2022

Admissibility of Hearsay Gathered Under MLAT: A Tempest in Canada

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ADMISSIBILITY OF HEARSAY GATHERED UNDER MLAT: A TEMPEST IN CANADA

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Accepted: 15 December 2022

ABSTRACT: One of the most pervasive and longstanding problems in the practice of mutual legal assistance in criminal matters between states has been 'form of evidence' – specifically, can the requested state provide evidence in such form as will be useful and admissible under the criminal evidence laws of the requesting state? It tends to be common law states that have difficulties with admissibility of MLAT-sourced evidence, and these often develop 'work-arounds' in their laws which attempt to relax admissibility standards. Canada is one such state, but a series of recent prosecutions has revealed judicial resistance to the tools employed. This note examines these cases and suggests some lessons they contain for broader practice.

Key words:
- mutual legal assistance in criminal matters
- inter-state cooperation
- evidence, law of
- domestic implementation of transnational criminal law
- Canada

1. INTRODUCTION

Once touted as 'the fastest growing business in the criminal justice field,'[1] mutual legal assistance (MLA) in criminal matters is now a well-established mode of inter-state cooperation in the suppression of crime.[2] It is a feature of bilateral,[3] regional,[4] and global regimes that are designed to facilitate evidence-gathering and prosecutions for offences that have transnational aspects.[5] It certainly has its modern-day travails, in particular the concern that MLA arrangements are too

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1 Kimberly Prost, 'Breaking Down the Barriers: International Cooperation in Combating Transnational Crime' (1998), copy on file with author.

2 See generally John AE Vervaele, 'Mutual Legal Assistance in Criminal Matters to Control (Transnational) Criminality' in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge, 2015) 121; Kimberly Prost, 'The Need for a Multilateral Cooperative Framework for Mutual Legal Assistance' in Larissa Van Den Herik & Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (CUP 2013) 93; Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, OUP 2020).

3 There are extensive networks of bilateral MLA treaties, which are usually referred to by the acronym 'MLATs.'

4 For example, the Inter-American Convention on Mutual Assistance in Criminal Matters (1992) OAS Treaty Series No 75; the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters (1992) 2329 UNTS 301.

5 By this, I refer to the major crime suppression conventions which have global reach, and which contain MLA provisions that the parties can use as between themselves if they do not have access to bilateral treaties; three of the most important are: the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1582 UNTS 95 (1988) (Vienna Convention); United Nations Convention Against Transnational Organized Crime, 2225 UNTS 209 (2000) (UNTOC); and the United Nations Convention Against Corruption, 2349 UNTS 41 (2003) (UNCAC).

slow-moving and administratively unwieldy to accommodate investigational needs in cyber-crime cases and cases involving electronic evidence generally.[6] Despite this, however, it is a fairly ubiquitous tool in the criminal cooperation toolbox and likely to remain so for the foreseeable future.

MLA is, of course, designed to allow the authorities of a state on the territory of which evidence can be found (the 'requested state') to gather and send evidence to a foreign state which requires it for use in a prosecution (the 'requesting state'). This addresses the sovereignty concerns which would arise from police or other officials in one state attempting to unilaterally gather evidence on the territory of another, which would offend the prohibition on extraterritorial enforcement jurisdiction. From early days, however, MLA practice has experienced irritants, a major one being form of evidence – to wit, the requested state might be perfectly willing to gather and send evidence to the requesting state, but potentially not in a form that is ideal or even acceptable to the latter, from the point of view of admissibility in court. Managing these problems can require busy and often-overworked officials to make tricky inquiries into whether gathering or compiling the evidence in a way that suits a foreign state's law is possible under their own law.[7] The overall issue is that the criminal justice systems of states do not 'speak each other's language' – they are not interlocking or compatible enough.[8]

One flashpoint for this kind of conflict is hearsay evidence, defined for current purposes as evidence of statements made by individuals out of court, introduced at trial to prove the truth of the contents of the statements.[9] Common law states have historically taken a fairly restrictive approach to the admissibility of hearsay, typically by making it presumptively inadmissible subject to exceptions. Civil law states and states with otherwise inquisitorial trial systems, by contrast, tend to take a very relaxed approach to admitting hearsay and tend simply to give hearsay statements the weight to which the court feels they are entitled.[10] Accordingly, police investigational methods in civil law states (and those with other systems, as well) might very well generate a fair bit of hearsay evidence, and it can be difficult for those states to produce evidence under an MLAT request that is as useful as the requesting state would like.

Criminal law is intrinsic to state sovereignty and, as has often been said, states tend to be quite chauvinistic about their own versions and suspicious of others.[11] Needless to say, states do not always take kindly to requests to tailor their criminal procedure to the formal requirements of foreign legal systems, and sometimes simply cannot accede to such requests under their domestic constitutional arrangements or lower-level laws. The resulting practical burden has been on common law states to formulate work-arounds for hearsay evidence received under MLAT.[12] As discussed in further detail below, Canada is one of those states; its domestic statute implementing

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6 Gail Kent, 'The Mutual Legal Assistance Problem Explained' (*Centre for Internet Law & Society*, 23 February 2015) <https://cyberlaw.stanford.edu/blog/2015/02/mutual-legal-assistance-problem-explained> accessed 16 January 2023.

7 Interesting and relevant examples are canvassed in UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012) at 14.

8 ibid 16.

9 See generally Mirjan Damaska, 'Of Hearsay and its Analogues' (1992) 76 Minnesota Law Review 425.

10 See Bruce Zagaris, 'United States on Mutual Legal Assistance in Criminal Matters' in M Cherif Bassiouni, *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Nijhoff 2008) 385; Jeremy A Blumenthal, 'Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective' (2001) 13 Pace International Law Rev 93.

