KEYNOTE SPEAKER'S OPENING REMARKS

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I wish first to join with the previous speakers in welcoming our visitors to British Camelot, where it only rains at night. I sincerely hope that you will all enjoy your visit here with us. We are gratified that British Columbia still seems to be an acceptable place to hold these conferences, regardless of the time of the year or how far the participants must travel.

I also wish to congratulate you good people who have shown sufficient concern for our legal-jurisprudential system to take the time to become involved in a conference such as this.

I am reminded of a trial which I am informed took place in the State of Texas when a jury retired after a hard fought trial where feelings ran very high. When the jury returned, they were asked if they had reached a verdict, and the Foreperson replied, "As a matter of fact, we have not. Instead, we have decided not to get involved!" I am grateful that you people have decided to get involved by attending this important conference.

I must also begin with a disclaimer, that I am training for the next Olympics, and after this morning I am sure you will all agree that I easily qualify for the team that will be "boring for Canada!"

I am greatly impressed by the interesting program that has been arranged for this conference, and I am not unmindful that I am a poor second choice for this opening address, replacing Madam Justice McLachlin who has been confined against her will to Ottawa this week. If she were here, I am sure you would be treated to comments appropriate to the subject matter of the conference, with a perfect blend of judicial, academic and philosophical content.

Replacement speakers, of course, should exercise considerable restraint, but being second choice has freed me from any obligation to be philosophical or academic, and I propose to seize this opportunity, with an influential, captive audience, to get some things off my chest where they have rested too burdensomely, and for too long. I shall regret, but only for a moment, that I may be assuming the role of a spoiler for the rest of this conference, but I hope that what I say may

furnish a cold-water context which should be kept in mind when considering what is to follow at the conference.

I notice the program suggests, correctly I am sure, that the more information we have the more accurate the decision, but I wish to start by pointing out, as you all know, that there is always a price to be paid for knowledge, information or truth, that should not be left out of your consideration of the arguments which will be offered by those who will be following me during this conference.

I am not unmindful of the fact that most - indeed almost all - of you are already fully aware of the matters I shall be discussing. From time to time, however, it is necessary to remind ourselves of the obvious with which some of us may have become too comfortable.

Evidence, of course, has many facets. Some regard it just as a set of rules governing the matters which may be considered by a tribunal; others regard it as a safeguard against unreliable information; some say it is to discover the truth while others say just the opposite; and many thinkers seem persuaded that it is a promising vehicle for changing both social policy and society itself. I suspect it is these social policy questions that most of you wish to discuss, and hear discussed, at this meeting because that is where the law of evidence presents the best opportunities for conceptual and intellectual exercise. I hope I shall not disappoint you greatly.

Evidence is all of the things I have mentioned, and more. Instead of attempting to become philosophical by analyzing filters in a diverse society, I propose to talk about the effect that evolving laws of evidence, and the procedures we have to obtain evidence, have caused to our system of judicial dispute resolution. What I wish to discuss is not so much the effectiveness of the filter mentioned in the program, but the size of its mesh.

This may not be very interesting to those of you who take an academic interest in evidence. I regret that, but for the next few minutes I propose to speak about some very practical matters that

are causing considerable difficulty in jurisprudential matters, and seem hardly to be mentioned in most discussions about evidence.

Let me give just a simple example. When I was called to the Bar in 1950, and for about 20 years thereafter, most murder trials in British Columbia were scheduled to start on a Tuesday, and we were invariably finished on Friday evening, or sooner. Today, we are lucky if we can complete the *voir dires* by the following Friday, and the trials often carry on for several further weeks. The same applies to most criminal trials, which often labour on for months and months. It is stated in a biography I have of Marshall Hall, that the longest trial of that notable lawyer was a meagre 8 days! Not many of our counsels, if any, can make that statement.

