COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Nguyen, 2015 ONCA 278
DATE: 20150424
DOCKET: C51500, C52619 and C52618

Weiler, Gillese and van Rensburg JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Bao Quoc Nguyen, Kien Binh Tu and Bao Tri Nguyen

Appellants

James Lockyer and Brian Snell, for the appellants

Jamie Klukach and Karen Papadopoulos, for the respondent

Heard: November 6, 2014

On appeal from the convictions entered on December 13, 2009, by Justice Michael H. Tulloch of the Superior Court of Justice, sitting with a jury.

Gillese J.A.:

[1] Should the spousal incompetency rule be extended to apply to common-law spouses? These appeals depend on the answer to this question.

OVERVIEW

[2] On October 5, 2002, Quang Thi Nguyen ("Quang") was shot and killed in a karaoke bar in Mississauga, Ontario. The shooter has never been identified.

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[3] Following a jury trial, Bao Quoc Nguyen ("Bao") and Kien Binh Tu ("Binh") were convicted of first degree murder. Bao Tri Nguyen ("Tri") was found guilty as an accessory after the fact to murder. Bao, Binh and Tri (the "appellants") appeal their convictions.

[4] The Crown's case against the appellants was circumstantial. As part of its case, the Crown called as witnesses the common-law spouses of both Bao and Tri. The Crown also led evidence of certain out-of-court statements made by Bao's common-law spouse shortly after the shooting.

[5] None of the appellants testified or called a defence.

[6] The appellants argue that the trial judge erred in failing to extend the spousal incompetency rule to common-law spouses. They ask this court to extend the rule to common-law spouses, with the result that the testimony of the common-law spouses and the out-of-court statements would be precluded and a new trial would be required.

[7] Although our law does not permit discrimination based on marital status, for the reasons that follow, I would not extend the spousal incompetency rule to common-law spouses.

[8] Limiting the scope of the rule to married spouses does discriminate against common-law spouses within the meaning of s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to

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the *Canada Act 1982* (UK), 1982, c. 11. However, that limit also leaves the spouse of the accused person competent to testify. Testimonial competence affirms the dignity and autonomy of an individual. Therefore, the limit to the spousal incompetency rule has the effect of affirming the dignity and self-worth of witness spouses, except where those individuals have chosen to marry and thereby accept the state-imposed responsibilities and protections flowing from that status. Accordingly, in my view, the limit can be demonstrably justified under s. 1 of the *Charter*.

[9] Consequently, I would dismiss the appeals.

THE UNDERLYING KEY CONCEPTS

[10] Spousal competence, compellability and privilege are distinct but related concepts. As they lie at the heart of these appeals, it is useful to consider their meanings now.

[11] Competence refers to a person's legal capacity to give evidence in a court of law. A person who is incompetent cannot testify, even if he or she wishes to do so. Competence is a threshold requirement for the admissibility of testimony, the purpose of which is to "exclude at the outset worthless testimony, on the ground that the witness lacks the basic capacity to communicate evidence to the court": *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 16.

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[12] Historically, at common law, numerous categories of potential witnesses were deemed incompetent to testify, including individuals with a criminal record, those who were unable to swear an oath, those with an interest in the proceeding (such as the accused), and the spouses of accused persons. However, legislation has materially changed this situation: see, generally, Sidney N. Lederman, Alan W. Bryant, & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, *4th ed*. (Markham, Ontario: LexisNexis, 2014) at pp. 869-91. A person is now generally presumed competent to testify: s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the "*CEA*"); *D.A.I.*, at para. 16.

[13] A compellable witness, on the other hand, is "one who may be forced by means of a subpoena to give evidence in court under the threat of contempt proceedings": *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 48 (citations omitted).

[14] Despite the trend towards testimonial competence, spouses of accused persons are competent and compellable witnesses for the prosecution only: 1) at common law, where the charge involves the person, liberty or health of the witness spouse; and 2) under ss. 4(2) and (4) of the *CEA*, in respect of certain enumerated offences: see *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 38-39. Spouses are, however, competent witnesses for the defence in criminal proceedings: s. 4(1) of the *CEA*.

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[15] Apart from the limited exceptions mentioned in the preceding paragraph, married spouses of accused persons are neither competent nor compellable witnesses for the Crown. This is known as the spousal incompetency rule and that is how the term is used in these reasons. The general common law rule is that competence implies compellability: *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 41. However, whether a spouse who is a competent witness for the prosecution is also compellable at the instance of the prosecution has not been finally resolved. In *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 676, Iacobucci J. declined to decide this question, stating that "the possibility that a competent spouse would be found also to be compellable is a real one".

[16] Privilege is the right of a person or class of persons to exclude certain communications from evidence or to refuse to testify about matters covered by the privilege. Privilege may relate to a class of relationships – for example, solicitor-client privilege – or may be established on a case-by-case basis. Once a privileged relationship is established, privilege "presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 42.

[17] Section 4(3) of the *CEA* creates a spousal privilege in respect of marital communications. Section 4(3) of the *CEA* reads as follows:

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> 4.(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

[18] As noted in *Couture*, at para. 41, spousal privilege

> is testimonial in nature, giving a right to withhold evidence but the communications themselves are not privileged. The privilege belongs to the spouse receiving the communication and can be waived by him or her.

[19] The implications of the spousal incompetency rule extend beyond the in-person testimony of the witness spouse. At paras. 64-66 of *Couture*, Charron J., writing for the majority, explains that the question to be answered when considering a spouse's out-of-court statement is whether the statement may be accepted into evidence as admissible hearsay without undermining the spousal incompetency rule or its underlying rationales. She emphasizes that it is important to keep the spousal incompetency rule inquiry analytically distinct from the hearsay inquiry.

[20] Finally, it bears emphasizing that the spousal incompetency rule represents a significant departure from the rationale which animates the law of evidence. There is a strong societal interest in ensuring that all relevant and reliable evidence is brought forward at a criminal trial to ensure a just result. Thus, the rules of evidence generally serve to further that interest and uphold the truth-seeking function of the courts by ensuring the reliability of evidence, or

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protecting an accused's right against self-incrimination. By contrast, the purpose of the rules governing spousal incompetence, compellability and privilege is external to the justice system, namely the protection of marital harmony and the avoidance of the natural repugnance resulting from one spouse testifying against the other: *Couture*, at para. 43.

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A BRIEF SUMMARY OF THE FACTS

Key individuals

[21] Bao and Tri are brothers. Bao and Binh were close friends at the time of the shooting. Quang was a drug dealer who owed Bao money.

[22] At the time of trial, Bao had lived with Quynh Ngo ("Quynh") in a conjugal relationship for over ten years. They had a ten year old child. Quynh also had a child from a previous relationship, whom Bao treated as if the child were his own. Quynh was a blonde Vietnamese woman.

[23] By the time of trial, Tri had lived with his common-law spouse, Caroline Tran Minh ("Caroline"), for about three and a half years. The couple lived in Montreal. The Crown conceded at trial that Tri and Caroline were common-law spouses.

[24] The owner of the karaoke bar where the murder took place, Thanh Pham ("Pham"), testified for the Crown. He was subject to a *Vetrovec* warning at trial.

Both the waitress working at the bar at the time of the murder, Hanh Tran ("Tran"), and the cook, Anh Tuan Nguyen ("Tuan") testified at trial.

The victim

[25] On October 5, 2002, Quang went to a karaoke bar in a Mississauga strip mall to meet Bao. At that time, Quang owed Bao money. Quang had contacted Bao to request a second loan, and Bao told him to meet at the karaoke bar to discuss the matter.

[26] Phone records showed eight calls between phones registered to Quang and Bao on the day Quang was murdered.

[27] Before driving to the bar to meet Bao, Quang picked up two of his criminal associates, one of whom testified at trial that Quang asked them to "watch his back" during the meeting. They stopped along the way to the bar to collect two machetes.

[28] On the way to the bar, Quang spoke on his cellphone to "Chi", an honorific for a woman, and told her he would be at the bar in 15 to 20 minutes.

[29] When they arrived at the bar, Quang told his associates to stay in the car. Quang then entered the bar. Quang's associates waited for him, first in the car and then in a nearby restaurant. When they left the restaurant, they noticed police activity in response to the shooting and drove away.

The bar before the victim's arrival

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[30] Before Quang's arrival, Bao was sitting in the bar, drinking beer, chatting with the bar's owner, Pham, and talking on his cell phone. Bao told Pham that he was expecting friends.

[31] Also before Quang's arrival, Tran (the bar's waitress) and Tuan (the bar's cook) noticed Binh standing outside the restaurant with a German Shepherd dog. Binh then entered the bar along with a white man. They sat together at a table near Bao. Binh ordered some beer and dried squid for himself and the white man.

[32] Tran testified that Binh stayed in the restaurant for approximately 20 minutes and left without finishing his beer.

[33] Pham testified that Binh and Bao did not acknowledge each other, which he found odd because he knew they were friends.

[34] Phone records showed seven calls between Bao and Binh on the day of the shooting, including one call just eleven minutes after the shooting and another call an hour and a half later. Following that later call, neither Binh nor Bao's cellphone was used again.

[35] After Binh left the bar but before Quang's arrival, Bao's common-law wife, Quynh, arrived. She sat with Bao and Pham. A bar customer testified that she saw a blonde Vietnamese woman talking on a cellphone and saying, "When are you coming?"

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[36] When Quang entered the bar, Bao waved him over to the table where he was sitting with Pham and Quynh. Pham then left the table; Quynh left the table soon after that to look at the karaoke songbook.

[37] Pham testified that he overheard Quang reassure Bao that "he will be responsible for" the money owed to Bao. Tran testified that the music in the bar was too loud to hear what people a few feet away were saying.

