



SUPREME COURT OF CANADA

CITATION: R. v. Baldree, 2013 SCC 35

DATE: 20130619

DOCKET: 34754

BETWEEN:

Her Majesty The Queen
Appellant
and
Christopher Baldree
Respondent
- and -
Attorney General of Ontario
Intervener

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: Fish J. (McLachlin C.J. and LeBel, Abella, Rothstein,
(paras. 1 to 77) Cromwell, Karakatsanis and Wagner JJ. concurring)

CONCURRING REASONS: Moldaver J.
(paras. 78 to 125)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. v. BALDREE

Her Majesty The Queen

Appellant

v.

Christopher Baldree

Respondent

and

Attorney General of Ontario

Intervener

Indexed as: R. v. Baldree

2013 SCC 35

File No.: 34754.

2012: November 7; 2013: June 19.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Admissibility — Hearsay — Drug purchase call — Implied Assertions — Implied assertion tendered for the truth of its contents — Applicability of hearsay rule — Purposive approach — Principled analysis of its necessity and reliability.

After B was arrested, a caller telephoned B's cell phone to arrange for a drug delivery. A police officer answered B's cell phone and agreed to deliver the drugs at the price that B usually charged. The caller gave his address. No effort was made to find and interview him and he was not called as a witness. The trial judge concluded that the police officer's testimony was not hearsay and admitted the contents of the call. B was convicted of possessing marijuana and cocaine for the purposes of trafficking. A majority of the Court of Appeal allowed the appeal, ordered a new trial, and held that the evidence should not have been admitted.

Held: The appeal should be dismissed and a new trial ordered.

Per McLachlin C.J. and LeBel, **Fish**, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.: The hearsay rule reflects the value our criminal justice system places on live, in-court testimony. The defining features of hearsay are (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. Hearsay evidence is presumptively inadmissible as a matter of law. The issue here is whether this exclusionary rule applies to express hearsay only, or to implied hearsay as well. An implied assertion tendered for the truth of its contents does not stand on a different

footing, with respect to the hearsay rule, than an explicit assertion to the same effect. The principled reasons for their presumptive inadmissibility apply equally to both. There is no principled reason, in determining their admissibility, to distinguish between express and implied assertions adduced for the truth of their content.

Hearsay evidence is presumptively inadmissible unless it falls under a traditional exception to the hearsay rule. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if, pursuant to the principled analysis, sufficient indicia of reliability and necessity are established on a *voir dire*. Hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. The need for a functional approach to implied assertions is readily apparent, bearing in mind the core hearsay dangers of the declarant's perception, memory, narration and sincerity.

Here, no traditional exception applies and the impugned evidence withers on a principled analysis. This was a single drug purchase call of uncertain reliability. No effort was made to find and interview the caller, still less to call him as a witness — where the assertion imputed to him could have been evaluated by the trier of fact in the light of cross-examination and the benefit of observing his demeanour. Although this drug purchase call does not withstand scrutiny under the principled approach, this need not always be the case with drug purchase calls.

Finally, the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code* can have no application in this case, since it cannot be said that there is no reasonable

possibility the verdict would have been different had the telephone call not been admitted.

Per Moldaver J.: An implied assertion of a factual proposition is part of the “contents” of a statement for purposes of the hearsay rule. Accordingly, the evidence of the drug purchase call was hearsay because it was introduced to prove that B was in fact a drug trafficker. In such cases, however, the real concern under the principled approach is reliability and it should be the focus of the inquiry. The necessity criterion has its purpose, but it is not meant to stifle the admission of reliable evidence. Rather, it is founded on society’s interest in getting at the truth. For that reason, in cases such as this one — where the prospect of locating, identifying, and receiving accurate information from a forthcoming and cooperative caller is remote — if the evidence is reliable, it should be admitted because its reception into evidence will be necessary in order to get closer to the truth. If the evidence is not reliable, it should be excluded.

The starting point is that a long line of cases have admitted evidence similar to that at issue here on the basis that it was non-hearsay. Because judges are not in the habit of admitting evidence they deem unreliable, these earlier cases appear to rest on the conclusion that drug purchase calls are reliable more often than not and, thus, can safely be categorized as non-hearsay. Even where such evidence was excluded, the concern was reliability. The common thread in these cases is that the

evidence's reliability dictated the answer with respect to admissibility — and that is the assessment courts should focus on.

The majority's analogy to an earlier decision of this Court to support its conclusion that the police should have tried to find and interview the caller breaks down upon scrutiny. There, the police were dealing with a known declarant who was fully cooperative and forthcoming. Here, the declarant was unknown. Apart from officer safety concerns, the likelihood of the police finding the declarant would seem slim. And the prospect of the declarant being forthcoming and cooperative, if found, would seem even slimmer. The necessity criterion was thus met.

Although it is perfectly consistent with the principled approach that even a single drug purchase call may meet the threshold test for reliability, the Crown failed in this case to establish that the call meets the test justifying its admission as substantive evidence that B was engaged in drug trafficking. Even if the caller was entirely sincere in his belief that B was a drug dealer, that does not address why the caller believed what he believed — and whether his belief was in fact true or not. This is not a case of multiple calls, where common sense tells us that the probability of numerous callers all being mistaken is unlikely. Nor do we have sufficient indicia of reliability, either within the statement or in the form of confirmatory evidence outside the statement. Had the circumstances been somewhat different, there may well have been a satisfactory basis for evaluating whether the caller believed B was a

drug dealer and whether that belief was in fact true. That is what threshold reliability requires.

Cases Cited

By Fish J.

Distinguished: *R. v. Ly*, [1997] 3 S.C.R. 698, aff'd (1996), 193 A.R. 149;
referred to: *R. v. Edwards* (1994) 91 C.C.C. (3d) 123, aff'd [1996] 1 S.C.R. 128; *R. v. Kearley*, [1992] 2 All E.R. 345; *R. v. Wilson* (1996), 29 O.R. (3d) 97; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358; *R. v. Fialkow*, [1963] 2 C.C.C. 42; *R. v. Lucia*, 2010 ONCA 533 (CanLII); *R. v. Cook* (1978), 10 B.C.L.R. 84; *R. v. Nguyen*, 2003 BCCA 556, 188 B.C.A.C. 218; *R. v. Parchment*, 2004 BCSC 1806 (CanLII); *R. v. Williams*, 2009 BCCA 284, 273 B.C.A.C. 86; *R. v. Graham*, 2013 BCCA 75 (CanLII); *R. v. Ramsum*, 2003 ABQB 45, 329 A.R. 370; *R. v. Bannon* (1995), 132 A.L.R. 87; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Bevan*, [1993] 2 S.C.R. 599.

By Moldaver J.

Distinguished: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787;
referred to: *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *R. v. Owad* (1951), 102 C.C.C.

