IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: *R. v. W.(N.)*, 2017 NSPC 33

Date: July 17, 2017
Docket: 3015277
Registry: Halifax

Between:

Her Majesty the Queen

v.

W.(N.)

RESTRICTION ON PUBLICATION: sections 110 and 111 YCJA

DECISION ON THE ADMISSIBILITY OF A HEARSAY STATEMENT

Judge:	The Honourable Judge Anne S. Derrick
Heard:	July 12 and 13, 2017
Decision:	July 17, 2017
Charges:	section 235, *Criminal Code*
Counsel:	Terry Nickerson and James Giacomantonio, for the Crown
	Roger Burrill and Anna Mancini, for W. (N.)

By the Court:

Introduction

[1] M.C.O gave a statement to police on July 13, 2016. When he did so he was under arrest for conspiracy to commit murder. Police investigators had intercepted communications which they alleged were conversations between M.C.O. and N.W. about killing M.B. and L.D. In the course of being questioned, M.C.O told his interrogators that N.W. had made an admission to him about killing J.C. Police were actively investigating J.C.'s homicide at the time and believed that N.W. was responsible.

[2] J.C. was found shot to death in the early morning hours of March 29, 2016. On July 13, 2016, when police investigators questioned M.C.O. they believed J.C. had spent the last hours of his life in a stolen Kia with M.B., L.D., N.W. and another young man, L.C. The investigation of J.C.'s homicide had included Part VI intercepts of these individuals. These intercepts led to the arrest of M.C.O.

[3] This application arises from M.C.O.'s testimony as a Crown witness at N.W.'s murder trial. M.C.O. claimed to have no memory at all of being interrogated by the police on July 13, 2016. The Crown sought to refresh M.C.O.'s memory by showing him a videotape of his statement. M.C.O. acknowledged it was him on the videotape but testified to having no memory of being arrested, held in custody, interrogated by police or taken to court.

[4] M.C.O.'s appearance as a witness was a protracted exercise in eliciting nothing. The Crown painstakingly tried to refresh M.C.O.'s memory to no avail. As contemplated by *R. v. K.G.B.* [1993] 1 S.C.R. 740, para. 111, the Crown next brought an application under section 9(2) of the *Canada Evidence Act.* I found significant inconsistencies between M.C.O.'s evidence in court and what he said to police on July 13, 2016. The Crown proved the statement by calling M.C.O.'s arresting officers and D/Cst. Donald Buell, the principal interrogator. I permitted Crown and Defence to cross-examine M.C.O. on his statement. His responses were consistently either denials or claims of memory loss. His posture in relation to the July 13, 2016, statement to police can be summed up by this answer in cross-examination by the Crown: "You can show me the video a thousand times – I don't remember."

The Intercepts and M.C.O.'s Memory

[5] During M.C.O.'s July 13, 2016, police interrogation, D/Csts. Buell and Simmons played portions of intercepts they told M.C.O. were telephone conversations between him and N.W. Some of these intercepts were played to M.C.O. in court by the Crown to see if they refreshed his memory. M.C.O. said they did not. He testified that he could not remember any such conversations, denied it was him on the intercepts and said he did not know if it was N.W.'s voice.

The Khelawon Application

[6] The memory-refreshing and cross-examination of M.C.O. having produced no results, the Crown applied to have M.C.O's videotaped statement introduced as M.C.O.'s evidence under the principles developed by the Supreme Court of Canada in *R. v. Khelawon*, [2006] S.C.J. No. 57 and related Supreme Court jurisprudence. Mr. Burrill has said these applications, now commonly referred to as "*Khelawon*" applications may soon be re-branded as "*Bradshaw*" applications after the Supreme Court of Canada's most recent decision on the principled approach to hearsay. He may well be right. Whatever may be the correct descriptor for these applications, as I will be discussing, *R. v. Bradshaw*, [2017] S.C.J. No. 35 is the trial judge's lodestar.

The Principled Approach – General Principles

[7] M.C.O.'s statement is hearsay and therefore presumptively inadmissible. *(Khelawon, para. 59)* The admission of a witness' statement will be permitted as a principled exception to the hearsay rule if the Crown succeeds in showing, on a balance of probabilities, that the statement's admission is (1) necessary and (2) reliable. *(Khelawon, para. 42)* In deciding whether to admit M.C.O.'s statement I must "start from the premise that [it is] presumptively inadmissible and then search for indicia of trustworthiness that can overcome the general exclusionary rule." *(R. v. Couture, [2007] S.C.J. No. 74, para. 85)*

[8] The problem with hearsay statements is "the general inability to test their reliability." *(Khelawon, para. 2)* The contents of a statement cannot be tested as a witness can be: the possibility of misperceptions, incorrect recollections, misrepresentations and lies cannot be explored. As the Supreme Court of Canada observed in *R. v. Youvarajah*, [2013] S.C.J. No. 41:

> **19** The law has conventionally favoured the evidence of witnesses who give evidence in court because they can be observed, under oath or affirmation, and their credibility and reliability can be tested by cross-examination. These elements help the trier of fact assess the credibility of the declarant or witness, the reliability of the evidence, and the degree of probative force it carries. When these elements are absent, as is the case with a statement made outside of the court, it is more difficult for the trier of fact to make these assessments.

