

## Evidence, Persuasion and Diversity

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### Article abstract

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# Evidence, Persuasion and Diversity<sup>1</sup>

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**Abstract:** My topic is the theme of the E-OSSA 12 conference, namely Evidence, Persuasion and Diversity. I will present relevant material from a selection of Canadian legal cases, along with background information as needed and commentary. My primary focus will be on two landmark Supreme Court of Canada cases—an Aboriginal law case and a case that was both a constitutional law case and a criminal law case.

**Résumé:** Mon sujet est le thème de la conférence E-OSSA 12, à savoir La preuve, la persuasion et la diversité. Je présenterai des documents pertinents tirés d'une sélection de procès juridiques canadiens, ainsi que des renseignements généraux au besoin et des commentaires. Je me concentrerai principalement sur deux affaires historiques de la Cour suprême du Canada - une affaire de droit autochtone et une affaire qui était à la fois une affaire de droit constitutionnel et une affaire de droit pénal.

**Keywords:** Aboriginal, *Charter*, constitutional, diversity, evidence, persuasion, reconciliation, sovereignty, title, trial.

## 1. Introduction

In section 2, I comment on the three subjects of the E-OSSA 12 conference theme. In section 3, I turn to my Aboriginal law case, and in section 4 I turn to my constitutional-and-criminal law case. In section 5, I make concluding remarks.

## 2. Evidence, Persuasion and Diversity

### 2.1 Evidence

One of the many books which the late Douglas Walton wrote was titled *Legal Argumentation and Evidence*; it was published in 2002. According to an account of evidence Walton gives in that book, for proposition P to count as evidence for proposition Q, P must have "weight of reasonable acceptance" (meaning that it must appear to be true), and this weight must be transferable by inference to Q (2002, pp. 16-17). If these conditions are satisfied, then P has probative value in relation to Q; that is to say, in Walton's terms, P "proves" Q in the sense that it moves "a weight of plausibility" onto Q (2002, p. 214) and therefore gives a reason to accept Q, although it may not be a conclusive reason (2002, p. 206).

Walton remarks that "[a]ll the Anglo-American treatises on [legal] evidence base their concept of evidence on [the] key concepts of weight of acceptance and probative value" (2002, p. 16). The word "weight" refers to "the ... probability that a proposition [for which evidence is given] is true" and to "the 'persuasive force' of the evidence, once it has been admitted" in a trial (2002, p. 21).

In a *Stanford Encyclopedia of Philosophy* entry on "The Legal Concept of Evidence" published in 2015, the author, Lai Hock Ho, says that "legal usage of the term 'evidence' is ambiguous."<sup>1</sup> He gives four senses of the word:

Sense 1: Evidence is "that which is adduced by a party at [a] trial as a means of establishing factual claims."

Sense 2: The term 'evidence' can "refer to a proposition of fact that is established by evidence in the first sense"—the adducing sense.

Sense 3: On a third conception, evidence is relational. "A factual proposition ... is evidence in the third sense only if it can serve as a premise for drawing an inference (directly or indirectly) to a matter that is material to the case" (i.e., relevant to the case).

Sense 4: "[T]he conditions for something to be received [or "admitted"] as evidence at [a] trial are sometimes included in the legal concept of evidence.... On this conception, legal evidence is that which counts as evidence in law."

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<sup>1</sup> Quotations are from section 1 of the entry.

Definition 3, as worded by Ho, states a necessary condition for a factual premise to be evidence in the relational sense. But if a factual proposition can serve as a premise for drawing an inference (directly or indirectly) to a matter material to the case, surely this is also *sufficient* for it to be relational evidence.

Following definition 4 and related commentary, Ho says that "[t]he sense in which the term 'evidence' is being used is seldom made explicit in legal discourse although the intended meaning will often be clear from the context."

## 2.2 *Persuasion*

In a relevant dictionary sense of the word, persuasion is "the action or process of persuading someone or of being persuaded to do or believe something" (NODE 1999). An instance of persuasion so defined would be a case in which someone was caused by argument to believe some claim and thereby persuaded (in one sense of the word) to believe it. Persuasion can also be said to occur if someone is caused by argument to *accept* some claim. In the second edition of his textbook *Thinking Logically*, James Freeman says that the persuasive force of an argument is its "ability to bring people to accept its conclusion" (1993, p. 48).

The two legal cases I will primarily consider include instances of persuasion but also instances of non-persuasion—instances in which, for example, a court or a judge was not persuaded of the truth or acceptability of some claim for which reasons were given.

