To Serve the Cause of Justice: Disciplining Fact Determination

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TO SERVE THE CAUSE OF JUSTICE: DISCIPLINING FACT DETERMINATION

by
Christine Boyle and Marilyn MacCrimmon*

As a part of a larger project called "The Challenge of Change: Rethinking Law as Discipline," Professors Boyle and MacCrimmon seek "to identify and examine current challenges to the conceptual underpinnings and methodology of the traditional legal paradigm." In focusing on the construction of "fact," the meanings of knowledge and the interplay between cultural understandings and the law of evidence, the authors note that the shifting boundaries of the discipline of law are engendering debates about what is marginal and what is core. They draw on challenges posed by the increasing diversity of producers and consumers of law in searching for the core idea of what lawyers do in contrast to, for instance, anthropologists, and argue that a core idea of law is to engage in legal reasoning that pays attention to the value of human rights in their broadest sense. In examining methods whereby the knowledge which grounds legal factual determinations can be made consistent with fundamental human rights such as equality and access to justice, the authors draw on a variety of legal topics-Aboriginal rights claims, sexual assault, contracts and self-defence.

1. INTRODUCTION

The research for this paper was funded by a grant devoted to a larger project entitled "The Challenge of Change: Rethinking Law as Discipline," based at the Faculty of Law of the University of British Columbia. This project "seeks to identify and examine current challenges to the conceptual underpinnings and methodology of the traditional legal paradigm characterized by a belief in the autonomy, neutrality and objectivity of law."2 The focus of this paper is, therefore, on that theme as it applies to the law of evidence and the process of fact determination. What are the challenges to the conceptual underpinnings and methodology of law in this context? What should "discipline" legal reasoning about fact determination and, in turn, the process of fact determination in itself?

We are here using the concept of discipline to mean a sort of methodological superstructure which shows what law is, in contrast both to other academic disciplines and to reasoning, such as intuition, unstructured by rules or assumptions about validity. Disciplines involve shared ways of thinking and talking. Disciplines define some questions as interesting and relevant, some as tedious, tangential or a waste of time. They define which rule must be strictly followed and which permits the exercise of discretion.

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1 The authors wish to express their thanks to the University of British Columbia Hampton Fund for Research in the Humanities and Social Sciences as well as to Lisa Gill, Monique Pongracic-Speier and Bennett Wong.


(2001), 20 Windsor Yearbook of Access to Justice
Disciplines have their own methods of framing and solving problems, what J.R. Balkin refers to as “tools of understanding”; “[the] world begins to resemble and seems to be organized around the intellectual tools that lay to hand. As the saying goes, when all that you have is a hammer, everything starts to look like a nail.”\textsuperscript{3} An example of a law “hammer” could be framed as “look to the past.” Another could be framed as “pay attention to hierarchy” (for instance in terms of legislation over case law, or appeal over trial courts). For Balkin:

> Academic disciplines ... are about authority, and in particular, about authority within particular groups of persons who think alike through training and discipline.\textsuperscript{4}

He defends this concept against the charge that it is authoritarian:

> At first glance, this might seem a rather authoritarian vision of disciplines and disciplinarity, a sort of academic bondage ... But quite the opposite is the case. For the authority of discipline is not the enemy of reason. It is its fountainhead. A discipline organizes and empowers thought. It makes having certain kinds of thoughts possible. Disciplines create forms of reasoning by the very organization they impose on the mind. Disciplined thought is organized thought, and the flip side of its organization is a necessary degree of structuring and preconception. It could not be otherwise, for an undisciplined mind would be unable to proceed very far.\textsuperscript{5}

It makes sense to assume that students will be most conscious of the methods of a new discipline when they are first exposed to it, such as in the first year of legal education. A description of the discipline of law in that context, and which still may resonate for many, can be found in the work of Karl Llewellyn:

> The first year ... aims to drill into you the more essential techniques of handling cases ... . The hardest job of the first year is to lop off your common-sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.\textsuperscript{6}


\textsuperscript{4} Ibid. at 954.

\textsuperscript{5} Ibid. at 955. This is an interesting comment in this context, since we will argue below that fact finding is relatively undisciplined and yet fact finders routinely proceed to complete their fact finding jobs.

This may suggest a monolithic view of what the discipline of law requires. But disciplines also frame their own debates about what counts as knowledge legitimately created on their terms—what is good rather than “junk” science, what counts as valid anthropological method, what is “legal” reasoning, and so on. For instance, anthropologists identify two types of knowledge—emic and etic:

Emic constructs are accounts, descriptions, and analyses expressed in terms of the conceptual schemes and categories regarded as meaningful and appropriate by the native members of the culture whose belief and behaviors are being studied. Etic constructs are accounts, descriptions and analyses expressed in terms of conceptual schemes and categories regarded as meaningful and appropriate by the community of scientific observers.7

Such debates are echoed within the discipline of law. Differing views about anthropological methods have relevance to and are reflected in judicial attempts to evaluate oral history evidence offered to prove Aboriginal rights. Thus anthropologists distinguish folk history from ethnohistory:

[T]he aim of ethnohistory is to explain what happened in terms that make sense to us ... [T]he contrast in folk history is that one attempts to find out how members of society explain why things happened the way they did. Thus the methodology of ethnohistory is essentially ‘etic,’ while the methodology of folk history is essentially ‘emic.’8

In Delgamuukw v. British Columbia, a leading case on Aboriginal land claims and the law of evidence in relation to such claims, the First Nations claiming Aboriginal title introduced oral history evidence of their social structure, customs, laws and attachment to the land.9 The trial judge rejected the oral histories “because they were not ‘literally true’, confounded ‘what is fact and what is belief,’ included some material which might be classified as ‘mythology,’ and projected a ‘romantic view’ of the


history of the appellants.”10 In a sense the trial judge’s method of analysing of oral history in Delgamuukw could be said to resemble an ethnohistorical approach in that he interpreted the oral histories “in terms that made sense to him”11 while the Supreme Court of Canada’s holding that oral history must be given independent weight requires legal decision makers to take into account how Aboriginal peoples “order their historical experiences” and “to recognize [Aboriginal peoples] for who they are.”12

Indeed the debate in law goes deeper in that not only do judges hearing oral history have to take a position on how to value or weigh it, but where they hear evidence from experts such as anthropologists or historians, in a sense they are called upon to judge the very methods of other disciplines. For instance, the trial judge in Delgamuukw assigned little weight to the evidence of anthropologists whose studies were based on the method of participant observation, although this is an accepted method in anthropological study.13 In his view, the close association between the First Nations and the anthropologists evidenced a bias in favour of First Nations.14 On appeal, the Supreme Court of Canada refused to revisit the trial judge’s rejection of the evidence holding that “findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts.”15 Similarly, in R. v. Marshall, the Supreme Court acknowledged criticism from “professional

10 Ibid. at para. 97. The trial decision in Delgamuukw was the subject of extensive commentary. Many commentators criticized the judgment as failing to take the perspective of Aboriginal peoples into account and in particular for giving no weight to the oral history evidence. See e.g., J. Cruikshank, “Invention of Anthropology in British Columbia’s Supreme Court: Oral Tradition as Evidence in Delgamuukw v. B.C.” (1992) 95 B.C. Stud. at 25; D. Culhane, The Pleasure of the Crown: Anthropology, Law and First Nations (Burnaby: Talon Books, 1997); A. Mills, Eagle Down is our Law: Witsuwit'en Law, Feasts, and Land Claims (Vancouver: University of British Columbia Press, 1997). For a legal perspective see G. Sherrott, “The Court’s Treatment of the Evidence in Delgamuukw v. B.C.” (1992) 56 Sask. L. Rev. 441. In contrast Alexander von Gemet concluded that the historical interpretations of the trial judge while “problematic, [were] not at all uncommon in the academic world,...” von Gemet, supra note 8 at 21.

11 See e.g., Mills, ibid. at 28-29 (contrasts the trial judge’s interpretation of a trader’s report that natives were naked as meaning the natives wore no clothes with an interpretation based on the culture of traders in the 1820’s with its beliefs about what constituted proper dress, which would view someone in a loin cloth or skirts as naked).