11 Markus Dubber, 'Comparative Criminal Law: Histories, Functions, Topics' (4 January 2018), 2–3, available SSRN <https://ssrn.com/abstract=3096540> accessed 16 January 2023.

12 Boister (n 2) 326–7.

its various MLATs contains provisions meant to ease the admission of hearsay that is received via a treaty request. Of late, however, Canadian Crown prosecutors have encountered difficulties with this machinery, in the form of a series of court decisions holding that the statutory provisions have gone too far in relaxing admissibility standards – to the point that they render trials unfair and thus fall afoul of the constitutionally-protected rights of the accused.

This short article will offer a review of these recent developments in Canada, as a means of illuminating relevant state practice in the often-murky world of inter-state criminal cooperation generally and MLA practice in particular. The legal findings discussed are, to some extent, driven by the peculiarities both of Canada's hearsay law and the wording of the statute implementing the MLA obligations. Nonetheless, there are instructive points of general application that emerge.

2. CANADIAN HEARSAY LAW

While this article cannot offer detailed observations on comparative criminal evidence law, it is worth highlighting the point that among the two dominant legal systems – common law and civil law – contrasting approaches are taken to trial evidence. Civilian systems tend to be quite generous towards the admissibility of evidence, with the fact-finder (typically a judge or investigating magistrate) simply assigning items of evidence the significance they are felt to deserve. In common law states, by contrast, evidence law generally contains a fairly rigid set of rules that exclude or carefully manage certain kinds of evidence due to concerns about its probative value; classic examples are character, opinion and, most relevant here, hearsay.

Importantly, the common law imposes a division of labour between the 'trier of law' (the judge) who makes decisions as to whether evidence is admissible, and the 'trier of fact' (the jury, or the judge in a judge-alone trial), which makes the findings of fact based on its evaluation of the admissible evidence (usually referred to as 'weighing'). The restrictive admissibility rules are primarily designed, then, to "protect" the trier of fact from the prejudicial effect that might result from admitting suspect evidence. For the purpose of admitting documentary evidence, the common law traditionally maintained a distinction between authentication (the question of whether evidence proffered by a party truly is what that party claims it to be) and admissibility (will the evidence be 'admitted,' that is, placed before the trier of fact to be used in its determinations regarding the facts of the case). Canadian evidence law essentially has all of the features described above.

In order to explain comprehensibly the MLAT case law being discussed here, a basic review of Canadian hearsay law is required.[13] As noted, Canada is a common law state and Canadian evidence law is almost entirely sourced in the common law, which is lightly modified by statute. Consistently with its common law heritage, Canada takes a restrictive approach to hearsay and has historically treated hearsay as presumptively inadmissible, subject to certain well-trodden exceptions. Beginning in roughly 1990, however,[14] the Supreme Court of Canada reshaped hearsay law along two axes: the 'principled approach' to evidence law, and the constitutionalization of the right to a fair trial. Each of these bears brief explanation.

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[13] I will not provide extensive citations to the relevant authorities or literature on Canadian hearsay law. The best general resources are: David M Paciocco, Palma Paciocco & Lee Steusser, *The Law of Evidence* (8th ed, Irwin Law, 2020) ch 4; Sidney N Lederman, Alan Bryant & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence* (5th ed, LexisNexis Canada, 2018) ch 6; Peter Sankoff, *The Law of Witnesses and Evidence in Canada* (Thomson Reuters, 2019); and David Tanovich, Louis Strezos & the Hon S Casey Hill, *McWilliams' Canadian Criminal Evidence* (Looseleaf edn, Carswell, 2013) ch 7.

[14] With its decision in *R v Khan* [1990] 2 SCR 531.

The 'principled approach' rested on the Court's recognition that the traditional approach to admitting evidence – essentially, rules barring admission which were subject to exceptions – was overly crude because it would not always respond to the factual situations at play in individual cases, and could result in both under- and over-exclusion of evidence.[15] The better course was to formulate higher-level 'principles' that would illustrate both the potential probative value and prejudicial effect of particular types of evidence; the detailed balancing of these was properly left to the trial judges charged with admissibility decisions, for evaluation in a manner suited to the case before them.

So far as hearsay went, the Court drew on the writing of Professor JH Wigmore and distilled the principles of admitting hearsay into twin criteria of 'necessity' and 'reliability.' Though presumptively inadmissible, a hearsay statement can be admitted if it is necessary (the original maker of the statement is unavailable or evidence of similar value cannot be introduced) and reliable (the statement was made in circumstances that would tend to make it safe for the trier of fact to rely on it as being true or accurate, or, there are sufficient procedural means available to test the reliability of the statement at trial). Through this lens, the traditional exceptions (for example, dying declarations, spontaneous utterances, and so on) could be seen as specific applications of necessity and reliability; moreover, the Court fashioned a residual exception under which a hearsay statement not fitting a traditional exception could nonetheless be admitted if it was necessary and displayed indicia of reliability.

As the Court developed its approach, it was explicit that this more nuanced and rigorous approach to hearsay admissibility was driven in part by fair trial considerations. The right of accused persons to a fair trial, which had always been enjoyed at common law, became a constitutional norm with the 1982 introduction of the Canadian Charter of Rights and Freedoms.[16] The Court's overall approach has been to use this Charter requirement (specifically found in sections 7 and 11(d) of the Charter) to discipline the law of evidence, on the intuitive notion that defective or unfair admissibility rules increased the danger of unfair trials. Regarding hearsay, as early as 2000 the Court noted that: 'It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.'[17] In its 2006 decision in *R v Khelawon*,[18] which is still the leading decision regarding the admissibility of hearsay, the Court provided the specific linkage:

> The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As

[15] See Robert J Currie, 'The Evolution of the Law of Evidence: Plus Ça Change…?' (2011) 15 Canadian Criminal Law Review 213.
[16] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[17] *R v Starr* 2000 SCC 40 [200].
[18] 2006 SCC 57.

