Court File No.: 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N :

BRADLEY BARTON

Appellant

- and –

HER MAJESTY THE QUEEN

Respondent

- and –

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, VANCOUVER RAPE RELIEF SOCIETY, LA CONCENTRATION DES LUTTES CONTRE L'ESPLOITATION SEXUELLE (LA CLES), AWCEP ASIAN WOMEN FOR EQUALITY SOCIETY, ABORIGINAL WOMEN'S ACTION NETWORK (AWAN), Formerly Exploited Voices Now Educating (EVE) and CEASE: CENTRE TO END ALL SEXUAL EXPLOITATION (CEASE), ASSEMBLY OF FIRST NATIONS, AD IDEM / CANADIAN MEDIA LAWYERS ASSOCIATION; THE WOMEN OF THE MÉTIS NATION / LES FEMMES MICHIF OTIPEMISIWAK, NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN AND WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., DAVID ASPER CENTRE FOR CONSITITIONAL RIGHTS, ABORIGINAL LEGAL SERVICES and CRIMINAL TRIAL LAWYERS' ASSOCIATION (ALBERTA)

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TABLE OF CONTENTS

PARTS I AND II - OVERVIEW AND STATEMENT OF ISSUES

1. IAAW and LEAF submit the following with respect to the matters in issue:

   (a) IAAW and LEAF played an appropriate role as interveners at the Alberta Court of Appeal. Their submissions addressed the issues raised by the Crown and their references to the factual record were appropriate and necessary in the context of a jury trial, particularly a trial in which discriminatory myths and stereotypes had become part of the evidentiary record.

   (b) Section 276(1) of the *Criminal Code* creates a categorical prohibition against admitting sexual history evidence to support the "twin myths," regardless of whether the evidence is offered by the Crown or the defence. The trial judge's duty to apply the principles underlying s. 276, as well as common law principles of evidence, to guard against the danger that myths and stereotypes become part of the trial process, is heightened when the sexual history of Indigenous women and women who exchange sexual activity for money are implicated.

   (c) Consent to the sexual activity in question must include consent to the degree of force used. Further, the defence of mistaken belief in consent is only available where an accused has taken positive, active steps to ascertain consent. A conclusion that consent need not include the degree of force used, or that an accused can assume, because of the paid context of an encounter, that a complainant consented to all sexual touching, with any conceivable amount of force, would negatively transform the law of sexual assault in Canada, to the detriment of women's s. 7 rights to security of the person and s. 15 rights to the equal protection and benefit of the law.

PART III - STATEMENT OF ARGUMENT

a) Wahkohtowin

2. Cindy Gladue was an Indigenous woman, with links to her Cree and Métis communities. She grew up and lived on the homeland of the Métis and Treaty 8 and Treaty 6 territories. She was a mother of three children, a daughter, sister, aunt, cousin, and friend.

3. Ms. Gladue died as a result of the actions of the Appellant. Ms. Gladue, and her family, are entitled to criminal proceedings examining the circumstances of her death that accord her dignity and guard against the operation of discriminatory myths and stereotypes.

4. In *Nehiyawak* (Cree) and Métis legal traditions, the doctrine of "*wahkohtowin*" refers to the "responsibilities and reciprocal obligations" we hold in relation to one another.[1] The guiding legal principle of such inter-relatedness emphasizes that judicial processes, decisions, and actions have relational sources and consequences.

5. This case relates to the dehumanization of Indigenous women in Canada who disproportionately face violent victimization, violations of their bodily autonomy, and threats to their humanity, and to how the criminal justice system responds to this reality. Reconciliation with Indigenous people in Canada requires the justice system to acknowledge and address these injustices. The principle of *wahkohtowin* counteracts any impulse to artificially isolate this case from systemic discrimination within the justice system simply because the defendant is not the subject of this discrimination. Canadian judicial processes carry responsibilities toward accused persons, sexual assault complainants, and deceased victims, who are in unavoidable relation to each other within that process.

b) IAAW and LEAF Played an Appropriate Role at the Court of Appeal

6. In *Mikisew Cree Nation*, the Court described the proper scope of an intervener's legal arguments.[2] IAAW and LEAF adopt the submissions of the Asper Centre in respect of this ground of appeal, and make the following additional submissions.

7. There is no general presumption against interveners in criminal law cases.[3] Interveners frequently provide assistance to this Court, particularly in appeals engaging difficult questions of

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[1] Harold Cardinal, "Nation-Building: Reflections of a Nihiyow (Cree)" in Paul DePasquale, ed, *Natives & Settlers, Now & Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada,* 1st ed (Edmonton: University of Alberta Press, 2007) at 74; Maria Campbell, "Human Rights Conference November 1, 2007" (Eagle Feather News, 2007) online: http://www.metismuseum.ca/media/document.php/11751.maria%20column%20November%202007.pdf at 2.

[2] *Mikisew Cree Nation v Canada,* 2005 SCC 69 at para 40, 41.

[3] The cases cited by the Appellant to support this point primarily establish that an intervener must make unique and different arguments.

public policy, raising competing *Charter* rights and/or matters of statutory interpretation.[4] The present case is an instance of such an appeal.

8. At the Court of Appeal, IAAW and LEAF were granted leave to intervene with respect to grounds that had been set out by the Crown in its notice of appeal.[5] IAAW and LEAF's submissions squarely addressed those grounds. In respect of the ground that "the Trial Judge erred in making a ruling under s. 276 of the *Criminal Code* … without an application being brought by the defence and without any hearing,"[6] the interveners made submissions on the proper interpretation of s. 276 of the *Criminal Code* and on the role of a trial judge with respect to that provision. In respect of the grounds that "the learned Trial Judge erred in his instructions to the jury with respect to manslaughter" and "erred in law in instructing the jury that the complainant's consent on a prior occasion could be used to support a finding of honest but mistaken belief in consent on this occasion,"[7] the interveners made submissions on the legal requirements of consent to sexual activity established by s. 273.1(1) of the *Criminal Code* and the concomitant responsibility of trial judges to instruct a jury with respect to those requirements. At trial and on appeal, the parties focused on sexual assault causing bodily harm as the potential predicate offence to manslaughter. The elements of sexual assault causing bodily harm, including the *actus reus* and *mens rea* of consent, were therefore in issue.

9. Interveners must refrain from taking a position on the outcome of an appeal, but this principle does not preclude interveners from referencing the factual record in the course of making legal arguments on the grounds of appeal. Careful attention to the trial record is indispensable to legal argument, particularly in cases that turn on the proper application of the principles of evidence law and the demands of jury instructions, as does this case. Furthermore, equality-seeking interveners must draw upon the factual record in order to illustrate the potential operation of discriminatory myths and stereotypes within the trial process.[8]

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[4] Recent examples include *R v Brassington,* 2018 SCC 37; *R v Wong,* 2018 SCC 25; *R v Comeau,* 2018 SCC 15; *R v Canadian Broadcasting Corp,* 2018 SCC 5.
[5] *R v Barton,* 2016 ABCA 68.
[6] *R v Barton,* 2016 ABCA 68; Notice of Appeal of Her Majesty the Queen from *R v Barton,* 2017 ABCA 216, Appeal No 1503-0091, Docket No 120294731Q1 at 3.
[7] *Ibid.*
[8] Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 SCLR (2d) 295 at para 11.

10. In the Alberta Court of Appeal, IAAW and LEAF provided a substantive equality analysis of s. 276 of the *Criminal Code* and of the definition of consent to sexual activity. This analysis focused on the dangers presented to the truth-seeking function of a trial where discriminatory myths and stereotypes about women's consent to sexual activity, particularly those implicating discrimination against Indigenous women, become part of the evidentiary record. Interveners must be able to demonstrate that their analysis is relevant to the trial record. For example, the argument that racist stereotypes have the potential to exacerbate the prejudicial dangers of sexual history evidence originated from the observation that, at trial, Ms. Gladue was described as "Native" 26 times, by Crown counsel, defence counsel and witnesses.[9] No argument was made as to why her Indigeneity was relevant to any legal or factual issue, and no effort was made to guard against the possibility that the jury might reason from discriminatory assumptions that they might hold about Indigenous women.

11. The interveners did not and do not take a position on the outcome of the appeal but instead provide legal analysis and arguments on particular grounds of appeal within the context of the trial record. These submissions were distinct from those of the parties, and useful to the Alberta Court of Appeal. They reflected the expertise IAAW and LEAF collectively hold with respect to substantive equality and, in particular, systemic discrimination against Indigenous women, as well as commitment to the legal principle of *wahkohtowin*.

c) Interpretation, Scope and Procedural Requirements of Section 276

12. Section 276 seeks to "eradicate discriminatory beliefs" from trial processes by "prevent[ing] the use of sexual history evidence for discriminatory or improper purposes."[10] Guarding against reliance on discriminatory myths and stereotypes promotes and protects women's s 7 security of the person rights as well as their s 15 substantive equality rights, particularly the rights of Indigenous women and of women who exchange sexual activity for payment.

13. IAAW and LEAF submit that the Alberta Court of Appeal correctly held that s. 276 applies to any charge for which proof of sexual assault is required, for the reasons it provided.[11]

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[9] *R v Barton,* 2017 ABCA 216 para 124.
[10] Martha Shaffer, "The Impact of the *Charter* on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose" (2012) 57 SCLR 337 at 344 – 345.
[11] *R v Barton,* 2017 ABCA 216 at paras 96 – 110.

14. Section 276(1) creates a categorical prohibition against admitting sexual history evidence to support the inferences that a sexual assault complainant is more likely to have consented to the sexual activity at issue because of her consent to other sexual activity or that she is less worthy of belief because of her sexual history (the "twin myths").[12] In *Darrach,* this Court held that "the 'twin myths' are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process."[13] The "'twin myths' are prohibited not only as a matter of social policy but also as a matter of 'false logic,'"[14] regardless of the source of the sexual history evidence.[15]

15. Section 276 is buttressed by the common law principles set out in *Seaboyer* regarding what evidence is considered relevant and admissible in sexual assault prosecutions as applied to all parties. While s. 276(2) does not explicitly require the Crown to submit to judicial inquiry before introducing sexual history evidence, the common law principles of evidence apply to the Crown, and further, judges have a positive duty to apply these statutory and common law principles to guard against the danger that myths and stereotypes might become part of the trial process, no matter how a woman's sexual history evidence emerges in a trial.[16]

16. When weighing probative value against the danger of prejudice, the application judge must take into account factors including: the need to remove from the fact-finding process any discriminatory belief or bias; the risk that the evidence may unduly arouse sentiments of prejudice, sympathy, or hostility in the jury; and the potential prejudice to the complainant's personal dignity and right of privacy.[17] Pursuant to s. 276.2(3), a trial judge must give reasons for a decision to admit sexual history evidence.[18]

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[12] *Criminal Code*, RSC, 1985, c C-46, s 276(1) (a) and (b).
[13] *R v Darrach,* 2000 SCC 46 at para 33.
[14] *R v Boone,* 2016 ONCA 227, para 37. See also *R v Seaboyer,* [1991] 2 SCR 577 at 605.
[15] *R v Darrach,* 2000 SCC 46 at para 33.
[16] In the Matter of an Inquiry Pursuant to s. 63(1)of the Judges Act Regarding the Honourable Justice Robin Camp. Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council, November 2016, p. 70; Elaine Craig, "Judging Sexual Assault Trials: Systemic Failure in the Case of Regina v Bassam Al-Rawi" (2017) 95 Canadian Bar Review 180; Emma Cunliffe, "Sexual Assault Cases at the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 SCLR (2d) at 316.
[17] *Criminal Code*, RSC 1985, c C-46, s 276(3)(d) - (f).
[18] *Criminal Code*, RSC, 1985, c C-46, s 276.2(3)

17. The danger that such evidence will distort the truth-seeking function of the trial is particularly acute where, as here, the victim is an Indigenous woman who – according to the accused's evidence at trial – allegedly consented to some sexual activity in expectation of payment. ln *Seaboyer*, L'Heureux-Dubé J, writing in dissent but not on this point, observed, "[e]vidence of prior acts of prostitution or allegations of prostitution... is never relevant and, besides its irrelevance, is hugely prejudicial".[19]

18. Where sexual history evidence is introduced without judicial inquiry and attention to the factors listed in s. 276(3) and the complainant is Indigenous, the risk that discriminatory beliefs or bias may infuse the trial process becomes acute. This Court has taken judicial notice of widespread systemic discrimination against Indigenous individuals involved in the criminal justice system.[20] Racism can shape the way jurors receive information during the course of the trial, so "the link between prejudice and verdict" is "clearest when there is an 'interracial element' to the crime".[21]

19. Indigenous women are vastly over-represented in the criminal justice system as accused and incarcerated individuals, as victims of sexualized violence,[22] and as murdered and missing women. This over-representation is facilitated by racist, dehumanizing and sexualizing stereotypes about Indigenous women that undermine trial accuracy.[23]

20. If, at any point in a trial, evidence that has the potential to engage racist and gendered myths and stereotypes is aired, the trial judge has a duty to give detailed and specific instructions to guard against the risk that a jury will engage in impermissible reasoning. For the reasons set out by the

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[19] *Seaboyer*, [1991] 2 SCR 577 at para 220.
[20] *R v Gladue,* [1999] 1 SCR 688; *R v Ipeelee*, 2012 SCC 13; *R v Williams*, [1998] 1 SCR 1128.
[21] *R v Williams,* [1998] 1 SCR 1128 at para 28.
[22] Tina Hotton Mahoney, Joanna Jacob and Heather Hobson, "Women in Canada: A Gender Based Statistical Report" 7th ed (Statistics Canada, 2017), Catalogue no 89-503-X, online: https://www150.statcan.gc.ca/n1/en/pub/89-503-x/2015001/article/14785-eng.pdf?st=pSCaSw4z; The Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada,* (Organization of American States, 2014), online: https://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf.
[23] Tracy Lindberg, Priscilla Campeau and Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Elizabeth Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012); The Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*, (Organization of American States, 2014) at 12.

Alberta Court of Appeal at paragraph 145 of its judgment, this duty may extend to the provision of clear mid-trial instructions.

d) Consent to the Sexual Activity in Question Must Include the Degree of Force Used

21. The purpose of sexual assault law is to protect sexual autonomy and bodily integrity. "Having control over who touches one's body, and how, lies at the core of human dignity and autonomy."[24] Consent entails "the conscious agreement of the complainant to engage in every sexual act in a particular encounter."[25]

22. IAAW and LEAF argue that, to be valid in law, a complainant's consent also must extend to the degree of force used in the sexual activity. This position follows naturally from the law of sexual assault and the legal principles governing consent. In particular, this Court has held that the *actus reus* of consent turns purely on the "subjective internal state of mind" of the complainant at the time of the touching,[26] that consent must persist throughout the duration of the sexual activity,[27] and that "there is no defence of implied consent to sexual assault in Canadian law."[28]

23. LEAF and IAAW submit that the Alberta Court of Appeal's holding that the amount of force used is integral to the jury's consideration of whether the complainant or victim consented is correct and should be upheld.[29] The Criminal Lawyers' Association of Ontario (CLA Ontario) argues that "[s]exual partners need only obtain fresh consent to new sex acts, not to incremental changes to the degree of force."[30] This argument fundamentally misapprehends the nature of the law governing consent. Consent is assessed at the time the touching occurs and may be withdrawn at any time, for any reason.[31] It must, therefore, entail the complainant's agreement to the amount of force actually used at any time during sexual activity. To accept CLA Ontario's argument would

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[24] *R v Ewanchuk*, [1999] 1 SCR 330 at para 28.
[25] *R v JA,* [2011] SCR 440 at para 31.
[26] *R v Ewanchuk*, [1999] 1 SCR 330 at para 26.
[27] *R v Ewanchuk*, [1999] 1 SCR 330 at para 26; *R v JA,* [2011] SCR 440 at para 49, 65.
[28] *R v Ewanchuk*, [1999] 1 SCR 330 at para 31.
[29] *R v Barton,* 2017 ABCA 216 at para 193.
[30] The Criminal Lawyer's Association of Ontario, Motion for Leave to Intervene by the Criminal Lawyer's Association of Ontario in *R v Barton*, Court File No 37769 at para 29(a).
[31] *R v JA,* [2011] SCR 440; *R v Ewanchuk*, [1999] 1 SCR 330.

undermine decades of statutory law reform and Supreme Court of Canada case law on the parameters of the law of consent.

24. This position is consistent with *R v Hutchinson*, where the majority reiterated that the complainant's voluntary agreement must relate to the "basic physical act agreed to at the time, its sexual nature and the identity of the partner."[32] *Hutchinson* involved deliberate fraud by the accused, who sabotaged the condoms and thus vitiated the complainant's apparent consent. The Court therefore did not need to pronounce more extensively on the conditions for valid consent, and it did not overrule previous decisions of the Court regarding those conditions.

25. When providing instructions about consent, a trial judge must direct the jury to consider all relevant evidence that bears upon the issue of whether the complainant agreed to the degree of force used. Where the complainant is living and able to testify, this will include her testimony, for example, that when sexual activity became painful, she withdrew consent. In the absence of direct evidence from the complainant about her consent, circumstantial evidence becomes critical.[33] A jury should be directed to consider the amount of force that was used to cause the injuries inflicted during sexual activity, the likelihood that injury would result from those actions, and the pain that would have accompanied such injuries, as relevant to whether the complainant consented throughout the sexual activity in question. When an accused chooses to testify, circumstantial evidence also offers evidence against which the plausibility of that testimony may be tested.[34]

26. It bears emphasizing that consent cannot be inferred from the circumstances of the sexual activity in question or from any relationship between a complainant and an accused.[35] This principle underscores the risk raised by the admission of evidence of a complainant's sexual history with an accused and by evidence of her alleged agreement to engage in sexual activity in exchange for payment. An accused is not entitled to rely on the false logic that because a sexual partner had agreed to earlier sexual relations or was engaged in sex in exchange for money she thereby consented to any and all sexual touching performed by the accused, no matter how violent

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[32] *R v Hutchinson*, [2014] 1 SCR 346 at para 22, aee also para 17.
[33] *R v Al-Rawi,* 2018 NSCA 10 at para 69; *R v Villaroman,* [2016] 1 SCR 1000 at para 23 – 24.
[34] Emma Cunliffe, "Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination" (2014) 18 Int J of Evidence & Proof 139 at 176 – 7.
[35] *R v JA*, [2011] SCR 440 at para 47.

or how life-threatening. To do so would severely undermine women's rights to life, to security of the person and to substantive equality.

