SCC File No. 36537

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT
(RESPONDENT)

AND:

ROBERT DAVID NICHOLAS BRADSHAW

RESPONDENT
(APPELLANT)

RESPONSE OF THE RESPONDENT
(ROBERT DAVID NICHOLAS BRADSHAW)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The Crown asserts that this case raises a question as to whether there is an elevated standard of proof under the principled approach for the admission of a hearsay statement made by an unsavoury witness, with a motive to lie, a so-called "*Vetrovec* witness".

2. With all due respect, this question simply does not arise in this case. It is premised on a mischaracterization of what the Court of Appeal for British Columbia decided in their unanimous decision. The Court did not find that there was any elevated standard of proof for any class of declarant, and nor did it apply such a standard. The decision is nothing more than the appropriate exercise of appellate jurisdiction through the application of settled legal principles to incontrovertible facts, leading to the conclusion that the trial judge had erred in admitting the hearsay statement of a co-accused who pleaded guilty to murder and, upon being called by the Crown refused to testify.

3. There is no dispute about the state of the law – the motive of the declarant is but one factor to be considered alongside others in determining if the hearsay statement is inherently reliable and thus admissible under the principled exception to the hearsay rule.

4. The proposed issue of national importance simply does not exist in the fact-specific circumstances of this case. This case concerned the admissibility of the hearsay statement of Roy Thielen who, it is true, had a motive to lie and shift responsibility away from himself. But the applicant fails to note that Thielen's motive to lie was only one small piece of the puzzle. The Court of Appeal found that an exceptional feature of this case, and one that critically undermined the inherent reliability of the statement, was that Thielen had made so many previous statements which brazenly contradicted the very material parts of his own hearsay statement. These material parts of the statement concerned whether it was Thielen or the

respondent who killed both deceased, an obviously important matter in the first degree murder trial.

5. In these circumstances, the Court of Appeal properly held that it was not possible, on its face, to determine if Thielen was lying or telling the truth when he made his statement, and for that reason, the dangers of admitting the hearsay statement could only be ameliorated by cross-examination.

6. It was also not possible to assess the reliability of the hearsay statement, and nor were there any safeguards in place to ensure the truth of Thielen's hearsay statement. He could not be cross-examined because he refused to testify at trial.

7. The Court of Appeal therefore unanimously determined that, in all the circumstances, the trial judge erred in admitting Thielen's statement. This decision was amply supported by well-settled legal principles which have been both recently and consistency articulated by this Court. Crown counsel's leave application ought to be dismissed.

Procedural History

8. Following the Court of Appeal's decision to allow the appeal and order a new trial on May 5, 2015, the Crown elected to re-try the respondent, Robert Bradshaw, for the first-degree murders of Laura Lamoureux and Marc Bontkes.

9. Mr. Bradshaw retained new trial counsel for the trial. On July 9, 2015, trial Crown and defence counsel appeared in court and scheduled dates for the new trial in B.C. Supreme Court. The trial is currently set for May of 2016, and is scheduled to last six weeks.

Statement of Facts

10. The respondent was initially tried for the first-degree murders of Lamoureux and Bontkes before a judge and jury in B.C. Supreme Court in 2012. Lamoureux was found shot to death on a street near her home on March 14, 2009. Five days later, on March

19, 2009, Bontkes was found shot to death in a park. Both Lamoureux and Bontkes were heavily involved in the drug trade in the City of Langley in British Columbia.

11. The murders of Lamoureux and Bontkes appeared to be connected to an ongoing turf war between various participants in the Langley drug trade. The evidence at trial was that Lamoureux and Bontkes were allied with another drug dealer in the area, Shane Sigurdson. Sigurdson and Lamoureux were said to be moving into territory operated by another dealer, Johnny Wade.

12. It was accepted at trial – and has never been disputed – that Wade hired a violent drug enforcer, Roy Thielen, to kill both Lamoureux and Bontkes in order to get rid of his potential rivals. It was also accepted that Thielen had his own personal reasons for wanting to kill Lamoureux and Bontkes. As it turned out, Thielen had previously dated Lamoureux and they were sworn enemies by the time of her murder, Thielen also hated Bontkes because he had previously tortured and kidnapped a woman named Michelle Motola, and sent her to work as a prostitute in Alberta. Thielen was very close with Motola and considered her to be his “sister”.

