

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT FOR BRITISH COLUMBIA)**

BETWEEN:

HER MAJESTY THE QUEEN

**APPLICANT
(RESPONDENT)**

AND:

ROBERT DAVID NICHOLAS BRADSHAW

**RESPONDENT
(APPELLANT)**

**APPLICANT'S MEMORANDUM OF ARGUMENT ON APPLICATION
FOR LEAVE TO APPEAL**

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PART I - STATEMENT OF FACTS

A. Overview

1. This leave application concerns the principled approach to hearsay evidence from a former co-accused, *Vetrovec* witness. Specifically, when a hearsay statement originates from a former co-accused, *Vetrovec* witness, is the test for threshold reliability elevated to a higher standard of proof, beyond a balance of probabilities, such that a trial judge's consideration of extrinsic, corroborating evidence is restricted to *only* evidence which implicates the accused in the crime?
2. With slightly different factual and legal applications, this issue has arisen in three different provinces at the trial and appellate levels of court in the span of two months: *R. v. Bradshaw*, 2015 BCCA 195; *R. v. Campeau*, 2015 ABCA 210; and *R. v. Tingle et al.*, 2015 SKQB 184. It is an issue of national importance which has yet to be addressed by this Court.
3. On March 14, 2009, the Respondent (also known as "Paulie") arranged a drug meeting with Laura Lamoureux (also known as "Double D"). The Respondent, together with Roy Thielen, drove to a location near Lamoureux's residence. Thielen shot and killed Lamoureux while the Respondent waited in a car across the street.
4. On March 19, 2009, the Respondent's seventeen year old girlfriend, Michelle Motola drove Marc Bontkes to Hi-Knoll Park where the Respondent and Thielen hid waiting. The Respondent then shot and killed Bontkes.
5. The police suspected Thielen and questioned him on two occasions in March of 2009. Thielen denied any involvement in the murders.
6. From November 2009 to July 2010, the police ran a 'Mr. Big' investigation targeting Thielen.
7. On May 15, 2010, during a road trip between Edmonton and Calgary, Thielen provided a statement to an undercover officer, Cst. "B". Thielen was recorded stating he shot Lamoureux and Bontkes. (The inconsistent statement)

8. On July 21, 2010, Thielen met with the fictitious crime boss, Sgt. "D". At this meeting, Thielen said he shot Lamoureux and "Paulie" (the Respondent) shot Bontkes.

9. On July 21, 2010, soon after his meeting with Sgt. "D", Thielen met the Respondent in a Best Western hotel room. Both were unaware they were being video and audio recorded. The Respondent made inculpatory statements regarding his knowledge and his participation in both murders:

- The Respondent drove with Thielen in the black Cobalt vehicle to meet Lamoureux.

Transcript of the Best Western Video, p. 112 (1196) – p. 113 (1206)

- The Respondent arranged the meeting with Lamoureux.

Transcript of the Best Western Video, p. 121 (1409) – p. 122 (1439)

- The Respondent and Thielen went to Thielen's house after the shooting of Lamoureux.

Transcript of the Best Western Video, p. 117 (1309-1312)

- In preparation for the Bontkes murder, they wore gloves, cleaned the gun and the shells and waited.

Transcript of the Best Western Video, p. 113 (1219-1224)

- The Respondent shot Bontkes.

Transcript of the Best Western Video, p. 113 (1225) – p. 114 (1233) & p. 117 (1303-1308)

- The gun was hidden at the Respondent's house after the killing of Bontkes.

Transcript of the Best Western Video, p. 114 (1239-1245)

- The Respondent burnt his shoes after the killing of Bontkes.

Transcript of the Best Western Video, p. 114 (1249)

10. Two days later, on July 23, 2010, the Respondent met Thielen at a park bench at Bothwell Park. The Respondent recounted for Thielen their earlier failed attempt to kill Bontkes which they referred to as "the dry run": *Transcript of the Bothwell Park Audio*, p. 132 (133) – p. 135 (222) Both were unaware they were being audio recorded.

