Yeah.
> [JAMES] Whatever way he goes you go the other –
> [DERRY] Yeah.
> [JAMES] I said go right back in the apartment if you can, *[if it's]* right there, *[It's]* only common fucking sense.
> [DERRY] [That's pretty said]
> [JAMES] I can't believe *[He's dreaming that I told him to run. I didn't fucking tell him to run.]*
> [DERRY] I told him, I said, that's why you get your *[he gave you]* 20 fucking dollars, to *[so you could]* go have a beer, and relax. [inaudible]
> [JAMES] *[Yeah, not run]* Walk away, fuck. [inaudible]
> [DERRY] *[He said he's up there and (inaudible)]*

[47] The interceptions of Smith were fewer in number and shorter in duration. At least two of them referred to nothing beyond efforts to set up meetings and, of course, such meetings were entirely consistent with the drug business going on

between Smith and Derry. One of the intercepts captured Smith describing a debt owed by James and Derry and demanding payment.

4. Intercept 93:

[48] This is a body pack intercept on April 6th, 2001 of a conversation between Derry and Smith. Derry gave Smith the suspension notice relating to James' parole to explain why James was back in jail. Derry explained this as James trying to assure Smith that he has stayed "honourable" - i.e., had not become a rat. (p. 2364) In this intercept, Smith tells Derry to tell James that he owes Smith $50,000 and he wants it.

> **[transcript provided to jury, I-93, page 7**
> **[SMITH]: (Speaking very low)....if he phones again, just tell him I want my money. Period.** *[When you get him just tell him I want my money period.]*
> **[DERRY]: Yeah he's supposed to call me Monday.**
> **[SMITH]: (Speaking extremely low)....Just period I want my money. I don't give a fuck how** *[he arranges it]* **....I just want my fuckin money....**
> **[DERRY]: (Speaking extremely low)....yeah....**
> **[SMITH]: (Speaking extremely low)....as far as I'm concerned** *[inaudible]*
> *[DERRY] [Anyhow, no matter how many times you tried to help the guy -*
> [**SMITH] he owes me fifty (50) fuckin grand now....**
> **....(Short Pause)....**
> [SMITH]: (Speaking extremely low)....it's goin' up, by the minute. ....(Short Pause)....
> [DERRY]: ....I know, no matter how many times you try to help the guy....
> [SMITH]: (Speaking very low)....I helped him three (3), four (4) fuckin times. *[He said something like this, him owing me a pile of money and he ain't going back to jail.]*

....(Short Pause)....
[SMITH]: It always ends up like this, him owin' me a pile of money and goin' back to jail.

III. ISSUES:

[49] The appellants raise a host of issues. I have found it helpful to consider them under five (5) headings.

A. Was there a miscarriage of justice:

1. Did a miscarriage of justice occur:
   (a) because the Crown failed to disclose allegations of wrongdoing before trial by Derry while in the witness protection program?
   (b) because further evidence of alleged wrongdoing by Derry has come to light since the trial?
   (c) because during deliberations, a juror may have seen one of the appellants in handcuffs?
   (d) because the trial judge interrupted the jury's deliberations to permit the jury to vote at an advanced poll?
   (e) because the trial was subject to various delays and disruptions?

B. Jury Directions Re: Potts and Derry:

2. Did the judge err by giving an inadequate "*Vetrovec*" warning and in his instructions about potentially confirmatory evidence of the testimony of Derry and Potts?

3. Did the judge err by instructing the jury that suggestions put by counsel during Derry's cross-examination were not evidence?

C. Kienapple:

4. Did the judge err by failing to enter a conditional stay of the conspiracy charge as it was subsumed by the conviction for first degree murder?

D. First Degree Murder:

5. Did the judge err in leaving planned and deliberate murder to the jury?

6. Did the judge err in leaving contract killing to the jury?

E. Hearsay Evidence:

7. Did the judge err in admitting hearsay evidence from Jylene Simmons that Sean Simmons told her he had been beaten because he had been accused of having an affair with the girlfriend of the head of the Halifax chapter of the Hell's Angels?

8. Did the judge err in admitting certain hearsay evidence under the co-conspirator's exception to the hearsay rule and in his instructions to the jury about the permitted use of such evidence?

IV. ANALYSIS:

A. Was There a Miscarriage of Justice?

1. Fresh Evidence: Disclosure and Derry's Credibility:

(a) Overview:

[50] The appellants have submitted proposed fresh evidence which they submit raises serious doubts about Derry's credibility as a witness. The evidence falls into two categories. First, there is evidence relating to events alleged to have occurred before the trial and verdict in this case. The appellants say this ought to have been disclosed for the purposes of trial. Second, there is evidence of events alleged to

have occurred after the verdict in this case and which has only come to light since the trial. The appellants submit that this evidence, along with the trial record and the evidence that ought to have been disclosed, shows that there is a serious risk that the guilty verdicts were miscarriages of justice. The appellants say that if this material had been available to defence counsel and placed before the jury, it is unlikely that they would have believed Derry's evidence. Without Derry, the appellants submit, there was no case against either appellant.

[51] In my view, the appellants have not shown any breach of their disclosure rights. The question, therefore, boils down to whether there is a reasonable possibility that all of the material now available about Derry, assessed in light of the trial record, could have affected the jury's verdict. In my view, there is not.

(b) Disclosure:

[52] It is, of course, settled law that the Crown, in response to a defence request, is required to disclose all relevant material in the prosecution's possession or control: see, e.g. **R. v. Stinchcombe**, [1991] 3 S.C.R. 326; **R. v. Egger**, [1993] 2 S.C.R. 451; **R. v. Chaplin**, [1995] 1 S.C.R. 727; **R. v. Bottineau** (2005), 32 C.R. (6th) 70; O.J. 4034 (Q.L.)(Sup.Ct.). Evidence bearing on the credibility of an important Crown witness meets the test of relevance for disclosure purposes. The question in this case is whether the material in issue here was within the prosecution's possession or control.

[53] Relevant material in the possession of the police is deemed, for disclosure purposes, to be within the control of the Crown. The Crown has a duty to obtain from the police and the police have a duty to provide to the Crown all material that should be properly disclosed to the defence: see, e.g. **R. v. L.A.T.** (1994), 84 C.C.C. (3d) 90 (Ont. C.A.) at 94; **R. v. Gagné** (1998), 131 C.C.C.(3d) 444 at 455 (Qc. C.A.), application for leave denied [1999] C.S.C.R. no. 2. However, there can be difficult questions about what body constitutes "the police" for this purpose. The focus of the disclosure obligation is the so-called "fruits of the investigation" and, consistent with that focus, the primary disclosure obligation relates to the investigating police force: **Stinchcombe** at 333. However, difficult issues may arise where, for example, relevant information is in the possession of the

investigating police force but was not obtained as part of the investigation or where relevant material is in the possession of some other police agency. The present case raises issues of the latter kind.

[54] In this case, the investigating police force was the Halifax Regional Police. However, Derry was enrolled in the witness protection program which is administered by the Commissioner of the RCMP: **Witness Protection Program Act**, S.C. 1996, c. 15 as am. I will accept, without finally deciding, that generally information which would otherwise be subject to disclosure and which is in the possession of the administrator of the program ought to be deemed to be within the possession of the investigating police force and the Crown for the purposes of a prosecution in which the protectee is to be called as a witness. On the other hand, I do not accept that the investigating police force or the prosecution has an obligation to disclose material unknown to it simply because it is within the possession of some police force somewhere in Canada. This would create an impossible burden. The investigating police force and the prosecutor would have to make inquiries with every police agency in the country in order to fulfil its disclosure obligations: see, e.g. **R. v. Gingras** (1992), 71 C.C.C. (3d) 53 (Alta. C.A.).

[55] I, therefore, approach the disclosure issue in this case as follows. Have the appellants shown that the material that they claim ought to have been disclosed was in the possession of or known to exist by either the investigating police force or the administrator of the witness protection program? In my view, the appellants have not shown this. They have, therefore, failed to show any breach of their rights to disclosure in this case.

[56] The material that the appellants claim ought to have been disclosed relates to events which occurred prior to the verdict of the jury in this case on August 3, 2003. I will identify the material by using the numbering set out in para. 82 of the appellant James' factum:

> (a) an act of fraud by Derry alleged to have occurred between August 26, 2002, and December 3, 2002 which resulted in a charge of fraud contrary to s. 380(1) of the **Criminal Code** being laid against Paul Derry after the trial;

(b) Derry allegedly writing worthless cheques by writing cheques backed by non-sufficient funds, and by writing cheques on closed bank accounts;
(c) Derry making false statements in connection with debt obligations;
(d) efforts by Paul Derry to avoid the effect of a licensing refusal in a government-regulated business.

[57] It appears that the three matters referred to in (a), (b) and (c) above relate to an allegation made to an unspecified police agency, somewhere in Canada in December of 2002 that Paul Derry had written non-sufficient funds cheques to make rent payments. Item (d) appears to have come to light in the police investigation of the bad cheques.

[58] There is no evidence as to which police service in Canada investigated these allegations or if they became known to the RCMP Source/Witness Protection Unit before the trial. We do know that the original complaint was made to a police service somewhere in Canada in late December of 2002 and that there is a reference to this incident in the running notes dated August 6, 2004 made by the source witness protection coordinator in the province in which Derry resided. These notes, we are told, were made to clarify incidents to support having a notice of shortcomings served on Derry in relation to the witness protection program.

[59] We do know that a fraud charge was laid in relation to this matter in May of 2004 alleging fraud between August and December of 2002. There were also charges of failure to attend court and to appear for the purposes of the **Identification of Criminals Act**, R.S. 1985, c. I-1 which were laid in June and October of 2004 in relation to alleged offences in May and October respectively. All of these charges were stayed by the Crown in August of 2005.

[60] There is no evidence that any police service which had an obligation to disclose this material knew, or even should have known, of these allegations before the end of the trial. In my view, the absence of such evidence is fatal to the appellants' allegation of breach of their rights of disclosure.

(c) Fresh evidence directed to factual issues decided at trial:

[61] The question remains whether the material which has come to light since the trial should be received on appeal and, if so, whether it supports the appellants' claim that a miscarriage of justice has occurred. There is no issue here of any lack of due diligence. The critical question is whether the proposed fresh evidence, considered in its totality along with the trial evidence, could reasonably be expected to have affected the verdict: **R. v. Palmer**, [1980] 1 S.C.R. 759.

[62] It will be helpful to set out the substance of the proposed fresh evidence.

[63] With respect to the various allegations set out as (a) to (d) earlier, the material before us is in substance as follows.

[64] A complaint was made in December of 2002 by the owner of a rental house that Paul Derry had written two N.S.F. cheques. The police investigated, although it is not very clear when the investigation started. The investigation included obtaining search warrants to search bank accounts.

[65] These searches, according to the material filed, revealed that there were two bank accounts, at least one of which was apparently in the name of a company and it seems that the two cheques in issue had been written on a company account. The search revealed that someone, who we are to assume was Derry, assured a creditor on December 2, 2002 that he was on the way to put money in the bank. The investigator drew the inference that this was not true as the account on which the cheque was drawn had been closed for five months at the time. There is also reference in the material to two other cheques written without sufficient funds.

[66] The investigator also looked into the businesses in which Derry was supposedly involved. These inquiries led to the office concerned with licensing private investigators. (The nature of the licence is blanked out in two places but appears in a third version of the same document which appears in the material filed.) The investigator's notes indicate that a person whose name is blanked out but is assumed to be Paul Derry had applied for licensing as a private investigator but was turned down because of his extensive criminal record. The investigator goes on: " He [presumably Derry] tried to get the licence several times and used others to act as applicants while he was a "silent partner". The inference I would

draw from the material is that he was attempting to do this through corporate vehicles.

[67] This note is dated April 23, 2004. When the investigation was conducted is unclear but it appears that the police did not contact Derry about any of these allegations until April 21, 2004. The material indicates that when confronted, Derry admitted that he used to make large amounts of money illegally and said that now he was changing his life around it was difficult for him to manage money properly. He also admitted being aware of the two cheques that had bounced and admitted he still owed the money.

