Citation: Fawley et al v Moslenko, 2017 MBCA 47 Date: 20170511
Docket: AI16-30-08580

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N :

ROBERT FAWLEY and	)	
TRACY ANGER-ISINELLI	)	***R. M. Beamish***
as the Personal Representative	)	*for the Appellant*
of the ESTATE OF	)	
KAILA LATOYA TRAN	)	***B. J. Harris***
	)	*for the Respondents*
(Applicants) Respondents	)	
	)	*Appeal heard:*
- and -	)	***November 29, 2016***
	)	
DRAKE DAVID MOSLENKO	)	*Judgment delivered:*
	)	***May 11, 2017***
(Respondent) Appellant	)	

On appeal from 2016 MBQB 59

MAINELLA JA

Introduction

[1] Determining legal responsibility for a murder is usually a matter for the criminal courts. The backdrop to this civil appeal is the drug-related murder of Kaila Tran (the deceased). Her family believes the murder was ordered by the deceased's boyfriend (the respondent). While the police arrested and charged him, he was never ultimately tried for the murder. The family wishes to bring a civil action against him. In order to begin the action, relief from a statutory limitation period was required. The deceased's sister, Tiffany Tran (the applicant), successfully brought an

application for leave to begin the action pursuant to section 14(1) of *The Limitation of Actions Act*, CCSM c L150 (the *LAA*).[1] The respondent appeals the order granting leave to begin a wrongful death action.

[2] The first of two issues raised by the appeal involves the application of the discoverability rule under the *LAA*. The respondent submits that the judge erred in determining that the applicant did not discover all decisive material facts that could link him to the murder until after the expiry of the limitation period. He says she knew the facts necessary to sue him before the limitation period expired, but did not act with the necessary diligence to commence the claim.

[3] The other issue raised is that of when is contentious hearsay evidence admissible in an application for relief from a limitation period under the *LAA*. The respondent argues that the application for an extension of time was based entirely on inadmissible hearsay and double hearsay and, therefore, the judge erred when he concluded that there was admissible evidence of a prima facie case on the causes of action alleged that would have a reasonable prospect of success at trial (see *Johnson v Johnson*, 2001 MBCA 203 at para 13; and *Justice v Cairnie Estate et al* (1993), 88 ManR (2d) 43 at para 9 (CA), additional reasons at 88 ManR (2d) 179, leave to appeal to SCC refused 100 ManR (2d) 296).

[4] For the following reasons I would dismiss the appeal.

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[1] The style of cause reflects that the application was originally filed in the name of the deceased's stepfather (Mr. Fawley) and her mother. Tiffany Tran was later appointed administratrix of the deceased's estate. Because of that development, the judge considered her to be the applicant for leave to begin an action under the *LAA* and the order he granted authorizes her to commence an application against the respondent for the wrongful death of the deceased.

Background

[5] On June 20, 2012, the deceased was brutally stabbed to death in the parking lot of her Winnipeg apartment. The attack was perpetrated by a drug dealer named Treyvonne Willis (Willis). Six days after the murder, Willis and the respondent were arrested and jointly charged with first degree murder.

[6] At common law, a cause of action in tort dies with the person to whom, or by whom, the wrong was done (see *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 at para 49). Survivor legislation has overridden this rule but there are statutory limitation periods. Section 7(4) of *The Fatal Accidents Act*, CCSM c F50, and section 2(1)(m) of the *LAA* create a two-year limitation period from a person's death for the commencement of a claim by qualified survivors for wrongful death. Similarly, section 53(2) of *The Trustee Act*, CCSM c T160, creates a two-year limitation period from a person's death for the commencement of a tort action relating to the death by the deceased's personal representative for the benefit of the deceased's estate. Accordingly, the two-year limitation period for a civil action in relation to the deceased's death expired on June 20, 2014.

[7] The murder case against the respondent fell apart at the preliminary inquiry. The Crown lost an evidentiary ruling and, as a result, was prevented from adducing certain evidence it believed linked him to the murder. Because of that unfavourable ruling, on June 17, 2014 (three days before the expiry of the limitation period), the respondent's murder charge was stayed. At the time, the applicant was told by a police detective and the

prosecutor that the investigation of the respondent would continue. However, the murder charge was not recommenced within one year or subsequently re-laid thereafter.

[8] The trial of Willis took place in April 2015. During the trial, the jury heard evidence from two Crown witnesses and also viewed a video-recorded statement by Willis to police that are relevant to this appeal.

[9] Tremaine Sam-Kelly (Sam-Kelly) was a friend of Willis who was present at the time of the murder and discussed it with Willis. He testified that Willis admitted to him prior to the murder that the deceased's "boyfriend" had told him to kill her. He told the jury that Willis said that the boyfriend had revealed to him that the deceased was a "snitch" who had to be killed because she might "rat him out". He also testified that Willis told him that the boyfriend had said to him, "if we get rid of her, he can give me the money" to pay a drug debt Willis owed. Finally, Sam-Kelly also told the jury that the boyfriend had given Willis information about the habits of the deceased to assist him in killing her.

[10] There is no suggestion or evidence that anyone other than the respondent was the boyfriend of the deceased at the time of her murder. The couple lived together and had been in relationship for several years.

[11] Cristina Valencia (Valencia) was a friend of Willis. She testified that Willis spoke to her two days before the murder about him owing $3,000 to a drug dealer.

[12] In the video-recorded statement, the jury saw that Willis confessed to the murder and said he killed the deceased to avoid violent repercussions

to him and his family members over an unpaid drug debt owed to a criminal organization. In this statement, Willis named the person who told him to kill the deceased; it was not the respondent. The police did not believe Willis. The investigation led police to believe that the person named by Willis as the directing mind of the murder had no involvement in it whatsoever. The only people ever charged for the murder were Willis and the respondent.

[13] On April 24, 2015, approximately ten months after the expiry of the limitation period, Willis was convicted, after trial by judge and jury, of first degree murder.

[14] Soon after Willis was convicted, the applicant was told by a police detective and the prosecutor that there was a second video-recorded statement from Willis to police ("the second statement"). The second statement was never shown to the jury during the murder trial. The applicant did not know of the existence of the second statement until the detective and prosecutor told her about it. The applicant was told by the detective and the prosecutor that, in that second statement, Willis told police that it was the respondent who had hired him to murder the deceased.

[15] The second statement of Willis is in the possession of the authorities. Although the applicant knows that the second statement exists, she knows nothing of its content other than what the detective and prosecutor briefly told her.

[16] The applicant says that the second statement, when considered in light of the testimony of Sam-Kelly and Valencia, is new evidence of a decisive character that may prove the respondent hired Willis to commit the

murder.

[17] On June 16, 2015, the application under the *LAA* for leave to begin a civil action against the respondent was filed. The proposed statement of claim alleges that he conspired together with Willis to cause the death of the deceased and that his actions amount to assault, battery and/or the intentional infliction of harm.

[18] The affidavit material filed in support of the application under the *LAA* consisted of three affidavits: one from Mr. Fawley and two from the applicant. There was no cross-examination on the affidavits filed.

Statutory Provisions

[19] The relevant provisions of the *LAA* are as follows:

> **Extension of time in certain cases**
> 14(1) Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between
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> (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
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> (b) the date on which the application was made to the court for leave.
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> **Evidence required on application**
> 15(2) Where an application is made under section 14 to begin or to continue an action, the court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf

of the claimant, it appears to the court that, if the action were brought forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.

Definitions
20(1) In this Part

"appropriate advice" in relation to any fact or circumstance means the advice of competent persons qualified, in their respective spheres, to advise on the professional or technical aspects of that fact or that circumstance, as the case may be;

"court" in relation to an action, means the court in which the action has been or is intended to be brought.

Reference to material facts
20(2) In this Part any reference to a material fact relating to a cause of action is a reference to any one or more of the following, that is to say:

(a) The fact that injuries or damages resulted from an act or omission.

(b) The nature or extent of any injuries or damages resulting from an act or omission.

(c) The fact that injuries or damages so resulting were attributable to an act or omission or the extent to which the injuries or damages were attributable to the act or omission.

(d) The identity of a person performing an act or omitting to perform any act, duty, function or obligation.

(e) The fact that a person performed an act or omitted to perform an act, duty, function or obligation as a result of which a person suffered injury or damage or a right accrued to a person.

Nature of material facts
20(3) For the purposes of this Part, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a person of his intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence based on a provision of this Act or any other Act of the Legislature limiting the time for bringing an action, an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions.

Where facts deemed to be outside knowledge
20(4) Subject to subsection (5), for the purposes of this Part, a fact shall, at any time, be taken not to have been known by a person, actually or constructively if

(a) he did not then know that fact;

(b) in so far as that fact was capable of being ascertained by him, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of ascertaining the fact; and

(c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, the fact might have been ascertained or inferred, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of obtaining appropriate advice with respect to the circumstances.

