

Fact or Friction: Social Science Evidence, the Courts, and the Charter

by Joseph Cheng¹

Over its three-decade history, one word has been used time and again to describe the *Charter's* impact on Canadian law, government and society: transformational. Since its advent, the *Charter* has become the central lens through which many fundamental issues in Canadian life have been filtered and decided. The list of issues litigated under the *Charter* is as long as it is diverse. Sunday shopping, abortion, tobacco advertising, same-sex marriage, prostitution, euthanasia – so many of the leading social policy issues of the day have found their way into the courts through the *Charter*.

Given its central role in Canadian society, it is not surprising that the *Charter* generates both controversy and praise, sometimes in equal measure. Through the years, a recurring tension has surfaced in the debates surrounding the role of the *Charter* in Canadian life. This tension arises from questions about the appropriateness of the courts wading too deeply into the public policy arena, into areas that have traditionally been the territory of Parliament and the legislatures.

The themes in this debate also play themselves out in the issues that courts (and counsel) have wrestled with in respect of the evidence that is to be put before the courts in *Charter* cases. Just as the subject matter of *Charter* cases challenges our conventional notions of what should and should not be tried in a court of law, so too has

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Charter litigation challenged our traditional conception of what kinds of evidence are put before the court.

One distinct aspect of *Charter* litigation is the use of social science evidence. Because the nature and scope of *Charter* cases can often transcend the issues affecting individual parties, courts have come to rely upon, and indeed, demand evidence of a broader scope when deciding *Charter* cases. This type of evidence, deemed critical for the purpose of allowing the court to adjudicate *Charter* cases on a proper record, can lead to its own unique challenges. These challenges include the issue of how to deal with competing and often inconclusive social science evidence, and problems relating to the admissibility of such evidence, and in particular, whether it satisfies the legal test for the admission of expert opinion evidence.

This paper canvasses the issues surrounding the use of social science evidence in *Charter* cases. It will look at the rationales offered for the use of social science evidence in these cases, and how such evidence has been used by the courts when considering these issues. It will explore the challenges inherent in the use of social science evidence, looking in particular at issues that have arisen when the courts have been confronted by competing and often inconclusive social science evidence, and more recently, considering the weight of such evidence when it is adduced through expert opinion.

Why do we need social science evidence in *Charter* cases?

Social science evidence encompasses a vast array of material – from survey evidence to journal articles, from expert reports to government-commissioned studies and more. When considering the uses of social science evidence, it is helpful to start by considering the distinction between adjudicative and legislative facts. As neatly summarized by Professor Hagan in a 1987 article on social science evidence and the *Charter*: “Adjudicative facts concern who did what, where, when, how and with what motive or intent, while legislative facts involve the use of social and economic data to establish a more general context for decision-making.”²

Social science evidence can be used both to establish adjudicative and legislative facts, but it is the arena of legislative facts that is particularly relevant for the purposes of this paper. *Charter* cases tend to have larger public policy implications beyond the individual facts and circumstances of the case. As such, courts adjudicating these cases often must look at the effect of the case not just on one individual or party, but on certain segments of society and sometimes even society as a whole. For this reason, the type of evidence marshaled in these cases will rarely be limited to the first-hand evidence of the parties themselves.

The importance of social science evidence was highlighted from the very beginning of *Charter* litigation. Early on, legal commentators recognized that the kind of evidence necessary for *Charter* litigation would need to draw from the social sciences.

² John Hagan, “Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation” in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 215.

In an article written in 1987, Professor Swinton (as she then was) commented on the promise and potential challenges of using social science evidence in *Charter* cases, noting that this evidence could be critically important to the court at all stages of the *Charter* analysis.³

Even more so, however, the call for social science evidence came directly from the Supreme Court of Canada, which, beginning in *R v Edwards Books and Art*,⁴ has repeatedly emphasized the need for a sufficient evidentiary record in *Charter* cases. In its decisions in *MacKay v Manitoba*⁵ and *Danson v Ontario (Attorney General)*,⁶ the Court ruled that *Charter* cases must not be decided in a “factual vacuum”, putting out a clarion call for concrete and meaningful evidence in *Charter* cases.

In *MacKay*, Cory J. described the rationale for this rule. He explained that as these “cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society,” courts must “insist upon the careful preparation and presentation of a factual basis in most *Charter* cases.”⁷ To do otherwise would lead to improperly considered decisions grounded upon the “unsupported hypotheses of enthusiastic counsel.”⁸ For this reason, Cory J. instructed that “*Charter* decisions should not and must not be made in a factual vacuum.”⁹

³ Katherine Swinton, “What do the Courts want from the Social Sciences?” in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 187.