155; *R. v. Fialkow*, [1963] 2 C.C.C. 42; *R. v. Cook* (1978), 46 C.C.C. (2d) 318; *R. v. Edwards* (1994), 19 O.R. (3d) 239; *R. v. Nguyen*, 2003 BCCA 556, 188 B.C.A.C. 218; *R. v. Williams*, 2009 BCCA 284, 273 B.C.A.C. 86; *R. v. Lucia*, 2010 ONCA 533 (CanLII); *R. v. Graham*, 2013 BCCA 75 (CanLII); *R. v. Wilson* (1996), 29 O.R. (3d) 97; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Couture*, 2007 SCC 28, [2007], 2 S.C.R. 517; *R. v. Woodcock* (1789), 1 Leach 500, 168 E.R. 352; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Ly*, [1997] 3 S.C.R. 698.

Statutes and Regulations Cited

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 686(1)(b)(iii), 693(1)(a).

Criminal Justice Act 2003 (U.K.), 2003, c. 44, s. 115.

Evidence Act 1995 (Aust.), No. 2, s. 59(1).

Federal Rules of Evidence (U.S.), Rule 801.

Authors Cited

Birch, Di. "Criminal Justice Act 2003 (4) Hearsay: Same Old Story, Same Old Song?", [2004] *Crim. L.R.* 556.

Bryant, Alan W., Sidney N. Lederman and Michelle K. Fuerst. *The Law of Evidence in Canada*, 3rd ed. Markham, Ont.: LexisNexis, 2009.

Canada. Law Reform Commission. *Report on Evidence*. Ottawa: Information Canada, 1975.

Dennis, I. H. *The Law of Evidence*, 4th ed. London: Sweet & Maxwell, 2010.

- Dufraimont, Lisa. Annotation to *R. v. Baldree*, 2012 CarswellOnt 1741.
- Finman, Ted. “Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence” (1961-1962), 14 *Stan. L. Rev.* 682.
- Hill, S. Casey, David M. Tanovich and Louis P. Strezos, eds. *McWilliams’ Canadian Criminal Evidence*, 4th ed. Aurora, Ont.: Canada Law Book, 2003 (loose-leaf updated March 2012, release 22).
- McCormick, Charles T. “The Borderland of Hearsay” (1930), 39 *Yale L.J.* 489.
- McCormick on Evidence*, vol. 2, 7th ed. by Kenneth S. Broun, General Editor. Eagan, Minn.: Thomson Reuters, 2013.
- Paciocco, David M., and Lee Stuesser, 6th ed. *The Law of Evidence*. Toronto: Irwin Law, 2011.
- Phipson on Evidence*, 17th ed. by Hodge C. Malek et al. London: Sweet & Maxwell, 2010.
- Rice, Paul R. “Should Unintended Implications of Speech be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence” (1992), 65 *Temp. L. Rev.* 529.
- Schiff, Stanley. “Evidence—Hearsay and the Hearsay Rule: A Functional View” (1978), 56 *Can. Bar Rev.* 674.
- Weinstein, Jack B. *Weinstein’s Evidence: Commentary on Rules of Evidence for the United States Courts and for State Courts*, vol. 4. New York: Mathew Bender, 1983 (loose-leaf updated August 1990, release 38).
- Wigmore, John Henry. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston: Little, Brown & Co., 1923.

APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Blair and Watt J.J.A.), 2012 ONCA 138, 109 O.R. (3d) 721, 287 O.A.C. 327, 280 C.C.C. (3d) 191, 92 C.R. (6th) 331, [2012] O.J. No. 924 (QL), 2012 CarswellOnt 1741, setting aside the accused’s conviction and ordering a new trial. Appeal dismissed.

James C. Martin and Brian G. Puddington, for the appellant.

Michael Davies and James Foord, for the respondent.

John S. McInnes, for the intervener the Attorney General of Ontario.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ. was delivered by

FISH J. —

I

[1] An out-of-court statement by a person not called as a witness in the proceedings is properly characterized as hearsay where it is tendered in evidence to make proof of the truth of its contents.

[2] It is undisputed on this appeal that hearsay evidence is presumptively inadmissible as a matter of law.

[3] The sole issue is whether this exclusionary rule applies to “express hearsay” only, or to “implied hearsay” as well. As a matter of logic and of principle, I am satisfied that it does.

[4] In both instances, the relevance of the out-of-court statement is not *that the statement was made*, but rather *what the content of the statement purports to prove*. And, in both instances, what the statement purports to prove is the truth of what the person not called as a witness is alleged to have asserted — expressly or by implication.

[5] With respect to their logical relevance, there is thus no substantive distinction between express and implied hearsay. The principled reasons for their presumptive inadmissibility apply equally to both.

[6] For these reasons and the reasons that follow, I agree with the majority in the Court of Appeal that the impugned out-of-court statement in issue here ought to have been excluded by the trial judge. It falls within no traditional exception to the hearsay rule and lacks the indicia of necessity and reliability that might otherwise render it admissible.

[7] Accordingly, I would dismiss the Crown's appeal to this Court against the judgment of the Court of Appeal.

II

[8] The respondent was convicted at his trial before judge alone of possessing marijuana and cocaine for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[9] His appeal was allowed by a majority of the Ontario Court of Appeal and a new trial ordered. The Crown appeals to this Court as of right, pursuant to s. 693(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, on the questions of law on which the dissent of Watt J.A. was based.

[10] Since I agree with the Court of Appeal that a new trial is warranted, I shall refer to the facts only to the extent necessary to dispose of this appeal.

[11] On May 11, 2006, Cornwall police officers Sergeant Shawn Martelle and Constable Robert Ouellette responded to a suspected break-in at the apartment of a certain Eric Lepage. They knocked on the door and a man, who identified himself as Chris Baldree, allowed them in. The officers entered and immediately detected an odour of marijuana, and discovered marijuana “joints” and small marijuana buds in an ashtray.

[12] In the closet of the spare bedroom, Sgt. Martelle found an open safe containing a sandwich bag filled with 90 grams of cocaine — and, beside the safe, a large cardboard box with one ziplock bag containing 511 grams of marijuana.

[13] Mr. Baldree was arrested along with three other people found in the apartment. The police seized from him a cellular telephone and some cash found in his possession.

[14] At the police station, Mr. Baldree's phone was ringing. Sgt. Martelle answered. At trial, he described the call as follows:

...

A. A male voice on the other end of the, of the phone advised that he was at 327 Guy Street and that he was a friend of Megan and asked for Chris. Knowing that there were two Chris that I had just arrested, I asked, "Chris who?" the male advised, "Baldree" and requested one ounce of weed. I then stated that I was now running the, the show here and that Mr. Baldree was not here and I was gonna take his

THE COURT: All right, sorry, asked for Chris.

A. Yes, I'm sorry Your Honour.

THE COURT: Yes.

A. And I questioned him, I asked him, "Chris who?" and he answered, "Baldree".

THE COURT: Yes.

A. He asked for one ounce of weed. I then asked him how much Chris charges him, he says he pays \$150. I then advised him I would deliver same, 327 Guy, and that was the end of the conversation. [A.R., vol. II, at p. 76].

The police made no effort at all to contact the caller at the address he provided.

