The Paper Chase: Subsections 540(7)-(9) of the *Criminal Code*[1]

Introduction

Subsections 540 (7)-(9) of the *Criminal Code* became law June 1, 2004. The intention of Parliament in enacting these subsections, according to the Parliamentary Research Branch, was 3-fold:

a. To streamline preliminary inquiries;
b. Reduce the time it takes to bring criminal cases to trial by reducing the number and duration of preliminary inquiries, and,
c. Minimize the extent to which complainants (particularly those in sexual assault cases, are subject to examination and cross-examination.[2]

In the last decade and a bit these amendments have been all but ignored by Canada's appellate courts. The few appellate decisions that have considered the amendments have focused on the facts of the case giving rise to the appeal and the limitations of *certiorari* as a vehicle of challenge for decisions alleged to be jurisdictionally flawed. The extraordinary remedies are aptly named. Any measure of success by their use is indeed extraordinary.

McLachlin C.J.C. in *Russell*[3] wrote:

> The scope of review on *certiorari* is very limited. While at certain times in its history the writ afforded more extensive review, today *certiorari* "runs largely to jurisdictional review or surveillance by a Superior Court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense."
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> With respect to preliminary inquiries held under section 548 of the *Criminal Code*, the reasons for limiting the scope of supervisory remedies are clear. While the preliminary inquiry also affords defence counsel the opportunity to assess the nature and strength of the case against his or her client, its primary purpose is to ascertain whether there is sufficient evidence to warrant committing the accused to trial. Critically, the preliminary inquiry is not meant to determine the accused's guilt or innocence. That determination is made at trial. The preliminary inquiry serves a screening purpose, and it is not meant to provide a forum for litigating the merits of the case against the accused. The limited scope of supervisory remedies reflects the limited purpose of the preliminary inquiry.[4]

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[1] By Patrick J Ducharme, delivered to the Judges of the Ontario Court of Justice at their Educational Conference at Niagara-on-the-Lake, Ontario November 4-6 2015.
[2] Edited Hansard, Number 124, September 28, 2000, 36th Parliament, second Session at 1645 and Sessions on October 2 2001 at 1700 and October 12, 2001 at 13-15.
[3] *R. v. Russell,* [2001] S.C.C. 53.
[4] *Ibid. at paras. 19and 20.*

In *Skogman*[5] Estey J. wrote:

> It need only be added by way of emphasis that such *certiorari* review does not authorize the Superior Court to reach inside the functioning of the statutory tribunal for the purpose of challenging the decision reached by that tribunal within its assigned jurisdiction on the ground that the tribunal committed an error of law in reaching that decision, or reached a conclusion different from that which the reviewing tribunal might have reached.[6]

Basis of Admissibility

Subsections 540 (7) and (8) permit the reception of copies of statements as evidence, provided:

a. Reasonable notice of the intention to tender the statements is given, together with a copy of the statements, and,
b. The justice considers the information in those statements credible or trustworthy in the circumstances of the case.

The Appellate Decisions

Ontario

In *R. v. Vasarhelyi*[7] the Court of Appeal for Ontario considered section 507 of the *Code* and the procedure to be followed for issuing process when an information is laid under 504. In *obiter*, the court suggested that these subsections were intended to expedite the preliminary inquiry and circumscribe the scope of the hearing.[8] Further, the court commented that these subsections expand the type of evidence that may be received on a preliminary inquiry beyond what the traditional rules of admissibility would permit. The traditional rules are expanded, provided the information tendered for reception is credible and trustworthy and the opposite party has received reasonable notice of the intention to introduce it, together with disclosure.[9]

The Court of Appeal for Ontario did not offer an opinion as to how a preliminary inquiry judge assesses written statements as credible or trustworthy. It did not offer an opinion on the scope of subsections (7)-(9). Those issues were not part of this appeal. The case unfortunately offers no guidance on how these subsections should be applied.

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[5] *R. v. Skogman*, [1984] 2 SCR 93.
[6] *Ibid*. per Estey J. at p. 100.
[7] *R. v. Vasarhelyi*, [2011] ONCA 397
[8] *Ibid.* at para.44.
[9] *Ibid.* at para. 46.

British Columbia

The Court of Appeal for British Columbia rendered a decision in *R. v. Rao*[10] that directly considered the goals and meaning of these provisions. At a focus hearing conducted by the preliminary inquiry judge the time estimated for the preliminary inquiry was significantly reduced upon the Crown's application to file two binders of unsworn materials as its entire evidence at the inquiry. The preliminary inquiry judge had suggested this procedure in her discussions with counsel. Defence counsel was permitted to make submissions challenging the procedure. The challenge by the defence was:

a. The defence should be given an opportunity to hear and cross-examine the witnesses;
b. Be provided an opportunity to have "some form" of discovery of the Crown's case on the key issues; and
c. An opportunity to cross-examine witnesses related to the collection and treatment of DNA evidence which was critical to the identification of the accused as a person participating in the alleged offences.

