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Abstract

Social science evidence plays an increasingly important role in contentious constitutional litigation. This paper examines the competence of courts to examine these materials in spite of both time- and finance-based pressures. Rather than critique the judiciary's ability to examine social science evidence, this article seeks to determine what judicial structure is best placed to examine these materials in contentious cases (particularly focusing on reference cases). Trial courts are determined to best address resource concerns, and are best able to handle expert evidence and social science data. Examination of three recent contentious constitutional cases confirms that they are able to weigh the latter materials well. They should thus be the court of first instance in contentious constitutional law references.

Keywords

References, Constitutional law, Contentious cases

Cover Page Footnote

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TRIAL LEVEL REFERENCES: IN DEFENCE OF A NEW PRESUMPTION

MICHAEL DA SILVA *

Two related phenomena in constitutional litigation inspire this article: 1) the use of expert witnesses and social science data in trial court constitutional litigation, and 2) the advent of the trial level constitutional reference. Recent constitutional jurisprudence has seen an increasing role for expert evidence and social science research in the determination of contentious cases. Trial level constitutional arguments in *Bedford v Canada* (concerning the constitutionality of criminal prohibitions against prostitution-related activities), *Canada (Attorney General) v PHS Community Services Society* (concerning constitutional exemptions from criminal drug trafficking offences for a safe injection site), and *Carter v Canada (Attorney General)* (concerning the constitutionality of criminal prohibitions on physician-assisted dying) relied heavily on expert submissions and social science data; in *Insite*, trial level weighing of this information provided a factual basis for the Supreme Court of Canada (SCC)'s ultimate determination.¹ Contemporaneous with these cases was the first use of British Columbia's trial level constitutional reference power: *Reference re: Section 293 of the Criminal Code of Canada*, also known as *The Polygamy Reference*.²

This article evaluates the potential of trial level references for receiving and weighing evidence in contentious references where the testimony of expert witnesses and the submission of social science data are likely to play a significant role in the ruling. It will primarily focus on *Bedford*, *Insite*, *Carter*, and *The Polygamy Reference*. Trial courts' abilities to evaluate expert submissions and social science data outside the reference context in the first three cases suggest that they are well-suited to serve the

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¹ *Bedford v Canada*, 2010 ONSC 4264 [*Bedford*]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*Insite*]; *Carter v Canada (Attorney General)*, 2012 BCSC 886 [*Carter*].

² *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [*The Polygamy Reference*].

same function in references. *The Polygamy Reference* was the test case for whether trial courts are capable of fulfilling this new function. While all four cases concern criminal law, criminal procedure will not form a significant portion of this article's analysis. Instead, the commonality stressed will be the contentiousness of the issues addressed in each case; these cases are among the most contested constitutional questions in recent memory, and accordingly received extensive media coverage. Since contentious cases are likely to produce conflicting expert witnesses and social science evidence, they are also where determinations on admissibility and weight are most important.

This article begins with a brief overview of the role of the judge in *Charter* litigation and the relevance of evidence thereto. After examining the power to institute trial level references, the article proceeds with a brief discussion of the law concerning the admissibility of expert evidence and the norms of constitutional litigation. *Bedford*, *Insite*, and *Carter* provide tests of trial level courts' ability to examine these materials in the context of complex and contentious constitutional arguments. The article then examines how these skills can be transposed into reference procedures and whether these reference procedures were successfully used in *The Polygamy Reference*. After demonstrating trial courts' unique ability to handle expert evidence, arguments in favour of the continued use of appeal level references for answering contentious constitutional questions, including the argument that trial level references add an unnecessary level of court resources, are examined and repudiated.

Ultimately, trial courts are best able to handle expert evidence and social science data, creating an evidentiary record that is invaluable in the determination of contentious reference questions, both at trial level and on appeal. Given that reference questions are likely to arise only on contentious issues, those jurisdictions that do not have the ability to send references to trial level courts should create this power and presume that reference questions will first be answered there.

I. THE ROLE OF THE JUDICIARY AND EVIDENCE IN *CHARTER* LITIGATION

A brief overview of the role of the judiciary in *Charter* litigation is required to understand the relevance of evidence to the legal tests courts apply. The Constitution of Canada, including the *Charter of Rights and Freedoms*, is the "supreme law of Canada, and any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect."³ The rights guaranteed in the *Charter* are

³ Part VII of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 52.

“subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁴

In a *Charter* case, the judiciary’s first step is to establish whether a right has been violated. There is a different, judicially created test for determining the violation of each *Charter* right. Common to all is the recognition that either the purpose or effect of legislation can result in a rights violation.⁵ In the event of a violation, the judiciary determines whether the limit to the right can be demonstrably justified. Demonstrably justified limits must have an important objective. The right’s limit must be rationally connected to that objective, and must minimally impair the right. The salutary effects of the limit must outweigh its deleterious effects.⁶

The judiciary must assess and weigh competing claims, including evidentiary claims, and establish a factual record and a legal determination on the basis thereof. The initial burden of proof for factual issues rests on the rights claimant, who has the onus to prove a breach.⁷ After a rights violation has been established, the burden of proof for all factual issues is on the government, who must prove that the violation is justified.⁸ Two types of facts must be proved in constitutional litigation: adjudicative facts concerning how rights violations occur or are justified, and legislative facts concerning the rationale for legislation.⁹ Expert evidence is rarely admissible concerning the latter.¹⁰ It can, however, be helpful for proving the effects of a given piece of legislation.¹¹ In references, only legislative facts are at issue, but potential effects demand intense expert scrutiny. Contextual data can demonstrate that the application of a law would result in a violation. Expert evidence and social science data can also be used to determine whether a limit is justified.

Robert Charney, a constitutional scholar, and counsel for the Attorney-General of Ontario, worries that the “fine line[s] between policy and politics, and between expert opinion and legal argument . . . [are] too easily crossed in *Charter* cases.”¹² He

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1 [*Charter*].

⁵ *R v Big M Drug Mart*, [1985] 1 SCR 295.

⁶ *R v Oakes*, [1986] 1 SCR 103.

⁷ Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2010) at 38-7.

⁸ *Ibid.*

⁹ Lori R Sterling, “Emerging Issues and Trends in Constitutional Evidence” in Debra M McAllister & Adam M Dodek, *The Charter at Twenty: Law and Practice* (Toronto: Ontario Bar Association, 2002) 65 at 66; Mahmud Jamal, “Legislative Facts in Charter Litigation: Where Are We Now?” (2005) 17 NJCL 1.

¹⁰ Sterling, *supra* note 9 at 69.

¹¹ *Ibid.*; Robert E Charney, “Evidence in Charter Cases: Expert Evidence and Proving Purpose” (2004) 16 NJCL 1 at 11.

