SUPREME COURT OF NOVA SCOTIA

Citation: *Hutchinson v R L Macdonald Investments Limited*, 2018 NSSC 248

Date: 20181005
Docket: Ken No 468775
Registry: Kentville

Between:

Frances Leona Hutchinson

Applicant

v.

R L Macdonald Investments Limited and
2376552 Nova Scotia Limited

Respondents

Judge:	The Honourable Justice Gregory M. Warner
Heard:	September 28, 2018, in Kentville, Nova Scotia
Final Written Submissions:	October 2, 2018
Counsel:	Richard Dunlop with Richard Jordan, for the Respondents, RL Macdonald Investments and 2376552 Nova Scotia Limited
	Randall Balcome Q.C., for the Applicant, Frances Hutchinson

By the Court:

Motion to exclude hearsay evidence

[1] This decision deals with the respondents' motion to exclude some of the hearsay evidence of the deceased principal and operating mind of the respondents contained in affidavits and exhibits in this Application in Court, scheduled for a four-day hearing in November 2018.

[2] The applicant claims that in October 2015, shortly after R. Douglas Macdonald ("Mr. Macdonald") was diagnosed with terminal pancreatic cancer, he made an oral promise to her, his long-time assistant, to cause the respondents to pay her a generous severance, equal to one month pay for every month of service since 2001, upon the likely wind up of his businesses some time after his death.

[3] Mr. Macdonald died on July 10, 2016. The applicant was terminated on November 21, 2017.

[4] The parties have filed 15 affidavits: five by the applicant and ten by the respondents. Most of the affidavits contain hearsay of Mr. Macdonald.

[5] In this motion, the respondents seek to exclude for the truth of their contents as hearsay the following oral and written statements, together with any reference to these "impugned statements" in affidavits or other documents:

1. In the applicant's first affidavit, the paras. 34, 35 and 36, which state:

> 34. Within a few days of the above medical diagnoses, Douglas at the RLMIL office in Kentville told him that he had been diagnosed with cancer and that the prognosis was not optimistic. Douglas then told me that he was going to fight it; however, in the worst-case scenario and something happened to him the assets of the RLMIL and the Numbered Company would have to be sold which would be a substantial task. Douglas also told me that he wanted to make sure that I was well looked after and indicated that when my employment with the Respondents ended I would receive a severance of one month for every month of service. Douglas also stated to me that he was unsure of how the treatment would impact on his abilities to work and function, and that he and Fay (his wife) might require my personal experience over the ensuring few months. I then thanked Douglas

> and told him I was grateful and would do everything I could to help in the process and work that had to be done.
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> 35. At approximately the same time, Douglas told me that he had started to prepare detailed notes of how his affairs were to be organized in the event that he passed away. These notes, he advised me, were for Fay and his son, Bruce Macdonald ("Bruce"), outlining the details of the Respondents' and related entities' business affairs and assets. Prior to Douglas' death I saw these notes on his computer screen at various times but did not read them or see the actual notes until after his passing on July 10, 2016.
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> 36. I was also told by Douglas that he had at various times carefully reviewed the notes and amended the notes with red lettered additions.

2. From affidavits filed by three persons on behalf of the applicant, that the applicant had advised them of Mr. Macdonald's generous severance agreement.

3. Any portions of the two detailed memoranda prepared and addressed by Mr. Macdonald to his wife and son – the first version e-mailed to his son on November 15, 2015 and the annotated version e-mailed on January 22, 2016, which memoranda both include at p. 8 the following:

> It is also the intent to pay Frances a severance package equal to one month's salary (current) times the months she has been employed by the company beginning in 2001 – this should be done in consultation with Duane at GT re tax implications. Her termination should not be done in haste as her services are invaluable and again only in consultation with Duane even if on a part time basis. She is due for a salary increase effective January 1/16 – suggest 3%.

[6] The respondents submit that the verbal statements made by Mr. Macdonald to the applicant and the written memoranda are hearsay; while they meet the principled test of necessity, they do not meet the threshold reliability test most recently described in *R v Bradshaw*, 2017 SCC 35 ("*Bradshaw*").

[7] In reply, the applicant makes five submissions:

1. The determination of admissibility should wait until the full evidence is heard and assessed at the hearing scheduled for November 26 to 29, 2018.

2. That the statements made verbally to the applicant, and contained in the two memoranda, attached to e-mails to Bruce Macdonald, son of Mr.

Macdonald, are only partially hearsay and, in any event, most of the affidavits filed on behalf of the respondents contain statements that are "technically hearsay" but meet the threshold test for admissibility. The respondent says that the affidavits of the three deponents, who relay what the applicant told them that Mr. Macdonald told her, were not intended to be introduced to prove the truth of their contents, but rather the fact that the statements were made.

3. The hearsay evidence is admissible under the traditional or categorical hearsay exceptions as declarations against interest per *R v Demeter*, [1978] 1 SCR 538 ("*Demeter*"), or as statements about his mental state, which include his "present intention to do a future act".

