

Summation and Commentary: Evidence Rules in the Blast of the Hurricane

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For two and a half days we have examined how information is used in adjudication, how the information is filtered by evidence rules before decision-makers may consider it, and how the decision-makers analyze what passes the filter. I have the job of summarizing and commenting on how our assessment of these processes has gone. For that, I take some leaves from Chief Justice McEachern's book in his introductory remarks. To start, I elaborate on some of his themes.

Evidence rules exist as part of the machinery of the trial in court. The court is one of our society's official institutions for settling disputes between citizen and citizen, and between citizen and the state, that cannot otherwise be settled peaceably. The court does this by determining the facts of the parties' dispute and then applying the applicable substantive rules and standards of the law to those facts to determine the rights and the wrongs of the dispute. That is what we call adjudication. Evidence rules are there to support the fact-determining part of adjudication - to help find out what happened between the parties.

The court's finding what happened is necessary because, otherwise, the applicable substantive rules and standards cannot be applied accurately to determine the rights and wrongs. Only if they are applied accurately can like cases be decided alike and unlike cases differently, a basic demand of any theory of justice. Only then can citizens plan their future lives by relying on the virtue of obeying substantive laws. And only then can the court enlist the public faith in its rationality and evenhandedness necessary to support general recourse to it for dispute settlement rather than recourse to the gun. A first principle of evidence law therefore directs that all evidence probative to determining what happened should be heard.

The truth about the past can be bought at too high a price. The court, as this official institution of dispute settlement, cannot engage enough of the necessary public support if, while finding what happened, it does not deal fairly with the parties and witnesses. Or if it takes too much time to do the job. Or if the parties must spend too much money to get the result. Or if the court ignores deep-seated values having nothing to do with finding what happened - human dignity, bodily sanctity, privacy, important social relationships, protection of the state and the

operation of state institutions (including the court itself). Any or all of these concerns, if respected by the court in formulating evidence rules, may - and usually will - compromise accurately finding what happened. Some probative evidence must be excluded.

But the compromise is necessary and longstanding. To survive as the arbiter of social disputes alternative to violence, the court must accommodate all the thrusts at once. The court must find the truth, but must find it by procedures sufficiently honouring the other values - perceived fairness, speed, reasonable cost, respect for human dignity, bodily sanctity, social relationships, and the lot.

In the adjudicative function of an administrative tribunal's work, the tribunal rightly should not be subject to the rules of evidence applied by the court. The tribunal is not, as is the court, a social institution existing simply and solely to settle disputes between citizen and citizen, and between citizens and the state. Adjudication there may be, but adjudication as the fact-determining portion of the tribunal's function of implementing the policy and specific directions of its constitutive legislation in the particular circumstances. The applicable rules governing the filtering and analysing of evidence must accommodate, not only truth-finding and extrinsic social values, but also the need to implement the statute's policy and directions.

That is my picture of the place of evidence rules in the adjudicative system. However, as we all know, we are in the midst of a revolution in evidence law covering both the filtering of the evidence and the processes of evaluation.

Over the past half-decade, the Supreme Court has drastically recast pre-existing rules. Apart from the astonishing changes made in specific evidence doctrine, the judges have announced that they will continue the work as appeals come to them by looking to underlying "principle" and "policy". Indeed, "principled approach" has come close to becoming the court's catchphrase. Put in other language, the judges say that they will look to purposes - what the particular rule under consideration is for.

Parliament too has acted, followed by some provincial legislatures. Recent statutory amendments look generally to the testimony of young children, and specifically to their testimony in sexual assault trials. Amendments to the Criminal Code deal with evidence in sexual assault trials of the complainant's previous sexual activity. In all, we might see what has been happening as not just a revolution. To mix metaphors, it is a hurricane, with mighty winds blowing from Ottawa carrying all before them. In light of the place of evidence rules in the court's working as official institution of dispute-settlement in society, how well have evidence rules fared in the era of revolution - in the blast of the hurricane?

In the review and comments that now follow, I will omit referring to some of the presentations made. I could not attend all of them, and the papers for several were not available in advance of the conference. Time restrictions now are also to blame. To those presenters whom I do not mention for these reasons, I offer my apologies.