> in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.
> [….]
> Prior to admitting hearsay statements under the principled exception to the hearsay rule, the trial judge must determine on a *voir dire* that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*…. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial…. The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach.[19]

The fundamental take-away point, then, is that the inappropriate admission of hearsay endangers the accused's right to a fair trial, a fundamental right which is protected under the highest law of the land; and that the admissibility of hearsay is primarily based on screening it for its necessity and reliability. From a remedial point of view, in Canadian constitutional law any statute that breaches a Charter right, on its face or in its operation, is subject to being 'struck down,' that is, ruled to be unconstitutional and declared to be 'of no force and effect.'[20]

3. CANADIAN MLAT LAW

Canada is party to approximately 58 bilateral MLATs, and also to a substantial number of multilateral criminal suppression conventions which contain MLA provisions, such as the UNTOC.[21] Canada takes a transformationist approach to the implementation of treaty obligations, and all of its MLA obligations are implemented via the Mutual Legal Assistance in Criminal Matters Act,[22] a federal statute with application across all criminal and federal regulatory proceedings. For cases where Canada is the requesting state, part II of the Act contains a small suite of provisions designed to ease the admissibility at trial of foreign-gathered records or 'things,' as well as presumptions of admissibility for documentation which purports to authenticate the records or things.

Of particular interest here is section 36, which provides:

> **Foreign records**
> **36 (1)** In a proceeding with respect to which Parliament has jurisdiction, a record or a copy of the record and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record, sent to the Minister by a state or entity in accordance with a Canadian request, is not inadmissible

[19] ibid [3], [47].

[20] See generally Kent Roach, 'Enforcement of the *Charter*: Subsections 24(1) and 52(1)' in Errol Mendes & Stéphane Beaulac (eds), *Canadian Charter of Rights and Freedoms* (5th ed, LexisNexis, 2013) 1123; Peter Hogg *Constitutional Law of Canada, Fifth Edition* (5th looseleaf edn, Thomson Reuters, 2007) §40.1.

[21] Above n 5. The Government of Canada has a searchable treaty repository, in which all MLATs and related treaties can be found, <https://treaty-accord.gc.ca/index.aspx> accessed 16 January 2023.

[22] RSC 1985, c 30 (4th Supp) (the Act).

> in evidence by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion.
> **Probative value**
> **(2)** For the purpose of determining the probative value of a record or a copy of a record admitted in evidence under this Act, the trier of fact may examine the record or copy, receive evidence orally or by affidavit, or by a certificate or other statement pertaining to the record in which a person attests that the certificate or statement is made in conformity with the laws that apply to a state or entity, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the state or entity, including evidence as to the circumstances in which the data contained in the record or copy was written, stored or reproduced, and draw any reasonable inference from the form or content of the record or copy.

For present purposes, on its face section 36 attempts to accomplish two things: under subsection (1), the contents of documents ('records') obtained from foreign states via MLAT are not inadmissible simply on the basis that those contents amount to hearsay; and subsection (2) provides that the court may take a wide variety of evidence into account as it determines what use it will make of the document, that is, what 'probative value' it will assign to it as it weighs the evidence. It is not illogical to read this as a direction that foreign-sourced hearsay is automatically admissible and that all of the considerations that might normally go to admissibility are instead assigned to how the trier of fact weighs the evidence.

Indeed, surveying the case law reveals that it is exactly this interpretation that the Crown has urged on the courts for many years. However, this position has mostly been staunchly resisted by the courts,[23] essentially on the basis that the admissibility of evidence is based in the inherent jurisdiction of the courts and not lightly removed by Parliament; and in particular that the courts always maintain the discretion to exclude evidence the probative value of which is outweighed by its prejudicial effect, since to provide otherwise would endanger trial fairness and thus run afoul of sections 7 and 11(d) of the Charter.[24]

Nonetheless, the Crown has continued to make the argument for the automatic admissibility of MLAT-sourced hearsay, based on the wording of section 36. This strategy backfired spectacularly in a complex human smuggling case in the Canadian province of British Columbia, to which I will now turn.

4. WHEN CHICKENS CAME HOME TO ROOST: *CHRISTURAJAH/RAJARATNAM*

In *R v Christurajah*,[25] the four accused were tried for allegedly smuggling undocumented migrants from Thailand to Canada.[26] The Crown sought to adduce in evidence a number of records received

[23] See, for example, *R v Armour Pharmaceutical* [2007] OJ No 5846 (Ontario Superior Court of Justice); *R v Boyce* 2019 ONCA 828 (Ontario Court of Appeal).

[24] As far back as *R v Corbett* [1988] 1 SCR 670 and *R v Potvin* [1989] 1 SCR 525, the Supreme Court of Canada has maintained that the Charter mandates the continuation of this power.

[25] 2016 BCSC 2400 (Supreme Court of British Columbia), affirmed on appeal, *R v Rajaratnam* 2019 BCCA 209 (British Columbia Court of Appeal). The case name changed on appeal because one of the accused, Christurajah, was the subject of a separate procedural remedy, and his case became uncoupled from that of the other three. Accordingly, I will refer to the trial level decision as *Christurajah* and the appeal decision as *Rajaratnam*.

