

# Discretion and the L.R.C.'s Code of Evidence

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In 1975, the Law Reform Commission of Canada proposed a Code of Evidence. The cornerstone of that Code was section 5 which provided:

*Evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time.*<sup>1</sup>

This provision was a "borrowing" of Rule 403 of the *Federal Rules of Evidence* in the United States which came into force in 1975. The Law Reform Commission's Code of Evidence got nowhere and there was great resistance to this particular section.

There were two principal lines of attack on the Proposed Code of Evidence. The first was against the idea of codification; the second was against the broad discretion reposed in section 5. The first criticism was that codification would freeze the law and eliminate the necessary flexibility inherent in the common law. The second, directed at section 5, was that there would be too much flexibility in the application of the law. The paradox in the attack is apparent. The answer to the critics is plain. A good Code would articulate the rules in terms of their underlying principles. This would promote greater certainty. Recognizing that within each rule there must exist a fair amount of discretion, by articulating the rule in principled terms you thereby begin the process of describing the guidelines for a sound exercise of discretion. The simplicity of the process makes the law clearer and the discretion of the judge is better brought under control. Counsel then can make arguments based on principle rather than on technical interpretations of a mechanical rule and the judge will similarly be obliged to make decisions based on principle. Indeed once we recognize that discretion already exists, and must necessarily exist, we make the law much more certain than it ever was before and the trial more fair.<sup>2</sup> It is necessary to recognize that the present law of evidence is, for many, often unclear and difficult to ascertain. For those who see the rules as eight volumes of *Wigmore* with innumerable exceptions, the task is overly complex and daunting. In that setting success often goes to the advocate best equipped with a memory for precedent and the ability to articulate the mechanical rule with precision. For many looking on the adversary system is seen as too much of a game with the outcome dependent on

the skill of the adversaries. If, on the other hand, we recognize precedent as valuable only as a vehicle for the expression of principle and focus on understanding the principle there will be a more genuine communication between counsel and the judge and a better appreciation by the onlooker as to why a particular piece of evidence was accepted or rejected. To promote justice and fairness we need to recognize that each particular case is an individual problem and demands judgment, and the exercise of discretion, in the application of the rules of evidence, based on a sound understanding of the principles that caused their creation.

After the rejection of the Law Reform Commission's work, a Task Force on Evidence was struck and given a mandate to overhaul the rules. It was told in no uncertain terms that the profession didn't want anything like section 5 to reappear and that a statute rather than a Code was to be the order of the day. The Task Force's efforts have, of course, also come to naught. Meanwhile Rule 403 of the Federal Rules in the United States, recognizing the place of discretion, remains in force and the Federal Rules have been largely copied by thirty-one of the states.

## **I. THE SUPREME COURT OF CANADA AND DISCRETION**

In Canada there has been no legislation recognizing the centrality of discretion in the application of the law of evidence. The Supreme Court, however, has been very clear in recognizing its necessity.

## **II. MORRIS**

In *Morris v. R.*,<sup>3</sup> the majority of the Supreme Court expressly agreed with the minority opinion's observations on the subject of relevancy. In that opinion Justice Lamer adopted as the law in Canada Professor Thayer's basic principle that everything of probative value should be received in evidence unless there is a clear ground of policy justifying exclusion. Quoting Thayer, Justice Lamer also wrote:

*To this general statement should be added the discretionary power judges exercise to exclude logically relevant evidence [...] as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, in their effect on the jury, and likely to be misused or overestimated by that body; others, as being impolitic, or unsafe on public grounds; others on the bare ground of precedent.<sup>4</sup>*

### **III. CORBETT**

In *Corbett v. R.*,<sup>5</sup> the Court decided that there was a discretion in a trial judge to shield an accused as witness from the questioning as to previous record permitted by section 12 of the *Canada Evidence Act*.<sup>6</sup> Justice La Forest gave us, perhaps, the best reminder to date of the origin of our rules and the need to understand their bases:

*The organizing principles of the law of evidence may be simply stated. All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or should otherwise be excluded on clear grounds of law or policy.<sup>7</sup>*

