Affaires mondiales Canada
Global Affairs Canada

THE RELEVANCE OF EVIDENCE

A CANADIAN PERSPECTIVE

Dr. Emma Cunliffe

CEJA · JSCA

Rodó 1950 Providencia
Santiago, Chile
Tel. +(562) 274-2933
www.cejamericas.org

EDITORIAL TEAM
Leonel González
Sandra Araneda
Javiera Portuguez

AUTHORS
@ Emma Cunliffe

The Relevance of Evidence: A Canadian Perspective

INTELLECTUAL PROPERTY REGISTRY
2021-A-5065

ISBN
978-956-8491-84-0

COVER DESIGN
CIPOD

LAYOUT AND PRINTING
CIPOD

Free distribution

THE RELEVANCE OF EVIDENCE

A CANADIAN PERSPECTIVE

Dr. Emma Cunliffe*

(*) Professor, Allard School of Law, University of British Columbia.

Table of contents

Introduction

Within Canada's adversarial trial system, the common law of evidence supplies the basic rules that govern how facts can be proven. The Canadian law of evidence begins from the premises that the parties can assemble the most complete and accurate factual record, and that the judge must act as an independent arbiter of the law. Particular rules seek to ensure that the information heard by the trier of fact is relevant to the matters in issue between the parties, that evidence rationally advances determination of those matters rather than appealing to prejudice or emotion, and that evidence is sufficiently reliable to be of potential value to the trier of fact. Unlike many common law jurisdictions, Canada has not codified its evidence law. This continued reliance on judge-made principles has allowed Canadian evidence law to evolve, for example to reflect the constitutional recognition of rights and freedoms – not just for criminal defendants, but also for victims of crime. It has also allowed Canadian law to adapt to the recognition of Indigenous rights and title.

This paper supplies a description of the sources of evidence law in Canada, and the history of reform to that law before turning to a discussion of the role and responsibilities of the trial judge and parties. Against this structural background, the paper introduces the key legal concepts of relevance, probative value and prejudicial effect; and explores how these concepts provide the basic organizing principles for the proper analysis of the admissibility of information into a Canadian trial. The paper turns to the examples of expert evidence and sexual history evidence to illustrate how the structural and conceptual features of Canadian evidence law work together to advance the goal of reaching accurate verdicts while respecting human rights.

Professor Lisa Dufraimont argues that many of the Canadian principles of evidence are predicated upon a mistrust of the jury's capacity to identify the dangers inherent in some kinds of evidence, such as hearsay[1]. While acknowledging that the Supreme Court of Canada has indeed articulated this concern, this author would argue that much of the law of evidence also serves other important purposes such as reducing the risk of wrongful convictions, promoting efficient use of court time, and protecting vulnerable witnesses against victimization within the trial process.

[1] Dufraimont, above note 89.

Canadian federalism, the *Charter*, and the history of evidence law reform

This part describes Canada's legal structure with particular attention to how the Canadian constitution structures courts and evidence law. Key features that have influenced the shape and development of Canadian evidence law include multijuralism (i.e. the co-existence of multiple legal traditions) and the adoption of the *Constitution Act*, 1982,[2] particularly the *Canadian Charter of Rights and Freedoms*.[3] Each of these features of the Canadian legal landscape helps to shape the Canadian legal concept of relevance, and associated legal concepts such as probative value and prejudicial effect.

CANADIAN FEDERALISM

Canada is a federal nation, with legal jurisdiction divided (and occasionally shared) between provincial and national levels of government. Federalism has a significant impact on courts and legal proceedings, and has been particularly important in Canada's approach to evidence law reform. Criminal law is assigned to federal jurisdiction, while most areas of civil law (e.g. property and contract) are provincial. Some fields, such as family law, are both provincial and federal.

A key driver of the Supreme Court of Canada's evidence law reform has been criminal law and procedure. Criminal law and procedure are exclusively assigned to federal jurisdiction by s. 91(27) of the *Constitution Act*, 1867, with the consequence that true crimes such as murder and theft are governed by federal law. Provinces may establish offences where their dominant purpose is to regulate some matter within their jurisdiction, for example highway traffic offences or offences related to the regulation of health and safety. Most federal criminal offences, and some evidentiary and procedural rules, are contained within the federal *Criminal Code*, RSC 1985 c. C-46 and the *Controlled Drugs and Substances Act*, SC 1996 c. 19. Pursuant to s. 9 of the *Criminal Code*, substantive criminal law has been comprehensively codified by Federal Parliament, to the exclusion of traditional common law offences. The only residual exception to this principle of codification is that judges retain the common law power to convict and punish criminal contempt of court.[4]

Superior trial court judges (e.g. the Superior Court of Justice in Ontario and the British Columbia Supreme Court) are appointed by the federal government, but sit on provincially constituted courts. These courts have jurisdiction over serious criminal cases and those civil cases where the value of the claim is higher. Most trials take place in

---

2 *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Constitution Act*, 1982].

3 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, ibid [*Charter*].

4 For a general overview of constitutional arrangements with respect to criminal law and procedure, see Kent Roach *Criminal Law* (Toronto: Irwin Law, 7th edition 2018).

provincial courts, for example the Ontario Court of Justice and the British Columbia Provincial Court. Judges in these courts are appointed by provincial government, but exercise federal jurisdiction with respect, for example, to criminal law. All appeal court judges – up to and including judges of the Supreme Court of Canada – are federally appointed.[5]

The federal structure of Canadian law and jurisdiction has shaped the Canadian law of evidence in a myriad of ways. One crucial example arose in the late 1970s, when Canada's and Ontario's law reform commissions drafted competing model codes of evidence. Their failure to agree on a uniform approach produced a stalemate at a time when many common law countries (such as the United States of America and Australia) were codifying the judge-made rules of evidence. As a result of this stalemate, the Canadian law of evidence remains largely common law, or judge-made.[6] Although there are some statutory laws of evidence at both the federal and provincial level, these statutes are generally fragmentary and in no way approach a comprehensive code of evidence.[7] Canadian judicial development of the legal principles of evidence has mostly played out within criminal cases, partly because of the heightened burden on the Crown to prove its case beyond a reasonable doubt and because the stakes – and therefore the need to be scrupulous with procedural fairness – are perceived to be much higher. Criminal cases are also the category in which the *Canadian Charter of Rights and Freedoms*, adopted in 1982, is most often raised. The rules of evidence also interact in significant ways with the criminal burden and standard of proof – i.e., the requirement that the state must prove the elements of a crime (and disprove most defences) beyond a reasonable doubt.

A distinctive feature of the Canadian legal system is 'bijuralism' – the coexistence of civil law and common law legal traditions. Specifically, the province of Québec has retained a civil law approach to civil and property law.[8] Canada's commitment to bijuralism has a constitutional basis[9] and has been vigorously protected by Québec and by the Supreme Court of Canada. For example, in a constitutional reference that clarified the principle that three of the nine justices on the Supreme Court of Canada must be appointed from among Québec judges and lawyers, the Court observed that:

> *The purpose of [this principle] is to ensure not only civil law training and experience on the Court, but also to ensure that Québec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Québec in the Supreme Court as the final arbiter of their rights.*[10]

---

5 For more information about the structure of the Canadian judicial system see Department of Justice, *The Judicial Structure* online at https://www.justice.gc.ca/eng/csj-sjc/just/07.html.

6 For more information about the Law Commissions' work and the codification path not taken, see Martin Friedland, "Reflections on Criminal Justice Reform in Canada" (2017) 64 Criminal Law Quarterly 274 at 284 - 5 online at https://www.law.utoronto.ca/utfl_file/count/documents/Friedland/clqreflectionsfriedland.pdf.

7 See for example the *Canada Evidence Act*, RSC 1985 (Federal), c C-5; *Evidence Act*, RSBC 1996 c 124 (British Columbia); *Evidence Act*, RSO 1990 c. E-23 (Ontario). The *Civil Code of Québec*, CQLR c CCQ-1991 also contains some rules of evidence.

8 For more information about bijuralism, see Department of Justice, *Bijuralism* online at https://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/aboutb-aproposb.html. *Civil Code of Québec*, CQLR c CCQ-1991.

9 See *Quebec Act*, 1774; s. 92(13) *Constitution Act*, 1867.

10 *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 49. All Supreme Court of Canada decisions cited in this paper are published and freely available at: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/nav_date.do.

The requirement that the Supreme Court of Canada include judges with civil law training and experience allows the Court to draw upon insights from both common law and civil legal traditions in its rulings on evidence and procedure.

More recently, Canadian legal academics and lawyers have argued that Canadian law incorporates plural legal traditions, specifically with respect to the Indigenous legal orders of First Nations, Métis and Inuit people in Canada.[11] When dealing with Aboriginal rights and title under s. 35 of the *Constitution Act*, 1982, the Supreme Court of Canada has adjusted the rules of evidence to ensure that Indigenous ways of knowing, preserving and sharing information are given appropriate evidentiary force.[12] So, for example, in *Mitchell v Minister of National Revenue*, the Chief Justice of Canada held for the majority:

> *[i]n determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective.*[13]

By embracing constitutional multijuralism, the Supreme Court of Canada has adopted a broader conception of relevance than that which historically characterized the common law tradition. As Chief Justice McLachlin's above statement suggests, this broader conception is reflected both in rules regarding the admissibility of evidence and in rules that govern the use and weight of evidence after it has been admitted at trial.

THE *CHARTER OF RIGHTS AND FREEDOMS*

A second significant feature of Canadian constitutionalism is the *Charter*, which was adopted in 1982. The *Charter* guarantees fundamental freedoms and human rights to all people in Canada, 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[14] These rights and freedoms are listed in sections 2 - 23 of the *Charter*, and other pre-existing rights are preserved by sections 25 - 29. Examples of the rights and freedoms guaranteed by the *Charter* include:

- freedom of thought, belief, opinion and expression including freedom of the press (which has been applied to protect the open court principle and public communications about court cases);[15]

---

11 See for example, John Borrows, "Indigenous Legal Traditions in Canada", (2005) 19 Washington University Journal of Law and Policy 167; Lisa Chartrand, *Accommodating Indigenous Legal Traditions* (Discussion paper prepared for the Indigenous Bar Association, 31 March 2005) online at https://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf.