Standard for an Extension of Time under the *LAA* and the Standard of Review

[20] Subject to certain exceptions set out in the *LAA*, Part II of the *LAA* is a complete code as to relief from a limitation statute in Manitoba (see

Rarie v Maxwell (1998), 131 ManR (2d) 184 at para 58 (CA)). In *Johnson*, Helper JA explained the two aspects of the onus under the *LAA* for an applicant to obtain leave to commence an action after the expiry of a limitation period in this way (at para 34):

> Pursuant to s. 14(1), the court must be *satisfied* on the evidence adduced that not more than 12 months have passed between the date on which an applicant first knew of all the circumstances of the case upon which the action is based and the date upon which the application to court was made. Pursuant to s. 15(2), no order is to be granted under s. 14(1) unless it appears to the court that an applicant's evidence would be *sufficient* to establish the cause of action on which the action is founded, absent evidence to the contrary.

See also *Penner v Martens et al*, 2008 MBCA 35 at paras 1-3; and *Sochasky v Winnipeg (City)*, 2013 MBQB 204 at para 22.

[21] The first part of the test is a statutory discoverability rule. The judge considers the evidence adduced by the applicant, in light of the legal principles set out in sections 14(1) and 20 of the *LAA*, and decides whether the applicant knew, or ought to have known, all material facts of a decisive character upon which the action is based not more than 12 months before the date on which the application was filed. Twaddle JA summarized the applicant's onus this way in *Einarsson et al v Adi's Video Shop et al* (1992), 76 ManR (2d) 218 (CA) (at para 13):

> Thus, an applicant must prove, at the very least, that he first learned of a fact material to his cause of action within the twelve months next before the application was filed. The fact, first learned within that period, must be "material" within the sense defined in s. 20(2); it must be of "a decisive character" as that phrase is defined in s. 20(3); and it must not be one which the applicant ought to have known about earlier.

See also *Manitoba Hydro Electric v Inglis (John) Co et al* (1999), 142 ManR (2d) 1 at para 25 (CA).

[22] The statutory discoverability rule has both a subjective and an objective component. The applicant must demonstrate both that she was unaware of the decisive material facts earlier than 12 months before the application was filed and that, in the circumstances, her lack of awareness was objectively reasonable (see *Johnson* at para 31). Awareness of having a possible cause of action is not to be confused with a party having a complete understanding of the particulars of the cause of action; whether it would, as opposed to could, succeed; or the amount of damages likely (see *Rebizant v Greenwood et al* (1998), 127 ManR (2d) 35 at para 71 (QB); *Johnson* at para 15; *Budd v Cardoso* (1996), 113 ManR (2d) 101 at paras 29-31 (CA); *Munroe v Holder*, 2002 MBCA 39 at paras 32-33; *Swan River Valley Hospital District No 1 v MMP Architects*, 2002 MBCA 99 at paras 20-31; *Lacroix (Guardian of) v Dominique*, 2001 MBCA 122 at para 14; and *Winnipeg Condominium Corp No 30 v The Conserver Group Inc et al*, 2008 MBCA 20 at paras 18-22).

[23] The *LAA* recognizes that the nature of the given material facts in a particular case may require a party to seek appropriate advice from a third party as to whether the facts are of a decisive character, for purposes of advancing a claim, before filing his or her application for relief from the limitation period. Hamilton JA explained the relevant principles in the following way in *McIntyre v Frohlich et al*, 2013 MBCA 20 (at paras 57-58):

> Sections 20(3) and (4) of the *Act* impose an "objective/subjective" test based on an assessment of what is reasonable given the applicant's personal characteristics of intelligence, education and experience. This assessment contemplates a consideration of whether the applicant has obtained "appropriate advice" in respect of the material facts.
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> Advice can be legal, medical or other expert advice. Depending on the factual circumstances, the date of receipt of an expert report has been found to constitute the date that a plaintiff knew of all the material facts of a decisive character. See, for example, *Winnipeg Condominium Corp. No. 30 v. Conserver Group Inc. et al.*, 2008 MBCA 20, 228 Man.R. (2d) 30, in which M.A. Monnin J.A. wrote (at para. 22):
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> > I do not, by any stretch, wish to state that in every case the requirements of s. 14(1) of the **Act** require that a putative plaintiff obtain expert evidence to buttress its position, but in this case it was necessary to satisfy the "decisive character" requirement of the **Act**.

[24] Assuming there is no issue that the applicant did not actually know all of the material facts of a decisive character earlier than 12 months before the application is filed, the discoverability determination the judge is tasked to make under the *LAA* is as follows: on what date, given the nature and character of the facts and the proposed cause of action, would it have been evident to a reasonable person, standing in the shoes of the applicant, that she could have a cause of action with a reasonable prospect of success? If there has been consequential delay because of the seeking of third-party advice, the appropriateness of that delay will turn on whether or not the material facts are of such a nature that they put the applicant "on notice" of the potential cause of action before seeking the third-party advice (see *Penner* at para 18; *Morry et al v Janzen et al*, 2015 MBCA 86 at paras 7-8, 13-14).

[25] The second part of the test is a limited assessment of the merits of the proposed action. Section 15(2) of the *LAA* requires the judge to assess the applicant's evidence and decide whether it is sufficient, subject to any possible defence(s), to establish a prima facie case that would have a reasonable prospect of success (see *Laing v Sekundiak*, 2015 MBCA 72 at para 66).

[26] The threshold for establishing a reasonable prospect of success is not as onerous as providing evidence that would prove the case on balance and not as simple as showing that the facts on which the claim is based, if accepted, could successfully resist a motion to strike out the claim (see *Chan v Chan*, 2001 MBCA 191 at para 14; and *Cairnie Estate* at para 45). No two cases for relief from a limitation period are alike. What is important is that the facts relied on by an applicant "must be of substance" (*Chan* at para 14). This means that the facts are not based on speculation or conjecture but, rather, are grounded in tangible and identifiable pieces of evidence that satisfy the judge. As Scott CJM explained in *Cairnie Estate*, "that there is something to the case so that if sent on to trial there is some realistic prospect that the action will succeed" (at para 45).

[27] Applications for relief from a limitation period are, as Scott CJM noted in *Penner*, "very fact-specific" (at para 17). Accordingly, the standard of review on appeal is largely deferential. Both aspects of the test for leave to commence an action after the expiry of a limitation period under the *LAA* are applications of a legal standard to a set of facts and, therefore, absent a purely legal error, raise questions of mixed fact and law reviewable on a standard of palpable and overriding error (see *Housen v Nikolaisen*, 2002

SCC 33 at paras 26-30; *McIntyre* at para 49; and *Laing* at paras 57-58).

Issue One—The Judge's Application of the Discoverability Rule under the *LAA*

Judge's Decision

[28] The judge rejected the respondent's argument that, based on him being arrested and charged with murder, he could have been sued civilly before the limitation period expired in 2014. The judge also concluded that the application under the *LAA* was made within 12 months of the date on which the applicant knew, or ought to have known, of the decisive facts that could link the respondent to the murder of the deceased as required by section 14(1) of the *LAA*. He stated (at paras 47, 48):

> I agree with the applicant's position that when the criminal charges against the respondent were stayed three days prior to the expiration of the limitation period, the applicant had insufficient evidence to establish that the respondent caused the deceased's death. It was not until after the conclusion of the Willis trial, that she was advised by the Crown and the police that there was a video confession in existence in which Willis states that the respondent hired him to kill the deceased. This information first came to her attention on April 25, 2015 and then again on May 17, 2015.
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> I am of the opinion, that this information along with the evidence given by Sam-Kelly and Valencia at the trial of Willis in April of 2015, was critical to the establishment of the necessary legal connection between the respondent's actions and the applicant's knowledge.

Could an Action be Commenced Based on the Murder Charge Alone?

[29] The respondent says that the applicant knew all of the material

facts necessary for the purposes of Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*), r 25.06(1) to draft a statement of claim and sue him before the expiry of the limitation period because he was arrested and charged with murder soon after it occurred. The rule states:

> **Material facts**
> 25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for a claim or defence, but not the evidence by which those facts are to be proved.

[30] In my view, this argument reflects a misunderstanding of the rule. The rule requires parties to turn their minds to the "essential elements" or "ingredients" of their claims or defences and then set out in the pleading "sufficient facts about the specific events" that, if proven, would establish or defeat the claim (*Robertson v Manitoba Keewatinowi Okimakanak Inc et al*, 2011 MBCA 4 at para 25). To meet the requirements of the rule, more must be done than simply making a conclusory statement. The materiality requirement obligates inclusion of the facts necessary to support or defeat the claim and the requested relief, but no more. As Beard JA explained in *Robertson*, "conclusory statements themselves cannot be taken as material facts that support the cause of action" (at para 25). See also *Vojic v Canada (MNR)*, [1987] FCJ No 811 (CA), leave to appeal to SCC refused, [1988] SCCA No 42.

[31] The essential characteristics of a proper civil pleading are well known: clarity, brevity and utility. As Binnie J explained in *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 (at para 43):

> Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement.

