R v. Hart: A Welcome New Emphasis on Reliability and Admissibility

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The purpose of the law of evidence is to promote the search for truth in a fair and constitutional manner. It largely accomplishes this dual purpose through regulation of the relevant actors from the police, lawyers, and witnesses to the triers of fact. That regulation takes the form of rules of exclusion, competency requirements, limiting instructions,[1] minimum constitutional standards and a healthy dose of judicial discretion. In *R v. Hart*,[2] the Supreme Court was confronted with an evidence-gathering methodology that triggered concerns about both the search for truth (wrongful convictions) and fairness (abusive state conduct).[3] However, it was a methodology that had escaped regulation through the law of evidence because neither the common law voluntariness or constitutional right to silence rules were triggered by the undercover police work.[4] The Supreme Court in *Hart* recognized that some judicial regulation was necessary through a "principled rule of evidence."[5]

Perhaps the most concise and coherent description of the theory of Canadian evidence law emerges from *Mitchell v. Minister of National Revenue*,[6] a case which dealt with the admissibility of oral history evidence in Aboriginal treaty cases. Surprisingly, *Mitchell* has never been cited in a

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[1]See Lisa Dufraimont, "Limited Admissibility and its Limitations" (2013) 46 UBC L Rev 241.

[2]2014 SCC 52 (S.C.C.), reported above at p. 221 [*Hart*].

[3]The RCMP "Mr. Big" stratagem is described in detail in *Hart*, *ibid* at paras. 56 to 61.

[4]*Ibid* at paras. 63-64.

[5]*Ibid* at para. 10.

[6][2001] 1 S.C.R. 911 (S.C.C.) [*Mitchell*].

criminal evidence case and it was unfortunately not referred to in *Hart*. In one short paragraph, Justice McLachlin, as she then was, held:

> . . . the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475 at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. *Underlying the diverse rules on the admissibility of evidence are three simple ideas*. *First*, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. *Second*, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. *Third*, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.[7]

The Court further held that in applying a principled approach to evidence, courts have to be culturally competent[8] and safeguard against bias and recognize the relevant lived experiences. Justice McLachlin held:

> In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective.[9]

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[7] *Ibid* at para. 30 [emphasis added].

[8] Cultural competence has been defined as one's ability to (1) recognize "an awareness of humans, and oneself, as cultural beings who are prone to stereotyping; (2) acknowledge the harmful effects of discriminatory thinking and behaviour upon human interaction; and (3) acquire and perform the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice." See Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2005) 85 Can Bar Rev 563 at 564.

[9] *Mitchell*, *supra* note 6 at para. 34. The Supreme Court has recognized the need for cultural competence in other contexts involving the law of evidence. For example, cautioning against using adult lenses to assess the evidence of children (see *R. v. B. (G.)* (1990), 56 C.C.C. (3d) 200, 77 C.R. (3d) 347 (S.C.C.) at 219-220 [C.C.C.]; *R. v. W. (R.)* (1992), 74 C.C.C. (3d) 134, 13 C.R. (4th) 257 (S.C.C.); *R. v. F. (C.)* (1997), 11 C.R. (5th) 209 (S.C.C.) at 227) and interpreting the rules to ensure that the evidence of witnesses with intellectual disabilities is

Although he did not cite *Mitchell*, Justice Moldaver, for the majority, approached the Mr. Big issue in a similar fashion. He imposed a burden on the Crown to establish that the probative value of a Mr. Big confession outweighs its prejudicial effect. Part of that determination includes an assessment of reasonable or threshold reliability.[10] The Court also recognized that in assessing reliability and probative value, it is necessary to take into account the relevant vulnerabilities of the target, including social and economic isolation, age or mental illness, which is the essence of a culturally competent approach to evidence.[11]

By implicitly adopting *Mitchell*'s theory of evidence and placing reliability at the forefront of admissibility, *Hart* has significant implications for other evidence where reliability and wrongful convictions are live issues. This would include, for example, identification evidence, tainted evidence (e.g. police evidence that appears to be the product of notes collaboration), coerced confessions by the accused to a third party, and informer evidence.[12] In these cases, the concern with prejudicial effect is not the same as in *Hart* where the primary issue was moral reasoning prejudice that may be triggered given the nature of the Mr. Big scena-

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heard in court (see *R. v. I. (D.)*, [2012] 1 S.C.R. 149, 89 C.R. (6th) 221 (S.C.C.)).

[10]*Hart*, *supra* note 2 at paras. 85, 94–99. As he put it, "[i]n this context, the confession's probative value turns on an assessment of its reliability" (at para. 85).

[11]*Ibid* at paras. 102-103, 133.