The situation is no different in other kinds of cases. The one day and one week civil trial is almost extinct, and long, tedious, expensive civil trials lasting many weeks, months or even years are not uncommon. A simple example: the trial of *Calder* v. *British Columbia (Attorney General)*,[1] including argument, in 1973, took just 4 days. The trial in *Delgamuukw* v. *British Columbia*[2] in 1987-1991, took 374 days, yet the issues were basically the same. I remember one counsel in *Delgamuukw* describing the plaintiff's claim as "from time immemorial, to litigation interminable," to which I added the further modifier, intolerable.

We have come to regard the right of every person to have his or her day in court as a sacred principle. That principle must now, of course, be temporally restated more in terms of months than of days in court. We seem to have forgotten the corollary principle that every person should also have a right to get out of court, at least after a reasonable time.

In a moment I shall discuss some of the evidence rules which have contributed to the problem I have just mentioned which threatens the continued existence of the trial process as we know it. It should not be thought, however, that the laws of evidence are the only cause of this debilitating development.

There are other causes. Disputes have become much more complex, and lawyers have been trained in our law schools to pursue every legal question to infinity. Otherwise, they say, perfect justice cannot be expected. Some of these lawyers - not many, but some -seem to think that every target is the same size, and no evidentiary stone is ever left unturned in our courts.

The very pursuit of perfect justice, however, is an impossible dream. If it takes too long, and becomes too expensive to obtain perfect justice, then some will be deterred from the attempt, and others will be financially ruined by the process. Furthermore, there is no assurance that reasonable justice is not just as satisfactory as perfect justice.

Yet, some of our rules, as I shall endeavour to demonstrate, seem designed to obtain perfect justice, and we have never tried to assess, on a cost-benefit ratio, whether perfect justice which is only available to a limited group of the litigating public, is worth its cost.

It seems to me, when cases become so complex that they take an unreasonable time to try, and also become prohibitively expensive for all but the wealthy or the well funded, the law should respond with rules of evidence and procedure that limit, rather than extend interminably, the time required for trials to be completed. The law of evidence must play its role in returning the trial process to the people who need it at reasonable cost.

It is not just trial courts which are experiencing this problem of complexity. We appellate court judges are fortunate that we deal only with a distilled version of the evidence waterfall that has engulfed the trial courts. As every appeal court judge knows, however, every ruling in the trial courts is a potential ground for appeal. Thus, all judges and lawyers have an interest in re-examining the rules and laws which govern the conduct of judicial proceedings.

Let me mention a few examples where the laws of evidence and procedure have not responded to the challenge created by the increasing complexity of legal issues. At this time, I do not pretend that I have well thought out solutions to any of these problems. My purpose is merely

to identify a number of existing and emerging problems in litigation in the hope that some day these problems may excite the attention of thoughtful scholars, lawyers and judges who, through discussion or inspiration or both, will be able to make remedial suggestions.

I shall divide my examples into categories, related to the source of the problem.

I. GENERAL RULES OF EVIDENCE OR PRACTICE

A. Voir Dires

It is no exaggeration to say that *voir dires* have become interminable.

In *R.* v. *Dietrich*,[3] Chief Justice Gale decided that it was not necessary to conduct a *voir dire* when the accused unequivocally admits a statement made to a person in authority was made voluntarily. That was a major step forward, making it unnecessary to hold many unnecessary and futile *voir dires*. In the same case, however, Chief Justice Gale also said:

> *Undoubtedly a Judge should hear representations with respect to the admissibility of prospective evidence in the absence of the jury. At times, for example, where the voluntariness of a confession is in question, such representations must be tested in the light of testimony from witnesses. But save in rare circumstances, the relevancy or propriety of specific evidence need not be determined by testimony given in advance and in the absence of the jury. By adopting such a procedure the trial is unduly prolonged, the jury is absent from the Court-room too long, and the continuity of the trial which is so desirable is unduly disturbed, to say nothing of an unfair preview of the evidence that may be afforded to the opposite party. It should not become fashionable to have evidence disclosed by a `voir dire' without very good reason. On the contrary, it is desirable that whenever possible evidence that is to be challenged be considered in the absence of the jury upon an outline by counsel of the nature of the prospective evidence. In the vast majority of cases the Judge will then be in a position to rule upon its admissibility.*[4]

While it is now possible to deal with objections to testimony before the jury is in place, I believe the practice suggested by Chief Justice Gale is seldom followed. I do not suggest that it

will be possible in every case to dispense with *viva voce* evidence, but it should be tried more often in a variety of circumstances. Further, it seems to me that it would be appropriate for some kinds of evidence, particularly technical evidence, to be reduced to writing for the purposes of evidence in chief on a *voir dire,* and cross examination should be severely limited. I suspect that many days of this kind of evidence could be saved by a reformed *voir dire* practice.