11. Police arrested Thielen on July 30, 2010. He provided statements to the police on July 30 and 31, 2010. In these statements, Thielen said he shot Lamoureux. Using numbers, he identified the Respondent as the shooter of Bontkes.

12. On August 2, 2010, Thielen participated in a six hour re-enactment DVD in which he drove with police to various locations, including the crime scenes. He related details in which he implicated himself and the Respondent in both murders. (The hearsay statement) In the re-enactment statement, Thielen described details of how the murders occurred and the Respondent's role in the murders. Many details in the re-enactment statement were confirmed by independent evidence (e.g. cell phone communication between Lamoureux and the Respondent just prior to her killing, forensic evidence relating to the number of shots fired, the use of the same gun in both shootings, the positioning of the bodies, the hiding place for the handgun under the Respondent's kitchen sink, the weather, the "dry run", the state of the fencing at the Bontkes murder scene, and the presence of a construction crew).

13. Thielen and the Respondent were initially charged on one indictment with two counts of first degree murder. Later, Thielen pled guilty to two counts of second degree murder.

14. At the Respondent's trial and as part of the Crown case, the jury heard Thielen's May 10, 2010 statement to Cst. "B" during the testimony of Cst. "B". The jury did not see the video of Thielen's statement to the crime boss, Sgt. "D". The jury saw the Best Western Hotel video, and the jury heard the Bothwell Park audio *before* Thielen was called to the stand. When called to the witness stand, Thielen refused to be sworn and he refused to testify. The Crown applied to admit into evidence for its truth the re-enactment DVD.

B. The Oral Ruling on the Admissibility of the Re-Enactment Statement

15. In the midst of the trial, a *voir dire* was held to determine the admissibility of the re-enactment statement. The trial judge examined the circumstances in which the re-enactment statement was taken and whether the truth and accuracy of the statement could be sufficiently supported by extrinsic evidence. On the *voir dire*, the trial judge considered all of Thielen's statements to the police and from the 'Mr. Big' operation. In concluding that the statement met threshold reliability, the trial judge pointed to extrinsic evidence which had restored faith in the hearsay statement. *Trial Judge's Oral Ruling on the Admissibility of the Re-enactment Statement, paras. 42-54*

16. The trial judge had the jury recalled and gave them a *Vetrovec* warning before the jury viewed the re-enactment DVD.

C. The Oral Ruling on the Admissibility of the Statement to Cst. "B"

17. After the trial judge ruled Thielen's re-enactment DVD was admissible for its truth, defence counsel applied to the trial judge to have Thielen's statement to Cst. "B" entered into evidence for its truth. The trial judge ruled this statement was not admissible for its truth as it did not meet the test for threshold reliability. The trial judge did admit the statement as a prior inconsistent statement.

18. The Respondent testified in the defence case. He denied any involvement in both murders. The jury convicted him of both counts of first degree murder.

19. The Respondent appealed his convictions for first degree murder.

D. The Reasons for Judgment of the B.C. Court of Appeal

20. The Court of Appeal allowed the appeal from conviction and ordered a new trial on both counts on the basis that the trial judge erred in his analysis of threshold reliability and should not have admitted the re-enactment statement into evidence for its truth.

PART II - APPLICANT'S POSITION ON LEAVE APPLICATION

21. The truthfulness of the re-enactment statement was supported by a body of extrinsic evidence, some of which directly implicated the accused and some of which did not.

22. The Court of Appeal erred in law by

- a. elevating the test for threshold reliability beyond a balance of probabilities for the admissibility of a hearsay statement from a former co-accused, *Vetrovec* witness;
- b. rejecting from the assessment of threshold reliability extrinsic evidence which supported the truthfulness of the statement but which did not directly implicate the accused;
- c. limiting the use of extrinsic evidence in the assessment of threshold reliability to only evidence implicating the accused in the crime;
- d. stating that the only safeguards relate to those in place at the time the statement is made; and
- e. parsing the factors relevant to threshold reliability and thereby unduly limiting the contextual analysis, resulting in a failure to consider the cumulative effect of all factors on the question of threshold reliability.