¹² *Ibid* at 1 [italics added for consistency in this paper].

advocates a general principle of deference to the legislature where there is competing social science evidence.¹³

Charney is right to be wary of the use of social science data in constitutional decision-making. His survey of the case law suggests that, “many Charter cases are concerned with speculation and prediction by academic experts.”¹⁴ Though Charney may overstate the limits of current social science practices, controlled scientific studies are not possible in at least some cases. There is little to suggest that courts are better placed to deal with competing data than legislators.¹⁵ However, where one also cannot say the legislature is better able to deal with the data, it is the legislature’s democratically legitimated institutional role that warrants deference, rather than its inherent ability to better address the issue. The legislature is elected to make decisions on contentious issues. Deference helps courts to avoid illegitimately taking jurisdiction over action that is properly legislative.

Importantly, however, legitimacy concerns are not present in references. A reference takes place when the government asks for the judiciary’s opinion, explicitly recognizing that the judiciary can best answer the contentious question. In references, there is no jurisdictional dispute and thus no usurpation of the properly legislative role.¹⁶

Courts must assess and weigh expert information; they cannot accept it uncritically. Determinations on both whether a right has been limited and if that limit can be justified are most often based on evidentiary records culled at the trial level.¹⁷ Trial courts have always been the arbiters of the evidentiary record. Trial judges test the evidence through adversarial review, and appellate judges usually defer to trial judges on findings of fact. Until recently, however, this valuable evidentiary record was unavailable in references. While expert affidavits and social science (i.e., Brandeis

¹³ *Ibid* at 4.

¹⁴ *Ibid*.

¹⁵ *Ibid* at 5.

¹⁶ Of course, those who believe that the legislature is best placed to deal with these issues can still rightly be concerned about the use of the reference procedure to outsource responsibility over difficult or contentious issues. Where the legislature is best placed to deal with an issue and mischaracterizes it as a legal, rather than policy, issue, it is problematic.

Charney is partly concerned about justiciability. Whether claims set against the backdrop of competing social science evidence should be justiciable is a serious question. There are cases where evidence is sufficiently indeterminate for any individual to establish a legal claim. Justiciability in this case is a serious question. In many cases, however, a legal claim is clearly, *prima facie* present, and it is the factual context that is indeterminate. If a claim is justiciable, expert evidence can play an important role in ascertaining the context of that claim, determining the real and potential effects of a given legislative action.

¹⁷ Hogg, *supra* note 7 at 38-8–38-9.

briefs) often enter the appellate level record in constitutional references, proof of facts is an identified concern in such cases.¹⁸ Trial level references may remedy this problem.

II. THE TRIAL LEVEL REFERENCE

The federal government and each provincial government have the power to refer questions to the courts. The recent *Polygamy Reference* is the first trial level reference in Canadian constitutional history. A question concerning the constitutionality of the criminal prohibition of polygamy, it was instituted by the Lieutenant Governor in Council's 2009 Order in Council 553.¹⁹ The statutory authority for the order in council was section 1 of British Columbia's *Constitutional Question Act*.²⁰ It states:

The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court must then hear and consider it.²¹

The "Supreme Court" here is not the SCC, but the Supreme Court of British Columbia.²² While the federal government can refer questions directly to the SCC,²³ provincial references begin in the superior court or court of appeal of each province and can be appealed as of right to the SCC.²⁴

Under the *CQA*, British Columbia can institute references at trial courts. This power is not unique. In Manitoba, references can begin either at the Court of Appeal or at the Court of Queen's Bench.²⁵ *The Polygamy Reference*, however, appears to be the first use of this rare power.

Order in Council 553's brevity makes it difficult to determine why *The Polygamy Reference* began at the Supreme Court of British Columbia, but the general understanding links this decision to trial courts' ability to accept and review fresh evidence. CBC News briefly summarized this perspective: "Sending the reference to the B.C. Supreme Court rather than the Court of Appeal will allow much more evidence to

¹⁸ *Ibid* at 8-21.

¹⁹ OIC 533, Orders in Council: Volume 36, Number 17, online: Queen's Printer <<http://www.qp.gov.bc.ca/statreg/oic/2009/RESUME17.HTM>>.

²⁰ *Ibid*.

²¹ *Constitutional Question Act*, RSBC 1996, c 68, s 1 [*CQA*].

²² *Interpretation Act*, RSBC 1996, c 238, s 29.

²³ *Supreme Court Act*, RSC 1985, c S-26, s 53.

²⁴ *Ibid*, s 36.

²⁵ *The Constitutional Questions Act*, CCSM c C180, s 1.

be heard, similar to a trial.”²⁶ Against a highly charged political background, the contentiousness of the case was clear. Multiple opposing expert perspectives were expected. Trial procedure provided clear guidelines for admitting them.

III. GENERAL RULES CONCERNING THE ADMISSIBILITY OF EXPERT EVIDENCE

Constitutional litigation takes place according to rules designed for the private law and criminal traditions. There is no *Constitutional Litigation Procedure Act* or *Rules of Constitutional Litigation*. Constitutional litigation, including *Charter* litigation, is guided by the laws, rules, and norms of traditional litigation. The laws of evidence employed in constitutional litigation are no exception. When studying the use of expert evidence in contentious *Charter* cases, it is accordingly advisable to examine the general rules concerning the admissibility of expert evidence before examining how constitutional litigation and trial level constitutional references complicate the situation.

Every province (except Quebec), every territory, and the federal government devote statutes to evidence.²⁷ Explicit detail on the admissibility of *expert* evidence is largely lacking. In Ontario, for instance, the only provision explicitly concerning expert witnesses simply requires leave for the use of more than three experts.²⁸ In British Columbia, sections concerning experts require written statements in non-criminal cases where expert testimony is to be tendered; this is the converse of the common law requirement that documentary and real evidence must be authenticated by a witness attesting to their status.²⁹ Neither act contains special provisions for constitutional litigants. Ultimately, the common law tradition and general practice guide whether expert evidence will be admissible and how it is weighed in constitutional cases.

The leading cases on expert evidence are *R v Mohan* and *R v Abbey*.³⁰ Under *Mohan*, expert testimony must be relevant, necessary in assisting the trier of fact, not subject to any exclusionary rule, and must come from a properly qualified expert.³¹

²⁶ “Blackmore seeks funds for polygamy hearing,” *CBC News* (26 March 2010) online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/story/2010/03/26/bc-blackmore-supreme-court-hearing.html>>.

²⁷ *Alberta Evidence Act*, RSA 2000, c A-18; *Evidence Act*, RSBC 1996, c 124 [*British Columbia*]; *Manitoba Evidence Act*, CCSM c E-150; *Evidence Act*, RSNL 1990, c E-16; *Evidence Act*, RSNB 1973, c E-11; *Evidence Act*, RSNS 1989, c 154; *Evidence Act*, RSO 1990, c E-23 [*Ontario*]; *Evidence Act*, RSPEI 1988, c E-11; *Evidence Act*, SS 2006, c E-11.2; *Evidence Act*, RSNWT 1988, c E-8; *Evidence Act*, RSNWT (Nu) 1988, c E-8; *Evidence Act*, RSY 2002, c 78; *Canada Evidence Act*, RSC 1985, c C-5.