### **IV. POTVIN**

In *R. v. Potvin*,<sup>8</sup> the Supreme Court had to deal with the admissibility of former testimony. Justice Wilson decided that there was a discretion to exclude former testimony even though it satisfied the statutory conditions. Justice Wilson went on to note that the limited discretion approved by the Court in *R. v. Wray*,<sup>9</sup> to exclude evidence of modest probative value, was not sufficiently broad to accomplish the fairness of which she was speaking. She stressed that even evidence of high probative value could be excluded if admission would render the trial unfair. Justice La Forest, Chief Justice Dickson concurring, agreed with Justice Wilson's conclusion and "explained" *Wray*:

*As my colleague notes, some have interpreted Martland J.'s dictum [in Wray] as limiting the discretion solely to situations where the evidence is highly prejudicial to the accused and is*

*of only modest probative value. I do not accept this restrictive approach to the discretion [...] under English law a judge in a criminal trial always has a discretion to exclude evidence if, in the judge's opinion, its prejudicial effect substantially outweighs its probative value [...] the discretion is grounded in the judge's duty to ensure a fair trial.*<sup>10</sup>

## **V. GRAAT**

There was a time when Canadian lawyers and judges spoke of an opinion rule together with a list of exceptions. That rule-exception approach is to be contrasted with the sound, principled, discretionary approach adopted by the Supreme Court of Canada in *Graat v. R.*<sup>11</sup>

In *Graat*, an impaired driving case, the defence argued that a police officer should not be permitted to express his opinion on whether the accused's ability to drive was impaired by alcohol. In *Graat* the Court noted how the law of evidence had been burdened over the years with a large number of exclusions and exceptions to the exclusions. The Court insisted on a return to broad principles and discretion. In ruling that the police officers were entitled to express their opinions regarding the accused's ability to operate a motor-vehicle, the Court reasoned:

*The probative value of the evidence is not outweighed by such policy considerations as danger of confusing the issues or misleading the jury. It does not unfairly surprise a party who had not had reasonable ground to anticipate that such evidence will be offered, and the adducing of the evidence does not necessitate undue consumption of time.*<sup>12</sup>

What a refreshing attitude!

## **VI. SWEITZER-B.(C.R.)**

In *Sweitzer v. R.*<sup>13</sup> the Supreme Court of Canada approved the *Boardman*<sup>14</sup> approach to similar fact evidence. The Court, in *Sweitzer*, noted that the creation of a list of exceptions to the general principle, while useful, tended to obscure the true basis upon which similar fact evidence was admissible. In *B.(C.R.)*,<sup>15</sup> the Supreme Court again rejected the category approach to similar fact

evidence and emphasized that the proper approach was a discretionary one, balancing probative value against possibility of prejudice. The majority recognized that the similar fact evidence would often be relevant solely through propensity but if of sufficient probative force would nevertheless be receivable. Writing for the majority, Madam Justice McLachlin wrote:

*It is no longer necessary to hang the evidence tendered on the peg of some issue other than disposition. [...] [E]vidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.*

[...]

*As a consequence of the rejection of the category approach, the admissibility of similar fact evidence since Boardman is a matter which effectively involves a certain amount of discretion.<sup>16</sup>*

## **VII. VETROVEC**

Aside from statutory requirements of corroboration the common law has also long required the same in certain instances. In *Vetrovec v R.*,<sup>17</sup> Dickson, J. bemoaned the numerous technical appeals involving corroboration, the complexity of the law and the massive periodical literature that had been generated. He stressed that this was an area that cried out for discretion:

*[...] what was originally a simple common sense proposition - an accomplice's testimony should be viewed with caution - becomes transformed into a difficult and highly technical area of law [...] All this takes one back to the beginning and that is the search for the impossible: a rule which embodies and codifies common sense.<sup>18</sup>*

A judge or hearing officer should approach her witnesses not simply as a class but as an individual who may or may not carry the baggage that goes with our stereotypes and exercise her discretion on an individual basis as to whether a warning is necessary.

