

## EVIDENCE: PRINCIPLES AND PROBLEMS

By Ronald Joseph Delisle

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Canadian lawyers have scarcely been as fortunate as their British or American counterparts with regards to textbooks. Until very recently, many law school subjects have gone without a single Canadian textbook. Often-times an English import filled the void admirably. When Canadian textbooks first began to appear, they often contained a marked Ontario bias, reflecting that province's legal talent and relatively large market for law books. Happily, though, several Canadian works national in scope<sup>1</sup> and of some merit have emerged in recent years, and while they have not yet covered the field, these texts have done much to further an understanding of the Canadian jurisprudence. Thus, writers like Castel, Davies, Fridman, Linden, Stuart, Waddams, Waters and Welling are doing for the Canadian profession what Bromley, Cheshire, Cross, Gower, Megarry, Morris, Wade, Williams and others have done for the English legal community. *Evidence: Principles and Problems* is a product of the contemporary effort to produce a textbook worthy of use in our law schools.

Delisle's new book fills a gap of sorts, although evidence is not a subject previously ignored by domestic authors.<sup>2</sup> What has been lacking, however, is an up-to-date general textbook. The book that formerly laid the best claim to that coveted position was Sopinka and Lederman's masterful work, *The Law of Evidence in Civil Cases*,<sup>3</sup> although its ambit was restricted as the title suggests. That successful text was published over a decade ago, and at the moment, there are no plans for a second edition. So *Delisle* came at a time when the market was ripe for a work of general application on evidence.

Delisle's book is something more than an introductory work, yet too short to be a textbook in the traditional sense.<sup>4</sup> As such, it suits the needs of an undergraduate very well: it is not too bulky, allowing the reader to keep to the highroad without being unduly troubled by "that codeless myriad of precedent, that wilderness of single instances".<sup>5</sup> However, the practitioner will also be repaid for reading this book, both as a refresher and for the copious case citation, which may be more thorough than a student would require for examination purposes. Despite the book's brevity,

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1. 'National' in the sense that it discusses the law of the nine common law provinces.

2. The following Canadian titles discuss the law of evidence and its subsections with varying degrees of depth and success: Peter K. McWilliams, *Canadian Criminal Evidence* (2nd ed. 1984); *MacRae on Evidence* (3rd ed. P. Y. Atkinson 1976); F. Kaufman, *The Admissibility of Confessions in Criminal Matters* (3rd ed. 1980); Donald K. Piragoff, *Similar Fact Evidence: Probative Value and Prejudice* (1981); Edward J. Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979); John Sopinka and Sidney Lederman, *The Law of Evidence in Civil Cases* (1974).

3. (1974).

4. Delisle tells us in his Preface, at p. v, that it is "basically a textbook".

5. Tennyson, *Aylmer's Field*.

Delisle is to be congratulated for the amount of information he has packed between the covers of his slim volume.

Divided into six chapters, this book is quite well written, never bookish or dull, and peppered with anecdotal comments. My foremost criticism is that the text is replete with extensive quotations from the 'masters' of evidence and lengthy passages from the cases. Indeed, excluding pages that list problems and further readings, there are only two pages that do not contain at least one quotation from an Act, a case or another writer.<sup>6</sup> This overuse of quotations detracts from the book's appearance and readability, making it resemble a casebook at times. This is particularly to be regretted because where Professor Delisle does write originally between questions, his style and clarity are of the first order. While an attempt to improve upon the pronouncements made by Thayer, Wigmore, Cross and the judiciary may seem at first pretentious and unlikely to succeed, much can be said in favour of fresh explanations, untrodden approaches. A textbook should do more than string together cogent excerpts from established works if its appearance is to be justified in an area wherein excellent treatises already exist.

Even though Delisle quotes very heavily from others, he has neglected some of the colourful statements from the bench that illustrate a legal principle, while offering some relief from the sometimes sombre task of reading texts or, especially, law reports. For instance, two examples can be found that vivify the general rule at common law, now circumscribed by subsection 24(2) of the *Charter*,<sup>7</sup> to the effect that improperly or illegally obtained evidence may be admissible in the course of proceedings. In 1861 Crompton J. said of improperly obtained evidence: "It matters not how you get it; if you steal it even, it would be admissible in evidence."<sup>8</sup> Fifty odd years later, Meredith J.A., speaking for the Ontario Court of Appeal, said of a piece of illegally obtained evidence:

Nor can I think that the magistrate erred in admitting the evidence objected to . . . The criminal who wields the 'jimmy' or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers; it is still quite permissible to 'set a thief to catch a thief.' . . .<sup>9</sup>

Delisle presents more than a mere narrative statement of evidence law. The reader is not confronted with a set of largely unexplained and uncriticized rules. This is befitting a book aimed primarily at students. Where a term or concept is apt to mislead, the author calls for its rejection and abandonment.<sup>10</sup> However, the book is not overly critical of our evidence law, rather it strikes a fair balance between explication and criticism. Likewise, Delisle occasionally refers to other jurisdictions for comparative purposes;<sup>11</sup> he refers frequently to the proposals of the law reform commis-

6. Pp. 282 and 335.

7. *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c. 11, (U.K.).

8. *R. v. Leatham* (1861), 3 L.T. 777, at 778, 8 Cox C.C. 498, at 501.