23. In elevating the test for threshold reliability and in finding the re-enactment statement did not meet threshold reliability, the Court of Appeal showed no deference to the trial judge and encroached upon the trier of fact's determination of ultimate reliability.

24. The Court of Appeal's reasoning was founded in part on the comments of Lamer, C.J.C. (as he then was) in *R. v. Smith*, [1992] 2 S.C.R. 915. It is an opportune time for this Court to reconcile the language used in *Smith* with the assessment of threshold reliability and in turn, to provide guidance to lower courts across the country.

PART III - ARGUMENT

26. The elevation of the hearsay test for threshold reliability is a change in the law which has broad implications for criminal cases across this country, especially those involving 'Mr. Big' undercover operations and *Vetrovec* witnesses. Such cases often involve the most serious crimes.

27. Recently, this Court addressed the principled approach to hearsay in the context of 'Mr. Big' statements: *R. v. Hart*, 2014 SCC 52; *R. v. Mack*, 2014 SCC 58. However, the applicable test for threshold reliability when the hearsay statement is from a former co-accused, *Vetrovec* witness did not arise in these cases and therefore, was not addressed by this Court. It is an opportune time for this Court to complete its review of this area of the law.

A. The Court of Appeal erred in elevating the test for threshold reliability

28. It is the position of the Applicant that the Court of Appeal elevated the test for threshold reliability beyond a balance of probabilities for the admissibility of a hearsay statement from a former co-accused, *Vetrovec* witness. The Applicant says the appellate court did so by (a) rejecting from the assessment of threshold reliability the extrinsic evidence which supported the truthfulness of the statement but which did not directly implicate the accused and (b) limiting the use of extrinsic evidence in the assessment of threshold reliability to only evidence implicating the accused in the crime. The Applicant will address items (a) and (b) later in this memorandum.

29. There were two powerful pieces of extrinsic evidence which originated from the Respondent and which directly implicated the Respondent in both murders – the Best Western video and the Bothwell Park audio. In these statements, the Respondent acknowledged his participation in both murders and his role as the shooter of Bontkes.

30. The Court of Appeal found the Respondent's inculpatory statements (the Best Western video and the Bothwell Park audio) were insufficient to satisfy threshold reliability.

31. Relying on past decisions from this Court, including *R. v. Smith*, the Court of Appeal determined the statements did not provide a circumstantial guarantee of trustworthiness: *BCCA Reasons, paras. 22-29*. The Court of Appeal stated:

[35] The trial judge also relied on the statements made by Mr. Bradshaw to Mr. Thielen, which were recorded as part of an undercover operation. These statements occurred at the Best Western Hotel on July 21, 2010 and in Bothwell Park on July 23, 2010. The trial judge referred to the content of these statements but did not say why they provided a circumstantial guarantee of trustworthiness to Mr. Thielen's re-enactment statements.

[36] In my respectful view, they do not. These statements provide some evidence of Mr. Bradshaw's knowledge, and perhaps participation in the murders. The statements do not, however, in these circumstances, reach the level of providing a circumstantial guarantee of trustworthiness required to permit the admission of highly prejudicial statements from a witness who had given many contradictory statements in the course of the investigation, without cross-examination. Mr. Bradshaw does not specifically implicate himself to the degree Mr. Thielen asserts in the re-enactment.

[37] The judge did not sufficiently address the issues that would detract from truthfulness of Mr. Thielen's statements, including his considerable motive to lie to extricate himself from his admissions to Cst. B. that he committed first degree murder, not once, but twice. *Emphasis Added*

32. The Court of Appeal's reasons for concluding there were no circumstantial guarantees of trustworthiness warrant consideration.

33. In his ruling, the trial judge provided page references to the key parts of the Best Western and Bothwell Park statements. The Respondent in his own words placed himself at both murder scenes and as the shooter of Bontkes. It is disingenuous of the appellate court to question why the accused's admissions would require further explanation. In the midst of the trial with the jury waiting, what more should the trial judge have said? When the trial judge's ruling was read in context with the inculpatory statements, it was clear why the Best Western and Bothwell Park statements provided circumstantial guarantees of trustworthiness for the re-enactment statement. Equally clear, the Best Western and Bothwell Park statements were strong evidence that Thielen's statement to Cst. "B" was likely false.