[15] Counsel for the accused promptly objected to this testimony on the ground that it was inadmissible hearsay. The trial judge disagreed. He found the evidence to be "non-hearsay", a convenient term I shall adopt throughout, on the basis of *R. v. Ly*, [1997] 3 S.C.R. 698, and *R. v. Edwards* (1994) 91 C.C.C. (3d) 123 (Ont. C.A.), aff'd on other grounds, [1996] 1 S.C.R. 128.

[16] In the judge's view:

Whether these calls can be referred to as admissible hearsay or simply statements of state of mind, the law holds that they are admissible as circumstantial evidence to indicate a person engaged in drug trafficking. They are not tendered in evidence for the truth of the fact that the individual phoning is in fact the individual whom the individual states to be or that the individual in fact will carry out the trafficking of the drugs. As stated, it is circumstantial evidence of an individual engaged in the trafficking of drugs. [A.R., vol. I, at pp. 22-23]

[17] Having concluded that Sgt. Martelle's testimony was not hearsay, the trial judge found it unnecessary to weigh its probative value against its prejudicial effect.

III

[18] All three justices in the Ontario Court of Appeal wrote separate reasons. Feldman and Blair J.J.A. allowed the appeal and ordered a new trial; Watt J.A., dissenting, would have dismissed the appeal.

[19] Feldman J.A. disagreed with the trial judge's characterization of the phone call as circumstantial evidence indicating that Mr. Baldree was engaged in drug trafficking. On the contrary, in her view, "admitting the contents of [the] call into evidence is admitting that evidence for a hearsay purpose. It is the implied assertion of the caller, untested by cross-examination, that the accused is a drug dealer" (para. 140).

[20] Feldman J.A. found that the trial judge thus erred by focusing “on the truth of whether the caller really wanted to purchase drugs, which was of course irrelevant, and not on the implied assertion in the request . . .” (para. 144).

[21] Citing the reasons of the majority of the House of Lords in *R. v. Kearley*, [1992] 2 All E.R. 345, and the opinion of McMurtry C.J.O. in *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.), Feldman J.A. concluded that the hearsay analysis should not hinge on whether the assertion is express or implied (para. 140).

[22] She found that the telephone call was hearsay and should not have been admitted as evidence against Mr. Baldree because it could not withstand scrutiny under the principled approach to the hearsay rule. Regarding necessity, the police had the caller’s address, yet made no effort to contact him; as to reliability, there was simply no basis to test the caller’s belief without subjecting him to cross-examination (para. 146).

[23] Feldman J.A. also concluded that the evidence was inadmissible because its probative value was outweighed by its prejudicial effect (para. 147).

[24] Feldman J.A. declined to apply the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code* and therefore held that the trial judge’s error required a new trial. Particularly in light of Crown counsel’s characterization of the drug purchase call as the strongest piece of evidence against the accused, Feldman J.A. could not conclude

that the improper admission of Sgt. Martelle's testimony had no effect on the verdict (para. 149).

[25] In separate but concurring reasons, Blair J.A. was uncertain whether the impugned evidence constituted hearsay. In any event, he considered it preferable "for jurists to spend less time focusing on the characterization of evidence into 'hearsay' or 'non-hearsay' categories in these types of close-call scenarios and to spend more effort focusing on the principled criteria of necessity/reliability and prejudice vs. probative value" (para. 155).

[26] Accordingly, Blair J.A. found it unnecessary to "cut the 'hearsay' Gordian knot to resolve this appeal" because the impugned evidence failed on both an assessment of its necessity and reliability and on weighing its probative value against its prejudicial effect (para. 156).

[27] In his dissenting reasons, Watt J.A. agreed with the trial judge that this Court's decision in *Ly* held that evidence of a single drug purchase call is admissible as non-hearsay (para. 73).

[28] According to Watt J.A., a principled analysis was unnecessary on these facts because the impugned evidence was not hearsay. He disagreed with his colleagues that the evidence should have been excluded on the basis that its prejudicial effect outweighed its probative value (paras. 95-98).

[29] In the alternative, Watt J.A. was of the view that even if the drug purchase call was improperly admitted at trial, the conviction should nevertheless stand pursuant to the curative proviso (para. 99).

IV

[30] The defining features of hearsay are (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 56. As Justice Charron explained in *Khelawon*, at para. 35, the hearsay rule reflects the value our criminal justice system places on live, in-court testimony:

Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. 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. The fear is that untested hearsay evidence may be afforded more weight than it deserves.

[31] In short, hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. Apart from the inability of the trier of fact to assess the declarant's demeanour in making the assertion, courts and commentators have identified four specific concerns. They

relate to the declarant's perception, memory, narration, and sincerity. *Ibid*, at para. 2; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 159.

[32] First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.

[33] Over the years, a number of common law exceptions were recognized, based on the belief that an overly rigid application of the exclusionary rule would impede the truth-finding process. As J.H. Wigmore explains:

The theory of the Hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment — for example, by reason of the death of the declarant —, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape.

(*Wigmore on Evidence*, (2nd ed. 1923), vol. III, at §1420, quoted with approval in *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 929)

[34] Beginning with *R. v. Khan*, [1990] 2 S.C.R. 531, the Court has moved away from a set of judicially created exceptions to the hearsay rule, and instead mandated a purposive approach, governed by a principled framework set out this way by McLachlin C.J. in *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 15:

- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
- (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
- (c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
- (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[35] The hearsay rule, like many others, is easier to state than to apply.

[36] No evidence is hearsay on its face. As mentioned at the outset, its admissibility depends on the *purpose* for which it is sought to be admitted. Evidence is hearsay — and presumptively inadmissible — if it is tendered to make proof of the truth of its contents.

[37] Plainly, in this case, the Crown adduced Stg. Martelle's evidence as proof of the truth of its contents. Since the declarant was not called to testify, Sgt. Martelle's testimony constituted hearsay and was therefore presumptively inadmissible. Accordingly, in my view, the trial judge erred in failing to subject the evidence to a principled analysis.

[38] Sergeant Martelle testified, it will be recalled, that someone claiming to be a resident of 327 Guy Street called the cell phone which Sgt. Martelle had seized from Chris Baldree, asked for Mr. Baldree, and requested an ounce of marijuana for the price of \$150.

[39] I agree with Feldman J.A. that the Crown did not offer this testimony as circumstantial evidence that the respondent was engaged in drug trafficking. Rather, the Crown asked the trier of fact to conclude, based on Sgt. Martelle's testimony, that the unknown caller intended to purchase marijuana from the respondent *because he believed the respondent to be a drug dealer*. The relevance of the statement thus hinges on the truth of the declarant's underlying belief. Any inference that can be drawn from the statement necessarily assumes its veracity.

[40] Had the caller stated that he wanted to buy drugs from Mr. Baldree because *Mr. Baldree sells drugs*, this would have amounted to an express assertion that Mr. Baldree is a drug dealer. Thus framed, the caller's assertion would doubtless have constituted hearsay.

[41] But the caller stated instead that he was calling because he wished to *purchase drugs from Mr. Baldree*. His assertion that Mr. Baldree is a drug dealer was no less manifest in substance, though implicit rather than explicit in form. In the Crown's submission, implied assertions are not caught by the hearsay rule and the telephone conversation was presumptively admissible for that reason.