27. An accused who wishes to argue that even if the complainant or victim did not consent, he mistakenly believed she did, must meet the terms of s 273.2(b)[36] and identify the reasonable steps he took to ascertain consent. Ambiguous behavior by complainants, such as wordless moans or passivity, will not suffice to relieve the accused of this obligation.[37]

28. An accused must take positive, active, steps to ascertain consent. He is not entitled to assume from the circumstances of the sexual activity or the nature of his relationship with the complainant that she is consenting. Nor is he entitled to assume consent from previous sexual activity. Furthermore, the presence of a power imbalance between an accused and complainant is a relevant factor to be considered in assessing what steps should be taken to ascertain consent. And most significantly, the more violent, dangerous or potentially injurious the proposed sexual activity is, the more onerous the reasonable steps obligation must be in order to respect complainants' security of the person and equality rights and the societal interest in safe and egalitarian relationships.

29. If the defence of "mistaken belief in consent" is aired before a jury, judges must carefully instruct jurors that they may not rely upon notions of "global consent" for women who exchange sex for money. An accused cannot rely on the transactional nature of the sexual encounter to dispense with the requirement that reasonable steps be taken to ascertain consent to every sexual act that takes place. The failure to provide such instructions risks depriving women who exchange sex for payment of the equal protection and benefit of the law of sexual assault.

30. A conclusion that an accused is entitled to use any degree of violence in his sexual interactions without regard to women's actual agreement to that specific force, as well as to the legal limits of "consent" to bodily harm, would upend decades of law reform aimed at protecting women's rights to security of the person and equal protection of the law. This radical doctrinal shift would harm all women in Canada, and would have devastating effects for Indigenous women, and particularly Indigenous women who exchange sex for payment.

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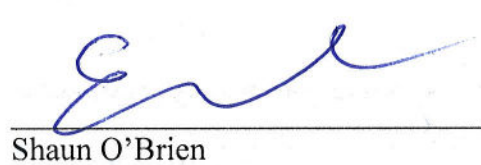
[36] *Criminal Code*, RSC, 1985, c C-46, s 273.2(b).
[37] See *R v Rodas*, [1999] OJ 4503 at para 8; *R v Cornejo*, (2003) 68 OR (3d) 117 at para 21.

31. There is no evidence that Ms. Gladue agreed to the infliction of bodily harm at any point in her dealings with the Appellant. Therefore, this is not a case in which the Court must resolve the question of whether public policy vitiates consent to sexual touching that is intended to cause, and does cause, bodily harm. Any future consideration of the rule in *Jobidon* as applied to sexual assault must guard against reintroducing discriminatory rules that would increase women's vulnerability to sexual assault, impinge on their s. 7 and s. 15 rights, or shield violent perpetrators from accountability.

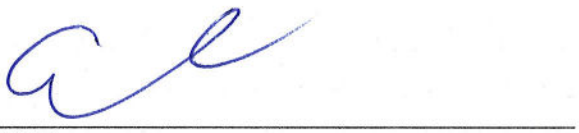
PARTS IV AND V – COSTS AND ORDER REQUESTED

32. IAAW and LEAF seek no costs, and request that none be awarded against them. IAAW and LEAF take no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, September 12, 2018



Shaun O'Brien



Lisa Weber

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PART VII – LEGISLATION

***Criminal Code*, RSC, 1985, c C-4**

Meaning of *consent*

273.1 (1) Subject to subsection (2) and subsection 265(3), ***consent*** means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Evidence of complainant's sexual activity

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has

***Code criminel* (LRC.(1985), ch C-46)**

Définition de consentement

273.1 (1) Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.

Exclusion du moyen de défense fondé sur la croyance au consentement

273.2 Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas :

a) cette croyance provient :

(i) soit de l'affaiblissement volontaire de ses facultés,

(ii) soit de son insouciance ou d'un aveuglement volontaire;

b) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.

Preuve concernant le comportement sexuel du plaignant

276 (1) Dans les poursuites pour une infraction prévue aux articles 151, 152, 153, 153.1, 155 ou 159, aux paragraphes 160(2) ou (3) ou aux articles 170, 171, 172, 173, 271, 272 ou 273, la preuve de ce que le plaignant a eu une activité

engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

b) is less worthy of belief.

Marginal note: Idem

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Marginal note: Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

sexuelle avec l'accusé ou un tiers est inadmissible pour permettre de déduire du caractère sexuel de cette activité qu'il est :

a) soit plus susceptible d'avoir consenti à l'activité à l'origine de l'accusation;

b) soit moins digne de foi.

Note marginale: Conditions de l'admissibilité

(2) Dans les poursuites visées au paragraphe (1), l'accusé ou son représentant ne peut présenter de preuve de ce que le plaignant a eu une activité sexuelle autre que celle à l'origine de l'accusation sauf si le juge, le juge de la cour provinciale ou le juge de paix décide, conformément aux articles 276.1 et 276.2, à la fois :

a) que cette preuve porte sur des cas particuliers d'activité sexuelle;

b) que cette preuve est en rapport avec un élément de la cause;

c) que le risque d'effet préjudiciable à la bonne administration de la justice de cette preuve ne l'emporte pas sensiblement sur sa valeur probante.

Note marginale: Facteurs à considérer

(3) Pour décider si la preuve est admissible au titre du paragraphe (2), le juge, le juge de la cour provinciale ou le juge de paix prend en considération :

(a) l'intérêt de la justice, y compris le droit de l'accusé à une défense pleine et entière;

(b) l'intérêt de la société à encourager la dénonciation des agressions sexuelles;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

(c) la possibilité, dans de bonnes conditions, de parvenir, grâce à elle, à une décision juste;

(d) le besoin d'écarter de la procédure de recherche des faits toute opinion ou préjugé discriminatoire;

(e) le risque de susciter abusivement, chez le jury, des préjugés, de la sympathie ou de l'hostilité;

(f) le risque d'atteinte à la dignité du plaignant et à son droit à la vie privée;

(g) le droit du plaignant et de chacun à la sécurité de leur personne, ainsi qu'à la plénitude de la protection et du bénéfice de la loi;

(h) tout autre facteur qu'il estime applicable en l'espèce.

Jury and public excluded

276.2 (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

Marginal note: Complainant not compellable

(2) The complainant is not a compellable witness at the hearing.

Marginal note: Judge's determination and reasons

Exclusion du jury et du public

276.2 (1) Le jury et le public sont exclus de l'audition tenue pour décider de l'admissibilité de la preuve au titre du paragraphe 276(2).

Note marginale: Incontraignabilité

(2) Le plaignant n'est pas un témoin contraignable à l'audition.

Note marginale: Motifs

(3) Le juge, le juge de la cour provinciale ou le juge de paix est tenu de motiver la décision qu'il

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

(a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(b) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and

(c) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Marginal note: Record of reasons

(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

1992, c. 38, s. 2.

rend à la suite de l'audition sur l'admissibilité de tout ou partie de la preuve au titre du paragraphe 276(2), en précisant les points suivants :

(a) les éléments de la preuve retenus;

(b) ceux des facteurs mentionnés au paragraphe 276(3) ayant fondé sa décision;

(c) la façon dont tout ou partie de la preuve à admettre est en rapport avec un élément de la cause.

Note marginale: Forme

(4) Les motifs de la décision sont à porter dans le procès-verbal des débats ou, à défaut, donnés par écrit.

1992, ch. 38, art. 2.

Judging, fast and slow:* using decision-making theory to explore judicial fact determination

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Abstract Empirical research with judges and jurors has provided research into the process by which legal decision-makers come to a view about the facts of the case. However, much remains uncertain, including questions about how judges' reasoning processes might differ from jurors' when thinking through the facts of a case, and how well the insights of decision-making research translate into the noisy context of real criminal trials. This article offers a preliminary exploration of connections between Pennington and Hastie's story model of decision-making, heuristics and biases research, and areas of fact determination that have presented persistent difficulties to criminal courts, including sexual assault, child homicide and the assessment of expert testimony. I discuss some of the key insights that cognitive psychology can offer to those who are interested in understanding how decision-makers think about the facts of a case, and where decision-makers may be prone to error.

Keywords Judges; Heuristics and biases; Implicit prejudice; Stereotyping; Expert decision-making

* With apologies to Daniel Kahneman.

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18

> Law is, and cannot be anything but, the creation of human minds; legal materials cannot answer legal questions, people do.[1]

Empirical research with judges and jurors has provided insights into the process by which legal decision-makers come to a view about the facts of a case. A relatively well-established body of research suggests that jurors reach their decisions by formulating a story, or narrative, of the events in a case and testing that story against the available verdicts.[2] Other research suggests that judges may be prone to many of the cognitive biases and systematic errors in reasoning that have been documented by cognitive psychologists.[3] However, much remains uncertain, including questions about how judges' reasoning processes might differ from jurors when thinking through the facts of a case, and how well the insights of decision-making research translate into the noisy context of real criminal trials.

This article offers a preliminary exploration of connections between the story model of decision-making, heuristics and biases research, and areas of fact determination that have presented persistent difficulties to criminal courts. In particular, I discuss some of the key insights that cognitive psychology can offer to those who are interested in understanding how decision-makers think about the facts of a case, and where they may be prone to error. Writing from Canada, where 99 per cent of criminal cases are tried by judge alone,[4] I focus particularly on judges as fact-finders. The Canadian practice offers two relevant and interesting features for work such as this. First, judges (unlike jurors) find themselves repeatedly engaged in fact determination over the course of a career, and are therefore professionally interested in the challenges of finding facts accurately. Secondly, the obligation imposed on judges (but not jurors) to provide reasons offers academic researchers some record of the reasoning process followed by these triers of fact. These two features make Canada a particularly fruitful jurisdiction in which to study the possibilities and constraints of fact determination in real cases.

1 D. Simon, 'Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology' (2001) 67 *Brooklyn Law Journal* 1097 at 1097.

2 N. Pennington and R. Hastie, 'Evidence Evaluation in Complex Decision Making' (1986) 51 *Journal of Personality and Social Psychology* 242; W. Twining, *Rethinking Evidence: Exploratory Essays*, 2nd edn (Cambridge University Press: Cambridge, 2006) at 306–11 and 443–6.

3 For example, C. Guthrie, J. Rachlinski and A. Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 *Cornell Law Review* 1; Simon, above n. 1.

4 L. Dufraimont, 'Evidence Law and the Jury: A Reassessment' (2008) 53 *McGill Law Journal* 199 at 209.

This article uses sexual assault and child homicide trials to illustrate the potential for psychological research to help lawyers and legal academics understand the processes that underlie fact determination. Examples from these fields have been chosen because such cases seem to provoke considerable anxiety for criminal lawyers and may be especially vulnerable to error. The persistence of low conviction rates for sexual assault despite reforms that have tried to prevent past injustices to sexual assault victims from recurring is an example of a legal problem that seems intractable, or at least unresponsive to normal legal tools.[5] At the same time, Innocence Projects in the USA have documented DNA exonerations for rapes (particularly rape/murders) in numbers that suggest that there is also a problem with wrongful convictions in this field or a sub-set of the field.[6] The same dual concern about over- and under-prosecution marks child homicide. Numerous wrongful convictions have been identified in the past decade and are widely attributed to erroneous expert evidence.[7] However, concerns that the difficulties of detecting child homicide may lead to under-enforcement are also expressed within the literature.[8] Good evidence of error in fact determination makes sexual assault and child homicide particularly productive fields for the application of insights from cognitive psychology.

In section 1 below, I introduce the Pennington and Hastie 'story model' of complex decision-making and draw on Dan Simon's work to consider how it may apply to judges who act as finders of fact. I link Simon's account to the heuristics and biases work pioneered by Daniel Kahneman, and Amos Tversky, and particularly their concepts of coherence and bias. In section 2 below, I explain two types of cognitive error identified by Kahneman and others—substitution and stereotyping—that may be particularly relevant to the trial context, and draw on

5 For example, W. Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Laws' (2011) 19 *Feminist Legal Studies* 27; K. Daly and B. Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39 *Crime and Justice* 565.

6 These wrongful convictions are 'wrong person errors' identified by DNA testing, and are not false complaints. See, e.g., B. L. Garrett and P. J. Neufeld, 'Invalid Forensic Science Testimony and Wrongful Convictions' (2009) 95 *Virginia Law Review* 1 at 8. The concentration of rape cases among identified wrongful convictions is at least partly attributable to the fact that this crime is particularly likely to yield biological evidence of the perpetrator for reanalysis.

7 For example, in England: *R* v *Clark* [2003] EWCA Crim 1020; *R* v *Cannings* [2004] EWCA Crim 1; *R* v *Anthony* [2005] EWCA Crim 952; *R* v *Harris* [2006] 1 Cr App R 5 (quashing two convictions in separate cases, and reducing a third from murder to manslaughter); *R* v *Henderson* [2010] EWCA Crim 1269. In Canada, see *R* v *Mullins-Johnson* 2007 ONCA 720; *R* v *Sherret-Robinson* 2009 ONCA 886; *R* v *CM* 2010 ONCA 690; *R* v *CF* 2010 ONCA 691; *R* v *Kumar* 2011 ONCA 120; *R* v *Marquardt* 2011 ONCA 281; *R* v *Brant* 2011 ONCA 362.

8 For example, J. Frederick, C. Goddard and J. Oxley, 'What Is the "Dark Figure" of Child Homicide and How Can It Be Addressed in Australia?' (2012) 1 *International Journal of Injury Control and Safety Promotion* 9.

Canadian criminal trials to offer some examples of scenarios in which I think these errors may arise. I also describe the findings of cognitive psychology in relation to acquiring expertise and educating decision-makers, and explain how these findings might be important for judicial fact-finding. In section 3 below, in an effort to offer some direction for future research, I suggest that consciously engaging a well-defined concept of plausibility may offer a useful tool for avoiding some errors of judgment in criminal trials. Finally, in the conclusion, I suggest the need for further research on the relationship between legal decision-making and contemporary research in the field of cognitive psychology.

1. The story model of complex decision-making

Evidence scholars today broadly accept the proposition that jurors think through 'the facts of the case' by constructing and testing a story of the case that focuses on causal and intentional relations between events. Nancy Pennington and Reid Hastie, leading researchers in the field of complex decision-making, postulate that the story-telling process has three steps:

1. During and after the presentation of evidence, the juror evaluates the evidence by constructing a story of the case.
2. The juror identifies the range of possible verdicts in the case.
3. The juror selects the verdict that best fits the story that the juror has constructed based on the evidence.[9]

The story model operates at two levels. The juror will construct a story about the case as a whole—the narrative of 'what happened'. Where evidence presents particular uncertainties, the juror will also engage in story construction, such as to understand intention and causality in relation to a sub-set of the facts—for example, to assess whether a complainant in a sexual assault case consented to sexual touching.

Identifying the range of possible verdicts is similarly more complex than a binary 'guilty/not guilty' or 'liable/not liable'. Continuing with the example of sexual assault, jurors' stories may focus on identity, whether sexual touching occurred, whether the complainant consented, whether the accused took reasonable steps to ascertain consent, and so on depending on which questions are at issue in the case. Judgment ultimately depends on stage three of Pennington and Hastie's model—the decision about which of several potential verdicts identified in stage two best matches the story constructed during stage one.[10] Pennington and Hastie

9 Pennington and Hastie, above n. 2 at 243.
10 Ibid. at 243–5.

suggest that stage three is likely to be a slow and careful ('deliberate') process for jurors because the legal categories of verdict are not well understood prior to trials. Stage three is also the point at which jurors are likely to engage burdens and standards of proof.[11]

Pennington and Hastie found that relatively little of the evidence at trial is used by jurors (average 13.6 per cent) and that 45 per cent of juror references to facts were inferred actions, mental states and goals that served as narrative bridges between facts drawn from evidence.[12] Jurors who ultimately prefer different verdicts have different interpretations of the evidence at trial, but their interpretations are relatively similar to those who prefer the same verdict. (It is important to note that Pennington and Hastie's research was conducted with individual jurors, and that collective deliberation seems likely to lead to a discussion of these different interpretations.)[13] The inferences that form 45 per cent of the juror narratives seem to be based on 'attitudes, experiences and beliefs about the social world'—such as the circumstances in which someone might be afraid versus angry.[14] Importantly, it is the constructed story form of the evidence, rather than the 'raw evidence' itself, that jurors use as the basis for assigning verdicts.[15] Jurors do not use the elements of an offence as the initial organising categories for the evidence—they only turn to these elements once they are satisfied with a basic story of the case.

Extending and to some extent modifying Pennington and Hastie's work, Simon has worked specifically on generating a 'psychological model' of how *judges* work with facts and law to reach a decision.[16] Simon hypothesises that when judges think through a case, they restructure evidence, precedent and legal argument in a manner that ultimately prioritises one outcome as the most coherent decision. Coherence, as used by Simon, is the phenomenon of endorsing evidence and arguments that support the decision made, and rejecting those materials that support an alternative conclusion.[17] Simon suggests that judges work through a process of generating two (or more) alternative mental models of a case, and then restructure those models until they identify the model that is most coherent as a means of settling upon an outcome.[18] Memory and communication naturally focus on the account that is most coherent and evidence pointing against that

11 Ibid. at 245.
12 Ibid. at 249.
13 I am grateful to Bill Thompson for reminding me of this point.
14 Pennington and Hastie, above n. 2 at 254.
15 N. Pennington and R. Hastie, 'Explanation-Based Decision Making: Effects of Memory Structure on Judgment' (1988) 14 *Journal of Experimental Psychology: Learning, Memory and Cognition* 521 at 523.
16 D. Simon, 'A Psychological Model of Judicial Decision Making' (1998) 30 *Rutgers Law Journal* 1.
17 Ibid. at 21–2.
18 Ibid. at 84–5.

account correspondingly becomes harder to recall or incorporate.[19] In the course of seeking coherence, decision-makers shift their evaluation of individual pieces of evidence. However, they are not aware of those shifts.[20]

Simon's account of decision-making is consistent with the research conducted by Daniel Kahneman and Amos Tversky. Kahneman and Tversky found that decision-makers intuitively seek coherence, even when presented with limited information, and that decision-makers are slow to think about what additional information they might ideally want to have. Having made a decision, decision-makers tend to be more confident about the likely correctness of their conclusion than the evidence itself suggests is appropriate.[21] When constructing a narrative, '[i]nformation that is not retrieved (even unconsciously) from memory might as well not exist'.[22] Kahneman calls this phenomenon 'what you see is all there is'.

