CHAPTER ONE

SOURCES AND GOALS OF THE LAW OF EVIDENCE

I. THE SCOPE OF THE LAW OF EVIDENCE

The word "evidence" has a variety of meanings. In this casebook, "evidence" refers most often to information that is offered by a party at trial as a means of establishing its claims: see further Hock Lai Ho, "The Legal Concept of Evidence" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Winter 2015 ed, online: <http://plato.stanford.edu/archives/win2015/entries/evidence-legal>. The law of evidence refers to those statutory, common law, and constitutional rules that regulate which information may be offered in a court proceeding, what inferences may be drawn from that information, and how facts are proven. The law of evidence is therefore also necessarily concerned with burdens and standards of proof and presumptions.

The eminent English scholar William Twining has made two observations about the traditional common law approach to teaching and writing about evidence. First, that approach has focused on the law and legal doctrine virtually to the exclusion of studying questions about factual reasoning. Second, scholarship and teaching of the law of evidence have tended to focus on questions of admissibility (that is, what information is admitted and what is excluded) in contested trials (William Twining, *Rethinking Evidence: Exploratory Essays*, 2nd ed (Cambridge: Cambridge University Press, 2006) at 241-42). Factual reasoning is a core legal skill and worthy of a course in its own right. Although this casebook does not offer a sustained analysis of factual reasoning—for such a treatment, see Terence Anderson, David Schum & William Twining, *Analysis of Evidence*, 2nd ed (Cambridge: Cambridge University Press, 2005)—it engages carefully with legal rules beyond those regulating admissibility and beyond the contested trial, including the regulation of inferences, admissions by a party, and judicial notice.

The law of evidence operates primarily within the framework provided by the substantive law. How does one determine what facts must be proven? The party asserting a cause of action, offence, or defence must lead evidence to establish *facts* that support each of the elements required in accordance with the *substantive law*. The law of evidence is thus concerned primarily with the means of proof that can be put before the trier of fact at trial, the permissible uses that the trier of fact can make of the proof, and how evidence and inferences may be presented and tested.

However, the law of evidence operates not only at the trial of substantive issues but also whenever facts must be established. Thus, evidence law applies to the proof of facts that provide a basis for applying *jurisdictional law* (to determine which court or tribunal has jurisdiction over the matter), *procedural law* (to determine issues that arise regarding the process of that court or tribunal), and *remedial law* (to determine the appropriate remedy insofar as the remedy is within the jurisdiction of the court or tribunal). Evidence law operates within, and is conditioned by, the context of the facts that are in issue and the purpose for which they are being proved. As will become clear throughout this book (consider, e.g., Chapter 3, Section III, which considers the concept of relevance in sexual assault trials), evidence law also operates within a broader social context and cannot be wholly separated from that context. This social context gives rise to risks such as the possible operation of unfair or discriminatory stereotypes. It also leads to concerns about ensuring that litigants have fair access to the information necessary to pursue their claims. Some aspects of the law of evidence seek to ameliorate such risks and concerns on the premise that this amelioration advances the truth-seeking functions of the trial while also securing other important rights and values.

An excellent illustration of both the importance and the inherent limits of building a factual case that adequately addresses the central legal and evidentiary issues at stake in a case is provided by Sonia Lawrence in her analysis of *Canada (AG) v Bedford*, 2013 SCC 72 ("Expert-Tease: Advocacy, Ideology and Experience in Bedford and Bill C-36" (2015) 30:1 CJLS 5). Lawrence documents the work done by those who challenged the constitutionality of *Criminal Code*, RSC 1985, c C-46 provisions to build an evidentiary foundation—based especially on expert evidence—to support their claim that the *Criminal Code* infringed the security of the person of those who engage in sex work. The evidentiary record was at the heart of efforts to persuade the Supreme Court of Canada to strike down those provisions. However, in subsequent parliamentary consultations on law reform, that evidentiary record played little role in informing how Parliament would respond to the Court's decision.

The *Bedford* example illustrates the complexity of the evidentiary record in much contemporary Canadian litigation and the extent to which evidence lies at the heart of advocacy. The Supreme Court of Canada has reformed the law of evidence considerably in recent years. These reforms reflect the imperatives of Charter guarantees of rights and freedoms, the growing judicial recognition that inflexible rules of admission and exclusion operated unjustly at times, and the increasing complexity of evidentiary records, particularly expert evidence.

This casebook focuses on the core of the law of evidence and aims to equip the reader not only to understand the law of evidence as it stands today, but also to adapt and respond to the change that is a constant feature of the law of evidence.

II. THE FUNDAMENTAL RULE OF THE LAW OF EVIDENCE

There is one overarching rule of evidence law: everything that is relevant to a fact in issue is admissible unless there is a legal reason for excluding it. Courts and commentators have expressed this overarching rule in several ways:

> (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.

(James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898) at 530 (cited as reflecting "the law in Canada" in *Morris v R*, [1983] 2 SCR 190 at 201, 7 CCC (3d) 97, Lamer J, dissenting).)

> Once evidence is found to be relevant, it is generally admissible and the jury is left to decide how much weight to give a particular item of evidence. Similarly, once evidence is determined to be relevant with respect to a particular live issue, the jury should normally be free to weigh the evidence in drawing conclusions about that live issue. This is subject to specific exclusionary rules and the judge's discretion to exclude evidence that is more prejudicial than probative.

(*R v White*, 2011 SCC 13 at para 54, Rothstein J.)

These very general statements raise at least three questions. First, what does it mean for something to be relevant? Second, what kinds of reasons justify the exclusion of relevant evidence? Third, what is the significance of a piece of evidence being admitted?

III. RELEVANCE

Two considerations determine whether a piece of evidence is relevant. The first, usually referred to as "factual relevance," might be described as a matter of logic or of cognition or perhaps as a matter of empirical knowledge. The test for factual relevance is whether the evidence makes a fact in issue more or less likely to be true. McCormick described the test as follows: "does the evidence offered render the desired inference *more probable than it would be without the evidence*?" (Charles T McCormick, *Handbook of the Law of Evidence* (St Paul, Minn: West, 1954) at 318; see also US Federal Rule of Evidence 401).