14 Delgamuukw v. B.C. (1991), 79 O.L.R. (4th) 185 at 248-51 (B.C.S.C.). The trial judge partly based his dismissal of the expert evidence on the Statement of Ethics of the American Anthropological Association which states that “[A]n anthropologist’s paramount responsibility is to those he studies.” See M. Asch, “Errors in Delgamuukw: An Anthropological Perspective” in F. Cassidy, Aboriginal Title in British Columbia: Delagmuukw v. R. (Lantzville, B.C.: Oolichan Books, 1992) 221 at 237, (responds to the criticism that anthropologists were biased due to their ethical commitment to give paramount responsibility to those he or she studies on the basis it is taken out of the context of an ethical code that is designed to ensure “rigour and comparability of results”).

15 Supra note 9 at para. 91.
Disciplining Fact Determination

Disciplining historians for what these historians see as an occasional tendency on the part of judges to assemble a 'cut and paste' version of history.”\textsuperscript{16} The Court's response was that, while the historical method requires that historians be open to revising their views in the light of new evidence and that in the discipline of history “finality ... is not possible”:

[t]he reality ... is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.\textsuperscript{17}

Disciplines can of course tolerate, and indeed thrive on, internal debates about method. However, at one end of the spectrum of such debates are the most dramatic challenges to any discipline. Such challenges can arise when there is serious lack of consensus about the very existence of a set of boundary-setting, methodological and legitimacy creating rules. In our view, it is the case today that law faces such a dramatic challenge. Increasingly diverse bodies of legal knowledge producers, users and consumers (as well as learners) are generating “... diverse notions about what is most worth teaching, studying and discussing”\textsuperscript{18} so that concepts of both what is marginal and core are contested. Indeed, what counts as legal knowledge or legal analysis at all is a matter of debate.

In this paper, we argue that this diversity-fuelled challenge, in itself, can be used as a source of a core idea of what it is that lawyers do, in academic distinction to, say, anthropologists or historians, or, in institutional distinction, to a society lacking an independent judiciary or bar, or even a segment of the public trained to think in terms of fundamental human values. We say that to engage in legal reasoning is to be attentive to human rights, in the broadest sense—that legally-trained people, that is those who understand and are committed to the concept of the rule of law, reflect the investment society makes in insurance against tyranny and injustice. This can be expressed in terms, familiar to lawyers, of professional responsibility. For example, the Law Society of British Columbia, in its Canons of Legal Ethics, says that “it is a lawyer's duty ... to serve the cause of justice.”\textsuperscript{19} We take the view that the discipline of law requires attention to the very values, in particular such values as human dignity and equality, which form the basis of the criticism that individual laws or legal practices fail to live up to those values. In that the very essence of lawyering requires attention to such values it can be said that people who are not so attentive are doing something that is perhaps legalistic but not law.

\textsuperscript{17} Ibid. at para. 38.
The work of Richard Weisberg on lawyers in Vichy, France provides an illustration:20

For several years I have been examining the way in which lawyers spoke during the stressful period of French history known as “Vichy” (1940-1944). Here I will present a variety of empirical data and make a disturbing claim arising from that data: that a loose system of institutionally acceptable professional rhetoric [including about the admissibility of evidence] caused (as much as did the terror or influence of German occupation) the definition, identification, and eventual destruction of tens of thousands of Jews—for the majority (but not the entirety) of such legal rhetoric was unchecked by any interpretative model that would have permitted recourse to certain foundational beliefs [such as inequality] to evaluate and constrain itself.21

An example closer to home could be a lawyer acting for the Crown asking, “How can I use the technical tools of law to avoid my client’s obligation to act honourably toward Aboriginal peoples” rather than “How can I advise my client to act honourably toward Aboriginal peoples” or “How are my ethical obligations as a lawyer affected by my client’s obligation to act honourably towards another party in litigation.” We realize there is a fine line here, between legitimate debate about what the honour of the Crown requires and a process of reasoning which permits neglect of that obligation but, in our view, there is a line there which sets a fundamental boundary on the discipline of law.22

In other words, we are not of the view that “to be a lawyer is to vacate the ordinary domain of ethical judgement and to inhabit a perverse world of normative disingenuity” or that “the hallmark of good lawyers is ... their cultivation of rule-craft.” Rather, we agree with Allan Hutchinson that, instead of “passive and technical involvement,” “[c]hoice and responsibility for those choices, are part and parcel of lawyering.”23

In particular, and in tune with our published work to date (one of us in the field of evidence law and one in the field of criminal law), we see attention to the fundamental value of equality as at the core of what it means to analyse issues within the discipline of law. It is with a sense of lawyers as the guardians of equality that we turn to the law of evidence to examine its responses to claims of disadvantage in the fact-finding process.

The law of evidence is a useful vehicle for considering this core element

21 Ibid. at 144.
22 The focus of this paper is not on an analysis of that boundary, and indeed it may be enough for our purposes to say that the more attentive legal analysis is to fundamental values the more disciplined and law-like it is.
Disciplining Fact Determination

It is becoming more law-like in its increasing focus on basic principles in terms of doctrine and its increasing regulation of the anarchic process of fact finding. In assessing such developments from a standpoint of considering whether they make law more or less disciplined in its focus on such a fundamental value, we draw on examples from a variety of topics—Aboriginal rights claims, sexual assault, contracts and self-defence.

Having approached this examination through a sense of the discipline of law as a superstructure, we turn to evidence rules as a second-level methodology or set of "tools of understanding" for determining knowledge—they filter the information that can be considered by the decision maker, determine its form and, to a limited extent, regulate its use. Studying them may provide some sense of the core of lawness, attention to fundamental values such as equality, that we suggest above.

[E]videntiary rules reflect epistemological assumptions ... . They identify valid data, specify how the data should be presented, and guide our evaluation ... . The rules of evidence specify who can be a source of knowledge (rules of witness competency), the test to identify which beliefs qualify as knowledge (exclusionary rules, burdens of proof), what kinds of things can be known (subjective beliefs are knowledge), methods of verification (rules on credibility and corroboration), etc.

Our consideration of the law of evidence takes place in a particular context. There are certain obvious elements that are challenging the law of evidence to change at the turn of the century. They are all interconnected as well as connected to access to justice: the increasing diversity of producers and consumers of law mentioned above, the increasing interdisciplinarity, both in the academy and in the profession, the increasing muscularity of constitutional rights such as equality, the increasing scholarly and judicial attention to (as well as appellate control over) common sense reasoning in fact determination and the shrinking role of the paradigm of the criminal trial by jury in a world with many different institutional contexts in which facts have to be determined.

Precisely because, on an ideal level at least, lawyers are disciplined to be attentive to fundamental values, the evidentiary "tools of understanding" are changing to meet the challenges of a recognizably diverse society. One consequence of these challenges is increased attention to the process of fact determination and in particular to the question: Whose social knowledge or

24 Thanks to Victoria Gray for her reaction to "lawness" as a Joycean word for the essense of law. See “Horseness is the whatness of allhorse.” James Joyce, Ulysses, Lestrygonians quoted at: http://www.concordance.com/joyce.htm (select Ulysses and on the next page enter “horseness”).
25 Balkin, ibid. at c. 1.
27 Ibid. at 388.
28 For example, the current interest in the use of mediation and the increasing use of international and transnational bodies such as international criminal courts.
world views will ground findings of fact? The criticality of this question is highlighted when the law adjudicates disputes between different cultures as in Aboriginal cases. The debate about social knowledge, however, is not so limited, but is central whenever persons with differing world views are seeking “justice.” Research on the process of fact determination in law shows that those groups whose world view ground factual determinations are the beneficiaries, according to Andrew Taslitz, of “... social resources, like physical freedom, money and other kinds of power ... often at another group’s expense.”

In other words, law as a discipline affects the rules which, in turn, disciplines the process of fact determination. Lawyers are becoming more self-conscious about this process, the ways that the law of evidence affects that process and that “our knowledge about ‘truth’ is conditioned by the culture to which we belong and our historical circumstances ...” In some instances, the law is becoming more open to stories of oppression and doctrine is emerging to facilitate the incorporation of those stories into fact determination. It can no longer simply be asserted that “facts are facts.” Facts are constructed and the law is beginning to discipline that construction to be egalitarian.

Against this background, we discuss some of the ways law disciplines fact determinations. How does law maintain uniform interpretive practices? What is the role of other disciplines in these challenges? We will examine three aspects of interpretive practices in legal factual determination:

1. The distinction between law and fact. When is an issue the subject of factual determination rather than substantive legal reasoning?
2. Pathways to social context. When can a fact finder examine the factual background or context of an issue, in particular evidence of social disadvantage in that context?
3. The control of relevance reasoning. When is common sense reasoning subject to regulation?