[9] The fact that a witness' statement cannot be tested through cross-examination does not however preclude it being admitted as evidence for the truth of its contents. The inability to subject evidence to the crucible of cross-examination,

> ... does not bar the admission of the hearsay evidence when (i) there is no real concern about whether the statement is true or not because of the circumstances in which it was made; and/or (ii) circumstances are such that the trier of fact will be able to sufficiently test the truth and accuracy of the statement. These situations are not mutually exclusive alternatives and can both be considered in assessing the admissibility of a statement. (*Khelawon, paras. 49 and 61-63.*)

[10] The admissibility inquiry in relation to hearsay evidence is focused on the dangers of admitting such evidence. *(Couture, para. 77)* At this stage, the issue is threshold reliability which "concerns admissibility, whereas ultimate reliability concerns reliance." (*Bradshaw, para. 39, citing Khelawon, para. 3*) The evidence, even if determined to be necessary, is only admissible if it is "sufficiently reliable to overcome the dangers arising from the difficulty of testing it." *(Khelawon, para. 49)* In addressing the matter of threshold reliability and whether the statement should even be allowed into evidence,

> ... 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. (*Khelawon, para. 4*)

The Principled Approach - Necessity

[11] The Supreme Court of Canada has held that the necessity criterion is to be given a flexible definition. (*Khelawon, para. 78*) As in *K.G.B.,* necessity in this case is made out on the basis of the unavailability of the testimony not the unavailability of the witness. Where a witness recants from a prior statement, necessity is established. (*R. v. Youvarajah, para. 22*)

[12] Necessity is not an issue in this application. The Defence concedes that necessity has been made out by M.C.O.'s purported complete memory loss. It is agreed that the Crown's application to have M.C.O.'s police statement admitted into evidence rises or falls on the reliability requirement of the principled approach.

The Principled Approach – Procedural and Substantive Reliability

[13] In *Bradshaw*, the Supreme Court of Canada has further elaborated and clarified the reliability requirement. *Bradshaw*, citing *Khelawon* and *Youvarajah*, notes that

> **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).

[14] Karakatsanis, J. for a majority of the Court in *Bradshaw* indicated that 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. (*para. 40*)

[15] In this case, it is conceded by the Crown that the procedural safeguards – what Karakatsanis, J. refers to as "substitutes for traditional safeguards" (*Bradshaw, para. 28*) - provided by a statement being taken in accordance with the requirements of *R. v. K.G.B.*, are largely not present. M.C.O's statement was not taken under oath or affirmation and he was not warned about the consequences of lying to the police. (*K.G.B., paras. 89 – 94*)

[16] Another procedural safeguard – cross-examination – is also not present in this case. In *Bradshaw*, Karakatsanis, J. held that "…cross-examination of a recanting witness before the trier of fact, may provide a satisfactory basis for testing the evidence." (*para. 28*) As I mentioned previously, there was no effective cross-examination of M.C.O. before me.

[17] However, M.C.O.'s statement was video-taped. Videotaping was enthusiastically endorsed by the Supreme Court of Canada in *K.G.B.* The Court held that the complete videotape record of a witness' statement "duplicates the experience of observing the witness in the courtroom" and is another important indicator of reliability "which will satisfy the principled basis for the admission of hearsay evidence." (*K.G.B., para. 100*)

[18] M.C.O.'s entire video-taped interrogation was played during the Crown's attempt to refresh M.C.O.'s memory. This enabled me to observe M.C.O.'s condition and his treatment by police. I saw nothing of concern.

[19] M.C.O. maintained that when he was arrested on July 13, 2016 he was "drunk and high." He testified that he had been drinking and consuming Ecstasy before he was arrested. He says this obliterated his memory and distorted everything he said in the interrogation.

[20] Having watched M.C.O. on video I have no doubt whatsoever that he was not under the influence of drugs or alcohol while being questioned by police. I watched

him sitting, standing and pacing. He spoke extensively with the police investigators. He was coherent and intelligible. He did not slur his words. He understood the questions put to him and the information he was given. He made logical comments and gave responsive answers. He was not sleepy or distracted. He was steady on his feet. Although obviously anxious and stressed and wanting to go home, he showed no signs of impairment.

[21] The police officers who testified – D/Cst. Giffin and Sgt. Keddy who arrested M.C.O. and D/Cst. Buell – all observed no signs of impairment or intoxication. No drugs or alcohol were found during M.C.O.'s arrest and when he was searched incidental to it.

[22] *K.G.B.* also requires me to be satisfied on a balance of probabilities that M.C.O.'s July 13, 2016 statement was "not the product of coercion of any form" whether in the form of "threats, promises, excessively leading questions by the investigator…or other forms of investigatory misconduct." (*para. 117; R. v. F.J.U., [1995] S.C.J. No. 82, para. 49*) The presence of coercion would undermine reliability, potentially fatally.

[23] Coercion is not an issue in this case. D/Cst. Buell and D/Cst. Simmons engaged in no verbal or non-verbal misconduct in the interrogation of M.C.O. They did not threaten or coerce him or make promises in order to obtain his statement. I am satisfied that the officers had a good rapport with M.C.O. and treated him respectfully. M.C.O. acknowledged that in the interrogation itself.

[24] There is no suggestion of any improper interactions with M.C.O. outside the interrogation room. D/Cst. Buell testified on the section 9(2) *Canada Evidence Act* application that he only spoke with M.C.O. in the room.

[25] I have no concerns about M.C.O.'s condition when he was being questioned nor any concerns about how D/Csts. Buell and Simmons dealt with him. However, as procedural reliability is not made out in this case, I must focus on whether the Crown has established substantive reliability, that is, the inherent trustworthiness of the statement. (*Bradshaw, para. 30*) *Bradshaw* indicates that,

> **30**…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).
>
> **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).

[26] In *Bradshaw*, Karakatsanis, J., citing *Khelawon* (*para. 49*) notes that the "threshold reliability standard always remains high – the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents." She held that procedural reliability and substantive reliability can be synergistic but warns care must be taken that using a combined approach – procedural reliability and substantive reliability complementing each other in circumstances where neither would have been sufficient on its own - "does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers." (*para. 32*)

Corroborative Evidence and Substantive Reliability

[27] This same heading is found in *Bradshaw*. Here, as there, the critical focus is on whether there is corroborative evidence to establish the threshold reliability of M.C.O.'s police interrogation. *Bradshaw* states that:

> **44**…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…

[28] The hearsay danger in this case is that M.C.O. may have lied to the police. Therefore, the corroborative evidence has to focus on the likelihood he was truthful during the July 13, 2016, interrogation. The function of the corroborative evidence at this stage "is to mitigate the need for cross-examination, not generally, but *on the point* that the hearsay is tendered to prove." (*Bradshaw, para. 45, emphasis in the original*)

[29] Corroborative evidence that merely confirms what is not disputed, that establishes "objectively verifiable details" not in issue, does nothing to advance the inquiry into whether threshold reliability has been established. (*Bradshaw, para. 46*)

[30] *Bradshaw* establishes that corroborative evidence

> **47**…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.