The second consideration that determines relevance is the issues to which the facts are relevant. The purpose of a trial is to determine facts and apply the law to those facts, but not just any facts: only those facts that are legally significant. Whether a fact is legally significant depends on the nature of the action. In a criminal prosecution, the facts to be determined depend on the elements of the offence charged and on the elements of any defences that are in play. Some offences, such as murder, require proof of subjective fault; others, such as manslaughter, do not. So evidence tending to prove or disprove the accused's subjective knowledge that his or her actions would cause death is always relevant in a murder trial. In a manslaughter trial, on the other hand, the accused's subjective foresight of death does not have to be proved or disproved, so evidence that related to that factual issue would be legally irrelevant (unless it also related to some other factual issue that was in dispute). Similarly, in a civil case, the facts in issue will be defined by the nature of the cause of action and any

defences, as set forth in the pleadings. Evidence tending *only* to prove or disprove facts lying outside of the facts that have to be proved to sustain the cause of action, or defend against it, will be legally irrelevant.

The two considerations are generally distinguished by the following terms: the first is called "relevance," and the second is called "materiality" or "legal relevance."

> *Relevance* is established at law if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced. The evidence is *material* if it is directed at a matter in issue in the case.

(*R v Collins* (2001), 150 OAC 220, 160 CCC (3d) 85 at para 18 (CA), Charron JA). Cases concerning the meaning of relevance in the first sense are presented in Chapter 3.

IV. REASONS FOR EXCLUDING RELEVANT EVIDENCE

One might think that everything that is relevant to a material proposition should be admissible: whenever relevant evidence is excluded, the trier of fact is deprived of some information that could have a bearing on its determination of the facts. Nonetheless, the law recognizes many grounds for exclusion, which may be tentatively grouped as follows.

First, relevant evidence may be inadmissible because to admit it would distort the fact-finding function of the court. Many of the major exclusionary rules are based on the concern that certain types of evidence, although relevant, tend to cause the trier of fact to reason irrationally or inappropriately. For example, the rule against hearsay is largely based on the concern that out-of-court statements offered for their truth, although relevant, are insufficiently reliable to enter into the trier of fact's reasoning. The rule preventing the Crown from leading evidence-in-chief of the accused's bad character is based in part on the concern that the trier of fact, on learning that the accused is a bad person, will tend to rely on that information to resolve any reasonable doubt that might otherwise arise on the evidence relating to the current charge. The concern about distorting the fact-finding process is a concern about the fairness of the trial. In addition to specific exclusionary rules based on this concern, the judge has a discretion to exclude evidence where its "probative value" is outweighed by its "prejudicial effect." This general discretion is discussed separately below.

Second, relevant evidence may be inadmissible because its admission would unnecessarily prolong a trial or confuse the issues. Perhaps the most notable rule founded on this concern is the so-called collateral facts rule (see Chapter 6), which in essence prevents a party from proving independently that an opposing party's witness is lying about matters that are unrelated to the matter in issue. Evidence that a witness tends to tell lies is always relevant because it goes to his or her credibility, which in turn goes to the tendency of his or her testimony to establish a fact in issue. Nonetheless, the exclusion of the evidence is justified on the basis that to permit an open-ended inquiry into the general credibility of every witness would create trials within trials, confusing the issues and unduly prolonging trials without significantly enhancing their truth-finding function.

Third, relevant evidence may be inadmissible because its admission would undermine some important value other than fact-finding. Thus, for example, evidence that unfairly surprises the opposite party may be excluded. Where a party to a civil action has failed to disclose relevant evidence in the discovery process, the evidence will not be admissible at trial except on terms that prevent prejudice to the opposing party (see Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, r 53.08). Section 24(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the Charter), provides for the exclusion of evidence obtained in violation of the Charter where "the admission of it in the proceedings would bring the administration of

justice into disrepute." Evidence obtained in a manner that infringes the Charter is often relevant and highly probative—indeed, it is frequently determinative—of the facts at issue, but it may nonetheless be excluded as a means of enforcing constitutional values (see Chapter 8). The law of evidence also recognizes various forms of privilege that foster certain relationships by protecting confidential communications from disclosure, even where the disclosure would advance the fact-finding function of the trial. A classic example is the accused person who confesses to his lawyer. This confession may place certain constraints on the lawyer's conduct of the accused's defence (see e.g. Law Society of Ontario, *Rules of Professional Conduct*, Commentary to r 5.1-1), but the lawyer cannot be compelled to divulge the confession because obtaining legal advice and representation would be undermined if the solicitor (or the client) could be compelled to disclose confidential communications. The privilege is important to long-term fairness in the administration of justice, which outweighs the interest of the administration of justice in getting at the truth in any individual case. Privilege is considered in Chapter 9.

Fourth, relevant evidence may be excluded because the manner in which it is acquired, or presented, is inconsistent with the nature of the trial process. In the common law adversarial trial, it is for the parties to investigate and to present the case; the trial judge is to be neutral, disinterested, and concerned with ensuring that the trial is fair to both parties; and the trier of fact is to be neutral, disinterested, and charged with the task of determining the facts based on the evidence. Thus, the trier of fact is not supposed to perform its own investigations into the facts of the case. No matter how relevant or probative the evidence discovered in this way might be, it would be inadmissible because it was acquired in a manner that is inconsistent with the adversarial process. It may deprive the parties of the opportunity to test the evidence and undermine the neutrality of the trier of fact. Rules concerning the form and manner of the examination and cross-examination of witnesses, the order of presentation of evidence, and the proper manner of addressing and charging a jury might also be seen as related to the need to have a fair trial conducted by impartial adjudicators.