I. THE HEARSAY RULE

Professor Delisle approves the work of the Supreme Court in *Khan*¹ and *Smith*:² hearsay evidence shall be admitted in the trial judge's discretion if the evidence is necessary and the surrounding circumstances of the statement's making show sufficient trustworthiness. He has no doubt about the wisdom of a flexible definition of necessity that includes entertaining comparatively more cogent hearsay in the presence of less cogent testimony from the same person. However, he is concerned that different judges will make different assessments of trustworthiness, rendering admissibility uneven.

There are deeper concerns. In developing the new law, the Supreme Court took no account of the hearsay rule's purpose - to protect the opponent of hearsay evidence against misuse by the trier of fact.³ In light of my picture of the place of evidence rules in the court's functioning, this is an issue of fairness to the opponent. None of the ordinary rules applicable to witnesses at a trial were applied to the hearsay declarant before or while he spoke. There was no appearance in the

courtroom before judge, parties, trier of fact and audience of spectators. There was no assessment of testimonial competence, no oath, no examination or cross-examination before the trier of fact. The opponent of the evidence is therefore naked. Most importantly, the opponent has had no opportunity to demonstrate to the trier by cross-examining the declarant any weaknesses in what respecting a witness I call the "testimonial factors" and what commentators call "hearsay dangers" respecting hearsay declarants:⁴ the declarant's opportunity and ability to perceive the event he talked about, his experiential capacity to understand that event, his memory of it, his intention to tell the truth in speaking, and his use of language accurately conveying his memory to the trier of fact. Moreover, the opponent cannot draw out of the absent declarant any modification of the statement or, better, a retraction. Nor can he cause the declarant to give any fresh statement hurting the party who offers the evidence and helping the opponent. All of these goals are standard and fair game in any cross-examination of a witness on the stand.

The Supreme Court ignored the opponent's interests in favour of repeatedly characterizing the hearsay rule as a guardian of trustworthiness. The Court also offered little guidance about how the judge shall make the assessment of trustworthiness in specific instances. At the least, it seems to me, the judge should perform an item-by-item check of the testimonial factors - the hearsay dangers - to see if, individually and as a package, the danger of weaknesses in the specific hearsay evidence offered was sufficiently reduced in the circumstances that the lack of application of the witness rules - especially opponent's opportunity to cross-examine - is not sufficient reason to apply the hearsay bar.

The Court in *Smith* made what seems to be almost a passing reference to several of the specific weaknesses while assessing the admissibility of the first two telephone calls.⁵ Indeed, even the court's words came close to the hearsay danger label. That may be some kind of mild, if unintended, approval of what I argue is necessary.

As for necessity, the Court's cavalier quotation from Wigmore⁶ to support the conclusion that "convenience" or "expediency" may substitute for real need again ignores the opponent's

interests. More than that, it compromises, I think, the nature of the modern common law trial in which witnesses appear in person to speak their evidence before the trier of fact. Wigmore, as I read his writings, did not contemplate that "necessity" or "convenience" encompassed a declarant's past words when the declarant is on the stand as a witness with memory dimmed from lapse of time. This is what was held proper by the Ontario Court of Appeal in *Khan v. Ontario College of Physicians*⁷ and approved by the Supreme Court in *B.(K.G.)*.⁸

How Wigmore interpreted "convenience" may be shown by an example of hearsay he treated as clearly admissible under an established exception and another example of admissibility he argued for when the common law was then against him. The first is the exception for official statements, that is, what we often call public documents. Wigmore argued that avoiding the disruptive effect on government operations where officials were always obliged to appear in court was a good enough reason to admit their hearsay statements.⁹ He argued a similar reason for admitting hospital records: obliging doctors and nurses who made the records to appear would unduly inconvenience hospital management.¹⁰ The trial judge in *Ares v. Venner*¹¹ accepted that argument. Although the Supreme Court on the appeal in *Ares*¹² quoted Wigmore here while reviewing the history of the litigation below, the Court did not approve the argument, even impliedly.

Two last points about *Khan* and *Smith*.

The nature of the Supreme Court's presentation of the new *ad hoc* exception in *Smith* and the Court's obvious enthusiasm for the development extend a wide invitation to counsel to invoke the judge's new authority. The Court sounded no note of caution that the authority should be exercised only in clear instances of minimal defects in testimonial factors. The Court set no guidelines to ensure that an investigation to find out whether that is so would be made. I therefore worry that many counsel at many trials will accept the invitation. I worry about the resulting lengthening of trials and the proliferation of appeals as counsel argue admissibility and as judges draft their reasons to support rulings in response. A regime where courts determine disputes with

minimum delay is important to maintain public respect for this institution of dispute settlement. *Khan and Smith* in operation will inevitably press toward increasing delays.

