

# Realizing the Potential of the Principled Approach to Evidence

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# Introduction

The changes that have swept through Canadian evidence law in recent decades are frequently described as a revolution.<sup>1</sup> The outcome of this revolution is that the courts have embraced a principled approach that emphasizes consistency in the application of evidence law with its underlying policies. The principled approach entails a general preference for flexible principles over strict rules. It requires evidence doctrines to be framed and applied in a way that is centered on the interests and values at stake in the evidence problem.

This paper examines the principled revolution in evidence law, beginning with a question about its origins: What were the pathologies of the traditional common law approach to evidence that sparked this upheaval? The classic expression of these deficiencies in Canadian law comes from Dickson J in *R v Graat*: “We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions.”<sup>2</sup> These “cumbersome rules” suffered from two prominent flaws, both of which are hinted at in Dickson J’s colourful description. First, the rules were excessively rigid: they were prone to being applied mechanically and acontextually in a way that often

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<sup>1</sup> See e.g. Mister Justice David H Doherty, “The Admissibility of Evidence in Criminal Proceedings: A Principled Approach in a Post-*Charter* World” in *Law Society of Upper Canada Special Lectures 2003, The Law of Evidence* (Toronto: Irwin Law, 2004) 1 at 2; Hamish Stewart, “Justice Frank Iacobucci and the Revolution in the Common Law of Evidence” (2007) 57:2 UTLJ 479; Bruce P Archibald, “The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?” (1999) 25:1 Queen’s LJ 1.

<sup>2</sup> [1982] 2 SCR 819 at 835, 144 DLR (3d) 267.

clashed with their animating rationales.<sup>3</sup> Second, the rules, exclusions and exceptions were unnecessarily numerous and technical—in a word, too complex.<sup>4</sup>

These twin defects in the common law of evidence—rigidity and complexity—ignited a revolution in Canadian evidence law. But to what extent have these defects been cured by the adoption of the principled approach? With respect to the rigidity problem, the principled approach has succeeded almost completely. Flexibility and judicial discretion are the order of the day, and in almost every area of evidentiary regulation we have seen “the triumph of a principled analysis over a set of ossified judicially created categories”.<sup>5</sup> The story is more mixed with respect to the complexity problem. Expectations that the principled approach would make evidence law simpler have not, on the whole, been fulfilled.<sup>6</sup> Some evidence doctrines have indeed been simplified, but others—most notably the hearsay rule—have actually become more complex. This paper examines why the principled approach has not resulted in greater simplification of the law of evidence. I will suggest an explanation that lies in the methods

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<sup>3</sup> See e.g. Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Markham, Ont: LexisNexis, 2009) (“the problem was that the rules themselves became fixed and inflexible and they were arbitrarily, and without thought, applied to every situation even when the rationale behind the rule could not justify its application to the particular fact situation in question” at 10).

<sup>4</sup> See e.g. *ibid* (before the advent of the principled approach, “[e]vidence law had become a series of bewildering and complicated inflexible rules” at 4). See also, Archibald, *supra* note 3. “For at least three decades there has been mounting dissatisfaction in Canadian legal circles with the state of the rules governing the admissibility of hearsay. Courts, doctrinal writers, law reform commissions, and the Federal/Provincial Task Force on the Law of Evidence all joined the chorus . . . decrying the complexity, rigidity and anachronistic aspects of the hearsay rules.” *Ibid* at 2-4 [footnotes omitted].

<sup>5</sup> *R v Smith*, [1992] 2 SCR 915 at 930, 15 CR (4th) 133, Lamer CJC.

<sup>6</sup> Commentators who expressed expectations that the principled analysis would simplify evidence law include Patrick Healy, “Developments in the Law of Evidence: The 1993-94 Term—Admissibility, Discretion and the Truth of the Matter” (1995) 6 Sup Ct L Rev 379 (“[t]he principled approach of the Court is chiefly an exercise in simplification” at 382); David M Tanovich, “*Starr Gazing: Looking into the Future of Hearsay in Canada*” (2003) 28:2 Queen’s LJ 371 at 376.

the courts have chosen to incorporate principle into evidence doctrines.

The analysis will unfold in three parts. Part I explores the ways in which evidence law is complex and explains why this complexity can be problematic. Part II examines the distinction between rules and principles in evidence law. Because the adoption of the principled approach marks a move away from rules and toward principles, it is worthwhile to consider the nature of the distinction between them, the strengths and weakness of these two forms of regulation, and how the complexity of rules differs from the complexity of principles. Part III discusses the different methods that courts have used to incorporate principles into the law of evidence. In some areas, complex and rigid rules have been cast aside in favour of the direct application of principles. In other important areas, however, principles have been piled on top of rules, compounding the complexity of the law. Ultimately, I will argue that the full potential of the principled approach will only be realized when the law of evidence moves beyond needless complexity as it has with needless rigidity. A principled analysis of evidence issues will never be simple, but the courts would do well to reduce the complexity of the rules themselves.

## **I. The Complexity of Evidence Law**

Complexity represents one of the distinguishing features of evidence law in the common law tradition.<sup>7</sup> To some extent, this complexity may be inescapable. It reflects the heterogeneity of the matters being regulated: facts, inference and proof.<sup>8</sup> The variability of facts and inferences arising in court cases seems almost infinite, so no matter how complex evidence rules become they remain “orders of

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<sup>7</sup> See e.g. Mirjan R Damaška, *Evidence Law Adrift* (New Haven, Conn: Yale University Press, 1997) at 8.

<sup>8</sup> For a discussion on the importance for evidence scholarship of studying these phenomena in themselves, see William Twining, “Taking Facts Seriously” in *Rethinking Evidence: Exploratory Essays* (New York: Cambridge University Press, 2006) 14.

magnitude less complex than the environment they regulate”.<sup>9</sup> In light of the variability and context-dependency of facts, some doubt whether evidence rules of general application can ever be framed in a way that adequately accounts for this underlying complexity.<sup>10</sup>

### A. What Is Complexity?

While the claim that evidence law is highly complex may seem obvious to anyone who has studied the subject, analytical precision requires some examination of what complexity means in this context. The complexity of evidentiary regulation in the common law tradition emerges primarily from two sources: the number or density of evidence rules and their technical quality.<sup>11</sup> Rules of evidence are *dense* in the sense that there are a large number of them, designed to address a great variety of factual scenarios.<sup>12</sup> Probably the best example is offered by the traditional hearsay rule with its many exceptions. Evidence rules are *technical* insofar as specialization and

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<sup>9</sup> Ronald J Allen, “Taming Complexity: Rationality, the Law of Evidence and the Nature of the Legal System” (2013) 12:2 Law, Probability & Risk 99 at 102.

<sup>10</sup> See Damaška, *supra* note 9 (continental jurists generally believe that “the probative weight of evidence is a matter too unruly to obey the lawgiver’s rein... [because it] depends on the infinite particularity of experience” at 20-21).

<sup>11</sup> This understanding of complexity accords with the definition adopted in Louis Kaplow, “A Model of the Optimal Complexity of Legal Rules” (1995) 11:1 JL Econ & Org 150 (“the complexity of legal rules refers to the number and difficulty of distinctions the rules make” at 150). See also Peter H Schuck, “Legal Complexity: Some Causes, Consequences, and Cures” (1992) 42:1 Duke LJ 1 (defining two features of legal complexity as “density and technicality” at 3).

