I. OUT-OF-COURT STATEMENTS AND THE RULE AGAINST HEARSAY [§10.1]

An out-of-court statement that is offered to prove the truth of its contents is hearsay and inadmissible at trial unless it falls within one of the traditional exceptions or can be shown to be sufficiently necessary and reliable under the principled approach. One of the first considerations when relying on out-of-court statements is distinguishing between a hearsay and a non-hearsay use. Counsel must ask: Am I using this statement for a hearsay purpose? A statement is not used for a hearsay purpose if it is not introduced for the purpose of proving the truth of the content of the statement– for example, under the narrative or circumstantial evidence exceptions discussed in *R. v. D.K.*, 2020 ONCA 79.

The statement may be verbal or written, or conduct that conveys meaning (*R. v. Baldree*, 2013 SCC 35 at para 48; *Wright v. Doe d. Tatham* (1837), 7 A & E 313, 112 E.R. 488 (H.L.); *see* also A.M. Bryant, et al., *The Law of Evidence in Canada*, 4th ed. (LexisNexis, 2014) at §6.1ff).

By its very nature, hearsay evidence often engages multiple actors. First, there is the "declarant", who with words, writing, or conduct conveys meaning. Second, there is the "witness" or proposed witness who receives the information conveyed to them by the declarant. Multiple actors are not engaged where the declarant and proposed

witness are one and the same—for example, where the declarant earlier gave a statement that they are not willing or able to repeat as a witness at trial.

The Supreme Court of Canada noted that the two defining features of hearsay are that the out-of-court statement is adduced to prove the truth of its contents (note that documents found in possession, including text messages, that are relied on for a non-hearsay purpose do not activate the hearsay rule, even if out-of-court statements are contained within (*R. v. Bridgman*, 2017 ONCA 940 at para. 72)) and that there is no opportunity for a contemporaneous cross-examination of the declarant (*R. v. Khelawon*, 2006 SCC 57 at paras. 35 and 56). The inability to test the evidence through cross-examination is the "central concern" underlying the hearsay rule (*R. v. Khelawon* at para. 58).

The reason for the general exclusionary rule with respect to hearsay was described in *R. v. Khelawon* (at para. 35) as:

> The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination.

In the criminal context, admission of hearsay evidence has a constitutional character (*R. v . Khelawon* (at para. 3); *R. v. Rajaratnam*, 2019 BCCA 209, leave to appeal refused 2020 CanLII 3698 (SCC)).

Traditionally, the rule against hearsay was an absolute rule, subject to various categories of exceptions, some of which are canvassed in this chapter. Attempting to fit statements into the defined exceptions came to be known as the "pigeon-hole" approach. This approach provided a degree of certainty to trial proceedings but sometimes led to illogical results where reliable statements were excluded and less reliable statements were admitted in evidence. Concerns about the inflexibility of that approach, and the possibility that it could frustrate the truth-seeking function of a trial, led to the development of the principled approach, which began with the Supreme Court of Canada's decision in *R. v. Khan*, 1990 CanLII 77 (SCC).

II. BURDEN OF PROOF FOR THE ADMISSION OF HEARSAY [§10.2]

The admissibility of a hearsay statement under the principled approach may be determined by the trial judge on a *voir dire*. The onus is on the party seeking to introduce the evidence to establish necessity and

reliability on a balance of probabilities (*R. v. Khelawon*, 2006 SCC 57 at para. 47).

R. v. Starr, 2000 SCC 40, created a reverse onus to be applied when the statement fits within a hearsay exception. Hearsay evidence falling within a traditional exception is presumptively admissible and the opposing party has the burden of showing that it should nonetheless be inadmissible under the principled approach (at para. 214).

Under the principled approach, while the onus is stated to be the same for the Crown and the defence in criminal matters, it may be that constitutional considerations will assist the defence in arguing for a somewhat lesser threshold standard for admissibility. Relying on *R. v. Finta*, 1994 CanLII 129 (SCC) at 527 to 528, a trial judge may relax the rules of evidence, including the admission of hearsay, in favour of the defence when to do so is necessary to prevent a miscarriage of justice. Constitutional considerations were also discussed in *R. v. Khelawon* where it was noted that the admissibility inquiry may take on a constitutional dimension when difficulties in testing the Crown's evidence, or an inability to present reliable defence evidence, may have an impact on an accused's fair trial interests (at para. 47). The court in *R. v. Post*, 2007 BCCA 123 confirmed that a relaxed standard may be applied when "trial fairness requires it, and the avoidance of a miscarriage of justice demands it" (at para. 90). But a relaxed standard does not mean an abandonment of the threshold reliability inquiry where hearsay evidence is tendered by the defence (*R. v. Post* at para. 87; *R. v. Kimberley*, 2001 CanLII 24120 (ON CA)).

III. THE "TRADITIONAL" HEARSAY EXCEPTIONS [§10.3]

As a result of the decision in *R. v. Starr*, 2000 SCC 40, even hearsay evidence that falls within one of the traditional exceptions can still be ruled inadmissible under the principled approach. When there is a conflict between the principled approach and a traditional exception, the principled approach must prevail (*R. v. Starr* at para. 213).

Accordingly, the requirements of a traditional hearsay exception may be challenged to determine whether they satisfy the criteria of necessity and reliability under the principled approach.

The Supreme Court of Canada affirmed the continuing significance of the traditional exceptions in *R. v. Mapara*, 2005 SCC 23 (at paras. 11 to 13).

It is clear from the court's decision in *R. v. Starr*, that the "traditional" exceptions still carry considerable importance in the law on hearsay

evidence. However, there may be some lingering confusion for counsel about how the principled approach and the exceptions work together.

> **Practice Point—Hearsay Exceptions**
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> The framework suggested by the Supreme Court in *R. v. Mapara*, should be followed: if the evidence does not fit within an established exception, it can be argued that it is admissible under the principled approach. The practical consequence of this is that counsel should prepare for both situations so as not to be caught short.

As a result of *R. v. Starr* and *R. v. Mapara*, it is now clear that a further hurdle for counsel to jump is that not only may the evidence be challenged by opposing counsel, but the hearsay exception under which counsel is attempting to have the evidence admitted may be challenged as well. Again, counsel must be extremely well prepared and have thought through all of the possible situations and made plans for how to handle each argument.

The following are some of the traditional exceptions to the hearsay rule.

A. CO-CONSPIRATORS EXCEPTION TO THE HEARSAY RULE [§10.4]

The court in *R. v. Mapara*, 2005 SCC 23 upheld the co-conspirator's exception to the hearsay rule, finding that it met the criteria under the principled approach. Under the co-conspirator's exception, a hearsay statement made by a co-conspirator may be considered by a jury as against all accused after the preconditions have been met (*R. v. Mapara* at paras. 22 to 26; *R. v. Tran*, 2014 BCCA 343).

In *R. v. Y. (N.)*, 2012 ONCA 745, the court considered whether the combined effect of *R. v. Mapara* and *R. v. Simpson*, 2007 ONCA 793 was that the co-conspirators exception would apply only when the co-conspirators were not available to testify. The court ruled that the principled approach to the co-conspirators exception is flexible and that the potential availability of the co-conspirator to give evidence is not an insurmountable impediment to application of the exception.

B. DECLARATIONS ABOUT FAMILY HISTORY [§10.5]

Declarations about family history fall under a hearsay exception that is generally only used in civil proceedings such as estate cases. The form