Like Professor Delisle, I also worry about opposing counsel who may not be prepared to respond on the spot. This is a question of fairness, and again a question of time if an opponent must ask for an adjournment for preparation. During the workshop, Professor Delisle suggested that the court impose a notice requirement on the proponent: the opponent will then know in advance and can be prepared. That, in my view, raises a question of the legitimacy of the court's *ipse dixit* to that effect. The legislature may do it, and both Parliament in England in the *Civil Evidence Act 1968*¹³ and the United States Congress in the *Federal Rules of Evidence of 1975*¹⁴ have done so. Perhaps rules committees under *Judicature Acts* may also do so. But I doubt that a court acting solely at common law has authority to impose any such requirement.

And, a point not yet mentioned, I worry about the extra hazards involved in trial preparation. First, there is the hazard to proponent's counsel who is unsure that the hearsay will be admitted and who debates the need to have available some kind of substitute if necessary. Think here of plaintiff's counsel in *Ares v. Venner*¹⁵ who offered the hospital records but had the nurses in court just in case. There is also the hazard to opponent's counsel who cannot count on the inadmissibility of relevant hearsay he may know is in the other side's hands.

II. DISCOVERY, DISCLOSURE, RELEVANCY AND PRIVILEGE

Professor Aquin favours broad discretion in trial judges to determine privilege in all instances of attempts to force witnesses to disclose confidential communications made in the course of a variety of social relationships. Wigmore's four famous criteria, applied and approved most recently by the Supreme Court in *Gruenke*,¹⁶ would be the test. Here we see the tension between truth-finding and maintaining the health of the social relationships involved.

Before leaving this topic, I must point out the anomaly in the current Canadian law of privileges. In *Descôteaux*,¹⁷ the Supreme Court greatly enlarged the scope of legal protection against disclosure of lawyer-client confidences. This the Court did by going out of its way in a lengthy *obiter dictum* to invent and elaborate a new "substantive rule" ostensibly bottoming the evidential privilege and the previous out-of-court instances of protection.¹⁸ In *Gruenke*, the Court flatly refused to recognize a class priest-penitent privilege - and almost any other class privilege I can think of - because its "policy reasons are [not] as compelling as the policy reasons which underlay the class privilege for solicitor-client communications", that is, "the effective operation of the legal system".¹⁹ As a result, lawyer-client privilege almost invariably overrides the search for truth without consideration of the needs of the specific situation before the court. However, any other privilege invariably does not. Because disclosing the content of many lawyer-client consultations would not, I think, much damage "effective operation of the legal system", the contrast with how the court treated confidences within other social relationships is striking. A non-lawyer might be forgiven for concluding that the judges protect their own.

Professors MacCrimmon and Boyle focus on reasons to bar the accused in a sexual assault trial from obtaining pre-trial production of a psychotherapist's records of the complainant's treatment. They eschew using an argument to privilege: they fear that a *Gruenke* approach will result in rulings of admissibility in many cases.

Instead, they argue that due protection of the Charter rights of equality (for the complainant) and fair trial (for the accused) must be considered in formulating procedures and standards for the judges' hearing and determination of the motion to produce. They say that the applicant accused should be obliged to establish an evidentiary foundation for a conclusion that the accused will find something relevant in the records. For this, they say, the accused should bring forward facts consistent with the equality guarantee - non-discriminatory generalizations underlying the argued relevance conclusion. The accused and the judge must not rely on questionable and even wrong stereotypes.

I think one cannot quarrel with the proposition that a judge should not order production if nothing relevant may be found, even taking into account the very broad definition of what is relevant on discovery. I think also that judges should not determine or assume relevance based on wrong stereotypical visions of how the world works. Counsel can, and should, present evidence showing an error in a stereotype, whatever it may be.

My concern is with what I detected as the argument of Professors MacCrimmon and Boyle that a judge's vision of the world should be inadmissible as a basis for a relevant determination if it threatens a conclusion of Charter equality. That seems to me to reject determining relevance on the basis of factual inquiry. The argument incorporates instead a directive to the judge to implement a Charter value. That is a different judicial function. But I may have got their thesis wrong.