34. The Court of Appeal over stated the inconsistency between the statements and underplayed the power of the extrinsic inculpatory evidence. There was one statement

in which Thielen said he was the shooter in both murders. In the six statements Thielen gave after his statement to Cst. "B", Thielen consistently said the Respondent was the shooter of Bontkes. Thielen had not given "many contradictory statements" as the Court of Appeal contends.

35. Further, Thielen's re-enactment statement was not an effort to "extricate" himself. This final comment by the Court of Appeal regarding motive is unfounded and wrong. In his re-enactment statement, Thielen maintained his involvement in both murders. When he made the re-enactment DVD, Thielen was facing charges for two counts of first degree murder. Moreover, before Thielen was aware of any police investigation and weeks before Thielen participated in the re-enactment statement, Thielen stated to Sgt. "D" that "Paulie" (the Respondent) was the shooter of Bontkes. Many months after the re-enactment statement was made, Thielen pled guilty to counts of second degree murder.

36. The circumstances of this case were more in alignment with the facts in *R. v. U.(F.J.)*, [1995] 3 S.C.R. 764 where the complainant refused to testify at trial and her hearsay statement to the police was admitted into evidence for its truth, because it was corroborated by extrinsic evidence – the statement of the accused. The Respondent's two inculpatory statements captured in the 'Mr. Big' operation were akin to the inculpatory statement given by the accused to the police in *U.(F.J.)*. In *U.(F.J.)*, the similarities in what the accused said in his inculpatory statement was the powerful extrinsic evidence which corroborated the hearsay statement of his daughter, the complainant. It is important to note that the accused's statement in *U.(F.J.)* was not taped as the recorder had malfunctioned. In the case at bar, the Respondent's image and his voice admitting his actions as the driver and the shooter were captured on video tape. And yet, the Court of Appeal said this evidence was insufficient to support the truthfulness of Thielen's re-enactment statement without the cross-examination of Thielen. It is also important to note that the complainant in *U.(F.J.)* recanted her statement. Thielen was an uncooperative witness, but he was not a recanting one. He never said his hearsay statement was untruthful. He simply refused to testify. In *R. v. Khelawon*, 2006 SCC 57, this Court said:

[86] ... In *U.(F.J.)*, the reliability requirement was met rather by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and the independent statement made by her father were so compelling that the only likely explanation was that they were both telling the truth. Again here, the criteria of necessity and reliability intersect. In the interest of seeking the truth, the very high reliability of the statement rendered its substantive admission necessary.

37. However, the Court of Appeal sought to characterize this case as akin *R .v. Smith*, and *R. v. Youvarajah*, 2013 SCC 41. *BCCA Reasons*, paras. 26-29

B. The Court of Appeal erred in rejecting extrinsic evidence not implicating the accused but supporting the truthfulness of the hearsay statement

38. In the case at bar, there was extrinsic evidence which corroborated the truthfulness of Thielen's hearsay statement but which did not directly implicate the Respondent in the murders.

39. The trial judge referred to a significant body of extrinsic evidence which corroborated the truthfulness of Thielen's re-enactment statement. Specifically, the trial judge stated:

[42] I turn to the second consideration of whether the truth and accuracy of the statement can be sufficiently supported by extrinsic evidence.

[43] First, the jury has already heard Constable B.'s evidence and it has seen audio-video recordings taken of conversations between Mr. Thielen and Mr. Bradshaw at the Best Western Hotel and at Boswell Park. Those meetings were set up by Constable B. with Mr. Thielen's cooperation, during the course of the Mr. Big operation, in an endeavour to elicit evidence of Mr. Bradshaw's possible participation in the murders of Ms. Lamoureux and Mr. Bontkes. The murders of Lamoureux and Bontkes were discussed by Thielen and Bradshaw at both meetings.