[31] It is not sufficient for me to find that M.C.O.'s truthfulness is more likely than any of the alternative explanations. *Bradshaw* requires me, on the basis of the circumstances and the *voir dire* evidence, to "be able to rule out any plausible alternative explanations on a balance of probabilities." (*para. 49*) I am mandated to consider even speculative explanations, provided they are plausible. (*Bradshaw, para. 48*) Where corroborative evidence is "consistent with many hypotheses", it does not show "that the only likely explanation" is the truthfulness of the statement under scrutiny.

[32] Bradshaw lays out a roadmap for trial judges trying to determine "whether corroborative evidence is of assistance in the substantive reliability inquiry…" We are to:

1) Identify the material aspects of the hearsay statement that are tendered for their truth.

2) Identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case.

3) Based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement.

4) Determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. (*Bradshaw, para. 57*)

M.C.O.'s Statement to Police on July 13, 2016

[33] The video of M.C.O.'s interrogation was entered as Exhibit VD-1 on the *Khelawon* application. As much as I could, within the time constraints for preparing this mid-trial decision, I watched the interrogation and made note of the time stamps for citing in these reasons. As fast-forwarding to certain parts of the statement-taking disabled the audio, I have had to resort to referencing the transcript provided to me at the *voir dire* as an aid. I have used time stamps where it was feasible to do so and transcript page references otherwise. Crown and Defence have agreed the transcript should therefore be marked as an Exhibit (*Exhibit VD-14*) so that my page references can be readily located.

[34] M.C.O.'s interrogation by D/Csts. Buell and Simmons lasted approximately four hours. The officers explained to M.C.O. that he had been arrested for conspiring to kill M.B. and L.D., the conspiracy having occurred between May 25 and June 27. Quite quickly D/Cst. Buell mentions N.W. and then the murder of J.C. M.C.O. knew that N.W. had been arrested for the murder. M.C.O. was asked if N.W. had ever talked to him about the murder or if he had heard any rumours "about why it went down." M.C.O. told the officers he hadn't heard too much about it.

[35] D/Cst. Buell then asks M.C.O. if he had heard that N.W. was "maybe the guy that fired the shot that almost killed [M.C.O.'s] brother." M.C.O. had never heard that and says he had understood it was M.B.

[36] D/Cst. Buell, after giving some investigative background in relation to the J.C. homicide, talks about what the police believed was N.W.'s involvement in a shooting at an apartment on Lakecrest Drive a few hours before J.C. was found dead. He tells M.C.O.:

> …What happens is [N.W.] is the one who orchestrated the whole idea to Lakecrest Drive…who lied to you, lied to your brother, lied to your family. Betrayed you, he's the one who wanted to go there, he's the one who orchestrated the whole thing, he's the one that's the cause of that bullet going into that apartment and just missing your brother…By less than a foot, by less than a foot man…(*Exhibit VD-14, page 30*)

[37] From there D/Cst. Buell gets to talking to M.C.O. about the conspiracy to commit murder he's been arrested for. M.C.O. has told D/Csts. Buell and Simmons he wouldn't have done anything – "I know that I'm charged but, either way I wouldn't have killed them, or I wouldn't have shot them or nothing like that or…" (*Exhibit VD-14, page 34*)

[38] M.C.O. is emphatic with the officers that he would not have tried to kill M.B. or L.D. and never made any move against them. He obviously realizes he is in serious trouble.

[39] D/Cst. Buell circles back to the J.C. murder and showing M.C.O. a crime scene photograph of J.C. lying dead, tells M.C.O.,

> …there's a guy who died for no reason at all other than because [N.W.] didn't like him, didn't trust him and thought he was going to get word back to your family about him organizing going to Lakecrest and firing that shot in the window…(*Exhibit VD-1, 18:05:32*)

[40] D/Cst. Buell shows M.C.O. a text conversation he says was exchanged between M.C.O. and N.W. in relation to the conspiracy. Shown another text, M.C.O. says: "…that's literally a joke, right. [N.W.] knows I wasn't doing that. Like everyone knows I wasn't doing that." (*Exhibit VD-14, page 47*)

[41] M.C.O. offers an explanation for the texts:

> …like, sometimes I do smoke, I'm not gonna lie to you guys but I must have been high or drunk and just talking stupid just for ah…to keep [N.W.] as a close friend, because I know we haven't been hanging lately but I wouldn't do that…(*Exhibit VD-14, page 49*)

[42] After some discussion about the officers' impression of N.W., the Lakecrest Drive shooting, various people and their relationships, D/Cst. Simmons asks M.C.O., "What did [N.W.] ever tell you about this whole situation?" M.C.O. responds: "I never talked to him about like the murder." (*Exhibit VD-14, page 64*)

[43] Following a discussion about how M.C.O. did not know that N.W. was at the scene of the Lakecrest Drive shooting, D/Cst. Simmons asks M.C.O. if he has told him "everything." M.C.O. says, yes, "that's all I know." (*Exhibit VD-14, page 66*)

[44] M.C.O. has been spending time in Toronto with his older brother, M. He mentions to the officers that he is due in court on August 31 for a mischief charge. He refers to it as "that stupid little charge." (*Exhibit VD-14, page 68*)

[45] M.C.O. continues to be anxious about the predicament he is in. He tells the officers he is not lying and adds: "I really hope I don't get charged with this 'cause like I wasn't, I wasn't meaning anything by it, and I wasn't planning…Planning on doing anything." In response to the process for laying charges being explained to him and D/Cst. Buell saying, "But you have to look at the seriousness", M.C.O. responds: "Oh no, I get the seriousness." (*Exhibit VD-14, pages 74 and 75*)