III. EXCLUSION OF EVIDENCE UNDER THE CHARTER AND ITS IMPACT ON LAW ENFORCEMENT

Professor Roach argues that, in directing how judges should apply Charter section 24(2) to exclude evidence, the Supreme Court has not committed itself to any one of the exclusionary approaches applied over the years in American constitutional law. These are the corrective approach (to correct the Charter violation by exclusion), the regulatory approach (to deter police misconduct amounting to a Charter violation), and the balancing approach (to balance competing social interests). Professor Roach concludes that the Supreme Court has instead developed what he calls a "contextual and purposive approach" when deciding the circumstances in which section 24(2) demands exclusion.

Mr. Handfield asserts the desire of police to honour individual rights and to obey the Charter's directions. But, he argues, the Supreme Court's reading of the Charter unduly protects individual rights at the expense of society's protection. He says that *Duarte*²⁰, *Wong*²¹, *Wise*²² and *Mellenthin*²³ have deprived the police of valuable evidence-gathering devices. The scope of

*Broyles*²⁴ restriction on the use of police informers is unclear. He further says that *Stinchcombe*²⁵ now causes policemen to omit from their files information that they would otherwise include. I have sympathy with Mr. Handfield's stance.

I contemplate how, in elaborating section 24(2) in *Collins*²⁶ and its progeny, the Supreme Court has mightily stretched the privilege against self-incrimination and the concept of unfairness at the trial. Then, in *Mellenthin*, without mentioning the Court's contrary position in *Collins* and other cases, the Court said that evidence tending to cause trial unfairness must inevitably be excluded.²⁷ The inconsistency of positions - and indeed the inconsistency of *Mellenthin* with what seems to be the clear intention of section 24(2) -- is compounded by *obiter* in *B.(K.G.)*²⁸ (decided only three months later), in which four out of the five judges who sat in *Mellenthin* joined, repeating the position in *Collins* without mentioning *Mellenthin*.

I contemplate how in *Hebert*,²⁹ the Supreme Court's majority adopted counsel's concession that a "right to silence" is contained in the "principles of fundamental justice" language of Charter section 7. I wonder at that. Since when is Canadian constitutional law made from counsel's concessions and without even some additional analysis? More: I wonder at the assumption by the unanimous court that those judges and scholars who have rejected an accused's right to silence as fundamental in all contexts simply do not recognize a basic tenet of our legal system when they see it. Such judges include the Supreme Court's majority in *Rothman*,³⁰ and the appellate judges in England who joined in the recommendation of the Criminal Law Revision Committee to abolish the caution and allow the trier's detrimental inference from an accused's silence upon being charged.³¹ Such judges also include distinguished past members of the United States Supreme Court³² and lower American appellate courts.³³ The scholars include Professor Delisle of Queen's University Law Faculty³⁴ - one of the presenters at this conference - as well as Professors Rupert Cross and Glanville Williams in England.³⁵

I am not now arguing that legislation should enact the Criminal Law Revision Committee's proposal. That is a contentious matter, even now being freshly debated in England.³⁶ What I am

arguing is the highly questionable wisdom of the Supreme Court's decision foreclosing any debate here as a matter of constitutional law. I am arguing against the assumption in *Hebert* and later in *Chambers*³⁷ that everybody has missed recognizing this basic tenet of our legal system but the current judges of the Supreme Court of Canada.

IV. VULNERABLE WITNESSES

Children's evidence is now more readily admissible and, when admitted, is more readily accepted as valid. According to *Khan*,³⁸ a child is competent to take an oath if he understands the solemnity of the occasion and the extra duty to tell the truth in court - religious understanding is no longer necessary.

Under both the reasoning and the court's specific assertion, *Khan* applies to all prospective witnesses, children and adults alike. One can wonder about the potency of the impulse to truth-telling that the standard approved in *Khan* allows. It seems to me much less powerful than the fear of divine punishment for lying under oath upon which competence to be sworn rested under the old common law. Indeed, it is less powerful, it seems to me, than the formula the Manitoba Court of Appeal set out in *Bannerman*: appreciating that the oath is an act of undertaking a moral obligation before God to tell the truth.³⁹ For this, some religious understanding is necessary. One can also wonder about the anomalies - indeed, anomalies bordering on the ridiculous - that the oaths sworn across Canada and in the rest of the common law world nonetheless contain an invocation of a Divine Being and that a witness swears the oath while holding or touching a book holy to those believing in that Divine Being.⁴⁰ Competence to swear the oath and the ritual of swearing the oath are, after *Khan*, badly out of sync.

