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What Did You Say? Making Sense of the Admissibility of Evidence in *R v Schneider*

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The law of evidence gets a bad rap. Too often, I hear lawyers muse that the rules of evidence are to be learned by rote and applied strictly. Evidence, if you know the rules, is simply a matter of application. There's no magic, so the naysayers say, when it comes to evidence; it is what is, or it isn't. The rules cannot change facts, nor can they create them. As a teacher and connoisseur of the law of evidence, I disagree. Evidentiary principles are built on legal and factual relationships that can be complex and intriguing. There is a hidden joy to those rules and principles. Yet, at the same time, evidentiary rules can revel in incongruities and blurry lines. This is why when the Supreme Court of Canada releases a decision on the law of evidence, we rule-lovers (or rule-breakers – perspective is everything when it comes to evidence) sit up and take notice. The most recent evidence decision in *R v Schneider*, 2022 SCC 34 (CanLII), is one such case offering clarity and opaqueness, laying down principles and applications, creating agreement and dissent, and all in all a package reminiscent of an old-fashioned "whodunnit". In short, by trying to make sense of those rules, we find them to be much more nuanced, engaging, and personal than we expected. In this blog post, we will take out the old magnifying glass to analyze the *Schneider* decision to see where the drama lies when the Supreme Court of Canada tries to make sense of the rules surrounding the admissibility of evidence. In doing so, I will be laying down some "rules" or propositions of my own.

Factually, the *Schneider* case has an air of mystery as it grapples with what was said by the accused on the phone within the hearing of his brother, who was trying desperately not to hear while under "significant" stress and the influence of alcohol (at para 20). As per any good law school exam fact situation, the one-sided conversation was far from clear, which makes it unclear whether the evidence is admissible. Moreover, after cross-examination on the *voir dire*, and then even more cross-examination and impeachment at trial, the evidence is about as clear as mud. According to his brother, Mr. Schneider, who was ultimately charged and convicted of murder, may have said on the phone "I did it" or "I killed her" (at para 20), although the brother could not remember the exact words (at para 77). Justices Russell Brown and Andromache Karakatsanis, in dissent, find the evidence is even more tenuous than that, as the brother "did not even recall knowing the substance of what was said" (at para 90). To make matters worse, the words, which may or may not have been said, may have come "at the beginning, middle or end of a long sentence" (at para 90). To this scrap of evidence, the rules of evidence were applied by the trial judge (admitted) and the British Columbia Court of Appeal (excluded by the majority), and the ball, so to speak, is now in the Supreme Court's court, which we turn to for the answer.

Proposition 1: Legal Principles Matter, Particularly When it Comes to Evidence

This is where the *Schneider* decision shines as Justice Malcolm Rowe, writing for the majority, gives a concise, cogent, and classic admissibility roadmap (at paras 1, 2, 35-62). He does this straight away in the first paragraph when he reminds us that admissibility of evidence is "governed by foundational legal principles". Indeed, these foundational principles have been at work for hundreds of years, coming to us from English common law. Take for example, the hearsay rule, which is engaged by the admissibility of the "words" in *Schneider*. According to John Wigmore, the recognized authority on anything and everything that is evidence, in his aptly named article "The History of the Hearsay Rule" (1904) 17:7 Harv L Rev 437, the hearsay rule "as a distinct and living idea," began "only in the 1500's" but did not "gain a complete development and final precision until the 1700's" (at 437). In other words, the hearsay rule is really old, as are the traditional exceptions to that rule, which are also engaged in the *Schneider* case.

The basic framework for admissibility, which Justice Rowe uses in deciding the case, reads like a law school CAN (Condensed Annotated Note). The first step is to determine whether the evidence is relevant and material, as only relevant and material evidence is admissible. However, relevancy and materiality are necessary but not sufficient conditions for admissibility. This is because relevant and material evidence is subject to common law and statutory exclusionary rules (of which the classic common law ones are the Opinion Rule, Hearsay Rule, Character Rule, Confessions Rule, Rule Against Oath-Helping, and Privilege). Consistent with the quip made by the non-legal cartoonist and humourist James Thurber that "there is no exception to the rule that every rule has an exception" there are a multitude of exceptions to the exclusionary rules. For instance, I have counted at least 33 exceptions to the hearsay rule.