Is this too simplistic? Perhaps some of the learned experts on evidence who are here could suggest reasons why this would be unfair, or impractical. I suspect many counsel would not favour such a change simply because they are comfortable with the present system, and they seem to believe that slow is truly beautiful, possibly because it takes so long!

B. Expert Evidence

Many judges think expert witnesses have engineered an upstream takeover of the judicial system. The older authorities established that expert evidence should only be admitted when the subject matter of an issue is beyond the ordinary competence and understanding of the tribunal. *R.* v. *Lavallée*[5] exemplifies, but is only one example of, the expanded admissibility of expert testimony in new areas of knowledge. Well enough. But that is not the only problem. Another serious problem, as I see it, is that almost anyone with a graduate degree, or several of them, can always be found to say something learned about any discrete subject which counsel wish to use to bolster their case, and we have no sufficiently precise definition of what an expert is, except the apocryphal person from out of town.

Some of you may have read a recent literary outburst on this question entitled *Galileo's Revenge*, where the author, a former clerk in the Supreme Court of the United States, but now a "science writer", fulminates against the promiscuous admission of what he calls "pseudo-science" into evidence, allegedly causing great injustice. If you haven't read this book, don't bother, because its underlying thesis is that courts should uniformly apply the principles stated in a 1923 decision of the Supreme Court called *Frye* v. *U.S.A.*[6] In *Frye,* the court decided that expert

scientific evidence was not admissible unless it was based on a scientific technique or theory which was generally accepted as reliable in the relevant scientific community. While this authority has not always been followed in the United States, and has been severely criticized by many writers as being too inflexible, it was high authority which was often relied upon to keep expert testimony within reasonable bounds.

Well, as many of you will already be aware, poor old Mr. Galileo has been undone again, because the Supreme Court of the United States (Rehnquist C.J. and Stevens J., dissenting) has just disapproved *Frye* for the reasons given by many of its critics, and because it was found that the Federal Rules of Evidence have superceded it. This is found in *Daubert* v. *Merrill Dow*,[7] which, ironically, was a case about the drug Bendectin. The irony is that the author of *Galileo's Revenge* used Bendectin, along with the Audi motor vehicle, as illustrations of unfortunate victims of pseudo-science in product liability litigation.

As the judgment in *Daubert* is based upon the *Federal Rules of Evidence*, it is necessary to mention that the relevant Rules, 104 and 702, provide first for the determination of preliminary questions concerning the qualification of a person to be a witness, a sort of *voir dire* procedure (Rule 104), and second, a Code for expert testimony (Rule 702). Rule 702 provides:

> *If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.*

As will be seen, I suspect these two rules have within them the seeds of the worst case scenario, that is a long *voir dire* followed by the admission of pseudo-science into evidence to bolster a weak case.

In construing these rules, the majority held that when faced with expert scientific testimony the trial judge must first make a preliminary assessment of whether the underlying reasoning or

methodology of the evidence is scientifically valid and properly can be applied to the case. Further, that many considerations will bear on the inquiry, including whether the theory or technique can be and has been tested, whether it has been subjected to peer review and publication, its known or potential error rate, the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. It was held that the focus must be solely on principles and methodology, not on the conclusions that they generate. This truly calls for a trial within a trial, which would be a long one.

In keeping with this concern, the court went on to observe that cross-examination, presentation of contrary evidence, and careful self-instruction on the burden of proof, rather than wholesale exclusion under the uncompromising *Frye* rule of general acceptance, is the appropriate means by which evidence may be challenged. Mr. Justice Blackmun, who gave the majority judgment, commented that the fact that even limited screening will occasionally prevent the jury from hearing about authentic scientific breakthroughs is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes. With respect, I would have thought *Frye* was more likely to provide a solution short of cosmic understanding, but that is not how the majority saw it.

