YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: *R v EP*, 2025 NSPC 25

Date: 20250722
Docket: 8805453
Registry: Halifax

Between:

His Majesty the King

v.

E.P.

Restrictions on Publication: *Youth Criminal Justice Act*
Section 110 - Identity of Young Accused
Section 111 – Identity of Young Complainant and Young Witnesses

Any information that will identify a young person who is an accused, a complainant,
or a witness shall not be published in any document or broadcast or transmitted in any way.

TRIAL DECISION

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	January 6-10, 13-17, 20, 23, 29, February 4, 27, March 31, and April 4, 7, 16, 2025 in Halifax, Nova Scotia
Decision:	July 22, 2025
Charge:	Section 236 of the Criminal Code
Counsel:	Terry Nickerson, Sarah Kirby, and Sharon Goodwin for the Crown Anna Mancini and Jordan Richard for the Defence

By the Court:

Publication Ban and Forms of Address

[1] *The Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*] protects the privacy of young persons involved in the youth justice system.

[2] The accused, the deceased, and most of the witnesses in this matter were under the age of eighteen. The *YCJA* protects their identities, and it is a criminal offence to publish them [ss 110, 111, and 138].

[3] With respect to forms of address, I will refer to EP as 'the accused' and the young person who died, AAM, as 'the deceased'. I do this for the purpose of clarity. I will refer to all other young persons by way of initials.

[4] I will also remove details that might identify any young person involved in this matter.

Introduction

[5] The accused and three other young people (CP, TR, and MP) were involved in a physical altercation with the deceased in a parkade at a local shopping centre. CP stabbed the deceased, and he died from his injuries.

[6] While the accused did not stab the deceased, I must determine whether he is nevertheless guilty of manslaughter because of his role in the incident.

[7] The accused was charged and tried on an allegation of second-degree murder. However, at the start of closing submissions, the Crown conceded that charge was not proven. I accepted that concession and found the accused not guilty of second-degree murder.

[8] The Crown argued that the accused was guilty of manslaughter through four routes. Each of these routes has specific legal requirements that the Defence argued have not been proven beyond a reasonable doubt.

[9] Fundamentally, the Crown and Defence disagreed on whether the stabbing by CP was part of a continuing group assault that the accused planned and participated in, or a distinct and independent action by CP that the accused was not part of and could not reasonably have foreseen.

Specific Arguments

[10] The Crown argued that the accused's role in the physical dispute makes him guilty of manslaughter through four possible routes:

> (1) he actually committed the offence since the stabbing was part of a single group assault which caused the death, making him guilty as a co-perpetrator under s. 21(1)(a) of the *Criminal Code*, RSC 1985, c C-46 [*Code*];
>
> (2) he assisted in the group assault that caused the death or assisted in the stabbing itself, making him guilty as an aider under s. 21(1)(b);
>
> (3) he encouraged the others in the group assault that caused the death or in the stabbing itself, making him guilty as an abettor under s. 21(1)(c); and/or,
>
> (4) the four young people agreed to commit a group assault, and he ought to have known that a probable consequence of that assault was another offence that presented a risk of bodily harm to the deceased, making him guilty through the doctrine of common purpose party liability under s. 21(2).

[11] The Crown further submitted that a reasonable person in the accused's circumstances would have foreseen a risk of bodily harm that was neither minor nor brief.

[12] The Defence argued that this was not a single physical altercation which ended in a stabbing. Rather, it was a series of individual altercations and the accused was only involved at the beginning and not at the time of the stabbing.

[13] The Defence argued that the Crown has not met the requirements for any of the suggested routes to liability. Specifically, the Defence submitted that the Crown has failed to prove each of the following: 1) that the accused was part of a group assault; 2) that he knew the deceased would be stabbed or did anything to assist or encourage the stabbing; 3) that his conduct caused the death; 4) that either the stabbing or any other similarly serious offence was reasonably foreseeable; and, 5) that a risk of bodily harm was reasonably foreseeable.

General Principles

[14] There are general principles that apply to every criminal trial.

[15] The accused is presumed to be innocent. The Crown bears the burden of proving each element of the offence beyond a reasonable doubt.

[16] Proof beyond a reasonable doubt is a high standard. It is more than suspicion or probability. It is not proof beyond any doubt or to an absolute certainty but falls much closer to absolute certainty than to proof on a balance of probabilities (*R v Starr,* 2000 SCC 40; *R v Lifchus,* 1997 CanLII 319 (SCC), [1997] 3 SCR 320).

[17] The offence or constituent elements can be proven through direct or indirect evidence, or a combination of both. Ultimately, what is important is to determine whether "the evidence as a whole establishes the accused's guilt beyond a reasonable doubt" (*R v Dinardo,* 2008 SCC 24 at para 23 [*Dinardo*]).

[18] Here, the evidence supporting at least some elements of the offence is indirect – circumstantial in nature. The burden in those instances is for the Crown to prove beyond a reasonable doubt that proof of that element is the only reasonable inference from the evidence (*R v Griffin,* 2009 SCC 28 at para 34 [*Griffin*]). There is no burden on the Defence to persuade me that other reasonable inferences may be drawn.

[19] The "mere existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt" (*Griffin* at para 34). The question is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty" (*R v Villaroman*, 2016 SCC 33 at para 38). If so, then the accused must be acquitted.

[20] I am entitled to accept some, none, or all of the testimony of any witness (*R v JHS*, 2008 SCC 30 at para 10).

[21] That being said, a criminal trial is not about simply choosing whether I prefer the evidence that supports guilt over that which does not. Where there is evidence that is inconsistent with guilt (whether from the accused, other defence evidence, or from the evidence tendered by the Crown), if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject that evidence and it does not raise a reasonable doubt, I must examine the remaining evidence that I do accept, and acquit if it leaves me with a reasonable doubt (*R v W(D)*, 1991 CanLII

93 (SCC), [1991] 1 SCR 742; *Dinardo*; *R v BD*, 2011 ONCA 51 at p 114; and, *R v Horne*, 2023 NSCA 64 at paras 58-59).

[22] The standard of proof beyond a reasonable doubt applies only to the determination of ultimate issues, not to the weighing of individual pieces of evidence (*R v Morin,* 1988 CanLII 8 (SCC), [1988] 2 SCR 345 at paras 33-43; *R v Morin,* 1992 CanLII 40 (SCC), [1992] 3 SCR 286 at para 19; *R v Ritch,* 2022 NSCA 52 at para 134, read in conjunction with footnote 56; *R v TJF*, 2023 NSCA 28 at para 48; and, *R v Ahmadzai*, 2012 BCCA 215 at para 34).

An Overview of the Types of Evidence at Trial

[23] Much of the evidence was provided through agreed statements of fact [ASFs] and exhibits that were entered on consent. This material included video recordings, some of which were enhanced, and printouts of text messages.

[24] Most of the communication between the participants was text-based. Subject to one exception, printouts of those communications were entered into evidence on consent (Ex. 11, 11A and 11B – the accused's phone; Ex. 12, 12A and 12B – the deceased's phone; and Ex.13, 13A and 13B – CL's phone).

[25] The Defence conceded continuity, authenticity, accuracy of time/date stamps, and authorship for all of the communications seized from these three devices (ASF – Ex. 12 and Ex. 13; and verbal agreement).

[26] The accused's communications from these devices were admissible for their truth under the 'admissions' exception to hearsay (ASF – Ex. 12 and 13; verbal agreement; mid-trial ruling).

[27] The Crown and Defence agreed that the deceased's communications were admissible as circumstantial evidence of his state of mind and for the truth of their contents under the principled exception to the hearsay rule (Ex. 12 – ASF).

[28] The Crown and Defence agreed that communications from people other than the accused and the deceased were not admissible for their truth. However, where relevant, the presence of those communications on these devices proved that the communications were sent or received (Ex. 12 and 13; verbal agreement).

[29] These exhibits are an objective record of what was said. However, the communications include acronyms, abbreviations, idioms, emojis, and nuances of meaning that had to be interpreted by the witnesses.

[30] The video recordings include surveillance video from various locations during the hours before the physical altercation and a recording made by MP on her telephone which includes audio.

[31] The physical altercation and the stabbing were captured on video by surveillance cameras (Ex. 3E-3G) and on MP's telephone (Ex. 3MM – 3OO). These were exhibited along with various shorter segments and still photos taken from them. Some include enhancements, such as audio enhancement of MP's cell phone recording, highlighting around certain images, magnifications, added time stamps, changes in playback speed, etc.

[32] Late in the trial, counsel also tendered an additional exhibit – a time-synced video - that included surveillance recordings from two angles and video from MP's cell phone ('synced video'; Ex. 79). Counsel agreed that this exhibit accurately synced the surveillance videos with the cell phone video.

[33] This exhibit allowed me to more easily reconcile the cell phone recording (which does not have a time stamp) with the surveillance videos. To identify specific points in the recordings, I have used the time counter in the synced video.

[34] To determine what happened during the altercation, I have primarily relied on the video recordings, but I have also considered the testimony of witnesses.

[35] When I have considered the testimony of witnesses who were examined using exhibits other than the synced video, I have gone back to the recording that was used during their testimony and cross-referenced it to the synced video.

Factual Overview

[36] I will now provide a general overview of the evidence. When I discuss specific arguments later in my decision, I will provide more detail about significant events and address important factual disputes.

[37] There is no dispute that on April 22, 2024, CP stabbed the deceased in the chest and that was the immediate cause of his death (Ex. 1, 8, 8A and 10-10C; testimony of medical examiner - Dr. Erik Mont).

[38] The accused and the deceased had agreed to meet to fight each other. The accused invited CP and TR to accompany him. There is no evidence that either CP or TR knew the deceased before that day.

[39] Indeed, the accused and the deceased barely knew each other. They were acquaintances who became involved in a conflict because both had been involved with the same young woman, CL.

[40] In early April, CL started dating the deceased. About a week before this incident, CL broke up with the deceased and started dating the accused.

[41] On April 22nd, the deceased contacted CL, asked why she'd blocked him on social media, expressed anger at her, and threatened the accused.

[42] On April 22nd at 1:09 p.m., the deceased contacted the accused by text and threatened him. Throughout that afternoon, the deceased and the accused continued to communicate with each other by text. The language on both sides was confrontational and included verbal 'posturing'. They agreed to meet in the parkade of the Halifax Shopping Centre to fight. They agreed the fight would be one-on-one.

[43] Separately, both the accused and the deceased arranged to bring friends to the fight.

[44] The accused arranged by text for TR and CP to come with him. The accused was friends with TR and knew CP less well. CP's girlfriend, MP, also joined them.

[45] The accused, TR, and CP agreed by text that the fight would not be one-on-one. They agreed that the accused would fight the deceased for ten seconds and then TR and CP would join in and the three of them would beat him up.

[46] The accused, TR, and CP each had a knife with them when they arrived at the parkade for the fight. There is no direct evidence of any agreement to bring, or use, knives. The accused's knowledge of whether TR and CP had knives is both relevant and in dispute so I will return to that issue later.

[47] Prior to the time set for the fight, the accused met TR, CP, and MP at the Scotia Square Mall. While there, CP and MP went into a store where CP acquired a knife. The four then took a bus to the Halifax Shopping Centre. Their conduct at the Scotia Square Mall and on the bus was captured on surveillance recordings.

Some of their conduct on the bus was also observed by Rebecca Nazvesky, who testified as a witness for the Crown.