If the evidence is not excludable under the exclusionary rules, then the next step is to determine whether the otherwise admissible evidence is subject to judicial exclusionary discretion. This discretion to exclude is applied where the prejudicial effect of the evidence outweighs the probative value. Justice Rowe follows these foundational principles in determining whether the majority of the British Columbia Court of Appeal (BCCA) erred in finding the trial judge should not have admitted the evidence in *Schneider*. Like every framework, no matter how useful or workable, the proof is in the pudding, and the ingredients of that pudding. When it comes to evidence rules, as evidenced in the *Schneider* decision, context is everything. Which brings us to Proposition 2.

Proposition 2: Don't Skip the Small Stuff Because Relevancy Matters

The *Schneider* decision is proof of the second proposition, as much of the case revolves around relevancy. Remember that the first step in the admissibility process is to determine whether the proposed evidence is relevant and material. Although we are "living in a material world," materiality is usually not the real issue, relevancy is, or rather what Justice Rowe calls "logical relevance" (at para 38). Materiality is a legal question about whether the evidence to be admitted is related to the legal issues in the case. For instance, in a civil case, materiality is dictated by the legal issues arising from the pleadings. Evidence is material if it is proffered by a party to an action to prove or disprove a "live" legal issue (see *R v Calnen*, 2019 SCC 6 (CanLII) at para 109).

Materiality is usually not the concern when deciding on admissibility of evidence. The more difficult determination is materiality's partner – relevancy, aka "logical relevance" (at para 38). As opposed to materiality, relevancy is anchored to the facts. The question being engaged with relevancy is whether the proffered fact, which lies outside of the trial evidence, tends to prove or disprove a fact in issue (at para 39). To answer this question, the judge must look inside, into the factual matrix of the case. This "outside-inside" glance represents the relationship that evidentiary rules have with each other and within the factual boundaries of a case. Referencing poet John Donne's famous quote that no person is an island, so too evidence rules and pieces of evidence themselves gain meaning when viewed one with the other. It is on this issue where *Schneider* gets interesting. In *Schneider* the specific issue on appeal was "what evidentiary context can a trial judge use to determine whether the evidence is capable of meaning, such that it could be relevant?" (at para 40). In other words, does context matter, and if so, which context is it?

Proposition 3: Evidence Needs Context Like a Courtroom Needs a Judge

Without context, evidence is just data points. Without a judge, a courtroom is merely a room. Context rules when it comes to the rules of evidence. Or does it? Justice Rowe's reasons in *Schneider* seems to approve of the contextual or "big picture" approach to determining relevancy. In his view, when determining relevancy, all cards are on the table, meaning the entirety of the trial evidence. Such an approach is certainly consistent with the Supreme Court of Canada's previous case law urging trial judges to make determinations in this "big picture" context. A classic example is found in the Court's decision in *R v Morin*, 1988 CanLII 8, [1988] 2 SCR 345, where the majority disproved of a two-step application of the burden proof, eschewing the application of the standard of reasonable doubt to individual pieces of evidence. Rather, as the standard controlling the ultimate determination, reasonable doubt must be applied to the entirety of the evidence. This concept of the "whole" extends to where the evidence is a matter of credibility as expressed in the *WD* instruction to the jury (*R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742). Although Justice Rowe appears to be on safe ground when it comes to this issue, there is a twist that depends on the actual context of the evidence heard at trial, resulting in a potential misstep in this search for context.