²⁸ Ontario, *supra* note 27, s 12.

²⁹ *British Columbia*, *supra* note 27, s 11-12.

³⁰ *R v Mohan*, [1994] 2 SCR 9 [*Mohan*]; *R v Abbey*, 2009 ONCA 624 [*Abbey*].

³¹ *Mohan*, *supra* note 30 at para 17.

Abbey reorganizes these requirements. It says courts must first determine whether expert testimony meets preconditions of admissibility for trial:

the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
the witness must be qualified to give the opinion;
the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
the proposed opinion must be logically relevant to a material issue.³²

Of these, only the requirement concerning other exclusionary rules requires explanation. Full description of those rules is beyond the scope of this paper, but they generally fit three types: exclusions based on unreliability/prejudicial effects, exclusions based on policy, and exclusions designed to protect the adversarial process.

If the preconditions listed above are met in a case, the court moves to the second, non-mechanical step of determining admissibility. It performs a “gatekeeper” function related to the legal relevance/necessity *Mohan* criteria, *viz.*, whether the evidence supports facts the litigator is trying to prove and is necessary to prove them.³³

The principles underlying judicial decision-making in the *Mohan* framework are closely related to the duties of expert witnesses. Once an individual is admitted as an expert, that person is expected to fulfill a distinct purpose. *The Ikarian Reefer* summarizes earlier case law detailing the duties of expert witnesses: experts must be unbiased; provide independent assistance to the Court; “never assume the role of an advocate;” and clearly articulate assumptions, gaps in the data, and where questions fall outside their expertise.³⁴ Under Ontario’s *Rules of Civil Procedure*, adopted elsewhere (e.g., Prince Edward Island), many of these duties take statutory form.³⁵

The *Mohan/Abbey* test makes assumptions concerning who will receive expert evidence. Defining “necessity” in terms of “assisting the trier of fact” requires the presence of a trier of fact (i.e., the trial judge or jury). Furthermore, reliability is traditionally the concern of trial judges, who observe witnesses and make determinations based on in-person interaction. Trial judges are considered expert at judging reliability. Accordingly, deference is often paid to trial level decisions on the admissibility of expert evidence and the weight accorded to it. Whether these factors

³² *Abbey*, *supra* note 30 at para 80.

³³ *Ibid* at paras 76-79, 82-85.

³⁴ *The Ikarian Reefer*, [1993] 2 Lloyd’s Rep 68 (QB).

³⁵ RRO 1990, Reg 194, s 4.1.01 [*Rules of Civil Procedure*].

and assumptions adhere in the constitutional context is the subject of the following section.

IV. APPLYING GENERAL EVIDENCE RULES TO THE CONSTITUTIONAL LITIGATION CONTEXT

The relevance of the *Mohan* and *Abbey* factors to constitutional litigation is apparent even in the limited number of cases reviewed here. While the reasons for judgment in *Insite* and *Carter* do not refer to *Mohan* or *Abbey*, the court in *Bedford* describes *Mohan* as the leading case on the admissibility of expert evidence in its second paragraph on the subject, and goes on to consider *Abbey*.³⁶ It also references the duty of experts outlined in *The Ikarian Reefer*.³⁷ The section on expert evidence in *The Polygamy Reference* is prefaced with a review of *Mohan* and *Abbey*.³⁸

It is nonetheless worth considering how the *Mohan/Abbey* factors must be employed differently in the constitutional context. Both the form and purpose of constitutional litigation may allow broader use of experts. In the absence of a full set of evidence rules for constitutional litigation, the unique features of constitutional litigation demand consideration of the problems inherent in it.

The form of constitutional litigation suggests more expert evidence may be tendered. For instance, the exclusionary rules related to the preservation of the adversarial process do not have the same salience in constitutional litigation. Unlike civil litigation, where litigators are obligated to serve as zealous advocates for their clients, constitutional cases involving the government as a party (i.e., all references) always have one side bound to the public good. Like expert witnesses, Attorneys General's duties are to the courts rather than clients. Many Attorneys General are bound to ensure that "the administration of public affairs is in accordance with laws," including the supreme law: the Constitution.³⁹ Thus, this tool of exclusion under the *Mohan/Abbey* test may not be relevant in constitutional litigation where the government is a party. Fewer exclusionary rules means fewer grounds for inadmissibility at the preconditions stage and puts more weight on the court's gatekeeper function. Given the purpose of constitutional litigation, the gatekeeper function may also be used sparingly.

Pointing out that expert evidence is used to produce a certain type of fact (adjudicative or legislative) is insufficient for understanding its purpose; understanding the purpose of those facts and, indeed, *Charter* litigation in general, helps justify wider

³⁶ *Bedford*, *supra* note 1 at paras 105-112.

³⁷ *Ibid* at para 100.

³⁸ *The Polygamy Reference*, *supra* note 2 at paras 71-75.

³⁹ E.g. *Department of Justice Act*, RSC 1985, c J-2, s 4; *Attorney General Act*, RSBC 1996, c 22, s 2(b); *Ministry of the Attorney General Act*, RSO 1990, c M-17, s 5(b).

use of expert and social science evidence in constitutional litigation. Contentious cases in particular seem to require more expertise. At common law, one cannot admit experts to prove information that is already known by the court (even where prior judicial decisions rested on assumption to the contrary).⁴⁰ In *Charter* litigation, however, “judges will be cautious about taking judicial notice of facts that could be considered controversial.”⁴¹ Many facts underlying contentious cases are controversial because the purpose of the litigation cuts to the core of what it means to be Canadian.

The *Charter* is meant to reflect Canada’s values. Accordingly, tests of *Charter* compliance must be in accordance with the nation’s fundamental values.⁴² The judgment in *Bedford* recognized section seven as reflecting Canada’s “core values.”⁴³ Both the Attorney General of Ontario and an intervener argued on the basis of societal values,⁴⁴ with moral values concerning the protection of individual security conflicting with social values about the place of sex in society.

When examining Canadian values, it is important to attend to multiple perspectives. The broad use of public interest interveners in Canada, which includes courts offsetting liberal perspectives by granting intervener standing to conservative groups (as in *Bedford*), is a facet of *Charter* litigation serving as a conversation about national values.⁴⁵ If multiple, competing voices must be heard, hearing the best versions thereof (i.e., expert testimonials) is necessary. Since judges are unwilling to take judicial notice of controversial facts,⁴⁶ expert perspectives from each side of the controversy allow them to come to determinations on the merits of competing perspectives.

The potential violation of the expert’s duty of impartiality inherent in this line of reasoning is not as flagrant as it appears. The duty not to be an advocate for a cause can be difficult to fulfill in contentious cases. For example, in *Bedford*, a concern throughout the case was that many expert witnesses were known advocates; the social science information they produced was potentially biased by their passion. When confronted with experts who explicitly espouse certain perspectives (and the evidence they adduce), it is important to remember that there is a statutory assumption that an expert will come in with a particular viewpoint. To say that the duty to serve as an

⁴⁰ *R v D(D)*, [2000] 2 SCR 275.

