SUPREME COURT OF NOVA SCOTIA
Citation: *MacDonald (Estate)*, 2024 NSSC 20

Date: 20240119
Docket: 523523
Registry: Halifax

In the Estate of Gerald Joseph MacDonald, Deceased

Between:

Diane Elisabeth Connolly Peters, in her capacity as the personal representative in the Estate of Gerald Joseph MacDonald

Applicant

v.

Michelle Connolly, Alan Connolly, Dalhousie Medical Research Foundation, and Diane Elisabeth Connolly Peters, in her personal capacity

Respondents

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	November 23, 2023, in Halifax, Nova Scotia
Counsel:	Jonathan Hooper, Tupman & Bloom LLP, for Michelle Connolly and Alan Connolly Tanya L. Butler and Jordan Archibald, Touchstone Legal Inc., for Diane Elisabeth Connolly Peters, in her personal capacity Sara D. Nicholson and Richard Niedermayer, KC, for Diane Elisabeth Connolly Peters, in her capacity as the personal representative of the Estate of Gerald Joseph MacDonald (Not Participating)

By the Court:

Introduction

[1] Michelle Connolly and Alan Connolly move for an order to strike portions of various affidavits filed by, or on behalf of, Diane Elisabeth Connolly Peters ("Miss Peters") in support of her claim to Imperial Oil Limited shares (the "Shares") that were in the name of Gerald Joseph MacDonald (now deceased) at the time of his death. In addition to the affidavit of Miss Peters, supporting affidavits were provided by:

- Matthew Robert Steven Hoggan
- Jelmut Samland
- Sharon Samland

[2] All four affidavits were filed on September 15, 2023, as part of an Application in Court brought by Miss Peters seeking the court's assistance in determining the ownership of the Shares.

[3] Counsel for the Connollys objected to a total of eight paragraphs or portions of paragraphs in the four affidavits in dispute. Prior to the hearing, counsel were able to reach agreement on the removal of certain paragraphs and portions of other

paragraphs in the affidavit of Matthew Robert Stephen Hogan (filed on September 15, 2023) and the affidavit of Helmut Samland (filed on September 15, 2023).

[4] What remain in dispute are the following paragraphs or portions of paragraphs contained in the:

1. Affidavit of Sharon Samland:

   Paragraph 19 – the words:

   > … , it did not surprise me when Diane said that Gerald gave her a gift of the shares.

   These words are part of the first full sentence of the paragraph.

2. Affidavit of Diane Elisabeth Connolly Peters, in her personal capacity:

   (a) Paragraph 32 – the entire paragraph:

   > Over the years after Elaine passed away, Gerald would frequently tell me, 'You know I am going to look after you.', implying that he planned to leave me money on his death. He was not clear about what he planned to leave me, and I never asked.

   (b) Paragraph 34 – the majority of the paragraph with the exception of:

   > (… (which was my childhood nickname that Gerald often called me).

   (c) Paragraph 37 – the portion of the paragraph that states:

> … he expressed concern that his neighbours who might hope or expect to inherit would concern themselves with his choices.

(d) Paragraph 38 – the entirety of this paragraph which states:

> Gerald asked me to keep the gift confidential. He instructed me to throw one key into Porter's Lake and keep one for myself. I asked why I could not just throw the other key in the garbage and Gerald told me he did not want anyone else getting ahold of the extra key.

[5] The objections were based on either hearsay or opinion or, in the case of paragraph 32 of the Peters' affidavit, the combined effects of hearsay and opinion.

Issues

[6] The issues that remain for this Court were succinctly stated in the brief filed by counsel for Miss Peters. They are reproduced here:

1. Hearsay Evidence
    a. Do the impugned statements in Diane's affidavit constitute hearsay?
        i. If yes, do they fall under a traditional exception?
        ii. If no, are they admissible by way of the principled approach?
    b. Does the impugned statement in Sharon's affidavit constitute hearsay?
        i. If yes, does it fall under a traditional exception?
2. Opinion Evidence
    a. Does the impugned statement in Sharon's affidavit constitute opinion evidence?
        i. If yes, is it lay opinion evidence?
        ii. If yes, is the opinion such that it is too intertwined with the facts of the case to be deemed inadmissible?

b. Does the impugned statement in Diane's affidavit constitute opinion evidence?

i. If yes, is it lay opinion evidence?

ii. If yes, is the opinion such that it is too intertwined with the facts of the case to be deemed inadmissible?

[7] When counsel uses the name "Diane", she is referring to "Miss Peters" and when she says "Sharon" she is referring to "Miss Samland".