13. The police investigation into the murders of quickly focussed on Thielen. The investigation of Thielen involved a “Mr. Big” investigation, which lasted about seven months.

14. At the conclusion of the investigation, in July of 2010, Thielen was charged with the first degree murders of Lamoureux and Bontkes as well as the attempted murder of Shane Sigurdson. Thielen and Bradshaw were initially co-accused and charged on the same indictment. After the preliminary inquiry, Thielen pleaded guilty to two counts of second degree murder. The charges Thielen faced for the attempted murder of Shane Sigurdson were dropped altogether. In 2012, Thielen was called to testify as a Crown witness in Bradshaw’s trial, but he refused to testify and was cited for contempt.

15. Over the course of about a year and a half, between the time Lamoureux was murdered on March 14, 2009 and the time Thielen was arrested and charged with the

two murders in July of 2010, Thielen had made a total of nine statements to various police officers, as well as other recorded conversations where Thielen discussed the murders. It is an understatement to suggest that Thielen's many statements about the murders were different. Many of the statements, in fact, flatly contradicted each other. In broad terms, Thielen statements ranged from him:

(1) denying any involvement whatsoever for Lamoureux 's murder and claiming that he had an abili on the night that she was killed;

(2) relating in great detail how he alone shot and killed both Lamoureux and Bontkes;

(3) stating that Bradshaw and Motola were the ones who had killed Bontkes, and finally,

(4) that Bradshaw alone had killed Bontkes and assisted him in the Lamoureux homicide.

16. The content and circumstances of Thielen's various statements concerning the murders were as follows:

The March 18, 2009 Statement

17. On March 18, 2009, Thielen was arrested and questioned regarding Lamoureux's shooting. He told police that he had nothing to do with the killing and that he had an alibi.

The March 25, 2009 Statement

18. On March 25, 2009, Thielen gave a statement to police after he was arrested following a vehicle stop by RCMP officers in Langley. When the police asked why he was wearing a bullet proof vest, he said because Lamoureux was shot and they were close.

The May 15, 2010 Statement to Constable B during the Mr. Big Investigation

19. In November of 2009, after Thielen had been identified by police as a person of interest in the murders of Lamoureux and Bontkes, Police began an undercover "Mr. Big" investigation in order to gather evidence against him and determine what role he played in the two homicides. Undercover police officers involved Thielen in a fictitious

criminal organization committing simulated criminal activities. The undercover police officers posed as criminal associates. The aim of this investigation was to have Thielen trust his “criminal” associates and ultimately talk about his role in the murders.

20. Cst. B. was the main undercover operator. He developed a very strong friendship and bond with Thielen during the course of the seven month investigation. Cst. B. testified that participating in fake criminal activities provided Thielen with an opportunity to meet other criminal associates and share stories about their past criminal activities.

21. In May of 2010, during one “road trip” from Edmonton to Calgary, Thielen provided Cst. B with a lengthy and detailed account of his role in the murders of Lamoureux and Bontkes. This statement was digitally recorded. He told Cst. B. that he alone shot and killed Lamoureux and Bontkes. Thielen told Cst. B. that the killings occurred after a man named “Wade” had called him up and complained about people robbing his drug lines. Wade told Thielen that he wanted him to kill Lamoureux and Bontkes.

22. With respect to Lamoureux’s murder, Thielen told Cst. B. that he shot Lamoureux in the head and chest while she was walking down the street.

23. Thielen told Cst. B. he had considerable animus toward Bontkes because he was involved in kidnapping and torturing his “sister”, Motola, and that she had been sent to be a prostitute in Alberta.

24. Thielen told Cst. B. how Motola lured Bontkes into a vehicle and took him to a park. While Ms. Motola was driving, Thielen was hiding in the backseat and Bontkes sat in the front passenger seat.

25. When they arrived at the park, Thielen surprised Bontkes from the back seat and forced him out of the car. He made Bontkes get on his hands and knees. He said that he then whispered into Bontkes’ ear, caressed and stroked his head, and kissed him in the ear. Thielen told Bontkes that he would not kill him if he apologized to Ms. Motola for

what he had done to her. However, this was a ruse as Thielen was going to kill Bontkes anyways. He then delivered a number of shots to Bontkes with a .45 colt revolver.

