SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Downey*, 2019 NSSC 21

Date: 20190116
Docket: CRH 475442
Registry: Halifax

Between:

Her Majesty the Queen

v.

Markel Jason Downey

Restriction on Publication: Sections 517 and 539 of the *Criminal Code* which have expired effective June 1, 2021

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	January 7 and 8, 2019, in Halifax, Nova Scotia
Date of Decision:	January 16, 2019
Counsel:	Scott Morrison and Erica Koresawa, for the Provincial Crown Patrick MacEwen, for the Defence

By the Court:

Background

[1] Markel Jason Downey was tried on three counts of attempted murder contrary to Section 239 of the *Criminal Code*. The charges stemmed from events which occurred on November 30, 2014. On February 14, 2017, at the conclusion of a 12 day (judge alone) trial, he was acquitted of all charges. After considering the evidence, the trial Judge was left in reasonable doubt as to whether the identity of the accused, as the shooter of the three victims, had been established. Ashley MacLean was the only "identification witness" called by the Crown at this trial ("the first trial").

[2] On February 14, 2018, the Court of Appeal, in a decision reported as *R. v. Downey*, 2018 NSCA 33, allowed the Crown's appeal, and ordered a new trial.

[3] Tragically, on July 2, 2018, Ms. MacLean died. Her death is alleged to be directly and causally related to the gunshot wounds which she sustained on November 30, 2014.

[4] In the wake of Ms. MacLean's death, the Crown has preferred indictment against Mr. Downey. He now faces charges:

a) pursuant to section 235(1) – first-degree murder of Ashley MacLean;

b) pursuant to section 239 – attempted murder of Logan Starr;

c) pursuant to section 239 – attempted murder of Jordan Langworthy.

[5] Only one of the above charges is new to Mr. Downey, but it is significant. This is the first-degree murder charge that he now faces in relation to Ms. MacLean. As a result of this new charge, Mr. Downey's second trial will take place before a Judge and jury. He has no right of election. Moreover, because the indictment has been preferred, there will also not be a preliminary inquiry beforehand. There was one, however, prior to the first trial.

[6] In this application, the Crown seeks to have Ms. MacLean's evidence from the first trial admitted for the truth of its contents in the second. To that end, the Crown

seeks to introduce an audio recording of her 2017 trial evidence, together with a certified transcript thereof.

[7] In this *voir dire*, the Crown has identified two potential bases for its application. The first is pursuant to section 715(1) of the *Criminal Code*. The second is pursuant to the principled exception to the hearsay rule on the basis of procedural reliability.

[8] The Crown also reserves the right to apply on the basis of the second prong of the "principled exception rule", that of substantive reliability, in the event that it does not succeed on at least one of the bases identified above.

[9] The Crown has tendered the audio recording and transcript of Ms. MacLean's evidence as taken in the first trial on January 23, 2017 and January 25, 2017. These are *voir dire* Exhibits "2" and "3", respectively.

[10] Exhibit "1" consisted of Admissions of Fact by Mr. Downey. The admissions were that:

1. Ashley MacLean died on July 2, 2018 and is unavailable for trial.
2. Markel Jason Downey was tried in Supreme Court between January 9 and February 14, 2017 in Halifax Nova Scotia, on matter CR 448479. He was present in court for the entire trial, including during Ashley MacLean's testimony.

Issues

[11] Simply stated, I must determine whether Ms. Maclean's audio testimony (and the transcript thereof) shall be admitted into evidence at Mr. Downey's (second) trial before Judge and jury, which will ensue later this year. If the Crown's motion is to succeed, it must be on the basis of either:

i. section 715 of the *Criminal Code* or,

ii. the principled exception to the hearsay rule (procedural reliability).

iii. Even if it meets the requirements of either (or both) of the above, I must determine, nonetheless, whether to exercise my residual discretion to exclude Ms. MacLean's testimony.

Analysis

i) section 715 of the Criminal Code

[12] The relevant portions of this section read as follows:

> 715 (1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person
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> (a) is dead,
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> …
>
> and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.
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> (2) Evidence that has been taken on the preliminary inquiry or other investigation of a charge against an accused may be admitted as evidence in the prosecution of the accused for any other offence on the same proof and in the same manner in all respects, as it might, according to law, be admitted as evidence in the prosecution of the offence with which the accused was charged when the evidence was taken.

[13] The Canadian *Charter of Rights and Freedoms* also has relevance in this context. Section 7 thereof states that:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[14] Section 11 goes on to say that:

> "Any person charged with an offence has the right...
>
> d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

[15] Both parties referred to *R v. Potvin*, [1989] 1 SCR 525 as the leading authority on the interpretation of section 715. In *Potvin*, the accused met with two friends at a bar and conceived of a plan to attend the home of an acquaintance and steal her

jewelry. The resident of the premises, whose jewelry was the target of the "operation", was beaten significantly and subsequently died of her injuries. All three primary participants, including Mr. Potvin, were charged with second-degree murder.

[16] At Mr. Potvin's trial the Crown intended to have his two friends (Mr. Deschenes and Ms. Thibault) testify against him. The former, although he had testified at the preliminary inquiry, refused to testify at trial. The trial Judge concluded that the requirements of section 715(1) of the *Criminal Code* (then section 643(1)) had been met, and that the preliminary inquiry testimony should be admitted as evidence at the trial for the truth of its contents.

[17] At trial, the Appellant's contention was the other two others (which is to say Ms. Thibault and Mr. Deschenes) were the ones who had inflicted the fatal injuries on the victim. The Appellant was convicted and the verdict was upheld at the Court of Appeal level.