V. THE ROLE OF STORIES IN FACT ANALYSIS

Professor Hastie's empirical research shows that triers of fact treat the evidence as the raw material for constructing an explanatory narrative - a story. In the process, jurors also draw on their individual conceptions of how the world works based on their own experience and life-values. They then reach a decision by matching the story to the law as set out by the trial judge. The psychologists' empirical findings track exactly what litigation counsel expect and, indeed, plan to have happen. They track the picture of the trial in court I outlined at the beginning of my remarks. This is corroborated by Mr. Justice Berger's arguments about the contents of jury instructions and judges' reasons for their conclusions at non-jury trials, as well as by what Chief Justice Goodridge said this morning. (Both were participants at the session on "How Adjudicators Make Decisions".) The social scientists prove that the lawyers were right all along.

VI. TRIBUNALS AND EVIDENCE

Nurjehan Mawani told us about fact-determination by the Immigration and Refugee Board, a tribunal implementing the policy and directions of the Immigration Act. The Board is rightly bound by neither court rules of evidence or procedure. Its divisions have gathered evidence by videotape and telephone conference. They admit hearsay freely and are not bothered by evidence failing to satisfy the best evidence rule. They take notice of specific facts learned through the members' experience hearing the flow of cases from day to day. Fairness, always necessary, is ensured by the demand for notice to all parties of what the tribunal is doing.

In assessing evidence, the board advisedly takes into account factors peculiar to claimants from particular ethnic and national backgrounds, and claimants alleging certain brands of persecution. To ensure wise assessment of the evidence, the Board operates training programs so that members may entertain the evidence with knowledge of the necessary factual backdrop. In all, the Board's operation as presented is a fine example of adjudication by an administrative tribunal whose rules and procedures accommodate truth finding, extrinsic social values, and the need to implement statutory policy and directions.

Professor McCallum argued that, even though a job of adjudication is being done by an administrative tribunal, the tribunal should stick closely to the court rules of evidence. As I understand what she said during the session, that should be so in all instances. I do not agree.

This far I would go. I am not an administrative lawyer and do not have detailed knowledge of the precise work done by a variety of tribunals established and empowered by statute. However, it seems to me, the closer the tribunal's adjudicative job is to resolving a dispute between parties, the more the tribunal might cleave to how courts do it. As an example, labour relations statutes across the country allow arbitrators under collective agreements to avoid evidence rules.⁴¹ But arbitrators usually apply them anyway. And rightly so: an arbitrator is essentially determining a dispute between an employee and an employer subject to the agreement's terms.

By the same token, the further the administrative tribunal's job is from such dispute settlement, the less court evidence rules need be honoured. Relevancy, always. Avoiding

evidence of little weight but demanding undue expenditure of time, always. Fair procedures, again always - but the hearsay rule and heavy application of a best evidence rule, no. And, when the tribunal is engaged in a fact-finding job in order to fashion policy under statutory direction or even to elaborate policy in a specific instance - even when there are opponents on the facts - the court-style hearing too must go. For a better job of fact-finding, replace it with an investigative enquiry. These are the lessons from the environmental assessment and approvals tribunals that Madame Justice Hesler, Michael Jeffery and Dick Gathercole told us about yesterday (in the workshop on "Evidentiary Challenges in Proving Causation and Future Risk in Environmental Litigation and Administrative Decision-Making").

VII. HOW ADJUDICATORS MAKE DECISIONS

Drawing on his own experience, Justice Denis in his paper raises concerns about a judge looking to his personal world view and value system to choose between social and individual interests competing for recognition in cases before the court. He asks counsel to present a new kind of evidence to illuminate how judges should view the problems.

During this era of revolution in evidence law, the Supreme Court has welcomed counsel's presentation of factual materials to help the court's law-elaboration function, mainly but not exclusively in constitutional appeals. To put a label on what is happening, the court is asking for and being supplied with materials on legislative facts. Usually counsel have listed the articles and books in the factums as "authorities" along with cited cases. Counsel have then relied on them in

the written and oral argument to support factual assertions there made. There are difficult problems involved in what has been happening.

Apart from all else, there is no procedure established in court rule or statute regulating how and when counsel shall supply or otherwise point to the materials, and how and when an opponent may respond. At present, as I understand it, counsel just do it.