Law

[8] Counsel for the Connollys and for Miss Peters both accurately set out the law with respect to the rules of evidence and the application of those rules to the determination of admissibility particularly in respect to affidavit evidence.

[9] The Nova Scotia Civil Procedure Rules allow for the use of affidavits in applications. Rule 5.20 states the following under the heading:

> **5.20 Rules of evidence on an application**
>
> The rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an *ex parte* application, accept hearsay presented by affidavit prepared in accordance with Rule 39 - Affidavit.

[10] Rule 39 deals with the construction and use of affidavits. The more pertinent aspects of this Rule, for purposes of this motion, can be found at:

> **39.02 Affidavit is to provide evidence**
>
> **(1)** A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.

> **(2)** An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.
>
> **…**
>
> **39.04 Striking part or all of affidavit**
>
> **(1)** A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> **(2)** A judge must strike a part of an affidavit containing either of the following:
>
> > **(a)** information that is not admissible, such as an irrelevant statement or a submission or plea;
> >
> > **(b)** information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> **(3)** If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> **(4)** A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> **(5)** A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[11] The Nova Scotia Evidence Act, RSNS 1989, c. 154 also bears on the matters before the Court. The Act contains the following provision:

> **Competency and compellability at trial**
>
> **45** On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding either or any of the parties to the action, matter or proceeding, *provided that in any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing,*

> *transaction or agreement with the deceased, or with respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence*. [Emphasis added]

[12] Counsel for the Connollys referred to an earlier decision of The Honourable Justice Scott C. Norton of this Court in *King v. Gary Shaw Alter Ego Trust*, 2020 NSSC 288, where at paras. 9-11, he stated:

> [9] The leading decision in this province on the appropriate contents of affidavits is *Waverly (Village) v. Nova Scotia (Municipal Affairs)*, 1993 NSSC 71. Therein, Justice Davison made the following observation and set out in summary form the guidelines for admissible affidavit evidence (I note here that his reference to "application" was to a Chambers Application in the former Rules, now a Motion in Chambers in our present Rules):
>
> > 14 Too often affidavits are submitted before the court which consist of rambling narratives. Some are opinions and inadmissible as evidence to determine the issues before the court. In my respectful view the type of affidavits which are being attacked in this proceeding are all too common in proceedings before our court and it would appear the concerns I express are shared by judges in other provinces...
>
> 20 It would [be] helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
>
> > 1.Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
> >
> > 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application [a motion under the present Rules]. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
> >
> > 3. Affidavits used in applications [motions] may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".
> >
> > 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.

> 5. The affidavit must state that the affiant believes the information received from the source.

[10] In *Sopinka, The Law of Evidence in Canada*, 5th ed. (Toronto: Lexis Nexis, 2018), the authors introduce the law of evidence as follows (p. 12):

> The law of evidence controls the presentation of facts before the court and is made up of common law principles, statutory provisions and constitutional principles. Its purpose is to facilitate the introduction of all logically relevant facts without sacrificing any fundamental policy of the law which may be of more importance than the ascertainment of the truth.

[11] There is a discretion for a judge to exclude evidence that meets the test of relevancy if the judge considers that the probative value is outweighed by its prejudicial effect. This discretion is most often considered in the context of criminal trials before juries. It has also been used to limit certain evidence in civil cases, again primarily before juries. The discretion has been recognized as broad: *R v. B. (C.R.)*, [1990] 1 S.C.R. 717.

[13] In an earlier decision that I was called upon to decide, *Hopgood v. Hopgood (Estate)*, 2018 NSSC 100, at para. 75, I wrote:

> [75] The requirement for corroboration in s. 45 is intended "to discourage dishonest or ill-founded claims against estates": *Johnson v. Nova Scotia Trust Co.*, (1973), 6 N.S.R. (2d) 88, 1973 CarswellNS 90 (N.S.S.C. (A.D.)). In *Murphy Estate (Re)*, (1998) 169 N.S.R. (2d) 284, [1998] N.S.J. No. 324, Justice Davison thoroughly reviewed the law concerning the corroboration required by s. 45. In so doing, he adopted the following list of principles compiled by O'Hearn Prob. Cr. J. in *Re McCarthy* (1970), 16 D.L.R. (3d) 72:
>
> > (a) Corroboration is of no avail if the claimant's story is not believed;
> >
> > (b) A mere scintilla of corroborating evidence is not sufficient;
> >
> > (c) Evidence that is consistent with two views or two opposing views is not corroboration of either.
> >
> > (d) The corroborating evidence need not be sufficient in itself to establish the case.
> >
> > (e) The direct testimony of the second witness is unnecessary for sufficient corroboration.
> >
> > (f) The corroboration may be afforded by circumstances alone.