Finally, as you will study more closely in Chapter 3, it is now well established in criminal cases that evidence should be excluded where its "probative value" is outweighed by its "prejudicial effect." In this context, "prejudicial effect" refers to the possibility that the evidence may distort the fact-finding process, resulting in unfairness to the accused. The issue may arise where evidence is admissible for one purpose but inadmissible for another purpose. Thus, for example, a witness's record of convictions is admissible as a means of testing credibility. If an accused decides to testify, his or her criminal record could thus be used to assess credibility, but it must not be used as evidence that the accused is a bad person and therefore likely committed the crime on which he or she now stands charged. A trial judge determining the admissibility of such evidence must choose between (1) admitting the evidence and providing the trier of fact with a limiting instruction as to how it can be used and (2) excluding all or part of the evidence. The second option should be chosen where the prejudicial effect of the evidence on one issue exceeds in some measure its probative value on the other. The rule that excessively prejudicial evidence should be excluded is sometimes treated as an aspect of the test for relevancy, but the preferable view is that the balance between probative value and prejudicial effect is the last test to be applied before evidence is admitted. See also Chapter 3, Section II.

McCormick referred to the reasons for excluding relevant evidence as "counterbalancing factors" and summarized them as follows (Charles T McCormick, *Handbook of the Law of Evidence* (St Paul, Minn: West, 1954) at 319-20):

> There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value. ... First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side-issue that

> will unduly distract the jury from the main issues. Third, the likelihood that the evidence ... will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.

Where evidence is relevant to a defence raised by the accused in a criminal trial, the evidence will be excluded if its "prejudicial effect" substantially outweighs its "probative value." In this context, "prejudicial effect" refers to a distortion in reasoning or unfair prejudice to social and individual interests, such as a sexual assault complainant's rights to equality, privacy, and dignity. In summary, to be admissible, a piece of evidence must pass the following tests:

1. a. Is the evidence factually relevant—that is, does it tend to prove or disprove the fact for which it is tendered?
   b. Is the evidence legally relevant (material)—that is, is the fact that the evidence tends to prove or disprove legally significant in establishing an element of the cause of action, offence, or defence at issue?
2. Is the evidence inadmissible on any ground of law or policy?
3. Does the prejudicial effect of the evidence outweigh its probative value? If the evidence is tendered by the accused in a criminal trial, does the prejudicial effect of the evidence substantially outweigh its probative value?

For evidence to be admissible, the answers to questions 1a and 1b must be "yes," and the answers to questions 2 and 3 must be "no." If *either* question 1a *or* question 1b is answered "no," then the evidence is inadmissible, and if *either* question 2 *or* question 3 is answered "yes," then the evidence is also inadmissible.

V. ADMISSIBILITY AND WEIGHT

Suppose a party has proffered a piece of evidence that has been determined to be relevant and that is not subject to exclusion on any ground of law, policy, or prejudice. What is the significance of admissibility? If evidence is admissible, the trier of fact should consider it in reaching a factual determination, but the trier of fact is not required to accept or to believe any particular piece of evidence or to draw from it the inferences that the party invites it to draw. In other words, there is a difference between the admissibility of evidence and the weight that is attached to it. It is for the trial judge to determine whether evidence is admissible; once it is admissible, it is for the trier of fact, subject to any cautions that the trial judge might give, to determine what importance to attach to the evidence in determining the facts in issue. An exception to this usual rule arises where, as a matter of law, the proof of one fact is presumed to constitute the proof of another fact. See, for example, s 139(3) of the *Criminal Code*, RSC 1985, c C-46. To the extent that such a presumption shifts an element of the burden of proof to the accused, it may infringe the presumption of innocence guaranteed in the Charter. The court must then determine whether the infringement is justified in accordance with s 1 of the Charter. See Chapter 11, Sections IV and V.

VI. THE SOURCES OF THE LAW OF EVIDENCE

The law of evidence in common law jurisdictions in Canada has four sources: the common law, statutes, Indigenous law, and the Constitution.

A. THE COMMON LAW

The law of evidence in Canadian common law jurisdictions is still governed largely by the common law—that is, by judicial efforts to explain, rationalize, and develop principles governing the admissibility, exclusion, and application of evidence. Some of the most important evidentiary rules, such as the rule against hearsay (Chapter 4), the rules relating to burden and quantum of proof (Chapter 11), and the rules relating to expert evidence (Chapter 5), derive almost entirely from the common law. In recent years, the Supreme Court of Canada has been actively modifying and developing the common law of evidence. It has replaced some categorical exclusionary rules with a more functional and principle-driven approach (e.g. in the law of similar fact evidence (see Chapter 7, Section II.C), hearsay (see Chapter 4), and corroboration (see Chapter 6, Section V)). In addition, the court has addressed stereotypical thinking embedded in the law of evidence and replaced outmoded assumptions with new starting points for determining the relevance of evidence. For example, the court has adopted a new approach to assessing children's evidence (see Chapter 2, Section I.C) and new approaches to the relevance of evidence relating to sexual assault (*R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 66 CCC (3d) 321; see Chapter 3, Section III) and spousal assault (*R v Lavallee*, [1990] 1 SCR 852, 55 CCC (3d) 97; see Chapter 5, Section III).

It is important to remember that the rules of evidence are a means for securing the dual ends of truth and fairness; they are not an end in themselves. Thus, Lord Devlin acknowledged, in a child wardship case, that special measures may be warranted in order to serve the cause of justice in the context of the case:

> [A] principle of judicial enquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed, otherwise it would become the master instead of the servant of justice. Obviously the ordinary principles of judicial enquiry are requirements for all ordinary cases and it can only be in an extraordinary class of case that any one of them can be discarded.

(*Official Solicitor v K*, [1965] AC 201 at 238 (HL).)

