

Conference Co-Chair's Opening Comments

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Recent developments in the law of evidence focus attention on the filtering and analyzing of evidence in legal decision making. As Professor Schiff comments in his closing remarks, "we are in the midst of a revolution in evidence law covering both the filtering of the evidence and the process of evaluation". Judges, other adjudicators, and lawyers are called upon to evaluate criteria which require a much broader inquiry into the reliability of the information, an evaluation of the social costs of admission or exclusion, and a re-examination of the meaning of a fair trial in the light of an increasing awareness of the complexity of fact determination and the influence of discriminatory myths and stereotypes on reasoning. For instance, decisions on the hearsay rule call for an evaluation of reliability and necessity. Decisions as to whether communications are privileged require a consideration of the importance to society of preserving the relationship. Decisions on the disclosure and admissibility of evidence in sexual assault cases require judges to examine the concept of a fair trial in the light of equality rights under the *Charter*.²

There is an increasing awareness that fact determination is a product of the interaction between the evidence and the decision maker's background and experience. Recent research by psychologists on juror decision making has found that a juror's explanation of legal evidence takes the form of a story constructed both from information explicitly presented at trial and knowledge possessed by the juror (Hastie). The problem for modern evidence scholarship is framed not so much in terms of decisions based on a limited set of information but in terms of the difficulties caused by a complexity of information. As noted by Chief Justice McEachern in his opening remarks, the challenge facing the justice system is how to regulate this complexity.

Recognition of the role of background information in fact determination and the resulting complexity is not new - many of the rules of evidence are designed to regulate the problems that result from the interaction of data with the background and experience of the decision maker, but the implications have yet to be understood. The conference papers in this volume contribute to our understanding.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Methods must be developed to incorporate the variety of backgrounds and experience of those directly affected by the justice system into the judicial fact determination process. As Madam Justice Huddart noted in her opening remarks, judges must bear in mind the need to view and analyze the evidence through a lens which allows them to keep in sight the diversity of society and the need for equality along with an awareness of their own biases. The Supreme Court of Canada has called for a re-interpretation of common law rules "to reflect changing circumstances in society at large".³ Judicial decision makers face the challenge of re-examining evidentiary rules to assess how the interpretation and application of evidence laws is affected by the recognition of diversity in our society, the Charter right to equality under sections 15 and 28 and the resulting necessity of incorporating the different perspectives arising from gender, age, race and culture into adjudicative decision making. Addressing these goals, papers in this volume consider topics such as the role of stories in juror and judicial decision making (Hastie), the difficulties of incorporating a full recognition of equality rights into decisions on pre-trial disclosure of medical and therapists' records, (MacCrimmon and Boyle) and the procedures being developed to obtain and evaluate the stories of vulnerable witnesses (Robb).

In the light of the complexity of fact determination in modern trials, judicial decision makers have turned to the sciences for help. There is an increasing awareness of the need for a full analysis of the role of expert opinion in judicial decision making. This volume contributes to this debate by examining the methods used by social scientists to evaluate reliability and validity (Vidmar), and the role of expert opinion in various types of adjudicative decisions such as environmental litigation (Duval Hesler), immigration decisions (Mawani), and sexual abuse of children (Robb).

The process of decision making by judges and other adjudicators is directly addressed in the papers discussing the methods of judicial decision making (Denis, Berger and Goodridge), the proof of causation and future risk in administrative decision making (Gathercole and Jeffery),

³ *R. v. Salituro*, [1991] 3 S.C.R. 654.

evidentiary issues in immigration proceedings (Mawani) and the role of specialized knowledge in judicial review decisions (Finlay).

The problem of complexity of information is considered in the papers which discuss the difficulties raised by replacing categorical rules with discretionary rules such as the reformulation of the hearsay rule (Delisle and Fabien), and the adoption of Wigmore's four criteria to identify privileged communications (Aquin). In contrast to these developments which are likely to increase the amount of information available to the decision maker, section 24(2) of the Charter excludes relevant, perhaps reliable information. In practice, however, many of the problems such as uncertainty and unpredictability of information that will be required by the decision maker are the same as those raised by inclusionary rules due to the vagueness of the guidelines for exclusion under section 24(2) (Roach and Handfield). Another issue considered is whether administrative tribunals which have traditionally adopted a flexible approach to the rules of evidence should deal with complexity by following the rules more strictly (McCallum). Complexity of information raises different problems in the pre-trial context. Access to information by one party in an adversarial setting may imply that an opposing party should also have access to information. In the absence of such access, the decision maker may be misled and may not be able to arrive at an accurate evaluation of the evidence. For instance, should there be some obligation on the part of the defence for disclosure in criminal proceedings (Slobogin)?

The 1993 annual conference of the Canadian Institute for the Administration of Justice was held in October, 1993 in Vancouver and was attended by over 150 distinguished jurists, academicians and practitioners. The planning committee was co-chaired by Madam Justice Carol Huddart of the Supreme Court of British Columbia and Professor Marilyn MacCrimmon of the Faculty of Law, University of British Columbia. The Executive Committee of the Canadian Institute for the Administration of Justice for 1993-1994 consists of The Honourable Judge Michèle Rivet, President of the Human Rights Tribunal of Québec (President), Madam Justice Carol M. Huddart of the Supreme Court of British Columbia (Vice-President), Chief Judge Heino Lilles of the Yukon Territorial Court (Vice-President), The Honourable Judge Nicole Duval Hesler

of the Superior Court of Québec (Secretary/Treasurer) and Christine Huglo Robertson (Executive Director). The Past President is Mr. Justice Robert Wells of the Supreme Court of Newfoundland.

The Canadian Institute for the Administration of Justice, based in the Faculty of Law at the Université de Montréal, sponsors and carries out research and educational programmes related to all aspects of the administration of justice, in cooperation with the Federal and Provincial governments, the judiciary, professional associations, law schools, practising lawyers, and the public. Its members come from all regions of Canada and include judges, members of administrative boards and tribunals, the legal profession, educators, journalists, court personnel, staff of social agencies, corporate executives, students and the public.

The Canadian Institute for the Administration of Justice has organized and conducted conferences and specialized seminars, prepared comprehensive background papers, conducted research, and published books in many areas of law.

