

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Magoon, 2018 SCC 14, [2018] 1 S.C.R. 309 | **Appeals Heard and Judgments Rendered:** November 27, 2017  **Reasons delivered:** April 13, 2018  **Dockets:** 37416, 37479 |

Between:

Marie-Eve Magoon

Appellant

and

Her Majesty The Queen

Respondent

And between:

Spencer Lee Jordan

Appellant

and

Her Majesty The Queen

Respondent

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Joint Reasons For Judgment:**  (paras. 1 to 76) | Abella and Moldaver JJ. (McLachlin C.J. and Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ. concurring) |

R. *v.* Magoon, 2018 SCC 14, [2018] 1 S.C.R. 309

Marie‑Eve Magoon Appellant

v.

Her Majesty The Queen Respondent

‑ and ‑

Spencer Lee Jordan Appellant

v.

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**Indexed as: R. *v.*** Magoon

2018 SCC 14

File Nos.: 37416, 37479.

Hearing and judgments: November 27, 2017.

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Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for alberta

*Criminal law — First degree murder — Unlawful confinement — Elements of offence — Father and stepmother convicted at trial of second degree murder in beating death of six‑year‑old child — Court of Appeal holding that death caused while child unlawfully confined and substituting first degree murder convictions — Whether child unlawfully confined — Whether unlawful confinement and murder part of same transaction — Criminal Code, R.S.C. 1985, c. C‑46, ss. 231(5), 279(2).*

*Criminal law — Appeals — Appeals to Supreme Court of Canada — Appeal as of right — Accused charged with first degree murder but convicted at trial of second degree murder — Accused appealing second degree murder convictions and Crown appealing first degree murder acquittals — Court of Appeal dismissing appeals by accused but allowing Crown appeals and substituting first degree murder convictions — Accused appealing as of right to Supreme Court of Canada from substituted verdicts — Whether accused can raise grounds of appeal relating to second degree murder convictions — Meaning of “any question of law” — Criminal Code, R.S.C. 1985, c. C‑46, s. 691(2)(b).*

*Criminal law — Appeals — Appeals to Court of Appeal — Jurisdiction — Accused charged with first degree murder but convicted at trial of second degree murder — Crown appealing first degree murder acquittals to Court of Appeal — Whether Court of Appeal had jurisdiction to hear Crown appeals — Criminal Code, R.S.C. 1985, c. C‑46, s. 676.*

M, who was six years old, died after spending a weekend at the home of her father and stepmother, the two accused. During that period, M was burned, forced for hours to run up and down the stairs as a form of punishment, and severely beaten. She suffered damage to her internal organs, and a subdural hematoma and cerebral swelling caused by at least five serious blows to the head. The accused did not seek medical attention for M until she was in complete cardiac and respiratory failure. She did not survive.

The accused were charged with first degree murder and convicted of second degree murder at trial. They appealed from their second degree murder convictions and the Crown appealed from their first degree murder acquittals. The Court of Appeal dismissed the accused’s appeals, but allowed the Crown appeals. It held that the accused unlawfully confined M in circumstances that rendered them liable for first degree murder under s. 231(5) of the *Criminal Code*. It therefore set aside the acquittals for first degree murder and substituted verdicts of guilty.

The accused appealed to this Court as of right, under s. 691(2)(b) of the *Criminal Code*. The Crown moved to strike portions of the accused’s notices of appeal, on the basis that the accused did not have an appeal as of right regarding the grounds of appeal that called into question their convictions for second degree murder. The accused then filed applications for leave to appeal under s. 691(1)(b) with respect to the grounds that the Crown sought to strike. At the hearing of the appeals, the Crown’s motions to strike were allowed, the accused’s applications for leave to appeal were dismissed, and the accused’s appeals were dismissed, with reasons to follow.

Held:The appeals should be dismissed.

The accused did have an appeal as of right to this Court under s. 691(2)(b) of the *Criminal Code* on any question of law relating to the reversal of their first degree murder acquittals, but required leave to appeal under s. 691(1)(b) in order to raise grounds of appeal relating to their second degree murder convictions. The meaning of “any question of law” in s. 691(2)(b) is restricted to questions of law relating to the substituted verdicts of guilty for first degree murder. Sections 691(1) and 691(2) must be read and interpreted harmoniously: s. 691(1) applies where a conviction has been affirmed by the court of appeal, and s. 691(2) applies where an acquittal has been set aside by the court of appeal. Each provision confers different rights on an appellant, depending on the circumstances, and these parallel routes of appeal must be kept separate and distinct.

The Court of Appeal had jurisdiction to hear the Crown appeals from the first degree murder acquittals in the present case. For appeal purposes, first degree murder and second degree murder are treated as two distinct offences. Where an accused is charged with first degree murder but convicted of second degree murder, he or she has been acquitted of first degree murder. In such a case, the accused may appeal the conviction for second degree murder, and the Crown may appeal the acquittal of first degree murder under s. 676(1)(a) of the *Criminal Code*.

The Court of Appeal did not err in finding the accused guilty of first degree murder. The five elements of the applicable test set out in *R. v. Harbottle*, [1993] 3 S.C.R. 306, which are required for an accused to be convicted of first degree murder under s. 231(5) of the *Criminal Code*, were met in this case, including the first and fifth elements.

With respect to the first element, unlawful confinement under s. 279(2) of the *Criminal Code* was established: the accused confined M, and the confinement was unlawful. M was coercively restrained and directed contrary to her wishes, and the acts of discipline far exceeded any acceptable form of parenting. The legal standard for proving unlawful confinement is the same for children as for adults, but in the case of a parent‑child relationship, courts must keep in mind that children are inherently vulnerable and dependent, and routinely receive — and expect — directions from their parents. The Crown does not have to prove some special or extreme form of confinement in cases involving parents and their children. A finding of confinement does not require evidence of a child being physically bound or locked up; it can also result from evidence of controlling conduct. Although parents are lawfully entitled to restrict the liberty of their children in accordance with the best interests of the child, if a parent engages in abusive or harmful conduct toward his or her child that surpasses any acceptable form of parenting, the lawfulness of his or her authority to confine the child ceases. Disciplining a child by restricting his or her ability to move about freely, by physical or psychological means, contrary to the child’s wishes, which exceeds the outer bounds of punishment that a parent or guardian could lawfully administer, constitutes unlawful confinement.