[46] M.C.O. emphasizes his aspirations,

> I just want to live my life and I just want to like play ball and like grow, grow up and have a family one day. I don't want to go to jail and all that other stuff. I don't want to go through all that stuff and I really did not mean none of this stuff. And I wouldn't look in your eyes and lie to you guys, I am being honest, I'm telling you guys everything I know. (*Exhibit VD-14, page 76*)

[47] M.C.O. stresses this a number of times throughout his interrogation. After portions of certain intercepts are played for him, and D/Cst. Buell says: "You see how you got yourself caught up in this?", M.C.O. responds: "Yeah, and like, I'll do anything to get out of it, like I really…" (*Exhibit VD-14, page 85*) A short time later he says again: "…you guys gotta believe me man like I'll do anything, I never intended on doing anything like that, it was me like feeling like I'm protecting myself." (*Exhibit VD-14, page 86*)

[48] This prompts D/Cst. Buell to ask M.C.O. if he is scared of N.W. M.C.O. tells the officers he knows he cannot get the better of N.W. in a fight,

> So I just feel like…just talk shit to him, and it would keep myself protected, you know, right. But I really did not mean it like that,

> I never really intended to do anything. I never even tried to do anything. (*Exhibit VD-14, page 87*)

[49] M.C.O. told D/Csts. Buell and Simmons that if he was asked in court whether N.W. had wanted him to kill M.B. he would say "Yeah, but I'm not gonna do it though." D/Cst. Buell asked him if N.W. wanted him to kill L.D. M.C.O. answered, "Yes." (*Exhibit VD-14, page 88*) M.C.O. goes on to comment about the Lakecrest Drive shooting: "It's just crazy how N.W. like lied to me and all that stuff…But, he, I was, literally just I was talking shit to him because defending myself…" (*Exhibit VD-14, page 89*)

[50] After listening to another intercept, M.C.O. says: "In order for me to like get this done and over with, I would have to go to court and say like [N.W.] wanted this to happen?" (*Exhibit VD-14, page 90*) D/Cst. Buell tells him they have to "talk to the investigative team about what their plans are, what their intentions are…" D/Cst. Simmons explains: "We are just trying to figure everything out here, what happened right, piecing everything together." M.C.O. reacts with: "Man, Dean, do you think I'm gonna go to jail?" (*Exhibit VD-14, pages 90 and 91*)

[51] This is immediately followed by the following exchange:

> D/Cst. Simmons: Well we just want to piece this together; we want to find out what happened. We want to know if you know more, do you know any more?
>
> M.C.O. Well I heard more. (*Exhibit VD-14, page 91*)

[52] M.C.O. tells the officers he was warned by his older brother, M., to stop associating with N.W. M.C.O. says, "…I heard that like he was there, I never even knew he did it like…" He clarifies for the officers that "he was there" meant when J.C. was murdered. (*Exhibit VD-14, page 92*)

[53] At this point M.C.O. has been with the officers approximately an hour and a half. His anxiety about going to jail has escalated. He says: "…I'll do anything for not to go to jail, like I really don't want to go to jail. It ain't my place…like I really wasn't gonna do anything…it was just me feeling like I am protecting myself, just from either N.W. like beating me up, like…" (*Exhibit VD-14, pages 92 and 93*) The officers refer to the Lakecrest Drive shooting again and M.C.O. says: "…Like I

really hope I don't go to jail for this shit man, cause I don't have…" (*Exhibit VD-14, page 93*)

[54] M.C.O. tells the officers he wants to get out of Nova Scotia and get back to Toronto and his brother. He says again that he does not want to go to jail "for this, [N.W.] I don't want to and I really didn't intend to do it." (*Exhibit VD-14, page 96*) He is reminded of the reality, that he is implicated by the evidence. M.C.O. replies: "I know but there's a way I can get out of it, you know what I mean?" (*Exhibit VD-1,19:05:47*)

[55] A few minutes later, M.C.O. says again he needs to focus on himself, "I don't want to go to jail for N.W., so like I, if I would have to go to court anything saying like that I was scared and stuff, I would do like all that." (*Exhibit VD-1, 19:08:38*)

[56] D/Cst. Buell brings up J.C.'s murder again and asks M.C.O. if at the time of the conspiracy to commit murder he knew that N.W. had killed J.C. – "Did you know at that time that he killed that guy?" M.C.O. says: "No, I never knew…" (*Exhibit VD-1, 19:10:25*)

[57] M.C.O. tells D/Csts. Buell and Simmons that the talk with N.W. about killing M.B. and L.D. was "purely fear and shit talk." (*Exhibit VD-1, 19:11:31*) He tells the officers, "I'm not lying to you guys…I will go to court, I will do anything…" (*Exhibit VD-14, page 103*)

[58] When M.C.O. is asked somewhat later by D/Cst. Buell why he should be believed when he says the conspiracy to murder talk was nothing more than him posturing, he says: "Because I would do anything, I'm willing to do anything to prove it to you and I have no history." (*Exhibit VD-14, page 111*)

[59] After saying he was "just talking shit 'cause I was scared of [N.W.]", (*Exhibit VD-1, 19:21:50*) M.C.O. is pressed by D/Cst. Buell to explain what he was "talking shit about…?" M.C.O. responds:

> I was just talking shit because [N.W.] wanted, [N.W.] wanted me to kill people but I was just talking shit, playing along but I really had no intentions on it…He wanted [L.D.] and [M.B.] killed, but I wouldn't…I was just playing along but really wasn't going to do anything…I was just talking shit and I messed up that's it,

> that's like everything, and I'm willing to do anything to get out of this and…(*Exhibit VD-1, 19:22:21*)

[60] M.C.O. says again to the officers, "I really had no intentions on doing it and like whatever you guys need me to do." (*Exhibits VD-1, 19:24:44*)

