A Tribute to Ron Delisle

*Don Stuart**

Ron Delisle passed away on March 12, 2013 with dignity after a brave struggle with illness. It is a privilege as his friend and colleague for some thirty-eight years to have this opportunity to reflect on his teaching career and the impact of his scholarship, particularly on the laws of evidence.

I first met Ron when I was teaching at the University of Alberta in Edmonton in 1973. At the time, he was the leader of the Law Reform Commission of Canada's project to reform the laws of evidence. I remember how inspirational he was to me as a new teacher of evidence. He brought dynamism, a sense of purpose and a wide knowledge of doctrinal law and its history. In 1974, he was appointed to the Provincial Court in Kingston. I was lucky enough to fill the resultant vacancy at the Faculty of Law at Queen's University. Fortunately for Queen's, and for me personally, Ron chose to return to his first love, teaching law, four years later. He said he missed the sense of engagement and excitement, and the informality.

Until Ron retired in 1999, he was one of our most successful teachers. He won multiple teaching awards within the faculty and across the university. He was an inspirational and engaging educator who had a unique ability to get students thinking and debating. One of his strengths was his infectious enthusiasm for his subject. He made learning challenging but always fun. Years before they became commonplace in teaching, he prepared video vignettes so that students could learn to think on their feet and see how rules of evidence operate in practice. He got students involved, and was never one to just straight lecture. He often had students debating across the room, and when it got too heated, he would go and sit down at the side just to lessen the tension. Ron loved to laugh and was a great raconteur. He had an amazing ability to weave into his teaching stories and experiences from his work at the Law Reform Commission or as a judge. His students often went out of their way to offer praise on their evaluations of his courses. As one first year Criminal Law student

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put it, "Professor Delisle is like a ray of sunshine on an otherwise cloudy day—like a big mellow bottle of Scotch. He gave and gave, and in the end we all learned a lot about criminal law, and just a little about life."

Ron's experience on the Provincial Court brought him instant credibility with judges and lawyers, and for years he was sought after for continuing education programs across the country. In one year, he attended fifteen different events of that sort. Just as with his law school teaching, he was highly successful in getting judges to discuss and debate problems. He often got them to relax and laugh, and to share their own experiences.

On Ron's retirement from the Faculty of Law in 1999, Jack Watson, now a Justice of the Alberta Court of Appeal, wrote:

> He has taught us all about what is sensible in law, while reminding us of what is merely convention, and while warning us what is merely power which can be misapplied.
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> There is no mendacity or politic evasions with Professor Delisle. What he knows is what you see, and what you see is what you get. He is a highly regarded and widely respected teacher with great knowledge of criminal evidence, both as it emerges and from whence it came. He speaks and writes with recognized authority and polite directness.
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> I am happy to join others in expressing my genuine appreciation for the outstanding contribution of Professor Delisle to legal understanding and the legal discourse in Canada. I have learned much from his thoughtful and unpretentious writings.

The Law Reform Commission of Canada's draft Code of Evidence[1] was not well received by the leaders of the profession, largely because of the view that the laws of evidence were well known to courtroom lawyers and that the proposed legislation would give too much discretion to judges. Ever since, no Canadian government has made it a priority to enact a comprehensive statement of the laws of evidence equivalent to the *Federal Rules of Evidence* put in place in 1975 in the United States and widely adopted by state legislatures.[2]

Ron was clearly disappointed with the conservatism of the legal profession. He wrote of the missed advantages of much greater accessibility of the rules of evidence for all lawyers and citizens. He also wrote explanatory notes on how rules are meant to operate, making criteria for

1. *Report on Evidence* (Ottawa: Information Canada, 1975).
2. USC tit 28 (2010).

judicial discretion more transparent and resolving undue ambiguities and anomalies in the present law.[3]

As Professor Lisa Dufraimont explains so well in her article in this volume of the *Queen's Law Journal*, over the past thirty or so years the judiciary, and the Supreme Court of Canada in particular, has significantly reformed our laws of evidence by asserting principles, many of which can be traced back to work of the Law Reform Commission and to Ron's teaching and prolific writings.[4] For example, in many years of presentations to judges and comments in the Criminal Reports, Ron laid the groundwork for a more discretionary approach to the admission of hearsay evidence. Courts now routinely turn to the principled criteria of necessity and reliability rather than the rigid and often anomalous pigeon-hole exceptions that sometimes creak with antiquity.