[38] Bao eventually moved to the bar and began singing at the karaoke machine. There was a loud noise and a flash. The white man had shot Quang in the back.

Immediately after the shooting

[39] After the shooting, the white man fled out the front door of the restaurant. Pham, who had ducked behind the bar with Bao, called the police. Pham and Bao waited at the restaurant for the police. Neither told the police that Binh had been in the restaurant.

[40] Quynh, Tran and Tuan ran out the back door immediately after the shooting. Tran and Tuan testified that as Quynh was exiting the restaurant, she was "panicking". She was unable to stand steadily and was having trouble walking. The three hid behind a dumpster. While hiding there, Tran and Tuan saw Binh with the German Shepherd dog, walking down the street and talking on his cellphone.

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[41] Quynh, Tran and Tuan left their hiding spot behind the dumpster and ran, holding hands, first to a convenience store in the same strip mall, where they stood for a few minutes, and then to a restaurant in the mall. They sat at a table and ordered hot soy milk. Tran testified that Quynh "looked frightened and anxious" and that Quynh told her that she was scared because her husband was still in the karaoke bar and she was worried about his safety but could not call him to check on him because she had his cellphone.

[42] Tran testified that Quynh then told her that: (1) her husband Bao had spoken on the phone with Quang earlier that day and her husband "was very upset because … [Quang] keeps changing the meeting location"; and (2) Bao told Quang that he had already ordered some beer, and if Quang wanted to meet with him, he should come to the karaoke bar. The admissibility of these statements is challenged on appeal.

Events after the shooting

[43] On October 6, 2002 – the day after the shooting – a police officer was notified about a German Shepherd dog that was wandering about unattended. The dog was registered to Quynh. The officer visited Bao and Quynh's home, along with an animal control officer and the dog. They attempted to return the dog to Quynh but Quynh said that she did not want the dog.

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[44] At trial, Quynh said that she did not remember whether she had ever owned a dog.

[45] On October 8, police officers investigating the homicide visited Quynh at home. They interviewed her outside of her home, in the police cruiser. The police officers asked Quynh whether she knew Binh. She said that she did and that her husband also knew him.

[46] After the interview concluded, Quynh and the officers entered the house, where they encountered Bao. Bao and Quynh spoke together in Vietnamese, and Quynh became visibly upset. She slid to the floor and crouched in a fetal position.

[47] Bao then told police that he knew “a Binh” who lived in Scarborough, but that he didn’t know Binh’s last name. Bao said he had last seen Binh two weeks earlier. He said that he did not know Binh’s cell phone number.

[48] The day after the shooting (October 6, 2002), Binh left Mississauga and went to Montreal. Binh and Tri arrived in Montreal together.

[49] While in Montreal, Binh and Tri asked a mutual acquaintance to arrange plane tickets to Vietnam for them so they could leave as soon as possible. This friend testified that Binh told him there had been some problems in Toronto. Binh and Tri also arranged for same-day visas for Vietnam.

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[50] On October 13, 2002, Binh, Tri and another friend flew to Vietnam. Only Binh's ticket did not have a return date. The three stayed with Bao and Tri's aunt, who testified that Tri had informed her only days before their arrival that they were coming.

[51] Binh remained in Vietnam for almost four years.

[52] Tri returned to Canada on November 12, 2002. He sent money to a friend in Vietnam and asked him to give it to Binh in small amounts. Police, who had obtained authorization for wiretaps, intercepted phone conversations between Tri and this friend, discussing Binh's return to Canada and Tri's providing Binh with monthly funds.

[53] On May 2, 2006, Binh returned to Montreal and lived there openly until his arrest on February 13, 2007. At that point, Binh gave a videotaped statement to police, which was played at trial. In it, Binh told the police that he had bought his ticket and flown to Vietnam by himself, and that he did not know the white man outside the karaoke bar. He said that the white man had asked him about the bar and he responded by explaining that there was singing inside. Binh and the white man then went into the bar together and ordered some beer. Then Binh left the bar. He said he couldn't remember anything else because he had been drinking.

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[54] Tri was arrested in Montreal on April 18, 2007. He had some of Binh's identification in his wallet.

[55] At trial, the Crown's theory was that Bao and Binh had orchestrated Quang's murder: Bao invited Quang to the bar, and Binh brought the gunman but left before the shooting. Tri helped Binh escape to Montreal and then Vietnam after the murder.

[56] None of the appellants testified or called a defence. Their position was that the gunman was not known to any of them, and was acting alone or with unknown parties.

THE PRE-TRIAL RULING ON SPOUSAL INCOMPETENCE

[57] Bao brought a pre-trial motion for an order declaring that his common-law spouse, Quynh, was neither a competent nor a compellable witness for the Crown. He argued that the spousal incompetency rule, as modified by s. 4 of the *CEA,* offends s. 15(1) of the *Charter* because it discriminates between married spouses and common-law spouses. He submitted that the rule should be extended to common-law spouses.

[58] The trial judge found that Bao and Quynh were in a common-law spousal relationship. However, he ruled that the spousal incompetency rule does not offend s. 15(1) of the *Charter* and dismissed the motion: 2010 ONSC 5843, 278 C.C.C. (3d) 490.

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[59] The trial judge applied the three-part test from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, to decide whether the spousal incompetency rule offends s. 15(1) of the *Charter* because it does not extend to common-law spouses. He found that the first two branches of the test were met, in that: (a) the spousal incompetency rule draws a clear and formal distinction between married spouses and common-law spouses that deprives common-law spouses of the benefit of claiming testimonial protection and spousal privilege, and (b) that distinction is based on the analogous ground of marital status.

[60] However, the trial judge found that the third branch of the test was not met. In his view, the spousal incompetency rule does not perpetuate a disadvantage to common-law spouses through prejudice or stereotyping, nor does it affect their dignity.

[61] The trial judge observed that unmarried couples choose to enter into common-law relationships, as opposed to legal marriages, for a variety of reasons. He stated that the decision to marry is a choice that brings with it benefits and obligations, and that choice should be respected: *Walsh v. Bona*, [2002] 4 S.C.R. 325. The applicant sought to receive the benefit of marital status with regard to testimonial protection, but without being subjected to the burden of other legal obligations attendant on the decision to marry.

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[62] The trial judge observed that s. 4(3) of the *CEA* affirms that spousal privilege attaches to communications made during the marriage and identifies the receiver of the communications as the privilege-holder. However, he noted, s. 4(3) was not in issue on the motion because the Crown was not seeking to lead evidence of communications made during the marriage.

[63] Thus, the trial judge observed, only s. 4(1) of the *CEA* could be relevant to the motion. Section 4(1) reads as follows:

> 4. (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

[64] The trial judge found that s. 4(1) of the *CEA* does not offend s. 15(1) of the *Charter*. Section 4(1) allows the spouse of an accused person to testify on behalf of the accused. This is not a codification of the common law rule but, rather, an exception to it that operates in favour of a married accused person. The applicant could have his common-law spouse testify at his trial, on his behalf, just as he could if he were married to her. Therefore, s. 4(1) had no real relevance to the proceeding.

THE ISSUES

[65] The overarching question in these appeals is whether the trial judge erred in ruling that the spousal incompetency rule should not be extended to apply to

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common-law spouses. When answering this question, the court must determine whether the trial judge erred in:

a. finding that Quynh, Bao's common-law spouse, was a competent and compellable witness;

b. admitting the evidence of Caroline, Tri's common-law spouse; and

c. admitting Quynh's out-of-court statements to Tran about what Bao had told her, on the basis that admission violated the spousal incompetency rule and the spousal privilege rule.

[66] A further issue is whether the trial judge erred in admitting Quynh's out-of-court statements to Tran under the spontaneous declaration exception to the hearsay rule.

[67] The appellants initially raised another ground of appeal, namely, that the trial judge erred in his *Vetrovec* instruction regarding Pham. Because they abandoned this ground of appeal prior to the oral hearing of the appeals, nothing more need be said about it.

DID THE TRIAL JUDGE ERR IN FAILING TO EXTEND THE SPOUSAL INCOMPETENCY RULE TO COMMON-LAW SPOUSES?

[68] The appellants argue that there is no principled reason why the spousal incompetency rule should not apply to common-law spouses, just as it does to

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married spouses. They say that the failure to extend the rule to common-law spouses is discriminatory and contrary to s. 15(1) of the *Charter*. They point to three recent cases in which the courts have considered this issue and concluded that the spousal incompetency rule creates a discriminatory distinction for common-law spouses which violates s. 15(1) and cannot be saved by s. 1: *R. v. Masterson* (2009), 245 C.C.C. (3d) 400 (Ont. S.C.); *R. v. Hall*, 2013 ONSC 834, 114 O.R. (3d) 393; and *R. v. Legge*, 2014 ABCA 213, 310 C.C.C. (3d) 404.

[69] The respondent concedes that the spousal incompetency rule creates a distinction based on marital status but contends that the trial judge correctly ruled that the spousal incompetency rule should not be extended to common-law spouses. The respondent submits that although excluding common-law spouses from the ambit of the rule creates a disadvantage for the accused person with a common-law spouse, when considered contextually, the rule does not discriminate in a substantive sense. The respondent further submits that even if the spousal incompetency rule does limit the s. 15(1) rights of accused persons with common-law spouses, that limit is reasonable and justifiable under s. 1 of the *Charter*.

[70] I agree with the appellants that the spousal incompetency rule creates a distinction between married and common-law spouses based solely on the analogous ground of marital status and that this distinction discriminates in a substantive sense.

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[71] Accordingly, as I explain below, the spousal incompetency rule violates s. 15(1) of the *Charter*. However, as I further explain, in my view, the limit to the claimant group's s. 15(1) rights is reasonable and justifiable under s. 1 of the *Charter*.