⁴ *R v Edwards Books and Art*, [1986] 2 SCR 713.

⁵ [1989] 2 SCR 357 [*MacKay*].

⁶ [1990] 2 SCR 1086.

⁷ *MacKay*, *supra* note 5 at para 8.

⁸ *Ibid* at para 9.

⁹ *Ibid*.

On what kinds of evidence should be put before the courts in these cases, Cory J. made the following comments:¹⁰ “The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.”

The Supreme Court made a similar pronouncement in *Danson v Ontario (Attorney General)*.¹¹ There, Sopinka J. expressed the Court’s uneasiness with regard to deciding cases without a proper factual record, stating that in the absence of a proper record, “the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.”¹²

The Supreme Court’s insistence on an appropriate factual record in *Charter* cases is not surprising, given that one of the primary roles of any court is to adjudicate individual disputes between parties based on rulings of fact and law. In this way, *Charter* cases are no different from any other cases that come before the courts. However, the need for a proper record in *Charter* cases can also be understood from the perspective of enhancing the court’s legitimacy when ruling on controversial matters involving public policy.

Parliament and the legislatures derive their legitimacy to craft public policy from the democratic process. While the courts have a clear mandate to adjudicate *Charter* cases within the constitutional framework, their role is, by definition, more

¹⁰ *Ibid.*

¹¹ [1990] 2 SCR 1086.

¹² *Ibid* at para 31.

circumscribed. For this reason, there is inevitable concern when courts are asked by litigants to enter the public policy arena. A proper factual record helps to ensure that courts function within the boundaries of their expertise and their mandate, and thereby enhances the legitimacy of their role as adjudicators, and not crafters, of public policy. In the absence of a full record of proper facts, a court deciding on a *Charter* case could easily be accused of usurping the role of Parliament or the legislatures.

Challenges in using social science evidence

The use of social science evidence by the courts has inherent challenges. Three particular issues that courts have wrestled with, over the years, are:

1. What is the proper approach for handling competing, and often inconclusive, social science evidence?
2. How should a court deal with challenges to the admissibility of such evidence?
3. What is the appropriate standard for appellate courts when reviewing findings of legislative fact by lower courts?

1. Competing and/or inconclusive social science evidence

One of the primary challenges facing the court when it weighs social science evidence in *Charter* cases is that there is often competing or inconclusive evidence. Public policy problems do not often lend themselves to easy answers or iron-clad evidence. As Professor Choudhry noted in a 2006 article on section 1 of the *Charter*, decisions of public policy are “often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even

educated guesses.”¹³ Stepping into the role of the arbiter of a dispute involving competing social science evidence can place the court in an awkward position, one that is traditionally more akin to that of Parliament and the legislatures.

This tension was acknowledged early on by the Supreme Court of Canada. In *Irwin Toy v Quebec (Attorney General)*,¹⁴ the Supreme Court recognized the delicate balance that must be maintained when courts are charged with evaluating policy decisions made by government. It noted that in the context of the *Charter*, courts would often be called upon to assess “conflicting scientific evidence and differing justified demands on scarce resources.”¹⁵ This role demands a measure of deference:

Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.¹⁶

Another notable case that addressed this issue was *McKinney v University of Guelph*.¹⁷ There, the applicants challenged their employer university’s mandatory retirement policies on the basis that the policies violated their section 15 rights. While the Court held that the mandatory retirement policies did discriminate on the basis of

¹³ Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 Sup Ct L Rev (2d) 501 at 524.

¹⁴ [1989] 1 SCR 927.

¹⁵ *Ibid* at para 79.

¹⁶ *Ibid* at para 74.

¹⁷ [1990] 3 SCR 229 [*McKinney*].

age, and hence violated the applicants' section 15 rights, the majority found that the violation was justified under section 1.