[26] Specifically, they were charged with 'knowingly organizing, inducing, aiding, or abetting the coming into Canada of persons not in possession of a passport or other required travel documents' under s 117 of Canada's Immigration and Refugee Protection Act, SC 2001, c 27.

from the government of Thailand via an MLAT request, including police records regarding the arrests of three of the accused in Bangkok, as well as travel, purchase and ownership documents relevant to the investigation, all attached to affidavits executed by a Thai police investigator. The documents contained both a great deal of hearsay and some statements of opinion. The accused made a motion to have the court declare that sections 36(1) and (2) of the Act were unconstitutional and of no force and effect, on the basis that they did not allow for appropriate screening of hearsay evidence and thus violated the right to trial fairness under sections 7 and 11(d) of the Charter.

In response, the Crown argued that the impugned sections simply removed the hearsay or opinion rules as the basis for excluding the evidence, and that it could still be excluded if it would breach another rule of evidence (for example, character), or if its probative value outweighed its prejudicial effect for some other reason than that it was hearsay or opinion. Moreover, section 36(2) gave the trier of fact some discretion over how to weigh the evidence, and from a policy point of view it was important that the Crown have 'effective tools for combatting international crime.'[27]

The trial judge, Ehrcke J, accepted the defence position and granted the motion. Reviewing the hearsay law outlined above, he affirmed that screening hearsay on the basis of necessity and reliability had a fundamental constitutional aspect, because admitting unreliable hearsay endangered both the right to full answer and defence and, ultimately, the right to a fair trial.[28] He noted that while Parliament had occasionally chosen to create statutory hearsay exceptions applicable in criminal cases, when it did so it built in safeguards and protections that preserved the ability of the trial judge to ensure that it was reliable enough to put before the trier of fact. For example, the exception for business records requires proof that the records were kept and relied upon in the ordinary course of business and excludes records emanating from investigations in contemplation of legal proceedings,[29] while the exception for admitting a transcript of testimony from certain kinds of previous court proceedings rests on the accused having had the ability to fully cross-examine the earlier witness.[30]

Turning to section 36, Ehrcke J reviewed the limited case law on the interpretation of section 36 and accepted that, despite the complex wording of the provision, the proper interpretation was that, 'although the section does not make compliant foreign records automatically admissible, it does have the effect of eliminating the need to establish the twin criteria of necessity and threshold reliability.'[31] In the end, this was its constitutional flaw. Justice Ehrcke noted that there were only two reliability 'protections' in section 36, and both were inadequate. First, the evidence must have been received in response to an MLAT request, which meant that a treaty was in place; this, he noted, 'will presumably eliminate the admission of records from manifestly corrupt and oppressive countries, since Canada would be unlikely to have concluded a treaty with such regimes.'[32] However, this provided little protection, since the kind of evidence sought to be introduced here could not be introduced by the government of Canada, either. 'Why,' Ehrcke J asked, 'should it be easier for the Crown to adduce foreign hearsay records than Canadian records?'[33]

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27 *Christurajah* (n 25) [21].
28 ibid [26]–[28].
29 ibid [44], [45].
30 ibid [47].
31 ibid [39].
32 ibid [49].
33 ibid [50].

Second, in section 36(2) the trier of fact was given discretion to consider the probative value of the evidence, which meant they could reject it if they found it to be unreliable. However, Ehrcke J opined, this was no substitute for scrutiny at the admissibility stage by the trial judge – whose role it is to keep unreliable hearsay from being placed before the trier of fact in the first place.[34] Accordingly, the provision was struck down as unconstitutional.

Ehrcke J's findings were upheld on appeal by the British Columbia Court of Appeal.[35] The Court's judgment is somewhat revealing of the difficulty the Crown was having with the case, as it notes among other things the fact that the judgment under appeal had, in fact, been a result of the Crown's fourth attempt to adduce the documents, not all of which were even provided in English translation. The earlier attempts had featured recorded audio-video testimony by the officer from Thailand, which Ehrcke J had refused to put before the jury because of sound quality problems,[36] as well as the eventual refusal of the officer to come to Canada or testify via video link.[37]

On appeal, the Crown had narrowed the range of the documents it sought to adduce, because it recognized the 'problematic' nature of many of the documents containing opinion and hearsay, and now only sought to adduce two printouts of travel history relating to two of the accused. However, it renewed its argument that hearsay received in response to an MLAT request did not have to meet the requirements of necessity and reliability, arguing on policy grounds that this 'does no more than "relax … the rigid grip of Canada's hearsay law on the admissibility of foreign evidence."'[38] In a shifting of its argument in the court below, the Crown contended that the provision was still constitutional, because the trial judge retained the ability to exclude the evidence if its prejudicial effect outweighed its probative value – including any hearsay or opinion content.

The Court began its analysis by noting that the provision had been part of the Act in its original form, which came into effect in 1988, a long time prior to when the principled approach to hearsay evidence had taken hold (and a point to which I will return below). Therefore, like Ehrcke J, the Court of Appeal agreed with the Crown's construction of the meaning of the provision:

> We agree with the Crown that s. 36 precludes a successful objection to the admissibility of a document solely on the basis that it contains hearsay or an opinion, which is a form of hearsay. We also agree with the Crown that, by reason of s. 36, a document containing hearsay can be tendered for the truth of its contents without the need to establish the evidence either falls within a recognized common law exception to the hearsay rule or meets the requirements of the principled approach to hearsay. To use the travel histories as an example, the Crown says because those documents were provided in response to a mutual legal assistance request they can, without more, be used to prove: (a) when the person whose name appears on the document entered or departed from Thailand; (b) the passport the person used; (c) the visa used (if any);

[34] ibid [52].
[35] *Rajatnaram* (n 25).
[36] ibid [77].
[37] ibid [79].
[38] ibid [131].