B. STATUTES

The common law rules of evidence can, of course, be modified by statute and often have been, but no Canadian common law jurisdiction has enacted a comprehensive code of evidence that is comparable to the *Federal Rules of Evidence* in the United States. The Law Reform Commission of Canada addressed the issue in its *Report on Evidence* (1975), and a Federal/Provincial Task Force on Uniform Rules of Evidence (1982) proposed more comprehensive legislation, but neither proposal was implemented. Accordingly, although every jurisdiction in Canada has an evidence act, those acts are not self-contained and cannot be understood without reference to the common law. For example, s 3 of the *Canada Evidence Act*, RSC 1985, c C-5, states:

> A person is not incompetent to give evidence by reason of interest or crime.

This provision makes no sense at all, except against the common law background in which the parties to an action were incompetent by reason of their interest, and certain convicted criminals were incompetent because their criminality was deemed to be fatal to their credibility. The evidence acts thus modify or add to the common law of evidence but do not create a comprehensive code to displace it.

In addition to the evidence acts, individual statutes may contain provisions concerning the evidentiary rules applicable to the matters they govern. The *Criminal Code*, for example,

contains many evidentiary rules that apply only in criminal proceedings; the *Controlled Drugs and Substances Act*, SC 1996, c 19, contains certain evidentiary rules applicable only to proceedings under that Act; the *Child and Family Services Act*, RSO 1990, c C.11, provides, in s 50(1), that evidence of the past conduct of a person toward a child, which generally would not be admissible if the person were an accused, is admissible in proceedings under the Act. Similarly, statutes governing administrative tribunals or the legislation that creates provincial inferior courts or specific administrative tribunals may contain provisions concerning the admissibility of evidence. See, for example, the *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 15, which generally authorizes tribunals, many of which operate less formally than courts, to admit testimony and documents even though they would not be admissible in court. This broad authority is subject only to the law of privilege and to any specific statutory provisions to the contrary.

Accordingly, the common law rules of evidence are often tailored, by statute, to address the special circumstances of particular types of subject matter and processes. The rules of evidence may even be tailored to different phases of the same proceeding. Thus, the requirements for the admissibility of evidence establishing guilt in a criminal case are more rigorous than those governing the admissibility of evidence on sentencing: see *Criminal Code*, ss 723 and 724.

By virtue of the principle of parliamentary supremacy, statutory provisions may modify, reform, and displace the common law. Nonetheless, the Supreme Court of Canada, without finding an infringement of the Charter, has been prepared to read statutory evidence requirements as being subject to the court's general common law discretion to exclude evidence whose prejudicial impact on the fairness of the trial outweighs its probative value on an issue in the case. (See *R v Bingley,* 2017 SCC 12 re *Criminal Code,* s 254; *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385 re *Canada Evidence Act*, s 12; *R v Potvin*, [1989] 1 SCR 525, 47 CCC (3d) 289 re *Criminal Code*, s 715.)

C. INDIGENOUS LAW

There are plural legal traditions in Canada. These are the common law adopted from England, the civil law in Quebec, and Indigenous legal traditions. Indigenous legal traditions predate the other two traditions and continue to exist, except where they have been explicitly extinguished (see *Calder v British Columbia (AG)*, [1973] SCR 313 at 318, 328, and 375, 34 DLR (3d) 145; *Mitchell v MNR*, 2001 SCC 33 at 927). The Supreme Court of Canada has held that, in litigation to determine the scope of unextinguished Aboriginal rights, Indigenous sources of evidence must be respected and balanced with other sources admissible at common law. For example, in *Delgamuukw v BC*, [1997] 3 SCR 1010 at 1069, 153 DLR (4th) 193, the Court held that oral histories passed down by elders are an important source of evidence for the determination of Aboriginal rights and should be given due weight within the process:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.

The Supreme Court of Canada has recognized the unique evidentiary barriers faced by Indigenous claimants and the validity of their sources of evidence, which must be fairly assessed and balanced with other forms of evidence to determine whether the validity of the Aboriginal claim has been established on a balance of probabilities (see *R v Marshall*, [1999] 3 SCR 456, 138 CCC (3d) 97; *R v Van der Peet*, [1996] 2 SCR 507 at para 68, 109 CCC (3d) 1, Lamer CJ).

And yet there are notes within the Court's jurisprudence that suggest that the Court continues to regard common law principles of evidence as representing a norm against which the

evidence brought by Indigenous claimants will be measured. Consider the following statement from *Mitchell v MNR*, 2001 SCC 33 at para 38:

> Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense" … .

For as long as this kind of affirmation of the "common sense" character of the prevailing common law principles of evidence persists, it is difficult to be entirely sanguine about the status of Indigenous law as a valued source of our laws of evidence. Indeed, as Patricia Cochran has observed, "'Common sense' is a powerful phrase, and when it is invoked in legal judgment without adequate reflection, it can harbour stereotypes, reproduce unjust power relations, and silence marginalized people" (Patricia Cochran, *Common Sense and Legal Justice* (Vancouver: McGill-Queen's University Press, 2017 at 2). As you will see throughout this casebook, the Supreme Court of Canada's evidence jurisprudence has been attentive to the dangers posed by stereotypes and has worked to eliminate unjust stereotypes from the law of evidence. Nonetheless, there is more work to be done.

D. THE CONSTITUTION

Section 52(1) of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Thus, the law of evidence, like any other law, is constrained by constitutional requirements. A statutory evidence provision that is inconsistent with the Constitution is of no force or effect. Furthermore, in a criminal prosecution, which involves state action, a common law rule of evidence that is inconsistent with the Charter is of no force or effect, and the court can formulate a new rule to replace it (see *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577; *R v Swain*, [1991] 1 SCR 933, 63 CCC (3d) 481; *R v Daviault*, [1994] 3 SCR 63, 93 CCC (3d) 21; *R v Stone*, [1999] 2 SCR 290, 134 CCC (3d) 353). In an action between private parties, involving no government action, a common law rule will be developed in accordance with Charter values (see *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129).