<sup>12</sup> See *ibid.* “Dense rules are numerous and encompassing. They occupy a large portion of the relevant policy space and seek to control a broad range of conduct.” *Ibid* at 3. See also Damaška, *supra* note 9 (noting “the density of the normative web cast over common law fact-finding” at 8). Interestingly, Damaška questions the common perception that Continental evidence law is much less dense than that in the common law tradition. *Ibid* at 8-10.

expertise are required to comprehend and apply them.<sup>13</sup> Technical rules depend on subtle distinctions foreign to the way fact-finding problems would be understood in ordinary life.<sup>14</sup> An example of a technical requirement is the rule that good character witnesses should speak only to the accused's reputation in the community and not to their own opinion of or experience with the accused.<sup>15</sup>

For the purposes of the present analysis, then, the complexity of evidentiary regulation will be understood principally as a function of its density and its technical character. It should be acknowledged, however, that evidence law is also complex in other ways. For instance, in his ground-breaking study of common law evidence in comparative perspective, Mirjan Damaška pointed out that another prominent feature that adds to its complexity is its "[l]ow degree of ordering":<sup>16</sup> individual rules of evidence frequently seem disconnected from each other and from any overarching justificatory scheme.<sup>17</sup> However, articulating principles to organize and justify evidentiary regulation constitutes the very stuff of the principled approach to evidence. As Canadian courts have embraced this approach, the structure of Canadian evidence law has begun to shift and will no doubt continue to shift to higher degrees of ordering.

A final dimension of complexity that bears mention is indeterminacy. Legal regulation can be defined as indeterminate to the

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<sup>13</sup> See *ibid* (because evidence rules are so technical, "there is relatively little an untutored person can extrapolate from his or her ordinary life experience that can be used in forensic proof-taking without much lawyerly intermediation" at 11-12); Schuck, *supra* note 13 ("[t]echnical rules require special sophistication or expertise on the part of those who wish to understand and apply them" at 4 [emphasis in original]).

<sup>14</sup> See *ibid* ("[technicality] is a function of the fineness of the distinctions a rule makes, the specialized terminology it employs, and the refined substantive judgments it requires" at 4); Damaška, *supra* note 9 at 11.

<sup>15</sup> See *R v Clarke* (1998), 129 CCC (3d) 1, 112 OAC 233.

<sup>16</sup> *Supra* note 9 at 9.

<sup>17</sup> Echoing the sentiments of Dickson J in *Graat*, Damaška explained that "through Continental eyes, [common law evidence] seems a maze of disconnected rules, embroidered by exceptions and followed by exceptions to exceptions. . . . Few elements common to evidence rules have been factored out, or organizing principles elaborated, to make the entire normative structure easily surveyable." *Ibid* at 9-10.

extent that it is “open-textured, flexible, multi-factored, and fluid”.<sup>18</sup> Since the principled approach to evidence moves the law away from rigid rules that command specific outcomes toward broad principles that allow flexible, contextual application, it clearly carries the potential to increase indeterminacy. Arguably, this greater indeterminacy invests the principled approach with a “hidden complexity”<sup>19</sup> that might not be apparent from a consideration of the principled standards in themselves. More will be said in the pages that follow about the potential for indeterminacy under the principled approach. For now, it suffices to note that some increase in indeterminacy is a necessary corollary to making evidence law less rigid.

### *B. Is Complexity a Problem?*

The rules of evidence in the common law tradition are dense and technical, and therefore complex. Admittedly, legal complexity has benefits, and it would be a mistake to assume that simpler rules are always preferable.<sup>20</sup> Complex rules may be needed in some contexts to ensure that the law is properly tailored to control the behaviour being regulated.<sup>21</sup> However, the complexity of evidence law has generally been viewed as excessive.<sup>22</sup> The genesis of this excessive complexity can be traced, at least in a general way, to the common law method. Our law of evidence has been largely judge-made, and it has developed ad hoc to respond to perceived problems in the process of proof. In the absence of any general structure of evidentiary principle, judges crafted rules, exclusions and exceptions as needed to do justice in particular cases. Over time, the rules and exceptions multiplied and

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<sup>18</sup> Schuck, *supra* note 13 at 4 [footnotes omitted].

<sup>19</sup> Archibald, *supra* note 3 at 62.

<sup>20</sup> See Schuck, *supra* note 13 at 8.

<sup>21</sup> See e.g. Kaplow, *supra* note 13 (“[r]ules that are more complex can be tailored to acts more precisely, thereby allowing better control of behaviour” at 150).

<sup>22</sup> See e.g. *supra* notes 4 and 6 and accompanying text. See also Schuck, *supra* note 13 (the general tendency is for law to develop “more complexity than we need” at 8).

their technical requirements proliferated.<sup>23</sup>

The costs of complexity can be substantial. Most obviously, complex rules are more difficult to learn and apply, so those responsible for applying them—typically lawyers and judges—must expend more resources mastering them.<sup>24</sup> When the body charged with applying the rules is a lay jury, as occurs not infrequently in our legal system,<sup>25</sup> the difficulties associated with learning and applying complex laws may be insurmountable. Complexity also has implications for access to justice and equality because a litigant’s ability to deal with complex rules without professional assistance is limited, and the advantages enjoyed by well-resourced litigants correspondingly increase.<sup>26</sup> Finally, because technical rules appear to be divorced from ordinary ways of reasoning, rules that are complex may be seen as illegitimate “technicalities” by the parties and the public.<sup>27</sup> Given these substantial costs of complexity, one may safely conclude that it is beneficial to simplify evidence rules to some extent.

Of course, this simplification has inherent limits. The law of evidence must remain complex enough to draw appropriate distinctions between discrete evidence problems and to instantiate the policies at play in each area. Interestingly, in the early days of the principled approach it was not uncommon for commentators to express worry that the law of evidence was becoming oversimplified.

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<sup>23</sup> See e.g. Damaška, *supra* note 9 (“the disheveled state of evidence law . . . is primarily attributable to the fact that common law evidentiary doctrine evolved ad hoc, cobbled up over time from judicial rulings in individual cases” at 11).

<sup>24</sup> Schuck, *supra* note 13 at 18; Kaplow, *supra* note 13 at 151.

<sup>25</sup> See e.g. *R v Corbett*, [1988] 1 SCR 670, 64 CR (3d) 1 (where juries are instructed about permitted and prohibited uses of evidence of limited admissibility); *R v Khela*, 2009 SCC 4, [2009] 1 SCR 104 (where the law of corroboration requires juries to determine whether unsavoury witness testimony is confirmed by independent, material evidence); *R v Carter*, [1982] 1 SCR 938, 1 DLR (3d) 385 (where the co-conspirators’ exception to the hearsay rule requires juries to determine the admissibility of the co-conspirator statements for themselves in accordance with a complex three-step test).

<sup>26</sup> Schuck, *supra* note 13 (“[c]omplexity’s costs . . . impose disproportionate burdens on the poor by raising prices and necessitating the services of lawyers and other professionals trained in the management of complexity” at 19).