Each of these cases originated in a trial. According to Walton, the rationality of the argumentation in a trial

comes from the rules of evidence, and the other procedural rules adopted by a court.... [B]y specifying what counts as 'evidence,' these rules are supposed to place the kind of legal argumentation used and evaluated in a trial on a level somewhat above that of purely psychological ... or rhetorical persuasion.... The rules of rational persuasion are procedural, and are meant to model due process, by a normative standard of rational discussion (Walton 2002, p. 159).

### 2.3 Diversity

There are various dictionary definitions of this word. For example: Diversity is the state or quality of being different or varied (*Collins English Language Dictionary*; online). Diversity is the fact of many different types of things or people being included in something (*Cambridge English Dictionary*; online). Diversity is the condition of being diverse (*The Oxford Universal Dictionary*, 1955).

Dictionary definitions of “diverse” also vary. For example: *Webster's New World Dictionary of the American Language* (1979) gives two senses of the word: first, different, dissimilar; second, varied. *The New Oxford Dictionary of English* (1999) defines “diverse” as “showing a great deal of variety.” According to *The Macmillan Dictionary* (online), and in a similar vein, diverse entities are “very different from each other.”

### 3. *Tsilhqot'in Nation v. British Columbia* (2014): Aboriginal law

The Supreme Court of Canada's judgment in this case was written by then Chief Justice of Canada Beverley McLachlin. She would have circulated a draft to the other seven participating judges to invite their comments so that she could revise the draft as necessary. They found the final version persuasive, and therefore concurred with it.

*Tsilhqot'in* was an Aboriginal title case. McLachlin explains that “Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits” (McLachlin 2014, para. 18) “subject to the restriction that the uses must be consistent with the group nature of the [title] and the enjoyment of the land by future generations” (unnumbered paragraph). There is a further restriction, stemming in part from the fact that Canada is a constitutional monarchy. The country's head of state is the British monarch, typically referred to in Canadian legal cases as “the Crown.” The further restriction is that on certain conditions the Crown has the right to encroach on Aboriginal title for development or other purposes. This right is based on the fact that the Crown acquired underlying title to the land when European sovereignty was asserted, or, more specifically, when *British* sovereignty was asserted.

For the purpose of the *Tsilhqot'in* case, the relevant land was the territory that became the province of British Columbia. The trial judge stated that 1846 was the date of sovereignty assertion over this territory, and he did so on the ground that "[t]he assertion of sovereignty, recognized by another nation, is clear at this point in our history" (Vickers, para. 602). The other nation was the United States. The Oregon Treaty of 1846 between Britain and the United States set the boundary between the United States and Canada at the 49th parallel west of the Rocky Mountains.

In an introductory summary, McLachlin describes the Tsilhqot'in Nation as "a semi-nomadic grouping of six bands sharing common culture and history" that has lived for centuries "in a remote valley bounded by rivers and mountains in central British Columbia" (2014, unnumbered paragraph). In 1998, one of the Tsilhqot'in bands made a title claim, on behalf of all the Tsilhqot'in people, to roughly five percent of what the Tsilhqot'in regarded as their traditional territory. The federal and provincial governments opposed the title claim.

The issue went to trial at the British Columbia Supreme Court in 2002. The trial lasted for 339 days over a period of five years. The judge found that the Tsilhqot'in were in principle entitled to a declaration of title to part of the claim area, and to a smaller area outside the claim area.

The case then went to the British Columbia Court of Appeal. In 2012, the Court held that title had not been established. The Court's ruling was appealed to the Supreme Court of Canada which held that the appeal should be allowed and that a declaration of Aboriginal title over the claim area should be granted.

McLachlin notes that the Supreme Court of Canada had never directly answered the question of how the courts should determine whether a semi-nomadic indigenous group (such as the Tsilhqot'in) has title to lands. Since the Supreme Court of British Columbia and the British Columbia Court of Appeal disagreed on the correct approach, she undertakes to clarify the test, and for this purpose she cites the 1997 Supreme Court of Canada case *Delgamuukw v. British Columbia*.

In that case, the Court said that the test for Aboriginal title to land "is based on 'occupation' prior to assertion of European sov-

ereignty. To ground Aboriginal title this occupation ... must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*" (McLachlin 2014, para. 25).