4. If the hearsay is not admissible under a traditional exception, it is admissible on the principled basis of necessity and reliability.

5. Section 45 of the *Nova Scotia Evidence Act*, to the effect that in any action or proceeding by or against heirs, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a judgment on his own testimony with respect to dealings, transactions or agreements with the deceased, unless such testimony is corroborated by other material evidence. She submits that the written memoranda and the totality of the circumstances of the case, including the affidavits filed by the respondents, corroborate the testimony of the applicant.

[8] With respect to the applicant's first issue, the respondents' motion for the determination of the admissibility of hearsay evidence for its truth was properly brought by this prehearing motion. This was requested by the court during the motion for directions hearing on March 5, 2018. The extensive case law regarding admissibility of hearsay for the truth of its contents, almost all of which was decided in the criminal context, consistently advocates for the determination of threshold admissibility in a separate *voir dire*.

[9] During oral arguments, counsel for the applicant conceded this Application is against corporate respondents, and not Mr. Macdonald' estate, and therefore s. 45 of the *Nova Scotia Evidence Act* is not applicable.

[10] At the hearing of this motion, neither party contested the necessity of the admissibility of hearsay evidence for its truth by reason of Mr. Macdonald' death.

[11] The real contest is whether the oral statements, alleged by the applicant to have been made by Mr. Macdonald, and the two memoranda written by Mr.

Macdonald constitute traditional exceptions to the admissibility of hearsay evidence for their truth and, if so, what affect does that have on who has the onus and burden of proof. Alternatively, if neither the oral statements nor written memoranda constitute traditional exceptions, the question becomes whether the statements and memoranda, in the context of all the affidavits filed and before the court, meet the principled approach to determining threshold reliability.

The Law Respecting Hearsay

[12] *Civil Procedure Rule 5.17* provides that the rules of evidence, including the rules about hearsay, apply in the hearing of an application and to affidavits filed for the hearing.

[13] Hearsay is an out-of-court statement that is offered to prove the truth of its contents. The essential defining features of hearsay are:

1. The fact that an out-of-court statement is adduced to prove the truth of its content.

2. The absence of a contemporaneous opportunity to cross-examine the declarant.

[14] This definition is more thoroughly summarized in paras. 1 to 4 in *R v Khelawon*, 2006 SCC 35 ("*Khelawon*"), (and essentially repeated in different words in *Bradshaw*, with an additional focus on corroboration at paras. 33 to 57):

> 1 This appeal turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliability. In particular, guidance is sought on what factors should be considered in determining whether a hearsay statement is sufficiently reliable to be admissible. This Court's decision in *R. v. Starr*, [2000] 2 S.C.R. 144, … has generally been interpreted as standing for the proposition that circumstances "extrinsic" to the taking of the statement go to ultimate reliability only and cannot be considered by the trial judge in ruling on its admissibility. The decision has generated much judicial commentary and academic criticism on various grounds, including the difficulty of defining what constitutes an "extrinsic" circumstance and the apparent inconsistency between this holding in *Starr* and the Court's consideration of a semen stain on the declarant's clothing in *R. v. Khan*, … [1990] 2 S.C.R. 531, the declarant's motive to lie in *R. v. Smith*, … [1992]

2 S.C.R. 915, and most relevant to this case, the striking similarities between statements in *R. v. U. (F.J.)*, … [1995] 3 S.C.R. 764.

2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

3 The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary

> in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.
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> 4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

[15] There are four specific concerns related to hearsay evidence. They relate to the declarant's perception, memory, narration and sincerity. In *R v Baldree*, 2013 SCC 35 ("*Baldree*"), at para. 32, Justice Fish wrote:

> [32] First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.

[16] In *R v Clarke*, 2013 MBQB 26 ("*Clarke*"), affirmed 2013 MBCA 98, the court provided a helpful non-exhaustive list of factors to assist in the analysis of sincerity, perception, memory, narration and external circumstances.

[17] Prior to the introduction of the principled approach to hearsay evidence, hearsay was governed by common-law principles that precluded the admission of hearsay except for a lengthy list of exceptions.

[18] The hearsay exceptions are governed by the same principles that underline the hearsay rule. The hearsay rule is in place to improve accurate fact finding by

excluding hearsay statements that may well be unreliable or cannot be adequately tested. In this way, the hearsay rule facilitates the search for truth. Hearsay exceptions are also in place to facilitate the search for truth by admitting into evidence hearsay statements that are reliably made and can be adequately tested.

[19] Hearsay evidence may be admitted under an existing traditional hearsay exception or may be admitted on a case by case basis according to the principles of necessity and reliability. Necessity and reliability are the guiding principles for the admissibility of all hearsay. The existing hearsay exceptions must comply with these principles.

[20] If the traditional hearsay exception does not conform to the principled approach, it must be modified, where possible, to bring it in compliance.

[21] The necessity requirement is satisfied where it is reasonably necessary to present the hearsay evidence in order to obtain the declarant's version of events. Reliability refers to threshold reliability. This is for the trial judge. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits significant indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.