Prior to the phone call, there was a constellation of events "leading up" to the phone call, involving "several conversations" between the accused and his brother, a response by the accused to the brother's questions about "the news release identifying a missing woman by saying 'it's true'". The accused had also informed his brother of the location of the body and the accused "displayed a remorseful demeanour during interactions that he had with the brother leading up to the phone call" (at para 29). Justice Rowe finds that this evidence is available to "inform the meaning of the words the brother overheard" (at para 29). This finding was at the crux of the split decision at the BCCA on the admissibility of the brother's evidence on the telephone conversation. The majority of the BCCA, in overruling the admission of the conversation, found the trial judge erred by not confining the admissibility question to the "micro-context", being "the parts of something written or spoken that immediately precede and follow a word or passage and clarify its meaning" (*R v Schneider*, 2021 BCCA 41 (CanLII) at para 90). On the other hand, the dissenting justice in the BCCA found the trial judge was correct to review the other evidence or the "macro-context" available at trial, which may help shed light on the relevancy of the telephone conversation.

Justice Rowe agreed with the BCCA dissent that this "significant" evidence beyond the "micro" realm was the proper context in which admissibility must be determined. In fact, "there is no basis in law to differentiate between 'micro' and 'macro' context" as "all evidence is capable of informing the judge's analysis" (at para 6). Even the Supreme Court dissent is on side with this latter suggestion, albeit Justices Karakatsanis and Brown would dismiss reference to these concepts as the controlling force behind the BCCA split decision (at para 93). To them, the concern is that when determining relevancy, caution is advised, or a judge may overstep the mark and use "irrelevant" evidence to bolster the relevancy of the proposed evidence in issue (at para 93). To take this further, the dissent is concerned that if the constellation of events is so broadly viewed, this will invite impermissible reasoning, such as a leap in logic, which would then inextricably lead to finding the words or "gist" or "tone" overheard by the brother as more relevant, probative, and meaningful than they really are. Indeed, I agree that one piece of this evidential context is troubling – that the accused told his brother where the victim's body was located before the phone call. This could inform the meaning of the phone call in a very specific way, lending credence to the idea that the accused's words were an admission of guilt. However, as the dissent points out (at paras 92, 94 and 96), this only fulfills relevancy (i.e., does the proffered fact tend to prove or disprove a fact in issue) if in fact the words heard were "I did it" or "I killed her."

No doubt it is a matter for the jury to decide what in fact was overheard at the time of the phone call, but, as the dissent feared, the testimony of the brother did not provide an adequate factual basis for this kind of finding. In the dissent's view, the constellation of evidence leading to the phone call was a red herring adding "nothing" to the assessment of the phone call (at para 92) because the brother's evidence was devoid of meaning from the start. In fact, the brother had no recollection of what was said (at para 94). There was no content to assess and therefore the broad context relied upon created content that was simply never there. Therefore, using the broad context was highly prejudicial as it involved impermissible reasoning that because the accused knew where the body was located, he must have admitted that he killed the victim even if the brother could not recall what, if anything, was actually said on the phone.

This leads us to the next proposition, which acts to bind context and evidence together.

Proposition 4: Evidence Needs Purpose

The fourth proposition also connects to proposition 1, which states that foundational legal principles matter and creates the framework for the approach to admissibility. The caveat to proposition 1, gleaned from proposition 4, imports a proto step to the framework. Before the legal framework is applied (i.e., relevancy and materiality), the judge needs to know the **purpose** of the evidence. This is best expressed by Justice Sheilah Martin in *Calnen* (at para 113), when she stated that "in addition to being aware of the general principles, it is important for counsel and trial judges to specifically define the issue, purpose, and use for which such evidence is tendered and to articulate the reasonable and rational inferences which might be drawn from it." Without this information, trial judges run the risk of error, as evidence without an articulated purpose may be used for an impermissible purpose, or worse yet, be admitted when it should not have been, considering the use to be made of it.