[32] The respondent's argument that he could have been sued in tort as soon as he was arrested and charged in 2012, without any reference in a statement of claim to the material facts as to how he committed the assault, battery and/or the intentional infliction of harm to the deceased, is unpersuasive. One of the requirements of both the torts of assault and of battery is an underlying intentional act of a particular nature (assault—intentional creation of the apprehension of imminent harmful or offensive conduct—see *Hurley v Moore* (1993), 112 Nfld & PEIR 40 at para 22 (CA); and battery—contact plus something else—see *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 at para 16). Merely being arrested and charged with murder provides no clarity as to what intentional act(s) occurred that allegedly have civil consequences. Without more, a civil pleading based on someone simply being arrested and charged for a crime would be inadequate.

[33] In cases where an injury or wrong may have both civil and criminal consequences, it is important to keep in mind that criminal pleadings are less exacting than civil pleadings because of the wording in the *Criminal Code*. Saying someone committed the murder of a named victim with some sense of time and place is likely sufficient to meet the *Criminal Code's* requirements for a count because the modern approach to criminal pleadings rejects formalism and focuses simply on whether an accused is

prejudiced (see *R v Sharpe*, 2007 BCCA 191 at paras 24-25). Section 583(f) of the *Criminal Code* confirms that a count is not objectionable because it fails to describe how a crime was committed:

> **Certain omissions not grounds for objection**
> **583** No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of section 581 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that
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> . . .
>
> **(f)** it does not specify the means by which the alleged offence was committed;

[34] Because of the nature of the law regarding parties to an offence in criminal law, not only does the Crown not have to allege in a count how a murder was committed or whether an accused was a principal or an accomplice, but the jury does not have to be unanimous as to the material facts of an accused's participation in a murder so long as they all agree that the accused was a party to the offence within one of the various ways set out in section 21 of the *Criminal Code* (see *R v Thatcher*, [1987] 1 SCR 652 at 690-99).

[35] Here, it was impossible for the applicant to meet the requirements of QB r 25.06(1) and provide anything more than speculative or conclusory statements about the respondent's complicity in the wrongful death of the deceased in 2012 because, as she deposed, she had no knowledge of what act(s) the respondent did that may have made him civilly liable for the deceased's death. In these circumstances, if such a claim had been filed before the limitation period expired, I have little doubt that it would have

been successfully struck out.

[36] Leaving aside what the law requires for a proper pleading, the respondent's submission is logically inconsistent. The respondent places great legal significance for civil purposes on the fact that he was arrested and charged with murder before the limitation period expired but he ignores the fact that, before the limitation period expired, the Crown stayed his criminal charge. For the sake of argument, any currency that could arise from him being arrested and charged evaporated when the charge was stayed by the Crown.

Was the Applicant's Lack of Awareness of the Second Statement Objectively Reasonable?

[37] I have also not otherwise been persuaded that the judge made a palpable and overriding error in his application of the discoverability rule under the *LAA* in light of the record. It is uncontested that the earliest date on which the applicant knew about the second statement was on April 25, 2015, after Willis was convicted of first degree murder. There is no evidence that anyone told the applicant about the second statement before that date. I also do not see on the facts here how knowledge of the second statement could be imputed to her on an earlier date on an objective basis.

[38] The applicant had no reason to believe or even suspect that there was something in the Crown's disclosure brief that would be the difference between whether or not she could have a cause of action against the respondent. The applicant deposed to the following facts, which were unchallenged:

> At all material times, I deferred to the Police investigation and the criminal proceedings advanced by the Crown. I relied on the information that the Crown and the Police told me regarding Moslenko's involvement in Kaila's murder. I had no independent knowledge of Moslenko's alleged involvement into Kaila's murder.

[39] As well, when the respondent's charge was stayed, the applicant was told by authorities that more investigation of the case was necessary. It was not unreasonable for her to rely on that advice. From the perspective of the reasonable person standing in the shoes of the applicant, the record here reasonably allows for the inference that, at the time the murder charge was stayed in 2014, there was no reason to believe that the Crown's disclosure brief would assist in making a civil claim.

[40] There have been cases where plaintiffs have used civil rules of discovery after an action has been filed to obtain the fruits of a criminal investigation by authorities to further their claims (see *Imperial Oil v Jacques*, 2014 SCC 66; *P (D) v Wagg* (2004), 71 OR (3d) 229 (CA); and *Wong v Antunes*, 2009 BCCA 278). That does not mean, however, that prospective plaintiffs must initiate litigation and engage in fishing expeditions to attempt to learn what investigators have on their files for fear that, by not doing so, they may be considered to not have acted reasonably for the purposes of the *LAA*. Questions about access to material gathered by a law-enforcement agency conducting a criminal investigation for a civil claim are better left to after the action has been commenced.

[41] I see no reason to disturb the judge's decision that the actions of the applicant in relying on the authorities were anything but objectively reasonable. The situation here can be contrasted with that in *Wolinsky et al v*

Assiniboine Credit Union, 2016 MBCA 15.

[42] In *Wolinsky*, creditors of two bankrupt companies sought an extension of time to begin an action under the *LAA* to sue a credit union because officials at the credit union may have had knowledge of cheque kiting by the debtors and did nothing to stop it. The applicants said, in the affidavits filed in support of the *LAA* application, that the first time they learned of a possible cause of action against the credit union was many years after the fact when criminal fraud charges over the cheque kiting were dismissed and the judge's findings about the credit union's knowledge of what had been going on was reported in a newspaper.

[43] This Court reversed the decision granting leave to begin the action and concluded that the record could not support the applicants' assertion that they only first learned of the credit union's involvement in the cheque-kiting scheme years after the fact because the information about the credit union's actions had long been in the public domain and widely reported. As Monnin JA noted, cross-examination of the applicants on their affidavits demonstrated "that the applicants were aware of the possible involvement of the respondent in a cheque-kiting scheme" long before the 12 months prior to the filing of their application under the *LAA* (at para 24).

Conclusion

[44] The respondent has not demonstrated any reversible error in the judge's application of the discoverability rule under the *LAA* and, therefore, I would not accede to this ground of appeal.

Issue Two—Contentious Hearsay Evidence on an Application to Extend a Limitation Period

Judge's Decision

[45] The judge's reasons regarding the merits of the proposed action for the purposes of section 15(2) of the *LAA* were as follows (at paras 53-56):

> Secondly, I am satisfied on the evidence of the applicant that a *prima facie* case has been established that would have a reasonable prospect of success.
>
> I note the respondent's concern that the applicant relies on hearsay evidence in order to argue the existence of these material facts. The fact that the applicant has had to rely on hearsay evidence in her affidavit is not surprising, given that the ongoing criminal proceeding arising out of the death of the deceased has restricted her ability to access that information directly. It may be that the applicant will face an evidentiary burden at a civil trial of this matter which is significantly higher than the onus she must satisfy in this application, and that she may not be able to meet that evidentiary burden in that context, but that is not a relevant consideration in this application.
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> As Queen's Bench Rule 39.01(4) provides:
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> > **Contents—motions**
> > 39.01(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.
>
> On the basis of the evidence before me, I am satisfied that the evidence relied on by the applicant in this application has met the test set out in ***Chan*** *supra*, including "... establish[ing] a continuity to support a cause of action and, if based on information and belief, must reveal the source of that information and belief to demonstrate the weight to be attached to any particular allegation." (para. 14).

Respondent's Hearsay Argument

[46] There was no affidavit from the detective or prosecutor, who had personal knowledge about the second statement, filed in support of the application. The respondent argues that the evidence that the second statement existed was hearsay as that fact came from what the detective and prosecutor told the applicant. He further says that the evidence that the contents of the second statement linked him to the murder of the deceased was double hearsay. He points out that the second statement was not before the Court. He submits that all that was before the Court was the applicant's limited information about the second statement based on what third parties told her was the content of the second statement.

[47] In terms of the admissibility on the *LAA* application of the second statement, the respondent says that the general rule is that an affidavit must be confined to facts within the personal knowledge of the deponent. QB r 4.07(2) provides:

> **Contents**
> 4.07(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

[48] The respondent says that the judge made a legal error by relying on the wrong QB rule as to when hearsay evidence may be received by affidavit, despite QB r 4.07(2). He submits that the judge based his decision on QB r 39.01(4), which governs affidavit evidence on a motion, instead of QB r 39.01(5), which governs affidavit evidence on an application. QB r 39.01(5) states:

> **Contents—applications**
> 39.01(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

[49] The respondent submits that hearsay evidence is only admissible on an application under QB r 39.01(5) if two conditions are met. First, the source of the information must be stated in the affidavit. Second, the fact deposed to must not be contentious (see *Rebizant* at paras 134-140).