[48] The Crown argued that this evidence establishes that the accused knew that CP had acquired a knife while at the Scotia Square Mall. The accused denied that. Again, I will return to examine his testimony and the other evidence in more detail later in my decision.

[49] The deceased also told his friends there would be a fight and asked them to attend at the parkade. The deceased and two friends went to a coffee shop near the Halifax Shopping Centre where they met more of his friends.

[50] The deceased's friends testified. They acknowledged that the deceased had agreed to meet the accused to fight. They testified that they understood it was to be one-on-one encounter. There was some suggestion that there may have been some discussion about intervening in the fight. Ultimately, none of them did intervene, so that evidence is not particularly relevant except to an assessment of their credibility.

[51] The deceased and two of his friends (HAA and OAS) went to the parkade where the fight was to take place. They were there for less than a minute when the accused, TR, CP, and MP arrived. One of the deceased's friends, OAS, left to get the deceased's other friends from the coffee shop. Only one friend, HAA, remained behind with the deceased.

[52] Seven witnesses and the accused testified about what happened in the parkade. HAA was the only Crown witness who was present for the entire event. The deceased's other friends came to the parkade after the confrontation had begun. Two adults, Melanie Adolph and Raymond Pelrine, also witnessed part of the altercation.

[53] As I said, the altercation was also captured on surveillance recordings from two angles and MP's recording on her telephone. The witnesses provided context for what is seen and heard in the recordings, sometimes filled in gaps for things that can't be seen or heard, and explained what they observed/heard and what they were thinking or how they interpreted what was happening. However, in general, the recordings are the best evidence of what happened.

[54] At times, the recollection of witnesses and the accused differs in detail from what is shown on the recordings or contained in the text messages. In many instances these differences relate to the date or time of events, their duration, who was present, and the sequence of events. For these details, where there is a difference, I have generally relied on the objective evidence contained in the video and the texts. In my view, most of these differences concern details that are peripheral to the important events and can be attributed to the passage of time and/or the fact that important events unfolded quickly and chaotically. As such, while the differences may impact my assessment of the reliability of a witness's evidence, they do not affect their credibility.

[55] I also note that many of the Crown witnesses discussed the events with others or were exposed to online communications about the events. In general, there is no evidence to suggest any intentional collusion. However, there is a real possibility that the evidence of some witnesses may have been tainted by this exposure. Again, this may impact the reliability of their recollections but generally does not impact their credibility.

[56] The fight between the accused and the deceased began at 5:01:30 pm and CP stabbed the deceased at about 5:03:50 pm.

[57] What transpired during that two-and-a-half-minute altercation will be important to my legal analysis, and I will review it in detail later in my decision. For now, I will provide a brief summary.

[58] The accused and the deceased began to fight, and within five seconds, TR and CP joined in. Then, for about 40 seconds, all three punched and kicked the deceased while he specifically fought with either the accused or CP. Toward the end of that period, the accused briefly disengaged - the first pause in the encounter.

[59] After that, the main physical altercation was between CP and the deceased with some involvement by the accused, TR, and MP. The deceased's friends arrived and TR and the accused each took out a knife. There were more pauses or breaks in the fighting when it appeared that the fighting was over.

[60] During the second pause, MP suggested taking the deceased's shoes. The accused did not participate in that discussion but did re-engage physically with the deceased by pushing or punching him.

[61] Following that second pause, CP and the deceased fought again.

[62] Then there was a third pause in the fighting. The participants separated, the accused put his knife in his backpack and put his backpack on his back. After that, the accused did not re-engage physically with the deceased.

[63] MP then apparently attempted to take the deceased's backpack, the deceased tried to stop her, she fell or was pushed to the pavement, and CP stabbed the deceased.

[64] There is no evidence that the deceased or any of his friends had weapons with them, and none of his friends physically intervened in the fighting.

[65] After stabbing the deceased, CP left the scene with MP. The accused and TR stayed for about a minute, during which the accused approached the deceased who was laying on the pavement and spoke to him. The accused then left with TR.

[66] The police subsequently arrested the accused and TR on a bus, and they seized a knife from each of them. The events on the bus were captured on surveillance. The Crown also called the bus driver, a passenger, and the two arresting officers. However, their testimony adds little to what can clearly be seen and heard on the surveillance recording and is contained in the ASFs.

[67] While on the bus, the accused deleted some of the messages he had exchanged with the deceased earlier in the day. The Crown argued that this was admissible 'after the fact conduct' from which I could draw an inference of guilt.

Specific Arguments and Legal Principles

[68] The Crown argued that the accused is guilty of unlawful act manslaughter (*Code* ss 222(1), (4) and (5)(a) and 234). The offence of unlawful act manslaughter requires the Crown to prove that:

> (1) the accused committed an unlawful act;
>
> (2) the act caused the death; and
>
> (3) a reasonable person would have foreseen a risk of bodily harm that was neither minor nor brief.

(*R v Javanmardi,* 2019 SCC 54 [*Javanmardi*])

[69] The Crown is no longer required to prove, as an independent element, that the unlawful act was objectively dangerous as that requirement is fully captured in the fault element for unlawful act manslaughter (*Javanmardi* at paras 26-30).

[70] The stabbing was the direct and immediate cause of the deceased's death (Ex. 1, 8, 8A and 10-10C; testimony of medical examiner - Dr. Erik Mont). Even though the accused did not personally commit that act, liability for manslaughter could be engaged because:

- I could find that he was a party to the unlawful act (stabbing) by assisting or encouraging CP in the stabbing; and/or,
- I could find that he committed or was a party to a different unlawful act (assault) that also 'caused' the death. For manslaughter, to prove an unlawful act 'caused' a death, the Crown does not have to prove the act was the only cause, the most significant cause, the direct cause, or the immediate cause of death - it is sufficient to prove it was "a significant contributing cause"

  (*R v Smithers*, 1977 CanLII 7 (SCC), [1977] 1 SCR 506 [*Smithers*]; *R v Nette*, 2001 SCC 78, at paras 71-72 and para 77 [*Nette*]; and *R v Maybin*, 2012 SCC 24, at para 20 [*Maybin*].)

[71] To review, the Crown submits that it has proven that the accused is guilty of manslaughter through four different routes under the *Code*: as a co-principal (s. 21(1)(a)); as an aider (s. 21(1)(b)); as an abettor (s. 21(1)(c); and/or, under 'common purpose' party liability (s. 21(2)).

[72] Each of these has their own specific legal requirements which I will discuss in more detail later. In general, to prove the accused's guilt under the first three routes (co-principal, aider, or abettor), the Crown must prove beyond a reasonable doubt that:

- The accused participated in an unlawful act by personally committing it (co-principal) or as a party (by assisting CP to commit it (aider) or by encouraging CP to commit it (abettor));

- The accused had the required mental state for his respective role in the unlawful act (as principal, aider, or abettor);
- The unlawful act was a significantly contributing cause of the deceased's death; and,
- There was a reasonably foreseeable risk of non-trivial and non-transitory bodily harm, meaning that a reasonable person in the same circumstances as the accused would have realized that the unlawful act would likely put the deceased at risk of bodily harm that was not minor or brief.

(*R v DeSousa*, 1992 CanLII 80 (SCC), [1992] 2 SCR 944 at pp 959 and 961-62 [*DeSousa*]; *R v Creighton*, 1993 CanLII 61 (SCC), [1993] 3 S.C.R. 3 at pp 42-23 [*Creighton*]; *R v Lozada*, 2024 SCC 18 [*Lozada*]; *Javanmardi*, at paras 25-31 and 36-38; *Smithers; Nette,* at paras 44 and 71-72; *Maybin* at paras 4 and 17; and, *R v. Pickton*, 2010 SCC 32 at paras 65-69 [*Pickton*])

[73] Where there are contributing causes other than the accused's conduct, they can intervene to break the chain of legal causation between the accused's acts and the deceased's death (*R v Strathdee,* 2021 SCC 40 at para 4 [*Strathdee*]; and, *R v Tower,* 2008 NSCA 3 at para 25 [*Tower*]).

[74] These 'intervening acts' can include the acts of a co-participant in a group assault (*Strathdee,* at para 4; and, *Lozada* at paras 28-30 and 32). As such, CP's act of stabbing the deceased (or other actions by him, TR, or MP)_ can constitute an 'intervening act' that breaks the chain of legal causation between the accused's conduct and the deceased's death.

[75] To prove the accused's guilt under the fourth route (common purpose party liability), the Crown must prove beyond a reasonable doubt that:

- The accused agreed with others, including CP, to participate in a common unlawful purpose such as a group assault;
- CP committed a different offence (the stabbing) while carrying out the original unlawful purpose; and,

- The accused ought to have known that one of the group, in carrying out the common purpose, would probably do something that a reasonable person would have foreseen as creating a risk of bodily harm that was neither trivial nor transitory.

(*R v Jackson*, 1993 CanLII 53 (SCC), [1993] 4 SCR 573 at paras 33 and 47 [*Jackson*]; and, *R. v. Gong*, 2023 ONCA 230 at paras 30-44 [*Gong*].)

[76] All these routes require the Crown to prove that the accused had the requisite intent for manslaughter – that a reasonable person in "all the circumstances of the case" would have realized their conduct exposed the deceased to a risk of bodily harm that was not minor or brief (*Creighton* at p 41).

[77] In deciding what a reasonable person would have realized, short of incapacity, I cannot consider the accused's personal attributes such as age, experience, and education (*Creighton* at p 72; *R v Beatty,* 2008 SCC 5 at para 40 [*Beatty*]; and, *Javanmardi* at paras 36-38). However, the 'reasonable person' must be put in the circumstances the accused was in when the events occurred (*Beatty* at para. 40). This requires me to consider all the circumstances, including what the accused knew at the time of the incident (*Javanmardi* at paras 39-41).

[78] None of these routes require the Crown to prove that the accused intended to kill the deceased, that he subjectively appreciated that the deceased would die, that a reasonable person would foresee the specific harm that resulted from the actions or that a reasonable person would foresee a risk of death (*Creighton*; *Jackson* at paras 1, 20-21 and 32-33; and, *Javanmardi* at paras 31 and 45).

[79] As I said, the parties disagree on whether the physical confrontation was an unlawful act and, if so, whether the stabbing was part of a continuing group assault, which the accused planned and participated in, or part of a new venture which the Defence argue the accused did not participate in.

[80] The Crown argued the former:

- that the accused, CP, and TR planned to assault the deceased and took knives with them;

- the accused knew they had knives;

- the accused, CP, TR, and MP assaulted the deceased;
- during that group assault, the accused took out a knife and told others to take out their knives; and,
- the group assault did not end until CP stabbed the deceased.

[81] The Crown argued that, in these circumstances, a reasonable person would have foreseen the risk of non-trivial bodily harm. As such, the accused is responsible for the consequences of the group assault through all, or some, of these four routes to liability and should be found guilty of manslaughter.

[82] The Defence argued the latter:

- that the accused planned and participated in a consensual fight that ended before CP stabbed the deceased;
- the accused did not plan, know or intend that knives would be used in the fight; and,
- what happened after the consensual fight was part of one, or more, new ventures that did not involve the accused. These new ventures could include: some new animosity between CP and the deceased; MP's new plan to steal the deceased's shoes; MP's spontaneous decision to steal the deceased's backpack; and/or, CP's spontaneous decision to stab the deceased, either because of their animosity, as part of a robbery, or to respond to the confrontation between MP and the deceased.