The fifth element of the test is also met: the unlawful confinement and murder of M were two distinct criminal acts that formed part of a single transaction. The unlawful confinement and the assaults leading to M’s death were part of the same single transaction of coercion and abuse, and the unlawful confinement persisted right up to the moment M lost consciousness. The unlawful confinement was not consumed in the act of killing: not all acts of violence against M were tied to the fatal blows, some of the assaults that met the causation standard for the murder were distinct from the acts of confinement, and the assaults against M were part, but not all, of what established the unlawful confinement, since the confinement also involved non‑physical acts of coercion.

**Cases Cited**

**Applied:** *R. v. Harbottle*, [1993] 3 S.C.R. 306; **distinguished:** *R. v. Farrant*, [1983] 1 S.C.R. 124; *Droste v. The Queen*, [1984] 1 S.C.R. 208; *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Arkell*, [1990] 2 S.C.R. 695; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; **considered:** *Guillemette v. The Queen*, [1986] 1 S.C.R. 356; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Noureddine*, 2015 ONCA 770, 332 C.C.C. (3d) 114; **referred to:** *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195; *R. v. Bottineau*, [2006] O.J. No. 1864 (QL), aff’d 2011 ONCA 194, 269 C.C.C. (3d) 227, leave to appeal refused, [2012] 1 S.C.R. vi; *R. v. Gratton* (1985), 18 C.C.C. (3d) 462; *R. v. Kematch*, 2010 MBCA 18, 252 C.C.C. (3d) 349; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 43, 231(5), 279(2), 662, 675(1)(a)(i), 676, 686(4)(b)(ii), 691(1), (2), 745.4.

APPEALS from a judgment of the Alberta Court of Appeal (Paperny, Veldhuis and Wakeling JJ.A.), 2016 ABCA 412, [2016] A.J. No. 1349 (QL), 2016 CarswellAlta 2435 (WL Can.), substituting convictions for first degree murder to the convictions for second degree murder entered by Nation J., 2015 ABQB 351, 594 A.R. 272, [2015] A.J. No. 607 (QL), 2015 CarswellAlta 975 (WL Can.). Appeals dismissed.

Michael Bates and Nicole Rodych, for the appellant Marie‑Eve Magoon.

Brendan M. Miller and Jeinis S. Patel, for the appellant Spencer Lee Jordan.

Christine Rideout and Andrew Barg, for the respondent.

The judgment of the Court was delivered by

Abella and Moldaver JJ. —

Overview

1. Meika Jordan died on November 14, 2011, after spending a weekend at the home of her father, Spencer Jordan, and her stepmother, Marie-Eve Magoon. She was six years old. Meika was burned, forced for hours to run up and down the stairs as a form of punishment, and severely beaten when Mr. Jordan and Ms. Magoon felt she was not complying. She suffered damage to her internal organs and sustained at least five serious blows to the head. Her father and stepmother did not seek medical assistance for her until she lost consciousness at the end of the weekend.
2. Ms. Magoon and Mr. Jordan were charged with first degree murder and convicted of second degree murder at trial. The trial judge did not accept their explanation that Meika died from a single accidental fall, and rejected their attempts to point the finger at one another. In her view, the evidence established that both had repeatedly and intentionally assaulted Meika, each knowing that their actions were likely to cause her death. However, she was not satisfied that Ms. Magoon and Mr. Jordan had unlawfully confined Meika while inflicting the fatal injuries on her, and she acquitted them of first degree murder under s. 231(5)(e) of the *Criminal Code*,R.S.C. 1985, c. C-46.
3. Ms. Magoon and Mr. Jordan appealed from their second degree murder convictions and the Crown appealed from their first degree murder acquittals. The Court of Appeal of Alberta dismissed Ms. Magoon’s and Mr. Jordan’s appeals, but allowed the Crown appeals. It held that the trial judge applied an incorrect, unduly narrow test for unlawful confinement, and that, applying the proper test, Ms. Magoon and Mr. Jordan did unlawfully confine Meika in circumstances that rendered them liable for first degree murder under s. 231(5)(e) of the *Criminal Code*. Accordingly, the Court of Appeal set aside the acquittals for first degree murder, and substituted verdicts of guilty.
4. Ms.Magoon and Mr. Jordan appealed to this Court. We dismissed their appeals from the bench at the hearing, with reasons to follow. These are our reasons.

Background Facts

1. At the time of Meika’s death, the custody arrangements between Mr. Jordan and Meika’s mother were in flux. As a result of a temporary family court order, Meika was with her father during the week and with her mother on weekends.
2. Mr. Jordan texted Meika’s mother shortly before Meika was due to be returned to her on Friday, November 11, requesting that Meika be allowed to stay the weekend. He lied, using the excuse that Ms. Magoon had left him and he did not want to be alone, in order to persuade the mother that Meika should be permitted to stay for the weekend. The real reason that Ms. Magoon and Mr. Jordan wanted to keep Meika was so that her mother would not see the very serious burn Ms. Magoon had deliberately inflicted on Meika’s hand by holding it over a flame on Thursday, the day before she was to be returned to her mother for the weekend.
3. On the evening of Sunday, November 13, Ms. Magoon and Mr. Jordan called paramedics. When they arrived, Meika was unconscious. She died in hospital the next day. Her injuries included a lacerated pancreas, a tear of the liver, a subdural hematoma and cerebral swelling, extensive bruising all over her body, matted hair with clumps missing, and a burn on her hand. An abdominal bleed had compromised her cardiovascular system, making her less able to survive the repeated blows to her head.
4. Ms. Magoon and Mr. Jordan told police that Meika had fallen down the stairs, but the medical evidence established instead a pattern of repeated and intentional violence that would have caused her considerable pain and noticeable physical deterioration before she died.
5. To find out how the wounds were inflicted, police undertook a Mr. Big undercover operation. Both Ms. Magoon and Mr. Jordan made admissions to undercover officers that established the timing and extent of their physical abuse of Meika. After a *voir dire*, the trial judge admitted a number of these admissions pursuant to the framework set out in *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544.
6. Ms. Magoon and Mr. Jordan were charged with first degree murder, and jointly tried by a judge sitting without a jury.

