

**REFORM AND PROPOSED REFORM OF HEARSAY LAW IN
AUSTRALIA, NEW ZEALAND, HONG KONG, AND CANADA,
WITH SPECIAL REGARD TO PRIOR INCONSISTENT STATEMENTS**
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A. Introduction

During the past twenty years, most common-law jurisdictions have attempted to reform their law of criminal evidence pertaining to hearsay. Many have enacted statutory reforms; Canada is distinctive among major jurisdictions in accomplishing hearsay reform almost entirely by judicial precedent.

In the prosecution of serious and violent crimes, a crucial hearsay issue is the admissibility of prior statements of witnesses whose trial testimony is inconsistent with their statements; or who are “hostile” to the party calling them at trial; or who purport to have forgotten their evidence; or who refuse to make an oath or affirmation to tell the truth in court; or who were involved in the alleged crime but do not appear at trial. The hearsay of these most difficult witnesses engages fundamental principles of fairness to the accused and human rights of the witness. Therefore the treatment of prior inconsistent statements is a useful indicator of key principles in the reform of hearsay law, and a useful indicator of how individual rights are faring in the prosecution and adjudication of the most serious crimes.

This paper is an overview of law reform pertaining to hearsay and in particular prior inconsistent statements, in four major Pacific-Rim common-law jurisdictions: Australia, Canada, New Zealand, and Hong Kong. Of necessity this overview refers to developments in English law, the source of the law of evidence for all of these

jurisdictions. The paper also refers to comparative developments in other common-law jurisdictions including the United States. As an overview, the paper is based on Canadian case-law and mainly secondary sources (academic articles and law reform commission reports) from the other jurisdictions. Due to that approach, this version of the paper does not include the very latest case decisions from jurisdictions other than Canada.

B. The Challenge of Hearsay, and Motives for Reform

In considering reform, one may join the Hearsay in Criminal Proceedings Subcommittee of the Law Reform Commission of Hong Kong in recognizing:

. . . the necessity to keep in mind the advantages of, and the original rationale for, the hearsay rule: the great importance of the right to challenge the accuracy of evidence, for the exercise of which the ability to confront and cross examine a witness is a key consideration. So, too, confrontation is said to be salutary to the witness and also gives the proceedings, and to an accused, a sense of justice being seen to be done.

Against that background, several motivations for reform are common to diverse jurisdictions.

1. Voices of the Vulnerable

In Canada, major judicial reform of hearsay law began with cases where a victim who was voiceless in court had made a prior statement that called out for legal consideration. In *Regina v. Khan*, [1990] 2 S.C.R. 531, a three-and-a-half-year-old child had described to her mother a sexual assault; in *Regina v. Smith*, [1992] 2 S.C.R. 915, a murder victim had repeatedly telephoned her mother just before she was found dead. These utterances were subject to the traditional rule excluding hearsay, and did not fit comfortably within any of the established common-law exceptions to the rule. The Supreme Court of Canada in those two seminal cases created the “residual exception” or

“principled approach” for the admission of hearsay based on necessity, reliability, and the preponderance of probative value over any prejudicial effect on the defence case.

Murder cases in every jurisdiction raise similar evidentiary issues, and child sexual abuse and spousal abuse are now admitted to be common everywhere. It is not surprising that hearsay reform in other jurisdictions also arose from the inadmissibility of victims’ out-of-court utterances. In Australia and New Zealand, the rule against hearsay became strained in cases where wives were assaulted or killed by their husbands. One New Zealand commentator opined that domestic violence prosecutions should not be "sacrificed . . . on the tarnished altar of the hearsay rule. . . . the social reality of such cases demands a reconsideration of the rules for their adjudication."¹

2. “*The Truth Held Hostage*”

Plainly the policy concern that justice should serve the vulnerable was a major impetus for hearsay reform. However an equally plain proposition is that an accused should not be convicted on the basis of untruthful or unreliable statements. Familiar to all criminal lawyers are the cases in which a woman who has reported assault denies it when called to testify against her partner, thus implying that one of her accounts must be false; or in which a child called to testify about sexual abuse by her father or step-father, says that nothing wrongful occurred. Concern with the veracity of prior inconsistent statements of living, compellable witnesses rose to a higher pitch in an altogether different class of case: homicides, extortions, and kidnappings carried out by co-perpetrators or by alleged criminal organizations. Serious group offences remain a crucible for reform in the law of hearsay. In Canada a turning point in the admissibility of prior inconsistent statements was the Supreme Court’s decision in *Regina v. B.(K.G.)*,

¹ Optican, Scott, "Hearsay and Hard Cases" (February 1994), N.Z.L.J. 48 at 50.

[1993] 1 S.C.R. 740, a case in which three teenagers testified that their police interviews, incriminating a fourth boy, were lies, yet the interviews were admitted into evidence. The interviews had been videotaped with the boys' parents present; one witness also had his lawyer present for the interview. The witnesses were cross-examined extensively regarding their recorded interviews. In *B.(K.G.)*, a recanting witness's amenability to meaningful cross-examination was elevated as the key factor in testing the "threshold reliability" of his or her prior inconsistent statement.

