

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Kennedy*, 2021 NSSC 211

**Date:** 20210625

**Docket:** *Halifax*, No. 498999

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Diane Christine Kennedy

**Restriction on Publication: 486.31(1) cc**

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**TRIAL DECISION**

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**Judge:** The Honourable Justice Joshua Arnold  
**Heard:** April 12, 13, 14, and 16, 2021, in Halifax, Nova Scotia  
**Final Written Submissions:** May 14, 2021  
**Counsel:** Zachary Firlotte and Christine Driscoll for the Provincial Crown  
Hanna Garson, for Diane Kennedy

## Overview

[1] Diane Kennedy is charged pursuant to s. 342(1)(c) and 380(1)(a) of the *Criminal Code* with defrauding B.P. in 2018 by taking his debit card and using his PIN number. B.P. met Ms. Kennedy while he was on an alcoholic binge. She withdrew money from his bank accounts over the span of ten days, first while he was binge drinking and staying at the Lord Nelson Hotel, then when he was in hospital for detoxification and rehabilitation. Ms. Kennedy says B.P. either gave her permission to use his debit card to drain his bank accounts and obtain cash advances on his credit card, or that his memory of this time period is so poor that there is a reasonable doubt as to the element of dishonesty regarding the crime of fraud.

[2] During cross-examination, defence counsel asked B.P. whether he had paid Ms. Kennedy for oral sex in the 1980s, in an effort to lay a foundation for a suggestion that he gave her permission to use his debit card and drain his accounts. Following argument, the court determined that B.P.'s name would be initialized in accordance with s. 486.31(1) of the *Criminal Code*, due to the nature of the questioning.

## Facts

[3] B.P. was 67 years old in November 2018. He is a recovering alcoholic. In October 2018 he was living in an alcohol recovery center in Halifax. At the end of October he relapsed and was asked to leave the center until he stopped drinking. He moved into the Lord Nelson Hotel in downtown Halifax. B.P. spent several days in his hotel room drinking, only breaking for short walks down Spring Garden Road to the Nova Scotia Liquor Commission ("NSLC") in the Park Lane Mall. He ordered room service for his meals.

[4] On November 7, 2018, during a trip to the NSLC to replenish his alcohol supply, while intoxicated, B.P. met Diane Kennedy, who was panhandling on Spring Garden Road. B.P. believed the encounter was during daylight hours, but he was not sure of the time. Ms. Kennedy asked him for money. B.P. said that when sober he does not give money to panhandlers, but when intoxicated he might. He believed he gave her ten or twenty dollars. He then returned to the hotel to continue his drinking binge.

[5] B.P. believed he had one or two similar subsequent encounters with Ms. Kennedy over the next day or so. On one of these occasions, B.P. needed cash, so

he went to the Scotiabank at the corner of Spring Garden Road and Brenton Street to withdraw money from the Automated Teller Machine (“ATM”). Ms. Kennedy followed him into the bank.

[6] B.P. did not have a crystal clear recollection of any of these events. He was under the influence of alcohol throughout. Regarding the visit to the bank, he believed that two of the ATMs were not working and he eventually obtained cash from the third machine. He said that he withdrew money, gave Ms. Kennedy twenty dollars, and went straight back to his room to continue drinking.

[7] Sometime over the next day or so, B.P. said he woke up in his hotel room. It was dark out. He was not sure of the time. Being out of alcohol, he made the short walk to the NSLC, but it was closed due to the time of day. Ms. Kennedy was again panhandling in the area and asked B.P. what he was doing. He explained his predicament and she said she could help. They found a cab driver that Ms. Kennedy knew and, at her direction, they drove around Halifax in search of a bootlegger. They stopped at several places, but no one answered the door.

[8] B.P. then asked the cab driver to take him to the Superstore on Barrington Street so that he could buy Listerine, to drink to tide him over until the NSLC opened, in an effort to stave off withdrawal symptoms. He felt he was too intoxicated to be served at the Superstore, so he gave Ms. Kennedy twenty dollars in cash to make the purchase for him. She did so, returned to the cab, and they drove back to Spring Garden Road. B.P. was in the front passenger seat and Ms. Kennedy was in the back seat. When the cab arrived at the Lord Nelson, as B.P. opened the door to get out, Ms. Kennedy said, “You dropped your wallet. You’re going to need this.” She then reached from the back seat to the front seat and handed B.P. his wallet.

[9] At one point in his testimony, B.P. could not recall when and where he obtained cash to pay the cab driver, but believed he had cash on him before looking for a bootlegger, because he had planned to use cash to pay the bootlegger, if they had managed to find one. He also testified that he withdrew \$100 from the Superstore ATM just before the Listerine was purchased by Ms. Kennedy so would have had cash to pay for the taxi as a result.

[10] On returning to the Lord Nelson, B.P. went into his hotel room by himself, drank some of the Listerine, and fell asleep. When he woke up, he felt he was starting to go through alcohol withdrawal and was worried about having a seizure. He called Emergency Services, notified the front desk that he had called an

ambulance, and was taken to the emergency department at the QEII Hospital, where he was admitted. He had his wallet with him at that time.

[11] B.P. said his recall of the first couple of days at the hospital was vague because he was medicated with valium to help control possible seizures from detoxification. After a few days in the hospital, B.P. said, his head started to clear, and he wanted to check on the stock market. When he accessed his bank account online, he discovered that all of his savings were gone. He then discovered that his debit card was missing from his wallet, but nothing else (including his credit card) was gone. B.P. said he had not given his debit card or his PIN to anyone, nor had he given anyone permission to access his funds. He initially thought he might have left his debit card in an ATM. He was not aware at that time that his debit card had been used to obtain cash from his bank accounts, to purchase items, and also to obtain cash advances from his credit card, at various ATMs and businesses.

[12] B.P. called the bank. He said he was told that in order to be reimbursed he would have to call the police. If he had given his debit card and PIN to someone, he would not be reimbursed. B.P. called the police. He denied giving his card and PIN to anyone. He said he was in a panic and could not recall all of the details.

[13] B.P. was not clear as to the precise amount of money taken from his various bank accounts between November 8 and 17, 2018. His bank records showed that on November 7 he spent \$6.89 at Shoppers Drug Mart, which he said would have been to buy mix for his alcohol. He took \$40.00 out of the Scotiabank ATM on November 8 at 05:38:04 a.m. On November 8 at 05:51:32 a.m., \$103.00 was withdrawn from his account at the Barrington Street Superstore. This is when he said he asked Ms. Kennedy to purchase the Listerine, before he returned to the Lord Nelson to drink, prior to calling the ambulance. B.P.'s bank records showed a further 18 transactions that day, totalling \$3,236.09. He denied making these withdrawals. He was in hospital for detoxification during the remainder of the withdrawals, purchases, and cash advances throughout the time frame encompassed by this charge. He said he did not carry out any of these further transactions.

[14] Melodie Paradis testified as a representative of Scotiabank. She works in the corporate security department. Ms. Paradis confirmed that B.P. had several accounts with Scotiabank, including a savings account and a VISA credit card. His debit card was linked to his credit card, giving access to his savings account and

allowing cash advances from his credit card through an ATM if the correct PIN was entered.