[42] In my view, the hearsay nature of this evidence cannot be made to depend on how the declarant framed his request. Such a formalistic analysis disregards the purposive approach to the hearsay rule adopted by this Court. Indeed, "it seems absurd that anything should turn on the grammatical form of the declarant's assertions": L. Dufraimont, Annotation to *R. v. Baldree*, 2012 CarswellOnt 1741.

[43] There is no principled or meaningful distinction between (a) "I am calling Mr. Baldree because I want to purchase drugs from him" and (b) "I am calling Mr. Baldree because he sells drugs". In either form, this out-of-court statement is being offered for an identical purpose: to prove the truth of the declarant's assertion that Mr. Baldree sells drugs. No trier of fact would need to be a grammarian in order to understand the import of this evidence.

[44] The need for a functional approach to implied assertions is readily apparent, bearing in mind the core hearsay dangers of perception, memory, narration, and sincerity.

[45] It has been argued that the danger of lack of sincerity is sometimes diminished for implied assertions. This is because “[i]f a declarant possesses no intention of asserting anything, it would seem to follow that he also possesses no intention of misrepresenting anything”: P. R. Rice, “Should Unintended Implications of Speech be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence” (1992), 65 *Temp. L. Rev.* 529, at p. 531.

[46] But the other hearsay dangers clearly remain operative, and may in fact increase when an individual “states” something by implication:

Looked at from the point of view of the four hearsay dangers, there is a much reduced risk of lies if the declarant did not intend to convey that which his statement is relied upon to prove, particularly if he it [*sic*] was not his purpose to make a representation of fact at all. But the other hearsay dangers remain, that is, the risk of misperception, false memory (unless the implied assertion concerns the declarant’s own state of mind) and ambiguity. Indeed the last danger may be magnified. When X says: “Is Z in there?” does this imply that Z is not with X and nothing more, or that Z is not with X and X wants Z, or Z is in danger, or X wants to know where Z is? *The upshot is that in many situations implied assertions depend for their value on the reliability of the declarant just as much as express assertions.* [Emphasis added.]

(H. M. Malek, et al., eds., *Phipson on Evidence* (17th ed., 2010), at p. 889)

Moreover, even insincerity remains a concern with implied assertions:

If the justification for the assertive/nonassertive distinction is the absence of the insincerity problem, and through that guarantee of sincerity a reduced level of perception, memory, and ambiguity problems,

this justification cannot be applied to implied statements from speech. Speech is a mechanism of communication; it is virtually always used for the purpose of communicating something to someone. It is illogical to conclude that the question of sincerity is eliminated and that the problem of unreliability is reduced for unintended implications of speech if that speech might have been insincere in the first instance, relative to the direct message intentionally communicated. If potential insincerity is injected into the utterance of words that form the basis for the implied communication, the implication from the speech is as untrustworthy as the utterance upon which it is based. [Rice, at p. 534]

[47] In short, “if the standard for comparing express and implied assertions is the quantity of dangers each entails, they are indistinguishable”: T. Finman, “Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence” (1961-1962), 14 *Stan. L. Rev.* 682, at p. 689.

[48] Accordingly, there is no principled reason, in determining their admissibility, to distinguish between express and implied assertions adduced for the truth of their contents. Both function in precisely the same way. And the benefits of cross-examining the declarant are not appreciably different when dealing with one form of testimony than the other. If an out-of-court statement implicates the traditional hearsay dangers, it constitutes hearsay and must be dealt with accordingly.

[49] In the present matter, the trial judge and the dissenting judge in the Court of Appeal both found that this Court had decided otherwise in *Ly*. With respect, I disagree.

[50] *Ly* concerned the admissibility of a telephone conversation between a police officer who had called a suspected “dial-a-dope” operation and the person who answered his call. The officer had called to arrange for the purchase and delivery of drugs. And the appellant, drugs in hand, later showed up at the agreed-upon time and place — where he was promptly arrested and charged with possession of drugs for the purpose of trafficking.

[51] The trial judge characterized as hearsay, and excluded for that reason, evidence of the police officer’s conversation with the person who had answered his call. On an appeal by the Crown, the Alberta Court of Appeal disagreed. It found that the impugned conversation was admissible as “part of the narrative”, since “[i]t was impossible to understand the development of the later events without the evidence of the telephone conversation which preceded them” ((1996), 193 A.R. 149, at para. 3).

[52] In brief oral reasons, this Court agreed with the Court of Appeal that evidence of the conversation was improperly excluded at trial. The Court noted that the conversation was tendered to explain why the appellant appeared at the designated time and place in possession of the drugs — and not, as in the case that concerns us here, for the truth of its contents: *Ly*, at para. 3.

[53] I see nothing in *Ly* to suggest — let alone decide — that an implied assertion tendered for the truth of its contents stands on a different footing, with

respect to the hearsay rule, than an explicit assertion to the same effect. Unlike *Ly*, that is the issue here.

[54] And the issue now comes before us for the first time, though it has for at least half a century divided lower courts in several provinces: see, for example, *R. v. Fialkow*, [1963] 2 C.C.C. 42 (Ont. C.A.); *Edwards; Wilson*; *R. v. Lucia*, 2010 ONCA 533 (Can LII); *R. v. Cook* (1978), 10 B.C.L.R. 84 (C.A.); *R. v. Nguyen*, 2003 BCCA 556, 188 B.C.A.C. 218; *R. v. Parchment*, 2004 BCSC 1806 (Can LII); *R. v. Williams*, 2009 BCCA 284, 273 B.C.A.C. 86; *R. v. Graham*, 2013 BCCA 75 (Can LII); *R. v. Ramsum*, 2003 ABQB 45, 329 A.R. 370.

VI

[55] The highest courts of England and Wales, and Australia, have likewise concluded that the hearsay rule governs implied assertions, only to have these decisions reversed by statute: see *Kearley*; *R. v. Bannon* (1995), 132 A.L.R. 87 (H.C.); *Criminal Justice Act 2003* (U.K.), 2003, c. 44, s. 115; *Evidence Act 1995* (Aust.), No. 2, s. 59(1).

[56] In Canada, Parliament has not found it necessary or appropriate to adopt legislation classifying implied assertions as non-hearsay. This is, of course, entirely understandable in view of our principled and more flexible approach to exclusion.

[57] As noted by Feldman J.A., the facts in *Kearley*, the leading British decision, were similar to the facts in this case. In *Kearley*, the police raided the home of the accused on suspicion that he was selling drugs. Drugs were found, but in insufficient quantities to support an inference of drug trafficking. While the police were present at the accused's residence, they intercepted ten telephone calls from callers asking to purchase drugs from him. Seven people also came to the apartment seeking to buy narcotics.