However, the value of cross-examination in establishing the reliability of prior inconsistent statements has long been questioned.² In many "domestic" cases there are sympathetic explanations for complainants' recantations³; but in cases featuring criminal associates, often the Crown or the defence or both must call witnesses who are known to have lied for unsympathetic purposes, but who are believed to have made truthful statements as well. Often the value of cross-examination is limited by such witnesses' obduracy. In Canada it is now not uncommon for associates of the accused to refuse to be sworn as witnesses, and to accept sentences for contempt of court, so that they cannot be cross-examined and no basis can be established for the admission of their prior inconsistent statements. Such recalcitrance may be attributed to threats or to fear, but a cultural abhorrence of "ratting," and general concern for one's safety, or for one's future earning capacity, produces the same result. Assuming that one of the witness's accounts is true, "the truth is held hostage" by a contemptuous witness.⁴

² Jackson, John D., "Hearsay: The Sacred Cow That Won't Be Slaughtered?" [1998] Int'l J. Evidence & Proof 166 at 173-176.

³ McDonald, Elisabeth, "Hearsay in Domestic Violence Cases" (May 2003), N.Z.L.J. 174.

⁴ In the United States, despite the Supreme Court's ringing affirmation of the constitutional right to "confrontation," the hearsay of a witness who is "available" for cross-examination is admissible, making cross-examination ineffectual if the witness recants. Friedman, Richard D., "Thoughts from Across the

3. The Profession's Concern for Certainty and Consistency

Another major motivation for reform has been the lawyerly yearning to impose order and rationality upon the complex and inconsistent common law of hearsay, which many professionals fear is incomprehensible to lay jurors.⁵ Some prior statements are excluded without consideration of their reliability, while other statements of unknown reliability are admitted under “traditional” exceptions.⁶ Concern also arose over provisions derived from s. 3 of the English *Criminal Procedure Act* of 1896 (the predecessor of s. 9 of the *Canada Evidence Act*), which govern how a party may cross-examine its own witness on a prior inconsistent statement.⁷ The genesis of Canadian criminal hearsay reform was the dissenting judgment of the honourable Mr. Justice Estey in *McInroy and Rouse v. The Queen*, [1979] 1 S.C.R. 588, in which he commented on jury instructions regarding cross-examination on prior statements (at 606):

. . . [it is] an offence against common sense to instruct the jury that the witness's prior statement . . . may be considered by the jury only on the issue as to credibility of the witness . . . and must be disregarded on the issues of fact.

4. The Influence of International Prosecutions: War Crimes and Terrorism

International criminal tribunals and other courts prosecuting war crimes have developed non-traditional rules for the admission of hearsay in cases where witnesses who gave statements have died or cannot be brought to testify. Such flexibility does not always favour the prosecutions. When the state of Israel prosecuted John Demjanjuk

Water on Hearsay and Confrontation,” [1998] Crim.L.R. 697 at 703, 707; Friedman, Richard D., “The Confrontation Clause Re-Rooted and Transformed,” [2003-2004] Cato S.C.R. 439 at 453.

⁵ Jackson, “Hearsay,” *supra* at 177.

⁶ For expressions of dissatisfaction from leading cases, texts, and law reform commissions, see The Law Reform Commission of Hong Kong, Hearsay in Criminal Proceedings Sub-Committee, Consultation Paper: Hearsay in Criminal Proceedings (Hong Kong: The Commission, 2005), at 4.2 (hereinafter, “HK Consultation Paper”).

⁷ Munday, Roderick, “Calling a Hostile Witness,” [1989] Crim. L.R. 866 at 866, 873-874.

decades after his alleged offences at a Nazi concentration camp, the conviction at trial was based in part on hearsay statements, but the acquittal on appeal resulted from freshly-located hearsay statements identifying a different man as the concentration camp guard nicknamed “Ivan the Terrible.” Kenneth Mann wrote that such international prosecutions bear:

. . . the requirement of the protection of values fundamental to the community of nations, some of which will not be consistent with the maximization of truth. . . . Thus, for example, the rules of evidence will not permit reliance on statements obtained from a defendant or obtained from a witness who was compelled to provide such statements upon pain or threats of torture . . .

. . . as a matter of convention and value choice, bounded systems of evidence, as those found in the common law countries, have usually been chosen in order to systemize preferences for false acquittals over false convictions. . .

. . . One major factor in the disproportionate distribution of error in the direction of false acquittals is the rule against hearsay. Restrictive hearsay rules tend to offer greater protection against the danger of judicial use of unreliable evidence, than does the rule of free admission of hearsay evidence in the discretionary system.⁸

However, international tribunals with huge backlogs of factually similar allegations have experienced pressure to speed up their proceedings by admitting hearsay, especially on contextual issues that arise in successive trials. Commentators have identified conflict between the increasing admission of hearsay before the International Tribunal for the Former Yugoslavia, and Article 6(3)(d) of the 1950 European

⁸ Mann, Kenneth, “Hearsay Evidence in War Crimes Trials,” [1994] *Israel Yearbook on Human Rights* 297 at 316, 320-322.

Convention on Human Rights, which confers upon each accused person the right “to examine or have examined witnesses against him.”⁹

Most recently, the admissibility of hearsay statements has been of grave concern in cases of alleged terrorism, where witness accounts may have been obtained by torture or lesser abuses. In a dramatic 2005 decision, the House of Lords held that witness statements allegedly obtained by torture by a foreign state (the United States) without British complicity, are not admissible in British proceedings (*A. and Others v. Secretary of State (No. 2)*, [2005] UKHL 71.) Before that House of Lords decision, Richard Friedman had written that one rationale of the American constitutional right to “confrontation” or *viva voce* cross-examination is that it provides “openness of procedure, which among other benefits ensures that the witness’s testimony is not the product of torture or milder forms of coercion or intimidation.”¹⁰ The Lords at [14-18] and others have drawn parallels with the law of admissibility (voluntariness) of confessions of the accused, and the general need to deter police from abuses during interrogation.¹¹ Lord Hoffman in *A and Others* at [86] made the telling comment that until now, “There was no need to consider whether [witness statements] had been obtained by torture. They were simply rejected as hearsay.”