II. THE DISTINCTION BETWEEN LAW AND FACT

The classification between law and fact has been fundamental to the evolution of the law governing the processes of fact determination. On a most basic level, a judge decides legal questions and a jury decides factual questions. The resolution of legal questions is governed by conventions of legal reasoning, while the resolution of factual questions is relatively unregulated. Adrian Zuckerman describes the traditional view of the distinction between legal and factual reasoning as follows:

... [L]egal reasoning [proceeds] according to normative rules laid down by the lawmaker or by morality .... By contrast, in factual reasoning, it is sup-

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30 Supra note 26 at 385.
posed, we are not concerned with what the rules of law or morality require but with what facts exist. To ascertain the facts, it is said, we only have to follow the forms of reasoning which are employed for this purpose in any form of factual inquiry.31

The decision whether to classify a matter as law or fact is, to a great extent, unregulated, falling between the stools of substantive and evidentiary analyses. While the allocation may be random or driven by social or political forces, it is possible to find some clues to what disciplines that allocation. Closest to the surface may be institutional concerns about the appropriate decision-maker, concerns most easily expressed in traditional terms as lack of confidence in juries. For instance, is the interpretation of contracts a matter of law or fact? Little attention has been paid to this issue, but the dominant view seems to be that interpretation of written contracts is a matter of law, while interpretation of oral contracts is a matter of fact.32 This distinction may be grounded in a fear that juries would not be able to recognize the trustworthiness of a written document, a concern not present with respect to oral agreements.

There is increasing awareness, however, that the choice may affect fundamental values such as equality and access to justice. Whether a matter is classified as law or fact has consequences, for instance, for the burden of proof in terms of who benefits from the status quo. The choice is not a simple one, but requires analysis of the consequences to those affected. In some instances, classifying an issue as factual will be more disciplined if it reflects a commitment to fundamental values. For example, seeing an issue as factual may reflect equality in the form of valuing diversity in being open to different outcomes. In other situations, classification as law is the more "disciplined" choice. For instance, classification of an issue as a matter of law may be seen to be more disciplined in that there is less opportunity for the operation of inegalitarian social knowledge.

The law of sexual assault provides a very clear example of both the importance of the classification of an issue as legal or factual and the shift-

32 See e.g., J.H. Wigmore, Evidence in Trials at Common Law, Volume 9, rev. by J.H. Chadbourn, (Boston: Little, Brown and Company, 1981) at 684: “[t]he construction of all written instruments belongs to the court” (emphasis in original); Sir Christopher Staughton, “How Do the Courts Interpret Commercial Contracts?” (1999) 58 Cambridge L.J. 303, the “meaning of a written contract is a question of law for the judge, and not a question of fact for the jury; the opposite rule applies to an oral contract. That is strange law. But as contract disputes are never now tried by a judge and jury, I leave the reader to ponder…over the logic of saying that the meaning of a contract is a matter of law.” See K. Lewison, The Interpretation of Contracts (London: Sweet & Maxwell, 1989) at 52: “The proper construction of a contract is a question of law. However, the ascertainment of the meaning of a particular word is a question of fact.” See also K.A. Rowley, “Contract Construction and Interpretation: From the “Four Comers” to Parol Evidence (And Everything in Between)” (1999) 69 Miss. L.J. 73 at 91: “[i]f a contract is clear and unambiguous, its meaning and effect are matters of law which may be determined by the court, and which should be enforced as written” and R. Braucher, “Interpretation and Legal Effect in the Second Restatement of Contracts” (1981) 81 Colum. L.R. 13 at 16: “[i]nterpretation is directed to the meaning of the terms of the writing, not to the meaning of the conversations of the parties, and it is treated as a matter of law unless it depends on extrinsic facts.”
The meaning of consent to sexual contact has been contested for some time, including on the level of whether its content is primarily factual or legal. A familiar example is the question of whether a woman who says no may nevertheless be consenting. If this issue is approached as a factual one then it is possible for a judge or jury to decide that “no can mean maybe” or, presumably, yes. If it is approached as a legal issue, then it is open to the law, on a normative level, to take the position that “no means no” and that, therefore, a complainant who said no has not consented as a matter of law. Indeed, for some time it looked as if this normative determination of when it is legal to touch someone sexually had been achieved by Parliament in its most recent reforms of the law of sexual assault (commonly known as Bill C-49), specifically s.273.1(2)(d) of the Criminal Code, which states that no consent is obtained ... where

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity [sometimes called the “no means no” provision].

The contrast between analysing the meaning of no as a factual or a legal issue, as well as the implications for the status of women, can be illustrated by reference to the majority and dissenting judgments at the Alberta Court of Appeal level in R. v. Ewanchuk. This was a sexual assault case in which the significant facts, for the purpose of this discussion, were that the complainant said no to the accused several times. He would then stop and then start touching her again. Nevertheless, the accused was acquitted at trial on the basis of implied consent. The Crown appealed unsuccessfully to the Court of Appeal but successfully to the Supreme Court of Canada. At the Court of Appeal, the majority saw the issue as one of fact and that it was being invited to overturn findings of fact for which there was evidentiary support. Fraser C.J.A., in dissent, saw the issue as involving a misunderstanding by the trial judge of the legal meaning of consent under s.273.1(1) of the Criminal Code. Her analysis was grounded in the relevant statutory provisions as opposed to a factual analysis of the significance of the complainant’s “nos.”

In this context, the classification of the issue as a legal one (albeit with a need for factual determinations such as whether the complainant actually said no) has significant advantages for women, the primary targets for sexual assault. The legal definition controls the operation of social knowledge by minimizing the possibility of discriminatory assumptions about the sexual accessibility and mendaciousness of women (such as willing women pretending to be unwilling). Thus, the shift from fact to law is an attempt to

33 Of course, whether or not she said no is uncontroversially a question of fact.
37 Ibid. at 337. The case became somewhat notorious for McClung J.A.’s factual characterizations of the complainant, for instance, that she did not present herself “in a bonnet and crinolines.”
Disciplining Fact Determination

regulate social knowledge by eliminating “archaic myths and stereotypes about the nature of sexual assaults ...”38 Legal rulings become more appealable. As well, the understanding that the concept of consent is controlled by law, not individual assumptions about human behaviour, leads to the understanding that mistakes as to consent can be mistakes of law. If “no means no” as a matter of law, it is a mistake of law for an accused to believe that when the complainant said “no” that she did not mean “non-consent” because she said no with a smile.39

Proponents of increased legal control of the meaning of consent were well aware of such advantages as they pressed for reform of sexual assault law. For example, in her discussion of the consultations leading up to the enactment of Bill C-49, Sheila McIntyre refers to the awareness of the need “to reform the substantive law that allows male-centered stereotypes and myths about women and women’s sexuality to define the criminality of male violence.”40

Interestingly, the shift from fact to law has not been stable, since the Supreme Court of Canada developed a new analysis of sexual assault in R. v. Ewanchuk.41 There are a number of very positive elements to Ewanchuk. The decision maintains the recognition that the meaning of consent is fundamentally a matter of law, and thus reviewable by appeal courts. It recognizes that some mistakes, for instance that silence constitutes consent, are mistakes of law and thus no defence. However, the case also restores a significant element of fact-based analysis to the concept of consent, given that the test for whether the complainant consented is a subjective one about her state of mind and “a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct.”42 Thus, while the case says there is no implied consent in law, a trial judge could reach what is, in effect, an implied consent conclusion as a matter of fact. Thus, “you say you did not consent, but given your behaviour I have a doubt about whether to believe your testimony about your state of mind.”

So it is difficult to be sure about whether Ewanchuk is positive or negative, in terms of the fact/law distinction, with respect to its implications for sex equality. The Court treats s.273.1 of the Criminal Code (which includes some of the more recent reforms such as the “no means no” provision) as relating to mistaken belief in consent rather than consent. Since the “no means no” rule does not control the legal meaning of consent, it is possible that a judge could, as suggested above, find the complainant’s assertion that “no” reflected her non-consenting state of mind to be lacking in credibility. This would undermine feminist arguments that “no” means non-con-

39 See e.g., ibid. at para. 51 where Major J., speaking for the majority, said that “a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence.”
41 Supra note 38.
42 Supra note 38 at para. 17-18.
sent as a matter of law. However, this may not be of practical significance given the strong statements that mistakes as to “no” meaning “yes” are mistakes of law. Nevertheless, at the moment, Ewanchuk seems to leave open the odd scenario that the Crown might not be able to prove non-consent, but could disprove mistaken belief in consent.