As a result, although the trial judge had ruled the plaintiff's evidence inadmissible under the *Frye* rule, and had accordingly dismissed the action on a motion based upon the defendant's properly qualified scientific evidence, the court reversed, and sent the case back to the trial court to conduct the necessary preliminary enquiry under Rule 104.

We have neither a comprehensive rule, nor a *Frye,* nor its nemesis in Canada. Instead, we have taken a traditional, common law approach with a collection of decisions, each designed to deal with the problems which arose in the specific case in question, to which we apply general rules, such as probative value weighted against prejudicial effect, which is also mentioned by Blackmun J. The recent experience in Canada is that almost anyone can be qualified as an expert,

and almost any theory can be admitted - from automatism[8] to propensity,[9] or lack of propensity to do almost anything.

The qualification of experts is not the only problem. The use of experts in nearly every case is also a major problem. For example, new roles for expert witnesses have resulted from the famous trilogy of cases dealing with the assessment of damages in cases of catastrophic injuries: (*Andrews,*[10] *Thornton*[11] *and Teno*[12]*).* Instead of recognizing that the trilogy created an entirely new approach to these kinds of cases, we just started making provision for longer and more expensive trials with multiple experts being required in almost every case.

The same applies to family law cases. Experts are now called on almost every known discipline from pensions to art collections, and so on and so on.

If an organization such as the Canadian Institute for the Administration of Justice, or some other branch of the law, does not construct a manageable format for the swift and fair determination of the expert witness crisis which takes up so much trial time, then we judges must try to do so. Some may say we should have done it years ago. They are probably correct.

C. The Hearsay Rule

Let's talk for a moment about our old friend, the hearsay rule, which is undergoing heavy weather. Paraphrasing Cardozo J., it might be said that the assault upon this former citadel of the law is proceeding in these days at a rapid pace. No one spends any time studying it anymore because it seems to be accepted by some that hearsay, like the parole evidence rule, stands in the way of discovering perfect truth. To them, I would echo the words I have already quoted from Mr. Justice Blackmun, that the rules of evidence should not be tailored to ensure cosmic truth, but to resolve legal disputes reasonably. These two rules, even if they sometimes prevent the discovery

of some truth, also tend to keep trials within reasonable limits. I am not persuaded that much injustice, if any, will result from speedier, and less costly trials.

In a miserable little paper I prepared in 1983, I identified several recent Canadian relaxations of the hearsay rule. Some were statutory, and remedial, such as the provisions for proof of business records which led to *Venner*. Others were less significant, such as earlier positive identification[13] statements against penal interest; *Lucier* v. *R.*[14] expanded *res gestae* or excited utterances: *R.* v. *Graham.*[15] More significant, in British Columbia at least, was *D.R.H.* v. *Superintendent of Family Services*[16] where the Court of Appeal of this province foreshadowed *Khan* by admitting child hearsay in a sexual assault case.

In *R.* v. *Khan*,[17] of whom it was once said that he was [Khan] but not forgotten, the Supreme Court of Canada leaned on an opening door to child hearsay on the grounds of necessity. This decision was criticized by some thoughtful writers such as Derek Roswell of the University of Toronto, who warned against the application of Wigmore's two great principles of necessity and trustworthiness to all hearsay rules, just as the dual criteria of prejudice and probative value have already enlarged the role of similar fact evidence. But this argument was over, really before it began, because in *R.* v. *Smith*,[18] the Supreme Court of Canada laid to rest any notion that *Khan* was only applicable to cases involving children. Chief Justice Lamer said:

> *The decision of this Court in Khan* [...] *should be understood as the triumph of a principled analysis over a set of ossified judicially created categories.*[19]

I take this to mean that, in practice, every piece of hearsay evidence tendered at trial must be examined for its own (probably unique) attributes of necessity and reliability.