## VIII. KHAN/SMITH

We exclude hearsay evidence because we regard the adversary as disadvantaged by his inability to cross-examine the declarant with respect to the dangers resident in the out-of-court statement of perception, memory, communication and sincerity.<sup>19</sup> Also the declarant's presence in the courtroom will enhance trustworthiness for a number of other reasons; the solemnity of the occasion, the presence of the opposite party, the possibility of a perjury prosecution. If we can find within the circumstances surrounding the making of the out-of-court statement sufficient guarantees of trustworthiness, the statement deserves receipt even if we cannot fit it within one of the particular exceptions created by the courts in the eighteenth and nineteenth centuries. We need to recognize that the pigeon-hole exceptions were created by judges who believed that the out-of-court statement in their particular case warranted consideration. There was a time when all judges approached the problem in a principled way.

The Supreme Court of Canada, in *Ares v. Venner*,<sup>20</sup> decided that it was time to reform the hearsay rule. The Court displayed a common sense, principled approach. In his unanimous opinion for the Court, Justice Hall was clearly inviting the profession to join in the attempt at reform of this absurdly technical rule by approaching admission through discretion based on the rule's underlying rationale. That call went largely unheeded.

And then came *R. v. Khan*.<sup>21</sup> The Court decided that where there were grounds of necessity and sufficient circumstances promoting reliability surrounding the making of the statement in their particular case and that the hearsay could be received.

In *R. v. Smith*,<sup>22</sup> the accused was charged with murder. To support its theory, the Crown relied upon evidence of four telephone calls made by the deceased to her mother. The Supreme Court decided that the evidence did not fit within a recognized hearsay exception but that this was not necessarily fatal to the Crown's case. Writing for the Court, C.J. Lamer characterized *Khan*

as a "triumph of a principled analysis over a set of ossified judicially created categories".<sup>23</sup> Two of the telephone calls could be admitted under this discretionary approach.

## CONCLUSION

The Supreme Court of Canada has achieved, judicially, what the Law Reform Commission of Canada was not able to achieve legislatively. It is noteworthy that two of the principal spokespersons on the Court in achieving this development are Chief Justice Lamer and Justice La Forest. In 1975 when the Law Reform Commission made its recommendations two signatories to the Commission's report were Antonio Lamer, the Vice-Chairman of the Commission and G.V. La Forest who was the Commissioner in charge of the Evidence Project. The Law Reform Commission's proposal, recognizing the absolute necessity of discretion in the application of the rules of evidence was vigorously debated in the 1970's and the proposal lost. As the result of judicial developments at the highest level the debate is now essentially over and the centrality of discretion in the law of evidence is recognized. What lies ahead is the challenge of articulating the guidelines which will assist in the best exercise of that discretion. I am confident that there will be, as a result, more actual certainty in the application of the law. I venture the thought that the unease felt by some toward the new regime would be quieted if they honestly look back at the old and ask whether there was more apparent certainty than actual.

I do recognize that it is probably more frequently in the interest of defence counsel, in civil and criminal cases, to argue against discretion just as they have in the past argued against codification. Plaintiffs and prosecutors welcome the development. Codification and discretion have as a necessary counterpart greater admissibility. If counsel's main task is to defend against the establishment of a case to answer, greater admissibility is anathema. Nevertheless it is plain that that is the direction in which we are heading; the course has been set and there is no turning back.