[14] Counsel for Miss Peters recognized the need for corroboration and argued that the decision regarding admissibility of evidence should be left to the hearing judge so that the entirety of the evidence could be taken into consideration. She also spoke to the application of the principled approach to determining whether hearsay evidence should be admitted. While recognizing that hearsay evidence is presumptively inadmissible unless it falls under a traditional exception it might, nonetheless, be found to be admissible under the principled approach. She cites the case of *R. v. Khelawon*, 2006 SCC 57, where at para. 2, Charron, J. wrote:

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

[15] Chief Justice Michael J. Wood, of the Nova Scotia Court of Appeal, provided his view of the development of the principled approach to the admissibility of evidence in the case of *McKinnon Estate v. Cadegan*, 2021 NSCA 79. At para. 33, he stated:

> [33] The development of the principled approach did not displace the traditional categories for hearsay exceptions. In fact, when evidence falls within an established common law exception, it will only be excluded in rare cases. The Supreme Court explained this in *Khelawon* :
>
> > 42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, _ 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:
> >
> > > (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
> > >
> > > (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
> > >
> > > (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
> > >
> > > (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[16] Chief Justice Wood also shared his view regarding the proper sequence to be followed when considering the admission of hearsay evidence. At para. 36 of *McKinnon Estate v. Cadegan, supra,* he stated:

> [36] In my view, the proper sequence to be followed when considering the admission of hearsay evidence is as follows:
>
> 1. Can the proponent establish that the evidence falls within one or more common law exceptions?
>
> 2. If a common law exception applies, can the opposing party show this is the "rare case" where the evidence should be excluded because it is not necessary or reliable?
>
> 3. If it is not a "rare case", should the evidence be excluded because its prejudicial effect exceeds its probative value?
>
> 4. If not admissible as a common law exception, is the evidence admissible under the principled analysis from *Khelawon*?

[17] In his brief, counsel for the Connollys cited the decision of former Nova Scotia Supreme Court Justice Arthur J. LeBlanc, in the case of *David v. Beals Estate*, 2015 NSSC 288. At paras. 78 to 84, former Justice LeBlanc, discussed in detail the test for admissibility of hearsay based on the principled approach. He wrote:

> [78] The seminal case on hearsay is *R. v. Khelawon*, 2006 SCC 57, [2006] S.C.J. No. 57. In *Canadian National Railway Co. v. Halifax (Regional Municipality)*, 2012 NSSC 300, [2012] N.S.J. No. 435 at paras. 6 & 8, I considered *Khelawon* and stated:
>
> > The "essential defining features" of hearsay are ... "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant." (*Khelawon* at para. 35) It must be emphasized that it is "only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises." (*Khelawon* at para. 36) …

> … [B]y putting one's mind, at the outset, to the second defining feature of hearsay -- the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci, J. in *R. v. Starr*, 2000 SCC 40 (CanLII), [2000] 2 S.C.R. 144, identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer, C.J. in U. (F.J.), 1995 CanLII 74 (SCC), [1995] 3 S.C.R. 764, expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested".

[79] A hearsay statement is *prima facie* inadmissible. However, courts have recognized that a rigid approach which would exclude all hearsay evidence would create inefficiency in our judicial system. Therefore, we admit hearsay in circumstances where the usual concerns about hearsay are refuted. Although in the past, courts created pigeon-holed exceptions to the rule against hearsay, the Supreme Court of Canada in *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81, and subsequently modified in *R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915, [1992] S.C.J. No. 74, and clarified in *Khelawon, supra*, adopted a new principled approach to hearsay evidence.

[80] This principled approach focuses on the usual concerns presented by hearsay evidence: necessity and reliability. It admits hearsay evidence where these concerns are not an issue. In doing so, the approach balances the conflicting issues of admitting evidence without cross-examination, and meeting society's interest in a trial process based on all of the available evidence: *Khelawon, supra* at paras. 61-100.

[81] The precise meaning of necessity is not easy to articulate and it seems to be largely contextual. Hearsay evidence will generally be necessary when it is not otherwise available and it is necessary to prove a fact in issue (*Smith, supra* at para. 34). The most obvious example of necessity is when the original declarant has died and is not available to testify (*Smith, supra* at para. 36). I find that the two impugned statements are necessary because Garfield Beals is deceased and aside from the Will, we have no evidence of Garfield Beals' intentions with respect to his estate.