12 *R v Van der Peet*, [1996] 2 SCR 507; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *Mitchell v Minister of National Revenue*, 2001 SCC 33.

13 *Mitchell v Minister of National Revenue*, 2001 SCC 33, [34].

14 *Charter* s 1, above note 2.

15 *Charter*, s. 2(b), ibid. See for example, *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835; *R v Mentuck*, 2001 SCC 76; *Re Vancouver Sun*, 2004 SCC 43. Emma Cunliffe, "Open Justice: Concepts and Judicial Approaches" (2012) 40 Federal Law Review 385 online http://www.austlii.edu.au/au/journals/FedLRev/2012/15.pdf.

- the right to 'life, liberty and security of the person', and the right not to be deprived of these rights 'except in accordance with the principles of fundamental justice' (this right has been interpreted broadly).[16] It protects, for example, a suspect's right to silence during police investigation and trial[17] and her right to make full answer and defence at trial, including through cross-examining witnesses called by the state.[18] It also protects a crime victim's right to privacy and security of the person during investigation and trial);[19]
- the right to be free from unreasonable search and seizure (again, this right has been interpreted broadly.[20] It extends, for example, to a more general right to privacy than the words of the provision might suggest);[21] and
- the right to equality (while the test for analyzing this right has varied over time,[22] it has consistently been held to incorporate a right to substantive, rather than formal, equality).[23]

Section 24(2) of the *Charter* is expressly an evidentiary rule, permitting a court to exclude evidence that has been obtained in breach of the *Charter* if 'it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.'[24] This *Charter* exclusionary remedy provides a significant individual remedy in circumstances where state actors breach a person's rights and freedom, particularly in the course of criminal investigation.[25] It has been used even to exclude highly reliable and inculpatory evidence of serious crimes, where the state has acted in clear violation of well-established *Charter* principles.[26] However, the Supreme Court of Canada's interpretation of the *Charter* exclusion remedy has also been criticized as unduly deferential to the executive branch of government.[27] The *Charter* exclusion remedy is also reactive – responding to individual breaches after they have occurred and after a case has gone to trial – rather than operating proactively or systemically. Section 24(1) augments the exclusionary remedy by permitting any person whose rights or freedoms have been infringed or denied to apply to a court for an 'appropriate and just' remedy.[28]

The *Charter* has impacted Canadian evidence law in ways that go well beyond the exclusionary remedy. At times, *Charter* arguments have been made to challenge statu-

---

16 *Charter*, s. 7, ibid. *Reference re B.C. Motor Vehicle Act*, [1985] 2 SCR 486.

17 *R v Singh*, 2007 SCC 48; *R v Prokofiew*, 2012 SCC 49.

18 For example, *R v Stinchcombe*, [1991] 3 SCR 326; see most recently *R v RV*, 2019 SCC 41.

19 *R v Mills*, [1999] 3 SCR 668; *R v Darrach*, [2000] 2 SCR 443. See Jamie Cameron, *Victim Privacy and the Open Court Principle* (Ottawa: Department of Justice, 2004) online https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr03_vic1/ [Cameron, *Victim Privacy*].

20 *Charter*, s 8, above note 2. *Hunter v Southam Inc*, [1984] 2 SCR 145.

21 *Hunter v Southam*, ibid; *R v Marakah*, 2017 SCC 59; *R v Jarvis*, 2019 SCC 10.

22 See Mary Eberts & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38 National Journal of Constitutional Law 89; Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 Supreme Court Law Review (2d) 295 online https://digitalcommons.osgoode.yorku.ca/sclr/vol57/iss1/13/ [Cunliffe, "Sexual Assault in the SCC"].

23 Eberts & Stanton, ibid; most recently, see *R v Barton*, 2019 SCC 33; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.

24 Ibid, s 24(2).

25 See *R v Grant*, 2009 SCC 32.

26 See for example *R v Harrison*, 2009 SCC 34.

27 Melanie Janelle and Richard Jochelson, "Canadian Exclusion of Evidence Under Section 24(2) of the *Charter*: An Empirical Model of Judicial Discourse" (2015) 57 Canadian Journal of Criminology and Criminal Justice 115; Troy Riddell, "Measuring Activism and Restraint: An Alternative Perspective on the Supreme Court of Canada's Exclusion of Evidence Decisions under Section 24(2) of the *Charter*" (2016) 58 Canadian Journal of Criminology and Criminal Law 87.

28 *Charter* s 24(1), above note 2. See for example *R v Nasogaluak*, 2010 SCC 6; *Vancouver (City) v Ward*, 2010 SCC 27.

tory and common law rules of evidence that predate the *Charter*.[29] The *Charter* rights and freedoms listed above have to a significant extent been given life through rules of evidence and procedure in criminal cases and, to a lesser degree, in other cases involving state intrusion into liberty and security of the person.[30] Common law rules of evidence governing matters such as state disclosure of information relevant to criminal charges, the permissible scope of cross-examination of witnesses, and the scope of an accused person's right to silence have been reformed in the *Charter* era.[31] Sometimes when changing these rules, courts have made express judicial reference to the need to accommodate *Charter* rights and freedoms, and at other times they have altered these rules in a way that reflects *Charter* values, but without that express acknowledgement. Generally, these judge-made principles apply to the law of evidence in trial proceedings beyond the criminal law context.

In 2009, David Paciocco (who was then a Professor of Law and is now a Justice of the Ontario Court of Appeal) observed that:

> *the broadest impact that the* Charter *has had on criminal trials is more furtive, and in fact, decidedly more profound than [ruling statutory provisions unconstitutional]; the* Charter *has altered the way criminal procedure rules operate. In subterranean fashion, the* Charter *has changed the very culture of proof and process by not only colouring our general conceptions of what is fair, but by changing relevant legal technique. The* Charter *has contributed to the rejection of the long-standing practice of treating the law of evidence and criminal procedure as a technical thing, replacing it with a contextual, discretionary approach[.]*[32]

Paciocco credits the *Charter*, and the judicial approach to *Charter* adjudication, with changing the character of judicial applications of the law of evidence in the context of criminal trials and pre-trial judicial decisions. He identifies the judicial discretion to exclude evidence, discussed below in 'Key Legal Concepts', as an example of a rule that is framed as a common law principle, but which was developed by the Supreme Court of Canada as a creative judicial solution to avoid rendering longstanding statutory rules of evidence unconstitutional on *Charter* grounds.[33]

Paciocco argues that this overall judicial approach has produced a situation where:

> *with the exception of the new principled rules of exclusion, the laws of evidence and trial process remain much the same after a quarter-century [since*

---

29 See for example *R v Corbett*, [1988] 1 SCR 670 challenging a statutory provision that any witness, including an accused person, could be cross-examined about their criminal record; *R v Potvin*, [1989] 1 SCR 525 challenging a statutory provision that provided for evidence given at a preliminary hearing to be received as evidence in a criminal trial, in certain circumstances; *R v Khelawon*, 2006 SCC 57 holding that the *Charter* right to make full answer and defence and to receive a fair trial helps to shape the requirements of the common law rule with respect to hearsay evidence.

30 For example, state apprehension of children from their families of origin. See *Winnipeg Child and Family Services v. KLW*, [2000] 2 SCR 519.

31 See for example, *R v Stinchcombe*, [1991] 3 SCR 326, *R v Seaboyer*, [1991] 2 SCR 577, and *R v Singh*, 2007 SCC 48.

32 David Paciocco, "*Charter* tracks: Twenty-five years of constitutional influence on the criminal trial process and rules of evidence" (2008) 40 Supreme Court Law Review (2d) 309 at 311 online https://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/12/.

33 Ibid at 325 citing, *R v Corbett*, [1998] 1 SCR 670 and *R v Potvin*, [1989] 1 SCR 525 as examples of cases in which the Supreme Court of Canada used this approach.

> *the* Charter's *inception], but the law of evidence and trial process has been profoundly altered and it has happened precisely because of the* Charter. … *As a result, rules are no longer checklist procedures that apply when each of their elements are met.* …
>
> *Simply put, discretion to protect* Charter *interests has worked its way into the fabric of the trial process at every stage.*[34]

It will help the reader to understand the contextual application of the key legal concepts described below if she appreciates Paciocco's observations about how the *Charter* has influenced the way in which Canadian judges interpret and apply the law of evidence. As Paciocco explains, the general direction of that influence has been away from checklist-style, general rules of inclusion and exclusion, and towards the judicial articulation of a set of principles that will be applied, flexibly and with careful attention to context, in the circumstances of the case at hand.[35] While this trend has largely been welcomed by Canadian evidence scholars, there are some costs associated with it.[36] In particular, predictability about whether a given piece of evidence will be admitted declines as judicial flexibility increases, and the principled approach has also arguably led to an increased use of court time to decide admissibility questions. As will be discussed below in 'The role of the judge and litigants', this trend towards more flexible application of the law of evidence has also brought changes to the Canadian understanding of the role and responsibilities of trial and appellate judges.

Another consequential way in which the *Charter* has influenced the character of the Canadian trial process is with respect to procedural safeguards for victims, especially victims of sexual violence. Historically, the common law conceived of criminal trial proceedings solely as an adversarial process implicating the state and the accused person. Professor Jamie Cameron explains:

> *in the context of sexual assault proceedings, the status of crime victims changed radically under the* Charter. *Albeit in the context of conflict between the rights of the accused and the complainant, the Supreme Court of Canada recognized a right of victim privacy under s 7 of the* Charter, *and placed it on an equal plane with the defendant's right of full answer and defence.*[37]

As Cameron alludes to, the Supreme Court of Canada has emphasized that there is no set hierarchy of *Charter* rights, with the result that where the *Charter* rights of victims are engaged alongside the *Charter* rights of an accused person, the court is exhorted to resolve apparent conflicts among rights "in the factual context of each particular case."[38] Since Cameron published this paper, these principles have been extended to

---

34 Ibid, at 346 - 7.

35 See for example, *R v Khelawon*, 2006 SCC 57 at [48] - [49]; *R v Hart*, 2014 SCC 52 at [121]; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at [50].