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SECTION 15 OF THE *CHARTER*

[72] Section 15(1) of the *Charter* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[73] In *R. v. Kapp*, 2008 SCC 41, [2008] S.C.R. 483, at para. 17, the Supreme Court set out a two-part test for assessing a claim of discrimination under s. 15(1) of the *Charter*:

> 1) does the law create a distinction based on an enumerated or analogous ground? and
>
> 2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

This test was affirmed in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 30.

1. Part 1 of the Test

[74] In this case, as the respondent properly concedes, the answer to the first question is clearly “yes”: the spousal incompetency rule creates a distinction based on the analogous ground of marital status.

[75] To satisfy the first part of the test, the claimant must establish that he or she has been denied a benefit that others are granted or carries a burden that others do not by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1): *Withler*, at paras. 31-33, 62; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 174.

[76] The objective of the spousal incompetency rule is to promote marital harmony and avoid the repugnance of compelling spouses to testify against each other: *Salituro*, at p. 672; *Couture*, at para. 43. The exclusion of common-law spouses from the ambit of the rule denies them these benefits because the common-law spouses of accused persons can be compelled to testify against their spouses.

[77] Further, the exclusion of common-law spouses from the ambit of the spousal incompetency rule is a distinction based on marital status, an analogous ground of discrimination under s. 15(1) of the *Charter*: *Miron v. Trudel*, [1995] 2 S.C.R. 418.

[78] Thus, the real question in respect of s. 15(1) is whether the second part of the test has been met.

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2. Part 2 of the Test

(i) The Test

[79] A distinction based on an enumerated or analogous ground is not, by itself, sufficient to found a violation of s. 15(1). Hence, the court must proceed to the second part of the test and determine whether the law has a discriminatory impact: *Withler*, at para. 34.

[80] *Withler*, at paras. 35-36, explains that there are two ways of establishing substantive inequality or discrimination for the purposes of the second part of the test. The first is to show that the impugned law, in purpose or effect, perpetuates prejudice or disadvantage to members of the claimant group based on personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.

[81] At para. 37 of *Withler*, the Supreme Court cautions that this analysis is contextual and not formalistic, saying:

> Whether [part 2 of] the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact on them. The analysis is

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> contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

[82] In the recent decision of *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 325, a majority of the Supreme Court stressed that prejudice and stereotyping are not discrete elements which a claimant is obliged to demonstrate in the second step of the s. 15(1) analysis.

[83] Justice Abella, writing for the majority on s. 15(1), explains why this is so at paras. 325-28 of *Quebec v. A*. Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member. Stereotyping, like prejudice, is a disadvantaging attitude but one that attributes characteristics to members of a group, regardless of their actual capacities. Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes. However, there is no additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory attitude exists, not on a discriminatory impact. It is the discriminatory conduct that s. 15 seeks to prevent, not the underlying attitude or motive.

[84] Accordingly, Abella J. writes at paras. 331-32, the court must conduct a "flexible and contextual inquiry" into whether a distinction has the effect of

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perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. The contextual factors will vary from case to case – there is no "rigid template". The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

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(ii) Application of the Test

A Preliminary Point

[85] I begin by noting that the appellants in this case advance their claim on behalf of common-law spouses generally. This means that the claimant group is not comprised solely of accused persons with common-law spouses. Rather, it consists of both accused persons with common-law spouses and their spouses. I make this point to emphasize that in performing its analysis, this court must consider the circumstances of the witness spouse, as well as the accused person with a common-law spouse. The result is that, in performing its *Charter* analysis, this court must take into account both aspects of the spousal incompetency rule – competence and compellability.

[86] Accordingly, the factual context for the present appeals differs in a critical way from that in *Legge*. In *Legge*, the Alberta Court of Appeal held that

common-law spouses were not compellable witnesses for the Crown. Significantly, the court in that case considered only one aspect of the spousal incompetency rule: compellability. It did so as a result of the manner in which that proceeding had unfolded.

[87] In the present appeals, the issue is whether the spousal incompetency rule should be extended to apply to common-law spouses, thereby engaging the concepts of both competence and compellability. *Legge* recognizes that the difference between competence and compellability is significant, noting at para. 52, that different concerns are raised by the concept of testimonial competence and expressly declining to deal with the competency aspect of the rule.

Substantive Discrimination

[88] I turn now to a consideration of the impact of the spousal incompetency rule on the claimant group. In my view, *Quebec v. A* has fundamentally changed the legal landscape on this matter.

[89] In *Walsh v. Bona*, [2002] 4 S.C.R. 325, the Supreme Court held that the distinction between married and common-law spouses in the context of a family property regime did not offend s. 15(1). However, in *Quebec v. A*, a majority of the Court expressly declined to follow *Walsh*: see paras. 338, 384 and 422. Justice Abella notes that in *Walsh,* freedom of choice to marry was key to the ruling of the majority that the distinction was not discriminatory under s. 15(1).

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Considering choice at that point in the analysis, Abella J. says, contradicts the approach to substantive equality because it collapses the justification for the distinction into the s. 15(1) analysis. Examining choice in the s. 1 analysis – instead of integrating it into the discrimination analysis under s. 15(1) – properly places the onus on the government to justify the exclusion: paras. 340 and 343.

[90] Justice Abella held that the distinction at issue in *Quebec v. A* was discriminatory because it imposed a disadvantage on *de facto*[1] spouses by excluding them from the protections given to legally married spouses. The disadvantage the exclusion perpetuates is an historic one, as it continues to deny *de facto* spouses access to economic remedies they have always been deprived of (para. 349). Since many spouses in *de facto* relationships exhibit the same functional characteristics as those in formal unions, with the same potential for economic vulnerability or disadvantage when the relationship ends, exclusion from the economic safeguards afforded to spouses in formal unions perpetuates historic disadvantage against them based on their marital status (para. 356).

[91] Similar reasoning applies to the present appeals, thereby rendering the spousal incompetency rule discriminatory within the meaning of s. 15(1). The spousal incompetency rule creates a distinction based on marital status and has the effect of denying common-law spouses protections afforded to spouses who

[1] The term used in *Quebec v. A* is *de facto* spouses, which refers to spouses who are neither married nor in a civil union: para. 284.

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are formally married. This denial of legal protections imposes an arbitrary disadvantage on common-law spouses solely because of their membership in the claimant group.

[92] Having so found, to paraphrase para. 357 of *Quebec v. A*, there is no need to look for an attitude of prejudice motivating, or created by, the exclusion of common-law spouses from the presumptive common law protections. Nor is it necessary to consider whether their exclusion promotes the view that the members of the claimant group are less capable or worthy of recognition as human beings or citizens. What is relevant is not the attitudes towards the members of the claimant group but the continuation of their discriminatory treatment.

[93] I conclude by noting that a full consideration of the effect of the exclusion must include the impact on witness spouses, whose exclusion spares them the significant disadvantage of being rendered testimonially incompetent. However, as this consideration is inextricably intertwined with the notion of choice, for the reasons given by the majority in *Quebec v. A*, it is relevant to the s. 1 analysis, which follows.

SECTION 1 OF THE *CHARTER*

[94] I have concluded that failing to extend the spousal incompetency rule to common-law spouses violates their guarantee of equality under s. 15(1) of the

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Charter. Now it must be determined whether the limit established by the spousal incompetency rule – namely, its application to married spouses only – can be demonstrably justified under s. 1 of the *Charter*.

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[95] Section 1 of the *Charter* reads as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[96] The first step in the s. 1 analysis is to determine whether the *Charter*-infringing measure is "prescribed by law": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 39. There is no question here that the offending rules are prescribed by law. The appellants have challenged the spousal incompetency rule and certain aspects of s. 4 of the *CEA*. The Supreme Court has made clear that a limit prescribed by law within the meaning of s. 1 may arise from the application of common law rules, as well as from a statute or regulation: *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 978-79.

[97] The *Oakes* test[2] provides the framework for determining whether a limit is reasonable and justifiable under s. 1 of the *Charter*. Under the *Oakes* test, two criteria must be satisfied. The first criterion relates to the objective which the measures responsible for the limit are designed to serve. That objective must be

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[2] *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-40. To the extent that elements of the *Oakes* framework have been modified by the subsequent jurisprudence, these cases are referred to where relevant.

of sufficient importance to warrant overriding a constitutionally protected right or freedom. The second criterion requires the government to establish that the limit is proportionate. This criterion requires the court to balance the interests of society with those of individuals and groups by assessing whether the limit is rationally connected to the goal, limits the right as little as reasonably necessary, and is proportionate in its effects: *Oakes*, at pp. 139-40; *Hutterian Brethren*, at para. 47.

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[98] As I will explain, application of the *Oakes* test leads me to conclude that the limit is reasonable and justifiable under s. 1. I reach this conclusion because restricting the spousal incompetency rule to married spouses supports the objective of ensuring that a witness spouse is not deprived of the freedom of choice, individual autonomy and human dignity associated with testimonial competence, unless both common-law spouses have chosen to marry and thereby accept the state-imposed responsibilities and protections associated with that status. Furthermore, the impairment of the rights of common-law spouses is minimized by the availability of the choice to marry.

1. A sufficiently important objective

[99] In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 109, Iacobucci J., writing for the majority, held that where a law violates the *Charter* through underinclusion, “the legislation as a whole, the impugned provisions, and the omission itself are all properly considered”. Justice Iacobucci affirmed this

approach in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 82, saying that where a law violates the *Charter* owing to underinclusion, the first stage of the s. 1 analysis is properly concerned with the object of the legislation as a whole, the impugned provisions of the Act, and the omission itself. See also *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.).