[68] There is also in the material a letter apparently from the owner of the rental property. It recounts the difficulties the owner had collecting rent, presumably from Derry. It also indicates that references for Derry had been his church pastor and associate pastor and that the writer had learned that Derry had been asked to leave the church.

[69] As noted, a charge of fraud for the N.S.F. cheques (in the amount of $875.00) was sworn on May 26, 2004 which was stayed by the Crown on August 4, 2005.

[70] The proposed fresh evidence also relates to events alleged to have occurred after trial. They are as follows.

> (d) misrepresentations to acquire welfare benefits to which Derry and his family were not entitled in 2003;
> (e) efforts by Derry to mislead his handlers in the Witness Protection Program in 2004.

[71] These two matters arise out of Derry and Potts lying to obtain welfare benefits to which they were not entitled. According to the material, these social assistance benefits were applied for in September, 2003 and benefits were received in the fall of 2003 and early 2004. Social Services referred the file to the police, but the police investigator made the decision not to open a file. No investigation occurred and no charges were laid. The Source/Witness Protection Section of the

RCMP reviewed Paul Derry's social assistance claims beginning on October 3, 2003.

[72] The material also includes a letter dated August 6, 2004, apparently from Derry, which set out his response to the alleged welfare fraud. He says that he and Potts lied to the Social Services officials about not receiving other income because to do otherwise would have put their position in the Witness Protection Program at risk. He claimed that they had only sought medical benefits which, he said, had been cut from their Witness Protection allowance about eight months earlier.

[73] That is the substance of all the proposed fresh evidence.

[74] The appellants say that this evidence casts sufficient doubt on Derry's credibility that the convictions ought to be set aside. I do not accept this contention and would dismiss the application to adduce fresh evidence respecting Derry's credibility. Considering all of the fresh evidence in light of the trial record, I conclude that there is no reasonable possibility that the proposed fresh evidence affects the reliability of the verdicts.

[75] The fresh evidence relates to dishonest acts which pale in comparison to the acts which Derry admitted before the jury. He came before the jury as a man who had earned his livelihood by deceit, helped plan and carry out a murder in order to get some relief from his drug debts and stood by while his wife and friends "rocked up" cocaine in the presence of his children. Skipping out on his landlord and cheating the welfare authorities as detailed in the proposed fresh evidence could not change for the worse the impression of Derry's character or credibility which the jury obtained from the trial evidence.

[76] The appellants say that the proposed fresh evidence has greater importance because Derry presented himself to the jury as a "changed" man; the fresh evidence could have led the jury to conclude that, in fact, he had not changed at all and persisted in his dishonest ways.

[77] I cannot accept this contention. Derry was not presented to the jury as a "changed" man either during his direct testimony or in the Crown's submissions. The jury was repeatedly warned to assess his evidence with great caution. On any reasonable view of this record, the only impression the jury could have had of

Derry was as a witness whose testimony was highly suspect and needed to be approached with the utmost caution. The proposed fresh evidence could not possibly have changed that impression.

[78] It is not correct to suggest, as the appellants do, that Derry presented himself to the jury as a "new" or "changed" man. There were but two references to this issue, both elicited during cross-examination.

[79] Derry was asked in cross-examination whether the immunity agreement and the letter of agreement that he and Ms. Potts had signed helped them clean up their lives. He answered "I don't know if the immunity agreement helped me change my life, no." When reminded that his answer at the preliminary inquiry to this question had been "yes" he said "I prefer to give the glory to God and not to an immunity agreement for my change in my lifestyle." (p. 2535). He was then asked in cross-examination if he had become a Christian and he replied in the affirmative and said that that happened approximately April 17, 2001 (p. 2535). Again he was asked in cross-examination: "... it's fair to say that you're (sic) lives now are very different than they were when you lived in Brockville then (sic) when you lived in Nova Scotia?" to which he answered "yes" (p. 2537).

[80] In a series of questions at the end of cross-examination about the impact of the immunity agreement, Derry did not mention his religious motivations again. For example, at p. 2757 he said "You're giving an awful lot of credit to the immunity agreement when you should be giving it to the operation and the solving of the murder." And then he said "I have a new life because I made a new life."

[81] The Crown's position before the jury was not that Derry should be believed because he was a new man, but because his evidence was strongly supported by other evidence. Crown counsel, in his closing address, did not say a word about Mr. Derry being a "changed" or "new man". The thrust of the Crown's position before the jury was to accept that both Derry and Potts were unsavoury witnesses and to urge the jury to look to the evidence which tended to confirm the truth of their testimony. The jury was repeatedly warned by the trial judge to approach Derry's evidence with great caution.

[82] In short, Derry was not presented to the jury as a 'changed' or 'new' man but as an unsavoury witness whose evidence had to be approached with great

caution. The proposed new evidence or what could reasonably be thought to be generated from it, could not reasonably be thought to put his evidence into any different light.

[83] I would not admit the proposed fresh evidence.

2. Fresh Evidence: Handcuffs:

[84] The appellant, Neil Smith, seeks to introduce fresh evidence to show that his conviction is a miscarriage of justice because the appellants may have been seen by a juror in handcuffs in a court house corridor not long before the verdict.

[85] There is extensive affidavit material filed on this issue. It shows that one of the jurors caught a brief glimpse of the appellants in the hall between the court room and the jury room. The appellants were surrounded by sheriff's officers and the juror was quickly ushered by another sheriff's officer into the jury room. It is uncertain on the evidence whether the juror saw that the appellants were in handcuffs as they were. There is evidence that both appellants complained that they had been seen by a juror in handcuffs and discussed the matter with their trial counsel. Trial counsel did not bring the matter to the judge's attention in court. Some time later on the day of this incident, the jury returned its verdict.

[86] The question is whether the possibility that a juror caught a brief glimpse of the appellants in handcuffs gives rise to a miscarriage of justice. In my view, no miscarriage of justice was occasioned by this brief encounter.

[87] There is a strong presumption that jurors will act in accordance with their oaths and follow the instructions of the trial judge to render a true verdict according to the evidence. As the Court noted in **R. v. Lawrence** (2001), 192 N.S.R. (2d) 43; N.S.J. No.83 (Q.L.)(C.A.) at para. 123:

> [123] The juror's oath of office, together with the careful and detailed instructions given to the juror, are, in part, reasons why there is an initial presumption in this country that a juror will be indifferent or impartial and perform his or her duties in accordance with the oath of office. See **R. v. Hubbert** (1976), 29 C.C.C. (2d)

> 279 (Ont. C.A.), also **R. v. Williams, (V.D.)**, [1998] 1 S.C.R. 1128, per McLachlin, J., at p.1139.

[88] The appellants' occupations and life style were obvious from the trial evidence and conceded by their counsel before the jury. Before the jury, Smith's trial counsel described him as a member of the Hell's Angels and noted that it was apparent from the evidence that his occupation was that of drug dealer of "some significance", at the top of the hierarchy of drug dealing. (pp. 3011 - 12). James' trial counsel conceded in his jury address that James was a drug dealer and that he could not say to the jury that James did not use intimidation or force in his drug dealing. (pp. 3063 - 4). In the context of this record, jurors would not have been surprised that security measures were being applied to these appellants.

[89] Jurors were warned repeatedly and strongly not to allow the appellants' other criminal activity to influence their verdict. All counsel and the judge warned the jury in strong terms to consider only the particular crimes charged on the evidence adduced. The judge, in his directions, stressed that the appellants were on trial for these specific crimes, not for other matters. The trial judge also reminded the jury of their oath to try the charge and render a true verdict according to the evidence (p. 3298).

[90] I respectfully adopt the comments of the Ontario Court of Appeal in **R. v. Roy**, [2004] O.J. No. 3940 (Q.L.)(Ont.C.A.) at para. 80, an appeal from a trial judge's refusal to grant a mistrial following a possible, brief observation by jurors of the accused in shackles outside the court room:

> [80] ... the standard instructions concerning the presumption of innocence were adequate to alleviate any potential for prejudice that might have arisen from one or more jurors obtaining a fleeting glimpse of the appellant in shackles. ... In my view, it is fanciful to suggest that the jury would disregard clear instructions concerning the presumption of innocence based on nothing more than a momentary opportunity of viewing an accused person in shackles.

[91] I would not admit the fresh evidence on the handcuffs issue and would dismiss this ground of appeal.

3. Trial Management Issues:

[92] The appellants advance two complaints about the judge's management of the trial. The appellant James says that the trial was "plagued by artificial and unnecessary delays" and that the judge's explanations to the jury were prejudicial to the defence. Both appellants maintain that the judge should not have permitted the jurors to vote at an advance poll because this created "inappropriate interference with the continuity of deliberations, and [exposed the] jurors to different and outside influences," after they began deliberations.

[93] In my view, neither point has merit. I turn first to the delay issue and then consider the point in relation to the jurors voting.

[94] Both Paul Derry and Tina Potts had medical problems that were brought to the attention of the trial judge and Defence counsel. Any delays caused by these medical problems were dealt with by counsel and the trial continued on schedule.

[95] Issues about the genuineness of Potts' and Derry's medical problems were canvassed at trial. Information was provided orally to the Court by Crown counsel and copies of medical condition information were given in vetted form to defence by the Court. The trial judge asked counsel if there was a problem if he told the jury that he had been advised that two witnesses were ill and the trial would have to be adjourned. Neither defence counsel had a problem with this.

[96] I reject the contention that there was undue delay or prejudicial comments by the judge in relation to trial scheduling.

[97] With respect to the voting issue, the facts are these.

[98] The jury commenced its deliberations on the morning of Thursday, July 31, 2003. (pp. 3299 - 3300; pp. 3309 - 3311) The jury deliberated on Thursday, July 31 and Friday, August 1 until the early afternoon. (p. 3329) On August 1 one of the jurors became ill and had to be sent to a hospital. The trial judge had told the remaining jurors to cease deliberating just before 2:52 p.m. on August 1, 2003 (pp. 3346 - 3348).

[99] The Court reconvened at 4:04 p.m. in the absence of the jury and the trial judge raised with counsel the need to offer the jury the right to vote at the

provincial election on Tuesday, August 5. The trial judge expressed concern that if the jurors had to vote on election day (Tuesday) there would be more people at the polls and in small communities it would be harder for the sheriffs to keep the jurors from having contact with others. The judge raised with counsel whether they should be permitted to vote on Friday, August 1, 2003 or Saturday, August 2, 2003. Both days had advance polls. (pp. 3348 - 3349) The trial judge told counsel the returning officer indicated there would be fewer people at the advance poll on Saturday, August 2. He also noted that if all eleven jurors wanted to vote, their polling stations would be all over the County. A deputy sheriff would have to accompany each one. The trial judge indicated that by letting them vote on Saturday it removed the time frame of election day. He did not want to put a time frame on their deliberations. (pp. 3349 - 3350)

[100] All counsel were asked for comments and were given time to think about this proposal. (pp. 3350 - 3351). James' counsel indicated "We've (i.e., both defence counsel) spoken to our client about this . . .". and then offered the proposal that the jury vote the next morning without first deliberating and, therefore, get the voting out of the way without breaking up deliberations on that day.

[101] After counsel had agreed on this procedure, the jury was told:

(a) they had a right to vote;

(b) the Court had to ensure provision was made for that right to be exercised;

(c) it would be preferable for them to vote on Saturday because of the expected smaller voter turnout;

(d) counsel and the trial Judge's consensus was that the jury vote first thing the next morning so deliberations would not be broken up;

(e) each juror would be accompanied by a deputy sheriff;

(f) once voting was done, it would no longer be a factor in their deliberations;

(g) arrangements would be made so the sheriffs would contact their homes and get their voting cards;

(h) when they were with the sheriff they would be allowed to speak to no one;

(i) the sheriff would accompany them up to the polling booth. (pp. 3355 - 3358).