The issues raised on this appeal were:

a. Whether the preliminary inquiry judge exceeded her jurisdiction or breached the principles of natural justice by committing the accused to stand trial based solely on her review of the "paper record" filed by the Crown; and
b. Whether the preliminary inquiry judge exceeded her jurisdiction or breached the principles of natural justice by rejecting the accused's request to cross-examine witnesses.

Counsel for the accused had asked the presiding judge, in moderately awkward fashion this series of questions:

"I take it, then, the procedure would be at the preliminary, Your Honour, I haven't been through this before, but it would be that if the Crown just files these as Exhibit 1 and 2 and that would be it. Is that what could be happening here, could that be it?

The court answered in succinct fashion: "Yes."

Counsel responded perceptively, "So, that could take five minutes."

The court responded, "That's right."

The Crown filed its entire case in paper form. Counsel for the accused was not permitted to cross-examine anyone. Later, the Crown stayed proceedings on the information leading to the committal and proceeded against the accused by way of direct indictment. An application by the

[10] *R. v. Rao*, [2012] BCJ No. 1247 (BCCA).

accused for *certiorari* to the Superior Court was refused. On further appeal to the Court of Appeal, the Crown argued that the issues were moot because the proceedings were stayed.

The appellate court, however, determined that the issues should be argued. The decision of the court began with, "I would allow the appeal. Since the appeal is moot, no useful purpose is served by granting any other remedy."

The appellate court pointed out that defence counsel did not expressly refer to subsection 540 (9) in his submissions. The court concluded, however, it was satisfied that counsel was, in fact, seeking to cross-examine the witnesses who generated the documents and the preliminary inquiry judge should have turned her attention to subsection 540 (9).[11] The court placed the onus on the preliminary inquiry judge to recognize that counsel was requesting the right to cross-examine the witnesses who generated the documents even in the absence of any reference to subsection (9).

The court found that the Superior Court erred in finding that the preliminary inquiry judge did not act in excess of her jurisdiction, or, in breach of the principles of natural justice. The court also found that the preliminary inquiry judge erred in concluding that the words, "relevant to the inquiry" in subsection 541 (5) meant only, "relevant to committal" and further erred in suggesting that the accused had no right to call witnesses pursuant to subsection 541 (5) if his sole purpose in doing so was to test or discover the Crown's case.

The court concluded the discovery role of preliminary inquiries had not been extinguished or rendered obsolete by these provisions.

Québec

The Court of Appeal for Québec in 2007 considered an appeal by the Crown from a decision dismissing its application for *certiorari* challenging a preliminary inquiry judge's decision to allow the accused's counsel to cross-examine young complainants, aged 14 and 10.[12] The accused was charged with sexual assault and sexual touching. The Crown had resisted calling the complainants at the preliminary inquiry, suggesting that having them testify would be harmful to each because they were "disturbed" as a result of the events that led to the charges.

The preliminary inquiry judge ruled that there were no exceptional circumstances justifying the refusal to allow cross-examination and ordered the complainants to testify *in camera* via closed-circuit television. The Crown challenged by way of *certiorari.* The Superior Court dismissed the Crown's application and the Crown appealed to the Court of Appeal.

[11] *Rao, supra* at paras. 66 and 70.
[12] *R. v. P.M.*, [2007] J.Q. No. 2195 (QCCA).

The Québec Court of Appeal found that the principles of natural justice had not been infringed by the preliminary inquiry judge's decision to permit cross examination *in camera* and via closed-circuit. The court found that counsel for the accused, despite these amendments, was permitted to cross-examine the witnesses. The court found that Parliament intended to confer upon judges a broader discretion, allowing them to take into account the appropriateness of having witnesses appear and be cross-examined.

The court specifically approved of the preliminary inquiry justice's decision supporting the right to cross-examination as an integral part of the right to make "full and complete defence", and, the justice's comments that only a serious reason would justify setting the right to cross-examine aside. Analysis of the evidence led the court to conclude that there were no exceptional circumstances that could have justified a refusal to allow the cross examination.[13]

Saskatchewan

The issues before the Saskatchewan Court of Appeal in *R. v. Beaven*[14] were as follows:

a. In a preliminary inquiry where the Crown's case was largely based on wiretap information led through the affidavit of the lead investigating officer; was the admission of hearsay identification of the accused's voice recorded by the wiretap a jurisdictional error? and,
b. Did the denial of defence counsel's ability to cross-examine the witness at the preliminary inquiry engage principles of natural justice?

The case came before the appellate court after the accused's application to quash his committal was rejected in the Superior Court. The accused was charged with trafficking in a controlled substance for the benefit of a criminal organization contrary to section 467.12 of the *Code*. Counsel for the accused always maintained that identification of his client was an issue. The Crown relied upon Cpl. Beaton's affidavit that provided this information:

a. Sgt. Allan Hofland, an investigator in this matter, identified Trevor Anderson as one of the voices speaking in Exhibit "B" as indicated in Exhibit "A".
b. Cpl. Chris Wilson, an investigator, identified Tanner Beaven as one of the voices speaking in Exhibit "B" as indicated in Exhibit "A".
c. I am able to identify Evan Richards and Tanner Beaven, the persons charged in this matter.[15]

Counsel for the co-accused did not object to the admission of this evidence. Counsel for Beaven did object. He argued the hearsay evidence of voice identification should not be admitted without

[13] *R. v. P.M., supra,* at para. 15.
[14] *R. v. Beaven*, [2012] SKCA 59 (SKCA).
[15] *Ibid*. at para. 4.

the officer providing *viva voce* evidence on a *voir dire*, contending recognition evidence was subject to a higher standard of scrutiny. The preliminary hearing judge admitted the affidavit, and, as a result, the accused claimed he was denied his right to cross-examine the witness who would be important to the identification issue at trial.