[50] The respondent argues that both the *existence* of and the *contents* of the second statement are contentious facts. He points out that, at the murder trial of Willis, the Crown relied only on the first statement of Willis to police which named, as the directing mind of the murder, someone other than the respondent. In that first statement (a written transcript of which is attached to an affidavit of the applicant), Willis also provided police with information which exculpated the respondent from any role in the murder. The respondent says that the contradictory word of a convicted murderer is not admissible. He also says that, if it is admissible, it cannot be sufficient evidence to establish a prima facie case that would have a reasonable prospect of success (see section 15(2) of the *LAA*).

Review of the Judge's Decision

[51] The key difference between QB rr 39.01(4) and (5) is that, on a motion, there is a more permissive approach to reliance on hearsay evidence. The logic of the distinction is that, generally speaking, motions address only procedural matters whereas applications lead to a final disposition of the rights of the parties (see *Telecommunication Employees Association of*

Manitoba Inc et al v Manitoba Telecom Services Inc et al, 2005 MBQB 259 at paras 8-9 (TEAM)).

[52] I agree with part of the respondent's submission. The rules regarding the contents of an affidavit in an application for relief from a limitation period under the *LAA* are governed by QB r 39.01(5), not r 39.01(4). The judge used the terms "motion" and "application" interchangeably throughout his reasons. For example, in his conclusion, he stated that, "In the result, the applicant's motion for an order granting leave to commence an action against the respondent for the wrongful death of Kaila Latoya Tran is granted" (at para 57) (emphasis added). Based on my review of the judge's reasons, he did not turn his mind to whether or not the evidence of the second statement was "contentious" hearsay because he considered the wrong rule.

[53] I have some sympathy for the path the judge followed, as there is an oddity in the law as to relief from limitation periods. Normally, leave to commence a proceeding is sought by way of a motion, not an application. QB r 14.01(3) provides:

> **Where leave required**
> 14.01(3) Where leave of the court is required to commence a proceeding, the leave shall be sought by preliminary motion.

[54] The interests involved when seeking relief from a limitation period also do not focus on resolving the substantive dispute between the parties, while substantive disputes are often at issue in applications. It is accepted that an application for relief from a limitation period should not become "a trial itself" (*Inglis* at para 21). Rather, the concern for the proceeding is

about ensuring a fair balancing of the interests of a plaintiff for relief from a limitation period while, at the same time, ensuring a defendant is not prejudiced in defending the claim by the delay in bringing it (see *Rarie* at paras 15, 45-46). If one looks at the nature of the hearing under the *LAA* based on the comments made in *TEAM*, a *LAA* proceeding is closer to being a procedural matter than it is to being a final disposition of the rights of the parties. For example, such applications can be dismissed based on the statutory discoverability rule even where an applicant has a very strong chance of success on the merits of the claim.

[55] Notwithstanding these concerns, the relevant statute, the *LAA*, defines the proceeding for relief from a limitation period as an "application" in section 14(1). The proceeding before the judge was correctly brought as an application (see QB r 14.05(2)(b)). Therefore, the judge should have directed his mind to the difference between the distinction between QB rr 39.01(4) and (5) as to the receipt of and reliance on contentious hearsay evidence in an affidavit. In my view, the judge misdirected himself by failing to consider whether the hearsay evidence in the applicant's affidavit relating to the second statement was contentious and, because of that fact, inadmissible on the application. Failing to apply the correct legal test to determine the admissibility of evidence is an error of law to be judged on a standard of correctness (see *R v DAI*, 2012 SCC 5, at paras 87-89). Because of the judge's legal error, no deference is owed to his decision regarding section 15(2) of the *LAA*.

Interpretation of QB r 39.01(5)

[56] Where I part company with the respondent is regarding his position that hearsay evidence is only admissible on application if it meets the requirements of r 39.01(5). In contrast, the position of the applicant is that it does not matter whether the evidence surrounding the second statement is contentious. In her view, if the judge erred, his error does not affect the result. She argues that the wording of QB r 39.01(5) is the same as the wording of the equivalent rule in the Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194 (the *Rules of Civil Procedure*), (r 39.01(5)). She says that the Ontario courts do not view r 39.01(5) as an exclusionary rule; it is a rule to permit hearsay evidence but it does not serve to exclude hearsay evidence on an application if it is otherwise admissible at common law or by statute. There is merit to this submission.

[57] While this Court has not had the opportunity to interpret QB r 39.01(5) previously, there are a number of decisions that are of assistance from this jurisdiction and others with similarly worded provisions.

[58] In *Aker Biomarine AS et al v KGK Synergize Inc*, 2013 ONSC 4897, a case involving an application for letters rogatory, the respondent contended that the application relied on contentious hearsay and, therefore, could not be granted. In the course of discussing the respondent's objection, Leach J confirmed that the purposes of rr 39.01(4) and 39.01(5) of the *Rules of Civil Procedure* are to admit evidence that is otherwise inadmissible for motions and applications if certain criteria are met. The rules do not serve to exclude evidence that is otherwise admissible. He stated (at paras 11-13):

> However, it must be remembered that the concern underlying these particular rules is and at all times remains the prevention of inadmissible hearsay; a necessary context for the application of Rules 39.01(4) and (5) made clear by many of the authorities relied upon by KGK. See, for example: *Evans v. Holroyd*, [1988] O.J. No. 1705 (H.C.J.), at paragraphs 12, 17 and 18; *Metzler Investment GmbH v. Gildan Activewear Inc., supra*, at paragraphs 11, 15, 48-51, and 54-55; and *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316 (CanLII), [2012] O.J. No. 3016 (S.C.J.), at paragraphs 109 to 116.
>
> What these and other authorities in this area make clear is that Rules 39.01(4) and 39.01(5) operate as controlled exceptions to the hearsay rule, and that challenges to admissibility based on alleged failure to satisfy the demands of those exceptions are predicated on an express or implicit finding that the impugned affidavit evidence should indeed be characterized as hearsay.
>
> Put another way, the literal wording of Rule 39.01(5) should not be interpreted or applied so as to create some form of "stand alone" method of challenging and excluding evidence that is *not* clearly hearsay; i.e., on the alleged basis that the affiant has not detailed the basis of his or her evidence to an opponent's satisfaction and/or in a manner to satisfy the demands of the applicable test or burden under consideration.

[59] The following comments by Linda S Abrams & Kevin P McGuinness in *Canadian Civil Procedure Law*, 2nd ed (Markham: LexisNexis Canada, 2010) on the *Civil Rules of Procedure* are also of assistance in identifying the purpose of QB r 39.01(5) (at para §11.100):

> The *Rules* expand the extent to which hearsay evidence may be used on motions and applications. They are not intended to restrict the evidence on which a court may act. Accordingly, hearsay evidence that is admissible under a general exception to the hearsay rule under the law of evidence is not subject to the requirements of the *Rules* pertaining to information and belief.

[60] In my view, QB r 39.01(5) is part of the conversation about what evidence is admissible on an application, but it is by no means determinative of the question. The rule must be read in conjunction with QB r 4.07(2). R 39.01(5) allows for some forms of hearsay evidence to be admissible on application that would be excluded under r 4.07(2). However, if the evidence in question could be given at a trial, such as hearsay evidence that falls under a recognized statutory or common law exception or the principled exception to the hearsay rule, it is admissible on an application on the basis of r 4.07(2) even if it does not meet the requirements of r 39.01(5). In summary, r 39.01(5) is not an exclusionary rule but, rather, is only a statutory exception to the hearsay rule. The case law recognizes that a party, on an application, can, in some circumstances, rely on a statement of a third party on a contentious fact for non-hearsay and hearsay uses.

[61] In *King Estate v King*, 1999 CarswellOnt 1797 (Gen Div), the executors of an estate brought an application to determine their right to refuse payment of a bequest to one of the sons of the deceased. As part of that proceeding, the executors asked the court to strike out affidavits of the respondent on the basis of r 39.01(5) of the *Rules of Civil Procedure* because the affidavits contained hearsay evidence about contested facts. Whitten J concluded that the fact that the affidavit material was contentious did not mean that it was inadmissible at the application. He gave the following interpretation of r 4.06(2) (which is worded the same as QB r 4.07(2)) and r 39.01(5) of the *Rules of Civil Procedure* (at paras 19-24):

> Rule 4.06(2) provides that affidavits should be confined to a statement of facts which are "*within the personal knowledge of the deponent* or to *other evidence that the deponent would give [if] testifying as a witness*" in court.

> This general rule appears to eliminate the use of hearsay in an affidavit, unless the deponent/witness could testify in accordance with the numerous exceptions to the hearsay rule.
>
> Rule 39.01(5) provides:
>
> > An affidavit for use on an application may contain statement of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.
>
> Statements of the deponent's information and belief are invariably hearsay. This is permissible under the rule as long as the statements are with respect to non-contentious matters.
>
> The meaning of "contentious" was explored in *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1989), 71 O.R. (2d) 513 (Ont. H.C.), where Farley J. stated at 521: "'Contentious' to me would appear to be something that is in dispute or to which there are differences between the contending parties."
>
> Rule 1.04(1) provides "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." Therefore, it would have not been intended that Rule 39.01(5) would disallow otherwise admissible evidence. If a statement based on information and belief is not hearsay by operation of the exclusions to the hearsay rule or by the scope of what is hearsay, rule 39.01(5) would not apply even though the statement is with respect to a contentious matter.