[102] After the jurors were given their instructions, counsel were asked if there was anything further and invited to raise any other points before the jury was brought back in at the end of the day. Neither defence counsel raised anything further. (p. 3358)

[103] The jury then returned to deliberate from approximately 4:30 p.m. to 6:16 p.m. (pp. 3358 - 3360). Court recommenced at 12:10 p.m. on Saturday, August 2nd and the trial judge told counsel that from his conversation with one of the deputies nothing untoward had happened at the voting. Neither Defence counsel had any questions or comments on this. (p. 3363) The jury was then told to return to their deliberations. (p. 3363)

[104] On Sunday, August 3, 2003, at 11:15 a.m., the jury reported they had a verdict. (p. 3366)

[105] In my respectful view, the appellants' complaints on this ground have no basis in either law or fact.

B. <u>Jury Directions Re Potts and Derry</u>:

1. '*Vetrovec*' Warning:

[106] Both the law and common sense recognize that the evidence of some witnesses must be approached with special caution and that a jury should be warned about the potential dangers of acting on their evidence.

[107] If ever there were two such witnesses, they were Derry and Potts. Derry served as a paid police informant. Both were accomplices to the murder. Both had received immunity from prosecution, been placed in witness protection and received housing and other benefits in exchange for their testimony. They had many reasons to say what the prosecution wanted to hear. The appellants each complain that the judge did not adequately warn the jury about the dangers of acting on this testimony. Specifically, the appellants say that the trial judge:

> failed to identify both Derry and Potts as unsavoury witnesses and failed to adequately instruct the jury as to the consequences of such an identification,

> failed to refer to their status as both paid agents and accomplices,

> failed to direct the jury that any evidence to be considered as confirmatory evidence should be evidence independent of those two witnesses, and

> failed to adequately caution the jury as to the dangers of relying upon their evidence;

[108] The appellants say that, as held in **R. v. Sauvé** (2004), 182 C.C.C. (3d) 321 (Ont. C.A.) at para. 82, application for leave to appeal dismissed [2004] S.C.C.A. No. 246, there are four elements to a proper *Vetrovec* warning:

(1) The evidence of certain witnesses is identified as requiring special scrutiny;

(2) The characteristics of the witness that bring his or her evidence into serious question are identified;

(3) The jury is cautioned that although it is entitled to act on the unconfirmed evidence of such a witness, it is dangerous to do so; and

(4) The jury is cautioned to look for other independent evidence which tends to confirm material parts of the evidence of the witness with respect to whom the warning has been given.

[109] The focus of the appellants' attack on the charge relates mainly to points 1, 2 and 4 in **Sauvé**. The basic submission is that the judge did not sufficiently stress that it was dangerous to convict on the evidence of Derry and Potts alone, why it was dangerous to do so and did not properly address the issue of whether there was confirmatory evidence.

[110] On a review of this charge in its entirety, there is simply no substance to these complaints. The judge's charge, read as a whole in the context of this record, amply satisfies the requirement for a suitable warning as delineated in **Sauvé**. The judge's warnings not only do not disclose error, but they were commendably thorough. His review of the potentially confirmatory evidence was likewise accurate and sound.

[111] I turn first to the content of the judge's warnings. As stated in the leading case of **R. v. Vetrovec**, [1982] 1 S.C.R. 811, no particular formula is required and the nature of the warning is within the discretion of the trial judge provided that discretion is exercised within reasonable limits: see **Vetrovec** at pp. 831-32 and **Sauvé** at paras. 86 - 87 As pointed out in **Sauvé**, there is no magic in the use of the words "danger" or "dangerous". The judge's directions identified the evidence of these witnesses as requiring special scrutiny, identified the characteristics of each

witness that brought his and her evidence into serious question and cautioned the jury that it was dangerous and unsafe to act on their unconfirmed evidence. These are the first three elements of the characteristics of a **Vetrovec** warning identified in **Sauvé** .

[112] The judge gave a clear warning about each of Derry and Potts just before each testified and, in fact, while they were in the witness box.

[113] In his instructions to the jury at the close of the case, the judge returned to the issue of approaching Derry's and Potts' evidence with caution. He identified the characteristics of Paul Derry and Tina Potts that brought their evidence into serious question. Not only did he refer to the fact that they were paid agents and accomplices but also that they had criminal convictions, many for dishonesty; that they had lived by committing fraud and dealing drugs; and that they had been given immunity from prosecution in return for co-operating with the police and testifying in Court. (pp. 3162 - 3163) The judge reminded the jury in particular about their criminal records; that criminal convictions may indicate a lack of moral responsibility to tell the truth; and that crimes of dishonesty bear more directly on a witness' credibility. (p. 3161) (pp. - 1688) The judge told the jury that Derry was a paid police agent who had an interest in testifying favourably for the prosecution and that favourable testimony may make the witness believe the police will keep their commitments and promises. He told the jury to approach Derry's testimony with care and caution. Finally, he told them that, in deciding how much or how little they will believe or rely on his testimony, they should take into account the fact that he was a police agent. The judge told the jury that it was dangerous to accept their evidence without support for it in the other evidence (p. 3166) having previously told them that it was unsafe to do so (p. 3162). The judge said: "I warn you that you should be extremely cautious in accepting their testimony" (p. 3162) and again, "In the absence of any supporting evidence you should be reluctant to accept the evidence of Tina Potts and Paul Derry" (p. 3165).

[114] While not the whole warning which the judge gave, the following excerpt shows how thoroughly the judge cautioned the jury about relying on Derry's and Potts' evidence alone:

> ... It is unsafe for you to rely on their evidence alone. That is because Tina Potts and Paul Derry are looked upon by the law as accomplices in the killing of Mr.

> Simmons and as well, Mr. Derry was a police agent. Both have admitted to a series of criminal convictions, many of which involved offences of dishonest[y]. Both have also admitted that they have lived by committing fraud and drug dealings. In addition, these two witnesses were very involved in the offences before the Court. They, according to their own evidence, provided the weapons used, drove the others to the scene of the offence, and disposed of the evidence afterwards. Mr. Derry also, by his own admission, actively participated in the search for Sean Simmons before he was killed.
>
> When arrested for the murder of Sean Simmons both admitted they lied to the police. They were given immunity from prosecution in return for cooperating with the police and testifying in Court. Paul Derry was paid $500 per week while working as a police agent and he and Ms. Potts were provided with an apartment. Mr. Derry's drug debt was paid off and both he and Ms. Potts were relocated and entered the witness protection program.
>
> Mr. Derry acknowledged in approaching the police he was looking to see if he could work an operation for them. In other words, he was looking to make money and obtain immunity for himself and Ms. Potts. You should examine all the other evidence in this case and look for evidence that confirms or supports that of Tina Potts and Paul Derry. What you should look for is evidence that agrees with the important parts of their testimony and makes you more confident that their evidence at trial is true (pp. 3162 - p. 3163);

[115] These warnings, in my view, were commendably thorough and completely correct.

[116] I turn next to the issue of the judge's instructions concerning confirmatory evidence, the fourth point noted in **Sauvé**. The appellants submit that the judge's caution was in error in relation to the existence of confirmatory evidence. They say that the trial judge did not direct the jury that "confirmatory" evidence had to be independent of the witnesses and that this is a critical concern.

[117] The appellants' assertion in this regard is simply not borne out by what the trial judge said in his charge:

> ... You should examine all the other evidence in this case and look for evidence that confirms or supports that of Tina Potts and Paul Derry. <u>What you should</u>

> look for is evidence that agrees with the important parts of their testimony and makes you more confident that evidence at trial is true. (p. 3163)
>
> . . .
>
> ... As a matter of law I can tell you that both of them are looked upon as accomplices and it is a rule of law that the evidence of one accomplice cannot confirm or support the evidence of another. You should not consider their evidence to see if they do, in fact, support one another (pp. 3165 - 3166).
>
> (Emphasis added)

[118] The judge then reviewed some evidence which the jury might find supported that of Derry (and to some extent, that of Potts). For example, he referred the jury to certain intercepts noting as well defence counsel's position that some of the evidence was not confirmatory (pp. 3163 - 3166).

[119] I cannot accept the submission that the judge erred by failing to review potentially confirmatory evidence. While his review was not exhaustive, he did refer the jury to various items of potentially confirmatory evidence while making clear the position of the defence. He emphasized that whether or not the evidence was confirmatory was for the jury to decide.

[120] The trial judge, in my view, in his mid-trial and final instructions made it clear to the jury that Derry and Potts were suspect witnesses, why that was so and provided strong warnings that it was unsafe to act on their evidence unless it was confirmed by other independent evidence. The judge drew the jury's attention to evidence which they might conclude confirmed material parts of Derry's evidence. I see no error of law in the manner in which the judge provided these cautionary instructions.

[121] Before leaving this issue, I would simply add a word about cases such as **Sauvé** which set out the components of a proper **Vetrovec** warning. While this listing of components provides a useful guide to trial judges, it ought not to be used as a checklist for identifying reversible error. The trial judge has considerable discretion as to whether and in what form a so-called **Vetrovec** warning is given:

see, e.g. **R. v. Bevan**, [1993] 2 S.C.R. 599 at 614 - 15; **R. v. Brooks**, [2000] 1 S.C.R. 237 *per* Major, J. at para. 79 and *per* Bastarache, J. at para. 3. I would not wish to see the useful guidance given in **Sauvé** and similar cases converted into a vehicle for return to "blind and empty formalism" which was renounced by the Supreme Court in **Vetrovec**.

[122] I conclude that the judge did not err in his warning to the jury about Derry's and Potts' evidence and would dismiss this ground of appeal.

2. Use of Derry's denials:

[123] The appellants argue that the trial judge misdirected the jury as to the use it could make of certain denials by Derry in response to suggestions put to him in cross-examination. The submission is that the judge's instructions could have led the jury to think that they should ignore Derry's answers. Respectfully, this point has no merit.

[124] Suggestions made by counsel to a witness in cross-examination are not admissible evidence of the truth of the suggestions: see e.g. Sopinka, Lederman and Bryant, **The Law of Evidence in Canada**, 2nd ed. (Toronto and Vancouver: Butterworths, 1999) at para. 16.101. It was not misdirection for the judge to so instruct the jury as he did in this case.

[125] The point raised here is that the judge's instructions could have led the jury to ignore the answers given by the witness. This follows, say the appellants, because the judge told the jury to "completely ignore" suggestions put to the witness by counsel and which were denied and not found elsewhere in the evidence.

[126] I cannot accept this interpretation of the judge's charge. In context, it is clear that the judge simply told the jury that factual propositions put to the witness by counsel were not evidence: pp.3151 - 3152:

> Now a factual suggestion put to a witness in cross-examination is not evidence unless the suggestion is accepted by the witness or was found elsewhere in the

> evidence. Counsel's question is not proof of the truth of a suggestion which is not accepted. The suggestion standing alone is not evidence.
>
> You should completely ignore suggestions in cross-examination, which were denied by the witness and not found elsewhere in the evidence. For example, Mr. Coady during cross-examination of Mr. Derry, a number of times made suggestions to Mr. Derry. Mr. Derry often disagreed with counsel's suggestions. These suggestions by Mr. Coady in his questions are not evidence. (Emphasis added)

[127] By telling the jury not to accept the question posed as evidence, the judge was only affirming to the jury that, as stated in other parts of his charge, they must focus only on the evidence. The jury was properly instructed as to how to go about the task of assessing the credibility of witnesses and, of course, they were not instructed to ignore any testimony in carrying out that assessment; instead, and properly, they were told to "... consider all the evidence that you saw and heard in this courtroom ... The evidence includes what each witness said in answering the questions the lawyers asked, but the questions themselves are not evidence." (p. 3138).

[128] I see no realistic possibility that the jury could have taken from the judge's instructions that they were to ignore Derry's answers to questions posed in cross-examination. On any fair reading, the instructions were to exactly the opposite effect.

[129] I would dismiss this ground of appeal.