In the section 1 analysis, LaForest J. observed that the evidence before the Court was complex, and the issue of mandatory retirement was "polycentric". He commented that the ramifications of such a case were "not matters capable of precise measurement,"¹⁸ noting that these were "decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch [...]."¹⁹ For this reason, he concluded the case called for a higher degree of "circumspection" than would be warranted in a case that called upon a court's direct expertise and knowledge, i.e. criminal law cases.²⁰

McKinney stands for the proposition that where the issues raised in a *Charter* case are polycentric in nature and where there is competing social science evidence, the court ought to show a measure of deference to the decision-making of Parliament or the legislatures. The Supreme Court also adopted a similar approach in *R v Butler*,²¹ where the Court considered a challenge to the obscenity provisions in the *Criminal Code*. There, the Court held that even in the face of competing social science evidence as to the harms of pornography, Parliament was "entitled to have a 'reasoned apprehension of harm' resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations."²²

¹⁸ *Ibid* at para 104.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ [1992] 1 SCR 452 at paras 104-107.

²² *Ibid* at para 108.

One particular subject of *Charter* litigation where courts routinely struggle with competing or inconclusive social science evidence is in the area of freedom of expression. The typical sort of fact pattern in these cases involves a government limitation on speech (and hence, a violation of the applicant's s. 2(b) right is easily made out) intended to address a particular societal harm (for example, controls on the advertising of specific products).²³ However, the evidence for the particular harm and on the benefits of the limitations, on both sides of the case, remains inconclusive. The courts must then struggle with the following problem: without conclusive evidence, how does the court embark upon a proper analysis of issues at hand?

In one line of cases, beginning in *Thomson Newspapers (c.o.b. Globe and Mail) v Canada (Attorney General)*,²⁴ the Supreme Court would develop a separate, contextual analysis for determining the level of deference that should be given to government in the assessment of the evidence required to justify the breach of the *Charter* right under section 1 of the *Charter*.

Thomson Newspapers was a challenge to provisions of the *Canada Elections Act* that prohibited the publication of surveys during the final three days of a federal election campaign. The Court held that the provisions violated the applicants' section 2(b) right to freedom of expression, and the majority of the Court held that this violation could not be saved under section 1.

²³ See: *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927 (limitations on advertising directed at children), *Thomson Newspapers v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 (limitations on broadcasting or publishing surveys in the final days of elections), *R v Bryan*, 2007 SCC 12 (blackout periods for the broadcasting of election results), *RJR-Macdonald v Canada (Attorney General)*, [1995] 3 SCR 199 (limitations on tobacco advertising), and *R v Butler*, [1992] 1 SCR 452 (criminal prohibition of obscenity).

²⁴ [1998] 1 SCR 877.

Bastarache J., on behalf of the majority, emphasized the need to pay “close attention to context” in carrying out the section 1 analysis, drawing a clear link between the context of the legislation in question and the type of proof that the Court would demand from the government. The issues of the standard and type of proof required for the section 1 justification was particularly relevant in this case because the social science evidence remained “in a state of some controversy.”²⁵

Drawing together elements from previous s. 2(b) cases, Bastarache J. summarized these contextual factors as being:

- a) The vulnerability of the group which the legislator seeks to protect;
- b) The group’s own subjective fears and apprehension of harm;
- c) The inability to measure scientifically a particular harm in question; and
- d) The nature of the activity which is infringed.

Assessing these four factors, the Court could then decide whether the government was entitled to some measure of deference.

Following *Thomson*, the Supreme Court would continue to elaborate on the types of situations that call for greater deference to government, particularly in cases where the social science evidence is inconclusive. In *Harper v Canada (Attorney General)*,²⁶ the Court considered whether limits on third-party election advertising violated the applicant’s right to free expression. The Court found that the limitations violated the applicant’s s. 2(b) rights, and then proceeded to look at the question of justification. Here, the government’s stated purpose for the limitation was to prevent the harm associated with electoral unfairness.

²⁵ *Ibid* at paras 87, 89.

²⁶ [2004] 1 SCR 827.

Bastarache J., for the majority again, held that this harm was very difficult “to measure because of the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and polls; and the multitude of issues, candidates and independent parties involved in the electoral process.”²⁷ Justice Bastarache explained that as a result, “logic and reason assisted by some social science evidence” would be sufficient to demonstrate harm for the purpose of the section 1 analysis. Put another way, Bastarache J. held that “a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness”²⁸ would constitute sufficient evidence of harm for the section 1 analysis.

