

# A COMPARISON OF THE LAW OF EVIDENCE

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This article draws upon the author's experience in teaching and writing on evidence law in Canada over the past 20 years, and periodic teaching of evidence law in Australia over the last 15 years. It therefore takes the stance of an interested 'outside' observer of Australia's evidence laws. There is value in seeing how different jurisdictions approach and deal with the same evidentiary issues.

In Australia, the leading engine for change in the law of evidence is the 'uniform *Evidence Act*' regime, whose creators wanted enacted in general form throughout Australia.<sup>1</sup> To date, the uniform *Evidence Act* applies to the Commonwealth, Australian Capital Territory, New South Wales, Tasmania and Norfolk Island, and Victoria is scheduled to follow suit in 2010.<sup>2</sup> Thus far, Queensland has eschewed the entreaties from the 'uniform lobby' to sign on. To a certain extent, the State has chosen its own path in developing its evidence laws. Whether Queensland should continue to 'go it alone' is beyond the scope of this paper.<sup>3</sup>

Queensland, Canada and the uniform evidence jurisdictions represent different approaches to the law of evidence. The uniform *Evidence Act* constitutes an evidence code; to a certain extent it is a break from the common law past. Queensland is a hybrid jurisdiction in that the common law prevails, but there is significant ad hoc legislative reform. Evidence law in Canada is primarily driven by the common law in the sense that it is judge driven. In order to highlight differences in perspective, this article will focus on three selected areas of evidence to canvass, compare and contrast the law in Canada and Queensland, and under the uniform Evidence Acts. The three topic areas are: 1) spousal competency, compellability and privilege, 2) admissibility of prior inconsistent statements for their truth, and 3) the hearsay exception where the witness is unavailable. The case of *R v Couture* from the Supreme Court of Canada is a useful starting point and factual base for the discussion.<sup>4</sup>

## I. *R v COUTURE*

The Couture's marriage and relationship was somewhat dysfunctional. The accused and his wife met in prison. He was a prisoner and she was a church counsellor. Prior to their marrying, the accused allegedly told her about killing two other women. Yet, they still married seven years later. A year after being married, they separated. He was abusive. His wife went to the Royal Canadian Mounted Police (RCMP) and divulged the confessions. The police reopened the case. However, before trial, Mr and Mrs Couture reconciled. Under Canadian law, the wife is not a competent witness for the prosecution. She could not be called by the Crown.<sup>5</sup> Instead the Crown sought to admit the out-of-court statements she had made by relying on the 'principled hearsay exception' created by the Supreme Court in *R v Khan*, which allows for hearsay statements to be admitted where 'reliable and necessary'.<sup>6</sup> The statements were admitted and Couture was convicted on two counts of second degree murder. On appeal, the Supreme Court of Canada in *Couture* ruled that introducing the evidence this way indirectly undermined the

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1 See, eg, Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) ch 1.

2 *Evidence Act 1995 (Cth)*; *Evidence Act 1995 (NSW)*; *Evidence Act 2001 (Tas)*; *Evidence Act 2004 (NI)*; *Evidence Act 2008 (Vic)* to commence on or before 1 January 2010.

3 The Queensland Law Reform Commission, in a detailed report, has outlined the areas for consideration should Queensland decide to adopt the uniform *Evidence Act*: Queensland Law Reform Commission, *A Review of the Uniform Evidence Acts*, Report 60 (2005).

4 [2007] SCJ 28.

5 *Canada Evidence Act*, RS 1985 c E-10, s 4.

6 (1990) 59 CCC (3d) 92 (SCC).

spousal non-compellability rule. Accordingly, the evidence was ruled inadmissible and a new trial was ordered.

## II. SPOUSAL COMPETENCY, COMPELLABILITY & PRIVILEGE

### A. Canada

Canadian law on spousal competency, compellability and privilege is governed by statute. In criminal cases, s 4 of the *Canada Evidence Act 1985* applies.<sup>7</sup> Outlined below is a summary of each part of s 4:

Section 4(1): Makes the accused and his or her spouse competent for the defence.

Section 4(2): Makes the spouse of an accused competent and compellable for the prosecution for listed crimes [mostly sexual offences].

Section 4(3): Recognises a privilege for a spouse to refuse to disclose to the court what the witness was told by his or her spouse.

Section 4(4): Makes the spouse competent and compellable for the prosecution for listed crimes against children under 14 years of age [crimes of violence].

Section 4(5): Preserves the common law exception for crimes against the spouse's person, liberty or health. The common law recognised the need to protect victims of spousal abuse.