[22] The principles of necessity and reliability are not fixed standards. They are fluid and work together. If an item of evidence exhibits high reliability, then necessity can be relaxed, and similarly if necessity is high then less reliability may be required.

[23] Substantially all the Supreme Court of Canada's caselaw respecting hearsay statements has been made in the context of criminal law. Criminal law has a constitutional dimension, which includes the accused's right to make full answer and defence, and the right to a fair trial. The standard of proof in criminal law is proof beyond a reasonable doubt. The standard of proof in civil law is on a balance of probabilities. This circumstance affects the contextual analysis of necessity and threshold reliability.

[24] David M. Paciocco and Lee Stuesser, *The Law of Evidence, Seventh Edition*, (Toronto: Irwin Law, 2015), at p. 127 describes the framework for considering the admissibility of evidence as follows:

> Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

> A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
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> In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
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> If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[25] To this analysis must be added the interpretation in *Bradshaw* of what corroborative evidence assists in assessing threshold reliability.

[26] Admitting evidence under the principled approach or a hearsay exception does not trump other rules of evidence. A hearsay statement that contains or repeats inadmissible hearsay is not admissible.

[27] As noted, whether evidence is sought to be admitted solely on the basis of the principled approach, or upon the basis of a traditional hearsay exception, the evidence must meet the requirements of necessity and threshold reliability.

[28] Necessity is founded on the need to get at the truth and has been described as a form of the "best evidence" rule.

[29] The unavailability of the maker of the statement is the most common reason why hearsay evidence is necessary. As in the *Khelawon* case, necessity was conceded in this case.

[30] While the assessment of threshold reliability has evolved through a series of Supreme Court of Canada decisions, what has not changed is that the function of the trial judge is limited to determining whether the particular 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. The determination of ultimate reliability is reserved to the trier of fact (*R v Hawkins*, [1996] 2 SCR 1043, at para. 175).

[31] In *Khelawon*, the court stated that the reliability requirement will generally be met on two different grounds, neither of which excludes the other:

> 62 One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came

about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [— 1420, p. 154]

63 Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. …

[32] Because hearsay comes in a wide variety of forms and contexts, there is no set list of factors that may influence reliability. In *Khelawon*, the court advocated a functional approach, which focuses on the particular dangers raised by the hearsay evidence and the circumstances that go to negate those dangers.

[33] Paciocco and Stuesser discuss the first ground, inherent trustworthiness, beginning at p. 135 in their text, and the second ground beginning at p. 138. Their checklist, and that in *Clarke*, form useful guides to the assessment of each of the statements and documents sought be excluded as hearsay in this motion.

[34] Effectively *Khelawon* broadened the matrix upon which the threshold reliability analysis is made by including substitutes for testing the evidence (called procedural reliability in *Bradshaw*), other than the evidence's inherent reliability. This test does not focus on whether there is reason to believe the statement is true but rather on whether the trier of fact is able to rationally evaluate or test the evidence.

[35] The significance of *Bradshaw* is in its analysis of substantive reliability by the circumstances in which it is made and whether there exists confirmatory or corroborative (as opposed to conflicting or neutral) evidence.

[36] The court in *Bradshaw* summarized the standard for substantive reliability at paras. 30 and 31:

> [30] A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (*Khelawon*, at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).
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> [31] While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (*Smith*, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith*, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).

[37] The real addition to the law begins at para. 33, where, in the context of a criminal proceeding, the court sets out a new test for using corroborative evidence to establish substantial reliability:

> [33] With these principles in mind, I turn to the issue at the heart of this appeal: When and how can a trial judge rely on corroborative evidence to conclude that substantive reliability is established?
>
> [34] The Crown submits that threshold reliability involves a consideration of all the corroborative evidence that supports the truthfulness of a statement, including evidence that does not implicate the accused, or directly confirm the disputed aspect of the statement. The Crown explains that this approach to corroboration is aligned with other areas of the law, including corroboration when assessing the ultimate

reliability of hearsay statements, the ultimate reliability of unsavoury witness statements, and the threshold reliability of Mr. Big statements.

[35] In contrast, the respondent Bradshaw submits that the trial judge can only consider evidence that corroborates the *purpose* for which a hearsay statement is tendered, and notes that the re-enactment statement was tendered to implicate him in the murders.

[36] In my view, the Crown's position that "a uniform definition of confirmatory evidence" should be employed "at both the threshold and ultimate reliability stages" is untenable because it misconstrues the relationship between threshold and ultimate reliability (A.F., at para. 96). It also misconstrues the relationship between threshold reliability and probative value.

[37] In *R. v. Starr*, 2000 SCC 40, … this Court held that corroborative evidence could not be considered in assessing the threshold reliability of hearsay. This bright-line rule was created to ensure that the trial judge did not invade the province of the trier of fact by pre-determining a hearsay statement's ultimate reliability (para. 217).