In *R v Bryan*,²⁹ the Court would again revisit this issue, this time in the context of a challenge to provisions of the *Elections Act* that mandated broadcast “blackout” periods for the publishing of election results. The blackouts in question were in place to limit access to polling results from jurisdictions where polling was still open. In finding the limit on freedom of expression to be constitutionally valid under s.1, the Court once again acknowledged the lack of conclusive social science evidence. Justice Bastarache invoked *Thomson* and *Harper*, and reiterated the pivotal reasoning in his majority opinions for the Court in those cases:

...several factors, such as the subtle influence of advertising on individual decision makers, the presence of other influencing factors and the complexity of electoral decisions, meant that the harm at issue there was difficult, if not impossible to measure and so concluded that ‘logic and reason assisted by some social science evidence [were] sufficient proof of the harm’...³⁰

²⁷ *Ibid* at para 79.

²⁸ *Ibid* at paras 79, 88.

²⁹ [2007], 1 SCR 527.

³⁰ *Ibid* at para 16. Internal citation omitted.

For this reason, he found that the limitations were justified under section 1.

More recently, the Supreme Court has stepped back from conducting an analysis of each of the four contextual factors as laid out by Bastarache J. in *Thomson and Harper*. Nevertheless, in *Saskatchewan (Human Rights Commission) v Whatcott*, decided in 2013, the Supreme Court reaffirmed the need to utilize a “contextual and purposive” approach to the section 1 justification in freedom of expression cases.³¹ The court affirmed that in cases where the social science evidence was inconclusive, a measure of deference to government could be appropriate.³²

2. Challenges to Admissibility

a) Recent Evidentiary Challenges in major Charter cases

Three recent *Charter* cases – *Bedford v Canada (Attorney General)*,³³ *Carter v Canada (Attorney General)*³⁴ and *Reference re: Criminal Code of Canada (British Columbia)*³⁵ (the *Polygamy Reference*) - are notable with respect to the various Courts’ approach to social science evidence in several respects, and particularly, issues relating to admissibility of such evidence as opinion evidence.

The size of the evidentiary record in each of these cases, which incorporated evidence from lay witnesses and expert witnesses, was massive. In the case of *Bedford*, the record included “over 25,000 pages of evidence in 88 volumes, amassed

³¹ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 65.

³² *Ibid* at paras 133-134.

³³ 2010 ONSC 4264 [*Bedford (SCJ)*], appeal allowed in part: 2012 ONCA 186, 109 OR (3d) 1, appeal allowed: 2013 SCC 72.

³⁴ 2012 BCSC 886 [*Carter*] Note that this article was prepared prior to the unanimous decision of the Supreme Court of Canada upholding the trial judges’ approach to, and determination of, the facts and disputed social science evidence, see: *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter (SCC)*] at para. 109.

³⁵ 2011 BCSC 1588 [*Reference re: Criminal Code of Canada (British Columbia)*].

over two and a half years [...]”.³⁶ In *Carter*, the record included 36 binders containing 116 affidavits, along with the evidence taken from 18 cross-examinations.³⁷ And in the *Polygamy Reference*, Chief Justice Bauman commenting both on the breadth and volume of the record, noted that it was “no exaggeration to say that the record embodies the bulk of contemporary academic research into polygamy.”³⁸ The record in the reference included over 90 affidavits and expert reports, and approximately 22 examinations and cross-examinations were held over the course of the hearing.

Each of these cases dealt with admissibility challenges to some of the social science evidence on the basis that it did not meet the test for expert opinion evidence as set out in *R v Mohan*.³⁹ The challenges in all of these cases related to charges that certain experts lacked sufficient expertise, or that rather than being impartial witnesses, the experts were partisan advocates for a particular position.

In each case, the judges at first instance applied the test for the admissibility of expert opinion evidence from *R v Mohan* and *R v Abbey*.⁴⁰ The *Mohan* test for admissibility of expert evidence is as follows:

1. The proposed evidence must be relevant;
2. It must be necessary in assisting the trier of fact;
3. There must not be an exclusionary rule that would disallow the evidence; and
4. It must come from a properly qualified expert.

³⁶ *Bedford (SCJ)*, *supra* note 32 at para 84.

³⁷ *Carter*, *supra* note 34 at para 114.

³⁸ *Reference re: Criminal Code (British Columbia)*, *supra* note 35 at para 27.

³⁹ [1994] 2 SCR 9.

⁴⁰ 2009 ONCA 624, leave to appeal refused [2010] SCCA No 125 [*Abbey*].