The dangers of 'what you see is all there is' are that decision-makers may reach a conclusion about what happened without alluding consciously to the information that would strengthen or challenge the conclusion, and decision-makers tend not to calibrate the confidence of their conclusions to the quality of the information on which it is based. Kahneman suggests that 'what you see is all there is' explains 'a long and diverse list of biases of judgment' including over-confidence, framing effects and base rate neglect.[23] Biases in this sense are most usefully defined as the production of error in a predictable direction.[24] Given that research has demonstrated that decision-makers are prone to making predictable errors, there is potentially enormous value in considering which errors might be particularly relevant to complex decision-making processes such as trials.[25] In the next section

19 Simon, above n. 1 at 1117.

20 Ibid. at 1128.

21 For example, people express considerable confidence in their predictions about likely Grade Point Average (GPA) scores given reading ability at the age of four: D. Kahneman, *Thinking, Fast and Slow* (Doubleday: Toronto, 2011) 3, 186–9.

22 Ibid. at 85.

23 Ibid. at 87–8.

24 C. Sunstein, 'Moral Heuristics and Risk' in S. Roeser (ed.), *Emotions and Risky Technologies*, Series: International Library of Ethics, Law and Technology vol. 5 (Springer: 2010) 3.

25 Some of this work is already being done by researchers such as Jeffrey Rachlinski and his co-authors. For example, Guthrie, Rachlinski and Wistrich, above n. 3; J. Rachlinski, 'Heuristics and Biases in the Courts: Ignorance or Adaptation?' (2000) 79 *Oregon Law Review* 61. Sharmila Betts has also demonstrated the relevance of the heuristics and biases literature to understanding the opinion evidence given by medical experts in child homicide and child protection cases: S. Betts, *A Critical Analysis of Medical Opinion Evidence in Child Homicide Cases*, PhD thesis, University of New South Wales (2013). For an older review of the literature, see D. Langevoort, 'Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review' (1998) 51 *Vanderbilt Law Review* 1499.

of this paper, I focus on two types of error—substitution and stereotyping—that seem particularly apposite to finding facts at trial, before turning to the research conducted by Kahneman and others about the acquisition of expertise.

2. Cognitive biases and judicial decision-making

> Stories help us to make sense of events, to structure an argument, and to provide coherence. But, in legal practice, they are also wonderful vehicles for 'cheating'. For instance, they make it easy to sneak in irrelevant or unsupported facts, to appeal to hidden prejudices or stereotypes, and to fill in gaps in the evidence. 'Good' stories tend to push out true stories—and so on.[26]

(a) Substitution

Kahneman describes substitution as 'the core of what became the heuristics and biases approach'.[27] Substitution is a procedure by which decision-makers find 'adequate, though often imperfect, answers to difficult questions'.[28] Essentially, our cognitive processes will offer an intuitive answer to a difficult question by substituting the answer to an easier question. For example, when asked 'How happy are you with your life these days?' a decision-maker may consider his or her present mood. One of the hallmarks of substitution is that a decision-maker may not be aware that he or she has engaged in substitution because of the ease with which the substituted answer comes to mind. Kahneman and Frederick suggest that attribute substitution is likely to happen where the answer to the initial question is 'relatively inaccessible'; a related attribute is relatively straightforward to judge; and the decision-maker's critical judgment does not reject the substitution.[29] The last requirement—that critical judgment does not intervene—is particularly important. The point is not that critical judgment cannot intervene: Kahneman, Frederick and Tversky have shown many times that expert decision-makers who 'should have known better' and 'did know better' make predictable mistakes in reasoning, even when it would be relatively straightforward to find the right answer.[30] Rather, the point is that decision-makers do not always engage their critical judgment when they should.

26 Twining, above n. 2 at 445–6.

27 Kahneman, above n. 21 at 98.

28 Ibid.

29 D. Kahneman and S. Frederick, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment' in T. Gilovich, D. Griffin and D. Kahneman (eds.), *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press: New York, 2002) 54.

30 Ibid. at 49; D. Kahneman and A. Tversky, 'Belief in the Law of Small Numbers' (1971) 76 *Psychological Bulletin* 105; Kahneman, above n. 21 at 149.

The factual questions asked in trials are often extraordinarily difficult, and their difficulty is compounded because relevant events took place in the past and often in a different social or cultural context from that which is familiar to the decision-maker. Notwithstanding these differences, Pennington and Hastie's work suggests that decision-makers automatically bring their 'attitudes, experience and beliefs about the social world' to bear on the task of deciding what happened in a given case.[31] Such attitudes and beliefs are inevitably based in large part on a combination of previous experience and hegemonic understandings of human relationships and other aspects of the social world.[32] These attitudes and beliefs help decision-makers to choose between competing accounts and to draw inferences from proven facts to material conclusions via a generalisation about how the world works. William Twining has listed many of the dangers of making generalisations in arguments about disputed questions of fact including the risk of unexamined assumptions about which of two rival generalisations to accept, the risk of assuming a consensus about common sense that does not in fact exist, and the risk of making value judgments that masquerade as empirical propositions.[33] Substitution in Kahneman and his co-authors' sense may be an inadvertent mechanism by which lawyers and triers of fact generalise from evidence to conclusions. Specifically, substitution might form one basis for the inferences that Pennington and Hastie identified as forming 45 per cent of the average juror's account of the facts of a case.

Academic commentators have observed persistent reliance on sexual history evidence in sexual assault trials in the face of Canadian evidentiary rules that seek to limit the use of this evidence. The Criminal Code provides that evidence that a complainant has engaged in sexual activity is not admissible to support an inference that, by reason of the sexual nature of the activity, the complainant is more likely to have consented to the activity that forms the basis of the trial, or that the complainant is less worthy of belief.[34] Any evidence of uncharged sexual activity should, pursuant to s. 276(2) of the Criminal Code, be subject to an application made on certain specified grounds. Notwithstanding this rule, evidence of past sexual activity remains common, particularly where the complainant and accused have a pre-existing intimate relationship.[35] An anecdotal measure of the persistence of this evidence is provided by the fact that lawyers and trial judges in

31 Pennington and Hastie, above n. 2 at 254.

32 See also W. L. Bennett and M. Feldman, *Reconstructing Reality in the Courtroom* (Rutgers University Press: London and New York, 1981).

33 Twining, above n. 2 at 335.

34 Criminal Code RSC 1985 c. C-46, ss. 276 and 277.

35 See, e.g., L. Gotell, 'When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records' (2006) 43 *Alberta Law Review* 743 at 762–4.

each of the three sexual assault cases that ultimately came before the Supreme Court of Canada in 2011 referred to the complainant's sexual history in the course of assessing her credibility.[36] This evidence is often introduced without first being subject to an application under s. 276(2), particularly where it relates to previous acts with the accused, and Crown counsel sometimes fail to object to the evidence.

The legislative purpose behind limiting the admissibility of sexual history evidence is to forestall reliance on the 'rape myths' that 'unchaste women were more likely to consent to intercourse and, in any event, were less worthy of belief'.[37] There is reasonably strong evidence that decision-makers over-value sexual history evidence when assessing whether the complainant consented on the charged occasion.[38] The persistence of sexual history evidence may reflect a process by which decision-makers inadvertently substitute the question 'had the complainant consented in similar circumstances before?' for the question 'did the complainant consent on this occasion?'.[39] Setting the substitution out as bluntly as this makes it seem an obvious error, and raises questions about whether legal decision-makers are really so willing to substitute sexual history evidence for the question of consent. However, there is some research demonstrating the persistence of this error with potential jurors,[40] and it is worth recalling Kahneman and Frederick's point that substitution errors are made by those who should and do know better when critical judgment fails to intervene.[41]

I have found examples of trial judgments in sexual assault cases that seem to engage in such substitution. The following example is taken from a real Canadian trial judgment,[42] but serves as a generic illustration. In this case, the trial judge rejects the accused's (H's) testimony that he had no sexual relations with the complainant (S), but explains why he is left in a reasonable doubt about consent by the complainant's testimony and that of her sister (Je):

36 *R* v *JA* 2008 OJ 5970 (Quicklaw); *R* v *JA* 2008 ONCJ 195; *R* v *JMH* 2009 OJ 6377 (Quicklaw). In the Supreme Court of Canada, see *R* v *JAA* 2011 SCJ 17; *R* v *JA* 2011 SCC 28; *R* v *JMH* 2011 SCC 45. I have found no record that this evidence was objected to in any of these trials, and nor did that use form the basis of subsequent appeals. The use of this evidence was variable—for some judges, it supported the complainant's account, and in others, it undermined her credibility. The use of the evidence was also persistent—some judges at Court of Appeal and Supreme Court of Canada level also drew on sexual history evidence in deciding appeals from these trial judgments.

37 *R* v *Seaboyer* [1991] 2 SCR 577; *R* v *Mills* [1999] 3 SCR 668.

38 For example, R. A. Schuller and P. A. Hastings, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions' (2002) 26 *Psychology of Women Quarterly* 252 and sources cited in that article.

39 See E. Cunliffe, 'Sexual Assault Cases in the SCC: Losing Sight of Substantive Equality?' (2012) 57 *Supreme Court Law Review* 295 at 311.

40 Schuller and Hastings, above n. 38.

41 Above, text accompanying n. 30.

42 *R* v *JMH* 2009 OJ 6377 (Quicklaw), Ontario Superior Court of Justice.

> In cross-examination about the incident on February 11th, the night she stayed, it was put to [Je] that her sister had told the court that she got up and woke Je up, who was sleeping on the couch, at which time they left, and that the inconsistencies between her recollection of the incident, namely waking up and seeing [S] in the bedroom, are not reconcilable. In cross-examination, she testified, 'I could be wrong about her waking me up the next morning. I could be confusing the times.' That evidence of young Je, whose evidence I accept without reservation, causes some concern. In cross-examination, when she testified, 'I could be wrong about her waking me up the next morning. I could be confusing the time', makes me wonder how many times S was at this home. How many times did she end up in Mr H's bed? She was quite specific in-chief when she says, 'When I woke up in the morning, S was in his bedroom.' In cross-examination, she allowed that maybe that was another occasion that she had seen S in Mr H's bedroom.[43]

Within the trial judgment, this paragraph seems to shift the framing of S's relationship with H from that of an unwilling victim of two isolated sexual assaults to that of an (at least) occasionally willing participant in a sporadic sexual relationship. Subsequent passages seemingly draw on S's statements about the incident of 11 February to test this narrative. As is commonly true in sexual assault trials, the evidence in this case was complex, the trial judge's decision to acquit H rested on more than one line of factual reasoning, and the burden of proof was crucial to the outcome. One will probably never find a contested case that demonstrates a pure operation of substitution, and it is not my intention to suggest that H was acquitted solely because the trial judge suspected that H and S had engaged in consensual sexual relations on other occasions and therefore concluded that S had consented on 11 February. Rather, the proposal that substitution may play a role in such cases is a subtler one.

Given the totality of the evidence including the trial judge's rejection of H's testimony and his finding that S and H had sexual intercourse on 11 February, the only material question in this case was whether S consented to the sexual activity that took place on the charged occasion. If the complainant had engaged in sexual relations with H at other times, this behaviour can only have been relevant to S's

43 The original judgment contains the plural 'times' in the first quote from Je and the singular 'time' in the second quote, as shown here. I am therefore unsure exactly what Je said, and in particular whether she was referring to the possibility of other dates or if she meant that she may have woken up more than once on the relevant night or morning. That question is not alluded to in the trial judgment.

credibility on the question of consent. In order to decide the tremendously difficult question of whether the complainant consented to sexual intercourse on the charged occasion, the trial judge drew inferences about the possibility of other sexual activity from Je's testimony[44] and this reasoning in turn raised negative inferences about S's credibility.[45] At least on the face of the judgment, there is no evidence that the trial judge expressly considered whether agreeing to sexual relations on other occasions is probative either of whether S consented on the charged occasion, or of whether S was testifying truthfully when she asserted both that she had not consented, and that she had communicated her lack of consent. If the trial judge did not advert to these questions, the finding that S's credibility is adversely affected by the possibility of other sexual activity having occurred between S and H arguably constitutes an example of the inadvertent suspension of critical judgment that Kahneman identifies as a hallmark of substitution.[46] Of course, an example such as this is complicated by the criminal burden and standard of proof. However, the Supreme Court of Canada and Parliament have both stated relatively clearly that evidence of the complainant's sexual history cannot rationally raise a reasonable doubt nor make the complainant less worthy of belief, standing alone.[47]

44 To be clear, Je did not testify that the complainant had engaged in prior sexual relations with H, or that the complainant had slept in H's room on other occasions, and so an inference to that effect was necessarily drawn by the trial judge in the quoted paragraph. Likewise, the complainant had not testified about other consensual sexual relations with H, but nor had she denied such relations and so her truthfulness was not in this sense in issue.

45 See D. A. Schum and A. W. Martin, 'Formal and Empirical Research on Cascaded Inference in Jurisprudence' (1982) 17 *Law & Society Review* 105 for a discussion of 'cascaded' inferences that 'are composed of one or more reasoning stages interposed between evidence observable to the fact finder and the ultimate facts-in-issue' (at 106). This example of a trial judge's treatment of Je's testimony fits Schum and Martin's model of a cascaded inference.

46 Other studies have suggested that low conviction rates in sexual assault cases where the complainant has a past intimate relationship with the accused may reflect a sense on the part of decision-makers that sexual contact without consent is 'really not a terrible offence', or that sex without consent in such a context may technically constitute a crime '[b]ut frankly, does it matter?': J. Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *Journal of Law and Society* 219 at 226. This research also shows the persistence of rape myths, including the reasoning that a woman who has consented before must have consented on the charged occasion (at 234), supporting my proposition that substitution plays a role in these cases. A refusal to apply the technical definition of sexual assault to the accused's actions presents different challenges from the substitution identified in this article. However, the two processes may be related in the sense that substitution may constitute an unconscious mechanism for avoiding a conclusion that is inconsistent with a decision-maker's intuitive sense of what justice requires in a given case. This analysis connects with the discussion of coherence offered above, text to nn. 16–20 and over-confidence, below nn. 85–87.

47 *R* v *Seaboyer* [1991] 2 SCR 577; *R* v *Osolin* [1993] 4 SCR 595; Criminal Code RSC c. C-46 1985, s. 276.

To avoid the risk of substitution and discipline the process of fact determination, attempts to adduce sexual history evidence should be rejected unless counsel can articulate the precise relevance and materiality of that evidence and explain why that use is permissible under the Criminal Code. General statements about the relevance of sexual history evidence ('it is important to the defence narrative', or 'it proves that she knew they would have sex when she left the bar with him') do not suffice—counsel should be asked to identify the inferential link from proven fact to preferred conclusion. In many cases, a closer analysis will disclose that the inferential reasoning depends on one of the rape myths that have been identified by the Supreme Court of Canada. Decision-makers who rely on inferences from or about past sexual conduct to support the existence of reasonable doubt should impose the same discipline on their own reasoning, to ensure that substitution is not operating to the detriment of a focus on the material issue.

In this and other examples I have found in similar judgments, the reliance on substituted information is not a reasoning problem *per se*[48]—problems arise from a lack of attention to the appropriateness and limits of drawing inferences from the substituted information, and from the potential for overlooking or devaluing conflicting evidence. Substituting an answer to an easier question for the difficult question of fact that is before a court may, in this sense, lead to errors of judgment. Substitution is perhaps particularly dangerous when it incorporates a prejudicial stereotype or negative generalisation about one or more of the actors in a case. I therefore turn next to stereotyping as it is understood in psychology and legal literature.

(b) Stereotyping

Kahneman uses the word 'stereotype' to mean 'statements about the group that are (at least tentatively) accepted as facts about every member'.[49] He explains that, in this usage, stereotyping is a neutral term that explains how we think about categories: 'we hold in memory a representation of one or more "normal" members of those categories'.[50] For Kahneman, reliance on stereotypes is a necessary cognitive tool for making sense of the world (as is reliance on other heuristics, and perhaps on narrativising). The mental pictures generated using a representative idea about a given category are helpful—they offer guidance to judgment that is better than random chance would suggest. However, psychologists have recognised that the use of representativeness leads to predictable errors

48 Although it may constitute an error under s. 276(2) of the Criminal Code where made in the absence of an application to rely on sexual history evidence.

49 Kahneman, above n. 21 at 168.

50 Ibid.

such as a willingness to believe the occurrence of unlikely events.[51] When combined with the idea that 'what you see is all there is', use of representativeness can also prompt decision-makers to ignore the issue of whether the information they have received is reliable. Reliability may, of course, be vital in a trial setting.[52]

The classic example of stereotype overwhelming probabilistic reasoning comes from a study performed by Kahneman and Tversky in the 1980s. It involved the following fact scenario:

> Linda is thirty-one years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in antinuclear demonstrations.