The difficulty in *Schneider* is that Justice Rowe seems to leave out this proto step or precursor to the relevancy step. His concern is that the majority decision of the BCCA wrongly used the purpose of the phone evidence, as an admission to the killing, in determining relevancy (at paras 78). In his view, at the relevancy step the evidence should not be "classified" as an admission (at para 42). Doing so too narrowly confines the other evidence at trial that would inform or assign meaning to the evidence in question (at para 42). This does not mean, Justice Rowe opines, "any and all evidence" can be used, but that the overarching question limiting the context is whether the evidence being used can give "non-speculative" meaning to the evidence being assessed (at para 44). Justice Rowe is correct in the sense that relevancy comes before an assessment of whether the otherwise admissible relevant evidence is excluded on the basis of an exclusionary rule. But, this position does not take in account the overarching concern with the purpose of that evidence, which the trial judge and counsel must always be mindful of when assessing the evidence at any step of the framework.

As Justice Martin explained in *Calnen*, being mindful of the purpose of the evidence "often requires counsel and the court to expressly set out the chain of reasoning that supports the relevance and materiality of such evidence for its intended use" (at para 113). It is not just context that matters but the inferences to be drawn as well. That "chain of reasoning" that requires the judge to assess relevancy is built on linkages made from the purpose for the admissibility of that evidence. Without purpose, relevancy is aimless and can lead to weaknesses in that chain.

Proposition 5: The Gatekeeper Function Rules!

This last proposition may not be wholly apparent in the *Schneider* decision, but it is one of my favourite evidence mantras. The last step in the legal framework, where the judge as gatekeeper has that final look at otherwise admissible evidence, is critical to the integrity of the justice system. In the balancing of the prejudicial effect of admitting the evidence against the probative value of the evidence, the objectives underlying the rules of evidence are given meaning and life. Truth-seeking and fairness come together and provide the appropriate backdrop to the admissibility question. This proposition concerns evidence that is admissible under all other rules of evidence, yet subjects it to concerns we as society should have with evidence that may lead to illogical and bad reasoning, resulting in unfairness, imbalance, and prejudice that erodes public confidence in the justice system. At the same time, this last look carefully calibrates these potential injustices with the probativeness or informativeness of the evidence, consistent with the societal desire that "truth will out".

In an appeal, this discretionary judicial balancing is given great deference (at para 79). Moreover, in considering the application of discretion, the trial judge can find ways to ameliorate the possible prejudice to the accused through jury instructions (at para 82). Justice Rowe found that the trial judge fulfilled this function and limited the prejudicial use of the evidence (at para 83). The dissent, however, found the instructions were not explicit enough and did not covey to the jury the "impact" the words could have on trial fairness (at para 95). In their view, over and above the complete lack of relevancy of the phone call evidence, on balance, the judicial discretion to exclude should have been used (at para 96).

Final Observations

The difference between the majority and dissent in *Schneider*, is unsurprisingly the decidedly different view both decisions take from the evidence. The majority sees "threshold" value to the phone call evidence, preferring to use the entire context of the evidence to determine whether the brother's testimony can make it over that low threshold to become a piece of evidence considered by the jury in coming to the ultimate determination of guilt or innocent. This is a position entirely consistent with the objective of the rules of evidence that enable the truth-seeking function of the court. Justice Rowe's view is consistent with the reasoning behind the principled approach to the admission of hearsay that is more organic, less tethered to the archaic pigeon-holed rules of evidence, and therefore more meaningful. Similarly, the dissent, which sees no value in the phone call evidence, finds it cannot get over that low threshold (at para 96). The dissent too is concerned with another fundamental objective of the law of evidence, which is trial fairness. By letting in highly speculative non-evidence, there is a greater risk that the ultimate determination, which can change lives in such an elemental way, will result in a miscarriage of justice. Although the accused does not have a right to a perfect trial, an accused has a right to a fundamentally fair one (see *R v G(SG)*, 1997 CanLII 311 (SCC), [1997] 2 SCR 716). In the dissent's view, assessing the evidence on any level – be it macro or micro or low or even non-existent – is simply "an exercise in pure speculation" (at para 92). The law does not work with fiction, but with facts.