Section 4(6): Prevents any adverse comment by the judge or prosecutor should the accused and his or her spouse choose not to testify.

Under Canadian law, Mrs Couture could not testify for the prosecution even if she wanted to. The spouse of an accused is not competent and compellable for the prosecution unless the offence charged falls within one of the exceptions. The only exception remotely possible is s 4(4). Unfortunately, the exception only applies to murders of children under 14 years of age, but here the two victims were 20 and 26 years of age. Mrs Couture would have to divorce her husband or satisfy the court that she was an 'irreconcilably separated spouse' before being allowed to testify.<sup>8</sup>

In terms of privilege, the Canadian law is even more bewildering. For argument's sake, let us assume that Mrs Couture is competent and compellable because the victims were under 14. She now has to testify, but can she claim privilege with respect to what she was told by the accused under s 4(3)? No. The wording of s 4(3) is limited to communications made 'during the marriage'. In *Couture*, she was told of the murders before they married.

There is more. Consider that Mrs Couture is competent for the prosecution and is willing to testify about the confessions that were made during the marriage. She is now on the stand and is about to tell the jury what her husband told her. The accused objects. He claims privilege over his communications to her. Who owns the privilege, the maker of the communication, or the receiver of the communication, or both? Under s 4(3), it is the receiver of the communication who holds the privilege. Yet, Dean John Henry Wigmore was of the view that logic dictated that the maker of the statement should hold the privilege as to whether his or her words are to be disclosed. He wrote 'The privilege is intended to secure freedom from apprehension in the mind

<sup>7</sup> *Canada Evidence Act*, RS 1985 c E-10. In Canada, criminal law is under federal jurisdiction and the Canada Evidence Act applies across the country.

<sup>8</sup> *R v Salituro* (1991) 9 CR (4<sup>th</sup>) 324 (SCC.). The Court ruled that if the prosecution could establish that a 'spouse' was in fact irreconcilably separated then s 4 did not apply. The Court reasoned that when the marriage was in fact ended, there was no further need to enforce spousal protections.

of the one desiring to communicate; it thus belongs to the *communicating one*.<sup>9</sup> It is difficult to see the logic in having the receiver hold the privilege, but that is the Canadian law.

Spousal privilege and competency also only applies to 'spouses'. Canada does recognise same sex marriage, so that is not an issue. What does arise is the status of de facto or common law relationships. Over the years, a number of challenges have been raised to this limitation. The argument raised is that a common law relationship is a 'de facto' marriage. The challenges have not succeeded. In the most recent case, the Saskatchewan Court of Appeal rejected the argument that the law should apply to common law spouses; the Court reasoned that such is a major change in the law, which is better left for Parliament and not for courts.<sup>10</sup>

As can be seen from the *Couture* case, the Canadian law is absurdly arbitrary. What to do? We look to Australia for guidance and we see two contrasting regimes.

### B. Uniform Evidence Act

Under the uniform *Evidence Act*, the starting point is that every person is competent and compellable to give evidence.<sup>11</sup> An exception is then created for spouses, de facto partners, parents or children of a defendant in a criminal proceeding.<sup>12</sup> These designated persons may object to testifying and, then, the court balances the harm to the witness or to the relationship against the desirability of having the evidence given.

The uniform *Evidence Act* is superficially attractive in that it purports to balance the importance of maintaining individual relationships against the need in the particular case for the evidence. However, upon closer scrutiny there are serious flaws with the uniform evidence model.

First, discretion means uncertainty. Moreover, the uncertainty as to whether the witnesses will actually testify arises on the eve of trial. Second, the triggering of the discretion is confined to certain specified relationships. The uniform *Evidence Act* is confined to spouses, de facto partners, parents or children of the accused. Placing limits on the persons who can seek to avoid testifying is bound to be arbitrary in the sense that the law will invariably exclude other equally situated relationships. For example, what about grandparents or siblings who raise the accused? Are they not 'de facto parents'? Third, the uniform *Evidence Act* is arbitrary in its exceptions. Under s 19 of the Act, witnesses cannot be excused from testifying in cases involving specified crimes or offences against children or in domestic violence offences.<sup>13</sup> The specified exceptions are necessarily arbitrary. In applying the exception, one judge observed:

Furthermore, a rigid distinction between domestic violence offences and other offences of violence may also produce incongruous results. For example, a woman who slaps her husband following an insulting remark is guilty of a domestic violence offence and the Court would be unable to uphold an objection under s 18 by one of her children called to give evidence against her. On the other hand, if the woman had not slapped her husband but murdered a neighbour, then the Court would be entitled to balance the harm that might be caused to the child against the other factors identified in s 18. It is difficult to imagine that the Commonwealth parliament intended such striking incongruity.<sup>14</sup>

In terms of privilege, the uniform *Evidence Act* lumps privilege with compellability. The privilege similarly is 'discretionary' subject to balancing the likelihood of harm to the person or relation versus the desirability of the evidence. In essence, the legislation mandates a 'case-by-case' privilege for spouses, de facto partners, parents and children of the accused. Moreover,

9 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3<sup>rd</sup>ed, 1940) [2340].