[44] Furthermore, the statements were made in the course of the Mr. Big operation without knowledge of being recorded, strengthening the inference that the statements are true.

[45] Third, the description given by Mr. Thielen of the shootings, where and how the shootings occurred, the number of shots fired, the fact the same gun was used, the positioning of the bodies of Ms. Lamoureux and Mr. Bontkes, the presence and position of the van at High Knoll Park, are all details that closely resemble the forensic evidence collected from the crime scene investigation.

[46] I further note that Mr. Thielen's police interviews with Corporal Dhaliwal, Sergeant Campbell and Corporal Dadwal were all free-flowing narratives. That is, Mr. Thielen voluntarily offered up not only a description of how the murders occurred, but also minute details of how they occurred. For example, he made observations about the state of the grass at the drug exchange meeting point where he waited to kill Ms. Lamoureux, as well as the fact the hedge had been pruned. At Hi- Knoll Park, he described where he and Mr. Bradshaw had stood and what they did while they waited for Ms. Motola and Mr. Bontkes to arrive. He even recalled the state of an area of the fencing in the parking lot. Finally, he correctly described the weather for both nights the murders occurred.

[47] Fifth, there are other witnesses that corroborate Mr. Thielen's version as to what occurred. Dwayne Nelson, who lived with Mr. Bontkes at the time of his death, described in some detail the telephone conversation between Mr. Bontkes and Ms. Motola on the night of his death. That conversation occurred shortly before Mr. Bontkes left the house in Ms. Motola's vehicle. I also note that Mr. Thielen's statement to the police implicated Ms. Motola in Mr. Bontkes' murder, a person for whom he had deep feelings.

[48] There is independent evidence that corroborates of Mr. Bradshaw's involvement in both murders. First, there is the tape recorded conversation at the Best Western Hotel, Room 159, on July 21, 2010. The particular references that I make are as follows: Exhibit 39: p. 48, lines 1196 to 1200; p. 49, lines 1201 to 1206 and lines 1219 to 1225; p. 50, lines 1226 to 1233; p. 53, lines 1303 to 1311; p. 57, lines 1405 to end; and p. 58, lines 1426 to 1437.

[49] I also refer to the recorded conversation at Boswell Park on July 23, 2007, Exhibit 40, specifically: p. 6, lines 133 to 167; p. 8, lines 184 to 193; p. 9, lines 210 to 217; p. 10, lines 247 to 261; and p. 15, lines 255 to 257.

[50] In this latter conversation, Mr. Bradshaw said there had been a construction crew out on the night of Mr. Bontkes' murder on 32nd Street. The police have confirmed that there was indeed a construction crew working in the vicinity that night. The police have confirmed there was a hiding place under the kitchen sink in the suite in which Mr. Bradshaw was residing at the time of the murders.

[51] I note Exhibit 24, which is a record of various telephone calls passing between Ms. Lamoureux's cell phone and a cell phone number associated with Mr. Bradshaw, with particular attention to the timing of those calls and the timing of Ms. Lamoureux's death. There is evidence before me that in the early morning hours of March 19, 2009, the night Mr. Bontkes was shot, that there were a number of telephone calls between Mr. Thielen's BlackBerry and the cell phone associated with Mr. Bradshaw. At least one call was made between Mr. Thielen's BlackBerry and Ms. Motola's cell phone a short period of time before gunshots were heard coming from High Knoll Park. Finally, a communication was recorded well after the murders between Ms. Motola and Mr. Bradshaw, marked as Exhibit 43A, following the police stimulation testified to by Corporal Dhaliwal.

[52] Emily Turpin, the person with whom Mr. Thielen was living at the time, testified that Mr. Bradshaw may have been present when Ms. Motola and Mr. Thielen discussed the plan to lure Mr. Bontkes into her vehicle.

[53] It will also be recalled that Mr. Thielen had identified "Paulie" as being involved in Mr. Bontkes' shooting in his discussion with Sergeant D. on July 21, 2010. As stated, "Paulie" is a name the jury has already heard in this trial as being a street name associated with Mr. Bradshaw.