<sup>27</sup> See *ibid* at 22.



For instance, Patrick Healy warned that eliminating specific admissibility rules in favour of a universally applicable balancing test of probative value versus prejudicial effect would render evidence law “misleadingly simplistic”<sup>28</sup> and give inadequate guidance for lawyers and judges.<sup>29</sup> In a similar vein, Marc Rosenberg commented that defining the test for admissibility of hearsay only “in terms of reliability and necessity [would be] just too vague to be of any practical use”.<sup>30</sup>

Such worries may have been reasonable at a time when the principled approach was emerging and the magnitude of the change in the law was unclear. However, with the benefit of hindsight they appear ill-founded. Specific evidence doctrines have not been entirely jettisoned in favour of a generalized balancing of prejudicial effect and probative value, nor has hearsay analysis been reduced to undifferentiated notions of necessity and reliability. Instead, a large variety of distinct evidence doctrines have survived, and seemingly general concepts have been given form and content through extensive guidance from the Supreme Court of Canada. One of the best examples of how the Supreme Court has added structure to evidence principles comes from the masterly judgment of Charron J in the leading hearsay case of *R v Khelawon*.<sup>31</sup> Writing for a unanimous Court, she explained what the principles of reliability and necessity mean in the hearsay context, drawing out the justifications for the exclusion and admission of hearsay in a way trial judges can apply in specific cases.<sup>32</sup>

The principled approach has, in short, not had the effect of oversimplifying evidence law in Canada. For better or worse, complexity remains a prominent feature of this body of law. Before explaining how the principled approach might come to grips with the

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<sup>28</sup> *Supra* note 8 at 449.

<sup>29</sup> *Ibid* (“[t]here is ever-diminishing value in principles of probative value and prejudice that are stripped of complexity and nuance to the point that there is little prescriptive guidance for trial courts and counsel and little basis for prediction that similar problems will be resolved with similar outcomes” at 450).

<sup>30</sup> Marc Rosenberg, “B. (K.G.)-Necessity and Reliability: The New Pigeon-Holes” (1993) 19 CR (4th) 69 at 75.

<sup>31</sup> 2006 SCC 57, [2006] 2 SCR 787.

<sup>32</sup> *Ibid* at paras 61-65; see text accompanying notes 49-50.

problem of complexity, it will help to look at the distinction between rules and principles, which is fundamental to understanding the success, the shortcomings and the hope that remains for the principled approach to evidence.

## II. Evidence Principles Versus Evidence Rules

The adoption of the principled approach represents a move away from a law of evidence centred on rules toward an evidence law centred on principles.<sup>33</sup> The concepts of a “rule” and a “principle” have attracted much attention in legal theory, but the tradition in cases and commentaries on Canadian evidence law has been to treat these terms as if they were self-explanatory. This paper will break with that tradition and briefly consider what the distinction between rules and principles means in the context of the Canadian evidence revolution.

### *A. Defining Characteristics*

Theorists distinguish rules and principles on several axes, not all of which are germane to the present analysis. However, the literature reveals three relevant dimensions on which rules and principles have been distinguished—specificity, justificatory content and weight. These dimensions are salient because they appear to reflect what the Canadian courts have in mind when they speak of the principled approach to evidence.

Some frame the distinction between rules and principles as one of *specificity*: relatively specific legal prescriptions are called rules, while

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<sup>33</sup> See Stewart, *supra* note 3 (“[t]he Supreme Court’s evidence revolution is best understood as an attempt to change the focus of decisions about the admission or exclusion of evidence from an exercise in rule application to an exercise in principled decision making” at 481).

relatively vague legal prescriptions are labelled as principles.<sup>34</sup> The terminology used to describe this distinction between specific and vague legal prescriptions varies, the most common formulation in the American literature being an opposition between specific “rules” and vague “standards”.<sup>35</sup>

Another dimension on which rules and principles have been distinguished involves their degree of *justificatory content*. Principles are bound up with and given content by the policies, values and rationales animating the law, while rules have a more attenuated relationship with the justifications behind the law.<sup>36</sup> In other words, rules tend to be “opaque”<sup>37</sup> to their underlying justifications, while principles allow their justifications to shine through. “Principles refer more or less directly to—indeed, they are often indistinguishable from—various values, interests, rights, policies and goals”,<sup>38</sup> explained Stephen Perry, whereas “[r]ules, by contrast, usually just specify a course of action to be followed in a particular type of circumstance.”<sup>39</sup>

A final dimension on which rules and principles have been distinguished is that of *weight*. If a legal prescription has weight, it can be assessed as having greater or lesser importance, and can be

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<sup>34</sup> See e.g. Joseph Raz, “Legal Principles and the Limits of Law” (1972) 81:5 Yale LJ 823 (“[r]ules prescribe relatively specific acts; principles prescribe highly unspecific actions” at 838); John Braithwaite, “Rules and Principles: A Theory of Legal Certainty” (2002) 27 Australian Journal of Legal Philosophy 47 at 47.

<sup>35</sup> See e.g. Frederick Schauer, “Prescriptions in Three Dimensions” (1997) 82 Iowa L Rev 911 [Schauer, “Prescriptions”] (the opposition between rules and standards “distinguish[es] moderately crisp prescriptions... from indeterminate prescriptions” at 913); Larry Alexander & Ken Kress, “Against Legal Principles” (1997) 82:3 Iowa L Rev 739 (“frequently the term ‘principle’ is used in place of the term ‘standard’ in discussions of the rule-standard dichotomy” at 740).

<sup>36</sup> See Stephen R Perry, “Two Models of Legal Principles” (1997) 82:3 Iowa L Rev 787 at 788.

<sup>37</sup> Alexander & Kress, *supra* note 37 (rules “are opaque in application to the values that they are designed to serve” at 740).

<sup>38</sup> Perry, *supra* note 38.

<sup>39</sup> *Ibid.*

balanced against competing considerations.<sup>40</sup> Principles are said to possess this quality of weight, while rules are said to lack it<sup>41</sup> because, as Ronald Dworkin famously wrote, rules operate “in an all-or-nothing fashion”.<sup>42</sup> Put another way, rules are conclusive because when their conditions are met, they operate automatically to demand specific outcomes.<sup>43</sup> If rules conflict with one another, there is a problem. Principles, on the other hand, may point in different directions and are susceptible to being balanced against one another.

The dimensions of specificity, justificatory content and weight are related in complex ways and do not always closely track one another. For example, a legal prescription that is specific will not necessarily be conclusive.<sup>44</sup> Moreover, with the arguable exception of weight, these dimensions operate not as binaries but as sliding scales.<sup>45</sup> Legal prescriptions can be more or less specific, and more or less defined by their justificatory content. For this reason, we cannot expect any clear division between rules and principles to be sustainable.

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<sup>40</sup> See e.g. Ronald M Dworkin, “The Model of Rules” (1967-68) 35:1 U Chicago L Rev 14 (“it is an integral part of the concept of a principle that it has this dimension [of weight], that it makes sense to ask how important or weighty it is” at 27); Schauer, “Prescriptions”, *supra* note 37 (“[w]eight [is] the ability of a prescription to prevail against a prescription indicating the opposite result” at 919); Perry, *supra* note 38 (“a given principle inclines toward but does not demand a particular result, since it can be outweighed by principles that point in the opposite direction” at 788).