[38] *Khelawon* overturned *Starr* on this point. Charron J. explained that, in appropriate cases, corroborative or conflicting evidence can be considered in assessing threshold reliability (paras. 93-100). *Khelawon* established that "an item of evidence [that] goes to the trustworthiness of the statement . . . should no longer be excluded simply on the basis that it is corroborative in nature" (*Blackman*, at para. 55 (emphasis added)). But "[i]t is important to emphasize that *Khelawon* did not broaden the scope of the admissibility inquiry; it merely refocused it" (*Blackman*, at para. 54). While *Khelawon* overturned the prohibition on considering corroborative evidence in the admissibility inquiry, it reaffirmed the distinction between threshold and ultimate reliability (para. 50; *Blackman*, at para. 56).

[39] The distinction between threshold and ultimate reliability, while "a source of confusion", is crucial (*Khelawon*, at para. 50). Threshold reliability concerns admissibility, whereas ultimate reliability concerns reliance (*Khelawon*, at para. 3). When threshold reliability is based on the inherent trustworthiness of the statement, the trial judge and the trier of fact may both assess the trustworthiness of the hearsay statement. However,

they do so for different purposes (*Khelawon*, at paras. 3 and 50). In assessing ultimate reliability, the trier of fact determines whether, and to what degree, the statement should be believed, and thus relied on to decide issues in the case (*Khelawon*, at para. 50; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 35-36). This determination is made "in the context of the entirety of the evidence" including evidence that corroborates the accused's guilt or the declarant's overall credibility (*Khelawon*, at para. 3).

[40] In contrast, in assessing threshold reliability, the trial judge's preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process (*Khelawon*, at para. 49; see also H. Stewart, "*Khelawon*: The Principled Approach to Hearsay Revisited" (2008), 12 *Can. Crim. L.R.* 95, at p. 106). At the threshold stage, the trial judge must decide on the *availability* of competing explanations (substantive reliability) and whether the trier of fact will be in a position to choose between them by means of adequate substitutes for contemporaneous cross-examination (procedural reliability). For this reason, where procedural reliability is concerned with whether there is a satisfactory basis to rationally *evaluate* the statement, substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to *reject* alternative explanations for the statement, other than the declarant's truthfulness or accuracy.

[41] In short, in the hearsay context, the difference between threshold and ultimate reliability is qualitative, and not a matter of degree, because the trial judge's inquiry serves a distinct purpose. In assessing substantive reliability, the trial judge does not usurp the trier of fact's role. Only the trier of fact assesses whether the hearsay statement should ultimately be relied on and its probative value.

[42] To preserve the distinction between threshold and ultimate reliability and to prevent the *voir dire* from overtaking the trial, … As Charron J. explained in *Khelawon*, "the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*" (para. 93). … The limited inquiry into corroborative evidence flows from the fact that, at the threshold reliability stage, corroborative evidence is used in a manner that

is qualitatively distinct from the manner in which the trier of fact uses it to assess the statement's ultimate reliability. …

[44] In my view, the rationale for the rule against hearsay and the jurisprudence of this Court make clear that not all evidence that corroborates the declarant's credibility, the accused's guilt, or one party's theory of the case, is of assistance in assessing threshold reliability. A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. If the hearsay danger relates to the declarant's sincerity, truthfulness will be the issue. If the hearsay danger is memory, narration, or perception, accuracy will be the issue.

[45] First, corroborative evidence must go to the truthfulness or accuracy of the *material aspects* of the hearsay statement (see *Couture*, at paras. 83-84; *Blackman*, at para. 57). Hearsay is tendered for the truth of its contents and corroborative evidence must go to the truthfulness or accuracy of the content of the hearsay statement that the moving party seeks to rely on. Because threshold reliability is about admissibility of evidence, the focus must be on the aspect of the statement that is tendered for its truth.[2] The function of corroborative evidence at the threshold reliability stage is to mitigate the need for cross-examination, not generally, but *on the point* that the hearsay is tendered to prove.

…

[47] Second, at the threshold reliability stage, corroborative evidence must work in conjunction with the circumstances to overcome the *specific hearsay dangers* raised by the tendered statement. When assessing the admissibility of hearsay evidence, "the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility" (*Khelawon*, at para. 4). Thus, to overcome the hearsay dangers and establish substantive reliability, corroborative evidence must show that the material aspects of the statement are unlikely to change under cross-examination (*Khelawon*, at para. 107; *Smith*, at p. 937). Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the *only likely explanation* for the hearsay statement is the declarant's

> truthfulness about, or the accuracy of, the material aspects of the statement (see *U. (F.J.)*, at para. 40). Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist.
>
> [48] In assessing substantive reliability, ***the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement*** (*Smith*, at pp. 936-37). Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it "eliminate[s] the hypotheses that cause suspicion" … In contrast, ***corroborative evidence that is "equally consistent" with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance*** …[my emphasis]
>
> [49] While the declarant's truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, ***the fact that the threshold reliability analysis takes place on a balance of probabilities means that,*** based on the circumstances and any evidence led on voir dire, ***the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities***. [My emphasis].
>
> [50] To be relied on for the purpose of rejecting alternative hypotheses for the statement, corroborative evidence must itself be trustworthy. Untrustworthy corroborative evidence is therefore not relevant to the substantive reliability inquiry (see *Khelawon*, at para. 108). Trustworthiness concerns are particularly acute when the corroborative evidence is a statement, rather than physical evidence (see *Lacelle*, at p. 390).