I do not suggest for a moment that some of these are not remedial changes to the hearsay rule, but again I wish to stress that every relaxation probably adds length-time to an already overburdened trial system.

II. PRELIMINARY DETERMINATION OF ISSUES

The preliminary determination of issues has become a burden to the litigation process. I hesitate to mention extreme examples, but Mr. Justice Watt, who is so well known to most of us, is currently engaged in a pre-jury process in a murder trial, known locally in Toronto as the "Trial from Hell". That process has already gone on for 38 sitting weeks extending over a year, is still continuing, and the jury hasn't yet been empanelled.

Every trial judge has had similar if somewhat shorter experiences to those of Mr. Justice Watt. As I have said, some of these new processes have been imposed upon trial judges by legislation, and some arise from decisions of the Supreme Court of Canada. In some cases, the purpose is to get questioned evidence admitted into evidence. In other cases, the purpose is to suppress it.

For example, pre-trial conferences are required in most criminal jury trials. They take a great deal of time. The Supreme Court of Canada in *Seaboyer*[20] and a later amendment to *Criminal Code* section 276, established a requirement for screening certain kinds of evidence that causes delay. Applications for production of documents required by *R.* v. *Stinchcombe*[21] delays the commencement of many trials so that carefully considered or last minute arguments of desperation may be advanced to limit or suppress evidence.

Another example is the challenge to wiretap authorizations. For almost 15 years we never opened the package. Then along came cases like *Wilson,*[22] *Garofoli,*[23] and *Dersch,*[24] which have added weeks and weeks to many trials. I agree that these changes increase the chances for perfect procedural justice.

I am reminded of a visit we received about 10 years ago from Lord Diplock, who had just spent a full week with the Court of Appeals for the State of New York. He told us that the merits were not even mentioned in any of the cases heard in that full week.

All this reminds me of the comments of Finlayson J.A. of the Ontario Court of Appeal in *R.* v. *Durette*,[25] where he said in circumstances somewhat similar to those of Watt J.:

> *Unless we, as courts, can find some method of rescuing our criminal trial process from the almost Dickensian procedural morass that it is now bogged down in, the public will lose patience with our traditional adversarial system of justice. As Jonathan Swift might have said, we are presently sacrificing justice on the shrine of process*.[26]

With respect, I would substitute "perfection" for process in the above quote, because that is what I think we have really done.

III. CIVIL CHARTER CASES

In its first *Charter* case, and on many subsequent occasions, the Supreme Court of Canada has reaffirmed the necessity for a factual foundation for the allegedly impermissible effects of challenged legislation, even though Laskin C.J.C. reminded us earlier that the *vires* of legislation can often be determined just on the language of the impugned enactment. This insistence upon an evidence foundation is an invitation to court inundation by technical evidence from all possible disciplines. Professor MacCrimmon of UBC Faculty of Law, who is here today, has wisely adverted to the cost of all this in a recent article.[27]

Another problem in this area is illustrated by a passage taken from the *Globe and Mail* newspaper of Saturday, October 2, 1993 quoting a lawyer involved in the Clayoquot Sound contempt proceedings. I do not know what role this lawyer played in the proceedings, but he correctly assessed the different viewpoints that lead to new kinds of cases being heard in the courts. He is quoted as saying:

> *The protesters want the opportunity to use the court as a forum in order to give their reasons as to why they found it necessary to stand on the road.*

There can be no doubt that some persons wish to use the courts as forums for the public discussion of contemporary issues. These kinds of cases tend to take up a great deal of judicial time, which some may think more properly belongs to other litigants wishing to have their cases heard within the limited judicial time available to all parties.

IV. DISCOVERY OF DOCUMENTS

In the same vein, although not a matter of admissibility, I wish to mention discovery of documents which contributes substantially to the cost and time of litigation. In more leisurely days, litigants could afford perfect disclosure of every document that might lead to a chain of enquiry that might assist a party on any issue in a case. Such was the rule established in the 1882 *Peruvian Guano Case*,[28] which is cited in almost every dispute over the production of documents. This is the rule that really jams the filter, because very often it seriously delays the commencement of a trial.