In *Abbey*, Doherty J.A. suggested a condensed two-step process for applying the *Mohan* criteria:

First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence.⁴¹

While the courts in *Bedford*, *Carter*, and *the Polygamy Reference* each adopted the same legal framework for assessing the admissibility of expert evidence, there were some notable procedural differences in how this issue was raised in each of the cases. In *Carter*, counsel for the government brought a motion to strike out a number of affidavits, and the court made a specific ruling on the admissibility of the impugned affidavits. In *Bedford*, the Superior Court judge heard submissions concerning the admissibility of the evidence at the hearing of the application. In her reasons, she determined that it was not practicable to determine the admissibility of each affidavit, and so instead decided to "exercise the gatekeeper function by assigning little or no weight to evidence which does not meet the *Mohan* and *Abbey* requirements."⁴² And in the *Polygamy Reference*, only one objection to an affidavit was raised, and the reference judge dealt with the objection by conducting a *Mohan* and *Abbey* analysis with respect to that evidence only.⁴³

⁴¹ *Ibid* at para 76.

⁴² *Bedford (SCJ)*, *supra* note 33 at para 113.

⁴³ *Reference re: Criminal Code (British Columbia)*, *supra* note 35 at paras 77-103.

b) Changes to the procedural rules surrounding the use of expert evidence

Problems with the reliability of expert evidence in the justice system are not limited to the *Charter* context. Recently in Ontario, there have been two major examinations of the issue in both the context of the civil and criminal justice systems – the 2007 *Civil Justice Reform Project* (the “*Osborne Report*”)⁴⁴ and the 2008 *Inquiry into Pediatric Forensic Pathology in Ontario* (the “*Goudge Inquiry*”).⁴⁵ Both reports made several recommendations related to the use of expert evidence, with the *Osborne Report* leading to the adoption of a new civil procedure rule relating to the duty of the expert witness.

This rule explicitly sets out that it is the duty of every expert to provide opinion evidence that is “fair, objective and non-partisan,” and that is “related only to matters that are within the expert’s area of expertise.”⁴⁶ Experts must now also sign an acknowledgment that they understand that their only duty in providing evidence is to assist the court.

The importance of an expert’s non-partisanship was recently highlighted in the Ontario Superior Court’s decision in *Moore v Getahun*.⁴⁷ *Moore* was a personal injury action. One of the issues that arose at trial related to a challenge brought by plaintiff’s counsel concerning communications between defendant’s counsel and a defence

⁴⁴ Honourable Coulter A Osborne, “Civil Justice Reform Project, Summary of Findings and Recommendations”, online: (2007) Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf>.

⁴⁵ Honourable Stephen T Goudge, “Inquiry into Pediatric Forensic Pathology in Ontario”, online: (2008) <<http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html>>.

⁴⁶ *Rules of Civil Procedure*, RRO 1990, Reg 194 (as amended), r 4.1.01(1) [*Ontario Rules of Civil Procedure*].

⁴⁷ 2014 ONSC 237.

expert relating to the expert's draft report. The expert had provided counsel with a draft report for comments, and the expert made changes to his report based on comments received from counsel.

Wilson J. held that this practice, which is commonplace, was inappropriate, and held that in light of the change to the rules surrounding expert witnesses, "counsel's practice of reviewing draft reports should stop." She further held that to ensure transparency of the process and the neutrality of the expert witness, counsel must make "full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications."⁴⁸ While not a *Charter* decision, the decision in *Moore* arguably applies to all cases involving expert witnesses in civil litigation.

The Ontario Court of Appeal, however, reversed, holding that as a factual matter "there is nothing in the record to indicate that either counsel or Dr. Taylor [the expert] did anything improper or that Dr. Taylor's report reflected anything other than his own genuine and unbiased opinion."⁴⁹ Furthermore, the Court held that nothing in the rule changes supported an alteration to the long-standing practice of counsel reviewing draft reports, and any such change would be contrary to the interests of justice: "Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how

⁴⁸ *Ibid* at para 520.

⁴⁹ *Moore v Getahun*, 2015 ONCA 55 at para. 50.

counsel could perform this role without engaging in communication with the expert as the report is being prepared.”⁵⁰

There is no basis for thinking the law as stated by the Court of Appeal is different for *Charter* cases. But regardless of the result, the *Moore* litigation and resulting debate between the justices and within the bar on these issues underscores the importance that our legal system attaches to expert testimony and the principle that the expert must understand that his/her duty is to assist the court, and not to any particular party, is vital in Canadian law.