[54] Based on all of the above evidence, I find the re-enactment meets the tests for threshold reliability.

40. The Court of Appeal systematically rejected any independent evidence which corroborated the truthfulness of the hearsay statement but which did not directly implicate the Respondent in the murders: *BCCA Reasons, paras. 31-34*.

41. The Applicant submits the Court of Appeal erred by (i) parsing the factors to be considered in the analysis of threshold reliability; (ii) excluding factors which did not directly implicate the accused in the crime; (iii) focusing exclusively on factors implicating the accused in the crime; and in doing so (iv) eviscerated the contextual analysis.

42. In *R. v. Starr*, [2000] 2 S.C.R. 144, this Court held that extrinsic evidence was inadmissible on the issue of threshold reliability. In *Khelawon*, this Court held that *Starr* should not be followed on this point: *R. v. Khelawon*, para. 93-100. Instead, citing *Idaho v. Wright*, 497 U.S. 805 (1990), this Court approved of the use of extrinsic corroborating evidence as indicia of reliability: *R. v. Khelawon*, paras. 50-51. The trial judge in this case tracked this development in the law in his decision on threshold reliability: *Trial Judge's Oral Ruling on the Admissibility of the Re-enactment Statement, para. 18*.

C. The Court of Appeal erred in limiting extrinsic evidence to evidence implicating the accused

43. The Court of Appeal found Thielen's re-enactment statement was hearsay evidence which did not demonstrate circumstantial guarantees of trustworthiness necessary to meet the test for threshold reliability. A key aspect of the appellate court's reasoning was that the corroborative, extrinsic evidence was limited to evidence which implicated the Respondent. The Court of Appeal stated:

[31] The judge looked for evidence that would corroborate Mr. Thielen's evidence. While independent corroboration can certainly add to the guarantee of truthfulness, such as the semen stain on the child's sleeve in *Khan*, much of what the trial judge relied on was not evidence that provided guarantees of truthfulness of Mr. Thielen's implication of Mr. Bradshaw. For example, he concluded that the description of the shootings by Mr. Thielen was supported by forensic evidence. The difficulty with using this evidence is that it does nothing to advance the guarantee of truthfulness in relation to Mr. Bradshaw being involved in the offences. Mr. Thielen admitted many times that he was present, and indeed committed the offences. There is nothing in his statement that is supported by forensic evidence that would implicate Mr. Bradshaw as opposed to Mr. Thielen.

[32] The judge relied on the details provided by Mr. Thielen, and the "free-flowing" nature of his interviews. Again, there is nothing in the details that provide a circumstantial guarantee of trustworthiness to his evidence that Mr. Bradshaw was involved. The admission to Cst. B. that he, Thielen, had committed the murders himself, were also "free-flowing" according to Cst. B. The judge used the details provided in the re-enactment, which is hearsay, to find that the re-enactment was reliable. It was not, again like *Khan*, a situation where the statements of the child were so out of the normal experience for a child, that the statement itself could provide a guarantee of trustworthiness. Again, there is nothing in the detail that would add trustworthiness over his earlier statement that he had been involved in the murders alone, without Mr. Bradshaw.

[33] The trial judge also relied on the evidence of Mr. Nelson as corroboration regarding a telephone conversation Mr. Bontkes (the deceased) had with Ms. Motola. Again, there is nothing in this evidence that adds any support to the implication of Mr. Bradshaw. Mr. Thielen's implicating Ms. Motola does not assist in supporting the truth of his statement against Mr. Bradshaw. *Emphasis Added*

44. Since this Court's decision in *R. v. Khelawon*, it is accepted that the trial judge acts as the gate-keeper in the assessment of threshold reliability. He or she considers all relevant factors, including the presence of corroborating or contradictory evidence.