⁴¹ Sterling, *supra* note 9 at 72.

⁴² *Reference re Secession of Quebec*, [1998] 2 SCR 217.

⁴³ *Bedford*, *supra* note 1 at para 3.

⁴⁴ *Ibid* at paras 3, 21, 24.

⁴⁵ For a challenge to the assertion that a multiplicity of voices can be heard in contentious constitutional cases, see Sanda Rogers, “Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada” in Sanda Rogers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Toronto: LexisNexis, 2010) 1.

⁴⁶ Sterling, *supra* note 9 at 72.

impartial advocate “prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged”⁴⁷ assumes that circumstances exist where an expert will be duty-bound to a party. In contentious cases, the duty to a party may extend to commitment to a cause. While the advocate is duty-bound to the court first, partisan perspectives do not absolutely bar admissibility.

An expert could be subject to censure for contempt of court if she is wholly partisan, and a judge will likely accord little weight to a clearly partisan perspective. The rules do not, however, bar the testimony of experts with known partisanship. Indeed, the purpose of constitutional litigation may require partisans to come together and produce their best evidence, while acknowledging its limitations. Throughout, experts must remember that the purpose of their testimony is to assist the court, not to “win” an intellectual or ideological battle. The question, then, is whether courts are capable of weighing this evidence and recognizing partisanship when they see it. *Bedford* serves as a strong indication that trial courts are particularly well suited for this labourious process.

V. THE USE OF EXPERT EVIDENCE IN SELECT TRIAL LEVEL CONSTITUTIONAL CASES: *BEDFORD*, *INSITE*, AND *CARTER*

Bedford v Canada

Aside from cost, a banal but important concern dealt with below, one of the greatest challenges to the admissibility of expert evidence and social science data in constitutional cases is the potential inability of courts to accurately assess its reliability. The fear, as outlined by the Ontario Court of Appeal in *Johnson v Milton (Town)*, is that:

judges who fail to properly perform their gatekeeper function run the risk of having their decision-making function usurped or severely eroded by “expert generalists” who profess to know something about everything and who are only too willing to provide the court with a ready-made solution for any contentious issue that might exist ... [While these experts] appear knowledgeable and generally come across well, upon closer scrutiny, their opinions may well turn out to be little more than concoctions consisting of guesswork, speculation, commonplace information and junk science, with a hint of valid science thrown in for good measure.⁴⁸

⁴⁷ *Rules of Civil Procedure*, *supra* note 35, Rule 4.1.01 (2).

⁴⁸ *Johnson v Milton (Town)*, 2008 ONCA 440 at para 49.

The fear of usurpation can be particularly acute where what constitutes an expert is difficult to define. As noted previously, the *Mohan* factors require opinion evidence to be given by an individual “qualified to give the opinion.” Traditional indicia of qualification include academic credentials and publications, though formal academic education is not required.⁴⁹ Many potential “experts” in *Bedford*, however, are best described as lay witnesses. There are evidentiary rules at the trial level that allow for opinion evidence from lay individuals whose work provides them with special expertise in the field. Police, for instance, are qualified to give evidence on the indicia of intoxication.⁵⁰ In *Bedford*, the court heard testimony from eight sex workers and nine police officers.⁵¹ These individuals had special knowledge because of their professions, but the court rightly did not include them in the expert evidence analysis. The court also did not allow them to serve as representatives of their professions, noting that, “no one person can be said to be representative of prostitutes in Canada.”⁵²

The greater concern in *Bedford* was with traditional “experts.” Regardless of credentials, one’s statements may improperly go beyond the scope of one’s expertise. Observers should be wary of an expertise “creep,” wherein the opinions of an expert from one field on issues in another field are taken to be suitable for judicial determination. As noted, research relating to prostitution is often conducted by advocate-intellectuals. *Bedford* is thus an instructive case in determining whether judges are capable of forming an evidentiary record without adopting expert biases.

In addition to a great deal of written work focusing on legislative history and international materials,⁵³ the court in *Bedford* heard expert testimony from both sides. The applicants’ experts largely argued that, “street prostitution is much riskier, in terms of violence, than indoor prostitution . . . [and that] the impugned provisions increase the level and risk of violence against prostitutes.”⁵⁴ By contrast,

Most of the respondent’s experts did not comment specifically on the impugned provisions or on prostitution in Canada. Rather, the focus of their evidence was on prostitution in general. The respondent’s experts largely maintained that all prostitution is inherently harmful, as prostitution is a form of violence against women.⁵⁵

⁴⁹ *R v Marquard*, [1993] 4 SCR 223 at 243.

⁵⁰ *R v Graat*, [1982] 2 SCR 819.

⁵¹ *Bedford*, *supra* note 1 at paras 85, 89.

⁵² *Ibid* at para 88.

⁵³ *Ibid* at paras 135-177, 178-217.

⁵⁴ *Ibid* at paras 121-122, 125.

⁵⁵ *Ibid* at para 131.

The court did not get bogged down in this battle of experts or frame their discussion on the experts' terms. Instead, the majority fit the experts within the section seven framework.

The structure of the judgment demonstrates the court's attentiveness to its role in applying the section seven test; the court did not let experts take over the case. The issue in *Bedford* was whether criminal laws prohibiting, for instance, indoor sex work, exposed sex workers to a greater risk of violence. The court ultimately held that the prohibitions "individually and together, force prostitutes to choose between their [section seven] liberty interest and their [section seven] right to security of the person" and struck down the prohibition.⁵⁶ When analyzing the potential section seven breach, the court did not structure the judgment on an expert-by-expert basis, outlining whether each sufficiently proved the points he sought to prove. A great deal of the expert evidence adduced compared indoor and outdoor sex work,⁵⁷ but the judgment did not include a section on this issue. Instead, the court focused on the larger constitutional questions within the section seven test and analyzed how expert evidence aided in the determination of those questions. It asked, "Can the harm faced by prostitutes in Canada be reduced?" and, "Do the impugned provisions sufficiently contribute to the harm faced by prostitutes?" then devoted subsections within those analyses to expert evidence.⁵⁸ Rather than becoming overwhelmed by the evidence, the majority performed a traditional analysis and fit expert analysis within it.

The court also produced a strong evidentiary record for future appeals. Following its treatment of each question, the court provided a strongly worded analysis of the expert evidence in general.⁵⁹ The court's analysis of Dr. Melissa Farley's testimony demonstrates its ability to assess and weigh evidence. Dr. Farley is a published researcher and psychologist.⁶⁰ She interviewed "900 prostitutes and former prostitutes in ten countries" and used them as the basis for 17 articles arguing that prostitution is an inherent harm.⁶¹ She also founded Prostitution Research and Education, "a non-profit organization that seeks to abolish prostitution."⁶² Her statements included inflammatory language, and some of her opinions on prostitution were found to have been formed prior to her research and, as such, were not well

⁵⁶ *Ibid* at para 3.