[100] Accordingly, under the first branch of the *Oakes* test, the court must consider the objective of the impugned common-law rule and the objective behind the exclusion of common-law spouses from its ambit in order to determine whether the objective underlying the exclusion is sufficiently important to justify overriding the constitutionally protected rights of common-law spouses under s. 15(1) of the *Charter*.

[101] As previously noted, the objective that underlies the spousal incompetency rule is to promote marital harmony and avoid the repugnance of compelling spouses to testify against each other.

[102] What then is the objective behind limiting the spousal incompetency rule to married spouses? In my view, that objective is to ensure that witness spouses in common-law relationships are not deprived of their autonomy, dignity and freedom of choice to testify, unless both spouses have chosen to marry and thereby accept the state-imposed responsibilities and protections associated with that status.

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[103] The spousal incompetency rule denies a witness spouse both the choice to testify and the assumption of the responsibilities that naturally flow from participation in the life of the community, a denial which the Supreme Court has described as going to the heart of the witness spouse's human dignity: *Salituro*, at p. 676. That denial adversely affects the individual's freedom, autonomy and dignity.

[104] In *Salituro*, at p. 673, Iacobucci J., writing for a unanimous court, explains that testimonial competence is consistent with respect for the freedom of all individuals, a central tenet of the legal and moral fabric of this country, particularly since the adoption of the *Charter*. Denial of the capacity to testify is a denial of human dignity and inconsistent with respect for the freedom of all individuals to choose whether to testify in criminal proceedings. At p. 676, Iacobucci J. emphasized the profound significance of the disadvantage flowing from being rendered incompetent, saying:

> The dignity of the person arises not only from the exercise of rights such as the freedom to choose, but also, and just as importantly, from the assumption of the responsibilities that naturally flow from participation in the life of the community. At the level of principle, it is just as much a denial of the dignity of an irreconcilably separated spouse to exempt the spouse from the responsibility to testify because of his or her status as it is a denial of the spouse's dignity to deny his or her capacity to testify. This is all the more true where historically it has been women who have been unable to testify.

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[105] These comments echo those of Lamer C.J. and Iacobucci J. at para. 39 of *Hawkins*:

> Perhaps most importantly, rendering a person incapable of testifying solely on the basis of marital status does strip an individual of key aspects of his or her autonomy.

[106] Limiting the spousal incompetency rule to married spouses ensures that this curtailment of the human dignity of the witness spouse occurs only where the spouses have, by choosing to marry, accepted the state-imposed benefits and burdens that accompany that status.

[107] In *Quebec v. A*, a majority of the Supreme Court accepted that in maintaining a distinction between married and common-law spouses for the purposes of spousal support and division of family property, the objective was to promote freedom of choice and autonomy for all couples. The majority agreed that this objective was of sufficient importance to ground a limitation of the equality rights of common-law spouses. Chief Justice McLachlin expressed it this way, at para. 435:

> Those who choose to marry choose the protections – but also the responsibilities – associated with that status. Those who choose not to marry avoid these state-imposed responsibilities and protections, and gain the opportunity to structure their relationship outside the confines of the mandatory regime applicable to married and civil union spouses.

[108] Although the distinction under consideration in *Quebec v. A* involved financial entitlements, similar reasoning applies here to protect the common-law

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spouse's testimonial competence: witness spouses will not be deprived of their autonomy and freedom of choice to testify unless the spouses have clearly accepted this limitation by choosing to marry.

[109] Accordingly, this is not a case like *M. v. H.* or *Halpern*, where the Crown could not establish distinct objectives underlying the exclusion. In this case, I accept the objective of the limit as proposed by the Crown, namely, to uphold the dignity and autonomy of the witness spouse and to uphold the freedom of choice of the common-law couple.

[110] Is the objective underlying the limit sufficiently pressing and substantial, when considered in light of the overall purpose of the rule? In my view it is.

[111] The protection of marital harmony is an important goal. But so too is the protection of freedom of choice and autonomy. As noted in *M. v. H.*, at para. 100, an underinclusive law may require the court to balance competing objectives, recognizing that in many instances laws do "not simply further one goal but rather strike a balance among several goals, some of which may be in tension". When the competing objectives in the present appeals are considered, I find that the Crown has met its burden. In my view, ensuring that witness spouses in common-law relationships are not deprived of their autonomy, dignity and freedom of choice to testify, unless the couple has chosen to marry and

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thereby accept the state-imposed responsibilities and protections associated with that status, is a sufficiently pressing and substantial objective.

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2. Proportionality

[112] There are three components to the proportionality analysis. First, the measure adopted must be rationally connected to the objective. Second, even if rationally connected, the measure must impair the right or freedom in question as little as possible. Third, there must be a proportionality between the effects of the measure which are responsible for limiting the *Charter* right or freedom and the identified objective.

(i) rational connection

[113] The measure in question in these appeals is limiting the spousal incompetency rule to married spouses. As we have seen, that measure serves the objective of ensuring that witness spouses are not deprived of their autonomy and freedom of choice to testify unless the couple has clearly accepted this limitation by choosing to marry.

[114] As in *Quebec v. A*, there is a rational connection between the measure and the objective: only couples who have accepted the state-imposed responsibilities and protections applicable to married spouses – including the curtailment of testimonial competence – are subject to this limitation on their personal autonomy and dignity.

(ii) minimal impairment

[115] The *Oakes* test further requires that the measure used to achieve the objective should impair the right or freedom in question "as little as is reasonably possible": *RJR-Macdonald*, at para. 160. In assessing this, the court should consider whether there are less infringing measures that would still achieve the objective in a meaningful way.

[116] As I have explained, the measure achieves the objective of upholding the individual autonomy of common-law spouses of accused persons because it limits the rule to married spouses. No party to these appeals has suggested any measure, other than refusing to extend the rule, which could maintain the individual autonomy of common-law spouses of accused persons who wished to preserve their testimonial competence.

[117] Further, the availability of the choice to marry minimizes the impairment to the rights of the accused common-law spouse, who thereby has a means to opt-in to the rule's application.

[118] I do not intend to suggest that the availability of marriage eliminates the impairment of the rights of accused persons with common-law spouses. The Supreme Court has repeatedly recognized that while in theory couples are free to choose to marry, in reality, a number of factors may place that decision beyond their control: see, for example, *Miron*, at para. 153.

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[119] Nonetheless, marriage may be an option for many common-law couples who wish to opt-in to the spousal incompetency rule prior to a trial. Indeed, the Supreme Court confirmed in *Hawkins*, at paras. 45-46, that a spouse is entitled to rely on the spousal incompetency rule even if the marriage takes place after the swearing of an indictment and is largely motivated by a desire to take advantage of the rule.

[120] Consequently, in my view, the existing spousal incompetency rule meets the requirement that it be minimally impairing.

(iii) proportionality

[121] At this stage of the analysis, the court must determine whether the law is proportionate in its effects. This requires the court to balance the objective against its deleterious effects or impact on the affected societal, individual and group rights and interests. That is, the court must determine whether the salutary effects of the limit outweigh its harmful effects: *Oakes*, at p. 139; *Hutterian Brethren* at paras. 72-74.

[122] The negative impact of the limit is serious. It denies common-law spouses the benefits of the rule, namely, protection of their marital harmony and prevention of the indignity of one spouse participating in the prosecution of the other: *Couture*, at para. 43. As well, common-law accused spouses lose a

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benefit that married accused spouses enjoy – immunity from the possibility that their spouses will be compelled to testify against them.

[123] However, as I have explained, extending the spousal incompetency rule to common-law spouses would have an inescapable negative impact on the *Charter* rights of non-accused witness spouses. The salutary effect of the limit, in respect of non-accused witness spouses, is the converse: it upholds their testimonial competence and all that is inherent in that competence, including respect for their individual autonomy, freedom of choice and human dignity.

[124] As noted in *Oakes* at p. 136:

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

[125] Individual autonomy and human dignity are well-recognized values animating the *Charter: R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 44-48. Thus, upholding these values through maintaining the witness spouse's testimonial competence, unless he or she consents to relinquish it, is a significant salutary effect.

[126] Furthermore, because the limit maintains the testimonial competence of witness spouses, it has the salutary effect of enhancing the important goal of truth-seeking in criminal prosecutions. There is a strong societal interest in

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having relevant evidence brought forward at a criminal trial to ensure a just result.

[127] I would also point out that in the family law context, spouses have the option of "contracting out" of the regimes governing spousal support and property division. Testimonial incompetence, however, renders an individual legally incapable of testifying: it is not a matter of choice nor is it a matter which the spouses can decide between themselves as a matter of contract. In this respect, therefore, the negative impact of extending the spousal incompetency rule can be viewed as more severe than that in *Quebec v. A.*

[128] The limit also has the salutary effect of promoting freedom of choice and autonomy for all spouses because only those who have chosen to marry and accept the state-imposed responsibilities and protections that flow from that status are subject to the spousal incompetency rule.

[129] The harmful effect of the limit is that it undermines the marital harmony of common-law spouses and permits the repugnance of compelling common-law spouses to testify against each other. However, this harmful effect is ameliorated by the availability of the choice to marry. I will not repeat my earlier comments about the limited availability of marriage for some common-law couples. With that in mind, however, I simply note that common-law couples who wish to avail

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themselves of the spousal incompetency rule may choose to marry at any time before a trial: *Quebec v. A*, at para. 403; *Hawkins*, at para. 46.

[130] For these reasons, in my view, the salutary effects of the limit outweigh the harmful effects, particularly as there is a means of ameliorating the harmful effects.