[18] When it reached the Supreme Court, all Justices agreed that the appeal should be allowed and a new trial was ordered. However, Wilson J., in delivering the reasons on behalf of herself, Lamer, and Sopinka, JJ., concluded that section 715 of the *Criminal Code* does not violate either sections 7 or 11(d) of the *Charter*, explaining:

> 11. …Our justice system has, however, traditionally held evidence given under oath at a previous proceeding to be admissible at a criminal trial if the witness was unavailable at the trial for a reason such as death, provided the accused had an opportunity to cross-examine the witness when the evidence was originally given. The common law origins of the predecessor section to the present s. 643(1) were noted by Bain J. in *R. v. Hamilton* (1898), 2 C.C.C. 390 (Man. Q.B.), at p. 406, where he said:
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> > It is a rule founded on common law principles that, if a witness be proved to be dead, secondary evidence of a statement he made under oath on a former trial between the same parties will be received, provided that the facts in issue are substantially the same, and that the person against whom the evidence is to be given had the right and opportunity of cross-examining the witness: *Reg.* v. *Smith*, 2 Stark. 208 and note; Taylor on Evidence, {SS} 464.
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> Likewise, Wigmore in his treatise on *Evidence* (Chadbourn rev. 1974), vol. 5, has explained at {SS} 1370 why the practice of admitting

testimony which has already been subjected to cross-examination is consistent with the requirements of the hearsay rule:

> {SS} 1370. Cross-examined statements not an exception to the hearsay rule.
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> The hearsay rule excludes testimonial statements not subjected to cross-examination ({SS} 1362 *supra*). When, therefore, a statement has *already been subjected to cross-examination* and is hence admitted -- as in the case of a deposition or testimony at a former trial -- it comes in because the rule is satisfied, not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has been already subjected to proper cross-examination, it has satisfied the rule and needs no exception in its favour. This is worth clear appreciation, because it involves the whole theory of the rule: . . .

12. The practice of admitting previously taken evidence if the accused had an opportunity on the previous occasion to cross-examine the witness has been sanctioned by courts in the United Kingdom (see *R. v. Hall*, [1973] 1 All E.R. 1 (C.A.), at p. 7) and in the United States (see *Ohio v. Roberts*, 448 U.S. 56 (1980)) … This right of confrontation has been held to be satisfied by the accused's having had an opportunity to cross-examine the witness at the time the previous evidence was given. It is clear to me from this survey that the right asserted by the appellant to confront an unavailable witness before the trier of fact at trial cannot be said to be a traditional or basic tenet of our justice system.

13. ... In this regard I would respectfully adopt the following statement of Vancise J.A. of the Saskatchewan Court of Appeal in *R. v. Rodgers* (1987), 35 C.C.C. (3d) 50, at pp. 60-61, 55 Sask. R, 198:

> Does this procedure offend the basic tenets and principles on which the principles of fundamental justice are based? Put another way, are these procedural safeguards sufficient to make the taking of the evidence accord with the principles of fundamental justice which are founded upon a belief "in the dignity and worth of a human person and on the rule of law"? In my opinion, they are. The conditions under which the evidence is given, including the solemnity of the occasion, are such as to guarantee its trustworthiness and to protect the rights of an accused. The evidence is given in open court in the presence of the accused, taken on oath or solemn affirmation, and the

> person against whose interest it is sought to be introduced has reasonable opportunity to cross-examine. The evidence is certified as to correctness by the judge before whom it was given. This is not a mechanism for the introduction of evidence which is not admissible, but rather a system for the use of evidence which would otherwise be lost. Its use, or admissibility, is provided for in a way which accords full safety to the rights of an accused. Those safeguards, together with the limited circumstances in which the procedure can be resorted to, justify its acceptance into evidence. The procedure is one which accords with the principles of fundamental justice, and in my opinion, s. 7 of the *Charter* has not been offended.
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> [Emphasis added]

[19] She further pointed out at para. 20:

> I would respectfully agree with Martin J.A. that the accused would have a constitutional right to have the evidence of prior testimony obtained in the absence of a full opportunity to cross-examine the witness excluded. When the evidence is sought to be introduced in order to obtain a criminal conviction which could result in imprisonment, the accused is threatened with a deprivation of his or her liberty and security of the person and this can only be done in accordance with the principles of fundamental justice. It is, as I have said, a principle of fundamental justice that the accused have had a full opportunity to cross-examine the adverse witness.

[20] And at para. 28:

> …Absent exceptional circumstances not present here it seems to me perfectly reasonable to expect an accused to be able to prove whether or not he or she was deprived of a full opportunity to cross-examine the witness. Only the accused, after all, (or his or her counsel) knows what was comprised in that "full opportunity" and the extent to which, if at all, it was denied or restricted. A denial or restriction can only have taken place if the intention or desire to pursue certain questions was present and was frustrated.
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> [Emphasis added]

[21] However, Justice Wilson noted that even evidence which may otherwise satisfy the requirements of section 715 of the *Criminal Code* may be excluded on the basis of a residual discretion possessed by the trial Judge:

> 30. "... not to allow the previous testimony to be admitted in circumstances where it's admission would operate unfairly to the accused. I hasten to add, however, that such circumstances will be relatively rare and that the discretion to prevent unfairness is not a blanket authority to undermine the object of section 643(1) by excluding evidence of previous testimony as a matter of course."

[22] This residual discretion could arise, for example, where there has been "... unfairness in the manner in which the evidence was obtained ... in those rare cases in which compliance with the requirements of [the section] gave no guarantee that the evidence was obtained in a manner fair to the accused." (*Potvin*, para. 29)

[23] Another circumstance in which the discretion might be exercised is in circumstances where the evidence (otherwise admissible under section 715) is exceeded in probative value by its prejudicial effect on the fairness of the trial itself. (*Potvin*, para. 30)

[24] Although only to be used in “rare cases”, the scope of this residual discretion appears to be aimed at incorporating continually evolving notions of trial fairness.

[25] As such, while it is certainly true that in *Potvin*, the Supreme Court of Canada has identified the above quote from *Hamilton* as articulating the common-law ancestor of the present section 715, the residual discretion possessed by the court to exclude evidence otherwise compliant with the section, can incorporate modern, post-*Charter* elements and notions of procedural fairness, and is therefore slightly broader than its pre *Code* antecedents.

[26] In any event, there are three elements involved in a section 715 analysis. I must consider whether, on a balance of probabilities, the conditions of section 715(1) have been met. I must also determine whether the accused had full opportunity to cross-examine the witness at the first trial. If the first two criteria are met, then I must consider whether the evidence should nonetheless still be excluded on the basis of trial fairness. (*R. v. Ellard*, 2004 BCSC 777, para. 34).