⁹ *Ibid.* at 304-310, 313; Wald, Patricia M., “To ‘Establish Incredible Events by Credible Evidence’: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings” (Summer 2001), *Harvard Int’l L.J.* 42/2, 535.

¹⁰ Friedman, “The Confrontation Clause,” *supra* at 441-443.

¹¹ A useful analysis, although it pre-dates the House of Lords decision, is Rosemary Pattenden's "Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT" (2006), 10 *Int'l J. Evidence and Proof* 1.

C. Comparative Reforms

A review of reforms to the admissibility of hearsay (and in particular prior inconsistent statements) in Australia, New Zealand, Hong Kong and Canada illuminates the key issues in reform and the principles that serve justice for both accused and witnesses. Canada is distinctive in accomplishing hearsay reform by judicial precedent; scholars and judges in other jurisdictions regularly have drawn comparisons with the Canadian approach, not always with approval. As the writer is more up-to-date with Canadian developments than with those in other jurisdictions, the state of Canadian hearsay reform will be discussed last, with a view to current issues.

1. A Statutory Approach: Australia

a) The Statute

Strain upon the exclusionary rule and its traditional exceptions was apparent in Australian decisions parsing hearsay into "implied assertions" having meanings not contemplated by the original speaker, or "original circumstantial evidence" not tendered for the truth of its contents, or "inherently reliable" utterances which were excepted from the rule (*Walton v. Regina* (1989), 166 CLR 283; *Pollitt v. Regina* (1992), 174 CLR 558.) Lengthy studies by the Australian Law Reform Commission resulted in proposals for reform, many of which were enacted in the 1995 Commonwealth *Evidence Act*, governing the federal courts and courts of the Territories. Similar legislation subsequently was enacted in some other states of Australia.

The approach of the 1995 Commonwealth *Evidence Act* was to codify in s. 59(1) the rule against hearsay, in wording which excludes "implied assertions":

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

The *Act* then provides for circumstances in which the rule against hearsay does not apply, with prescribed conditions that are intended to promote reliability. Section 65(2) (paraphrased here) provides for the admission of hearsay in criminal proceedings where the person who originally spoke or wrote is unavailable to testify, if his or her statement or utterance:

- (a) was made while he or she was under a duty; or
- (b) was made when or shortly after the asserted fact(s) occurred and in circumstances that make it unlikely that the statement was fabricated; or
- (c) was made in circumstances that make it highly probable that the statement is reliable; or
- (d) was made against the interests of the person who originally made the statement or utterance.

Sections 65(8) and 65(9) provide an extended exception for hearsay adduced by the accused, and for "rebuttal" hearsay adduced by the prosecutor.

Section 66(2), in turn, provides for the admission of hearsay in criminal proceedings where the original speaker or writer is available at trial, if the asserted fact was "fresh in his or her memory" when he or she made the previous statement. This makes admissible all prior consistent and inconsistent statements of testifying witnesses, but s. 102 preserves the common-law rule that generally a party cannot use a prior consistent statement to bolster the credit of its own witness. Section 67 requires notice of hearsay evidence; ss. 135 and 136 give the court discretion to exclude hearsay evidence; and s. 137 provides that the court must exclude hearsay evidence where its probative value is outweighed by "the danger of unfair prejudice to the defendant."

Crucial to the treatment of prior inconsistent statements of hostile or uncooperative witnesses is s. 60, which has the effect of admitting for all purposes, a hearsay statement or "representation" that has been admitted "for a purpose other than proof of the fact intended to be asserted by the representation." Thus, a prior inconsistent statement that is used to challenge the credibility of a witness, also may be considered "for the truth of its contents." The Law Reform Commission vacillated in proposing this provision, but recommended it in part to simplify jury instructions on prior inconsistent statements.¹² The admission of such statements under s. 60 was made more likely by s. 38, under which a court may give a party leave to cross-examine its own "unfavourable" witness without a finding of "hostility."

b) Ten Years Later: An Evaluation

By 2003, one commentator was moved to write: "In Australia, the general dissatisfaction with the operation of the traditional hearsay rule is arguably matched only by the dissatisfaction created by current judicial responses to reform of the rule."¹³ In 2004, when the Australian Law Reform Commission began a review of the operation of the 1995 *Evidence Act*, a leading concern was the admission of statements of recanting or otherwise dubious witnesses under s. 60 of the *Act*. In *Lee v. The Queen* (1998), 157 ALR 394, the High Court resisted the application of s. 60 to such a witness. The witness had given a statement to police saying that he heard Lee make inculpatory remarks near the scene of robbery, but the witness testified that he could not recall speaking with Lee and declined to adopt his own prior statement. Therefore the prosecution tendered a

¹² Beazley, The Hon. Justice, "Hearsay and Related Evidence - A New Era?" (1995), U.N.S.W.L.J. 39 at 42.

