

SUPREME COURT OF YUKON

Citation: *R v Boss*,
2026 YKSC 31

Date: 20260421
S.C. No. 24-01504
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

SETH BOSS

Before Chief Justice S.M. Duncan

Counsel for the Crown

Neil Thomson and
Howard D. Piafsky

Counsel for the Defence

Jennifer Budgell

This decision was delivered in the form of Oral Reasons on April 21, 2026. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): Anthony Primozic died a senseless and horrific death at the hands of Seth Boss. Seth Boss was charged with second degree murder, and he pled guilty to the included offence of manslaughter at the outset of this trial. His plea was rejected by the Crown, and the trial proceeded on the charge of second degree murder.

[2] The issue to be decided is whether the Crown has proved beyond a reasonable doubt that Seth Boss had the intent to commit murder. The Crown says the ferocious

and sustained nature of the attack by Seth Boss on Anthony Primozić and the evidence of purposive conduct by Mr. Boss after the incident, along with other evidence, are sufficient to satisfy its burden. The defence says that Mr. Boss was severely intoxicated to the extent that there is a reasonable doubt as to whether he could form the subjective intent necessary for a conviction of second degree murder. The Crown does not disagree that Mr. Boss was intoxicated; however, they say he was not intoxicated to such a degree that he would not have known his actions against Mr. Primozić would have caused his death or would have caused bodily harm likely to have resulted in death, and he was reckless as to whether death ensued or not.

[3] There were extensive admissions of fact in this case, and they will be attached as an appendix to my written decision.

[4] I will review the salient facts, the theories of the Crown and defence, and the applicable legal principles. I will then assess the evidence of both the Crown and the defence and explain the reasons for my conclusions.

[5] The courtroom gallery has been full throughout this trial, and the evidence has been difficult to hear. The loss of a loved one, especially in such a brutal and senseless way as happened here, is an unimaginable pain. As a trial judge, I am obliged by the law to set aside any sympathy or prejudice for anyone in this case and make my decision only on the admissible evidence in court and the legal principles that apply, including the important one of the requirement of the Crown to prove the essential elements of the offence beyond a reasonable doubt.

Facts

[6] These facts are taken from the agreed statement of facts and the attached

videos and audio recordings and the evidence of the witnesses who testified along with the photos and reports introduced in their testimony. The Crown called three police witnesses — Sgt. Wilson, Sgt. Lavallée, and Sgt. Watts — as well as the pathologist, Dr. McKinnon. The defence called three expert witnesses: Ms. Kirkwood, Dr. Morgan, and Dr. Lu. The accused did not testify.

Events leading up to the death

[7] Seth Boss is a resident of Lower Post, British Columbia, and he worked at the Silvertip mine in northern British Columbia. He was born on November 3, 2001. On or around March 7, 2022, he travelled to Haines Junction with his grandfather Mason and younger brother for a short visit with family. He stayed with his grandfather while in Haines Junction. They planned to drive back to Whitehorse on March 9th with a cousin, Marshall Boss.

[8] Anthony Primozic was a resident of Haines Junction and was 25 years old when he died. Anthony and Seth were relatives and were previously familiar with each other.

[9] There was no evidence of any animus on Seth's part towards Anthony, nor was there any evidence of any motive of Seth to harm Anthony.

[10] On March 8, 2022, Seth arrived at the home of his auntie Kim Boss in Haines Junction at approximately 9:00 p.m. Kim described Seth as “drunk,” “pretty loaded,” and “kinda outta hand . . . or drunk.” Kim observed Seth carrying a square whisky bottle and six tall cans (500 millilitres each) of beer, which he was drinking. Another of Seth's aunties, Marie Boss, was also at Kim's house.

[11] At approximately 9:40 p.m., Seth and Marie left Kim's house to buy beer and cigarettes at the Kluane Park Inn (KPI). Seth was carrying a black nylon bag with string

shoulder straps. Seth and Marie entered the KPI bar around 9:53 p.m. Seth was carrying a tall can of beer when he entered the bar. The video from the security camera at the bar shows the bartender motioning towards Seth to leave. He does so and re-enters without the tall can of beer.

[12] The video shows Seth and Marie drinking at the bar. Seth drank either four or five alcoholic drinks, including at least one hard alcoholic beverage. He is seen on video buying cigarettes and a 15-pack of Budweiser beer.

[13] Marie gave a statement to police on March 11, 2022, in which she described Seth's level of intoxication as eight out of ten. She said she "could tell, he's my nephew."

[14] Seth and Marie left the bar at 11:09 p.m. Seth tripped while leaving the bar and broke the box of beer on the steps, causing the cans to fall out of the case. Marie drank a couple of cans that broke, leaving 13 cans. Seth collected those cans and put them inside his black bag. This black bag was later found by police at Anthony's home.

[15] Seth and Marie began walking back to Kim's home. They separated at the skating rink/convention centre. Marie continued walking to Kim's home and assumed Seth was following behind her. He never arrived at Kim's home but was walking alone, carrying the bag with beer cans.

[16] At approximately 11:40 p.m., Anthony was also out walking, and he called his aunt, Georgina Griffiths, while she was walking back to her hotel room at the KPI. The call recorded on Anthony's phone confirms that they could see each other on the road while they were talking. Anthony suggested he meet her at the road. They talked briefly about money, and Anthony said he wished they had 15 more dollars to "buy a fuckin'

bottle”.

[17] Both Anthony and Georgina noticed another person walking on the road and wondered who it was. Anthony recognized him and said, “it’s fuckin’, it’s fuckin’ Seth Boss!”

[18] Seth was heard on this phone recording saying “get away from me! . . . Just stay right where you are! . . . I don’t know if you are a ghost or not?” Anthony replied that it was all good and he was not a ghost. Seth then responded, “you’re real, you’re real, come with me right now . . . Anthony get over here . . . I know you’re real.”

[19] Approximately nine minutes later, Anthony and his aunt Georgina spoke again on the phone. She told Anthony she needed three dollars. Anthony said he had no money and then asked Seth if he had three dollars. Anthony told Georgina he will bring him — that is, Seth — over to the KPI, and she said, “No . . . he’ll tell his mother.” Anthony then said he had not seen Seth for “like four fuckin’ years.” Georgina said she had not seen him since he was a little kid.

[20] A video from a security camera at the KPI shows Anthony and Seth in the hallway of the KPI hotel rooms. It shows them walking to a hotel door and knocking on it. They are passing between them a square bottle of hard alcohol, almost empty. The size of the bottle is not clear; it could be either a 375 millilitre or a 750 millilitre bottle. Seth is observed on the video taking a sip from the bottle. He is carrying his black bag on his back.

[21] Anthony called Georgina at 11:53 p.m. while they were in the hallway knocking on a hotel door, and she asked where he was. He told her he was outside her door and had knocked three times. Georgina replied that she was coming up.

[22] The video shows the three of them entering Georgina's hotel room. Anthony had been knocking on the wrong door. The video then shows the hotel manager knocking on Georgina's door, shortly after they entered, and speaking with whomever answered. Seconds later, Anthony and Seth left Georgina's room, with Seth running down the hallway.

[23] At 11:59 p.m., Anthony called Georgina again, but the call went to voice mail. While the phone was ringing, the recording picked up Seth and Anthony speaking. Anthony said, "let's go down the street. There's a gazebo." He told Seth he was calling his auntie Georgina in answer to Seth's question, and Seth said, "well fuckin' tell her to pick us up." Seth then said "God dam it! That's it I got the beer!" Anthony responded, "you're too much sometimes."

[24] The two young men were walking in the street before they reached Anthony's home. At 12:21 a.m., Anthony called Marie Boss, and Seth was heard in the background saying, "let's go, let's go . . . across to your house." Anthony replied, "my house fuckin', my house is over there." When Marie Boss answered the phone, Anthony said, "I have Seth, I'm just wondering where you are so that's cool."

[25] At 12:25 a.m., Anthony received a text from Kim Boss asking where he was and if Seth was with him. At 12:30, Anthony texted, "Ywah [as written], that's why I called U . . . gonna put him to bed." Kim responded, "where are you?" and shortly after, "phone please."

[26] At 12:33 a.m., Anthony received a call from Kim Boss' phone with Marie Boss there. Marie asked whether Seth was there, and Anthony replied, "Yeah I fuckin' have him with me because you wouldn't answer your fuckin' phone." Anthony is then heard

saying to Seth, “hey watch, watch, . . . You watch it fuck sakes . . .,” and a second or two later, “come here . . . come with me fuckin’ kid, fuck sakes.” Kim told Anthony that Marie was coming to get Seth, and Anthony relayed this to Seth. Anthony then stated he was not going to walk “because [inaudible] took him around KPI about four fuckin’ times.” Kim told Anthony “well keep him there with you,” and Anthony swore a few more times and ended with “whatever then fuckin’ never mind . . . fuckin’ annoying.”

[27] At 12:38, Kim texted that Mason and Marshall were coming to pick up Seth and that they were making sure he had cigarettes and beer. Anthony responded at 12:40 that they were at his house and “no beer and no cigarettes lol”.

[28] Between 12:30 and 1:00 a.m., Seth’s grandfather Mason received a call from Kim asking him to go and look for Seth. Mason reported that he drove around the village for approximately 30 minutes but did not find Seth. He returned to his home at 68 Jackson Street.

[29] At 12:42 a.m., Anthony texted Kim that “he says bullshit” and shortly after “IDK come grab him.” At 12:46 a.m., Kim texted to ask if Mason had shown up. Anthony replied approximately six minutes later at 12:52 that “he was talking to Marshall and him to go fuck himself...and told him.” In answer to Kim’s question, Anthony said he had no clue what Mason did in response.

[30] At 12:54 a.m., Anthony texted Kim again to say “Idk hes passed out now” and confirmed Seth was still at Anthony’s home when Kim asked if Seth had gone with Mason. She then texted that Mason was mad as it was and had climbed out of bed to get Seth. At 12:58 a.m., Anthony texted Kim “so he’s not coming to get him?”

[31] At 1:08 a.m., Anthony received a call from Marie asking where Seth was.