1. Division of Legislative Authority

Sections 91 and 92 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, define the subjects on which the federal and provincial governments can legislate. The limitations on legislative powers created by ss 91 and 92 apply to the rules of evidence as well as to substantive law: only Parliament can create or modify statutory rules of evidence for matters falling under federal jurisdiction, and only the provincial legislatures can create or modify statutory rules of evidence for matters falling under provincial jurisdiction. Thus, for example, because of Parliament's jurisdiction over criminal law and procedure, the provincial legislatures cannot create evidentiary rules for criminal proceedings; because of provincial jurisdiction over "Property and Civil Rights in the Province," the federal government cannot create evidentiary rules concerning contractual disputes or tort actions (except those involving the federal Crown).

It follows that the division of legislative authority also governs the applicability of evidence statutes. In criminal and federal regulatory matters, and in disputes involving the federal Crown,

the *Canada Evidence Act* will apply. In matters within provincial jurisdiction, the appropriate provincial evidence act will apply.

In some instances, however, the applicable evidence law in a matter within federal jurisdiction will be determined in accordance with provincial evidence provisions that are incorporated by reference into the *Canada Evidence Act* by virtue of s 40, which provides that

> [i]n all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

In what situations would s 40 apply? Explain how it interacts with s 8(2) of the *Criminal Code*, which states that

> [t]he criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

2. The Canadian Charter of Rights and Freedoms

The Charter came into force on April 17, 1982. It has had a fundamental impact on the law of evidence in Canadian criminal proceedings in at least four ways.

First, the Charter provides express constitutional protection for some evidentiary principles in criminal proceedings: the presumption that an accused is innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal (s 11(d), the right not to be compelled as a witness against oneself (s 11(c)), and the right against self-incrimination in subsequent proceedings (s 13).

Second, s 7 of the Charter has proved to be an important vehicle for the constitutionalization of evidentiary principles. Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In criminal proceedings, liberty is always at stake, so s 7 is always applicable. All criminal proceedings must therefore be conducted in accordance with the principles of fundamental justice. The question then becomes: are any of the common law rules of evidence so important or so basic to the justice system that they have become principles of fundamental justice? The Supreme Court of Canada has considered arguments of this type on several occasions, and although it has usually rejected the claim, there is no doubt that some very basic principles of evidence have been embedded in s 7 (see e.g. *R v Seaboyer; R v Gayme* in Chapter 3 and *Application Under S 83.28 of the Criminal Code (Re)*, 2004 SCC 42 in Chapter 8). Common law or statutory evidence rules that are inconsistent with the principles of fundamental justice must either be justified under s 1 or be declared of no force or effect.

Third, the Charter protects important rights in the investigation of offences: "the right to be secure against unreasonable search or seizure" (s 8), "the right not to be arbitrarily detained or imprisoned" (s 9), and "the right on arrest or detention … to retain and instruct counsel without delay and to be informed of that right" (s 10(b)). Common law or statutory evidence rules that are inconsistent with these rights must again either be justified under s 1 or be declared of no force or effect; state action that is not authorized by statute or common law and is inconsistent with these rights cannot be justified since it is not "prescribed by law" as required in s 1. The scope of rights relating to investigation of offences is reviewed in a course on criminal procedure.

Fourth, where evidence is obtained in a manner that infringes a Charter right, the Charter provides for a remedy in the following terms:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

This exclusionary rule will be considered in Chapter 8, Section II.

VII. THE TRIAL PROCESS

It is impossible to understand the rules of evidence in common law jurisdictions without a basic understanding of the common law trial. This book is intended for use in the second or third year of a Canadian law school program, and students should already have some familiarity with the trial process from their first-year curriculum. What follows is, therefore, a very brief overview of the main features of a common law trial.

A. WITNESSES

The witness is at the centre of the common law trial, whether the subject matter of the trial is criminal or civil. For this reason, witnesses and the procedural rules associated with their testimony form the focus of Chapter 2. With very few exceptions, all facts have to be proved or disproved through the testimony of witnesses. Testimony is elicited through questions put by counsel (or by the parties themselves if they are unrepresented) and, occasionally, by the trial judge. The questions asked by the party calling a witness constitute the examination-in-chief; the questions asked by other parties constitute cross-examination. The principal difference between examination-in-chief and cross-examination is in the permissible form of questioning: leading questions are generally not permitted in examination-in-chief but are the usual method of cross-examination (see Chapter 2, Section IV). At the conclusion of cross-examination, the party who called the witness may re-examine the witness to address any matters arising from the cross-examination that were not addressed in the examination-in-chief.

B. CRIMINAL PROCEEDINGS

In Canadian law, every criminal trial begins with a charging document called the indictment, or the information. The charging document specifies the offence charged and contains some statement, usually quite brief, of the facts that are to be alleged by the Crown. (The law of criminal pleadings in Canada is quite complex and is considered in a course devoted to criminal procedure.) Before the trial begins, the Crown has a constitutional duty to disclose all relevant and non-privileged information to the defence (see *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1), but there is no corresponding disclosure obligation on the defence. At the outset of the trial, the accused will be called upon to plead "guilty" or "not guilty." (Other pleas are possible, but, again, these are best considered in a criminal procedure course.) A plea of guilty is a formal admission of the facts necessary to establish the Crown's allegations (see Chapter 10). A plea of not guilty indicates that the accused will

dispute the Crown's case, thus requiring the Crown to adduce sufficient evidence to establish each element of the offence.