¹³ Collins, Rebecca, "New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to Reform of the Hearsay Rule" (December 2003), E Law - Murdoch University Electronic J.L., 10/4 at [1].

police officer's "second-hand" hearsay of what the witness said that Lee had said. The Court held that s. 60 cannot permit a witness's prior statement to be evidence of the truth of an admission by the accused, when the witness was never in a position to assert the truth of what the accused said. The Law Reform Commission retorted that the application of *Lee* to exclude prior inconsistent statements and "second-hand" hearsay is inconsistent with the legislative intent of s. 60.¹⁴

The combined effect of s. 38, permitting cross-examination of one's own "unfavourable" witness, and s. 60, permitting admission of a prior inconsistent statement for all purposes, also raised concern that prosecutors could call witnesses for the purpose of having their prior inconsistent statements admitted into evidence, and that defence counsel would be left with the barren task of cross-examining witnesses who had disavowed their prior statements.¹⁵

There was also a proposal to the ALRC that s. 66, admitting the prior statements of witnesses who testify in a criminal trial, should be aligned with s. 84, governing admissions of the accused, and should be aligned with international human rights law. It was suggested that the prosecution must be barred from adducing prior witness statements unless the court is satisfied that the statements were not influenced by violent, oppressive, or degrading conduct towards the witness or another person, or by threats of such conduct. And from the prosecution side, there was a suggestion of amendments to admit the statements of witnesses who would not testify out of fear.¹⁶

¹⁴ Australian Law Reform Commission Report 102, "Uniform Evidence Law" (Commonwealth of Australia, NSW Law Reform Commission, Victorian Law Reform Commission: 2005) at 7.94-7.100.

¹⁵ Australian Law Reform Commission Discussion Paper 69, "Review of the Uniform Evidence Acts" (Commonwealth of Australia: 2005) at 5.40-5.69; *Adam v. The Queen* (2001), 207 CLR 96.

¹⁶ ALRC Report 102, *supra* at 8.17-8.37.

Yet another point of controversy was the admission (under s. 65) of the prior inconsistent statements of "complicit persons:" associates or accomplices, already sentenced or never charged, who have given statements inculcating the accused but who recant or refuse to be sworn at trial, and thus are not amenable to cross-examination. In *Regina v. Suteski* (2002), 56 NSWLR 182, defence counsel acknowledged that the Crown had taken all reasonable steps to compel a recalcitrant witness to testify. The court decided that a contempt citation was unlikely to assist, and admitted the witness's prior inconsistent statement on the basis that it was a statement against the witness's own interest under s. 65(2)(d). Prosecutors, the Law Society and the ALRC, all recognizing the dubious motives of "complicit persons" who give statements incriminating others, agreed that "Evidence of that quality should not be prima facie admissible." An amendment was proposed, requiring that to be admissible such statements both must be against interest, and must have been "made in circumstances that make it likely that the representation is reliable."¹⁷

Of particular interest to Canadian criminal counsel is a final concern raised during the ALRC review of the *Evidence Act*: whether the threshold reliability of a hearsay statement should continue to be assessed with regard only to the circumstances in which the statement was made, or whether the *Act* should be amended so that other evidence in the case could be considered in evaluating the threshold reliability of a statement. In contrast to recent Canadian developments, the ALRC declined to propose such an amendment, on the grounds that an inquiry into broader "circumstances":

. . . is likely to require the trial judge to consider the whole of the prosecution case and determine guilt before admitting the representation

¹⁷ *Ibid.* at 8.38-8.51.

as reliable. This would sit uncomfortably with safeguards designed to afford the defendant a fair trial.¹⁸

The issues raised during the ALRC's review of the 1995 *Evidence Act* appear to demonstrate that codification is not a panacea for uncertainty or technicality in the law of hearsay.¹⁹ Rebecca Collins, whose 2003 comment appears at the beginning of this section, concluded that concurrent common-law reform in Canada resulted in more consistent judicial treatment of hearsay. In Australia, the fact that the *Evidence Act* has applied only in the federal and territorial courts has contributed to judicial ambiguity regarding hearsay reforms.²⁰

2. Towards Synthesis of Common Law and Statute: New Zealand

In New Zealand in 1994, Scott Optican remarked upon judicial unwillingness to create a "reliability-based exception to the hearsay rule," and upon the "tendency of New Zealand criminal courts to approach hearsay problems in an overly-technical and rule-based fashion."²¹ The New Zealand Law Reform Commission carefully considered developments in Canada and other common-law jurisdiction, as well as pressures to admit hearsay in New Zealand cases, and committed itself to the tests of necessity and reliability. However in *Regina v. Manase*, [2001] 2 NZLR 197 at [16-17]²², the Court of Appeal was critical of what it perceived as the low and imprecise standard of "necessity" in Canada, which "has led Canadian Courts to allow hearsay to be introduced in circumstances which depend on little more than the trial Judge's subjective opinion that it would be desirable to let it in," given relevance and "a sufficient degree of reliability."

¹⁸ *Ibid.* at 8.52-8.58.

¹⁹ McCrimmon, Les, and Alston, Bruce, "Reviewing the Evidence Act 1995: Some Emerging Themes" (2005), Reform 86, 63 at 64.

²⁰ Collins, "New Exceptions or Principled Determinations," *supra* at [1-4].

²¹ Optican, "Hearsay and Hard Cases," *supra* at 49.

²² As summarized in Robertson, Bernard, "What is Left of Hearsay?" (November 2001), N.Z.L.J. 421.

While asserting that New Zealand law should not develop in the Canadian manner, the Court of Appeal acted in advance of the New Zealand legislature by recognizing a "general residual exception" to the rule against hearsay, based on the requirements of relevance, inability to testify, and threshold reliability, subject to a residual discretion to exclude hearsay when its prejudicial effect outweighs its probative value. Wary of apparent Canadian generosity towards witnesses who claim "inability" to testify, the Court noted at [30]:

. . . it will seldom, if ever, be appropriate to admit hearsay evidence simply because the witness would prefer not to face the ordeal of giving evidence or would find it difficult to do so. To adopt that approach would be to tilt the balance too far against the accused or opposite party who is thereby deprived of the ability to cross-examine.