[15] Ms. Paradis confirmed that a security video taken on November 8, 2018, at 5:35:50 AM, shows B.P. at Scotiabank on Spring Garden Road, using the ATM while another easily identifiable person watches. Ms. Paradis confirmed that the female shown in the video (who was Ms. Kennedy) would be able to see the ATM screen where she was standing.

[16] In the video Ms. Kennedy can be seen watching the ATM screen as B.P. is using it to make a withdrawal. The two of them can be seen interacting. On cross-examination it was suggested to B.P. that he waved Ms. Kennedy over to watch him enter his PIN. B.P. denied this and said that his hand gesture on the video is one of frustration with the machine. From my review of the video, although B.P. does make a hand gesture while speaking to Ms. Kennedy, it is not clear that he waved Ms. Kennedy over. What is clear is that she walked over to him while they were chatting and he was at the ATM and then took a number of looks at the screen area while he was focused on using the machine.

[17] Various Agreed Statements of Fact were admitted at this trial. According to the various agreements, Ms. Kennedy used B.P.'s debit card at numerous locations (ATMs and businesses) around Halifax between November 8 and 17, 2018. The relevant transactions are as follows:

<b>Date</b>	<b>Time</b>	<b>Location</b>	<b>Details</b>
November 8, 2018	6:24 a.m.	Scotiabank Branch at 5656 Spring Garden Road, Halifax	Diane Kennedy makes a withdrawal from an ABM.
November 8, 2018	6:56 a.m.	Subway Store #11359 at 5669 Spring Garden Road, Halifax	Diane. Kennedy appears on video making a purchase.
November 8, 2018	10:30 a.m.	Subway Store #30913 at 1403 Robie Street	Diane. Kennedy appears on video making a purchase.

November 9, 2018	8:25 a.m.	Sobeys Store #881 at 6960 Mumford Road, Halifax	Diane Kennedy appears on video making a purchase.
November 9, 2018	12:30 – 12:35 a.m.	Irving Circle K Convenience (Store #2054) at 2499 Robie Street, Halifax	Diane Kennedy appears on the surveillance video using an ATM and making a purchase.
November 10, 2018	3:01 p.m.	Scotiabank Branch at 5201 Duke Street, Halifax	Diane Kennedy makes a withdrawal from an ABM.
November 10, 2021	3:10 p.m.	Lawton's Drugs at Scotia Square (5201 Duke Street, Halifax)	Diane Kennedy appears on video making a purchase.
November 10, 2018	3:31 p.m.	Subway Store #11359 (5669 Spring Garden Road, Halifax)	Diane Kennedy appears on video making a purchase.
November 11, 2018	6:57 p.m.	Scotiabank Branch at 5656 Spring Garden Road, Halifax	Diane Kennedy makes a withdrawal from an ABM.
November 12, 2018	12:09 a.m.	Scotiabank Branch at 5656 Spring Garden Road, Halifax	Diane Kennedy makes a withdrawal from an ABM.
November 13, 2018	2:51 p.m.	Scotiabank Branch at 5201 Duke Street, Halifax	Diane Kennedy makes a withdrawal from an ABM.
November 13, 2018	3:05 p.m.	Spring Garden Convenience (5681 Spring Garden Road, Halifax)	Diane Kennedy appears on video making two purchases.
November 14, 2018	7:30 a.m.	Scotiabank Branch at 5201 Duke Street, Halifax	Diane Kennedy makes a withdrawal from an ABM.

November 14, 2018	7:54 a.m.	Lawton's Drugs at Scotia Square (5201 Duke Street, Halifax)	Diane Kennedy appears on video making a purchase.
November 14, 2018	8:17 a.m.	Spring Garden Convenience (5681 Spring Garden Road, Halifax)	Diane Kennedy appears on video making a purchase.
November 14, 2018	11:28 a.m.	Scotiabank Branch at 5201 Duke Street, Halifax	Diane Kennedy makes a withdrawal from an ABM.
November 15, 2018	8:05 a.m.	Subway Store #30913 (1403 Robie Street, Halifax)	Diane Kennedy appears on video attempting to make a purchase.

[18] The total amount withdrawn from B.P.'s bank account during the entire time period, including those not caught on video, was \$29,063.16. This exceeds the amount of the agreed transactions as detailed in the table above.

[19] According to the agreed facts, Ms. Kennedy started using B.P.'s debit card to withdraw money from various ATMs and use at businesses on November 8, 2018, at 6:24 AM, at the Scotiabank on Spring Garden Rd. On that date, B.P. said, he was in his hotel room drinking Listerine, and then was asleep until he woke up and called the ambulance, and was admitted to the QEII on November 9, 2018, at 1:52 AM, remaining there in detoxification until November 21. B.P. testified that he did not use his debit or credit card while he was in hospital, and that he did not give anyone, including Ms. Kennedy, permission to access or withdraw money from his accounts during this time.

[20] Scotiabank partially reimbursed B.P. with \$28,409.65 on November 30, 2018. Such reimbursement was not contingent on the outcome of this trial.

[21] B.P. agreed that alcohol affects his memory. He said he assumed he blacks out at times when binge drinking. Drinking affects his decision-making. He takes more risks. He feels freer. And he is looser with his money. He said he would not give money to panhandlers when sober or go to unfamiliar areas looking for a bootlegger. He said that when he relapsed in 2018, he was feeling a bit desperate.

[22] On cross-examination, it was put to B.P. that he had paid Ms. Kennedy to provide him with oral sex in the 1980s. B.P. firmly denied that suggestion (as noted, because of this line of questioning the court initialized B.P.'s name in accordance with s. 486.31(1) of the *Criminal Code*). He denied ever meeting or knowing Ms. Kennedy prior to November 8, 2018. He said that he only met her on that day because she was panhandling, and that he had never spoken to her about anything other than giving her money when she was panhandling, and during their interactions when she helped him look for a bootlegger and shop for Listerine. He said that he did not ask Ms. Kennedy to take money out of an ATM for him, did not give her his debit card, and did not give her his PIN. He said it was not possible that he authorized anyone, including Ms. Kennedy, to take his money.

[23] On cross-examination it was pointed out that at the preliminary inquiry, B.P. testified that he withdrew \$100 from an ATM during the relevant time frame. He was not sure if he put the money in his pants pocket or his wallet. He stated that he did not recall using his credit card between October 31 and November 9, 2018, other than to pay for his hotel room. He did not initially report anything to the bank or the police relating to his credit card, as it was not missing and he did not know about the cash advances when he spoke to the police.

[24] When B.P. entered hospital in November 2018, he went through detoxification. He did not clearly remember the first couple of days in detox. He denied having delirium tremors when going through withdrawal, but he agreed that for the first 12 hours of previous detoxifications he had experienced visual hallucinations, and that he had experienced auditory hallucinations in extreme situations. He did not recall experiencing either auditory or visual hallucinations in this case, but his medical records state that while he was in hospital he reported tactile hallucinations along with auditory and visual disturbances. B.P. denied actually experiencing these disturbances, explaining that he probably falsely claimed that he was having those issues in order to get a higher dosage of valium, to reduce the discomfort of detoxification.