Participants were asked to rank eight statements describing Linda according to the probability that they were true. Six of the eight statements were occupations or activities such as 'Linda is a member of the League of Women Voters' or 'Linda is an insurance salesperson'. The two important statements were 'Linda is a bank teller' and 'Linda is a bank teller and is active in the feminist movement'.[53] Eighty-five per cent of respondents answered that Linda was more likely to be a bank teller and active in the feminist movement than to be a bank teller. This answer is, however, logically incorrect—because the conjunction of attributes makes 'Linda is a bank teller and active in the feminist movement' a sub-set of the phrase 'Linda is a bank teller', the logical answer would be to rank the simpler phrase as more probable.[54] Kahneman and Tversky found that even once the error was pointed out, people had tremendous difficulty accepting this characterisation. Intuitive reasoning insists on the importance of the attributes set out in the original statement, and thus prioritises the activation of a

51 Ibid. at 151.

52 D. Menashe and M. E. Shamash, 'The Narrative Fallacy' (2005) 3 *International Commentaries on Evidence* at 16 citing V. Liberman and A. Tversky, *Critical Thinking: Statistical Reasoning and Intuitive Judgment* (Open University: Tel Aviv, 1996) 136; National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press: Washington, 2009) ('NAS Report'); Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, HC 829 (TSO: London, 2011).

53 Kahneman, above n. 21 at 156–7.

54 For an interesting discussion of the support this experiment lends to the proposition that decision-makers reason by inference to the best explanation (rather than using Bayesian logic), see D. Chart, 'Inference to the Best Explanation, Bayesianism, and Feminist Bank Tellers' (2001) PhilSci-Archive, available at <http://philsci-archive.pitt.edu/322/1/ibefbt.html>, accessed 23 January 2014.

stereotype (in Kahneman's sense of a representation of a category) over probabilistic reasoning.[55] This phenomenon persists even when the decision-maker is expressly warned that the information supplied about the subject may be unreliable.[56]

In its usual, more pejorative, sense within legal discourse, stereotyping is understood to arise when one group of people treats a stereotyped group as though certain generalisations or classifications capture features of all individuals who belong to the stereotyped group. Such stereotyping therefore begins with representativeness in Kahneman's sense, but adds a negative connotation in the injustice of treating all members of the group as if they were, for relevant purposes, the same. Decisions made on the basis of such generalisations risk overlooking the particular attributes of individual members of the stereotyped group. Such decisions risk denying individuals legal protection based on irrelevant considerations and denying individuals the capacity to be judged on their own merits.[57] Often, but not always, legal treatments of stereotyping operate on the assumption that stereotypes are produced by bad motives or, at least, by ignorance.[58]

Contemporary research suggests that actions and exclusions based upon negative stereotypes may only rarely be motivated by deliberate hostility or prejudice.[59] The Implicit Association Test and other studies have demonstrated the pervasiveness

55 Kahneman, above n. 21 at 158–9. Kahneman and Tversky's research has been criticised by Gerd Gigerenzer on several bases, including the proposition that participants are judged by a standard of probabilistic reasoning that is not necessarily the only applicable norm that might apply to the problem set. Gigerenzer's research suggests that many participants understand the phrase 'Linda is a bank teller' to mean 'Linda is a bank teller (and is not active in the feminist movement)'. G. Gigerenzer, 'On Narrow Norms and Vague Heuristics: A Reply to Kahneman and Tversky' (1996) 103 *Psychological Review* 592. However, these criticisms are answered in P. Vranas, 'Gigerenzer's Normative Critique of Kahneman and Tversky' (2000) 76 *Cognition* 179. For the purposes of fact determination within the trial, the key point of Kahneman and Tversky's Linda problem is that decision-makers can be primed in a manner that activates stereotypes and distracts from a consideration of relative likelihoods. If the stereotype does not rationally affect the likelihood of a competing explanation, the decision-maker is thereby likely to be led into error.

56 Kahneman, above n. 21 at 147 and 153.

57 This paragraph summarises a passage that originally appeared in Cunliffe, above n. 8. The definition of stereotyping is based on one offered by S. Moreau, 'The Wrongs of Unequal Treatment' in F. Faraday, M. Denike and M. K. Stephenson (eds.), *Making Equality Rights Real*, 2nd edn (Irwin Law: Toronto, 2009) 31 at 36–7.

58 Cass Sunstein has argued that an understanding of discrimination based on assumptions about bad motives or ignorance risks being under-inclusive. See C. Sunstein, 'Three Civil Rights Fallacies' (1991) 79 *California Law Review* 751 at 753–4.

59 C. D. Hardin and M. R. Banaji, 'The Nature of Implicit Prejudice: Implications for Personal and Public Policy' in E. Shafir (ed.), *Policy Implications of Behavioral Research* (Princeton University Press: Princeton NJ, 2012) at 2–3.

of implicit stereotypes and the fact that prejudice is often 'unwitting, unintentional, and uncontrollable'.[60] Curtis Hardin and Mahzarin Banaji explain:

> The most important characteristic of implicit prejudice is that it operates ubiquitously in the course of normal workaday information-processing, often outside of individual awareness, in the absence of personal animus, and generally despite individual equanimity and deliberate attempts to avoid prejudice ... Interestingly, implicit prejudice of this kind appears to operate to an equal degree, regardless of the personal characteristics of research participants, including participant social category, and individual differences in related explicit attitudes and implicit attitudes.[61]

The idea of implicit prejudice is thought to help explain the persistence of different outcomes for a variety of social groups, including African Americans, women and gays and lesbians. Implicit stereotypes operate differentially in relation to each of these groups, a factor which helps to explain why these groups have experienced differing progress and disadvantage in various fields of social endeavour. At times, implicit stereotypes may hold statistical justification in the sense that members of the stereotyped group are more likely to possess the negative trait (implicit stereotypes may be, in that limited sense, rational).[62] Even where this is so, however, stereotypes tend to become overly entrenched by virtue of the decision-maker's tendency to notice information that confirms pre-existing notions of coherence and overlook information that is inconsistent with those notions.[63] Given that implicit prejudice is widespread and, by definition, inaccessible even to the person who holds the prejudice, implicit stereotyping may present particular threats to fair and equitable fact-finding in adversarial trials.

It seems likely that there exists a connection between the representativeness errors described by Kahneman and Tversky and the implicit prejudice that Banaji and colleagues have focused on. Where the representative heuristic activated by the processes described by Kahneman and Tversky carries negative connotations, the result may be that the subject of this heuristic is more harshly judged through

60 Hardin and Banaji, above n. 59 at 3. To learn more about the Implicit Association Test, visit <https://implicit.harvard.edu/implicit/>, accessed 23 January 2014. The test is also described and its applicability to discrimination law considered in A. G. Greenwald and L. Hamilton Krieger, 'Implicit Bias: Scientific Foundations' (2006) 94 *California Law Review* 945 at 952–62.

61 Ibid. at 6 (references omitted).

62 Sunstein, above n. 24 at 756; Greenwald and Hamilton Krieger, above n. 60 at 949. Of course, 'rational' as used here is not intended to connote 'morally or legally appropriate'.

63 E. Aronson, *The Social Animal* (Taylor & Francis: Abingdon, 1972) 174 cited in Sunstein, above n. 24.

an operation of implicit prejudice in Banaji's sense of the term. This sort of implicit prejudice may be particularly pernicious if, as Kahneman and Tversky suggest, reasoning on the basis of stereotype is accompanied by base rate errors (i.e. a willingness to prefer a statistically unlikely explanation to one that is more probable) and a suspension of critical judgment about the reliability of the information that has activated the stereotype.

The implicit nature of stereotyping described by Banaji and colleagues makes it particularly difficult to demonstrate by looking at trial transcripts and judgments. However, concerns about the possibility of stereotyping arise in a range of fields. One particularly challenging example is child homicide cases. As most Canadian readers will be aware, a number of parents and caregivers were wrongly convicted or wrongly accused of child homicide in Ontario during the 1990s and early 2000s. These miscarriages of justice are most closely associated with the work of a paediatric forensic pathologist named Dr Charles Smith, but a report prepared by Justice Stephen Goudge makes it clear that failures of critical judgment occurred at a number of points in the criminal justice system, and that the usual checks and balances did not operate sufficiently well to prevent these wrongful convictions.[64] Justice Goudge's report traces the systemic failures and makes numerous recommendations for reform of child death investigation and prosecution.

One factor that has received relatively little attention in the popular or academic literature about the failures of child death investigation is that the Ontario families who were subjected to wrongful accusations were disproportionately welfare-dependent, aboriginal or immigrant, and single parent or blended (in the sense that the deceased children lived with one or more non-biologically related adult). Smith was relatively open about his tendency to use family status and gender as a heuristic by which to assess the likely cause and mode of death in a child who had died suspiciously. For example, in a preliminary hearing for a second-degree murder case that was eventually withdrawn by the Crown, he testified:

> Here are the principles and once again, you throw them out if you want to. Blunt force injuries, shaking, blunt impact head injury or abdominal injuries are much more likely to be inflicted by a man than a woman. That man is not likely the biological parent of the infant or child. They are a person who usually has a criminal record. Violence is part of their background. They have often grown up in a home where

64 S. T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Queen's Press: Toronto, 2008).

> violence has been used to work out family problems. They tend to be someone who has not finished high school. They've not held a job in the last six (6) months. They tend to be on welfare. All of these very unfortunate social factors that come into play here; probably they may represent some sort of stressors or triggers that lead to this. ...
>
> Asphyxial deaths are more likely to be caused by women.[65]

Smith did not, as far as I am aware, ever demonstrate that his 'principles' were drawn from systemic reviews of child deaths or that they were in fact anything more than speculative.[66] Nonetheless, his testimony was taken by trial courts as an accurate account of medical research into criminally suspicious child deaths. In this and other cases, the presence of some of the listed social factors may have contributed to Smith's view that the deliberate infliction of harm was the most probable cause of death in circumstances that were also consistent with accidental injury or illness.

As is commonly true with reasoning based on stereotype, there may well be some statistical truth to some aspects of Smith's comments—for example, it feels intuitively likely that a parent who has experienced violence as a child is more likely to perpetuate violence against children than one who has never had such an experience. However, at least two problems arise with his reasoning. First, for the purposes of establishing criminal guilt at trial, it is inappropriate to reason from outcome (this child died while living with non-biologically related adults) to cause (therefore this child was killed rather than dying accidentally). Secondly, even if the family circumstances of the child are relevant in the sense that statistically, children are more likely to be killed when living with non-biologically related adults than when living with biological parents,[67] one should be extremely careful about base rates when generalising from proven fact to material fact. In fact, very few children who live with non-biologically related adults are killed each year, in absolute numbers or as a proportion of all children who live in these circum-

65 *R* v *Laidley* Preliminary Inquiry Transcript (Ontario Court of Justice) 5 January 2000 at 17–18, quoted in Transcript to Goudge Inquiry hearings, 20 November 2007.

66 Research into the medical literature on child homicide suggests that the information supplied in the quoted passage bears, at best, a loose relationship with empirical research into inflicted death—and much of the research that seems to support Smith's characterisation has been challenged as unreliable. See K. A. Findley *et al.*, 'Shaken Baby Syndrome, Abusive Head Trauma and Actual Innocence: Getting it Right' (2012) 12 *Houston Journal of Health Law and Policy* 209; E. Cunliffe, *Murder, Medicine and Motherhood* (Hart Publishing: Oxford, 2011).

67 Relevance is used here in the minimal sense described by the Supreme Court of Canada in *R* v *Arp* [1998] 3 SCR 339 that it tends to increase the probability of a fact in issue. See generally D. Paciocco and L. Stuesser, *The Law of Evidence*, 5th edn (Irwin: Toronto, 2008) 31–5.

stances. Equally, while relatively few children die in Canada, those who die in accidents greatly outnumber those who are killed by homicide.[68] Presumably, accidents are no less likely to occur when a child lives with non-biologically related adults. The problem with Smith's approach, disclosed in this and other examples, is that the representative stereotypes (non-biologically related adults are more likely to be violent towards children) overwhelm information about base rates and present a serious risk that the ultimate decision-maker will be distracted from the task of deciding whether the Crown has proven beyond a reasonable doubt that this child was killed by the accused person's act. In legal terms, the prejudice of such reasoning is amplified by the fact that it focuses the decision-maker on who the accused is rather than on what she is alleged to have done.

There are many other examples in which reasoning by stereotype is employed by lawyers and witnesses before juries. For example, lawyers faced with the task of proving or resisting an allegation that a parent has killed a child often rely on evidence about the quality of that parent's caregiving. They invite the trier of fact to rely on such evidence without careful regard to the extent to which it is appropriate to infer homicidal behaviour from, for example, evidence that the parent was sleep-deprived and short-tempered.[69] Again, the problem here is one of base rates—most parents are sleep-deprived at some point, and such a condition is likely to lead to grumpiness. Fortunately, very few parents kill their children.[70] Focusing on sleep deprivation as a reason for harming a child offers a plausible-sounding explanation for an otherwise difficult fact scenario, but may prompt decision-makers to overlook both the pervasiveness of sleep deprivation among parents and the rarity of homicide. When an argument about sleep deprivation is coupled with information that may resonate with negative stereotypes (such as incidental information disclosing that an accused is aboriginal, or that she herself was a foster child, or simply by virtue of the fact that the subject is accused of a serious offence), Kahneman's representativeness error may be more likely to arise.

Most worryingly, I have found in my study of more than 25 child homicide cases that stereotyping within expert reasoning of the sort described in relation to

68 For example, Statistics Canada reports that in 2006–08, 542 children under the age of 12 died accidentally while 61 children under the age of 12 were victims of homicide. These numbers are based on records kept by provincial coroners and medical examiners: Statistics Canada, *Canadian Coroner and Medical Examiner Database: Annual Report 2006–2008* (Statistics Canada: February 2012) 39–41.

69 See Cunliffe, above n. 66 at chs. 1 and 6.

70 See Betts, above n. 25 at 209 for a similar discussion of the use of evidence regarding maternal depression.

Smith and lay stereotyping of the kind described in the previous paragraph often occur within the same case. In such instances, the expert testimony may be taken as independent, 'scientific' validation of behavioural evidence against the accused when, in fact, both lines of reasoning are influenced by implicit prejudice. The simultaneous operation of stereotyping within types of evidence that the court treats as being independent of one another may help explain the failure of critical reasoning that led to wrongful convictions in child homicide cases in Canada and elsewhere across the common law world during the 1990s and early 2000s.[71]

(c) Expertise

Lawyers usually employ the term 'expert' to describe a witness who is permitted, by reason of having specialised skills or knowledge that exceed that of a normal trier of fact, to offer an opinion on a topic that is relevant to the case before the court.[72] I used 'expert' in that sense in the previous sub-section when discussing the evidence given by Dr Charles Smith. Psychologists use the terms 'expertise' and 'expert judgment' somewhat differently from lawyers and, to complicate matters further, differently from one another. Two main schools of studying expertise are the proponents of naturalistic decision-making, whose approach is best illustrated by the work of Gary Klein; and the proponents of the heuristics and biases approach, who include Kahneman and Tversky. Naturalistic decision-making seeks to 'promote reliance on expert intuition', while the heuristics and biases approach is primarily interested in failures of so-called expert judgment.[73]

The heuristics and biases approach to expertise is a further application of the ideas about errors in decision-making that have already been introduced in this article, but naturalistic decision-making takes a more positive view of the possibilities of expert judgment. Those who work within the naturalistic decision-making school tend to study individuals who are regarded as outstanding within a difficult field in an effort to understand how they make sound decisions in contexts that may appear overwhelming to a novice or even a reasonably highly skilled peer. Those who are more interested in heuristics and biases look for evidence of failures of professional judgment, and (consistent with their overall interest in decision-making) seek to understand when and why judgment fails.

Despite the differences between naturalistic decision-making and heuristics and biases, the two schools have much in common. Their similarities and differences

71 Cunliffe, above n. 66 at 194.

72 For a fuller discussion, see A. W. Bryant, S. L. Lederman and M. K. Fuerst, *Sopinka, Lederman and Bryant: The Law of Evidence in Canada*, 3rd edn (LexisNexis: Toronto, 2009) 785–6.

73 D. Kahneman and G. Klein, 'Conditions for Intuitive Expertise: A Failure to Disagree' (2009) 64 *American Psychologist* 515 at 515.

are well delineated in an iconic article by Kahneman and Klein.[74] Both schools are interested in expertise in a sense that may loosely be defined as perceived mastery of a task.[75] So, for example, researchers have studied both the skills of and the mistakes made by tennis players, chess masters, army recruitment officers, paediatric nurses, baseball talent scouts, stock traders, livestock judges and fire-fighters.[76] Both schools agree that there are times when expert decision-making is very good, and times when it fails; and they share an interest in delineating the conditions for success and failure.

If expertise is defined by mastery of a task, it is also important to explain what psychologists mean when they refer to 'expert intuition'. 'Expert intuition' as the term is used within the literature, is somewhat different from intuition in its more usual connotation of having an amorphous gut sense about a given matter. Robin Hogarth explains that expert intuition can be developed by experience, and that the acquisition of expert intuition is illustrated by, for example, the process of learning to drive a car. Operations that are initially performed self-consciously (checking mirrors, staying within one's lane) eventually become nearly automatic—this sense of performing a task somewhat automatically with a high level of skill is expert intuition.[77] Expert intuition can develop in any sphere of endeavour that satisfies certain conditions (described below), given sufficient practice—the phrase simply refers to skilled judgment, the exercise of which has become second nature to a decision-maker. For example, I seek to teach my students how to identify hearsay as quickly and accurately as possible, to help them acquire expert intuition so that they can eventually stand to make an objection almost without conscious analysis. Once trial lawyers successfully learn this skill, identifying hearsay becomes much like driving. However, as judges occasionally tell me, a young lawyer's objections to hearsay can resemble a shotgun rather than a rifle. Such an imperfect understanding suggests something short of the acquisition of expert intuition and also demonstrates the conceptual complexity of hearsay. This example illustrates that expert intuition is harder to

74 Ibid.

75 Naturalistic decision-making measures performance by outcome and peer assessment while heuristics and biases tend to assess performance relative to quantitative performance measures. Accordingly, naturalistic decision-making is interested in relative performance (who is best in the field?) while heuristics and biases is interested in comparing professional judgment with models, or algorithms, for decision-making (how well does this expert perform?): Kahneman and Klein, above n. 73 at 519; J. Shanteau, 'Competence in Experts: The Role of Task Characteristics' (1992) 53 *Organizational Behavior and Human Decision Processes* 252.