We wonder if the Supreme Court of Canada considered the implications of stressing the “fact” content of the concept of consent, and would prefer to see more disciplined, in the sense of conscious, attention paid to the implications of any shift in fact/law classifications.

The Supreme of Canada’s decision in Delgamuukw v. B.C., referred to above, is an instance in which the consequences of law/fact classification were only partially addressed. In Delgamuukw, the Court held that Aboriginal rights depend on factual questions about pre-contact practices of the Aboriginal peoples and placed the burden on them to establish these facts in each case. The process whereby Aboriginal rights are made questions of fact is not set out or analyzed by the Court. However, the Court did recognize that the factual test would be an almost impossible one to satisfy unless oral history evidence of Aboriginal peoples was put on “an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.”

In determining whether an Aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive Aboriginal culture, a court should approach the rules of evidence and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.

The Court held that the laws of evidence must be adapted:

“so that the Aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of Aboriginal societies, which, for many Aboriginal nations, are the only record of their past.”

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43 For instance, the test for Aboriginal rights requires that Aboriginals demonstrate “a continuity between current Aboriginal activities and the pre-contact practices, customs and traditions of Aboriginal societies,” supra note 9 at para 83.

44 Supra note 9 at para. 87. Given that many Aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce “conclusive evidence from pre-contact times about the practices, customs and traditions of their community” (R. v. Van der Peet, [1996] 2 S.C.R. at para. 62). To quote Dickson C.J. in Simon v. R., [1985] 2 S.C.R. 387, at 408: “given that most Aboriginal societies ‘did not keep written records,’ the failure to do so would ‘impose an impossible burden of proof’ on Aboriginal peoples, and ‘render nugatory’ any rights that they have.”

45 Supra note 9 at para. 80.

46 Supra note 9 at para 84.
Placing oral history evidence on an equal footing with written historical evidence increases the possibility that the law will decide the meaning of Aboriginal rights within the context of their culture's history.47

While Delgamuukw goes some way toward incorporating Aboriginal perspectives into the legal decision making process, the Court's failure to consider fully the consequences of its decision to make the existence of Aboriginal rights largely factual questions about pre-contact or pre-sovereign laws, occupation and customs and the continuation of these activities into the present has left both the Crown and Aboriginal peoples floundering in the factual arena. For instance, subsequent to the decision in Delgamuukw, the Crown, in some cases, has taken the position that since the existence of Aboriginal rights depends on facts that must be established in each case, the Crown has no obligation to take these rights into account until these facts are proven.48 This choice by the Crown has sparked a debate about whether legal rules which place the burden on First Nations to establish their rights in costly and lengthy trials are consistent with the honour and fiduciary obligations of the Crown towards Aboriginal peoples.

Characterizing issues as factual and complex then placing the burden on Aboriginal peoples to establish these facts has affected their access to justice in several ways. For instance, applications by First Nations to have their rights determined by way of summary trial have, in recent cases, been unsuccessful.49 As a result Aboriginal peoples must incur the time and expense of a full trial in order to establish their rights. The Secwepemc Band and the Okanagan Indian Band have argued, in response to the Crown's argument that a full trial is necessary, that the combination of the Bands' poverty and the cost of a trial means that the Bands will not have "effective access to justice as a means of defending themselves and vindicating their constitutional rights."50 Therefore, the Bands argue if the Court orders a full trial, it must require the Province to pay the Bands' costs for that trial.

On applications for injunctive relief, characterization of issues as complex factual questions has affected whether courts consider the merits of the case. Courts are less likely to do so if issues are seen as complex and therefore even strong evidence of title may be given little weight.51 View-
ing Aboriginal rights as complex factual questions has also resulted in more weight being given to preserving the status quo on applications for an injunction based on the reasoning that since complex, factual issues will take a long time to resolve, those who currently benefit from the law will suffer high costs if an injunction is issued. The effect has been to shift the balance in favour of the Crown. In order to preserve the status quo, the Crown has been granted applications to prevent First Nations from exercising asserted Aboriginal rights and applications by First Nations to enjoin the Crown from infringing Aboriginal rights have been denied. These decisions may give too little weight to the interests of First Nations when the status quo is an existing legal regime that gives no recognition to Aboriginal rights and benefits non-Aboriginal third parties.

Case law and commentary on Aboriginal rights reflects a growing consciousness that the seemingly neutral classification of an issue as factual is inconsistent with a perspective which is explicitly attentive to public values such as those in the Charter. For instance, case law and commentators suggest that the Crown has a fiduciary duty to consult in respect of asserted Aboriginal title. Such consultation can have the effect of converting factual questions about Aboriginal rights and title to matters of law. Thus, Sonia Lawrence and Patrick Macklem argue that Delgamuukw imposes a duty on the Crown to consult prior to taking an action that might infringe an Aboriginal right and that this would “require the Crown to make good faith efforts to first jointly define the nature and scope of Aboriginal or treaty rights before it seeks to determine the extent to which its proposed actions might infringe such rights.” The duty would “operate to minimize reliance on litigation as a means of determining the nature and scope of Aboriginal and treaty rights” and would “create incentives on the parties to determine their respective rights without resorting to litigation.”

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52 J. Hunter, “Advancing Aboriginal Claims After Delgamuukw—the Role of the Injunction” in Litigating Aboriginal Title, ibid. at 1.3.11 argues that because “it is now apparent that Aboriginal rights claims will take a very long time to resolve on their merits” “... the intrusive nature of an injunction is less satisfactory.” But compare Mogerman, ibid. at 1.2.10. who quotes the Supreme Court of Canada in RJR-MacDonald, ibid. that preserving the status quo, “as a general rule ... has no merits as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo.”

53 See e.g., B.C. (Minister of Forests) v. Adams Lake Indian Band [2000] B.C.J. No. 995 (C.A.)


56 Ibid. at 262.

Would enforcing the Crown’s duty to consult be more disciplined in the sense that we have suggested, in that the Crown would be more attentive to the values of human dignity and equality? Good faith consultation with a view to “negotiat[ing] an agreement specifying the rights of the respective parties to the territory in question”\(^{58}\) and “translat[ing] Aboriginal interests adversely affected by proposed Crown action into binding Aboriginal or treaty rights”\(^{59}\) would reduce the number and complexity of the issues in the factual arena, effectively making them matters of law. The issues in dispute would be limited and summary trials for outstanding issues could be possible. Such consultation would be disciplined to the extent that the Crown acts in good faith consistent with its obligation to act honourably towards Aboriginal peoples. Factual questions about rights would be resolved in a manner more likely to bring about a reconciliation with Aboriginal peoples than trial procedures designed primarily for determination of individual rights. As LaForest J. stated in *Delgamuukw v. British Columbia*:

> On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.\(^{60}\)

The phenomenon of the shifting boundaries of law and fact is linked to the concept of substantive materiality as a pathway to the admission of evidence of social context discussed below.

As the discussion of Aboriginal rights illustrates, it is not sufficient to look solely at the shifting boundary between law and fact; we should also pay attention to the interaction between that boundary (as well as other rules) and social context. Thus *Delgamuukw*’s move to factual questions of Aboriginal history would have had more adverse consequences for Aboriginal peoples if the Supreme Court had not also changed the rules on oral history. This change created a pathway for Aboriginal peoples to introduce evidence of their social context—a topic to which we turn to next.

### III. PATHWAYS TO SOCIAL CONTEXT

A significant development in the late-twentieth century has been what we have suggested is a heightened discipline in the form of attention to social disadvantage through an increasing focus on social context. Rather than proceeding as if social location—determined in part by experience of, for instance, racialization, gender-based violence, poverty, colonial history and disability—is irrelevant to fact finding, decision-makers are becoming more open to taking social context into account, or at least are grappling with appropriate responses to such evidence.\(^{61}\)

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\(^{58}\) *Supra* note 55 at 267.

\(^{59}\) *Ibid.* at 255.

\(^{60}\) *Supra* note 9 at para. 207.