36 See eg Lisa Dufraimont, "Realizing the Potential of the Principled Approach to Evidence" (2013) 39:1 Queen's Law Journal 11; Alan Bryant et al, *Sopinka, Lederman and Bryant: The Law of Evidence in Canada* (Toronto: LexisNexis Canada, 3rd ed 2009) at 33 - 35.

37 Cameron, *Victim Privacy*, above note 17 at i.

38 *R v Mills*, [1999] 3 SCR 668 at [63] see also *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835.

victims in other proceedings involving sexual violence – including the rights of deceased victims in homicide cases.[39] The victims' rights recognised by the Supreme Court of Canada also extend beyond privacy, to include equality and dignity-related principles.[40]

The constitutional recognition of *Charter* rights and freedoms – and the accompanying judicial reconceptualization of trial process and the roles and responsibilities of official legal actors – has had a profound impact on the Canadian conception of relevance, probative value, and prejudicial effect. The nature and extent of that impact will be discussed throughout the ensuing sections of this paper. In the next part, the role and responsibilities of Canadian judges and lawyers will be introduced.

39 *R v Barton*, 2019 SCC 33.

40 *R v Mills*, [1999] 3 SCR 668 at [67], [81]; Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe" (2002) 40 Alberta Law Review 655 online http://albertalawreview.com/index.php/ALR/article/view/1359; Cunliffe, "Sexual Assault Cases in the SCC", above note 20; Emma Cunliffe, "*Henry v British Columbia*: Still Seeking a Just Approach to *Charter* damages in Wrongful Conviction Cases" (2017) 76 Supreme Court Law Review (2d) 143 online https://commons.allard.ubc.ca/fac_pubs/427/.

The role of the judge and litigants

This part describes some of the key legal and ethical principles that define the role and responsibilities of judges and lawyers in Canadian trial courts. It begins with an explanation of the judge's role within the Canadian system of adversarial litigation, with attention to the principles of judicial independence and judicial impartiality, and a discussion of the growing expectation that the trial judge will play a more active role as 'gatekeeper' than was historically expected. It then discusses the role and responsibilities of lawyers within the trial process, with special attention paid to the distinctive responsibilities of state prosecutors and defence lawyers in criminal cases. It concludes with a brief discussion of juries.

The Canadian model of adversarial justice is largely rooted in the British common law tradition.[41] This system operates on the presumption that parties are responsible for investigating the factual basis for the litigation, amassing evidence, identifying witnesses, and presenting evidence to the court. Evidence is usually presented via witnesses who are called in person to testify and be cross-examined in open court. Real evidence – for example, a weapon allegedly associated with a crime, or the original signed contract that a party seeks to enforce – is generally admitted via a witness who can testify about its provenance. In a criminal trial, the function of investigation, securing evidence and identifying witnesses is primarily vested in the police and prosecutor, although an accused person also has the right (if rarely the financial means) to conduct investigations and call witnesses to support their defence. Within this system, the judge plays little or no role in investigating the facts, calling witnesses, or deciding what issues are most important to the case.

JUDICIAL INDEPENDENCE AND IMPARTIALITY

According to Canadian law, the judge must be – and be seen to be – an independent and impartial arbiter who does not 'descend into the fray' of the dispute between the litigants.[42] The judge does not investigate, but relies on the litigants to bring relevant and admissible information before the court in accordance with the rules of evidence and procedure. Historically, the judge's role was understood to be largely passive, particularly during witness testimony and cross-examination, but the changes brought to Canadian legal culture by the *Charter* have ushered in a more active judicial role. In *Brouillard Also Known As Chatel v R*, Justice Lamer explained

> *it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge*

41 Even in Québec, bijuralism is reflected in the incorporation of common law procedures within the Québec Civil Code. See *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at [33].

42 See, for example, *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25; *R v Mian*, 2014 SCC 54. In this context, independence includes independent from the political and executive branches of government: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3.

> *may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.*[43]

While *Brouillard* suggests that a trial judge has a duty to intervene in witness examination to ensure trial fairness, Justice Lamer also explained that she must demonstrate 'prudence and … judicial restraint' when exercising this responsibility.[44] In particular, the trial judge must also take care to remain – and be seen to remain – impartial.[45]

A key safeguard of judicial impartiality is the principle of judicial independence.[46] Judicial independence is a constitutional and common law principle[47] that has been described by the Supreme Court of Canada as having an individual and institutional dimension – that is, both the individual judge and her court as an institution must be independent of the executive and legislative branches of government and of other institutions.[48] At its most fundamental, the principle of judicial independence

> *connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.*[49]

There are three components to these objective conditions: security of tenure, administrative independence and financial security.[50] The institutional design of the Canadian court system reflects the principle of judicial independence in many of its aspects. One of the more important examples for federally appointed judges is that, pursuant to the Part II of *Judges Act*, the power to investigate and recommend removal of a federally appointed judge is vested in the Canadian Judicial Council, a body comprised of the chief justices of relevant courts.[51] The Canadian Judicial Council has published *Ethical Principles for Judges*, a document which provides further guidance on key principles such as judicial independence, integrity, equality and impartiality.[52]

Judicial impartiality has also been carefully defined by the Supreme Court of Canada. In *R v S(RD)*, the accused was a Black Canadian youth, who was charged with assaulting a police officer. The only witnesses at trial were the police officer who had allegedly been assaulted, and the accused. Their accounts of the interaction that led to the charge differed markedly, and so the trial judge was tasked with considering whether the prosecution had proven beyond a reasonable doubt that RDS had assaulted the officer. The trial

---

43 *Brouillard Also Known As Chatel v R*, [1985] 1 SCR 39 at [17].
44 Ibid at [24].
45 *Groia v Law Society of Upper Canada*, 2018 SCC 27 at [104] - [105].
46 *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at [10].
47 Ibid at [82] - [86].
48 *Valente v. The Queen*, [1985] 2 SCR 673 at 685.
49 Ibid at 687.
50 Ibid, at pp 694, 704 and 708.
51 *Judges Act*, RSC 1985 c. J-1.
52 Canadian Judicial Council, *Ethical Principles for Judges* (2004) online: https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_judicialconduct_Principles_en.pdf. These principles are (as of summer 2020) being revised and a new version is expected imminently.

judge, who was a member of Nova Scotia's Black community, observed in the course of acquitting RDS that 'I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups.'[53] The Crown appealed, in part on the basis that these remarks and others like them raised a reasonable apprehension of bias on the part of the trial judge. A majority held that the trial judge's remarks did not raise a reasonable apprehension of bias, though the judges differed about whether they were close to the line. Justice Cory defined impartiality and bias as follows:

> *impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.*
>
> *In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.*[54]

A reasonable apprehension of bias will arise where an informed person who has taken the trouble to inform herself about the relevant circumstances would find substantial grounds to be concerned about a real likelihood of bias on the part of the judge.[55]

Three of the nine Supreme Court of Canada judges who decided *S(RD)* elaborated upon the relationship between a judge's personal experience and the principle of judicial impartiality. They explained:

> *while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. … [T]he differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.*[56]

This passage is a precursor to the notion of 'conscious objectivity', which was subsequently clarified by Chief Justice McLachlin in an extra-judicial interview. Conscious objectivity requires a judge to be thoughtful about how litigants might experience the world differently from the judge herself:

> *'What you have to try to do as a judge,' … 'whether you're on* Charter *issues or any other issue, is by an act of the imagination put yourself in the shoes of the different parties, and think about how it looks from their perspective, and really think about it, not just give it lip service.'*[57]

---

53 *R v S(RD)*, [1997] 3 SCR 484 at [4]. A more complete history of this case is supplied in Richard Devlin, "Begun in faith, continued in determination" in Adam Dodek and Alice Woolley (eds) *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) chapter 4.

54 Ibid at [104] - [105].

55 Ibid at [112].

56 Ibid at [29] per L'Heureux-Dubé and McLachlin JJ, Gonthier J concurring.

57 Joseph Brean, "'Conscious objectivity: that's how the chief justice defines the top court's role. Harper might beg to differ." *National Post*, 23 May 2015 quoting Chief Justice McLachlin. Online https://nationalpost.com/news/conscious-objectivity-thats-how-the-chief-justice-defines-the-top-courts-role-harper-might-beg-to-differ.

In 2015, the Supreme Court of Canada unanimously adopted this understanding of the relationship between a judge's life experience and the responsibility of judicial impartiality, holding:

> *Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. [Former Chief Justice of Canada,] Bora Laskin noted that the strength of the common law lies in part in the fact that*
>
> > *the judges who administer it represent in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties. It is salutary that this is so, and eminently desirable that it should continue to be so.*
>
> *The reasonable apprehension of bias test recognizes that while judges 'must strive for impartiality', they are not required to abandon who they are or what they know[.]*[58]

So, in Canada, a judge is expected to draw upon her life experience in the course of exercising her responsibilities to ensure that a trial is fair to all litigants: however, she must also remain open-minded to litigants and witnesses whose life experience and circumstances may be very unlike her own. This expectation is reflected in the Supreme Court of Canada's caselaw about trial judges' role with respect to the law of evidence and it is particularly important to the concept of relevance and the assessment of the prejudicial risks of some kinds of evidence.

JUDICIAL GATEKEEPING RESPONSIBILITIES

The Supreme Court of Canada now uses the metaphor of 'gatekeeper' to describe the trial judge's responsibility to be vigilant with respect to the admissibility and use of evidence. The gatekeeper function requires the trial judge to ensure that she applies the rules of evidence throughout the trial. She must exclude evidence that does not meet the admissibility standards set out within the law of evidence; and ensure that where evidence is admitted only for certain purposes, or only within a certain scope, it is not misused. The earliest applicable use of the gatekeeper metaphor appears in *R v J(J-L)*, a 2000 Supreme Court of Canada decision on the admissibility of expert opinion evidence. In that case, Justice Binnie explained on behalf of a unanimous Court:

> *the Court has emphasized that the trial judge should take seriously the role of 'gatekeeper'. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis*

[58] *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at 33.