76 Kahneman and Klein, above n. 73; R. Hogarth, *Educating Intuition* (University of Chicago Press: Chicago, 2001).

77 R. Hogarth, 'On the Learning of Intuition' in H. Plessner, C. Betsch and T. Betsch (eds.), *Intuition in Judgment and Decision Making* (Lawrence Erlbaum Associates: Mahwah NJ, 2008) 91 at 94–5.

attain in some domains than others. Still, the transition from novice to skilled judgment encompasses a similar process of shifting from conscious, deliberate analysis to near-automatic performance of recurrent tasks in every field. While expert intuition is a component of expertise, however, it is not the case that every task performed by a decision-maker will be susceptible to the acquisition of expert intuition. At times, there is no substitute for careful deliberation.

Working with a broad understanding of expertise as measured by performance on a task, it is possible to think of fact determination at trial as a task to which the findings of psychologists who study expertise may be relevant. Some aspects of fact determination may lend themselves to the acquisition of expert intuition, but others may be less routine and/or more prone to risks of error that are not readily identified by the decision-maker. Accordingly, in this sub-section, I describe some important findings of the research into expert decision-making before suggesting how these findings might offer insights into the work of both expert witnesses (as lawyers usually understand the term) and judicial decision-makers.

Much of the literature on expert decision-making emphasises the point that expertise is 'domain-specific'.[78] That is, a person may be expert in one field of their lives, but a novice in others. A chess player is unlikely to be able to tell that an infant is about to develop a serious infection, and a paediatric nurse has no special claim to be an exceptional chess player by virtue of her abilities with observing the health of infants. Perhaps more importantly for present purposes, Kahneman observes that 'expertise in a domain is not a single skill but rather a large collection of miniskills'.[79] In other words, mastery of one or several of the skills engaged by a domain does not mean complete mastery of the field—learning may be uneven across a given field, and a sound transfer of skills across tasks depends on whether the tasks require the same fundamental skills.[80] In assessing a person's expertise, it is therefore important to focus on the particular skill being exercised, the task being completed, and the individual's previous opportunity to acquire that skill in the same or an analogous environment; and not on the person's prior experience across the field as a whole. This observation resonates with legal policy reports that emphasise the importance of confining expert witnesses to their fields of expertise,[81] but it also requires a more subtle inquiry into whether the expert's experience is truly transferable to the task being performed in a given case.

78 Hogarth, above n. 76 at 274.
79 Kahneman, above n. 21 at 238.
80 See also Betts, above n. 25 at 226–33.
81 For example, Goudge, above n. 64 at 471–5.

One hallmark of expertise is the capacity to identify the correct strategy for problem solving. Klein and co-authors found that expert decision-makers generate a plausible strategy for the situation they face, simulate that strategy to see if it will work, and then implement the strategy if appropriate (or either modify the strategy or move on to an alternative if the initial strategy fails the simulation).[82] This process, often described as skilled intuition, depends on the decision-maker's capacity to recognise patterns within their environment. Herbert Simon described skilled intuition as follows: 'The situation has provided a cue, this cue has given the expert access to information stored in memory, and the information provides the answer. Intuition is nothing more and nothing less than recognition.'[83] This definition of skilled intuition is endorsed by Kahneman and Klein.[84]

It is, however, difficult for individual decision-makers to recognise the source of seemingly intuitive solutions. Decision-makers are not automatically aware of whether a given solution emerges from the sort of skilled intuition described above, or if it is predicated on a heuristic such as substitution. In particular, Kahneman and Klein emphasise that confidence is a highly misleading guide to accuracy in decision-making.[85] Kahneman suggests that confidence in a decision arises from the ease with which the answer comes to mind, coupled with a sense that the information relied upon to answer the question is coherent.[86] Neither of these factors is a good guide to the correctness of the answer. In fact, in administering the Cognitive Reflection Test to Florida judges, Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich found that judges who answered the questions incorrectly, but gave the intuitive answer, were more likely to report that the questions were easy than judges who answered correctly.[87]

Guthrie and colleagues' findings demonstrate the salience of an observation made by Kahneman and Klein: that one sign of expertise on a given task is having the capacity to identify the question as one that requires more careful thought.[88] James Shanteau and co-authors describe this capacity slightly differently, as being the ability to discriminate between subtly different characteristics of the task or environment. They suggest that this is one of two criteria by which true expertise

82 Kahneman and Klein, above n. 73 at 516.
83 H. A. Simon, 'What Is An "Explanation" of Behavior?' (1992) 3 *Psychological Science* 150 at 155.
84 Kahneman and Klein, above n. 73 at 520.
85 Ibid. at 522.
86 Kahneman, above n. 21 at 86–7, 212, 239–40.
87 Guthrie, Rachlinski and Wistrich, above n. 3 at 16.
88 Kahneman and Klein, above n. 73 at 522.

can be judged.[89] The second criterion they identify is consistency—that is, the capacity to reach the same decision repeatedly for the same task.[90] The combination of these criteria suggests that an expert is one who is capable of identifying relevant differences between situations, and who makes consistent decisions about which approach to use in similar situations across time. However, the authors also point out that it is possible to do well on these criteria while using incorrect rules for decision-making.[91] That is, an expert's approach may meet Shanteau's criteria but lead systematically to incorrect outcomes.

Given that confidence seems to be a misleading source of information about the likely accuracy of expert reasoning, psychologists have focused on considering the conditions that are likely to lead to skilled decision-making. Kahneman and Klein concluded that the acquisition of expertise depends on the presence of two basic conditions:

- an environment that is sufficiently regular to be predictable[; and]
- an opportunity to learn these regularities through prolonged practice.[92]

The first condition, that the environment be predictable, is also referred to as the validity of the environment. A close search of the literature cited by Kahneman and Klein suggests that there is no settled definition of a predictable environment. This condition seems to have emerged from comparisons between fields of expertise in which experts seem to perform well, 'even in the face of considerable difficulty'; and fields in which experts 'seem to be incapable of performing much above the level of novices'.[93] Experts who perform well include weather forecasters, livestock judges, astronomers, chess masters, physicians, nurses and accountants. Those who perform poorly include clinical psychologists and psychiatrists (when predicting long-term success for a patient), student admissions officers and personnel selectors, stockbrokers and nurses.[94] Nurses appear on both lists because different tasks were tested in the various studies—reinforcing the point made previously that expertise in one task does not guarantee expertise across all tasks in a given field.

89 J. Shanteau, D. J. Weiss, R. P. Thomas and J. C. Pounds, 'Performance-based Assessment of Expertise: How to Determine if Someone Is a True Expert or Not' (2002) 136 *European Journal of Operational Research* 253 at 256–7.
90 Ibid. at 258.
91 Ibid. at 261.
92 Kahneman, above n. 21 at 240.
93 Shanteau, above n. 75 at 257–8.
94 Ibid. at 258.

Several explanations have been offered for the differences in performance between these two groups, but the one that seems to have gained most traction is that the tasks performed by the highly performing experts are repetitive and are performed in similar conditions over time. By contrast, the tasks performed by poorly performing experts are more dynamic—both the task, and the conditions in which the task is performed, differ frequently.[95] A second important difference is that many of the highly performing expert fields have developed decision-making aids that systematically direct the expert's attention to relevant information and also aid in learning the relevant skills.[96] In fact, the development of such decision-making aids may be an important step in shifting a given type of expertise from poorly-performing to relatively high-performing.[97]

The second condition identified by Kahneman and Klein is that the decision-maker must have an opportunity to learn the regularities of the environment through prolonged practice.[98] This requirement suggests the importance of experience within the environment, in the most literal sense of hours spent practising a given skill. However, the literature also emphasises that not all practice is equally helpful. Kahneman and Klein identify that the type of practice, the level of motivation and engagement, self-regulation and talent all contribute to the quality of learning.[99]

Focusing more on the external factors that contribute to successful learning, Robin Hogarth concluded that practice is effective when the environment offers rapid and accurate feedback.[100] He suggests that, in an environment in which the costs of making errors are high and the feedback from those errors is both accurate and immediate, a talented and motivated learner is likely to master the skill relatively well, particularly if given good guidance. Hogarth suggests tennis as an example that satisfies these criteria.[101] However, other environments provide irrelevant feedback and therefore risk distracting the decision-maker from valid cues. For example, Hogarth relates the example of a 19th century physician who believed he could diagnose impending typhoid by palpating a patient's tongue.

95 Ibid. at 258–9.

96 Ibid. at 259.

97 Gigerenzer cited ibid. at 259. Betts has suggested that the use of decision-making algorithms may help to avoid wrongful convictions in child homicide cases, but has also identified the difficulties of obtaining reliable medical data on which such algorithms might be based: Betts, above n. 25 at 234–8.

98 Kahneman and Klein, above n. 73 at 520.

99 Ibid. at 520 citing K. A. Ericsson, N. Charness, R. R. Hoffman and P. J. Feltovich (eds.), *The Cambridge Handbook of Expertise and Expert Performance* (Cambridge University Press: New York, 2006).

100 Hogarth, above n. 76 at 87.

101 Ibid. at 89–90.

The physician did not wash his hands between patients and therefore, unfortunately, his belief was reinforced when many patients did indeed develop typhoid soon after being 'tested'.[102] As Hogarth explains:

> The ability to notice connections is a powerful means of learning, but it does not guarantee that what you learn will be appropriate. The process that leads to acquiring valid beliefs about the world is the same process that leads to acquiring superstitions and other erroneous beliefs.[103]

Hogarth calls environments in which the feedback is misleading 'wicked environments'. Wicked environments lead to error by providing positive feedback for mistaken actions.[104] In examples such as the typhoid scenario supplied above, they can even lead to a situation in which the apparent expert's actions change the object of study for the worse.

Unfortunately, it seems to be human nature to value information that appears to confirm one's pre-existing beliefs and to disregard or fail to search for information that contests those beliefs (as Kahneman says, 'What you see is all there is').[105] One of the important conclusions of Hogarth's work is that learning in an otherwise wicked environment can be aided by engaging in a conscious search for *disconfirmation* of one's hypotheses.[106] For example, Hogarth suggests that a decision-maker who has formulated a seemingly good hypothesis should ask herself: 'What evidence would you need to see to be convinced that you are mistaken?'.[107] Answering this question is not straightforward but in a sense, that is the point of asking it; it will shift decision-making from an intuitive process into the more deliberate processes of careful analysis.[108]

To summarise the foregoing discussion of expert decision-making, the literature in this field universally suggests that confidence is no guide to expertise and, in fact, some research suggests that confidence can lead to error by making a decision-maker disinclined to check the validity of his or her conclusions. In order to assess whether a decision-maker is expert in a given task, one approach is to

102 Ibid. at 85 and 89. The example is borrowed from T. Lewis, *The Youngest Science: Notes of a Medicine Watcher* (Viking: New York, 1983) 22.
103 Hogarth, above n. 76 at 85.
104 Ibid. at 89.
105 See above, discussion accompanying nn. 21–23.
106 Hogarth, above n. 76 at 236–9.
107 Ibid. at 237.
108 Ibid.

consider whether he or she is capable of distinguishing between relevantly different situations but also able to reach consistent outcomes in analogous situations. However, in many cases, and particularly if one lacks good information about relevant differences and consistency, the consensus seems to suggest that it is best to have regard to whether the decision-maker is working in a predictable environment that offers rapid and accurate feedback to the decision-maker. Higher-quality decision-making is also likely to result from a conscious search for disconfirmation of one's hypotheses. One should always be alert to the possibility that the environment is supplying misleading cues, as it did to the typhoid doctor. Finally, the research seems to suggest that expertise is domain-specific—the fact that a decision-maker has acquired expertise in relation to some tasks is no guarantee of proficiency at tasks that engage different skills.

The principles set out above may prove useful when assessing the reliability of testimony offered by an expert witness. First, experts who express great confidence in their conclusions should be carefully scrutinised, particularly in a context in which there is known disagreement among reputable experts. It may be that they have fallen prey to the illusion of validity, by which decision-makers trust their intuition even in the face of evidence that challenges that opinion.[109] Their confidence is a product of their sense that it was easy to reach the relevant decision, and that the information they relied upon was coherent, rather than being produced by a good process.[110] This example also reinforces the importance of attending to debates within an expert's field, in part by requesting that experts address these debates explicitly within their reports and in testimony.[111] Courts should be particularly wary of experts who testify to a perfect record of accuracy or who assert the capacity to reach conclusions other experts cannot reach.[112] An expert's expression of confidence in his or her own opinion should never substitute for a careful inquiry into the process he or she used in coming to that opinion and the environment in which he or she was working.

The idea that expertise can be judged in part by a decision-maker's capacity to identify that a given situation requires a different strategy is somewhat more difficult to access within the constraints of the trial process. Knowing whether an expert possesses this capacity depends in part upon the quality of research within

109 Kahneman, above n. 21 at 211.

110 Ibid. at 239–40; see also Betts, above n. 25 at 225–32.

111 See further, E. Cunliffe, 'Independence, Reliability and Expert Testimony in Criminal Trials' (2013) 10 *Australian Journal of Forensic Sciences*. An open access version of this article is available at <http://www.tandfonline.com/doi/abs/10.1080/00450618.2013.784358#.UcH-sPb738U>, accessed 24 January 2014; Goudge, above n. 64 at 471–5.

112 NAS Report, above n. 52 at 47.

the field from which the expert emerges. Specifically, the type of studies performed by psychologists, in which expert performance is compared with the performance of those who are novice at the relevant task, may offer clues about the overall capacity of the field to draw valid distinctions based on subtle environmental cues.[113] The work that has been done by naturalistic decision-making scholars to draw out the cues used implicitly by experts may also assist with this task if the relevant field has been studied in this manner.[114] However, Shanteau and co-authors' reminder that decision-makers may distinguish consistently and yet incorrectly is important here—it remains crucial to exercise critical judgment in relation to the criteria used by the expert to make relevant distinctions.[115] For example, if Dr Charles Smith used family form as a criterion by which he identified criminally suspicious deaths (as some of his testimony suggested), he was drawing a distinction that was almost certainly misleading.[116] Expert witnesses should be able to articulate the criteria they use to decide what type of task confronts them in a given case.

The second criterion specified by Shanteau and co-authors was consistency of judgment. The National Academy of Science concluded in 2009 that many routine fields of forensic science 'have never been exposed to stringent scientific scrutiny'.[117] In particular, most fields have never been subjected to proficiency tests that are designed to assess an expert's capacity to reach conclusions that are both consistent and accurate. Such tests assess expert performance by asking them to complete tasks in which the tester knows the base truth. For example, one could administer a proficiency test to a fingerprinting expert by asking the expert to analyse several sets of fingerprints. These fingerprints would be very like those found at crime scenes and obtained from suspects, but the task would be simulated in the sense that the tester knows which sets are a true match, and which are not.[118] Essentially, proficiency tests are one measure of how well an expert can perform the task that is relevant to his or her testimony. The salience of proficiency testing becomes apparent when one considers Shanteau and his co-authors' suggestion that consistency is an important marker of expertise. In order to perform well on a proficiency test, a participant must be able mentally to group tasks in a manner that leads to consistent decisions being made about

113 For example, the studies cited in Shanteau, above n. 75.

114 Kahneman and Klein, above n. 73 at 516–17.

115 Shanteau, Weiss, Thomas and Pounds, above n. 89.

116 See above, text accompanying nn. 65–68, including the statistics given about accidental versus homicidal deaths.

117 NAS Report, above n. 52 at 42.

118 An example of such an experiment (involving fingerprint evidence) is reported in M. B. Thompson, J. M. Tangen and D. J. McCarthy, 'Human Matching Performance of Genuine Crime Scene Latent Fingerprints' (2013) 38 *Law & Human Behavior* 84.

similar tasks. Likewise, for an expert to offer helpful information to a court, that expert must be consistent in her approach to similar cases, while also being able to shift approaches in response to relevant differences.

The importance of the NAS Report for much of the expert testimony given in criminal courtrooms is suggested by a statement by one of its authors, the former Chief Justice of the Court of Appeals (DC Circuit):

> I started the NAS project with no skepticism regarding the forensic science community. Rather, I assumed, as I suspect many of my judicial colleagues do, that the forensic disciplines are well grounded in scientific methodology and that crime laboratories and forensic practitioners follow proven practices that ensure the validity and reliability of forensic evidence offered in court. I was surprisingly mistaken in what I assumed.[119]

The report has prompted an enormous amount of academic commentary, and many forensic science associations in the USA have begun work on improving the standards to which they operate. However, it has had surprisingly little impact on judicial approaches to assessing the reliability of expert evidence in the USA or elsewhere. According to the report and associated commentary, there is considerable reason for concern about the quality of opinions offered by forensic scientists in a range of routine fields.[120] In particular, the judicial practice of relying on the witness's experience and the court's previous use of such evidence to admit routine forensic evidence does not offer a sufficient safeguard against misleading expert evidence.[121] This finding, expressed by the National Academy of Science and by academic commentators, is consistent with Shanteau and co-authors' view that discrimination and consistency are the best indicia of true expertise[122] and with Hogarth's conclusion that the quality of

119 H. T. Edwards, *The National Academy of Sciences Report on Forensic Sciences: What it Means for the Bench and Bar* (presentation to the Superior Court of DC), available at <http://www.law.yale.edu/documents/pdf/Alumni_Affairs/Stith_Edwards_NAS_Report_Forensic_Science.pdf>, accessed 24 January 2014.

120 For more on the NAS Report and judicial approaches to reliability, see G. Edmond, S. Cole, E. Cunliffe and A. Roberts, 'Admissibility Compared: The Reception of Incriminating Expert Opinion Evidence in Four Adversarial Jurisdictions' (2013) 3 *University of Denver Criminal Law Review* 32. For general discussions of the implications of the report, see e.g. J. Mnookin *et al.*, 'The Need for a Research Culture in the Forensic Sciences' (2011) 58 *UCLA Law Review* 725.