[38] Analysis of the *Bradshaw* test requires legal context. The rules of evidence describe direct and circumstantial evidence. As Sopinka, Lederman and Bryant write in *The Law of Evidence in Canada*, 5th edition (Toronto: LexisNexis, 2018) beginning at p. 72, direct evidence is when a witness tells the court what he/she saw or heard personally to a precise fact in issue. Circumstantial evidence is indirect evidence from which the court is entitled to draw conclusions or inferences as to the precise fact in issue.

[39] In criminal law, determination of guilt on the basis of circumstantial evidence requires that the trier of fact be satisfied beyond a reasonable doubt that guilt is the only reasonable conclusion or inference. This was recently reaffirmed in *R v Villaroman*, 2016 SCC 33 ("*Villaroman*"). In civil law, the test for use of

circumstantial evidence is different. It is treated like direct evidence and any other kind of evidence. It is weighed to determine the strength to be given it in determining a fact in issue on a balance of probabilities.

[40] Corroborative evidence can be direct or circumstantial evidence. The test of admission of corroborative evidence is affected by that difference. It is context for the interpretation of the threshold reliability criteria for admission of hearsay corroborative evidence in *Bradshaw*. Many of the common phrases found in criminal circumstantial evidence decisions such as *Villaroman*, and on the use of inferences when the accused elects not to tender evidence at trial, such as *R v Nobles* [1997] 1 SCR 33 ("*Nobles*"), appear in the *Bradshaw* analysis.

Traditional hearsay exceptions

[41] Finally, I intend to deal with two aspects generally analyzed under the traditional exceptions to the hearsay rule: admissions of a party and declarations against pecuniary or proprietary interest.

[42] For this analysis, I accept as proven that Mr. Macdonald was the principal and operating mind of the corporate respondents in this proceeding. It is acknowledged that any admissible statements made by him in the context of this proceeding were statements which he was, at the time, authorized to make on behalf of the respondents.

[43] The general **admissions exception** rule is that a party may introduce against an opposing party, among other things, any relevant:

1. statement made by the opposing party,

2. act of the opposing party, and

3. statement by a person the opposing party authorized to make the statement, or where the statement was made by the opposing party's agent or employee concerning a matter within the scope of the agency or employment, during the existence of the relationship.

[44] Paciocco and Stuesser write that there is some debate as to whether admissions should be treated as a hearsay exception. They say that the prevailing view, accepted by the Supreme Court of Canada in *R v Evans,* [1993] 3 SCR 653

("*Evans*"), at para. 24, is that an admission is an exception to the hearsay rule, even though it has a different basis than the other exceptions to the hearsay rule.

[45] In *R v Mapara*, 2005 SCC 23 ("*Mapara*"), at para. 21, the Supreme Court accepted that an admission was still hearsay and that admissions should be examined for conformity to the principled approach for necessity and threshold reliability.

[46] This admissions exception concerns informal admissions as opposed to formal admissions - the latter dispenses with the need to prove a fact in issue. Informal admissions, as in the nature of the verbal and written statements of Mr. Macdonald on behalf of the corporate respondents, is not conclusive proof of an issue nor does it bind a party. It is always open to be contradicted or explained.

[47] Admissions are evidence both for and against the maker. The maker is entitled to offer an explanation for having made them. Admissions do not have to be against the maker's interest when made.

[48] Paciocco and Stuesser add that admissions may be implied from a party's conduct. The admissibility of the evidence is really a question of relevancy. The court must be satisfied as to the validity of the inference from the conduct of the alleged admission.

[49] A **declaration against pecuniary or proprietary interest** may be admitted:

1. Where the declarant is unable to testify;

2. The statement when made was against the declarant's interest; and,

3. The declarant had personal knowledge of the facts stated.

[50] The rationale for this traditional exception is the assumption underlying it, that people do not readily make statements that admit facts contrary to their interest unless those statements are true.

Analysis

[51] If the oral statement and two memos are admissions or declarations against interest, they fit into the category of a traditional exception to the hearsay rule. In

that event, the four-part analytical framework from *Khelawon* cited in the *Law of Evidence, Seventh Edition* at p. 127 applies.

[52] Effectively that means that while hearsay evidence is presumptively inadmissible, the traditional exceptions to the hearsay rule remain presumptively admissible. The hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, in accordance with the principled approach. In what *Khelawon* described as rare cases, the evidence falling within a traditional exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case [*Khelawon*, para 60]. Even if the hearsay evidence does not fall within a traditional exception, it may still be admitted using the principled approach.

[53] The respondents argue that the alleged oral statements and written memos are not statements against the respondents' pecuniary interest.