The criminal court may be constituted by a judge and a jury or by a judge sitting alone. In a trial with a jury, the trial judge decides all the legal questions that arise, including the admissibility of evidence and the propriety of any questions asked or answers given. At the end of the trial, the judge instructs the jury as to the applicable substantive law and as to the burden and quantum of proof on whatever factual issues are to be decided. Counsel for the parties may make objections to the judge's charge to the jury, and, if warranted, the judge will reinstruct the jury. The jury is the trier of fact: it determines what the facts are and applies the law to those facts, but the jury does not report its factual findings. Instead, the jury simply reports whether it has found the accused guilty or not guilty on each charge. In a trial by judge alone, the judge performs the functions of judge and jury, deciding legal questions and finding facts. The judge is required to provide reasons for decision, which, having regard to the particular circumstances of the case, provide an explanation of the basis of the decision in a manner that is reasonably intelligible to the parties and enables meaningful appellate review of the correctness of the decision (see *R v Sheppard*, 2002 SCC 26). Despite the centrality of the jury to common law rules of evidence, less than 1 percent of criminal cases in Canada are resolved by a jury verdict. (See, further, Lisa Dufraimont, "Evidence Law and the Jury: A Reassessment" (2008) 53:2 McGill LJ 199.)

In a criminal case, subject to very few exceptions, the Crown is required to prove the facts it alleges beyond a reasonable doubt (see Chapter 11). If the accused pleads not guilty, the Crown calls its witnesses first. This part of the trial is called the Crown's case-in-chief. The Crown's witnesses will be examined in chief by Crown counsel, cross-examined by defence counsel, and, if appropriate, re-examined by Crown counsel on matters arising during the cross-examination. At the close of the Crown's case, the accused may bring a motion for a directed verdict of acquittal. The ground for such a motion is that the Crown's evidence, even if believed, is insufficient to establish the elements of the offence, so the accused must be acquitted (see *United States of America v Shephard* (1976), [1977] 2 SCR 1067, 30 CCC (2d) 424). If the trial judge grants the motion, the Supreme Court of Canada has held that the judge should withdraw the case from the jury and enter the acquittal himself or herself (see *R v Rowbotham; R v Roblin*, [1994] 2 SCR 463, 90 CCC (3d) 449).

Once the Crown's case is complete, the accused may (but need not) call witnesses. The accused may (but need not) testify. The defence witnesses will be examined in chief by defence counsel, cross-examined by Crown counsel, and re-examined by defence counsel. At the end of the accused's case, the Crown may, in rare circumstances, be permitted to call evidence in reply, with the accused, in even rarer circumstances, having a right to further reply.

After all the evidence has been heard, the trier of fact will be addressed by counsel for the accused and by counsel for the Crown. (On the order of these addresses, see *Criminal Code*, s 651, and *R v Rose*, [1998] 3 SCR 262, 129 CCC (3d) 449.) If the defence calls evidence, counsel for the accused addresses the trier of fact first. The trial judge then instructs the jury, and the jury retires to consider its verdict. In Canada, it is a criminal offence for jurors to disclose their deliberations, except under limited circumstances (see *Criminal Code*, s 649). If the trier of fact acquits the accused, he or she is, of course, free to go (unless the accused is in custody in relation to another matter). If the trier of fact finds the accused guilty, he or she is remanded for sentencing by the trial judge.

1. Voir Dire to Determine Conditions Precedent to the Admission of Evidence

In a trial by jury, it may be necessary to hold a "*voir dire*" (a trial within the trial) to determine the facts that are a condition precedent to the admissibility of evidence. Thus, for example,

before a witness refers to a confession made by the accused, it must be established that the confession was voluntarily made. (See the discussion in Chapter 8, Section I.) The *voir dire* is held in the absence of the jury since knowing that the accused had confessed would be highly prejudicial if the confession is held to be inadmissible. On some other evidentiary issues, a *voir dire* will be heard in the presence of the jury. Thus, for example, a *voir dire* as to whether a child is competent to testify will be heard in the presence of the jury. If the judge finds that t he child is competent to testify, the jury can make use of the evidence on the *voir dire* in assessing the weight to give to the child's testimony. If the judge finds that the child is not competent, there is no likelihood of prejudice resulting from the jury having heard the evidence on competence (see Chapter 2).

For an excellent overview of the Canadian criminal trial, see Alan W Mewett & Shaun Nakatsuru, *An Introduction to the Criminal Process in Canada*, 4th ed (Toronto: Carswell, 2000). Overviews of procedural developments in Canadian criminal law are provided by Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed (Toronto: Carswell, 2010), and by Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999).

2. Appealing on the Basis of Evidence Rulings in Criminal Cases

The rights of the accused and the Crown to appeal from verdicts in proceedings by indictment are laid out in part XXI of the *Criminal Code*. Generally speaking, the accused may appeal from conviction on a question of law, as well as on other grounds, whereas the Crown may appeal from acquittal only on a question of law. A trial judge's decision to admit or to exclude evidence is a question of law. Decisions about admissibility are therefore frequent grounds of appeal for both the Crown and the accused. Most of the cases included in these materials are reports of appellate decisions. Where an appellate court holds that evidence was admitted or excluded in error, it will nonetheless dismiss the appeal unless the error resulted in a substantial wrong or a miscarriage of justice (*Criminal Code*, s 686(1)(b)(iii)). Where an appeal is allowed, the court may quash the conviction, substitute a verdict, or order a new trial so that the matter can be determined on a proper evidentiary foundation (*Criminal Code*, ss 686(2), (3), and (4)).

3. Fresh Evidence on Appeal

An appeal is argued on the basis of the record of evidence at the trial, but in an appropriate case, the appellate court has the power to hear additional evidence (*Criminal Code*, s 683; *Palmer v R*, [1980] 1 SCR 759, 50 CCC (2d) 193).