Conclusion

[131] Thus, although excluding common-law spouses from the ambit of the spousal incompetency rule infringes their rights to equality under s. 15(1) of the *Charter*, in my view, the limit is reasonable and justifiable under s. 1. Consequently, although Quynh and Caroline were the common-law spouses of accused persons in this trial, the trial judge made no error in treating both as competent and compellable witnesses for the Crown.

[132] Accordingly, the trial judge made no error in ruling that the spousal incompetency rule did not apply to Quynh nor did he err in admitting Caroline's evidence.

DID THE TRIAL JUDGE ERR IN ADMITTING QUYNH'S OUT-OF-COURT STATEMENTS TO TRAN BECAUSE OF THE RULES RELATING TO SPOUSES?

[133] As previously mentioned, the appellants also challenge the admission of the out-of-court statements made by Quynh to Tran. It will be recalled that Tran testified that shortly after the shooting, Quynh told her (Tran) that her husband

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Bao had told her (Quynh) the following things: he had spoken to Quang on the phone; Quang wanted to change the location of the meeting; he was upset by Quang's request; and, he refused to change the location of the meeting because he was already at the bar.

[134] The appellants submit that Tran's testimony about Quynh's out-of-court statements ought not to have been admitted because it was evidence of a marital communication and spousal privilege extends to it. This evidence, the appellants submit, violated both the spousal incompetency rule and s. 4(3) of the *CEA*. It will be recalled that s. 4(3) of the *CEA* reads as follows:

> 4. (3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

[135] Section 4(3) of the *CEA* is not applicable on the facts of this case. As *Couture* makes clear, at para. 41, the spousal privilege established by s. 4(3) of the *CEA* is testimonial in nature and prevents compelled testimony. The communications themselves are not privileged. The impugned statements were given in testimony not by Quynh but by Tran. Quynh was not compelled to disclose to Tran what her husband told her nor were the impugned statements elicited under compulsion at trial.

[136] The appellants' primary argument on this ground of appeal stems not from s. 4(3) of the *CEA*, but from the principle in *Couture* that hearsay statements

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should not be admitted if doing so would undermine the spousal incompetency rule. I have rejected the submission that the spousal incompetency rule should be extended to apply to common-law spouses. Accordingly, the spousal incompetency rule has no relevance to the admissibility of Quynh's out-of-court statements.

[137] However, the question remains whether the trial judge erred in admitting those statements because they offend the hearsay rule. This question is addressed in the following section.

DID THE TRIAL JUDGE ERR IN ADMITTING QUYNH'S OUT-OF-COURT STATEMENTS TO TRAN UNDER THE SPONTANEOUS DECLARATION EXCEPTION TO THE HEARSAY RULE?

[138] The appellants submit that the trial judge further erred in admitting Quynh's out-of-court statements to Tran under the spontaneous declaration exception to the hearsay rule. They say that the requirement of contemporaneity was not made out and that the content of the statements shows that they were not spontaneous but, rather, the result of reflective thinking on Quynh's part.

[139] There is no direct evidence as to how long after the shooting the statements were made. The appellants contend that Quynh uttered the statements between 15 and 45 minutes after the shooting, but that there is no evidence of when exactly these alleged statements took place. The Crown proposes, based on cell phone records and Tran's testimony about a phone call

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Quynh received, that the statements were made approximately 15 minutes after the shooting.

[140] The appellants acknowledge that exact contemporaneity between the occurrence and the declarations is not necessary, but contend that a stricter temporal correspondence between the two is required when the statement is made by a bystander, rather than a victim of the crime. They rely on *R. v. Morin*, 2009 QCCA 1131, 265 C.C.C. (3d) 285 for this proposition.

[141] As for the submission that the statements lacked the requisite spontaneity, the appellants point to Tran's testimony, which indicates that when Quynh made the statements she was worried about her husband and reflecting on events that led up to the shooting, and was not speaking about the shooting itself. Thus, the appellants contend, Quynh's statements were not an instinctive reaction to the shooting as required by the spontaneous declaration exception.

[142] The respondent submits that there is no basis for interfering with the trial judge's decision to admit the statements. The trial judge found that Quynh made the statements while "in a state of shock" shortly after the shooting. This finding, the respondent says, was both reasonable and well-supported by the evidence.

[143] As for the appellants' contention that too much time had elapsed for the exception to apply, the respondent says that the focus is not solely on how much time has elapsed but, rather, on whether the declarant remained in the emotional

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state that makes the possibility of concoction remote. Furthermore, the respondent says, Quynh's statements did relate to the shooting because in them, Quynh was reflecting on why the deceased was at the bar and her husband's role in his being there.

Analysis

[144] I would accept the respondent's submission on this matter. I see no basis on which to interfere with the trial judge's admission of Quynh's statements to Tran under the spontaneous declaration exception. While the trial judge gave only brief reasons for admitting the statements, it is clear that he did so because he found that when Quynh made the statements to Tran, she was in a state of shock brought on by the shooting. In the circumstances considered as a whole, I understand the trial judge to have found that the context in which the statements were made satisfactorily answered any concerns about concoction or distortion.

[145] Hearsay statements are generally inadmissible for the truth of their contents. Spontaneous declarations are an established exception to the hearsay rule and are presumptively admissible in evidence. Statements made under pressure or emotional intensity give the guarantee of reliability upon which the spontaneous declaration rule has traditionally rested: *R. v. Khan*, [1990] 2 S.C.R. 531, at p. 540.

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[146] In *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), affirmed [1990] 2 S.C.R. 531, at p. 207, Robins J.A. explained[3]:

> a spontaneous statement made under the stress or pressure of a dramatic or startling act or event and relating to such an occasion may be admissible as an exception to the hearsay rule. The stress or pressure of the act or event must be such that the possibility of concoction or deception can be safely discounted. The statement need not be made strictly contemporaneous to the occurrence so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive and misrepresent. Where the spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received.

[147] In *R. v. Dakin* (1995), 80 O.A.C. 253, at para. 20, this court confirmed that strict contemporaneity was not required and noted that admission of the statements is to be assessed "not simply by mechanical reference to time but rather in the context of all of the circumstances obtaining at the time, including those which tell against the possibility of concoction or distortion".

[148] Thus, to the extent that *Morin* can be read in the way suggested by the appellants, namely, that as a rule, the statements of bystanders must be more contemporaneous to the occurrence than those of victims, I do not agree.

[149] In my view, whether the statements are made by a bystander or a victim, the inquiry should remain as stated in *Dakin*: the focus should be not simply on

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[3] Although the Supreme Court disagreed with this court on the application of the spontaneous declaration exception in *Khan*, it did not take issue with Robins J.A.'s description of the test.

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the number of minutes that elapsed between the occurrence and the making of the statement but, rather, on whether, given the totality of the circumstances surrounding the statement, the court can safely discount the possibility of concoction or distortion.

[150] The case law makes it clear that each case must be assessed on its own unique circumstances to determine whether there are sufficient assurances of reliability. So, for example, the Supreme Court held in *Khan*, at p. 540, that a child's statement made 15 minutes after leaving the doctor's office where she had been assaulted and approximately 30 minutes after the assault itself, was not sufficiently contemporaneous because it was not "made under pressure or emotional intensity which would give the guarantee of reliability". In *Dakin*, however, statements made by burn victims over 45 minutes after the event (a fire) were admitted as spontaneous declarations. And, in *R. v. Michaud*, [2004] O.J. No. 2098 (C.A.), a statement made by the victim within an hour and half of the assault was found to be admissible as a spontaneous declaration.

[151] In the present case, there was ample evidence upon which the trial judge could conclude that Quynh's statements to Tran were admissible as a spontaneous declaration. Quynh was so deeply upset by the shooting that she was unable to stand steadily, could not walk properly, and appeared to be "panicking".

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[152] Furthermore, the statements were made not long after the shooting, while Quynh waited at the restaurant, still uncertain about how the events had concluded and while sufficiently emotionally overpowered by the events so as to discount the possibility of concoction. She was personally acquainted with the victim and present when he was shot. Her husband Bao remained in the bar in which an unknown shooter had opened fire on his companion. And Quynh had no way to contact Bao or confirm that he was safe. Indeed, Tran testified that Quynh was still frightened and anxious at the time that she made the statements.

[153] Finally, I do not accept the appellants' submission that the statements could not be admitted under the spontaneous declaration exception because they described events leading up to the shooting, rather than the shooting itself. The appellants offered no authority for this submission, and I see no principled basis for limiting the exception in such a way. In any event, the reason for the victim's presence in the bar was relevant and directly related to the shooting.

[154] Accordingly, I would dismiss this ground of appeal.

REMEDY

[155] In the event that I am incorrect and failure to extend the spousal incompetency rule to common-law spouses does violate s. 15(1) of the *Charter* in a manner that cannot be justified under s. 1, in my view, the appropriate remedy is a declaration of constitutional invalidity, rather than "reading in" suitable

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language to s. 4 of the *CEA* and extending the spousal incompetency rule to apply to common-law spouses.

[156] Reading in to rectify a constitutional defect is warranted "only in the clearest of cases", where it would further the law's objective without intruding unacceptably into the legislative domain: *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 718. In light of Bill C-32, *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, 2nd Sess., 41st Parl., 2014, cl. 52, which is currently before Parliament, it cannot safely be assumed that Parliament would choose to preserve the spousal incompetency rule if it were to be applied to a broader group of potential witnesses. Clause 52(1) of the Bill would abrogate the spousal incompetency rule by amending s. 4(2) of the *CEA* to provide that:

> No person is incompetent or uncompellable to testify for the prosecution by reason only that they are married to the accused.

DISPOSITION

[157] Accordingly, I would dismiss the appeals.

"E.E. Gillese J.A."
"I agree. K. van Rensburg J.A."

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Weiler J.A. (Concurring):

A. INTRODUCTION

[158] I agree with Gillese J.A. that the spousal incompetency rule should not be extended to common-law spouses.