[54] I conclude that the promise that, if the applicant stayed on, increased her workload and took care of the business and personal affairs of Mr. Macdonald and his spouse, she would receive severance of one month for each month of service, would clearly exceed what a court of law would award absent any such promise. A promise to pay severance that is within or close to the range in the caselaw is not what is before this court in this circumstance. The commitment to pay severance equal to one month for each month of service since 2001 was against the pecuniary interest of the respondents and indirectly the family trust and estate of Mr. Macdonald.

[55] A circumstance supporting this conclusion is Mr. Macdonald's understanding in the memos of the worth of the respondent company.

[56] I am equally satisfied that the oral statements and memos constitute statements by the opposing parties' agent concerning a matter within the scope of his employment or agency during the time that the statements were made. The statements are "informal admissions". They are not conclusive proof of an issue and are open to be contradicted and explained, but they are admissions as described in *Evans* and *Mapara*.

[57] My conclusion that the oral statements and memos are statements against pecuniary interest and admissions does not end the analysis. The traditional exceptions evolved over time as part of the common law because they were usually found to have sufficient indicia of reliability. However, the Supreme Court of

Canada has made clear that, whether in those rare cases or otherwise, the traditional exceptions are still subject to the principled analysis, and dependent upon a case-by-case analysis.

[58] Because the hearsay is a traditional exception, it is presumed to be admissible, and the onus shifts to the respondents to satisfy me on a balance of probabilities that the evidence does not meet the reasonable necessity and threshold reliability standard.

[59] I therefore now apply the principled approach to the oral statement and the memos e-mailed in November and January.

[60] In this case, necessity is admitted. The only issue is threshold reliability.

[61] The factors identified by the Supreme Court of Canada in *Baldree*, *Khelawon* and *Bradshaw* state that in the *voir dire* the trial judge should identify the particular hearsay dangers in determining whether the evidence should be available to the trier of fact to determine ultimate reliability.

[62] In *Bradshaw*, the court ruled that the test for using corroborative evidence to establish substantive reliability is a strict one. The court stated that the corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement (para 45), and the corroborative evidence must work in the specific circumstances to overcome the specific hearsay dangers (para 47).

[63] As noted earlier in this decision, Paciocco and Stuesser, *The Law of Evidence, Seventh Edition*, beginning at p. 135 set out a list of factors dealing with both prongs to the analysis set out in *Khelawon* and adopted *Bradshaw*; that is, inherent trustworthiness (called "substantive reliability" in *Bradshaw*), and whether there were adequate substitutes to testing whether the evidence is reliable (called "procedural reliability" in *Bradshaw*).

[64] I understand the respondents argument to be that Mr. Macdonald's two memos, which were really one memorandum prepared over time and e-mailed to the family on November 15, 2015; discussed at family meetings; and annotated and sent in a second e-mail on January 22, 2016, after steps to implement the strategy set out in the memo had been commenced, are themselves hearsay and therefore cannot be corroboration for the verbal statement that Mr. Macdonald made to the applicant in October 2015.

[65] The court in *Bradshaw* states, at para 50, that the corroboration must be trustworthy, and this concern is particularly acute when the corroboration is a statement as opposed to physical evidence. The law generally requires that corroboration be independent evidence.

[66] The oral statement that the applicant says Mr. Macdonald made in October 2015 is entirely independent evidence from the two memos prepared by Mr. Macdonald himself, then forwarded to and discussed with his family, and vice versa. There is nothing in *Bradshaw* or any other case that I found that holds that the corroboration itself cannot be hearsay.

[67] I now refer to the factors set out by Paciocco and Stuesser to assess inherent trustworthiness with respect to a hearsay statement. Their checklist asks whether the statement was made using the following considerations.

1. **Spontaneously**

[68] There is no direct evidence in this case whether the oral statement in October 2015 was made spontaneously or was premeditated. Mr. Macdonald attended at the company office a few days after the diagnosis of terminal cancer. He told the applicant of his diagnosis, and they have an emotional exchange. He asked her to stay on and that she may be required to carry a heavier load in terms of the business, as well as to assist him and his wife personally. He asked her to stay on after his passing, but acknowledged that his family may liquidate the business, so he promised that the company would provide her with the severance equal to one month for each month of service since 2001.

[69] It is probable that Mr. Macdonald thought about his and the respondents' needs in the context of his prognosis. He appears to have thoroughly considered his business interests in the lengthy, comprehensive memos. I conclude that, while the interview in October was emotional, the promise of severance in exchange for her continued loyalty was not likely spontaneous.

[70] This is supported to some extent by the affidavits of Peter Muttart, a retired lawyer and Mr. Macdonald's partner in the numbered company. It is clear that Peter Muttart had had discussions with regards to the normal range of severance payments. I also infer, from those affidavits, that Mr. Macdonald wanted to do better.

[71] If the oral statement was spontaneous, it is clear that the two memos were not. They were methodically created by an astute businessman who knew his needs and those of his estate and the business. They were lengthy and thorough. They were e-mailed first on November 15th, reviewed with the family and re-emailed with annotations on January 22, 2016.