<sup>41</sup> See Dworkin, *supra* note 42 at 27. But see Alexander & Kress, *supra* note 37 (rules “are sometimes said to have no weight; but the more accurate way of characterizing rules is to say that . . . because they are determinative when applicable, their weight is infinite” at 741).

<sup>42</sup> *Supra* note 42 at 25.

<sup>43</sup> See *ibid*; Perry, *supra* note 38 (“[i]f the facts of a given case are such that the conditions of application of a valid rule have been met, then the rule must be applied; the rule is, in those circumstances, ‘conclusive’” at 787-88).

<sup>44</sup> See e.g. Schauer, “Prescriptions”, *supra* note 37 (specificity and weight “are two different distinctions, and they do not necessarily track each other” at 914). On the other hand, one might argue that, logically, the dimensions of weight and justificatory content are inseparable, because the policies and values underlying a principle are the very things that give the principle weight. Thanks to my colleague Chris Essert for this insight.

<sup>45</sup> See e.g. Raz, *supra* note 36 at 838; Isaac Ehrlich & Richard A Posner, “An Economic Analysis of Legal Rulemaking” (1974) 3:1 J Legal Stud 257 at 258.

Much more could, of course, be said about these three dimensions, their logical properties and their interrelationships. A full account of these matters, however, lies beyond the scope of this paper. The present analysis aims only to illuminate, somewhat more systematically than is customary in this area, what it means for the Canadian law of evidence to de-emphasize rules and embrace principles. Whatever the relationships in logic between specificity, justificatory content and weight, the idea of a principle that has developed in Canadian evidence law appears, as a matter of fact, to be a function of all three of these dimensions. Descriptively, then, when Canadian courts speak of evidence principles, they seem to mean legal prescriptions that are at once vague, closely identified with (if not identical to) their justifications, and capable of being weighed against one another.<sup>46</sup> Two examples illustrate this point.

(i) Example One: Threshold Reliability

Consider the standard of “threshold reliability” that must be met before hearsay evidence can be admitted under the principled approach. Justice Charron explained that requirement in these terms in *Khelawon*:

Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule.<sup>47</sup>

She went on to explain that the dangers of hearsay could be overcome in individual cases by pointing to circumstances surrounding the making of the statement that support its reliability, by determining that its reliability could be sufficiently tested despite its hearsay

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<sup>46</sup> See Doherty, *supra* note 3 (“admissibility is determined by identifying the underlying rationale or policies that favour admission of the evidence and those that favour exclusion . . . [and] [o]nce these policies are identified, the principled approach requires that they be weighed and balanced against each other” at 2).

<sup>47</sup> *Supra* note 33 at para 61.

character, or by applying some combination of these kinds of reasons.<sup>48</sup> The principle of threshold reliability is vague in the sense that the factors that can influence the analysis are numerous and unspecified. The principle also appears inseparable from its justificatory content; it is identified on its face as a reliability principle, and its purpose is to ensure that reliable evidence is admitted and that unreliable evidence is not. Finally, the threshold reliability analysis openly calls for a case-by-case weighing of concerns about dangers of admitting hearsay against the reasons for believing that it is reliable enough to be admitted.

## (ii) Example Two: Expert Evidence

The principles governing admission of expert evidence have similar qualities. In the leading case of *R v Mohan*, the Supreme Court held that expert evidence should only be admitted where it is broadly “relevant” and “necessary” to assist the trier of fact.<sup>49</sup> Justice Sopinka explained that these principles should be applied in the context of a cost-benefit analysis.<sup>50</sup> The need for the expert assistance to clarify technical matters for triers of fact should, he reasoned, be “assessed in light of its potential to distort the fact-finding process”<sup>51</sup>—for example, by wasting time or confusing jurors.<sup>52</sup> Like the principles of hearsay, expert evidence principles are unspecific, they have strong justificatory content, and they are intended to be weighed and balanced against one another.

## *B. Strengths and Weaknesses*

The preceding discussion of the characteristics of rules and principles lays a foundation for considering the strengths and

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<sup>48</sup> *Ibid* at paras 61-65.

<sup>49</sup> [1994] 2 SCR 9 at 20, 114 DLR (4th) 419.

<sup>50</sup> *Ibid* at 20-21.

<sup>51</sup> *Ibid* at 24.

<sup>52</sup> *Ibid* at 21-22, 24.

weaknesses of these forms of regulation. Specificity and conclusiveness, two of the characteristics of rules, carry an important disadvantage: they generate over-inclusion and under-inclusion.<sup>53</sup> When specific and conclusive rules are framed in advance, and an attempt is made to apply them to new fact situations, they frequently and predictably do not work in the way their underlying rationale suggests they should, or they work in a way that their rationale suggests they should not.<sup>54</sup> It is of interest to students of evidence law that these problems of over-inclusion and under-inclusion are exacerbated by uncertainty or heterogeneity in the phenomenon being regulated (what could be more uncertain or diverse than facts?).<sup>55</sup>

It should come as no surprise that these over-inclusion and under-inclusion problems were recognized as pathologies of the traditional rules of evidence, and that in Canada, these problems gave momentum to the evidence revolution.<sup>56</sup> For example, in her account of the development of the principled approach to hearsay, McLachlin CJC noted the “occasional arbitrariness” of the traditional category-based rules:

[T]he rule[s] became rigid and could, in some cases, exclude evidence which should have been received having regard to the underlying criteria of necessity and reliability. [They] could also occasionally lead to the admission of evidence which should be excluded, judged by these criteria.<sup>57</sup>

Evidence doctrines centered on principles avoid over-inclusion and under-inclusion, because principles are unspecific and are applied in a contextual balancing process centered on the policies and values—the justifications—underlying the law.

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<sup>53</sup> See e.g. Barbara Luppi & Francesco Parisi, “Rules versus standards” in Francesco Parisi, ed, *Production of Legal Rules* (Cheltenham: Edward Elgar, 2011) 43 at 45; Ehrlich & Posner, *supra* note 47 at 268.

<sup>54</sup> See *ibid.*

<sup>55</sup> See *ibid.* (“problems of overinclusion and underinclusion are more serious the greater the heterogeneity (or ambiguity, or uncertainty) of the conduct intended to be affected” at 270).

<sup>56</sup> See e.g. *supra* note 6 and accompanying text.

<sup>57</sup> *R v Mapara*, 2005 SCC 23 at para 14, [2005] 1 SCR 358.

Thus, focusing on principles would seem to be a promising way to overcome the problematic rigidity of rules, and the experience of the principled approach to evidence in Canadian law is that the rigidity of the older law has been almost entirely eliminated. Evidence doctrines from hearsay<sup>58</sup> to similar facts<sup>59</sup> to case-by-case privilege<sup>60</sup> are now centered on principles to be applied flexibly with a view to advancing their justifications. Further assurance of a flexible analysis of evidence issues flows from the trial judge's general discretion to exclude otherwise admissible evidence when its prejudicial effect outweighs its probative value.<sup>61</sup>

However, the flexibility that comes with focusing on broad principles entails some costs. Because principles are unspecific and lack the conclusiveness of rules, they are inescapably indeterminate in application.<sup>62</sup> Consistent results across similar cases are therefore harder to attain under principles than under rules.<sup>63</sup> Moreover, as commentators on the principled approach to evidence have noted, principled analysis places more demands on the adjudicator both

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<sup>58</sup> See *R v Khelawon*, *supra* note 33.