> *that all of the frailties could go at the end of the day to weight rather than admissibility.*
>
> *The Court's gatekeeper function must afford the parties the opportunity to put forward the most complete evidentiary record consistent with the rules of evidence. As McLachlin J noted in* R v Seaboyer*:*
>
> > *Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted.*[59]
>
> *Nevertheless, the search for truth excludes expert evidence which may 'distort the fact-finding process'[.]*[60]

As Binnie J explains in this passage, the Supreme Court of Canada has given trial judges the responsibility to ensure that the law of evidence is rigorously applied throughout the course of a trial, even with respect to evidence called by the accused person in a criminal trial. As will be described below, much of the law of evidence is directed towards excluding or managing evidence that has the potential to distort the fact-finding process, either because it is irrelevant to the issues in dispute or because it is potentially misleading. As gatekeeper, the trial judge must have a thorough understanding of evidence law and its underlying precepts.

More recently, the Supreme Court of Canada has emphasized that a trial judge's responsibility to act as evidentiary gatekeeper arises regardless of whether the litigants object to a particular piece of evidence. For example, in the context of expert evidence, the Court has held that:

> *Given the concerns about the impact expert evidence can have on a trial – including the possibility that experts may usurp the role of the trier of fact – trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges – including those in judge-alone trials – have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the [relevant law] at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence.*
>
> *It is foreseeable that mistakes will be made and that, as happened in the instant case, testimony that strays beyond the proper scope of the expert evidence will be given. It is also foreseeable that defence counsel may fail to*

---

59 *R v Seaboyer*, [1991] 2 SCR 577 at 611.
60 *R v J(J-L)*, 2000 SCC 51 at [28] - [29] citing *R v Mohan*, [1994] 2 SCR 9.

> *object to the testimony at the time the problematic statements are made. … It goes without saying that where the expert evidence strays beyond its proper scope, it is imperative that the trial judge not assign any weight to the inadmissible parts.*[61]

Similarly, in cases addressing the relevance of sexual history evidence to a prosecution for sexual violence, the Supreme Court of Canada has held that 'proper management of evidence which falls within the scope of [this rule of evidence] requires vigilance from all trial participants, but especially trial judges – the ultimate evidentiary gatekeepers.'[62] Consistent with the judicial principle of conscious objectivity, this gatekeeping responsibility extends to a judicial responsibility to exclude evidence and arguments that play upon 'biases, prejudices, and stereotypes' and to instruct juries to be careful not to adopt factual reasoning that relies on these errors.[63]

The Canadian legal system also incorporates the use of lay jurors in some cases. The proportion of trials held with a jury is very small, and largely confined to the most serious criminal cases and a small number of civil trials.[64] Where a trial judge sits with a jury, the trial judge is responsible for ensuring that legal principles including the law of evidence are adhered to, and the jury is responsible for deciding whether the party that bears the onus of proof has discharged that onus (for example, whether the state has proven identity and the elements of the charged offence beyond a reasonable doubt). A key dimension of the judges' responsibility when sitting with a jury is to seek to ensure that inadmissible evidence is not heard by the jury. Where inadmissible evidence is accidentally or erroneously introduced, the trial judge must consider what steps she should take to ensure that the jury does not act upon that evidence, including whether a mistrial should be declared.[65] In general terms, a Canadian trial judge provides fairly lengthy instructions to a jury about matters such as the legal standard of proof beyond a reasonable doubt, how to work with circumstantial evidence, and how to resolve contradictions within witness testimony.[66] In addition, the trial judge is required to summarize the evidence for the jury (in contrast with the practice in most United States jurisdictions).

---

61 *R v Sekhon*, 2014 SCC 15 at [46] and [48].

62 *R v Goldfinch*, 2019 SCC 38 at [75]. See also *R v Barton*, 2019 SCC 33 at [68]; *R v RV*, 2019 SCC 41 at [71] and [78].

63 *R v Barton*, ibid at [197]. See generally, Emma Cunliffe, "Juzgando, Rápido y Lento: Utilizando la Teoria de la Toma de Decisiones Para Explorar la Determinación de Hechos Judiciales" (2020). Nueva Doctrina Penal. (1ª Edición). Hammurabi. https://biblioteca.hammurabidigital.com.ar/reader/nueva-doctrina-penal-1596631837?location=19 (in English: Emma Cunliffe, "Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination" (2014) 18 International Journal of Evidence & Proof 139 - 80.) Emma Cunliffe, "The Magic Gun: Settler Legality, Forensic Science, and the Stanley trial" (2020) 98:2 Canadian Bar Review 270 online: https://cbr.cba.org/index.php/cbr/article/view/4609; Donna Martinson and Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Canadian Journal of Family Law 11; Austin Cullen et al, *In the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp* (Ottawa: Canadian Judicial Council, 29 November 2016) online: https://cjc-ccm.ca/sites/default/files/documents/2019/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf.

64 See Lisa Dufraimont, 'Evidence law and the jury: a reassessment' (2008) 53 McGill Law Journal 199.

65 See for example, *R v Barton*, 2019 SCC 33 at [119] and [197].

66 See for example, *R v Lifchus*, [1997] 3 SCR 320 (addressing the instructions that must be given with respect to 'proof beyond a reasonable doubt'); *R v Villaroman*, 2016 SCC 33 (regarding circumstantial evidence); and *R v W(D)*, [1991] 1 SCR 742 (regarding cases where the credibility of two contradictory witnesses must be assessed).

Parties' roles and responsibilities

While the role and responsibilities of trial judges have been extensively discussed, some correlate principles for lawyers remain rather under-defined within Canadian law.[67] The lawyers' role is well described by Woolley: 'the fundamental obligation of lawyers is to assist clients to pursue their goals under and through the law – to be zealous advocates while respecting the rule of law.'[68] As Woolley further explains, this conception of the lawyer's role is inextricably connected to procedural and substantive laws:

> *the normative principles that underlie the lawyer as resolute advocate within the bounds of legality – the normative structure of the rule of law and the role of lawyers in ensuring access to law – are deeply intertwined with substantive and procedural legal norms in Canada.*[69]

While Woolley is in this context making the argument that the premise of resolute legal advocacy structures the Canadian legal system as a whole, it is also implicit within her references to 'the bounds of legality' that substantive and procedural legal norms – such as the law of evidence – help to structure the boundaries of the lawyer's ethical role.[70] This notion that law establishes boundaries to ethical lawyering becomes clearer in a later passage in the same work:

> *a lawyer must engage in good faith interpretation of the law, and work within the systems of the law as they exist – if the lawyer burns documents that are properly producible in discoveries, for example, then the lawyer has not allowed the client to access the civic compromise of the law, he has helped the client to destroy it.*[71]

To the extent that law – including evidence law – may sometimes be unsettled or indeterminate, the principle of legality permits a lawyer to engage in resolute legal advocacy to seek to resolve that indeterminacy in favour of her client. But to the extent that law and legal principles are settled, the lawyer has a duty to advocate in a manner that respects those settled principles.

As a matter of constitutional principle, lawyers' duty of commitment to their client's cause renders them somewhat independent of the executive and legislative branches

---

67 See generally, Alice Woolley, *Understanding Lawyers' Ethics in Canada* (2nd ed. Toronto: Lexis Nexis, 2016).

68 Ibid, at §1.1. For prosecutors, the fundamental duty is set out in *Boucher v R*, [1955] SCR 16 at 23-24: 'Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion "of winning or losing".' Prosecutors will proceed with criminal charges where there is a reasonable prospect of conviction and proceeding is in the public interest.

69 Woolley, ibid at §2.5.

70 I am grateful to Woolley for a conversation in which she talked this principle through with me.

71 Woolley, above note 60 at §2.73. In a notorious Canadian example, a defence lawyer removed videotapes of a crime from a client's home, after the police had searched that home. The ethical responsibility of the lawyer was never fully adjudicated by the law society or court, but the consensus position is that a lawyer in this position should either decline to move the physical evidence from its location *or* find an anonymous means by which to turn the evidence over to the state. See Allan C Hutchinson, 'Putting up a defence: Sex, murder and videotapes' in Adam Dodek and Alice Woolley (eds) *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) chapter 2.

of the state.[72] However, the boundaries of this independence remain unclear.[73] The right to practice law is regulated at a provincial level, and each province has a law society (or equivalent) with responsibility for determining the requirements for admission to practice law and the ethical responsibilities of lawyers. Provincial law societies publish codes of conduct that set out many of these responsibilities. These codes are primarily enforced by the law society, but courts also play a role in defining lawyers' ethical duties.[74] Beyond basic expectations such as competency, integrity and the strict protection of client confidentiality, specific rules define the lawyer's role with respect to evidence law and the role of a lawyer in preparing for trial and appearing in a courtroom. For example:

> *the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means … in a way that promotes the parties' right to a fair hearing in which justice can be done.*[75]
>
> *The lawyer's function as advocate is openly and necessarily partisan.*[76]
>
> *A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.*[77]
>
> *When acting as an advocate, a lawyer must not:*
>
> …
>
> *Knowingly attempt to deceive a tribunal … by offering false evidence, misstating facts or law, … [or] suppressing what ought to be disclosed ….*[78]
>
> *A lawyer may seek information from any potential witness[.]*[79]
>
> *When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.*[80]

---

72 A duty of commitment to a client's cause, and the capacity to discharge that duty free from government interference, has been recognised as a principle of fundamental justice pursuant to s 7 of the *Charter*. *Canada v Federation of Law Societies of Canada*, 2015 SCC 7 at [80] - [86]. In this case, a majority declined to recognise a broader constitutional principle of independence of the bar.

73 Ibid; see also *Groia v Law Society of Upper Canada*, 2018 SCC 20.

74 *Groia*, ibid at [55]; Amy Salyzyn, "The Judicial Regulation of Lawyers in Canada" (2014) 37 Dalhousie Law Journal 481 online https://digitalcommons.schulichlaw.dal.ca/dlj/vol37/iss2/2/; Woolley, above note 60 at §1.50 - 1.71.

75 Federation of Law Societies of Canada Model Code of Professional Conduct, 2017 (FLSC Code) clause 5-1-1 commentary 1 online flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf. Woolley has identified the inherent ambiguity within this commentary and the lack of clear guidance it provides to lawyers, above note 60 at §2.3 - 2.4.