> (d) where the entry or departure occurred (e.g., airport or checkpoint); and (e) in the case of air travel, the flight on which the person arrived or departed.[39]

The issue was the provision's constitutionality, since it was clear from the Supreme Court of Canada's case law that hearsay could not be admitted via either a common law exception or a statutory exception unless those exceptions accounted for necessity and reliability. Shorn of those requirements, the provision endangered trial fairness. It was also no answer to argue, as the Crown had, that the trial judge could still exclude on the probative value versus prejudicial effect weighing, since that discretionary power only kicked in when the hearsay was found to be both necessary and reliable; it was designed to protect against situations when necessary and reliable hearsay might, for some reason particular to the case at hand, nonetheless affect trial fairness.[40]

Accordingly, the Court of Appeal held that section 36 breached sections 7 and 11(d) of the Charter and therefore was of no force and effect. It did limit the scope of the judgment to 'evidence tendered by the Crown in a criminal trial,' and made 'no comment as to the application of section 36 in other contexts.'[41]

5. THE CHICKENS CROSS PROVINCIAL BORDERS: *RAJA*

At the time of writing, *Rajatnaram* has been fully applied only once, in the 2020 case of *R v Raja* which took place in the Canadian province of Ontario.[42] The battle was actually joined a year earlier, in *R v Boyce*,[43] a case that involved evidence obtained from Panama via an MLAT request. In that case, the Court of Appeal agreed with the finding of the British Columbia Court of Appeal in *Rajatnaram* that section 36(1) of the Act did indeed remove the trial judge's ability to screen MLAT-sourced hearsay for necessity and reliability.[44] However, the issue of whether this interpretation rendered the section unconstitutional had been raised for the first time on appeal, and as the matter had not been canvassed in the trial court the Court of Appeal declined to decide the issue.

Raja arose from an alleged heroin trafficking operation where the drugs were being sent from Pakistan to addresses in Canada that were associated with the accused. Two of these shipments had been seized by Pakistani police, and Canada requested that Pakistan provide evidence regarding the seizures, via the mutual legal assistance provisions in the Vienna Narcotics Convention,[45] to which both states are parties. The Canadian request for assistance was quite detailed and specific,[46] but the information received in response was deficient in a number of ways, consisting of a letter from a government official, accompanied by unsworn and uncertified copies of documents, some of which were translated only in part. The Crown sought to rely on the documents for the sole purpose of demonstrating that the substance in the seized shipments had been heroin.

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39 ibid [123].
40 ibid [127], [130].
41 ibid [132].
42 2020 ONCJ 250 (Ontario Court of Justice). I say 'fully applied' because, in a decision released just as this article was going to press, an Ontario Court of Justice trial judge made an identical ruling, but simply invoked *Raja* and *Rajatnaram* without any analysis: *R v Lalji*, 2023 ONCJ 45.
43 2019 ONCA 828 (Ontario Court of Appeal).
44 ibid [12].
45 Above n 5.
46 Much of it is reproduced in the decision: *Raja* (n 42) [15]–[16].

The accused made essentially the same argument that had been made in *Rajatnaram*, and with the same result. The trial judge, Wells J, noted that the Court of Appeal had already decided in *Boyce* that section 36(1) did remove necessity and reliability screening, and this was binding authority for this lower court. On the constitutional challenge, Justice Wells summarized the findings in *Rajatnaram* and agreed with them – to admit hearsay of this sort without the opportunity to challenge it would undermine the accused's right to a fair trial and to full answer and defence, and thus breached sections 7 and 11(b) of the Charter.[47] Justice Wells also made some comments which threw cold water on the Crown's argument (from *Rajaratnam*) that some reliability attached to documents received via a request simply because they were the result of international cooperation:

> [33] Here, the Crown seeks to rely on evidence that lacks even the most basic indicia of trustworthiness. Despite the details sought in the Request for Assistance, the Pakistan Documents are not certified to be true copies or accompanied by any oath or guarantee of truthfulness. If signatory countries to The Convention are truly committed to combating transnational crime, a commitment to effective assistance in prosecuting cases seems obvious. There was no evidence lead to suggest that the Pakistan authorities would be unwilling to testify via video-link for example. Were it the case that *any* country refused to make witnesses available to testify about documents provided under The Convention, this would call into serious question both their commitment to the cause, and the reliability of the evidence provided.
> [34] Combating transnational crime, including global drug trafficking, is an important objective. In many instances, courts will need to be flexible in allowing for the presentation of evidence in different ways, particularly where that evidence is from another part of the world. However, that flexibility cannot extend so far as to allow for the admission of what would otherwise be inadmissible evidence, simply because it comes from another State pursuant to a treaty. It cannot be that officer notes from Pakistan in this case are somehow imbued with reliability (and therefore admissible for their truth), when notes of investigators from PRP could not be so tendered.

In the result, the evidence was excluded. At the time of writing, there had been no appeal of the decision in *Raja* because the prosecution is still ongoing.[48]

As a postscript, it may be worth noting the extent to which these decisions have and have not changed Canadian law on the subject. The British Columbia Court of Appeal is the highest court in the province of British Columbia, and *Rajatnaram* binds all trial courts of criminal jurisdiction in that province, which would include the British Columbia Provincial Court and the Supreme Court of British Columbia. The decision is not binding on courts in other provinces, but those courts are permitted to consider it and even adopt it, and the findings of senior appellate courts are often influential. This is in fact what happened in *Boyce*, as the Ontario Court of Appeal agreed with the British Columbia Court of Appeal's interpretation of section 36(1) in *Rajatnaram*. This makes two senior appellate courts that have agreed on that particular interpretation. As to the section's constitutional invalidity, *Raja* is from the Ontario Court of Justice, which is the lowest

[47] ibid [32].