[83] In general, the Defence argued there were intervening acts and new motives that interrupted the requisite chain of causation and undermined the common intent requirement for common purpose party liability because a reasonable person would not foresee a risk of non-trivial bodily harm in these circumstances. Further, the Defence submitted that if the accused was a participant in any unlawful conduct that included a reasonably foreseeable risk of bodily harm, he abandoned it prior to the stabbing.

[84] The defence of abandonment may excuse a person from liability as a party under all four routes (*R v Kirkness,* 1990 CanLII 57 (SCC) [*Kirkness*], [1990] 3

SCR 74; and, *R v Gauthier*, 2013 SCC 32 [*Gauthier*]). It has four requirements that are set out in *Gauthier* at para 50:

> (1) There was an intention to abandon or withdraw from the unlawful purpose;
>
> (2) There was timely communication of this abandonment or withdrawal to those who wished to continue;
>
> (3) The communication served unequivocal notice on those who wished to continue; and,
>
> (4) The accused took, in a manner proportional to his participation in the planned offence, reasonable steps in the circumstances either to neutralize or cancel out the effects of his participation or to prevent the commission of the offence.

[85] Where there is an air of reality to the defence, the Crown must disprove it beyond a reasonable doubt (*Gauthier* at para 23). The defence meets the air of reality test if there is "(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true" (*Gauthier* at para 23; and, *R v Cinous*, 2002 SCC 29 at para 82).

Analysis

[86] I will address each route separately. However, on these facts, there is overlap between the elements of the different routes and the facts that relate to those elements.

Route 1: Co-Principal – s. 21(1)(a)

[87] It is now settled that co-principal liability is available in group assaults, even where the fatal blow is struck by a single participant (*Strathdee* at para 4; and, *Lozada*).

[88] The Crown argued that the accused was a co-perpetrator in a group assault (an unlawful act), his conduct significantly contributed to the death, and there was a reasonably foreseeable risk that the deceased would be exposed to non-trivial bodily harm.

[89] The Defence argued that the Crown has not proven that the accused participated in an unlawful act, that any unlawful act significantly contributed to

the death given the intervening acts, or that there was a reasonably foreseeable risk of non-trivial bodily harm.

[90] To determine whether the Crown has proven the accused is guilty of manslaughter as a co-principal, I must consider whether:

> (1) he, along with the others, committed an offence/unlawful act;
>
> (2) his actions were a significant contributing cause of the death;
>
> (3) a reasonable person in the same circumstances as the accused would realize that the group assault would likely put the deceased at risk of bodily harm that was not minor or brief (see: cases cited above); and
>
> (4) the accused abandoned any unlawful purpose
>
> (*Pickton* at paras 65-69 and *Javanmardi* at paras 36-38).

(1) The Accused Committed an Unlawful Act

[91] The unlawful act alleged here is an assault. To prove the accused committed an assault, the Crown must prove that he intentionally applied force to the deceased, the deceased did not consent, and the accused knew the deceased was not consenting.

[92] For the following reasons, I am satisfied beyond a reasonable doubt that the accused committed an assault (an unlawful act).

[93] The deceased consented to a one-on-one fight with the accused:

- The text messages sent by the deceased, beginning a little after 1:00 p.m. on the 22nd and continuing until about 5:00 p.m., as interpreted by CL and the accused where necessary, establish the deceased's intent and agreement to fight the accused. These messages were sent to the accused, CL, and the deceased's friends. The deceased also said things to his friends in person suggesting that he was going to fight the accused and wanted to fight him (Ex. 12A, pp. 28-34; testimony of HAA, MAS, AAS, and MAR); and,

- The deceased then showed up for the fight. His actions immediately before the fight are consistent with subjective consent – he removed his backpack and put it down, he put up his fists in a fighting stance, and the two of them started throwing punches. That continued for about four seconds (Ex. 79, 1:20-24).

[94] The deceased's consent to that initial one-on-one fight was valid.

[95] For public policy reasons, the law does not permit someone to consent to bodily harm being inflicted upon them, so if the accused intended and caused bodily harm to the deceased in that initial fight, the deceased's consent would not be legally valid (*R v Jobidon*, 1991 CanLII 77 (SCC), [1991] 2 SCR 714). Bodily harm is defined as any hurt or injury that interferes with a person's health or comfort in a way that is more than transient and trifling (*Code*, s. 2; and, *R v Moquin*, 2010 MBCA 22, paras 22-24).

[96] However, I am not persuaded that the initial altercation between the accused and the deceased caused bodily harm to the deceased. It was brief, involved punches and grabbing onto each other and, in the video, there are no visible signs of injury (Ex. 79, 1:20-24). Dr. Mont, not surprisingly, did not differentiate between injuries caused during this initial altercation and what came after. However, his testimony and report would not, without more, prove that bodily harm was caused by that initial altercation. As such, the deceased's consent to that initial altercation was valid even if the accused intended to cause bodily harm.

[97] As such, the accused's conduct during the initial four second altercation was not an unlawful act because the deceased had consented to it, that consent was valid, and the force used against him did not go beyond what he consented to.

[98] The recordings of the events in the parkade clearly show a subsequent application of force by the accused, TR, and CP towards the deceased.

[99] I am satisfied beyond a reasonable doubt that the deceased did not consent to that application of force, and the accused knew that.

[100] The deceased's earlier consent did not include consent to fight the accused with the others.

[101] Consent is subjective, meaning that whether the deceased consented is to be determined by reference to what was in his mind. I do not have the deceased's testimony about what was in his mind. However, I do have his text messages and the inferences I can draw from what I observe in the video.

[102] The deceased's prior consent was to a one-on-one fight. In the text messages, he told the accused the fight would be one-on-one, and either to not bring other people or to tell them not to do anything. The accused confirmed to the deceased that he was not bringing anyone (Ex. 11A, pp. 17-21).

[103] The accused acknowledged when he testified that the agreement with the deceased had been to a one-on-one fight.

[104] However, shortly after agreeing to a one-on-one fight, the accused texted TR and CP (Ex. 11A, pp. 39 and 46). The messages between the accused and each of TR and CP (via MP's phone) show that they agreed that the accused would fight the deceased one-on-one for ten seconds and then the other two would join in and they would beat him up together (Ex. 11A, pp. 39-45).

[105] Furthermore, the accused didn't tell the deceased about his new agreement with TR and CP, so didn't seek his consent. As such, there was no valid prior consent to the force that was used against him by the accused after TR, CP and MP became involved.

[106] I am also persuaded that the deceased did not consent to that force after he arrived at the parkade. Based on what is shown in the video and considering the testimony of the accused and the other witnesses, I am satisfied beyond a reasonable doubt that the deceased did not consent to the application of force after the others joined in.

[107] TR and CP joined in the altercation while the deceased was fighting the accused. They did so at the accused's request. The deceased was not asked whether he consented to that.

[108] The accused acknowledged that after about 4 seconds of fighting with the deceased one-on-one, he said "Get him...go, go, go" and that this was directed to TR and CP. The accused said his intent was for them to join in to help him. They did. For the next seven seconds, the accused and the deceased were standing and

holding/wrestling with each other while TR and CP punched the deceased repeatedly, including in the head area (Ex. 79, 1:24-1:31).

[109] Then the accused and the deceased fell to the pavement. When they landed, the deceased was on top of the accused and that continued for most of the time that they were on the pavement. For approximately 16 seconds, they were on the pavement wrestling and throwing punches while TR and CP repeatedly kicked and punched the deceased. The accused testified that he had been slammed to the pavement and was repeatedly saying "get off me" to the deceased, and "get him off me" to TR and CP. That can't be heard on the recording but given the location of MP in addition to the other background noise, that is not surprising, and I accept that the accused said that (Ex. 79, 1:31-1:50).

[110] The accused and the deceased then got to their feet. CP held the deceased. The deceased was only on his feet momentarily before both he and CP fell to the pavement (1:50-1:51).

[111] CP and the deceased then fought on the pavement while the accused and TR both repeatedly and forcefully kicked the deceased, including in the head area, for about ten seconds (1:51-2:03).

[112] During this period, the deceased defended himself, but that conduct does not equate to voluntary consent. For much of this period he was defending himself against more than one aggressor. When the deceased was in a physical altercation with just one person, the most that can be said is that he acquiesced to that altercation without any real choice.

[113] The deceased clearly did not consent to any application of force by CP and TR. However, my focus must be on whether the accused's conduct was unlawful. The Defence argued that the question is not whether the deceased consented to each and every blow, but whether he consented to the risks associated with the fight (*R v Gardiner,* 2018 ABCA 298 at para 3 [*Gardiner*]).

[114] What happened after the accused invited TR and CP to join the fight was either a continuation of the same fight or a whole new fight. Either way, I am satisfied beyond a reasonable doubt that the deceased did not consent.

[115] If I look at it as a continuation of the same fight, the accused's unilateral decision to change the terms of the agreed-upon fight by inviting his friends to join

negated the deceased's original consent. Consent extends only to "those blows that might reasonably be anticipated to occur in the course of the fight" (*Gardiner* at para 3). Given his agreement with the accused, the deceased would not reasonably have anticipated that TR and CP would join in, or that the accused, along with TR, would kick him while he was fighting CP.

[116] Alternatively, by inviting his friends to join, the accused started a whole new fight which the deceased did not consent to.

[117] The accused applied force to the deceased that went beyond his consent to fight one-on-one, and the accused knew that. As such he committed an assault on the deceased. That unlawful act began when TR and CP began assaulting the deceased at the accused's request, or at the latest when the accused started kicking the deceased while he was on the pavement with CP. When it ended is more complicated and I will address that question later in my reasons.

[118] Because I have found that there was no consent, at this stage I don't have to decide whether consent was valid.

[119] There were other unlawful acts which I will discuss later in my decision. For now, it is enough to say that the only other unlawful acts that I am satisfied were committed by the accused are uttering a threat to cause death and possession of a weapon for a dangerous purpose. The accused took out a knife and told TR to take his knife out. There is evidence that he took out his knife due to fear and for defensive purposes, and I don't have the benefit of comprehensive argument on whether he was committing an unlawful act at that moment. However, he later threatened to stab the deceased while holding the knife. At that moment, there is no doubt that he uttered a threat to cause death to the deceased, and his possession of the knife became an unlawful act.

(2) The Unlawful Act was a Significant Contributing Cause of Death

[120] For the following reasons, I am satisfied beyond a reasonable doubt that the accused's unlawful conduct – planning and participating in a group assault – was a significant contributing cause of the deceased's death.

[121] That unlawful conduct certainly contributed to the deceased's death. The accused planned the group assault, asked CP to attend, and then invited CP to intervene in his fight with the deceased. As such, 'but for' the accused's conduct,

CP would not have been in a physical altercation with the deceased and would not have stabbed him.

[122] I am also satisfied beyond a reasonable doubt that his conduct 'significantly' contributed to the deceased's death.

[123] In reaching that conclusion, I have considered: (i) the general guidance in the caselaw relating to causation; (ii) the more specific guidance relating to intervening acts; and (iii) the specific conduct in this case.

(i) General Principles of Causation

[124] Determining whether an accused has caused a death in a legal sense is "based on concepts of moral responsibility and is not a mechanical or mathematical exercise" (*Nette* at para 83; *Maybin* at para 16). It requires that an accused's conduct be sufficiently connected to the death that he *should* be held legally responsible for it (*Nette* at para 45).

[125] In *Tower,* the Nova Scotia Court of Appeal said that causation requires that:

> …the effect of the accused's acts must have subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event (at para 26, citations omitted).