The requirement of sufficient occupation must be considered from both the Aboriginal perspective and the common law perspective. The Aboriginal perspective encompasses diverse factors, including the "laws, practices, size, technological ability [of the group concerned] and the character of the land claimed" (McLachlin 2014, para. 41). The common law perspective involves "the idea of possession and control of the lands" (para. 36). It "requires an intention to occupy or hold land for the purposes of the occupant" (para. 41) and takes possession to extend beyond physically occupied sites, such as a house, "to surrounding lands that are used and over which effective control is exercised" (para. 36).

For the title requirement of sufficient occupation to be met, there must be evidence that the Aboriginal group concerned had "a strong presence on or over the land claimed," and this presence must be manifested "in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group" (McLachlin 2014, para. 38).

What acts would constitute evidence of such occupation would depend in part on the manner of life of the people. Since different Aboriginal groups may have different ways of life, sufficiency of occupation "may be established in a variety of ways" (McLachlin 2014, para. 37)—hence, in diverse ways.

Where present occupation is relied on as proof of pre-sovereignty occupation, there must be *continuity* between these occupations. This means, McLachlin says, that "for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times" (2014, para. 46). There must therefore be evidence that it is.

Proof of *exclusivity* of occupation requires evidence that the Aboriginal group "must have had 'the intention and capacity to retain exclusive control' over the lands" concerned (McLachlin 2014, para. 47). This could be established "by proof that others were excluded from the land, or by proof that others were only

allowed access to the land with the permission of the claimant group" (para. 48).

From this summary, it will be apparent that for each of the general requirements for establishing Aboriginal title, McLachlin makes one or more points expressly, or, in the case of continuity by implication, about the evidence needed to show that the requirement is satisfied.

The Supreme Court of British Columbia and the British Columbia Court of Appeal had diverse conceptions of the appropriate test for Aboriginal title. The B.C. Supreme Court "held that 'occupation' was established for the purpose of proving title by showing regular and exclusive use of sites or territory" (McLachlin 2014, para. 27). The Court of Appeal applied a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors "*intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty" (para. 28).

McLachlin disagreed with the Court of Appeal on this crucial matter. In her view, the thesis that only specific, intensively occupied areas can support Aboriginal title was erroneous. A culturally sensitive approach, she said, "suggests that regular use of territories for hunting, fishing, trapping and foraging is 'sufficient' use to ground Aboriginal title, provided that such use, on the facts of a particular case, [indicates] an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law" (McLachlin 2014, para. 42).

Turning to the Tsilhqot'in title claim, McLachlin says that the trial judge of the B.C. Supreme Court (The Hon. Mr. Justice Vickers) identified the correct legal test and applied it appropriately to the evidence. He "found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in," and this finding, McLachlin asserts, "supports [his] conclusion of sufficient occupation" (McLachlin 2014, para. 55). She adds that "[t]he geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic[al] occupation existed, further supported an inference of continuous occupation" (para. 57). From the evidence



that prior to the assertion of sovereignty the Tsilhqot'in "repelled other people from their land" and demanded that "outsiders who wished to pass over it" obtain their permission to do so, the trial judge "concluded ... that the Tsilhqot'in treated the land as exclusively theirs" (para. 58).

At the trial, evidence was presented in the diverse fields of "archeology [sic], anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry and forest ecology" (Vickers 2007, p. iii).

Vickers notes in his judgment that "Tsilhqot'in was not a written language until the last half of the twentieth century" and that "[t]he history of the Tsilhqot'in people is an oral history, accessed by listening to the stories and legends told by Tsilhqot'in people" (Vickers 2007, para. 131). He added:

The absence of a Tsilhqot'in written record raises a number of evidentiary challenges... Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence.... In order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization (para. 132). This process requires a court to not only 'peer beyond recorded history' but also to set aside some closely held beliefs about the reliability of oral history evidence (para. 133).

Vickers goes on to cite a 1996 Supreme Court of Canada case indexed as *R. v. Van der Peet*, meaning 'Her Majesty the Queen versus Van der Peet'. As I have noted, Canada's head of state is the British monarch. When the British monarch is female, the upper-case letter 'R' in a Canadian case name is an abbreviation of the Latin word 'Regina', meaning 'Queen'. Since 1952, Canada's head of state has been Her Majesty Queen Elizabeth the Second.

Vickers quotes in part as follows from *R. v. Van der Peet*:

The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case (Vickers, 2007, para. 133).

In *Delgamuukw* (S.C.C.), Vickers notes, Chief Justice Lamer (as he then was) said:

The justification for this special approach can be found in the nature of aboriginal rights themselves.... [T]hose rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory (Vickers 2007, para. 134).