10 *R v Martin* (2009) SKCA 37, [22].

11 See, eg, *Evidence Act 1995* (Cth) s 12.

12 *Evidence Act 1995* (Cth) s 18.

13 Tasmania has the longest list of exceptions: see *Evidence Act 2001* (Tas) s 19.

14 *R v YL* [2004] ACTSC 115, [22].

under the uniform *Evidence Act*, the privilege is not available in respect to the listed offences in s 19 of the Acts.<sup>15</sup> Justice Stevens, in the United States Supreme Court case of *Jaffee v Redmond* (*Jaffee*), remarked that ‘An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.’<sup>16</sup> *Jaffee* concerned psychotherapist-patient privilege, however, Justice Stevens’ comments are apropos for all privileges. A privilege that is both qualified by discretion and by offence is hardly worth preserving.

### *C. Queensland*

Queensland, going its own Australian way, recently abolished spousal incompetency, non-compellability and privilege.<sup>17</sup> The Queensland legislation is beautifully simple:

#### Witnesses in a criminal proceeding

(1) In a criminal proceeding, each person charged is competent to give evidence on behalf of the defence (whether that person is charged solely or jointly with any other person) but is not compellable to do so.

(2) The husband or wife of an accused person in a criminal proceeding is competent and compellable to give evidence in the proceeding in any court, either for the prosecution or for the defence, and without the consent of the accused.

(3) In a criminal proceeding, a husband or wife is competent and compellable to disclose communications made between the husband and the wife during the marriage.

The attraction of abolishing the rule completely is that it is simple, fair and is not arbitrary. Simplicity is a quality to be admired. It provides certainty in application. It is also the fairest of solutions. Everyone is treated the same. No one person or group is left out. De facto spouses, same sex partners, siblings, parents, children are treated exactly the same. No crimes are exempt; no arbitrary list of offences is required.

The fundamental reality is that if spouses are required to testify like any other person, it will make no difference. The institution of marriage will not crumble. The individual marriage or relationship may well go on. In *Couture*, the fact that the wife went to the police in the first place did not destroy the marriage.

Nor should we think that prosecutors will be calling spouses willy-nilly. No prosecutor will call a potentially hostile witness unless they have cause and have a means to control the witness through, in all likelihood, a prior statement. Mrs Couture would be called because she gave prior statements to the police. On the stand, we do not know what she would do. She apparently is a religious person; perhaps the oath may capture her conscience and she may tell the court what her husband told her. On the other hand, she may well contradict her statements. In any event, at least the trier of fact would have her explanation, or lack of explanation, and be in a better position to assess the truthfulness of the statements if admitted into evidence.

Dean Wigmore many years ago wrote:

It follows, on the one hand, that *all privileges of exemption from this duty are exceptional*, and are therefore to be discountenanced ... judges and lawyers are apt to forget this exceptional nature ... The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion of these privileges.<sup>18</sup>

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<sup>15</sup> It should be noted that s 19 has not been duplicated in Victoria.

<sup>16</sup> 518 US 1, 18 (1996).

<sup>17</sup> *Evidence Act 1977* (Qld) s 8.

<sup>18</sup> Wigmore, above n 9, [2192].

Dean Wigmore's views reflect the wisdom and experience of the common law.

Queensland is right. Spouses, however defined, should be treated as ordinary witnesses. They then would be competent and compellable by the Crown and defence in all criminal cases and there would be no privilege to refuse to disclose to the court what the accused spouse may have said to the witness. Surely it is in society's best interests that the criminal courts receive all relevant evidence, from whatever the source – evidence should only be denied where there exist valid competing social values and there is no proof, other than rote statement, that preserving spousal incompetency and privilege is necessary to maintain marital harmony and the marriage bond. People understand that it is the state, through the operation of law, that is compelling the testimony and that a spouse or partner is not willingly testifying. There are many reluctant witnesses. In the absence of need, society's interest in receiving the evidence prevails.