## FOOTNOTES

1. For an attack on the discretionary powers in the Proposed Code, see R.P. Anderson, "A Criticism of the Evidence Code: Some Practical Considerations" (1977) 11 U.B.C. L. Rev. 163.
2. One commentator has argued that the Federal Rules in the U.S. were misnamed as "the drafters did not consider them as rigid rules to be mechanically applied, but rather as flexible principles for both trial and appellate courts". From that it followed that the principal command of the Rules to trial judges was to run a fair trial; to appellate courts to ensure that in their overall assessment a fair trial was run. See T.M Mengler, "The Theory of Discretion in the Federal Rules of Evidence" 74 Iowa L. Rev. 413.
3. *Morris v. R.* (1984), 7 C.C.C. (3d) 97 (S.C.C.). For a recent application of the discretionary exercise recognized in *Morris*, see *R. v. Clermont* (1986), 53 C.R. (3d) 97 (S.C.C.).
4. *Morris, ibid.* at 106.
5. *Corbett v. R.* (1988), 64 C.R. (3d) 1 (S.C.C.).
6. *Canada Evidence Act*, R.S.C. 1985, c. C-5.
7. *Supra* note 5 at 33.
8. *R. v. Potvin* (1989), 68 C.R. (3d) 193 (S.C.C.).
9. *R. v. Wray* (1971), 11 C.R. 235 (S.C.C.).
10. *Ibid.* at 243-244. For a criticism of *Potvin* see Delisle, 68 C.R. (3d) 193. If unfairness can exist when the declarant is not present since demeanour is not open to view by the trier, and declarant is generally not present when hearsay is introduced through an exception, is there then a similar discretion in a trial judge whenever the Crown seeks to introduce hearsay through an exception?! With respect to the particular exception canvassed in *Potvin*, are the statutory conditions themselves not sufficient to ensure fairness? The statement was made under oath, in solemn surroundings, subject to a perjury prosecution for falsehood, in the presence of the accused and subject to, at least the opportunity of cross-examination.
11. *Graat v. R.* (1983), 31 C.R. (3d) 289 (S.C.C.).
12. *Ibid.* at 306.

13. *Sweitzer v. R.* (1982), 68 C.C.C. (2d) 193. It is curious in *Corbett* that the Chief Justice retreats to the *Makin* rule and exception language.
14. *R. v. Boardman*, [1975] A.C. 421 (H.L.).
15. *R. v. B.(C.R.)* (1990), 76 C.R. (3d) 1 (S.C.C.).
16. *Ibid.* at 22 and 24. I realize that there are two more recent decisions of the Court, *R. v. C.(M.H.)* (1991), 4 C.R. (4th) 1 (S.C.C.) and *R. v. B.(F.F.)* (1993), 18 C.R. (4th) 261 (S.C.C.) which may affect this exposition of similar fact evidence; see annotations by this author, at the same citations, criticizing these more recent judgments. But *B.(C.R.)* remains the most fully reasoned opinion and the most authoritative.
17. *Vetrovec v. R.* (1982), 67 C.C.C. (2d) 1 (S.C.C.).
18. *Ibid.* at 13.
19. See generally E.M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv. L. Rev. 177.
20. *Ares v. Venner* (1971), 14 D.L.R. (3d) 4 at 16 (S.C.C.). For differing views as to whether *Ares v. Venner* represents the law in Ontario, compare *Tecoglas Inc. v. Domglas Inc.* (1985), 51 O.R. (2d) 196 (H.C.) and *Exhibitors Inc. v. Allen* (1990), 70 O.R. (2d) 103 (H.C.).
21. *R. v. Khan* (1990), 79 C.R. (3d) 1 (S.C.C.). The Court recognized that the *Ares v. Venner* approach was applicable to criminal cases as well as civil. For commentary on this and for description and citations of a number of earlier appellate opinions recognizing the applicability, see R.J. Delisle and M. Rosenberg, "Ares v. Venner and the Criminal Law" (1990), 78 C.R. (3d) 158. Also see *R. v. Miller* (1992), 9 C.R. (4th) 347 at 363 (Ont. C.A.) an appeal from a murder conviction, applying *Khan*: "Although the reasons in the *Khan* case referred to this flexible approach in the context of the evidence of children of tender years in cases involving sexual offences, both the comments (appearing in *Khan*) and the court's reference to its decision in *Ares v. Venner*, and to the dissenting reasons of Lord Pearce in *Myers v. Director of Public Prosecutions*, indicate approval of a more flexible approach where warranted by the circumstances".
22. *R. v. Smith* (1992), 15 C.R. (4th) 133 (S.C.C.).
23. *Ibid.* at 147.