There are various, overlapping, pathways to such evidence, which we will illustrate in turn.

- Materiality—changing the substantive rule.
- The rules of evidence.
- Judicial Notice—the evolving concept of impartiality.
- Openness to expert opinion.

### A. Materiality—changing the substantive rule

One of the ways that the law of evidence affects access to social context evidence is through the requirement that evidence be material. Materiality is governed by the substantive law—changing the legal rule changes which evidence is admissible. Sometimes, of course, the substantive issues are very clear while sometimes the legal question to be answered remains elusive, with consequent effects for the fact-finding process.

For example, what is the substantive test with respect to the interpretation of contracts? Are the courts trying to determine the subjective intent of the parties or an objective intent embodied in the words that they have used? Wigmore suggested that there are four available standards—what do the words of the contract mean to the community at large (the ordinary or popular meaning), what do they mean to a special class of person, such as those engaged in a particular trade (local), what do they mean in terms of the common intention of the specific parties (mutual) and what do they mean to an individual (individual).\(^6\) The evidentiary significance of the answer to Wigmore’s questions is obvious, for example, in relation to whether counsel refers to dictionaries, or calls the contracting parties and asks them what they intended. The dominant view seems to be that it is the intent as embodied in the words that matter; that it is primarily those words which will reveal how the parties “intended” to allocate risks via contract.\(^6\) Hence evidence of the subjective understanding of the parties, perhaps coloured by their social location, is immaterial.

Evidence will shift from immaterial to material or vice versa when the wording of the rule or the understanding of the meaning of the terms of a rule is changed. We might say that the principle of materiality has a Janus-like quality, with a light and a dark side. On the light side it can help marginalized groups control the operation of stereotypes by making discriminatory social knowledge immaterial or by making egalitarian social knowledge material.

This light side of materiality is illustrated by the express changes to the sentencing provisions in the *Criminal Code*, which incorporated the social context of Aboriginal peoples into sentencing decisions. Section 718.2(c) of the *Criminal Code* provides that “all available sanctions other than imprisonment that are reasonable in the circumstances should be consid-

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\(^6\) Wigmore, *supra* note 32 at 186.

Disciplining Fact Determination

This section, by making the distinctive situation of Aboriginal peoples material to sentencing decisions, reflects a commitment to egalitarian values by its recognition of constraints imposed on Aboriginal peoples by history, poverty and racism. In *R. v. Gladue*, the Supreme Court, in interpreting this section, held that the circumstances of Aboriginal offenders "are unique, and different from those of non-Aboriginal offenders." The Court concluded:

> [T]he circumstances of Aboriginal offenders differ from those of the majority because many Aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation and many are substantially affected by poor social and economic conditions ... [A]s a result of these unique systemic and background factors, [Aboriginal peoples are] more adversely affected by incarceration and less likely to be 'rehabilitated' thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

Judges are to give attention to the "unique background and systemic factors which may have played a part in bringing the particular aboriginal offender before the courts." The following circumstances are material:

- What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence?
- How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

Another instance in which changes to a substantive rule, or to the understanding of its meaning, made formerly immaterial evidence material is *R. v. Lavallee*. The accused, a battered woman, was charged with the murder of her batterer. She claimed she had acted in self-defence, which requires that the accused act under a reasonable apprehension of death or grievous bodily harm. Prior to the Supreme Court's decision in *Lavallee*, the requirement of an imminent attack had rendered inadmissible evidence of the context which might have made the use of force in self-defence reason-

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65 Ibid. at para. 68.
66 Ibid. at para. 66.
67 Ibid. at para. 80.
In Lavallee, the Supreme Court recognized the limitations of the imminent danger requirement and reconstructed the concept of the reasonable person to include the experiences of battered women. Subsequently, two justices of the Supreme Court provided the following guidelines for identifying material social context:

To fully accord with the spirit of Lavallee, where the reasonableness of a battered woman's belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences. A judge and jury should be told that a battered woman's experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women.

On the other hand, materiality also has a dark side. The dark side is that materiality, in the words of Robert Burns, "serves to assure that the truth which emerges at trial is a 'legal truth,' determined solely by those aspects of the case that the law deems of consequence." In addition, as is illustrated by Aboriginal cases, what the law deems of consequence may not reflect the social knowledge and experience of disadvantaged groups. For instance, labeling Aboriginal rights as sui generis permits doctrines and concepts to be reshaped and altered without an in-depth analysis of the reasons for the change or the consequences for fundamental rights; it also changes the boundaries of material evidence, shifting them and making them fuzzy. Consider, for instance, the concept of fiduciary duty. In non-Aboriginal cases, it requires the fiduciary "to act selflessly and with undivided loyalty" to the other party. In the law relating to Aboriginal peoples, the Sparrow version seems to have more to do with setting out how

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70 R. v. Malott, [1998] 1 S.C.R. 123 para. 43 per L'Heureux-Dube J. and McLachlin J. (as she was then).
73 R. v. Sparrow, [1990] 1 S.C.R. 1075. The Court held that infringements of Aboriginal rights by the Crown may be justified. For the broad scope of interests that can justify infringement see Delgamuukw, supra note 9 at para. 165:

"The general principles governing justification laid down in Sparrow, and embellished by Gladstone, operate with respect to infringements of Aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community' (R. v. Gladstone, [1996] 2 S.C.R. 723 at para. 73). In my opinion, the development of
Aboriginal rights can be infringed consistent with the honour of the Crown. Evidence immaterial under the common law doctrine, such as whether infringement would benefit a third party, is now material.

The dark side of materiality is also illustrated by the choice of the legal test for the determination of Aboriginal rights, discussed above, which turns on factual questions about pre-contact activity, but not current activity. Under this test, Aboriginal practices invented to adjust to the European migration are not considered. The effect is to make the impact of the alleged right on the relationship between members of the society and the continuing existence of the group immaterial.  

Borrows and Rotman argue that the test places a displaced focus on Aboriginality and:

[D]raws on inappropriate racialized stereotypes of Aboriginal peoples by attempting to distil the essence of Aboriginality by reference to their pre-contact activities. This caricature presupposes that Aboriginal peoples and their legal systems did not develop in response to European influences, and it freezes them at the point of contact.

A more disciplined choice of material facts would have considered whether the facts selected reflected stereotypical images of Aboriginal peoples.

agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

Our focus here is on how substantive law focuses attention on some facts while excluding others, the resulting picture risking the charge of being a stereotypical image. But there is a rich body of literature on stereotyping Aboriginal people generally. See e.g., R. Kyle, “Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-Sparrow Era” (1997) 31 U.B.C. L. Rev. 293 at 310: “... the stereotypical view that Aboriginal people were historically unconcerned about improving their situation in life”; E. Pasmeny, “Aboriginal Offenders: Victims of Policing and Society” (1992) 56 Sask. L. Rev. 403 at 408. The author quotes Michael Jackson from, Locking Up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release (Vancouver: University of British Columbia, 1988) at 5:

“[This stereotype] reflects a view of [N]ative people as uncivilized and without a coherent social or moral order ... [I]t prevents us from seeing [N]ative people as equals. The fact that the stereotypical view of [N]ative people no longer is reflected in official government policy does not negate its power in the popular imagination and its influence in shaping decisions of the police.”

Choice of material facts can limit access to justice by creating an impossible evidentiary standard—evidence that is difficult or impossible to obtain is made material. For instance, in *R. v. Pamajewon*, Chief Justice Lamer rejected a broad characterization of the Aboriginal claim as a right to manage the use of reserve lands and characterized the claim as “the right to participate in, and to regulate, high stakes gambling activities on the reservation.”77 As John Borrows commented on the decision: “The claim is defeated since Anishinaabe gambling, prior to contact, was not done in a 20th century scale. Hardly surprising that this standard of evidence could not be met. Not many activities in any society, prior to this century, took place on a 20th century scale.”78

**B. The rules of evidence**

The framing of the material issue does not, in itself, exhaustively determine the admissibility of social context evidence. The rules of evidence themselves, influenced by process-type values, control the openness to such evidence as well. Thus, the law frames evidence rules which limit admissibility, for instance, the rule that extrinsic evidence is inadmissible to interpret a contract unless there is an ambiguity—the “plain meaning” rule. The substantive test could be the agreement of the parties, as objectively manifested in the words of the contract, as discussed above. The law of evidence could then take an approach that is open to the indeterminacy of words and is sceptical of the idea of the objectivity of a decision-maker uninformed by social context. Thus, extrinsic evidence to assist in applying the substantive test would be admitted.