The Queen's Bench judge dismissed the accused's application to quash on the basis that the preliminary hearing judge was alive to the subsection 540 (7) criteria, heard evidence on the issue, and found the evidence was sufficient. The court determined that the decision was made within the jurisdiction of the preliminary inquiry judge having been founded on the evidence presented and that it did not constitute a reviewable matter.[16]

The Court of Appeal for Saskatchewan rendered three concurring decisions, each rejecting the accused's appeal. The most interesting of the three, from this writer's perspective, was the decision of Caldwell J.A. because he offered these opinions:

a. The scope of supervisory remedies in the context of a preliminary hearing is limited. (citing *R. v. Russell* ,[2001] SCC 53 per McLachlin C.J.C. at paras.19-20.);
b. It is irrelevant whether a reviewing court would have reached the same conclusion as the preliminary hearing judge. (citing. *R. v. Skogman*, [1984] 2 SCR 93 per Estey J. at p. 100);
c. An erroneous evidentiary ruling under which the only evidence on an essential ingredient of an offence is admitted is not a jurisdictional error. (citing *R. v. LeBlanc et al,* [2009] NBCA 84), and,
d. Cross-examining a witness at a preliminary hearing is not a component of the right to make full answer and defence. What is protected under section 7 is the right to make full answer and defence *at trial*, not the right to cross-examine a witness at a preliminary hearing. (citing. *R. v. Bjelland* [2009] 2 SCR 651 at para. 32).

New Brunswick

In *LeBlanc and Steeves v. R.*[17] the Court of Appeal for New Brunswick was asked to resolve a conflict between the provisions of subsection 189 (5) and subsection 540 (7). Subsection 189 (5) provides that the contents of a private communication lawfully intercepted shall not be received in evidence unless the party intending to adduce it has complied with certain notice requirements. Subsection 540 (7) provides that a justice may receive as evidence any information that would not otherwise be admissible provided the justice considers the evidence credible or trustworthy in the circumstances of the case. The issue before this appellate court was whether the contents of a private communication, lawfully intercepted, but without the notice mandated by 189 (5) was admissible at a preliminary inquiry pursuant to 540 (7). It should be noted that the Crown argued that notice had effectively been given by timely disclosure.

[16] *Ibid*. at para. 7.
[17] *LeBlanc and Steeves v. R* [2009] N.B.C.A. 84 (NBCA).

The Superior Court judge had dismissed the application for *certiorari* because the accused had not complied with section 536.3. Each accused had identified all the issues on which they wanted evidence to be given at the preliminary inquiry but did not insist upon notice under subsection 189 (5).

The Court of Appeal for New Brunswick disagreed. The court found that the wording of section 536.3 does not preclude an accused from stating that all issues are live issues at the preliminary inquiry. Ironically, section 536.3 was part of the reforms of 2004 hoping to streamline preliminary inquiries that included the enactment of subsection 540 (7). Despite disagreeing with the application judge's ruling, the appellate court still found that it did not amount to jurisdictional error.

The court concluded that the justice at the preliminary inquiry was faced with conflicting statutory provisions regarding the admission of intercepted communications. Deciding which of the two provisions would hold sway could not amount to jurisdictional error. The court described it in this way:

> In the present case, the justice at the preliminary inquiry was faced with conflicting statutory provisions regarding the admission of the intercepted communications. On the one hand, s.189(5) prohibited the admission of this evidence unless the prescriptions of that provision had been met, while, on the other hand, the justice was authorized to "receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case" (s. 540(7)). The question is this: who, at the preliminary inquiry, had the jurisdiction to resolve this apparent conflict between s.189(5) and s.540(7)? The answer is as clear as it is simple: the presiding justice, of course. How can it be said that, in resolving an evidentiary issue that only he could be called upon to resolve, the justice committed jurisdictional error? In my view, it cannot. The determination of whether or not the intercepted private communications could be admitted in evidence as credible or trustworthy evidence that would not otherwise be admissible was one to be made within the scope of the jurisdiction of the justice presiding at the preliminary inquiry. It is an evidentiary ruling and does not go to jurisdiction. Evidentiary rulings made at a preliminary inquiry are beyond the reach of judicial review, whether the ruling is right or wrong.[18]

The preliminary inquiry justice's decision to admit the evidence despite the fact that mandatory notice under section 189 (5) might not have been given, did not commit a jurisdictional error.

[18] *LeBlanc*, supra at para.50.