C. First Degree Murder:

[130] The appellants submit that the trial judge should not have left either planned and deliberate murder or contract killing to the jury and that he erred in his instructions concerning contract killing. I will consider these submissions in turn.

1. Planned and Deliberate Murder:

[131] The appellants submit that there was no evidence that either Kelsie or Gareau planned or deliberated upon Simmons' murder. They submit, therefore, that the judge was wrong to instruct the jury that it was open to them to find that the appellants were complicit in a planned and deliberate murder committed by either Kelsie or Gareau.

[132] I cannot accept this submission. There was a considerable body of evidence which, if accepted by the jury, would have entitled them to find that the deceased was shot by Kelsie in the company of Gareau in pursuance of a planned and deliberate murder ordered by Smith and aided by James. The judge briefly reviewed some of the evidence of planning and deliberation in his charge: (pp. 3244 - 3245)

> There is the evidence of Mr. Derry and Ms. Potts of Mr. James giving $20 to Mr. Gareau and the evidence of the conversation between Mr. James and Mr. Gareau. Ms. Potts said Mr. James said, "I'll get you later," to Mr. Gareau. Mr. Derry said that after Mr. James gave him the $20, Mr. James said to Mr. Gareau to take off to the Ship Victory and then to go back home. He said he understood Mr. Gareau was to go to the Ship Victory as soon as the murder was committed.
>
> There was also Mr. Derry's evidence of the conversation between Mr. James and Mr. Kelsie after he handed him the gun about, as Mr. Derry said, Mr. James mentoring Mr. Kelsie. That is, giving him advice on how to kill Mr. Simmons and as well, the conversation later when Mr. Kelsie returned to the car. Mr. Derry said after Gareau and Kelsie left the plan was for the rest of them to go set up around the corner, wait for Deano to come back, when Deano came back we were going to leave. In relation to Mr. Gareau he said he was to leave, go to the Ship Victory, and then take a cab over to the Square. He said James communicated these instructions to Gareau. ...

[133] I would dismiss this ground of appeal.

2. Contract Killing:

[134] The appellants submit that:

(i) the factual basis for the Dean Kelsie "arrangement" was not admissible;
(ii) the trial judge's charge was defective because he did not clearly tell the jury that any "arrangement" had to have come into existence before the killing; and
(iii) there was an inadequate factual basis in the evidence to support the possibility of murder by arrangement with Gareau.

[135] The appellants' submission in relation to point (i) is correct. The evidence concerning the arrangement with Kelsie consisted of an out of court statement by Kelsie which the Crown now concedes was not admissible as evidence of any arrangement for him to kill Simmons. I will address this issue later in my reasons. The remaining issues are whether there was evidence to leave to the jury about an arrangement involving Gareau and whether the judge erred by failing to tell the jury that any arrangement had to precede the killing. I will consider these points in reverse order.

(a) prior arrangement:

[136] A murder is planned and deliberate when it is committed "pursuant to an arrangement." Section 231(3) of the **Code** provides:

> **231.** (3) ... murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.

[137] The requirement that the murder be committed "pursuant to an arrangement ..." means that the arrangement must have been in place at the time of the murder: see **R. v. Sauvé, supra** at paras. 151 - 153.

[138] The appellants submit that the judge failed to instruct the jury about this requirement. I cannot accept this submission. Any fair reading of the judge's charge shows that he made this requirement crystal clear.

[139] The trial judge told the jury that for an arrangement to exist, there had to be the *quid pro quo* of the recipient to cause or help cause the death of another person. He also told them the murder must be committed pursuant to the arrangement (p. 3257). He provided definitions of the word "pursuant" which included "in accordance with" and "by reason of" or "done in consequence of." (p. 3257) The trial judge told the jury that for there to be an arrangement, the person who killed Mr. Simmons must know that he is to be paid for doing the killing; he must commit the murder in accordance with or by reason of an arrangement in which there is to be gain or benefit to himself (p. 3258). He added: "... the person who killed Mr. Simmons must know of the arrangement under which there is to be gain or benefit to himself prior to the murder." (p. 3258) Each of these instructions made it clear that the arrangement had to have been in place before the killing.

(b) evidentiary basis for an arrangement with Gareau:

[140] The appellants submit that there was no evidence of any prior arrangement with Gareau. The only evidence in relation to any arrangement with Gareau related to him being given some money by James and being told by James words to the effect "I'll get you later" just before the killing. The submission is that this was not sufficient evidence to justify leaving murder by arrangement with the jury. (I note that the appellants specifically do not submit that only the actual killer can be made liable for first degree murder through s. 231(3): **R. v. Nenadic** (1997), 88 B.C.A.C. 81; B.C.J. No. 619 (Q.L.)(C.A.), at paras. 146 - 147, leave to appeal dismissed [1997] S.C.C.A. 302; the appellants' submission is that there is no evidence of prior arrangement in this case.)

[141] The evidence of an arrangement with Gareau was this. Derry testified that James had given Gareau $20.00 just prior to the murder and told him to take off to the Ships (sic) Victory, a bar, afterwards. (pp.1743 - 1744). Tina Potts testified that after she, Derry, Kelsie and James met up with Gareau just before the killing, James talked to Gareau. She said that Gareau wanted a fix because he was "dope-

sick", that James gave him $20.00 and said "... 'I'll get you later. Basically, like, I'll do something for you later, but here's 20 bucks.'" (p. 957)

[142] The jury could have concluded that Derry's and Potts' evidence on this point was, to some extent, confirmed by intercept number 81 (see para. [46] above) recording a conversation among James, Derry and Potts on March 28, 2001 (pp.1856 - 1857; pp. 1866 - 1867). While it is Derry that refers to the 20 dollars on the tape, it would have been open to the jury to infer that James accepted this version of the events, including him having given Gareau $20.00.

[143] Derry's and Potts' testimony and Intercept 81 formed a factual basis to leave it to the jury to decide if the $20.00 payment and apparent promise "to get you later" was an arrangement for the purposes of s. 231(3) of the **Criminal Code**. The trial judge rightly left this evidence to the jury along with proper instructions on what constitutes a murder by arrangement.

[144] The appellant, Smith argues that the trial judge erred by telling the jurors that murder by arrangement was a separate offence. However, the judge did not so instruct the jury. Rather, the trial judge told the jury that murder by arrangement was an alternative way in which murder may become first degree murder (pp. 3247- 3248): see **R. v. Droste**, [1984] 1 S.C.R. 208; **R. v. Richardson**, [1994] 1 S.C.R. 155. There was no error in this instruction.

D. Kienapple:

[145] The appellants argue that they should not have been convicted of both the substantive offence of first degree murder and the offence of conspiring to commit murder. They maintain that all of the elements of the conspiracy are subsumed in the first degree murder conviction. They say that the same behaviour that is said to establish their liability for first degree murder is the conspiracy to commit first

degree murder. Thus, according to **R. v. Kienapple**, [1975] 1 S.C.R. 729, the conspiracy charge ought to be conditionally stayed: **R. v. Provo**, [1989] 2 S.C.R. 3.

[146] The **Kienapple** principle is that a person must not be punished twice for the same wrong. How this principle applies was set out in **R. v. Prince**, [1986] 2 S.C.R. 480. The Court held that two offences will constitute the “same wrong” only if two conditions are met.

[147] First, there must be a "factual nexus" between the charges: see p. 492. Generally, this means that there must be “...an affirmative answer to the question: Does the same act of the accused ground each of the charges? Second, there must be a "legal nexus" between the offences. This condition will be satisfied only "... if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle." **Prince** at p. 498.

[148] The focus of the appellants’ submissions is the first condition, that is the factual nexus between the two charges. I am not persuaded that the first condition is met here. The act of agreement with the requisite intent is the gist of conspiracy, while counselling or aiding a planned and deliberate murder requires encouragement of or assistance in carrying out the substantive offence: see, e.g., **Sheppe v. The Queen**, [1980] 2 S.C.R. 22 and **R. v. Grewall** (2003), 185 B.C.a.C. 247; B.C.J. No. 1825 (Q.L.)(C.A.); **R. v. Hamilton**, [2005] 2 S.C.R. 432; **R. v. Greyeyes**, [1997] 2 S.C.R. 825 at para. 26. Thus, the act of reaching agreement and acts of counselling or aiding are not necessarily the same acts.

[149] Even if the first condition is met, the appellants’ argument fails. The first condition – the existence of a factual nexus – is not sufficient to engage the **Kienapple** principle. As noted by Dickson, C.J. in **Prince**, **Kienapple** has been found not to apply in many cases in which a single act of the accused gave rise to two charges: at pp. 494-495. The second condition – the requirement of a legal nexus – must also be met. Here, it is not.

[150] To determine whether this second condition is satisfied, one must ask whether there is any "additional and distinguishing element" that goes to guilt present in the conspiracy convictions that is not present in the convictions for first degree murder.

[151] Smith's liability for murder, as left to the jury, depended on a finding that he counselled James to commit the first degree murder of Simmons (p. 3287). Counselling requires "deliberate encouragement" or "active inducement", but not an agreement as is required for conspiracy: **R. v. Hamilton**, **supra**.

[152] James' liability, as left to the jury, depended on his either having aided Kelsie or Gareau to commit a first degree murder or having counselled one or the other of them to do so. As noted earlier, counselling does not require agreement which is the essence of conspiracy. Aiding in this context requires performing acts which help or assist the killer: **R v. Greyeyes**, **supra** at para. 26. As the judge correctly instructed the jury, the Crown did not have to prove an agreement between James and either Kelsie or Gareau to establish that James aided one or both of them to murder Simmons (p. 3269). Even with respect to murder by arrangement, the possible "arrangements" were not necessarily the same as the possible agreements that underpinned the conspiracy charge. It follows, in my view, that the required legal nexus did not exist to engage the **Kienapple** principle.

[153] I would dismiss this ground of appeal.

E. <u>Hearsay Evidence</u>:

1. Hearsay evidence of Jylene Simmons:

(a) The issue:

[154] As noted earlier, Jylene Simmons, the wife of the deceased, provided evidence of a possible motive for Smith to want Simmons "whacked." She testified that her husband had been beaten twice in 1994, and that Smith had been present when the second beating took place. She also testified, over defence objection, that her husband had told her that he had been beaten the first time because he had been accused of having an affair with the girlfriend of the head of the Hell's Angel's Halifax Chapter. The judge ruled this testimony was admissible under the principled approach to the admission of hearsay evidence. The appellant Smith says the judge erred in doing so.

[155] Simmons' statement to his wife and repeated by her in court was clearly hearsay. Under the principled approach, hearsay evidence that is not admissible under any of the traditional hearsay exceptions may be admitted if the party adducing it shows that it meets the requirements of necessity and threshold reliability. If these requirements are satisfied, the judge nonetheless has a discretion to exclude the evidence if it is of little probative value and its admission would be highly prejudicial to the other party.

[156] In this case, the necessity requirement was clearly met; that was never in dispute. Simmons was obviously not available to testify. The questions about the admissibility of his out of court statement relate to the requirement of threshold reliability and whether admitting the evidence was unduly prejudicial.

[157] The judge found that the requirement of threshold reliability had been established and that admitting the evidence would not be unduly prejudicial to Smith. In my view, he was right and I would dismiss this ground of appeal.

[158] Before turning to an analysis of the arguments advanced by the appellant Smith, it will be helpful to set out the disputed evidence in more detail and to place it in context.

[159] Ms. Simmons testified that Smith had been a friend of her late husband and that her husband had lived with Smith in Dartmouth from around the end of 1992 until October of '93. She knew Smith to be a Hell's Angel and that her husband had other friends or acquaintances who were associated with the Hell's Angels. (p. 1588) These included Greg Brushett, Mike McCrae and Clay McCrae. She knew that for a period of time her husband had wanted to become a Hell's Angel (p. 1591). She said she knew Maria Novelli who was Mike McCrae's wife or girlfriend (p. 1594). Ms. Simmons testified that Mike McCrae had been away on a trip in early 1993 and had asked Simmons to check on Ms. Novelli to make sure that she was okay.