⁵⁷ *Ibid* at paras 133, 310, 325, etc.

⁵⁸ *Ibid* at paras 307-324, 333-351.

⁵⁹ *Ibid* at paras 352-358.

⁶⁰ *Ibid* at para 132.

⁶¹ *Ibid*.

⁶² *Ibid*.

regarded by the court.⁶³ The court thus identified Dr. Farley’s advocacy and the doubt it cast upon her research findings, which were in conformity with the position that she advocated. Similarly, two other doctors were identified as “more like advocates [than experts]”, due in large part to their “sweeping statements.”⁶⁴

Dr. Farley’s case also demonstrates that cross-examination of experts provides for a more robust determination on the merits of expert evidence than the mere submission of a Brandeis brief. During cross-examination, Dr. Farley conceded that “she [was] not aware of any study that shows that indoor prostitution is as risky, or riskier, than street prostitution.”⁶⁵ She was also forced to recant earlier statements about a link between post-traumatic stress disorder (PTSD) and prostitution. She initially,

deposed that there is no difference between extreme emotional distress or post-traumatic stress disorder . . . in indoor and outdoor prostitution. . . . [On] cross-examination, she acknowledged the difficulty in directly linking PTSD with prostitution.⁶⁶

Cross-examination thus fully bears out the duty of the expert witness: identifying weaknesses. Oral testimony and cross-examination create a strong evidentiary record that would be unavailable if evidence were tendered in written materials alone.

The Ontario Superior Court of Justice proved adept at weighing the evidence in *Bedford*. It provided a model for clarifying the outcome of the evidence weighing process with blunt statements like “I assign less weight to Dr. Farley’s evidence.”⁶⁷

The presence of several lay witnesses who merely “mirrored what was said by other witnesses” may suggest that too many individuals were admitted to the court, but this was not the fault of the judiciary.⁶⁸ The court was aware that they should not have been admitted.⁶⁹ The parties did not want to bar admission, instead asking for reduced weight in the court’s consideration of each lay witness’ testimony.⁷⁰ It is possible that the court’s will was overborne by the parties. In this case, the court should have saved time by refusing to admit certain witnesses from the outset. The parties, who have a duty to the court, should have been stronger advocates and saved judicial resources.

⁶³ *Ibid* at paras 354-355.

⁶⁴ *Ibid* at para 357.

⁶⁵ *Ibid* at para 320.

⁶⁶ *Ibid* at para 321.

⁶⁷ *Ibid* at para 356.

⁶⁸ *Ibid* at para 95.

⁶⁹ *Ibid* at para 352.

⁷⁰ *Ibid*.

There is, however, a strong benefit in having a multiplicity of perspectives on the record; it forestalls future evidence-based arguments on appeal.

The *Bedford* court was able to create a robust evidentiary record, and used it to conclude that the prohibitions against prostitution-related activities “sufficiently contribute to a deprivation of their [viz., prostitutes] security of the person” and thereby violate section seven.⁷¹ It is too early to know whether the SCC will rely on this record when the case progresses to that court,⁷² but *Insite* serves as a strong indication that the SCC considers trial level evidence in making its constitutional determinations and sees value in a robust evidentiary record for deciding contentious cases.

Canada v PHS Community Services Society (Insite)

In *Insite*, the SCC majority identified a limitation of section seven on the basis of the trial judge’s findings of fact:

The trial judge made crucial findings of fact that support the conclusion that denial of access to the health services provided at Insite violates its clients’ s. 7 rights . . . He found that many of the health risks of injection drug use are caused by unsanitary practices and equipment, and not by the drugs themselves. He also found that “[t]he risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.” . . . Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out . . . s. 4(1) of the *CDSA* limits the s. 7 rights of staff and clients of Insite.⁷³

However, though the provision was found to limit Insite staff and clients’ section seven rights, the court held that this limit did not violate section seven.⁷⁴ A further finding that the Minister’s refusal to grant an exemption from that section to a safe injection site limited the section seven right in a manner discordant with the principles of fundamental justice was heavily couched in findings of fact made at the trial level.⁷⁵

⁷¹ *Ibid* at para 359.

⁷² Note: On October 25, 2012, the SCC granted leave to appeal the ONCA’s decision in *Canada (Attorney General) v Bedford*, 2012 ONCA 186. See *Attorney General of Canada et al v Terri Jean Bedford et al*, 2012 CanLII 64742 (SCC).

⁷³ *Insite*, *supra* note 1 at paras 93-94.

⁷⁴ *Ibid* at para 114.

⁷⁵ *Ibid* at paras 131, 133.

Specifically, paragraphs 85, 87, and 89 of the trial judgment included facts key to both holdings.⁷⁶

The data in paragraph 85 focuses primarily on an Expert Advisory Council report, which the trial court accepted for its factual details without proffering judgment on the opinions contained within.⁷⁷ The court assessed the strengths of arguments concerning methodology, calling some critiques “benign.”⁷⁸ For instance, critics stated that “while some longitudinal studies have been conducted, the results have yet to be published and may never be published given the overlapping design of the cohorts.”⁷⁹ Labeling this benign is consistent with the aforementioned assertion that publishing is neither necessary nor sufficient for determining expertise or the admissibility of social science data.

The trial court also tacitly weighed a great deal of research in coming to the list of “incontrovertible conclusions” outlined in paragraph 87 and crucial to the SCC’s findings; these findings were based on the evidence adduced by PHS, VANDU and Canada, and clearly supported the ultimate decision in *Insite*’s favour.⁸⁰

Carter v Canada

The Supreme Court of British Columbia’s decision in *Carter* is perhaps the most notable trial level constitutional decision released post-*Insite* and is similar to that case in many respects. *Carter* featured a contentious legal issue, extensive media coverage, a high probability of appeal, and both a government party and experts on each side owing a duty to the court. In that case, a patient suffering from amyotrophic lateral sclerosis (ALS) challenged the criminal prohibitions on assisted death on section seven and fifteen grounds, while two individuals who had assisted a friend’s suicide simultaneously pursued their own section seven claim. The court deemed the laws unconstitutional, issuing a one-year suspended declaration of invalidity and giving the ALS patient, Gloria Taylor, a constitutional exemption in the interim.⁸¹ The trial judge’s lack of direct engagement with the expert evidence in this case makes it *prima facie* less compelling than *Bedford*, but the court’s interaction with experts is important for understanding current trial level relationships with this important source.

⁷⁶ *Ibid* at paras 93, 131, 133.

⁷⁷ *PHS Community Services Society v Attorney General of Canada*, 2008 BCSC 661 at para 85.

⁷⁸ *Ibid* at para 86.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at para 87.

⁸¹ *Carter*, *supra* note 1 at para 19. Ms. Taylor passed away without invoking the constitutional exemption.