The rule of evidence dealing with the admissibility of extrinsic evidence to assist in the interpretation of contracts is an appropriate candidate for consideration in this review article. It was the subject of a similar type of assessment by Wigmore, who stated that the “history of the law of interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism.”79 In our view, the interpretation of contracts is an interesting area which can be used as an illustration of the point that it is increasingly clear that the law of evidence emerges from debates about competing values or policies. For example, the values of commercial certainty80 and judicial economy (associated with a positivist judicial orientation to the view that words have a meaning that may be objectively

78 Borrows, *ibid.* at 54.
79 *Supra* note 32 at 193.
80 We realize that commercial certainty might be seen more as a substantive value in the law of contracts rather than an evidentiary value having to do with the process of fact finding. However, we suggest that the substantive context is likely to influence evidentiary concerns. Where there is a value of certainty in the marketplace, this will form a part of analysis of both contract and evidence issues. Fact finding about commercial matters, therefore, is particularly likely to present itself as having to do with determinate rather than indeterminate matters (words are words, especially written words, rather than variable social constructions). Lord Justice Scrutton reflected concerns about the process of
disciplining fact determination (determined) may be in tension here with the value of protection of the vulnerable (associated with more openness to the indeterminacy of words and to the importance of context). Such tensions play a role in the development of substantive contract law, but also in inter-connected issues of evidence law.

Two quotes may illustrate the kind of tension that we mean. Sir Christopher Staughton has been critical of the openness to evidence of the surrounding circumstances, or background or matrix, to assist in the interpretation of contracts. Referring, in particular, to Lord Hoffman’s judgment in *Investors Compensation Scheme v. West Bromwich Building Society,*

81 favouring the admissibility of “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man,”

82 he said:

> It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation ... . [T]he proliferation of inadmissible material with the label “matrix” [is] a huge waste of money, and of time as well.

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Compare this focus on commercial and judicial economy with the view expressed in a recent decision of the Supreme Court of Canada in *R. v. Marshall* 84 about the appropriate approach to the interpretation of treaties between the Crown and Aboriginal peoples. The Court noted that there is a difference between treaties and modern commercial transactions between two parties of relatively equal bargaining power; 85 it proceeded, then, to express a positive view of the admission of contextual evidence to help determine what had been agreed:

> [E]ven in the context of a treaty document that purports to contain all the terms, this Court has made it clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *R. v. Taylor and Williams,*

86 if there is evidence by conduct or otherwise as to how the parties under-

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81 *Investors Compensation Scheme Ltd. v. West Bromwich Building Society,* [1998] 1 W.L.R. 896 (H.L.), a case which incidentally held that subjective evidence of intention should be excluded.

82 Ibid. at 913.

83 *Supra* note 32 at 307.


85 Ibid. at para. 4. McLachlin J., in dissent, at para. 78, also indicated that “treaties constitute a unique type of agreement and attract special principles of interpretation.”

stood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.\textsuperscript{87}

Given that \textit{Marshall} is a recent decision of the Supreme Court of Canada, it is an important indication of more openness to extrinsic evidence and, thus, potentially, evidence of social context. It can be argued that \textit{Marshall} is a case dealing with the interpretation of treaties and that the law relating to Aboriginal peoples is \textit{sui generis}. However, on a broader level, \textit{Marshall} is a case where explicit (as we would suggest more disciplined) attention to norms such as equality and the honour of the Crown was linked to more evidentiary openness to context, including disadvantage in that context. It is possible that treaty jurisprudence dealing with honour, in the large sense of the honour of the Crown toward Aboriginal peoples, may influence the approach to the little honours of everyday commercial agreements. This could happen through an emerging substantive doctrine of good faith as well as evidentiary openness to evidence of social context to assist with the interpretation of contracts.

Even on a more bread and butter doctrinal level there is evidence of the same shift. For instance, some case law suggests that extrinsic evidence can be admitted with respect to latent (when an attempt is made to apply the contract to the facts) but not patent (obvious) ambiguities.\textsuperscript{88} However, the current trend in the case law seems to be to admit such evidence with respect to any ambiguity, fueled by academic commentary such as the following:

\begin{quote}
In the past, however, much turned on whether the ambiguity was latent or patent. Because courts were reluctant to rewrite contracts for the parties, they did not permit extrinsic evidence to clear up ambiguities which appeared on the face of the written document itself. Such ambiguities could be clarified by resort only to legal principles of construction and not to evidence of the parties' intentions. This prohibition against the use of parol evidence is erroneous and is no longer accepted as a valid principle.\textsuperscript{89}
\end{quote}

Indeed, it has been argued by an American scholar that courts are increasingly rejecting the plain meaning rule and admitting extrinsic evidence, at least to show that ambiguity exists, or even generally to determine meaning:

\begin{quote}
[A]n increasing number of courts ... have acknowledged that extrinsic evidence relating to context should always be admissible to determine whether
\end{quote}

\textsuperscript{87} \textit{Ibid.} at 236. See also \textit{Delgamuukw, supra} note 9 and \textit{R. v. Sioui, [1990] 1 S.C.C. 1025.}
\textsuperscript{88} D.R. Bennett, "Recent Developments in the Law of Parol Evidence" (1993) 51 \textit{The Advocate} 511 at 515.
ambiguity exists. In so doing, these courts hold that it is not possible to know whether there are two or more reasonable interpretations of a disputed contract term without examining the surrounding circumstances. In the newest trend, a few courts have taken a further step and have removed all restraints upon admission of extrinsic evidence of context. These courts do not pause to ask if ambiguity is shown; they simply allow the language to be utilized to discover the real meaning of the contested language. 90

It is tempting to see such developments as modern in some sense—that somehow the current generation of scholars and jurists have some distinctive insights into the interaction of social location and law, insights which challenge a more formal conception of the discipline of law. However, returning to Wigmore suggests that the more things change, the more the “modern” stays the same:

Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words—that is, their association with things. 91

It is, perhaps, distinctive to the beginning of the 21st century to connect this rejection of primitive formalism with attention to social disadvantage—as does the Supreme Court of Canada in Marshall with respect to the interpretation of Aboriginal treaties—but the above passage from Wigmore can still be quoted, in a way which makes contemporary sense, in support of Marshall.

The rules of evidence clearly interact with materiality, as well as with the fact/law distinction, discussed above. This can be illustrated by combining the points made about contracts so far, in terms of a spectrum. What would be the most formalistic approach to the interpretation of contracts? First, law should fix the meaning of words. Second, the legal test to be applied is the popular meaning of the words used. Third, the only source to be consulted is the document itself. At the other end of the spectrum, one would find interpretation viewed as a matter of fact, the test being the subjective intentions of the parties and openness to hearing their own evidence about their intentions.

It is tempting to suggest that the former end of the spectrum is the more “disciplined.” In a sense it is, given the greater possibility of reasons being given for a legal as compared to a factual matter, as well as the certainty with respect to the sources used. On the other hand, substituting judicial assumptions about the meaning of words for evidence of what the parties’ meant could be seen as less disciplined if it neglects evidence of the social

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91 Supra note 32 at 237.
context affecting meaning. In our view, Marshall suggests that where there is concern about disadvantage in the social context, and even where the substantive law remains unchanged, the more disciplined approach is to be open to extrinsic evidence.

C. Judicial notice—the evolving concept of impartiality

Fact finders may become more exposed to evidence of social context due to changes in substantive law and in rules about admissibility. Recently a great deal of attention has also been paid to judicial notice as a means of drawing on knowledge of social context without the need to call evidence in individual cases. Judicial notice is a means by which something can be established without offering evidence.

Judges and jurors necessarily draw on their social knowledge, their experiences and their background in finding facts. “Human reasoning in part is a product of one’s experience” and that “experience is less what is produced at trial and more the interaction of what is produced with the background and experience of the fact finder.” 92 How disciplined is the doctrine of judicial notice in ensuring that the operation of such knowledge is accurate, fair, impartial and egalitarian? There are positive signs that the doctrine can be used to expand the social context to include an understanding of the adverse effects of racism and gender bias in our society.