26. Cst. B. said that this conversation with Thielen was relaxed and free-flowing. He said that Thielen did not require any prompting.

July 21, 2010 statement to the "Crime Boss"

27. On July 21, 2010, Thielen and Cst. B. arrived at a Best Western hotel in Burnaby, B.C. so that they could meet the "crime boss". The purpose of this meeting was for Thielen to further discuss his involvement in the murders so that the crime boss would be in a position to take care of Thielen's potential liability. At one point in the meeting, having explained his own involvement in the killings, Thielen mentioned for the first time that another man, "Paulie", was also involved.[1] He stated that "Paulie" and Motola were the ones who shot Bontkes. Thielen said he did not know Paulie's real name, but thought that it was "Eric". The police told Thielen to get Bradshaw to come over to the Best Western so the two could discuss the murders. Bradshaw arrived and then the two engaged in a conversation in the bathroom. That conversation was recorded, but the audio quality was not good because a tap was running for much of the time.

July 23, 2010 statements of Thielen and Bradshaw at Bothwell Park

28. On July 23, 2010, a further meeting was arranged between Bradshaw and Thielen at Bothwell Park in Surrey. The material parts of their conversation took place in the bathroom of the hotel room, where Bradshaw is heard asking questions about the murders and confirming the details of the murders with Thielen. Bradshaw testified at trial that he felt obligated out of fear of the criminal organization and as a favour to Thielen to go along and back Thielen up on what he had told the crime boss about the two murders. Specifically, Bradshaw was "corroborating" Thielen's account for the purpose of enhancing Thielen's credibility with the crime boss. In other words, if Bradshaw could confirm Thielen's account to the crime boss, then Thielen would look more credible.

[1] "Paulie" was Bradshaw's nickname.

July 30, 2010 Statement to Corporal Dhaliwal

29. On July 30, 2010, Thielen was arrested for the first degree murders of Lamoureux and Bontkes. He provided a lengthy statement to Corporal Dhaliwal. In that statement, he repeatedly expressed concerns that if he provided information about the murders he would be putting his life at risk. He said he would be willing to bring down a "whole bunch of people" if they arranged for his name to be changed. At the same time, he stated that could not give the "whole story" because the dates were "so foggy".

30. During this statement Thielen described the murders but did not specifically identify Mr. Bradshaw as Bontkes' shooter. He only referred to the participants by numbers.

July 31, 2010 Statement to Sargent Campbell

31. Following his statement to Corporal Dhaliwal, Thielen approached Sargeant Campbell to provide another statement. In this statement, he provided a detailed account of Johnny Wade's involvement in both murders as he was the one who had hired Thielen to carry out the murders.

32. Thielen stated that he was Wade's "enforcer" and that Wade asked him to kill both Lamoureux and Bontkes because they had ripped off his drug line. Thielen and Wade then made arrangements to acquire both a gun and ammunition to be used in both killings.

33. Despite Thielen's statement implicating Wade for both murders Wade was never charged. According to Sergeant Campbell, this was because the only evidence implicating Wade came from Thielen and there was "little else to corroborate" Thielen's version of events. [T. Vol.4, p.731, ll.2-4; A.B., Vol.6, p.1008]

August 2, 2010 "re-enactment" statement

34. On August 2, 2010, about a year and a half after the murders, Thielen provided another statement to police during a “re-enactment”. Thielen told Constable Dadwal that he was with Mr. Bradshaw when Lamoureux was killed. He claimed that Mr. Bradshaw arranged to sell drugs to Lamoureux , and that when she arrived, Thielen shot her. The statements Thielen made to Constable Dadwal in the course of the re-enactment were not taken under any oath or affirmation. This is likely because the focus of the investigation at that time was Thielen himself, and not Bradshaw or on anybody else.

35. Thielen said that he did not shoot Bontkes. For the first time, he expressly pointed the finger at Bradshaw and claimed that Bradshaw was the only one who shot Bontkes. (Importantly, this was also the first time Thielen referred to Bradshaw as “Rob”, Bradshaw’s real name).

36. Thielen also told Constable Dadwal that, after the murder of Bontkes, a man named Steve Lambert bought the gun that was used in both murders from him. Thielen said that he, in turn, gave the money from the sale of the gun to Wade.