In addition, there has been no debate, let alone conclusion, about the propriety of the court's entertaining and then adopting factual assertions in materials that are not reasonably indisputable but nonetheless have not been exposed to any kind of test imposed on evidence at a trial. Indeed, in some instances, the Supreme Court has entertained materials from opposing litigants containing contradicting assertions of social science fact and - without the standard evidence tests - the Court has chosen the fact-version of one over that of the other in reaching factual conclusions bottoming law-making.⁴²

In *Moge v. Moge*,⁴³ the Supreme Court elaborated the spousal support provisions of the Divorce Act. It may well be that the factual assertions about a divorced wife's economic plight set out in the social scientists' writings were matters taken for granted by those working in the field.⁴⁴ If so, I have no problem with what the Court did. But, if not, I challenge the Court's adoption of the factual assertions without at least some kind of assessment under ordinary trial procedures.

Look at this as a jurisprudential problem, a problem of how judges may legitimately fashion law. If judges base new law on factual propositions that are reasonably disputable, how may citizens attempting to plan their lives into the future reckon on what the law will be? How can lawyers, exercising the counselling function of the bar, advise their clients about how to act within the law? And how much can citizens respect the impartiality of the law and the judicial law-makers when the law so made rests on judges' deliberate choices among reasonably disputable factual propositions and the values inherent in them?

Unsatisfied with counsel's efforts, judges of the Supreme Court have sometimes privately searched out their own materials and then based fact-conclusions on them - all without notice to counsel and thus without counsel's opportunity to respond with argument or countering materials.⁴⁵ For many of the articles and books referred to in *Moge*, that seems to have been what happened there.⁴⁶ Indeed, when judges have done this in some cases, they have reached mistaken conclusions of fact based on apparently careless or uncomprehending reading of the materials they found. This happened in *Askov*⁴⁷ and in *Brydges*.⁴⁸ The errors influenced the law resting on those factual conclusions.

This points to another problem. Whether the judge relies on materials counsel presents or on the products of his own research, the judge may well have insufficient expertise to understand the writings of social scientists whose work is beyond the scope of the judge's training and education.

Professor Vidmar (in the session on "The Increasing Use of Social Science Evidence by Courts") told us about the frailties of much social science evidence, whether in oral testimony or in the professional journals. As he said, no judge can be an expert in the many disciplines whose members purport to aid the determination of legislative facts. But he implores the judges at least to learn the social scientists' basic vocabulary and concepts for assessing the validity and reliability of their work. I am not sure that that is enough. Absent that, a judge with insufficient expertise to understand the testimony or literature before the court should ignore it.

CONCLUSION

At the end, if I have one message to leave with the judges here, it is this: The time has gone for easy reference to *Phipson* or *Cross*, and the quick quotation of a passage. That is clear. But, be careful. The alternative is not easy reference to Supreme Court judgements and quotations from Chief Justice Lamer and Justice McLachlin.

Instead, respond to the Supreme Court in kind. By that I mean, give back purposes for purposes. Know the reasons for the rules and for the procedures. For that you should read the books - and not just the Chief Justice's favourite, *Wigmore*. Ponder what the commentators and the scholars (off and on the bench) have written. Fashion and re-fashion and apply evidence rules with careful regard, of course, to what the Supreme Court has said - but, just as important, in light of the scholars' and commentators' analysis and your understanding of it in the context of the trial system that you, as experienced masters of adjudication, know well. After all, the rules of

evidence that have come to us and which you now ponder have no application, indeed no relevance, outside the adjudicative process in the court where they were born and where you use them.

I wish you good luck as you struggle in the blast of the hurricane!