[61] According to M.C.O. it was after M.B. got released from "jail" that N.W. tells M.C.O. M.B. is "acting funny" and "not answering his messages and stuff" which, says M.C.O., led N.W. to believe M.B. was "switching up on him." (*Exhibits VD-1, 19:25:25, 19:25:40, 19:25:50*)

[62] D/Csts. Buell and Simmons tell M.C.O. they believe he knows more than he is telling them. As D/Cst. Simmons puts it: "But I need a hundred percent here, and I don't think you are." D/Cst. Buell follows this with: "…you're saying you want to do the right thing, you're saying you want to step up…this is your opportunity right now, this is the most important moment of your life right now to step up and tell one hundred percent of the truth of what's going on…" M.C.O. responds: "'Cause of, that picture" a reference to the crime scene photograph of the dead J.C. (*Exhibit VD-14, page 117*)

[63] D/Cst. Buell goes straight for what the investigators are after: "So [N.W.] tells you that he killed [J.C.], let's be real." M.C.O.'s response is equivocal:

> "Well, no like, he didn't, like his specific words wasn't, I killed him but…" (*Exhibit VD-1, 19:27:46*)

[64] What follows from M.C.O. is a description of remembering "exactly" that he and N.W. were sitting in the car. M.C.O.'s older brother, M., did not want N.W. out at his house because he was likely to attract police attention. M.C.O. went on to explain what N.W. said:

> Like, yeah I was there like, he never like, he never like said oh like I shot him or he he just like, um, yeah I was there, me and M.B., me and M.B. were there. And yeah, that was like, that was it…(*Exhibit VD-14, page 118*)

[65] D/Csts. Buell and Simmons are not satisfied. M.C.O.'s answer is described as "eighty percent of the way there now." They circle back to the Lakecrest Drive

shooting and press M.C.O. to think about "how this guy would have killed your brother" and "of the fact he did kill this boy, in cold blood and the fact that you know, he's got you in this position right instead of out playing ball on a nice sunny day, here you are arrested by the police." (*Exhibit VD-14, page 119*)

[66] D/Cst. Buell admonishes M.C.O., "…so let's get to the real truth where he tells you…" and D/Cst. Simmons adds: "I don't believe the conversation ends there, I know there's more details." M.C.O. is urged to "be real", he's told "there's more" and this is his "chance to tell the truth…" (*Exhibit VD-14, page 119*) M.C.O. asks the officers: "If I be real with you guys can I go home and stuff?" (*Exhibit VD-14, page 120*) They press him harder.

D/Cst. Simmons:	No, we want you to be real here.
D/Cst. Buell:	I just want you to be real with me, it's not about you going home. It's about you wanting to be real for your family…for these other people, let's be real man, let's tell the real truth.
M.C.O.	Yeah, he told me he killed him. (*Exhibit VD-14, page 120*)

[67] Asked about the precise details – exact words, date, circumstances - M.C.O. says N.W. "just started crying." M.C.O. says he asked what was wrong and N.W. said: "I killed that fella." (*Exhibit VD-14, page 120*) M.C.O. tells D/Cst. Buell he knew "about him being there" so he didn't have to ask N.W. who he was referring to. (*Exhibit VD-14, page 121*) Asked about whether N.W. had explained why, M.C.O. says it was because of "the leg situation", what D/Cst. Buell - at the start of the interrogation when describing what investigators had learned about the events before J.C. was shot - had referred to as "the bitch game." (*Exhibit VD-14, page 31*)

[68] M.C.O. tells D/Csts. Buell and Simmons that was N.W.'s only motive for killing J.C. and that he – M.C.O – was so shaken up after this conversation that he got into a bad car accident in his brother's car on the way home. (*Exhibit VD-14, page 121*)

[69] D/Cst. Buell asks M.C.O. if N.W. told him how many times he shot J.C. or where. M.C.O. says he didn't ask for any details.

[70] The suspicions about M.B.'s and L.D.'s reliability and the intercepted conversations with N.W. came later, M.C.O. explains to the officers:

> Yeah, so that is, that is when he start coming across all that, and I'm just talking shit after he's telling me he killed him, I'm just sitting there and I'm like thinking to myself nine times out of ten he's going to jail when the police come back, they're gonna arrest him one hundred percent, I'm saying all I need to do is just stay close, like stay as the buddy, in the buddy range as I can with him, so nothing happens to me. (*Exhibit VD-14, page 128*)

[71] According to M.C.O. the conspiracy conversations were "a couple of days later or something like that, cause after I dropped him off I didn't see him for like a couple of days…" (*Exhibit VD-14, page 128*) M.C.O. tells D/Csts. Buell and Simmons that N.W. says he needs M.C.O. "to kill [M.B.] and [L.D.] and all that stuff. And I'm just like talking shit 'cause I'm thinking in my head, he could have a gun on him right now." (*page 129*) M.C.O. says N.W. came to him in person and

> …was like talking to me about it. And the way he was talking was like if you don't do it you're gonna be next and stuff and that's why I was just like beating around the bush, beating around the bush or whatever, but I never ever tried anything… (*Exhibit VD-14, page 130*)

[72] After exploring whether M.C.O. accepted any money or other consideration for the intended hits on M.B. and L.D., D/Cst. Buell asks him:

> D/Cst. Buell: What made you decide to tell us the truth now?
>
> M.C.O. 'Cause like I really don't want to go to jail. I just wanna, just go home and talk to my Dad right about now… (*Exhibit VD-14, page 132*)

[73] Asked how he feels, M.C.O. says:

> Like I just feel as I am being more honest with you guys and stuff, and giving you guys what you need so I feel, I there is a better chance of me to go see my Dad, getting to talk to him and then just like, I feel like I just need to get away. (*Exhibit VD-14, page 132*)