Prior Proceedings

*Court of Queen’s Bench of Alberta, 2015 ABQB 351, 594 A.R. 272*

1. The trial judge made the following findings of fact with respect to Mr. Jordan. On Saturday, November 12, he pushed Meika, causing her to fall backwards and hit her head with force. On Sunday, November 13, in anger, he punched Meika’s stomach with full adult force, causing abdominal injuries, including the laceration of her pancreas. After hitting Meika in the stomach, Mr. Jordan forced her to run up and down the stairs as punishment. When she failed to comply, he dragged her up and down the stairs by her hair and ankles, causing her head to hit the stairs repeatedly. He also threw her up the stairs into the kitchen and pushed her down to the kitchen floor with force a number of times.
2. The trial judge made the following findings of fact with respect to Ms. Magoon. On Thursday, November 10, Ms. Magoon held Meika’s hand over a lighter until she suffered a serious, but not life-threatening burn. Meika screamed and urinated on herself from the pain. On the afternoon of Sunday, November 13, while Meika was trying to run up and down the stairs, Ms. Magoon shoved and kicked Meika multiple times, causing her to fall and hit her head on the wall and on hardwood siding. She pushed Meika into a high chair several times, and also stood over Meika in the kitchen, holding her by the arms and shaking her. This caused Meika’s head to hit the tile floor repeatedly.
3. The trial judge found that the medical evidence could not conclusively establish precisely which blow caused Meika’s death, but the potential causes were identifiable. The internal injuries resulting from the blow Mr. Jordan delivered to Meika’s abdomen would have accelerated her death and met the standard of legal causation. Moreover, any one or a combination of the (at least) five significant blows to Meika’s head administered by both Ms. Magoon and Mr. Jordan could have been the fatal blow, resulting in bleeding in Meika’s brain. Since each delivered a blow that was capable of being one of the fatal blows, the trial judge found that the Crown had met its burden of proving causation for both Ms. Magoon and Mr. Jordan.
4. The trial judge found that both accused were frustrated with Meika and felt that she was not complying with the discipline they had imposed. Each was generally aware of the disciplinary steps taken by the other, having discussed making her run the stairs and spanking her. Mr. Jordan was aware of the burn Ms. Magoon inflicted on Meika, and each knew that the other was physically assaulting Meika on Sunday. The trial judge also found that both Ms. Magoon and Mr. Jordan were aware of the deterioration of Meika’s condition on Sunday, including her neurological deterioration. In her view, they were acting in a common purpose throughout the weekend.
5. The trial judge was further satisfied that Ms. Magoon and Mr. Jordan knew that the bodily harm they inflicted on Meika would likely cause her death. She also found that they were reckless as to whether or not death ensued. In this regard, she noted that even though the deterioration of Meika’s level of function was apparent, both Ms. Magoon and Mr. Jordan continued to assault her. Moreover, they did not seek medical attention until Meika was in complete cardiac and respiratory failure.
6. For those reasons, the trial judge concluded that Mr. Jordan and Ms. Magoon were guilty of second degree murder. The trial judge then considered whether Mr. Jordan and Ms. Magoon were guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*.
7. The applicable test is set out in *R. v. Harbottle*, [1993] 3 S.C.R. 306, which requires that for an accused to be convicted of first degree murder under s. 231(5) of the *Criminal Code* (then s. 214(5)), the Crown must establish beyond a reasonable doubt that: (1) the accused was guilty of the underlying crime of domination or of attempting to commit that crime; (2) the accused was guilty of the murder of the victim; (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim; (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and (5) the crimes of domination and murder were part of the same transaction (p. 325).
8. The trial judge concluded that the Crown had proven elements two, three, and four. Her inquiry therefore focused on elements one and five: Did Ms. Magoon and Mr. Jordan unlawfully confine Meika, and, if so, were the unlawful confinement and murder part of the same transaction?
9. The trial judge rejected the Crown’s submission that withholding Meika from her biological mother under false pretences and contrary to the existing custody order constituted unlawful confinement. The trial judge also rejected the Crown’s submission that Ms. Magoon and Mr. Jordan lost lawful authority to control Meika when they began assaulting her, concluding that although “each accused had clearly overstepped any authority they had to discipline Meika”, her mere presence in the house at the time the assaults occurred did not establish that she was unlawfully confined (para. 202).
10. In light of this, the trial judge concluded that the Crown had failed to prove the first and fifth elements of the *Harbottle* analysis. As a result, she convicted Ms. Magoon and Mr. Jordan of second degree murder, and acquitted them of first degree murder.
11. Ms. Magoon and Mr. Jordan each appealed their second degree murder convictions, and the Crown appealed each of their first degree murder acquittals.