76 FLSC Code, ibid at clause 5.1-1 commentary 3. Note that the prosecutor's function in a criminal case is subject to greater limites with respect to partisanship than other lawyers'.

77 Ibid, at clause 7.2-1.

78 Ibid, at clause 5.1-2.

79 Ibid, at clause 5.4-1.

80 Ibid, at clause 5.1-2 commentary 4.

> *A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.*[81]

> *When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction …. [Accordingly,] a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.*[82]

> *When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits.*[83]

As these examples from the Model Code published by the Federation of Law Societies of Canada illustrate, the Law Society's code of conduct provides a relatively comprehensive – if sometimes unhelpfully vague and apparently contradictory[84] – guide to the limits of ethical conduct on the part of lawyers when engaged in litigation. This guidance addresses all phases of a lawyer's work, from contacting potential witnesses in order to secure evidence, through examining witnesses, and to the public statements a lawyer may make about a court or case.

Canadian case law also supplies guidance – for example, with respect to cross-examining witnesses, the Supreme Court of Canada held in *R v Lyttle* that:

> *[t]he right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value.*[85]

In *Lyttle*, a defence lawyer suspected on the basis of police notes that had been disclosed to her client that the victim, who had been badly beaten, was assaulted because he had defaulted in paying a drug debt. This theory potentially provided a basis to acquit the accused. The Court held that 'a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question.'[86] The unanimous judgment defines what constitutes a 'good faith basis' as:

> *a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner*

---

81 Ibid, at clause 5.1-2A.
82 Ibid, at clause 5.1-1 commentary 9.
83 Ibid, at clause 5.1-3.
84 For example, in some circumstances the duty to treat others with courtesy (Clause 7.2-1) has the potential to conflict with the duty to 'ask any question … however distasteful, that the lawyer thinks will help the client's case.' (Clause 5.1-1.)
85 *R v Lyttle*, 2004 SCC 5 at [44].
86 Ibid, at [47].

> *does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.*[87]

The reference to misleading questions in this passage, as with the earlier reference to probative value and prejudicial effect, appears to place some limits on the principle that an advocate may 'ask any question, however distasteful ….'[88] Questions asked by a lawyer when examining a witness must have a good faith basis, they must be relevant, and they must otherwise meet the requirements of evidence law.[89]

This limit precludes a lawyer from asking questions where a reasonable lawyer would expect that the question will elicit inadmissible evidence from the witness. The point was made more directly in *R v Howard*:

> *It is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence.*[90]

The requirement to attend to the demands of the law of evidence when asking questions of a witness is part of what is encompassed by the proposition that a lawyer must be a 'resolute advocate within the bounds of legality.'[91] Similarly, caselaw emphasizes that 'cross-examination must be done in a way that respects the dignity of the witness, no matter what the lawyer's assessment of the witness's morality or honesty.'[92] In a criminal case, the duty to refrain from improper cross-examination imposes ethical responsibilities on the judge, prosecutor, and defence lawyer.[93]

While the discussion has so far focused largely on the responsibilities and ethical limits of a lawyer's role in the courtroom and with respect to witnesses, Canadian law also sets out principles that regulate a lawyer's role and responsibilities with respect to the exchange of evidence before trial. These principles permit lawyers and their clients to prepare for the adversarial trial, and indeed to consider whether pre-trial settlement, a guilty plea, or a stay of proceedings is a more appropriate resolution. In general terms, parties to civil litigation have mutual responsibilities to disclose all information that is relevant to the litigation well before trial, regardless of whether that information will help

---

87 Ibid, at [48]. See also *R v Osolin*, [1993] 4 SCR 595 at 665; Woolley, above note 60 at §8.92 - 8.102.

88 FLSC Code, above note 67 at 5.1-1.

89 *R v Lyttle*, 2004 SCC 5 at [48]. See also *R v Osolin*, [1993] 4 SCR 595 at 665 - 666.

90 *R v Howard*, [1989] 1 SCR 1337. Note that this sentence was misinterpreted by some courts to imply that a lawyer could not cross-examine a witness unless she could prove the basis for her question with admissible evidence. In *R v Lyttle*, 2004 SCC 5, the Court clarified that *Howard* should be interpreted to mean that counsel should not use cross-examination to elicit or submit information that is otherwise inadmissible pursuant to the law of evidence.

91 Woolley, above note 60 at §2.5.

92 Ibid at §8.103.

93 Ibid, at §8.105.

or harm the party's case.[94] Witnesses may be questioned to elicit relevant information, and relevant procedures such as medical examinations may also be arranged.

In criminal trials, the principles are more asymmetrical – reflecting the operation of the presumption of innocence in that context. The state has a constitutional responsibility to disclose, upon request, all relevant information within the possession of the prosecutor, and police have a correlate responsibility to turn such information over to the prosecutor.[95] As the Supreme Court of Canada has ruled,

> *the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.*[96]

This recognition that the evidence obtained by police and prosecutors is a public resource that must be made available to the accused in order to ensure that justice is done reflects the broader principle that '[t]he role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty.'[97] By contrast, the defence 'has no obligation to assist the prosecution' by making disclosure and 'is entitled to adopt a purely adversarial role towards the prosecution.'[98] There are some limits to the principle that the defence need not disclose her evidence in advance of trial, for example with respect to alibi evidence and expert evidence – in circumstances where information is distinctively within the knowledge of the accused person, and could not otherwise be expected to be anticipated by the prosecution, such information must be disclosed in advance of trial to give the state a fair opportunity to investigate it.[99] If an accused person fails to disclose such information, the evidence may be excluded or, if admitted, may be given less weight.

These rules governing pre-trial exchange of information facilitate trial preparation by ensuring that all parties have a fair opportunity to understand the likely evidence, and they promote efficiency in the use of court resources.

---

94 See, for example, *Supreme Court Civil Rules, BC Reg 168/2009* Part 7. Online https://www.bclaws.ca/civix/document/id/complete/statreg/168_2009_00.

95 *R v Stinchcombe*, [1991] 3 SCR 326.

96 Ibid at 333.

97 Ibid.

98 Ibid.

99 *R. v. Chambers*, [1990] 2 SCR 1293 at 1319; *Criminal Code* (RSC 1985 c. C-46) s. 657.3(3).

Key legal concepts

RELEVANCE, PROBATIVE VALUE, AND PREJUDICIAL EFFECT

As may be evident from the foregoing discussion, relevance is the fundamental organising concept of evidence law in Canada. Relevance assesses the logical relationship between a given piece of evidence and the matters that must be proven in a case. In a classic passage, Lamer J explained:

Thayer's statement of the law which is still the law in Canada, was as follows:

> *(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.*[100]

Relevance is the term used within Canadian law to denote this expectation of a logical relationship between the evidence and the matter that must be proven in the trial. Relevance is closely related to two additional concepts: probative value and prejudicial effect (or prejudicial risk, as it is sometimes referred to). Broadly speaking, relevance speaks to the *existence* of a logical relationship between the evidence and the matter that must be proven; probative value refers to the *extent* to which the evidence establishes the matter that must be proven; and prejudicial effect refers to the *risk* that the evidence might distract or confuse a trier of fact away from focusing on matters other than those which must be proven. In a passage that has been adopted by the Supreme Court of Canada, Professor Charles McCormick explained:

> *Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible. But relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it. Often, of course, several of these dangers such as distraction and time consumption, or prejudice and surprise, emerge from a particular offer of evidence. This*

[100] *Morris v The Queen*, [1983] 2 SCR 190 at 201 citing Thayer, *A Preliminary Treatise on Evidence at the Common Law* at 530 per Lamer J dissenting but not on this point. James Thayer was a Harvard legal scholar whose *Treatise* establishes many of the fundamental theories of common law evidence.

> *balancing of intangibles – probative values against probative dangers – is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized.*[101]

In most instances, a trial judge has a discretion to exclude relevant evidence where its probative value is outweighed by its prejudicial effect. However, in criminal cases, evidence offered by the accused person may only be excluded where its probative value is *substantially* outweighed by its prejudicial effect.[102]

The case of *R v Morris* demonstrates the foundational significance of relevance, and its relationship with exclusionary rules in the common law.[103] Morris was charged with conspiracy to import and traffic in heroin, in a case involving drugs that originated in Hong Kong. Police found a newspaper clipping in Morris's bedside table, which described the drug trade in Pakistan and the Middle East. The Supreme Court of Canada, sitting seven judges instead of the usual nine, agreed with Lamer J that relevance requires a logical relationship between the evidence and the material fact for which the evidence is offered. In *Morris*, the state argued that Morris's possession of the newspaper clipping was relevant, as it indicated that Morris 'had an interest in and had informed himself on the question of sources of supply of heroin'.[104] All seven judges accepted that the evidence was relevant in the logical sense that a person who possesses such a clipping may be more likely to have such an interest and that this group is, in turn, more likely than others to be engaged in the criminal act of conspiracy to commit trafficking. Justice McIntyre, for the majority of four judges, held that the evidence was admissible because it indicated 'that preparatory steps in respect of importing narcotics had been taken or were contemplated' by Morris.[105] However, Lamer J argued in dissent on behalf of three judges that the only proposition for which the newspaper clipping could be offered was inadmissible because it related to Morris's character rather than to his participation in the charged offence: the proposition that Morris was 'the sort of person who would be likely to have committed the offence' of trafficking.[106] Beyond offering the classic Canadian legal definition of relevance, the case illustrates that evidence may be relevant and yet inadmissible on the basis that it raises a risk of distraction – focusing the jury on Morris's character rather than on whether he had committed the acts with which he was charged.

Other cases present more straightforward examples of the relevance analysis and its relationship with probative value and prejudicial risk. In *R v J-LJ*, Binnie J held that

> *Evidence is relevant 'where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence.'*[107]

---

101 Charles McCormick, *McCormick's Handbook of the Law of Evidence* (2nd ed. 1972) at 438 - 40 adopted in *R v Seaboyer*; *R v Gayme*, [199] 2 SCR 595 at 610.

102 Ibid at 611.

103 An exclusionary rule is one whose applicability excludes the evidence from the trial.

104 *R v Morris*, ibid at 191 - 192.