3. Standard of Review for Findings of Legislative Fact

One final issue with respect to the use of social science evidence in *Charter* cases, which has been the subject of recent consideration by the Supreme Court, is the issue of the appropriate standard for reviewing findings of legislative fact from courts of first instance. In its decision in *Bedford*, the Supreme Court has now unequivocally confirmed “palpable and overriding error” as the only standard of review for evidentiary findings in *Charter* litigation. This is the case even where the evidentiary record is

⁵⁰ *Ibid*, at para. 64. And see discussion generally at paras. 33-66. The same logic resulted in the Court’s conclusion regarding disclosure of communications between counsel and their expert prior to trial (at para. 78): “Absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness.”

comprised solely of affidavits, and where the findings of fact have been established by complex social science evidence.⁵¹

The confirmation of this standard departs somewhat from statements by McLachlin J. (as she then was) in *RJR-Macdonald*. There, McLachlin J. stated that while “in the context of the s. 1 analysis, more deference may be required to findings based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considered social science and other policy oriented evidence.”⁵²

In *Bedford*, the Court held that applying the “palpable and overriding error” standard to all findings of fact, including legislative facts, accorded with the traditional, fundamental “division of labour” between trial and appellate courts.⁵³ Departing from a deferential standard of review would be contrary to judicial economy, resulting in duplication of the lower court’s fact-finding role by the appellate court.⁵⁴ The Court also held that adopting a different standard of review for social science evidence would also be unworkable, in that it would create two different standards of review – one for adjudicative facts and credibility of affiants and witnesses, and another for social and legislative facts.⁵⁵ This approach was more recently affirmed by the Supreme Court of Canada in its reasons upholding the trial judge’s finding in *Carter*, the physical-assisted death litigation under the *Charter*.⁵⁶

⁵¹ *Canada (Attorney General) v Bedford*, 2013 SCC 72, at para 48 [*Bedford (SCC)*].

⁵² *RJR-Macdonald v Canada (Attorney General)*, [1995] 3 SCR 199, at para 141.

⁵³ *Bedford (SCC)*, *supra* note 52 at para 49.

⁵⁴ *Ibid* at para 51.

⁵⁵ *Ibid* at para 52.

⁵⁶ *Carter (SCC)* *supra* note 34.

Conclusion: Where do we go from here?

Social science evidence has been a critically important facet of *Charter* litigation since the beginning of the *Charter* era. Three decades on, however, courts continue to grapple with fundamental issues regarding its use and admissibility.

The recent changes to the civil procedure rules in Ontario codify the principle that above all, an expert owes a duty to the court, and must provide evidence that is “fair, objective and non-partisan”.⁵⁷ In the context of *Charter* litigation, which often engages complex social science evidence and expert witnesses who may take strong views on one or the other side of the policy question before the court, these changes are important in helping to ensure that the record before the court is credible and unbiased.

Recent large-scale *Charter* challenges such as *Bedford*, *Carter* and the *Polygamy Reference* demonstrate that the issues relating to the use of social science evidence in *Charter* cases are far from resolved. One of the major lessons from *Bedford* is the vitally important role of the court of first instance in fact-finding in *Charter* cases. With the Supreme Court’s instruction in *Bedford* that lower courts should always be afforded a high degree of deference in fact-finding, even in relation to findings of social and legislative facts, more than ever, it is incumbent on the parties to ensure that the court of first instance “gets the evidence right”.

⁵⁷ *Ontario Rules of Civil Procedure*, *supra* note 47, r 4.1.01(1).

One question that has been left unanswered by the Court's decision in *Bedford* and other recent cases are questions of institutional capacity and competence that arise when such enormous importance is placed on findings of fact from the court of first instance. This is particularly the case where, as in the three recent cases cited in this paper, so many *Charter* proceedings develop such voluminous and contentious records. These records also generally deal with subject matter relating to public policy, an area outside of the court's traditional realm of expertise. In this context, placing such an enormous burden upon the findings of fact from a single judge raises real challenges relating to institutional capacity and expertise. These concerns are arguably compounded when appellate courts are instructed to afford a high degree of deference to a lower court's findings of fact.

The struggle over how best to admit and weigh often complex and conflicting evidence in *Charter* cases illustrates the delicate balance that courts must strike when they adjudicate matters that were once almost exclusively the preserve of Parliament or the legislatures. It is unlikely that this tension will ever completely be resolved, especially given the highly charged nature of many of the *Charter* cases that appear before the courts. However, developing a rational, credible approach to social science evidence is essential: it ensures that courts have a sufficient factual matrix before them when considering the *Charter*, and ultimately, enhances the legitimacy of these often-contentious and often-controversial decisions.