[74] By now it is close to 8 p.m. and M.C.O. has been with D/Csts. Buell and Simmons for about two and a half hours. They leave the room to confer with the investigative team. While they are gone M.C.O. becomes anxious, asking an officer who is tasked to respond if he knocks on the door, "What did they say like, did they say if I am staying or not?" (*Exhibit VD-14, page 136*) When D/Csts. Buell and Simmons return, M.C.O. immediately asks them if they know whether he will get to go home. As the officers prepare to play M.C.O. some intercepts, he inquires whether the investigators "plan on keeping me?" and asks: "You think they'll end up keeping me?" (*Exhibit VD-14, page 142*)

[75] D/Cst. Buell tells M.C.O. he feels "we're missing something here…" (*Exhibit VD-14, page 143*) M.C.O. wants to know when he will know if he can go home. A further long discussion ensues about the conspiracy allegation and portions of intercepts are played but M.C.O. never resigns himself to the likelihood he will be kept in police custody. When the officers leave the room again, M.C.O. asks: "If you guys do let me go, do I need to find my own transportation?" (*Exhibit VD-14, page 198*)

[76] It is D/Cst. Simmons who returns. He accuses M.C.O. of having "skirted around this whole situation" and not being "truthful. He says: "You told me bits and pieces but I know you know certain fine details about this whole thing…" (*Exhibit VD-14, page 203*) After some more discussion about the conspiracy allegations and M.C.O. continuing to protest his innocence, D/Cst. Simmons brings up the J.C. murder: "So, tell me about your conversation with [N.W.] right from the start in terms of when you found out about him basically..." He explains he is referring to J.C. and says: "So tell me how it started, that conversation." (*Exhibit VD-14, page 206*)

[77] This produces some new details from M.C.O. He and N.W. were driving, smoking a "blunt" and listening to music turned up loud. He recalls he was listening

to a specific song, “Free da Real Right?” M.C.O. notices N.W. crying and asks him what is wrong, “that’s when he tells me…he shot that fella.” D/Cst. Simmons tells him, “No tell me how he said it to you” and M.C.O. responds with: “I killed that fella.” He again says N.W. told him about the leg room conflict motive. After getting N.W. home, M.C.O. says he had a car accident. (*Exhibit VD-14, pages 206 – 207*)

[78] M.C.O. persists in asking about being released. He asks again toward the end of the interrogation (*Exhibit VD-1, 22:04:22*); his voice quavers and he is plainly distressed at being told he is going to have to go to court. He pleads with D/Cst. Simmons: “…why can’t you let me out…I’ll do anything…” (*Exhibit VD-1, 22:06:03*) He tells D/Cst. Simmons, “…I can help you guys, I can show you guys stuff, I’m willing to do all that, you guys aren’t hearing me out…I don’t want to go to jail…I’ve literally been doing nothing…” (*Exhibit VD-1, 22:07:08*)

[79] When D/Cst. Simmons has left the room, M.C.O. is visibly agitated and upset, pacing the room and hitting himself multiple times in the head in obvious anguish. When D/Csts. Buell and Simmons return, M.C.O. continues to be very distressed about being held for court.

Threshold Reliability and M.C.O.’s Statement to Police

[80] The Crown is seeking to have M.C.O.’s statement introduced for the purpose of placing before me the following evidence:

- the admission by N.W. to M.C.O. “I killed that fella”;
- M.C.O. identifying himself and N.W. in the intercepts and text messages;
- M.C.O.’s interpretation of the texts;
- M.C.O.’s narrative of the conspiracy to commit murder and the reasons behind the conspiracy.

[81] Mr. Giacomantonio submits that the Crown has advanced corroborative evidence for each of these evidentiary points such that the need for cross-examination, which was not possible in this case, is mitigated. (*Bradshaw, para. 45*) The question that I am confronted with is whether, having considered the “evidence as a whole and in the circumstances of the case, the only likely explanation for the hearsay statement” is [M.C.O.’s] truthfulness about, or accuracy of, the material aspects of the statement. (*Bradshaw, para. 44*)

[82] As I previously noted, there are few circumstantial guarantees of M.C.O.'s truthfulness. He was video-taped but not questioned under oath or affirmation or warned about the consequences of lying. Mr. Giacomantonio acknowledges this but submits there is corroborative evidence to support the accuracy and sincerity of each of the evidentiary points the Crown wishes admitted at this threshold stage. I will address each one in turn.

The Confession

[83] As I have described, M.C.O. told the police that N.W. admitted to killing J.C. Mr. Giacomantonio submits that admission is corroborated by M.B.'s evidence that N.W. shot J.C. Mr. Giacomantonio points to what he views as the most powerful piece of corroborative evidence for the confession – M.C.O. describing the "leg room test" to police, evidence that, in the Crown's submission, had to have come from N.W.

[84] Mr. Burrill identified a significant concern about the corroborative purity of the "leg room test" evidence. While it was described by M.B., L.D., and L.C. – the other occupants of the stolen Kia – as involving N.W. and J.C. and having occurred in the hours before J.C. was shot dead, it was mentioned to M.C.O. early in his interrogation by D/Cst. Buell. Long before M.C.O. says anything about it, D/Cst. Buell tells him:

> …[P...] [that is, J.C.] even feels weird by him, just from the moment they pick him up [referring to N.W.], he's got this like evil stare with him, he's like playing the bitch game with them, or he is pushing his legs like this in the car, causing [P...] to go like this, everything else, he's playing the bitch game with them, so they're getting a weird feeling. (*Exhibit VD-14, page 31*)

[85] This considerably weakens the corroborative force of M.C.O.'s description of the "leg room test". In the circumstances, it is no more probable that M.C.O. learned about this from N.W. than he learned about it from D/Cst. Buell. Although there is no evidence M.B., L.D. or L.C. told him, there is clear evidence the police did. The Crown is correct that M.C.O. wasn't in the car but it is equally plausible that he acquired his knowledge about "the bitch game" from the police as it is that N.W. told him about it.