Carter focused in part on cross-jurisdictional legal analyses, with a thorough review of the effects of legalization/regulation regimes in other nations suggesting, “the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced.”⁸² However, while comparative law was useful to the court in *Carter* for analyzing competing regulatory schemes, it was expert evidence that demonstrated the actual effects of those schemes. In assessing the expert evidence, the court ably analyzed the strengths and limitations of each researcher. For example, the court acknowledged the limitations of a given data set on its own, but noted that it was supplemented by studies conducted by other researchers, including one researcher whose willingness to change her position in light of new questioning suggested objectivity.⁸³ In *Carter*, the Supreme Court of British Columbia appears willing and able to assess expert evidence and make specific comments about how the evidence will be weighed.

Interestingly, the expert evidence in *Carter* not only helped to frame the legal issue, but was also an important element in establishing the justiciability of the claim. *Carter*’s fact situation was substantially similar to the SCC’s well-known decision in *Rodriguez v British Columbia (Attorney General)*.⁸⁴ Indeed, the court in *Carter* noted that the adjudicative facts in the case did not distinguish it from *Rodriguez*; however, “the evidence as to legislative and social facts in this case” differed substantially from *Rodriguez*, so that the issue in *Carter* was not entirely predetermined by *stare decisis*.⁸⁵ It likely would have sufficed to establish the justiciability of the new claim to note that “the legal issues [in *Carter* and *Rodriguez*] are not identical,” but the court went on to note that “the evidentiary record, bearing both on the assessment of consistency with the principles of fundamental justice under s. 7, and on justification under s. 1, is very different than the record that was before the courts in *Rodriguez*.”⁸⁶

The justiciability question is nonetheless a controversial one. “In *Bedford*, the Court of Appeal held that changes in legislative and social facts are not grounds for declining to follow binding precedent” and the Attorney General of Canada supported this position.⁸⁷ The court in *Carter* recognized this, and clearly established where it was bound by *stare decisis* from *Rodriguez* and where it was not: “For the purposes of this summary, *Rodriguez* decides that the impugned legislation engages Gloria Taylor’s rights to security of the person and liberty, and further decides that s. 241(b) of the

⁸² *Ibid* at para 883.

⁸³ *Ibid* at paras 649-653.

⁸⁴ [1993] 3 SCR 519 [*Rodriguez*].

⁸⁵ *Carter*, *supra* note 1 at paras 941-942.

⁸⁶ *Ibid* at paras 1002-1003.

⁸⁷ *Ibid* at paras 946, 1000.

Criminal Code is not arbitrary.”⁸⁸ Expert evidence tendered on issues subject to *stare decisis* could not be used to overturn that decision: “Because I will not address the question of arbitrariness, which was decided in *Rodriguez*, I will not address the parties’ submissions about the ‘reasoned apprehension of harm’ standard in that context.”⁸⁹ The court’s caution surrounding *stare decisis* indicates that the rule of law is unlikely to be replaced by the rule of experts in the foreseeable future.

Perhaps recognizing the potential for this contentious case to be appealed, the court went so far as to provide an extensive analysis of expert evidence from the medical ethics literature tendered as part of the arbitrariness claim subject to *stare decisis* under *Rodriguez*, “both in order to create a record for higher courts and because this body of evidence and law has some relevance to other issues that are necessary . . . to address.”⁹⁰ It clearly outlined its findings in the introduction, then provided a robust summary of positions, first presenting the positions neutrally and then analyzing each position.⁹¹ Its extensive analysis included evidence from ethicists,⁹² practitioners,⁹³ professional bodies,⁹⁴ public opinion,⁹⁵ public committees,⁹⁶ and prosecution policies.⁹⁷ The analysis helpfully details common ground between the positions, then devotes several paragraphs to summarizing the arguments against and for assisted death respectively.⁹⁸

Having established the ethical landscape, the court goes on to comment on individual experts. For instance, in their discussion of the distinction between suicide and assisted suicide, the court bluntly states, “The preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death. I find the arguments put forward by those ethicists, such as Professor Battin, Dr. Angell and Professor Sumner, to be persuasive.”⁹⁹ This provides a robust record for future courts without violating legal norms. The court is clear that it will not confuse legal questions with ethical ones. Indeed, it sets out the law on the issue before touching on the expert evidence.¹⁰⁰ Once the ethical analysis begins, the court is clear that it will only raise

⁸⁸ *Ibid* at para 1005.

⁸⁹ *Ibid* at para 1289.

⁹⁰ *Ibid* at para 163.

⁹¹ *Ibid* at paras 5-10, 232-358.

⁹² *Ibid* at paras 232-253.

⁹³ *Ibid* at paras 254-272.

⁹⁴ *Ibid* at paras 273-277.

⁹⁵ *Ibid* at paras 278-287.

⁹⁶ *Ibid* at paras 288-298.

⁹⁷ *Ibid* at paras 299-307.

⁹⁸ *Ibid* at paras 308-315.

⁹⁹ *Ibid* at para 335.

¹⁰⁰ *Ibid* at para 231.

ethical arguments where they are legally relevant, while still providing a detailed account of the ethical evidence lest future courts require it. It does not attend to larger questions of whether ethical expertise actually exists. The court does, however, explain its treatment of the ethics-related materials by stating: “The overarching reason why the ethical debate is relevant is that both legal and constitutional principles are derived from and shaped by societal values,” and the law makes distinctions between types of death that mirror distinctions in the ethical community.¹⁰¹

Problems in the *Carter* decision include the lack of clarity surrounding the importance of public opinion to the court, and the court’s inarticulateness concerning the problems with survey evidence. However, the court demonstrated a strong ability to summarize and analyze a wide range of materials. As the next section will demonstrate, *Carter* was not the first time that the court has proved its ability in this respect.

In all three cases discussed above, trial courts have created fulsome evidentiary records that may be relied on at the appellate level. Trial court decisions greatly assist appellate decision-making; the comprehensive treatment of expert evidence in *Bedford* and *Carter* will provide appellate courts with even greater tools to make difficult decisions in those contentious cases. In *Insite*, the SCC based its section seven analysis on trial court findings, suggesting that the court was satisfied with the trial court’s weighing of competing evidence and its ability to determine which facts were relevant to the case. While *The Polygamy Reference* will not go to a higher-level court since the timeframe for appeal has passed, the evidentiary record in that case would have been helpful for appellate decision-makers.

VI. EXPERT EVIDENCE IN *THE POLYGAMY REFERENCE*

Trial courts’ ability to assess and weigh expert evidence is not limited to non-references, as demonstrated in *The Polygamy Reference*. In this case, the Supreme Court of British Columbia had to deal with an expert witness similar to Dr. Farley (discussed above, in relation to *Bedford*), and proved able to successfully avoid expertise “creep” in a reference question context. Angela Campbell, a Harvard LLM holder and McGill professor, was admitted as a legal scholar and expert. According to her affidavit, Campbell pursued “academic research in the area of women in polygamous marriages, particularly in the community of Bountiful.”¹⁰² A literature review and interviews with 22 women in Bountiful over two trips totaling 12 days were

¹⁰¹ *Ibid* at paras 317, 327-335.