*Court of Appeal of Alberta, 2016 ABCA 412*

1. In the Court of Appeal, Justice Paperny, writing for herself and Justice Veldhuis, dismissed Ms. Magoon’s and Mr. Jordan’s appeals from their second degree murder convictions. She saw no reviewable error in the trial judge’s conclusion that the Mr. Big statements were admissible and that Ms. Magoon had the requisite intent for murder. She rejected Mr. Jordan’s submissions that the trial judge erred in her findings of a common purpose, the absence of abandonment or any intervening act, and the requisite intent for murder. She also saw no error in the trial judge’s approach to causation and the concept of recklessness.
2. Justice Paperny allowed the Crown appeals from Ms. Magoon’s and Mr. Jordan’s first degree murder acquittals. She concluded that the trial judge erred by applying an unduly narrow definition of confinement in the case of children. She also held that the trial judge conflated the issue of whether there was a confinement with the question of lawful authority for the confinement. She explained that none of the defences related to the parent-child relationship, such as “justified” use of force by way of correction under s. 43 of the *Criminal Code*, applied. According to Justice Paperny, had Meika been an adult, what she experienced would have constituted unlawful confinement.
3. After addressing all five *Harbottle* elements, Justice Paperny concluded that the test for first degree murder under s. 231(5)(e) of the *Criminal Code* had been met. Accordingly, she substituted first degree murder convictions for both Ms. Magoon and Mr. Jordan pursuant to s. 686(4)(b)(ii) of the *Criminal* *Code*.
4. Justice Wakeling, in concurring reasons, held that Meika was unlawfully confined because Ms. Magoon and Mr. Jordan had no legal right to care for Meika on the weekend because her mother’s consent was vitiated by Mr. Jordan’s deception. For this reason, he agreed with Justice Paperny that Ms. Magoon and Mr. Jordan were guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*.
5. Ms. Magoon and Mr. Jordan appealed to this Court.

Analysis

The Crown’s Motions to Strike

1. Ms. Magoon and Mr. Jordan filed separate notices of appeal pursuant to s. 691(2)(b) of the *Criminal* *Code*. Ms. Magoon filed her notice of appeal on January 23, 2017, and Mr. Jordan filed his on March 8, 2017, along with a motion for extension of time. The Crown consented to the extension of time.
2. At the outset of the appeals, the Crown moved to strike portions of Ms. Magoon’s and Mr. Jordan’s notices of appeal. It did so on the basis that Ms. Magoon and Mr. Jordan did not have an appeal *as of right* under s. 691(2)(b) of the *Criminal Code* regarding the grounds of appeal that called into question their convictions for second degree murder. Rather, it maintained that with respect to those grounds, Ms. Magoon and Mr. Jordan required leave to appeal under s. 691(1)(b) of the *Criminal Code*.
3. At the hearing, this Court allowed the Crown’s motions to strike (*Bulletin of Proceedings*, June 8, 2018, at pp. 746-47). We did so on the basis that it was not open to Ms. Magoon and Mr. Jordan to raise grounds of appeal relating to their second degree murder convictions — grounds that were unanimously dismissed by the Court of Appeal of Alberta — without first obtaining leave from this Court.
4. The following questions arise from the Crown’s motions to strike: What is the meaning of “any question of law” in s. 691(2)(b) of the *Criminal Code*? More precisely, does “any question of law” include questions of law relating to Ms. Magoon’s and Mr. Jordan’s second degree murder convictions? Or is “any question of law” restricted to questions of law relating to the substituted verdicts of guilty for first degree murder? As we will explain, the latter question accurately reflects the state of the law and it should be answered in the affirmative.
5. Sections 691(1) and 691(2) of the *Criminal Code* state:

**Appeal from conviction**

**691** **(1)** A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

**(a**) on any question of law on which a judge of the court of appeal dissents; or

**(b)** on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

**Appeal where acquittal set aside**

**(2)** A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada

**(a**) on any question of law on which a judge of the court of appeal dissents;

**(b)** on any question of law, if the Court of Appeal enters a verdict of guilty against the person; or

**(c)** on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

1. A plain reading, as well as a contextual and purposive approach to interpreting these provisions, leads to the conclusion that Ms. Magoon and Mr. Jordan required leave under s. 691(1)(b) of the *Criminal Code* in order to raise grounds of appeal relating to their second degree murder convictions. This interpretation is also consistent with this Court’s jurisprudence.
2. Sections 691(1) and 691(2) of the *Criminal Code* set out the routes of appeal to the Supreme Court of Canada available to an accused. Section 691(1) applies where a conviction has been affirmed by the court of appeal; s. 691(2) applies where an acquittal has been set aside by the court of appeal. In this case, both sections apply.
3. There were four separate and distinct appeals heard by the Court of Appeal of Alberta. The first two appeals, by Ms. Magoon and Mr. Jordan, related to their second degree murder *convictions*. The Court of Appeal of Alberta unanimously dismissed those appeals, thus affirming the convictions. As such, with respect to the questions of law raised in those appeals, s. 691(1)(b) provides the only appeal route to this Court. The second two appeals, by the Crown, related to Ms. Magoon’s and Mr. Jordan’s first degree murder *acquittals*. The Court of Appeal of Alberta allowed the Crown appeals, and entered verdicts of guilty for first degree murder. Thus, with respect to the questions of law raised in those appeals, s. 691(2)(b) is the only appeal route to this Court.
4. A contextual analysis supports this conclusion. Sections 691(1) and 691(2) of the *Criminal Code* must be read and interpreted harmoniously. Each provision confers different rights on an appellant, depending on the circumstances. These parallel routes of appeal must be kept separate and distinct. An appellant cannot challenge a decision of a court by appealing a different decision. That would be the illogical result if we were to give effect to the interpretation sought by Ms. Magoon and Mr. Jordan.
5. Ms. Magoon and Mr. Jordan cannot challenge the Court of Appeal’s decisions relating to their second degree murder convictions under the guise of s. 691(2)(b) (a route available only for appealing the first degree murder acquittals), just as they cannot challenge the Court of Appeal’s decisions relating to the first degree murder acquittals under s. 691(1)(b) (a route available only for appealing the second degree murder convictions). Ms. Magoon and Mr. Jordan must appeal from these separate decisions under the appropriate sections of the *Criminal Code*.
6. And Ms. Magoon and Mr. Jordan suffer no unfairness by interpreting “any question of law” in s. 691(2)(b) as meaning any question of law relating to the substituted verdict of guilty. Such an interpretation does not preclude Ms. Magoon or Mr. Jordan from raising issues relating to their second degree murder convictions, as this option is still available under s. 691(1)(b). Sections 691(1) and 691(2) simply provide different routes of appeal to the appellants — one requires leave; the other does not.
7. This analysis is also consistent with the purpose of these provisions. The purpose of s. 691(2)(b) of the *Criminal Code* is to allow an appellant to raise any question of law arising from a conviction entered by the court of appeal. The right given to an appellant under s. 691(2)(b) is equivalent to the right to appeal to the court of appeal which is given to an appellant who has been convicted at trial: under s. 675(1)(a)(i) of the *Criminal Code*, an accused who is convicted at trial may appeal to the court of appeal, *as of right*, on any question of law *arising from that conviction*. The same automatic right to appeal a conviction entered by a court to the next level of court applies to an accused who is acquitted at trial, and subsequently convicted at the court of appeal. The appellant may appeal, *as of right*,to the Supreme Court of Canada on any question of law *arising from the substituted verdict of guilty*.
8. In our view, it would be contrary to Parliament’s intent to allow an appellant to re-litigate before this Court, without leave, any and all issues the court of appeal had unanimously decided against the appellant in upholding the trial decision. This is especially so where, in cases like this one, the acquittals at trial were not outright acquittals, but rather, acquittals for first degree murder coupled with convictions for second degree murder.[[1]](#footnote-1) But that is the consequence of too broad an interpretation of “any question of law” in s. 691(2)(b). This cannot have been what Parliament intended when it enacted two separate routes of appeal for accused persons under ss. 691(1) and 691(2) of the *Criminal Code*.
9. This Court’s jurisprudence supports the same conclusion. In *Guillemette v. The Queen*, [1986] 1 S.C.R. 356, Lamer J. held that although an accused has an appeal as of right where the court of appeal sets aside an acquittal for second degree murder, an accused can only raise issues relating to that substituted conviction. The accused cannot seek an acquittal on an underlying conviction on the lesser and included offence of manslaughter without obtaining leave. In *R. v. Keegstra*,[1995] 2 S.C.R. 381, Lamer C.J. did not depart from the position he took in *Guillemette*.[[2]](#footnote-2)
10. In sum, under s. 691(2)(b) of the *Criminal Code*, an appellant has an appeal to the Supreme Court of Canada, *as of right*,on any question of law relating to the offence for which he or she was acquitted at trial, and for which the court of appeal has entered a verdict of guilty. In contrast, under s. 691(1)(b), an appellant may appeal to the Supreme Court of Canada, *with leave*, on any question of law relating to the offence for which he or she was convicted at trial, where the court of appeal has affirmed the conviction. Accordingly, Ms. Magoon and Mr. Jordan have an appeal as of right on any question of law relating to the reversal of their first degree murder acquittals, and they may appeal with leave any other issues of law relating to their second degree murder convictions.
11. For these reasons, this Court allowed the Crown’s motions to strike.
12. After concluding that Ms. Magoon and Mr. Jordan required leave to appeal from their second degree murder convictions, this Court then proceeded to deny them leave ([2017] 2 S.C.R. viii and [2017] 2 S.C.R. vii).

The Court of Appeal’s Jurisdiction to Hear the Crown Appeals From Ms. Magoon’s and Mr. Jordan’s First Degree Murder Acquittals

1. We turn now to the argument that the Court of Appeal of Alberta lacked jurisdiction to hear the Crown appeals from the first degree murder acquittals. Ms. Magoon submits that first degree murder and second degree murder are not two distinct offences; rather, they are simply sentencing designations for the underlying offence of “murder”. Because Ms. Magoon and Mr. Jordan were charged with murder and convicted of murder, it would then follow that there were no true verdicts of acquittal in this case.
2. In support of that position, Ms. Magoon relies on the following decisions by this Court: *R. v. Farrant*, [1983] 1 S.C.R. 124; *Droste v. The Queen*, [1984] 1 S.C.R. 208; *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Arkell*, [1990] 2 S.C.R. 695; *Harbottle*; and *R. v. Nette*,2001 SCC 78, [2001] 3 S.C.R. 488. Although this Court did indicate in those cases that first degree murder and second degree murder were sentencing designations for the single substantive offence of “murder” (see *Farrant*, at pp. 140-41; *Droste*,at pp. 218-19 and 221-22; *Paré*, at pp. 624-25; *Arkell*, at pp. 702-3; *Harbottle*, at p. 323; and *Nette*, at para. 50), those comments were made in an entirely different context — the trial context. None of the cases upon which Ms. Magoon relies discuss the classification of first degree murder and second degree murder in the appeal context. The cases are therefore distinguishable on that basis.
3. As we will explain, for appeal purposes, first degree murder and second degree murder are treated as two distinct offences. Where an accused is charged with first degree murder but convicted of second degree murder, he or she has been acquitted of first degree murder. In such a case, the accused may appeal the conviction for second degree murder, and the Crown may appeal the acquittal of first degree murder. The Court of Appeal of Alberta therefore had jurisdiction to hear the appeals by the Crown in the present cases.
4. We begin with the relevant *Criminal Code* provisions. When ss. 662(2) and 676(2) of the *Criminal Code* are read together, it becomes apparent that where an accused is charged with first degree murder but convicted of second degree murder, the Crown may appeal the first degree murder acquittal.
5. Section 662 of the *Criminal Code* provides that where a person is charged with one offence, but only a part of that offence is proved, he or she may be convicted of a lesser, included offence. Specifically, under s. 662(2), where an accused is charged with first degree murder, and the evidence does not prove the offence of first degree murder, he or she may still be convicted of second degree murder. Section 662 of the *Criminal Code* states:

**Offence charged, part only proved**

**662 (1)** A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

**(a**) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or

**(b)** of an attempt to commit an offence so included.

**First degree murder charged**

**(2)** For greater certainty and without limiting the generality of subsection (1), where a count charges first degree murder and the evidence does not prove first degree murder but proves second degree murder or an attempt to commit second degree murder, the jury may find the accused not guilty of first degree murder but guilty of second degree murder or an attempt to commit second degree murder, as the case may be.