Are the conditions of section 715(1) met?

a) “Same charge”

[27] The Crown argues for a broad definition or ascribed meaning to the words "the same charge" utilized in section 715(1). It points to the *Black's Law Dictionary* definition, which states that, in the area of criminal law, the word "charge" is defined

as an "accusation of a crime by a formal complaint, information or indictment". In the absence of authority defining the word to mean a specific *Criminal Code* section or offence, counsel urges that the phrase be taken to mean "the same substantive allegation". It is in this context that the Crown references the aforementioned passage in *Hamilton* (as quoted in *Potvin*), and correlates its submissions with the common-law foundations of the section as identified by the Supreme Court of Canada in *Potvin*. It will be recalled that the common-law requirement prior to codification was merely that "... The facts in issue are substantially the same, and that the person against whom the evidence is to be given had the right and opportunity of cross-examining the witness..." (*Hamilton*, p. 406).

[28] *R. v. Druken*, (1995) 135 Nfld & P.E.I.R. 338 (NLSC) ("*Druken #1*") is cited as an example of a circumstance in which the court was prepared to take a broad view of the words "the same charge" when interpreting the section. Both sides, nonetheless, agree that this case involved a preliminary inquiry conducted on the basis of charges of aggravated assault, after which the accused was only committed for trial on common assault.

[29] In *Druken #1*, one of the witnesses who testified at the preliminary inquiry later refused to give evidence at trial. The court concluded that the words "same charge" were broad enough, within the context in which they are used in section 715(1), to encompass those which are "included offences" in relation to the specific *Criminal Code* offence faced by the accused at the preliminary. (*Druken #1*, para. 18)

[30] Counsel for the accused argues that *Druken #1* should be restricted to its specific factual context, and that, in any event, section 715(2) contemplates the admission of the preliminary inquiry evidence in that case by way of a specific provision permitting its use in those circumstances. Should Parliament have intended to provide for the admission of such evidence in other contexts (the argument goes) it would have made similar specific provision for other circumstances in which the strict wording of section 715(1) would be mitigated. It did not.

[31] As I explained earlier, one identifiable difference between section 715(1) and the pre-existing common-law which it purported to codify consists (possibly) in the breadth of the modern residual discretion possessed by the trial Judge to exclude the testimony in question notwithstanding the fact that it otherwise meets the prescribed criteria. This discretion, nonetheless, would still only be exercised "... in those rare cases in which compliance with the [specified criteria] gave no guarantee that the

evidence was obtained in a manner fair to the accused", or in those circumstances where the probative value of the of the evidence in question is exceeded by its prejudicial effect upon the fairness of the (next) trial process itself. (*Potvin*, para. 29)

[32] The other difference with the common law articulated in *Hamilton* (and *Potvin*) is found in the "same charge" wording contained in section 715. In the absence of interpretative authority to the contrary, or of a contrary definition in the statute itself, and in the absence of "circumstances which negated or minimized the accused's opportunity to cross-examination the accused" (Potvin, para. 13 - to be dealt with momentarily) these words, as they relate to the present context, must be taken to mean that the evidence may be received "…provided that the facts in issue are substantially the same …" in the second trial as they were in the first.

[33] After all, upon what would it impact, if the facts in issue were not substantially the same in the subsequent trial? It would impact upon the accused's ability to cross-examine the deceased on the facts relevant to the charges being faced in the second trial or proceeding – facts which he did not get to cover when the witness testified in the first trial.

[34] Although Mr. Downey faces one new charge (murder), and two others which are the same, this presents no new factual issues or context. As we will see, the matrix remains almost entirely the same. *Potvin* (paras. 11 – 12) strongly suggests that section 715(1) codifies the pre-existing common law as stated in *Hamilton* (already quoted). If so, this would be consistent with the interpretation of "the same charge" as equivalent to a situation (in the second trial) where the facts at issue will be "substantively the same". Of course, this is subject to the proviso that the accused must have had full opportunity to cross examine Ms. MacLean in the first trial.

b) Ability to Cross-Examine

[35] In the circumstances, I have no hesitation in concluding that the requirements specified in section 715(1) of the *Criminal Code*, on a balance of probabilities, have been met in this case. To repeat, the factual milieu of this case is virtually the same as that in respect of which the first trial was conducted. The Defence argues identity – it says that the accused was not the shooter. In the second trial, the murder charge (plus the two attempted murder charges) is more serious, obviously, than the three attempted murder charges faced by Mr. Downey at first instance. However, the only difference, substantively is one which is uncontested. One of the three victims has now died, allegedly as a result of her injuries as sustained on November 30, 2014.

Ms. MacLean's evidence was not (and could not) be relevant to causation, if the cause of her subsequent death in 2018 should be controverted at the second trial. Moreover, any evidence which Ms. MacLean could have possibly offered to assist the jury in determining whether Mr. Downey had the requisite *mens rea* for first-degree murder is contained in the material upon which she was cross-examined in 2017: what she says that she observed and heard him doing and saying prior to the shootings.

[36] Substantively, all of Ms. MacLean's evidence was explored in the presence of the accused at the first trial. Mr. Downey will be represented by the same counsel at the next one. His counsel conducted an extensive and very thorough cross-examination of the deceased. There were no lacunae in her evidence. Defence counsel has not pointed to any factual areas which he was unable to explore with Ms. MacLean at the first trial which will be of relevance in the second.

[37] As a consequence, the accused has not shown (on the balance of probabilities) that he "did not have full opportunity to cross-examine the witness" on all matters that are actually or potentially relevant to the second trial. On a balance of probabilities, therefore, the conditions of section 715(1) have been met.