### III. PRIOR INCONSISTENT STATEMENTS ADMITTED FOR THEIR TRUTH

Assume that Mrs Couture is competent and compellable for the prosecution. She takes the stand and, not surprisingly, recants her earlier statement. She is found to be adverse and cross-examined on her prior statement made to the police. The issue then becomes whether this prior inconsistent statement can be entered into evidence for its truth. In order to decide, we need to examine the context in which the earlier statement was made.

In June 1996, two RCMP officers visited the Couture home regarding the ongoing double murder investigation. Mr Couture was not at home and Mrs Couture said that all she knew was that one of the victims was an ex-girlfriend of her husband. A year later, the marriage was not going well. Her husband was being abusive and she left the home. She had told her daughter and church counsellors of her husband's confessions and everyone urged her to go to the police. One of her church counsellors arranged, on her behalf, an appointment with the RCMP and he drove her to the police station. Before the interview began, the RCMP officer explained that as she was Mr Couture's wife the prosecution could not compel her to testify. She was not asked to make the statement under oath and nor was she cautioned about the making of a false statement. The interview was audiotaped, but was not videotaped.

In this 'first' statement, Mrs Couture told the police that her husband had confessed to killing the two women. He had strangled or suffocated each, sexually desecrated them after death, then removed their bodies by truck and buried them.

Approximately a month later, the RCMP called Mrs Couture and asked her to come into the station to make a second statement. By this time Mrs Couture was focused on reuniting with her husband. This interview was videotaped, but was not made under oath. The RCMP officer explained that he did not take the statement under oath as his practice was to take a statement first and see that the witness was being truthful and exhaustive in their memory and then to take a second videotaped statement, under oath and after a warning about the making of false statements. Mrs Couture's second statement was not as forthcoming as her first. In this situation, because of her 'reticence', the officer decided not to take a third 'formal statement'.

The prosecution concentrates on and seeks to admit the first statement for its truth. Under common law, prior inconsistent statements made by a non-party witness, if offered for their truth, are not admissible unless adopted as true by the witness. They are admissible only as to credibility to show that on a prior occasion the witness said something inconsistent with the testimony now given.<sup>19</sup> Juries would have to be instructed that: 'What was said in the statement is not to be taken as evidence of the truth. The statement serves only to test the credibility of the witness.' Such a limiting instruction has been described as 'pious fraud'.<sup>20</sup> In the *Couture* case, undermining Mrs Couture's credibility is of no moment. The prosecution needs the prior statement to be admitted for its truth. In Canada and Queensland, and under the uniform

<sup>19</sup> *R v Deacon* (1947), 3 CR 265 (SCC).

<sup>20</sup> Edmund M Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' (1948) 62 *Harvard Law Review* 177, 193.

*Evidence Act*, prior inconsistent statements are admitted for their truth, but under different law and conditions.

### A. Canada

In Canada, there is no legislation overturning the common law. The Supreme Court of Canada in *R v B(KG)* (commonly called '*KGB*') applied the principles of 'necessity and reliability' to craft a new hearsay exception.<sup>21</sup> Necessity flows from the fact that the earlier statement is important evidence that will be lost because it is held hostage by the recanting witness. In terms of reliability, the Court was concerned because the trier of fact was being asked to choose between two statements, one made out of court and the other made in court with all the trial safeguards. In this regard, Chief Justice Lamer called for 'comparative reliability'. He wanted to replicate all the trial safeguards of oath, presence and cross-examination. Prior inconsistent statements would only be admitted for their truth where adequate substitutes could be found for each trial safeguard. Therefore, this new hearsay exception required that:

- 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;
- the statement is videotaped in its entirety; and
- the opposing party has a full opportunity to cross-examine the witness respecting the statement.

The Chief Justice did go on, however, to state that if the requirements could not be strictly met, one could look to other circumstantial guarantees of trustworthiness.<sup>22</sup>

One criticism of *KGB* was that it created a new 'pigeon-hole' exception based on rigid criteria. In *R v Khelawon*, the Supreme Court clarified that *KGB* was not to be interpreted as creating a categorical exception based on fixed criteria.<sup>23</sup> Rather, the admissibility of prior inconsistent statements for their truth is to be determined in a more flexible fashion.