[126] In *Nette,* at para 77, Justice Arbour said this about causation:

> In a homicide trial, the question is not what caused the death or who caused the death of the victim but rather did the accused cause the victim's death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence. It will be significant, and exculpatory, if independent factors, occurring before or after the acts or omissions of the accused, legally sever the link that ties him to the prohibited result.

[127] Here, the "what" and the "who" of cause of death are clear – CP's stabbing of the deceased was the direct and immediate cause of his death. However, as I said, legal causation for manslaughter doesn't require that the accused's actions be the *only*, the *most* significant, the *direct* or the *immediate* cause (*Maybin* at para 20).

[128] In *Strathdee,* at para 4, the Supreme Court applied these concepts in the group assault context, saying the focus when considering guilt for manslaughter should be on:

> … whether an accused's actions were a significant contributing cause of death, rather than focusing on which perpetrator inflicted which wound or whether all of the wounds were caused by a single individual. In the context of group assaults, absent a discrete or intervening event, the actions of all assailants can constitute a significant contributing cause to all injuries sustained. …

[129] In deciding whether the intervening conduct of others relieves an accused of liability for the outcome of his own conduct, it is appropriate to consider whether the conduct was reasonably foreseeable and whether the intervening actor was independent (*Maybin* at paras 28-29 and 43-44; *Lozada* at paras 15-17, 23-25 and 26-30; *Strathdee* at para 4; and, *R v Sinclair,* 2009 MBCA 71). However, these are analytical aides, not new tests for causation (*Maybin* at paras 28 and 29). Neither is determinative on the question of whether the chain of causation is broken. In each case the facts and context must be closely examined. The focus should always be on whether the accused "should be held legally responsible for the consequences of his actions" (*Maybin* at para 29).

[130] In *R v Kazenelson*, 2015 ONSC 3639; aff'd 2018 ONCA 77, Justice MacDonnell, beginning at para 136, provided a helpful summary of the law relating to intervening acts:

> One of the ways that legal causation narrows the field is by means of the doctrine of intervening acts. That doctrine recognizes that in some circumstances other causes may intervene in a way that would make it unfair to attribute responsibility for a resulting harm to the accused. In assessing whether it would be unfair, two approaches have emerged in the case law.
>
> The first approach looks to whether the intervening act was objectively or reasonably foreseeable. An intervening act that was reasonably foreseeable will not usually relieve the offender of responsibility, but an act that can be characterized as "extraordinary" or "unusual" might do so….
>
> The second approach considers whether the accused's conduct was effectively overtaken by a more immediate causal action that was independent of the accused's conduct, making the intervening act the sole cause in law: *Maybin*, paragraphs 27, 46. For that to occur, the independence of the intervening act must be apparent. It must appear that … insofar as the harmful result is concerned, the conduct of the accused was "not operative at the time of the [harm]". "If the intervening act is a direct response or is directly linked to the [accused's] actions and does not by its

> nature overwhelm the original actions, then the [accused] cannot be said to be morally innocent of the [resulting harm]".

[131] Here, the Defence argued that this was not one continuous altercation beginning with the accused fighting the deceased and ending with the stabbing. Rather, there were gaps and intervening acts, so the effect of the accused's acts did not subsist up to the stabbing. His acts were both spent and interrupted by multiple intervening acts including MP's independent suggestion to steal the deceased's shoes, MP's attempt to steal the deceased's backpack and, most significantly, CP's act in stabbing the deceased.

[132] The Crown argued that this was one continuous altercation with no significant gaps, and the acts of MP and CP were neither unforeseen nor independent. As such the chain of causation from the accused's unlawful group assault to the deceased's death was not broken.

(ii) Intervening Acts

[133] Causation is case-specific and fact-driven. However, to understand the Supreme Court's instruction on intervening acts it is useful to briefly review the facts in two leading cases - *Maybin* and *Lozado.*

[134] In *Maybin,* two brothers attacked the victim in a bar, repeatedly punching and kicking him in the head until he was unconscious. Then, a bar bouncer punched the victim in the head. Shortly thereafter, the victim died. The medical evidence did not establish whether his death was caused by the combination of blows or a single blow and, if so, which one. To determine whether the brothers' conduct had caused the death or the bouncer's act was an intervening act that broke the chain of causation, the Supreme Court of Canada considered both the reasonable foreseeability of his act and whether he was an independent actor. The Court found that under either analysis, the result was the same – the bouncer's action did not break the chain of causation (paras 28-29 and 43-44). The brothers' acts were a sufficiently contributing cause to ground liability for manslaughter.

[135] In *Lozada,* there was a group assault where the victim was stabbed. The Defence argued that the stabbing was an intervening act. There were two altercations between two groups and the second altercation was retaliation for the first. During the second altercation, Lozada's group attacked the victim. He fell to the ground and was assaulted. Lozada fought an associate of the victim, knocked

him down, and repeatedly punched him. About 15 seconds after the second altercation began, someone other than Lozado stabbed the victim twice and he died. Lozada was convicted, by a jury, of manslaughter.

[136] As I said, one of the analytical aids to help me determine whether the acts of MP and CP broke the chain of causation is to ask whether those acts were reasonably foreseeable.

[137] In *Maybin,* the Court said that the reasonable foreseeability approach suggests "that an accused who undertakes a dangerous act, and in so doing contributes to a death, should bear the risk that other *foreseeable* acts may intervene and contribute to that death" (para 30). It addresses the question of whether it is "fair to attribute the resulting death to the initial actor" (para 30).

[138] In *Lozada,* Moreau, J., writing for the majority, summarized the reasonable foreseeability analytical aid as requiring consideration of "whether the general nature of the intervening acts and accompanying risk of harm was reasonably foreseeable at the time of the accused's unlawful acts*,* or whether the intervening acts flowed reasonably from the accused's conduct" (para 24).

[139] This statement contains several principles:

- *Both* the intervening action and the accompanying or ensuing risk of harm must be reasonably foreseeable (*Maybin* para 38);

- It is only the *general nature* of the intervening act and the accompanying risk of harm, that must be foreseeable (*Maybin,* para 38). While '[s]ome degree of specificity about the nature of the intervening act must be foreseeable", the Crown does not have to prove reasonable foreseeability of its "precise details" or the "precise future consequences" (*Maybin* paras 34 and 37-38); and,

- The relevant time to assess reasonable foreseeability of a potentially intervening act and its accompanying risk of harm is at the time of the accused's unlawful act(s), not the time of the intervening act (*Maybin* para 34).

[140] When addressing the required level of specificity for reasonable foreseeability in *Maybin*, the Court said that legal causation did not require

objective foreseeability that the bouncer would assault an unconscious person. Rather, objective foreseeability of intervention by bar staff or a patron causing further assault of the victim was enough (*Maybin* at para 38). The brothers had started a one-sided fight in a crowded bar. In that context, both the intervening act (intervention by bar staff or a patron) and the ensuing risk of non-trivial bodily harm (further assault of the victim) were objectively foreseeable.

[141] The required level of specificity was again considered in *Lozada.*

[142] There was no evidence that Lozada knew or foresaw that anyone in the group had a knife or that the victim would be stabbed. Furthermore, when someone else stabbed the victim, Lozada was fighting with the victim's associate. However, Lozada was nevertheless convicted of manslaughter by a jury. The trial judge instructed them that the specific act of stabbing did not have to be reasonably foreseeable; it was enough if "the continuation of assaults on [the victim] and the risk of nontrivial bodily harm to [the victim] from those continuing assaults was reasonably foreseeable at the time of the particular [accused's] dangerous unlawful act" (para 8).

[143] On appeal, Lozado argued that the jury should have been told that "a stabbing could break the chain of causation unless the use of some weapon – or, at the very least, the heightened escalation of the assault – was reasonably foreseeable" (para 18).

[144] The Supreme Court did not agree that this level of specificity was required. Moreau, J., writing for the majority, agreed that the trial judge's instruction in isolation could be ambiguous and that it was not enough for the jury to conclude that a continuation of the assaults on the victim and the resulting risk of non-trivial bodily harm were reasonably foreseeable (para 19). However, the instruction was correct "provided that" the jury accepted that the continuation of the assaults was of the same "general nature" as the fatal act, or that the "stabbing flowed reasonably from [Lozada's] conduct" (para 19).

[145] The other analytical tool available to me is to ask whether the acts were independent.

[146] In *R v Triolo,* 2023 ONCA 221, Doherty, J.A. (whose majority reasons were substantially agreed with by the majority of the Supreme Court in *Lozada,* at para 5), said that an act is independent "…if it is not directly linked to the actions of the

accused, and by its nature overwhelms the actions of the accused so that the accused can properly be said to be morally innocent in the death" (para 187).

[147] *Maybin* is also instructive in deciding whether an intervening act is independent. As the Court said at para 49:

> Whether an intervening act is independent is … sometimes framed as a question of whether the intervening act is a response to the acts of the accused. In other words, did the act of the accused merely set the scene, allowing other circumstances to (coincidentally) intervene, or did the act of the accused trigger or provoke the action of the intervening party?

[148] The trial judge found the actions of the Maybin brothers and the actions of the bouncer to be separate and independent assaults but also "an interrelated series of events" (para 58). He said, "the assaults took place in the same location and in the same manner, and from …Maybin's first punch to the bouncer's blow, the elapsed time was less than a minute" (para 59).

[149] Applying these principles to the facts of this case, I conclude that the Crown doesn't have to prove reasonable foreseeability of the specific act of stabbing, use of a weapon, or a heightened escalation of the assault *as long as* CP's act was a continuation of and was of the same "general nature" as the group assault or flowed reasonably from it (*Maybin* at para 34; *Lozada* at para. 19).

[150] To decide whether the potential intervening actors (and their actions) were independent I should consider: whether MP and CP's conduct was responsive to/a reaction to the accused's conduct or coincidental; whether their conduct was closely connected to the accused's in time, place, circumstance, nature and effect; whether the effects of the accused's actions were still "subsisting" and not "spent" at the time they acted; and, whether their actions were so overwhelming as to make the effect of the accused's actions merely part of the history as opposed to still being "operative" at the time of the deceased's death (*Mabin,* at para 59, citing *Tower,* at para 26).

[151] To do that, I have to more closely examine the specific facts of this case, including, what happened in the parkade and what the accused knew and intended.

(iii) Detailed Review of the Facts

Events in the Parkade

[152] The entire event in the parkade, from the beginning of the physical altercation between the deceased and the accused to when CP stabbed the deceased, took about two and a half minutes (Ex. 3E-G; 3N-Q; and 79).

[153] I've already described the first 45 seconds of the altercation (Ex. 79, 1:20-2:03). I'll continue where I left off.

[154] There were multiple pauses in the accused's involvement in the physical altercation. I accept that at times, he was prepared to end the altercation and expressed that. However, after each pause until the final one, he re-engaged by applying force to the deceased.

[155] While CP and the deceased were still fighting on the pavement, the accused backed away for a couple of seconds to reposition his backpack (the first pause). This was only a brief pause in the accused's involvement. CP and the deceased continued fighting on the pavement, TR continued to grab onto the deceased and kick him, and EP stayed close to them. The accused then engaged the deceased again by grabbing and kicking at him. The deceased attempted to stand but was pulled back down by TR. The accused said, "are you done?" The fighting between CP and the deceased paused briefly. The accused again said, "are you done?", but then immediately kicked the deceased (2:03-2:18).

[156] The accused testified that he asked the deceased "are you done?" because he was done fighting and wanted to know if the deceased was also done. He said he kicked the deceased again because the deceased kept punching, so it was clear that he wasn't done fighting.