Lamer acknowledged, however, that "[m]any features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence" (Vickers 2007, para. 136). He emphasized in particular the broad social role of oral histories "not only 'as a repository of historical knowledge for a culture' but also as an expression of 'the values and mores of [that] culture'" (para. 136).

The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial – the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements ... These ... statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay (para. 136).

However, Lamer then said:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents (para. 136).

Lamer describes oral histories as a type of evidence. I think he was probably using the word 'evidence' in the adducing sense noted by Ho, in which case he would have considered an item of oral history to be evidence in this sense if it were adduced at a trial as a means of establishing a factual claim.

Vickers also cited the 2001 S.C.C. case *Mitchell v. M.N.R.* (Minister of National Revenue) on constitutional law and evidence. In that case, McLachlin, who by then had succeeded Lamer as Chief Justice of Canada, said that the rules of evidence should

facilitate justice, and that underlying what she called the diverse rules on the admissibility of evidence are three simple ideas:

First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. [This would be evidence in the relational sense.] Second, the evidence must be reasonably reliable; ... Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice (McLachlin 2001, para. 30).

McLachlin added that aboriginal oral histories may meet the test of usefulness on two grounds:

First, they may offer evidence of ancestral practices and their significance that would not otherwise be available (McLachlin 2001, para. 32).

Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question (para. 32).

[A further] factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? (para. 33).

McLachlin noted that in *Delgamuukw* the Supreme Court of Canada "did not mandate the blanket admissibility of [oral history] evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis" (McLachlin 2001, para. 31).

In a section of her *Tsilhqot'in* judgment titled "Was Aboriginal title established in this case?," McLachlin said that "[t]he trial judge applied a test of regular and exclusive use of the land," and that this was "consistent with the correct legal test" (McLachlin 2014, para. 51). The question, then, was "whether he applied it appropriately to the evidence in [the] case" (para. 51), and she concluded that he did.

However, the Province of British Columbia had argued on appeal that "the trial judge's conclusions on how particular parts of the land were used [could not] be sustained." Among its reasons

were the claim that "[t]he boundaries drawn by the trial judge [were] arbitrary and contradicted by some of the evidence," and the claim that he "failed to identify specific areas with adequate precision, instead relying on vague descriptions" (McLachlin 2014, para. 59).

McLachlin was not persuaded. She said that "[m]ost of the Province's criticisms of the trial judge's findings on the facts [were] rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title" (McLachlin 2014, para. 60).

But she nevertheless accepted "the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support[ed] a declaration of Aboriginal title" (McLachlin 2014, para. 62). She concluded that "the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, ... buttressed by evidence of more recent continuous occupation" (para. 66).

Accordingly, McLachlin was persuaded that the Tsilhqot'in should be granted title to the claim area, and her fellow judges agreed. It was a momentous decision—the first time in Canadian history that a court had granted a declaration of Aboriginal title.

In May 2015, nearly a year after the *Tsilhqot'in* decision, McLachlin gave a speech at the Aga Khan Museum in Toronto titled "Unity, diversity, and cultural genocide." She began by saying that "Canada is a diverse multi-cultural state" (n. p.). However (and this is a comment of mine), for many years there existed in Canada a residential school system which could be said to have been based on the racist belief that Canada should not be so diverse as to include the cultures of First Nations:

First Nations ... [c]hildren were taken from their parents and sent away to residential schools, where they were forbidden to speak their native languages ... [and] forced to observe Christian religious practices ... The objective was to 'take the Indian out of the child', and thus to solve what John A. Macdonald [Canada's first Prime Minister] referred to as the 'Indian problem'. 'Indianness' was not to be tolerated; rather it [was to] be eliminated. In the

buzz-word of the day, *assimilation*; in the language of the 21<sup>st</sup> century, *cultural genocide*. (McLachlin 2015: from the paragraph beside note 6; n. p.).

According to *The Canadian Encyclopedia*, more than 130 residential schools existed in Canada between 1831 and 1996. An estimated 6,000 children died in them.

In 2008, the Truth and Reconciliation Commission of Canada was established. It released a six-volume report in 2015, several months after McLachlin's Aga Khan Museum speech. Volume 6 set out guiding principles and a framework for advancing reconciliation between Aboriginal and non-Aboriginal peoples in Canadian society (TRC Report, Vol. 6, pp. 15-16).