2. **Naturally**

[72] The oral statement was made at the workplace, where one would expect Mr. Macdonald to inform the applicant of his intention. The two memos were prepared and revised in a careful manner and appear to have prepared on the work place computer over time.

3. **Without suggestion**

[73] There is nothing in the evidence from which to infer that someone else, whether it was the applicant, his partner in the numbered company, his accountant or any member of his family, suggested that he should provide the applicant with the generous severance promise. As noted, there is some evidence that he discussed the range of severance with his partner in the numbered company, a former lawyer. There is no evidence of duress or that he was not of sound mind or that the oral statement or written memos were anything other than the thoughts of Mr. Macdonald.

4. **Reasonably contemporaneously with the events**

[74] I surmise that the longer after the event that a record is made, or that a reporting of a hearsay statement is made, the less likely it is to be either accurate or truthful, or the more suspicious its circumstances. The oral statement, unless fabricated by the applicant, was made contemporaneous with the relevant circumstance. That is, within a few days of the diagnosis of terminal cancer. No one has suggested that the statement was fabricated; the obvious reason is that within a few weeks of the oral statement, the first memo containing the same statement was e-mailed by Mr. Macdonald to his family and discussed with them, and an annotated version prepared and emailed again.

5. **By a person who had no motive to fabricate**

[75] There is no suggestion by the respondents that the Mr. Macdonald had a reason to fabricate either the oral statement or the written memos. The only submission made, which is dealt with below, is that Mr. Macdonald may have made a mistake in the oral or written statements.

6. **By a person with a sound mental state**

[76] I accept that Mr. Macdonald was emotional and cried with the applicant at their October meeting in his office. That was natural. There is no evidence or circumstance which would suggest that Mr. Macdonald was not of sound mental state.

[77] Clearly the memos were the work of a competent knowledgeable and thorough business person. His memos demonstrate that he was of sound mind. Nothing in the memos suggest that he was in such an emotional state that it would impair the thoroughness of his research and the plan of action set out in the two memos.

7. **Against the person's interest in whole or in part**

[78] I have already dealt with this. Even if I am in error with respect to whether the oral statement or the two memos are traditional exceptions to the hearsay rule as statement against interest, or admissions, the severance promise made by Mr. Macdonald, a promise that was more generous than what a court of law would otherwise award, was clearly against the interest of the respondents and indirectly against the interest of the family trust and his estate. The reason for Mr. Macdonald's generosity is a matter of ultimate reliability; on their face, the statements and the consistent memos are clear and transparent.

8. **By a young person who would not likely have knowledge of the acts alleged**

[79] This consideration is not relevant.

9. **Whether there is corroborating evidence**

[80] This factor described by Paciocco and Stuesser in the seventh edition of their text predates *Bradshaw*. I therefore analyse this factor in the context of *Bradshaw*.

[81] The issue before the court in this voir dire is not the ultimate reliability of the statements and memos.

[82] For threshold purposes, the applicant need not establish reliability "with absolute certainty". *Bradshaw* raised the test for using corroborative evidence to establish substantive reliability to a higher level.

[83] The facts in *Bradshaw* were that the corroborative evidence of the co-accused of the defendant in two material aspects did not point to the accused but was equally consistent with innocence. It is an important factual distinction from this case that the corroboration in *Bradshaw* was not evidence of the accused.

[84] At the risk of redundancy, I highlight what I interpret as the new standard for corroborative evidence established by the court in *Bradshaw* as follows:

1. At para. 31, substantive reliability is established when the statement is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken.

2. At para. 45, that corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement.

3. At para. 47, corroborative evidence must work in conjunction with the circumstances to overcome the specific hearsay dangers.

4. At para. 48, adding evidence that is supportive of the truth of the statement but is "equally consistent with alternative explanations" does not add to the statement's inherent trustworthiness, and most importantly:

5. At para. 49, the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any

evidence led on the *voir dire*, the judge must be able to rule out any plausible alternative explanations on a balance of probability.

6. And at para. 50, corroborative evidence must itself be trustworthy, and trustworthiness concerns are particularly acute when the evidence is a statement rather than physical evidence.

[85] The ordinary, dictionary definition of "plausible" is: seeming reasonable or probable. Synonyms include: credible, reasonable, believable, likely, feasible, and tenable.

[86] The proper interpretation of *Bradshaw* does not require the court, at the threshold stage, to eliminate every possible or speculative interpretation of the clear and unambiguous words in the oral statements and the consistent statements in the memos.

[87] The comprehensive memo, e-mailed to the family on November 15th; revised and e-mailed again with annotations after discussions with the family, clearly took time to prepare and were the work of a knowledgeable, methodical and thorough writer. The memos show an attention to detail. They are not the words of the applicant or a third party, but the respondents' operating mind or agent. They are in writing. On their face, they are clear and unambiguous.

[88] The statements at page 8 of both memos are consistent with what the applicant swears that the declarant committed to her in his office in October.