[62] Whitten J refused to strike the contentious affidavit material for several reasons. In his view, some of the statements were not being relied on for the truth of the statements but for non-hearsay uses (see paras 35, 38). One aspect of the affidavit material fell within a recognized common law exception to the hearsay rule (see para 34). Finally, part of the affidavit material "could" (at para 33) fall within the principled exception to the

hearsay rule as stated in *R v Khan*, [1990] 2 SCR 531.

[63] In *Newmarket (Town) v Halton Recycling Ltd*, 2006 CarswellOnt 3371 (Sup Ct J), the Town brought an application for a declaration that the operators of an organic waste-processing plant were creating a public nuisance and an order that the plant be closed for up to two years. The respondent sought to have part of the Town's application record struck out on the basis of it containing contentious facts contrary to r 39.01(5) of the *Rules of Civil Procedure*.

[64] Fuerst J accepted that the word "contentious" in r 39.01(5) refers to facts "likely to cause an argument; disputed, controversial" (at para 14). She went on to note that, except where the information and belief is obviously contentious, it will normally require the other party to put forward his or her own affidavit to demonstrate that the fact is, in fact, contentious (see paras 18-20; and also see *Kisilowsky v Her Majesty the Queen*, 2016 MBQB 224 at paras 50-52; *Garowey v Rural Municipality of Whitemouth*, 2011 MBQB 87 at paras 12-13; *Metropolitan Toronto Condomium Corp No 781 v Reyhanian*, 2000 CarswellOnt 2431 (Sup Ct J) at para 16; *Ontario (Securities Commission) v 1367682 Ontario Ltd*, 2008 CarswellOnt 2920 (Sup Ct J) at para 8; *NTI v Canada (AG)*, 2007 NUCJ 27 at paras 24-26; and *Mahe v Nunavut Liquor Licensing Board*, 2006 NUCJ 23 at paras 49-50).

[65] Fuerst J agreed with the approach taken in *King Estate* that r 39.01(5) is simply an exception to the hearsay rule and not an exclusionary rule on an application. She stated (at para 15):

> [E]ven where the facts *are* contentious, a statement on information and belief is permissible if it is not hearsay because

> it is not tendered in proof of the truth of its contents, or if it falls within an exception to the hearsay rule, including the principled approach: *King Estate, supra*.

[66] On the facts of the case, she found some of the Town's record was inadmissible hearsay but other aspects of the record "may" or were "capable" of non-hearsay uses or falling within recognized exceptions to the hearsay rule (paras 35, 43(2), 43(5)).

[67] In *Garowey*, challenge by way of an application was brought to a municipality's decision to construct a water and sewer system. The municipality unsuccessfully attempted to have the applicant's affidavit struck as contentious hearsay (see r 39.01(5)) because it contained statements attributed to the reeve and members of the municipal council. Duval J concluded that the mere fact that counsel for the municipality objected to the contents of the affidavit material did not make the contents contentious as no affidavit material in reply had been filed to make the facts contentious. She also went on to say that r 39.01(5) was not applicable because the evidence in question was not inadmissible hearsay; it was either original evidence as to the intention of the reeve/council members or it fell within a recognized exception to the hearsay rule as being statements against interest.

[68] In *McCorkill v Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2013 NBQB 419, aff'd 2015 NBCA 50, leave to appeal to SCC refused, [2015] SCCA No 411, the applicants applied for a declaration that a bequest to an alleged neo-Nazi hate group in a will was contrary to public policy. In support of the application, reliance

was placed on affidavit material filed by an intervener containing annual audited reports prepared by B'nai Brith Canada as to annual incidents of anti-Semitism in Canada. One of the interveners argued that the affidavit material was not admissible under r 39.01(5) of the New Brunswick, *Rules of Court*, NB Reg 82-73, which has similar wording to QB r 39.01(5).

[69] Grant J rejected the objections to the affidavit material based on it containing hearsay and opinion evidence. He ruled that, although the documents fell outside a "strict application of Rule 39.01(5)" (at para 69), they were admissible on the application because they were in the nature of "business records" and were "necessary" and "reliable" for the determination of the application (at para 65).

[70] In *6705058 Manitoba Ltd v Penguin Heating and Cooling Technologies Inc*, 2016 MBQB 62, an application was made to discharge a builder's lien. The respondent's affidavit material included an inspection report prepared by the respondent. The applicant objected to the admissibility of the document as being contentious hearsay. Edmond J agreed that it was contentious hearsay and was therefore not admissible under QB r 39.01(5), but he was satisfied that the inspection report was a "business record" and, because the deponent would be able to testify about it as a witness in court, it was admissible on the application pursuant to QB r 4.07(2).

[71] In *1718351 Ontario v Township of Guelph/Eramosa*, 2011 ONSC 4036, a landowner brought an application for a prescriptive easement. The applicant attempted to rely on statutory declarations on title from previous owners, as well as a letter from the solicitor of a previous owner, to establish

the historical use of the right. Hourigan J (as he then was) determined that the statutory declarations and the solicitor's letter were hearsay and could not be admitted pursuant to r 39.01(5) of the *Rules of Civil Procedure*. He stated (at para 25):

> On a plain reading of Rule 39.01(5) there is an absolute prohibition on the inclusion of hearsay statements in affidavits filed in an application where the statements go beyond non-contentious issues. However, in *Ontario Judges' Assn. v. Ontario* (Management Board), (2002) 58 O.R. (3d) 186 (Div. Ct.), affirmed (2003), 67 O.R. (3d) 641 (C.A.), leave to appeal allowed (2004) 197 O.A.C. 398 (S.C.C.), the court admitted affidavits based on information and belief and relating to contentious issues because they provided necessary evidence. It would appear, therefore, that notwithstanding the plain wording of the Rule, hearsay statements in affidavits filed in applications may be admissible in certain circumstances.

[72] Hourigan J then went on to consider whether the evidence sought to be tendered would be admissible under a traditional hearsay exception or, failing that, the principled approach to the hearsay rule. Ultimately, he determined that the documents in question were not admissible on the application.

[73] There is an important aspect to the approach taken by Edmond and Hourigan JJ in *6705058 Manitoba* and *1718351 Ontario* as compared to how Whitten and Fuerst JJ dealt with the hearsay issues in *King Estate* and *Halton Recycling Ltd*. The language used in both *King Estate* and *Halton Recycling Ltd* is more tentative as to the admissibility of the hearsay evidence on an application for good reason.

[74] Judges have an evidentiary gate-keeper role in any judicial

proceeding to ensure the fairness and integrity of the fact-finding process (see *R v Grant*, 2015 SCC 9 at para 44). This role is particularly important when dealing with expert opinion evidence (see *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 16) and hearsay evidence (see *R v Youvarajah*, 2013 SCC 41 at paras 21-24). This evidentiary gate-keeper obligation must, however, be understood in context. Not all judicial proceedings call for fact finding on the merits of the underlying dispute between the parties. The judge's gate-keeper obligation is greatest when dealing with a trial or another proceeding, such as certain types of applications, where a final disposition of the rights of the parties will be made. However, when the judge is conducting a proceeding that will not result in a final disposition of the rights of the parties as to the dispute in question, the judge must adjust his or her evidentiary gate-keeper role to conform to the reality that the ultimate fact-finding necessary to resolve a dispute is not occurring. Accordingly, the judge must decide whether the nature of the hearing he or she is conducting requires him or her to decide whether the challenged evidence is potentially admissible or actually admissible.

[75] Unlike the situation in *6705058 Manitoba* and *1718351 Ontario*, in *King Estate* and *Halton Recycling Ltd*, Whitten and Fuerst JJ were not deciding the merits of the applications. Rather, each was dealing with a preliminary objection to part of the application record. In *Halton Recycling Ltd*, the respondent had not yet even filed its materials in response. Because of that feature of those cases, the evidentiary gate-keeper role of Whitten and Fuerst JJ was less onerous. In contrast, Edmond and Hourigan JJ were dealing with evidentiary issues in the course of deciding the merits of the

applications. Each of them had to make a decision as to whether the evidence in issue was actually admissible, not potentially admissible; that decision was directly related to the final disposition of the dispute between the parties.

[76] The principles that I take from this jurisprudence lead me to summarize the purpose and scope of QB r 39.01(5) in the following manner:

1. The purpose of r 39.01(5) is to admit evidence on an application that is otherwise inadmissible under r 4.07(2); it is not a free-standing exclusionary rule to challenge otherwise admissible evidence.

2. The pre-conditions to admissibility on information and belief under r 39.01(5) are that the source of the information must be specified in the affidavit and that the facts deposed to are not contentious.