[25] B.P. also said he did not recall telling the medical staff that "he was drinking because of a relationship problem", although that comment appears in the medical notes. The notes additionally state that staff found him dressed and trying leave at one point during detox, but B.P. said he did not recall that either.

[26] B.P. stated that during his contact with Ms. Kennedy he was not so drunk that he could not operate an ATM, although he thought he unsuccessfully tried two



ATMs on November 8, 2018, before successfully withdrawing money from the third machine.

[27] Detective Constable Kelli Rogers testified that B.P. did not report any fraud in relation to his credit card. Therefore, when obtaining surveillance video, she only obtained video relating to his debit card use. His debit card was never recovered.

### **Burden of proof and presumption of innocence**

[28] Section 11(d) of the *Canadian Charter of Rights and Freedoms* provides that a person charged with an offence has the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” Ms. Kennedy is presumed innocent of the charge, unless the Crown proves each element beyond a reasonable doubt. Cory J., speaking for the majority in *R. v. Lifchus*, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt, as it should be explained to a jury:

36 ... It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit. [Emphasis in original.]

[29] Justice Iacobucci, for the majority, said in *R. v. Starr*, 2000 SCC 40, that “an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities” (para. 242). Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person, in this case Diane Kennedy, beyond a reasonable doubt, which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

## Credibility and reliability

[30] A trier of fact must consider all of the evidence and can believe some, none, or all of a witness' testimony. I have to decide if I am satisfied beyond a reasonable doubt that the Crown has proven that Ms. Kennedy committed fraud and unlawful possession of B.P.'s debit card. This will require consideration of the credibility of witnesses, including B.P. Due to B.P.'s intoxication during the time frame in question, his evidence must be scrutinized with extreme care.

[31] In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152, the majority of the British Columbia Court of Appeal discussed credibility as follows:

11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[32] In *Baker v. Aboud*, 2017 NSSC 42, Forgeron J. summarized the principles governing credibility assessment (some citations omitted):

13 Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:

\* Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.

\* There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re, supra*.

\* Demeanor is not a good indicator of credibility: *R. v. Norman*(1993), 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.

\* Questions which should be addressed when assessing credibility include:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re, supra*;
- b) Did the witness have an interest in the outcome or were they personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which they testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny...*;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[33] The majority in *Lifchus* acknowledged that “certain doubts, although reasonable, are simply incapable of articulation” and emphasized that a “juror should not be made to feel that the overall, perhaps intangible, effect of a witness’s demeanor cannot be taken into consideration in the assessment of credibility” (para. 29).

[34] A related principle to credibility is reliability. The relationship between the two concepts was explained in *Cameco Corporation v. The Queen*, 2018 TCC 195:

[11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, 1993 CanLII 3387 (ON CA), [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

. . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

[35] B.P. testified that during the detoxification process he likely lied to the medical staff about his symptoms in order to get a higher dose of valium to ease the discomfort of detoxifying. His account of his behaviour during the detoxification process does not accord with the hospital records.

[36] Additionally, as noted, he was impaired by alcohol during his interaction with Ms. Kennedy, which affected his memory.

[37] B.P. was internally inconsistent in relation to some of his testimony. For example, although B.P. testified that he had cash to pay a bootlegger he also testified, and the banking records confirm, that he withdrew \$100 at the Barrington Street Superstore, and therefore gave Ms. Kennedy \$20 to buy Listerine. Why would he withdraw money at that time if he already had cash? Subsequently he paid the taxi driver with cash upon arrival at the Lord Nelson. During his testimony B.P. was not consistently clear when and where he had obtained that cash.

[38] There are real issues with B.P.'s credibility and reliability. Therefore his testimony has to be carefully examined.

[39] B.P. was adamant and unwavering that he did not give Ms. Kennedy his debit card. He testified that at the end of their sole taxi ride together on November 8, 2018, she handed him his wallet as he was exiting the taxi at the Lord Nelson. What is clear is that Ms. Kennedy began using the debit card shortly thereafter. One logical inference is that she took his debit card from his wallet during the taxi ride and very quickly started the process of draining his bank account. B.P. was cross-examined on this point, and stated:

Q. After a period of mental haze, it suddenly pops into your mind that, perhaps, your wallet slipped out of your pocket while in the cab with Ms. Kennedy, correct?

A. No, that's not correct.

Q. It's correct, or Is it correct that you don't, in fact, recall this detail...that you don't recall this detail until November 19 when speaking with the police officer?

A. I wasn't asked to recall it so I had no reason to recall it. I was very thankful for Ms. Kennedy, when she said, "here's your wallet, it has fallen out". I was very appreciative of that...of that fact and that's all...I mean there's no reason to recall that but, in my discussions with the detective, I very well could have said that...that that's what happened, because that's what did happen.

Q. Now, in the statement to Detective Rogers on November 19, 2018, it's correct you testified that you were as thorough as possible at the time?

A. Yeah.

Q. And you didn't mention anything about recalling any details about the cab ride with Ms. Kennedy, correct?

A. Could you repeat that?

Q. You didn't testify about any of these details...

A. I would have testified...any questions she answered, if she had asked me about it I would have given her the best answer I could have at the time. So, but, in terms of what I said, I can't recall, no.

Q. Do you recall testifying at the preliminary inquiry that after emerging from Barrington Superstore with the \$100, you put it in your wallet and put your wallet in your pocket?

A. Yes, I remember saying that.

Q. And that's also your recollection at this point today?

A. That's would be my recollection, yeah.

Q. So your cab ride has come to a conclusion, you're sitting in the cab...so then you're sitting in the cab with Ms. Kennedy and the cab driver, correct?

A. Right.

Q. And now you pay for the cab, correct?

A. Right.

Q. And you pay for the cab in cash?

A. Right.

Q. Which you pull out from your wallet, correct?

A. Right.

Q. In your jacket pocket?

A. If the money was in the wallet, that's where I would have pulled it out from. If I'd put the money in my pants, I would have pulled it out of my pants pocket. I don't remember which one it was.

Q. And you testified today that at no point was the wallet not on your person, correct?

A. That's my belief, yeah.

Q. So, you paid for the cab in cash?

A. Correct.

Q. And then you start to get out of the cab.

A. Right.

Q. So at no point is it possible that suddenly...at no point is it possible that upon getting out the cab that Ms. Kennedy also has a hold of your wallet, correct?

A. No, not correct. As I said, I may have, when I went to get the money, may have put it in my pants pocket, in which case I wouldn't have put it in my wallet. I don't remember one way or the other. All I remember, very distinctly, is when I got out she said, "don't forget this," and she handed me the wallet and I was very happy to get it.

Q. So were you being dishonest when you testified, with certainty, at the preliminary inquiry under oath that you recall...that you recall placing the \$100 in your wallet and your wallet in your jacket pocket?

A. I have not been dishonest with any answers I've given. If I've said that and it may have been – I'm not saying that's what happened or what didn't happen. I'm just saying it could have been in my pants pocket.