45. The reliability assessment is focused on the trustworthiness or truthfulness of the statement. In assessing the inherent trustworthiness, *Khelawon* spoke of the trial judge's inquiry into those factors tending to show whether or not the statement was true. The credibility of the declarant was one factor. In the case of a *Vetrovec* witness, this Court has never said that the credibility of the declarant is the predominant or the sole consideration in the reliability assessment. Equally, this Court has not said that factors such as extrinsic evidence are restricted to those directly implicating the accused in the crime. On the contrary, this Court has rejected this type of analysis in the context of

Vetrovec witnesses: *R. v. Kehler*, 2004 SCC 11, paras. 15-17; *R. v. Ryan*, 2014 ABCA 85, paras. 61-62. This Court ought to clarify whether such an analysis applies to the hearsay statements of former co-accused, *Vetrovec* witnesses.

D. The Court of Appeal erred in stating that the only safeguards are those in place at the time the statement is made

46. The Court of Appeal stated:

[30] ... The trial judge, at para. 19, correctly identified the concern over the dangers of permitting the use of the statement. However, his reference to “safeguards” at the threshold test in the context of this case is misplaced. The guarantee of trustworthiness and accuracy at the threshold test does not arise as a result of anything a judge or the Crown at trial can do. Safeguards are those in place when the statement is taken, for example, placing the person under oath, warning them of the consequences of lying under oath and so on, but that is not the situation here. The judge looked at safeguards that could be imposed at trial, which do not assist in ascertaining threshold reliability. *Emphasis Added*

47. With respect, the Applicant says the Court of Appeal is wrong when it is says that safeguards in the determination of threshold reliability are limited to factors in place when the statement is taken. The most recognized safeguard is cross-examination which occurs at trial long after the time when the statement is taken.

E. The Court of Appeal showed no deference to the trial judge’s assessment of relevant factors

48. The trial judge’s decision on threshold admissibility is entitled to considerable deference on appeal. He was the one who heard the *voir dire* evidence first hand. The trial judge’s decision will only be interfered with where the trial judge has failed to consider the proper factors or has made unreasonable findings. The Applicant submits that no such errors were made by the trial judge in this case.

49. The Court of Appeal showed no deference to the decision of the trial judge. Instead, the appellate court usurped the role of the trial judge. The Court of Appeal concluded that the trial judge ought to have withheld the re-enactment statement from the jury, because in its view, the presence of extrinsic, confirmatory evidence could not

provide a circumstantial guarantee of trustworthiness without the cross-examination of Thielen.

F. By elevating the test for threshold reliability, the Court of Appeal, encroached upon the trier of fact's determination of ultimate reliability

50. This Court has said that the role of the trial judge requires him or her to remain mindful of the limited role that he or she plays in determining admissibility and that he or she ought not to determine the question of ultimate reliability on the admissibility *voir dire*: *R. v. Khelawon*, para. 93.

51. The Applicant says that in elevating the test for threshold reliability, the Court of Appeal encroached upon the trier of fact's determining ultimate reliability.

52. The absence of cross-examination is an important factor in determining threshold reliability. However, there is no general rule that a hearsay statement must be excluded where there is no opportunity to cross-examine the declarant: *R. v. Smith*, p. 935; *R. v. Khelawon*, para. 63; *R. v. Groves*, 2013 BCCA 446, para. 65.

53. This was one of those cases where it was not possible to test the evidence in the optimal way – in court, under oath and under cross-examination. Nevertheless, common sense tells us that the jury should not lose the benefit of this evidence when there are adequate substitutes for testing the hearsay evidence: *R. v. Khelawon*, para. 63.

54. If the Court of Appeal is correct, threshold reliability for the hearsay statement of a former co-accused, *Vetrovec* witness cannot be satisfied by extrinsic, inculpatory statements of the accused. Only the cross-examination of the *Vetrovec* witness will suffice. This Court ought to clarify whether this is in fact the state of the law.

PART IV - SUBMISSIONS RESPECTING COSTS

55. The applicant makes no submission respecting costs.

PART V - NATURE OF ORDER SOUGHT

56. That the application for leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Margaret A. Mereigh
Counsel for the Applicant

July 31, 2015
Vancouver, British Columbia

PART VI - LIST OF AUTHORITIES

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