37. Constable Dadwal testified at trial that he was aware that Thielen might have made some other statements about his involvement in the murders and that they may have differed from the statements he made during the re-enactment. Constable Dadwal testified that he did not confront or seek any explanation from Thielen in regards to any of those previous contradictory statements. Constable Dadwal testified that he did not know about Thielen’s prior statement to Constable B which Thielen stated that he alone shot Lamoureux and Bontkes.

Thielen’s refusal to testify

38. Following his refusal to testify, the Crown sought to admit only Thielen’s August 2, 2010 “re-enactment statement” for the truth of its contents under the principled exception to the hearsay rule. The trial judge found that Thielen’s statement contained circumstantial guarantees of trustworthiness and ought to be admitted for the truth of its contents. In so doing, he noted that:

(a) Safeguards could be put in place at the trial to ensure the trustworthiness of the Thielen's statement, such as allowing defence counsel to cross-examine the recipient of Thielen's statement, Constable Dadwal, on the previous contradictory statements Thielen had made about the murders (*Reasons,* at para. 61);

(b) Thielen's statement was a free-flowing and was made by him that without any hope of reward or any ulterior motive other than to tell the truth. Rather, the trial judge found that Thielen's re-enactment statement was, in effect, a statement against interest and so it was more likely truthful (*Reasons,* at para. 46);

(c) The details of Thielen's statement were consistent with the forensic evidence in how both Lamoureux and Bontkes were shot (*Reasons,* at para. 45); and

(d) The details of Thielen's statement were consistent with parts of the statements that Bradshaw had made at the Best Western and at Bothwell Park (*Reasons,* at para.49)

39. After the trial judge admitted Thielen's "re-enactment" for the truth of its contents, defence counsel sought to have the May 15, 2010 statement to Cst. B admitted for the truth of its contents so the jury could assess whether or not to accept Thielen's version of events implicating Mr. Bradshaw in the murders. The trial judge refused. He found that Thielen's statement Cst. B. statement carried "little inherent indicia of reliability" because it was made in the context of a Mr. Big investigation, where Thielen was trying to impress a criminal associate in order to receive potential rewards (*Reasons on Admissibility of Second Statement,* Applicant's Record, p.27, at para.11).

40. Mr. Bradshaw was ultimately convicted of two counts of first degree murder.

On Appeal

41. The Court of Appeal was unanimous in finding that the trial judge had committed a number of errors in admitting the re-enactment statement. In so doing, the Court of Appeal held aspects of the trial judge's reasons "demonstrated a fundamental misunderstanding of the role of the judge at the threshold gatekeeping stage" (*B.C. Court of Appeal Decision ("BCCA Decision*"), Applicant's Record, p.42, at para.38).

42. Contrary to the trial judge's decision, the Court of Appeal held that there were no safeguards available that could guarantee the trustworthiness of the statement. The Court of Appeal found that "safeguards" in this context did not consist of things that the court could do to enhance the trustworthiness of the statement, like, as the trial judge did here, allowing the recipient of the statement to be cross-examined at trial. Rather, such "safeguards" referred to things done when the statement itself was taken, such as the statement being made under oath or affirmation or providing the maker of the statement with a warning as to the consequences of lying. The Court of Appeal therefore held: "[t]he judge looked at safeguards that could be imposed at trial, which do not assist in ascertaining threshold reliability" (*BCCA Decision,* p.40, at para.30).

43. The Court of Appeal held that Thielen's statement was not inherently reliable and did not contain any circumstantial guarantees of trustworthiness. A key consideration, which the Court of Appeal emphasized throughout its decision, was that Thielen had provided so many contradictory statements concerning the murders in the past (*BCCA Decision,* paras. 4, 34, 36, 37 38). The most notable of which was Thielen's statement to Cst. B. where he stated in great detail how he alone shot and killed both Lamoureux and Bontkes. As the Court of Appeal held (at para.34):

> The context is all important. Mr. Thielen initially took full responsibility for the murders in a "free-flowing" conversation he had with the undercover operator. He described, in considerable detail, how the people were killed by him. Sometime later he implicated Mr. Bradshaw. None of the evidence referred to above adds any circumstances from which a jury could rely on the re-enactment for its truth, without cross-examination of Mr. Thielen on the other statements he made regarding the murders without implicating Mr. Bradshaw.