Q. But you don't really know if that happened.

A. The only thing I'm clear of is that Diane Kennedy handed me my wallet as I was getting out of the cab.

Q. That's the only piece of testimony that you're truly certain of?

A. Well, no. I'm certain of a lot of other things. What were you referring to? I mean are you...if you're asking me if I'm certain if I put the money in my wallet or my pants pocket, it could have been either one. I don't know at this point – it's a minor detail and it's a couple of years ago, so.

[40] As noted above, B.P. had some other issues with the reliability of his memory of the relevant time period due to his alcoholic binge and detoxification. He agreed that because of his memory deficits some of his testimony was based on what he believed happened, as opposed to what he actually remembered about the actual events. For example, on direct examination he stated:

Q. What can you tell me about that first transaction?

A. Being \$6.89, at Shoppers, that would have been me coming back from the liquor store and getting some mix.

Q. And I'll direct you to the next column, to the right of local date is local time.

A. Uh, okay, local time, right.

Q. Can you tell the Court what time that transaction would have taken place?

A. Well, it says...no I...I can't, actually. It says 100302, whatever that means.

Q. And do you recall making that transaction?

A. I don't recall making it, but it's...it's what I would have done, you know.

Q. And you may have said this, but do you recall what that transaction may have been for?

A. Yes, it would have been for mix – that amount of money.

Q. And when you say ‘mix’?

A. For...I...I drink vodka, so. Probably would have been an orange juice.

...

Q. For now, let’s go back to local time. Can you read off the time stamps of those transaction?

A. Uh, so, local time is 05:36:33, 05:37:43, and 05:38:04.

Q. Thank you, Mr. P. And the next transaction, do you recognize that transaction?

A. Um...next transaction...remember I said when I was in the parking lot at...at Superstore, I couldn’t recall at what point I’d gotten money. But looking at the amount, which is \$103, \$3 would have represented the transaction fee. So, apparently, I went into the Superstore to get out cash. And that would have made sense because I was too intoxicated to go and pick up the Listerine – they wouldn’t have served me, they just would have turned me away, so then I would have...but they wouldn’t – when you go to the white machine you can just go in and go over there. It’s not a big deal. So, they wouldn’t have stopped me from doing that. So I must have thought for some reason that I needed money, I probably did. And, so I would have gone into the Superstore at that point when...and that...that clears it up in my mind the confusion as to where I got money at that point.

Q. And just to refresh my memory here, where did you go after the Superstore?

A. Straight back to my room at the hotel.

Q. What did you do when you got back to your hotel?

A. Drank my Listerine.

...

Q. But you don’t recall which happened first – whether you went in to take out the money or whether Diane went in to buy the Listerine.

A. No, I...I would have gone in for the money ‘cause I wouldn’t have given my card to anybody.

Q. I’ll restate the question. You don’t know which happened first, whether Diane went in to purchase the Listerine first or whether...

A. No, I would have gone in for the money first and then Diane would have gone in.

Q. You do not...are you stating this out of memory or out of reason?

A. Out of reason.

## Elements of fraud

[41] Ms. Kennedy is charged with fraud and with possession of a forged or falsified credit card:

1. That she between the 6<sup>th</sup> day of November, 2018 and the 15<sup>th</sup> day of November, 2018, at or near Halifax, Nova Scotia, did by deceit, falsehood or other fraudulent means, did unlawfully defraud B.P. of a sum of money, a total value exceeding \$5,000.00, contrary to Section 380(1)(a) of the Criminal Code.

2. AND FURTHER that she at the same time and place aforesaid, did unlawfully have in her possession a card, to wit., a Scotiabank debit card, in the name of B.P., knowing the same to have been obtained by the Commission in Canada of an offence, contrary to Section 342(1)(c).

[42] Section 380(1)(a) of the *Criminal Code* states:

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars...

[43] In *R. v. Olan*, 1978 2 SCR 1175, Dickson J. discussed the elements of fraud. He stated, for the court, at p. 1182-1183:

Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of “defraud” but one may safely say, upon the authorities, that two elements are essential, “dishonesty” and “deprivation”. To succeed, the Crown must establish dishonest deprivation.

...

The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud. The following passages from the English Court of Appeal judgment in *R. v. Allsop* in my view correctly state the law on the role of economic loss in fraud, at pp. 31, 32:

Generally the primary objective of fraudsters is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is “intended” only in the sense that it is a contemplated outcome of the fraud that is perpetrated. If the deceit which is employed imperils the economic interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and



notwithstanding that the deceiver did not desire to bring about an actual loss.

We see nothing in Lord Diplock's speech [in *Scott*] to suggest a different view. "Economic loss" may be ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists it may be measured in terms of money . . .

Interests which are imperilled are less valuable in terms of money than those same interests when they are secure and protected. Where a person intends by deceit to induce a course of conduct in another which puts that other's economic interests in jeopardy he is guilty of fraud even though he does not intend or desire that actual loss should ultimately be suffered by that other in this context.

[44] Ms. Kennedy did not testify and called no evidence. Her position is that the Crown has not proven the element of dishonesty beyond a reasonable doubt. She says there is a reasonable doubt as to whether she used B.P.'s credit card without his permission. Her counsel suggests that B.P. gave her permission to access his money while he was drinking and when he sobered up was too distraught and embarrassed to admit what he did. There is no evidence to support this proposition. Ms. Kennedy relies on inferences on this point. When the suggestion was put to B.P., he denied it. Defence counsel says that B.P. had to blame someone for taking his money if he wanted be reimbursed by the bank, and says that because he was on an alcoholic binge and has a poor memory for the critical events during the relevant times, his denials are meaningless. In essence, the accused says the Crown has not proven beyond a reasonable doubt that B.P. did not give her permission to use his card. B.P. was asked several times whether he gave Ms. Kennedy permission to use his debit card or access his bank accounts. On direct examination, B.P. said, variously:

Q.: To your recollection, Mr. P, had you given your debit card to anyone?

Mr. P.: Absolutely not.

Q. Did you give anyone permission to use your debit card?

A. Absolutely not.

Q. Had you given your PIN number to anyone?

A. Absolutely not.

Q. How many debit cards would you have had in November of 2018?

A. One.

...

Q. And did you give anyone to make those transactions?

A. No, I did not.

Q. Did you give out your debit card to anyone?

A. No, I did not.

Q. Did you give your PIN number to anyone?

A. No, I did not.

...

Q. Where were you on November 10, 2018, Mr. P.?

A. Absolutely in the hospital.

Q. Did you leave the hospital for any reason?

A. No, I did not.

Q. Do you recall making any of those transactions, listed on that page...page 4?

A. No.

Q. And did you give anyone permission to use your debit card or make those transactions?

A. No.

...

Q. And where were you again on November 10<sup>th</sup>, Mr. P.?

A. I was in the hospital.

Q. Were you making any purchases while you were in the hospital?

A. No.

Q. Did you go anywhere on November 10?

A. No.

Q. Did you give anyone permission to make transactions on your Visa card on November 10?

A. No, no.

...