The admissibility of Mrs Couture's first statement is open. A *KGB* hearing would have to be held. As can be seen, the RCMP did not comply with the oath or warning. But it is also true that the absence of an oath is of 'modest' or 'marginal significance' and the necessary substitute need not be overly compelling. What is needed is a 'tenable substitute to take up the little bit of reality slack left by the missing oath'.<sup>24</sup> A more pressing concern is that the statement was not videotaped. On the other hand, Mrs Couture can be cross-examined on the making of the statement. This is a case-by-case analysis and, as can be seen, there is much uncertainty in application. If the statement were admitted under *KGB*, then it would be admitted for its truth; that is to say the jury could use the statement as an admission of guilt by the accused.

There are a number of important points about the Canadian approach. First, it is the courts that are reforming the law – not the legislature. Canadian courts are more activist.<sup>25</sup> No doubt this reflects the power bestowed upon the courts in interpreting, safeguarding and applying the *Charter of Rights and Freedoms*. The Charter is part of Canada's constitution and, as such, it is the 'supreme law' of the land.<sup>26</sup> Unfortunately, one by-product of the Charter is 'Charter inertia'. Parliament is happy to leave reform of the law to the courts on difficult and unpopular issues. For example, the courts led the way in protecting and requiring same sex marriage. Little criminal law reform by way of safeguarding or protecting the rights of accused persons has been undertaken in Canada since the Charter was enacted in 1982. Protecting the rights of 'criminals' wins few votes. Therefore, Canada has no legislation governing disclosure to the defence, the

21 [1993] 1 SCR 740.

22 Ibid 795–6.

23 [2006] 2 SCR 787.

24 See *R v Trieu* (2005) 195 CCC (3d) 373, [90] (Ontario, Canada).

25 See, eg, *Bannon v R* (1995) 185 CLR 1, where Brennan CJ strongly rejected the more flexible Canadian approach to the admissibility of hearsay evidence.

26 *Constitution Act*, C 1982, s 52.

authority and conduct of strip searches, or safeguards in questioning suspects. Protections are left to the courts to craft. Second, the attitude of the RCMP to videotaping of the statements in *Couture* was somewhat cavalier, but in Canada there is no legislated regime for videotaping of statements.

### *B. Uniform Evidence Act*

The admitting of prior inconsistent statements made by an ‘unfavourable witness’ is governed by ss 38 and 60 of the uniform *Evidence Act*. Under s 38, the party calling the witness may, with leave of the court, cross-examine the witness on making a prior inconsistent statement. Section 60 allows the statement to be admitted for its truth. Section 60, as it was originally enacted, stated:

The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

Section 60 is a perfect example of what is so wrong with the uniform *Evidence Act*. The meaning of the section is not clear. We are told by its creators at the Australian Law Reform Commission that:

The intention of s 60 was to enable evidence admitted for a non-hearsay purpose to be used as evidence of the truth of the facts asserted in the representation, and to do so whether or not the evidence is first-hand or more remote hearsay, subject to the controls provided by ss 135–137.<sup>27</sup>

The problem, quite simply, is that the section does not expressly say that. Vagueness invites ambiguity that, in turn, leads to confusion.

The decision of the High Court in *Lee v R* (*Lee*)<sup>28</sup> reflects the ambiguity in the section. In *Lee*, at issue was the statement by a witness who confronted the accused on the street shortly after a bungled robbery. The witness wanted \$80 owed to him by the accused, who did not want to talk with the witness at the time and said, ‘I haven’t got it, leave me alone, cause I’m running because I fired two shots ... I did a job and the other guy was with me bailed out.’ The witness was called by the prosecution but could not recall any conversation with the accused. The prosecution was granted leave to cross-examine the witness on his earlier statement made to the police. The police officer who prepared the written statement then gave evidence of the taking of the statement.

The High Court found that s 60 only applied to ‘intended assertions’ by the maker of the statement. The witness could only intend to assert that the accused said he was involved in a robbery, but the witness could not have intended to assert the fact that the accused had ‘fired two shots’, had done a ‘job’ and the other guy had ‘bailed out’. Section 60 rendered the hearsay rule inapplicable to the witness’s representations, but had no application to the accused’s representations. The High Court held that this interpretation was consistent with the whole scheme of the Act, which admits ‘first hand hearsay’ but eschews ‘second hand hearsay’. Therefore, s 60 only applies to direct evidence observed by the maker of the statement. For example, if the witness had said, ‘I saw the accused rob the store.’ This would be admissible for its truth but not the statement, ‘The accused told me he robbed the store.’

In response to *Lee*, s 60 was amended in the Commonwealth and in New South Wales Acts. Section 60 now reads:

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2)).