Reconciliation is a prominent theme in the *Tsilhqot'in* judgment. To give just one example, in that judgment McLachlin wrote that Aboriginal title cases "require an approach that results in decisions based on the best evidence that emerges ... What is at stake is nothing less than justice for the Aboriginal group and its descendants, and ... reconciliation between the group and broader society" (McLachlin 2014, para. 23).

#### **4. *R. v. Morgentaler* (1988): Constitutional law and criminal law**

This case concerned the constitutionality of a section of the *Criminal Code of Canada* pertaining to abortion.

It was heard by the Supreme Court on appeal from a 1985 judgment of the Ontario Court of Appeal. The appellants were three medical doctors, including Dr. Henry Morgentaler. Indictments were made against the doctors "charging that they had conspired with each other with intent to procure abortions" contrary to two sections of the *Criminal Code of Canada*, including section 251 enacted in 1969 (*Morgentaler* 1988, p. 31).

A trial occurred before a judge and jury, and the doctors were acquitted. The Crown appealed the acquittal. The Ontario Court of Appeal allowed the appeal and set aside the acquittals, thereby deciding in favour of the Crown. On appeal, the Supreme Court of Canada found section 251 of the *Criminal Code* to be unconstitutional and restored the acquittals, with two judges dissenting.

When I speak here and subsequently of section 251 of the *Criminal Code*, or simply of section 251, I mean what was section 251 of the *Criminal Code* at the time of the *Morgentaler* proceedings. As a result of the *Morgentaler* decision, section 251 was declared to be of no force or effect, but it remained in the *Criminal Code*, though later renumbered section 287, until 2019 when section 287 was repealed.

Stated in a somewhat simplified form, section 251 made it a criminal offense for a person to abort the foetus of a pregnant woman and for a pregnant woman to use any means, or permit any means to be used, for the purpose of aborting her foetus. However, on a certain condition the first of these prohibitions did not apply to a qualified physician who, in an accredited or approved hospital, used any means for the purpose of performing an abortion, and the second did not apply to a pregnant woman who permitted a qualified physician to use, in an accredited or approved hospital, any means for the purpose of aborting her foetus. The condition was that a majority of the members of the therapeutic abortion committee for that hospital must have stated in writing that in their opinion the continuation of the woman's pregnancy would, or would be likely to, endanger her life or health (cf. Dickson 1988, pp. 47-49).

The *Morgentaler* case raised several constitutional questions. One of the questions was whether section 251 infringed rights and freedoms guaranteed by one or more of six specified sections of the *Canadian Charter of Rights and Freedoms*; this charter is part of Canada's *Constitution Act, 1982*. The specified *Charter* sections included section 2(a) and section 7. Section 2(a) protects freedom of conscience. Section 7 provides as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (Dickson 1988, p. 50). I will be mainly concerned with section 7, but I will note a reference to section 2(a) by one of the *Morgentaler* judges.

Section 1 of the *Charter* says that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can

be demonstrably justified in a free and democratic society" (Dickson 1988, pp. 49-50).

Accordingly, a second constitutional question in *Morgentaler* was whether, if section 251 of the *Criminal Code* did infringe rights and freedoms guaranteed by one or more of the specified *Charter* sections, it was nevertheless justified by section 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*.

I will focus initially on parts of the judgment given by Brian Dickson, who was then Chief Justice of Canada. As noted, one of the rights listed in section 7 of the *Charter* is the right to security of the person. Dickson asked whether section 251 of the *Criminal Code* impaired security of the person. This depended in part on what would constitute such impairment.

Dickson said: "The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person" (Dickson 1988, p. 56). For the purpose of deciding whether section 251 impaired security of the person, Dickson considered a variety of evidence, hence a diversity of evidence, including evidence on the following matters:

Delays in women's access to medical treatment caused by section 251's procedural requirements.

The effects of delays in access to treatment.

Mortality rates for early and late abortions.

The harm to the psychological well-being of women caused by section 251.

The availability in Canada of access to a legal therapeutic abortion.

The evidence Dickson considered on these matters came from diverse sources. They included trial testimony by experts and three reports.

The evidence was relational. It persuaded Dickson beyond any doubt that section 251 of the *Criminal Code* was "*prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy" (Dickson 1988, p. 56).

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations (Dickson 1988, p. 56). [This] is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice (p. 57).