[48] Personal communication from David Quayat, co-counsel for the Crown in *Raja*. Canadian criminal law does not allow for appeals of interlocutory decisions, and thus any appeal of this particular decision could only occur after the final trial verdict is rendered.

court of criminal jurisdiction in the province of Ontario and has no binding *stare decisis*-type authority. As a matter of judicial comity, other judges of that court are required to consider it but are free to depart from it if they disagree with its interpretation of the law. No other court in the province is bound to follow it.

The Supreme Court of Canada, the findings of which are binding on all Canadian courts, has not yet considered the issue raised in these cases. Accordingly, the best way to describe the impact of these cases is to say that they have put Canadian law on the admissibility of MLAT-sourced hearsay in a state of flux (and have undoubtedly created headaches for the Crown and police).

6. ANALYSIS: LEVELLING THE TENSION BETWEEN SOVEREIGNTY AND COOPERATION

It is important to note the actual effect of the case developments canvassed here. It is not the case that hearsay evidence that is received via MLAT is inadmissible at Canadian trials, even trials in British Columbia and Ontario – rather, MLAT-sourced hearsay is put back on an equal footing with all the other evidence that might be led by the Crown in a criminal prosecution. That is to say, it must comply with the standard rules of evidence. While section 36 of the Act does cover opinion that might be contained in documents, the judgments do not seem to make any findings about this kind of evidence, and therefore, notionally, the section still applies to opinion. Practically, however, any opinion evidence that shows up will almost exclusively be hearsay in any event, since it will still amount to out of court statements offered to prove the truth of their contents, and thus will be required to meet the standard requirements for the admission of hearsay.

Why is this a problem? And, more usefully for readers of this publication, is there anything useful or instructive about this case law, driven as it is by Canadian evidentiary and constitutional particulars? I submit that there is. The messiness in these cases may reflect some local specifics but is also an illustration of the well-known problem referred to earlier: the difficulty often encountered by requesting states (particularly common law states) in obtaining evidence from requested states in a form that is admissible in a prosecution.

Introducing flexibility in this area has historically proven to be difficult. Criminal law, after all, is closely linked to the sovereignty of states as embodied in their legal and constitutional norms and traditions. International law contains various legal rules that are designed to respect and accommodate two realities: first, as I often tell my students (with slight comic effect), that there are over 190 different criminal law systems in the world, each of which thinks the others are ‘doing it wrong;’ and second, that states are motivated to ‘protect’ their territories and citizenry from foreign extensions of criminal law power.

The international law of jurisdiction is instructive. For example, states are obliged to refrain from attempts to exercise prescriptive jurisdiction over an offence to which they have no reasonable connection. States are prohibited from exercising their enforcement powers on the territories of foreign states. At the same time, the system is not just reactive and protective but also actively respectful since the legal culture is one of mutual guarding of sovereignty. This can be seen in domestic laws of evidence; for example, states typically do not apply their own criminal

procedure laws to the actions of foreign police, when those police were acting on their own territory and under the authority of their own state's law.[49]

Evidence of both the conservative tendencies of states in criminal cooperation and the desire to temper those tendencies can be tracked at the international level. As far back as article 7(12) of the 1988 Vienna Convention we see a sovereignty safeguard common to MLATs: requests are to be 'executed in accordance with the domestic law of the requested Party;' yet the same article provides that 'to the extent not contrary to the domestic law of the requested Party and where possible,' the requesting state's wishes must be respected.[50] Identical language is found in article 18(17) of the UNTOC,[51] and article 46(17) of the UNCAC.[52] All of these reflect similar language in article 6 of the United Nations Model Treaty on Mutual Legal Assistance in Criminal Matters.[53] The simple idea is that if it is possible for the requested state to satisfy the evidentiary requirements of the requesting state, it should try to do so. On paper, at least, states often indicate that they are willing to do so.[54]

There is also encouragement of requesting states to provide for flexibility in their domestic laws of evidence.[55] Regarding hearsay in particular, the Model Legislation on Mutual Legal Assistance in Criminal Matters published by the Commonwealth Secretariat rather gingerly suggests essentially the same approach as is found in the Canadian legislation, that in the law of the requesting state an MLAT-sourced document should not be inadmissible 'by reason only that it contains a statement which is hearsay.'[56] Less ambitiously, the 2000 UNDCP Model Foreign Evidence Bill proposes essentially an 'interests of justice' hearsay exception, where the trial court can take into account considerations such as whether the evidence is actually otherwise unavailable, its probative value, whether much would be accomplished by cross-examining the maker of the statement, and any prejudice to the defence.[57]

State practice shows that there is some, albeit limited, receptivity to this latter idea among the common law states where this issue usually takes hold.[58] Similarly to the now-questioned

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[49] For example, *R v Terry* [1996] 2 SCR 562 [19], where the court (per McLachlin J as she then was) emphasizes 'the exclusivity of the foreign state's sovereignty within its territory, where its law alone governs the process of enforcement.'

[50] Above n 5.

[51] ibid.

[52] ibid.

[53] Reproduced with commentary in UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* (undated), 96, <https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf> accessed 16 January 2023.

[54] A recent review of implementation of the UNCAC obligations indicated '[t]he vast majority' of parties are willing to and do try to accommodate requesting state requests regarding form of evidence.' See Dimosthenis Chrysikos, 'Article 46: Mutual Legal Assistance' in Cecily Rose, Michael Kubciel & Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (OUP 2019) 440, 467.

[55] See the *Revised Manuals* (n 53) 97: 'implementing legislation should be flexible enough to allow States with different legal systems and requirements to obtain evidence in an admissible form.'