44. The Court of Appeal found that because Thielen had given a number of inconsistent statements, "[t]he difficulty was that it was not possible, on its face, to determine which statement was the truth and which was a lie". In these circumstances, the Court of Appeal concluded that the dangers of admitting Thielen's re-enactment statement "could only the ameliorated by cross-examination" (*BCCA Decision,* p.42, at para.38).

45. The Court of Appeal allowed the appeal and ordered a new trial.

II. ISSUE

46. The issue on this leave application is whether is whether the Court of Appeal's decision raises an issue of national importance sufficient to require the guidance and intervention of this Court.

III. ARGUMENT

47. The Court of Appeal's decision does not raise any issues of national importance that justify granting leave. The Court of Appeal decided the case based on well-established legal principles which were distilled from this Court's decisions in *R. v. Khelawon,* 2006 SCC 57, *R. v. Starr,* 2000 SCC 40, *R. v. Smith,* [1992] 2 S.C.R. 915 and most recently in *R. v. Youvarajah,* 2013 SCC 41. All of these decisions amply support the conclusion unanimously reached by the Court of Appeal in this case.

48. There is no disagreement between or among courts in Canada on the relevant legal principles. There is also no uncertainty on the general or specific points of law involved in this case. There are no issues of national importance.

49. The applicant does not really suggest that there is any real confusion or inconsistency in the relevant law. Rather, on this leave application, the applicant uses the opportunity to allege a number of errors on the part of the Court of Appeal and then submits that these errors somehow "require this Court's attention". Merely alleging an error and then submitting that the error requires this Court's attention is insufficient to demonstrate the case for leave.

50. More importantly, the applicant's complaints about the B.C. Court of Appeal's decision are unfounded and, with respect, are the product of a misunderstanding or a mischaracterization the Court of Appeal's decision.

The Court of Appeal's decision is a fact-specific application of a well-established legal framework

51. There is no confusion or uncertainty concerning the governing principles of the principled approach to the hearsay rule. The framework for the admissibility of a statement under the principled approach is clearly set out in recent jurisprudence from this Court. There is no need to either revisit the governing approach, let alone to tweak or refine it.

52. In *R. v. Khelawon,* this Court extensively reviewed the framework for considering the admissibility of statements under the "principled approach" to the hearsay rule, which was first articulated in *R. v. Starr.* All hearsay is presumptively inadmissible. If hearsay evidence does not fall within a traditional exception, it can be considered under the principled approach where the focus is on necessity and reliability of the evidence. There was no dispute about necessity in this case. It was accepted that Thielen's statement met the necessity requirement because he refused to testify.

53. Reliability is established where the hearsay statement exhibits sufficient *indicia* of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.

54. The "optimal means" of testing the truth of a statement is by cross-examining the declarant in open court. However, where this is not possible, threshold reliability is established where: (1) notwithstanding the hearsay form of the statement, truth and accuracy can still be sufficiently tested; or (2) there is "no real concern" about the truth of the statement because of the circumstances in which it came about – in other words – the statement is "inherently trustworthy" (*R. v. Khelawon*, at para. 62-63; *Youvarajah,* at para.30).

55. These two methods of determining reliability are not mutually exclusive. In *Khelawon,* this Court held that necessity and the various elements of threshold reliability were interrelated and worked together.

56. In this case, it was common ground that the truth and accuracy of Thielen's statement could not be adequately tested.

57. In addition, as the Court of Appeal found, there were no safeguards in place surrounding the making of Thielen's re-enactment statement that would assist in establishing any inaccuracies or fabrications. That is to say, the re-enactment statement was not made under oath, nor were there any warnings given to Thielen about the consequences for being untruthful. The Applicant complains about the "safeguards" aspect of the Court of Appeal's decision, but does not point to any safeguards in this case, let alone any significant ones that would have added to the reliability of Thielen's statement in any way. It is important to recall that the discussion of "safeguards" in this case relates to the trial judge's error in finding that adequate "safeguards" consisted of allowing defence counsel to cross-examine Cst. Dadwal, who was the recipient of Thielen's re-enactment statement. This was an utterly meaningless exercise when it came to assessing the truth or reliability of Thielen's statement, and the applicant has not suggested otherwise.