¹⁰² *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (Evidence, Angela Campbell Affidavit #2 at para 1) [*Reference re Section 293*].

the bases of her expertise.¹⁰³ As in *Bedford*, cross-examination greatly assisted the court in assessing the strength of Campbell's evidence. Campbell was cross-examined by more participants than any other witness.¹⁰⁴ Both her admissibility and testimony were featured in national media.¹⁰⁵ Her evidence was the most contentious in a contentious case and consequently provided the greatest challenge to the trial court's ability to weigh evidence.

Campbell was challenged on two grounds: 1) her status as an advocate undermined her ability to fulfill her duty to the court, and 2) her social science data was poorly collected and not properly related to her field of expertise. The first claim was based on the fact that Campbell had published works calling for the decriminalization of polygamy. The Attorney General of Canada accused her of being an advocate rather than an expert.¹⁰⁶ The Supreme Court of British Columbia, however, was unconcerned with Campbell's previous out-of-court statements. As they rightly pointed out, most scholars develop opinions about topics they study in great depth.¹⁰⁷ This has not stopped them from following provincial rules about expert testimony and not veering into advocacy *simpliciter*.¹⁰⁸

The court went on to suggest that broader expert evidence admission requirements may be acceptable in a reference, partly because of the lack of certain exclusionary criteria (outlined above). According to the court, the risk of Campbell's previous "advocacy" impairing her ability "to provide objective evidence to the court is attenuated in the context of a reference . . . [because the] court is not acting in an adjudicative capacity, and the expert evidence stands only as legislative fact."¹⁰⁹

The more damning criticism of Campbell focused on the methodology behind her social science evidence, and related to whether she was properly qualified to conduct said research. The group "Stop Polygamy in Canada" criticized Campbell for her training in law. While Campbell has taught legal research courses, she has not taken a course on social science methodology. Training plays an important role in determining what expertise one can rightfully be said to possess. One's profession is not a barrier to knowledge of another field, but may be a barrier to expertise in another field if one is not trained in the methods of that discipline.

¹⁰³ *Ibid* at paras 3-6, 17.

¹⁰⁴ According to the witness list, she was cross-examined by 6 participants.

¹⁰⁵ Wendy Stueck, "Polygamy supporter's testimony allowed; Province loses to bid to prevent hearing from legal expert who interviewed Bountiful women," *The Globe and Mail* (1 December 2010) S3 (Factiva); James Keller, "Women of Bountiful not oppressed, court hears," *The Toronto Star* (2 December 2010) A14 (Factiva).

¹⁰⁶ *The Polygamy Reference*, *supra* note 2 at para 98.

¹⁰⁷ *Ibid* at para 99.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* at para 100.

The Supreme Court of British Columbia proved adept at dealing with these methodological concerns, and weighed the evidence accordingly. They recognized the contentiousness of Campbell's evidence and the importance of dealing with it in-depth, devoting an entire section of the judgment to her expertise.¹¹⁰ Campbell's research was described as insufficient both due to her lack of time in the area and the small sample size of her study; her literature review was accorded greater weight.¹¹¹ According to the court, her research conclusions were "sincere, but frankly somewhat naive in the context of the great weight of the evidence;" she seemed to take participant statements at face value.¹¹² This did not disqualify her statements from the record. Her comments on plural marriage and Mormonism were cited in the background sections, and further statements were discussed in the section one proportionality analysis determining whether the limit on rights was "demonstrably justified."¹¹³

While the court in *The Polygamy Reference* was not as strong in giving clear indications of how evidence before the court was weighed as the court in *Bedford*, how the evidence was used in the judgment provides a clear indication of the result of that process. Given the criticism of Campbell's social science evidence, it is likely that the court only accorded weight to Campbell's literature review. The lengthy treatment of her work would have spared appeal courts from having to assess the work *de novo*, had the decision been appealed, and eliminated the possibility of higher courts erroneously relying on questionable materials.

None of the other experts in the case were subject to a "sustained challenge" with respect to admissibility,¹¹⁴ but the court did face many challenges with respect to expert evidence, not the least of which was volume. A large number of expert witnesses were featured in the case, through written submissions and oral testimony. Expert affidavits were filed on a wide spectrum of issues, from the history and consequences of polygamy to polygamy in Islamic law.¹¹⁵ Many experts who tendered expert affidavits were subject to direct questioning or cross-examination in court, including an expert on the clinical psychological makeup of fundamentalist Mormon polygamy survivors.¹¹⁶

Despite the wide breadth of issues and expertise, the Supreme Court of British Columbia weighed and assessed the evidence with subsections devoted to nearly every

¹¹⁰ *Ibid* at paras 77-103.

¹¹¹ *Ibid* at paras 757, 596-600.

¹¹² *Ibid* at paras 752, 758.

¹¹³ *Ibid* at paras 264-272, 1312, 1327.

¹¹⁴ *Ibid* at para 77.

¹¹⁵ *Reference re Section 293, supra* note 102 (Evidence, John Witte Jr Affidavit; Evidence, Walter Scheidel Affidavit; Evidence, Mohammed Fadel Affidavit).

¹¹⁶ *Ibid* (Evidence, Lawrence D Beale Affidavit). According to the witness list, Dr. Beale was subject to both direct questioning and cross-examinations.

topic, including Islam and psychology.¹¹⁷ Often, specific experts were addressed in these sections; whole subsections of the section devoted to evolutionary psychology focused on Drs. Henrich and Shackleford respectively.¹¹⁸ As in *Bedford*, however, the case was structured with legal issues at the forefront. The subsection on Islam was situated in the “Historical Context” section and the subsection on evolutionary psychology in the “Alleged Harms” section.

The wide array of topics on which expert evidence was adduced in *The Polygamy Reference* may be a function of the fact that the law challenged in the reference was subject to “overbreadth” criticisms. The final judgment held the challenged law *was* overbroad to the extent that it allowed for the prosecution of minors.¹¹⁹ If the scope of the law was too wide, it is unsurprising that a conversation on it would need to attend to diverse topics. It is, however, just as likely that the wide array of expertise was required due to the rights conflicts at issue. Five *Charter* rights were explicitly at issue in the reference.¹²⁰ Each potential rights violation and justification thereof was subject to its own tests and burdens; expert evidence and social science data could play a role in each. Past references, such as the *Same Sex Marriage Reference*, also featured rights conflicts.¹²¹ It is likely that future references will, too. A strong evidentiary record can ensure that each claim is properly assessed. Appellate courts may be best able to weigh these competing claims, but they are not best placed to receive the wide array of evidence needed to determine if violations and justifications are properly established under each test. Trial level courts have the resources and expertise necessary to assess and weigh the evidence, even in a reference context.