[56] The Commonwealth Office of Civil and Criminal Justice Reform, Model Legislation on Mutual Legal Assistance in Criminal Matters (2017), art 12(2), <https://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_14_ROL_Model_Leg_Mutual_Legal_Asstnce.pdf> accessed 16 January 2023.

[57] UNDCP, Model Foreign Evidence Bill (2000) s 6, <https://www.unodc.org/pdf/lap_foreign-evidence_2000.pdf> accessed 16 January 2023. I note parenthetically that this is quite similar to the Canadian hearsay law's balancing of necessity and reliability, as explained above.

[58] The explanatory note to art 12(2) of the Commonwealth Model Legislation (n 56) certainly points to this as a solution for common law states. I would note that I am speaking here of the substantive admissibility of hearsay,

Canadian approach, Ireland's law provides for automatic admission of the contents of an MLAT-sourced document 'as evidence of any fact stated in it of which oral evidence would be admissible.'[59] The United States uses this approach selectively (often via the MLAT itself, which is self-executing),[60] and has a formalized exception for MLAT-sourced business records,[61] though overall there is no uniform mechanism.[62] Australia's federal legislation begins by removing the application of the hearsay rule as a bar to admissibility, but supplements this with an 'interests of justice' discretion to exclude that resembles the approach in the UNDCP Model Bill.[63] South Africa's legislation appears to provide relaxed admissibility for statements taken after criminal proceedings have been instituted, but subjects hearsay gathered prior to the beginning of proceedings to its usual hearsay regime.[64] New Zealand, on the other hand, subjects MLAT-sourced hearsay to the normal rules of evidence.[65]

As the current Canadian developments show, however, pushing domestic courts away from their entrenched legal standards regarding hearsay can be challenging. This reluctance is not necessarily a bad thing; the local law will often be grounded in good sense gained over decades or centuries of trial experience. Nor is it intuitive that the transnational nature of any particular case should mean compromising on trial fairness and/or disadvantaging the defence. This seems particularly apposite when we recall that the defence starts out from a point of relative disadvantage in virtually all criminal law systems, and moreover rarely has access to the foreign state in order to gather its own evidence or obtain means to challenge evidence that was gathered there.[66]

The question, then, is this: is there a case for trial courts treating foreign-gathered evidence more flexibly than that gathered domestically? As noted above in *Christurajah*, Justice Ehrcke asked, 'Why should it be easier for the Crown to adduce foreign hearsay records than Canadian records?'[67] While the judge intended the question to be rhetorical, there is a policy-based answer, which is that successful international criminal cooperation may require it, at least in some form. The Commentary to the 2000 UNDCP Model Foreign Evidence Bill captures the point:

> The conditions of admissibility before a court for evidence obtained from other states will differ from state to state. Restrictive rules on admissibility will lead to such

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that is, the admission of the contents of documents for the truth of those contents. While it is beyond the scope of this article, both MLATs and implementing legislation often contain provisions that exempt from the hearsay rule material purporting to authenticate the documents which were the subject of the request. So, for example, a certificate signed by a foreign authority that certifies or explains the provenance of the documents is not treated as hearsay; the prosecution is not required to call as a witness a foreign official, simply to authenticate. Section 36 of the Canadian Act contains language to this effect. My overall impression is that this specific kind of relaxation of the hearsay rule tends not to be controversial.

59 Criminal Justice (Mutual Assistance) Act 2008 (Ireland), s 73(8).

60 Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases 2010* (Nijhoff 2010).

61 18 US Code § 3505(a)(1).

62 See generally Christopher J Smith, Anthony Aminoff & Kelly Pearson, 'Gathering Gang Evidence Overseas' (2020) 68(5) US Attorneys Bulletin 47; Lauren Briggerman and others, 'Challenges to Obtaining Foreign Evidence in Cross-Border Criminal Cases' The Champion (November 2019) 30.

63 Foreign Evidence Act 1994, 1994/59, ss 24–5.

64 International Cooperation in Criminal Matters Act No 75 of 1996, ss 5(1) and 5(2). See Jamil Ddamulira Mujuzi, 'The South African International Cooperation in Criminal Matters Act and the Issue of Evidence' (2015) 48(2) De Jure 351, 375–8.

65 Mutual Assistance in Criminal Matters Act 1992, 1992/86, s 63(1).

66 Boister (n 2) 327–8.

67 Above n 25 and accompanying text.

> evidence being excluded in many cases. The interests of justice are such that before evidence obtained from foreign states can be admissible, it must satisfy certain conditions, but it would seem contrary to those interests if it has to satisfy the rules of admissibility applicable to evidence obtained in the state itself; given the differences in requirements in different legal systems, this would unduly complicate and lengthen the judicial process.[68]

Lurking in policy statements of this kind is an implicit criticism of the restrictive nature of evidence rules in common law states versus the broader approach in civil law states, which might raise hackles among the former. That said, a rational domestic system of evidence law, in principle, should be able to bend in some manner (consonant with national rules and standards) to accommodate the simple fact that foreign states do not do things in the same way as 'we' do, and in some cases cannot do them in that way. The differences in approach should not necessarily be fatal to the integrity (and eventually the admissibility) of the evidence. This is what Justice Gerard La Forest tried to capture decades ago, in the extradition case of *Canada v Schmidt*, when he stated:

> … I see nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours with different checks and balances. The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country.[69]

At the same time, however, flexibility should not come at the cost of procedural integrity and trial fairness. The finer point made by La Forest J was that the 'checks and balances' in domestic criminal law systems may look different from each other, but there must nonetheless be checks and balances. As reflected in the MLAT provisions from the suppression conventions canvassed above, it may be good policy for both requesting and requested states to be accommodating to foreign standards around evidence-gathering and admissibility – but this should be accompanied by efforts on every side to keep the need for accommodation to a minimum.