58. Ultimately, in determining the inherent trustworthiness of a statement, this Court held in *R. v. Couture,* 2007 SCC 28, that there must be a "certain cogency about the statements that removes any real concern about their truth and accuracy". This is generally a high standard. Indeed, in many of the "principled exception" cases this Court has considered in recent years, the hearsay statements were ruled inadmissible (see, *Khelawon, Couture, Youvarajah*).

The importance of context and Thielen's many contradictory statements

59. In determining whether Thielen's statement was inherently trustworthy, the Court of Appeal focused on the context of the case, stating "*the context is all important*" (at para.34). This is entirely consonant with the approach in *Khelawon* where this Court stated (at para.93): "*whether certain factors will go only to ultimate reliability will depend on the context*". Such a case specific, contextual inquiry is necessary because hearsay comes in a variety of forms and contexts.

60. Here, the Court of Appeal rightly pointed out that the context included the many contradictory statements Thielen had provided before his final re-enactment statement. The re-enactment statement could never be described as a spontaneous "one off" statement. Also, it was not at all contemporaneous with the events – it was given to police 18 months after the killings and provided only when Thielen was himself arrested for the first-degree murders. In fact, the re-enactment statement was one of many previous statements that Thielen made about the murders. The various statements were exceptional in their diversity and their degree of contradiction.

61. For example, Thielen first denied all involvement in Lamoureux's murder claiming that he had an alibi on the night that she was killed. Later he related in great detail how he alone shot and killed both Lamoureux and Bontkes. Then he stated that Bradshaw and Motola were the ones who had killed Bontkes. And finally, in the re-enactment statement, he said that Bradshaw alone had killed Bontkes and assisted him in the Lamoureux killing.

62. These contradictory statements went to the core of whether there were any concerns about the truthfulness of Thielen's statement, particularly as it related to him implicating Bradshaw in the murders of Lamoureux and Bontkes. The most glaring of these contradictory statements concerning <u>who</u> killed Lamoureux and Bontkes was Thielen's statement to Cst. B in May of 2010 during the "Mr. Big" investigation. In that statement, Thielen explained in great detail to an undercover police officer that he alone shot and killed both Lamoureux and Bontkes. The undercover officer, Cst. B., also testified that his conversation with Thielen on this occasion was free-flowing and that Thielen did not require any prompting.

63. The trial judge, however, relied on the "free flowing" nature of the re-enactment statement to find that this suggested that it was inherently reliable.

64. In this context, given the nature of the contradictory statements, the Court of Appeal held that it "was not possible, on its face, to determine which statement was the

truth and which was a lie" and only cross-examination could provide the trier of fact with an adequate basis upon which to assess the truth of the re-enactment statement (*BCCA Decision,* p.42, at para.38)

65. This was a fact-specific finding and one that was well supported by the jurisprudence. In *Smith* (a decision which was and affirmed in *Khelawon,* at para.72), Chief Justice Lamer for the Court concluded that a hearsay statement of the deceased was inadmissible because he could not say that he was "without apprehensions" that the deceased was mistaken about what she said in her "third phone call". This aspect of *Smith* has been reaffirmed *Khelawon* and again *Couture* where this Court found the reliability of the hearsay statement rested on whether there is "no real concern" about the truth and accuracy of the statement. Here, it could not be said that there were "no real concerns" or no "apprehensions" concerning the truth and accuracy of Thielen's re-enactment statement. If anything, considering all that he said about the murders over the course of 18 months, Thielen's final re-enactment statement raised more questions than answers, and therefore very real concerns and serious apprehensions.

66. In the end, all the Court of Appeal's decision represents is an application of settled legal principles of hearsay to the unusual circumstances of this one case. Unusual, because the declarant was an admitted killer who refused to testify, who was cited in contempt, and who had provided hours of contradictory statements to different police officers.

67. That the Court of Appeal's decision in this case is a fact specific application of well-established principles is further supported by the Alberta Court of Appeal's recent decision in *R. v. Campeau,* 2015 ABCA 210. That case concerned the admissibility of a Mr. Big statement. In finding the statement admissible, Côté J.A. addressed the appellant's reliance on the Court of Appeal's decision herein by noting that it was not only of no assistance to the appellant, but also that it was "*quite fact and situation specific*" (at para. 15). While the applicant relies on *Campeau* on this leave application,

that decision actually undermines the applicant's position as it confirms the fact specific nature of this case and how no broader legal principles can be extracted from it.