A year later another commentator reported that New Zealand courts nonetheless were tending to follow the Canadian approach to the admissibility of hearsay, which had become more restrictive with the Supreme Court of Canada's decision in *Regina v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40. As Canadian counsel are aware, that decision made the common-law exceptions to the hearsay rule subject to the tests of necessity and reliability, if any conflict arise between the traditional and "principled" approaches. Peter Sankoff wrote of *Starr's* lesson for New Zealand:

The irony of this development is that the traditional view of a purely principled approach to hearsay has tended to presume that reform of the rules would make the admission of hearsay *easier*. *Starr* demonstrates that it may also have the effect of *denying* admission to previously acceptable hearsay and of making the decision to admit a more complicated one. On the other hand, it should have the effect of making the rules fairer.²³

In Canada, *Starr* was of great significance to the admissibility of prior inconsistent statements, due to the Supreme Court's limitation of the "threshold

²³ Sankoff, Peter, "Gazing Into the Hearsay Crystal Ball?" (July 2002), NZLJ 250 at 252.

reliability" assessment to the circumstances in which the statement had been made, forbidding any consideration of other evidence that might contradict or corroborate the statement.

New Zealand hearsay reform culminated in the *Evidence Act, 2006*, which is elegant in its simplicity, and bold in departing from all categorical exceptions in favour of a general test for admissibility of hearsay. Section 4(1) defines "witness" as "a person who gives evidence and is able to be cross-examined." "Hearsay" is defined as any statement "made by a person other than a witness" which is "offered . . . to prove the truth of its contents." Thus all prior statements of witnesses are presumptively admissible, and the statute addresses only the hearsay statements of persons unavailable as witnesses. Section 16(2) defines "unavailable as a witness" to include persons who are deceased; unfit to testify due to age or physical or mental condition; outside the jurisdiction, where it is not "reasonably practicable" to obtain their testimony; or not capable, with reasonable diligence, of being "identified or found." There does not appear to be any interpretive leeway for persons whose testimony is "unavailable" due to their refusal to be sworn or other forms of resistance. The statutory definition of "unavailable witnesses" has the effect of taking the "necessity" test out of the courts' hands.

Section 18 makes the hearsay of an unavailable witness admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable.

"Circumstances relating to the statement" are defined in s. 16(1) to include:

- (a) the nature of the statement;
- (b) the contents of the statement;
- (c) the circumstances that relate to the making of the statement;
- (d) any circumstances that relate to the veracity of the person; and
- (e) any circumstances that relate to the accuracy of the observation of the person.

Research of recent decisions would indicate how broadly this definition is being interpreted. As in other jurisdictions with hearsay statutes, in New Zealand there is a notice provision (s. 22), requiring particularization of "the circumstances relating to the statement that provide reasonable assurance that the statement is reliable" and also "why the person is unavailable as a witness" or "why undue expense or delay would be caused if the person were required to be a witness." The New Zealand statute however re-codifies a familiar impediment to the admission of prior inconsistent statements by requiring a ruling of "hostility" before a party may offer evidence challenging the truthfulness of its own witness (s. 37(4)) and before a party may cross-examine its own witness (s. 94). The definition of "hostile" in s. 4(1) requires careful reading. Paraphrased, it includes witnesses who are lacking in veracity, who testify inconsistently with a prior statement, who refuse to answer questions, and who deliberately withhold evidence.

Critics of the new provisions have pointed out that the prior inconsistent statements of witnesses feigning forgetfulness appear to be automatically admissible, although cross-examination of such witnesses is so fruitless as to undermine protection from unreliable hearsay.²⁴ The intractable witness may be beyond the reach of the most rational reform.

3. Choosing Elements for the Future: Hong Kong

The Law Reform Commission of the Special Administrative Region of Hong Kong referred to many of the above-described developments in its 2005 consultation paper on "Hearsay in Criminal Proceedings," which proposed reforms that remain far

²⁴ Optican, Scott, and Sankoff, Peter, "The Evidence Bill 2005: A New Approach to Hearsay" (December 2005), N.Z.L.J. 446 at 448-449.

from legislation. In *Wong Wai-man v. HKSAR* (2000), 3HKCFAR 322 at 328, the Court of Final Appeal acknowledged Canada's course of judicial reform, but expressed the view that in Hong Kong reform should be left to the legislature, following the majority reasons in *Myers v. DPP*, [1965] AC 1001 and *Regina v. Blastland*, [1986] AC 41. As in every jurisdiction except Canada, in Hong Kong statutory reform is preferred in the belief that codification will make the law of hearsay rational, clear and amenable to consistent application. Interestingly, the Law Society in Hong Kong took the position that no reform was necessary, because "most cases were tried by magistrates who, where the interests of justice so required, paid little attention to the [exclusionary] rule" – although in theory, Hong Kong criminal law retains the exclusionary rule and exceptions, without judicial discretion to admit hearsay.²⁵

The Hearsay in Criminal Proceedings Sub-Committee of the Law Reform Commission proposed to adopt statutory elements from several of its predecessors in hearsay reform. In general the Sub-Committee favoured the New Zealand model of hearsay reform, which as we have seen, itself had the benefit of hindsight upon the Canadian and Australian models:

The strength of this model is its inclusionary discretion based on the principles of necessity and reliability, a logical reflection of the principles underlying specific exceptions to the hearsay rule. This discretion introduces flexibility into the law, but with sufficient barriers to filter out undesirable hearsay evidence. With its defined terms and conditions, it provides a degree of guidance to judges in exercising the discretion.²⁶

²⁵ HK Consultation Paper, Preface at [5]; 8.1. The limited scope of this paper prevents an exploration of what Hong Kong magistrates consider to be "the interests of justice" when admitting hearsay. The Singapore judiciary has been rebuked by academics, for approving the "massive use of prior inconsistent statements by the prosecution when its witnesses do not perform to its liking": Hor, Michael, "Prior Inconsistent Statements: Fairness, Statutory Interpretation and the Future of Adversarial Justice" (2002), 14 SAclJ 248 at 254.