Q. Immediately below that, again sticking with transaction date, four entries, November 14<sup>th</sup>. Do you know anything about those transactions, Mr. P.?

A. None whatsoever.

Q. And where were you on the 14<sup>th</sup>?

A. In the hospital.

Q. Did you leave the hospital for any reason?

A. No, I did not.

Q. Do you recall making any transactions on your Visa card on November 14<sup>th</sup>?

A. No.

Q. And did you provide anyone with permission to make transactions on your Visa card?

A. No.

...

Q. And I'll direct you to the next transactions, Mr. P. Their local time, I believe the first one starts at 062408.

A. Just hang on for one sec. Okay, right. The next transaction is another 0 which, again, I have no idea what that means. I guess someone tried to get money out and nothing happens and the next one is Brenton for \$900.

Q. And the transaction after that?

A. \$840.

Q. Do you recall making those transactions?

A. I absolutely did not make those transactions.

Q. And where were you, to your recollection, at the time that those transactions would have been made?

A. Uh, what's...what's the date? Local date...the 8<sup>th</sup>. I would still been in my room. Either in my room...I...I don't recall the exact date that I left the hotel, but those records are available at the hotel. So, I either left on the 8<sup>th</sup> or the 9<sup>th</sup>.

[45] Counsel went on to review with B.P. the debit transactions between November 8 and 17, day by day. B.P. confirmed in each case that he had not given anyone permission to make the transaction, and that he had not given anyone his PIN. In respect of the transactions after he entered hospital, he confirmed that he did not leave the hospital. He made similar denials with respect to the credit card cash advances while he was in the hospital.

[46] During cross-examination, B.P. said, alternatively that he either did not give Ms. Kennedy permission, or would not have given her permission, to use his card. He said variously:

Q. But you don't actually recall going into the bank to take the money out of the Superstore, correct?

A. Not...not strongly, no.

Q.: So it's possible that Diane, in fact, went out to get the money out for you, correct?

A.: No, I would not willingly give my card to anybody.

Q. Okay but that's not something that you actively remember either way?

A. I don't...I don't...I have a vague memory of going into the white machine in there, but it's not clear...it's not like the ATM at Scotia...at Scotiabank.

...

Q. Is it possible that you knew or recalled, around November 9, that you had authorized somebody to take your savings?

A. Is it possible?

Q. Um-hmm.

A. No, it's not.

Q. Okay.

A. And the reason it's not possible is because I didn't do it.

Q. So you're sure it's not possible that you knew, through giving Diane Kennedy your money, that you had far little left than you had previous?

A. No.

Q. Okay. Do you recall saying to an addictions liaison, on November 9, that you would have to likely stay in...in some sort of free housing because you had spent a lot of your money?

A. No, I don't recall.

Q. Okay.

A. I may have been referring to Al-Care, 'cause Al-Care was free.

...

Q. So is it possible, then, at that point, Mr. P., that you take out your wallet and you say, and give Ms. Kennedy your debit card, and say, "I won't need this where I'm going"?

A. Totally impossible.

Q. Impossible because of logic, correct?

A. No, impossible because of experience. I didn't do that.

Q. And is it true that you at that same time stated, "Take this card and buy whatever you want"?

A. I absolutely did not say that.

Q. That you stated, "Take my debit, it's okay, I still have my Visa"?

A. I absolutely did not say that.

Q. And that at then point...at that point, you passed on your four-digit debit PIN for her to use?

A. No, that's incorrect.

[47] While B.P.'s memory is hazy for the time period in question, his evidence was not contradicted at all on the issue of whether he gave anyone permission to use his debit card to access his accounts. Nor did B.P. waver in any way on this point. However, there is more to the analysis.

[48] If I find that B.P. was able to clearly, credibly, and reliably recall that he did not give Ms. Kennedy permission to access his bank accounts, then the element of dishonesty has been proven beyond a reasonable doubt.

[49] If I find that B.P. could not clearly recall whether or not he gave Ms. Kennedy permission, but instead says that he "would not have given her permission", the analysis is less straightforward. His testimony would be circumstantial evidence, not direct evidence, regarding this element of fraud.

### **Essential elements of unlawful possession of a credit card**

[50] Section 342(1)(c) of the *Criminal Code* states:

342. (1) Every person who

....

(c) possesses, uses or traffics in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered

(i) by the commission in Canada of an offence...

....

is guilty of

(e) an indictable offence and is liable to imprisonment for a term not exceeding ten years...

[51] Ms. Kennedy admits that she had possession of B.P.'s debit card during the relevant time frame. She simply does not admit that she did so unlawfully. If it is proven that she knew the debit card was obtained by fraud, I am satisfied that the cash advances from his VISA account, using B.P.'s debit card and PIN, would

constitute use of a credit card, provided that I am also satisfied that the accused was the one who withdrew those advances.

### **Subsequent Submissions**

[52] Following counsel's closing arguments, seeking further clarification of the parties' positions, the court emailed counsel the following questions:

1. What total amount of money does the Crown allege Ms. Kennedy defrauded B.P. of?
2. How is that amount of money broken down/calculated?
3. Aside from the ATM transactions captured on video, where Ms. Kennedy can be seen using B.P.'s debit card and which she has admitted she did in the various Agreed Statement of Facts, how does the Crown say they have proven that it was Ms. Kennedy who is responsible for the remaining transactions?

[53] On May 4, 2021, the Crown replied as follows:

1. The total amount the Crown alleges Diane Kennedy defrauded B.P. of

The Crown alleges Diane Kennedy defrauded B.P. of **\$29,063.16**. This amount is broken down as follows:

- Debit transactions from account number [REDACTED] **\$13,249.66**
- Cash withdrawals from account number [REDACTED] **\$5,813.50**
- Cash advances from ScotiaGold Passport VISA card [REDACTED] **\$10,000.00**

2. Calculation of total amount

In coming to this amount, the Crown relies on Exhibit 8 ("B.P.'s Cardholder Printout, November 7-November 17, 2018"). As Your Lordship will recall, Ms. Melodie Paradis testified at trial that the column to the far right of this document indicates whether a particular transaction was rejected. If there is no indication of rejection in that column, then the transaction in question was accepted.

The Crown arrived at a total amount of \$29,063.16 by adding up the amounts of all the approved transactions beginning with page 1, transaction number 8 of Exhibit 8. This was an \$840.00 cash withdrawal from ABM #XB22 at the Scotiabank located at 5656 Spring Garden Rd. in Halifax on November 8, 2018 at 6:24 a.m. This transaction is also represented at paragraph 4 of Exhibit 4 ("Agreed Statement of Facts – Wendy LeBlanc").

The last approved transaction is represented at page 9, transaction number 12 of Exhibit 8. This was a \$2,000.00 cash advance performed at ABM #XB15 at the

Scotia Square Scotiabank located at 5201 Duke Street in Halifax on November 14, 2018 at 11:28 a.m. This transaction is also represented at paragraph 10 of Exhibit 4.