Summary of Appellate Decisions

R. v. Vasarhelyi was not about these subsections. Its focus was section 507. *R. v. Rao*[19] directly considered the goals and meaning of these provisions. The court would have granted a remedy if it was possible to do so. In the course of supporting a beleaguered accused, the court suggested that a judge at a preliminary inquiry may, in rare circumstances, breach the rules of natural justice.

Québec's appellate court in *R. v. P.M.* suggested that the accused's "right" to cross-examine permitted by these subsections should not be lightly discarded. These subsections, however, make clear that the opportunity to cross-examine is not a right.

R. v. Beaven brought the scope of supervisory remedies into sharp focus and probably most accurately reflects where future appellate decisions will go, if and when, our appellate courts are sufficiently moved to consider these provisions. *LeBlanc* demonstrates successful challenges by way of extraordinary remedy will be limited.

Evidentiary rulings, even if erroneous, will not amount to jurisdictional error. It will be irrelevant that a reviewing court would have reached a different conclusion. Cross-examination on 540 (7) information is, and will remain, discretionary. The right to make full answer and defence is an issue for trial, not the preliminary inquiry.

Jurisdictional error has been found in circumstances where:

a. Counsel has been refused an opportunity to make submissions;
b. The presiding justice has failed to consider the whole of the evidence is required by subsection 548 (1) (b);
c. The presiding justice has discharged an accused despite some evidence upon which a reasonable jury properly instructed could return a verdict of guilty, and,
d. The presiding justice, after receiving direct evidence, weighed the competing inferences.[20]

[19] *R. v. Rao*, [2012] BCJ No. 1247 (BCCA).
[20] E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed. looseleaf (Aurora, Ont: Canada Law Book, 2009), at 13:1210, 13:2005, and 26:2090.

The types and manner of jurisdictional error are not finite. Our courts will continue to shape and hone the categories of jurisdictional error.

What is the Proper Method of Challenge?

Decisions on the reasonableness of subsection 740 (8) notice or subsection 740 (7) decisions on credible or trustworthy evidence are not appealable. They are also not easily reviewable by way of extraordinary remedy. Challenges to an order of committal, or, alleged jurisdictional errors related to the evidence taken at a preliminary hearing are limited to relief sought by way of *certiorari, mandamus* or prohibition. The scope of these extraordinary remedies is very limited. They require proof of jurisdictional error.

A Superior Court justice is not permitted to override the decision of a justice at a preliminary inquiry merely because the justice committed an error of law or reached a conclusion different from that which the reviewing court would have reached.[21] Instead, a review by extraordinary remedy, can only find success if it demonstrates the justice at the preliminary inquiry acted in excess of its assigned statutory jurisdiction or in breach of the principles of natural justice.[22]

Decisions on the reasonableness of notice, or, whether the evidence is, in fact, credible or trustworthy, do not generally fit the present-day interpretation of jurisdictional error. One of the central purposes of the preliminary inquiry is to ensure that the accused is not committed to trial unnecessarily.[23] A justice presiding at a preliminary inquiry performs a gatekeeper function. The test by which a preliminary inquiry justice determines whether an accused should be required to face trial is based on sufficiency of evidence.[24]

Sufficiency is defined as: whether the evidence taken at the preliminary inquiry is sufficient to permit a properly instructed jury acting reasonably to reach a verdict of guilt.[25] Unless the evidence at the preliminary inquiry establishes that the justice's decision on sufficiency of evidence was a decision in excess of her jurisdiction or a breach of the principles of natural justice, the decision will be unassailable on review by way of extraordinary remedy. Jurisdictional error requires proof that the presiding justice failed to apply the proper test of sufficiency or breached the principles of natural justice.

Section 784 provides that an appeal lies to the Court of Appeal from a decision granting or refusing the relief sought in proceedings by way of *mandamus, certiorari* or prohibition. The right of appeal is automatic. However, the accused does not have an automatic right to a stay of

[21] *R. v. Russell*, [2001] S.C.J. No. 53 at para. 19.
[22] *R. v. Skogman*, [1984] 2 S.C.R. 93 at p. 99.
[23] R. v. Russell, [2001] 2 S.C.R. 804,at para. 20.
[24] Section 548.
[25] *R. v. Charemski*, [1998] 1 S.C.R. 679, at para 30.

trial proceedings pending a decision by the appeal court.[26] The power to grant a stay is discretionary, the test being whether the accused can show the existence of a serious question of law, irreparable harm to the accused unless a stay is granted, and, that the balance of convenience favours granting a stay.

What is 'Credible or Trustworthy'Evidence?

How does a preliminary inquiry judge determine credible or trustworthy evidence when the evidence is only written statements? Who bears the onus of establishing the evidence submitted by way of statements is credible or trustworthy?

Credible or trustworthy is a necessary condition for the admissibility of evidence under subsection 540 (7). It requires that the presiding justice "considers" the proposed evidence credible or trustworthy "in the circumstances of the case." The last phrase suggests that 540 (7) applications must be considered on a case-by-case basis.