Anthony responded that Seth was right there, “he’s just fuckin’ woke up.” Marie asked to speak to Seth. She asked him if he wanted her to come to get him, and Seth replied, “no.” She then asked, “you still have your Auntie Kim’s pack of smokes?” and Seth replied, “Yes I do.” Marie stated, “okay well I’m just making sure cause I’m just at the KPI and I’m fuckin’ back tracking you.” Seth responded, “So am I,” to which Marie said, “You’re not at the KPI, you’re across the highway, you’re with Anthony.” Seth then said, “Yes I am but at the same time I know where you are too. I know where Auntie Kim is . . . I know I owe her cigarettes.” Marie responded, “Well I’m just asking, well I’m just making sure that you have your beer and your smokes.” Seth said again, “Yes I do.” Marie said, “Okay well don’t fuckin’ makes me worry like that. . . okay well you’re spending the night there I guess?” Seth responded, “Duh? Well” Marie said, “Well you should what?” And Seth responded, “well uh, I’ll, I’ll stay the night with Auntie Marie duh but uh I mean.” Marie asked again, “Well do you want me come get you . . . that’s what I’m asking.” Seth replied, “No.” Marie said, “I’m at the fuckin’ KPI and I know where you are right now cause your Grandpa and Marshall were just worried too.” Seth concluded the call then by saying, “Alright I love you too good night” and hung up the phone.

[32] At 1:12 a.m., Anthony sent a Snapchat message to an unknown individual stating “do you know seth boss?” And then “he needs a ride idk he fucking hammered.”

[33] At 1:25 a.m., Kim texted Anthony, “well save us some beers then, thx so much for taking him in, Gaad, just got us all going.” Anthony responded at 1:31 a.m. “yeah all good.”

[34] At 2:02 a.m., Anthony texted Kim again, “Csn [as written] you come grt [as written] him,” and at 2:22 a.m., Anthony texted to Kim, “oh sorry Marie he keeps trying

to choke me out.” Kim had turned her phone off shortly after 1:30 a.m. and did not receive the last messages from Anthony until later that morning. At 2:20 a.m., two calls were made from Anthony’s phone to Kim, but there was no answer. No further calls or texts came from Anthony’s phone.

[35] Anthony died between 2:20 a.m. and 3:00 a.m. on March 9, 2022.

Events after the death

[36] At 3:34 a.m., on March 9, 2022, a security camera video at the Diamond Willow Apartments shows Seth entering the apartment building. He appears intoxicated in the video. He sits on the stairwell leading to the second level. He removes his boots clumsily. He puts his head in his hands and appears to be sobbing. He leans against the wall and some white material from the wall rubs off onto his coat. After about two minutes, he holds on to each of his sock feet in turn with his hands. He reaches for his pocket and notices the white material on his sleeve. He removes his coat and brushes the white material off of the sleeve and then folds it and places it beside him. He pulls out his phone from his pocket and scrolls through it and taps on it for about 37 seconds. He stares at a black screen for several seconds and then puts it away. He sits again with his head in his hands. At around 3:42 a.m., he puts his boots and coat back on and leaves the building. He stumbles on his way out.

[37] Around 4:00 a.m., Seth arrived at his grandfather’s home, where he went to sleep until the afternoon. Kim Boss took mail to Mason’s home around 5:00 p.m. and observed Seth lying on a bed in the living room, appearing hungover.

[38] That evening, Mason drove Marshall, Seth and his younger brother from Haines Junction to Whitehorse. There, they were picked up by their mother and driven to Lower

Post, British Columbia.

[39] Meanwhile, at approximately 7:00 p.m., on March 9, 2022, Anthony's mother found him in his bedroom, deceased and covered in blood.

Injuries to Anthony and cause of his death

[40] The pathologist, Dr. Elizabeth McKinnon, who conducted the autopsy of Anthony on March 14, 2022, provided a report in which she stated the cause of death was multiple blunt and sharp force injuries.

[41] Anthony had four complex lacerations of his scalp ranging in size from 5.5 centimetres to 18.5 centimetres. A laceration is a blunt force injury caused by the impact of a body surface and a flat surface, creating a break in the skin and bleeding underneath. Complex lacerations have a distinct non-linear shape.

[42] There were no brain injuries and no skull fractures.

[43] Dr. McKinnon opined these injuries were severe enough to cause death because of the occurrence of significant blood loss. The scalp is vascular, meaning it contains many arteries and veins, and injuries produce a lot of blood.

[44] Dr. McKinnon noted the presence of two long, thin, wooden fragments in his hair, 2.5 centimetres and 1 centimetre in size and blue-green in colour.

[45] In addition, there were numerous sharp force injuries, described as an injury from a sharp implement with a pointed side that can penetrate. They were on his head, face, neck, chest, abdomen, right shoulder, and hands, ranging in size from 0.6 centimetres to 2.3 centimetres. They perforated the skin and soft tissues. Enough force was applied to penetrate through his hoody and shirt.

[46] These wounds were most prevalent on his neck, chest, and lower abdomen.

More specifically, there were numerous wounds to his strap muscles, which support soft tissues, the trachea, esophagus, and thyroid gland. These were serious injuries, enough to cause death on their own.

[47] There were two wounds to the right internal jugular vein, which connects to the brain and heart. These serious wounds were enough to cause death on their own.

[48] There were three other areas of injury in the neck area which were not serious enough to cause death on their own: numerous wounds to the thyroid gland, four wounds to the subglottic larynx, and one wound to the proximal esophagus, a fairly deep structure within the neck.

[49] There were approximately 12 wounds perforating the skin and soft tissues of the chest with penetrating trauma of the underlying structures: at least three wounds on the bilateral anterior ribcage; one wound to the right mid sternum; two wounds to the pericardium of the heart, which is the protective soft tissue around the heart; one 0.6-centimetre stab wound to the right ventricle of the heart — a fatal injury; and three wounds to the right middle lobe of the lung that would have been fatal if that had been the only wound, but it was not here because there was minimal bleeding in the lung, likely because of loss of blood from other areas of the body. It is possible that Anthony had already passed away at the time of that injury.

[50] Other wounds were superficial injuries of the skin and soft tissues of the right shoulder, lower abdomen, and perforating wounds of the palm of the hand and to the top of the left hand. On the right hand between the thumb and the index finger, there was a round perforation, indicative of a defensive wound, that is, an attempt to block an assault from a sharp force instrument.

[51] Sgt. Wilson, the forensic identification police officer, took photos at the autopsy and testified there were approximately 100 puncture wounds.

[52] Dr. McKinnon noted a superficial linear abrasion of the neck that was not strangulation and was not serious. There was no petechial hemorrhaging in his eyes, a condition generally seen when there is strangulation.

[53] Dr. McKinnon was not asked and did not provide an opinion on what kind of instrument or instruments may have caused these injuries. She could not opine on the amount of force used to create the wounds. She said it was impossible to say whether Anthony was standing up, mobile, or moving at any time. She opined that the injuries to the heart, jugular vein, and strap muscles in the neck and the bleeding in the head were all fatal on their own. The injuries to the heart and the jugular vein would have caused Anthony to die within minutes. She could not say how long it might have taken him to die from the lacerations in the head, as that depended on the effect of blood loss.

[54] The toxicology report of samples of Anthony's blood, urine, and vitreous humour revealed a Blood Alcohol Concentration (BAC) level of 269%. Urine was 372%, and vitreous humour was 313%. Urine percentage is not indicative of blood alcohol concentration.

Scene of Anthony's bedroom and surrounding areas

[55] Sgt. Wilson took multiple photographs of the scene that show a cluttered room, including a mini-fridge and a computer desk.

[56] There was a significant amount of blood on Anthony, his clothing, beside and around him, including on a towel on the left side of his body. There was blood on the walls and doors leading to the bedroom and blood on the computer desk, the computer,

the fridge, the closet organizer, and the recliner. Samples taken by Hemastix by the police officer and tested, revealed that it was Anthony's blood.

[57] The police officer testified there appeared to be half of a piece of a broken electric guitar under Anthony's body. Two pieces of the broken guitar were rolled up in a beige comforter. One of the pieces contained the neck, the portion of the guitar with frets. Blood was visible on the guitar and on testing, found to be Anthony's blood.

[58] A black mesh bag containing three unopened cans of Budweiser beer and a Helly Hansen winter glove was found in the bedroom. This was confirmed to be the black bag Seth had with him earlier in the evening, seen in the videos from the KPI.

[59] The police seized the bag, the glove, pieces of the guitar, the towel, a sweater, and three empty Budweiser beer cans. DNA results revealed Seth Boss' DNA on the bag, the glove, and the mouth of one of the beer cans, and Anthony Primožic's DNA on the guitar, towel, sweater, and also on the mouth of the same beer can.

[60] Police also seized four guns from the bedroom: a Ruger 36 rifle with bullets, a Tikka USA rifle, a Mossberg 12-gauge shotgun, and a 14 Crosman air gun. Ammunition was visible in the room, including a magazine with bullets on the fridge. There is no evidence that the guns had any role in Anthony's death.

[61] In the bathroom beside the bedroom, there was blood on the wall, the wooden frame, the sink, including the faucet, and on a towel near the sink. In the sink, there were visible from the photograph two empty Kokanee beer cans, toothpaste, a plastic bottle appearing to be shampoo, a device with a cord, and other items. These items were not seized from the sink. No Hemastix testing was done. There was no obvious staining on these objects, and no fingerprints were taken from the faucet or the tap.

[62] The role of a blood stain pattern analyst is to examine characteristics of blood stain patterns such as their size, shapes, locations, and distribution of blood stains, to provide an interpretation of the physical events that give rise to their origin. Sgt. Watts, the analyst in this case, advised Sgt. Wilson about the location and process of taking DNA swabs and the types of photographs. He reviewed the swabs and 917 photographs and did not attend the scene. His conclusions were as follows:

- i. The spatter stains in the bedroom (fridge, boxes, walls, and computer desk) were consistent with creation by force applied to a source of liquid blood and indicated the event causing the major bloodletting occurred in that room.
- ii. The transfer stains, meaning stains created by contact between one blood-bearing surface and another, on the wall and chair in the bedroom were consistent with a person contaminated with blood coming into contact with these areas. Swipes noted within the pattern were consistent with movement during contact.
- iii. The transfer stains on the bathroom wall and door frame were consistent with creation by a person or object contaminated with blood coming into contact with these areas. Swipes within the patterns were consistent with movement during contact.
- iv. The altered bloodstains on the bathroom faucet were consistent with the creation by the deposit of blood on the item, altered by the presence of another fluid.