3. A fact is contentious only if the evidence makes it likely to cause an argument, be disputed or raise a controversy. The mere objection of counsel to a fact does not make it contentious. Unless a fact is obviously contentious from the affidavit material filed by the party wishing to rely on the fact, the other side will have to establish the fact is contentious through either cross-examination on the affidavit or filing his or her own affidavit if the particular application permits such practice.

4. If the affidavit evidence in question does not meet the requirements of r 39.01(5), before disregarding it, the judge must also be satisfied that the evidence is not otherwise admissible, based on the law of evidence, if it was given by a witness in court.

5. Where the judge is not weighing the evidence in order to decide the merits of the dispute between the parties, the question for the judge to decide is the potential admissibility of the evidence, not its actual admissibility. In such cases, if the evidence is potentially capable of being admitted, it may be received and relied upon even if the facts are contentious.

[77] I will now turn to the respondent's argument that both the *existence* and the *content* of the second statement are inadmissible hearsay on the basis of r 39.01(5).

Hearsay Objection to Existence of the Second Statement

[78] In my view, the existence of the second statement is not a fact that is contentious. Those portions of the applicant's affidavit which establish the existence of the second statement are admissible pursuant to r 39.01(5), as the source of the information is identified (a detective and prosecutor who are named) and there is no basis to see how this fact is contentious.

[79] It is important to note that, in an application under the *LAA* for relief from a limitation period, a respondent is not entitled to call evidence as to whether or not there is a prima facie case for the purposes of section 15(2) (see *John Inglis* at paras 20-21). That, however, does not mean that a

respondent will not be able to show that a fact is contentious for the purposes of r 39.01(5). A respondent can cross-examine on an affidavit to demonstrate a fact is contentious. Facts can also be contentious simply on the basis of the record presented by the applicant.

[80] I have no concerns here as to the hearsay nature of the applicant's affidavit regarding the existence of the second statement. The respondent did not cross-examine the applicant as to when she learned of the existence of the second statement for the purposes of section 14(1) of the *LAA*. The mere fact that counsel for the respondent challenges the existence of the statement does not make that fact contentious (see *Garowey* at para 13; *Kisilowsky* at para 51; and *Attorney-General of Canada and Continental Trust Co, Re* (1985), 52 OR (2d) 157 at 163 (H Ct J)).

Hearsay Objection to Content of the Second Statement

[81] The situation as to the content of the second statement is, however, quite a different matter. On the basis of the applicant's affidavit, it is obvious that the content of the second statement is a contentious fact. As previously mentioned, in his first statement to police, Willis names a person other than the respondent as the directing mind of the murder and also provides exculpatory evidence about the respondent. In my view, because of the contentious nature of the content of the second statement, it would not be admissible under QB r 39.01(5) for the purpose of the *LAA* application. The question then becomes how could the content of the second statement be admissible when it is presumptively inadmissible hearsay evidence?

[82] The applicant's argument that the second statement is not hearsay

evidence because it is a video recording is not persuasive. A video recording of an event as it happens, such as a recording by a surveillance camera, is original evidence that is admissible provided that it is proven that the recording has not been tampered with (see *R v Nikolovski*, [1996] 3 SCR 1197). In contrast, the mere fact that an out-of-court statement is video recorded does not take away from the fact that the statement is still hearsay if it is relied on for the purpose of its truth and, therefore, is presumptively inadmissible (see *R v B (KG*), [1993] 1 SCR 740).

[83] There is no statutory or recognized common law exception to the hearsay rule that would allow a declarant's post-arrest statement to police that is mere narrative of a past event to be admissible against another party for the purpose of the truth of its content. In my view, only the principled approach to the hearsay rule would allow the potential admission of the content of the second statement for the purposes of its truth (and also Willis' comments to Sam-Kelly about the respondent). That rule of evidence focuses on the questions of necessity and reliability (see *Khan* at p 542 and *R v Smith,* [1992] 2 SCR 915 at 933).

Willis' Status as a Former Co-Accused of the Respondent

[84] Before addressing the questions of necessity and reliability, a preliminary consideration is whether there is some evidentiary rule that would independently prevent the admissibility of the evidence sought to be admitted pursuant to the principled exception to the hearsay rule (see *B (KG)* at p 784). If there is, then the principled exception to the hearsay rule is of no assistance to the applicant.

[85] There is a long-standing rule of evidence that, in a criminal case, an out-of-court statement of one co-accused cannot be used by the Crown as proof against another co-accused (see *McFall v The Queen*, [1980] 1 SCR 321 at 338). That rule, however, in my view, has no application here and would not prevent resort to the principled exception to the hearsay rule in a civil action against the respondent even though, at one time, he had the status of being a co-accused with Willis.

[86] To begin, that evidentiary rule has no application to a civil case. The rule also may be limited in its application in criminal cases only to the Crown (see *R v Waite*, 2014 SCC 17 at para 4). Also important to consider is the fact that Willis and the respondent are no longer co-accused facing a joint criminal trial. The prosecution of Willis is over. The respondent faces no criminal charges over the deceased's murder; the only question is his potential civil liability for complicity in the murder of the deceased.

[87] The decision of *R v Naicker*, 2007 BCCA 608, leave to appeal to SCC refused, [2008] SCCA No 45, is instructive. The background there was that three individuals were tried for kidnapping offences in two separate trials. On the second trial, the Crown attempted to call the accused from the first trial as a witness to testify against the two accused on the second trial. The witness refused to testify based on a claim of personal safety. The Crown then moved to admit his video-recorded statement to police for its truth as, in it, he implicated the two accused on trial. After conducting a *Khelawon* hearing (see *R v Khelawon*, 2006 SCC 57), the trial judge admitted the evidence based on the principled exception to the hearsay rule.

[88] The British Columbia Court of Appeal ruled that the trial judge did

not err in doing so despite the fact that the witness was accused of the same crimes as the accused at the trial. Lowry JA stated (at paras 44-46):

> There simply is no rule of evidence that precludes the admission of the statement of an accomplice who is tried separately. Nor does it appear to me there is any sound basis upon which a preclusive exception to the principled approach to hearsay should be created. The principled approach has been developed as a flexible approach not to be impaired by rigid, preconceived notions of reliability.
>
> It is entirely open to the Crown to decide whether the participants in a crime are tried jointly or separately. If the evidence of one participant is required to convict another, the Crown may obtain the evidence by conducting separate trials where the evidence could not be obtained in a joint trial. The Crown is entitled to achieve in one way what it could not achieve in another. There is no principle that precludes the Crown from proceeding as it sees fit in this regard and no rule that restricts its access to the evidence: ***R. v. Crooks*** (1982), 2 C.C.C. (3d) 57 (Ont. H.C.), aff'd (1982), 2 C.C.C. (3d) 57 at 64 (Ont. C.A.). An accomplice who is separately tried is a witness in the trial of another participant in the crime like any other witness. I see no reason why, under the principled approach, a statement given to the police by an accomplice should be any less admissible for the truth of its content than a statement given by any other witness where the requirements of necessity and reliability are established. What is, of course, of paramount importance is that the requisite threshold of reliability be clearly met.
>
> Roman Narwal was in law a competent witness. Once he refused to testify, it was necessary to adduce his statement to the police officer if the value of his evidence was not to be lost. The indicia of reliability in the circumstances under which the statement was made were, in my view, particularly compelling. What the appellants advance as the principal reason the statement of an accomplice is inherently unreliable has no application here. Narwal did not attempt to deflect responsibility from himself to the other participants in the crime. He did minimize the incident in terms of the conduct to which Singh had been subjected, but not in a way that suggested an involvement on the part of the

> other participants that was any greater than his own. His purpose was to put the police right about Singh and the reason he had been "grabbed". In so doing, Narwal implicated himself. The appellants' other reasons why the statement was unreliable (the fact that Narwal was an experienced criminal and was a target of police investigation at the time of the statement) are outweighed by other indicia of reliability.

[89] In my view, this is not a case where there is a potential concern of making evidence admissible through the "back door" which would not be otherwise admissible if Willis gave it as a witness (*B (KG)* at p 784).

Assessing Admissibility of Evidence for Purposes of LAA

[90] As previously explained, an application for relief from a limitation period under the *LAA* is essentially a procedural matter; the proceeding does not determine the substantive rights of the parties to a dispute. Accordingly, the evidentiary gate-keeper role for a judge hearing such an application is to consider the potential admissibility of evidence falling outside of QB r 39.01(5), not its actual admissibility. The relevant question here, therefore, is whether the contentious hearsay evidence relied on by the applicant is potentially capable of being admitted at a civil trial.