68. The same goes for the applicant's reliance on *R. v. Tingle,* 2015 SKQB 184, a recent Mr. Big case from Saskatchewan. In ruling a Mr. Big statement admissible, the trial court also addressed the Court of Appeal's decision herein and held that it was too factually dissimilar to have any relevance to the circumstances of that case. (see paras. 173). Again, this case does not help the applicant in its request for leave as it underlines the context-specific nature of this case and how it has no wider implications for the law.

Motive was one factor properly factored into the analysis, but it was not decisive

69. The applicant also bases this leave application on the issue of whether there is an elevated standard of proof for the admissibility of hearsay statements of an unsavoury witness who, like Thielen, had a motive to lie. The applicant further contends that as a result of the Court of Appeal's decision, a hearsay statement of a "*Vetrovec* witness" can never be admitted in the absence of cross-examination. This is a mischaracterization of the Court of Appeal's decision. The Court of Appeal did not find that there is any such elevated standard of proof, and nor did it apply such a standard. Moreover, the Court of Appeal certainly did not find that Thielen's hearsay statement could not be admitted <u>because</u> he was a *Vetrovec* witness.

70. As noted above, the primary factor that led the Court of Appeal to conclude that Thielen's re-enactment statement was not inherently reliable was the previous contradictory statements that Thielen had made. The applicant ignores this obviously important contextual factor which the Court of Appeal found undermined the reliability of Thielen's statement (*BCCA Decision,* at paras. 34, 36, 38).

71. The fact that Thielen was also a highly unsavoury character with a strong motive to lie and shift responsibility away from himself was just a further factor that reinforced why his hearsay statement did not meet the high standard for admissibility. To the

limited extent that the Court of Appeal relied on Thielen's motive to lie, such reliance was entirely legitimate and in keeping with recent jurisprudence from this Court.

72. This Court has held on more than one occasion that the motive of the declarant, though by no means determinative, is still an important consideration in determining the inherent reliability of a statement at the threshold stage. In *R. v. Youvarajah,* this Court held that a hearsay statement of a co-accused who pleaded guilty to second-degree murder, and in so doing, implicated his co-accused in the murder was not inherently reliable, in part, because of the declarant's "strong incentive to minimize his role in the crime and to shift responsibility to the appellant, a co-accused, in order to obtain a favourable outcome" (at para.33; see also, *R. v. Blackman,* [2008] 2 S.C.R. 298, at para. 42).

73. Thielen's statement was even less reliable than the hearsay statement ruled inadmissible in *Youvarajah.* The hearsay statement tendered in *Youvarajah* was in the form of a prior inconsistent statement and the declarant was still available to be cross-examined at trial. In spite of that, the statement was ruled inadmissible. This was not the case here as Thielen was not available to testify and be cross-examined. In addition, there was no indication that the declarant in *Youvarajah* provided any prior contradictory statements, let alone anything close to the contradictory statements that Thielen had made.

Applicant's reliance on *R. v. U.(F.J.),* [1995] 3 S.C.R. 764 is misplaced

74. The applicant submits that the Court of Appeal was incorrect to rule the statement inadmissible and instead suggests that this case is most similar to *R. v. U. (F.J.),* [1995] 3 S.C.R. 764, where a prior inconsistent statement of a recanting witness in a sexual assault trial was admitted. The two cases are, however, in no way similar. *U.(F.J.)* concerned admissibility of a statement made by a person who was cross-examined at trial. In finding the statement admissible, this Court stressed that the availability of the complainant to be cross-examined was a key factor, which in addition to other factors, established threshold reliability and admissibility.

75. This was, quite clearly, not the case here. Thielen refused to testify. On top of that, there were no alternative means of testing his evidence, and there were no safeguards in place to determine the truth and accuracy of the statement. There would be no useful purpose in granting leave so the parties could engage in a fruitless debate about whether *U.(F.J.)* is comparable to this case or not, a discussion that has already been undertaken by this Court in *Khelawon* (see, paras. 44 and 45) where this Count cautioned against a "rigid pigeon-holing analysis".