[63] Sgt. Watts was questioned about the altered stains on the faucet. He testified he

could not confirm the stains had been altered by water, but the fact that they were on the faucet in an area where water is present suggested this. He could not say whether the fluid was there before or after the blood was deposited or by whom the blood was deposited. He could not say whether the faucet was operating or turned on when the blood was deposited there. He testified that he could conclude at some point blood from the person bleeding or from the person contaminated by blood, was deposited on the faucet. As noted earlier, the testing showed the blood was Anthony's blood.

[64] Sgt. Watts on cross-examination corrected his report dated April 7, 2022, in which he wrote:

the presence of the altered bloodstains on the faucet was indicative of an individual operating the faucet, typically in an effort to clean blood from their hands, body or clothing.

Sgt. Watts testified that since he wrote the report, he has learned through court proceedings that this conclusion is too speculative. There are other possible explanations for its presence.

[65] Sgt. Watts testified that it was difficult to determine from the bloodstains and swipes the order of events during the incident, and he gave no evidence on that point.

Evidence of alcohol at the scene

[66] In the bedroom, various containers of alcohol were found. There were three empty cans of Budweiser, all of which were seized. There was an empty 750 millilitre bottle of Fireball Cinnamon Whisky at 33% proof, near Anthony's body. There was an empty 100 millilitre bottle of Alpenbitter, also near Anthony's body. There was one unopened can of Budweiser in the mini-fridge, and three unopened cans of Budweiser in the black bag. There was a 15-pack box of empty Budweiser cans in the shower. There were empty Kokanee cans of beer on a table and in the bathroom sink, and

several empty boxes of Kokanee beer in the bedroom.

Expert evidence

[67] The defence called three experts, all of whom were duly qualified without objection. They were a toxicologist, Ms. Carolyn Kirkwood, and two forensic psychiatrists, Dr. David Morgan and Dr. Shaohua Lu.

[68] Ms. Kirkwood has a Bachelor of Science in microbiology and has taken courses in pharmacology and pharmacokinetics. After working as a forensic chemist, bacteriologist, toxicologist, and serologist, beginning in 1972, she established a business in 1992, in consulting in cases involving blood alcohol concentration readings and interpreting reports and records on blood alcohol and drug readings from autopsy, hospital records, drinking patterns, and breath-testing instruments. Toxicology is the analysis of body tissues for the presence of drugs and alcohol.

[69] Ms. Kirkwood provided her opinion on the effects of alcohol on the human body, and specifically on the absorption, elimination, and distribution of alcohol in the human body. She also calculated an estimated BAC level in Seth Boss, based on two drinking scenarios that were provided to her. In order to calculate a theoretical BAC, that is, where there is no available blood sample, as in this case, she testified it is helpful to have the person's alcohol consumption — amount and type of alcohol — the period of time over which the drinking occurred, the person's weight, gender, and drinking pattern. After the theoretical BAC is calculated, it is often discounted because it may be affected by factors that vary with the individual, such as the rate of absorption and rate of elimination. An individual with a high tolerance to alcohol can also have a different BAC after drinking the same amount as someone who is "alcohol naïve," that is, a low

tolerance to alcohol. It may take more alcohol for the person with high tolerance to reach the same BAC as someone with lower tolerance. A person with high tolerance may exhibit fewer symptoms or symptoms of less severity at the same BAC as someone with low tolerance or than the general population with BAC at that level.

Ms. Kirkwood referenced the Dubowski chart of BAC levels and correlating symptoms as the gold standard reference tool for toxicologists. She noted that someone with high tolerance will still exhibit some of the symptoms described in the chart.

[70] In this case, Ms. Kirkwood reviewed the agreed statement of facts and a letter and three emails from defence counsel. She calculated Seth Boss' BAC based on two alcohol consumption patterns. The difference between them was the amount of whisky consumed, that is, one scenario was a 375 millilitre bottle shared, and the other was a 750 millilitre bottle shared. In both scenarios, she did not account for any consumption by Seth Boss before 9:00 p.m.; she assumed he drank two tall cans of beer, 6.5 cans of the 13 cans of beer in the black bag, because of sharing with Anthony, and agreed that if this were 4.5 cans, it would likely lower the BAC, but did not say by how much. She assumed the square whisky bottle Seth had at the beginning of the evening was the same one that was shared with Anthony throughout the evening and did the calculation on the basis of both a 375 or 750 millilitre bottle.

[71] Ms. Kirkwood calculated Seth's theoretical maximum BAC was between 448% in the first scenario and 568% in the second scenario by 3:00 a.m. on March 9th. At this level, most people would be comatose. After factoring in the estimated rate of absorption, rate of elimination, and tolerance level, she reduced the likely estimate to a range between 224% and 284%. A persuasive factor for Ms. Kirkwood was Anthony's

BAC of 269% and her knowledge that BAC taken at death is an accurate reading and does not change. She opined that two people drinking together generally drink the same amount, so that generally their BACs would be similar, accounting for some individual differences as noted.

[72] Her description of symptoms at this level included likely problems with memory, comprehension, judgment, and balance; slurred speech; loss of reaction time; and loss of fine motor control. A person with this BAC would likely be at the level of confusion or stupor on the Dubowski scale. Ms. Kirkwood opined on the basis of her experience of approximately 50 years as a toxicologist, that a person with a BAC between 250% and 300% would be severely impaired, with their ability to determine risk, reaction capability, and judgment all severely impacted. While to some extent this would be dependent on the individual, generally a person at this BAC level would have problems making coherent, cohesive decisions and would be unable to figure out consequences of their actions. They would demonstrate irrational, impulsive behaviour and would have problems communicating and interacting appropriately with others. Nonetheless, someone with a BAC at this level may still be able to perform an action like driving, because of its habitual or ritualistic nature; they would just not be able to do it well. Ms. Kirkwood also agreed that a person who drank as much as Seth was reported to have drunk shows someone with high tolerance to alcohol.

[73] Dr. Morgan is a physician with a certified specialty in psychiatry and a subspecialty in forensic psychiatry, which is at the intersection of law and psychiatry and in which scientific and clinical expertise is applied in a legal context. He has a Bachelor of Science in pharmacology, a Bachelor of Medicine, a Bachelor of Surgery, and a

Master of Laws. He has extensive experience in the assessment and treatment of people who suffer from a wide and complex variety of mental disorders, including substance use disorders. He was qualified as an expert to provide an opinion on the effects of intoxication on cognitive function. He reviewed the agreed statement of facts, several videos, and the post-mortem examination of Anthony Primozic.

[74] Although not a toxicologist, Dr. Morgan calculated an estimated BAC of Seth Boss based on two alternative drinking scenarios.

[75] The first scenario consisted of an estimated 15 drinks calculated from his consumption of four beers and one hard liquor drink at the KPI bar, 6.5 beers from the 13 cans shared with Anthony, and half of a 375 millilitre whisky bottle, the same square bottle he had at the beginning of the evening and shared with Anthony. He estimated his BAC at 300% to 375% less rate of elimination of approximately one drink per hour over four to six hours for a 60% to 120% reduction. One drink causes the BAC to increase by 20% to 25%.

[76] The second scenario consisted of 23 drinks, calculated from five beer and one hard liquor drink at the KPI bar, 6.5 beer from the 13 cans shared with Anthony, and half of two whisky bottles, one 375 millilitres and one 750 millilitres, seen empty in Anthony's room. Dr. Morgan did not testify to the BAC calculation in this second scenario because he had corrected a typo in his report which reduced the number of drinks, and he was not asked to do a recalculation. In that scenario, he recognized that the reduction of 60% to 120% through elimination.

[77] In neither scenario does Dr. Morgan account for any drinks Seth may have consumed before 9 p.m. Dr. Morgan assumed Seth consumed alcohol rapidly and that

he had nothing to eat.

[78] Dr. Morgan concluded after reading the agreed statement of facts, including the transcripts and audio of the telephone calls, the post-mortem report, and watching the three videos, that Seth showed clinical signs of significant intoxication – specifically, slurred speech, incoordination, and impaired conscious level, as well as perceptual disturbance evidenced by his comment to Anthony “are you a ghost?” The falling asleep for approximately 15 minutes, Dr. Morgan said, was most likely due to alcohol, because if he had fallen asleep due to physical exhaustion, he would have likely stayed asleep. He also noted Seth’s aggressive behaviour, based on the words directed at Marshall attributed to him by Anthony in his text conversation with Kim. Further, he testified that the video of Seth in the Diamond Willow Apartments stairwell showed he was in a highly intoxicated state and concluded from this that Seth’s cognition was probably significantly impacted by his level of intoxication. Specifically, his ability to foresee the consequences of actions, that is, his ability to make choices to act in a way to attain goals, was significantly impacted by his degree of intoxication.

[79] Dr. Lu is also a psychiatrist from British Columbia, on clinical staff at the Vancouver General Hospital. He has a specialty in forensic psychiatry. He worked with the substance treatment outpatient psychiatry program for seven years and has engaged in ongoing assessment and treatment of patients with addiction and complex pain since 2013. He was a co-medical manager in the concurrent disorder intervention unit where he developed and implemented addiction and psychiatric disorders treatments. He was an invited member of the Health Canada expert task force on substance use. For this case, he reviewed the agreed statement of facts, the videos,

including the stairwell video, and at least one KPI video, and the transcript of the 10 phone calls.

[80] Dr. Lu calculated that Seth likely consumed approximately 20 to 25 standard drinks, in addition to the four or five drinks he consumed at the KPI. This was based on the six tall cans of beer at 5%, the 13 cans at 5%, the 750 millilitre bottle of whisky at 40%, and the 100 millilitre bottle of whisky at 40% found in Anthony's bedroom, all divided by two to account for sharing with Anthony. Dr. Lu assumed the general elimination rate of 10% to 20%. He rejected counsel's suggestion on cross-examination that the elimination rate would be higher for Seth assuming he had a high tolerance to alcohol. Dr. Lu opined that a higher elimination rate only happens after a long period of chronic drinking, at least a decade. Based on this, Dr. Lu opined Seth's BAC could have reached 500%, but with continuous elimination and time, it was likely between 350% and 450%.

[81] Dr. Lu explained that with regular alcohol use, a person's body develops tolerance because of the body's biological adaptations. An alcohol-tolerant person can drink more because they can tolerate a higher BAC without the expected or predicted behavioural changes. A younger healthier brain can generally tolerate more alcohol without showing symptoms. One to two beers may not affect a person with high tolerance. But tolerance does not mean that a person with a high BAC is not affected physically, cognitively, and/or psychologically: at a certain BAC level, usually 300%, everyone is affected, and the brain function is impaired.