FOOTNOTES

1. *R. v. Khan* (1991), 59 C.C.C. (3d) 92 (S.C.C.).
2. *R. v. Smith* (1992), 94 D.L.R. (4th) 590 [hereinafter *Smith*].
3. For an elaboration of the following analysis, see S. Schiff, "Comment, Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Can. Bar Rev. 674. A less detailed statement is set out in 1 S. Schiff, *Evidence in the Litigation Process*, (Toronto: Carswell, 1993) at 334-337. The inspiration is the superb article by Professor E.M. Morgan, to whom all students of the hearsay rule must be indebted. E.M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv. L. Rev. 177 at 177-188.
4. The term "hearsay danger" with its target meaning were apparently invented by Professor Morgan. See his article, cited *supra* note 3. Commentators have since adopted the term and Morgan's meaning.
5. *Supra* note 2 at 605. In *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.), decided some six months after *Smith*, Lamer C.J. for the majority uses the hearsay danger label to identify the failure to have various of the ordinary witness rules applied to the hearsay declarant - requirements of appearance in the courtroom, administration of oath and opportunity for opponent to cross-examine. The presence of this alternative (and less useful) meaning of the label is bound to cause confusion.
6. *Supra* note 2 at 604, quoting what is now *Wigmore on Evidence*, vol. 5 (Boston: Little, Brown & Company, 1974) at s. 1421.
7. *Khan v. College of Physicians & Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193 (Ont. C.A.).
8. *Supra* note 5 at 296.
9. *Wigmore*, *supra* note 6 at s. 1631.
10. *Ibid.* at vol. 6, at s. 1707.
11. *Ares v. Venner* (1971), 14 D.L.R. (3d) 4, at 9 - 10 (S.C.C.) (synopsizing and quoting from trial judgment).

12. *Ibid.* at 10.
13. *Civil Evidence Act (U.K.)*, 1968, c. 64, s. 8(2).
14. Federal Rules of Evidence, 28 U.S.C. 803(24), 804(b)(5) (1975).
15. *Supra* note 11 at 9 and 16.
16. *R. v. Gruenke* (1992), 67 C.C.C. (3d) 289 (S.C.C.).
17. *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
18. *Ibid.* at 604-605.
19. *Supra* note 16 at 305.
20. *R. v. Duarte* (1990), 65 D.L.R. (4th) 240 (S.C.C.).
21. *R. v. Wong* (1991), 60 C.C.C. (3d) 460 (S.C.C.).
22. *R. v. Wise* (1992), 70 C.C.C. (3d) 193 (S.C.C.).
23. *R. v. Mellenthin* (1993), 76 C.C.C. (3d) 481 (S.C.C.).
24. *R. v. Broyles* (1992), 68 C.C.C. (3d) 308 (S.C.C.).
25. *R. v. Stinchcombe* (1992), 68 C.C.C. (3d) 1 (S.C.C.).
26. *Collins v. The Queen* (1987), 38 D.L.R. (4th) 508 (S.C.C.).
27. *Supra* note 23 at 491.
28. *R. v. B.(K.G.)*, *supra* note 5 at 287.
29. *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 at 23-24 (S.C.C.).
30. *Rothman v. The Queen* (1981), 121 D.L.R. (3d) 578 (S.C.C.).
Martland J. delivered the majority judgment, in which Ritchie, Dickson, Beetz, McIntyre and Chouinard JJ. concurred.
31. "Criminal Law Revision Committee, Eleventh Report - Evidence (General)", 1972, CMND 4991, paras. 28-47. E. Davies and Lawton JJ.A. were members of the committee joining in the report.

32. Hughes C.J. and Brandeis, Stone and Black JJ. joined in the unanimous judgment of the Court delivered by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 at 325-26 (1937):
"[I]mmunity from compulsory self-incrimination [...] might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as mischief rather than a benefit, and who would limit its scope and destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry [...]".
33. See W.V. Schaefer, "Police Interrogation and the Privilege Against Self-Incrimination" (1966) 61 NW. U. L. Rev. 506, 518-521. H. Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change" (1968) 37 U. Cinc. L. Rev. 671 at 713-714, 721-722. Walter Schaeffer was a judge of the Illinois Supreme Court, and Henry Friendly was a judge of the United States Court of Appeal for the Second Circuit. Both argued in favour of a procedure for pre-trial interrogation of accused persons before a judicial officer and for permissible detrimental inferences at trial if an accused refused to respond during the interrogation.
34. Professor Delisle headed the Evidence Project of the Law Reform Commission of Canada that recommended a procedure similar to that mentioned in note 33. "Law Reform Commission of Canada Evidence Project, Study Paper no. 5: Compellability of the Accused and the Admissibility of his Statements" (1973) at 12-13.
35. As members of the Criminal Law Revision Committee, both joined in the Evidence report cited *supra* note 31.
36. The Royal Commission on Criminal Procedure rejected the proposal. "Report of Royal Commission on Criminal Procedure", CMND 8092, 1981, paras. 4.47-4.57. The Royal Commission's contrary recommendations were implemented in a *Code of Practice* issued under the *Police and Criminal Evidence Act (U.K.)*, 1984, c. 60. But the proposal was adopted for application in Northern Ireland, Criminal Evidence (Northern Ireland) Order 1988, and soon thereafter a Home Office Working Group recommended similar changes to the law in England and Wales. "Report of the Working Group on the Right to Silence" (1989). Recently, the Home Secretary said that the government was seriously considering the idea. *The Globe and Mail* (7 October 1993) A1.