[82] In *MacNeil v. MacNeil*, 2014 NSSC 171, [2014] N.S.J. No. 269 at paras. 44-46, Edwards J. explored the meaning of reliability:

> 44 In *R. v. Khelawon*, 2006 SCC 57, the Court considered whether certain statements were sufficiently necessary and reliable to be admitted under the principled exception to the hearsay rule. The Court discussed factors to be considered when determining whether a hearsay statement is sufficiently reliable to be admissible. At paragraph 4, Charron, J. stated as follows:

> [4] . . . all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

45 At paragraphs 61-63, the Court went on to state as follows:

> [61] Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually met in two different ways: . . .
>
> [62] One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:
>
> > There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [-- 1420, p. 154]
>
> [63] Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination . . .

46 In R v. Hart, 1999 NSCA 45, Cromwell, J.A. (as he then was), set out a (non-exhaustive) list of factors to consider when assessing whether reliability of a hearsay statement under the principled approach. At page 22 of the decision, Justice Cromwell stated as follows:

> . . . reliability has been considered as relating to the circumstances in which the statement was made which tend to assure its trustworthiness. Without attempting an exhaustive list of such

> circumstances, relevant considerations include whether the statement was made on oath, whether it is made in the presence of the trier of fact (R. v. B.(K.G.), supra), whether the maker had any motive to falsity, whether the story is one that the witness could imagine if the events had not occurred (R. v. Khan, supra), and whether, in all the known circumstances, the statement could reasonably have been expected to have changed significantly had the declarant testified and been cross-examined (R. v. Smith, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915).
>
> [83] Thus, hearsay evidence is reliable when the circumstances surrounding the statement are such as to make the statement likely to be true. Lamer J. in *Smith*, *supra* at para. 30, explained:
>
> > … [T]he circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination. … [W]here the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible.
>
> [84] When determining reliability, courts are not limited to the circumstances surrounding the out-of-court statement. For example, corroborating evidence can be taken into account (*Khelawon, supra* at paras. 99-100).

[18] These authorities speak to the importance of allowing only relevant evidence in court. The importance of the concept of relevance was noted by the Supreme Court of Canada, in *R. v. Blackman*, 2008 37 (SCC). At para. 29, Charron, J. put it this way:

> The most basic principle of our law of evidence is that, as a general rule, any information that is relevant to an issue in the case may be admitted in evidence. Put differently, evidence may only be admitted if it relates logically to an issue in the case.

[19] Doherty, J.A., in *R. v. Watson* (1996), 30 O.R. (3d) 161 (Ont C.A.) stated that “relevance”:

> … requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence of or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation, then "Fact A" is relevant and prima facie admissible.

[20] With this as the underpinning of the discussion to follow, I will now turn to each of the challenged paragraphs or portions of paragraphs in the two remaining affidavits under scrutiny.

Discussion

[21] Paragraph 19 of the "Sharon Samland" affidavit filed on September 15, 2023) states the following in its entirety:

> 19. Knowing how much of her life Dianne had dedicated to caring for Gerald and Elaine, it did not surprise me when Dianne said that Gerald gave her a gift of the shares. ~~On the contrary, I would have been shocked if Gerald died without leaving Diane something~~.

[22] Counsel have already agreed to strike the last full sentence of this paragraph. What remains in dispute is the underlined portion:

> … , it did not surprise me when Diane said that Gerald gave her a gift of the shares.

[23] Counsel's objection is based on his assertion that this is inadmissible in that it expresses the opinion of the affiant. Not simply her opinion that "Diane" told her this but more so that "Gerald" said this to "Diane". The opinion (for that is what it

clearly is) relates to what "Diane" alleges was said to her by the testator. The only evidence of what the testator might have said is that of "Diane" herself. It is uncorroborated. To allow the affiant to express an opinion on what someone alleges someone else said is patently unacceptable. It is inadmissible opinion evidence and should not be allowed to remain. I order that the impugned words (underlined above) be struck. It cannot be saved by applying the principled approach to admissibility. It is neither necessary or reliable. The affiant's opinion does not offer any assistance to the hearing judge in deciding the relevant facts of this application.

[24] Turning now to the affidavit of Diane Elisabeth Connolly Peters, in her personal capacity (filed on September 15, 2023), the paragraphs that remain challenged are paras. 32, 34, 37, and 38.

[25] In respect to para. 32, counsel agreed that the phrase "implying that he planned to leave me money on his death" should be struck. The remainder of this paragraph remains in dispute. The paragraph (with the redacted phrase) now reads as follows:

> 32. Over the years after Elaine passed away, Gerald would frequently tell me "you know I am going to look after you", … . He was not clear about what he planned to leave me, and I never asked.