[160] Ms. Simmons testified about two beatings her late husband had received. The first occurred around Thanksgiving of 1994. She had gone to New Brunswick. Within 48 hours of arriving there, she received a "phone call that she should come home by herself." (p. 1996). When she arrived home, Simmons had stitches on his

eyelid and a black eye. The disputed evidence was Ms. Simmons' testimony about what Mr. Simmons said to her about the beating. Ms. Simmons' evidence was that he told her he had been beaten because someone had accused him of having an affair with Maria Novelli.

[161] Ms. Simmons also testified about a second beating which occurred the day after she arrived home from New Brunswick. Several people came to the house including Clay McCrae (Mike McCrae's brother and also a Hell's Angel), Smith and Brushett. McCrae talked to Simmons in the bedroom and she went down to the basement area. Smith was in the doorway of the landing area and the others were in the bedroom with Simmons. She heard screaming and groaning and hitting. She left the house. After about 20 minutes, she returned to the house and found Simmons in the doorway, badly beaten. Anything that had to do with the Hell's Angels, including clothing or photographs, had been taken. She identified a photograph that she had taken of Simmons and Smith, probably in February of 1994, and testified that this photograph had been removed from their rec room following the beating (p. 1609). She indicated that she had spoken to Smith on the telephone once following the beating and that she was looking for personal photographs. Smith told her that he had not taken any personal pictures, just pictures affiliated with Hell's Angels (p. 1610). The police found this photograph in Smith's attic after his arrest.

[162] Simmons and the family decided within a few hours of the beating to leave town. Ultimately, they returned to Halifax in December of 1998 (p. 1627), Simmons having come towards the end of October ahead of the family. Ms. Simmons said that she understood her husband to have lived for a time on the same street as Clay McCrae and Brushett.

[163] The Crown's position was that the out of court statement by Simmons about why he had been beaten was significant. It provided a possible motive for the Hell's Angels wanting to have Simmons killed. The defence said that the facts did not support the Crown's theory about motive. In addition to the evidence about Simmons having returned to Halifax in 1998 and living near McCrae and Brushett, there was also evidence that, in late 1997 and early 1998, he had been named in the Halifax media a number of times as being involved in a high profile case. There was evidence Simmons had been in the area during these times. Counsel suggested that it made no sense to think that the Clubhouse was looking for Simmons in the

autumn of 2000 given that his presence would have been obvious to them long before.

(b) The judge's ruling:

[164] The judge found that the evidence met the test of threshold reliability. He reasoned that the deceased's statement had been made shortly after the events it described and in circumstances that gave rise to no apparent motive to misrepresent the truth. The deceased, the judge thought, would not appear to have had any motive to lie to his wife about having been accused of having an affair with another woman.

[165] The judge also carefully assessed the potential prejudicial effects of the hearsay evidence. The deceased had identified his attacker and made certain other statements to Ms. Simmons. The judge ruled that she could not repeat these aspects of the statement because of their potential prejudicial effect. He found, however, that it would not be unduly prejudicial to permit Ms. Simmons to testify about Simmons' statement as to why he had been beaten.

(c) Standard of appellate review:

[166] Appellate review of the admission of these statements must accept the trial judge's findings of fact absent manifest error. However, the correctness standard of review applies to the questions of whether the judge invoked an incorrect legal standard, failed to consider a required element of a legal test or made some other error in principle. In addition, the judge's application of the legal principles to the facts will generally be reviewed for correctness in rulings such as this concerning the admissibility of evidence: **R. v. Merz** (1999), 140 C.C.C. (3d) 259 (Ont. C.A.) at para. 49; **R. v. Underwood (G.B.)** (2002), 170 C.C.C. (3d) 500 (Alta. C.A.) at paras. 60-63. **R. v. Assoun** (2006), 207 C.C.C. (3d) 372, leave to appeal ref'd [2006] S.C.C.A. No. 223(C.A.) at para. 54; **R. v. P.S.B.**, (2004), 222 N.S.R. (2d) 26 (C.A.) at para. 37.

(d) Analysis:

[167] The appellant Smith submits that the judge made two errors in his analysis and, therefore, wrongly admitted this evidence. First, the judge was wrong to find that the evidence met the requirement of threshold reliability and, second, the judge erred by failing to exclude the evidence because it was of slight probative value and highly prejudicial. I will address these submissions in turn.

(i) threshold reliability:

[168] On the issue of threshold reliability, the appellant Smith makes two main points: Simmons may well have had a motive to lie and his telling Ms. Simmons that he had merely been accused of having an affair carried no circumstantial guarantee of trustworthiness. As to the first point, the submission is that Simmons' involvement in the drug business provided possible reasons for him to lie to his wife about the beating. As to the second point, it is argued that while admitting an affair to Ms. Simmons might have some guarantee of trustworthiness given the improbability of his making a false statement of this nature to her, there is no such guarantee in Simmons' statement because he said that he had merely been accused of the affair.

[169] In my view, the judge did not err in law in finding that this statement met the test of threshold reliability. Here, there was no realistic risk that Simmons was mistaken about why he had been beaten; the question of reliability was whether he had been truthful with Ms. Simmons. As the judge found, the nature of the statement and the circumstances in which it was made provided sufficient substitute guarantees of reliability to meet the threshold reliability standard.

[170] The requirement of threshold reliability may be met in two different ways. The first is to show that, in the circumstances, one may have sufficient trust in the truth and accuracy of the statement. The other is to show that, in the circumstances, the truth and accuracy of the statement may be adequately assessed even though the statement is not being made in court, on oath or subject to cross-examination: see **R. v. Khelawon**, [2006] S.C.J. No. 57 (Q.L.) at paras. 62 -63; **R.**

v. Wilcox (2001), 152 C.C.C. (3d) 157 (N.S.C.A.); **R. v. Czibulka** (2004), 189 C.C.C. (3d) 199 (Ont.C.A.), leave to appeal ref'd [2004] S.C.C.A. 502 . As Charron, J. put it in **Khelawon** at para. 105, hearsay evidence is not admissible under the principled approach "... unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy."

[171] In this case, threshold reliability may only be established by showing that Simmons' statement to Ms. Simmons is sufficiently trustworthy. There is no substitute basis for testing the evidence. The statement was not made on oath or videotaped; there are no other substitutes for the inability of the jury to see and hear him give this evidence in court. Thus, the narrow question is whether the judge was right to find that the circumstances in which the statement was made provide sufficient trust in the truth and accuracy of his statement. In other words, do the circumstances "... substantially negate the possibility that Simmons was untruthful or mistaken ...": **R. v. Smith**, [1992] 2 S.C.R. 915 at 933.

[172] The reliability – that is, the accuracy and truthfulness – of a declarant's statement depends on what have been referred to as the person's "testimonial factors": memory, perception, sincerity and use of language: see, e.g., Stanley Schiff, **Evidence in the Litigation Process**, 4th ed., Master Ed. (Scarborough: Carswell, 1993) vol. 1 at 296-7. The factors of memory, perception and use of language are concerned with the accuracy of the declarant's perception and recounting of the events in question. The concern is whether the declarant, although honest, was either mistaken or inappropriately expressed what was perceived. The factor of sincerity, on the other hand, is concerned with the declarant's truthfulness. The concern is that the declarant is deliberately attempting to mislead.

[173] Turning to the present case, there can be no realistic concern about the accuracy of Simmons' statement to Ms. Simmons. The circumstances show that he made the statement within hours of the beating so that it would have been fresh in his memory. As for his perception of the events, it is hard to imagine that he could have been mistaken about why he had been beaten. With respect to his use of language, it is impossible to think that he would have mis-expressed himself to Ms. Simmons in this simple statement. So the issue of threshold reliability comes down to a consideration of Simmons' sincerity and whether the circumstances

substantially negate the possibility that he lied to her about why he had been beaten.

[174] The judge, in my view, did not err in finding that there were circumstantial guarantees of Simmons' honesty in this statement. The circumstances showed that Simmons had no known motive to lie to Ms. Simmons and the nature of the statement itself provided some guarantee that it was true.

[175] It is well-settled that if the circumstances show that there is no known motive to lie, this may provide a sufficient circumstantial guarantee of trustworthiness to meet the requirement of threshold reliability: **R. v. Starr**, [2000] 2 S.C.R. 144 at para. 215; **R. v. Khan**, [1990] 2 S.C.R. 531 at pp. 541-42 and **Smith, supra** at pp. 936-37. The absence of any motive to lie may be inferred from, among other things, the nature of the relationship between the declarant and the person to whom the statement was made: see e.g., **R. v. Czibulka**, **supra** at p. 215-16. Here, the evidence about the relationship between Simmons and Ms. Simmons showed that he had no known reason to lie to her about why he had been beaten.

[176] The evidence at trial showed that the relationship between Simmons and Ms. Simmons at the time appeared to be a strong one. She immediately came home when she was needed. They continued to live together and were subsequently married after they left Halifax. From Ms. Simmons' testimony it is apparent that she knew about Simmons' involvement with the drug business and the Hell's Angels. The appellants' suggestion that this provided a motive for him to lie to her is not consistent with the evidence. I agree with the judge that, on this record, it was shown that Simmons had no known motive to lie to Ms. Simmons about why he had been beaten.

[177] The nature of the statement itself may also, in some circumstances, provide assurance of its truthfulness. I agree with the judge that this was such a case.

[178] The fact that a statement is, to the declarant's knowledge, contrary to his pecuniary, proprietary or penal interest is some circumstantial guarantee that it was not fabricated: Sopinka, Lederman and Bryant, **The Law of Evidence in Canada, supra** at para. 6.97 *ff*. Of course, the strict requirements of the common law exception relating to declarations against interest are not satisfied in this case.

However, the underlying rationale of the traditional exception is pertinent: people generally will not fabricate statements which are contrary to their own interests: see, for example, **Czibulka** at p. 214. In my view, the judge was right to find that Simmons was unlikely to falsely tell Ms. Simmons that he had been accused of having an affair with Maria Novelli.

[179] Ms. Simmons had been away when Simmons was beaten, providing Simmons an opportunity to fabricate a story, if he had been so inclined. Ms. Simmons knew Maria Novelli and knew that Simmons had been asked to "look after her" and had done so. Simmons, with the time for reflection which he had and with his lifestyle of which Ms. Simmons was aware, could surely have come up with a less awkward explanation for the beating if he had wished to lie to Ms. Simmons about it. While it is true, as the appellant Smith points out, that Simmons' statement was not a confession of the affair, it was certainly open to the judge to find that it was highly unlikely that Simmons would have fabricated an allegation of this nature against himself to explain the beating to Ms. Simmons.

[180] In summary, the judge did not err in finding that threshold reliability had been established in this case. The circumstances provided sufficient assurance that the deceased could not have been mistaken about why he had been beaten and that he was unlikely to have lied about it to Ms. Simmons.

(ii) probative value v. prejudice:

[181] The appellant Smith submits that the judge erred in assessing the probative value and prejudicial effect of the evidence. With respect to probative value, the submission is that this evidence provided little in the way of motive for the killing, given the long lapse of time between the beating (October of 1994) and the killing (October, 2000) In short, if the Hell's Angels wanted Simmons dead over the alleged affair with Maria Novelli, they could easily have killed him in 1994. There is also evidence that Simmons had been back in town for a couple of years by the fall of 2000, that he had lived close to members of the Hell's Angels and that his name had appeared in the press. As argued by defence counsel at trial, Simmons' presence in Halifax could not have been news to the Hell's Angels in the fall of 2000. With respect to the prejudicial effect of this evidence, Smith says that there

was a significant risk that the jury might not recognize how weak the evidence of motive was. Taking these factors into account, Smith says that the judge ought to have excluded this evidence.