[157] That testimony is not supported by the recordings. Between when the accused first asked if he was done and when the accused kicked him, the deceased did not throw any punches or do anything else that could reasonably be perceived as continuing to 'fight'. Immediately after the accused first asked the deceased if he was done, TR grabbed the deceased's hoodie and pulled while the deceased and CP continued to 'wrestle' on the pavement. The deceased tried to defend himself by putting his hands up to protect his head and got to his knees. The accused then asked him for the second time if he was done, and then immediately kicked him.

[158] The accused then backed away and the deceased's friend, HAA, approached, saying something like "guys, stop". CP then stood up, still punching the deceased as the deceased got to his feet (2:18-2:19).

[159] The next pause in the fighting lasted longer and it appeared that the fight was over (the second pause). The accused again said to the deceased, forcefully, "are you done? You did this", while pointing at the deceased. The deceased walked towards the accused, they stood facing each other, and the accused said, "don't fuck with me" and, in a calmer voice, "you can walk away now", and "you want to grab onto me". HAA again said something like "guys, stop" (2:19-2:35).

[160] The accused testified about what he meant by "you want to grab onto me". He explained that this was a reference to the start of the fight and not an invitation to re-engage. I accept that explanation. The tone and cadence of the comment suggest a statement of incredulity rather than a question or suggestion.

[161] During this pause in the fighting which lasted about 17 seconds, there was some physical posturing between the deceased and the accused, but no contact, and the altercation appeared to be over. HAA testified that he thought the fight was over at this point because the fighting had stopped, they had gotten up and the accused and the accused were speaking to each other.

[162] The accused testified that he was done fighting at that point. He felt calmer, his adrenaline was lowered, and he wanted to know if things were resolved between him and the deceased. He said he did not push the deceased again because he could tell the deceased was done – the deceased wasn't fighting or throwing punches – so he assumed the deceased was also done with the fight. The accused testified that the deceased had wanted to fight him, they had fought, and while they weren't friends, the conflict between them was over. He said he started to focus more on his surroundings. He started to get concerned that the police might come. He was in the community on conditions at the time and was worried that he would be "breached".

[163] The matter could have ended there. However, MP then said something like "get his shoes". I accept the accused's evidence that he didn't hear that. MP's voice was not raised. Her voice was captured on her phone's recording. However, her phone was closer to her than the accused was, she appeared to be speaking to TR, and at that time the accused was paying attention to the deceased.

[164] The accused then said to the deceased, "is the beef done?" He testified that this was to confirm that the deceased also thought the conflict between them was resolved. TR cut him off by loudly commenting that the deceased had nice shoes on. The accused testified that he heard that.

[165] CP then moved behind the deceased such that the deceased was essentially surrounded - CP, TR, MP, and the accused were positioned in front and behind him. HAA was standing nearby. TR then said something like "get those shoes off" to the deceased and pushed him towards CP. CP also said something like "get those shoes off" and pushed the deceased back towards where the accused, TR, and MP were standing. MP then said, "those are nice shoes" and moved towards the deceased. At the same time, the accused essentially took a swing at the deceased who stumbled out of the 'circle'. TR again told the deceased to "take those fucking shoes off" (2:35-2:43).

[166] The accused described this as a "bully circle". He said that the other three were still picking on the deceased, but he didn't want to be part of it. The accused said that when the deceased was pushed towards him, he pushed the deceased away and out toward his stuff, hoping that the deceased would take his stuff and go.

[167] The recording does not entirely support the accused's testimony (2:42-2:43). The accused's action did have the effect of pushing the deceased out of the 'circle" and in the general direction of where he had put his backpack. However, the accused's action looks more like a punch or a smack than a push – it involved one arm, swung at shoulder height, and his hand or fist connecting with the deceased. The accused testified that he connected with the deceased's torso, not his head. The recording doesn't clearly show this, so I accept the accused's evidence on that point. However, given what I can see on the video, I don't accept his evidence that this application of force towards the deceased was for the purpose of helping him to get out of the 'circle'.

[168] The deceased then backed away from the group and all four of the youths moved towards him. CP was closest, with TR and MP right behind him and the accused about six-to-ten feet behind them (2:43-2:45).

[169] CP then struck the deceased, and they began to fight again with TR and MP standing close to them. The group of the deceased's friends then arrived, running towards the altercation. At that time, the accused was about eight-to-ten feet from the deceased and CP. The accused looked toward the deceased's friends and said, "watch out behind you" and something like "pull out your knife. Knife, knife, knife", while running towards where CP and the deceased were fighting (2:45-2:49).

[170] The accused ran to the altercation and touched the deceased's back. The deceased and CP continued to fight. The accused took off his backpack and removed a knife. TR can also be seen with a knife in his hand, but it is not clear where it came from. The deceased's friends moved closer but did not intervene. HAA shouted "one-on-one". TR said, "you all want to get poked like [name redacted]", apparently to the deceased's friends. The fight between CP and the deceased continued, moving deeper into the parkade, and the two fell to the pavement. The accused then said to the deceased something like "get off him or I'm going to fucking stab you" (2:49-3:12).

[171] TR didn't testify and it is not clear what he meant when he said, "you all want to get poked like [name redacted]". The accused testified that he did not hear that comment on the day and I accept his evidence. HAA did hear it. He thought the name was a reference to [redacted]. He interpreted the statement to mean 'stay back or you'll get stabbed'. That is a reasonable interpretation.

[172] CP and the deceased continued to fight on the pavement, moving further into the parkade. TR and the accused continued to have their knives out. MP intervened in the fight between CP and the deceased, kicking the deceased while he was on the pavement 'wrestling' with CP (3:12-3:19).

[173] The accused was extensively cross-examined on his reasons for telling TR to take out his knife, for having his own knife out, and for threatening the deceased. The accused said the following:

- When he saw the deceased's friends run up, he was scared. He and his friends were outnumbered, and he saw one of them holding a backpack in front of him so was concerned they had weapons.

- He was specifically warning TR because he thought one of the deceased's friends was coming up behind TR.

- He hoped/expected that when the deceased's friends heard him say "knife" and saw the knife, they would back off and the fight would end.

- He heard HAA say "one-on-one" but didn't immediately put his knife away because his group was still outnumbered by the other group.

- While he had his knife out it was pointed at the ground, not at anyone.

- When he touched the deceased, he was trying to pull him off CP. He said he wanted to pull them apart to stop the altercation. He acknowledged that he threatened the deceased, but said at that time, CP was losing the fight – the deceased had him in a headlock.

- He did not intend to stab him but hoped that the threat would scare him into letting go of CP.

- He didn't know why CP and the deceased were fighting, and he didn't join in because his fight was over.

[174] I accept that the accused's reason for telling TR to take his knife out, for taking his own knife out, and for continuing to hold it was, at least in part, defensive or responsive to the arrival of the deceased's friends. I also accept that he didn't know why CP and the deceased were fighting at that point. His testimony about what was happening is consistent with what can be seen on the video and the testimony of witnesses. His testimony about what he was thinking and feeling is plausible given what was happening. The reliable evidence, including the video and most of the witnesses, confirm that the accused did not actively use the knife to threaten the deceased's friends.

[175] However, I have concluded that his conduct was also to prevent the deceased's friends from intervening in the fight between the deceased and CP. The accused did threaten the deceased with the knife and use it to hold the others at bay.

[176] At the end of the fight between the deceased and CP, the accused again engaged physically with the deceased. When the deceased and CP stopped 'wrestling', as the deceased started to stand, the accused used his foot to apply force to the deceased. The contact was between the bottom of the accused's foot and the deceased's shoulder. The force used was less than when the accused had kicked him earlier and did not prevent the deceased from standing. The deceased stood and took a step away from CP (3:19-3:22).

[177] The accused testified that the motion he made with his foot during this part of the fight was to push the deceased or give him a "boost" away from CP and towards his friends. He said it was not a kick, he did not use much force, and his intent was to move the deceased away. I accept that the accused's action with his foot was more of a push than a kick and that its purpose was to move the deceased

away. However, given all the circumstances, I don't accept that his purpose was to assist the deceased. I accept that the accused wanted the altercation to be over, but given his conduct up to this point, I believe that he also wanted to assist CP by pushing the deceased away from him. As the accused said, he thought the deceased was winning the fight with CP – that is why he threatened the deceased. It makes sense that this concern would also cause him to want to push the deceased away from CP.

[178] At this point, the final pause in the altercation began. It lasted about 15 to 20 seconds. The deceased and CP got to their feet and stopped fighting. The deceased walked away and went to stand with his friend, HAA. They were joined by another of the deceased's friends. The three of them then backed away from the others. CP and MP walked away from the accused. The accused put his knife in his backpack, put his backpack on his back, and looked away from the others. For a moment, there was some distance between the groups – the deceased was with two of his friends, the accused was alone, CP and MP were together, TR was alone picking something up from the pavement, and the deceased's other friends were some distance away (3:22-3:35).

[179] The altercation appeared to be over. The accused and the witnesses all testified that they thought it was over. The accused testified that he put his knife away because the groups were dispersing and it was clear that everyone was done fighting and had calmed down. His testimony on this point is corroborated by the video and the other witnesses.

[180] The accused said at that point the original conflict between him and the deceased was not at all in his mind. He was thankful the conflict had finally stopped. He said that he planned to walk away.

[181] He was cross-examined about why he didn't walk away at that time, or earlier. He testified that his friends were still outnumbered, and he couldn't leave them there.

[182] The deceased started to walk towards where he had left his backpack in a corner of the parkade. MP and CP were closer to the deceased's bag. MP moved towards the deceased's backpack and the deceased started to run towards it. The accused had just finished putting his backpack on his back and looked away, and then down. The deceased reached the place where MP and his backpack were located. There was a struggle, perhaps over the backpack, and MP fell, or was

pushed, to the pavement. CP moved quickly towards them and stabbed the deceased. Everyone, including the accused, moved towards their location (3:35-3:42).

[183] The deceased jumped away over a low barrier in the parkade. He went to his knees and laid down. He didn't get up again. CP and MP ran away. The deceased's friends and Ms. Adolph ran towards the deceased. The accused and TR also went to him. The accused bent over him and touched his head. The accused and TR remained at the scene for about a minute after the stabbing and then left (3:42-4:44).

[184] The accused testified about the stabbing and the events immediately afterward. He said that while he was looking away from the others, he saw a commotion out of the side of his eye. He then saw the deceased "gallop" over the barrier holding his chest. He said TR came and told him to go but he felt he couldn't leave the deceased there like that. He said he was shocked and confused. He didn't know what to do and didn't know first aid. He went to the deceased and told him to breath and "stay with me".

[185] I accept the accused's evidence about what he said to the deceased and his reasons for staying. Ms. Adolph was nearby and didn't hear what was said, but she was occupied. Mr. Pelrine heard someone say something like this but couldn't say who it was.

[186] To properly assess the reasonable foreseeability of the potential intervening acts, I must also consider all the circumstances, including what the accused intended and knew about the presence or use of weapons and the risk of bodily harm.

The Text Messages

[187] The text messages clearly establish that the accused planned that he, CP, and TR would assault the deceased. The Crown argued that the messages also establish that he planned to cause serious bodily harm. The Defence argued that the messages demonstrate exaggerated posturing on both sides and the evidence doesn't prove an intent to cause bodily harm.

[188] The messages do not support an intent to assault the deceased with weapons or, specifically, knives. They do support an intent to beat him up which

necessarily involves some infliction of harm, though not necessarily harm that would satisfy the definition of "bodily harm".