105 *R v Morris*, ibid at 191 - 192.

106 Ibid, at 201.

107 *R v J-LJ*, 2000 SCC 51 at [47] quoting David Paciocco and Lee Stuesser, The Law of Evidence (Toronto: Irwin Law, 1996), at 19.

In this case, the defence sought to admit expert evidence of uncertain reliability to show that the accused person, who had been charged with sexual offences against a child, did not possess the clinical psychological characteristics of a pedophile. Binnie J expressed serious doubts about whether the evidence could even pass the minimal threshold of relevance, given the lack of information supplied by the expert witness as to its reliability.[108] However, he ultimately excluded it on the basis that the probative value of the expert evidence was at its highest unknown: 'consideration of the cost-benefit analysis seems to support the conclusion that the testimony offered as many problems as it did solutions.'[109] In this case, Binnie J emphasises that it is important for a party who proffers evidence (especially expert evidence) to explain the basis on which the evidence may rationally be ascribed probative value: 'What is asked of the trier of fact is an act of informed judgment, not an act of faith.'[110] The Court also emphasized the risk of prejudicial effect that arises when expert evidence is offered without a rational basis for jury evaluation: 'the search for truth excludes expert evidence which may "distort the fact-finding process"'.[111]

The concept of relevance and its relationship with probative value and prejudicial effect is also well illustrated by *R v Arp*.[112] Mr Arp was charged with two counts of first-degree murder in the deaths of two women. DNA evidence linked Arp to the second murder, but no DNA evidence was retained from the first crime scene (which was investigated prior to the widespread forensic use of this technology). Instead, the prosecution relied on similarities between the circumstances of the two deaths to argue that Arp must be responsible for both of them. In *Arp*, Cory J defined relevance as follows:

> *Relevance depends directly on the facts in issue in any particular case. The facts in issue are in turn determined by the charge in the indictment and the defence, if any, raised by the accused. … To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to 'increase or diminish the probability of the existence of a fact in issue. … As a consequence, there is no minimum probative value required for evidence to be relevant.*
>
> *Evidence of propensity or disposition (e.g. evidence of prior bad acts) is relevant to the ultimate issue of guilt, in so far as the fact that a person has acted in a particular way in the past tends to support the inference that he or she has acted that way again. Though this evidence may often have little probative value, it is difficult to say it is not relevant.*[113]

In the result, the Supreme Court of Canada held that the DNA evidence linking Arp to the commission of one murder was properly admissible as circumstantial evidence against him in respect of the other murder. This was so because there were striking similarities between the manner and circumstances in which the two murders were

108 Ibid, at [47] - [55].
109 Ibid at [55].
110 Ibid, at [56].
111 Ibid at [28] citing *R v Mohan*, [1994] 2 SCR 9 at 21.
112 *R v Arp*, [1998] 3 SCR 339.
113 Ibid at [38] - [39], citations omitted.

committed. The Court also required that the trial judge provide careful instructions to the jury about how it could use this evidence.

In a case where the prosecution seeks to rely on evidence about the disposition of the accused person to prove that she has committed the charged offence, that evidence will have significant prejudicial effect. The prejudicial effect with which the court will be concerned here is threefold:

> *(1) the jury may find that the accused is a "bad person" who is likely to be guilty of the offence charged; (2) they may punish the accused for past misconduct by finding the accused guilty of the offence charged; or (3) they may simply become confused by having their attention deflected from the main purpose of their deliberations, and substitute their verdict on another matter for their verdict on the charge being tried.*[114]

However, this prejudicial effect can in some instances be overcome, if the evidence has a degree of probative value that exceeds the prejudicial effect and/or the risk of prejudice can be effectively managed through clear judicial instructions about how the evidence may (and must not) be used.[115] In *Arp*, the Court offered the example of an accused person who has been proven beyond a reasonable doubt to have committed one crime, using a *modus operandi* that is so distinctive that only she could have committed a second crime with the same characteristics. The Court emphasized '[t]his inference is made possible only if the high degree of similarity between the acts renders the likelihood of coincidence objectively improbable.'[116] The test for admitting this kind of evidence, which in Canada is referred to as similar fact evidence, was further elaborated by the Supreme Court of Canada in *R v Handy*.[117]

APPLYING THE PRINCIPLES I: EXPERT EVIDENCE

The trial judge has a common law power to exclude evidence where its probative value is exceeded by its prejudicial effect.[118] Where the evidence in question is called by the accused person in a criminal case, the balance is slightly different: the evidence should be excluded if its prejudicial effect substantially outweighs its probative value.[119] As the foregoing discussion of *J-LJ* illustrates, the relationship between probative value and prejudicial effect has been important in the Supreme Court of Canada's decisions on the admissibility of expert evidence, particularly where the information supplied by an expert witness is insufficient to permit the court to assess the reliability or risk of error associated with the evidence.[120] Indeed, the Court has described the heart of the somewhat technical rules governing the admissibility of expert opinion evidence as

114 Ibid at [40], citing *R v LED*, [1989] 2 SCR 111.
115 Ibid at [43].
116 Ibid.
117 *R v Handy*, 2002 SCC 56.
118 *Sweitzer v The Queen*, [1982] 1 SCR 949 at 953; *R v Seaboyer*, [1991] 2 SCR 577 at 611.
119 *Seaboyer*, ibid at 611.
120 *R v J-LJ*, 2000 SCC 51; see also *R v Mohan*, [1994] 2 SCR 9; *R v Trochym*, 2007 SCC 6.

"best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process."[121]

An expert witness has a duty to act as an independent advisor to the court on matters within her expertise, despite the fact that she will normally be called by one of the parties.[122] The Court has emphasized that an expert witness, and the party who wishes to call that witness, should supply the court with sufficient information about her techniques and methods to allow the court to assess whether the proposed evidence is sufficiently reliable and, indeed, likely to be necessary to permit the trier of fact to understand other evidence or the case as a whole.[123] Reliability and necessity, together with cogency, collectively establish the measure of probative value.[124]

The Supreme Court of Canada has repeatedly emphasized that in the absence of good information about reliability and necessity, a significant risk of prejudicial effect arises from expert evidence. For example:

> *There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedence, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.*[125]
>
> *The possibility that such evidence – 'cloaked under the mystique of science' – would distort the fact-finding process, was very real.*[126]
>
> *In the case at bar, we consider once again the need to carefully scrutinize evidence presented against an accused for reliability and prejudicial effect, and to ensure the basic fairness of the criminal process.*[127]
>
> *[W]e are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice [citations omitted]. … "[S]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice."*[128]

Over the course of more than twenty years, the Court has accordingly strengthened the principle that a trial judge must scrutinize the prejudicial effect of expert evidence very closely before admitting that evidence at trial. The caselaw largely adheres to the view

---

121 *R v Bingley*, 2017 SCC 12 at [16] per McLachlin CJ.
122 *White Burgess Langille Inman v Abbott & Haliburton*, 2015 SCC 23.
123 *R v Mohan*, [1994] 2 SCR 9; *R v Trochym*, 2007 SCC 6; For a more complete discussion of the Canadian approach to the admissibility of expert evidence, see Emma Cunliffe, "A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence" in Paul Roberts and Michael Stockdale (eds) *Forensic Science Evidence and Expert Witness Testimony* (Cheltenham: Edward Elgar, 2018) at 310 - 332.
124 *R v DD*, 2000 SCC 43 at [36].
125 *R v Mohan*, [1994] 2 SCR 9 at 21. See also *R v D.D.*, 2000 SCC 43 at [52] - [56].
126 *R v J-LJ*, 2000 SCC 51 at [55].
127 *R v Trochym*, 2007 SCC 6 at [1].
128 *White Burgess Langille Inman v Abbott & Haliburton*, 2015 SCC 23 at [12].

that the trial judge is in the best position to assess probative value and prejudicial effect in respect of expert evidence, as is true with other kinds of evidence:

> *This leaves for consideration the general requirement that the probative value of expert evidence must outweigh its prejudicial effects. Probative value is determined by considering the reliability, materiality and cogency of the expert testimony: ... probative value and prejudicial effects are case-specific. The determinations made by the trial judge deserve appellate deference.*[129]

Despite these expressions of appellate deference towards trial judges' assessments of probative value and prejudicial effect, the Supreme Court of Canada and provincial courts of appeal frequently intervene to correct trial judges' assessments of the probative value and prejudicial effect of expert evidence. This author has argued elsewhere that this active appellate role reflects the fact that a more robust gatekeeping role is now expected of trial judges by appellate courts, and that Canadian trial judges are still cultivating the necessary skills to discharge these expectations.[130]

APPLYING THE PRINCIPLES II: SEXUAL VIOLENCE CASES

The Supreme Court of Canada has also played an extremely active role in directing how the legal concepts of relevance, probative value and prejudicial effect should be applied by trial judges when assessing the admissibility of evidence in sexual violence cases. Historically, the common law permitted evidence about a complainant's reputation (for example, a reputation for promiscuity) and specific evidence about her sexual history (with the accused or other people) to be brought by an accused person in defence of a charge of sexual assault.[131] This evidence was regarded as being probative to the question of whether the complainant consented to sexual activity, and at times, to whether the accused person believed that she had consented (even if she had not in fact done so). More recently, the belief that a person's reputation or sexual history as such make it more likely that she has consented (or make it more reasonable to conclude that the accused was mistaken about consent) has come to be seen not only as outdated, but as particularly harmful to women and girls, who form the majority of victims of sexual violence.[132] The *Charter* rights to equality, dignity and privacy have formed the basis for a reappraisal of the treatment of complainants within the trial process, including through a reformulation of longstanding common law rules of evidence.[133] Some of this reform

---

129 *R v DD*, 2000 SCC 43 at [36] per McLachlin CJC dissenting, but not on this point (see Major J at [47]).

130 Emma Cunliffe, "A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence" in Paul Roberts and Michael Stockdale (eds) *Forensic Science Evidence and Expert Witness Testimony* (Cheltenham: Edward Elgar, 2018) at 310 - 332.

131 Subject to the operation of the collateral facts rule. See eg *R. v. Krausz* (1973), 57 Cr. App. R. 466.

132 See for example John McInnes and Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 University of British Columbia Law Review 341.