[26] Counsel for Miss Peters raised a concern about deciding issues of admissibility of proffered evidence without having a full hearing in which all the evidence, including evidence obtained on cross-examination of the affiants, could be presented. I do not feel encumbered by the fact that my ruling comes prior to the full hearing. In an application in court, the bulk of the evidence is provided by way of affidavits. A review of the affidavits allows a motions judge to discern the nature of the case and the issues that have to be decided. Although the evidence might be challenged on cross-examination, the evidentiary basis to support the opposing positions of the parties can be readily ascertained. What Miss Peters alleges, to support her claim to ownership of the Imperial Oil shares, is not corroborated by the affidavit evidence of any other person. However, should she be prevented from testifying to what she says she was told by the testator prior to his death? I would be hesitant, at this juncture, to deny her that opportunity. She still has the burden of overcoming the provision contained in Section 45 of the Nova Scotia Evidence Act. If she fails to establish any corroborating evidence of her assertions, this might simply be a Pyrrhic victory for her. The ultimate decision should be left to the hearing judge after a full review of all the evidence and after the submissions of counsel.

[27] I will not order the removal of what remains of paragraph 32.

[28] In regard to paragraph 34, counsel for the Connollys submit that most of the paragraph with the exception of the bracketed portion which reads, "… (which was my childhood nickname that Gerald often called me).", should be struck.

[29] Consistent with my ruling on paragraph 32, I would allow the first sentence of this paragraph to remain as is. The last two sentences (including the bracketed portion) should be removed. They offer nothing relevant to the matter before the Court.

[30] Counsel for the Connollys asks that the words "he expressed concern that his neighbours who might hope or expect to inherit would concern themselves with his choices.", which are in paragraph 37 of Miss Peter's affidavit. These words can be found at the end of the second sentence of this paragraph.

[31] I agree with counsel for the Connollys that these words should be struck. They are hearsay but more so are irrelevant for purposes of this application.

[32] Counsel for the Connollys did not challenge the first part of this sentence which reads: "Gerald valued his privacy greatly, and … ". Although it is more in the nature of an opinion, it is an observation and assessment of the late Mr. MacDonald which Miss Peters would likely have been able to make. This might

still be raised as an objection before the hearing judge. That will be left to her to ultimately decide should counsel wish to pursue the matter further.

[33] My ruling in regard to paragraph 37 is subject to the same comments previously made regarding the requirement to offer corroborating evidence as set out in Section 45 of the Nova Scotia Evidence Act. This requirement could significantly impact the claims being advanced by Miss Peters. Again, that is the ultimate decision that the hearing judge will be called upon to make.

[34] Finally, in regard to paragraph 38, counsel for the Connollys ask that it be removed in its entirety based on hearsay. This paragraph is part of a narrative that begins at paragraph 31 under the heading "The Gift of the Imperial Oil Shares". I have already dealt with the objections raised by counsel in regard to paragraphs 32, 34, and 37. Paragraph 38 is more closely connected with paragraphs 35 and 36 which have not been objected to. While ostensibly hearsay the first two full sentences of paragraph 38 can be considered, but again, subject to the overarching provisions contained in Section 45 of the Evidence Act.

[35] The last full sentence of this paragraph which begins "I asked why … ." is not only hearsay but is also irrelevant to the issues that have to be decided. As such, it should be redacted in its entirety.

Final disposition

[36] My ruling regarding the inadmissibility of certain parts of the "Sharon Samland" and "Diane Peters" affidavits and its impact on the ultimate decision the hearing judge eventually makes remains to be seen.

[37] I am mindful of the reality that in matters of probate and the proper interpretation of wills often times hearsay evidence is allowed. Recently a case decided by my colleague, the Honourable Justice John A. Keith, in *Curry v. Curry*, 2023 NSSC 402, the hearsay evidence of a witness who testified about conversations he had had with the deceased testatrix prior to her death was received. The witness did not stand to gain from his testimony which is unlike the case now before the Court but he was able to recall previous conversations and what the deceased testatrix had communicated to him. His testimony was more in the nature of providing corroborating evidence but Justic Keith accepted it " … without reservation." (See para. 90 of the *Curry*, *supra*, decision.)

[38] My ruling allows for the evidence of the affiants to be put before the Court. But, unless corroborated by other admissible evidence it might not provide the results Miss Peters is seeking. As previously stated, that remains with the hearing judge to decide after all evidence and submissions of counsel are considered.

[39] I will leave it to counsel to properly edit the various affidavits that have been amended or modified based on agreement and in accordance with this ruling.

[40] The matter of costs arising from this motion should be left to the various parties to try to agree upon. Otherwise, the hearing judge will decide what is appropriate in the circumstances of the application.

McDougall, J.