[189] I accept that there was a certain amount of posturing in the accused's messages to the deceased, TR, and CP, and in the deceased's messages to the accused and others.

[190] The messages between the accused and the deceased show strong language and posturing on both sides (Ex. 12A, pp. 11-25):

- The deceased began the text exchange with the accused on April 22nd. The first message he sent was, "you done bitch".

- In the subsequent exchange, the accused said, "I'll stomp yo ass", "you gon be leaking when im done with [you] bro", "you gon bite the curb", and "u gon get yo ass beat".

- The deceased used similar language, saying "Fuck you I'll fuck you up just watch [til] I catch you bitch ass", "watch [til] I get your ass on the ground", "if you don't be at Mumford after school I'll get you any where", "you start that shit and I'll end it".

[191] The deceased also sent similar messages to others (Ex. 12A, pp. 7-11):

- to CL - "Ill fuck [name redacted] up I'm telling you"; and,

- to a third party - "I'm going to fuck him up", "ill [beat] the fuck out of him", tell him to watch his back, "I'll fuck him up I am not even joking", I'm getting his ass at Mumford today".

[192] The accused used similar strong language when communicating with TR and CP. He acknowledged that he shared screen shots with TR of his exchanges with the deceased, including the message telling him "you gon be leakin". Further, when discussing the plan for TR and CP to jump in after 10 seconds, the accused told them they wouldn't hold back, agreed that he would "fuck him up" in the initial 10 seconds, told them they would then fuck him up together, and told them "this gon be fun" and that he couldn't wait (Ex. 11A, pp. 39-45). In his testimony, the accused confirmed that he communicated this to CP and they did not discuss how the altercation would end.

[193] The accused testified that in the messages with the deceased he was "talking shit" – they both were – and he was acting tough to try to intimidate the deceased to avoid a fight. I accept that the accused's message, "you gon be leakin" is a clear warning/threat that the deceased would be bleeding after the fight. However, given the general posturing between them, I can't say it was a literal threat or that it was a specific threat to stab him.

[194] The accused testified that he wanted to avoid a fight because he was on a court order and thought it was a dumb reason to fight. He testified that he sent a message to the deceased suggesting they should meet to fight the next day but deleted it when the deceased didn't answer. However, he also testified that he was looking forward to the fight and didn't feel he could back down without looking weak. I accept that the deceased is the one who initiated contact and pressed for a fight. I also accept that the accused was conflicted about whether to fight.

[195] The accused testified that he thought the fight with the deceased would be "a standard fist fight". He acknowledged that changed a bit when he decided that the three of them would "jump" the deceased. However, he said he still thought they would beat up the deceased by punching and kicking him and then walk away. I accept that.

[196] The accused's subjective intent or expectation is not determinative. I have concluded that, given the content of the messages, a reasonable person would have foreseen a risk of serious harm - harm that was not brief or minor - from the planned assault. A reasonable person who knew that the plan was for three young men to "jump" one person and beat him up by punching and kicking him, would foresee the risk of serious bodily harm.

Knowledge of Knives

[197] There is no dispute that the accused, TR, and CP each had a knife with them during the incident.

[198] I am not satisfied that the accused was part of any plan to bring knives or use them. There is no direct evidence from the text messages of any advance discussion or plan to bring or use knives and the accused denied that there was any in-person discussion about it.

[199] I am also not satisfied that the accused had his knife with him for any purpose associated with the fight. I accept his testimony that he always carried a knife, he had the knife with him before he and the deceased agreed to fight, and he did not have the knife with him for any purpose related to the fight. The fight was not arranged until the afternoon, after the accused had already left his residence with his knife in his backpack.

[200] The Crown argues that when the altercation began the accused knew that TR and CP had knives.

[201] I am satisfied that the accused knew that TR had a knife with him when they went to the Halifax Shopping Centre. He initially testified that he didn't specifically know whether TR had a knife with him on April 22nd. However, he acknowledged that he and TR were friends, and he knew that TR regularly carried a knife. He also acknowledged that during the incident he yelled to TR, "watch out behind you" and something like "pull out your knife. Knife, knife, knife" (Ex. 79, 2:45-2:49). This clearly suggests that at that point in time, he knew or believed that TR had a knife, and he ultimately agreed that he did know that TR had a knife at that moment. The accused didn't receive any new information about whether TR had a knife between when the physical altercation started and when he said this. As such, the only rational conclusion from this evidence is that he believed TR had a knife before the physical altercation in the parkade started.

[202] The accused testified that he didn't know with any certainty whether CP had a knife with him on April 22nd until CP stabbed the deceased. The Crown submitted that is not credible because the accused generally believed that all youth carried a knife, he had seen CP with a knife before, he specifically knew that CP had obtained a knife while they were at the Scotia Square Mall before going to the Halifax Shopping Centre, his direction to "pull out your knife" during the altercation suggests he knew CP had a knife, and that he ultimately acknowledged during his testimony that he knew his friends had knives.

[203] Whether he specifically knew that CP acquired a knife at the Scotia Square Mall immediately before going to the group assault is relevant. If the accused knew that CP had acquired a knife on his way to the planned assault, that would be strong support for an inference that he knew there was a risk that CP would use the knife.

[204] For the following reasons, I am satisfied that the accused believed or thought that CP probably had a knife. However, I cannot say that he was specifically aware that CP acquired a knife at the Scotia Square Mall or that he knew with certainty that CP had a knife.

[205] The accused testified that a lot of the youth he knew carry a knife, and that it is a common thing. He didn't know CP as well as he knew TR. He recalled seeing CP with a knife only once before and didn't know whether he regularly carried one. I accept that testimony.

[206] CP acquired a knife from a store in the Scotia Square Mall and handled it and its packaging while he was in the accused's proximity at the Scotia Square Mall and on a bus ride to Halifax Shopping Centre. The accused testified that he didn't know that CP acquired the knife and didn't see him with it in the Scotia Square Mall or on the bus. The Crown argued that he should not be believed given his proximity to CP at the Scotia Square Mall and during the bus ride. The video evidence from the Scotia Square Mall and the bus doesn't establish that the accused saw the knife or heard any discussion about the knife, so doesn't establish that the accused knew CP had acquired a knife.

[207] The surveillance video from the Scotia Square Mall does not establish that the accused knew that CP had acquired the knife from the store (Ex. 2). The accused and TR did not go into the store with CP and MP, and they walked away from the store before CP and MP came out. CP and MP were 20 to 30 feet behind the accused as they walked through the mall. The accused looked back once but testified he didn't see anything except MP holding a drink. The video does not contradict that.

[208] The accused and TR then took an escalator to the lower level. CP and MP were behind them on the escalator. While on the escalator, CP had a package in his hand which contained the knife and he appeared to be trying to open it. The accused testified that he did not turn around, was focussed mainly on his phone, and did not see the knife in CP's hand. The surveillance video corroborates that.

[209] CP also had the knife with him when the four of them took the bus to the Halifax Shopping Centre. The accused testified that he did not observe anything in CP's hand during the bus ride. Again, the Crown argued he should not be believed given his proximity to CP on the bus. The four sat at the back of the bus with CP and MP in a seat directly in front of the accused and TR (Ex. 5A, 5C & 5E).

Starting shortly after they sit down and continuing for about two minutes, CP and MP were handling some item(s) in plastic packaging (Ex. 5A, 4:30-4:32). They appeared to be trying to open the packaging, and I accept that it contained a knife. However, the back of their seat would have blocked the accused's view of the item, and he was mostly looking down.

[210] At one point while they had the packaging in their hand, the accused leaned forward, and they had a short conversation. The accused couldn't specifically recall that but believed he might have been showing CP his tattoo. He maintained that he didn't see a knife or packaging in CP's hand and couldn't recall him fiddling with anything. The video does not establish that the accused could have seen the knife during this interaction.

[211] Around that time, MP can be heard, on the recording, saying something about a knife, while she was holding what appeared to be a knife. Ms. Nazvesky also testified that toward the end of the ride as they were approaching the Mumford terminal, she heard what she thought was a female voice say, "where's my knife?".

[212] The accused denied hearing MP say anything about a knife and I accept that testimony. He was sitting closer to MP than Ms. Nazvesky. However, he testified that he had connected his phone to a blue tooth speaker and was playing music loudly. He was holding the speaker so was quite close to it. He said he was mainly focussed on his phone, connecting to his speaker, and texting. He believed he was texting with the deceased and possibly CL. He testified that during portions of the ride, the bus was also quite crowded and noisy. That testimony is generally corroborated by objective evidence:

- The time stamps on the surveillance video from the bus and the text messages confirm that he was messaging with the deceased while he was on the bus (Ex. 5 & 12A);

- Ms. Nazvesky, who was riding the bus, confirmed that she saw the four youth at the back of the bus and heard them playing music; and,

- The surveillance video from the bus confirms that the bus was very crowded during part of the ride, with people standing in the aisles.

[213] Ms. Nazvesky also testified that when they were getting off the bus, she saw someone getting off with a red object that she believed to be a knife/case/pouch in

their belt area. She wasn't sure it was a knife but was certain it was the shape of a knife. I accept that she saw a red handled knife, and it was probably possessed by CP. OAS testified that he saw CP holding a red handled knife immediately before CP stabbed the deceased. His memory of the colour may have been impacted by photos he'd seen of CP with a red handled knife. However, a still photo taken from MP's recording of events in the parkade shows what appears to be a red handled knife in CP's hand.

[214] The accused testified that he didn't see a knife when they got off the bus and I also accept that. The surveillance video shows that CP and MP were in front of the accused when they exited, so if CP was wearing a knife on his belt area, it probably would not have been visible to the accused.

[215] Finally, after they got off the bus and were walking toward the parkade to meet the deceased, MP's recording captured her and TR boasting about how they would use knives against the deceased and his friends (Ex. 3X-3GG & Ex. 79). While they were across the street from the parkade, the deceased, OAS, and HAA were on the street corner near the parkade. MP apparently saw them, and she and TR had the following discussion:

> MP: Three v three. (*This is an apparent reference to there being three people on each side of the confrontation – the deceased and his two friends (OAS and HAA) vs. the accused, CP, and TR.)*
>
> TR: I'll poke them, I'll start poking all of them. (*The clear inference from this is that TR is talking about using his knife to stab the others.)*
>
> MP: Me too. Three v three. … They're little kids. What … what the fuck.

[216] If the accused heard this, it is admissible against him as evidence of what he knew at the time and the foreseeability of risk.

[217] The accused testified that he did not hear the discussion, and I accept that. TR's comments are audible on MP's cell phone recording. However, she was speaking to TR who was close to her and the phone was also with her, whereas, the accused was walking well ahead of them. The accused did not participate in the conversation

[218] Given the accused's distance from TR and MP, and the fact that he didn't acknowledge the comment verbally or through any gesture, I can't conclude that he heard those comments.

[219] Based on all of this, I am not satisfied that the accused specifically knew that CP had acquired a knife while at the Scotia Square Mall. His proximity to CP while CP was handling the knife, his proximity to MP when she referred to a knife, and his proximity to MP and TR when they spoke about using the knife against the deceased and his friends, all make me suspicious about what he saw and heard. However, I can't say that he probably knew.

[220] However, based on his general knowledge, his comments during the altercation, and his admissions during the trial, I am satisfied that by the time the altercation started, he believed CP had a knife. His comments during the altercation and his testimony about that are particularly relevant to that conclusion.