In *R. v. Muzhikov*[27] Wright J. was the presiding justice at a preliminary dealing with multiple accused charged with several offences that essentially alleged forcible confinement of named persons for the purpose of introducing them to prostitution, or, performing the services of a prostitute. Each of the named persons, alleged to be victims of forcible confinement, had gone missing immediately prior to the commencement of the preliminary inquiry. Consequently, the Crown pursuant to these provisions, sought to file the statements of the two witnesses instead of calling *viva voce* evidence.

Wright J. found that the words "credible or trustworthy" are used in the same context as they are used in section 518 of the *Criminal Code*. Credible or trustworthy evidence requires, "a *prima facie* air of reliabilty" to allow a court to consider it as evidence.[28] It need not be sufficient to base a conviction, but it must be suitable for consideration as to whether there is some evidence for a jury to properly consider at trial.[29]

In *R. v. Francis*[30] Ratushny J. received applications by two accused seeking *certiorari* on committals to trial on the basis that the preliminary inquiry justice exceeded his jurisdiction:

a. When he breached the principles of natural justice by refusing to permit the applicants, pursuant to subsection 540 (9) to cross-examine the witness and make submissions on the threshold admissibility of that witness's evidence regarding the "credibility or trustworthy" requirements of section 540 (7), before the evidence was admitted under that section;

[26] *R. v. Boutin,* (1990), 58 C.C.C. (3d) 237 (QCCA), leave to appeal to SCC refused 59 CCC (3d) vi.
[27] *R. v. Muzhikov* [2005] O.J. No. 866 (ONCJ).
[28] *Ibid. at para.42.*
[29] *Ibid*. at para. 42.
[30] *R. v. Francis,* [2005] O.J. No. 2864 (ONSC).

b. When he failed to follow the mandatory procedures under subsections 540 (8) and (9) requiring reasonable notice of the intention to introduce evidence under subsection 540 (7) and examination or cross-examination of the witness before admitting that evidence;
c. By his ruling that there was sufficient evidence of identification to meet the Sheppard (sic) test of some evidence of this essential element upon which a reasonable jury properly instructed could convict and based his decision on evidence improperly admitted under subsection 540 (7).

This case was heard by Her Honour approximately one year after these amendments became law. The Crown had sought to introduce a video statement on the first day of the preliminary inquiry. The Crown also sought to introduce a transcript of the witness's testimony from an earlier court proceeding that did not involve the applicants. The Crown had not given any advance notice of the witness's testimony from the earlier court proceeding. The Crown was seeking admission of the video statement to demonstrate that it was "credible or trustworthy".

Although the presiding justice initially determined that the Crown had not provided adequate notice for the court statement, his ruling changed on the second day of the preliminary. On the second day he ruled that the issue of inadequate notice had become moot by virtue of the passage of time since the first day of the preliminary inquiry. Now, both items of evidence were admissible.

He stated it was the Crown that must meet the burden of demonstrating that the evidence it wished admitted under these subsections was "credible or trustworthy". He ruled, however, that the question of burden of proof related only to *threshold admissibility* and not to the ultimate issue of credibility or trustworthiness, questions, he said, that must be left to the jury.

Ratushny J. agreed with Wright J. in *Muzhikov* that the information sought to be introduced under subsection (7) has to, at least, have a *prima facie* air of reliabilty to allow it to be admitted on the preliminary inquiry.[31] She also found that the evidentiary threshold applied to the admission of hearsay evidence at trial should not be applied to evidence contemplated to be admitted pursuant to subsection (7). She found that the subsection itself implies a lesser threshold of admissibility by allowing the receipt of evidence described as "any information that would not otherwise be admissible."[32] The consideration of whether the tendered information is "credible or trustworthy" remains only a threshold question of admissibility in the context of the screening function of a preliminary inquiry.[33]

These issues, at least in part, were also before the Court of Appeal for Québec in *R. v. P.M.*[34] The Crown in *P.M.* had maintained that the justice committed an error in stating the burden of proof. According to the Crown, the accused had to justify his application for cross-examination by

[31] *R. v.Francis, supra,* note 29 at para.27.
[32] *Ibid.* at para. 28
[33] *Ibid.*
[34] *Supra, note12.*

"preponderant" evidence and had not done so.[35] The Crown also argued that, through the combined effect of subsections (7) and (9), cross-examination had become the *exception* when the prosecution intends to prove its case by means of a credible or trustworthy statement.

The appellate court disagreed.[36] The court found that the credible or trustworthy character of the statements is a necessary condition for their reception in evidence. It found that this aspect is to be assessed by the justice at "a first stage."[37] The relevance of the evidence is assessed next. The court found that a statement deemed trustworthy does not thereby become more relevant.[38] The court suggested that the Crown's interpretation could have "disastrous consequences" for the preliminary inquiry. In doing so, the court quoted Professor Paciocco (now Paciocco J.) with approval when he wrote:

> Depending on how it is interpreted, and depending on how it integrates into the existing legislation, an amendment that will permit the reception of inadmissible hearsay evidence could go beyond simply putting the preliminary inquiry into intensive care; it could prove fatal to the preliminary inquiry in most cases, even without further statutory intervention.[39]

The court also quoted Professor Paciocco (now Paciocco J.) with approval when he wrote:

> In other words, while there is no constitutional right to have a pretrial determination of the sufficiency of the case, if the denial of the preliminary inquiry results in an inadequate disclosure there is a *Charter* violation. The discovery function of the preliminary inquiry is therefore hardly secondary or ancillary according to the constitutional jurisprudence; it is the sole function to acquire constitutional support.
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> Cross-examination can turn lines of disclosure into pages of discovery, enabling defence counsel to explore information not found in what are often the selective, even skeletal statements obtained by the police. It permits the defence to correct innocent non-disclosure caused by prosecutors or police officers who failed to see the relevance of information that the accused uncovers during cross examination, and it permits defence counsel to observe the demeanor and quality of the witnesses, factors important in the tactical decisions that counsel will make...[40]

And, the court agreed with Ratushny J. in *R. v. Francis* offering this opinion:

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[35] *Ibid*.at para. 52.
[36] *Ibid*. at para. 53.
[37] *Ibid.* at para. 54.
[38] *Ibid.* at para. 54.
[39] David M Paciocco, "A Voyage of Discovery: Examining the Precarious Condition of the Preliminary Inquiry" (2003) 48 Criminal Law Quarterly 151 at 152.
[40] *Ibid*.at paras. 159-161.

> In *R. v. Sonier* (citation omitted) Omatsu J. observed that in bringing in these new amendments, Parliament did not intend to eliminate the secondary discovery function of the preliminary inquiries or to convert preliminary inquiries into a paper hearing. I agree and see no reason to believe otherwise, partly in light of the screening device and discovery mechanism purposes of the preliminary inquiry as described by Hynes, *supra*, that appear alive and well at this time and are reflected in the retention of Part XVIII of the Criminal Code dealing with the preliminary inquiry and in section 541, retaining the right of the accused to call its own witnesses.[41]

Sadly, the court did not offer specific answers to the questions of who bears the burden of demonstrating credible or trustworthy and upon what basis. By commenting that the Crown's suggestion that the burden rests with the accused could have disastrous consequences, one assumes that the court, without expressly stating, believes the burden falls to the Crown. The court did refer to the Parliamentary Research Branch that wrote the following in a legislative summary prepared prior to the passage of this legislation:

> Clause 29 permits a preliminary inquiry judge to receive otherwise inadmissible evidence which the judge considers to be credible or trustworthy, including a recorded statement of the witness, provided that the party offering the evidence gave reasonable notice to the other parties or the judge ordered otherwise. In such a case, however, a party is able to apply to the judge to have the source of such evidence appear for examination or cross-examination.[42]

The court concluded that the intention of Parliament does not support the Crown's theory that cross examination on a statement produced via 540 (7) was to be considered an exceptional circumstance.

"Credible or Trustworthy" Has History

Credible or trustworthy evidence is referred to in subsection 518(e) of the *Criminal Code* in relation to evidence admissible at bail hearings. For at least 40 years the same words have been interpreted in a specific way dealing with the important issue of one's liberty. There is no reason to think Parliament, in enacting subsections 540 (7)-(9), believed that this terminology would be given any different meaning now.

In *R. v. Powers*[43] Lerner J. defined the term "credible or trustworthy" as a relaxation of the rules of evidence applied at trial, making hearsay evidence admissible, "so long as each party has a fair opportunity of correcting or contradicting any statement or evidence he considers prejudicial to his position."[44] In doing so, Lerner J. relied upon similar reasoning in *Re Vergakis*[45] finding

[41] *R. v. Francis*, (2005) 202 C.C.C. (3d) 147 (ONSC) at para. 20.
[42] As quoted in *R. v. P.M. supra* at para.72.
[43] *R. v. Powers*, [1972] OJ No. 902.
[44] *Ibid*. at para. 19.

credible or trustworthy evidence admissible so long as the person affected by the credible or trustworthy evidence is given an opportunity to be heard and given a fair opportunity for correcting or contradicting any relevant statement prejudicial to the person's position.[46]

Because the term "credible or trustworthy" has been used for years in relation to bail such that its meaning is settled in law, there is no reason to believe that the use of this terminology for preliminary inquiries should or will be treated any differently. Barr J. in *R. v. Hajdu*[47] found that Crown counsel was not permitted to read into the record the evidence on a bail hearing unless there is a specific agreement to do so between the Crown and defence. When there was no agreement, the Crown was required to produce some evidence that allows the defence to challenge the evidence of the Crown.

In *R. v. Woo*[48]the accused brought an application for bail review on a charge of trafficking in cocaine. The order of detention was made on the strength of statements made by the Crown, but the Crown tendered no evidence. The justice at the bail hearing relied upon the Crown's statements. The court held that the accused had not justified his release. The accused had provided the court with information that he was 38 years old and married with one child, and, that he and his wife owned their home in which they had $200,000 equity. He owned and operated a business that employed 6 to 8 persons. He also produced impressive letters of reference that were tendered on his behalf.