C. CIVIL PROCEEDINGS

Civil proceedings begin with a statement of claim from the plaintiff, a statement of defence from the defendant, and further pleadings from any other parties to the action. Following the exchange of pleadings, rules of civil procedure in each jurisdiction provide for pre-trial discovery. Although pleadings and discovery in civil cases are properly considered in a course on civil procedure, they merit a brief discussion here as they also have implications for the proof of facts at trial. The pleadings frame the issues in the action and provide the basis for determining whether evidence is relevant to a material issue. An admission of fact in a pleading dispenses with the need to prove that fact at trial and thereby makes that issue immaterial. The party's affidavit on production disclosing documents relevant to the action is often an important source of evidence. A party may give notice to another party to admit certain facts, including the authenticity of documents, and a party who unreasonably fails to do so, requiring that the facts be proven at trial, may suffer costs consequences. An admission made in the oral

examination for discovery, or in response to a notice to admit, can be read into the record at trial and will dispense with the need for further proof. In addition, the examination for discovery enables the examining party to assess the strengths and weaknesses of the case. Moreover, if the party changes his or her story at trial, the transcript of the examination for discovery can be used to impeach his or her credibility. (See e.g. Ontario *Rules of Civil Procedure*, rr 31.11 and 51, and Ontario *Evidence Act*, ss 20 and 21.)

Most civil cases are heard by a judge sitting alone, but jury trials are by no means unusual. The functional division between the judge and the jury in a civil trial is the same as in a criminal trial: the judge decides all questions of law, including decisions about the admissibility of evidence, and the jury determines the facts and applies the law to them. As in a criminal case, the parties to a civil case call witnesses who are examined in chief by the party calling them, are cross-examined by the other parties, and may be re-examined. The jury's factual findings in a civil case may be more detailed than in a criminal case; the jury may, for instance, be asked to answer a series of questions bearing on the defendant's liability rather than simply finding the defendant liable or not liable.

Appeals in civil cases, as in criminal cases, may be founded on alleged errors in admitting or excluding evidence.

1. Evidence in Interlocutory Proceedings in Civil Matters

Prior to trial of a civil action, it may be necessary to determine procedural issues, such as a motion to add a party, a motion for an interlocutory injunction, or a motion to compel further discovery. Where facts must be established in support of an interlocutory motion, the evidence is generally presented in sworn statements or affidavits. Where necessary, the witness (deponent) in the affidavit may be required to attend and be cross-examined before a special examiner (see e.g. Ontario *Rules of Civil Procedure*, r 39).

D. THE COMPETING GOALS OF THE TRIAL PROCESS

Ideally, the trial would determine the facts correctly, inexpensively, expeditiously, fairly, and without damaging other social values. In practice, these goals are likely to come into conflict with each other: for example, correctly determining the facts may take a very long time or might be quite costly, or it might involve compromising other social values, such as the privacy of witnesses or the security of the state. The rules of evidence, like other procedural rules, are therefore concerned not just with truth-seeking but also with a range of other values. The law of evidence acts as a filter preventing the trier of fact from hearing some information and limiting what it can do with the information it does hear. As you read through the judicial reasoning that forms the bulk of this book, you should ask yourself whether the Canadian law of evidence does a good job of balancing the various goals of the trial process.

1. The Adversary System and the Roles of Counsel and the Court

Our trial process is based on the adversary system, the essential attributes of which are defined by the respective roles of the parties and the court. In contrast to the inquisitorial system, the adversary process is not shaped by an official. Rather, the parties and their counsel determine the issues to be litigated, the evidence to be offered, and the strategy to be pursued. The judge is a neutral adjudicator of legal questions and more passive than a judge in an inquisitorial jurisdiction. The judge does not investigate or conduct research into the facts at issue (*Phillips v Ford Motor Co of Canada Ltd*, [1971] 2 OR 637, 18 DLR (3d) 641 (CA)), does not call witnesses (unless, in a criminal trial, it is necessary to do so to ensure that justice is done (*R v Cleghorn*, [1967] 2 QB 584), and generally should exercise restraint in questioning witnesses so as not

to interfere with the fair conduct of the trial. The judge's role is to supervise the proceedings: to determine the admissibility and sufficiency of evidence, to decide any procedural issues, and to intervene as necessary to ensure the fairness and efficiency of the proceeding. Finally, the role of the judge is to listen to the evidence and submissions and to decide: to review the evidence for the jury and instruct the jury on the law or, when the judge sits without a jury, to determine the applicable legal principles, find the facts, and apply the law to the facts, giving sufficient reasons to indicate the basis of the decision.

In support of the adversary system, it is argued that the opportunity for parties to participate in shaping the case enhances the legitimacy of the proceeding. A party who has had a full opportunity to raise issues, tender proof, and submit arguments is more likely to have confidence in the process. Moreover, it is assumed that the self-interest of the parties will motivate them to leave no stone unturned in presenting a strong case and testing the evidence of the other side. It is also argued that the tendering and challenging of evidence throughout the trial tend to keep the trier of fact in a state of suspended judgment until all admissible evidence is before the court, thus counteracting the human tendency to form an early hypothesis about the case and screen out the facts that do not fit that hypothesis.

Notwithstanding the conceptual strengths of the adversary system, its effectiveness is handicapped to some extent by practical constraints. The parties may not have access to equal resources to investigate the facts and present the case (see Mark Cooney, "Evidence as Partisanship" (1994) 28:4 Law & Soc'y Rev 833). In some instances, parties may not be equally motivated on either side of the case. The trier of fact must rely on evidence filtered through witnesses rather than first-hand investigation. Techniques of questioning witnesses may distort the truth-finding process in some cases, and methods of assessing credibility and judging the plausibility of competing accounts may reflect culturally limited assumptions. Whatever the state of the evidence, the trier of fact must make an immediate and definitive decision at the completion of the trial. The "winner takes all" approach raises the stakes of the litigation, and the adversarial nature of the proceedings may disrupt continuing relationships.