[82] Dr. Lu opined that anyone who can drink to a level beyond 300% has some elements of alcohol tolerance. In this case, Dr. Lu stated that the amount of alcohol

Seth drank between 9:00 p.m. and 2:30 a.m. without passing out for more than 14 minutes supported his assumption of his high tolerance, even assuming he was sober at 9:00 p.m.

[83] Dr. Lu explained that the theoretical BAC might not always be higher than the actual BAC. It depends on the person's metabolism, body size, rate of consumption, consumption of food, and medication. He agreed there was no evidence in this case about Seth's consumption of food or medication. He testified that, generally, eating a large meal can delay absorption of alcohol into the system and may lower the BAC, but otherwise eating does not have a significant effect.

[84] On cross-examination, Dr. Lu was questioned about the reasonability of his conclusion that the ghost comment made by Seth showed impaired reality, a clinical sign of extreme intoxication and mental incapacity. The Crown suggested that if that were the case at that time, which was 11:40 p.m. and not 9:40 p.m. as the Crown mistakenly stated, his BAC level later in the evening would have been at the level of coma or death. Dr. Lu strongly disagreed that Seth's BAC could have been as low as 200% during the evening, even if he were not at a level of extreme (in the clinical sense) intoxication at 11:40 p.m., and even with the reduction of the BAC level due to the variability factors and a lower amount of alcohol consumed. This was because of the high number of drinks Seth consumed throughout the evening, as evidenced by his continuous consumption at the KPI bar, his continuing to drink after this, as well as Anthony's BAC level of 269%. Dr. Lu accepted the same premise as Ms. Kirkwood, that people drinking together and sharing drinks are likely to have similar BAC levels.

[85] At Dr. Lu's estimate of 350% he concluded that Seth would have impairment in

maintaining attention and concentration. He would have disorganization of his thought forms, meaning he would be going from one idea to another and would be hard to follow. His ability to make decisions would be affected. In his report, Dr. Lu concluded:

... Mr. Boss' capacity to form basic intent, his capacity to plan, to organize and to foresee the consequences of his action would be severely impaired. There is a reasonable probability that he had distorted perception and impaired reality testing that further affected his capacity to form intent.

He testified that in his view there was no possibility that Seth did not have problems with mental focus, planning, organization, and thinking through his actions in a meaningful way.

Theories of the Crown and the defence

[86] The Crown argues that the evidence of the attack's ferocity and sustained nature, combined with the evidence of Seth's purposive conduct after the incident, show his ability to engage in rational thought at the time of the offence. These are significant factors that establish proof beyond a reasonable doubt that he had the actual intent to cause Anthony's death, according to the Crown. His state of intoxication was not so advanced that it gave rise to a reasonable doubt about that actual intent, nor was it advanced enough for him not to know the attack was likely to result in the death of Anthony Primozic, and he proceeded anyway.

[87] The Crown says Seth Boss has "a high hill to climb" to establish that his level of intoxication rose to a level that impaired his foresight of the consequences of his act due to the brutal and sustained nature of the attack. The Crown argues that the attack was in at least two parts: first, the blows to the head from the wooden electric guitar, using a degree of force sufficient to cause death; and second, the infliction of over 100 puncture wounds, including those penetrating the strap muscles, jugular vein, and heart in two

places, each severe enough to cause death on their own. The Crown suggested there may have been a third part, that is, the ligature around the neck. The fact that there was a focus on the vital organs — heart, lungs- and the neck, is evidence to support intent. The degree of intoxication would have to be particularly advanced to raise a reasonable doubt, similar to a situation where an intoxicated person shoots someone at close range in the head, where death is an obvious foreseeable consequence.

[88] The Crown points to the following evidence or inferences to be drawn from the evidence in support of their argument that Seth Boss showed sufficient rational thought to form actual intent: he left Anthony's home and he did not pass out; the blood in the bathroom gave rise to an inference that Seth was trying to wash the blood off of himself; in the stairwell of the Diamond Willow Apartments, he was apparently warming his feet, showing purposive conduct, and he demonstrated motor skills through his ability to unbutton, fold, and place his coat down, use his phone, and place his boots neatly in front of him. He was able to find his way to the apartments and then his grandfather's home at 68 Jackson from Anthony's home at 117 Lowell in a reasonable period of time, not passing out along the way. All of this evidence supported a lower level of intoxication than suggested by the defence, and the ability to think rationally and act in a goal-oriented, purposive way. The Crown acknowledged that Seth Boss was intoxicated, but he was not so intoxicated as to raise a reasonable doubt about his ability to form actual intent.

[89] The Crown questioned the amount of alcohol Seth consumed and accordingly the weight to be attributed to the expert evidence of the effects of intoxication on him. The experts calculated a theoretical BAC level, reliant on the data or information they

were provided by defence counsel. The Crown stated all the experts appear to have looked at or considered different information. They did not realize that only nine cans of Budweiser beer could have been shared with Anthony, not 13, because of the three remaining in the black bag and one in the mini-fridge, and the fact that the Fireball Cinnamon Whisky in Anthony's room was 33%, not 40%.

[90] The Crown suggests that the experts' evidence was result-oriented, that is, they arrived at a theoretical or estimated BAC on flawed data and then looked for signs and symptoms in the facts provided to them to substantiate their opinion.

[91] The Crown says the uncertainty of the experts' conclusions, because of the imperfect data they were provided, their lack of impartiality, combined with the evidence of Seth's purposive, goal-oriented conduct and the severity of the injuries inflicted, all contribute to establishing proof of his intent beyond a reasonable doubt.

[92] The defence says that the evidence that Seth Boss drank a copious amount of alcohol that night and was severely intoxicated at the time of Anthony Primozic's death gives rise to a real and reasonable possibility that he did not form the intent to kill Anthony, and he did not know that death was likely and proceeded anyway. This possibility is not inconsistent with the nature of the injuries. The Crown was unable to negate the reasonable inferences that Seth continued to drink alcohol after leaving the KPI and that he consumed a significant quantity leading up to Anthony's death.

[93] The expert evidence was unequivocal, according to defence, that his level of intoxication affected his ability to foresee the consequences of his actions as well as his cognitive function, judgment, and impulse control. The lack of any motive or animosity towards Anthony also favours Seth in determining whether the requisite intent is proved.

[94] In assessing the after-the-fact conduct, defence says there is no evidence to infer that Seth used the faucet in the bathroom to wash his hands. There was no evidence of the precise time he left after the attack or how long it took him to reach the Diamond Willow Apartments. The video of Seth in the apartment stairwell shows him severely intoxicated, through his actions showing lack of balance and coordination, the absence of any ostensible reason for stopping there or for removing his boots and coat. His ability to reach the Apartments and eventually his grandfather's home by 4:00 a.m. was attributable to his familiarity with Haines Junction and his resulting procedural or residual memory. A review of all of the evidence raises a reasonable doubt that Seth Boss had the requisite intent.

Law

Essential Elements of Offence and Reasonable Doubt

[95] Seth Boss has pled guilty to manslaughter. This means he has admitted he has committed an unlawful act that caused the death of Anthony Primozic. He admits that the unlawful act he committed is one that is objectively dangerous, that is, a reasonable person would realize it gives rise to a risk of harm, and a reasonable person in his circumstances would foresee the unlawful act gives rise to a risk of death. Put another way, he admits the elements of manslaughter: an unlawful act causing death, general intent for assault, and objective foresight of non-trivial harm (*R v Creighton*, [1993] 3 SCR 3 (*Creighton*)). Specifically, Seth Boss has admitted he caused Anthony Primozic's death by inflicting multiple blunt and sharp force injuries to his head, neck, and chest. He also admits the date and time of the offence, that he is the person accused, and that the Court has jurisdiction.

[96] A conviction for manslaughter requires that the unlawful act be one that is objectively dangerous (*R v Hodgson*, 2024 SCC 25 (*Hodgson*) at para. 47), but it does not require proof beyond a reasonable doubt what the accused intended or knew. For manslaughter, “the mental fault lies in failure to direct the mind to a risk which the reasonable person would have appreciated.”

[97] The Crown has charged Seth Boss with second degree murder. The *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*), defines second degree murder as murder

- (a) where the person who causes the death of a human being
 - (i) means to cause his death, or
 - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

The Crown must prove these essential elements of the offence beyond a reasonable doubt.

[98] A reasonable doubt is a doubt based on reason and common sense, which must be logically based on the evidence or lack of evidence. Reasonable doubt is not based on sympathy for or prejudice against anyone involved in the trial. It is not enough to conclude that an accused is probably guilty or likely guilty. The defence does not have to prove anything. On the other hand, the Crown does not have to prove the essential elements to a level of certainty.

[99] Murder is different from manslaughter because of the mental element required to be proved with respect to the death (*Creighton* at 17 and *Hodgson* at para. 48 citing *R v Vaillancourt*, [1987] 2 SCR 636 at 654). The Crown must prove beyond a reasonable doubt that the offender has the requisite intent for murder: (*R v Walle*, [2012] 2 SCR 438

at para. 3). This is called subjective intent. It requires proof of “heightened thought and reasoning processes”: *R v Crossley*, 2025 BCCA 224 (*Crossley*) at para. 12 citing *R v Tatton*, 2015 SCC 33 at paras. 42–43, and *R v Brown*, 2022 SCC 18 at para. 43. As said by the Supreme Court of Canada in the case of *Hodgson* at para. 49, a conviction for murder requires subjective intent because it is an offence that “carries with it the most severe stigma and punishment of any crime in our society” (*R v Martineau*, [1990] 2 SCR 633 (*Martineau*) at 645). The law requires subjective foresight of death because the criminal liability for murder is of the highest kind and cannot be justified “except where the actor possesses a culpable mental state in respect of that result”; thus, the harsh stigma and punishment associated with murder is reserved for “those who choose to cause death [intentionally] or who choose to inflict bodily harm that they know is likely to cause death” (*Martineau* at 646).

[100] To explain this further, in considering whether Seth Boss had subjective intent, his actions in this case are not to be assessed against the objective standard of a reasonable person in the same circumstances. Determining the subjective foresight required for murder means a focus only on what Seth Boss actually intended, not what he should have known about the dangerous nature of his actions (*Hodgson* at para. 50). It is not enough that Seth Boss foresaw simply a danger of death; he must have foreseen a likelihood of death, flowing from the bodily harm that he was inflicting on the victim.