9. *R. v. Honan* (1912), 26 O.L.R. 484, at 498, 6 D.L.R. 276, at 280 - 281, 20 C.C.C. 10, at 16 - 17 (C.A.).

10. See, e.g., at 249 where the author considers the term *res gestae*.

11. For example, at 363 and 364 Delisle describes with approval the Scottish and Australian approaches to excluding improperly obtained evidence.

sions and regularly to the *Uniform Evidence Bill*.<sup>12</sup> After discussing a topic, Delisle sets out the relevant clauses of the *Bill*, which now has the support of the Uniform Law Conference of Canada and may well be enacted by the Dominion and, in the fullness of time, at least some of the provinces. Based largely on the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*,<sup>13</sup> the *Bill* has been met, quite properly, with objection in some quarters. Yet including clauses of the *Bill* at this point in time may have been a wise decision. If the *Bill* were to receive Royal Assent, the profession will have access to important parts of the *Bill* along with some commentary thereon. But even if the *Bill* were not enacted by federal nor provincial legislatures, its provisions may serve as a guide for students and the bench in future attempts to shape the law of evidence, which is, and hopefully will remain, a flexible judge-made branch of our law.

As the title indicates, a significant part of the book is devoted to problems intended apparently for class discussion. The problems are not uniformly excellent, but Delisle has selected many that are instructive. Where a problem is based on an actual case, the author gives the style of cause and a citation. Now a citation can undoubtedly be helpful, but would it not have saved the curious reader much time and effort if a *précis* of the courts decision on the issue were given — even in the most pruned language? Surely it would not have added much to the length of the book if the court's disposition were provided. This would have done no small service for the inquisitive reader, while at the same time giving students answers of the sort they often nervously go without. Arguably, the inclusion of the 'answers' would reduce the utility of the problems in class discussion (somewhat less so if they were listed in an appendix) or even mislead a student into thinking that the answers given are 'correct' on account of their source. I am not convinced, however, that providing one answer to a problem, albeit one derived by a court, inhibits independent reasoning in most law students: providing solutions does not defeat the purpose of the problems. It is regrettable that Delisle did not go one step further when he recorded his problems.

By way of a review of contents, rather than take the reader through a vacuous chapter-by-chapter description, I will say only this: Delisle's book covers all the areas traditionally canvassed in law school evidence courses, although the arrangement of topics is somewhat unconventional.<sup>14</sup> Of particular interest will be the discussion on the impact of the *Charter*<sup>15</sup> upon such issues as the presumption of innocence and reverse onus clauses<sup>16</sup> and the exclusion of evidence the admission of which would bring the administration of justice into disrepute.<sup>17</sup> Such important cases as *Oakes*,<sup>18</sup>

12. Bill S-33, 32nd Parl., 1st Sess. First Reading November 18, 1982. I wish to record my gratitude to Professor Keith Turner, Q.C., for divesting me of former misconceptions about the status and progress of this Bill.

13. (1982).

14. Rather than give the topics of dying declarations and *res gestae* their own chapters or headings as other writers have done, Delisle discusses them under the subheadings "Exceptions where Declarant or Testimony Unavailable" and "Exceptions not Dependent on the Availability of the Declarant".

15. *Canadian Charter of Rights and Freedoms*, especially ss. 8, 10, 11, 13 and 24.

16. See at 83 - 88.

17. See at 365 - 368.

18. *R. v. Oakes* (1983), 40 O.R. (2d) 660, 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339, 32 C.R. (3d) 193 (C.A.).

*Carroll*<sup>19</sup> and *Boyle*<sup>20</sup> are covered at their appellate court levels, but the book went to press before the Supreme Court of Canada handed down judgments in the landmark cases of *Therens*<sup>21</sup> and *Southam*<sup>22</sup>. Cases of such importance, along with others still pending judgment in the Supreme Court of Canada, invite the release of a second edition in the near future.

Speaking structurally for a moment, one might say that Delisle's book has its strengths and weaknesses. The standard of proofreading is admirable, but no table of statutes has been provided. In contrast with the table of cases, which is well prepared, the index, which consists of just over five pages of large print, lacks a sufficient degree of specificity to be of much use. The table of contents is typically more helpful for locating things in a pinch.

Attractively bound by Carswell, *Evidence: Principles and Problems* should be met overall with approval as a significant contribution to the Canadian literature. With time, as the book advances down the road from introductory work to textbook, subsequent editions will hopefully include more original content and the book may one day occupy the pride of place among Canadian evidence textbooks.

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19. *R. v. Carroll* (1983), 40 Nfld. & P.E.I.R. 147, 115 A.P.R. 147, 4 C.C.C. (3d) 131, 32 C.R. (3d) 235 (P.E.I. C.A.).

20. *Re Boyle and R.* (1983), 41 O.R. (2d) 713, 148 D.L.R. (3d) 449, 5 C.C.C. (3d) 193, 35 C.R. (3d) 34 (C.A.).

21. *R. v. Therens* (1985), 59 N.R. 122, [1985] 4 W.W.R. 286, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97 (S.C.C.).

22. *Hunter v. Southam Press Inc.*, [1984] 2 S.C.R. 145, (1985), 11 D.L.R. (4th) 641, 55 N.R. 241, [1984] 6 W.W.R. 577, (1985), 14 C.C.C. (3d) 97.