[182] I cannot accept these submissions. The potential probative value of this evidence, in the context of this record, cannot be dismissed as slight. The jury could (and, of course, I emphasize could) have found this evidence, in combination with other evidence, in particular Smith's presence at the second beating, provided some link between Smith and a motive to harm Simmons which, in turn, tended to provide an explanation of why Smith wanted Simmons "whacked" as Derry testified. As for the prejudicial effect of the evidence, the relevant consideration is not how damaging the evidence may have been to the defence, but rather to whether its admission impaired the accused's right to a fair trial or whether the evidence would be misused by the jury: **R. v. B.(P.S.), supra** at para. 50. As noted, the judge limited the evidence about Simmons' statement on the ground that certain aspects would be unduly prejudicial. In my view, the admission of the aspects which the judge permitted in evidence did not impair Smith's right to a fair trial or create a risk that the evidence would be misused by the jury. To paraphrase Lamer, C.J. in **Smith**, the jury, properly instructed, was perfectly capable of determining what weight ought to be attached to this evidence and of drawing reasonable inferences from it.

[183] I would dismiss this ground of Smith's appeal.

2. Co-Conspirator's Exception:

(a) Introduction:

[184] Both appellants submit that the trial judge mishandled the out of court statements by the alleged co-conspirators. They allege two main errors: first, that the judge wrongly admitted and gave wrong legal instructions about out of court statements by Gareau and Kelsie; and, second, that in a number of instances the

judge gave erroneous and incomplete instructions about the purposes for which the jury could use some of the evidence.

[185] I agree with the appellants that the judge made two errors in this regard. Both relate to an out of court statement by Kelsie which Derry reported in his testimony. The judge told the jury that they could use this evidence in determining whether there had been a conspiracy and also as to whether there had been a murder by arrangement. In my respectful view, both of these directions were in error and the out of court statement by Kelsie was not admissible for any purpose.

[186] All of the appellants' various submissions on these issues turn on the hearsay rule and the exception to it in relation to statements by co-conspirators. Before turning to analyse these submissions, it will be helpful to set out a brief summary of the relevant legal principles. I will then deal with the submissions directed to the allegedly erroneous instructions about the use the jury could make of various items of evidence and conclude with my opinion respecting Kelsie's and Gareau's out of court statements.

(b) Overview of legal principles:

[187] Evidence is hearsay if it has two features: first, that it is a statement given other than by the person who made it while testifying in the proceeding in which it is tendered and, two, that it is being offered to prove the truth of its contents. The hearsay rule is, thus, concerned both with who made the statement and the purpose for which the statement is offered. Evidence is not hearsay simply because a witness is repeating a statement originally made out of court. Evidence is only hearsay if, in addition to that, the evidence is being offered to prove the truth of what was said. As Charron, J. said for the Court in **Khelawon** at para. 35, "[t]he essential defining features of hearsay are ... (1) the fact that the statement is adduced to prove the truth of its contents; and, (2) the absence of a contemporaneous opportunity to cross-examine the declarant. ..." It follows that whether or not evidence is hearsay depends on the purpose for which it is offered.

[188] Determining the purpose for which an item of evidence is offered may be difficult. The analysis requires looking at the proposed evidence in light of the

substantive law that governs the case and the principles of relevance. The same item of evidence may be hearsay for one purpose and not hearsay for another purpose.

[189] The distinction between hearsay and non-hearsay is both critical and difficult in conspiracy cases. The gist of the offence is the agreement to perform an illegal act or to achieve a result by illegal means: **R. v. Douglas**, [1991] 1 S.C.R. 301 at p. 316. The agreement can rarely be proved by direct evidence. As Rinfret, J. said for the Supreme Court in **R. v. Paradis**, [1934] S.C.R. 165 at p. 168:

> The actual agreement must be gathered from "several isolated doings", ... having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

[190] It follows from this that in many instances, acts and declarations of alleged co-conspirators may not be hearsay but original circumstantial evidence of the existence of the conspiracy, but these same acts and declarations may be hearsay for the purpose of showing who were members of the conspiracy: see, e.g., **Schiff, Evidence in the Litigation Process, supra**, at pp. 491-492; J.C. Smith, "*Proving Conspiracy*", [1996] Crim.L.R. 386 at pp. 387 - 388. This point was very clearly made by the High Court of Australia in **R. v. Ahern** (1988), 165 C.L.R. 87 at p. 93:

> In conspiracy cases a clear distinction is to be made between the existence of a conspiracy and the participation of each of the alleged conspirators in it. Conspiracy is the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means and it is the fact of the agreement, or combination, to engage in a common enterprise which is the nub of the offence. The fact can seldom be proved by direct evidence of the making of an agreement and must in almost all cases be proved as a matter of inference from other facts, that is to say, by circumstantial evidence. For this purpose, evidence may be led which includes the acts or declarations of one alleged conspirator made outside the presence of the others provided such evidence is not led to prove against the others the truth of any assertion or implied assertion made by the actor or the maker of the statement. It may take the form of evidence of separate acts or utterances from which the fact of combination might be inferred. Led in that way, it is not

> hearsay and is not dependent upon some circumstance to take it outside the hearsay rule, such as an implied authority making the acts and words of one the acts and words of the other.

[191] Thus, it is particularly important in conspiracy cases to consider, in light of the purpose for which out of court acts and statements are adduced, whether for that purpose, the evidence is hearsay or not. Evidence may not be hearsay for the purpose of showing the existence of an agreement, but may be hearsay for the purpose of showing membership.

[192] Hearsay evidence is inadmissible unless it fits within one of the many traditional exceptions to the rule or its admission is justified under the principled approach which I discussed earlier. This case is concerned with the admissions exception. An "admission" is an out of court statement by a party to a proceeding which, although hearsay, is admissible if it is offered at the instance of an opposite party. For example, an out of court statement by an accused person, while hearsay, is admissible at the instance of the Crown. (This is subject to special rules, not relevant here, which relate to out of court statements by an accused to a 'person in authority').

[193] An admission is generally admissible only against the party who made it. For example, if the Crown led evidence that Smith, in an intercepted communication with Derry, said something implicating James, that out of court statement generally would be admissible as against Smith but not against James. But this rule is broadened in cases in which the statements are made by persons engaged in a conspiracy or other crimes of common intention. The broadening of this rule in alleged conspiracies is the focus of this case.

[194] The general rule that an admission is only evidence against the party who made it is broadened in a conspiracy case if three requirements are established. If the Crown establishes beyond a reasonable doubt that the conspiracy alleged in the indictment existed and that the accused was likely a member of it, the jury is entitled to use out of court statements by other likely members of the conspiracy against the accused. This principle applies only to statements made in furtherance of the conspiracy - that is, while the conspiracy was ongoing and toward the accomplishment of the common object: see, e.g. **R. v. Mapara**, [2005] 1 S.C.R. 358 at para. 8, citing **Sopinka, Lederman and Bryant, supra** at p. 303. While

this is known as the “co-conspirators” exception to the hearsay rule, it is really a special branch of the admissions exception.

[195] To summarize, Crown evidence of an out of court statement by one accused is generally admissible as evidence of its truth only against that accused. This flows from the admissions exception to the hearsay rule. In a conspiracy case, however, this limitation is relaxed: out of court statements by persons who are proved probably to have been members of the conspiracy and which are made in furtherance of it are admissible against other probable members.

[196] There is a special set of rules governing how co-conspirators’ admissions are to be dealt with at trial. In a jury trial, these rules are part of the judge’s instructions to the jury because (at least in Canada) the jury must make the findings of fact which permit the rules to be applied. The jury, rather than the trial judge, determines whether out of court statements by one alleged conspirator are admissible against another alleged co-conspirator.

[197] The process to be followed by the jury in making this determination consists of three "steps" as set out by the Supreme Court of Canada in **R. v. Carter**, [1982] 1 S.C.R. 938. The jury must first determine beyond a reasonable doubt on “all the evidence” whether the alleged conspiracy existed. Then it must determine whether, on the balance of the probabilities and using only evidence independently admissible against each accused, the accused and the maker of the out of court statement were members of that conspiracy. If those two findings are made, the jury may then use the out of court statements, along with the other admissible evidence, to determine whether the Crown has proved guilt beyond a reasonable doubt.

[198] Step one of this process is concerned with whether the Crown has proved the existence of the conspiracy alleged in the indictment. It is not concerned with who were the members of the conspiracy. This was explained by McIntyre, J. in **R. v. Barrow**, [1987] 2 S.C.R. 694 at pp. 741-2:

> It is entirely possible, and not uncommon, to be satisfied beyond a reasonable doubt on all the evidence that a conspiracy for the purposes alleged in the indictment existed while still being uncertain as to the identity of all the conspirators. ... On this first step what is considered is the existence of the

> conspiracy, not individual membership. At this point the hearsay exception is inapplicable. This is in accordance with the view expressed by Martin J.A. in *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525, in reference to the conspirator's exception to the hearsay rule, where he said, at p. 544:
>
> > It only comes into play, however, where there is evidence fit to be considered by the jury that the conspiracy alleged between A and B exists. It is clear that where the fact in issue to be proved is whether a conspiracy exists between A and B, A's acts, or declarations implicating B cannot be used to prove that B was a party to the conspiracy, in the absence of some other evidence admissible against B to bring him within the conspiracy: see *Savard and Lizotte v. The King* (1945), 85 C.C.C. 254 at p. 262, [1946] 3 D.L.R. 468, [1946] S.C.R. 20 at p. 29.

[199] It is important to remember that the co-conspirators exception is only one of many exceptions which may justify the admission of hearsay evidence. Statements may accompany and explain acts and, therefore, in appropriate circumstances, be admissible as part of the *res gestae*: **Sopinka, Lederman and Bryant, supra** at p. 6.243. The intention of alleged co-conspirators is relevant and in certain circumstances, their statements of intention may be admitted under a hearsay exception: see **Sopinka, Lederman and Bryant, supra** at pp. 6.225 - 6.242; **R. v. Starr**, [2000] 2 S.C.R. 144 at paras. 168-174. Hearsay evidence may also be admitted under the principled approach if it meets the requirements of necessity and threshold reliability: see, e.g., **R. v. Sutton** (1999), 140 C.C.C. (3d) 336 (N.B.C.A.), aff'd [2000] 2 S.C.R. 595.

[200] With these principles in mind, I will now turn to consider a number of instances in which the appellants allege that the judge erred in his instructions about the use the jury could make of various pieces of evidence. In my view, the principles which I have just outlined show that in these instances the judge did not make the errors alleged. I will set out each of the errors which the appellants allege were made and discuss them in turn.

(i) In connection with the "*Vetrovec*" warning, the judge erred when he directed the jury that they could use intercepted conversations involving the police agent Derry while acting as a police agent with James and with Smith as evidence capable of supporting Derry's credibility in relation to Smith and James' participation in the homicide: pp.3163 – 3165.

[201] I earlier addressed issues about what evidence was capable of being confirmatory of Derry's evidence. The submission here is that statements by James and Smith after the conspiracy had ended were not admissible to confirm Derry's evidence. This submission, in my view, is not well-founded.

[202] As noted, out of court statements by either James or Smith were admissible against the person who made the statement. This flows from the admissions exception and it does not matter, for this purpose, whether the statements were made in furtherance of the conspiracy. Thus, any statement by James to Derry, whether before, during or after the conspiracy, was admissible at the instance of the Crown in relation to James for all purposes and, if otherwise appropriate, these statements could be considered as corroborating Derry's evidence. The same was true for Smith.

(ii) The judge erred by directing the jury that they could use post-offence conversations and intercepts that involved Derry suggesting to James an incriminating version of the October 3, 2000 events, and James disagreeing, to prove aiding and abetting of the murder by James: pp.3271 – 3272.

[203] The Crown's position, in part, was that James aided Kelsie by giving the gun to him, giving him instructions and by instructing Derry and Potts to get rid of the clothes which Kelsie had worn at the time of the shooting. The Crown claimed that James aided Gareau by giving him instructions.