[159] I would go further. Assuming that the spousal incompetency rule were to be extended to common-law spouses and the trial judge erred in admitting the evidence of the common-law spouses, I would nevertheless apply the curative proviso under s. 686(1)(b)(iii) of the Criminal Code, R.S.C. 1985, c. C-46, and dismiss the appeal.

B. THIS IS AN APPROPRIATE CASE FOR THE APPLICATION OF THE CURATIVE PROVISO

(1) Overview

[160] Where an appellate court is of the opinion an appeal against conviction could be decided in favour of an appellant on the ground the trial court made a wrong decision on a question of law, it may nevertheless dismiss the appeal under s. 686(1)(b)(iii) if "it is of the opinion that no substantial wrong or miscarriage of justice has occurred". This is known as the curative proviso.

[161] The prerequisites for application of the proviso are succinctly stated by Moldaver J. on behalf of the majority in *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53:

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> As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error … not been made". Flowing from this principle … there are two situations where the use of s. 686(1)(b)(iii) is appropriate: 1) where the error is harmless or trivial; or 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict. [Citations omitted.]

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[162] In deciding whether or not a substantial wrong or miscarriage of justice has occurred, an appellate court will consider: (1) the seriousness of the error involved; and (2) whether the evidence is so overwhelming the trier of fact would inevitably convict, having regard to the legally admissible evidence and the effect the inadmissible evidence might possibly have had on the trier of fact's inference drawing process.

[163] Assuming the trial judge erred in allowing the common-law spouses to be called as witnesses, this error was not a harmless or trivial error; it was a serious error. My decision rests on the application of the second branch of the curative proviso.

[164] The Crown bears the burden of demonstrating that the curative proviso is applicable and of satisfying the court that the conviction should be upheld notwithstanding the legal error: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34.

[165] The appellants submit that the Crown has not discharged its burden and therefore that the curative proviso cannot be applied. Their position is two-fold. On the one hand, the appellants submit that the evidence of Quynh, Bao's common-law spouse, and Caroline, Tri's common-law spouse, provided important context about the relationship between the parties and the events of October 5, 2002, that assisted the Crown's case. On the other hand, the appellants submit that the testimony of Quynh and Caroline deprived them of a fair trial. They make this argument particularly with respect to Quynh, whose testimony they say was inculpatory by its very worthlessness. The appellants submit that the cumulative effect of Quynh's evasive answers, her declaration as an adverse witness, the Crown's cross-examination, and the Crown's comments about her credibility in his closing address damaged them all in the eyes of the jury.

[166] I disagree. As I will illustrate, a review of the timeline of events – as corroborated by the testimony of numerous witnesses, phone records, and Quynh's statements to the waitress Tran shortly after Quang's shooting – demonstrates that the case for the Crown was overwhelming. In these circumstances, convictions were inevitable.

[167] I also reject the appellants' contention that admission of the common-law spouses' testimony tainted the jury's impression of the appellants and rendered their trial unfair. First, the mere fact that a witness appears to be feigning a lack

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of memory, has recanted evidence previously given, or is declared adverse will not lead to a finding of trial unfairness in the absence of any evidence or rational inference as to how the appellants were prejudiced. Second, any adverse inferences that could be drawn from the evidence of the common-law spouses were available either from other more reliable sources or were not material. Overall, the admission of the common-law spouses' evidence did not affect the fairness of the trial and the jury would inevitably have convicted. The prerequisite for applying the curative proviso is met.

[168] Finally, I see no reason to accede to the appellants' submission that, as a matter of policy, the court should exercise its discretion not to apply the proviso out of respect for the spousal incompetency rule. My reasons follow.

(2) On the whole of the admissible evidence, the Crown's case was overwhelming

[169] The evidence in this case was overwhelming that Quang's murder was an organized hit arranged by the appellants Bao and Binh, and that Tri was an accessory after the fact. None of this evidence came from the trial testimony of the common-law spouses.

[170] As Moldaver J. stated in *Sekhon*, at para. 56:

> [W]hen considering the second branch of the proviso in the context of a circumstantial case, it is necessary to look at the whole of the admissible evidence in assessing the strength of the case. It is not the task of an appellate court to parse each item of evidence in

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> search of a possible innocent explanation. If that were so, it would be virtually impossible to ever satisfy the second branch of the proviso in a circumstantial case.

Overall, the appellants' submission that the testimony of the common-law spouses provided important context which assisted the Crown overlooks the mass of properly admitted circumstantial evidence that made the Crown's case overwhelming.

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(a) Timeline of events

[171] As it unfolded at trial, the timeline of the evening of October 5, 2002, and the following days provided overwhelming support for the Crown's theory that Bao and his friend Binh plotted to kill Quang, and that Bao's brother, Tri, was an accessory after the fact by facilitating Binh's flight from Canada to Vietnam. That timeline was established through the evidence of several eyewitnesses who were with the appellants and Quang on the night of the murder and was corroborated on key elements through phone records. The evidence reveals:

- **6:04 p.m., 6:32 p.m. and 7:06 p.m.** Times of three phone calls from Bao's cell phone to Quang's phone. The 6:32 p.m. call lasted over 17 minutes. These calls corroborate the waitress Tran's evidence, admitted for the truth of its contents under the res gestae exception to the hearsay rule, that shortly after the shooting, Quynh told her that Quang kept trying to change the location of the meeting but Bao refused. I also note that Bao himself told police that Quang wanted to meet him somewhere else, but Bao refused. That statement,

transcribed in the notes of the police who interviewed him, was admitted into evidence at trial.

- **7:00 p.m. (approx.)** Quang told his friends Hon and Lam that he needed help. The three met up at a karaoke bar in downtown Toronto. Quang was anxious, frustrated and worried. He explained that he had to go meet some people at a restaurant in Mississauga. He asked his friends to go in first, sit at a separate table, and "watch his back", in case he was attacked. Quang refused to tell Hon and Lam what the problem was. On the way to the bar, Quang and his friends stopped at Quang's brother's house and picked up two machetes.

- **8:02 p.m.** One minute phone call from Bao's home phone to Binh's cell phone.

- **8:30 p.m.** Tran (the waitress) and Tuan (the cook) returned to the bar after running errands. They saw Binh standing outside, holding Bao's German Shepherd dog on a leash. Tuan recognized Binh from his previous visits to the bar.

- **8:41 p.m.** 1 minute, 47 second phone call from Bao's cell phone to Binh's cell phone.

- **8:30-8:45 p.m.** Bao arrived at the bar and took a seat at table 9, facing the entrance. He told the owner, Pham, that he was expecting friends.

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- **8:48 p.m.** Phone call from the bar phone to Binh's cell phone. The Crown suggests that this was the call in which Bao instructed Binh to bring the shooter in.

- **8:50 p.m.** (approx.) Binh enters the bar with the "white man" (i.e. the shooter). Pham noted that white customers were "very rare" at his bar. Binh and the white man sat down at table 4, which was directly across from table 9 where Bao sat. Bao and Binh did not acknowledge each other. This struck Pham as odd because whenever he had seen Bao and Binh at the bar in the past, "they [were] always together and they [were] very friendly with each other and they – they [were] very close … just like a brother". Binh ordered several beers but left after a couple of minutes, leaving the white man sitting alone. Pham thought perhaps Binh would come back, but he did not see him again that night. Tran testified that Binh stayed in the restaurant for approximately 20 minutes and left without finishing his beer.

- **8:59 p.m.** One minute phone call from Bao's cell phone to Binh's cell phone.

- **9:00 p.m. (approx.)** Bao's common-law wife, Quynh, arrived and sat down at Bao's table.

- **9:03 p.m.** 5 minute, 33 second phone call from Bao's cell phone to Quang's phone. Recall that the waitress Tran testified that, according to Quynh,

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Bao told Quang that he had already ordered some beer, and if Quang wanted to meet with him, he should come to the karaoke bar.

- **9:10 p.m.** 1 minute, 32 second phone call from Quang's phone to Bao's cell phone. A bar customer testified that she saw a blonde Vietnamese woman talking on a cellphone and saying, "When are you coming?" Quynh was a blonde Vietnamese woman. Quang's friend Lam testified that, on the way to the bar, Quang spoke on his cellphone to "Chi", an honorific for a woman, and told her he would be at the bar in 15 to 20 minutes.

- **9:25 p.m.** One minute phone call from Quang's phone to Bao's cell phone.

- **9:30 p.m. (approx.)** Quang entered the bar alone. Lam explained that when he, Quang, and Hon parked the car, a short distance away from the bar, Quang changed his mind about needing backup and told his friends to stay in the car. He said that it was "his problem", "he's the older brother in this", and "he can manage his own problems". Pham was sitting and talking to Bao and Quynh when Quang arrived. Pham saw Bao wave to Quang. Pham got up from the table and gave his seat to Quang.

At that point, Pham left the bar to go and get a pizza. When he came back, he overheard Bao and Quang talking. Pham testified, "I do recall that Quang mention to Bao that one of his brothers screw something or owe Bao some money. Then he'll try to repay Bao for it and he will be responsible for it." Quang

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told Bao he would repay the money “soon”. This is consistent with Bao’s statement to police shortly after the murder, in which he explained that Quang was meeting him to talk about a loan. Bao and Quynh got up from the table and went to select a karaoke song from behind the counter. They asked Tran for help.