[12]See, in particular, the discussion in Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 Criminal Law Quarterly 210; and Lisa Dufraimont, "Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions" (2008) 33 Queen's Law Journal 261.

rio.[13] Rather the concern is with reasoning prejudice.[14] As Justice Doherty observed in *R. v. Frimpong*:[15]

> Evidence is prejudicial in the relevant sense if it threatens the fairness of the trial. Evidence may be prejudicial if it cannot be adequately tested and challenged through cross-examination and the other means available in the adversarial process.[16]

Historically, reliability has often been treated as a question going to weight rather than admissibility.[17] So, for example, in *R. v. Hodgson*,[18] Justice Cory observed that "the quality, weight or reliability of evidence is a matter for the jury, and that the admission of evidence which may be unreliable does not per se render a trial unfair: see, e.g., *R. v. Buric* (1996), 28 O.R. (3d) 737 (C.A.); aff'd [1997] 1 S.C.R. 535, and *R. v. Charemski*, [1998] 1 S.C.R. 679."[19] Indeed, in 2006, Kent Roach was highly critical of the traditional position in light of our history of wrongful convictions:

> Rules concerning the admissibility of evidence, as well as the protection of wrongful convictions, are matters within the inherent domain of the judiciary. . . . [C]oncerns about reliability should factor into

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[13]See the discussion in *Hart*, *supra* note 2 at para. 106.

[14]See Hill, Tanovich & Strezos, *McWilliams Canadian Criminal Evidence* (5th ed) (2014) at 5–17.

[15](2013), 1 C.R. (7th) 242 (Ont. C.A.) [*Frimpong*].

[16]*Ibid* at para. 18. See also, *R. v. Candir* (2009), 250 C.C.C. (3d) 139 (Ont. C.A.) [*Candir*], where Justice Watt held at para. 59:

> Introduction of the evidence may involve a significant expenditure in time, not commensurate with the value of the evidence. The evidence may mislead because its effect on a trier of fact, especially a jury, may be disproportionate to its reliability: *R. v. Mohan*, [1994] 2 S.C.R. 9 at pp. 20-21; *R. v. Khelawon*, [2006] 2 S.C.R. 787, at para. 3; *R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.), at para. 57.

[17]For a detailed discussion of this issue, see Hill, Tanovich & Strezos, *supra* note 14 at 5:20.50.30 The Reliability of Evidence.

[18][1998] 2 S.C.R. 449, 18 C.R. (5th) 135 (S.C.C.) [*Hodgson*].

[19]*Ibid* at para. 21.

> the assessment of both the probative value of the evidence and its possible prejudice to the accused.[20]

Since *Hodgson*, there have been retreats from this position with courts prepared to recognize the relevance of threshold reliability in determining admissibility in cases involving in-dock identification evidence,[21] Reid-technique generated confessions,[22] statements by an accused to persons not in authority,[23] and otherwise admissible hearsay evidence.[24] That said, there has been inconsistency[25] and some retention of the traditional rule, for example, in cases involving jailhouse informers.[26]

This retreat, however, has largely been led by our appellate courts and not the Supreme Court.[27] *Hart* is now the most explicit and highest au-

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[20]Roach, *supra* note 12 at 214.

[21]See *Frimpong*, *supra* note 15 at para. 18; *R. v. Tebo* (2003), 175 C.C.C. (3d) 116, 13 C.R. (6th) 308 (Ont. C.A.); *R. v. Holmes* (2002), 169 C.C.C. (3d) 344, 7 C.R. (6th) 287 (Ont. C.A.) at 358-59 [C.C.C.]; *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193 (Ont. C.A.) at 237-38.

[22]See *R. v. Pearce*, 2014 MBCA 70 (Man. C.A.) at para. 62.

[23]See *R. v. Wells* (2003), 174 C.C.C. (3d) 301, 12 C.R. (6th) 185 (B.C. C.A.).

[24]In particular, *R. v. Humaid* (2006), 37 C.R. (6th) 347 (Ont. C.A.) at para. 57 and *Candir*, *supra* note 16. *Humaid* was quoted with approval in *R. v. Blackman*, [2008] 2 S.C.R. 298, 57 C.R. (6th) 12 (S.C.C.) at para. 51 [*Blackman*]. This part of *Blackman* is discussed *infra* at note 27.

[25]See *R. v. Wang* (2001), 153 C.C.C. (3d) 321 (Ont. C.A.) at 331–333.

[26]See *R. v. Duguay* (2007), 50 C.R. (6th) 378 (N.B. C.A.) at 395–401. In her Annotation of *R. v. Duguay* (at 380), Professor Lisa Dufraimont observes that "*Duguay* represents a step in the opposite direction . . . Preventing judges from considering credibility and reliability under the rubric of probative value moves the law toward a category-based approach to the trial judge's discretion to exclude." See also, Professor Dufraimont's criticism of the current state of the law in "*R v. Henry* and the Problem of the Weak Identification Evidence Case" (2011) 80 CR (6th) 81.

[27]The one exception being *Blackman*, *supra* note 24 at para. 51, where the Supreme Court was prepared to slightly open the door to assessing reliability as part of probative value in the context of hearsay evidence. Justice Charron accepted that there may be a rare case in which the credibility or reliability of the recipient or narrator of the out-of-court statement is so deficient that its prejudicial effect will outweigh its probative value. Justice Moldaver relies on *Blackman* in support of his approach. See *Hart*, *supra* note 2 at para. 97.

thority on point. It has returned the law of evidence to first principles. The search for truth and justice are impeded by unreliable evidence and *Hart* and *Mitchell* make it clear that trial judges have an obligation to be the gatekeeper and regulate its admission. It now seems clear that where there is reason to be concerned about the reliability of a particular type of evidence, a trial judge must now ensure that there is sufficient threshold reliability in the particular case to give the evidence the necessary probative value to warrant its admission.