²⁶ HK Consultation Paper at 8.33.

However the Sub-Committee recommended that Hong Kong legislation should begin as the Australian and United Kingdom statutes begin, with codification of the general rule that hearsay is inadmissible. And it recommended that Hong Kong legislation should culminate, like the U.K. *Criminal Justice Act 2003*, with judicial discretion to direct an acquittal in jury trials where the prosecution has relied upon hearsay and it appears "unsafe" to convict the accused.

The Hong Kong Sub-Committee endorsed New Zealand's statutory definition of circumstances in which witnesses are deemed "unavailable" so that hearsay may be tendered: "The underlying principle . . . is that the condition of necessity should not turn on the whim or discretion of the declarant to testify."²⁷ It was noted that under s. 116(1)(e) of the U.K. *Criminal Justice Act 2003*, the hearsay of fearful witnesses is admissible with leave of the court, which must evaluate the claim of fear and consider the interests of justice. The Sub-Committee also considered Scotland's 1995 *Criminal Procedure Act*; s. 259(2) permits the admission of hearsay when the statement-maker refuses to be sworn or to testify. But under the proposed Hong Kong reforms, witnesses claiming to be in fear would not qualify as "unavailable" and their statements would not be admitted; the Sub-Committee believed that "including this class of witnesses would require too great an exercise of discretion by the court in determining whether the condition had been fulfilled. Cross-examination of the declarant would be particularly desirable in such cases."²⁸

Of interest to Canadians, the Hong Kong reformers decided at a time when no other jurisdiction supported this approach, that "evidence that corroborated or otherwise

²⁷ *Ibid.* at 9.35.

²⁸ *Ibid.* at 9.40, 5.62.

supported the truth of the hearsay statement should be considered by the trial judge in applying the reliability criterion." The Sub-Committee quoted at great length from the majority and dissenting opinions in *Idaho v. Wright*, 110 SCt 3139 at 3150-3151, wherein the majority of United States Supreme Court held that:

. . . admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, [is] a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

The Hong Kong Sub-Committee recognized the Supreme Court of Canada's adoption of this limit in *Regina v. Starr, supra*, but noted that this adoption had occurred "in passing," and that there had been significant academic criticism and some judicial dissent. The Sub-Committee took the view that:

. . . the essence of this [threshold reliability] criterion is the requirement that the judge be satisfied of reasonable assurances as to the statement's veracity. We do not believe that such assurances should be artificially restricted to the circumstances surrounding the making of the statement. Logic and common sense dictate that evidence and circumstances corroborative of the facts asserted in a statement can help assure a person of the probable truth of those facts.²⁹

To avoid infringement upon the jury's decision regarding ultimate reliability, the Sub-Committee added that the absence of supporting evidence should not preclude a finding of threshold reliability.

However, the Hong Kong Sub-Committee took a conservative position with regard to the prior inconsistent statements of recanting or uncooperative witnesses. It quoted extensively from *Regina v. B.(K.G.), supra*, but totally rejected the admission of prior inconsistent statements on four bases:

-a jury might ignore the witness's oral testimony exculpating the accused;

²⁹ *Ibid.* at 8.41.

- Hong Kong police generally do not electronically record witness statements;
- “the experience of those working in the Hong Kong criminal justice system suggests that inaccurately recorded or influenced witness statements are not uncommon. This problem becomes accentuated when statements are translated from one language to another, which is a procedure common in Hong Kong.”
- cross-examination at trial is ineffectual if the witness denies the prior inconsistent statement or feigns forgetfulness.

The Sub-Committee stated that the admissibility of prior inconsistent statements should be re-considered if Hong Kong police adopt “a universal practice of reliably recording witness statements by audio-visual means.”³⁰

The Hong Kong Sub-Committee also expressed particular concern regarding exculpatory hearsay tendered through defence witnesses: “We believe that there is a real risk in Hong Kong that a relaxation in the hearsay rule would encourage fabricated third-party confessions to be adduced for exculpatory purposes.” The Sub-Committee therefore recommended that exculpatory defence hearsay should be admitted only where “there are sufficient confirmatory circumstances that clearly indicate the trustworthiness of the statement,” in addition to the requirements for the admissibility of other hearsay: necessity, threshold reliability, and the balancing of prejudicial effect against probative value.³¹

³⁰ *Ibid.* at 10.43-10.67.

³¹ *Ibid.* at 9.62. This concern suggests that associates of the accused are more loyal in Hong Kong than in Canada, although occasionally an “alternative perpetrator” takes credit for a Canadian offence. For an interesting treatment of defence exculpatory hearsay, see *Regina v. Post*, 2007 BCCA 123, 217 C.C.C. (3d) 225.