[221] During the altercation, the accused said something like "pull out your knife. Knife, knife, knife". If CP was included in that direction, then he clearly knew or believed that CP had a knife. The reference to "knife" is singular which suggests he was speaking to one person, and he initially testified that it was directed at TR because when the deceased's friends had arrived, TR's back was to them and he wanted to warn him.

[222] However, in cross-examination it was repeatedly suggested to him that with this comment he was telling his "friends" to take out "their knives" and he ultimately agreed (transcript of April 7, 2025, pp. 52, 53, 54, 68, 69, 73, 111, 120 and 154).

[223] During cross-examination, he initially reiterated that his direction was to TR only (transcript of April 7, 2025, p. 85):

> Q. And you have told your friends at this point to get their knives out?
>
> A. I told [TR], yeah.
>
> Q. Well, you didn't say [TR], get your knife.
>
> A. No, but [CP] was in a fight, so how would he get his knife if he's in a fight?
>
> Q. You didn't specify who you were directing to get their knives out...

A. No.

[224] In this passage, he did not say that he didn't know CP had a knife, he said that CP couldn't "get his knife" because he was in a fight. This suggests he knew CP had a knife but didn't think he could get it out.

[225] Most significantly, the accused ultimately agreed that during the fight he knew both TR and CP had knives (transcript of April 7, 2025, p. 154):

> Q. But you knew in the course of the fight with [the deceased] that they had them when you asked them to pull their knives out?
>
> A. Yeah.

[226] He didn't receive any new information about whether CP had a knife between when the physical altercation started and when he said "take out your knife. Knife, knife, knife". As such, the only rational conclusion from this evidence is that he believed CP had a knife before the physical altercation in the parkade started.

Knowledge of general and specific risk of death or serious bodily harm associated with knives

[227] The accused acknowledged he knew that knives were dangerous and could cause death or serious bodily harm.

[228] There was also some evidence that the accused had previously considered whether CP himself presented a risk for stabbing someone.

[229] The night before these events, at about 11:18 p.m. the accused communicated with a third party [TP] about CP (who is referred to in the communication by a nickname, JP) (Ex. 11A, pp. 22-23):

> TP: do u think if I run jp 1s hell stab me *('run 1s' means to fight one-on-one)*
>
> Acc: ya prb (*probably)* hes on some crazy shit but if u living the street life u shouldn't care abt time
>
> TP: what would happen if he pulls out a knife and I pull out bear mace

> Acc: uhh idk *(I don't know)* I cant tell the future … He will prb gwt (*probably get)* maced

[230] In the remainder of their conversation, the accused encouraged the third party to resolve their dispute with CP.

[231] This discussion is hypothetical, and the accused's responses are equivocal. As such, this does not establish that he knew CP was capable of stabbing someone. However, it confirms that the accused believed CP had a knife and establishes that less than 24 hours before the incident he had turned his mind to the question of whether CP was capable of stabbing someone.

Conclusion on Significant Contributing Cause

[232] As I said, I am satisfied beyond a reasonable doubt that the accused's unlawful conduct during the group assault was a significant contributing cause of the deceased's death. I am satisfied, generally, that the connection between his actions and the death is sufficient to morally justify legal liability.

[233] First, looking at this broadly:

- The accused planned a group assault.
- The accused participated in a brutal group assault which included punching and kicking, including to the deceased's head.
- The accused had a knife.
- The accused believed that TR and CP had knives.
- The accused had recently considered whether CP was capable of stabbing someone.
- During the altercation, the accused told at least TR to take out his knife.
- The accused took out his own knife.
- The accused threatened to stab the deceased in the presence of CP.

- The accused witnessed MP and TR try to take the deceased's shoes and continued to physically engage with the deceased.

[234] I appreciate that there were pauses in the altercation, but after each pause until the last one, the accused re-engaged and used force against the deceased.

[235] I also appreciate that things unfolded quickly, there was a cascading chain of events, and things happened that the accused did not plan or intend - for example, MP decided to steal the deceased's shoes and backpack, the main physical altercation shifted to CP and the deceased, and the violence escalated at the end to the stabbing.

[236] However, the accused put the plan in motion, and he contributed to the group assault. He also contributed to the potential escalation in violence and heightened risk of non-trivial bodily harm. He took out his knife, he directed his friends to take out theirs, and he threatened the deceased with stabbing. When he did that, he may not have intended to escalate the violence and risk. He also may not have intended to carry out the threat to the deceased. However, his conduct did escalate the violence and risk, and it was reasonably foreseeable that it would. In reaching that conclusion, I considered whether the general nature of the intervening act(s) and the risk of non-trivial harm were objectively foreseeable at the time of his unlawful act(s) – meaning, what would a reasonable person in the accused's circumstances have foreseen at the time he engaged in the assault(s)? I also considered whether the acts of the others were independent having regard to the relationship between the actors and their acts, and the accused's conduct and the group assault.

[237] I have concluded that the acts of MP and CP that led to the stabbing, and CP's conduct in stabbing the deceased, were reasonably foreseeable and not sufficiently independent so as to break the chain of causation from the accused's conduct to the death.

[238] In these circumstances, given what the accused planned, what he knew, and what he himself did, a risk of non-trivial bodily harm was reasonably foreseeable, even without the use of weapons. Further, given that he knew about the presence of knives and he gave the direction to take the knives out, it was also reasonably foreseeable that one of his group would continue the assault beyond his plan, escalate the violence, and use a knife.

[239] The Crown doesn't have to prove that CP's specific act in stabbing the deceased was reasonably foreseeable, nor the specific circumstances in which bodily harm might have occurred. I appreciate that the immediate trigger for that act was probably the altercation between MP and the deceased that flowed from her decision to take his backpack. However, given her previous attempt to take the deceased's shoes, the attempted theft of another item was not surprising and it was entirely foreseeable that something would happen that would trigger someone in the accused's group to use a knife to cause bodily harm.

[240] The question of whether CP and MP were acting independently was more challenging to answer as there are features here that support this Defence argument:

- They were probably acting with their own motivations.
- MP's decision to take the shoes and the backpack, and CP's decision to stab the deceased, appeared to be spontaneous or impulsive.
- Each of MP's acts reanimated the physical altercation. The timing suggests that her attempt to take the deceased's backpack, and the deceased's response to that action, was probably the immediate trigger for CP to stab the deceased.
- The accused was surprised by MP's decision to take the bag.
- There was a temporal and contextual break between the accused's last unlawful act and the stabbing. The temporal break was about 20 seconds between the accused's last physical contact with the deceased and the stabbing (Ex. 79, 3:20 and 3:40). The contextual break was more significant – during those 20 seconds, the accused walked away from CP, put his knife in his backpack, put his backpack on his back, and began to look elsewhere (3:26).

[241] However, other features undermine the Defence argument that CP and MP were acting independently:

- CP, TR, and MP were not independent actors in that they were not third parties (as the bouncer was in *Maybin*) – they were part of the accused's group and all were part of the group assault.

- All were at the scene because the accused planned a group assault.
- When MP suggested taking the deceased's shoes and TR took action to do so, the accused did not disengage and he again used force against the deceased, suggesting he was prepared to go along with the variation of the plan.

[242] The foreseeability and independence inquiries are analytical tools to help me determine whether the accused's conduct significantly contributed to the death. I have concluded that the general nature of CP's conduct and the risk of the ensuing harm were reasonably foreseeable, and that CP was not an independent actor although there are features of his conduct that were independent.

[243] As Paciocco, J.A. said in *R v Romano,* 2017 ONCA 837 at para 30:

> The threshold for breaking the chain of factual causation is not generous. This is because, "[t]he criminal law does not recognize contributory negligence nor is it equipped with any mechanism to apportion responsibility for the harm occasioned by criminal conduct, expect as part of sentencing": *K.L.*, at para. 18. Moreover, if an accused is already engaged in an unlawful act, the intensity of the causal connection required to furnish moral blame for the consequence can be modest.

[244] This whole event transpired in about two and a half minutes. The stabbing, or some similar escalation in violence, was a natural and ordinary, or reasonably predictable, occurrence. It naturally flowed from the group assault and was directly related to the accused's unlawful conduct. In the circumstances, it was not "extraordinary" or "highly unusual" that someone would get stabbed and CP's act in stabbing the deceased was not so overwhelming as to make the accused's conduct "merely part of the background or setting" (see *Lozada,* paras 20-21).

[245] Ultimately, CP's act in stabbing the deceased was reasonably connected in time, place, circumstance, nature, and effect with the accused's acts and the effects of the accused's unlawful conduct were still "subsisting" and not "spent" at the time that CP acted (*Tower*, at para 26).

(3) Serious Bodily Harm was Reasonably Foreseeable

[246] I accept that when the accused planned and began this assault, he did not subjectively foresee that knives would be used, that MP would try to take the deceased's shoes or backpack, that the deceased would be stabbed, or that the

deceased would die. However, that level of foresight is not required to convict for manslaughter.

[247] I am persuaded beyond a reasonable doubt that a reasonable person in the circumstances of the accused would have foreseen a risk of non-trivial and non-transitory bodily harm. In other words, I find that a reasonable person in the same circumstances as the accused would have realized that their unlawful conduct would likely put the deceased at risk of bodily harm that was not minor or brief.

[248] That risk was reasonably foreseeable from the start of the attack – even without the use of knives. The plan included a group assault that the accused acknowledged would involve three people punching and kicking the deceased. As seen on the videos, the actual assault included forceful punches and kicks to the deceased's head and body that were quite brutal. Those actions alone exposed the deceased to a risk of bodily harm and a reasonable person would have foreseen that. However, given the accused's knowledge that knives were present and his decision to direct that the knives be taken out, the risk of serious bodily harm from a knife was also reasonably foreseeable.

(4) Defence of Abandonment

[249] The Crown has proven all the elements of manslaughter.

[250] While there is an air of reality to the defence of abandonment, the Crown has also disproven it beyond a reasonable doubt.

[251] I accept that the accused intended to end the fight, and to abandon or withdraw from his original unlawful purpose. During the altercation he repeatedly said "are you done?" and, at times, he disengaged. However, after each pause until the final pause before the stabbing, he re-engaged by applying force to the deceased.

[252] During the final break, he put his knife in his bag, put his bag on his back, and stepped back. I accept that he wanted the altercation to be over and intended to leave – to withdraw from the assault (the original unlawful purpose). However, he said nothing and did not leave. This conduct would have provided some indication to the others that he was no longer involved. However, in all the circumstances, it does not meet the requirements for the defence of abandonment – it does not provide timely communication or unequivocal notice to the others and

does not constitute reasonable steps to neutralize or cancel the effects of his previous participation, or to prevent the commission of the offence.

[253] He is only required to communicate his intent in a manner that is reasonable and practicable in the circumstances, and I appreciate that things happened quickly. However, there was time when he stepped back to say, "I'm done" or "that's enough". There was also time to actually walk away.

Conclusion on Co-Principal Liability

[254] Despite the very able submissions by Defence counsel, I find the accused guilty of manslaughter as a co-perpetrator in a group assault that significantly contributed to the death.

[255] In case I am wrong in that conclusion, I will go on to consider the other potential routes to liability.

Route (2) & (3) - Aiding and Abetting – ss 21(1)(b) and (c)

[256] In general, to convict the accused of manslaughter under these provisions, the Crown must prove that:

- the accused knew that CP intended to commit an offence;
- the accused did something that helped and/or encouraged him for the purpose of helping or encouraging him;
- the offence caused death; and,
- A reasonable person in all the circumstances would have foreseen a risk of bodily harm that was not minor or brief.