[101] How do we determine what is going on in someone’s mind? We cannot look into the mind of the accused, and we do not usually have direct evidence of their mental state (*R v Robinson*, 2010 BCSC 368 at para. 107). Instead, the proven or admitted

facts and inferences drawn from those facts must be assessed. A well-accepted common inference is that a sane and sober person intends the natural consequences of his or her acts. However, before that inference can be drawn in a particular case, all the circumstances of the situation must be assessed. All the circumstances can include, for example, the degree of intoxication of the accused. If the accused provides evidence of intoxication, it must be assessed to determine whether it raises a reasonable doubt about whether the accused had subjective intent to cause bodily harm, or that the bodily harm he inflicted was of such a nature that it was likely to result in death.

Defence of Intoxication

[102] Seth Boss' defence is that he did not form the state of mind for murder because of his degree of intoxication. It is not enough for the Crown to prove that he had the capacity to form the intent; the Crown must prove he formed the actual intent. It may be possible that an accused is not so intoxicated as to lack capacity to form intent, but the degree of intoxication had an impact on their ability to exercise that capacity to form specific intent and thus raises a reasonable doubt on the Crown's proof of specific intent (*Crossley*).

[103] The leading decision providing guidance on the defence of intoxication is *R v Daley*, 2007 SCC 53 (*Daley*). In that case, like this one, the accused was charged with second degree murder and raised the defence of intoxication. In deciding whether the judge's instruction to the jury on intoxication was proper, the Supreme Court of Canada developed three legally relevant degrees of intoxication: mild, advanced, and extreme. Mild intoxication is alcohol-induced relaxation of inhibitions and socially acceptable behaviour and is not a factor in determining intent. Extreme intoxication,

which is akin to automatism and absolves an accused of complete criminal responsibility, is also not relevant in this case.

[104] Advanced intoxication occurs

...where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea* [intent]. (at para. 41)

Advanced intoxication is usually the degree of intoxication that juries and judges struggle with most often, and it is what is relevant here.

[105] The Supreme Court of Canada has said that the degree of intoxication required to advance a successful intoxication defence may vary with the type of offence:

[in] certain types of homicides, where death is the obvious consequence of the accused's act, an accused might have to establish a particularly advanced degree of intoxication [in order] to successfully avail himself . . . of a . . . defence of this type. (at para. 42)

[106] The Supreme Court of Canada in *Daley* did not specify the kind of evidence necessary to meet this threshold, nor did the Court identify specific signs of impairment that must be present in order for the defence of intoxication to succeed. This is because this inquiry is highly factual and highly contextual: whether the evidence in a particular case is sufficient to raise a reasonable doubt will vary with the circumstances.

The determination requires an assessment of all the evidence, that is, what is the overall impact of intoxication on the accused's state of mind at the time of the offence, as borne out by the entirety of the evidence (*Crossley* at para. 33). The British Columbia Court of Appeal said in the case of *Crossley* that the evidence must be sufficient to raise a reasonable doubt as to whether intoxication by drugs or alcohol impaired the accused's foresight of the consequences of their actions (*Crossley* at para. 36 citing

Daley at para. 41) or, put another way, whether it was “sufficient to ‘reduce’ the accused’s ‘appreciation of the consequences of [their] actions, at the time of the act’” (*Crossley* at para. 36).

[107] The British Columbia Court of Appeal then sets out some helpful factors in that case for the trial judge to consider. Those factors (not a closed list) are: the nature of the acts that caused death; the manner in which those acts were committed; the quantity of alcohol or drugs consumed before the offence; whether the accused was displaying impairment at the time of the offence and to what extent; evidence of purposive behaviour before, during, and after the offence; and any expert evidence that may be adduced specific to intoxication, including its likely effect on the accused’s ability to appreciate the consequences of their actions: *Crossley* at para. 37 citing *R v Sundman*, 2021 BCCA 53 at para. 108.

[108] The Alberta Court of Appeal in the case of *R v Matchatis*, 2020 ABCA 435, summed up the task of the trial judge or jury as:

[32] [They] must weigh and consider all of the evidence of intoxication in a contextual manner to determine whether the accused’s intoxication crossed the line from mere loss of inhibition, impaired judgment and increased bravado to the point where they are left with a reasonable doubt as to whether the intoxication was severe enough that its effect might have impaired the accused’s foresight of the consequences of their actions.

[109] I want to review some cases that provide examples of circumstances where the injuries were severe, and where courts have found that the degree of intoxication was sufficient to create a reasonable doubt that the accused had the necessary intent for murder.

[110] In *R. v. Beaulieu*, 2014 BCSC 834, the accused hit the victim over the head and

on the neck and shoulders with an iron bar numerous times and then repeatedly stabbed him. The blows with the bar caused severe injury that would have caused his death were it not for the stab wounds. The accused also dragged the victim. There was no BAC available from a blood sample. The toxicologist expert calculated a BAC based on the alcohol consumed of a low level of 278% and a high level of 696%, the latter of which was unlikely because not many people could survive that high of a reading. The expert described somebody at the level of 278% as severely impaired, with marked slurring of speech, confusion, disorganized thoughts, problems with short-term memories, and possible blackouts (at paras. 53, 57). She also said in the 270% range that a person would be "...slow moving, lethargic, have trouble standing, be confused, incoherent, and not aware of his surroundings" (at para. 76).

[111] According to eyewitnesses in that case, the accused showed none of these symptoms during or after the attack. The accused also used crack cocaine but the toxicologist's view was that he was severely impaired without the cocaine. Based on all the evidence, including the violent attack, the Court had reasonable doubt of his intent to murder and found him guilty of manslaughter.

[112] In *R v Robinson*, 2010 BCSC 368 (*Robinson*), the victim died as a result of the accused stabbing her several times in the neck, chest, and abdomen. He had a brain injury, had used cocaine before the killing, had a history of alcohol abuse, and an unstable regimen of prescription medication. The Court had a reasonable doubt that when he stabbed the victim he subjectively knew what he was doing was likely to cause her death. His attack was described as one of frenzy. Some of the factors relied upon by the Crown and the Crown's expert to try to establish his intent at the time of the

killing — such as driving to and from the scene, using the washroom, being aware of the location of the rooms in the victim’s house, throwing away the knife and wallet — were indicative of voluntary action or conscious thought with respect to a simple task or an almost automatic action (at para. 130), and were not sufficient to prove intent beyond a reasonable doubt. The Court found him guilty of manslaughter.

[113] In *R v JD*, 2011 YKYC 1, the accused, a youth, hated her mother’s boyfriend and one day attacked him with a kitchen knife and stabbed him 12 times. She admitted killing him but said she did not intend to do so. The Crown argued that J.D.’s actions in inflicting multiple stab wounds demonstrated her intent to cause bodily harm and that she was reckless as to whether death ensued. They also relied on certain statements by J.D. after the fact. The Court found the statements were sufficiently equivocal or at variance with the known facts that it would be unsafe to rely on them to the extent necessary to say definitively that J.D. had sufficient subjective intent to commit the offence. The Court also found a lack of physical evidence including the inability of the blood spatter expert to opine on the sequence of events to support the Crown theory that J.D. pursued the victim around the house, thereby showing some awareness of what was happening. Acknowledging the absence of any past history of violence or sign that J.D. might harm the victim despite her admitted hatred of him, or explanation of her actions, the Court concluded it was “like reading a book with the final chapter missing,” and had a reasonable doubt about her subjective intent, finding her guilty of manslaughter.

[114] In *R v Shimell*, 2016 BCSC 383, the accused fatally stabbed the victim, his uncle, suddenly and without warning. He had been staying with the uncle and his wife while

visiting family over Christmas. There was no proven motive, in fact, no connection at all between the prior social interaction, which was pleasant and devoid of ill-will or negativity, and the sudden attack. The accused had been drinking steadily and heavily all day, although the Court found it was impossible to know with precision the extent of the accused's intoxication, because his actual absorption rate and rate of elimination were not known. In addition, he was a seasoned drinker, meaning that his degree of tolerance made the BAC not the most reliable indicator of the degree of impairment. The expert in blood alcohol analysis and the interaction and effect of alcohol on the human body estimated the accused BAC to be between 300% and 400% with an elimination rate of between 10% and 20%, lower if the rate were 30%. While declining to find a specific BAC, the judge concluded his BAC would have been high. The absence of motive was a significant factor in this case for the judge's finding of reasonable doubt that the accused had subjective intent.

[115] The final example is that of *R v Kahnapace*, 2014 BCSC 2410 (*Kahnapace*), where the accused stabbed her partner in the chest with a steak knife. The accused had been drinking significantly and using crack cocaine that day, but it was impossible to determine her level of intoxication at the time of the stabbing. The Court accepted she was intoxicated, despite not showing outward signs such as slurred speech or unsteadiness on her feet, and her purposeful conduct after the stabbing, including calling a neighbour for help. After considering all of the evidence, and in particular the evidence of intoxication, the tension between the parties, and the physical altercation between them, the judge was left with a reasonable doubt that she had the necessary intent for murder.

[116] These case examples reference other legal principles that also apply in this case: motive, after-the-fact conduct, circumstantial evidence, and the rule in *R v W(D)*, [1991] 1 SCR 742 (*W(D)*) when the accused calls evidence. I will explain briefly each of these before applying the law to the facts here.

Motive

[117] Motive is a question of fact and evidence, and it is not an essential element of the offence of murder. It is relevant, however, because a proved absence of motive may be an important fact in favour of the accused (*Lewis v The Queen*, [1979] 2 SCR 821 at 833 and 835). By contrast, a proved presence of motive may be an important fact in the Crown's case, including on the issue of intention, and especially where the evidence is circumstantial (at 836).

W(D)

[118] Defence counsel argued that *W(D)* applies in this case because the accused called evidence through experts. I do not see how the *W(D)* "formula" has direct application in this case. *W(D)* is a case that provides guidance to the trial judge on how to consider the testimony of an accused at trial or other evidence the defence has called, where the trier of fact needs to make credibility findings between conflicting evidence called by the defence and Crown, or arising out of evidence favourable to the defence in the Crown's case. *W(D)* explains how the concept of reasonable doubt relates to these credibility findings (*R v BD*, 2011 ONCA 51 at paras. 105, 114).