By that point, Bao, Quynh, Quang, and the white man were the only customers in the bar. The white man got up to go to the bathroom. Within about two minutes, Pham saw him return. He then heard a gunshot. Pham looked up and saw Quang and the white man struggling with each other. The white man looked up and pointed the gun at Pham and the others. Then the white man fled. Neither Pham nor Tran heard any argument between Quang and the white man prior to the shooting. Tran, having witnessed the shooting, ran into the kitchen and told Tuan to run. Quynh, Tran, and Tuan ran out the back door immediately after the shooting. The three hid behind a dumpster. While hiding there, Tran and Tuan saw Binh with the German Shepherd dog, walking down the street and talking on his cellphone. Quynh, Tran, and Tuan left their hiding spot behind the dumpster and ran, holding hands, first to a convenience store in the same strip mall, where they stood for a few minutes, and then to a restaurant in the mall. Quynh told Tran that she was scared because her husband was still in the karaoke bar and she was worried about his safety but could not call him to check on him because she had his cellphone.

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- **9:51 p.m.** Pham called 911. While waiting for the first responders to arrive, Pham told Bao he would not mention anything to the police about Binh. He explained at trial: "To my instinct and my feeling, what happened that night after the incident, I feel a bit strange about something happening because Binh and Bao, they always are very good friends and today – that night, they did not speak to each other and then something happen to my restaurant. So I'm not sure why I mention to that statement but I decided".

- **9:55 p.m.** Police arrived.

- **10:04 p.m.** One minute phone call from Binh's cell phone to Bao's cell phone.

- **10:30 p.m. and 10:51 p.m.** Phone calls from Binh's cell phone to Phong Le, a friend in Montreal.

- **11:34 p.m.** One minute phone call from Bao's home phone to Binh's cell phone. Bao's and Binh's cell phones were never used again, though the bills continued to be paid.

- **The following days.** Hours after the murder, Bao's brother Tri, who lived in Montreal, was observed leaving Bao's home. Both Binh and Tri arrived in Montreal the day after the murder. A witness testified that she spoke to Binh on the phone that day, and that he was with Tri.

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Binh told another friend, Luong, that he, Tri, and Phong Le wanted to go to Vietnam as soon as possible because he “had some problems” in Toronto. Binh told Luong it was best for him not to know too much.

Tri asked Phong Le to accompany them to Vietnam because Tri and Binh were not familiar with the country. Tri said they wanted to leave “as soon as possible”.

Phong Le drove to Ottawa to get Tri and Binh’s travel visas more quickly. The three left for Vietnam on October 13, 2002. Binh stayed with Tri and Bao’s aunt, whom he had never met before. He stayed for over 3.5 years.

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[172] Having regard to the timeline of events outlined above, the Crown’s case was overwhelming on the evidence properly admissible at trial. In addition, as Gillese J.A. writes at para. 42 of her reasons, Tran testified that, while at the restaurant, Quynh told her that:

> (1) her husband Bao had spoken on the phone with Quang earlier that day and her husband “was very upset because … [Quang] keeps changing the meeting location”; and (2) Bao told Quang that he had already ordered some beer, and if Quang wanted to meet with him, he should come to the karaoke bar.

[173] The admissibility of these statements was challenged on appeal. I agree with Gillese J.A.’s very comprehensive analysis and conclusion that these statements were admissible under the *res gestae* exception to the hearsay rule. I also agree with my colleague that s. 4(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which prohibits compelled disclosure of communications made

between spouses, was not applicable on the facts of this case. The admission of this evidence strengthened the Crown's case, but, in my opinion, the case for the Crown was overwhelming without it. The jury would have drawn the inference from the timeline of events and the evidence of other witnesses that Quang was fearful and reluctant to come to the karaoke bar to meet Bao, and that Quynh's presence at the bar was a factor in Quang's decision to enter the bar alone.

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(b) The Crown's case stood basically uncontradicted

[174] I also note that the fact the accused chose not to testify, while not justifying an inference of guilt, is a factor an appellate court may consider in deciding whether to apply the curative proviso: see e.g. *R. v. Leaney*, [1989] 2 S.C.R. 393, at p. 418; *R. v. Sellars*, [1980] 1 S.C.R. 527, at pp. 534-5; *R. v. Avon*, [1971] S.C.R. 650, at p. 657. When the prosecution's evidence standing alone would support a conclusion of guilt beyond a reasonable doubt, the absence of any explanation provides no basis for the jury to draw any other inference: *R. v. LePage*, [1995] 1 S.C.R. 654, at paras. 29-30. In this case, the fact that none of the appellants testified meant the Crown's case stood basically uncontradicted.

(3) The appellants' trial was not unfair; the trier of fact would inevitably have convicted

(a) The common-law spouses' evidence

(i) Quynh's evidence

[175] Quynh's evidence shed no light on the events of October 5, 2002. Crown counsel successfully applied to have Quynh declared an adverse witness midway through her examination-in-chief. As the Crown noted in his closing address, she answered "I can't remember" over 100 times. She denied being able to recognize a video of her own house and said she could not remember if she owned a dog in 2002.

[176] The substance of Quynh's evidence was this: Quang was an acquaintance of her husband Bao. She was present during the shooting but did not remember whether she had seen the shooter. She admitted knowing Binh. She said she did not remember whether she saw Binh on the night in question. She had Bao's phone at some point that night. She denied her conversation with the waitress, Tran. She gave the phone to Tran to call a friend for a ride home and never got it back from Tran. She carried on paying the bill for the cell phone. Later, she went to Vietnam and she saw Bao's brother, the appellant Tri, while in Vietnam.

[177] Bao's counsel elected not to cross-examine Quynh.

[178] In his address to the jury, the Crown suggested Quynh was not a credible witness. The Crown did not suggest that the jury should look unfavourably on Bao because his wife gave evasive or unhelpful evidence.

(ii) Caroline's evidence

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[179] Caroline testified that Binh moved in with her and Tri and lived with them for several months before his arrest in Montreal in 2007. She denied the Crown's suggestion that she was part of a plan to hide Binh from the police. The appellants submit her denial was not very credible. They suggest that Tri would have told her why Binh moved in with them and that an adverse inference against them resulted from her denial.

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(b) The appellants' position

[180] The appellants submit that the cumulative effect of the Crown's having called Quynh when she was not a competent or compellable witness against Bao, her evasive testimony, her declaration as an adverse witness, the Crown's cross-examination of her, and the Crown's submissions as to her lack of credibility deprived all of the appellants of a fair trial because the jury would have drawn an adverse inference against them based on her testimony and demeanour. In light of this, they submit that the curative proviso should not be applied in this case.

[181] They explain, at para. 35 of their factum:

> Quynh's testimony was entirely unresponsive and evasive. It may be said to demonstrate why the spousal incompetency and privilege rules exist. On the one hand, she swore to tell the truth. On the other hand, she obviously did not want to testify against her own husband or say anything that could harm his case. Although it was entirely wrong for her to do so, she tried to "take a middle ground" by continually claiming that

> she had no memory. As a consequence, much of her testimony was incredible and undoubtedly false.
>
> ...
>
> Her testimony, full of perjured answers, could only have damaged the [appellants] in the eyes of the jury. Insofar as she said anything substantive in her testimony, it also assisted the Crown's case against her husband and his co-Appellants.

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[182] In their factum, the appellants do not suggest that the Crown called Quynh solely to discredit her – and by extension, the accused – contrary to this court's directions in *R. v. Soobrian* (1994), 21 O.R. (3d) 603, and *R. v. Figliola*, 2011 ONCA 457, 105 O.R. (3d) 641.

(c) The appellants' trial was not unfair

[183] The mere fact that a witness appears to be feigning a lack of memory, has recanted evidence previously given, or is declared adverse does not necessarily lead to an inference of trial unfairness. In *R. v. Hawkins*, [1996] 3 S.C.R. 1043, for example, the court considered whether admitting a witness's previous statement implicating the accused, as well as her subsequent recantation, would result in prejudice or unfairness to the accused. In that case, a witness testified against the accused at the preliminary inquiry but midway through her testimony, she recanted. By the time of the trial, she had married the accused and was no longer a competent or compellable witness. The question was whether her earlier testimony and recantation could be read in at trial. After finding that admitting the earlier statements would not violate the spousal incompetency rule, the Supreme

Court went on to hold that admitting the statements would not result in prejudice or unfairness to the accused. In coming to this conclusion, the court pointed out, at para. 93, "there has been no evidence indicating *how* the admission of [the witness's] preliminary inquiry testimony would actually prejudice the accused and the trial process. It is only this sort of prejudice that is relevant" (emphasis added).

[184] In this case, the appellants' submission that the admission of the common-law spouse's evidence prejudiced the accused is largely based on an assertion that the jury may have drawn a general adverse inference against the appellants from Quynh's evasive testimony and demeanor, and to a lesser extent Caroline's, thereby rendering the appellants' trial unfair. It is a submission that the jury might possibly have departed from its duty not to decide the case on the basis of bias or prejudice.

[185] Jurors take an oath to decide a case truly according to the evidence before them. In addition, the trial judge in this case gave the jury the usual instructions emphasizing the importance of impartiality in his charge to the jury and instructed the members of the jury on "the irrelevance of prejudice and sympathy". He told the jury members to "consider the evidence, and make [their] decision without any sympathy, prejudice or fear" based on an "impartial assessment of the evidence."

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[186] Unlike a judge-alone trial, where the reasons will indicate the extent to which the trial judge relied on improperly admitted evidence, a jury does not give reasons for its verdict. When reviewing a jury's conviction, an appellate court acts on the assumption that when a jury is properly instructed, it will understand and follow those instructions: see e.g. *R. v. Corbett*, [1988] 1 S.C.R. 670. Therefore, in attacking a jury's finding of guilt, defence counsel will usually submit that the trial judge erred in law in the manner in which the jury was charged.

