Ron Delisle: A Personal Tribute

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Over the decades, the Queen's Faculty of Law has had many debates and discussions about curriculum reform and pedagogy. For the most part, Ron Delisle would sit quietly, listening to his colleagues. After the meetings, he would invariably say to me, "I just want to be an evidence teacher." And that he was: a consummate evidence teacher, for students, judges and lawyers.

In the more than twenty-five years that I worked with Ron, most of our personal interactions involved lengthy discussions of evidence issues. This started soon after Ron re-joined our faculty after several years on the Ontario Provincial Court bench. He came back with a host of ideas about how the law of evidence might be reformed, and he wanted to try them out. Especially because I had a bit of jury experience, we soon started engaging in regular discussions and even arguments—although they were invariably polite and cheerful. They would always start with Ron posing a problem. After a bit of thought, I would attempt an answer. My favourite recollections are the many times he would say something like, "Very good, Allan; that's the same approach as the 'such-and-such' case." Then, he would proceed to explain why both the case and I were wrong.

As early as the 1970s, Ron was a big believer in expanding judicial discretion over evidentiary issues. It was not that he was against evidence rules; he drafted a Code of Evidence for Canada's military tribunals. But he was concerned particularly about hearsay, and how the hearsay exceptions had lost touch with forensic realities. In this regard, he was a pioneer. I can still hear him explaining that there was good hearsay and bad hearsay, and that the law needed to do a better job of sorting them out. He was completely pleased by the Supreme Court of Canada's principled approach. However, his faith in judicial discretion suffered a bit when he saw some of the strange decisions that quickly followed

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R v Khan[1] and *R v Smith*.[2] The issue of extrinsic evidence on the hearsay voir dire was not hard for him, because he was a long-time supporter of the dissenting opinion in the American case of *Idaho v Wright*.[3] As a result, he was quite vexed by *R v Starr* and its apparent exclusion of extrinsic evidence from the reliability question.[4] (Maybe someone should have called him about it.) Fortunately, there were members of the Supreme Court who were equally troubled by it, and *Starr* was largely reconfigured and clarified in *R v Khelawon*.[5]

Notwithstanding his confidence in judicial discretion, Ron supported the development of an evidence code and, as noted above, he even drafted one for Canadian military tribunals. In our 1999 conference, "Towards a Fair and Just Criminal Law",[6] he presented his views, and used his military Code as an example. He explained that he favoured the approach taken in the US Federal Rules of Evidence, which set out general statements of principle as the rules, followed by commentary explaining their application in more pragmatic terms. Professor David Paciocco, now on the Ontario Court of Justice, offered a different view. This was followed by a lively question period which, as I recall, turned into a polite debate between Ron and David. Ron clearly recognized that his approach would necessarily generate more scope for judicial discretion, as it had with respect to hearsay. It would produce uniformity in principle but, I feared, it would also give rise to divergent and discrepant applications.

This was a point of disagreement between Ron and me. I was concerned that judges, as a class, did not have Ron's insights, or the experience and analytical skills of our leading evidence writers—people like Tom Cromwell, David Doherty, David Paciocco and Marc Rosenberg. Given Ron's extensive and well-received experience in judicial education, he was confident that combining clearly articulated, codified principles with appropriate commentaries and thoughtful training would solve the problem. While he may have been right, we can see from important judicial statements of evidence principles that the problem is not a simple

1. [1990] 2 SCR 531, 79 CR (3d) 1.
2. [1992] 2 SCR 915, 15 CR (4th) 133.
3. 497 US 805 (1990).
4. 2000 SCC 40, [2000] 2 SCR 144.
5. 2006 SCC 57, [2006] 2 SCR 787.
6. See Don Stuart, RJ Delisle & Allan Manson, "Towards a Clear and Just Criminal Law: A Criminal Reports Forum" (Toronto: Carswell, 1999).

one. For example, the principled approach to hearsay has taken decades to develop, has produced many discordant decisions along the way, and still leaves residual issues that need attention. Conversely, similar fact or discreditable conduct evidence was, for many years, probably the biggest source of (often successful) appeals against convictions based on evidentiary issues. The difficulty, as Ron regularly pointed out, arose from the impossibility of reconciling the judicial assertion that one could not reason from disposition with the simple fact that the entire issue was about disposition. After the clarifying decision written by Binnie J in *R v Handy*,[7] one rarely sees this issue generating an appeal. The analysis offered in *Handy* started with an important statement of principle: this kind of evidence is presumptively inadmissible.[8] While that was a significant step, the real value of the decision lay in the careful manner in which Binnie J set out a methodology that explained how the relevant factors of probative value and prejudice should be addressed. This degree of guidance was similar to Ron's preference for statements of principle followed by more precise and pragmatic commentary.

Another of Ron's major contributions was pedagogical. In Canada, he was one of the first teachers to prepare video scenarios to illustrate cases. This goes back many years to when the technology was a bit crude—not the "hi-tech" productions we now see. Over a period of days, Ron used the local courthouse and had volunteers appear as witnesses, reading from scripts that provided the factual context of some leading cases. These scenarios highlighted the evidence issue in play, and a judge made the ruling. The videos provided the background for Ron's probing classroom discussions. For students, including his judicial education audiences, this was a very forceful technique. I recall playing the ambulance driver in the classic *Rex v Wysochan* case—the witness who told the court that he heard the dying wife say "Stanley, help me, I am too hot" just before she expired.[9] This was one of Ron's favourite cases because it raised not only issues of hearsay, but also a hard question of proof.

I have no doubt that Ron Delisle was the leading Canadian evidence scholar of his time. Now, we are fortunate to have a new group of young evidence scholars who are making important contributions to this

7. 2002 SCC 56, [2002] 2 SCR 908.
8. *Ibid* at para 55.
9. (1930), 54 CCC 172 at 172 (available on QL) (Sask CA).

fascinating subject. Looking back, we should recognize that much of the foundation for their work was produced and shaped by Ron.