. . .

1. Section 676 of the *Criminal Code* sets out the Crown’s rights of appeal to the court of appeal. Under s. 676(1)(a), the Crown may appeal a verdict of acquittal on any ground that involves a question of law alone. The meaning of “acquittal” in this section is clarified in s. 676(2) of the *Criminal Code* — an acquittal includes situations where an accused is acquitted of the offence specifically charged but is convicted of any other offence. The relevant portions of s. 676 of the *Criminal Code* state:

**Right of Attorney General to appeal**

**676 (1)** The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

**(a)** against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

. . .

**Acquittal**

**(2)** For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 730 of any other offence.

. . .

1. Reading ss. 662(2) and 676(2) together leads to only one conclusion: the Crown may appeal to the court of appeal from an acquittal for first degree murder where there has been a conviction for second degree murder. Thus, for appeal purposes, first degree murder and second degree murder are treated as two distinct offences.
2. The specific wording in ss. 662(2) and 676(2) also supports this conclusion. In s. 662(2) we find the words “not guilty of first degree murder but guilty of second degree murder”. Similarly, in s. 676(2) we find the words “convicted . . . of any other offence”. The language in these two provisions is *conviction* language, not sentencing language. A person is not simply convicted of “murder” — he or she is convicted of either first degree murder or second degree murder. Once a conviction has been entered, the accused and Crown may appeal. While it is true that in its *effect*, a convictionfor first degree murder entails a longer period of parole ineligibility,[[3]](#footnote-3) there must nevertheless first be a *conviction* for first degree murder. Again, the language in these provisions strongly indicates that for appeal purposes, Parliament intended that first degree murder and second degree murder be treated as two separate offences.
3. And accepting Ms. Magoon’s contrary argument would lead to unacceptable consequences. If first degree murder and second degree murder are merely sentencing designations, as Ms. Magoon suggests, then where an accused is charged with first degree murder but convicted of second degree murder, the Crown would presumably have to appeal only under the sentencing appeal provisions in the *Criminal Code*, namely ss. 676(1)(d) and 676(4). If that is so, it would lead to the bizarre situation of the Crown effectively arguing a conviction appeal under the guise of a sentence appeal. In our respectful view, this is illogical and cannot have been what Parliament intended.
4. Sections 676(1)(d) and 676(4) of the *Criminal* *Code* govern Crown sentence appeals and set out the circumstances in which they are permitted. They are meant to be relied on when the Crown is of the view that the sentence imposed (or the period of parole ineligibility in the case of second degree murder) is inadequate. These provisions are not, however, meant to be used by the Crown to argue that an accused who has been convicted of second degree murder should have beenconvicted of first degree murder.
5. When it appealed in this case, the Crown did not take issue with thelength of the sentence imposed, or the period of parole ineligibility that accompanied the second degree murder convictions. The Crown’s concern was that the trial judge had erred when applying the test for unlawful confinement. It defies logic and common sense to suggest that the Crown must make such arguments under the guise of a sentence appeal. This cannot have been what Parliament intended when it enacted ss. 676(1)(d) and 676(4) of the *Criminal Code*.
6. The sentence appeal provisions were not enacted as a way to effectively convict persons of first degree murder by increasing the length of their sentence (under s. 676(1)(d)) or increasing the period of their parole ineligibility (under s. 676(4)). The present appeals are entirely separate and distinct from sentence appeals. The Crown is arguing that the elements of the offence have been made out, not that the accused should have received a longer sentence or period of parole ineligibility.
7. Conviction appeals and sentence appeals are distinct, and care must be taken not to conflate them. The Crown has a right of appeal under s. 676(1)(a) of the *Criminal Code* where an accused is acquitted of first degree murder but convicted of second degree murder; the Crown does not need to argue the merits of the appeal under the pretence of arguing a sentence appeal under ss. 676(1)(d) or 676(4) of the *Criminal Code*. Ms. Magoon’s interpretation of first degree murder and second degree murder as mere sentencing designations in the appeal context is both illogical and runs counter to Parliament’s intent in enacting the distinct conviction and sentencing appeal provisions in the *Criminal Code*.
8. Again, the jurisprudence supports this conclusion. In *Keegstra*, this Court held that “[w]hen an accused is convicted of an included offence, he or she has been acquitted of the offence originally charged”, and that in such a case, “[t]he accused can appeal the conviction and the Crown can appeal the acquittal” (para. 32). This is what occurred in this case. Accordingly, Ms. Magoon and Mr. Jordan could appeal their second degree murder convictions, and the Crown could appeal their first degree murder acquittals.
9. Indeed, in some cases it may well be *necessary* for the Crown to appeal a first degree murder acquittal, as failing to do so limits the remedies available to the court of appeal. In *R. v. Noureddine*, 2015 ONCA 770, 332 C.C.C. (3d) 114, for instance, two accused were charged with first degree murder, and convicted of second degree murder. They appealed their convictions, but the Crown did not appeal their first degree murder acquittals. The Crown argued that a new trial on the charge of first degree murder wasthe “inevitable legal consequence of the position advanced by the appellants that the improper jury selection rendered the court improperly constituted to try [them]” (para. 71). Doherty J.A., writing for a unanimous Court of Appeal, rejected the Crown’s argument:

If an accused appeals from conviction on an included offence, this court cannot set aside the acquittal returned on the main charge absent an appeal by the Crown from that acquittal: *R. v. Guillemette*, [1986] 1 S.C.R. 356 (S.C.C.), at p. 361; see also *R. v. Bird* (1952), 104 C.C.C. 286 (Ont. C.A.), at p. 289. Section 686(8), which allows this court to make orders ancillary to an order allowing an appeal from conviction if “justice requires”, does not extend to an order setting aside an acquittal returned on the merits on a related charge at the same trial: *R. v. Sullivan*, [1991] 1 S.C.R. 489 (S.C.C.), at pp. 505-506.