[119] The use of *W(D)* has expanded to apply to evidence beyond that of an accused, but there still must be conflicting evidence that requires assessment. For example, in *R v Avetysan*, 2000 SCC 56, the Court explained that a *W(D)* instruction addresses how a

jury should assess credibility in a situation where there are two irreconcilable versions of events described in testimony. Similarly, in *R v JHS*, 2008 SCC 30, the Court said:

Essentially, *W(D)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the “credibility contest” error. (at para. 9)

And finally, in *FH v McDougall*, 2008 SCC 53, the Court said:

The *W(D)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. (at para. 85)

[120] Here there are no conflicting testimonial accounts. The defence expert evidence on intoxication and its effects on the body and cognition was vigorously challenged on cross-examination by the Crown, but the Crown did not call conflicting expert evidence. The main facts of the case were agreed upon by defence and Crown. There was no credibility contest here; instead, the different conclusions urged on the Court by the defence and Crown are based on different inferences from the same facts or evidence or different weight sought to be attributed to the evidence called by the defence.

After-the-fact conduct

[121] As noted above, evidence of purposive behaviour after the incident has occurred can be relevant in the assessment of the effect of intoxication on the accused. However, the law has limited the use that can be made of after-the-fact conduct. It is not determinative in deciding whether an accused is guilty of murder or manslaughter, that is, whether the accused had actual intent. It can be used only to decide whether the degree of the accused’s intoxication was such that he had no capacity to form the intent to commit murder. If the trier of fact has reasonable doubt about the accused’s capacity to form intent, something that after-the-fact conduct can be used to determine, then they

must have reasonable doubt about whether he actually intended to kill the victim.

[122] An example of how this law was applied is clear from *R v Lightning*, 2018 ABCA 324 (*Lightning*). In that case, the accused admitted he caused the death of a deceased by an unlawful act of stabbing, and he pled guilty to manslaughter. As in this trial, the only issue there was whether his degree of intoxication was sufficient to raise a reasonable doubt about whether he had the requisite intent for murder. Evidence of after-the-fact conduct included: witnesses' testimony that he did not appear to be grossly intoxicated after the stabbing, that he put the knife back in its sheath, that he was smiling, reversed his jacket, rode a bicycle, hid under a parked car while police sirens were sounding, and when approached by police, said he "had a warrant." At trial, he was convicted of second degree murder, but the Alberta Court of Appeal ordered a new trial because the trial judge had not instructed the jury properly that the after-the-fact conduct could only be used to determine his capacity to form the intent for murder, not whether he actually had that intent.

Circumstantial evidence

[123] Much of the evidence in this case is circumstantial. This means that inferences may be drawn from the evidence of the circumstances surrounding the events in question. Circumstantial evidence is not direct evidence but is indirect evidence. For example, direct evidence from a witness is it was raining outside. Indirect or circumstantial evidence is where a witness testified they observed someone entering a building wearing a rain jacket and carrying an umbrella, both dripping wet. If that witness is believed, then the reasonable inference from that witness' observation may be that it was raining outside, even though there was no direct evidence of the rain.

[124] The Court in *R v Beckman*, 2022 ABQB 298 (*Beckman*) at para. 93, provided a comprehensive summary of the law on circumstantial evidence. An assessment of circumstantial evidence requires two steps. The first is the same as the determination required with direct evidence, that is, whether the evidence is to be believed. If the evidence is believed, the next step is whether or not to draw an inference from that evidence. Arguments may arise as to whether the circumstantial evidence supports the inference to be drawn, or whether the same evidence may support other inferences. In a circumstantial case, an accused may only be convicted if the sole reasonable inference from all of the evidence is that the accused is guilty. The evidence must not support reasonable exculpatory inferences. As stated by the Supreme Court of Canada in *R v Villaroman*, 2016 SCC 33 (*Villaroman*) at paras. 18 to 22 and 25, if the evidence supports a reasonable inference that the accused is innocent, the accused cannot be convicted (*R v Griffin*, 2009 SCC 28 at para. 33; *R v Mayuran*, 2012 SCC 31 at para. 38; *R v Cooper*, [1978] 1 SCR 860 at 865–866). “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” (*Villaroman* at para. 36).

[125] In a circumstantial case, as in any case, the evidence must be considered as a whole. The Ontario Court of Appeal in *R v Hudson*, 2021 ONCA 772 at para. 70, described this concept as:

The assessment of circumstantial evidence . . . does not involve an examination of individual items of circumstantial evidence in isolation and separately from the rest, adjudging them against the criminal standard of proof and rejecting them if they are found wanting, as surely they will be. No individual item of circumstantial evidence is ever likely to do so. They are the building blocks of proof, not the final product. . . . And it is the whole of [the individual items of

evidence], taken together, whose cumulative force must be considered and may constitute a basis for conviction: *Côté v The King* (1941), 77 CCC 75 (SCC) at 76.

[126] When the defence relies on inferences from circumstantial evidence to raise a reasonable doubt, these do not have to arise from proven facts. This wrongly obliges the accused to prove facts. The assessment of reasonable doubt is made by considering all of the evidence. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt (*Villaroman* at para. 35). In order to convict in a circumstantial case, it is necessary for the co-existence and interaction of facts pointing towards guilt to defy exculpatory explanation (*R v Handy*, 2002 SCC 56 at paras. 41, 45, 47, 110).

[127] The Supreme Court of Canada in *Villaroman* stated:

There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the [trier of fact] may unconsciously “fill in the blanks” or bridge gaps in the evidence to support the inference that the Crown invites it to draw. (at para. 26)

Instead,

the trier of fact [must] consider “other plausible theor[ies]” and “other reasonable possibilities” which are inconsistent with guilt: *R v Comba*, [1938] OR 200 (Ont CA) at 205 and 211, per Middleton J.A., aff'd [1938] SCR 396 (SCC); *R v Baigent*, 2013 BCCA 28, 335 BCAC 11 (BC CA) at para. 20; *R v Mitchell*, [2008] QCA 394 (SCC) at para. 35 . . . 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”: *R v Bagshaw*, [1972] SCR 2 at p. 8. “Other plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the absence of evidence, [and] not on speculation. (at para. 37)

[128] Reasonable inferences need not be the simplest or most easily drawn:

... “[t]o hold otherwise would lead to the untenable conclusion that a difficult inference could never be reasonable and logical” (*R v Katwaru*, 153 CCC (3d) 433 (ONCA)).

A reasonable inference arising from the absence of evidence must be based on the evidence admitted at trial and the absence of evidence that would be expected as a matter of common sense to have accompanied that admitted evidence. In other words, it is a contextual analysis. In order for a reasonable inference to be drawn from the absence of evidence, that absence of evidence must be significant in relation to the evidence that was admitted.

(*R v Tuel and Wuor*, 2023 YKSC 12 at paras. 25-26)

Conclusions

[129] The question of whether the Crown has proved beyond a reasonable doubt that Seth Boss had subjective intent in the context of the evidence of his intoxication is dependent on my assessment of all of the evidence. This includes (but is not necessarily limited to) the nature of the attack, the way in which it was committed, the amount of alcohol he consumed, the display of his impairment at the time of the offence, purposive conduct before, during, and after the attack, and of the experts, including their views of the likely effect of the alcohol on his ability to appreciate the consequences of his actions (*Crossley*). I will address each of these factors, but I first want to discuss motive.

Motive

[130] There is a proved absence of motive in this case, a finding that favours Seth Boss. The conclusion comes from the following factors:

- Seth and Anthony were relatives.

- Their meeting that night was by chance and unplanned.
- They greeted each other in a friendly manner.
- Anthony suggested bringing Seth to Georgina's hotel room when they met up.
- In the KPI hallway video, they appeared friendly with one another.
- Their conversations afterwards give rise to a reasonable inference that they were going to continue drinking together.
- Anthony agreed to take Seth to his home and was taking care of him.
- The conversation between the two from the phone recordings showed no hostility or animosity between them; at most, they showed Anthony's annoyance with Seth when trying to get him to come with him, and annoyance through his later texts referencing his state of intoxication and indications that he wanted someone to pick him up.
- Seth's aunties were content to have Seth stay with Anthony, thanking Anthony for taking him in, showing that they had no reason to suspect any conflict between the two men.
- Anthony responded "yeah all good" when Kim thanked him, suggesting he did not have a concern.
- The first indication of any aggression was the text at 2:22 a.m. from Anthony to Kim's phone saying he, Seth, was trying to choke him, Anthony, out and the other texts and calls from Anthony around that same time.

[131] There is no evidence of a reason or intention for Seth to want to cause harm to

Anthony. There was no evidence of an argument, a disagreement, or a threat before the attack, including from the texts and phone calls to and from Anthony. This finding is part of the evidence to be considered in determining whether a reasonable doubt has been raised, about Seth's intent to cause Anthony's death, and it favours Seth.

[132] Turning to the factors set out in the *Crossley* case.

Nature of the attack and way it was committed

[133] There is no question that the injuries sustained by Anthony Primozic from Seth Boss were sufficiently severe that any reasonable person would know they were likely to cause death, but there is no direct evidence of what occurred in Anthony's bedroom. There is not enough circumstantial evidence to draw the inferences the Crown asks me to draw about the nature of the attack and the way it was committed in support of proof beyond a reasonable doubt of actual subjective intent. There is insufficient evidence to draw a reasonable inference that the attack occurred in at least two stages — first the head injuries, and then the puncture wounds, and then, possibly, the neck ligation — an order of events that could suggest a form of rational thought or planning. There is no evidence about whether or not Anthony was mobile during the attack, when, and for how long. There is no evidence of what specific degree of force was used to inflict any of the injuries, the period of time during which the full attack occurred, or whether any of the wounds were inflicted post-mortem.

[134] Neither Dr. McKinnon, the pathologist, nor Sgt. Watts, the blood stain pattern analyst, could give an opinion on these factual questions. The extent of the pathologist's evidence beyond the details of the wounds was that it was possible that some of the wounds could have been inflicted post mortem, and the injuries to the jugular, strap

muscles, and heart would likely have caused death within minutes. It is of note that the injuries to the head did not cause a brain injury or skull fracture.