[58] The majority of the House of Lords concluded that the drug purchase calls and the in-person statements were inadmissible hearsay. Because they were phrased as requests for drugs, the statements did not directly assert but instead implied that the accused was a drug dealer. However, whether stated expressly or impliedly, their Lordships found the information communicated to be the same. In Lord Ackner's words:

[I]f the inquirer had said in the course of making his request, "I would like my usual supply of amphetamine at the price which I paid you last week" ... the hearsay rule prevents the prosecution from calling police officers to recount the conversation which I have described ...

If [however] the simple request or requests for drugs to be supplied by the appellant, as recounted by the police, contains in substance, but only by implication, the same assertion, then I can find neither authority nor principle to suggest that the hearsay rule should not be equally applicable and exclude such evidence. What is sought to be done is to use the oral assertion, even though it may be an implied assertion, as evidence of the truth of the proposition asserted. That the proposition is asserted by way of necessary implication rather than expressly cannot, to my mind, make any difference. [pp. 363-64].

[59] Two main reasons have been urged against applying the hearsay rule to implied assertions.

[60] First, as Watt. J.A. states (at para. 83) and as the Crown argues, excluding implied assertions as hearsay has the potential of broadening the exclusionary rule, given that “[v]irtually every human action is based on some set of assumptions implicitly accepted and, on this approach, ‘asserted’ by the actor” (A.F., at para. 62, quoting *McWilliam’s Canadian Criminal Evidence* (4th ed. (loose-leaf)), at p. 7-21).

[61] Second, as critics of *Kearley* have pointed out, applying the hearsay rule to implied assertions such as drug purchase calls has the potential to deprive the trier of fact of reliable evidence and thereby impede the truth-finding process: see, for example, D. Birch, “Criminal Justice Act 2003 (4) Hearsay: Same Old Story, Same Old Song?”, [2004] *Crim. L.R.* 556, at pp. 564-65.

[62] The short answer to the first argument is that we are not concerned on this appeal with the application of the hearsay rule to assertions implied through non-verbal conduct. Our concern, rather, is with a quintessentially *verbal* statement.

[63] The issue of the applicability of the hearsay rule to inferences that can be drawn from non-verbal conduct is best left for another day. For present purposes, I find it sufficient to say that “one can engage in conduct without ever intending to communicate *anything* to *anyone*, [but t]he same is not true of speech or a

combination of speech and conduct (for example, placing a bet) because the sole purpose of speech is communication”: Rice, at p. 536 (emphasis in original).

[64] The second concern mentioned above is greatly attenuated, I again emphasize, by Canada’s principled approach to hearsay.

[65] In *Kearley*, having found the evidence in that case to be hearsay, it was automatically excluded because it did not fall within a traditional exception to the hearsay rule.

[66] The Canadian approach suffers from no such inflexibility. Under our law, hearsay evidence that is not admissible under a traditional exception may nonetheless be admitted pursuant to a principled analysis of its necessity and reliability. This “sensible scheme” recognizes that “some implied assertions, like some express assertions, will be highly reliable even in the absence of cross-examination”: Finman, at p. 693. Pursuant to its terms, implied assertions that are necessary and reliable may be admitted while those that are unreliable or unnecessary will be excluded.

VII

[67] On the facts of this case, no traditional exception applies and the impugned evidence withers on a principled analysis. It satisfies neither the requirement of necessity nor the requirement of reliability.

[68] In *Khelawon*, necessity was conceded. Justice Charron nonetheless took care to note that

in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. [para. 104]

This is the kind of “appropriate case” contemplated by *Khelawon*. And the answer is that the police *made no effort at all* to secure the evidence of the declarant: they never sought to interview or even find him, though *he gave them his address*. Moreover, there was no explanation offered as to why no efforts were made to locate the declarant.

[69] Nor is the single telephone call in this case sufficiently reliable. As Feldman J.A. found in the court below, “[t]here was no basis to say that the caller’s belief was reliable without testing the basis for that belief by cross-examination” (para. 146). Indeed, this is not a situation “in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished”: *Khelawon*, at para. 62, quoting *Wigmore on Evidence*, at §1420.

[70] In concluding as I have, I take care not to be understood to have proposed a categorical rule for drug purchase calls. Although the call at issue here does not withstand scrutiny under the principled approach, this need not always be the case.

[71] For example, where the police intercept not one but several drug purchase calls, the quantity of the calls might well suffice in some circumstances to establish reliability — indeed, while “[o]ne or two might [be] mistaken, or might even have conspired to frame the defendant as a dealer”, it would “def[y] belief that all the callers had made the same error or were all party to the same conspiracy”: I. H. Dennis, *The Law of Evidence*, (4th ed. 2010), at p. 708.

[72] Moreover, the number of callers could also inform necessity. The Crown cannot be expected, where there are numerous declarants, to locate and convince most or all to testify at trial, even in the unlikely event that they have supplied their addresses — as in this case. And it is important to remember that the criteria of necessity and reliability work in tandem: if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed: see *Khelawon*, at para. 86, citing *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, and *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

[73] Here, we are presented with a single drug purchase call of uncertain reliability. The caller gave his address. No effort was made to find and interview him, still less to call him as a witness — where the assertion imputed to him could have been evaluated by the trier of fact in the light of cross-examination and the benefit of observing his demeanour.

[74] Manifestly, the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code* can have no application in this case, since it cannot be said that there is no reasonable possibility that the verdict would have been different had the impugned telephone call not been admitted: *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617.

[75] Indeed, in summing up, Crown counsel described the impugned telephone call as the strongest piece of evidence in the case (A.R., vol. IV, at p. 127). In counsel's words, "the cell phone call placing the order seals the story as far as I'm concerned ..." (p. 138). Moreover, the trial judge referred to the phone call in his reasons for judgment and took it into account when assessing Mr. Baldree's credibility (A.R., vol. I, at p. 29).

[76] In this light, it can hardly be stated that the improper admission of this evidence could not have affected the result at trial

IX

[77] For all of these reasons, I would dismiss this appeal, affirm the judgment of the Court of Appeal, set aside the respondent's conviction, and order a new trial.

The following are the reasons delivered by

MOLDAVER J. —

I. Overview

[78] I join my colleague Fish J. in rejecting this drug purchase call under the principled approach to hearsay, and I agree in the main with his opinion. In particular, I agree that an implied assertion of a factual proposition is part of the “contents” of a statement for purposes of the hearsay rule. Indeed, while the parties disagree, the intervener Attorney General of Ontario advances that very view.

[79] I write separately, however, to underscore my reservations with Part VII of my colleague’s reasons, which deal with the criteria of necessity and reliability under the principled approach. In particular, I am concerned by my colleague’s approach to necessity. That criterion has its purpose, but we ought not to approach it as a box that must invariably be checked off before drug purchase calls like this one can be admitted. In such cases, the real concern is reliability — and that, in my respectful view, should be the focus of our inquiry.

[80] The starting point is the recognition that we are today characterizing as hearsay — and thus presumptively inadmissible — evidence which has long been received by the courts as circumstantial evidence. It is not a step to be undertaken lightly. Nonetheless, I believe it is the right one. As my colleague observes, the characterization of a particular piece of evidence as hearsay should not hinge on the declarant’s particular choice of words (paras. 42-43). Rather, the focus should be on the existence (or non-existence) of the hearsay dangers having regard to the purpose for which the out-of-court statement is being tendered.