<sup>59</sup> See *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908.

<sup>60</sup> See *R v Gruenke*, [1991] 3 SCR 263, (*sub nom R v Frosty and Gruenke*) [1992] 75 Man R (2d) 112.

<sup>61</sup> In *R v Seaboyer*, this discretion was recognized as applicable to prosecution evidence and civil evidence. [1991] 2 SCR 577, 4 OR (3d) 383. The Supreme Court also held that defence evidence can be excluded where its prejudicial effect *substantially* outweighs its probative value. *Ibid* at 580.

<sup>62</sup> See *supra* notes 20-21 and accompanying text.

<sup>63</sup> See Frederick Schauer, "The Convergence of Rules and Standards" [2003] NZ L Rev 303 [Schauer, "The Convergence"] (vague "standards are said to facilitate the ease of case-by-case optimisation, but at some cost to the possibility of predicting in advance what the result is likely to be" at 309); Robert J Currie, "The Evolution of the Law of Evidence: Plus ça change . . .?" (2011) 15 Can Crim L Rev 213 ("[a] problem with proceeding on principle is that the resulting admissibility exercise lacks certainty and specificity" at 219). But see RJ Delisle, "Evidence: Judicial Discretion and Rules of Evidence: Canada Evidence Act, s 12; *Corbett v The Queen*" (1988) 67 Can Bar Rev 706 ("[a] sound exercise of discretion is absolutely essential to the proper application of the rules of evidence and recognition of that fact will likely produce greater real certainty at the sacrifice only of apparent certainty" at 716).



intellectually and in terms of time.<sup>64</sup> Because principles have strong justificatory content and require balancing, doing a principled analysis means weighing the underlying policy considerations in light of the specific facts of the case.

One can readily appreciate that, for judges, this multifaceted process will generally be more difficult than mechanically applying a specific, conclusive rule.<sup>65</sup> As David Paciocco has written, it “calls on a higher skill set. The principled approach requires far more proficiency, and far more understanding of what is at stake, than do the settled rules.”<sup>66</sup> While these added intellectual demands can properly be understood as a cost of the principled approach, they can also be understood as one of its strengths. The very reason Canadian courts embraced the principled approach was because the unthinking, mechanical application of evidence rules was seen to be inadequate.<sup>67</sup> If the principled approach prevents judges from thoughtlessly applying rules they do not understand, that is a good outcome, even if it comes at some cost in terms of predictability and procedural efficiency.<sup>68</sup>

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<sup>64</sup> See Bryant, Lederman & Fuerst, *supra* note 5 at 33-35; Archibald, *supra* note 3. “[T]here may be a legitimate concern over procedural aspects of the application of the principled approach and its hidden complexity. This is manifested in the emergence of long and detailed *voir dire*s.” *Ibid* at 62.

<sup>65</sup> See e.g. David M Paciocco, “The Hearsay Exceptions: A Game of ‘Rock, Paper, Scissors’” in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) 17 (“[t]he principled approach is also more taxing to apply” at 53).

<sup>66</sup> *Ibid* at 53. See also Schauer, “The Convergence”, *supra* note 65 (“not every decision-maker has the time, energy, or inclination to engage in the ‘from the ground up’ process that unconstrained discretion and unspecified standards require” at 316).

<sup>67</sup> See Bryant, Lederman & Fuerst, *supra* note 5 at 10.

<sup>68</sup> To apply evidence rules

### *C. The Complexity of Principles and the Complexity of Rules*

By now it is clear that the principled analysis of evidence carries its own complexity: it requires a nuanced, contextual and necessarily indeterminate balancing of the policies underlying the law. We might label this kind of complexity a “complexity of principles” since the difficulties of this type of analysis arise from the attempt to grasp the implications of broad, justificatory principles in individual cases.

The complexity of principles can be contrasted with the complexity of evidence rules, which is the principal focus of this paper and which, as we have seen, springs from the density and technical character of highly specific evidence doctrines. Rule complexity can get in the way of a principled analysis by encouraging judges to focus on the dense regulatory landscape and the technical features of the rules. Indeed, as discussed above, the excessive complexity of evidence rules was one of the driving concerns behind the evidence revolution. However, as we will see in the next section, even after the introduction of the principled approach rule complexity continues to be a problem in Canadian evidence law.

## **III. Methods of Incorporating Principle**

It is sometimes said that the principled approach to evidence has simply replaced evidence rules with principles and that judges must

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intelligently, the judge and the counsel must not only know the rule, they must understand it. They must appreciate the underlying reason for the rule so that they can decide whether it merits application. The goals, truth, efficiency and fairness are pre-eminent. The rules are there to assist in attaining those goals. They must never be allowed to wag the dog!

Ronald J Delisle, *Canadian Evidence Law in a Nutshell*, 2d ed (Toronto: Carswell, 2002) at 3-4. See also Bryant, Lederman & Fuerst, *supra* note 5 (“the lack of certainty is an acceptable cost as the principled approach strives to achieve substantive justice” at 34).

now apply principles directly to evidence problems.<sup>69</sup> This account of the principled approach is an oversimplification because the law of evidence has always been, and will no doubt remain, a mix of rules and principles. For example, in his compendious review of the law on expert opinion evidence in *R v Abbey*, Doherty JA explained that the admissibility standards in that area are a combination of rules (“preconditions to admissibility...that will yield ‘yes’ or ‘no’ answers”) and principles (a “cost-benefit analysis [that] is case-specific and . . . often does not admit of a straightforward ‘yes’ or ‘no’ answer”).<sup>70</sup> The principled approach has not eliminated rule application from the domain of evidence law, but has shifted the emphasis from a law focused on rules to one focused on principles.<sup>71</sup> This shift toward principle has been achieved in different ways in different areas of evidence law.

Surveying the law of evidence reveals that there are two basic methods for incorporating a principled analysis. The first is to replace certain specific rules with vague, justificatory principles. The second is to retain traditional rules but make them subject to a discretionary principled analysis. These two methods, which we might call the replacement and additive methods, differ in an important respect: under the replacement method, principles must be applied directly to legal problems,<sup>72</sup> whereas under the additive method, principles “operate through the mediation of rules”.<sup>73</sup> In practice, these methods do not function as strict alternatives because, in any given area of

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<sup>69</sup> See e.g. Doherty, *supra* note 3 (“courts in Canada have abandoned a rules-based approach to questions of admissibility in favour of an approach that determines admissibility by the application of broad principles to specific fact situations” at 1); Bryant, Lederman & Fuerst, *supra* note 5 (under the principled approach, “courts should consider . . . any aspect of evidence law, by paying heed to the underlying policies which led to the creation of the rule of evidence and apply them to the circumstances of the particular case” at 6).