133 See for example Christine Boyle and Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor Yearbook of Access to Justice 55; Elizabeth Sheehy, "Feminist argumentation before the Supreme Court of Canada in *R v Seaboyer; R v Gayme*: The Sound of One Hand Clapping" (1991) 18 Melbourne University Law Review 450 online http://www.austlii.edu.au/au/journals/MelbULawRw/1991/27.pdf; Lucinda Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault" (2004) 42 Osgoode Hall Law Journal 625 online https://digitalcommons.osgoode.yorku.ca/ohlj/vol42/iss4/5/; Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 Supreme Court Law Review 295 online https://digitalcommons.osgoode.yorku.ca/sclr/vol57/iss1/13/.

has been legislative, through Parliamentary amendments to the *Criminal Code*, while other aspects have been reformed through judicial decision-making. Both dimensions have been the subject of significant commentary and interpretation by the Supreme Court of Canada.

The history of beliefs about the probative value of sexual reputation and sexual history evidence provides an especially useful illustration, both of the fundamental nature of relevance, probative value and prejudicial effect and of the subtleties that can arise when assessing these principles with respect to particular kinds of evidence. Both points are well demonstrated by the landmark case of *R v Seaboyer*; *R v Gayme*.[134] In this case, a constitutional challenge was made to Parliamentary reforms to the *Criminal Code*. These Parliamentary reforms attempted to prohibit any evidence about the sexual history of a complainant, with very limited exceptions. They also prohibited any evidence 'whether general or specific' of the sexual reputation of the complainant if that evidence is brought for the purpose of evaluating the complainant's credibility. The case accordingly engaged with a conflict between legislative attempts to reform the criminal law in order to protect women's equality and an accused person's right to make full answer and defence to the charge of sexual assault. In assessing whether the Parliamentary amendments breached the *Charter*, the Court carefully scrutinized the potential relevance, probative value, and prejudicial effect of evidence that would be excluded by the amendments. The Court noted that the legislation squarely amended the common law of evidence:

> *The main purpose of the legislation is to abolish the old common law rules which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited.*[135]

The parties differed on the question of whether the legislative amendments operated only to exclude evidence 'of little or no worth and considerable prejudice' or if they went 'too far and in fact eliminate … relevant evidence which should be admitted notwithstanding the possibility of prejudice.'[136] In her majority reasons, Chief Justice McLachlin provided considerable guidance about the proper analysis of relevance, probative value and prejudicial effect. She began by emphasizing the case-specific nature of the analysis:

> *a trial is a complex affair, raising many different issues. Relevance must be determined not in a vacuum, but in relation to some issue in the trial. Evidence which may be relevant to one issue may be irrelevant to another is-*

134 *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577.
135 Ibid at 604.
136 Ibid at 608.

> *sue. What is worse, it may actually mislead the trier of fact on the second issue. Thus the same piece of evidence may have value to the trial process but bring with it the danger that it may prejudice the fact-finding process on another issue.*
>
> *The law of evidence deals with this problem by giving the trial judge the task of balancing the value of the evidence against its potential prejudice.*[137]

Chief Justice McLachlin characterised the principles of relevance, probative value and prejudicial effect and the judicial discretion to exclude evidence as 'common sense rules based on basic notions of fairness' that 'form part of the principles of fundamental justice enshrined in s. 7 of the *Charter*.'[138] Accordingly, these principles of evidence law now have *Charter* protection in a case that threatens the life, liberty or security of a person. They cannot be lightly curtailed when the information is being relied upon by the accused person.

The rule that relevant evidence called by an accused person may only be excluded where its prejudicial effect substantially outweighs its probative value was therefore the measure by which Chief Justice McLachlin assessed the constitutionality of the legislative amendments in *Seaboyer*. With respect to the rule prohibiting evidence of sexual reputation for the purposes of evaluating credibility, the Court held 'There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by [this section] can serve no legitimate purpose in the trial.'[139] Sexual reputation evidence was therefore seen by the Court to be so utterly lacking in any logical relationship with a complainant's truthfulness that it is irrelevant, with the result that it should always be excluded from trial. No assessment of probative value and prejudicial effect is necessary.

The Court's approach to sexual history evidence reflected that greater nuance exists with respect to that evidence. Justice McLachlin explained that the provision excluding sexual history evidence:

> *does not condition exclusion on use of the evidence for an illegitimate purpose. Rather, it constitutes a blanket exclusion, subject to three exceptions – rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident. The question is whether this may exclude evidence which is relevant to the defence and the probative value of which is not substantially outweighed by the potential prejudice to the trial process. . . .*
>
> *In my view, the answer to this question must be negative. The Canadian and American jurisprudence affords numerous examples of evidence of sexual conduct which would be excluded by [the provision] but which clearly should be received in the interests of a fair trial, notwithstanding the possibil-*

[137] Ibid at 609.
[138] Ibid at 611.
[139] Ibid at 612.

> *ity that it may divert a jury by tempting it to improperly infer consent or lack of credibility in the complainant.*[140]

Justice McLachlin detailed several such examples of evidence that would hold significant probative value and for which the prejudicial effect could be managed, in her reasons. In Justice McLachlin's view, a key difficulty with the statutory provision as it was then framed arose from its attempt to categorically define the circumstances in which sexual history evidence is, or is not, relevant. In a passage that embodies the turn to more flexible approaches described above by Paciocco, Justice McLachlin explained:

> *provisions such as [this] … adopt a "pigeon-hole" approach which is incapable of dealing adequately with the fundamental evidentiary problem at stake, that of determining whether or not the evidence is truly relevant, and not merely irrelevant and misleading. This amounts, in effect, to predicting relevancy on the basis of a series of categories. Courts and scholars frequently have alluded to the impossibility of predicting relevance in advance by a series of rules or categories. In* R v Morin,[141] *Sopinka J, speaking for the majority of this Court, stated:*
>
> > *It is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in a case. Attempts in the past to define the criteria for the admission of similar facts have not met with much success .... The test must be sufficiently flexible to accommodate the varying circumstances in which it must be applied.*[142]

Given the risk that the provision, as framed, would exclude sexual history evidence that is relevant and has significant probative value, in circumstances where the prejudicial effect could be appropriately managed, Justice McLachlin concluded that it was unconstitutional. However, as she explained, this conclusion did not render sexual history evidence automatically admissible:

> *The inquiry as to what the law is in the absence of [this section] is thus remitted to consideration of the fundamental principles governing the trial process and the reception of evidence. Harking back to Thayer's maxim, relevant evidence should be admitted, and irrelevant evidence excluded, subject to the qualification that the value of the evidence must outweigh its potential prejudice to the conduct of a fair trial. Moreover, the focus must be not on the evidence itself, but on the use to which it is put.*[143]

Justice McLachlin set out 'judicial guidelines' for judges to follow when sexual history evidence is offered in a sexual violence case. These guidelines were twofold:

---

140 Ibid at 613.
141 *R v Morin*, [1988] 2 SCR 345 at 370-71.
142 *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577 at 619.
143 Ibid, at 630 - 631.

> *First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence. The examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional. The trial judge must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence. …*
>
> *The trial judge's second responsibility will be to take special care to ensure that, in the exceptional case where circumstances demand that such evidence be permitted, the jury is fully and properly instructed as to its appropriate use. The jurors must be cautioned that they should not draw impermissible inferences from evidence of previous sexual activity.*[144]

This relatively lengthy discussion of Justice McLachlin's majority reasons in *Seaboyer* has been included because it illustrates two points especially clearly. First, the fundamental common law principles of relevance, probative value and prejudicial effect form the basic logic of admissibility within the Canadian common law of evidence, and have constitutional significance with respect to evidence called by an accused person. These principles will – when fully understood and properly applied – lead a trial judge to the correct analysis of admissibility in most instances, even where a specific exclusionary rule may also apply.[145] Second, stereotypes about human behaviour and credibility – such as the belief that a woman's sexual reputation has some bearing on her truthfulness when testifying – can distort the factual reasoning process when evidence is not subjected to a careful analysis of relevance, probative value and prejudicial effect.

This second point – the distorting effect of stereotypes – has been a particular focus of academic work on sexual violence, and of the Supreme Court of Canada's sexual violence rulings since before *Seaboyer* was decided. In this context, a stereotype is a generalization about human behaviour that may sometime be correct, but is frequently inaccurate. Stereotypes are particularly invidious when they are used to assess the credibility of witnesses who have historically been deprived of the full protection of the law based on social beliefs about their personhood. So, for example, where the accused person wishes to use evidence that the complainant had previously consented to sexual activity with the accused in similar circumstances, he is inviting the trier of fact to reason that a person who has agreed to sexual activity in the past is more likely to be lying when she says that she did not agree on the charged occasion. This generalization resonates with stereotypes about women and sexual activity, such as the proposition that women lie about consensual sexual activity.[146]

While Justice McLachlin acknowledged the phenomenon of stereotypes, as seen in the quoted passage from her reasons regarding sexual reputation evidence, her col-

---

144 Ibid, at 634.

145 See further, ibid at 621 - 623.

146 These stereotypes were at one time actively perpetuated by evidence scholars and lawyers alike. See, for example, John Henry Wigmore, *Evidence* (3rd ed, Little, Brown, Boston, 1940) s 924a; T.S., "Evidence: The unchastity of a female witness as a ground for impeaching her veracity" (1933) 32 Michigan Law Review 251. The perpetuation of these stereotypes is discussed, for example, in Elizabeth Sheehy, "Evidence law and the 'credibility' of women: A comment on the E Case' (2002) 2 Queensland University of Technology Law Journal 157.

league Justice L'Heureux-Dubé supplied a more complete discussion of myths and stereotypes about women and sexual violence, in her partial dissent in *Seaboyer*. Justice L'Heureux-Dubé supplied a list of such myths and stereotypes, but also explained that her list was

> *by no means exhaustive. Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly.*[147]

Justice L'Heureux-Dubé's remarks about the difficulties of rooting out stereotypes were prescient. In 2018, Professor Elaine Craig published a study of Canadian sexual assault trials in which she concluded that sexual history evidence was still being routinely admitted without the careful assessment of probative value and prejudicial effect that had been mandated in *Seaboyer* and subsequent (constitutional) statutory amendments.[148] Similarly, this author published an article in 2012 in which she identified that even the Supreme Court of Canada continued to draw upon sexual history evidence in breach of its own guidelines about how courts should approach the admissibility and use of that evidence.[149]

Since this commentary was published, the Supreme Court of Canada has redoubled its efforts to use evidence law to exclude myths and stereotypes from factual reasoning in sexual violence cases.[150] It has also extended that reasoning to address specific myths and stereotypes about, for example, Indigenous women and those who exchange sexual activity for payment. So, for example, in *R v Barton*, the Supreme Court of Canada criticized a trial judge and lawyers who had repeatedly referred to the deceased victim as 'native' (a non-preferred term for Indigenous) and a 'prostitute' (also a non-preferred term in Canadian English today). Justice Moldaver explained for the majority:

> *our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons – and in particular Indigenous women and sex workers – head-on. Turning a blind eye to these biases, prejudices, and stereotypes is not an answer. Accordingly, as an additional safeguard going forward, in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls. This instruction would go beyond a more generic instruction to reason impartially and without sympathy or prejudice.*[151]

---

147 Ibid at 654. See further Justice L'Heureux-Dubé's extra judicial writing, e.g. Claire L'Heureux-Dubé, "Beyond the Myths: Equality, Impartiality and Justice" (2001) 10 Journal of Social Distress and the Homeless 87.