[81] Thus, I agree that judges must satisfy themselves of the reliability of drug purchase calls on a case-by-case basis. If the evidence is reliable, it should be admitted *because its reception will be necessary in order to get closer to the truth*. If it is not reliable, the evidence should stay out. The only difference between yesterday and today should be that in characterizing implied assertions as hearsay, we avoid the thorny debate about what the declarant did or did not intend to assert and, instead, put the focus on what truly matters in cases such as this one: “whether the evidence is sufficiently reliable to warrant its reception” (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at p. 244).

[82] Here, for reasons I will explain, this call cannot be said to be sufficiently reliable. Accordingly, I agree that it should have been excluded.

II. Analysis

A. *The Concern Is Threshold Reliability*

[83] It is important to set the stage for the following discussion by clarifying what is actually at issue. Here, I am speaking only of *threshold* reliability, not *ultimate* reliability. At this point, a court is concerned only with whether the call exhibits sufficient indicia of reliability so as to afford the trier of fact “a satisfactory basis for evaluating the truth of the statement” (*R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 75). Threshold reliability exists because of a “fear . . . that untested hearsay

evidence may be afforded more weight than it deserves” (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 35).

[84] But once threshold reliability is established, ultimate reliability — including what weight, if any, to attach to the evidence — is a matter for the trier of fact. As Charron J. observed in *Khelawon*, at para. 50:

Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence.

B. *The Historical Treatment of Drug Purchase Calls*

[85] As Watt J.A. observed in his dissenting reasons at the Court of Appeal, the question about drug purchase calls — in particular, whether they may contain an implied assertion — “has played little or no role” in the jurisprudence to date (2012 ONCA 138, 109 O.R. (3d) 721, at para. 53). Nonetheless, as my colleague Fish J. points out, a long line of cases have admitted evidence similar to the evidence under consideration here on the basis that it was non-hearsay (para. 54). See, e.g., *R. v. Owad* (1951), 102 C.C.C. 155 (Ont. C.A.); *R. v. Fialkow*, [1963] 2 C.C.C. 42 (Ont. C.A.); *R. v. Cook* (1978), 46 C.C.C. (2d) 318 (B.C.C.A.); *R. v. Edwards* (1994), 19 O.R. (3d) 239 (C.A.); *R. v. Nguyen*, 2003 BCCA 556, 188 B.C.A.C. 218; *R. v. Williams*, 2009 BCCA 284, 273 B.C.A.C. 86; *R. v. Lucia*, 2010 ONCA 533 (CanLII); *R. v. Graham*, 2013 BCCA 75 (CanLII).

[86] These decisions give me pause. Can we have been wrong for so long?

[87] Because I think it safe to conclude that judges are not in the habit of admitting evidence they deem unreliable, I am led to believe that these earlier cases rest on the conclusion — often unstated, but sometimes explicit — that drug purchase calls are inherently reliable. It may be that these decisions reflect an implicit judicial consensus, emerging from multiple decisions over multiple decades, that because such evidence is reliable more often than not, it can safely be categorized as non-hearsay. Feldman J.A. made a similar point in her reasons (para. 131).

[88] The case of *Edwards, supra* offers a helpful example of an explicit conclusion as to the reliability of these calls. In that case, the issue was whether “a number of calls [to the accused’s phone] from people ordering small amounts of crack cocaine” were admissible to prove the accused was a drug dealer (p. 243). Although McKinlay J.A. concluded that the evidence was not being introduced to prove the truth of its contents and thus was not hearsay, in the alternative, she held that the evidence was admissible under the principled approach:

In my view, the evidence in issue fulfils these criteria. It was necessary to prove the nature of the appellant’s drug activities, and they could not have been proven in this case in any other way that was available to the police. They did not know the identity of the callers, and, in any event, it is unlikely the callers would have testified if their identity had been known. The evidence is reliable, because it was made under circumstances which negate the possibility that the requests were spurious ones. The callers were led to believe that the persons to whom they were speaking (the police) were speaking on behalf of the appellant. [Emphasis added; para. 23.]

[89] To the extent the other cases reflect McKinlay J.A.’s view about the reliability of such calls, they align with explicit conclusions to the same effect made by regulation or statute in other jurisdictions. See, e.g., *Federal Rules of Evidence* (U.S.), Rule 801; *Criminal Justice Act 2003* (U.K.), 2003 c. 44, s. 115. As one leading treatise on the U.S. *Federal Rules of Evidence* observed in explaining the Rules’ blanket exclusion of implied assertions from the definition of hearsay:

[W]hen a person acts in a way consistent with a belief but without intending by his act to communicate that belief, one of the principal reasons for the hearsay rule — to exclude declarations whose veracity cannot be tested by cross-examination — does not apply, because the declarant’s sincerity is not then involved. [Emphasis added.]

(J. B. Weinstein, *Weinstein’s Evidence: Commentary on Rules of Evidence for the United States Courts and for State Courts* (loose-leaf), vol. 4, at § 801(a)(01))

See also *McCormick on Evidence* (7th ed. 2013), vol. 2 (arguing the Rule 801 definition is “a compromise between theory and the need for a relatively simple and workable definition in situations where hearsay dangers are generally reduced” at p. 208-9); I. H. Dennis, *The Law of Evidence* (4th ed. 2010) (arguing that because “hearsay dangers are often significantly reduced in cases of implied assertions, there is no compelling systemic reason for applying the hearsay rule to them”, at p. 710).

[90] Indeed, the Law Reform Commission of Canada’s proposed *Evidence Code* of 1975 proceeded on the same basis. Its definition of hearsay thus excluded implied assertions, whether verbal or non-verbal. See *Evidence Code*, s. 27(2)(b) in *Report on Evidence* (1975). The commissioners — including Antonio Lamer, who

would go on to become a principal architect of the principled approach to hearsay — concluded:

Under the definition, . . . a person's words or conduct are not hearsay if he did not intend them to be assertive. In assessing the reliability of such evidence account may have to be taken of the dangers of hearsay evidence. . . . [U]nlike conscious assertions, a person is seldom likely to be deliberately misleading when he engaged in non-assertive activity, which is the most important danger associated with hearsay. In defining hearsay to exclude non-assertive conduct the Code follows the better view of the present law. [Emphasis added; p. 69.]

[91] The above reasoning, however, suffers from one important drawback. That is because when we speak about hearsay in a case such as this one, a distinction must be drawn between the *fact* that something is true and the declarant's *belief* that it is true. As Professor McCormick observed:

It is only where the statement is offered as the basis for the inferences, first, that the declarant *believed* it, and, second, that the facts were in accordance with his belief, that the evidence is hearsay. [Emphasis in original.]