The Crown could have appealed the acquittal on the first degree murder charge. For appeal purposes, the acquittal on the first degree murder charge is distinct from the conviction on the included offence of second degree murder. Section 676(2) gives the Crown a right of appeal on the main charge even if there is a conviction on the included offence. It follows in my view that the acquittal on the main charge is not put in issue when an accused exercises his right to appeal a conviction returned on the included offence. An order directing a new trial on the main charge of first degree murder, available had the Crown successfully appealed from the acquittal on that charge, cannot be regarded as an order ancillary to the order made on the appeal brought by the accused quashing his conviction on a charge of second degree murder. [Emphasis added; paras 75-76.]

Thus, as Doherty J.A. aptly points out, absent a Crown appeal from the first degree murder acquittal, the Court of Appeal could only order a new trial on the included offence of second degree murder. If the Crown is of the view that a new trial should be ordered on the offence originally charged, it *must* appeal the acquittal. Such a requirement illustrates that, for appeal purposes, first degree murder and second degree murder are to be treated as two distinct offences.

1. For these reasons, the Court of Appeal of Alberta had jurisdiction to hear the Crown appeals from Ms. Magoon’s and Mr. Jordan’s first degree murder acquittals — this despite the fact that Ms. Magoon and Mr. Jordan were convicted of second degree murder at trial.

The Substituted Verdicts of Guilty for First Degree Murder Under Section 231(5)(e) of the Criminal Code

1. We turn now to the substantive issue in these appeals: Was the Court of Appeal correct in finding Ms. Magoon and Mr. Jordan guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*? In our view, it was.
2. Section 231(5) of the *Criminal Code* states, in part:

**Hijacking, sexual assault or kidnapping**

**(5)** Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

. . .

**(e)** section 279 (kidnapping and forcible confinement); or

. . .

Under s. 231(5), second degree murder becomes first degree murder where the accused commits the murder in conjunction with one of the other offences listed in that section, such as sexual assault or kidnapping. All of the offences listed in s. 231(5) involve unlawful domination. The provision reflects Parliament’s intention to “treat murders committed in connection with crimes of domination as particularly blameworthy and deserving of more severe punishment” (*R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195, at para. 19; see also *Paré*, at p. 633).

1. Unlawful or forcible confinement under s. 279(2) of the *Criminal Code* is one of the enumerated offences of domination that can give rise to liability for first degree murder under s. 231(5)(e). Section 279(2) states:

**Forcible confinement**

**(2)** Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

* + - * 1. an indictable offence and liable to imprisonment for a term not exceeding ten years; or
        2. an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

1. To determine whether Ms. Magoon and Mr. Jordan are guilty of first degree murder under s. 231(5)(e) of the *Criminal Code*, this Court must determine whether the test in *Harbottle* is met (see para. 17 of these reasons). At issue in this case are the first and fifth *Harbottle* elements: Was Meika unlawfully confined, and were the unlawful confinement and murder part of the same transaction? We begin with the first element — unlawful confinement.
2. Under s. 279(2) of the *Criminal Code*, the Crown must establish that (1) the accused confined the victim, and (2) the confinement was unlawful. In *Pritchard*, Binnie J. held that unlawful confinement occurs if “for any significant period of time [the victim] was coercively restrained or directed contrary to her wishes, so that she could not move about according to her own inclination and desire” (para. 24). In *R. v. Bottineau*, [2006] O.J. No. 1864 (QL) (S.C.J.), aff’d 2011 ONCA 194, 269 C.C.C. (3d) 227, leave to appeal refused, [2012] 1 S.C.R. vi, Watt J. held that an “unlawful confinement . . . consists of restricting the victim’s liberty, but *not* his or her ability to escape. The restriction need *not* be to a particular place or involve total physical restraint” (para. 116 (emphasis in original); see also *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont. C.A.)). Restraint of the victim through physical acts of violence is sufficient but not necessary to establish unlawful confinement. Confinement can be effected “by fear, intimidation andpsychological and other means” (*R. v. Kematch*, 2010 MBCA 18, 252 C.C.C. (3d) 349, at para. 89).
3. Although the *legal* standard for proving unlawful confinement is technically the same for children as for adults, the parent-child context is relevant to both parts of the unlawful confinement analysis. First, children are easier to confine and, in the case of young children, are regularly confined for health and safety reasons, or as a disciplinary measure. Second, there are lawful justifications for confinement in the parent-child context that do not exist in other contexts. When dealing with a parent-child relationship, courts must assess whether there has been unlawful confinement with these two considerations in mind.
4. Children are easier to confine because they are inherently vulnerable and dependent, and generally look to adults to define the scope of permissible behaviour. This is especially so in the case of young children, whose dependency is usually total. Parents are placed in a position of trust and responsibility over children precisely because children are often helpless without the protection and care of their parents. Parents are the adults on whom children are most dependent and from whom they routinely receive — and expect — directions. A child’s freedoms are, from the child’s point of view, demonstrably circumscribed by the fact that parents are their primary authority figures.
5. But this does not mean that the Crown must prove some special or extreme form of confinement in cases involving parents and their children. As Monnin J.A. said in *Kematch*:

In the present case, although there were no actual physical restraints in the nature of bindings or handcuffs or barriers over [the victim], except occasionally by a barrier, the young child was clearly physically restrained and restricted and directed at times to either remain in her bedroom or forbidden to leave the basement, to which she was regularly banished. Actual physical restraint or coercive restraint, as referred to by Binnie J. in *Pritchard*, is required, but depending on the circumstances it can be effected, as here, by fear, intimidation andpsychological and other means. In a case of a child and a parent, or an adult and a child, the need for physical bindings or the like would be even less of a requirement because of the unequal relationship that already exists. [Emphasis added; para. 89.]