121 For example, NAS Report, above n. 52 at 108–9, 149, 174–5; Mnookin *et al.*, above n. 120. Two recent examples of continued judicial reliance on such proxies are supplied by: *R* v *Herrera* (2013) 7th Circuit, US Court of Appeals, 11-2894; and *R* v *Aitken* 2012 BCCA 134, BC Court of Appeal.

122 Shanteau, Weiss, Thomas and Pounds, above n. 89.

feedback supplied by the learning environment matters enormously to learning.[123]

Given the present lack of proficiency studies in many fields of forensic science, Kahneman and Klein's attention to the conditions for developing expert intuition remains a very important gauge of the potential for error. These conditions are the existence of a predictable environment and the opportunity to learn the regularities of the environment through high-quality practice.[124] Speculatively, some fields of forensic science seem likely to do better on these criteria than others. For example, fingerprint analysis offers a reasonably bounded set of variations (although these variations are subtle) and a limited range of challenges (in the sense that latent fingerprints may be partial, smudged, distorted or otherwise indistinct, but their relative dimensions, the medium in which they are studied, and the range of conclusions open to the fingerprint analyst are fairly constant). Fingerprint analysts have considerable opportunity to practise a relatively constrained set of skills over the course of a career. Relating these features to Kahneman and Klein's criteria, fingerprint analysis entails a repetitive task that is performed in similar conditions over time. However, this does not by any means exhaust the conditions for high-quality expertise. Existing 'standards' or 'methodologies' for fingerprint identification (such as ACE-V) have been criticised for encouraging the exercise of subjective judgment, failing to require analysts to document their decision-making, and failing to stipulate common, research-based rules for such matters as the rarity of particular features.[125] Each of these factors is relevant to a fingerprint analyst's capacity to work systematically with the regularities of their task.

It is also important to consider the quality of fingerprint analysts' practice, and particularly the quality and timeliness of feedback. Working closely on a daily basis with law enforcement officials, fingerprint analysts may receive all sorts of biasing information, and the feedback they receive may be more tailored towards the usefulness of their opinions to a police investigation than it is directed towards the accuracy of their conclusions.[126] Incorporating proficiency testing and appropriate teaching, with good feedback, would certainly improve analyst

123 Hogarth, above n. 76 at 89–90.

124 Kahneman and Klein, above n. 73 at 520.

125 See S. Cole and A. Roberts, 'Certainty, Individualisation and the Subjective Nature of Expert Fingerprint Evidence' [2012] Crim LR 824 at 834–8 and the sources cited therein.

126 Ibid. at 838–44.

performance,[127] but identifying similarities and differences between prints is perhaps a field that is susceptible to good expert performance provided that the conditions are right. Early studies suggest this belief that fingerprint analysts will perform reasonably well under test conditions may well be borne out.[128] However, the conclusion that fingerprinting experts are consistently better than novices at excluding non-matching fingerprints in the absence of contextually biasing information does not mean that all of the claims made by fingerprint experts can be supported or that courts should rely on past practice as a sufficient basis for continuing to admit fingerprint evidence. The reliability of fingerprint analysis may ultimately be demonstrable, but it has not yet been demonstrated in a judicial setting.[129] Kahneman's insight that one must assess expertise in a manner that focuses on the task being performed by the expert, rather than looking at overall experience or qualifications, is also important to bear in mind in relation to fingerprint analysis. Policy reports,[130] drawing on important work conducted by Simon Cole,[131] show that many of the claims made by fingerprint experts in present and past testimony are either incorrect or unverified. Even if fingerprinting proves relatively reliable in some aspects, therefore, it will remain important to investigate decision-making processes, the proficiency of individual experts, their work on the particular case, potential sources of contextual bias, and the extent to which their expressed opinions are supported by research and training.

Understanding some causes of infant death seems to be an area that is far less susceptible to the development of good expertise. If one looks first at the regularities of the environment, it becomes apparent that infant death occurs in a wide

127 Small-scale studies suggest that there may be reason to doubt the consistency of fingerprint examiners' conclusions over time: I. Dror and D. Charlton, 'Why Experts Make Errors' (2006) 56 *Journal of Forensic Identification* 600; I. Dror, D. Charlton and A. Peron, 'Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications' (2006) 156 *Forensic Science International* 74, both discussed ibid. at 839–40.

128 Thompson, Tangen and McCarthy, above n. 118.

129 See the NAS criticism of *US* v *Havvard* 260 F 3d 599 (7th Cir. 2001) and *US* v *Crisp* 324 F 3d 261, 268 (4th Cir. 2003); NAS Report, above n. 52 at 103–4.

130 NAS Report, above n. 52 at 103–5; Expert Working Group on Human Factors in Latent Print Analysis, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (National Institute of Justice: Washington DC, 2012) available at <http://www.nist.gov/oles/upload/latent.pdf>, accessed 24 January 2014; A. Campbell, *The Fingerprint Inquiry Report* (Edinburgh, Crown Copyright care of APS Group Scotland, 2011) available at <http://www.thefingerprintinquiryscotland.org.uk/inquiry/3127-2.htm>, accessed 24 January 2014.

131 S. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Harvard University Press: Cambridge, MA, 2001); S. Cole, 'Splitting Hairs? Evaluating "Split Testimony" as an Approach to the Problem of Forensic Expert Evidence' (2011) 33 *Sydney Law Review* 459; Cole and Roberts, above n. 125.

variety of circumstances. A pathologist presented with a recently deceased infant must have regard to the environment in which the child lived and died, the child's gross anatomy and a variety of biological markers that may suggest the operation of medical conditions or other causes of death. The range of possible causes of infant death is still not fully understood, as the term 'sudden infant death syndrome' makes clear.[132] Turning to the opportunities presented to acquire expertise, further challenges emerge. Infant death is now a relatively rare phenomenon, and even the busiest pathologist is only likely to see a few criminally suspicious cases per year. Each of these cases is likely to be different from the next. There is, furthermore, no simple way to design proficiency tests that offer a reasonable simulation of the work done by a pathologist on a real case. It is impossible to conduct blind testing with known base truths about cause of death, and there are no base rates for many of the biological markers considered important for ascertaining some criminally relevant causes of death.[133] The expert is unlikely to have full information about what happened to the child in the days and hours before death, and the reliability of any information offered by parents, caregivers and other witnesses is likely to be compromised both by their grief and by their status as potential suspects. The work of police officers and others may similarly be compromised by the heightened emotional atmosphere of a child homicide investigation. The events that lead to a child's death are almost never captured on video. Sharmila Betts offers an insightful discussion of the obstacles to acquiring medical expertise in child homicide cases including the problem of base rates, and demonstrates the potential relevance of the cognitive psychology research on expert decision-making to forensic medical research, in her recent PhD thesis.[134]

Given the factors described above, it is perhaps unsurprising that infant death has produced wrongful conviction in Ontario and elsewhere. I am not suggesting that all infant deaths are impervious to diagnosis. In some cases, cause of death will be clear—a child who dies in a car crash, an overwhelming infection, a drowning or death from a congenital disorder can be identified relatively readily after the appropriate tests have been conducted and properly interpreted. But there remains a core of cases in which the anatomical and diagnostic investigations are inconclusive. Current research suggests that there is simply no medical way to distinguish between homicide, natural death and accident in some cases of infant death.[135] Most relevantly, this observation applies to suspected smothering and to some head injuries.

132 See further, Cunliffe, above n. 66 at chs. 3 and 4.

133 The particular challenges associated with relying on certain biological markers as raising the index of criminal suspicion are discussed by Betts, above n. 25 at 207–9.

134 Betts, above n. 25.

135 Findley, above n. 66; Betts, above n. 25; Cunliffe, above n. 66.

Expert evidence in child homicide cases may accordingly be particularly vulnerable to undetected failures of professional judgment. In fact, there is some reason to suggest that child homicide trials may at times have constituted a wicked environment in Hogarth's sense of the term. Several of the wrongful convictions of parents that occurred in the United Kingdom involved the work of a paediatrician named Sir Roy Meadow. Meadow became associated with a rule that he did not coin (but which became widely known as Meadow's law), to the effect that one sudden infant death in a family is a tragedy, two such deaths are suspicious, and three should be considered homicide unless proven otherwise.[136] In 1999, Meadow wrote a paper on recurrent infant death in families in which he explained how to differentiate between natural and inflicted death. He concluded that mothers had killed children in 86 per cent of 24 families that had experienced recurrent infant death. Meadow explained that judicial processes (criminal trials and care proceedings involving surviving children) provided independent validation of his conclusions, because judges and juries had concluded that the relevant children were killed.[137] The trouble with this reasoning is, of course, that the courts' verdicts were based in large part on Meadow's testimony.[138] Nonetheless, the important point here is that Meadow perceived the judicial process as an independent re-evaluation of his research. Numerous wrongful convictions resulted in part from this dynamic.

Judges and lawyers are inclined to view experts as offering information to the judicial process. However, the Meadow example suggests that experts also learn from the experience of testifying and take cues from the outcomes of cases in which they participate. The trial process might usefully be re-imagined from this perspective as a learning environment in which experts seek feedback for their decision-making. The costs of expert witness error may be enormous, as the wrongful convictions of parents and caregivers in Canada and the United Kingdom demonstrate; and specialist feedback on the accuracy of expert decision-making is likely to be delayed, if it comes at all. In the absence of this feedback, experts rely on other cues such as a court's decision to adopt their opinions. Just as was true for the typhoid physician described by Hogarth, experts in child homicide cases may have been misled by the feedback offered by their learning environment into making grave errors.

During the Goudge Inquiry, Charles Smith testified to a similar dynamic in his understanding of his responsibilities as an expert witness. He acknowledged that,

136 Cunliffe, above n. 66 at 53–7.

137 R. Meadow, 'Unnatural Sudden Infant Death' (1999) 80 *Archives of Disease in Childhood* 7.

138 See further, Cunliffe, above n. 66 at 62–5.

with the benefit of hindsight, he was 'profoundly ignorant' about his role.[139] In a lengthy passage that resonates well with the research on learning environments, he expanded on his perspective:

> I think this is, perhaps, analogist [*sic*] to doing an autopsy; but, in fact, infinitely more complex than doing an autopsy. I would never expect a person, who had read a chapter on how to do an autopsy, to walk into an autopsy room and perform an autopsy. Though that person would say, Oh, I've read the chapter, here's the points, they—they may not even know how to pick up and handle the instruments properly. And I have taught residents even those basic things as—as how to hold instruments.
>
> And so I think it is naive to pretend that one could engage in the very difficult and foreign environment of a courtroom—that is, difficult and foreign for a medical practitioner—and expect them to perform in accordance with what they may have been read or told without someone saying: This is what you did right. This is what you did wrong. This is what you could have done better.
>
> Nowhere in medicine do we expect a person to perform a difficult task without adequate training. And—and yet here, apart from—in my case, a workshop, and reading a publication or a handout on that workshop, I had no training. And—and just as if a person was doing an autopsy, and doing it wrong because no one had taught them, they could do it wrong a hundred (100) or a thousand (1,000) times, and no one had said, No, you've made a mistake.[140]

Smith's recollection that he received no feedback is contestable, given that cases were withdrawn or dropped by prosecutors after his work was criticised, and especially in light of the lengthy judgment issued by Dunn J in *R* v *SM* early in Smith's work as an expert witness.[141] Nonetheless, his point that experience without feedback perpetuates error is an important one, as is his suggestion that lawyers and judges have a responsibility to teach expert witnesses about how to behave within the complicated environment of a courtroom. It may be helpful to bear in mind that expert witnesses take cues from the work of courts

139 Transcript to Goudge Inquiry Proceedings, Charles Randall Smith evidence-in-chief, 28 January 2008, 31.

140 Transcript to Goudge Inquiry Proceedings, Charles Randall Smith, cross-examination, 29 January 2008, 51–2.

141 *R* v *SM* 1991 CarswellOnt 3661.

and particularly from judges when seeking to understand their responsibilities and the role of their opinions within the criminal justice system.

In the introduction to this sub-section, I suggested that the psychological definition of expertise as proficiency at a given task may apply to the work of judicial decision-makers. In this regard, it is interesting to compare legal analysis with fact determination. By the time she is appointed to the bench, a judge will have considerable training and experience in legal analysis.[142] From the most basic introduction to legal reasoning given in first year law school, through more advanced classes and bar entrance examinations, to the formal and informal training of practice including the work of persuading courts to adopt certain interpretations of the law, judges will have had many previous opportunities to receive feedback on the quality of their legal analysis and to acquire expert intuition about routine legal questions. This learning continues after judicial appointment through an appeals process that ensures that appeal courts offer feedback to trial judges' understanding and application of the law, and perhaps also through academic commentary on judicial decisions. While legal reasoning requires a subtle set of skills, it seems likely that the environment in which lawyers and judges acquire those skills is relatively well geared to producing expertise, at least within one's practice area.

Law students and lawyers receive far less training in reasoning with facts. Evidence courses may not be compulsory, and in any event they usually focus on legal rules of admissibility, and spend far less time on factual analysis. While advocacy courses and work on cases may teach skills in argumentation, lawyers rarely obtain direct feedback about the quality of their factual reasoning. This lacuna continues after judicial appointment, due to the principle that questions of fact are rarely subject to valid appeal (and when they are appealed, a high standard of review applies). The base truth at stake in a given trial is rarely accessible—constructing an account of what happened in the absence of definitive information is, in fact, a key purpose of holding a trial. The usual inaccessibility of base truth is one of the reasons why demonstrable wrongful convictions provide an important insight into the fact determination process. The trial system has been designed for finality and to respect the capacity of fact-finders to assess credibility. However, the lack of training in factual reasoning and absence of feedback about the quality of fact determination may perpetuate risks of error and bias.

142 Of course, depending on the nature of their practice prior to their appointment, and the case load and allocation policy of the court on which they sit, newly appointed judges may well find themselves working in fields that they had not previously practised in.

Some studies of fact determination suggest that judges are susceptible to common biases, but such studies are rare and many suffer from significant methodological limitations.[143] The work done by Guthrie, Rachlinski and Wistrich is far more robust than earlier studies and demonstrates risks of bias in judicial reasoning in legally relevant experimental contexts.[144] However, there remains a need for high-quality studies of fact determination in trial settings. Given the advances made in understanding common biases and heuristics, implicit prejudice and the acquisition of reliable expertise, the tools now exist to design such studies. The results of these studies are likely to shed light on the tasks that judicial decision-makers perform well, as well as areas in which factual reasoning can be improved.

Given that studies of the validity of fact determination have not yet been undertaken, it seems important to offer strategies for avoiding at least some of the risks of error that have been identified above. In the next section, I use the example of a wrongful conviction to introduce the potential contribution that a conscious assessment of plausibility might make to valid fact determination, before turning in the conclusion to some suggestions that have been made by others.

3. Plausibility

Mr Farah Jama was convicted of rape after a trial before a judge and jury in the Victorian County Court on 21 July 2008. Jama, a Somali-Australian man, was alleged by the Crown to have raped the complainant near a women's toilet cubicle of a suburban Melbourne nightclub while she was unconscious. The only evidence against Jama was a trace quantity of sperm found in a swab taken from the complainant's vagina. When tested, the sperm matched Jama's DNA.

The complainant attended hospital for a rape examination after being found unconscious in a locked toilet cubicle. She testified to having consumed five drinks in approximately an hour while taking medication that could interact with alcohol; she believed that she did not drink enough to pass out. The complainant could not recall having left her drinks unattended and did not see anyone interfere with them. At trial, the prosecutor raised the suggestion that the

143 See Shanteau, above n. 75 and the sources cited therein including J. S. Carroll and J. W. Payne, 'The Psychology of Parole Decision Processes' in J. S. Carroll and J. W. Payne (eds.), *Cognitive and Social Psychology* (Routledge: London, 1976) 13; E. Ebbesen and V. Konecni, 'Decision-Making and Information Integration in the Courts: The Setting of Bail' (1975) 32 *Journal of Personality and Social Psychology* 805.

144 Above n. 3.

complainant had been drugged; however, no drug was found in the complainant's bloodstream or urine.

There was no direct evidence that Jama had ever attended the nightclub. Jama, a 19-year-old black man, had no apparent reason to be at a nightclub that was geared towards singles nights for those aged 28 and older and located in a predominantly white neighbourhood some distance from his home. Surveillance videos from the entrance to the club did not capture his image, and bar staff did not recall ever having seen him on the premises. The complainant similarly had no recollection of seeing a man who resembled Jama. The complainant recalled the first 15–20 minutes of her time at the nightclub, and she was found unconscious 30 minutes after arriving there. There were no fingerprints, mobile phone records, infringement notices or other evidence placing Jama in the nightclub or anywhere nearby.

After a trial in which he pleaded not guilty, Jama was convicted and sentenced to six years' imprisonment. Nineteen months after he was sentenced, it emerged that the DNA swabs and slides taken at the hospital had been contaminated prior to their arrival at the testing lab. The complainant had probably never been raped.[145]

In his report on the circumstances that led to Jama's conviction, former Victorian Supreme Court Justice Frank Vincent observed:

> the DNA evidence was, like Ozymandias' broken statue in the poem by Shelley, found isolated in a vast desert. And like the inscription on the statue's pedestal, everything around it belied the truth of its assertion. The statue, of course, would be seen by any reasonably perceptive observer, and viewed in its surroundings, as a shattered monument to an arrogance that now mocked itself. By contrast, [t]he DNA evidence appears to have been viewed as possessing an almost mystical infallibility that enabled its surroundings to be disregarded. The outcome was, in its circumstances, patently absurd.[146]

145 This account of the *Jama* case is based on F. H. R. Vincent, *Report of the Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama* (Victorian Government Printer: Melbourne, 2010) 9–28.

146 Ibid. at 11.

Hindsight is 20/20 and it is difficult now to understand how Jama was ever convicted. However, Kahneman's insight that decision-makers are apt to reach intuitive decisions based on incomplete information, and then over-value the reliability of that information, is important in this context. For those involved in the *Jama* case, the combination of an unconscious complainant who was in a nightclub but testified she had not drunk enough alcohol to pass out, a DNA match, and perhaps the fact of a young black defendant who was a stranger to the complainant (whose race is not identified) may have resonated with pre-existing stereotypes about how sexual assaults can happen. The result of this combination of factors seems to have been a suspension of critical judgment about the inherent implausibility of the prosecution case.