Willis is a Compellable Witness for the Applicant

[91] In this case, Willis is a competent and compellable witness for a civil action against the respondent (see sections 3 and 4 of *The Manitoba Evidence Act*, CCSM c E150). Based on the evidence of Sam-Kelly at the murder trial of Willis and the anticipated content of the second statement, Willis may be able to provide direct evidence to prove that the respondent was complicit in the murder of the deceased. The evidence which the

applicant seeks to rely on suggests that the respondent apparently hired Willis to murder the deceased to assist Willis with his drug debts. In the unlikely event that Willis testifies in a manner consistent with the evidence of Sam-Kelly and the anticipated content of the second statement, then there is no question that the applicant has established that she has a prima facie case on her proposed causes of action that would have a reasonable prospect of success at trial (see section 15(2) of the *LAA*).

[92] While compellable, in the more likely event that Willis testifies about the respondent in accordance with his first statement to police, or refuses to testify at all, the applicant would be able to make application to cross-examine him on his oral statements to Sam-Kelly and his second statement to police that has been reduced to writing pursuant to sections 19-21 of *The Manitoba Evidence Act*. If that procedure is unsuccessful in moving Willis to adopting the facts alleged by Sam-Kelly or the content of his second statement, then the applicant would be able to seek a *Khelawon* hearing to admit the second statement of Willis and his comments to Sam-Kelly for the truth of their contents under the principled exception to the hearsay rule.

[93] The term "*Khelawon* hearing" is the moniker currently used to describe the *voir dire* held at a trial to determine whether presumptively inadmissible hearsay evidence meets the criteria of necessity and reliability. At the hearing, the onus is on the party seeking to admit the evidence to establish these criteria on the balance of probabilities (see *Khelawon* at paras 42 and 47; and *R v Woodard*, 2009 MBCA 42 at para 46).

Potential Admissibility of Out-of-Court Statements by Willis under the Principled Exception to Hearsay Rule

[94] There is no merit to the respondent's submission that the principled exception to the hearsay rule and a *Khelawon* hearing to determine admissibility questions relating to the principled exception to the hearsay rule have no application to civil cases. Absent some statutory modification to the rules of evidence, the hearsay rule and the common law exceptions to it apply equally to civil and criminal cases (see *Khan v College of Physicians and Surgeons of Ontario* (1992), 9 OR (3d) 641 at 653 (CA); *Jung et al v HSBC Trust Company (Canada) et al*, 2006 BCCA 549, additional reasons at 2007 BCCA 67; *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 at paras 87, 102-3, 118; and Maria G. Henheffer & Margaux Savoie, "The Principled Approach Exception to Hearsay Evidence in Civil Litigation," in Justice Todd Archibald & Justice Randall Echlin, *Annual Review of Civil Litigation 2008*).

[95] However, the context of a given case in terms of the issues and the impact that the hearsay evidence may have to resolving them is always a consideration in the application of the principled approach to the hearsay rule (see *R v Couture*, 2007 SCC 28 at para 76). While that does not mean that hearsay evidence is necessarily more readily admissible in civil cases than in criminal cases, civil courts must be mindful that there are dynamics in a civil case that are different than in a criminal case, such as a lesser burden of proof, the importance of access to civil justice and the principle of proportionality. As Adams J noted in *Clark v Horizon Holidays Ltd*, 1993 CarswellOnt 929 (Gen Div), the principled exception to the hearsay rule

signals "a willingness in the judiciary to design procedures and evidentiary rules to enhance the accessibility and, therefore, the relevance of our courts" (at para 37). See also *Dodge v Kaneff Homes Inc*, 2001 CarswellOnt 1099 at paras 23-24 (Sup Ct J).

[96] One of the difficulties here is that, although the testimony of Sam-Kelly in the murder trial of Willis is before this court, the second statement of Willis is not. It is of course through no fault of the applicant that the police are withholding access to the second statement and that, until an action is filed, she lacks access to the remedies in the *QB Rules* to obtain the second statement through the discovery process. I do not, however, see the fact that the actual second statement is not before this court as a bar to considering the question of its potential admissibility for the purposes of whether she has a prima facie case with a reasonable prospect of success (see section 15(2) of the *LAA*).

[97] The fact that the second statement exists is, as I said previously, not contentious. As a co-accused with Willis for almost two years, the respondent likely had possession of the second statement, having received it as part of the Crown's disclosure brief. It is also safe to presume, for the purpose of the narrow questions before this Court at this time, that its content does actually potentially link the respondent to the deceased's murder. While hearsay, that fact comes from a police officer and a member of the bar who have no interest in these civil proceedings. It is important to bear in mind that the principled exception to the hearsay rule must be interpreted with flexibility, mindful of the circumstances of the case (see *R v U (FJ)*, [1995] 3 SCR 764 at para 35). Because the actual admissibility of

the evidence is not the question to be decided, I am satisfied that the record is sufficient for my purposes. I will now turn to the questions of necessity and reliability.

[98] In this case, I am dealing with two pieces of hearsay evidence: the declarant, Willis', statements to Sam-Kelly and his second statement to police. Each piece of hearsay evidence requires an individual admissibility ruling (see *R v Laporte (PLR)*, 2016 MBCA 36 at paras 97-98). In coming to the decision I have reached, I have considered the admissibility of each piece of hearsay evidence individually in light of the overall context here, including the fact that the declarant made several statements about the murder of the deceased.

[99] The questions of necessity and reliability are not separate thresholds; rather, they "work in tandem" (*R v Baldree*, 2013 SCC 35 at para 72). The circumstances of the given case will determine where a particular strength or weakness in one of the characteristics is accommodated by the opposite quality of the other characteristic.

[100] Necessity means the hearsay evidence is reasonably necessary, not absolutely necessary (see *Khan* at p 546). The rationale behind the requirement of necessity is ensuring that the trial process can arrive at the true facts of the dispute (see *Khelawon* at para 49). Necessity is established when there is no other way to present evidence of similar value at trial (see *R v Hawkins*, [1996] 3 SCR 1043 at para 71). In this case, the concern as to the necessity of admitting the hearsay evidence does not depend on whether Willis is unavailable to testify at the proposed civil action; rather, the question is whether his courtroom testimony is unavailable (see *R v Devine*,

2008 SCC 36 at para 16). As Côté JA explained in *R v Dionne*, 2004 ABCA 400 (at para 8):

> Even when the witness is physically present, hearsay evidence may be necessary if the trial judge is satisfied that there is no reasonable prospect of obtaining meaningful testimony by direct evidence: ***R. v. W.J.F.,*** [*R v F(WJ),* [1999] 3 SCR 569 at para 31]. The relevant question is whether the interests of justice are better served by admitting the testimony, or by leaving the witness's knowledge unutilized: ***R. v. W.J.F.,*** [*R v F(WJ)*] ***supra***.

[101] Like in *Naicker*, the record here demonstrates that Willis is unlikely to cooperate and voluntarily give evidence in support of the applicant's action in the courtroom. In his first statement to police, Willis described the respondent as a "good friend" and "a buddy of mine". According to the first statement Willis gave to the police, prior to the murder, Willis was a drug dealer heavily involved in the activities of a criminal organization. Despite being threatened, beaten and shot over a drug debt, he refused to turn to authorities to extricate himself from his predicament. He told police that contacting them would have made things worse. Instead, he decided to kill a person, the deceased, whom he barely knew. Willis has stood alone facing the murder charge for several years and, although he apparently implicated the accused in his oral statements to Sam-Kelly and in the second statement to the police, there is no reason to have any confidence that he would be prepared to testify against the respondent at a criminal trial, let alone a civil one. The record here is persuasive that the testimony of Willis may be unavailable for the applicant despite reasonable efforts by her to obtain it by compelling him to testify and cross-examining him on his oral statements to Sam-Kelly and the second

statement as may be permitted under *The Manitoba Evidence Act*.

[102] While a civil finding of complicity in a murder has significant reputational and monetary damage consequences, it pales in comparison to the severity of the criminal consequences if one is found guilty of first degree murder. The hearsay evidence of the declarant, Willis, via Sam-Kelly testifying and the second statement, is important to establishing the truth as to who ordered the murder of the deceased. Admission of the contentious hearsay evidence is likely the only way in which a trier of fact will be able to determine who, on balance, directed Willis to commit a brutal murder in broad daylight. Given that there appears to be no realistic alternative to ensure that the trier of fact has the benefit of all of the potential facts of this case, contextual factors, such as a lesser burden of proof, access to civil justice on a serious matter and the principle of proportionality, would all favour admissibility of the hearsay evidence.

[103] Also noteworthy is the fact that any concerns about the unfairness of allowing hearsay evidence in this case is dampened by the fact that Willis is available to be cross-examined at a civil trial by the respondent on his prior statements to police and Sam-Kelly (see *U (FJ)* at paras 34-35 and *Dodge* at para 25).

[104] I will now turn to the question of the other requirement of the principled exception to the hearsay rule, reliability.