[86] Mr. Giacomantonio says M.C.O.'s statement about N.W.'s confession to killing J.C. is corroborated by the detail he provides – that he and N.W. were in Toronto together, that they were driving around smoking marijuana, that a specific song – the name of which he remembers – was playing and that in a shocked state after N.W. confessed, M.C.O. had a car accident. The car accident has been admitted by the Defence (*Exhibit VD-13*) It happened on May 30, 2016. But that is not evidence that any of what M.C.O. told police about the context for the confession is true. There is no evidence that N.W. was with M.C.O. on May 30 in Toronto. The Crown says they were seen together in Toronto on May 20, a fact which the Defence has admitted (*Exhibit VD-13*), but that does not establish they were there together ten days later.

[87] In Mr. Giacomantonio's submission, the car accident is a peculiar detail that M.C.O. has no reason to make up. He didn't make it up. It is a fact that M.C.O. had a car accident in Toronto. But I don't see how, in the circumstances, it corroborates his statement that N.W. confessed to J.C.'s murder.

[88] As for the other details about the circumstances in which M.C.O. says N.W. confessed, they have no independent foundation and could have easily been invented.

[89] As for the corroboration offered by M.B.'s testimony that N.W. shot J.C., it carries the baggage of M.B.'s admitted involvement in J.C.'s murder. In isolation it is not a sturdy foundation on which to build threshold reliability.

[90] Mr. Giacomantonio pointed me to *Bradshaw* where at paragraph 64 Karakatsanis, J. said: "It is hardly plausible that Thielen [Bradshaw's accomplice] would have been mistaken – or wrongly remembered – whether Bradshaw participated in the murders." The concern I have with M.C.O.'s statement about N.W.'s confession is not that he may have been mistaken or have wrongly remembered, but that he was lying.

[91] M.C.O.'s police interrogation was, as I have detailed, replete with his entreaties to the police to let him go home, accept that he didn't mean anything in the intercepts and texts they presented to him and set him free. Mr. Giacomantonio has submitted that M.C.O.'s anxiety over his detention was just as likely to drive him to tell the truth as it was to make him lie. As Mr. Giacomantonio observed,

people can tell the truth for self-serving reasons. This was a case, says Mr. Giacomantonio, of M.C.O. trying to use the truth to set himself free.

[92] I am required by *Bradshaw* to consider "alternative, even speculative" explanations for the statement. (*para. 57*) It is not speculative in M.C.O.'s case to consider that he may have lied to the police about N.W. because he believed it would facilitate him getting released. I have to be troubled by M.C.O.'s offers to D/Csts. Buell and Simmons to "do anything" and all such related statements he made before telling them N.W. had confessed to him.

[93] And in accordance with *Bradshaw*, I have to determine whether the corroborative evidence rules out the possibility that M.C.O. was lying "such that the only remaining likely explanation for the statement" is M.C.O.'s truthfulness about N.W.'s confession. I don't find it does.

The Conspiracy to Commit Murder

[94] The corroborative evidence relating to the conspiracy to commit murder are the intercepts and the text messages. The first issue I must address is voice identification.

[95] The Crown called D/Cst. Stanley in support of the submission that the voice on the intercepts tendered at the *voir dire* was that of N.W. D/Cst. Stanley testified that he used self-identification, acquired familiarity, and context to identify N.W.'s voice.

[96] D/Cst. Stanley was assigned to monitor a Part VI investigation that was underway in relation to the J.C. homicide. One of the targets for the Part VI was N.W. D/Cst. Stanley personally reviewed 5,332 of the 36,205 telephone calls, text messages and probes installed in residences and vehicles related to the investigation. He listened to calls where targets self-identified or were identified by others. Armed with those cues he would listen repeatedly to other calls for the purpose of identifying the voices in those calls. D/Cst. Stanley testified that he acquired familiarity with the targets also by contextual factors.

[97] D/Cst. Stanley testified that he would listen to the same self-identifying/being identified calls multiple times to refresh his memory of the target's voice.

[98] On June 30, 2016, D/Cst. Stanley listened to five telephone calls selected by him in which N.W. was identified as a participant. An index of these calls was filed as Exhibit VD-7. It was D/Cst. Stanley's conclusion that N.W. was using three different phones during the time of the Part VI investigation.

[99] The five selected calls were played in court. In them, a voice identified himself as either "[N…]", "[T…]" or "[T-T…]". I have already heard that "T-T…]" was a nickname for N.W.

[100] D/Cst. Stanley testified that one of the phones being monitored was subscribed to [T…W…of…Drive].

[101] D/Cst. Stanley also familiarized himself with N.W.'s voice by flying to London, Ontario when N.W. was arrested and monitoring his two and a half hour interrogation by police. D/Cst. Stanley said it was helpful to listen to N.W.'s voice in this context rather than just on the intercepted telephone calls. D/Cst. Stanley said he wanted to be able to recognize the same voice "mannerisms" he was hearing on the phone calls. D/Cst. Stanley also monitored a subsequent 32-minute interview conducted with N.W. by Halifax Regional police.

[102] By the time D/Cst. Stanley monitored the police interviews, he had familiarized himself with N.W.'s voice. D/Cst. Stanley testified he is confident it is N.W.'s voice on the five intercepts played in court that he had listened to.

[103] There was no argument from the Defence about voice identification. I am satisfied that the Crown has correctly identified N.W.'s voice on the intercepts.

[104] D/Csts. Buell and Simmons used excerpts of the intercepts during their interrogation of M.C.O., confronting him with the evidence that supported his arrest for conspiracy to murder M.B. and L.D. As I detailed in my review of the interrogation, M.C.O. told the officers there had been discussions with N.W. about killing M.B. and L.D. but said he had just been stringing N.W. along about his willingness to participate in the plan.