4. Judicial Reform and the Prior Inconsistent Statements of Witnesses: Canada

a) The Course of Reform

Canada departed from the statutory course of the three above-described jurisdictions when in *Ares v. Venner*, (1970) 14 DLR (3d) 4, our Supreme Court chose to follow the minority of the Lords in *Myers v. DPP*, *supra*, and *Regina v. Blastland*, *supra* (the majorities had decided that hearsay reform should be left to Parliament.) The Honourable Mr. Justice Hall wrote (at 16) that "this Court should adopt and follow the minority view rather than resort to saying in effect: 'This judge-made law needs to be restated to meet modern conditions, but we must leave it to parliament . . . to do the job.'" Twenty years later, Chief Justice Lamer affirmed that "the duty of the courts to review common law rules has a pragmatic basis: courts are best situated to assess the operation and possible deficiencies of common law rules in practical situations" (*B.(K.G.)*, *supra* at [55].) As indicated above, the Court had pursued reform in *Regina v. Khan*, *supra*, and *Regina v. Smith*, *supra*, developing its "principled" and "flexible" approach, based on the requirements that there be necessity for the admission of hearsay, and that the tendered hearsay meet a threshold of reliability. While reserving judicial discretion to exclude hearsay where its prejudicial effect outweighs its probative value, Lamer CJC was confident in jurors' ability to assess hearsay (*Smith*, *supra* at [45]):

. . . the approach that excludes hearsay evidence, even when highly probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate. . . . Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence . . .

The most significant recent development in the Canadian law of hearsay was the Supreme Court's decision in *Regina v. Khelawon*, [2006] 2 S.C.R. 787, 2006 SCC 57,

that other evidence in a case, contradicting or corroborating a hearsay statement, may be considered in evaluating the threshold reliability of the statement (the Court explicitly overruled its contrary position in *Starr, supra*). Any fears that that this change might bolster the admission of a greater number of hearsay statements, are abating only six months after the *Khelawon* decision, as the Supreme Court and other courts remain cautious about the admission of prior inconsistent statements.³² Both in *Khelawon, supra* at [47], and in last week's decision in *Regina v. Couture*, 2007 SCC 28, [2007] S.C.J. No. 28, the Supreme Court reminded us that in Canada hearsay remains presumptively inadmissible, that a lack of cross-examination may affect the fairness of the trial, and that because there are constitutional rights to a fair trial and to full answer and defence, the rule against hearsay has a "constitutional dimension."

b) Prior Inconsistent Statements

The Supreme Court's 1993 decision in *Regina v. B.(K.G.), supra*, admitting the prior inconsistent statements of teenaged witnesses who claimed to be liars, must have appeared adventurous when viewed from other jurisdictions struggling with hearsay reform. The Court was clear that additional guarantees of reliability are required when the trier of fact must choose between a prior inconsistent statement and the witness's sworn testimony, and it placed great emphasis on the opportunity for meaningful cross-examination of dubious witnesses.

The *B.(K.G.)* decision did not rest solely upon the abstract principles of necessity, reliability, and probative value exceeding prejudicial effect. The Supreme Court in *B.(K.G.)* at [37-39], [98-99] praised the videotaping of police interviews as a "milestone"

³² See, for example, *Regina v. Duong* (2007), 217 C.C.C. (3d) 143 (Ont.C.A.); *Regina v. T.G.N.*, 2007 BCCA 2, [2007] B.C.J. No. 1.

in the administration of justice, which greatly reduced the danger of being unable to observe a hearsay statement and assess the declarant's credibility. Chief Justice Lamer commented upon a Law Reform Commission of Canada study in which all interviews of suspects in a certain police department were videotaped for two years, and the recordings were praised by Crown and defence counsel, and even by the police. In jurisdictions where recording is not prevalent, there remain basic concerns with regard to the accuracy and credibility of hearsay. Meanwhile in Canada, the expectation of recording is now extending beyond the statement or interview to all related interactions between the witness or suspect and the police.

Another major development in *B.(K.G.)*, *supra* at [115-118], [174-177] was the requirement that a hearsay statement must not have been influenced by coercion in any form, whether it be threats, promises, excessively leading questions, pre-interview coaching, or other investigatory misconduct. This must be proven on the balance of probabilities when the witness has been interviewed as a witness, and beyond a reasonable doubt when the witness has been interviewed while detained as a suspect. This standard has been enforced by a criminal bar and a judiciary both conditioned by extensive litigation of the accused's rights under the *Canadian Charter of Rights and Freedoms*. Often "proving" a prior inconsistent statement involves presenting every person in authority who dealt with the witness before he or she gave a statement.

The decision in *B.(K.G.)*, *supra* also established the further "threshold reliability" factors of an oath or affirmation, and detailed warnings to the witness about the consequences of false statements. Since that decision, the assessment of threshold reliability has been creatively pursued so that an ever-increasing variety of personal and

social factors are taken into account. Anything that might affect the reliability of an utterance or statement can be argued with respect to the admissibility of hearsay.³³ As a New Zealand commentator wrote, the Canadian approach:

. . . allows for a case-by-case consideration of individual pieces of evidence and examination of an infinite number of factors that assist in guaranteeing the preliminary reliability of the evidence. Rather than attempting to slot particular facts within a rigid evidentiary framework, a tendering party can request a more sensitive appraisal of the particular facts in an attempt to determine whether the evidence is both reliable and necessary.³⁴

c) Where Cross-Examination is Futile: The Future of Hearsay Reform

In the common-law tradition, hearsay is viewed as most unfair when it cannot be tested by cross-examination. In the prosecution of serious and violent crimes, it is not uncommon for a witness to feign forgetfulness of his incriminating evidence, or to simply dismiss his prior statements as lies. In such cases cross-examination is of little more value than in cases where the witness refuses to be sworn or affirmed, and says nothing at all in the witness box. In Canadian courts, the absence of meaningful cross-examination usually has resulted in the prior statement being ruled inadmissible.