In both civil and criminal trials, it is now routine, which was certainly not the case in the 1970s, for judges to have the discretion to exclude relevant evidence if its probative value is exceeded by its prejudicial effect. Ron fought hard at the Law Reform Commission and in his writings for that discretion to be established, and for the understanding that prejudice means prejudice to the fact-finding process rather than just bad news for the side arguing for exclusion.

Another important area influenced by Ron was the admissibility of similar fact evidence. In a number of Criminal Reports comments, he argued against the traditional reluctance of the courts to admit such evidence if its only purpose was to show bad propensity. In case after case, the issue turned on trying to identify some other allowable purpose even when the reality was that the evidence was really probative on the issue of propensity. In *R v Arp*, the Supreme Court again asserted that disposition evidence adduced solely to invite the jury to find the accused guilty because of past immoral conduct was inadmissible.[5] However, the Court did add that evidence of similar past misconduct could be admitted where the prohibited line of reasoning could be avoided. The Court suggested this could occur where the jury might "infer from the degree of

3. Ronald Joseph Delisle et al, *Evidence: Principles and Problems* 10th ed (Toronto: Carswell, 2012) at 30–31.

4. Lisa Dufraimont, "Realizing the Potential of the Principled Approach to Evidence" (2013) 39:1 Queen's LJ 11.

5. [1998] 3 SCR 339, 166 DLR (4th) 296 [cited to SCR].

distinctiveness or uniqueness that exists between the commission of the crime and the similar act that *the accused is the very person* who committed the crime".[6]

Ron was not convinced:

> By what process of reasoning does the jury do that? How does the jury infer that the accused is the "very person"? For there to be relevance, there needs to be [a] premise linking the evidence tendered to support any proposition to that proposition. What is the premise here? The only process of reasoning that comes to my mind that would allow a jury to make the necessary inference is that a person who would commit an act similar to the crime under review is more likely to have committed the crime! Is reasoning through propensity actually being avoided? Or is it "inevitable"?[7]

The Supreme Court's position finally became clear with the blockbuster judgment of Binnie J in *R v Handy*,[8] which Ron much admired. The Court squarely decided that a pattern of bad character can be exceptionally admitted to show propensity, and laid out detailed criteria for the exercise of that discretion.[9] Ron did remain frustrated at the continued emphasis placed on the need to warn juries that such evidence could only be used to show specific rather than general propensity.

When the Supreme Court developed its tests for the discretion under section 24(2) of the *Canadian Charter of Rights and Freedoms*[10] to exclude evidence obtained in breach of the *Charter*, it developed a dichotomy that *Charter* violations involving so-called conscripted evidence were more serious than violations involving non-conscripted evidence. Ron was the first academic to question the wisdom of this approach.[11] Over the years, the dichotomy resulted in the drawing of bright lines: there was virtually automatic exclusion of statements by the accused, but real evidence would likely be admitted no matter how serious the *Charter* violation. The dichotomy was finally abolished by the Supreme Court in *R v Grant*, in

6. *Ibid* at 363 [emphasis in original].
7. RJ Delisle, "*Batte*: Similar Fact Evidence Is a Matter of Propensity" (2000) 34 CR (5th) 240 at 241–42.
8. 2002 SCC 56, [2002] 2 SCR 908.
9. *Ibid* at paras 56–98.
10. *Canadian Charter of Rights and Freedoms*, s 24(2), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.
11. See RJ Delisle, "*Collins*: An Unjustified Distinction", Case Comment (1987) 56 CR (3d) 216.

favour of a discretionary approach that does not distinguish in advance between different types of evidence but turns on the seriousness of the *Charter* violation rather than the seriousness of the offence.[12]

On a personal note, I richly benefitted from teaching with Ron and from discussing teaching strategies and experiences. For years, we also worked closely together in editing and writing for the Criminal Reports and in co-authoring multiple editions of three teaching books in substantive Criminal Law, Criminal Procedure and Evidence. Ron was one of the quickest workers and writers I have known. He never missed a deadline. He was always constructive in his feedback. He valued brevity and warned against unnecessary minutiae and side tracks. "That gets in the way", he would often say.

Ron was devoted to his wife Gloria and his two sons, Marc and Chris, and their families. He is sorely missed by family and friends and by many of the students he taught. I will remember his enthusiasm for teaching and scholarship, his insights and help, his laugh and his wonderful ability to tell a story.

12. 2009 SCC 32, [2009] 2 SCR 353.