(*Jackson*; *Creighton*; and *Javanmardi,* paras 25-31)

[257] The Crown doesn't have to prove that the accused wanted the deceased to die (*R v Briscoe,* 2010 SCC 13 at para 16 [*Briscoe*]; *R v Hibbert,* 1995 CanLII 110 (SCC), [1995] 2 SCR 973 at para 35).

[258] Aiding and abetting are distinct modes of participation. However, they are legally and factually related, so I will deal with them together.

[259] The specific arguments under this route are as follows:

- The Crown argued that the accused assisted/encouraged CP in either the stabbing that directly caused the deceased's death or in other offence(s) (group assault or attempted robbery) that significantly contributed to the deceased's death.

- The Defence argued that the Crown has not proven that the accused had the requisite knowledge and intent for liability as an aider or abettor to the stabbing or any attempted robbery/theft and, if he had the requisite knowledge and intent for a group assault, the Crown has not proven that conduct significantly contributed to the deceased's death given the intervening acts, or that there was a reasonably foreseeable risk of non-trivial bodily harm.

[260] I am persuaded beyond a reasonable doubt that the accused is also guilty of manslaughter as an aider to the assault that was a significant contributing cause of the death:

- Based on the evidence already reviewed, I am persuaded beyond a reasonable doubt that the accused helped CP in that assault with the purpose of helping him: he asked CP to join the assault; he assaulted the deceased along with CP; he held the deceased's friends at bay while the deceased and CP were fighting; he tried to pull and push the deceased away from CP; and, he threatened to stab the deceased if he didn't get off CP;

- For the reasons set out above, I am persuaded that the group assault was a significant contributing cause of death; and,

- For the reasons set out above, I am persuaded that a reasonable person in the circumstances would have foreseen a risk of bodily harm that was not minor or brief.

[261] I am not persuaded beyond a reasonable doubt that the accused aided or abetted CP in the stabbing:

- His conduct didn't specifically help CP in the stabbing (*Briscoe* at para 14). The conduct that helped CP in the assault ended about 20 seconds

before the stabbing and he took no further action during those 20 seconds; his mere presence is not sufficient for aiding or abetting (*R v Dunlop and Sylvester*, 1979 CanLII 20 (SCC), [1979] 2 SCR 881);

- Some of his conduct may have had the effect of abetting CP in the stabbing - encouraging, instigating, or promoting stabbing (*R v Greyeyes*, 1997 CanLII 313 (SCC), [1997] 2 SCR 825 at para 26). For example, telling TR and CP to take out their knives and threatening to stab the deceased in the presence of CP;

- I am not persuaded the accused knew that CP intended to commit the stabbing (*Briscoe,* paras 17-18; and, *R v Yanover and Gerol*, 1985 CanLII 3619 (ONCA), [1985] OJ 123 (ONCA) at pp 329-30); and,

- I am not persuaded that the accused intended to assist or encourage CP in the stabbing (see "for the purpose" in s. 21(1)(b); *R v Heldson,* 2007 ONCA 54; and, *R v Curran,* 1977 ALTASCAD 284 (CanLII), (1977), 38 CCC (2d) 151 (Alta SC App Div).

Route 4 - Common Purpose Party Liability – s. 21(2)

[262] Section 21(2) says:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[263] This route extends liability to participants in a common unlawful purpose for crimes committed by other participants in furtherance of that that common unlawful purpose (*R v Simon,* 2010 ONCA 754, at paras 25, 40-42).

[264] To convict the accused of manslaughter under this provision, the Crown must prove that:

- The accused and CP formed an intention in common to carry out an unlawful purpose (the group assault) and to assist each other.

- In carrying out the group assault, CP committed a separate offence (the stabbing).

- A reasonable person in the circumstances would have been aware that:

    - the commission of that separate offence (the stabbing) was a probable consequence of carrying out their common purpose (the group assault); and,

    - the separate offence (the stabbing) presented a risk of bodily harm that was not brief or minor.

[265] Under this route, the Crown has to prove two related knowledge or mental components: the knowledge requirement for s. 21(2) – that the accused knew or "ought to have known" that one of the participants in the agreement would *probably* commit the separate offence in carrying out their original agreement; and, the knowledge requirement for manslaughter - that a reasonable person in the circumstances would foresee that the separate offence presented a risk of bodily harm that was not brief or minor.

[266] The phrase, "ought to have known" essentially means 'should have known' and requires me to consider what a reasonable person would have known.

[267] Under this route, the specific arguments are as follows:

- The Crown argued that the accused and the others had a common intention to carry out a group assault (an unlawful purpose), CP stabbed the deceased (a different offence) while carrying out the group assault, and the accused ought to have known that one of the group would probably commit another offence that presented a risk of non-trivial and non-transitory bodily harm to the deceased.

- The Defence argued that the Crown has not proven that any common intent between the accused and the others was for an unlawful purpose, that CP stabbed the deceased "while carrying out" any common purpose, or that the accused ought to have known that any member of the group would do anything that presented a risk of non-trivial bodily harm to the deceased.

[268] I am satisfied beyond a reasonable doubt that the accused is also guilty of manslaughter under this route.

Was there a Common Unlawful Intent/Purpose?

[269] The Crown must prove there was an agreement between two or more people to assist each other in committing a criminal offence, but does not have to prove that the participants had the same motives or goals (*R v Cadeddu,* 2013 ONCA 729 at paras 56-57).

[270] I am persuaded beyond a reasonable doubt that the accused and the others formed an intention in common to carry out an unlawful purpose – a group assault – and to assist each other.

[271] The text messages I cited earlier establish that the accused, TR, and CP agreed that the three of them would beat up the accused. As I explained above, I am persuaded beyond a reasonable doubt that was an unlawful act and the accused knew that. He knew the agreement with the deceased had been to a one-on-one fight, not a three-on-one fight, so knew he was planning to apply force to the deceased without the deceased's consent - an unlawful act.

[272] The Crown argued that some of accused's conduct after the event is relevant circumstantial evidence, commonly referred to as "after-the-fact conduct". In their Brief, the Crown outlined the evidence that fell under this category (paras 98-102).

[273] However, in oral argument the Crown advised it was not pursuing its argument for much of that evidence. Orally, the Crown argued that the accused's conduct in deleting messages between him and the deceased supports an inference that he knew he was involved in an unlawful act. Specifically, the accused deleted messages showing that the deceased had not consented to the fight that the accused had set up, and other messages demonstrating the extent of the harm that he anticipated.

[274] In my view, that conduct can be equally explained by his knowledge that CP had just stabbed the deceased and a desire to remove any evidence linking him to that event, including evidence that he was responsible for the deceased being there. As such, it is not helpful in determining whether he thought the assault was unlawful (*R v Arcangioli,* 1994 CanLII 107 (SCC), [1994] 1 SCR 129 at para 145;

R v Calnen, 2019 SCC 6 at paras 119-123). In concluding that there was a common unlawful purpose, I have not relied on that evidence.

[275] The Crown also argued that stealing the deceased's backpack was part of the plan. However, I am not persuaded beyond a reasonable doubt that it was. There is no evidence that the accused knew MP was going to do that. There is no evidence that taking the backpack was discussed prior to going to the Halifax Shopping Centre or during the altercation, the accused was not near her when she did this, the accused did nothing to help her or encourage her, and when he found out after the incident that she had the backpack, he expressed surprise (Ex. 11A, p 68). The only evidence to support that the accused had any interest in the backpack was an undated text exchange between him and CL about the deceased, where he said "he got a nice bag. Tell him I like it" (Ex 77). I don't believe the accused's evidence around this comment, but in the absence of other evidence, that comment is not sufficient to conclude that stealing the backpack was planned.

Did CP commit a separate offence "in carrying out" the group assault?

[276] The accused and the others carried out the planned group assault.

[277] I am also satisfied that other unlawful acts were committed in the parkade:

- Robbery of the deceased's shoes.
    - For purposes of this trial, I am satisfied that MP and TR's conduct satisfies the elements of robbery. MP suggested that they take the deceased's shoes. TR agreed and told the deceased to take his shoes off. Then they both immediately applied force to the deceased. Their conduct went beyond mere planning.
- Attempted theft/robbery of the deceased's backpack.
    - For purpose of this trial, I am satisfied that MP attempted to steal the deceased's backpack which was at least an attempted theft.
- The stabbing.
    - This was aggravated assault or some form of culpable homicide.

[278] I am persuaded beyond a reasonable doubt that these other unlawful acts were all committed while carrying out the group assault.

[279] I have concluded that it is artificial to break the two-and-a-half-minute altercation down into a series of separate acts. I recognize that there were pauses in the fighting during which the accused and witnesses thought the matter was over. However, after each of those pauses, other than the last, the accused and others re-engaged physically with the deceased. I am persuaded that these were pauses in the context of a continuing group assault.

[280] The most significant of the pauses was the final one, and the most significant of the unlawful acts were the attempted theft of the bag and the stabbing which flowed from it and directly caused the death.

[281] During that final 20-second pause, the participants had backed away from each other, the accused had put away his knife and put his backpack on his back, and all witnesses believed the fight was over. However, I am satisfied that the attempted theft of the bag and the stabbing were reasonably temporally connected to the common purpose. There had been earlier breaks in the fighting, but after each one, members of the group had continued to apply force to the deceased. CP may have had some new or added motive to stab the deceased, but the original plan – the group assault – was not over.

[282] A stabbing would not be a "usual" or "normal" step in all group assaults (see: The National Judicial Institute's *Canadian Judicial Council Model Jury Instructions*). However, given the presence of knives, I cannot say it was unusual or abnormal in this context. Nor can I say that CP was off on his own enterprise. Here, the accused put in motion a plan that included a group assault. He was carrying a knife, believed that TR and CP were also carrying knives, took out his knife and told, at least TR, to take out his knife.

[283] The robbery of the shoes and the accused's unlawful acts in threatening the deceased while holding a knife provide important context. Those offences all flowed from the assaultive conduct; all were temporally and contextually integrated with the group assault.

[284] In concluding beyond a reasonable doubt that CP committed the stabbing *while* carrying out the group assault, I rely primarily on the following:

- The whole event in the parkade took about two-and-a-half minutes;

- CP was present at the request of the accused for the purpose of participating in a group assault;

- All of the unlawful conduct flowed from the original common purpose – the group assault. The final act, the stabbing, flowed directly from the attempted theft/robbery of the backpack; and,

- The stabbing occurred about 20 seconds after the last application of force by other members of the group, but only seconds after the application of force by MP, a member of the group.

[285] The stabbing was reasonably temporally and contextually connected to the common purpose.

Would a reasonable person have been aware that another offence was a probable consequence and of the risk of harm?

[286] I am persuaded beyond a reasonable doubt that a reasonable person would have known both that another offence was a probable consequence of the group assault and that this other offence presented a risk of bodily harm that was not minor or brief.

[287] Specifically, given the accused's knowledge of the plan and knowledge that TR and CP probably had knives, he ought to have known that a separate offence involving infliction of serious bodily harm, including with a knife, was a probable consequence of the group assault. This is especially so after he took out his knife and directed TR to take his out.

[288] As I have said, even without his knowledge that knives would be present and his direction to TR to take out his knife, there was a real probability of assault causing bodily harm or death. Any one of the kicks to the deceased's head could have caused serious lasting harm or death. A reasonable person with all the information known to the accused would have been aware of that.

[289] As such, I am persuaded beyond a reasonable doubt that the accused is also guilty of manslaughter under this route.

Elizabeth Buckle, JPC