[38] Next, I must consider whether I should nonetheless exercise my discretion to disallow the admission of Ms. Maclean's evidence in the second trial. Since the considerations under this rubric are almost identical to those with which I will be required to deal when the final criterion to my deliberations under the principled exception to the hearsay rule is dealt with, I will defer consideration of my residual discretion until that time. I will then deal with it in an omnibus fashion, in the broadest sense permitted to me either under section 715 and/or the common-law.

ii) The principled exception to the hearsay rule (procedural reliability)

[39] If I am wrong in my application of section 715 to this case, and if the statement is not compliant with the requirements of that section, then Wigmore's statement (in *Potvin*, para. 11) no longer applies. Ms. MacLean's testimony becomes relegated to the status of an out of court statement ("out of court" in the sense that it will not have been made in the presence of the trier of fact in the second trial) and it can (in such a case) only be admitted in the second trial for the truth of its contents if it falls within the principled exception to the hearsay rule.

a) Threshold Reliability

[40] Preliminary to my consideration of this topic is the observation that what I am being called upon to do is determine threshold reliability with respect to Ms. MacLean's testimony. I bear in mind that I will not be the trier of fact in the upcoming trial – that will be the jury. Only the jury may decide what her evidence is ultimately worth in the ultimate scheme of things (if admitted).

[41] In *R. v. Bradshaw*, 2017 SCC 35 the court explained threshold reliability this way:

> 26. To determine whether a hearsay statement is admissible, the trial judge assesses the statement's threshold reliability. Threshold reliability is established when the hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it" (*Khelawon*, at para. 49). These dangers arise notably due to the absence of contemporaneous [page 880] cross-examination of the hearsay declarant before the trier of fact (*Khelawon*, at paras. 35 and 48). In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them (*Khelawon*, at paras. 4 and 49; *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 75). The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity, and should be defined with precision to permit a realistic evaluation of whether they have been overcome.
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> 27. The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah*, at para. 30).
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> 28. Procedural reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (*Khelawon*, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (*Khelawon*, at para. 76; *Hawkins*, at para. 75; *Youvarajah*, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (*B. (K.G.)*, at pp. 795-96). However, some form of cross-examination of the declarant, such as preliminary inquiry

> testimony (*Hawkins*) or cross-examination of a recanting witness at trial (*B. (K.G.*); *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764), is usually required (*R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95) ...
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> [Emphasis added]

[42] As I have previously noted, the Crown has predicated its arguments on the basis that Ms. MacLean's earlier statement at the first trial meets the requirements identified above for procedural reliability. The Crown has not argued substantive reliability but reserves its right to do so if its present application fails.

[43] As discussed when section 715 was considered above, Ms. McLean swore an oath to tell the truth at the first trial. Her evidence in chief was fully canvassed. She was subjected to thorough and extensive cross-examination. This court (on *voir dire*) is ideally positioned to assess the thoroughness of that cross-examination by virtue of the fact that the audio recording of her evidence in the first trial was replayed in its entirety. The transcript was available also.

b) Application of the *Bradshaw* framework

[44] We begin with the proposition that all "out of court" utterances are hearsay, even those given in a prior court proceeding (if the requirements of section 715 are not met). Hearsay is presumptively inadmissible.

[45] An exception to the "hearsay rule" may arise (and hence, the evidence may pass the metaphoric "threshold" to admissibility) if the criteria embodied in *Bradshaw* ("the principled exception"), or in one of the traditional common-law exceptions to the Rule, is established.

[46] This principled approach to a hearsay statement requires a determination as to whether the elements of (1) necessity and (2) either threshold or substantive reliability have been met in the particular case. If they have been established, then I may admit, at trial, the impugned statement as part of the body of evidence to be considered by the trier of fact.

[47] Ms. McLean is deceased. Necessity is met.

[48] Moreover, she was sworn in (as indicated) and subjected to thorough cross-examination at the first trial. As such, Ms. MacLean's testimony is sufficient to pass the requisite threshold of procedural reliability. The ultimate reliability and weight

(if any) to be accorded to her testimony will be determined by the jury in the second trial if I admit it.

(iii) My residual discretion to exclude (under both section 715(1) Criminal Code and the principled exception to the hearsay rule)

[49] To be fair to the Defence, it has properly conceded that the elements of necessity and threshold procedural reliability are met by the impugned testimony under a *Bradshaw* analysis. However, counsel argues, as he did, *inter alia*, when section 715 was being considered, that I ought to exercise my discretion and nonetheless exclude this evidence. He reiterates the considerations set forth in *Potvin* (as discussed above) and emphasizes certain points in particular.

[50] First, the accused argues that this is an audiotape only. Ms. MacLean, at least in the first trial, was the prosecution's only identification witness. The jury will be deprived in the next trial (if her evidence is admitted) of the ability to assess her demeanour. While conceding that this is not the sole (or even primary, in many cases) basis upon which credibility and/or reliability is determined, counsel argues (in effect) that it is unfair to the accused to deprive the trier of fact (the jury) of one of the tools which would ordinarily be at its disposal when those issues are determined. This acquires heightened importance (the argument continues) when it is recalled that one of the charges now faced by Mr. Downey is first-degree murder, the most serious charge of all.

[51] Second, the accused refers to several instances in Ms. MacLean's testimony in the first trial where (he submits) she contradicted herself and/or gave evidence which conflicted with what she said at other times (for example, in her statement to the police or at the preliminary inquiry). To the extent that such evidence (it is argued) in some instances also conflicts with the testimony provided by other witnesses at the first trial, her unavailability will now preclude the defence from confronting her with those inconsistencies.

[52] Third, it is argued that the prosecution could take advantage of the Defence, when the second point is considered, and decide not to call those witnesses whose evidence contradicted any of the particulars offered by Ms. McLean when she testified at the first trial. This would present the trier of fact with an apparently sanitized and/or artificially uniform set of facts when the time comes to assess the Ms. Maclean's credibility, her reliability and/or the weight to be accorded to her evidence. If it pursued this course, the Crown could lead the jury to erroneously

conclude that her evidence is uncontradicted, by withholding any competing versions.