7. CONCLUSION: PRACTICAL SOLUTIONS

What can be done on a practical level? And, specific to this comment, what are potential solutions for a state like Canada where attempts to calibrate admission standards are scotched by the courts? One of the more obvious is precisely the one that was at issue here: the modification of the requesting state's evidentiary rules to accommodate the peculiarities of the foreign system. The Canadian legislation, originally passed in 1988, was an early example of this, though as discussed here, Canada's practice also shows that simply attempting to make foreign-sourced hearsay automatically admissible will sometimes be too crude a measure. There might be some middle ground between automatic admissibility and subjection to the state's ordinary hearsay rules, such as building presumptions (perhaps rebuttable) about the reliability of the evidence, or statutory direction to trial judges to take into account the international features of an investigation. The main

[68] *UNDCP Model Foreign Evidence Bill [Commentary]* (2000) <https://www.unodc.org/documents/legal-tools/model_foreign_evidence_bill__commentary.pdf> accessed 16 January 2023.

[69] [1987] 1 SCR 500, 522.

point is that states interested in complying with the spirit of their obligations to facilitate cooperation should turn their minds to admissibility standards.

The Canadian cases also offer a more prosaic point, which is that when states have access to MLAT-specific laws of evidence, it is important to keep them up to date. *Rajatnaram* happened, after all, because an experienced defence lawyer attacked the constitutionality of statutory wording created in 1988, using court authority from 2006. The argument was a clever one but could have been made much earlier; the Crown, for its part, did not foresee it and instead kept advancing an interpretation of the statute that it had been urging on the courts for decades, and ended up hoist with its own petard when that interpretation was found to be both correct and unconstitutional. The lesson, perhaps, is simply that legislation or other domestic laws meant to implement MLA practice need to be as modern as possible and keep pace with other criminal and constitutional law developments.

One technological solution is increasingly obvious: having witnesses testify directly by way of video/internet connection, so as to prevent the need to adduce hearsay evidence in the first place. This is, in a sense, old hat because the technology required to do this has been around for some time, some MLATs already provide for it,[70] and many states currently avail themselves of it; Canada is one of these.[71] One of the silver linings of the COVID-19 pandemic is that much more extensive use has been made of virtual testimony, and both the technology and the overall skill level at using it have improved significantly in many jurisdictions. Article 11 of the new Second Additional Protocol on Enhanced Cooperation and Disclosure of Electronic Evidence to the Council of Europe's Convention on Cybercrime provides a thorough template for inter-state cooperation,[72] dealing with issues such as cost, translation, rules regarding privilege, and so on, that could provide guidance to states less familiar with the technique.[73]

To be sure, this will not always be an available or effective solution; some states will lack the infrastructure or resources to provide witnesses in this way, and as happened in *Rajatnaram* itself the video and audio feed will not always be up to court standards. However, on the whole one suspects more extensive use could be made of this technique than is being done at the moment. At the very least, as Wells J suggested in *Raja*, the prosecution should be required to prove that they inquired into the possibility with the state from which the evidence came and provide some reason why it cannot be done.

Wells J's reasons also suggest another practical point, albeit one that has been a preoccupation of MLAT practice for some time: for inter-state cooperation to work, the burden should not be placed entirely on requesting states; authorities in requested states must 'step up their game' and, at the very least, attempt to comply with the parameters of the request. The prosecution in *Raja* was hampered by the fact that the Pakistani authorities appear to have made only a half-hearted effort to provide the evidence in usable form. This led to Justice Wells' dry but poignant comment: 'If signatory countries to [the UNTOC] are truly committed to combating transnational crime, a commitment to effective assistance in prosecuting cases seems obvious.'[74]

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[70] For example, the UNCAC (n 5) art 46(18). The review of implementation noted that many parties have handled such requests, and 20 of these stated they do so 'regularly or routinely' – see Chrysikos (n 54) 473.

[71] Canada Evidence Act, RSC 1985, c C-5, s 46(2). Indeed, in *Lalji*, above note 42, when the court ruled that the hearsay evidence would be excluded, the Crown simply opted to have the Australian witnesses testify "remotely," which suggests some form of video link [11].

[72] ETS No 224 (2021).

[73] ETS No 185 (2001). The text of Protocol and its explanatory report can be found online: <https://rm.coe.int/booklets-bc-2-protocols-guidance-notes-en-2022/1680a6992a> accessed 16 January 2023.

[74] *Raja* (n 42) [33].

In fairness, it is undoubtedly true that police and prosecutors the world over must deal with over-stretched budgets and scarcity of time. Nonetheless, this case does tell us that the 'obligation' of accommodation first propounded globally in the Vienna Convention back in 1988 remains aspirational in some settings.

A conclusory point: all of this might be made easier if there were more attention to transnational and comparative criminal law in the education and training of criminal justice officials (including defence lawyers) the world over. One recently-retired senior Canadian justice official has commented that, given the continuing expansion of transnational crime, 'lawyers and other professionals interested in criminal justice policy will need to be well versed in both domestic and comparative criminal law and procedure.… They will be asked to translate international to domestic, and domestic to international.'[75] Operationally, it seems particularly important that (as the UNODC urged a decade ago), 'States make a concerted effort to carefully and fully explain the niceties of their laws to each other … [and] make inquiries about the other country's legal systems whenever there is a doubt.'[76] This would make most sense in the context of heavily-trafficked bilateral or regional networks, at least for a start.

[75] Donald K Piragoff, KC, 'The Internationalization of Canadian Criminal Justice Policy' in Robert J Currie (ed), *Transnational and Cross-Border Criminal Law: Canadian Perspectives* (Irwin Law, forthcoming 2023).

[76] UNODC (n 7) 16.