Jama is a particularly strong demonstration of the importance of conducting a deliberate assessment of the plausibility of the facts on which conviction turns. While the story preferred by the Crown at trial resonated strongly with stereotypes about sexual assault, factoring time and space into the equation rendered the story highly suspect. On the Crown theory, the black teenager Jama entered a nightclub filled with Caucasians older than 28 and located in a predominantly white neighbourhood without being observed by security cameras, staff or the complainant. He either slipped a pill into the complainant's drink without being seen or noticed that she was unwell and found a way to get into the women's washroom unseen. It seemed physically unlikely that there was space for intercourse in the toilet stall, so in the space of 15 minutes he managed to move her somewhere nearby, rape her, and return her to a locked cubicle, again without being seen. He left no fingerprints or other evidence in the course of committing this alleged crime aside from a trace quantity of DNA. The example of the *Jama* case suggests that some wrongful convictions might be avoided by a deliberative process that pauses to reassess the prosecution narrative on its own merits prior to a decision to convict being made.

Plausibility presents challenges as well as potential to the fact-finding process. In my usage, 'plausibility' is intended to connote *physical* and *chronological* plausibility—conscious attention to whether the preferred account could have happened, given the evidence received about when and where certain events must have occurred. It is also intended to direct the decision-maker's attention to whether the preferred account is likely—for example, is it likely that Jama could have entered the nightclub, raped the complainant somewhere other than where she was found, and departed in the space of 15 minutes without being observed and without leaving any traces of his presence aside from a trace quantity of DNA?

Assessing plausibility according to how people 'typically' behave is likely to open the door to all of the heuristics and biases that have already been discussed in this article (and perhaps more), and is not my proposed strategy. Identifying the possibility that a decision-maker is imposing his or her own sense of how the world works on someone whose experience is quite different is an important interim step when assessing a nascent narrative. However, focusing plausibility on time and space may hold more potential to interrupt intuitive reasoning that is based on substitution or stereotypes, particularly where the stereotype is otherwise likely to distract the trier of fact from the most likely explanation. This approach entails consciously asking:

> for the account that I find more coherent to have occurred, what must the protagonist have done? When and how must she have done it? In what time period did it occur, according to the best and most independent evidence I can muster? How well is this account grounded in the trial record, and to what extent am I making inferences from proven facts? What evidence challenges this account, and do I disbelieve that evidence? Are there things I would expect to see if this narrative were true, but which are absent from or contradicted by the record? And, what assumptions am I making about human behaviour to get to this result?

Returning to the Pennington and Hastie story model, these questions have the capacity to focus a trier of fact on the evidence that has not been accounted for by the preferred account, and to consider what inferences are being drawn to reach the preferred conclusion.

Asking these questions is not, of course, a panacea—it seems likely that in most cases the legally preferred account is plausible in these senses, whether or not it is ultimately true.[147] Actively considering plausibility may, however, at least help a decision-maker to slow down his or her thinking sufficiently to identify the premises on which his or her conclusions turn. This may be particularly helpful in an emotionally difficult case, or in one in which there are strong

147 Research emerging from innocence projects suggests that prosecutors often retrospectively alter their preferred narrative when presented with post-conviction evidence that tends to exculpate the accused. This tendency to change the prosecution account reflects the malleability of narrative given a particular set of evidence, and the limitations of plausibility as a device to prevent wrongful convictions. See, e.g., D. Medwed, 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 *Boston University Law Review* 125. I am grateful to David Hamer for reminding me of this point.

opinions.[148] In the criminal context, if a decision-maker is leaning towards conviction, taking a 'last look' with plausibility in mind seems consistent with ensuring that the prosecution has discharged its burden of proof. Consciously inserting a plausibility assessment into the fact-finding process also fits well with Hogarth's suggestion that one can improve decision-making by seeking actively to disconfirm one's reasoning.[149]

4. Conclusion

> Stories can be told many ways, and even stories that lead to very different legal conclusions can be different plausible and accurate versions of the same event. It may make sense, then, to think that the presence of these different, competing versions of a story is itself an important feature of the dispute at hand that courts are being called upon to resolve.[150]

Taken collectively, story models of complex decision-making, Kahneman and colleagues' work on heuristics and expertise and Banaji and colleagues' work on implicit prejudice have considerable potential to assist judges and legal academics to understand both the process and the vulnerabilities of coming to a decision about the facts of the case. I see the story model as descriptive of the decision-making processes of ordinary decision-makers (and probably, with some amendment, of judges), rather than as a normative theory of how one should think through a case. The value of understanding Pennington and Hastie's work is that it draws attention to the role of narrative and inference in making sense of a case. More particularly, Pennington and Hastie's findings suggest that the constructed story of the case may draw on a relatively small proportion of the evidence given at trial, and that individual decision-makers may fail to engage

148 Another example of a case in which such inquiry might have prevented a wrongful conviction is the 'dingo baby case'—the conviction of Lindy Chamberlain for killing her daughter, Azaria. On the Crown case, Chamberlain was away from a communal barbeque area for 10 minutes with her newborn daughter and her six-year-old son. In that time, according to the Crown, she killed Azaria by slitting her throat with scissors, and then deposited Azaria's body in a camera bag. The passenger side of the car was covered in blood, but Chamberlain returned to the communal area wearing the same clothing, running happily with her equally happy son, holding a can of baked beans and a can opener. Independent witnesses heard a baby cry after Chamberlain had returned to the barbeque area. The car was parked a few metres from the barbeque. Of course, subsequent investigations demonstrated that the supposed infant's blood was nothing of the sort and it is now generally accepted that a dingo is the most likely cause of Azaria's disappearance and presumed death. See further E. Cunliffe, *Weeping on Cue: The Socio-Legal Construction of Motherhood in the Chamberlain Case*, LLM thesis, UBC, 2003.

149 Hogarth, above n. 76 at 236–9.

150 K. L. Scheppele, 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2073 at 2097–8.

explicitly with evidence that contradicts their preferred narrative. The selectivity in evidence use and the narrative work supplied by inferential reasoning seem to be two likely places for error to arise, and therefore to be places where attention may productively be focused if one wishes to improve fact determination at trial.

The finding that jurors use a constructed story of the case for the purposes of thinking through an appropriate verdict resonates with Simon's argument that judges seek coherence within their verdicts by restructuring evidence and arguments until one outcome appears to follow naturally from the case. Simon points out that this process of seeking coherence can cause decision-makers to overlook or forget about conflicting evidence. Simon's and Pennington and Hastie's work is in turn consistent with Kahneman and colleagues' proposition that once decision-makers have identified a coherent narrative from incomplete facts, they tend to overlook the flimsiness of information on which their thinking was originally based and become overly confident in their conclusions ('what you see is all there is').

Kahneman and colleagues have pointed to substitution as one mechanism by which such confidence arises. I have suggested that the challenges of fact-finding at trial may make legal decision-makers somewhat vulnerable to engaging in substitution. The idea of stereotyping is more complex, in part because this word is used differently in different contexts. For Kahneman and colleagues, stereotyping is a necessary and even useful way of categorising a complicated world, but it leads to predictable errors such as the willingness to believe in the occurrence of unlikely events, a tendency to overlook base rates, and a tendency to ignore warnings about the unreliability of evidence. Banaji and colleagues have provided valuable insights into the operation of stereotypes by demonstrating that much negative stereotyping occurs implicitly, without the conscious control or even awareness of the decision-maker. I have pointed to some examples of moments at which implicit prejudice might operate within the reasoning of experts and lay participants in the justice system, and suggested that particular dangers arise when these two forms of implicit prejudice coincide. Substitution and stereotyping may operate as underlying mechanisms by which a story of the case is generated or perhaps by which one story is preferred as being more plausible than a competing account. However, more research is needed to understand whether this takes place and, if so, by what process.

In the passage quoted at the beginning of this conclusion, Kim Lane Scheppele suggests that the existence of competing stories might usefully be understood by legal decision-makers as an invitation to consider the possibility that alternative plausible accounts of a legally relevant account may exist, and to consider the

ramifications of that possibility for fact-finding. Scheppele's approach may slow down the impulse to identify a single true story, and the cognitive processes that this impulse sets in train. In keeping with Scheppele's insight, I have suggested that, in every case, a conscious assessment of plausibility should be conducted prior to making a final decision about the facts of a case.

In a very helpful literature review of the application of behavioural decision-making theory to law, Donald Langevoort identifies that the operation of some cognitive biases may be contingent—i.e. susceptible to reduction or elimination where, for instance, there is a strong motivation towards achieving accuracy.[151] Some research suggests that when decision-makers are motivated to achieve accuracy, their performance on tasks that are vulnerable to cognitive bias improves. However, biases that serve a 'strong underlying motivation' may be harder to shift.[152]

One field in which the legal process seems particularly vulnerable to error is in assessing the quality (or reliability) of expert testimony. Reviewing the psychology literature on the acquisition of valid expertise, I have suggested that it may be productive for judges and lawyers to focus on the environment in which an expert has acquired her expertise, as well as her opportunities to learn from accurate feedback. Recalling Kahneman's observation that an expert may perform many tasks, only some of which may be conducive to the acquisition of good expertise, it seems particularly important to consider the particular tasks completed in a given case, and the claims being made by the expert about what conclusions she is able to draw. These tasks and claims should be compared with prior experience to identify the extent to which they are analogous with past practice. The quality of the practice itself should also be assessed. Given that experts occasionally seem to regard court processes as a form of validation of their work, it is important for judges and lawyers to consider what lessons they may inadvertently be teaching experts about their role and responsibilities.

In the absence of better empirical information about the dangers of storytelling, Terence Anderson, David Schum and William Twining offer some guides to assessing stories in a trial context. Their criteria include a search for internal consistency within the preferred story as well as adopting a decision-making stage in which the decision-maker pays explicit attention to finding and accounting for conflicting evidence. They also invite decision-makers to be self-conscious about the extent to which a preferred narrative is grounded in evidence versus

151 Langevoort, above n. 25 at 1520–1.
152 Ibid.

inference, to try to identify value judgments within their reasoning, and to think about the potential for prejudice to be playing a role in the construction of their preferred story.[153] These suggestions, if consciously applied in every instance, seem to have considerable potential to improve fact determination at trial. To these criteria, I would draw from Kahneman and colleagues' work to add that having self-conscious reference to the reliability and completeness of evidence on which a judgment is being made may help to forestall reliance on substitution and stereotyping. Finally, taking a last look at chronological and physical plausibility may help to avoid some errors in judgment.

Much more research needs to be done to understand judicial fact-finding and to consider the possibilities for training law students and lawyers as well as judges in factual reasoning. Insights gleaned from cognitive psychology have the potential to focus such research in areas that have presented persistent difficulties for trial courts. In the meantime, there may be potential in exercising a disciplined and self-critical approach to testing the plausibility of the stories one tells about 'the facts of the case'.

153 T. Anderson, D. Schum and W. Twining, *Analysis of Evidence* (Cambridge University Press: Cambridge, 2005) 281–2 and generally ch. 10.

59

NATION-BUILDING AS PROCESS

Reflections of a Nihiyow [Cree]

Harold Cardinal

AFTER LISTENING to the presentations all day long, I feel almost as if I were at one of those really fine, classy restaurants facing a large and diverse buffet, and not quite knowing what to pick from. Rather than deciding what topic from these presentations to comment on, I'll comment instead on matters that weren't discussed at length. First, I wanted to express my appreciation for the invitation to participate. I particularly enjoyed our American guest's [Patricia Seed's] presentation because I think there are a number of areas where that presentation, as well as the others, are relevant to what is happening in Indian country today.[1]

I have, for the last twenty years or so, been engaged as a full-time student, studying, on the one hand, under the direction and guidance of traditional teachers from Cree and other First Nations and, on the other, more recently, at various universities. My studies have focussed in part on trying to discover the points at which there might be convergences between the knowledge systems of the Cree people and other First Nations and the knowledge systems found in Western educational institutions.

We need to recognize that the colonizing experience has been pervasive and extensive throughout both the Aboriginal community and the white community.[2] One of the things I found informative in Patricia Seed's talk is that, from an intellectual point of view, perhaps some of us in the First Nations communities make the conceptual mistake, when we use the term "white man," of assuming that we are dealing with a uniform whiteness or sameness when discussing the "white community." As is sometimes the case when First Nation communities are described, there is the tendency to ascribe a uniform sameness to them without acknowledgement of their diverse linguistic, cultural, or traditional differences.

The consequence is often that not enough attention is given to the differences existing in the intellectual or traditional histories of both white peoples and First Nations.

I was also interested in the distinction our American guest made between the conception of human rights as an individual rights paradigm contrasted to the other more collective formulations of the human rights paradigm. I say this, making more of a mental note to myself in terms of where we have to go in forging a different direction for the future of First Nations peoples. First Nations peoples today are being required to step back and assess what has been happening across the country and within our communities. In our assessment process, some of us are beginning to realize how much we have internalized or adopted, as First Nations or Aboriginal peoples, the colonial mindset of government bureaucrats, policy makers, and law makers. This statement is not intended to be value-laden or a diatribe against Euro-colonialism. Rather, my statement is made in an effort to recognize the scope and complexity of the task our peoples are facing in their nation-building undertakings today. This task requires that we look at ourselves not only as individuals but as members of the communities from which we originate, and that we understand clearly, honestly, and accurately what is happening in and to our communities.

One of the initial challenges in the nation-building exercise is the need for a careful analysis of the many issues underlying the question of identity. I only have time here to outline some matters that need urgent attention and resolution, though we need to return at another time to review the issues in more detail. In dealing with the question of identity, Cree Elders pose the following question to their young people: *"Awina maga kee anow."* In translation this says, "Who is it that we really are?" The Elders pose this question in their own language and context in a way that resonates in a broader environment.

Colonization is not an experience unique to the Cree or other First Nations. It is an experience we share with other Canadians and with other peoples throughout the world. In this context, the term "colonization" is intended to be descriptive rather than definitive. It is descriptive in the sense that it describes a historical reality in Canada and other parts of the world. That reality is simply this: European nations sent their peoples to different parts of the world where they established colonies. Through these colonies, European nations occupied and assumed control over territories and peoples of those lands. In 1867, Great Britain reorganized its European colonies located in Canada under one government. That reorganization was effected in 1867 with the passage of the British North

America Act in the British Parliament. Though it gave some governance rights to its colonies, Britain retained continuing control of its British colony. Canada did not receive its full and complete independence as a nation-state until the patriation of the British North America Act in 1982. Hence, for Aboriginal and non-Aboriginal peoples, the process of decolonization and nation-building is a continuing one in Canada.

Other nations throughout the world are still in the process of nation-building. We see this in a contemporary context in countries like post-apartheid South Africa or the new nations that emerged after the breakup of the Soviet Union or in the struggle of Palestinians to create their own state. Even in nations, like Israel, that achieved independence in the mid-1950s, we see a continuing process of giving secular states a meaning related to identity. There, the Israeli Supreme Court had to consider the question of "Who is a Jew?" Here in Canada, I would dare say that Canadians, in different regions of the country, are still trying to formulate an answer or answers to the question of "what is a Canadian?" or "who is it that 'Canadians' really are?" In that sense, the questions other peoples ask themselves are not that different from that posed by Cree Elders to their young people. For Aboriginal persons, the question of identity is made more complicated and difficult by the particular historical treatment to which First Nations peoples were subjected in Canada. Today, these questions signal a particular phase of decolonization. As such, it is becoming clear to more and more Aboriginal persons that the answers must be found within and among the people who constitute the particular nation. Legitimate answers can no longer be provided by some omnipotent power located in foreign jurisdictions outside the context of the particular peoples concerned.

In Canada, Europeans arrogated unto themselves the power and authority to determine and define who was and was not a Cree person or who was or was not a member of a First Nation.[3] The identities of Cree and other First Nations peoples were to be determined by a legal construct. That legal construct began with a legal presumption that Crees and other First Nations peoples were primitive, savage, and heathen, and hence not possessing the capacity to be recognized as persons under the laws of the country. Public policy was predicated on the assumption that public good would best be advanced by removing Crees and other First Nations peoples from their "wilderness habitations" and relocating them to places where they could be "isolated from their past" and protected from "contamination," from the influence of premature contact with "civilization." They were to be "civilized and Christianized" in a carefully controlled and legally secured environment. These places were conceived as "half-way

house" laboratories in which Crees and other First Nations peoples were to be sanitized, civilized, and Christianized. The goal of Canadian public policy and law was that once the Crees and other First Nations peoples completed the transformative process, they were to emerge into Canadian society, free from their wild and primitive past, inculcated with a sense of self-shame so strongly embedded that they would never again yearn for or seek to be associated with their former "savage" identities.

This legal construct became entrenched in Canadian law and public policy in determining who an "Indian" was and who had a legal right to be a member.of the group known as "Indians." By arrogating these powers unto themselves, Europeans sought to possess the exclusive power to determine who was and was not an Indian; who was entitled to inhabit Indian communities; and who could or could not be entitled to receive state services and recognition. The labels that Europeans adopted for the Cree and other First Nations, such as "heathens," "savages," or "rude and primitive men," reflected a particular time and era of European history when the world and its inhabitants were divided into those who were "civilized" and those who were not, those who were Christian and those who were not. There is no clearer description of the European mandate to civilize, Christianize, and dominate others than that expressed by Judge Boyd in the St. Catherine's Milling and Lumber Case of 1885. In that case, Boyd described the Indians of Ontario and Western Canada as "rude and primitive men" who needed to be civilized and through civilization transformed into "productive members of civilized societies."[4]

Though decolonization requires the deconstruction of these racist colonial paradigms, we are confronted with the effects and consequence of a centuries-old, carefully constructed, state-sponsored system designed to transform the minds and souls of all First Nations persons in Canada. For decades upon decades it was the only system imposed and enforced upon the First Nations peoples. This became for many the only reality known by successive generations, and it was this reality that pervasively informed all thoughts respecting the question of collective identity and individual self-identity. Those who sought to maintain their tribal languages, customs, cultures, or connections became the objects of state-inspired and -encouraged ostracism. Those who sought to maintain and strengthen their original identity became, over time, the minority who were characterized as the small, backward remnants of a radical minority, yearning to return to a distant past to which they could never return.