37. *R. v. Chambers* (1991), 59 C.C.C. (3d) 321 at 341 (S.C.C.) (right to silence under Charter s. 7, as elaborated in *Hebert*, entitles accused to refuse to answer questions upon arrest and charge).
38. *Supra* note 1 at 97-99.
39. *R. v. Bannerman* (1966), 48 C.R. 110 at 120-122 (Schultz J.A.), 136-138 (Dickson J. *ad hoc.*). *Bannerman's* holding about the religious foundation of the moral obligation has been misread in the later cases. An example is *R. v. Khan* in both the Court of Appeal for Ontario, (1988), 42 C.C.C.(3d) 197 at 205-206, and in the Supreme Court, *supra* note 1 at 98.
40. See, for example, *Alberta Evidence Act*, R.S.A. 1980, c. A-21, s. 16(1); *Manitoba Evidence Act*, R.S.M. 1987, c. E150, s. 15(1); *Oaths Act*, (U.K.), 1978, c. 19, s. 1; Wigmore, *supra* note 6 at s. 1828 (Chadbourn rev. 1976) (forms of oath authorized by statute in various American states). For the forms of oath officially authorized for use in Ontario courts, see "Courtroom Procedure" 18-25 (A. Campbell rev. 1979).
41. For example, *Labour Relations Act*, R.S.O. 1990, c. L.2, s. 45 (8.1), item 10 as am., S.O. 1992, c. 21, s. 23(3).
42. *In Reference Re An Act to Amend the Education Act* (1988), 40 D.L.R. (4th) 18 (S.C.C.) an affidavit setting out assertions about 19th century historical facts sworn by a professional historian was filed in the Court of Appeal. See materials filed in the Court of Appeal Office, Osgoode Hall, Toronto. It was referred to by the dissenting judges in the Court of Appeal who would have struck down the legislation. (1986), 25 D.L.R. (4th) 1 at 17. Upon the appeal to the Supreme Court, an affidavit sworn by a second historian was filed, setting out contradicting assertions of historical fact. The first historian in turn replied in yet a third affidavit. See materials filed in the office of the Supreme Court of Canada, Ottawa. Judges in the Supreme Court upholding the legislation referred to the affidavit of the second historian but not to those of the first. (1987), 40 D.L.R. (4th) 18 at 45-47. In several later Charter cases, the court saw the conflict between factual assertions in materials filed by opposing parties as a reason to doubt the accuracy of the proponent's factual assertions. *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at 401 (S.C.C.); *Ford v. Quebec (Attorney-General)* (1988), 54 D.L.R. (4th) 577 at 626

(S.C.C.).

43. *Moge v. Moge* (1993), 99 D.L.R. (4th) 456 (S.C.C.).
44. See *ibid.* especially at 482-484, 488-489, 491-492 and 494.
45. Examples are listed and briefly discussed in S. Schiff, *Evidence in the Litigation Process*, Vol. 2 (Toronto: Carswell, 1993) at 1043 n. 29.
46. The reasons of L'Heureux-Dubé J., writing for the majority, refer to fourteen articles and books not mentioned in any of the factums.
47. *R. v. Askov* (1990), 74 D.L.R. (4th) 355 at 394-396 (S.C.C.). Cory J. on behalf of the majority referred extensively to "recent statistics kept by the courts in Montreal, Longueuil and Terrebonne", which were not contained in studies filed by the parties. His conclusions about the incidence of court delays were based in part on comparing the statistics from the Quebec courts with those from Ontario courts, although the two were not comparable. M. Code, *Trial Within a Reasonable Time: a Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States* (Toronto: Carswell, 1992) at 86-88.
48. *R. v. Brydges* (1990), 53 C.C.C. (3d) 330 at 348-349 (S.C.C.). Lamer J. on behalf of the majority referred to two books respecting the nature of legal aid in Canada, and drew the incorrect inferences from them that duty counsel were available 24 hours a day across the country. P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1086.