3. How the Crown says it has proven that Diane Kennedy was responsible for the remaining transactions

The Crown has alleged that Ms. Kennedy obtained Mr. P.'s PIN and debit card in a dishonest manner on November 8, 2018. The Crown further submits that it has proven that Ms. Kennedy was using Mr. P.'s debit card without permission every day between November 8 and November 14, 2021 while Mr. P. was in the hospital.

The Agreed Statements of Facts submitted by the parties establish that Ms. Kennedy completed 17 transactions with Mr. P.'s debit card for a total of \$13,141.95. The Agreed Statements of Facts also indicate that Ms. Kennedy made purchases, withdrawals, or cash advances with Mr. P.'s debit card on November 8, 9, 10, 11, 12, 13, and 14, 2018. The transactions continue all the way up until 11:28 a.m. on November 14, 2021, after which the transactions are rejected for a Restricted Card or "Hot Card" (see Exhibit 8, page 9, transactions numbers 13-16 and page 10, transaction number 2).

**Given the transaction dates in the Agreed Statements of Facts for which Ms. Kennedy is clearly responsible, the Crown submits that the Court can infer that she was also responsible for the remainder of the transactions listed throughout Exhibit 8.** In direct examination at trial, Mr. P. was adamant that he did not leave the hospital for any reason, did not have his debit card, and did not give anyone permission to access his debit or credit accounts. He was consistent on these points and was not shaken on cross-examination.

Respectfully, the only other possibility would be that Ms. Kennedy was giving another person or other people Mr. P.'s debit card to use at their will only to have it returned to her each day or multiple times per day. In the unlikely event this occurred, the Crown further submits that fact does nothing to diminish Ms. Kennedy's guilt. As the Crown highlighted in its submissions at trial, the test for fraud as articulated by the Supreme Court of Canada includes two essential elements: dishonesty and deprivation (see: *R. v Olan*, 1078 CarswellOnt 49 and *R. v Theroux*, 1993 CarswellQue 2040). **The Crown has alleged that Ms. Kennedy obtained Mr. P.'s debit card and PIN through dishonest actions which ultimately deprived Mr. P. of his money. If Ms. Kennedy had passed that banking information on to other individuals with the assurance that they could spend as they pleased and then return the card to her, this is merely another dishonest act in a series of dishonest acts that deprived Mr. P. of over \$29,000.00 without his knowledge or permission.**

Ultimately, the Crown has established that Ms. Kennedy was in possession of Mr. P.'s debit card each day from November 8 to November 14, 2018. **The Crown**

**submits that the Court can infer she was responsible for each and every transaction listed in the entirety of Exhibit 8. The only possible alternative is that Ms. Kennedy was exchanging or sharing Mr. P.'s debit card and banking information with other unknown people. If this had occurred, that fact would not diminish Ms. Kennedy's guilt whatsoever as it would represent yet another dishonest act that led to the deprivation of Mr. P. [Emphasis added]**

[54] On May 11, 2021, Ms. Garson replied for the defence, alleging that by seeking clarification of the parties' positions the court had infringed the fair trial rights of the accused. She alleged, *inter alia*, that the defence had made a strategic decision to call no evidence in order to have the "last word" on closing, and that this request undermined this decision. Defence counsel concluded:

**By allowing the Crown to hear the closing statement of the defence, to have the trier of fact point out the shortcomings of their case and argumentation, then further provided the opportunity to address all they failed to address when they had the lawful opportunity to do so would cause an otherwise fair trial to become an unfair trial. It is respectfully submitted that the further opportunity to present Crown theories and argument would violate section 7 of the Charter. Therefore, any further submissions in relation to the questions posed should not be considered by this Honourable Court.**

[Emphasis in original]

[55] I will explain my reasons for rejecting this submission later. As to the substantive questions, defence counsel replied:

**i. What is the total amount of money alleged by the Crown to have been defrauded and how is that total broken down?**

The Defence repeats that the use of the sums of money provided to Ms. Kennedy by Mr. P. was lawful. Additionally, the defence submits that if the Crown has not made it clear to the Court the amount of which Ms. Kennedy is alleged of defrauding Ms. P., then the result should be an acquittal – not another opportunity to provide greater clarity.

In response to the sums provided by the Crown, please accept the following rudimentary table, listing and totaling the relevant sums from Exhibit 8 (including sums withdrawn from both credit and chequing accounts). The total reached is **\$19,019.26**, which varies from the crown's total significantly. Please note the transaction type 'XTC', which was explained in testimony to signify transferring funds from a credit account to another account, is not akin to spending or withdrawing funds, and therefore is not included in the total. Further, the sums for which the response code is 4 are not included in the totals, as only the code of 1 was explained to be a 'successful' transaction.



**3. Aside from the ATM transactions captured on video, where Ms. Kennedy can be seen using B.P.'s debit card and which she has admitted she did in the various Agreed Statement of Facts, how does the Crown say they have proven that it was Ms. Kennedy who is responsible for the remaining transactions?**

The agreed statement of facts establish that Ms. Kennedy completed 17 transactions with the debit card that at one time belonged to Mr. P.'s. However, Exhibit 8 reveals various other transactions involving the account of Mr. P.

The only evidence of use of Ms. Kennedy's card is through the video evidence referenced in this Agreed Statement of Facts. Determination that Mr. Kennedy engaged in further use of the debit card could only be drawn through inference. The role of and requirements for inference in reaching this conclusion only heightens the necessity that the testimony of Mr. P. be able to bear the weight of the Crown's onus.

Herein lies the same problem that has plagued the Crown throughout their attempt to sufficiently prove the allegations against Ms. Kennedy: the proof beyond a reasonable doubt that Mr. P.'s did not willingly give Ms. Kennedy use of his debit card, as well as attribution of spending or withdrawing of particular monies to Ms. Kennedy alone – requires that the Court be able to place significant trust in the testimony of Mr. P. Bluntly put, Mr. P.'s reliability is too weak to bear such a weighty burden.

[Emphasis in original]

[56] On May 14, 2021, the Crown replied, asserting, correctly in my view, that the issues I asked about had, in fact, been addressed in submissions at trial. Crown counsel cited the following direct excerpts:

**Direct Excerpts from the Crown's Closing Argument Relating to Your Lordship's Three Questions**

“It can be inferred, and the Crown would submit that the manner of spending is one of the most compelling pieces of evidence in this matter:

- 141 transactions in less than 10 days;
- Sums ranging from \$20.00 to \$2,000.00;
- Transactions from all around the downtown Halifax area at all hours of the day and night,
  - For example, \$989.00 from an ATM at the Robie Street Circle K at 12:32 a.m.”

“Mr. P. has testified he did not give Ms. Kennedy permission to either attempt or successfully complete 141 debit transactions over a period of only 10 days or spend over \$29,000.00 of his money and he was not shaken on cross-examination.”

“From that point on, Ms. Kennedy starts spending and withdrawing money from any place she can and any way she can without Mr. P.’s knowledge or permission.”

“The Agreed Statements of Facts that we’ve entered place Ms. Kennedy, in video or photograph, at various locations around the city making withdrawals or purchases between November 8 and November 17.”