[135] There is a reasonable inference that the wooden electric guitar was used as a weapon to inflict the blunt force injuries on the head, due to the blood stains on the guitar, that fact that it was broken, and that pieces of it were found in Anthony's hair. But I am unable to draw any reasonable inference from the evidence as to what caused the puncture wounds. Thus I can come to no conclusions on the amount of time it would take to inflict those wounds, how many wounds may have been inflicted at the same time, the degree of force necessary to do so, or the degree of coordination required, as all of these are dependent on what was used as a weapon.

[136] The reason for the attack is inexplicable. As noted, there is a proved absence of motive for Seth to harm Anthony.

[137] This absence of evidence and inability to draw these reasonable inferences suggested by the Crown affect the establishment of intent beyond a reasonable doubt. While the severity of the injuries is not an insignificant factor, there is no evidence from the attack itself to distinguish between a frenzied, senseless, impulsive attack and an attack that showed the accused had a subjective intent to cause death.

Amount of alcohol consumed

[138] The amount of alcohol Seth consumed in the course of the evening between 9:00 p.m. and 3:00 a.m. was significant. He appeared at his aunt Kim Boss' place at 9:00 p.m. carrying a six-pack of tall cans of beer and a square bottle of whisky, from which he was consuming, and was described as "pretty loaded," drunk, and "kinda outta hand." He stayed at Kim Boss' home until approximately 9:40 p.m.

[139] Further evidence consistent with his drinking is the video of him entering the KPI at approximately 9:53 p.m. with a tall beer can in his hand, being asked to leave by the bartender and returning without the can. While it is impossible to know how much he had consumed at this point, I infer that over the time that he was at his aunt's and entering the KPI, he had consumed at least two tall cans of beer and 1.5 ounces of whisky. It is possible that he consumed more.

[140] At the KPI bar between approximately 9:53 p.m. and 11:09 p.m., the video shows that he consumed four or five beer and one hard alcoholic drink. This is a rapid rate of alcohol consumption. The video also shows him buying a 15-pack of Budweiser beer. Even though his aunt Marie was also drinking, which could have affected her ability to assess his level of intoxication, I accept her description of his level of intoxication as eight out of ten, because he was her nephew, she had seen him at Kim's place before they went to the bar, and they drank similar amounts while at the bar.

[141] While it was difficult to tell whether his movements were indicative of intoxication while he was inside the bar, as he was sitting most of the time, he tripped outside of the KPI and dropped the box of beer on the steps. He put 13 of the 15 cans into the black bag, the same one that was later found at Anthony's home.

[142] In the video at the KPI hallway, Seth was seen with a square bottle of whisky, either 375 millilitres or 750 millilitres, that was almost empty. He was drinking from it and passing it to Anthony. While the Crown asks me to infer that this bottle could have come from Anthony, I do not accept this inference as reasonable. Shortly before this, Anthony told his aunt Georgina on the phone that he wanted to have \$15 to buy a bottle, from which I infer he did not have a bottle with him. Although the video from the KPI hallway

is not fully clear, it does show Seth reaching behind his body under his jacket and appearing to hand something to Anthony. In the immediate next frame, Anthony is holding the whisky bottle and there is nothing on the video that showed him reaching into a pocket or somewhere else to pull out a bottle, nor is there anything else in Seth's hands in that frame. It is reasonable to infer that the whisky bottle came from Seth and is the same square bottle as Seth was drinking from at Kim's place. He and Anthony had met up approximately 17 minutes before they were in the KPI hallway, so it is also a reasonable inference that Seth drank most of the bottle, given its almost empty status at that point. It is difficult to tell whether it is a 375 millilitre or a 750 millilitre bottle.

[143] Around this same time, at 11:59 p.m., on a recorded phone call in which Anthony left a voice mail for his aunt Georgina, Seth's voice can be heard saying, "God dam it! That's it I got the beer!"

[144] Although there are gaps in the evidence after the KPI bar video of the amount of alcohol consumed by Seth, I can draw reasonable inferences that he continued to drink. This case is similar to that of *R v Williams*, 2019 BCCA 49 (*Williams*), where the accused raised the defence of intoxication. There was no direct evidence for approximately one and a half hours between the time the accused left the restaurant where he had consumed alcohol and the fatal stabbing. The Court of Appeal reasoned that it was open to the jury to draw a reasonable, non-speculative inference that the accused continued to drink alcohol after leaving the restaurant and before the stabbing (at paras. 53 and 54). Evidence relied on included the accused's testimony that he was drinking heavily in the late afternoon and went downtown with the goal of getting drunk, that he drank for two hours at the restaurant, and that a bartender testified he overheard

him talking with a friend about going to a liquor store. This last piece of evidence on its own was found to be reasonably capable of supporting an inference of further consumption because it was not made in suspicious circumstances and it expressed the accused's intentions.

[145] The Court of Appeal confirmed it was open to the jury to infer that he and the deceased consumed what they purchased at the store before the stabbing because he did not have any liquor with him on his arrest. The analysis in this case supports the ability of the Court to draw an inference that an accused consumed more alcohol than was established directly in evidence by relying on the pattern of drinking before the gap in time and further access to alcohol.

[146] In this case, a drinking pattern was established for Seth between 9:00 p.m. and approximately midnight, from the alcohol in his possession when he arrived at Kim's, from his consumption at the KPI, from the 13 cans in his black bag accounting for four unopened ones remaining at the end of the evening, from the whisky bottle he shared with Anthony at the KPI, from the comments "I got the beer," and from Anthony's texts and phone calls describing Seth, among other things, as hammered and passed out. Like in the case of *Williams*, there is no evidence of the other beer cans Seth had in the black bag when he left the KPI, confirming the inference that nine of the 13 beer were drunk by Seth and Anthony.

[147] There were two empty bottles of whisky, Fireball and Alpenbitter, near Anthony's body, that were not tested for DNA. It is not known if they were empty before that evening or not, especially in the context of Anthony telling Georgina he wanted to buy a bottle earlier in the evening. However, Anthony's BAC of 269% at the time of his death

and the DNA of both Anthony and Seth on the beer can seized from the bedroom supports a reasonable inference that the two men shared other alcohol in his bedroom, whether it was whisky or additional beer. I accept the opinion evidence of Ms. Kirkwood and Dr. Lu that when people drink together, they can be assumed to drink a similar amount, due to a natural human tendency not to want another person to have more than they have.

Evidence of impairment at the time of the offence

[148] There was no direct evidence of impairment at the time of the offence. There is, however, evidence of Seth's impairment in the two- to two-and-a-half-hour time period before the event — at least two to two and a half hours and likely more — which includes the tripping on the steps at the KPI bar; the ghost comment; leaning against the wall twice at the KPI hotel and, in that video, touching his arms and holding them up inexplicably, grabbing his head, and holding on to Anthony's shoulder; not knowing the direction of Anthony's house from wherever they were; passing out from at least 12:54 a.m. to 1:08 a.m., not responding rationally or appropriately to Marie during their phone call at 1:08 a.m. and sounding disoriented and saying things that were incoherent and illogical during that call.

[149] Evidence from Anthony supporting Seth's impairment includes Seth being hard to control and annoying to Anthony while they were together in the street between 12:20 a.m. and 12:33 a.m. in particular, Anthony saying to one of the aunties that he was "gonna put him to bed", Anthony telling Kim that "he says bullshit", at 12:42 a.m., Anthony telling Kim and Marie that Seth was passed out for at least 14 minutes, Anthony asking Kim and Marie several times if anyone was coming to get Seth and

messaging someone on Snapchat that “He needs a ride idk he fucking hammered.” The numerous calls and texts to Anthony from Seth’s two aunties asking where Seth was, offering to come get him, sending his grandfather to look for him and saying they were worried about him and thanking Anthony for taking him in, also support an inference of his significant intoxication.

Purposive conduct before, during, and after the event

[150] Before the event, there seemed to be no purpose to Seth Boss’ actions. He separated from Marie after leaving the KPI, when she thought he was following her back to Kim’s place with the beer and cigarettes. When he met up with Anthony, he followed him to the KPI hotel and then followed him back to his house. While walking there, he was causing Anthony difficulty by not staying with him. If there was any purpose to his conduct, it was that he wanted to continue drinking.

[151] During the event, there is no evidence.

[152] The Crown asks me to infer purposive conduct from Seth’s actions after the event: an attempt to wash his hands, “fleeing” Anthony’s home, stopping at the Diamond Willow Apartments to warm up, and finding his way back to 68 Jackson. The Crown says this evidence, which is the closest in time to the event, is indicative of Seth’s capacity to form actual intent. I will address each of these suggested inferences separately.

(i) Blood in the bathroom

[153] There is a lack of evidence to support reasonable inferences suggested by the Crown of how the bloodstains got to the bathroom. There is no evidence of the order in which the injuries were inflicted, whether or not Anthony was mobile at any time during

the attack, whether the alteration in the blood on the faucet was water or some other fluid, whether the fluid was on the faucet before or after the blood was deposited, whether the items in the sink and the towel were wet, and whether the faucet was working. Sgt. Watts, as I said, testified that it would be speculative to conclude that the altered bloodstain on the faucet was consistent with someone trying to wash blood off of themselves.

[154] Given the severity of Anthony's injuries and the confirmation by the police investigators that the majority of the bloodletting incident occurred in the bedroom, I do find there is a reasonable inference that the blood in the bathroom was deposited there by Seth. However, I do not accept the further inference as reasonable that he was trying to wash his hands or remove blood from himself. There is insufficient evidence from in and around the sink and the bathroom to do so. There are other reasonable possible explanations for the smears of blood on the walls and towel, such as Seth entering the bathroom and running his hands along the wall and the towel.

[155] Even if there were sufficient evidence to draw an inference that Seth was washing his hands, this does not necessarily demonstrate purposive conduct showing a capacity for rational thought. It needs to be considered along with all of the other evidence of his state of intoxication. And while this question was not asked of the experts in this case, I note in the case of *Robinson*, the use of the washroom by the accused after the event was found to be an automatic action and not necessarily indicative of capacity.

(ii) *Fleeing the home*

[156] There is no evidence of how long the attack took. As a result, there is no

evidence of how long Seth remained at Anthony's home after the attack was over. I cannot draw a reasonable inference that he "fled" the scene, which in turn could support an inference of an ability to think rationally. The fact that he left behind his black bag with three unopened beer and at least one of his gloves suggests a degree of confusion consistent with intoxication.