[53] These arguments do not persuade me that I ought to exercise my discretion to exclude Ms. MacLean's evidence notwithstanding its compliance (as I have found) with the criteria specified in section 715 of the *Criminal Code* and also those which govern whether it should be admitted as a principled exception to the hearsay rule (as articulated in *Bradshaw*). I will explain, but first, wish to refer to the elaboration upon some general principles already discussed, as contained in *R. v. Saleh*, 2013 ONCA 742.

a) Some Additional Elaboration

[54] In *Saleh*, the court noted:

> 74. The exclusionary discretion in s. 715(1) is directed at two principal types of mischief: unfairness in the manner in which the preliminary inquiry evidence was obtained, and unfairness in the trial itself caused by the admission of the preliminary inquiry evidence: *Potvin*, at pp. 551-552. A trial judge should only exercise this discretion after weighing two competing and frequently conflicting concerns (*Potvin*, at pp. 552-553):
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> * fair treatment of the accused; and
> * society's interest in the admission of probative evidence to get at the truth of the allegations in issue.
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> 75. The focus of the trial judge's concern must be on the protection of the accused from unfairness, rather than the admission of probative evidence without too much regard for the fairness of the adjudicative process: *Potvin*, at p. 553.
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> 76. Section 715(1) is a statutory exception to the hearsay rule. It does not follow, however, that the principled approach to the hearsay rule has no place in the interpretation and application of the provision: *R. v. Li*, 2012 ONCA 291, 110 O.R. (3d) 321, at para. 50. That said, the principled approach may exert a greater influence on the issue of necessity than on that of reliability: *Li*, at paras. 56 and 60.
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> 77. Among the relevant factors a trial judge might consider in deciding whether to exclude preliminary inquiry evidence that would otherwise qualify for admission under s. 715(1) is the crucial nature of the evidence itself: *Michaud*, at para. 26. Equally relevant is the crucial

> nature of the credibility of the witness whose evidence is tendered for admission: *R. v. Tourangeau* (1994), 128 Sask. R. 101 (C.A.), at para. 18; and *R. v. Castanheira*, [1996] O.J. No. 3006 (C.A.), at para. 2.
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> 78. The circumstances in which evidence previously given may be excluded in the exercise of discretion under s. 715(1) are comparatively rare. The discretion to permit unfairness does not provide the trial judge with an open licence to undermine the object of s. 715(1) by excluding previous testimony as a matter of course: *Potvin*, at pp. 547-548.
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> 79. Section 715(1) is not an exhaustive code governing the admissibility of preliminary inquiry testimony at a subsequent trial: *Hawkins*, at para. 57. For example, where preliminary inquiry testimony fails to satisfy the requirements for admissibility under s. 715(1), it remains open to the trial judge to consider whether the testimony may be admissible under common law principles, for example, under the principled exception to the hearsay rule.
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> [Emphasis added]

[55] The court's reference in *Saleh* (para. 76) to section 715 as a "statutory exception to the hearsay rule" appears to be at odds with the way Wigmore characterizes it. It will be recalled that the latter said: "when a statement has already been subjected to cross-examination as in the case of … testimony at a former trial – it comes in because the rule is satisfied, not because an exception to the [hearsay] rule is allowed". The Supreme Court of Canada in *Potvin* (para. 11) adopted Wigmore.

[56] Other than the above discrepancy, which it is not necessary to attempt to resolve for the purposes of this decision, *Saleh* remains a helpful "lens" through which to view the principles enunciated in *Potvin*.

b) The inability of the jury to observe Ms. MacLean's demeanour when assessing her evidence.

[57] Mr. Downey's first contention in this respect is one which has already been specifically addressed by the Supreme Court of Canada in *Potvin.* For example, the court stated:

> 17. The appellant submits that the provision of a full opportunity to cross-examine at the preliminary inquiry does not necessarily ensure fairness. More specifically, he argues that 1) the trier of fact is deprived of the ability to assess the credibility of the witness through observing

> his or her demeanour; 2) when the evidence is taken at a preliminary inquiry the credibility of that evidence is not in issue; and 3) the accused at the preliminary inquiry may have strategic reasons for not testing the credibility, or even conducting any cross-examination, of a witness. Despite the fact that these observations may be sound and could operate to the detriment of the accused, I do not think they are of such magnitude and effect as to deprive the accused of the basics of a fair trial. I say this for the following reasons.
>
> 18. I note that although it is possible that an accused might suffer a detriment because of the trier of fact's inability to assess the credibility of a witness on a face to face basis, it is also true that this feature of s. 643(1) could work to an accused's benefit. In any event, because s. 643(1) can only be invoked when its stringent pre-requisites are met by the party seeking to introduce the previous testimony, it is not a provision that the Crown can use at will to its advantage or as a device to protect Crown witnesses who may not prove to be credible before the trier of fact.
>
> [Emphasis added]

[58] In *R. v. Michaud*, [2000] 144 C.C.C. (3d) 62 (CA) the court opined:

> 26. In considering whether to exercise his discretion in favour of the exclusion of Mr. Albert's previous testimony, the trial judge was not at liberty to disregard the seriousness of the offence with which Mr. Michaud was charged nor could he overlook the fact that Mr. Albert's prior testimony, if accepted by the jury, constituted an eye-witness account of the commission of a first degree murder. Mr. Michaud's right to be fairly treated could not overshadow "society's interest in the admission of probative evidence in order to get at the truth of the matter in issue". See *Potvin*, at p. 533. The potentially high probative value of Mr. Albert's prior testimony did not argue in favour of its exclusion. Quite the contrary, it was a factor that militated strongly in favour of its admission as evidence. Finally, it bears mention that Mr. Albert admitted under oath to having made out-of-court statements that were inconsistent with his testimony and the jury's attention was repeatedly drawn to his admissions. The jury's lack of opportunity to observe Mr. Albert's demeanour when confronted with more allegations of prior inconsistent statements, that is the allegations of Messrs. LeBlanc, Ouellette and Roussel, did not taint the trial process with the degree of unfairness that could justify the exclusion of Mr. Albert's evidence.

[59] The court, however, went on to make the important point:

> 28. … Mr. Michaud's challenge to the exercise of that discretion fails. Nonetheless, I would add that Mr. Michaud will be at liberty to object, at his new trial, to the admission of specific parts of Mr. Albert's testimony on the basis that they offend the ordinary rules governing the admissibility of evidence. It is axiomatic that s. 715(1) cannot be used by the Crown as a means of adducing evidence that Mr. Albert would not have been allowed to give had be been available to testify. See *Hawkins,* at page 1089.