“The evidence clearly demonstrates that Ms. Kennedy obtained Mr. P.’s PIN number, obtained his debit card, and then began using that debit card as quickly and efficiently as she possibly could until either the funds ran out or the card was reported.”

[57] The Crown also objected to defence counsel’s claims that the court’s request for further submissions gave it an unfair advantage:

**The Crown’s Position on Supplemental Clarification Requested by Your Lordship**

The parties were asked to respond to three questions posed by Your Lordship. The Crown did so in good faith and objects to the tone of Ms. Garson’s letter wherein she suggests the Crown “failed to make submissions at trial regarding how the allegedly impugned transactions occurred, how many impugned transactions occurred, and the sum for which Ms. Kennedy is charged with defrauding Mr. P. No theories were put forward, no explanations were proposed.” Respectfully, this statement is simply inaccurate and will not reflect the record. After considering Your Lordship’s questions we did comment on the remote possibility of anyone else having possession of the card. We do not feel these comments affect Ms. Kennedy’s fair trial rights, but certainly invite Your Lordship to ignore them if they are of concern. We maintain our position that the evidence shows Ms. Kennedy had possession of the card during the period alleged in the Indictment and defrauded Mr. P.

The Crown further objects to Ms. Garson’s suggestion that we have been provided the **“opportunity to concoct supplemental submissions in response to those deficits, deficits that were either not noted or not appreciated by Her Majesty.”** Once again, these so-called “deficits” were addressed at trial and the record will reflect that fact. The Crown also takes exception to the explicit accusation that it has concocted supplemental submissions. The verb “concoct” implies that the Crown was acting in a dishonest manner and fabricated or contrived something it put before the Court. We provided good faith answers to the three questions posed by Your Lordship.

[Emphasis in original]

[58] In dealing with Ms. Garson’s complaint that my asking follow-up questions subsequent to closing arguments is unconstitutional, a violation of s.7 and s.11(d) of the *Charter*, and may have impacted her client’s decision to call evidence, I am

satisfied that this argument has no basis in logic, in fact, or in law. My questions arose after the Crown and defence had closed their respective cases. I did not provide the Crown an opportunity to call further evidence or split their case. I merely asked for clarification as to how the parties suggested the facts should be applied to the law. Neither counsel had made the answer to my questions clear to me during their closing submissions. Answering those three follow-up questions as to how they were suggesting the facts should be applied to the law could not logically (or temporally) have any bearing on Ms. Kennedy's election whether or not to call evidence or take the witness stand.

[59] A judge asking questions of counsel once each party's case is closed is commonplace, is proper, and is not unconstitutional. Ms. Garson provided no law in support of her complaint. For examples of the unremarkable nature of such a procedure, see *R. v. Dawkins*, 2021 ONCA 235, at para 3, and *R. v. Mayrhofer-Lima*, 2017 ONSC 101, at paras. 44-45, leave to appeal denied, 2017 ONCA 949.

[60] It is appropriate and unremarkable that a judge will ask questions of counsel during closing arguments. It is also appropriate for a judge to ask follow-up questions of counsel subsequent to closing arguments in a judge alone trial where the judge's decision is reserved, as long as both counsel are provided with a fair procedure to reply, as was the situation here. No authority has been provided suggesting that such a request is not a proper exercise of the trial judge's discretion.

### **Circumstantial evidence**

[61] In this case, the Crown says that the court can *infer* Ms. Kennedy's guilt from the evidence. That is, despite the lack of direct evidence of her state of mind, the Crown says it is possible to infer dishonesty. Additionally, at some points in his testimony, B.P. said that he was basing his answers on "logic", that is, on what he would have or would not have done, not on his clear memory. Both of those issues involve an analysis of circumstantial evidence.

[62] In *R. v. Villaroman*, 2016 SCC 33, Cromwell J., for the court, noted that "in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt" (para. 30). He went on to explain that the modern state of the law is that inferences consistent with innocence do not require proven facts:

[35] At one time, it was said that in circumstantial cases, “conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts”... However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts... Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown’s evidence does not meet the standard of proof beyond a reasonable doubt.

[36] I agree with the respondent’s position that a reasonable doubt, or theory alternative to guilt, is not rendered “speculative” by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt “is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence”: para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider “other plausible theor[ies]” and “other reasonable possibilities” which are inconsistent with guilt... I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused”... “Other plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [Some citations omitted.]

[63] Justice Cromwell went on to contrast the approach to exculpatory circumstantial evidence to that governing inculpatory evidence, citing *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375, where the court stated that “[i]n the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation” (emphasis in original). The court explained that “according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed” (emphasis omitted). Justice Cromwell commented that the idea “that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative” was a helpful way of describing the line between plausible theories and speculation” (para. 41).

[64] In *R. v. Calnen*, 2019 SCC 6, Martin J., dissenting in part, discussed circumstantial evidence, in the form of after-the-fact-conduct evidence:

[111] After-the-fact conduct is circumstantial evidence. Like other forms of circumstantial evidence, after-the-fact conduct allows a fact finder to draw particular inferences based on a person's words or actions... This process of inductive reasoning is a cornerstone of the law of evidence, and is used frequently to draw inferences from circumstantial evidence, as well as to assess credibility and to determine the relevance and probative value of evidence...

[112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. **As with all circumstantial evidence, a range of inferences may be drawn** from after-the-fact conduct evidence. **The inferences that may be drawn “must be reasonable according to the measuring stick of human experience” and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence...** That there may be a range of potential inferences does not render the after-the-fact conduct null... In most cases, **it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. “It is for the trier of fact to choose among reasonable inferences available** from the evidence of after-the-fact conduct”...

[Emphasis added and citations omitted.]

[65] In *R. v. Al-Rawi*, 2018 NSCA 10, in the context of a sexual assault case, Beveridge J.A. discussed the relevance of a witness testifying that they had no memory of an event, but would never consent to certain sexual activity that took place during that event:

70 Where a complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" Despite the potential to discount the typically negative response as speculation, the answer is usually received into evidence, and depending on the reasons, may or may not have a bearing on the determination if consent or capacity to consent were absent... [Citations omitted.]

[66] In *R. v. Garciacruz*, 2015 ONCA 27, the court stated that evidence of the “complainant's pre-existing attitudes and assumptions” can serve as a basis for an inference that a complainant clearly would have refused to consent “regarding the period during which [the complainant] has no recollection” (para. 69).

[67] Similarly, in *R. v. Kontzamanis*, 2011 BCCA 184, the court held that although the complainant had no memory of the alleged assault, the jury could “make the crucial credibility finding that the complainant subjectively did not

consent, based on her unequivocal evidence that, under no circumstances, would she have consented to sex with the appellant at any time” (para. 31).