Fraser J. in dealing with the issue of credible or trustworthy evidence wrote the following:

> I do not see any conflict among *West, Hajdu* and *Dhindsa*. They arrived at this result:
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> 1. Where Crown counsel and defence counsel agree as to matters of fact, those facts may be presented to the court by means of statements of counsel.
> 2. Where counsel do not agree as to matters of fact (where, in the words of *Dhindsa*, there is "controversy or contradiction"), evidence must be tendered.
> 3. If evidence is required, it sometimes may be presented in affidavit form and may include hearsay.[49]

Consequently, while subsection 518 (1) (e) entitles the justice at a bail hearing to act on hearsay evidence considered credible or trustworthy, it is not authority for Crown counsel to simply read a statement of the circumstances of the offence, a procedure which deprives the accused of his right to cross-examine.

Re Vergakis was an immigration case. Immigration cases have for years also used the same phrase "credible or trustworthy evidence." The *Immigration and Refugee Protection Act* provides

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[45] *Re Vergakis*, [1964] BCJ No. 100 (BCSC).
[46] *Ibid*. at para.44.
[47] *R. v. Hajdu*, (1984), 14 CCC (3d) 563 (ONSC).
[48] *R. v. Woo*, [1994] B.C.J. No. 1011 (BCSC).
[49] *R. v. Woo, supa,* at para.28.

that the Board may receive evidence it considers credible or trustworthy. The Federal court has treated "credible" and "trustworthy" as having the same meaning: "credible."[50]

Consequently, the words 'credible or trustworthy'signify a relaxation of the rules of evidence to permit otherwise inadmissible hearsay evidence provided the accused in criminal matters or the opposing party in administrative matters is given an opportunity to be heard and given a fair opportunity for correcting or contradicting any relevant statement prejudicial to her position.

Air of Reliability vs. Air of Reality

The air of reliability test sounds very much like another test that has been used for years to determine whether there is an evidential foundation warranting that a defence be put to a jury. According to the Supreme Court of Canada in *R. v. Cinous*[51] the air of reality test is as follows:

> We conclude that the authorities after *Pappajohn v The Queen* continue to support a two-pronged question for determining whether there is an evidential foundation warranting that a defence be put to a jury. The question remains whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused. This is the current state of the law, uniformly applicable to all defences. [52]

Consequently, the air of reality test is a principle of law that a defence should only be put to a jury if there is an evidential foundation for it. And, this test has long been recognized by the common law.[53] However, the obvious difference between the air of reliability test referred to by Paciocco J. and other justices in the East Region and the air of reality test is that the air of reality test is applied after all the evidence is heard providing the trial judge with a strong measure of evidentiary context by which the decision can be made. The air of reliability test, in contrast, is to be made by justices examining a statement or a document without context, without any ability to actually test the reliability of it.

In *R. v. Buzizi*[54] the Supreme Court of Canada was required to determine whether the defence of provocation should have been put to the jury. Were the objective and subjective elements of the defence of provocation established thereby lending an air of reality to this defence? Fish J. raised the concept of an air of reality test to a question of law, rather than a question of fact. In doing so, he challenged the reasoning of minority Justice Wagner as follows:

> With respect, I have three brief observations concerning the reasons of Justice Wagner.

[50] *Sheikh v. Canada (M.E.I.),* [1990] F.C. 238 (C.A.).
[51] *R. v. Cinous,* [2002] 2 S.C.R. 3.
[52] *Supra note 50 at para. 82.*
[53] *Supra, note 50 at para. 50.*
[54] *R. v. Buzizi* [2013] 2 S.C.R. 248.

> First, my colleague finds that an appellate court must defer to the trial judge in determining whether a defence has an air of reality. As my colleague acknowledges, however, the applicable standard of review in this regard is *correctness*. It follows, in my view, that the trial judge is not at all in the "best position" to determine whether a defence has an air of reality, since that is a question of law:...the interpretation of a legal standard (the elements of the defence) and the determination of whether there is an air of reality to a defence constitutes questions of law, reviewable on a standard of correctness.[55]

What remains clear is that the air of reality test used to determine whether a defence should be left to a jury has very specific parameters and is required to be based on a consideration of all the evidence presented at trial, together with legal principles, prior to addresses of counsel to the jury. This test is a far different circumstance than examining documents presented by a Crown to a judge prior to admission at a preliminary inquiry without context and without guiding legal principles. Most often the circumstances will not permit any actual or reasonable testing of the reliability under subsection 540 (7).