[105] Reliability means "the hearsay statement was made in circumstances which provide sufficient guarantees of its trustworthiness" (*Hawkins* at para 74). The judicial assessment of reliability at the

admissibility stage focuses on "threshold reliability, not ultimate reliability" (*Hawkins* at para 75; and *Khelawon* at para 2). The rationale behind the requirement of reliability is ensuring the integrity of the trial process (see *Khelawon* at para 49). The approach to be taken in determining threshold reliability is a functional one. As Charron J explained in *Khelawon* (at para 93):

> Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility—it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire.*

[106] In *B (KG)*, Lamer CJC discussed when a prior inconsistent statement will be substantially reliable (at pp 795-96):

> Therefore, the requirement of reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness with respect to the two hearsay dangers a reformed rule can realistically address: if (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

[107] The record here does not suggest that Willis' comments to Sam-Kelly or the second statement satisfy all of the criteria discussed in *B (KG)*. Neither statement was made under oath with awareness of the consequences of a false statement; while the second statement was video recorded, the statements to Sam-Kelly were not; and, finally, there could be cross-examination in a civil trial of both Sam-Kelly and Willis about the hearsay evidence. There are, however, several features of the record which would bear on the question of whether the hearsay evidence is substantially reliable.

[108] To begin, there is an absence of a motive for Willis to lie about implicating the respondent in the murder of the deceased (see *R v Blackman*, 2008 SCC 37 at paras 39-46). As previously mentioned, according to Willis' first statement to police, he and the respondent were good friends. Willis also told the police, at the time of the deceased's murder, there was no animosity between him and the respondent. Accordingly, there is evidence on the record here not only that Willis and the respondent were friends but also that, at the time of the murder, there was no reason that the reliability of the statements by Willis about the respondent might be tainted. The record does not create any concerns that Willis might have a reason to deceive either Sam-Kelly or the police about the respondent directing him to murder the deceased.

[109] Because the two statements of Willis to police are video recorded and were taken by the police in the course of their investigation in relation to that evidence, a trial judge will be able to consider factors, such as the

contemporaneity of the second statement in relation to the first statement, the demeanour of Willis in the two statements, and circumstances that may have arisen that led Willis to name the respondent as the person who directed him to kill the deceased (see *R v Nguyen*, 2001 ABCA 98).

[110] Unlike the position I am in, the trial judge will also be able to consider the similarity of the declarant, Willis', statements to Sam-Kelly and his second statement to police against each other and against the first statement to police. Inferences can be drawn from similarities or differences between hearsay statements on a *Khelawon* hearing (see *R v Korski (CT)*, 2009 MBCA 37 at para 43; and *U (FJ)* at para 40).

[111] The applicant also argues that there is extrinsic evidence that is confirmatory evidence on the issue of threshold reliability. That evidence comes in the form of a financial motive for the respondent to have the deceased murdered.

[112] According to the unchallenged affidavit of Mr. Fawley, the deceased told him just before she died that the respondent was "involved significantly in the drug trafficking trade" and "she needed to end the relationship". Mr. Fawley also deposed that the deceased "was in the process of leaving the respondent" and "moving to Calgary, Alberta". Although this information and belief is hearsay, its source is specified and it is not contentious as it was unchallenged by the respondent.

[113] Accordingly, aside from the fact that some aspects of this evidence may be admissible under the state-of-mind exception to the hearsay rule (see *R v Griffin*, 2009 SCC 28 at paras 56-66), all of this evidence is properly

admissible on the application pursuant to QB r 39.01(5).

[114] The applicant further deposes that, within a week after the murder (which would be in the six days between the murder and the respondent's arrest), the respondent frequently came to the applicant's house to discuss collecting on life insurance policies relating to the deceased in which he was one of the beneficiaries. The respondent told the applicant that the nature of the deceased's death would allow for a "double" benefit. The respondent asked that the applicant sign the necessary paperwork so that he could collect the insurance monies and move to Vancouver, British Columbia. The applicant refused. These facts are within the personal knowledge of the applicant and were unchallenged by the respondent.

[115] According to the applicant's affidavit, the total amount of life insurance monies paid out for the death of the deceased was $270,000. One life insurance company paid the respondent $50,000 based on the death of the deceased. A second life insurance company paid $55,000, plus interest, to Mr. Fawley as a named beneficiary but refused to pay out the remaining $165,000 despite the respondent's demand for payment. Ultimately, that life insurance company paid these monies into court. The court ordered that part of the monies be paid to the estate of the deceased. The remaining amount, $106,778, plus accrued interest, is with the court but is claimed by the respondent.

[116] These facts may allow for the inference that the death of the deceased would personally benefit the respondent with a large sum of money despite the deceased being in the process of breaking up with him and leaving Winnipeg. In my view, such facts could potentially be used as

confirmatory evidence on a *Khelawon* hearing that the respondent had a financial motive to have the deceased killed by Willis before she left Winnipeg.

[117] Quite rightly, the respondent raises the issue that the hearsay evidence in question from Sam-Kelly and the second statement is contradictory evidence to Willis' first statement to police which exonerates the respondent from any complicity in the deceased's murder. The difficulty with this argument is that, at a *Khelawon* hearing, the issue will be threshold reliability, not ultimate reliability. The mere fact that the hearsay evidence that the applicant wishes to rely on is contradicted by the first statement Willis gave to police does not make the second statement and the statements made to Sam-Kelly necessarily unreliable. The question of inconsistencies or conflicting evidence is for the trier of fact to resolve (see *R v Sterling (T)* (1995), 137 SaskR 1 at para 307 (CA); *R v R (T)*, 2007 ONCA 374 at paras 17-19; and *Korski* at paras 40-45).

[118] Reliability can be met in two different ways. Some hearsay statements are, because of the circumstances of their making, sufficiently reliable (e.g. *Khan*). In other cases, while the evidence may not be "cogent", the circumstances allow for it to be tested (*Khelawon* at para 49). The situation here is the latter scenario. There are several features of this case that will allow for a trial judge to test the reliability of the proposed hearsay evidence. In particular, I note that the declarant, Willis, is available for cross-examination by the respondent. That is an important factor to compensate for the lack of contemporaneous cross-examination on his prior statements to Sam-Kelly and the police (see *Khelawon* at para 66).

[119] As the facts here unfortunately illustrate, the drug world is a nasty, brutish place with little regard for the sanctity of human life. Piercing the conspiracy of silence that often shrouds the truth in a horrendous crime is a challenge, but the law is not without the means to do so in a fair and principled fashion. The co-conspirators exception to the hearsay rule has long been ready to address admissibility questions of hearsay comments made in furtherance of a joint criminal venture (see *R v Carter*, [1982] 1 SCR 938; and *R v Mapara*, 2005 SCC 23). That, however, is not the only way in which hearsay evidence about organized criminal activity can be admitted and considered.

[120] In my view, this case has a strong necessity component as the hearsay evidence is important to get to the truth on a serious matter. Accordingly, less reliability is required. However, with that said, there are here more than adequate ways of testing the evidence in question. After careful consideration of the record and the relevant principles, I am persuaded that the applicant has demonstrated that each of the pieces of hearsay evidence relating to the respondent's involvement in the murder of the deceased is potentially capable of being admitted at a civil trial against the respondent as being both necessary and reliable under the principled exception to the hearsay rule.

Relevance of QB r 4.07(2)

[121] In coming to the decision I have made on the potential admissibility of the hearsay evidence based on a *Khelawon* application, I am mindful of the fact that QB r 4.07(2) talks of the admission of evidence that the "deponent" could give at trial as a witness "except where these rules

provide otherwise".

[122] If the hearsay evidence in question is admitted after a *Khelawon* hearing, it would of course not be the deponent, in this case the applicant, who would testify to the evidence in question in the witness box. The evidence of the declarant, Willis, would come through Sam-Kelly and the video recording of the second statement. This technically may seem at odds with a strict reading of QB r 4.07(2). However, this is one of those situations where the words of Sopinka J in *Reekie v Messervey*, [1990] 1 SCR 219 are apt, "As a general principle, the rules of procedure should be the servant of substantive rights and not the master" (at p 222).

[123] In my view, QB r 4.07(2) should not be read so strictly as to prevent potentially admissible evidence under the principled exception to the hearsay rule from being admitted simply because it would come from some other witness or, in this case, a video recording. Such an interpretation of QB *r* 4.07(2) is inconsistent with QB r 1.04(1) which provides:

> **General principle**
> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Conclusion on Issue Two

[124] Although the judge erred in law in his application of the correct legal test for the admissibility of contentious hearsay evidence on an application, his error did not, in my view, occasion a substantial wrong or miscarriage of justice.

[125] There are facts of substance here grounded in tangible pieces of identifiable evidence that provide a logical path to establish that the applicant has a prima facie case with a reasonable prospect of success at trial on the proposed causes of action (see *Chan* at para 14; and section 15(2) of the *LAA*). The road the applicant must travel may be a long and precarious one, and will likely turn in large measure on a contested *Khelawon* hearing, but it is not a speculative or fantastic journey. The reality often is that the pursuit of justice is arduous but that does not mean that it is impossible in difficult circumstances, such as the case here.

Disposition

[126] In the result, the appeal is dismissed with costs.

Mainella JA

I agree: Beard JA

I agree: Cameron JA