[68] The Supreme Court of Canada considered this type of evidence in *R. v. Esau*, [1997] 2 S.C.R. 777, where McLachlin J. (as she then was), dissenting, accepted that evidence that the complainant “would not have consented ... because the respondent was her second cousin” was “consistent with denial of consent or with unconscious incapacity to give consent” (paras. 91-92). However, the majority, *per* Major J. stated that the conclusion that “the complainant would not for personal reasons have consented ... in view of the complainant's failure to remember, is no evidence of her denying consent” (para. 23). Justice Major’s comment on this point has been treated as being limited to the immediate facts of *Esau*. For example, in *R. v. J.R.*, 2008 ONCA 200, Feldman J.A. said, for the court:

[17] The trial judge in the present case found that because of intoxication, the complainant did not have the capacity to consent. He also reasoned, based on her evidence, that she would not have consented and he accepted that the evidence of a lack of struggle also supported his conclusion of the complainant’s lack of capacity in those circumstances. In my view, the trial judge was entitled to view the cumulative effect of the evidence and draw the conclusions he did. In *Esau*, the majority was not laying down a rule, but was instead discussing why it rejected the minority’s view of the value and effect of the evidence in that case in the context of the defence of honest but mistaken belief in consent.

### **Assessment of the evidence**

[69] There are voids in B.P.’s memory of the time period of the alleged offences. He was not always clear as to what he actually remembered and what he had pieced together. However, he was consistent in his testimony that he did not give Ms. Kennedy his debit card or his PIN, nor did he give her permission to use his debit card, use his PIN, or access his bank accounts. He was credible on this point. While there are issues regarding his reliability generally, I am satisfied that based on B.P.’s testimony, he did not give Ms. Kennedy permission to use his debit card, his PIN or to drain his bank accounts and get cash advances.

[70] If I am wrong, and B.P. was assuming that he did not consent based on reason and logic, I am satisfied that B.P.’s assertion that he would never consent to giving anyone his debit card and PIN is circumstantial evidence that can be considered among the constellation of evidence presented at trial to determine whether the Crown has proven Ms. Kennedy’s guilt beyond a reasonable doubt.

[71] In relation to the Crown's request that I infer Ms. Kennedy's guilt in relation to the instances of debit card usage for which she has not admitted in the Agreed Statement of Facts, and for which there is no video or photographic evidence of her accessing the relevant ATM or business at the relevant time, there is a plethora of circumstantial evidence pointing toward her guilt. Ms. Kennedy can be seen looking at the ATM screen when B.P. is entering his PIN. Further, B.P. says that Ms. Kennedy handed him his wallet when he was getting out of the taxi, so that she had the opportunity to take his debit card. Ms. Kennedy agrees that she was captured on video using his debit card at various ATMs and businesses around the city starting soon after she had access to B.P.'s wallet and ending only when the bank cancelled his debit card. The frequency, amounts, and locations of the withdrawals by Ms. Kennedy, all while B.P. was incapacitated, add to this constellation of evidence.

[72] Ms. Kennedy concedes by way of the Agreed Statement of Facts that she was in possession of B.P.'s debit card and that she used it during the relevant time periods. Those time periods include a short time when B.P. was in the midst of an alcoholic drinking binge, in his room in the Lord Nelson, drinking Listerine. He withdrew money from the ATM at the Barrington Street Superstore on November 8, 2018, at 5:51 AM. B.P. said they then drove straight back to his hotel. He was sitting in the front passenger seat and Ms. Kennedy was directly behind him in the rear passenger seat. When they arrived at the Lord Nelson, Ms. Kennedy handed B.P. his wallet from the back seat. He went to his room and drank Listerine until he fell asleep. The unauthorized spending started almost right away. Ms. Kennedy agrees that she used his debit card in an ATM on November 8, 2018 at 6:24 AM, less than an hour after B.P. used it at the Superstore.

[73] Between November 7 and 8, 2018, B.P. was drinking heavily in his hotel room. He was then in hospital detoxifying between November 9 and November 21, 2018. He did not use his debit or credit cards during that time. During that time period, there were 141 transactions or attempted transactions at multiple locations, involving the use of his debit card for withdrawals from his bank account, purchases at businesses, or cash advances on his credit card. Ms. Kennedy agrees that she used his debit card during this time period.

[74] The Crown has proven the guilt of Diane Kennedy beyond a reasonable doubt in relation to the use of B.P.'s debit card on the dates listed in the Agreed Statement of Facts and for the total amounts made up by that usage. B.P. did not give her permission to use his debit card or his PIN. She took advantage of a

highly intoxicated man in the midst of an alcoholic relapse. She watched him entering his PIN at an ATM where he was generously giving her money while she was panhandling. She took his debit card during the cab ride from the Barrington Street Superstore to the Lord Nelson and then returned the wallet, minus the debit card. She then immediately went on a cash withdrawal and spending spree, using his debit card at ATMs to withdraw funds from his bank account and purchase items. I find that B.P. did not give Ms. Kennedy his debit card, his PIN, or permission to access his accounts. I am convinced beyond a reasonable doubt that Ms. Kennedy took his debit card and PIN. She had no colour of right to use B.P.'s debit card or access his accounts.

[75] Some of the cash withdrawals, purchases, and cash advances were not captured on video, and were not admitted by Ms. Kennedy in the Agreed Statement of Facts. Someone used B.P.'s debit card and PIN for those transactions during the same time frame in which Ms. Kennedy admits she was doing so in the transactions caught on video.

[76] The defence advances the theory that B.P. gave her permission to access his money while he was drinking and that when he sobered up he was too distraught and embarrassed to admit what he did. The possibility that B.P. made the police complaint and then testified as he did because he was embarrassed when he sobered up and he needed to blame her in order to be reimbursed by the bank, of course, could be one inference. However, through B.P.'s testimony, and the rest of the evidence presented at trial, the Crown has negated this as a reasonable possibility or a logical inference. B.P. was asked about this claim directly, he denied the defence suggestions, and I found him consistent, credible, and reliable on this point. Evidence of the pattern of Ms. Kennedy's use of the debit card supports B.P.'s testimony.

## **Conclusion**

[77] The Crown must prove each essential element of an offence beyond a reasonable doubt to obtain a conviction. I have found that Ms. Kennedy took and retained possession of B.P.'s debit card unlawfully, taking it from him in the cab without his permission while he was intoxicated, then using it without his permission, to fraudulently take money out of his bank accounts, make purchases, and obtain cash advances on the dates and occasions that she is identified doing so via video. The total amount of those fraudulent withdrawals is \$12,741.42.



[78] In relation to the unadmitted use of B.P.'s debit card, which was not captured on video, to make withdrawals from his accounts, to make purchases, and to obtain cash advances, is the inference that Ms. Kennedy also used B.P.'s debit card for these transactions consistent with the directions in *Villaroman*? Is there a reasonable inference other than that Ms. Kennedy also made these transactions? I am satisfied that there is no logical or reasonable inference other than that Ms. Kennedy was using the debit card and PIN to also make cash withdrawals, cash advances, and to make purchases, the same as she was doing over the same time period for the instances she admits. I therefore find that Ms. Kennedy is also responsible for those additional unadmitted transactions equaling \$16,321.74.

[79] I am satisfied that the Crown has proven beyond a reasonable doubt the elements of both offences charged. Diane Kennedy is guilty of unlawful possession of B.P.'s debit card. She is also guilty of fraud in the amount of \$29,063.16.

Arnold, J.