The Definition of Sufficiency in 548

The classic definition of sufficiency has been described as, 'some evidence upon which a reasonable jury, properly instructed, could convict.[56] Perhaps understandably, use of the term "some evidence" led some justices to refer to the test of sufficiency as a distinction between 'no evidence' and 'some evidence.' McLachlin J. (as she then was), noting this error, referred to the distinction between 'no evidence' and 'some evidence' as "nonsensical."[57] She decided to fix the problem. She did so in two cases: *R. v.Charemski*[58] and *R. v.Arcuri.*[59]

In *Charemski,* McLachlin J., in dissent on a different issue[60], wrote that the test of *sufficiency* relates to the ability of the evidence to support a verdict of guilt, that is, whether there is sufficient evidence to permit a properly instructed jury to reasonably *convict*. It is *not* a question of: is there is any evidence, even a scintilla, in support of the case for the prosecution. It *is, should the justice be reasonably satisfied that a jury could find the accused guilty on the evidence established*.[61]

In *Arcuri*, at a preliminary inquiry on first-degree murder, the Crown's case was entirely circumstantial. The accused called two witnesses offering testimony that was potentially exculpatory. The case provided the court with an ideal opportunity to dispel the notion that, "any

[55] *Supra, note 52 at paras. 14 and 15.*
[56] *U.S. v. Shephard,* [1977] 2 S.C.R. 1067. affirmed in *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, and *R. v. Monteleone,* [1987] 2 S.C.R. 154.
[57] *R. v. Charemski,* [1998] 1 S.C.R. 679, at para. 21.
[58] *R. v. Charemski,* [1998] 1 S.C.R. 679
[59] *R. v. Arcuri* [2001] 2 S.C.R. 828.
[60] There was no disagreement between the majority and the dissenting justices as to her description of the test of sufficiency. See *R. v. Arcuri* [2001] 2 S.C.R. 828 at para. 27.
[61] *Charemski, supa,* at para. 21.

evidence" or just "some evidence" meets the test of sufficiency. The use of that terminology could be misunderstood to mean that if the Crown presents evidence that would, on its own, be sufficient to support a verdict of guilty, the preliminary inquiry judge need not consider exculpatory evidence of the defence. That result, the court concluded, would be inconsistent with the mandate of the preliminary inquiry justice.[62]

The preliminary hearing justice is required by section 548 to consider "the whole of the evidence." The test of sufficiency cannot foreclose consideration of defence evidence. It remains true, if the Crown adduces direct evidence on every essential element of the offence, the test of sufficiency will be met. Questions of credibility in these circumstances will properly be left to the jury.

When, however, the evidence is circumstantial, and/or the court hears exculpatory evidence from the defence, applying the proper test as characterized by McLachlin J. in *Charemski*, the presiding justice is required, to consider all the evidence, and determine, "whether a properly instructed jury, acting reasonably, could *find guilt beyond a reasonable doubt*."[63]

Charemski dealt with the issue of evidence sufficient to leave a case to the jury upon a motion for a directed verdict. The test of sufficiency is, however, the same for preliminary inquiries, extradition cases, non-suit applications and directed verdicts.[64] McLachlin J. in *Charemski* felt that the court's decisions in *Mezzo* and *Monteleone* had, unfortunately and unintentionally, created some "ambiguities" in the test for sufficiency.[65] Nevertheless, she was confident the ambiguous comments in those decisions were not intended to abandon the long-standing rule that the proper test is, "whether a properly instructed jury, acting reasonably, could *find guilt beyond a reasonable doubt*."[66]

This same test prevails in the United States, England and Australia.[67] By necessity, this may require a justice presiding at a preliminary inquiry to engage in a limited evaluation of inferences in order to answer this question. It is the only test, the court concludes, that satisfies the logic of the trial process and adequately safeguards an accused's rights. It is a test that best harmonizes the tests established for the analogous proceedings of motions for directed verdicts and non-suits.[68]

The test to determine sufficiency is not whether there is no evidence or some evidence, but whether a properly instructed jury acting reasonably could find guilt. Sufficient evidence means: *sufficient evidence to sustain a verdict of guilt beyond a reasonable doubt*. McLachlin J. (as she

[62] *R. v. Arcuri*, [2001] 2 S.C.R. 828. at para. 32.
[63] *Charemski*,*supra,* at para. 29.
[64] *R. v. Arcuri*, [2001] 2 S.C.R. 828. at para.21.
[65] *Ibid.* at para. 29.
[66] *Charemski,* at paras. 29 and 30.
[67] *Ibid*. At para.25.
[68] *Ibid*. at para. 31.

then was) wrote, "merely to refer to 'sufficient evidence' is incomplete, since "sufficient" always relates to the goal or threshold of proof beyond a reasonable doubt. This must constantly be borne in mind when evaluating whether the evidence is capable of supporting the inferences necessary to establish the essential elements of the case."[69]

Conclusions

Generally, the Crown will be required to call a witness to, at minimum, explain written statements and documentary evidence and provide some basis for a finding that the evidence is credible or trustworthy. It is a threshold consideration for admissibility.

'Credible or trustworthy' has, for years, been defined as a term permitting otherwise inadmissible hearsay evidence provided the accused is given an opportunity to be heard and given a fair opportunity for correcting or contradicting any relevant statement prejudicial to her position. Some cases have embraced the notion that the information sought to be introduced has to exhibit at least a *prima facie* air of reality to be admissible. No guidelines have been provided as to how this is to be accomplished.

The issue of admissibility will be determined on a case-by-case basis. It is also evident that these amendments have not removed the dual purpose of preliminary inquiries, to determine sufficiency of evidence, and, to provide the defence with discovery of the Crown's case. These amendments also have not removed the ability of the defence to challenge or contradict the evidence sought to be tendered in written form.

[69] *Ibid*, at para. 35.