This leads to the case we all discuss in evidence class – *R v Ferris*, 1994 CanLII 31 (SCC), [1994] 3 SCR 756. The decision is one line, with Justice John Sopinka dismissing the Crown appeal:

> … with respect to the evidence that the respondent was overheard to say "I killed David", if it had any relevance, by reason of the circumstances fully outlined by Conrad J.A., its meaning was so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value.

The Alberta Court of Appeal decision in *Ferris* (*R v Ferris*, 1994 ABCA 20) lends fuller context. There, Justice Carole M. Conrad considered whether the trial judge erred in admitting "an incomplete verbal utterance" consisting of "… I Killed David …" (ABCA at paras 1-2). These words were overheard by the investigating officer while Ferris was on the telephone (at para 3). The officer heard "conversation before, after, and in between" the "I've been arrested" and "I killed David" but could not hear what was being said, at the time he was not trying to overhear, and he was in the process of leaving the area when he heard them (at para 4-5). Justice Conrad, as Justice Rowe did in *Schneider*, began her analysis with step one of the legal framework for admissibility, namely whether the evidence was relevant (at para 13). In her assessment, Justice Conrad (correctly in my view) states that "words do not become admissible merely because they are uttered out of the mouth of the accused" (at para 15). To be probative of some fact in issue, the party tendering the evidence must "prove the connection between the evidence offered and the fact" in issue (at para 15). In other words, they must articulate the purpose of that evidence, being an admission for the proof of their contents (at para 15). Whether the officer was truthful in his evidence is a matter of weight, but whether the utterance is relevant as an admission depends on the meaning ascribed to that utterance (at para 15). She found there was no context at all for the accused's comments. The words uttered could have been as easily an admission as an explanation of what the police alleged the accused did. If admitted, the words would be a "highly prejudicial" (at para 22). Justice Conrad was clear that there was no question the words were spoken but the

open question was meaning they could be given (at paras 26, 29). In her view, the words were not "logically probative of a fact in issue," not relevant, and therefore not admissible (at para 31).

Factually, there are similarities and differences between *Schneider* and *Ferris* that are, as I said earlier in this post, at the heart of the disagreement between the majority and dissent in *Schneider*. Justice Rowe sees content to the phone conversation and the meaning of that content is informed by the larger context of the trial evidence. Justices Karakatsanis and Brown see no content and therefore there can be no context that could ever assist in discerning meaning. In any event, as correctly pointed out by Justice Rowe, Justice Sopinka in *Ferris*, in agreeing the words were inadmissible, did so by applying the last look judicial exclusionary discretion. This leaves a sense, as suggested by Justice Rowe, that Justice Sopinka thought the words were otherwise admissible and relevant (at para 69). Although it is difficult to make an argument based on one sentence, the decision by Sopinka J in *Ferris* must be read in the context of the case. In *Ferris*, the trial judge ruled the words admissible after a *voir dire* in which the judge found the statements were voluntary (*Ferris*, ABCA at para 10). The trial judge then considered "the next matter," which was whether the words "should nevertheless be held inadmissible because of the prejudicial effect" (*Ferris*, ABCA at para 10). Immediately after this comment on the potential prejudicial effect of the statement, the trial judge found the statement admissible based on a number of reasons including its relevancy (*Ferris*, ABCA at para 10). This review of the trial judge's reasons suggests the consideration of relevancy was made in the context of the application of the discretionary exclusion by the trial judge. This may explain why Justice Sopinka emphasized the judicial discretion to exclude in the decision, rather than the relevancy point.

There is more I can see under the magnifying glass that is of interest. Front and centre for me, for instance, is the hair-line difference between the admissibility and weight of evidence, which is woven throughout the *Schneider* decision. I will leave that and other issues for another day and another evidence class discussion. Who knows, I might even add a proposition or two in doing so. In the end, the *Schneider* decision attempts to make sense of admissibility of evidence and provides insights that I will carry with me as a purveyor and, dare I say, a lover of the law of evidence.

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