The "extrinsic" evidence did little or nothing to establish reliability in the context of this case

76. The trial judge found that Thielen's statement was inherently reliable because it was consistent with forensic evidence: the number of shots fired in each of the murders, how the bodies were positioned, and the gun that was used. The trial judge also noted that Thielen's hearsay statement was consistent with the "minute details of how the murders occurred", such as, the weather on both nights, that a hedge was pruned where Lamoureux was killed, and the state of the grass in the park where Bontkes was killed (*Reasons,* at paras.45-46).

77. Contrary to the applicant's assertion, this was not "extrinsic" corroborating evidence and was not capable of even potentially amounting to evidence that would guarantee the truthfulness of Thielen's statement to the extent that it implicated Bradshaw. Thielen always admitted to being present during the murders, and, at other times, he admitted to actually committing both offences. He, of course, knew of the "minute details" of the killings. All Thielen had to do was add Bradshaw into his scenario to make an otherwise convincing version of events that, as the trial judge found, was corroborated by the crime scene evidence. The Court of Appeal rightly found that the forensic evidence relied on by the trial judge was essentially worthless when it came to determining the reliability of Thielen's hearsay statement implicating Bradshaw (*BCCA Decision,* at para.40).

78. This Court has already recognized that where an accomplice implicates the accused by providing certain details of the offences, this cannot amount to providing corroborating or independent evidence of the accused's participation. In *R. v. Smith,* [2009] 1 S.C.R. 146, it was held that an accomplice is in a particularly good position to concoct a story that falsely implicates the accused precisely because he can provide minute, confirmable details of the offences (at para.15).

79. The applicant also complains about the Court of Appeal's treatment of the trial judge's reliance on Bradshaw's own prior statements to establish threshold reliability. There is no merit to these complaints and they do not amount to issues of national importance.

80. The undeniable fact is that in none of his statements, did Bradshaw implicate himself to the extent that Thielen had in his re-enactment statement where he, for the first time, identified Bradshaw by name as the sole shooter on the Bontkes homicide.

81. In fact, in one of the statements (at the Best Western), Thielen himself referred to the Lamoureux killing – where he admittedly shot and killed the deceased – as "*my first one*", suggesting that the Bontkes homicide was, in effect, his "second one". That Thielen shot and and killed both individuals is supported by the undisputed evidence that Thielen was hired by Johnny Wade kill both Lamoureux and Bontkes. This was also supported by Thielen's own detailed admission to Cst. B, as detailed above, (*Video Transcript,* p.112, at line 1996).

82. In assessing the effect of Bradshaw's statements to the reliability analysis, it is important to, again, keep in mind the context of this case. Thielen's re-enactment statement was highly prejudicial and made by an accomplice, who not only had a motive to lie, but who had made other statements which brazenly contradicted the material parts of his hearsay statement. For this reason, the Court of Appeal, quite properly, held that given the nature of Bradshaw's statements, they did not rise to such significance so as to render Thielen's statement inherently reliable. After all, the presence or absence of corroborating evidence, just like motive, is merely one factor to

be weighed and considered in the overall circumstances of the case in determining threshold reliability (*Khelawon,* at para.108).

83. No useful purpose would be served in exploring these fact-specific issues or inquiries on a national level.

Appellate deference not an issue of national importance

84. There is finally no issue of national importance concerning the deference owed to a trial judge's decision to admit hearsay evidence at the threshold stage. It is well-established that deference is owed to a trial judge's decision to admit hearsay evidence absent an error in principle (*Youvarajah,* at para. 44). Here, the Court of Appeal determined that the trial judge committed a number of errors in principle and most importantly that he "demonstrated a fundamental misunderstanding of the role of the judge at the threshold gatekeeping stage" (*BCCA Decision,* at para.38). In these circumstances, the Court of Appeal was not entitled to treat the trial judge's determination with any deference.

IV. SUBMISSIONS ON COSTS

85. The respondent makes no submissions on costs.

V. ORDER SOUGHT

86. That the application for leave be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Richard Fowler, Q.C.
Eric Purtzki
Counsel for the respondent

September 4th, 2015
Ottawa, Ontario

VI. LIST OF AUTHORITIES

Paragraph(s)

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