[60] Obviously, it is less than ideal that Ms. MacLean's demeanour will be unavailable to the jury in the upcoming trial. One may acknowledge the myriad cases which have downplayed the importance to be attached to the demeanour of the witness, *simpliciter*, as the basis upon which the credibility of a witness is determined, without (at the same time) being seen to advocate the proposition that it is, in all cases, entirely irrelevant.

[61] I accept that this has the potential to cause some prejudice to the accused. As pointed out both in *Michaud* and *Potvin*, however, it also has the potential to work to the accused's advantage. Even if prejudice to the accused should arise it is significantly attenuated when the thoroughness of the previous cross-examination (to which Ms. MacLean was subjected) is considered. It may be further circumscribed (if need be) by appropriate instructions to the jury directing them to bear in mind that they have been unable to observe Ms. MacLean's demeanour when they access her overall credibility and reliability in Mr. Downey's second trial.

c) Inability to confront Ms. MacLean with instances in which it is alleged that her testimony contradicted that offered by other witnesses in the first trial.

[62] This, too, constitutes a basis for potential prejudice. It also arises due to the unavailability of Ms. MacLean. That said, it is also possible to make the same point in relation to this concern as was mentioned (at para. 18) in *Potvin* previously: it may help Mr. Downey, overall. Simply stated, it is impossible to predict how favourably Ms. MacLean's evidence, where it is alleged that there was a conflict between her evidence and those of another witness(es), would have "stacked up" against the competing version(s).

[63] This, too, (if it arises) may be adequately addressed, in my view, with an appropriate charge to the jury, when the time comes, after the evidence as a whole has been heard.

d) The Crown could take unfair advantage of the Defence by failing to call the witness(es) whose evidence contradicts Ms. MacLean.

[64] It is true that this concern has been aired in some of the decided authorities. It may have merit in some circumstances. For example, consider *Saleh*, *supra*:

> 91. First, the trial judge failed to consider the manifest unreliability of Yegin in assessing whether the admission of his evidence would operate unfairly to the appellant. Under *Potvin*, the focus of the trial judge's concern was to be the protection of the appellant from unfairness. The evidence at issue came from a witness who was present at the shooting. He was charged with the same murder as the appellant. He had a substantial motive to assign blame to others; in particular, to the appellant. His account of events evolved over time, changing when he was confronted with physical findings that belied his version of the events. Yet the jury never saw this witness (as a result of his own conduct), or viewed his cross-examination.
>
> 92. Second, the trial judge failed to consider the impact on the fairness of the trial of the appellant's inability to confront Yegin, in the presence of the jury, with information obtained after Yegin had testified at the preliminary inquiry. The trial judge appears to have acknowledged the relevance of at least some of this material when he permitted defence counsel to file a printed record of it. The inability of counsel to cross-examine Yegin on this material had a significant impact on trial fairness.
>
> 93. Third, the trial judge erred in failing to consider the effect of excluding Esrabian's evidence on the fairness of the appellant's trial that left the jury with only Yegin's account of the crucial events. In the end, the appellant was denied the benefit of a second version of the crucial events to juxtapose with that of Yegin in an attempt at least to whittle down his level of participation in the killing of Hassan.
>
> 94. Fourth, the trial judge appears to have confined his exercise of an exclusionary discretion to that for which s. 715(1) provides under *Potvin*. To be fair, the discretion under s. 715(1) was the principal focus of the submissions of counsel at trial. That said, the discretion to exclude evidence tendered under s. 715(1) of the *Criminal Code* is not limited to the fairness considerations of *Potvin*. The trial judge has a gatekeeper function to ensure that only relevant, material, and admissible evidence gets before the jury. The appellant was entitled to a cost-benefit analysis of Yegin's evidence to determine whether its value to the correct disposal of the allegations contained in the

> indictment exceeded its cost to the litigation process. No such analysis was done.

[65] It is important to remember, however, that in *Saleh* the Ontario Court of Appeal was dealing with a matter in which the trial had already been heard and the impugned evidence admitted. It was able to evaluate a *fait accompli*, and could determine (on the basis of the trial evidence as a whole) whether the admission of the prior statement, in the context of all of the other evidence heard at trial, had worked unfairly against the accused.

[66] Consider also *R. v. Druken*, [1995] N.J. No. 46 (NFLDSC) (*"Druken #2"*). In this case the court identified some of the concerns with the evidence taken at preliminary inquiry which the Crown sought to have read in at the (Judge and jury) trial of the accused. Wells, J. noted:

> 34. All of the foregoing except (i) were known to the defence at the time of the preliminary inquiry in November 1993 and were or could have been pursued on cross-examination. All of the foregoing are clearly matters which the jury are fully capable of assessing and taking into account in their deliberations, in much the same way as they would have had M.D. been able to give evidence, save of course for the observation of her demeanour.
>
> 35. The problem now before this Court is, did the accused have a full opportunity to cross-examine the adverse witness by reason of the fact that neither the Crown nor the defence knew at the time, that M.D. may possibly have had some degree of mental illness or impairment, at the time when she was giving her evidence at the preliminary inquiry.
>
> 36. The medical evidence was neither known nor available at the time and cross-examination could hardly have elicited from the witness an accurate, or indeed any, diagnosis of her own mental state. The "new" evidence is nevertheless available to the defence at trial. M.D.'s probable mental state at the time of the preliminary inquiry and in June 1993, is available and may be presented to the jury to assist it in the determination and evaluation of matters of fact, which role is exclusively granted to the jury by law. As the Supreme Court said in Potvin at page 304 in referring to Section 715:
>
> > "It is my view that the word "may" is directed not to the parties but to the trial judge. I believe it confers on him or her a discretion not to allow the previous testimony to be admitted in circumstances where its admission would operate unfairly to the accused."