148 Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Kingston: McGill-Queen's University Press, 2018). For a summary of subsequent legislative amendments – and the ruling that these amendments were constitutional – see *R v Darrach*, 2000 SCC 46.

149 Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 Supreme Court Law Review (2nd series) 295.

150 See, e.g. *R v Gagnon*, 2018 SCC 41; *R v Barton*, 2019 SCC 33; *R v Goldfinch*, 2019 SCC 38; *R v RV*, 2019 SCC 41.

151 *R v Barton*, 2019 SCC 33.

Justice Moldaver supplied examples of the kind of judicial instructions that should be given to a jury in order to ward off the risk of reasoning on the basis of stereotypes. He also specifically addressed the use of the term 'native' to refer to the victim in this case:

> *while in some cases it may be both necessary and appropriate to establish certain biographical details about an individual such as his or her race, heritage, and ethnicity where that information is relevant to a particular issue at trial, and while witnesses may at times rely on such descriptors without being prompted by counsel, it is almost always preferable to call someone by his or her name. …*
>
> *Being respectful and remaining cognizant of the language used to refer to a person is particularly important in a case like this, where there was no suggestion that Ms. Gladue's status as an Indigenous woman was somehow relevant to the issues at trial. …*
>
> *At the end of the day, her name was "Ms. Gladue", not "Native woman", and there was no reason why the former could not have been used consistently as a simple matter of respect.*[152]

In this body of caselaw, the Supreme Court of Canada has re-emphasized the importance of a rigorous analysis of relevance, probative value and prejudicial effect as a means of identifying and countering appeals to stereotype, particularly in the context of sexual history evidence.[153]

These cases are still comparatively recent, and at the time of writing there has been relatively little academic writing published about them. An exceptional analysis of the ways in which Canadian legal processes have mis-applied principles of relevance in ways that deprive Indigenous women of the equal protection and benefit of the law was offered in 2012 by Indigenous scholars Tracy Lindberg, Priscilla Campeau and Maria Campbell.[154] The analysis that the laws of evidence can and should be employed by trial judges to dispel the potential operation of racist myths and stereotypes has been elaborated by this author in the slightly different context of the Saskatchewan trial of a white farmer for killing a young Indigenous man.[155] Writing shortly before these cases were decided by the Supreme Court of Canada, Lisa Dufraimont surveyed sexual violence cases in which, on her analysis, sexual history evidence was both relevant and at risk of engaging myths and stereotypes, and proposed how best to balance the competing concerns in such cases.[156]

---

152 Ibid, at [205] - [207].

153 See also *R v Gagnon*, 2018 SCC 41; *R v Goldfinch*, 2019 SCC 38.

154 Tracy Lindberg, Priscilla Campeau and Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Elizabeth Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012). These matters are also touched on in Cullen et al, above note 63 and in Buller et al, *Final Report of the National Inquiry into Murdered and Missing Indigenous Women*, (Ottawa: Government of Canada, 2019) section 1 chapter 8. See also the several factums filed by Indigenous and women's equality seeking interveners in *R v Barton*, available at https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=37769.

155 Emma Cunliffe, "The Magic Gun: Settler Legality, Forensic Science and the *Stanley* trial" (2020) 98 Canadian Bar Review 270 online https://cbr.cba.org/index.php/cbr/article/view/4609.

156 Lisa Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44 Queen's Law Journal 316.

This brief discussion of developments in the law relating to sexual history evidence since *Seaboyer* was decided demonstrates the difficulty that has been experienced by judges and lawyers when trying to move away from the invidious stereotypes that formerly shaped the common law of evidence in relation to sexual assault. However, it also demonstrates that careful attention to the principles of relevance, probative value and prejudicial effect permits trial judges to 'slow down their reasoning' sufficiently to identify the potential operation of myths and stereotypes, and take steps to counter that possibility.[157]

[157] See further, Emma Cunliffe, "Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination" (2014) 18 International Journal of Evidence & Proof 139.

Conclusion

At its most fundamental level, the law of evidence supplies the rules by which facts are established within the adversarial common law trial. In recent decades, Canadian law has increasingly embraced the recognition that these rules can operate either to facilitate or to stifle access to justice. The shift to a principled approach to admissibility places a close analysis of the logical relevance of evidence at the heart of evidence law, along with a careful, highly structured assessment of the value and the potential risks associated with specific kinds of evidence and forms of proof. Within the complex constitutional compromise of Canadian federalism, Canadian courts have – at their best – adapted evidence law to help identify and exclude the operation of myths and stereotypes about those who have historically been disserved by Canadian law.

> *[T]he evidentiary "tools of understanding" are changing to meet the challenges of a recognizably diverse society. One consequence of these challenges is increased attention to the process of fact determination and in particular to the question: Whose social knowledge or world views will ground findings of fact? …*
>
> *In other words, law as a discipline affects the rules which, in turn, disciplines the process of fact determination.*[158]

These disserved groups include victims of sexual assault and Indigenous Canadians. However, as academic writing and interveners have made clear, this project remains very much a work in progress.

The Canadian experiment with using evidence law as an integral means of securing *Charter* rights and freedoms – including the right to equal protection and benefit of the law – is ongoing. Almost forty years after the *Charter* was adopted (and thirty-five years after the equality provision came into force), it has become apparent that judges play a crucial constitutional role as independent and impartial guardians of constitutional rights and freedoms, particularly with respect to State proceedings that have the potential to infringe upon human freedom, dignity and security of the person. However, social inequalities, particularly the inequality of resources allocated to State prosecutors and investigators vis-à-vis defence lawyers and victim representatives, threaten the presumption that parties are best positioned to identify and lead the most relevant evidence.

This inequality has, for example, led to an asymmetry of access to expert witnesses. In Canada, most forensic science expertise is concentrated within law enforcement agencies, and criminal defendants rarely have access to qualified expert advice. While the legal expectation that expert witnesses will act as independent advisors to the court is partly intended to ameliorate this inequality, inevitably the greatest resources tend to

158 Christine Boyle and Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor Yearbook of Access to Justice 55 at 61 - 62.

be dedicated to developing forms of expertise that serve State governance priorities.[159] One consequence has been a string of wrongful convictions that has arisen from unreliable forensic science evidence.[160] It remains to be seen whether recent judicial efforts to heighten admissibility standards for expert opinion evidence will result in fewer such errors arising in the future.

Similarly, it is evident to most attentive observers that racist myths and stereotypes about Indigenous Canadians have not yet been eradicated from Canadian trial proceedings, despite sustained efforts on the part of the Supreme Court of Canada and many legal commentators. Barton presents a particularly shocking example of a case in which well-established legal principles were overlooked by lawyers and a trial judge, resulting in serious legal error. When this case was decided by the Supreme Court of Canada, that Court began its judgment with the following acknowledgment:

> *We live in a time where myths, stereotypes, and sexual violence against women – particularly Indigenous women and sex workers – are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can – and must – do better.*[161]

The majority concluded its judgment with the observation that "the criminal justice system did not deliver on its promise to afford [Cindy Gladue, the victim] the law's full protection, and as a result, it let her down – indeed, it let us all down."[162] However, *Barton* is not the only contemporary example of the operation of such myths and stereotypes within the Canadian legal system, particularly with respect to Indigenous victims.[163]

In short, the aspirations of the principled approach to evidence have not yet been fully realised, nor are they fully supported by appropriate resourcing within the Canadian criminal legal system. Despite these shortcomings, the cases discussed in this paper – including those such as *Barton* in which errors arose at trial – demonstrate the potential for the concepts of relevance, probative value, and prejudicial effect, rigorously applied, to discipline the process of fact determination, uncover and dispel the operation of myths and stereotypes, and thereby help Canadian courts to more fully realise the promise of the *Charter*.

---

159 Emma Cunliffe, "*Charter* rights, State expertise: Testing State claims to expert knowledge" (2020) 94 Supreme Court Law Review 367 online https://commons.allard.ubc.ca/fac_pubs/536/.

160 See Emma Cunliffe and Gary Edmond, ""What Have We Learned? Lessons from Wrongful Convictions in Canada" in Benjamin Berger, Emma Cunliffe and James Stribopoulos (eds), *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017).

161 *R v Barton*, 2019 SCC 33 at [1] per Moldaver J.

162 Ibid at 210.

163 See also Roberta Campbell, *Independent Report on the Incarceration of Angela Cardinal* (Alberta, 2018) online https://open.alberta.ca/publications/independent-report-on-the-incarceration-of-angela-cardinal#summary; Cullen et al, above note 63; National Inquiry into Murdered and Missing Indigenous Women, above note 154; Emma Cunliffe, "The Magic Gun", above note 155.

@CEJAoficial

@CEJAoficial

@CEJAoficial

@CEJAoficialOK