[105] The Crown concedes that M.C.O.'s repeated denials that he intended to further the conspiracy cannot be viewed as reliable. The intercepts reveal M.C.O. to be relaxed and engaged in the discussions with N.W. There is no evidence of fear or

reluctance. That is also evident in the text messages which I am satisfied have been authenticated by D/Cst. Stanley. (*Exhibit VD-11*)

[106] I agree with the Crown that the intercepts and text messages constitute very good corroborative evidence. M.C.O. and N.W. did not realize they were under surveillance. They conducted their conversations in this state of blissful unawareness with no reason to fabricate or misrepresent what was being discussed. If the only hearsay issue here was the conspiracy, the intercepts would lift it over threshold reliability and into evidence. But the value of the intercepts to the conspiracy does not spill over to corroborate M.C.O.'s police statement as a whole. While the intercepts and text messages left no room for M.C.O. to fabricate with respect to the conspiracy, the same cannot be said of his evidence about N.W.'s confession.

[107] The intercepts corroborate the conspiracy, and if introduced into evidence at the trial, they can stand on their own, but they do not corroborate all the points the hearsay is intended to prove. (*Bradshaw*, *para. 44*)

Interpreting the Intercepts and Text Messages

[108] M.C.O.'s statements to the police about the intercepts and text messages are of interest to the Crown because he identifies himself and N.W. in them and provides interpretation. He identifies individuals referred to by their nicknames. He confirms the content. Again, if the only hearsay issue here was the conspiracy, the intercepts would establish threshold reliability. But they are not corroborative evidence beyond the conspiracy.

The Mischief Charge

[109] Mr. Giacomantonio tendered at the *voir dire* a certified copy of an Information charging N.W., M.C.O. and another youth with mischief. (*Exhibit VD-2*) As I have noted, M.C.O. told D/Csts. Buell and Simmons that he and N.W. had been charged with mischief – "that stupid little charge" he called it – and they were, on April 11, 2016. I do not find this to be corroborative evidence that rules out M.C.O. lying in his July 13 police interrogation about the hearsay evidence the Crown is interested in being received for its truth

The Inability to Cross-examine

[110] There is no question that a witness like M.C.O. throws a spanner into the works of the criminal justice process. It is a challenge the criminal justice process has to confront without lowering its admissibility standards. *Bradshaw* reminds us that "Hearsay can exceptionally be admitted into evidence if it is necessary and sufficiently reliable." (*para. 18*) *Bradshaw* reiterates that trial judges act as "an evidentiary gatekeeper", a role that involves protecting "trial fairness and the integrity of the truth-seeking process." (*para. 24, citing Youvarajah, paras. 23 and 25*) *Bradshaw* draws a bright line around hearsay and requires trial judges to be satisfied the corroborative evidence or circumstances show the hearsay statement to be inherently trustworthy. Only then is the presumption of inadmissibility rebutted. (*para. 71*)

[111] A witness like M.C.O. is not unfamiliar to the criminal justice system. The presumptively inadmissible character of hearsay is not attenuated by such witnesses. The following example illustrates this. In *R. v. T.G.N.*, 2007 BCCA 2, the Court recognized the challenges presented by the witness who completely frustrates the full opportunity to cross-examine:

> **7** At trial, when Mason was called by the Crown he recanted the statement. The Crown was given leave to cross-examine but without effect. Crown counsel then applied to have the statement admitted as substantive evidence, relying on the principled exception to the hearsay rule for prior inconsistent statements of a witness as explained in ***R. v. B.(K.G.)***…
>
> **8** The trial judge conducted a *voir dire* to determine admissibility. Mason testified that he was drunk and had no recollection of the events of the evening. He recalled making a statement to the police but he said that everything in it was false. He said he gave the statement because he was afraid that the police would keep him in custody if he did not tell them what they wanted to hear. The trial judge described Mason as "one of the most unsatisfactory witnesses [he] had the unfortunate duty

> to have in [his] court" and he was "satisfied that, almost without exception, everything [Mason] said in [his] courtroom was a lie."
>
> **19**…[The trial judge] was able to assess Mason's demeanour during the interview, but there was no contemporaneous cross-examination or equivalent testing of Mason's account. Mason's intransigent recantation insulated the statement from any meaningful test of its reliability at trial, apart from the demonstration of Mason's total unreliability as a witness.

[112] In a decision that would withstand scrutiny under *Bradshaw*, the British Columbia Court of Appeal held that

> **17…**In these circumstances, the presumption of inadmissibility can only be overcome if the circumstances demonstrate a degree of reliability that it can be admitted into evidence in the search for truth without undermining the integrity of the trial process that normally depends on the right of an accused to test the evidence against him through cross-examination.

[113] I have no doubt that M.C.O. lied in court. To call him an "unsatisfactory witness" is an understatement. I do not believe he cannot now remember anything about his arrest by police only a year ago, being interrogated for four hours, being charged with conspiracy to commit murder, being held in police custody and going to court. M.C.O. testified that he had had no injury or illness that would have affected his memory. Whatever M.C.O.'s reasons for lying in court, he ensured that what he does remember of events in 2016 was unavailable for scrutiny through the conventional trial processes of direct and cross-examination.

[114] It has never been the law that when a witness refuses to testify or feigns memory loss his or her statement is simply admitted into evidence. A criminal trial can be hobbled by the lying, obstructionist, feigning witness. The jurisprudential answer to that problem has not been to loosen the fetters around hearsay.

Conclusion

[115] Hearsay evidence is presumptively inadmissible. Corroborative evidence can enable the trial judge to assess threshold reliability "if it overcomes the specific

hearsay dangers presented by the statement." (*Bradshaw, para. 4*) *Bradshaw* mandates that trial judges be satisfied 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." (*para. 44*) I am required to "rule out any plausible alternative explanations on a balance of probabilities." (*para. 49*) I have been unable to do so in this case. I am not satisfied the only likely explanation is that M.C.O. was being truthful in his statement to D/Csts. Buell and Simmons. Consequently, on the basis of these reasons, I am denying the Crown's application to have the statement admitted into evidence.

[116] I want to conclude by expressing my appreciation to Mr. Giacomantonio and Mr. Burrill for the assistance they provided me, in this challenging area of the law, through their very able submissions.