[Emphasis added]

[67] Justice Wells continued at paras. 37 – 39:

> 37. In the context of the present case, the words "circumstances where its admission would operate unfairly to the accused", are the operative words. The discretion is a statutory discretion to be used to prevent any unfairness that could otherwise result, in the words of the Court, from a purely mechanical application of the section. As the Court said at p. 307:
>
> > "In my view there are two main types of mischief at which the discretion might be aimed. First, the discretion could be aimed at situations in which there has been unfairness in the manner in which the evidence was obtained. Although parliament has set out in the sections specific conditions as to how the previous testimony has to have been obtained if it is to be admitted under Section 643(1), the most important of course being that the accused was afforded full opportunity to cross-examine the witness. Parliament could have intended the judge to have a discretion in those cases in which compliance with the requirements of Section 643(1) gave no guarantee that the evidence was obtained in a manner fair to the accused."
>
> 38. And again at p. 308:
>
> > "In my view, once it is accepted that Section 643(1) gives the trial judge a statutory discretion to depart from a purely mechanical application of the section, the discretion should be construed as sufficiently broad to deal with both kinds of situations, namely where the testimony was obtained in a manner which was unfair to the accused or where, even although the manner of obtaining the evidence was fair to the accused, its admission at his or her trial would not be fair to the accused."
>
> 39. Though this case presents some difficulty, I have nevertheless concluded that safeguards can be imposed which will satisfy the criteria of fairness to the accused. I am satisfied that the law permits the evidence given by M.D. at the preliminary inquiry, to be read to the jury. However, in allowing it to be read, I have an obligation to ensure that that procedure is not unfair to the accused. I have concluded that fairness can be ensured by making available to the jury all relevant facts

> both medical and otherwise, touching on M.D.'s evidence, so that they will form a part of the entire evidence and enable the defence to argue the issue of the weight or quality of M.D.'s evidence, in the light of all of the circumstances surrounding it. To do otherwise would be manifestly unfair to the accused and could allow the jury to receive a distorted view of M.D.'s evidence and a distorted view of her capabilities and/or her possible motives to misrepresent.
>
> [Emphasis added]

[68] He concluded at paras. 40 - 41 of *Druken #2*:

> 40. It shall be a condition precedent to the reading of M.D.'s evidence taken at the preliminary inquiry, that the Crown will call Dr. Strong to give evidence as to her present and past medical condition insofar as he knows it, and the Crown shall introduce through the appropriate police officers the statements made by M.D. to the police on June 13th and 14th, and will also call Constable Randell to give evidence as to the taking of the statements and the sequence of events involving the suspicions of M.D.'s son, between the times of M.D.'s first and second statements. The accused shall have full right of cross-examination of such medical and other witnesses, after which M.D.'s evidence taken at the preliminary inquiry, may be read to the jury.
>
> 41. I am satisfied that with these safeguards, the jury will be able to make proper factual determinations, and that M.D.'s evidence will have been presented to the jury in a manner which will address the concerns expressed in Potvin at page 308 in respect of: the two competing and frequently conflicting concerns of fair treatment for the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue.
>
> [Emphasis added]

[69] As with *Saleh*, however, *Druken #2* possesses elements which distinguish it from Mr. Downey's situation in the case at bar. *Druken #2* appears to have been rendered at a *voir dire* conducted in the middle of a (Judge and jury) trial, (see para. 3 of *Druken #*2) at a time when the potential impact of the preliminary inquiry testimony upon the fairness to the accused of the trial could be assessed at least upon that portion of the trial evidence already heard.

[70] Here, the "die" has not yet been cast. The Defence is speculating, and in effect asking the court to correct a "problem" that has not yet arisen. If it does arise, for example, when the Crown has decided (and disclosed) its list of witnesses,

procedural safeguards may be put at place at the pre-trial conference(s) or at the trial itself to forestall and/or minimize any potential unfairness to the accused. Absent this, I would be reluctant to employ a "pre-emptive strike" and direct either side as to how it must conduct its case.

[71] Moreover, in a "worst case scenario" the Defence could call the witnesses in question as part of its own case. Finally, the court at trial could direct that the witness(es) in question be called (and provide any procedural directions necessary) as it did in *Druken #2,* if it were necessary to correct any apparent prejudice to Mr. Downey which had arisen.

[72] This is not to downplay or trivialize Defence concerns. I have concluded that there is potential for some (slight) prejudice to accrue to Mr. Downey with respect to each of the points that he has argued. These concerns, however, do not pass muster when juxtaposed with the probative value of Ms. MacLean's testimony.

e) The probative value of Ms. MacLean's testimony in the first trial exceeds the prejudicial effect of its admission in the second.

[73] Ashley MacLean's evidence is highly probative (or "highly relevant", if you will). One only needs to refer to the decision of the Court of Appeal in *Downey, (supra).* For example, in allowing the Crown appeal and ordering the accused's new (upcoming) trial, Saunders, J.A. stated:

> 29. Ms. MacLean testified that she was able to identify all four intruders the "exact second they walked into the bedroom". With regards to the respondent, Jason Downey, she said he was standing about six feet away, right in front of the bed and holding a gun in his right hand. She said she knew it was him before he even started speaking. She told him there wasn't any reason to shoot, that they didn't have anything in the house, but that they could take whatever they wanted and just leave them alone. She said the respondent was the only one who spoke. She testified he said:
>
> > Who's this white girl trying to tell me to leave?
>
> and that when she shouted there was no reason to shoot them, and they could get caught for it, the respondent replied:
>
> > How am I going to get caught ... Nobody's going to get caught because none of you guys are going to make it out of here alive.

30. When she "started freaking out" Ashley MacLean said the respondent pointed the gun at her and:

> "started telling me to shut up. And then he just shot me ...and then he continued to shoot me... I thought I was dead ... I couldn't move, like, I couldn't feel anything ... I was on that bed, like, I couldn't breathe, like, it was really hard to breathe ... so it kind of felt like I was kind of suffocating ... And Logan got up and, like, ran out of the room. And I remember just hearing him on the phone out in the living room with the cops and he was kind of screeching on the phone, freaking out.
>
> And Jordan was in the room and he -- he just kind of looked at me. And Jordan was in the room and he -- I remember he just kind of looked at me. He was telling me that they were just blanks, that they weren't real, that -- like, we were going to be fine...when I opened it, like, a mouthful of blood just, like, came piling out of my mouth. I remember I told him that I needed him to help me roll over because I couldn't breathe ... And I told that, if he didn't roll me over, that I was going to die, because ...I couldn't take a breath at all.