It is important to acknowledge modifications to the adversary system that seek to address some of its handicaps and enhance its effectiveness as a fair means of getting at the truth. The discovery process in civil cases (see e.g. r 31 of the Ontario *Rules of Civil Procedure*) and the obligation of the Crown to make full disclosure to the defence in criminal prosecutions (*R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1; *R v McNeil*, 2009 SCC 3) avoid the potential unfairness of trial by ambush and equip the parties with potential evidence. The professional standards expected of lawyers and judges should operate to restrain abuses of the process. Adverse cultural or stereotypical assumptions that could distort the process can be challenged, usually through expert evidence, or excluded through common law and statutory rules. Plea bargaining in criminal cases and the introduction of mediation and pre-trial conferences in civil cases encourage the resolution of disputes, and, in civil cases, rules of costs provide incentives to be realistic in assessing the value of a civil case for settlement purposes. The requirement, in criminal cases, that the Crown prove guilt beyond a reasonable doubt strives to ensure, but does not always secure, that the innocent are not convicted. It must be noted, however, that fairness often depends upon the validity of the assumption that triers of fact are able to compartmentalize their analysis when evidence is admissible for one purpose but cannot be used for another. It is indeed troubling that some empirical studies challenge the validity of that fundamental assumption (see *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385).

The most intractable problem with the adversary system is the frequent disparity in the resources of the parties, including at times the inability of one or both parties to retain counsel. The problem is addressed to a limited extent through the availability of legal aid and the tradition of members of the bar providing professional services on a *pro bono* or voluntary basis, and access to relevant information is facilitated by the rules regarding discovery and disclosure. However, the number of unrepresented parties in our courts is an increasing concern. Problems with access to justice strike at the core of the adversary system.

VIII. R V GALLOWAY: A CASE STUDY

Throughout the casebook, we will be returning to the fictional case of Martin Galloway, who is charged with first-degree murder in the death of his wife, Angela. Developments in the Galloway trial will be introduced at the end of each chapter, and questions that introduce particular evidentiary challenges in litigation relating to topics dealt with in the chapter will be posed.

With each new problem, those facts necessary to address the issue raised will be provided. For now, by way of introduction, below are some background facts to help orient you with respect to this case and the key issues that lie at the heart of this litigation.

Martin Galloway, the accused, is charged with first-degree murder in the death of his wife, Angela. She was killed on Easter Sunday, March 27, 2020. There is no dispute that Angela Galloway was brutally murdered; the issue at trial will be whether the accused is the person who killed her.

At the time of the murder, the Galloways had been married for approximately seven years and had two children, then aged five and three. The deceased had been involved in competitive dog training and used the drive shed of their rural home (located 10 metres [30 feet] northwest of their residence) to train her dogs. Although the Galloway home is in the country, neighbours live on each side of them, in homes situated within earshot.

At approximately 11:00 p.m. on Sunday, March 27, 2020, the accused telephoned 911 and reported that he had found his wife in the drive shed. She was unconscious and appeared to have suffered a serious head injury. He was directed to return to her and perform CPR. Emergency personnel arrived 15 minutes later. One of the firefighters was an off-duty police officer; upon seeing Angela Galloway, he concluded she was dead and secured the scene.

The accused cooperated with the police and was interviewed by them on three separate occasions, initially on March 28 and then again on April 18 and June 2, 2020. In each of his statements, the accused told police that he and his wife had spent March 27 (Easter Sunday) with their children before visiting his in-laws for dinner, returning home around 7:00 p.m. That evening a friend, Tom Jenkins, dropped by their home to see the accused (who is a chiropractor) for a back adjustment. Jenkins left around 9:00 p.m. The accused told police that after Tom left, he and his wife watched *Nova* on PBS. (The accused was able to describe the program in detail to police.) At 10:00 p.m., his wife went out to the drive shed to train her dog for an upcoming competition. The accused used the hot tub in the basement of the home, tidied up the house, and got ready for bed. When his wife had not returned by 11:00 p.m., the accused went out to speak to her as he was anxious to go to bed. He told police he opened the side door to the drive shed and found his wife. After calling 911 from the house, he returned to the drive shed and performed CPR. He told police that his wife was initially face down on her left side and that he rolled her onto her back, unzipped her jacket, and performed several cycles of CPR.

The Crown's case against Martin boils down to the following arguments that it intends to substantiate with supporting evidence:

1. First, the Crown contends that the crime scene was staged to make it appear as though the drive shed was broken into. In that respect, the Crown will point to the following:
   a. the purported point of entry was a broken window to the drive shed that is visible from the home and the street, whereas a far more discreet window at the back of the drive shed was untouched;
   b. those who perpetrate break-ins avoid residences where the occupants are home—the Galloway home was well lit on the night in question and two cars were in the driveway;
   c. late on an Easter Sunday evening is an especially strange time for a break-in as residents are very likely to be home;

   d. no property of any apparent value, including rings on Angela's hands, was taken (notably, a snow blower was pushed outside of the drive shed, just beyond a roll-up door, but was not removed from the property); and
   e. the amount of trauma visited upon Angela was more consistent with a crime of passion, not the sort of force one would expect from a burglar simply trying to make good his escape.
2. Second, the Crown contends that Martin was the only person with the opportunity to commit the crime. In that regard, the Crown will emphasize that none of the neighbours heard or saw anything unusual on the evening in question prior to the arrival of emergency personnel.
3. Third, the Crown contends that Martin lied about performing CPR. It asserts that he simply did not have enough blood on his person to have performed CPR on the blood-soaked victim. (When police arrived, there were only a few spots of blood on the accused's T-shirt.)
4. Finally, and most importantly from the perspective of the Crown, during the six-month period leading up to the murder, Martin was involved in a passionate affair with another woman: Margaret Jenkins. The Crown will point to the affair as supplying Martin with the motive to kill his wife.

In contrast, it will be the position of the defence at trial that the accused is innocent. The defence will point to the broken window in the drive shed and the snow blower pushed outside of the drive shed's open roll-up door as evidence of the break-in. In addition, the defence hopes to rely on a body of evidence that seems to point away from Martin as the killer, including unidentified fingerprints on the deceased's vinyl jacket; an unidentified partial palm print on the snow blower; unidentified footwear impressions on the windowsill and inside the drive shed; and fibres found on a stud, inside the drive shed, just below the broken window.

FURTHER READING

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