(C. T. McCormick, "The Borderland of Hearsay" (1930), 39 *Yale L.J.* 489, at 490))

[92] Our concerns with respect to the reliability of the hearsay statement are thus two-fold. First, there is the concern that the declarant may not *believe* what she is saying and thus may be consciously lying (the sincerity hearsay danger). Second, even though she may believe what she says, she may be *mistaken about the facts* of what she is saying (the perception, memory, and narration dangers). As some

scholars have observed, it is this second concern that has at times been overlooked. See, e.g., S. Schiff, “Evidence—Hearsay and the Hearsay Rule: A Functional View” (1978), 56 *Can. Bar. Rev.* 674, at p. 683, n. 33 (criticizing the *Evidence Code* definition for “ignor[ing] every reason for the hearsay rule except the danger that the declarant may have been insincere”).

[93] It seems to me that this second ground of concern is what led to the decision in *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.). In that case, the Crown sought to tender evidence that while the police were at the accused’s home, “a man came to the door asking for ‘Rob’ and seeking to buy drugs” (p. 104). The accused’s name was Robert Wilson. The trial judge admitted the evidence on the strength of *Edwards*, but the Court of Appeal reversed. McMurtry C.J.O. reasoned that it was “dangerous” and “unsafe” to draw an inference that the accused was a drug dealer from a single visit (pp. 104-5).

[94] Significantly, however, McMurtry C.J.O. was untroubled by the result in *Edwards*. In his view, the evidence of “ten separate calls” in that case permitted an “irresistible inference” about the nature of that accused’s activities (p. 104). Thus, while it is possible that one individual could be mistaken in believing that the person he called (or called on) was a drug dealer, one would be hard-pressed to conclude that *ten* such people could *all* be mistaken. See D. M. Paciocco and L. Stuesser, *The Law of Evidence* (6th ed. 2011), at p. 111-12; Dennis, at pp. 707-9.

[95] In other words, the distinction between *Edwards* and *Wilson* is that the evidence in one case was judged to be *reliable* and the evidence in the other was not. It was that assessment that dictated the answer with respect to admissibility — and that, as I see it, is the assessment we should be focusing on.

C. *What is the Role of Necessity?*

[96] I turn then to the question of necessity. It bears recalling that “the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability” (*Khelawon*, at para. 2 (emphasis added)). That, of course, is not to suggest that we have ousted necessity as a prerequisite to the admission of hearsay evidence. We have not. But what we have said is that “necessity and reliability should not be considered in isolation” because “[o]ne criterion may have an impact on the other” (para. 77). Indeed, we have recognized that “[i]n the interest of seeking the truth, the very high reliability of [a] statement [can render] its substantive admission necessary” (at para. 86 (emphasis added), citing *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (“*K.G.B.*”), and *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764). That is the principle I would apply here.

[97] My colleague, however, sees a broader role for necessity in cases such as this one. He quotes Charron J. in *Khelawon*, at para. 104, for the proposition that “in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the

evidence of the declarant in a manner that also preserves the rights of the other party” (emphasis added). On that basis, he concludes, at para. 68:

This is the kind of “appropriate case” contemplated by *Khelawon*. And the answer is that the police *made no effort at all* to secure the evidence of the declarant: they never sought to interview or even find him, though *he gave them his address*. [Italics in original; underlining added.]

[98] With respect, I am not at all sure that this is the kind of “appropriate case” Charron J. had in mind when she said what she said in *Khelawon*.

[99] The declarant in *Khelawon* was a frail 81-year-old who was living in a retirement home after having suffered a stroke. He died before trial and thus could not be called to testify, but the Crown sought to introduce, under the principled approach, an unsworn videotaped statement he made to the police during the course of their investigation. It was in that context that Charron J. observed, at para. 104:

Although Mr. Skupien was elderly and frail at the time he made the allegations, there is no evidence that the Crown attempted to preserve his evidence by application under ss. 709 to 714 of the *Criminal Code*. He did not testify at the preliminary hearing. The record does not disclose if he had died by that time. In making these comments, I do not question the fact that it was necessary for the Crown to resort to Mr. Skupien’s evidence in hearsay form. Necessity is conceded. However, in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. That issue is not raised here. [Emphasis added.]

[100] It seems to me that Charron J. was making the point that even though the police should reasonably have anticipated that the declarant might not be able to attend the trial — “Mr. Skupien was elderly and frail” — they did nothing to secure his evidence in a better form even though they knew he was likely to be cooperative and forthcoming. As Charron J. noted, ss. 709 to 714 of the *Criminal Code* “expressly contemplate this eventuality and provide a procedure for the taking of the evidence before a commissioner in the presence of the accused or his counsel thereby preserving both the evidence and the rights of the accused” (para. 7 (emphasis added)).

[101] The facts in *Khelawon* are thus a far cry from the facts in the case at hand — and because of that, care should be taken before we start accepting that a perfectly reasonable request of the police in one set of circumstances will necessarily translate into an equally reasonable request in other circumstances.

[102] And that, in my respectful view, is where the analogy to *Khelawon* breaks down. In *Khelawon*, the police were dealing with a known declarant who was fully cooperative and forthcoming. Here, the declarant was unknown and even if the police had been able to find him — a big “if” — there is no reason to believe that he would have been forthcoming and cooperative. Indeed, the opposite is more likely to be true.

[103] With that in mind, it bears recalling that, as Charron J. herself observed shortly after *Khelawon*, the test for necessity is not whether the hearsay statement is

the best form of the evidence (for that will always be live testimony), but whether it is the “best available form” in the circumstances (*R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 79 (emphasis added)).

[104] The question that arises then is: should we be requiring the police, in the name of necessity, to track down unknown and often unknowable declarants, who are unlikely to be found and unlikely to be forthcoming and cooperative in the event they are found?

[105] The answer, I believe, is found in *Edwards*, where McKinlay J.A. observed:

[The police] did not know the identity of the callers, and, in any event, it is unlikely the callers would have testified if their identity had been known. [p. 249]

In my respectful view, McKinlay J.A.’s logic remains sound, even on the facts here.

[106] Although it is true the police in this case had the benefit of the caller’s address, the caller’s identity was still unknown. Surely, the police were not going to show up at 327 Guy St. and ask who there was looking to buy drugs from Chris Baldree. Apart from officer safety concerns, the likelihood of the police finding the declarant would seem slim. And the prospect of the declarant being forthcoming and cooperative, if found, would seem even slimmer. An undercover drug buy would be

even more problematic, given the number of officers who would be needed to see it through and the obvious risks to the officer safety inherent in such an operation.

[107] Under either option, the game would hardly be worth the candle. And that, in my view, provides a full answer to the concern that the police offered no explanation as to why they made no efforts to locate the declarant. With respect, no explanation was necessary — common sense provides one. If there is little chance of finding the declarant, and little chance that, if found, he or she will be forthcoming and provide the police with evidence in a better form than the call itself (such as a *K.G.B.* statement or testimony in court), the necessity criterion will have been met.

[108] Equally problematic is the suggestion by my colleague that *even where there are multiple callers*, the police could be expected to go out and seek to persuade *at least some* of them to testify (para. 72). With respect, absent evidence of collusion, I see that as being wasteful. It amounts to little more than tipping our hat to necessity for necessity's sake. That has not been, and should not be, what the test for necessity requires.