<sup>27</sup> Australian Law Reform Commission, above n 1, [7.65].

<sup>28</sup> (1998) 195 CLR 594.

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Applying *R v Lee*, Mr Couture's confession to his wife would not be admissible for its truth, and if we apply the new amendments it makes no difference. Mr Couture's admission to his wife would still not be admissible under s 60(3). The Commission wrote, 'The Commissions agree that the special nature of the evidence, the peculiar nature and risks of criminal proceedings and the need to safeguard the defendant's right to a fair trial make it important that remote hearsay not be admitted as evidence against the accused.'<sup>29</sup> The Commission is fixated on the notion of 'remote' or 'second-hand' hearsay as opposed to 'first-hand' hearsay. This is the wrong question or focus. Second- or first-hand is not the critical issue; the key is reliable or unreliable evidence. This is the Canadian, and I would venture to say the North American, approach.

With respect, the High Court's interpretation may well reflect the ambiguity inherent in the uniform *Evidence Act*, but it is inconsistent with principle and so too is the amendment. In evidence law, we allow a chain of hearsay reasoning. Hearsay may build upon hearsay so long as each statement falls within a hearsay exception. The exceptions reflect a measure of reliability. Therefore, in the *Couture* case, the hearsay exception for admitting prior inconsistent statements admits the wife's statement for its truth and her husband's statement falls within the hearsay exception for admissions.

### C. Queensland

Queensland has long held that prior inconsistent statements are admissible for their truth. The applicable section reads:

101 (1) Where in any proceeding

a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19 ... that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

Unlike the uniform *Evidence Act*, s 101 of the *Evidence Act 1977* (Qld) specifically addresses prior inconsistent statements. The one proviso is that the statement must be one 'of which direct oral evidence by the person would be admissible'. Witnesses may give direct oral evidence as to statements made by accused persons. Therefore, the Queensland courts recognise that admissions contained in the statements are admissible for their truth.<sup>30</sup> Applying this law to *Couture*, Mrs Couture's prior inconsistent statement, which contained her husband's admission of guilt, could be admitted for its truth. The Queensland law is clear and simple.

## IV. IF THE WITNESS WAS UNAVAILABLE

In *Couture*, the prosecution could not call Mrs Couture as she was not competent to testify for the prosecution. This part examines the current law on the issue of unavailable witnesses in Canada and Queensland, and under the uniform *Evidence Act*.

### A. Canada

In Canada, the statement would fall to be determined under the 'principled exception' where the statement is 'reasonably necessary' and there is 'threshold reliability'.<sup>31</sup> 'Necessity' is founded on the need to get at the truth. Hearsay evidence may be necessary to enable all relevant

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<sup>29</sup> Australian Law Reform Commission, above n 1, [7.144].

<sup>30</sup> *R v Lacey* [2001] QCA 255; *Simon-Beecroft v Proprietors 'Top of the Mark' BUP* [1997] 2 Qd R 635 (CA).

<sup>31</sup> *R v Khan* (1990) 59 CCC (3d) 92 (SCC).



and reliable information to be placed before the court and where a party is unable to obtain evidence of a similar quality from another source. ‘Threshold reliability’ will generally be met by showing that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. For example, the statement may have been made spontaneously, reasonably contemporaneous with the events, or was against the person’s interest at the time. Alternatively, it could be met by showing that there is no real concern about whether the statement is true or not because there are substitutes for the safeguards that courts have traditionally relied upon to determine the truth or falsity of evidence, such as contemporaneous cross-examination, the oath and the ability to observe the declarant’s demeanour at the time the statement was made.<sup>32</sup>

*Couture* underscores the uncertain nature of the principled exception. Justice Charron, writing for the majority, would not have admitted Mrs Couture’s statement under the principled exception. She found that ‘there is nothing about the statements themselves that compels one to trust their truth and accuracy in this untested form.’<sup>33</sup> This conclusion belies her primary concern – lack of cross-examination.

Justice Rothstein would have admitted the statement under the principled exception. One indicia of reliability that influenced Justice Rothstein was that Mrs Couture had, on a number of occasions, repeated her husband’s confession to her daughter and church counsellors. These conversations were important because they were made prior to her estrangement from her husband. In Justice Rothstein’s view, this evidence showed that Mrs Couture was not motivated out of bitterness from her separation with the accused to concoct a story about his confession to her.

Mrs Couture’s statement was also ‘corroborated’ by certain other evidence. There was evidence that the two women disappeared at the same time and were together when they were killed; that the accused removed their bodies by truck; and that they were buried in shallow graves. Can one use this corroborating evidence in determining threshold reliability?