[74] Later at paras. 32 – 34:

32. Ms. MacLean said she was "100 percent positive" in identifying ES, Z, DB and Markel Jason Downey as the four intruders and Markel Downey as being the man who shot her. When asked whether there was anything distinct about the respondent's voice, Ms. MacLean said:

> It's not really distinct, it's just I'm so used to hearing -- like, hearing his voice, that I just knew it by sound. Kind of like anybody else's voice. Nobody sounds the exact same, everybody has a different kind of voice, so I can't really tell you the distinction. I would just say that I know his voice from my recollection of all the times that I have talked to him, so it wasn't hard to know it was him the second he started speaking.

33. Later, in her direct examination, Ms. MacLean was asked by Crown counsel:

> Q. Was there anything about the content of the conversation you had with the shooter that made you think

> -- led you to know or think you know who you're talking to?
>
> A. It wasn't really about what we were talking about, it was just more I recognized his voice from all the other times I talked to him, so it's like I don't really see anybody else sounding exactly like him. So when I was talking to him, I did recognize his voice from previous conversations I've had with him in the past.

34. When asked whether there was anything distinguishing about the respondent's eyes, Ms. MacLean testified:

> A. He kind of reminds me of a pit bull, so I don't know, just kind of like, when I look at him and stuff, it's just he, like -- it's kind of hard to explain, but he kind of reminds me of a pit bull when I look at him. So that was a weird, like, explanation, but that's -- that's...
>
> Q. That's okay. This is your chance to explain what you mean by that, that's all.
>
> A. That's what I mean is, like, that's how I could distinguish him, which is -- that's how I see him, so...

[75] Then, in reviewing the law, Saunders, J.A. continued:

54. A helpful explanation of this distinction can be found in the decision of the British Columbia Court of Appeal in *R. v. Bob*, 2008 BCCA 485 where Neilson, J.A., writing for a unanimous court said:

> [13] ... this was a case of recognition, rather than identification. There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her. While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence: *R. v. Aburto*, 2008 BCCA 78; *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), aff'd [1996] 2 S.C.R 461, 107 C.C.C. (3d) 194.
>
> [Emphasis in original]

[76] And at para. 97:

> 97 The trial judge contrasted Logan Starr's and Jordan Langworthy's inability to identify the gunman with Ashley MacLean's ability to do so. He added, among other things, that they had more time in which to observe the gunman, as compared to Ms. MacLean. With respect, this is irrelevant to Ms. MacLean's immediate recognition of the respondent because:
>
> - The preponderance of evidence established that the lighting in the living room was very dim -- therefore, any added opportunity to observe was diminished, and
>
> - More importantly, neither Logan Starr nor Jordan Langworthy knew the respondent before this event.

[77] Finally, at paras. 111 – 114:

> 111. All of these factors inform Ms. MacLean's ability to reliably recognize the respondent, immediately. His mask did nothing to conceal his identity. His voice was recognized by Ms. MacLean. She knew her assailant from the two years they had spent together in school, and as neighbours.
>
> 112. The failure to consider the evidence of Messrs. Starr and Langworthy in this way deprived the trial judge of appreciating that Ms. MacLean's recognition of an otherwise non-descript person carried significant weight, because of her familiarity with him.
>
> 113. Finally, the trial judge failed to consider the context of the dispute between Ashley MacLean and the respondent, which led to her quitting gym class in Grade 11. The dispute and her later reconciliation with the respondent were relevant to a number of issues:
>
> - Ms. MacLean testified that the respondent became quite heated during their dispute -- this may well have provided her with the ability to recognize his elevated voice in the bedroom, whereas the trial judge only considered their conversations in the school stairwell, on this point, and
>
> - Their eventual reconciliation, by virtue of her friendship with his ____, Z, caused Ms. MacLean to consider the

> respondent as more of a friend, thereafter. This provides a qualitative context to her familiarity with him.
>
> 114. In sum, the effect of the trial judge's assessment of the evidence was to silo Ms. MacLean's testimony and subject pieces of it to the overall Crown burden. This stripped the persuasive value of the whole of the Crown's case and constitutes an error in law.

Conclusion

[78] Ms. MacLean's testimony at the first trial is compliant with the requirements of section 715(1) of the *Criminal* Code, and also meets the criteria for admission under the principled exception to the hearsay rule. I am not persuaded that I ought to exercise my discretion and nonetheless exclude Ms. MacLean's evidence (and the transcript thereof) for the truth of its contents in the second trial.

[79] There is (some) potential prejudice which may accrue to the accused for the reasons discussed above. Much of that prejudice, however, is contingent or speculative, and, in any event, there are procedural safeguards which may be employed to greatly vitiate any impacts upon the accused's right to a fair (second) trial if they materialize.

[80] Tragically, Ms. MacLean is dead, and hence, unavailable. Her unavailability does not detract from the fact that her prior testimony is highly relevant (hence probative) with respect to the issues that must be addressed in the second trial.

[81] Moreover, the facts in issue in the second trial will be almost identical to those in the first. As noted, there may be a new issue as to the causation of Ms. MacLean's death in 2018, however, her testimony (obviously) is not relevant to that. Also, there may be a tangential issue, at some point in the second trial, as to whether *mens rea* for first degree murder is present. The deceased's prior testimony thoroughly covered what she says the accused did and said prior to shooting her and the others which is all that she could offer on that topic.

[82] The overwhelming preponderance of the jury's task in the second trial will be to determine whether the Crown has proven beyond a reasonable doubt that the accused was the shooter. Ms. MacLean's evidence is highly probative with respect to that issue. Its probative value greatly exceeds any potential prejudice which may accrue to the accused by virtue of its admission.

[83] As a consequence, the Crown's application is granted. By necessary implication, the visual aid to which Ms. MacLean referred (in court) during her 2017 testimony (*voir dire* Exhibit "5") is also admissible.

[84] Nonetheless, if there are any individual portions of Ms. MacLean's testimony which the Defence contends "…offend the ordinary rules governing the admissibility of evidence …" (*Michaud,* para. 28) then I would be prepared to hear argument targeted at those specific pieces of it, if necessary.

Gabriel, J.