Canadian laws were enacted to enforce this paradigm. Successive generations of First Nations children were removed from their families and communities and taken to places where they could be isolated from the

world so that those who sought to re-frame and transform their minds and souls could do so in complete and unabridged freedom. Laws mandated the separation of families from one another and authorized the forced removal of whole families from their communities. These same laws made it illegal for those removed to return to live in their communities of origin. These laws became the only basis for determining who could be considered an Indian and who had or did not have the right to live with and among the Indians.

This history of state labelling has had a pervasive effect on First Nations people collectively and individually. They were forced by the laws of Canada, decade after decade, to accept the removal of their brothers, sisters, sons, and daughters from their communities without any recourse. Over a long period of time, for an increasing number of First Nations people, this removal was the norm and the law to be followed. Such assimilationist strategies, encouraged under the Indian Act, shaped the legal standards that determined Indian identity and membership in Canada. Even after the 1985 amendments to the Indian Act, this Act still controls and limits the persons who can be recognized under its laws. We are confronted with a situation rooted in a long colonial history and legal practice where a state government possesses not only the sole right and power to label First Nations peoples with a particular identity, but also the authority to keep redefining that label to the extent that the issue of identity keeps going around in an endless circle, causing havoc, pain, and suffering in our communities. I look, for example, at the state power exercised through the Indian Act in defining who is an Indian, the number of times that definition has changed, the consequence in terms of the hundreds, thousands of people who were one day considered Indian under the laws of the country and then, the next day, considered non-Indian by those same laws without anything having changed except a legal definition. And then I see the internal division and strife that results from those changes. It is a strife that rips apart families in Indian country.

The most recent manifestation is found in the Bill *C-^i* debate across the country. One finds thousands of individuals who have gained or regained state recognition of their status through the provisions of the Indian Act. Yet many of these individuals continue to find themselves at the outskirts of their communities of origin. Persons in their communities are saying, "We don't want you back." An increasing number of these excluded individuals are finding themselves in a legal twilight zone; while they have achieved legal recognition, they are discovering that it remains, in substance, a fraudulent mirage. They have succeeded in acquiring a legal label, but it is one to which few if any rights or benefits flow. It is one

that does not allow them to become members of a community nor entitle them to the benefits that flow to those members of the community. This mirage is costly, particularly for the many previously recognized as Metis. Many individuals who had assumed the identity of Metis and gained acceptance in that community are finding that success in achieving legal recognitition as a status Indian is accompanied by the cost of affiliation with the Metis. The Metis are saying, "If you are Indian, you cannot be a Metis." Hence, they lose whatever rights they may have attained as a result of their past or continuing affiliation with Metis communities. Of increasing concern to a growing number of persons is the fact that in Alberta, within the Metis Settlements, persons who had long been accepted as members of the Settlement communities are finding that the price they pay for recognition under the Indian Act is the cost of being stripped of their membership in the Metis Settlements. In some instances, persons in their late 8os and early 905 who founded and developed these Settlements are finding themselves and their families stripped of any land rights they may have acquired, in addition to the loss of any right to benefits or services to which their settlement membership formerly entitled them.[5] In short, they find themselves unable to enjoy the benefits of either Metis status or Indian status. This is one more aspect of the Bill €-31 question. As a result, we are seeing more communities in turmoil, division, anger, resentment, pain, and a whole lot of suffering. Where many assumed that the guarantees provided in the Charter of Rights and Freedoms in Canada would resolve and remove the inequities of discrimination, experience is instead showing that, for many Aboriginal peoples, legislation passed by both Canada and Alberta is responsible for increasing the inequities and contributing to an increasingly destructive, divisive strife within many Aboriginal communities.

There is some attempt to characterize the situation as one that arises because of a conflict between "collective" and "individual" rights. It is not at all clear that this is the case. Where an Aboriginal or treaty right has been breached or taken away by and with the authority of the Crown, the Crown has an obligation to restore that right to the individuals so deprived and it has a duty of restitution to those persons. The Crown should not be relieved of it's responsibilities, nor should it be allowed to benefit illicitly from a mis-characterization of the problem for redressing the injury and providing restitution for the damages and suffering that have been and continue to be caused in its name.

Adding to our growing confusion and anger, we are beginning to see a systematic, organized, and coordinated attempt to discourage any restitution on the notion that it would represent acknowledgement of "race-based" rights, an approach rooted in an attempt to limit the notion of equality as found in the Charter of Rights and Freedoms. The Canadian Supreme Court rejected the attempt to limit the notion of "equality" in the manner now increasingly suggested by so-called theoreticians of the far right. The general approach taken seems to say that the rights of Aboriginal peoples should not be recognized because such recognition is contrary to the notion of "equality." The concept of "equality" is protected under Section 15(1) of the Charter of Rights and Freedoms: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." It was generally believed that such protection would empower and protect those who had been excluded or discriminated against in the past. That general purpose of the Charter provision was recognized in the early Charter cases heard by the Supreme Court of Canada and dealt with as a way in which remedies might be provided to those so excluded or discriminated against.

Aboriginal peoples first ran into the "reverse discrimination" argument in the mid-6os, prior to the enactment of the Charter of Rights and Freedoms. This approach seemed at the' time to be an attempt to restrict, or, perhaps more accurately, bastardize the notion of equality as popularized by the American Civil Rights movement. We saw in the Civil Rights movement a way in which redress could be found for people discriminated against, who were being made to suffer, who were being deprived of their rights, whatever those rights were. We saw a country that was able to recognize, despite its laws and social practices, that discrimination was wrong and illegal. We saw, for the first time in our lives and in the lifetime of our parents, an example of how the concept of legal and political equality could be used as the basis upon which injustice was redressed. That debate resonated here in Canada, particularly for Aboriginal peoples, who were experiencing in the late 19605 a political reawakening.

The notion of using equality to argue for the recognition of fundamental human rights for Aboriginal people got turned on its head by the Canadian government in 1969. It decided to test a new and different notion of equality, which in essence argued that if everyone is to be recognized as equal, there should be no special status and no recognition of First Nations or Aboriginal rights in this country. It took a massive effort to stop this proposal, articulated in the so-called white paper of 1969. But that theme has recently been resurrected in Canada despite the fact that Aboriginal and treaty rights were expressly affirmed and recognized in the Canadian Constitution in 1982. The Canadian Constitution recognized both the col-

lective and individual rights of Aboriginal peoples as an integral part of its conceptual framework underlying the notion of equality.[7]

The notion of equality as one restricted to a narrow, individual rights-based conception was purposely rejected in the way Section 15 of the Canadian Constitution was formulated. Here the political leadership appears to have attempted to extend constitutional protection by balancing the notion of collective rights and individual rights. Section 25 was introduced at the insistence of Aboriginal peoples, who sought to ensure that the notions of individual rights as recognized and protected in the Charter did not override treaty and Aboriginal rights. In some respects, we are just seeing the preliminary attempts by Canadian courts to find that balance. The wrongful acts of the Canadian nation-state, which aggressively sought to dismember First Nations and to deprive them of their fundamental rights and freedoms, cannot be allowed to use the ongoing judicial consideration of balancing collective and individual rights as a cover to avoid discharging Crown constitutional obligations. These were deliberate acts undertaken on behalf of the Crown and responsibility for equitably and fairly redressing past wrongs is neither removed or absolved by the Charter of Rights and Freedoms, nor by any terms of the Canadian Constitution.

In addition to ensuring that the Crown discharge its legal obligations and duties, Aboriginal peoples are confronted with the enormous task of nation-building or reconstruction. A large part of that effort requires that First Nations reconnect with the healing and reconciliation capabilities which are rooted in their spiritual traditions. Aboriginal peoples must recognize that the answer must be found within the cultural and traditional milieus. An increasing number of Aboriginal peoples have successfully entered the academic community and are beginning a process of connecting with Aboriginal Elders. That connection is integral to what in an academic context is called the process of deconstruction. It is a process by which Euro/Anglo and Canadian/American concepts, terms, and words are translated into an Aboriginal language and then, with the assistance of Elders, compared and analyzed. It is a challenge many Elders have welcomed and responded to with enthusiasm. It is a task well-suited to Elders for, at a conceptual level, many yearn to be involved and have the knowledge and capacity to be engaged in such a dialogue. Through this process, we try to examine the essence of the concept, and then see how it plays in our language and cultural contexts.

The deconstruction process is an essential component of our nation-building exercise. For me, this is probably one of the most rewarding kinds of exercises. I had to go through an extensive period of time training

in my own language and traditions to be able to engage in that process and to identify where the comparative points are. I think that's the other thing that I find really valuable about the presentation that was made by our guest speaker. Because it seems to me that as an intellectual exercise, as an academic exercise, as a thinking exercise, we need to be able to construct a theoretical comparative framework to link the knowledge systems that are there between the First Nations and the western nations. Part of the problem in the past has been that attempts at comparative analysis have been really misguided. Past comparative exercises have been limited to attempts to find one word or one term in the English language and compare that with a corresponding term in a First Nations language. What you get from that kind of exercise is an almost total distortion of meaning, with the end result that one is unable to recognize what is being discussed. And at the end of the day you end up with an interpretation or understanding that seems to confirm the white man's worst fear of the Indian of having no conceptual capacity or understanding. Part of the problem was the fact that people who attempted such a discourse did not understand enough about the First Nations languages, traditions, and contexts that gave meaning. This is evident, for example, in many early First Nations dictionaries developed by missionaries.

What I find working with our Elders is that the Cree language and other First Nations languages organize their teachings in the form of doctrines and speak to principles. When I was active in the political community and we were going to Ottawa to make presentations to the federal government and we had our advisors and consultants and writers and they put before us stacks of paper this high for our presentation, the Elders would kind of laugh at us and tweak us at the nose and say, "How come you need so much paper to say that when all we need is a small phrase to say the same thing?" What we didn't understand then is that many of the words and phrases in our languages are really statements of general principles or doctrinal statements. The expectation was that one would look at a concept and then spend time to identify all of its subset concepts and principles. The approach inherent in this way of examining matters is not really a quaint practice unique to First Nations. The same approach is found in the study of law. The tort principle, for example, that you have a responsibility to your neighbour, stated as a doctrine of law, is a very short legal phrase, but from there you have the whole body of tort law which has evolved to apply to many different contexts. The Cree language operates in the same way.

I began my studies in the oral traditions of our people after I had grown up in the residential school system, gone through high school,

and begun university. My thinking at that point had been programmed by the educational system as it then was. The Elders were concerned when I began to speak in the public forum as a political representative in this province [Alberta] that I was speaking and thinking too much like a white man. They brought me under their wing to begin teaching me and to help me begin a different process of learning. This process of learning has been ongoing for many years. At the onset of my learning experience, they said to me: Our ways are so rich. We have so much in terms of knowledge, ceremony, and process. If you are now coming home trying to find yourself and locate yourself in our conceptual world, you have to have a theoretical framework; you have to know how you measure, how you judge what you see, how you assign values, how you determine what is right, what is wrong. If you don't have that conceptual framework, the problem that you will run into is what in white language is called the "rule of man," where every man makes up his own rule, and it changes with every individual that comes along, so you're forever walking around in circles, not knowing where the hell you're coming from or where you're going. To avoid that, they said, you have to become familiar with our conceptual and theoretical framework. That was thirty years ago, and it wasn't until I was doing my graduate studies and looking at the theoretical perspectives that accompany the study of law that I got a sense of what the Elders were talking about. You can study law, and other disciplines, and go through school for four years, without being able to pull all of the component parts together, unless you are aware of a theoretical framework or perspective to apply.

In terms of our nation-building exercise, this is really our challenge today. I welcomed Sharon Venne's earlier presentation and in some ways wish I was starting law school again so I could take her class at the University of Saskatchewan. The approach she discussed represents a different paradigm from our current legal framework and the academic disciplines in this country. We need to generate a new or different analytical paradigm, not because you-want to tickle someone's intellectual curiosity, but because we need to find new answers and solutions to some growing, serious problems in our communities, and in our relationships with non-Aboriginal peoples.

When we talk about treaty, for example, from a Cree perspective, we are talking about a fundamental Cree doctrine of law called *Wa-koo-towin,* the laws governing relationships. These laws establish the principles that govern the conduct and behaviour of individuals within their family environment, within their communities, and with others outside their communities. *Wa-koo-towin* provided the framework within which the treaty relationships with the Europeans were to function. It is one of the most comprehensive doctrines of law among the Cree people and contains a whole myriad of subsets of laws defining the individual and collective relationships of Cree people.

We have to be able to understand where the doctine of *Wa-koo-towin* comes from and what role it played in the treaty-making exercise. Because when our Elders lifted the pipe, when our Elders used the sweet grass, when our Elders used the ceremonies to go into a treaty-making session, they weren't putting on an anthropological show to impress Europeans newly arriving into their territory. They were doing that for a very specific reason. That was their way of moving, their way of giving life, their way of giving physical expression to the doctrine of *Wa-koo-towin,* the kind of relationship that they were under an obligation to extend to and enter into with other peoples. As Sharon mentioned, that was a practice that our peoples had for eons of time, in terms of establishing relationships with each other, with other nations. And the mutual undertaking of a relationship between the Europeans and our people, the story of that, the knowledge of that, the details of that are contained in the doctrines that the sweet grass symbolizes, that the pipe symbolizes. And our Elders tell us: If you want to understand our treaties, from our perspective, that's where you have to go to seek that knowledge. And when you have that knowledge, that will give you the definition and the description of this particular event.

What we have to do, I suppose, in putting these various concepts together, is to be able to begin placing on one side the doctrines, the philosophies, the conceptual information, to see to what extent that resonates with our own cultural framework, our own take on what those concepts are. Because whatever concepts you find in international law, in the international community, or in the Western academic community, we have parallel extensive doctrines or concepts. The notion of human rights is not something new to our teachings; it's an integral part of our way of life as a people, rooted in what Sharon referred to as a concept of the relationship between our people and our Creator. That's where those concepts originate. What we now have to be able to do is to sit down with our Elders and look at the whole doctrine of human rights—I thought initially from the English perspective, but after listening to Patricia Seed's talk, we're going to have to bring in the Iberian perspective as well—because in many ways the decolonising experience that we're going through in this country is an experience shared by peoples throughout the world. It isn't something unique to us as First Nations people. So we have to be able, like the Islamic people, or the Jews, or any other non-European

nation, to look at these concepts, to see in a global framework how the various components match our own thinking, and then make them part of the institution-building that we have to be involved in as First Nation people. We have to be able to give shape, substance, and form to the governmental institutions that our people must now develop because the Canadian Constitution acknowledges our inherent sovereign rights as nations. We must also recognize that the colonial structures now in place, as denned by the Indian Act, are not structures that originate from our own people. We have to deconstruct those institutions and begin a process of reconstructing.

In a recent meeting of Elders and First Nations scholars here in Edmonton, one of the Elders raised the need to bring the hereditary system back as a system of government. The collective response of the First Nations scholars was kind of, "Oh no, not that again, it's outdated!" But when you look at that notion, both Britain and Canada have one of the oldest hereditary systems of government in the world. The concept of the Queen as the sovereign symbol of British-Canadian nations is rooted in the person of the royal occupant who isn't elected but rather is born into that position. That hereditary system of government is in place because there is a certain amount of conceptual stability associated with that form of governance. It may be that we have to revisit the concept of hereditary governance from a First Nation perspective to determine whether or not contemporary democratic institutions can be created in a manner that respects both traditional values and contemporary democratic requirements. What we need to find is a way of creating institutions that have stability, cohesion, and relevance. What the Elders speak about is really the wish of any organized nation or society: a governance system and institutions that reflect our own values and traditions.

The analytic or conceptual approach I have described is integral to our process of nation building. It is also a necessary component of the healing and reconciliation process that needs to happen in Indian country if we are meaningfully to address issues dealing with identity and finding solutions to repair the damage and injury wrought upon and suffered by too many individuals. I really appreciated the opportunity to listen in to the conversations and presentations made today because I usually judge the value of a meeting by how much I learn from it, rather than hearing the same old stuff all over again, perhaps repeated in different fashions. With all of the presentations I really learned a lot, and I again thank the organizers for the opportunity and privilege of learning with you today.

NOTES

1 Editor's note: Dr. Cardinal revised the text of his talk on three occasions before his illness prevented him from further work. Beyond correcting a few minor typos and incorrect bibliographic references, I haven't altered this version since it represents the last sense he gave me before passing of how he wanted his original talk to appear in print. For more information on the editing process, see the Introduction.

2 I use the term "white community" in the way the Supreme Court of Canada has approached the term "word of the white man." In R. u. Sioui (1990), the Supreme Court of Canada stated that the term "treaty" was not a term of art, but a formal word identifying agreements in which the "word of the white man" is given by European/ Canadian representatives to make certain of the "Indians' co-operation" (S.C.R. 1025, para. 44). I use the term "white community" as aterm of art to describe Anglo/American and French/Canadian approaches to First Nations peoples.

3 According to the Indian Act R.S.C. 1985 c. 1-5 s. 2(1), an "Indian" is a person who is "pursuant to this Act and is registered as an Indian or is entitled to be registered as an Indian."

4 See St. Catherine's Milling and Lumber Co. u. The Queen (1888).

5 According to the Metis Settlement Act R.S.A 2000, CM-14 s. 90(1), "a settlement member terminates membership in a settlement if (a) the person voluntarily becomes registered as an Indian under the Indian Act (Canada)."

6 See, for exam pie, Andrews u. Lau; Society of British Columbia (1989) 1. S.C.R. 143. Since then, the Supreme Court has heard many cases dealing with varying aspects of $.15(1), giving rise to continuing concerns by many.

7 See the Charter of Rights and Freedoms, s. 15(1); Sections 35 and 25.