[89] The *Bradshaw* analysis requires the court to rule out any "plausible" alternative explanation on a balance of probabilities. I have to be careful not to pass from assessing threshold reliability to assessing ultimate reliability.

[90] I have considered whether Mr. Macdonald made a mistake in promising the applicant more generous severance than a court would otherwise award in exchange for her continued loyalty to the respondents and his family when he was unable to continue and when he had passed.

[91] Circumstances that may lead the court to conclude, at the trial of the admissible facts, that the oral statements regarding severance were or were not a mistake could include the assessment of: the credibility the affiants on cross-examination, and the contents of the memos as a whole, including the worth Mr. Macdonald placed on the respondent business.

[92] The unlikelihood of Mr. Macdonald transposing the word "month" for "year" three times - in an oral statement and two memos written over time (and reviewed with family), and his awareness generally of what the normal range for severance was, and the long and close working relationship between the applicant and the respondents, meets the threshold test for reliability. The memos corroborate the oral statements, and vice versa.

[93] The respondents' interpretation of the *Bradshaw* test – elimination of all alternative explanations, even if based on speculation, would leave no difference between the threshold and ultimate reliability assessments. Said differently, there would be nothing left for the hearing on the merits.

[94] The specific hearsay dangers in this case are not at all similar to the specific hearsay dangers identified in *Bradshaw*. In this case, the corroborative evidence includes the memos written by the operating mind of the respondents. Mr. Macdonald had been advised informally about the normal range of severance awards. He appears from his memos to be an knowledgeable and thorough businessman of sound mind.

[95] It is not for this court in this motion to decide ultimate reliability.

[96] During the oral submissions, the court asked counsel if they had considered factors enumerated in *Clarke*. Counsel indicated that they had not. They requested an opportunity to provide supplemental written submissions applying these factors. I will now, with some overlap of the Paciocco/Stuesser analysis, consider the *Clarke* factors.

1. **Sincerity**

[97] I basically agree with the applicant's submission that though neither the oral statement nor the two memos were provided under oath, the motive to be truthful and accurate was very strong, because the purpose of the utterances was to describe and organize the future of the respondent companies. The importance of the statements was clearly implicit in the solemn and serious context in which they were uttered and produced. The first memorandum was read and reviewed at a meeting of family members who would be Mr. Macdonald's successors in the company.

[98] While I accept that there was some emotion at the time of the initial oral statement in October made shortly after his diagnosis, the overall purpose and context of the November memo was set out in a business-like manner, respecting business issues. Mr. Macdonald had the opportunity to correct his oral and written statements and, despite reviewing them, he did not change them.

[99] I agree with applicant's counsel that the location of these statements - the verbal statement was made at the respondents' office, and the fact that the memos were prepared and reviewed in front of the family members, adds to the sincerity.

2. **Perception**

[100] The diagnosis of terminal cancer and the desire to organize one's business affairs in a meaningful and logical way, would normally have, and appear from a review of the two memos to have, caused Mr. Macdonald to be more focused and intent than if the statements were produced and relayed in a more relaxed circumstance.

[101] I have already indicated that he was not under duress. While he was, at least in October, emotionally distraught by his diagnosis, there is no evidence that this fact interfered with his thorough, businesslike and thoughtful memos. There was no evidence that he was suffering from any mental illness or was not of sound mind.

[102] The verbal statement, and more particularly the two memos, show Mr. Macdonald was aware of the circumstances in respect of which he was speaking. He had a peculiar and special knowledge because, for many years, he had been the controlling mind of the respondent company.

3. **Memory**

[103] This issue is concerned with the ability to recall relevant matters. Often this arises in circumstances where the out-of-court hearsay statement is recalled a significant time after its making. That is not the circumstance here. The two memos were written shortly after the verbal statement.

4. Narration

[104] The oral statement was not videotaped or given under oath. The two written memos, while not written under oath, are clear and articulate statements of the respondents through their agent Mr. Macdonald. The statements on their face are clear, logical and understandable. The three statements, the oral statements and two written memos, are consistent. There is nothing suspicious about the narration.

5. External circumstances

[105] The oral statement to the applicant and the two memos mutually support and corroborate one another. I agree that, in accord with application of the *Bradshaw* threshold reliability standard to corroborative evidence, the two written memos provide a high degree of corroboration for the oral statements of October.

Conclusion

[106] The oral statements and two memos meet the *Bradshaw* test for threshold reliability. To deny admission for the truth of their contents would not advance the truth-seeking function of the trier of fact, but the opposite.

[107] It is not contested that the three affiants who reported what the applicant told them about the severance offer was hearsay and not admissible for the truth of the contents.

[108] Even if I had not been satisfied that the oral statements and two memos were admissible as traditional exceptions to the hearsay rule, I would have come to the same conclusion applying solely the principled approach. Who carried the onus or burden of proof was not determinative of this decision.

Costs

[109] Based on counsel's agreement that costs for this motion would be $2,000.00, I award costs in $2,000.00 to the applicant Frances Hutchison, regardless of the outcome on the determination on the merits of the application.

Warner, J.