I have commented in a number of cases that the documents in the *Peruvian Guano* case probably didn't fill a medium sized manila envelope, and the rule enunciated was probably very fair and sensible in 1882. But that was then, and now is quite different. There is no particular need to mention examples, although aboriginal and product liability litigation come quickly to mind. In those cases the need to disclose every last piece of paper or computer memory becomes oppressive, as do other forms of discovery such as interrogatories, and examinations for discovery which often go on far too long. I am aware of some cases in this province where examinations for discovery extended over more than one hundred days. Who can afford that?

We all know of cases that were settled, or abandoned, simply because one party or the other could not possibly afford to comply with the disclosure requirements of *Peruvian Guano,* and where compliance within a reasonable time is often impossible. It is surely unnecessary to mention the cost of such disclosure in many kinds of litigation.

What other industry, I ask rhetorically, would impose the same unyielding, intractable requirement of perfect compliance upon every production problem that might arise. Surely, a flexible scale of disclosure could be established for different classes of litigation. At the very least, judges should assert a discretion to limit discovery reasonably.

The trend, however, is all the other way in both civil and criminal law, where all procedures seem designed to achieve perfection. In this respect, however, the recent report of Mr. Justice Martin on *Disclosure in Criminal Cases* only attempts to establish reasonable levels of disclosure by both Crown and defence.[29]

V. SPECIOUS CASES OR DEFENCES

Lastly, in this litany of filter failures, I must mention how difficult it is to get rid of specious cases without a full blown trial. Until *Hunt* v. *Carey Canada Inc*.[30] the leading case on striking out pleadings and causes of action in British Columbia was *Minnes* v. *Minnes*.[31] Let me tell you what a foolish case that was. The plaintiff was married to defendant A, and she was having an affair with defendant B. Her husband sued her for divorce on the grounds of adultery with B, and an unopposed decree of divorce was granted. She married B. Then she changed her mind and sued A and B for a declaration that A's divorce from her was obtained by her fraud and the fraud of both A and B, and that she was still married to A. She had no prospect of success because of the fact that she and B had each changed their status by getting married.

In these circumstances a wise Chambers judge dismissed the action on a motion alleging that there was no reasonable cause of action. But alas, the Court of Appeal reinstated the claim on the ground that actions should be struck out only in the clearest possible cases etc. etc. The case went to trial, and after a long trial, it was of course dismissed as was pre-ordained from the beginning. As I have said, that case was the leading authority on striking out actions in this province until *Hunt,* which cites and relies upon *Minnes*. It is, of course, only because of the

breadth of the language used by the Court of Appeal that permitted such a foolish case to become a powerful authority.

Hunt falls into the same category. The plaintiff in that case was indeed asserting a new form of civil conspiracy, and he may succeed as the case has not yet been tried. *Donoghue* v. *Stevenson*,[32] also, asserted a new cause of action, and should not have been struck out at the pleading stage. While *Hunt* may be a perfectly valid case to go to trial, the breadth of the language practically forecloses any action ever being dismissed on pleadings.

There are, however, many, many cases, some of which I have participated in, where the action should have been struck out on pleadings. However, judges naturally feel constrained by authority to allow highly doubtful cases to proceed at great expense of time and money, when they should be decided on legal grounds without evidence.

But enough horror stories. Some of the things I have discussed are procedural, governed or authorized by Rules of Court or legislation. Some are pure evidence questions, and some are related to judicial innovation and lawyer's invention. It is obvious from what I have said, however, that there are serious tensions in the system. Many of our brightest minds are planning new assaults upon judicial time. I need only mention gender, multi-cultural, aboriginal, environmental, equality, products liability, medical, biological and reproductive issues, class actions, and many more new kinds of litigation to strike fear and despair into the hearts of the judiciary. It seems obvious that we cannot carry on as we have in the past, delivering a kind of Mercedes or Lexus judicial product where every issue is going to be litigated to the last warehouse full of documents, the evidence of countless experts, the longest imaginable cross-examinations, and unlimited new causes of action.