In Canada the dilemma of the contemptuous witness is open to judicial reform, because the “necessity test” for hearsay is based not upon the “unavailability” of a witness, but rather upon the unavailability of the witness’s testimony. The flexibility of the common law has permitted admission of the prior inconsistent statements of unsworn or totally unresponsive witnesses in a few cases with exceptional circumstances. Two recent British Columbia decisions, which are subject to appeals, show that situations arise where the hearsay statement of a criminal arguably is as reliable as the statements of the

³³ Factors in to be considered on threshold reliability have proliferated in cases following the critical approach in *Regina v. Diu* (2000), 144 C.C.C. (3d) 481 (Ont.C.A.).

³⁴ Sankoff, "Gazing Into the Hearsay Crystal Ball?" *supra* at 250.

child in *Regina v. Khan* or the unfortunate woman in *Regina v. Smith*. In *Regina v. Naicker and Narwal*, 2006 BCSC 935, Mr. Justice Josephson sitting without a jury admitted a police officer's hearsay of a separately-tried co-perpetrator, who during a videotaped interview after his own arrest, agreed to give further information "off the record." The unrecorded portion of the interview was found to meet the threshold of reliability partly because it was a voluntary confession in which the declarant did not downplay his own primary role, but also in large part because of the police officer's conduct. The officer was credible in testifying that the suspect spoke largely without prompting (as he had in the recorded portion of the interview); the officer dictated what he had heard as soon as he left the interview area; and he was thoroughly cross-examined regarding the completeness and accuracy of the hearsay.

In *Regina v. Adam*, 2006 BCSC 1355, [2006] B.C.J. No. 2042, Mr. Justice Romilly sitting without a jury admitted the very lengthy, detailed videotaped statements of two men who had already pleaded guilty in a drug exportation conspiracy, and who were found to have had no motives to lie. One man refused to answer any questions in court, appearing terrified; the other refused to answer the Crown's questions, but agreed with everything that defence counsel suggested; both were cited for contempt of court. They had given statements as a condition of plea and sentence agreements which their lawyers had negotiated. While acknowledging strong precedent on the importance of meaningful cross-examination, Romilly J. relied upon authorities which state that other indicators of threshold reliability may compensate for a lack of cross-examination. He also cited (at [182]):

. . . sound policy reasons to support this approach. Foremost among these is the concern that intimidation and coercion should not become a viable tool for preventing evidence from being presented to the court.³⁵

D. Rights of the Accused and the Witness as Guides to Hearsay Reform

Commentators from other jurisdictions have wondered how Canada can be at ease with incremental judicial reform in an area as crucial as hearsay law, but Canadians may wonder how painstaking statutory reform in other jurisdictions has resulted in some of the same dilemmas faced by Canadian courts. Neither statutory nor judicial reform appears to have any advantage in speed. However, the above cursory comparison suggests that some consistent principles apply to the just reform of hearsay law, whether by statute or by precedent.

1) Vigilance for Wrongful Convictions and the Accused's Right to a Fair Trial:

Reformers in every jurisdiction have been motivated by deep concern that freer admission of hearsay must not contribute to an increased number of wrongful convictions or to unfair trials.

2) Constitutional Standards and Human Rights:

Entrenched procedural rights for the accused, and accepted human rights for witnesses, are vital safeguards in any reform of the admissibility of hearsay. It is not coincidental that Canadian courts had the confidence to engage in hearsay reform after fundamental rights already had been litigated for about a decade under the *Charter of*

³⁵ Another interesting case in this vein is *Regina v. Goodstone*, 2007 ABCA 88, [2007] A.J. No. 313. There, a witness was called to the stand during a *voir dire*, during which she refused to be sworn in the trial, said that her prior statement was a lie, and attempted to exonerate the accused. The witness never appeared before the jury, but in addition to receiving her videotaped statement, the jury was given an agreed statement of facts concerning the witness's recantation in the *voir dire*, and was warned repeatedly that her statement had not been tested by cross-examination. However, before the judge had an opportunity to instruct the jury on this hearsay issue, the jury took the initiative of asking why the witness, who had been mentioned by others, had not testified.

Rights and Freedoms. Building on the experience of Canada and other jurisdictions, the Law Reform Commission of Hong Kong has bound hearsay reform to the preservation of fundamental rights.³⁶

3) *The Voluntariness Requirement:*

Essential to the rights of witnesses is the requirement that statements used in criminal proceedings must be proven voluntary and free from any form of coercion or investigatory misconduct.

4) *A Vigorous Criminal Defence Bar:*

Where the law of hearsay takes new departures, defence counsel must be capable and unfettered in challenges to the admissibility of statements.

5) *Disclosure and Notice:*

The admissibility of contentious evidence such as prior inconsistent statements is analyzed most effectively in the context of full, timely disclosure by the prosecution.³⁷

6) *Police Conduct and the Recording of Statements:*

Finally, the pursuit of high principles in the courtroom rests on the foundation of transparent police investigation. In Canada perhaps no other factor has influenced the admissibility of prior inconsistent statements as much as the electronic recording of police interviews. Conversely, developments in the law governing the statements of accused and witnesses have raised the standards of police practice.

³⁶ HK Consultation Paper at 7.2, 8.6.

³⁷ ALRC Report 102, *supra* at 7.15.

NOTE REGARDING SOURCES

All Canadian cases are available at: www.canlii.org

Each jurisdiction has further provisions relating to hearsay in criminal proceedings, and separate provisions governing hearsay in civil proceedings. Full text of legislation is available at the following locations:

New Zealand *Evidence Act 2006*: <http://www.legislation.govt.nz>

Commonwealth *Evidence Act 1995*: http://www.austlii.edu.au/au/legis/cth/consol_act/

U.K. *Criminal Justice Act 2003*,

U.K. *Civil Evidence Act 1995*: http://www.bailii.org/uk/legis/num_act/