<sup>70</sup> 2009 ONCA 624 at paras 78-79, 97 OR (3d) 330.

<sup>71</sup> See text accompanying note 35.

<sup>72</sup> See Raz, *supra* note 36 (“situations in which what ought legally to be done is determined directly by the application of various principles to the case . . . [are] radically different from those [situations where] . . . principles . . . operate through the mediation of rules” at 841).

<sup>73</sup> *Ibid.*

evidence law, certain rules may be retained and others eliminated. Nevertheless, it will be useful to compare and contrast these methods and to consider examples of each. In general, I will argue the replacement method is preferable where the traditional rules are dense and technical because in those circumstances the additive method only exacerbates their complexity.

#### *A. The Replacement Method: Replacing Rules with Principles*

The utility of the replacement method will be demonstrated by reference to three examples: opinion evidence, hearsay and similar fact evidence. *Grat*<sup>74</sup> was an early example of the use of the principled approach in Canadian law. The case concerned the lay opinion rule: the question was whether several witnesses, including police officers, should have been permitted to testify, based on their own observations and opinions, about whether the accused's ability to drive was impaired by alcohol on the night in question. Justice Dickson reviewed the law on lay opinion, which was traditionally understood as an exclusionary rule with numerous recognized exceptions for such matters as estimates of the age of a person, the condition of a thing, or the speed of an object's movement.<sup>75</sup> In an impressive judgment that remains the leading case on point, Dickson J discarded the former category-based approach and focused on the underlying principle.<sup>76</sup> A lay witness should, he reasoned, "be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived".<sup>77</sup> The witnesses at trial had properly been permitted to express their opinions on the accused's impairment, he held, because they were "merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly".<sup>78</sup>

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<sup>74</sup> *Supra* note 4.

<sup>75</sup> *Ibid* at 835.

<sup>76</sup> *Ibid* ("[t]o resolve the question before the Court, I would like to return to broad principles" at 835).

<sup>77</sup> *Ibid* at 837.

<sup>78</sup> *Ibid* at 841.

A second and more recent example of the replacement method can be found in the development of the distinction between threshold and ultimate reliability in the hearsay context. In determining the admissibility of hearsay evidence, it is well established that the trier of law decides only whether the evidence meets a criterion of “threshold reliability”.<sup>79</sup> The “ultimate reliability” of the evidence—whether it will be relied on as true—is a matter reserved for the trier of fact.<sup>80</sup> When the principled approach to hearsay was being developed, courts sometimes imposed categorical rules about what kinds of considerations could be relevant to threshold reliability and what other considerations should be limited to the ultimate reliability inquiry. Most famously, in *R v Starr*, Iacobucci J limited the considerations that could be used in the threshold reliability inquiry:

At the stage of hearsay admissibility the trial judge should not consider the declarant’s general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence.<sup>81</sup>

In *Khelawon*, Charron J overturned *Starr* in this respect and held that categorical distinctions between threshold and ultimate reliability factors should be rejected.<sup>82</sup> Instead, threshold reliability was to be determined, as discussed above,<sup>83</sup> by way of a principled analysis weighing hearsay dangers against whatever indicia of reliability existed on the facts of the case.<sup>84</sup>

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<sup>79</sup> *R v Khelawon*, *supra* note 33 at para 50.

<sup>80</sup> *Ibid.*

<sup>81</sup> 2000 SCC 40 at para 217, [2000] 2 SCR 144.

<sup>82</sup> *Supra* note 33.

<sup>83</sup> See *ibid* at paras 61-65; see text accompanying notes 49-50.

<sup>84</sup> *R v Khelawon*, *supra* note 33 at para 55.

The third and perhaps the most interesting example of the replacement method comes from the law on similar fact evidence. The common law has long held evidence of an accused's prior discreditable conduct generally inadmissible, primarily because of a concern that triers of fact, especially juries, would be unfairly prejudiced against an accused with an unsavoury past.<sup>85</sup> Historically, the prevailing view was that evidence of the accused's prior bad acts was never admissible to show the accused's propensity to commit the offence, but that it could be admitted for a number of other purposes, which operated as exceptions to the general exclusionary rule.<sup>86</sup> With the encouragement of lower courts and commentators,<sup>87</sup> the Supreme Court of Canada moved away from this category-based approach in a series of cases,<sup>88</sup>

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[T]he relevant factors to be considered on an admissibility inquiry cannot invariably be categorized as relating either to threshold or ultimate reliability. Rather, the relevance of any particular factor will depend on the particular dangers arising from the hearsay nature of the statement and the available means, if any, of overcoming them.

*Ibid.*

<sup>85</sup> See *R v Handy*, *supra* note 61 at paras 39-40.

<sup>86</sup> See *R v B (CR)*, [1990] 1 SCR 717 at 724, 109 AR 81:

Cases in which similar fact evidence had been admitted were reified into a series of categories in which, and only in which, similar fact evidence could be admitted. Similar fact evidence was admitted to show intent, a system, a plan, malice, identity, as well as to rebut the defences of accident, mistake and innocent association.

*Ibid.*

<sup>87</sup> See especially RJ Delisle, "The Direct Approach to Similar Fact Evidence" (1996) 50 CR (4th) 286 [Delisle, "Direct Approach"]; *R v B (L)* (1997), 35 OR (3d) 35, 9 CR (5th) 38 (CA), Charron JA.

<sup>88</sup> See *R v Sweitzer*, [1982] 1 SCR 949, 26 AR 208; *R v B (CR)*, *supra* note 88, McLachlin J ("[i]t is no longer necessary to hang the evidence tendered on the peg of some issue other than disposition" at 731). But see *ibid*, Sopinka J, dissenting ("I am unable therefore to subscribe to the theory that in exceptional cases propensity alone can be the basis for admissibility" at 744).

culminating in its unanimous judgment in *R v Handy*.<sup>89</sup>

Writing for the Court, Binnie J clarified that evidence of the prior bad acts of the accused could be admitted, in exceptional cases, for the purpose of establishing the accused's propensity to commit the offence.<sup>90</sup> Justice Binnie laid out a test for admissibility that was a model of simplicity:

Similar fact evidence is . . . presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.<sup>91</sup>

To supplement this general admissibility standard, Binnie J went on to offer several pages of guidance on how the test should be applied. For example, he counselled trial judges to clearly identify the issue to which the similar fact evidence was relevant, to probe the connection between the similar fact evidence and the facts of the particular case, and to consider the level of specificity or generality of the propensity being alleged.<sup>92</sup> The balancing of prejudicial effect and probative value that now determines the admissibility of similar fact evidence calls for a principled analysis explicitly centered on the policy considerations that inform the law. This principled analysis replaces a tradition of rule-based reasoning that focused on fitting similar fact evidence into categories bearing little or no relationship to the policy issues at stake.

These three examples demonstrate that the Supreme Court has often swept away specific, conclusive evidence rules with low justificatory content, and replaced them with unspecific principles that carry weight and strong justificatory content. This replacement method of incorporating evidence principles frequently serves to simplify the law in areas where traditional evidence doctrines were dense or technical. The elimination of the numerous stipulated exceptions to the lay opinion and similar fact evidence rules exemplify

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<sup>89</sup> *Supra* note 61.