In *R v Starr*, the Supreme Court of Canada held that the trial judge should not consider the declarant’s general reputation for truthfulness, nor any prior or subsequent statements, consistent or not, nor the presence of corroborating or conflicting evidence. The trial judge was only to look at the circumstances of the statement itself.<sup>34</sup> This approach was consistent with the majority decision of the United States Supreme Court in *Idaho v Wright*.<sup>35</sup> It required that the trial judge confine ‘threshold reliability’ to the circumstances in which the statement was made.

This ‘boxing’ of considerations proved problematic. Courts strained under the analysis as to whether a matter was inside or outside of the box, rather than concentrating on whether the statement was sufficiently reliable to be put to the trier of fact. The Supreme Court of Canada reversed itself in *R v Khelawon*. Justice Charron, clearly stated that the analysis was out of the box:

Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, 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.<sup>36</sup>

In reversing itself, the Supreme Court now looked to the dissenting opinion of Justice Kennedy in *Idaho v Wright*. Justice Kennedy’s position is captured in the following observation: ‘It is a

32 See *R v Couture* [2007] SCJ 28, [114]; *R v Khelawon*, [2006] 2 SCR 787.

33 *R v Couture* [2007] SCJ 28, [101].

34 (2000) 147 CCC (3d) 449 [217] (SCC)

35 497 US 805 (1990).

36 *R v Khelawon*, [2006] 2 SCR 787, [4].

matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.<sup>37</sup>

### *B. Uniform Evidence Act*

Section 65 of the uniform *Evidence Act* applies to criminal proceedings if the maker of a previous representation is not available. It reads as follows:

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

... c) made in circumstances that make it highly probable that the representation is reliable ...<sup>38</sup>

In terms of unavailability, a person is unavailable under the Act if ‘it would be unlawful for the person to give evidence about the fact’ or ‘all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success’. Let us assume that a spouse who objects to testify under s 18 of the Act would be regarded as unavailable.

The problem regarding ‘first-hand’ and ‘second-hand’ hearsay arises once again, only this time, s 65 falls under ‘Division 2— “First-hand” Hearsay’ and pursuant to s 62, direct personal knowledge of an asserted fact is required; previous representations made by other persons are excluded. In this situation, it seems clear that the repetition by the unavailable Mrs Couture of her husband’s confession would not be admitted under s 65.

Even if it did, another issue would be about reliability of the statement. The section requires that the representation be ‘made in circumstances’ that make it highly probable that it is reliable. We are back to the issue of ‘boxing’ the circumstances.

The debate is engaged and there are conflicting authorities. In *Williams v R*, a Full Court of the Federal Court noted that the legislation spoke of the ‘circumstances’ in which the representation was made. The Court went on to observe that it was open to consider ‘other available relevant evidence as to all the circumstances in which the statement was made’ and that it was open to the trial judge to consider ‘the consistency of what was said with other material in the Crown case’.<sup>39</sup>

The New South Wales Court of Criminal Appeal in *R v Ambrosoli*<sup>40</sup> took a somewhat narrower view. The Court emphasised that the focus needs to be on the circumstances of the making of the previous representation rather than on the accuracy of the representation at large. However, the Court did allow for the consideration of prior or later statements or conduct of the person making the previous representation.<sup>41</sup>

The courts under the uniform *Evidence Act*, therefore, appear to be adopting a ‘limited box’. Any ‘box’, limited or otherwise, is problematic. Consider the following:

- The maker of the statement has a strong motive to lie. Is this inside or outside the box?
- The maker of the statement said that he saw the accused throw the gun in a dumpster down the block and the gun is found there by the police. Is this inside or outside the box?
- The maker’s statement is strikingly similar to a confession made by the accused to the police. Is this inside or outside the box?

37 Cited in *R v Khelawon*, [2006] 2 SCR 787, [98].

38 *Evidence Act 1995* (Cth) s 65 (emphasis added).

39 (2000) 119 A Crim R 490, [54].

40 [2002] NSWCCA 386.

41 *Ibid* [36].

- The maker of the statement complained of being beaten by the accused and bruises are observed on her face. Is this inside or outside the box?<sup>42</sup>

### C. Queensland

Section 93B of the Queensland *Evidence Act 1977* provides for the admission of otherwise hearsay statements when the maker of the statement is unavailable. The applicable part reads:

(1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact –

- a) made a representation about the asserted fact; and
- b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.

(2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was – ...