Significantly, a finding of confinement does not require evidence of a child being physically bound or locked up; it can just as easily result from evidence of controlling conduct.

1. As indicated, there are lawful justifications for confining a child in the parent-child context that do not exist in other contexts. But acknowledging, as we do, that parents are lawfully entitled to restrict the “liberty” of their children in accordance with the best interests of the child, this authority is not without limit (see *Bottineau* (S.C.J.), at para. 489; *Bottineau* (C.A.), at para. 101). If a parent engages in abusive or harmful conduct toward his or her child that surpasses any acceptable form of parenting, whether or not physical violence is inflicted, the lawfulness of his or her authority to confine the child ceases. In those circumstances, the lawful authority is transformed into unlawful authority because it represents the exploitation of authority for an improper purpose. This case does not fall within s. 43 of the *Criminal Code* whereby a parent “is justified in using force by way of correction toward a . . . child . . . who is under his care, if the force does not exceed what is reasonable under the circumstances” (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4,[2004] 1 S.C.R. 76, at para. 40).
2. In short, disciplining a child by restricting his or her ability to move about freely (by physical or psychological means), contrary to the child’s wishes, which exceeds the outer bounds of punishment that a parent or guardian could lawfully administer, constitutes unlawful confinement. And that is what occurred in this case — Ms. Magoon and Mr. Jordan clearly confined Meika, and the confinement was unlawful.
3. Justice Paperny concluded that Meika’s experience over the entire weekend constituted confinement. Although Ms. Magoon and Mr. Jordan quarrel with this finding, Ms. Magoon concedes that she confined Meika when she forcibly burned her hand on Thursday. Mr. Jordan and Ms. Magoon concealed that abuse from Meika’s mother, never sought medical treatment for it, and created an atmosphere of abuse and intimidation.
4. But for present purposes, it is not strictly necessary to determine exactly when Meika’s confinement began. Even viewed on their own, Sunday’s events — namely, Ms. Magoon and Mr. Jordan forcing Meika to run the stairs and physically assaulting her when she failed to comply — amounted to unlawful confinement.
5. On Sunday, Meika was subjected to serious and repeated physical abuse for what Ms. Magoon and Mr. Jordan perceived to be her non-compliance with their orders. They made her run the stairs until she was physically incapable of continuing. That course of physical abuse and coercive direction continued until her injuries rendered her unconscious, enforced not merely by the assaults but, as Paperny J.A. found, through “fear and intimidation” (para. 114 (CanLII)). There is no doubt that Meika was confined on Sunday. She was coercively restrained and directed contrary to her wishes. And the confinement was clearly unlawful. The acts of “discipline” were grossly disproportionate, cruel, degrading, deliberately harmful, and far exceeded any acceptable form of parenting.
6. Having concluded that Meika was unlawfully confined, we turn now to the fifth *Harbottle* element — whether the unlawful confinement and murder were part of the same transaction. In our view, they were. The unlawful confinement and the assaults leading to Meika’s death were part of the same single “transaction” of coercion and abuse. The course of unlawful confinement leading up to Meika’s death was, in the words of Wilson J. in *Paré*, the “continuing illegal domination” of Meika, representing an “exploitation of the position of power created by the underlying crime” (p. 633). And the unlawful confinement persisted right up to the moment Meika lost consciousness.
7. In *Pritchard*, this Court held that the underlying crime of domination must be distinct from the act of killing (para. 27). In this case, Meika’s unlawful confinement and her murder constituted two distinct criminal acts. The trial judge found that Ms. Magoon and Mr. Jordan physically assaulted Meika in a number of ways, and not all acts of violence were tied to the fatal blows. And some of the assaults that the trial judge found met the causation standard for the murder, including Mr. Jordan’s blow to Meika’s stomach, were distinct from the acts of confinement identified above. Moreover, the assaults against Meika were part, but not all, of what established the unlawful confinement, since the confinement also involved non-physical acts of coercion. We see no basis, therefore, for concluding that the unlawful confinement was, in the words of Binnie J. in *Pritchard*, “consumed in the very act of killing” (para. 27).
8. Accordingly, the *Harbottle* test is met in this case. Ms. Magoon and Mr. Jordan unlawfully confined Meika, and the unlawful confinement and murder were two distinct criminal acts that formed part of a single transaction. The Court of Appeal of Alberta did not err in substituting verdicts of guilty for first degree murder.

Conclusion

1. For these reasons, this Court dismissed Ms. Magoon’s and Mr. Jordan’s appeals.

*Appeals dismissed.*

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Solicitors for the appellant Spencer Lee Jordan: Walsh, Calgary; Kay Patel Mahoney — Criminal Defence Lawyers, Calgary.

Solicitor for the respondent: Attorney General of Alberta, Calgary.

1. To be clear, if a trial judge acquits an accused outright, and the court of appeal then sets aside the acquittal and substitutes a verdict of guilty, an accused may appeal to the Supreme Court of Canada as of right under s. 691(2)(b) of the *Criminal Code*, and raise *any* question of law in support of an outright acquittal. However, such a case is distinguishable from a situation where the trial judge acquits an accused of one offence, but convicts him or her of a lesser included offence, and that conviction is subsequently affirmed by the court of appeal — as was the case here. [↑](#footnote-ref-1)
2. While we appreciate that the wording in the old s. 691(2)(b) provisions cited in *Guillemette* and *Keegstra* referred to “a question of law”, as opposed to “any question of law” (in the current provision), this Court’s interpretation of the provisions is nevertheless consistent with the new wording in the *Criminal* *Code*. *Guillemette* and *Keegstra* are therefore still instructive on the scope of an appellant’s right to appeal under s. 691(2)(b) of the *Criminal Code*. [↑](#footnote-ref-2)
3. We note, however, that under s. 745.4 of the *Criminal Code*, where an accused is convicted of second degree murder, a trial judge may increase the period of parole ineligibility to up to 25 years. [↑](#footnote-ref-3)