<sup>90</sup> *Ibid* ("evidence classified as 'disposition' or 'propensity' evidence is, exceptionally, admissible" at para 51).

<sup>91</sup> *Ibid* at para 55.

<sup>92</sup> *Ibid* at paras 56-97.

the beneficial simplification that can flow from replacing evidence rules with principles.

One objection should be anticipated at this point. It could be argued that the extensive guidance from appellate courts on how the principled approach should be applied significantly complicates the law of evidence and amounts, in effect, to a reintroduction of rules.<sup>93</sup> For example, Robert Currie has written that the “extremely *detailed* . . . grocery list of admissibility considerations” for similar fact evidence offered in *Handy* approaches “a rule-based regime”—a development Currie lauds as a corrective for the indeterminacy of a principled analysis.<sup>94</sup> I would argue that this line of reasoning confuses what I have called the complexity of principles with the complexity of rules. The guidance offered by Binnie J in *Handy* is extensive, but that is because the principles at stake in the similar fact evidence context are multiple and nuanced. A principled approach that merely effaced the complexity of the issues at play would be plainly inadequate; principled analysis means coming to grips with the policies of the law as they apply in specific cases.<sup>95</sup> A test for the admissibility of similar fact evidence based on balancing prejudicial effect and probative value is admittedly complex in the sense of being indeterminate and rich in implications, but it is not complex in the way that rules are complex: it

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<sup>93</sup> See e.g. David M Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed (Toronto: Irwin Law, 2008) (because “appellate courts sometimes try to elaborate on the vague formulae that have been adopted . . . [s]ome of the open-textured rules are beginning to operate much like the more rigid rules that they were designed to replace” at 6). See also Schauer, “The Convergence”, *supra* note 65 (“rule-appliers, even if they in theory enjoy the considerable discretion granted to them, will supplement the standards with more specific ‘guidelines’ or ‘rules of thumb’ that in practice have all of the characteristics of rules” at 316).

<sup>94</sup> Currie, *supra* note 65 at 221 [emphasis in original].

<sup>95</sup> Ron Delisle has written in the context of similar fact evidence that

[t]he test for reception or rejection is simple to articulate . . . [:] Measure probative worth against the possibility of prejudice . . . Make no mistake. While the test is simple to articulate, the balancing of these competing considerations is one of the most difficult tasks facing a trial judge today.

“Direct Approach”, *supra* note 89 at 288.



is neither technical nor dense. This distinction is important because the complexity of principles is both necessary and inescapable; it reflects and incorporates the policies and values implicated by the evidence problem. Rule complexity, on the other hand, is not necessary and is escapable; it is often distracting and dispensable, since it encourages judges to focus on technical requirements that are divorced from underlying questions of policy.

### *B. The Additive Method: Layering Principles on Top of Rules*

In contrast to the replacement method, using the additive method to implement the principled approach fails at times to dispense with unnecessary rule complexity. This problem is illustrated in the following two examples, one from the law of prior inconsistent statements and one from the law of hearsay.

The law of prior consistent statements is an example of an area where the courts have added a principled analysis without displacing traditional evidence rules. A long-standing exclusionary rule applies to pre-trial statements by a witness consistent with that witness' testimony on the stand.<sup>96</sup> Several exceptions have been recognized, including the situation where the prior consistent statement is used to rebut an allegation that the witness' testimony was recently fabricated.<sup>97</sup> The Supreme Court of Canada has considered this body of law in several recent judgments, and has begun to introduce a principled analysis emphasizing the reasons for exclusion—i.e., that prior consistent statements are low in probative value<sup>98</sup> and that they might mistakenly be understood as confirmatory of the witness' testimony.<sup>99</sup> Working from these principles, the Court has even recognized that prior consistent statements may be admissible in novel situations, as where the prior statements of a mentally disabled witness formed a part of the narrative of her disclosure that provided

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<sup>96</sup> See e.g. *R v Stirling*, 2008 SCC 10 at para 5, [2008] 1 SCR 272.

<sup>97</sup> See *ibid*.

<sup>98</sup> See *ibid*; *R v Dinardo*, 2008 SCC 24 at para 36, [2008] 1 SCR 788.

<sup>99</sup> See *R v Ellard*, 2008 SCC 27 at para 42, [2009] 2 SCR 19.

context for assessing her credibility.<sup>100</sup> The Court might have gone even further and eliminated the category-based approach entirely, fashioning in its place a principled approach starting from the premise that mere repetition of a story does not normally lend that story credibility<sup>101</sup> but recognizing that various special circumstances exist where repetition legitimately supports the credibility of an assertion. The Court has not, however, chosen to simplify the law in this way. Instead, it has upheld the structure of the rule as an exclusionary one with various stipulated exceptions.<sup>102</sup> To the extent that a principled analysis has been introduced, it has been superimposed on the existing rules.

The second and most prominent example of the additive method of incorporating evidence principles is the treatment of traditional hearsay exceptions under the principled approach. The traditional rule against hearsay, with its multiple categorical exceptions for dying declarations,<sup>103</sup> excited utterances,<sup>104</sup> statements against interest<sup>105</sup> and the like, represented the epitome of rigid and complex evidentiary

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<sup>100</sup> See *R v Dinardo*, *supra* note 100.

<sup>101</sup> See e.g. Christine Boyle, “A Principled Approach to Relevance: the Cheshire Cat in Canada” in Paul Roberts & Mike Redmayne, eds, *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Portland, Or: Hart, 2009) 87 (the law on prior consistent statements reflects the basic idea that “repetition does not make an allegation more credible” at 113).

<sup>102</sup> See *R v Edgar*, 2010 ONCA 529, 101 OR (3d) 161. Justice Sharpe stated in *Edgar*:

I agree with the submission that the gradual abandonment of the traditional “black letter rule–list of exceptions” approach to the law of evidence in favour of the principled approach invites reconsideration of the law relating to the admissibility of an accused’s prior consistent statements. However, in recent decisions, the Supreme Court appears to have maintained the traditional approach to prior consistent statements.

*Ibid* at para 22.

<sup>103</sup> See *R v Aziga* (2006), 42 CR (6th) 42, 73 WCB (2d) 340 (Ont Sup Ct J) [cited to CR].

<sup>104</sup> See *R v Clark* (1983), 42 OR (2d) 609, 1 DLR (4th) 46 (CA).

<sup>105</sup> See e.g. *R v Demeter* (1977), [1978] 1 SCR 538, 75 DLR (3d) 251; *R v Lucier*, [1982] 1 SCR 28, 132 DLR (3d) 244.

regulation.<sup>106</sup> With the advent of the principled approach to hearsay, one might have expected some if not all of the traditional “pigeon-hole”<sup>107</sup> exceptions to the exclusionary rule to be discarded. After all, the Supreme Court recognized early on that the traditional exceptions were based on reliability and necessity, the very same criteria that ground the admission of some hearsay evidence on a principled basis.<sup>108</sup> One might question what value would be added to the principled approach by retaining this complex set of exceptions if they in essence only duplicated the principled analysis itself.