[204] The issue raised by the appellants relates to the judge's instructions about whether James was a party to the murder as an "aider" under s. 21(1) of the **Code.** The judge referred to two intercepts, numbers 81 and 58, of conversations between James and Derry in this regard. I have discussed these interceptions at paras. [46]

and [44]. These statements by James were admissible against him under the admissions exception to the hearsay rule. The jury could reasonably draw the inference that the conversation was about the day of the murder and that James' words referred to instructions which he had given to Gareau on the day of the shooting.

[205] The judge did not err in referring the jury to this evidence which was properly admissible against James and which was relevant to their consideration whether James had aided Gareau.

(iii) The judge erred in drawing the following items of evidence to the jury's attention as being evidence that they could consider in relation to step one of the **Carter** process:

> the intercepted conversations with Smith and James: p. 3198,
> evidence of a meeting between Derry, Smith and others in the absence of James and after October 3, 2000: pp.3200 – 3201,
> evidence of the alleged reduction of James' portion of an alleged drug debt after October 3, 2000: p. 3202.

[206] I can consider these three points together.

[207] Mr. Derry testified about a meeting some time after the killing attended by himself, Potts, Harrie, Milton and Smith. His testimony was that Smith was "quite angry at the time" because he had found out that James had taken credit for killing Simmons but had not actually done it. Smith, according to Derry, said that he had taken off the debt for that and that he was upset about that too. If I understand counsel's argument, it is that none of this evidence is admissible at step one of the **Carter** analysis because none of these statements was made in furtherance of the conspiracy.

[208] I do not accept this argument. Out of court statements by either accused were admissible against the maker of the statement under the admissions exception to the hearsay rule. It is true, of course, that statements not made in furtherance of the conspiracy were not admissible against anyone other than the maker to show

another person’s possible membership in the conspiracy. But the jury was fully and properly charged about that aspect.

(iv) the judge erred by telling the jury that they could consider the "statements and actions" of anyone else who have been a member of the conspiracy "to give context" on the issue of probable membership in the conspiracy without the limitation that such "statements and actions" must be "in furtherance" of the conspiracy.

[209] I do not accept this submission. In my view, the judge appropriately conveyed to the jury that the acts and declarations of the accused are not to be viewed in isolation of their alleged co-conspirators acting and speaking in furtherance of the conspiracy. Importantly, however, he was careful to stress that only evidence coming directly from the accuseds' own acts and words could be used to determine their probable membership in the conspiracy (pp. 3206 - 3214).

(v) The judge erred by allowing Derry, while testifying, to "interpret" Wayne James' words for the jury during the playing of the intercepted communications between them.

[210] In his evidence, Paul Derry explained what he understood was being said in intercepts to which he was a party. The trial judge carefully and fully charged the jury in relation to their use of the intercepts. He told the jury it was their decision if statements by Paul Derry were adopted by Neil Smith or Wayne James (pp.3207 - 3212). He emphasized that the evidence had to come from Wayne James and Neil Smith's own words and actions (pp.3207 -3208 and p. 3212). The trial judge also charged the jury that the accused could only be held responsible for what they said, not for what anyone else had said, unless they adopted the other person’s statement. (p. 3170 - 3172). The trial judge made it clear to the jury it was for them to find the facts as to what was said by Neil Smith and Wayne James in the interceptions. The judge's instructions, taken together, were to the effect that the interpretation of what was said by the accused was for the jury, not Paul Derry, to determine.

[211] I see no error in the judge's approach and do not accept the appellants' submissions to the contrary.

[212] I will now turn to the appellants' submissions in relation to out of court statements by Gareau and Kelsie.

(c) Gareau:

[213] The appellants submit that out of court statements by Gareau concerning a "kite" – that is, a letter secretly passed from one inmate to another – were inadmissible hearsay and that the judge wrongly instructed the jury about its possible use. I disagree. Viewed in context, Gareau's out of court statement was not hearsay and was admissible to give meaning to James' out of court statements which were properly admissible against him. In my view, the judge did not err either in admitting this evidence or in his instructions to the jury about its possible use.

[214] This issue has to be approached in the context of all of the evidence about the "kite". In April of 2001, Gareau and James were both at the Correctional Centre. Intercept 90 records a conversation at that time between Gareau and Derry. Gareau indicated that he had received "... a letter from our friend..." saying "what's up, brother, keep the faith...". These words are similar to words found in trial Exhibit 59, the alleged "kite", which I have reproduced at para. 16 above. In intercept 91, recording a conversation on the same date, James told Derry that "... I sent him [referring to Gareau] down a kite ...". It was an agreed fact at trial that the alleged kite had been obtained from Gareau's lawyer and that he had received it from Gareau. All of this evidence arguably supported an inference that James' recorded statement in Intercept 91 was speaking about that document, that he had authored it and that he had sent it to Gareau.

[215] Used as part of this chain of reasoning, Gareau's statement was not hearsay but original evidence. The statement explained James' own out of court statement which was admissible against him. Gareau's statement tended to show his knowledge of the text of the alleged "kite", which in turn tended to show that it

was the document which his lawyer had obtained from him and which James was referring to in the intercept. It was, therefore, properly admitted.

[216] The appellants also submit that the judge erred in his charge about the use the jury could make of this evidence. I do not accept this submission. The part of the charge to which the appellants refer dealt with circumstantial evidence and drawing inferences. The judge used the "kite" as an example. I see no error in the judge referring to this chain of evidence as an example of an inference which might be drawn from circumstantial evidence.

(d) Kelsie:

[217] The appellants make two submissions about a statement allegedly made by Kelsie which Derry testified about in his evidence. The alleged statement was that James had promised Kelsie $5000 for the killing but had not paid it. The appellants say that the judge erred in his handling of this evidence. The judge told the jury that they could consider it on the issues of whether there had been a murder by arrangement and whether a conspiracy existed. The appellants say that both directions were wrong.

[218] Respectfully, I agree with this submission. In my view, Kelsie's out of court statement was not admissible for any purpose. It follows that it was wrong to tell the jury that they could use it in determining whether there had been a murder by arrangement or that the conspiracy existed.

[219] The evidence in question was this. Derry testified that Kelsie said James was supposed to have given him $5,000 for the murder: (p.1814)

> Q. Mr. Derry, did you ever have occasion after October the 3rd, 2000, to discuss with Mr. Kelsie anything he received or may have or was to receive as a result of his involvement in the events?
>
> A. Deano [i.e. Kelsie] said he was supposed to get $5,000 from Wayne James.
>
> Q. You say, Deano said he was supposed to get that?

A. Instead he got three 8-balls of cocaine.

Q. Okay. He got three 8-balls of cocaine. Who did Mr. Kelsie tell you gave him those three 8-balls of cocaine?

A. Wayne James.

[220] This evidence, of course, is hearsay: it is an out of court statement made other than by a witness while testifying in the proceedings to prove the truth of what is stated, i.e., that James was going to give him $5,000 for his part in the shooting. No exception to the hearsay rule applies to this statement offered for this purpose. It was not even provisionally admissible under the co-conspirator's exception because it was not made in furtherance of the conspiracy. It was therefore not admissible. The judge, however, told the jury they could use it as evidence of murder by arrangement; in other words, that they could use Kelsie's statement as evidence that James had promised him $5000 for the killing. The Crown concedes, in my view, properly, that this was misdirection. The judge's instruction invited the jury to use inadmissible hearsay as evidence of the alleged arrangement. Respectfully, this was an error.

[221] The appellants submit that there was a second wrong instruction to the jury concerning this evidence. The judge told the jury they could consider Kelsie's out of court statement as evidence of the existence of a conspiracy, that is, at step one of the **Carter** process. They submit that this was misdirection and that this evidence was not admissible even for that limited purpose. I agree with the appellants. However, this error is of no significance on this record. I will first explain why, in my view, this error could not have affected the result and then return to set out, briefly, why I agree that the instruction was wrong.

[222] This error is relevant only to the conspiracy count. It could not have affected the conspiracy verdict, however. The judge's subsequent instructions made it clear that this statement could not be used either on the issue of probable membership or in determining guilt of the conspiracy charge.

[223] Kelsie's statement was not independently admissible against either appellant and was not made in furtherance of the conspiracy. The judge clearly and repeatedly instructed the jury that, unless these two conditions were met, they could not use out of court statements as evidence of either probable membership in the conspiracy or as evidence of guilt. (With respect to probable membership, see the judge's instructions at pp. 3205 -3206; 3209 (re Smith); 3210; 3212; 3214 (re James); with respect to the "in furtherance requirement, see the judge's instructions at p. 3209 (re Smith); pp. 3214 - 3215 (re James); pp. 3215 - 3217 (re both accused.)). In the judge's review of evidence that might meet those requirements, he did not refer to Kelsie's statement, which, as noted, did not meet them. It follows that the judge's instructions on these two requirements precluded the jury from using Kelsie's statement as evidence of either membership in the conspiracy or guilt.

[224] Although this error was clearly harmless, the point was fully argued and I will set out my reasons for rejecting the Crown's position that the Kelsie statement could be considered at step one of the **Carter** process.

[225] At the first of the three **Carter** steps, the issue is whether the Crown has established that the conspiracy alleged in the indictment existed. In **Carter**, the Court said that this question is to be determined by looking at "all the evidence". The issue of who were the members of the conspiracy is not considered at this step: **R. v. Barrow**, **supra** at pp. 741-2. There is considerable controversy in the Canadian case law about what the Court meant in **Carter** when it said "all the evidence" may be considered at step one: **R. v. Pilarinos**, [2002] B.C.J. No. 1324 (Q.L.)(S.C.) at paras. 51 - 56. There are two main views.

[226] What differentiates the two main views is whether or not, at step one, evidence which is provisionally admissible under the co-conspirators exception may be considered. One view holds that it may not, the other that it may. Neither of these views would assist the Crown in this case because, as noted, Kelsie's statement is not even provisionally admissible under the co-conspirator's exception. The Crown submits that there is a third view which would justify admitting Kelsie's statement on the step one inquiry. This submission is best approached by looking first at the other two views by way of context.

[227] One view is that when **Carter** refers to "all the evidence" being considered at step one, it means "all the admissible evidence". On this view, evidence which is otherwise inadmissible, including evidence that is only provisionally admissible under the conspirator's exception to the hearsay rule, cannot be used to show the probable existence of a conspiracy. This view is supported by some of the language used in **Barrow** and the approval in **Barrow** of a passage from Martin, J.A.'s judgment in **R. v. Baron and Wertman** (1976), 31 C.C.C. (2d) 525 (Ont.C.A.). I have set out these passages above. In **Barrow**, the Court indicates that at step one, "the hearsay exception is inapplicable" and then cites Martin J.A.'s reference in **Baron** to the proposition that the hearsay exception only comes into play once "... there is evidence fit to be considered by the jury that the conspiracy alleged ... exists." This suggests that even provisionally admissible evidence cannot be considered on this threshold determination of whether there was a conspiracy. However, **Barrow** is at best ambiguous on this point: the Court also approved the trial judge's instruction that, at step one, the jury could consider all the evidence which appears to have included hearsay evidence.

[228] At least three Canadian appellate courts, including this one, have said that only evidence otherwise admissible may be used at step one. In **R. v. Jamieson** (1989), 90 N.S.R. (2d) 164 (A.D.), the Court held that the trial judge ought to have instructed the jury that hearsay evidence, which might be admitted under the co-conspirator's exception to the hearsay rule – that is, evidence provisionally admissible under that exception – could not be considered on the issue of whether the alleged conspiracy existed. As the Court put it at para. 30, "[h]earsay evidence is not admissible on the initial determination whether the alleged conspiracy or alleged common design existed." To similar effect, see **R. v. Duff** (1994), 90 C.C.C. (3d) 460 (Man. C.A.); **R. v. Viandante**, [1995] M.J. No. 269 (C.A.) at para. 46, leave denied [1996] S.C.C.A. No. 243 (but see the same Court's decision in **R. v. Loewen (J.K.)** (1999), 134 Man.R. (2d) 234 (C.A.) at para. 17; **R. v. Graham**, [2005] O.J. No. 1004 (Q.L.)(C.A.) at para. 8; see also **R. v. Wiggins**, [1986] B.C.J. No. 2477 (Q.L.)(S.C.); S. David Frankel, **"Developments in the Law Relating to the Co-conspirator exception to the Hearsay Rule"** (1983), 31 C.R. (3d) 107 at p. 109; Matthew R. Goode, **Criminal Conspiracy in Canada**, (Toronto: Carswell, 1975), at p. 250.