[187] In this case, the appellants do not attack the trial judge's charge to the jury. The trial judge did not mention Quynh's evidence in his over 300-page charge, other than to note that her testimony was inconsistent with her hearsay statement to Tran. Had Quynh not testified, Tran's evidence as to what Quynh told her would have gone unchallenged. Thus, Quynh's denial did no harm to the appellants.

[188] To the extent that the appellants rely on the decision of the Supreme Court in *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, in submitting that the trial judge's error of law resulted in prejudice or unfairness to the appellants, I cannot agree that *Sarrazin* assists the appellants. Unlike this case, in *Sarrazin* the case for the Crown was not overwhelming, as both the Court of Appeal and the Supreme Court agreed: *Sarrazin*, at para. 29. Furthermore, the appellant in *Sarrazin* challenged the trial judge's charge to the jury; the appellants in this case do not. More importantly, in *Sarrazin*, at para. 31, the Supreme Court declined to

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adopt the appellant's theory, derived from *R. v. Haughton*, [1994] 3 S.C.R. 516, that the palatability of a potential verdict may have played a role in the jury's decision. In other words, the Supreme Court rejected the submission that the jury departed from the evidence and its instructions respecting the evidence on account of emotion. Thus, the very premise underlying the appellants' argument here was rejected in *Sarrazin*. I will elaborate.

[189] In *Sarrazin*, the deceased died of a blood clot after being shot and then consuming cocaine. A central issue in the case was whether his death was caused by the gunshot wound or by the consumption of cocaine. The trial judge charged the jury on second degree murder and manslaughter. Despite defence counsel's request, he refused to put attempted murder to the jury. The jury convicted the accused of second degree murder. This court unanimously held that the trial judge erred in not putting attempted murder to the jury but split on whether the proviso could be applied, with the majority holding that it could not.

[190] On further appeal, the Supreme Court was unanimous in holding that the trial judge erred in not putting the offence of attempted murder before the jury. However, the Court divided on the issue of whether to apply the curative proviso. Both the majority and minority agreed that, depending on the circumstances, implicit findings of fact made by a jury can be relied on in order to apply the proviso, but they disagreed on whether this was an appropriate case in which to do so.

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[191] The Crown pathologist had testified that he could not rule out cocaine as the sole cause of death and he also accepted that reasonable pathologists could disagree on whether the shooting or the cocaine was the cause of death. In the opinion of the majority, those admissions laid an evidentiary foundation for the defence position that even if the appellant had murderous intent, there was a reasonable doubt about causation. Binnie J., on behalf of the majority, held that the curative proviso could not be applied. He cited Callinan J. in *Gilbert v. The Queen*, [2000] HCA 15 (Austl. H. C.):

> [I]t is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of choices offered, particularly when, as here, a particular choice was not the only or inevitable choice: at para. 35.

[192] The jury was not presented with the option of convicting the appellant of attempted murder, and it could not safely be assumed that, had they been presented with this option, they would have convicted him of second degree murder. The proviso could not be applied.

[193] Cromwell J., on behalf of the three judges who dissented, noted that the trial judge gave the jury complete and accurate instructions on causation, and no one questioned this. He held, at paras. 47-48, that the approach the Court should adopt is to look to the conclusions necessarily reached by the jury, as reflected in its verdict, and use those conclusions to assess whether there was any reasonable possibility that the verdict would have been different had the trial

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judge not erred in his instructions. Cromwell J. held that the jury's verdict of second degree murder necessarily meant that they were persuaded beyond a reasonable doubt that the gunshots and not the cocaine caused the deceased's death. The instructions on attempted murder would only have been relevant if the jury had a reasonable doubt about causation, which, as their verdict indicated, they did not. Consequently, Cromwell J. would have applied the curative proviso.

[194] Unlike in *Sarrazin*, the appellants here have not laid any evidentiary foundation from which to draw a rational inference that if the trial judge erred in law in admitting the evidence of the common-law spouses, his error might possibly have led to bias or prejudice towards the appellants and affected the jury's inference drawing process. The presumption that the members of the jury followed the trial judge's instructions and made their decision without any sympathy or prejudice applies.

[195] As to any specific inferences the jury might have drawn from the improperly admitted evidence, these could not possibly have affected the verdict. Not every inference drawn from improperly admitted evidence will preclude application of the curative proviso. The Supreme Court's decision in *Sekhon* provides helpful guidance as to when an improper inference will be prejudicial to the accused. In that case, the trial judge erred by admitting inadmissible evidence and, in addition, drew an improper inference from that evidence. Nonetheless, the court applied the curative proviso.

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[196] Sekhon was convicted of importation and possession for the purposes of trafficking of 50 kg of cocaine. The only issue at trial was whether he knew he had cocaine in his truck when he crossed the border from the United States into Canada. The evidence as to Sekhon's knowledge of the cocaine was entirely circumstantial. Sekhon testified that an acquaintance had asked him to drive the truck across the border, and that he had no knowledge of the cocaine. A police officer gave expert evidence respecting the customs and habits of drug couriers, and testified that in his many years' experience he had never encountered a blind courier, that is, a courier who did not know that he was carrying drugs. The trial judge rejected Sekhon's evidence in its entirety and, in giving his reasons for doing so and for finding that Sekhon knew about the cocaine, referred to the police officer's expert evidence as one factor, among many, that supported his conclusion.

[197] The Supreme Court unanimously held that the expert's evidence about never having encountered a blind courier should not have been admitted. This evidence was not legally relevant to Sekhon's guilt or innocence and was prejudicial to the accused. The majority, held, however, that the curative proviso should apply because Sekhon's guilt was the only rational conclusion.

[198] The majority found the fact Sekhon detached the fob from the keychain before handing the keys to the truck to the customs officers was, in itself, devastating. If the buttons on the fob were pressed in a specific sequence, the

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compartment between the bed and the frame of the truck in which the cocaine was found would open. Moreover, the majority held, this evidence did not stand alone but was part of a web of circumstantial evidence pointing towards Sekhon's guilt. Even though the improperly-admitted evidence supported a prejudicial inference, a majority of the court nonetheless applied the curative proviso because, even had the error not been made, a conviction was inevitable. Although the minority disagreed in the result, their refusal to apply the curative proviso was not based solely on the fact the evidence created an unfair inference. Like the majority, the minority held that the central issue was whether the trial judge's finding of guilt was the only rational conclusion available on the evidence. They held that other plausible explanations existed, and so declined to apply the proviso.

[199] Here, any adverse inferences that could have been drawn from Quynh's substantive evidence were also in evidence either from other more reliable or direct sources, or were of little relevance to the events on the night in question. On the issue of whether Bao knew Binh, for example, Pham, the owner of the bar, testified that Bao and Binh were very close, like brothers. In addition, Bao acknowledged that he knew Binh in his statement to the police, which was admitted at trial.

[200] While the appellants submit that Quynh's evasive answers were given in an attempt to distance Bao and herself from Binh and thus reflected badly on

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them, the jury had other more direct evidence that Bao was trying to distance himself from Binh. In Bao's statement to the police, Bao lied about the extent of his relationship with Binh, saying he did not know Binh's last name or his cell phone number. And in addition to Pham's evidence about their relationship, the records of the calls from Bao's cell phone to Binh's cell phone objectively proved Bao's statement about not knowing Binh's cell phone number was false.

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[201] In the same vein, the fact that Caroline was asked why Binh lived with her and Tri in Montreal for many months following Binh's return from Vietnam, and that she answered she did not know, is insignificant compared to the evidence that, right after the shooting, Tri helped Binh flee to Vietnam and live there for several years.

(4) Conclusion

[202] On the admissible evidence I have reviewed, the case for the Crown was overwhelming. Further, the fact that the appellants did not testify meant that the Crown's case stood uncontradicted. The admission of the common-law spouses' testimony did not affect the jury's inference-drawing process so as to render their trial unfair for two reasons. First, the mere fact that a witness appears to be feigning a lack of memory, has recanted evidence previously given, or is declared adverse will not lead to an inference of trial unfairness in the absence of any evidence or rational inference, not present here, as to how the appellants were prejudiced. Second, any adverse inferences that could be drawn from the

testimony of the common-law spouses were available either from other more reliable sources or were not material.

[203] In deciding whether the appellants had a fair trial, the court cannot only focus on the alleged legal error that was committed. Rather, the court must consider the whole of the evidence and assess the effect of the alleged error in that context. Overall, the admission of the common-law spouses' evidence did not affect the fairness of the trial and the jury would inevitably have convicted. Accordingly, the Crown has discharged its burden of demonstrating that there was no substantial wrong or miscarriage of justice and the curative proviso can be applied.

(5) Policy considerations

[204] The appellants submit that even if the curative proviso is applicable, the court ought not to apply it for policy reasons. They submit applying the proviso would undermine the spousal incompetency rule that seeks to preserve marital harmony.

[205] In relation to the appellant Binh, the marital harmony of the two couples is irrelevant. Insofar as Bao and Tri are concerned, the need to protect their marital harmony must be balanced against the seriousness of the crime at issue and society's interest in having that crime prosecuted based on all the available evidence. Any policy analysis must also account for the fact that the spousal

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incompetency rule itself has been widely criticized as antiquated and regressive: see e.g. *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 673-4; Lee Steusser, "Abolish Spousal Incompetency," (2007) 47 C.R. (6th) 49; Kent Roach et al., "The Spousal Incompetence Rule and Marital Privilege: Where an Anachronism Meets Reality," (2012) 59 C.L.Q. 109.

[206] I would not exercise my discretion and decline to apply the proviso on account of policy reasons.

[207] Even if the trial judge erred in law in allowing the common-law spouses to be called and in admitting that evidence, there was no substantial wrong or miscarriage of justice and I would dismiss the appeal.

Released: April 24, 2015 ("K.M.W.")

"Karen M. Weiler J.A."

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