[109] At bottom, the point is that the necessity criterion is not meant to stifle the admission of reliable evidence. Rather, it is “founded on society’s interest in getting at the truth” (*Khelawon*, at para. 49). Necessity should be viewed as a servant of the truth, not its master. For that reason, in cases such as this one — where the prospect of locating, identifying, and receiving accurate information from a forthcoming and cooperative caller is remote — if the evidence is reliable, it should be admitted

because its reception into evidence will be necessary in order to get closer to the truth. If the evidence is not reliable, it should be excluded. Either way, in my view, the focus should be reliability.

D. *Was This Call Reliable?*

[110] The reliability of a particular hearsay statement can be tested by looking at, among other things, the circumstances in which the statement came about. One may look for indicia of reliability within the four corners of the statement. The law also provides that indicia of reliability may be found outside the statement in the form of confirmatory evidence (*Khelawon*, at para. 100).

[111] The Crown maintains that this call was sufficiently reliable to warrant its reception. In particular, the Crown relies on the absence of any evidence that “the caller was motivated by anything other than a desire to purchase drugs” and the argument that the “spontaneity of the conversation was made under circumstances where an intentional lie was remote” (A.F., at para. 82).

[112] This argument has something to it. As I indicated above, there is good reason to believe that the sincerity hearsay danger is reduced in cases such as this one. That said, Mr. Baldree argues that the circumstances in which this call came about are sufficient to warrant concern that this call may have been “made to throw suspicion” on him (R.F., at para. 85).

[113] As the record reveals, there was initially some uncertainty about the respective roles of Mr. Baldree and the other Chris in this case, Christopher Anderson, as to the drugs found in the apartment. Sgt. Martelle testified that Mr. Anderson was known to be “deal[ing] in . . . those types of drugs” (A.R., vol. II, at p. 106). He was apparently a man of some repute, known “on the streets” as “the Mexican” (at p. 59).

[114] On its own, Mr. Baldree’s argument is insufficient to impugn the reliability of this call. He has not suggested, for example, how Mr. Anderson or anyone else could have arranged for a fabricated call when the police seized all cell phones at the time of the arrests and no persons were released by the police until *after* the call was received. Had either of Mr. Anderson’s two associates been released by the police *before* the call was received on Mr. Baldree’s phone, it would have been a different matter. But those are not our facts.

[115] I caution thus against inferring suspicious circumstances in these types of cases absent any evidence suggesting as much. If that were our approach, many of our time-tested hearsay exceptions would unravel. To state the obvious, a dying man does not lose his ability to lie. And yet, in the case of dying declarations, we do not indulge in speculation about potential fabrication. Instead, the law recognizes that a motive to lie in such circumstances is at best remote (*R. v. Woodcock* (1789), 1 Leach 500, 168 E.R. 352 (K.B.), at p. 353. In other words, we recognize a norm of human behaviour for what it is — a norm.

[116] In sum, because our rules are not designed around theoretical possibilities but practical realities, a drug purchase call by mere dint of being a drug purchase call should not raise suspicions of fabrication. While the onus remains on the proponent of the evidence to establish that the evidence is sufficiently reliable to warrant its reception, I would suggest that “it falls to the person opposing the evidence to show circumstances of suspicion” (*R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 8, *per* McLachlin C.J.). Here, the record does not reveal a sufficient basis to worry about the circumstances in which the call to Mr. Baldree’s phone came about.

[117] Examining the sincerity of this caller’s belief, however, does not end the matter — and ultimately this is where the Crown’s argument in this case falls short.

[118] Here, the Crown sought to introduce the drug purchase call to establish not merely that the caller *believed* that Mr. Baldree was a drug trafficker (evidence of limited value to the Crown’s case), but that Mr. Baldree was *in fact* a drug trafficker (evidence of significant value). Indeed, though he characterized it as circumstantial evidence, the trial judge here correctly recognized that the evidence was being used to establish that *Mr. Baldree was “engaged in the trafficking of drugs”* (A.R., vol. I, at p. 23 (emphasis added)). It was on the basis of *that fact* that the Crown sought an inference that Mr. Baldree was in possession of the cocaine and marihuana found in the apartment.

[119] The problem with the Crown’s argument is that it says little about the reliability of the assertion that Mr. Baldree is in fact a drug trafficker. The argument

is more successful with respect to the fact that the caller *intended to purchase drugs*. Accordingly, the statement would have been admissible as a statement of present intention if the Crown had sought to introduce it for *that* purpose (see, e.g., *R. v. Ly*, [1997] 3 S.C.R. 698). But, as Feldman J.A. observed, that is not why the Crown sought to introduce this evidence (para. 144).

[120] Put another way, the problem with the Crown's argument is that even if the caller was entirely sincere in his belief that Mr. Baldree was a drug dealer, that does not address *why the caller believed what he believed* — and whether his belief was in fact true or not. This is not a case of multiple calls, where common sense tells us that the probability of numerous callers all being mistaken is unlikely. Nor do we have sufficient indicia of reliability, either within the statement or in the form of confirmatory evidence outside the statement.

[121] Accordingly, and absent more, it thus seems to me a bridge too far to accept the Crown's argument that this call meets threshold reliability thereby justifying its admission as substantive evidence that Mr. Baldree was engaged in drug trafficking.

E. *Can a Single Call Ever Be Reliable?*

[122] Just because the single call here did not meet the threshold test for admissibility, it does not follow that multiple calls are *required* to establish as much. Indeed, it is perfectly consistent with the principled approach that even a single drug

purchase call may meet that threshold. I will attempt to explain why using the facts of this call as an example.

[123] As I mentioned earlier, what is missing in this call is some assurance that Mr. Baldree was *in fact* a drug dealer. There are insufficient circumstantial guarantees of trustworthiness within the call itself and little or no external confirmatory evidence. However, if the caller had declined the offer of delivery and instead asked “if I can drop by Eric’s apartment to pick up the drugs”, that may have been sufficient because it would have indicated greater familiarity with Mr. Baldree and his activities, including contemporary knowledge of his recent move to Mr. Lepage’s apartment. A debt list at Mr. Lepage’s apartment with Mr. Baldree’s fingerprints on it may also have done the trick because it would have served as confirmatory evidence of Mr. Baldree’s involvement in drug trafficking. One can imagine other scenarios.

[124] My point is simply that had the circumstances been somewhat different, there may well have been a satisfactory basis for evaluating whether the caller *believed* Mr. Baldree was a drug dealer *and* whether that belief was *in fact* true. That is what threshold reliability requires. Setting aside the facts of this case, we do not know what the circumstances of some future call might be. I would thus caution against the notion that only multiple calls can be reliable.

III. Conclusion

[125] Subject to these comments, I join the reasons of my colleague. Accordingly, I would dismiss the appeal.

Appeal dismissed.

*Solicitor for the appellant: Public Prosecution Service of Canada,
Brampton.*

Solicitors for the respondent: Foord Davies, Ottawa.

Solicitor for the intervener: Attorney General of Ontario, Toronto.