He argued that it did not (Dickson 1988, pp. 63-73). Hence its deprivation of a pregnant woman's right to security of the person was not in accordance with those principles, and this meant that section 251 of the *Criminal Code* violated section 7 of the *Charter*. The next question, then, was whether it could be saved under section 1 of the *Charter*. Dickson argued that it could not (pp. 73-76) and was therefore inconsistent with Canada's *Constitution Act, 1982*.

One of the Supreme Court judges in the case was Justice William McIntyre. He was not persuaded by Dickson's judgment. In McIntyre's view, Dickson's position depended for its validity on the proposition that "the pregnant woman has the right to an abortion ... and that interference with [this] right constitutes an infringement of her right to security of the person" (McIntyre 1988, p. 142). But, McIntyre claimed, "[t]he proposition that women enjoy a constitutional right to have an abortion is devoid of support in ... [section] 7 of the *Charter* or any other section" (p. 143). Hence, "it cannot be said that security of [a pregnant woman's] person has been infringed by state action or otherwise" (p. 142).

McIntyre's argument did not persuade Dickson or any of the other four majority judges. Dickson might have made the following reply:

My argument can be expressed as follows: State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. Section 251 of the *Criminal Code of Canada* constitutes state interference with the bodily integrity of pregnant women and inflicts serious state-



imposed psychological stress upon them. Hence, section 251 breaches their security of the person.

This argument (the reply concludes) does not depend for its validity on the proposition that pregnant women have a right to an abortion.

I turn next to the judgment of Justice Bertha Wilson. She was the first woman to be appointed to the Supreme Court of Canada, and with her appointment in 1982, the Court became marginally more diverse in respect of gender. Currently, four of the Court's nine judges are women.

Wilson's approach to assessing the constitutionality of section 251 differed from Dickson's. Dickson focussed on the procedural requirements of the section, but Wilson's focus was on whether, as a constitutional matter, a pregnant woman can be compelled by law to carry the foetus to term against her will. This, she believed, was the central question that had to be addressed. To address it, she considered whether the *Charter's* section 7 right to liberty gave the pregnant woman the right to decide for herself (with her doctor's advice) whether or not to have an abortion.

In her opinion, the liberty right gave individuals "a degree of personal autonomy over important decisions intimately affecting their private lives" (Wilson 1988, p. 171). She argued that the decision of a pregnant woman to terminate her pregnancy is a decision of this sort and therefore counts as a decision of the kind that the right to liberty is supposed to protect. Section 251 violated this right because it took the decision away from the woman and gave it to a committee (p. 172).

Wilson further argued that section 251 violated the woman's right to security of the person (pp. 173-174).

The question which then arose was whether section 251's violation of a pregnant woman's liberty and security rights was in accordance with the principles of fundamental justice. Here Wilson needed a test for deciding whether a measure's deprivation of a section 7 right to life, liberty, or security accords with those principles. Dickson's test for making this decision was whether the deprivation contradicts the basic tenets of the legal system. Wilson's test was different. Her test was whether the deprivation "has the

effect of infringing a right guaranteed elsewhere in the *Charter*" (Wilson 1988, p. 175). If it does, then it is not in accordance with the principles of fundamental justice.

She argued that the deprivation of section 7 rights that resulted from section 251 *did* infringe another *Charter* right, namely the right to freedom of conscience (section 2(a) of the *Charter*), because (she said) "the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience.... The question is: whose conscience?" Answer: "[T]he conscience of the woman" (Wilson 1988, pp. 175-176). Consequently, section 251 violated section 7 of the *Charter*. But could it be saved under section 1 of the *Charter*? Wilson argued that it could not (p. 183), and that it was therefore unconstitutional (p. 184).

To summarize at a very general level, the 1988 *Morgentaler* decision of the Supreme Court of Canada drew upon a diversity of evidence from diverse sources. It exhibited diverse perspectives on the main constitutional issues and, in the judgments of Dickson and Wilson, diverse methodological approaches to those issues. The majority judges were persuaded that section 251 was unconstitutional, but the two dissenting judges were not, and neither was the Ontario Court of Appeal.

## 5. Conclusion

The *Tsilhqot'in* and *Morgentaler* Supreme Court of Canada cases exemplify a diversity of diversities, including diversity of evidence (in one sense or another of this term) and diversity of judicial perspectives, and both cases include instances of persuasion. In these ways they exemplify the subjects of the E-OSSA 12 conference theme: Evidence, Persuasion and Diversity.

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<sup>i</sup> This paper is a slightly edited version of the keynote I presented at the twelfth conference of the Ontario Society for the Study of Argumentation (OSSA), June 3-6, 2020.