- b) made in circumstances making it highly probable the representation is reliable ...

Section 93B is based on the uniform *Evidence Act* legislation but has more restricted application. First, it only applies in a ‘prescribed criminal proceeding’, which is limited to offences as defined in chs 28 to 32 of the *Criminal Code*. These are, generally speaking, crimes of violence or causing injury. Limiting the section’s application leads to arbitrary and illogical exclusions. For example, kidnapping (ch 33), stalking (ch 33A), and robbery (ch 38) are not prescribed criminal proceedings. Second, ‘unavailability’ is limited to where the person is ‘dead or mentally or physically incapable of giving the evidence’. Refusal by a witness to testify would not be caught by the section. Accordingly, s 93B could not be applied to the *Couture* case should Mrs Couture refuse to testify.

Let us assume that Mrs Couture is dead and the prosecution seeks to introduce her statement using s 93B. What needs to be resolved is the scope of s 93B. Does it only apply to ‘first-hand hearsay’? Unlike the uniform *Evidence Act*, there is no first-hand’ hearsay division and, as we have seen, Queensland courts do admit ‘second-hand’ hearsay through s 101.

Section 93B speaks of a ‘person with personal knowledge of an asserted fact’. Do we apply *R v Lee*? Mrs Couture heard the confession but cannot speak to the truth of that confession. Hearsay exceptions found in ss 92, 93 and 93A all use the phrase ‘where direct oral evidence of a fact would be admissible’. Arguably, this allows for the admissibility of representations concerning admissions made by an accused. Section 93B did not use this phrase. Was this by design? If so, then s 93B may well be confined to first-hand hearsay.

Another issue that needs to be resolved is the scope of ‘made in circumstances’. Once again, is Queensland going to follow the limitations alluded to by the courts in their consideration of the comparable uniform *Evidence Act* legislation? Will the Queensland courts ‘box’ the circumstances? The issue is open. In *R v Lester*, the trial judge quoted from and followed *R v Ambrosoli*, but the Court of Appeal did not expressly endorse this interpretation of the law.<sup>43</sup>

## V. CONCLUSION

A comparative analysis of evidence law is, as proposed at the outset, instructive. In terms of spousal competency, compellability and privilege, the Canadian legislation is untenable. Reform is needed. The stark choice in terms of reform of the law is expansion or contraction – either the protections now afforded spouses to other similarly situated persons are expanded or

42 See *R v Crump* [2004] QCA 176.

43 [2008] QCA 354, [45–52].

protections are denied to all. Based on the above analysis, the latter option, which follows the Queensland approach, is preferred. Our trial system rests on the coming forward of witnesses and their giving of evidence. Society should accept and demand that it is the duty of every person to provide relevant evidence.

A fundamental consideration with respect to prior inconsistent statements is that the maker of the statement is available and can be questioned on the making of any prior statement. Queensland's s 101, and its interpretation, is the simplest, most straightforward and most judicially efficient route to follow. Furthermore, it has stood the test of time and proven to be workable over the last 30 years.

Admitting of statements where the maker is unavailable means that the 'necessity' in receiving the maker's evidence is high. There often are no alternative sources for obtaining the evidence. On the other hand, the accused is deprived of the opportunity to test the unavailable witness's assertions. We need to ensure that there are sufficient indicia of reliability before the out-of-court statement is admitted. The legislation, both under the uniform *Evidence Act* and under the Queensland *Evidence Act*, is unduly rigid. In terms of applying the legislation, the Canadian experience in determining threshold reliability is worth noting. In particular, 'boxing' the circumstances did not work. The key principle is whether the statement is sufficiently reliable to be put before the trier of fact to assess. If we become too technical in our application of the law, then this principle is lost.

The Australian Law Reform Commission, in beginning its journey to reform the law of evidence, outlined certain 'Guiding Principles' and focused upon whether the rules of evidence:<sup>44</sup>

- adequately reflect their alleged rationale and other relevant policy considerations;
- are unnecessarily uncertain;
- exclude probative evidence;
- operate unfairly on parties and witnesses;
- are too complex to be understood or applied; and/or
- add to costs and time both in and out of court.

These principles are worthy of consideration and it is interesting to test the resulting uniform legislation against its own criteria. Frankly, it does not do well. A review of the areas raised shows a uniform *Evidence Act* that is at once too complex and too obtuse to be readily understood by courts or lay persons alike, that excludes probative evidence without real valid purpose, leads to uncertainty, and must add to the cost and time of court actions.

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44 The Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) [3.81].