Expectations that traditional hearsay exceptions would be thoroughly reviewed, modernized and some even discarded were fuelled by the Supreme Court’s judgment in *Starr*, where the majority of the Court opted to modify the present intentions exception by adding a reliability-based requirement.<sup>109</sup> Five years later, in *R v Mapara*,<sup>110</sup> however, the Court apparently changed course by upholding unchanged the co-conspirators’ exception to the hearsay rule, despite that exception’s notorious capacity to admit highly unreliable evidence.<sup>111</sup> In *Mapara*, the Court opted to preserve the traditional hearsay exceptions and embed them in the principled analysis, resulting in an overall structure which the Chief Justice summarized as follows:

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<sup>106</sup> See Bryant, Lederman & Fuerst, *supra* note 5 at 4; Archibald, *supra* note 3 at 2-4; *R v U(FJ)*, [1995] 3 SCR 764, 128 DLR (4th) 121 [cited to SCR] (“[t]he hearsay rule and its rigidly formulated exceptions had become a sometimes illogical and frequently confusing series of pigeon-hole categories” at para 20).

<sup>107</sup> *Ibid.*

<sup>108</sup> See *R v Smith*, *supra* note 7 at 928-30.

<sup>109</sup> *Supra* note 83 (adding a requirement that statements of state of mind or present intentions would only be admissible when they were not made under “circumstances of suspicion” at para 168).

<sup>110</sup> *Supra* note 59.

<sup>111</sup> I have written elsewhere that retaining the co-conspirators’ exception could perhaps be justified on pragmatic grounds related to the procedural realities of conspiracy trials, where separating the statements of co-conspirators being tried together is next to impossible. However, the Court in *Mapara* contented itself with a plainly unconvincing argument that co-conspirator statements met the standard of threshold reliability. See Lisa Dufraimont, “*R. v. Mapara: Preserving the Co-conspirators’ Exception to the Hearsay Rule*” (2006) 51:2 Crim LQ 169.

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.<sup>112</sup>

This framework hardly stands out as a model of simplicity. With its reliance on presumptions and multiple routes to admission or exclusion, the principled framework itself adds technical dimensions to the law of hearsay. The exceptions embedded in the principled approach are no longer conclusive (but only presumptive) standards, but they remain rules in the sense that they contain highly specific requirements and low justificatory content. In sum, the adoption of the principled approach to hearsay has preserved the troubling complexity of the former law of hearsay and has exacerbated the problem by adding more layers of technical analysis. The hearsay rule thus furnishes the prime example of the complexity-aggravating tendencies of the additive method.

It should be acknowledged that the decision to retain the traditional exceptions was not without foundation. No doubt, the members of the Supreme Court hoped that maintaining those exceptions would preserve the judicial wisdom on which they were built.<sup>113</sup> The cases on hearsay exceptions contain numerous time-honoured assumptions about what makes out-of-court statements reliable:<sup>114</sup> for example, the dying declarations exception rests on the

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<sup>112</sup> *Supra* note 59 at para 15.

<sup>113</sup> See Currie, *supra* note 65 (“hundreds of years of valuable judicial insight were in danger of being tossed aside for a ‘principled’ exercise that would inevitably produce more *voir dire*s and less certainty” at 221).

<sup>114</sup> See Boyle, *supra* note 103 (“[t]he law of evidence is a rich source of assumptions about human behaviour crystallised into doctrine” at 112).

idea that people are more likely to speak the truth in the face of death,<sup>115</sup> and the excited utterances exception relies on the notion that statements emerging spontaneously and contemporaneously with events carry some assurance of reliability.<sup>116</sup> Justice L'Heureux-Dubé aptly described this set of assumptions in her dissenting reasons in *Starr*: “These exceptions have historically been founded on truisms common to classes of people or common to circumstances applicable to all people. There is no reason why that should not continue to be the case.”<sup>117</sup>

One can hardly find fault with the impulse to maintain the judicial insights coded into the traditional hearsay rule and its exceptions. Still, I would argue that this goal could have been accomplished by eliminating the pigeonhole exceptions as such, while acknowledging the persuasive value of past decisions and well-accepted forms of reasoning on the law of hearsay.<sup>118</sup> In this way, courts could continue to mine the older hearsay cases for the wisdom they contain, without being bound to grapple directly with the complex body of rules comprising the pigeonhole exceptions. Put another way, acknowledging the persuasive value of past decisions would recognize and maintain the richness of hearsay principles as they have developed in the law. Unfortunately, the Supreme Court instead preserved the traditional hearsay exceptions as rules within a principled framework and thereby made the law of hearsay more complex.

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<sup>115</sup> See *R v Aziga*, *supra* note 105 at para 13.

<sup>116</sup> See *R v Clark*, *supra* note 106.

<sup>117</sup> *Supra* note 83 at para 54.

<sup>118</sup> For example, a court would be able to find some assurance of reliability in the fact that the hearsay declarant made the statement in the face of death without applying the technical requirements of the dying declarations exceptions as the Court did in *R v Aziga*. *Supra* note 105.

## Conclusion

Excessive complexity in evidentiary regulation carries real costs in terms of the comprehensibility of the law, its ease of application, and even its perceived legitimacy. The law of evidence should operate as a tool in the pursuit of truth, fairness and other crucial justice system objectives. When the rules are dense and technical, however, they all too often become an obstacle in the pursuit of the objectives they are intended to serve. Ultimately, appellate courts and evidence commentators alike should recognize that there is a limit to what we can expect from busy lawyers and trial judges. We can expect them to apply evidence law in a way that is mindful of its justifications, or we can expect them to apply dense and technical evidence rules, but we can hardly expect them to do both. The complexity of evidence rules should no longer be allowed to impede a principled analysis.

On the whole, the introduction of the principled approach represents a major advance in the Canadian law of evidence. The rigidity of the entire field of law has been reduced, and the consistent focus on the rationales behind the rules has meant that admissibility decisions are now more likely to further the law's underlying policies. In some areas, the principled approach has led to the welcome simplification of evidence law, thinning out or sweeping away dense and technical rules and replacing them with balancing tests based on principles. The law of lay opinion, the distinction between threshold and ultimate reliability, and the law of similar facts all provide examples of where this replacement method has worked well. In these areas, the doctrinal structure of the law has been simplified and its engagement with the underlying policies has been enhanced. In other areas, most importantly the traditional exceptions to the hearsay rule, the courts have used the additive method of piling principles atop a complex set of rules. That method can keep judges distracted by the technical requirements of antiquated rules and exacerbate the troubling complexity of the law of evidence.

No one suggests that the principled approach will make the law of evidence easy to learn or apply. The law of hearsay can never be reduced to the bald proposition that hearsay should be excluded

unless necessary and reliable, and the law of expert evidence can never be boiled down to a simplistic notion that experts should be allowed to testify where their testimony is relevant and necessary to assist the trier of fact. The multiplicity and subtlety of the policies at stake make that kind of simplicity an unattainable and indeed an undesirable goal. On the other hand, holding on to dense and technical rules from another era impedes the full development of the principled approach. The Supreme Court of Canada has shown itself capable of providing ample guidance to give colour and content to the principles of evidence. Our evidence law needs a fullness of such principled guidance, not a surfeit of complex rules.