In R. v. Gladue, discussed above, a requirement that the accused offer evidence of social context in every case would have placed an unnecessary burden on the accused and adversely affected his or her access to justice. The Court held instead, that “[j]udges may take judicial notice of the broad systemic and background factors affecting Aboriginal people,” 93 such as “widespread racism which has translated into systemic discrimination in the criminal justice system” 94 and “the priority given in Aboriginal cultures to a restorative approach to sentencing.” 95 In R. v. Williams, an Aboriginal accused was charged with robbery and elected to be tried by judge and jury. 96 The Supreme Court held that the accused could question potential jurors to determine whether they possessed prejudice against Aboriginals which might impair their impartiality. The Court appeared sensitive to the effect on access to justice of requiring prejudice to be proved in every case

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93 Gladue, supra note 64 at para. 93.


95 Ibid. at para. 93.

96 Supra note 94.
in its reference to the doctrine of judicial notice, expressing the view that "widespread racial prejudice, as a characteristic of a community may ... be the subject of judicial notice."  

Judges must remain impartial while taking judicial notice of social context. Thus, the rules regulating the impartiality of judges also, to some extent, discipline the operation of the social knowledge of the judge such that the operation of inegalitarian assumptions are controlled. In *R. v. R.D.S.*, a Black youth was charged with assaulting a White police officer. In acquitting the accused, the trial judge referred to the fact that police officers had been known to over-react when dealing with non-White groups. The Crown appealed on the ground that these remarks indicated a reasonable apprehension of bias. In upholding the acquittal, four justices held that the standard of impartiality requires judges to incorporate information about social context into their decisions and that legitimate social knowledge is identified by looking at the knowledge of the reasonable person who is an informed and "right-minded" member of the community—a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the Charter. The statements of two other justices are consistent with this statement in that they identify "societal awareness and acknowledgement of the prevalence of racism and gender bias in a particular community" as part of the knowledge of the reasonable person.

D. Openness to expert opinion  

Another pathway to social context evidence is through expert testimony (assuming materiality and consistency with the requirements of the opinion rule). Social science evidence, in particular, has been relied upon to provide a context in which to understand the behaviour of the witnesses and the parties. Thus, in *R. v. Lavallee*, evidence of battered women syndrome was introduced through Dr. Shane to assist the jury in assessing the reasonableness of the perceptions of a battered woman who killed her abuser. In *R. v. Marquard*, expert evidence was admitted to explain the reasons why young victims of sexual assault often do not complain immediately. Anthropological and historical evidence is often relied upon in Aboriginal cases. Our objective here is not to address the rule on expert opinion itself, but to consider how the law disciplines itself through its posture toward interdisciplinarity.

Since everyone could agree that judges should neither over-use nor over-value expert evidence about the social sciences, a central issue is the starting perspective. Judges differ in their receptivity to expert opinion. Should they start from a position of scepticism or of enthusiasm? Should judges

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100 *R.D.S.*, *ibid.* at para. 111.
see their role as keeping out as much expert evidence about social science as possible, particularly in jury trials, as it is expensive, time-consuming, difficult or impossible to assess, may well be biased and incompetent and often simply duplicates common sense especially where there are unresolved disputes within the research area itself? It seems there is a strong voice for such a sceptical stance in current Canadian literature and case law. For example, Professor Paciocco has argued that there should be tight control over expert evidence since the use of bad science can pose a greater threat than the use of common sense ever did.\textsuperscript{103} Several of the most contested areas, where we are seeing liberal use of the expression "junk science," have to do with violence against women.

Would self-consciousness about the consequences of exclusion of expert opinion for a fair, egalitarian fact determination process lead to a more positive view? From this perspective, it seems sensible to assume that the more we know, the more we might be able to combat inequalities in the world. Groups who experience inequality, classes of witnesses who risk being treated as relatively lacking in credibility or whose behaviour seems implausible or is easily interpreted as consistent with lying—such as children, women, and accused persons—use various strategies to try to enhance their credibility, both legally and socially. They may well turn to non-legal sources for support in those efforts. As well they may turn to such sources to provide arguments for changes in substantive law. In other words, the diverse world in which judging is taking place is a world in which social location could affect the degree to which it is hoped that the social sciences can contribute to genuinely open-minded fact determination and legal policy development.

As we have emphasized, judges and lawyers are increasingly aware of the importance of taking social location into account. This awareness has lead to a scepticism about common sense assumptions and an openness to expert opinion to correct misperceptions about human behaviour. For instance, in \textit{R. v. Chisholm}, Hill J. stated:

There exists, it seems a trend toward the admission of expert evidence relating to the reactive behaviour of individuals who have been sexually victimized as relevant and necessary to the comprehension of the credibility of sexual assault complainant’s testimony. Experts such as [a clinical psychologist], can make a valuable contribution to an informed understanding of common patterns of behaviour clinically identified in instances of sexual victimization.\textsuperscript{104}

If such an open stance is adopted, it is vital to be clear about the use to which expert evidence is being put. In \textit{Chisholm}, Hill J. noted that expert testimony on the behaviour of people who have been sexually assaulted

\begin{itemize}
  \item \textsuperscript{104} \textit{R. v. Chisholm} (1997), 8 \textit{C.R.} (5th) 21 (Ont. Gen. Div.) at para. 72-73.
\end{itemize}
can be relevant and necessary to the comprehension of the credibility of the testimony of sexual assault complainants. It can assist the trier of fact "by providing an alternate context for the complainant's conduct—ordinarily one which serves as an informed check on the rush to a presumed inference that the behaviour is inconsistent with the occurrence of the assault alleged." 105

This openness and carefulness is not just to facilitate challenge, but also allows for different levels of scepticism depending on the level of use. The undoubted dangers of expert evidence, primarily that it may be over-valued or misused, vary according to what the evidence is addressing. Using it for diagnostic purposes, for example, that a child was abused or that the accused is not a sexual offender, justifies a very high level of scrutiny, while using it to correct stereotypes in relation to credibility is a much less aggressive use.

The law's stance towards interdisciplinarity is evolving. Historically, the discipline of law has jealously guarded its borders; insights of other disciplines have not readily been incorporated into legal discourse. 106 However, insights from other disciplines can operate to facilitate open-minded fact determination. One way this has occurred is when these insights have been incorporated into a report of a governmental commission. For instance, the Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back draws on research in other disciplines which shows the existence of widespread racism against Aboriginal people and documents their oppression. 107 David Stack 108 traces the ways that the Report had been relied upon by courts to make Aboriginal world views relevant to judicial fact finding in sentencing: 109 in decisions as to whether jurors can be challenged on the basis that a "juror is not indifferent between the Queen and the accused" 110 and in adapting the rules of evidence to reflect Aboriginal perspectives. 111

The more disciplined approach to the admissibility of expert opinion would be to be similarly sceptical about different forms of reasoning and not to reserve scepticism for information derived from other disciplines. Rejecting expert evidence via a high standard of validity, while having little or no standard of validity for replacement reasoning, could well raise

105 Ibid. at para. 73.
106 Resistance to information from other disciplines can take the form of recasting. Pierre Schlag describes the recasting by the discipline of law of "intellectual and cultural insights from other disciplines into forms and uses that accord with the aesthetics of the judge: the legal brief, the legal opinion, the 1,000 footnote law review article." Schlag, supra note 6 at 2059, n. 15.
110 Criminal Code, supra note 35, s. 638 (1)(b); Williams, supra note 96.
111 Delgamuukw, supra note 9.
concerns about open-mindedness. The competition for expert evidence is, of course, common sense, to which we turn in the next section.

IV. THE CONTROL OF RELEVANCE REASONING

Once one is in the realm of a material factual issue, the next inquiry is whether evidence is relevant. Relevant evidence is evidence that has any tendency to make a material proposition more or less probable. Analytically, the link between the evidence and proposition is provided by a generalization about the behaviour of people or things. These generalizations, in most cases, arise from the common sense knowledge and experience of the fact finder. For instance, if the material proposition is whether John is intoxicated, the relevance of evidence that John was seen in the Kings Head Pub depends on generalizations based on common knowledge about what people do in pubs—that is, people in pubs sometimes drink intoxicating beverages to excess. Under the concept of relevance, if the generalization is even slightly likely, the evidence is relevant. Until recently, although the role of common sense knowledge and reasoning in relevance assessment was acknowledged, this role was largely unexamined and uncontrolled. For instance, Stanley Schiff concludes that relevance does not "depend on any rules of law; it depends solely on the ordinary processes of reasoning and the common sense assessment of probabilities within the framework of the defined issues."