[229] This approach is supported by the principles of evidence law relating to admissions generally and admissions by agents.

[230] A hearsay statement by a co-conspirator is admitted as a special type of admission. (As noted earlier, other hearsay exceptions may be applicable in certain cases, but I will focus here on the co-conspirator's exception.) To be admissible under the admissions exception to the hearsay rule, the statement must have been made by a party. In other words, admissions may only be received as evidence of their truth once there has been a preliminary determination that the statement was made by a party; hearsay assertions of that fact in the statement itself cannot be used to establish this preliminary fact: see, e.g. **R. v. Evans**, [1993] 3 S.C.R. 653 at pp. 667-68.

[231] Turning to admissions by agents, their admissibility rests on the same basis as statements by co-conspirators: see, e.g. C. Tapper, **Cross and Tapper on Evidence**, 10th ed., (London, Edinburgh, Dublin: Butterworths, 2004) at pp. 610-11. Statements by an agent to third parties within the scope of the agent's authority are admissible as admissions against the principal. However, the existence of the agency must be proved in order for the agent's admissions may be so used. The agent's own out of court statements that he or she was an agent are hearsay if offered for this purpose. By analogy, in conspiracy cases, the fact of "agency" is established by proof of the existence of the conspiracy and the declarant's probable membership in it. Consistent with the approach in the agency cases, the alleged conspirator's hearsay statements should not be admitted for this purpose.

[232] This first view would not support the Crown's position in the present case: Kelsie's statement was hearsay and was not admissible under any hearsay exception. On the first view, it would not be admissible at the first of the three **Carter** steps.

[233] A second view is that "all the evidence" at step one refers to all of the evidence which is either admissible generally or which is provisionally admissible under the co-conspirator's exception. This view has been adopted in a number of cases. For example, in **Loewen** the Court said that "all the evidence" at step one means all the evidence including hearsay. To the same effect, see **R v. Buell** (1996), 146 Nfld. & P.E.I.R. 173; P.E.I.J. No. 110 (Q.L.)(S.C.A.D.) at paras. 11 - 19; **R. v. Falahatchian and Momeni**, (1995), 99 C.C.C. (3d) 420 (Ont.C.A.) at pp. 435-437; application for leave to appeal abandoned [1995] S.C.C.A. No. 402; **R. v. Fraser** (1999), 176 Nfld. & P.E.I.R. 181, N.J. No. 188 (Q.L.)(N.L.S.C. C.A.) at

paras. 17 - 22; **R. v. Pilarinos and Clark** (2002), 167 C.C.C. (3d) 97, B.C.J. No. 1958 (Q.L.)(S.C.) at para. 171. It is supported by comments in **Carter** which appear to differentiate between "all of the evidence" and evidence which is independently admissible against an accused. It follows that "all the evidence" should be understood to refer to both the evidence otherwise admissible and the evidence contingently admissible under the co-conspirators exception.

[234] This second view would not assist the Crown in this case: it is conceded that Kelsie's out of court hearsay statement is not even provisionally admissible under the co-conspirators exception. This is because it was not made in furtherance of the conspiracy. It follows that it could not be admitted at step one under this second view, because the statement is not even provisionally admissible under the co-conspirators exception.

[235] I do not have to resolve the difference between the first and the second view which I have just described: neither would assist the Crown in this case. I would add, however, that the difference between these views may not be as great as it first appears. This is because, as I discussed earlier, evidence may well not be hearsay for the purpose of proving the existence of the conspiracy even though it is hearsay for the purpose of showing who was a member of it. As Hamilton, J. (as she then was) wisely observed in **R .v Neves** (2000), 149 Man. R. (2d) 1; M.J. No. 390 (Q.L,)(Q.B.) at para. 91, aff'd (2005), 201 Man. R. (2d) 44; M.J. No. 210 (Q.L.)(C.A,), "... what might be considered hearsay for the purposes of the third step of the analysis is not necessarily hearsay for the purposes of the first step. The evidence of acts or declarations of individuals alleged to be involved in the conspiracy can be direct evidence going to whether the conspiracy existed."

[236] There is no dispute that, at the first step, at least all the evidence which is relevant and otherwise admissible should be considered. This includes non-hearsay relevant to the issue of the existence of the conspiracy and any hearsay evidence which may be admissible under a traditional exception or under the principled approach. In many cases, acts and declarations of alleged co-conspirators will be admissible on one of these bases, either because on the issue of the existence of the conspiracy, they are non-hearsay or because they accompany and explain acts of the declarant, or because their reception is necessary and the statements are shown to have sufficient threshold reliability to be received under the principled approach.

[237] The Crown submits that there is a third view: that "all the evidence" means all the evidence which has been received at trial and includes evidence which is neither admissible generally nor even provisionally admissible under the co-conspirator's exception. The Crown submits that **R. v. Sutton** (1999), 140 C.C.C. (3d) 336(N.B.C.A.), aff'd [2000] S.C.J. No. 53 and **R. v. Collins** (1999), 133 C.C.C. (3d) 8 (N.L.C.A.) support this view. Respectfully, I do not agree.

[238] It is submitted that based on **Sutton, supra**, declarations by co-conspirators need not be in furtherance of the alleged conspiracy to be admissible at step one of **Carter**. It is submitted that based on **Collins, supra**, the danger of transferring guilt from one alleged conspirator to another through declarations of the former is removed because of the requirements at step two of **Carter** that only evidence directly admissible against the accused can be considered.

[239] In my view, **Sutton** does not support the Crown's position. In that case, the pertinent aspect is the majority's statement at para. 19 that "... all hearsay evidence that meets the criteria of necessity and reliability may be considered by the jury in step one ...[of the **Carter** process] ... whether in furtherance of the conspiracy or otherwise...". Of course, hearsay evidence that meets the criteria of necessity and reliability is admissible under the principled approach if it is relevant. (I would add that evidence which is not hearsay but relevant to the existence of the conspiracy is also admissible at step one whether or not in furtherance of the conspiracy.) In short, **Sutton** is a case in which the challenged evidence was admissible hearsay evidence under the principled approach and relevant to the issue of the existence of the conspiracy.

[240] But that is not our case. There is no suggestion that the out of court statement by Kelsie was shown to meet the criteria of necessity and reliability. **Sutton** is not authority for the admission of such evidence. (I note as well that this aspect of **Sutton** was not addressed by the Supreme Court in affirming the order for a new trial made by the Court of Appeal. The Supreme Court accepted the agreement of the parties that the trial judge had erred in two respects: first, that his instructions wrongly eliminated from consideration the police surveillance evidence at step one; and, second, that the judge's instructions concerning step two placed too high a standard of proof on the Crown. The other aspects of the majority's judgment in the Court of Appeal were not discussed by the Supreme Court.)

[241] The Crown also relies on **Collins** but, in my view, it is of no assistance. In **Collins**, two brothers were jointly charged with conspiracy to traffic in illegal drugs. One of the issues was whether a statement by one of the accused to the police after both brothers had been arrested could be used as evidence of the existence of the conspiracy. There was no question that the statement was admissible under the admissions exception against the accused who made it; the issue was whether it was admissible for any purpose against the other accused. The Court held at para. 93 that, with respect to step one, the out of court statement by one of the accused could be admitted "... as direct proof of the conspiracy's existence..." even though it could not be admitted as evidence of the other accused's membership in it unless his probable membership were established by evidence independently admissible against him.

[242] The present case is not similar to **Collins**. There, the out of court statement in issue was by a party and, therefore, admissible against that party under the admissions exception to the hearsay rule. Unlike the situation in **Collins**, in this case, the maker of the statement, Kelsie, was not a party to the trial of Smith and James and so his out of court statement was not admissible as an admission by a party. **Collins** does not provide authority for the view that Kelsie's evidence is admissible. (I need express no opinion on the proposition on which **Collins** is based.)

[243] In order to uphold the admissibility of Derry's evidence about Kelsie's statement, one would have to hold that all out of court hearsay declarations by separately indicted co-conspirators, even if not potentially admissible under the co-conspirators exception to the hearsay rule, are nonetheless admissible to prove that a conspiracy for the purpose alleged in the indictment existed. **Sutton** and **Collins** do not support such a view.

[244] I conclude, respectfully, that the judge erred in instructing the jury that Kelsie's statement could be considered by them in relation to the issue of whether the alleged conspiracy existed.

IV. DISPOSITION:

[245] In the course of his otherwise impeccable handling of a complex trial, the judge made two related errors of law: first, by telling the jury that Kelsie's out of court statement could be used as evidence of the existence of a conspiracy and second, by telling them that this statement was evidence of murder by arrangement. In my view, these errors, neither individually nor cumulatively, could have affected the result. I would therefore dismiss the appeals notwithstanding these errors as they did not occasion any substantial wrong or miscarriage of justice.

[246] Having found errors of law at trial, the Court of Appeal may nonetheless dismiss the appeal if persuaded that the errors did not occasion any substantial wrong or miscarriage of justice: s. 686(1)(b)(iii). To apply this curative provision, the Court must be persuaded that the verdict would necessarily have been the same if the errors had not occurred or, to put the same point in different words, that there is no reasonable possibility that the verdicts would have been different if the errors had not been made: see **R. v. Bevan**, [1993] 2 S.C.R. 599 at pp. 616-17

[247] This curative provision may be applied in two main types of cases: cases involving errors, that, because they were trivial or immaterial to the outcome, could not have affected the result and cases involving errors the significance of which is overborne by overwhelming evidence of guilt: see, e.g., **R. v. Arradi**, [2003] 1 S.C.R. 280 and **R. v. Khan, supra**, at paras. 29-31. Rosenberg, J.A. in **R. v. Armstrong** (2003), 179 C.C.C. (3d) 37 (Ont. C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 554, noted that within the first class of cases, there are two types of errors: trivial errors and errors whose effect on the verdict may be traced to ensure they made no difference: at para. 25.

[248] In my view, both of the errors in this case are of the latter type: it is possible in the circumstances of this case to trace their effect and to be satisfied there is no reasonable possibility that the verdicts would have been different had the errors not been made.

[249] I have already set out why, in my view, the error concerning step one of the **Carter** process could not have affected the result. The misdirection was relevant only to the conspiracy count. The judge's correct instructions on steps 2 and 3 of the **Carter** process prevented any use of Kelsie's statement on the issues of the appellants' probable membership in the conspiracy or on their guilt on the

conspiracy count. This misdirection could not, therefore, have affected the findings of guilt.

[250] I reach the same conclusion about the misdirection that Kelsie's statement could be used as evidence of an arrangement to murder Simmons. Any wrong use by the jury of Kelsie's statement could not have affected the jury's assessment of Derry's credibility. Derry was the one reporting the statement. The verdicts indicate that the jury accepted beyond reasonable doubt the critical points of his testimony. Having done so, conviction of both appellants was inevitable. As counsel for Smith put it in argument, "... if the jury believed [Derry], we're dead ..." In my view, that is a completely correct summary of the situation. I do not accept the suggestion advanced by James' counsel that the jury could have acted on this out of court statement reported by Derry and somehow thought that in doing so, they were relying less on Derry's testimony. On Derry's evidence, there was a simple, overwhelming and unanswered case of planned and deliberate murder: Smith ordered the killing and James helped to plan and to carry it out. Proper instructions about Kelsie's statements could not have altered the jury's assessment of Derry's evidence and could, therefore, not possibly have affected the verdicts.

[251] I would dismiss the appeals.

Cromwell, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.