(iii) *Travel to and stop at the Diamond Willow Apartments and travel to 68 Jackson*

[157] At trial, there was much interpretation of Seth's actions seen on video from the Diamond Willow Apartments entryway and stairwell, between 3:34 a.m. and 3:42 a.m. by the two forensic psychiatrists and counsel. This is evidence of his state closest in time to the event. While the video does not require expert testimony to explain what he is doing, I accord some weight to the expert evidence in interpreting his actions in the context of assessing his degree of intoxication.

[158] There is no evidence of how long it took Seth Boss to get from Anthony's home to the Diamond Willow Apartments or of the route he took. There was no evidence of why he stopped there. His aunt Marie lived there, but he made no attempt to go to her apartment or contact her. The fact that he was able to find his way there can be attributed to procedural or residual memory. As explained by Dr. Morgan, Dr. Lu, and Ms. Kirkwood, a person can be in state of intoxication with cognitive impairment and may still be able to navigate a route from one location to another, especially in a place with which they are familiar. Dr. Morgan compared procedural memory to driving a car or riding a bike: once you have the skill you can access it. Dr. Lu said his ability to navigate in itself was insufficient to determine his cognitive function. He confirmed that despite being intoxicated, a person can rely on residual information to find their way in a

familiar location. Ms. Kirkwood confirmed that a person in a state of intoxication could perform functions such as driving, but would not do so well.

[159] In this case, there is evidence Seth Boss lived in Haines Junction for a time during his childhood. He has a number of relatives who live in Haines Junction. There is no evidence he was unable to find his way earlier in the evening from his grandfather's home where he was staying to Kim Boss' home. Sgt. LaVallee's evidence of the most direct route from Anthony's home to 68 Jackson showed a distance of 1.4 kilometres and not the route taken by Seth. A reasonable inference can be drawn that he relied on procedural memory, based on locations with which he was familiar, where his relatives lived, to navigate his way. This is not inconsistent with an advanced state of intoxication with cognitive impairment.

[160] There is no dispute that Seth Boss showed signs of intoxication seen in the Diamond Willow Apartments video. The question is what degree of intoxication is evident or can be inferred and what does it say about whether his conduct was purposeful and his capacity to form actual intent.

[161] The following factors allow me to draw an inference that his conduct was not purposeful:

- On entry, he uses his hands to climb the stairs, sits down on one of the steps, and tries unsuccessfully to remove his right boot. He then removes his left boot, loses his grip on it, and it falls down several stairs. He is able then to remove his right boot, and he throws it down the stairs. There are no visible laces or buckles on his boots requiring fine motor skills, only a loosening was required. He is showing lack of coordination and balance.

- He is swaying as he sits, holding his head in his hands, and leaning several times against a wall that appears to be freshly plastered because it leaves residue on his coat. He falls down one of the stairs and has difficulty grasping his right boot. Again, he is showing a lack of coordination and balance.
- He appears to be weeping or sobbing while he is holding his head. The Crown suggests this could be a consciousness of guilt. But this cannot be used to determine actual intent, and in any event, weeping may be equally consistent with a conviction for manslaughter as a conviction for murder (*Lightning* at paras. 25, 31, 32). An emotional state is also consistent with an advanced state of intoxication, where emotional states can be extreme and there can be significant mood swings.
- After sitting there for almost two minutes without his boots, Seth briefly touches his right foot and then his left foot. The Crown suggests this provides a reason for his stop- to warm his feet, showing that he had some sensitivity to cold. While this is one possibility, I do not accept it as reasonable. There is no evidence of the temperature that night in March, and earlier in the evening Anthony was seen in the KPI hallway video after coming in from walking in the street, wearing a hoodie and no toque. There is no evidence about whether the stairwell was heated. If warming were the purpose of his stop, it would be rational for him to begin warming his feet as soon as he removed his boots. Instead, he waits almost two minutes before briefly touching each of his feet. He does not keep his hands on them, nor does he rub them as would be expected if he were trying to warm them. There is no obvious explanation for his removal of his boots. This

reason of warming is not consistent with one of his next movements, which is to remove his coat.

- He pulls his phone from his pocket with difficulty and enters what appears to be a four-digit password and then scrolls or taps for approximately 37 seconds. He does not text or call anyone. He does not type. He stares at a black screen for approximately 18 seconds and puts the phone back in his pocket. While the experts were not questioned directly about this, given the prevalent and pervasive use of mobile phones today, there is a reasonable inference that these actions are attributable to procedural or residual memory. His actions in tapping and scrolling appeared aimless, and the fact that he was not texting or calling anyone further contributes to this inference. Tapping and scrolling do not require the same amount of cognitive ability as typing a text or even making a call.
- He puts on his jacket and boots with some difficulty and he stumbles as he leaves the building, again showing a lack of coordination and balance.
- For several periods during this time, he sits there with his head in his hands, looking down, doing nothing.

[162] His brushing off of the white residue on his coat, putting his two boots in front of him on the stairs, and removal of his coat by undoing snaps do suggest some ability to control his actions. However, these must be considered in the context of all of the evidence, including his degree of tolerance. I note on this point that the defence of intoxication was successful in *Kahnpace*, where the accused was not showing outward signs of intoxication after the fatal stabbing where she went to get help from the

neighbours.

[163] I conclude from the assessment of all of this evidence of after-the-fact conduct that there is insufficient evidence to show capacity to form an intent to cause the death.

Expert evidence of intoxication

[164] I have already reviewed in detail the expert evidence of intoxication, and I will address the Crown's arguments that the forensic psychiatric experts' conclusions are not deserving of weight because of flawed data and a result-oriented approach.

[165] It is impossible to know with certainty how much Seth had to drink or what his BAC level was at the time of the offence because we do not have a blood sample. There are too many unknown, individualized variables to do more than estimate. An estimate can be based on the scientifically based mathematical calculation, using the amount of alcohol consumed over a period of time and other individualized variables related to rate of absorption and elimination. This estimate can be supplemented by evidence of clinical symptoms.

[166] Experts who are addictions or substance disorder specialists, as is Dr. Lu and, to a lesser extent, Dr. Morgan, can correlate clinical symptoms with a certain degree of intoxication. This is what the experts did in this case. Their conclusions on the BAC level of Seth, which all the experts agree are necessarily estimates, range from minimums of 224% to 350%, and are based on all of the information with which they were provided: the agreed statement of facts and information as noted above from former defence counsel in Ms. Kirkwood's case; the agreed statement of facts, videos, transcripts and audio of the phone calls in Dr. Morgan's and Dr. Lu's case. They also applied their scientific and clinical knowledge about the effects of alcohol on the body,

including how it is processed by the body. The evidence of Ms. Kirkwood, with her expertise in toxicology, and the evidence of Dr. Lu and Dr. Morgan around clinical symptoms and biological processes involving alcohol and the body and some of their observations applicable in this case are to be given weight.

Conclusion on level of intoxication

[167] Based on the agreed statement of facts, the other evidence provided, and the reasonable inferences I have drawn from that evidence, or absence of evidence, I accept that Seth Boss' level of intoxication was high, at least as high as Anthony's at 269%, and likely higher, given his drinking pattern since at least 9:00 p.m. that evening. This conclusion is drawn from the evidence of the BAC estimate of Ms. Kirkwood, the toxicology expert. The information she relied on about Seth's alcohol consumption was conservative and based primarily on the agreed statement of facts. Although she included a calculation of 6.5 cans of beer shared, instead of 4.5 cans shared, which she said would lower the BAC, she did not account for any drinks before 9:00 p.m. and assumed, in both scenarios, there was only one whisky bottle. The only difference in the two scenarios she used for her calculation was the size of the whisky bottle, either 375 millilitres or 750 millilitres. Assuming Seth's weight of 75 kilograms, and with reduction due to elimination, time, and the other individualized factors, her estimate was a low of 224% and a high of 284%, reduced from a theoretical BAC of 448% or 568%.

[168] With these levels, as noted above, Ms. Kirkwood described symptoms of impairment as including problems with memory, comprehension, and balance. Generally, a person would have problems making coherent, cohesive decisions and would be unable to figure out the consequences of their actions. Their ability to

determine risk, reaction capability, and their judgment would be severely impacted. An individual having consumed this much alcohol would exhibit irrational, impulsive behaviour, and would have problems communicating and interacting appropriately with others. They may experience mood swings. Ms. Kirkwood testified that a person with this BAC would likely beat the level of confusion or stupor on the Dubowski scale.

[169] The Dubowski alcohol table provides clinical descriptions of people with BACs between 180% and 300% (confusion) to include disorientation, mental confusion, exaggerated emotional states, perceptual disturbances, staggering gait, impaired balance, slurred speech, and muscle incoordination. Seth Boss demonstrated all of these symptoms over the course of the evening of March 8th and 9th, before and after the offence. For people with a BAC between 270% and 400%, clinical signs include general inertia, marked muscular incoordination, impaired consciousness, sleep or stupor. All experts agreed that Seth Boss exhibited high tolerance based on the amount he consumed and may not exhibit all of the symptoms described in either category.

[170] Based on all of the evidence of intoxication that I have reviewed, it is sufficient to raise, in my view, a reasonable doubt about Seth Boss' subjective intent. That is, the impact of Seth's degree of intoxication impaired his foresight of the consequences of his actions, sufficient to raise a reasonable doubt about the requisite intent.

Miscellaneous

[171] There is one more miscellaneous factor that I have also considered in this case. The fact that there were four guns and ammunition in Anthony's bedroom, all in plain view, is evidence leading to an inference against a subjective intent to kill Anthony. If his actual intention was to do so, using a gun would have been a more direct, easy, and

efficient way.

Finding

[172] “It is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death” (*R v FM*, 2008 BCCA 111 at para. 7 citing *R v Martineau*, [1990] 2 SCR 633 (SCC)).

[173] The Crown bears a high burden. The Crown is required to prove that Seth Boss had subjective intent to kill Anthony beyond a reasonable doubt. After a careful consideration of all of the evidence, including a proved absence of motive, I conclude there is insufficient evidence to meet this burden. There is evidence that Seth Boss’ state of intoxication was advanced enough that his ability to foresee the consequences of his actions was impaired.

[174] I am not persuaded beyond a reasonable doubt on the basis of all of the evidence that Seth Boss had the intent to cause the death of Anthony Primozić, or that he meant to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not. I find him not guilty of second degree murder. I find Seth Boss guilty of manslaughter.

DUNCAN C.J.