I suppose some might say that judicial establishments have already been increased substantially over the last several years and that this should permit the courts to provide the extra time required by all these improvements on prolixity, but that is not so. Most busy courts are also

experiencing enormously increased volumes of cases, and are unlikely to catch up, particularly if additional procedures are imposed by legislation or appeal courts to filter even more evidence even more minutely.

The message I wish to leave with you, is that we must either substantially reform the system in order to make it more manageable, possibly at the risk of only achieving reasonable justice, or we must greatly increase the size of the judicial establishment, or we must suffer the loss of a number of classes of cases from judicial determination. The public and governments will decide this question for us, if we do not do it ourselves.

Lastly, in closing, may I mention an occasion when another Chief Justice made a speech like mine. It was terribly boring. When he had finished the convenors gathered around and said all the right things, such as "That was very interesting," and "you certainly gave us lots of food for thought." One brave person, however (a woman, although it could have been anyone), said "Chief Justice, I thought you were incredibly dull and boring!" The Chair took the Chief Justice aside and said "Don't pay any attention to her, she has just been circulating around listening to others and she is just repeating what they are saying!"

FOOOTNOTES

1. *Calder* v. *British Columbia (Attorney General)*, [1973] S.C.R. 313.

2. *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

3. *R.* v. *Dietrich*, [1970] 3 O.R. 725 (C.A.).

4. *Ibid.* at 738.

5. *R.* v. *Lavallée*, [1990] 1 S.C.R. 852.

6. *Frye* v. *U.S.A.*, 293 F. 1013, 34 ALR 145 (1923), 54 APP D.C. 46 [hereinafter *Frye]*.

7. *Daubert* v. *Merrill Dow*, 125 L.Ed., 2d 469 (1993). P. Huber, *Galileo's Revenge*: *Junk Science in the Courtroom* (New York: Basic Books, 1991) [hereinafter *Daubert*].

8. *R.* v. *Parks,* [1992] 2 S.C.R. 871.

9. *R.* v. *Abbey,* [1982] 2 S.C.R. 24.

10. *Andrews* v. *Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229.

11. *Thornton* v. *School Dist. No. 57,* [1978] 2 S.C.R. 267.

12. *Arnold* v. *Teno* [1978] 2 S.C.R. 287.

13. *R.* v. *Swanston,* [1982] 2 W.W.R. 546 (B.C.C.A.).

14. *Lucier* v. *R.*, [1982] 1 S.C.R. 28.

15. *R.* v. *Graham,* [1974] S.C.R. 206.

16. *D.R.H.* v. *Superintendent of Family Services* (1984), 58 B.C.L.R. 103 (C.A.).

17. *R.* v. *Khan*, [1990] 2 S.C.R. 531 [hereinafter *Khan*]..

18. *R.* v. *Smith*, [1992] 2 S.C.R. 915.

19. *Ibid.* at 930.

20. *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577.

21. *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

22. *Wilson* v. *R.*, [1983] 2 S.C.R. 594.

23. *R.* v. *Garofoli*, [1990] 2 S.C.R. 1421.

24. *Dersch* v. *Can (A.G.)*, [1991] 1 W.W.R. 231 (S.C.C.).

25. *R.* v. *Durette* (1992), 72 C.C.C. (3d) 421 (Ont. C.A.).

26. *Ibid.* at 440.

27. M. MacCrimmon "Developments in the Law of Evidence, 1990-91 Term: Social Science, Law Reform and Equality", (1992) 3 Sup. Ct. L. Rev. 269 at 286.

28. *Campagnie Financiere et Commerciale du Pacifique* v. *The Peruvian Guano Case* (1882), 11 Q.B.D. 55 (C.A.) [hereinafter *Peruvian Guano*].

29. Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, The Hon. G. Arthur Martin, Chair, 1983.

30. *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959 [hereinafter *Hunt*].

31. *Minnes* v. *Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.) [hereinafter *Minnes*].

32. *Donoghue* v. *Stevenson*, [1932] A.C. 562.