Recent scholarship, case law and legislation emphasizes the key role of common sense reasoning about human behaviour in assessments of relevance and suggests that egalitarian fact finding may require legal control of that reasoning. In our view, a perspective which is explicitly attentive to public values, such as those in the Charter, and, in particular, to the values relating to disadvantaged groups, presents one of the most significant challenges to this area of law. A jurisprudential stance which views law "from the bottom" brings into focus areas which could be seen as being marginal but which can be catalysts for change. Given greater acknowledgement of varying perspectives and more effort at self-conscious reasoning about facts, an argument can be made that an explicit egalitarian perspective is replacing a stance of value-neutrality as animating, indeed disciplining, the evolution of the law of evidence.

There is growing awareness by legal decision makers that relevance is not a value-neutral concept and that the highly intuitive and anarchic pro-

112 Fact Determination, supra note 92.
113 The rules of evidence distinguish circumstantial from direct evidence. Only circumstantial evidence must be found to be relevant in the sense described. However, even with so-called direct evidence, generalizations about the credibility and reliability of the source are necessary parts of assessments of probative value.
114 The example is from Boyle, MacCrimmon & Martin, supra note 13 at 48.
cess of fact finding may need to be controlled. Taking an egalitarian perspective requires a self-conscious effort to identify when relevance assessments are based on discriminatory and inegalitarian generalizations. Therefore, in some cases, a commitment to fundamental values will require that, as a matter of law, certain inferences be prohibited although some may see a relevance link based on their common sense knowledge. Examining fact determination from the perspective of the disadvantaged shows that generalizations or stereotypes based on gender, race, sexual orientation, status, age, etc. have operated in the past to affect access to justice. Stereotype was described in Law v. Canada (Minister of Employment and Immigration) as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess. It is not that harmful stereotypes never are descriptive, but that their operation inflicts grave social costs and is inconsistent with norms such as human dignity, autonomy and equality. Such reliance “tends to perpetuate a system in which legal and social arrangements place ‘one’ social group defined in terms of a morally irrelevant characteristic, systematically below another.” What is required, in the words of Alan Mewett, is a “fair inference-drawing process.”

One area where relevance assessments have been disciplined with a view to furthering egalitarian fact finding is sexual assault. For instance, evidence that a complainant had consented to sexual relations in the past was formerly thought to be relevant to the question whether the complainant consented to sexual relations with the accused via a generalization that women who have consented to sexual relations in the past are more likely to have consented to sexual relations or, in other words, that they have a disposition to consent to sexual relations. The Supreme Court of Canada, in R. v. Seaboyer, condemned this reasoning on the ground that it draws on illegitimate myths and stereotypes. We have argued that relevance grounded on sexual disposition reasoning is inconsistent with human dignity and autonomy. Decisions fundamental to human worth, such as a decision to engage in sexual relations, “should not be seen as emanating from a

117 See e.g. Fact Determination, supra note 92.
121 Subsequently, s. 276 of the Criminal Code, supra note 35, made inadmissible evidence of sexual contact with the accused or any other person for the purpose of implying that, by reason of the sexual nature of the activity, the complainant consented or is not credible.
person’s character, as if such fundamental decision flowed from a disposition rather than being the product of individual reflection in terms of time, circumstances, and current preferences.\textsuperscript{122}

Commitment to the values of individual dignity, privacy and the right to make a meaningful choice are also key dimensions when, as we view law “from the bottom,” we take the perspective of the accused. Consider whether the failure of an accused to give evidence is relevant to the issue of guilt. As a matter of common sense, an accused’s failure to testify and to offer an explanation seems relevant based on the generalization that innocent persons would welcome an opportunity to tell their side of the story. The existence of other plausible explanations for a failure to testify, such as a belief that the accused would be a poor witness, do not make the failure irrelevant. Other explanations for the evidence go to weight, not to the relevance assessment. However, although a failure to testify could be seen to be relevant, the Supreme Court of Canada, in \textit{R. v. Noble}, held that the silence of the accused cannot be used in determining whether an accused is guilty beyond a reasonable doubt.\textsuperscript{123} Inferring guilt from silence was inconsistent with the accused’s right to silence and the presumption of innocence. Sopinka J., for the majority, stated that the right to silence “was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply evidence out of his or her own mouth.”\textsuperscript{124} Inferring guilt from silence also conflicts with the right to make a meaningful choice whether or not to testify because “[t]he failure to testify tends to place the accused in the same position as if he had testified and admitted his guilt.”\textsuperscript{125}

Disciplined fact determination may require that evidence formerly deemed irrelevant be labeled relevant or, if formerly deemed relevant but of low probative value, be assigned higher probative value. As we have discussed, the test for Aboriginal title requires proof of occupation pre-sovereignty and the continuation of that occupation to present times. In \textit{Van der Peet} and \textit{Delgamuukw}, the Supreme Court recognized the difficulties inherent in demonstrating a continuity between current Aboriginal activities and the pre-contact practices, customs and traditions of Aboriginal societies.\textsuperscript{126} Is evidence of present practices, customs and traditions relevant to show pre-contact occupation? The trial judge in \textit{Delgamuukw} thought not. He had held that the oral history evidence of current practices


\textsuperscript{123} \textit{R. v. Noble}, [1997] 1 \textit{S.C.R.} 874. The majority did hold, however, at para. 77, that once the Crown has proven its case beyond a reasonable doubt, the trial judge may refer to the silence of the accused as evidence of the absence of an explanation which might raise a reasonable doubt, or to indicate that the judge need not speculate about possible defences that might have been offered by the accused had he or she testified. Sopinka J. continues at Noble, \textit{ibid.} para. 90 that “these uses may be superfluous.” See 6 \textit{C.R. (5th)} 5 for a criticism by Ronald Delisle.


\textsuperscript{125} \textit{Noble}, \textit{ibid.} at para. 75.

\textsuperscript{126} \textit{Delgamuukw}, \textit{supra} note 9 at para. 83.
and even of the practices of their immediate ancestors going back 100 years could not demonstrate the requisite continuity between present occupation and past occupation in order to ground a claim for Aboriginal title.\textsuperscript{127} Effectively, he held that there was no logical link between post-contact and pre-contact practices.\textsuperscript{128}

Upon appeal, the Supreme Court held that evidence of post-contact practices, customs and traditions are relevant to prove pre-contact practices, customs and traditions. In commenting on the trial judge's failure to find a link between post and pre-contact practices based on oral history, the Court stated that even "if oral history cannot conclusively establish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty."\textsuperscript{129}

V. CONCLUSION

The discussion of controlling relevance reasoning above illustrates what we see as the very positive development of attention to the fundamental value of equality as an emerging habit. It is part of the business of law to construct facts; at this time, we see lawyers and judges beginning to discipline themselves to ask how that construction can be egalitarian. Rather than sticking to stock stories, such as the lying woman and the unreliable child, there is more of a self-conscious effort to tell new stories and cast a critical eye on the old ones. There is more openness to the idea that there may be varying perspectives on "facts" and the inferences to be drawn from them. More explicit attention to reasoning about facts diminishes the scope for fact finding ungoverned by the rule of law, through increased accountability flowing from the giving of reasons and appellate control.

Similarly, in other parts of the paper, we have noted openness to evidence of social context, permitted by changes in substantive law, in evidence doctrine, including judicial notice, and a posture of careful interest in information from other disciplines. We cast such developments as increased discipline in the sense of increased attention to fundamental values. However, pockets of relative anarchy still resist the conclusion that the reasoning in those pockets is disciplined. Thus, we see a lack of conscious attention, a necessary though not sufficient condition for egalitarian legal reasoning, to the fact/law classification and to the effect of rules of substantive law and evidence on litigants' ability to explain their social location to decision makers. It is in the area of Aboriginal rights, where the need for egalitarian fact finding is most pressing and significant, that we see the greatest current challenge to law to become more disciplined.

\textsuperscript{127} Ibid. at para. 100.

\textsuperscript{128} The trial judge held oral history evidence of present and recent occupation "did not demonstrate the requisite continuity between present occupation and past occupation in order to ground a claim for Aboriginal title." Ibid. at para. 100.

\textsuperscript{129} Ibid. at para. 101 (emphasis added).