VII. IN DEFENCE OF APPEAL COURT REFERENCES

Trial courts, then, are well placed to examine the admissibility of expert evidence in constitutional cases, tending towards an inclusive approach consistent with the understanding of constitutional litigation as a conversation on national values. They are able to weigh competing expert evidence in both non-reference and reference decisions, establish well-argued decisions, and produce strong evidentiary records for potential appeals. Arguments for beginning references in courts of appeal nonetheless remain. They will be repudiated here.

¹¹⁷ *The Polygamy Reference*, *supra* note 2 at paras 238-255, 493-576.

¹¹⁸ *Ibid* at paras 498-553.

¹¹⁹ *Ibid* at paras 1202-1203, 1356-1357, 1359-1360.

¹²⁰ *Ibid* at paras 1048-1098 (freedom of religion), 1099-1105 (freedom of expression), 1106-1127 (freedom of association), 1128-1226 (liberty and security of the person), 1227-1270 (equality).

¹²¹ *Reference re Same-Sex Marriage*, [2004] 3 SCR 698.

Judicial Economy

A strong criticism of trial level references focuses on judicial economy. While contentious cases are those best suited to the trial level reference, they are also most likely to be subject to appeal. All four cases discussed in this article were considered likely candidates for appeal all the way to the SCC from the outset. A reference can begin at a court of appeal as of right, and British Columbia's *Constitutional Question Act* does not forestall appeal to the Court of Appeal or the SCC.¹²² In references like *The Polygamy Reference*, where appeal was expected, one could nonetheless question whether the possibility of additional fact-finding at the trial level offsets the cost in time and judicial resources of adding an additional level of proceedings.

The concern about the use of judicial resources and too many experts at lower levels is a valid one, but there should be greater concern about judicial resources at higher levels. Creating a large evidentiary body at the lower court level is ideal for judicial economy at higher-level courts. While this may create additional concerns about deference to findings on expert opinions, economic arguments in contentious cases likely to go to the SCC are in favour of trial level determinations. As *Insite* demonstrates, this record provides valuable assistance to the SCC in their decision-making.

Furthermore, if all provinces were to adopt British Columbia's model, legislatures would be able to bring references either at a trial level or at the appeal court level.¹²³ The presence of "or" suggests that either venue is available. At the outset, it was commonly (erroneously) accepted that *The Polygamy Reference* was likely to go to the SCC and the establishment of an evidentiary record at the trial level was prioritized. Had the cost of beginning at the trial level been too prohibitive, the power to start at a higher level was available. Given "fresh evidence" jurisprudence outlined below, however, overcoming the presumption in favour of starting references at the appeal court level may be difficult.

Evidentiary Expertise

While both the purpose and form of constitutional litigation make broad admission criteria desirable for evidence in constitutional references, the unique

¹²² *CQA*, *supra* note 21, s 9(3). Under that Act, "[a]n appeal lies from the judgment in the manner of a judgment in an ordinary action."

¹²³ *Ibid*, s 1. This model gives government the power to "refer any matter to the Court of Appeal or to the Supreme Court."

characteristics of constitutional litigation might make admitting evidence at the appeal level more ideal.

Where the evidence being adduced primarily employs non-legal methodologies, the trial level decision-maker may not be better placed than an appeal judge to assess admissibility and weight. Trial judges have no more training than appeal judges in non-legal methodologies. Moreover, although trial judges do have extensive experience dealing with oral testimony, they have no special expertise in determining the merit of written arguments. Whether oral testimony is the best format of garnering evidence in constitutional cases is open to question. Experts' in-court actions and tone may not be important. Whether a gatekeeper needs to observe expert witnesses to determine their necessity or reliability is debatable. Peer review and other indicia of the value of expert opinion and social science data do not rely on in-person interaction. If courts were to employ an evidence gathering regime without examination and cross-examination, trial courts would be no better placed to read written submissions than appeal courts.

This argument, however, is at odds with: 1) our understanding of the value of written submissions wherein Brandeis briefs are viewed as having an "inherent unreliability;"¹²⁴ and 2) the aforementioned evidentiary rule requiring documents and other data to be validated by a witness who is at least theoretically compellable. The concerns that arose surrounding the expert witnesses Farley and Campbell discussed above also provide good reason why the mere submission of written data is likely insufficient for building an adequate evidentiary record.

It is true that there is no trial process in many constitutional cases, and therefore no oral evidence. When these cases go on to appeal, the appellate courts know that the first instance court received the evidence in affidavits with written cross-examination and was in no better position to assess that evidence than the appellate review courts. One should not, however, be too quick to dismiss the possibility that many cases will require in-court review to best assess the evidence.

Expansion of Appeal Court Evidentiary Powers

An argument could also be made in favour of retaining in-court testimony, but with an extension of courts of appeal's review power where they are courts of first instance in references. Appeal courts can hear fresh evidence in criminal matters in some circumstances.¹²⁵ A similar power could be extended to appeal courts hearing decisions initiated in provincial courts.

¹²⁴ Sterling, *supra* note 9 at 83.

¹²⁵ *Criminal Code*, RSC 1985, c C-46, s 683.

This argument shares a number of the critical concerns discussed above, including expertise and economic issues. Trial courts have more experience judging the admissibility of expert evidence and may have special expertise in weighing it. They thus have a better institutional memory for completing these tasks. In addition, economy of time is an issue; there are fewer courts of appeal and thus fewer opportunities for cases to be heard. The more time spent tendering evidence in any particular appeal level constitutional reference, the less time is available for other considerations (constitutional or otherwise). The result may be admitting fewer experts for the sake of time alone, resulting in a weakened evidentiary record and fewer opportunities for appeal judges to hone their evidence weighing skills.

Furthermore, as Lori Sterling points out in “Emerging Issues and Trends in Constitutional Evidence,” the leading test for the admissibility of fresh evidence, set out in *Palmer v The Queen*, explicitly opposes the notion of expanding appeal courts’ abilities to receive fresh evidence with respect to adjudicative or legislative facts; the general rule on when to submit evidence is “the earlier the better.”¹²⁶ While some critics suggest the standard for the admission of fresh evidence is “impossibly high,”¹²⁷ the advent of the trial level reference and, thus, an earlier opportunity to submit evidence, places the onus on opponents of the trial level reference to show why the presumption against early submission should be overturned. Given the potential problems with expertise and economy, there are compelling reasons for maintaining the presumption of early admittance.

Severance of Factual and Legal Findings

One may grant both that an evidentiary record is important for a proper determination of a constitutional question and that the trial court is best placed to establish an evidentiary record, but nonetheless challenge the suggestion that a trial court is best placed to use that record and answer the question being posed. In this schema, appeal courts would defer to the trial court’s factual findings, but would make *de novo* legal determinations about their implications. While severance of factual findings from legal determinations at the trial level may have its merits, it is unclear what value there would be in restricting trial courts from making findings on the legal matters at issue. Under the current appeal procedure, only appellate decisions are binding and appeal courts retain broad discretion to disagree with lower courts’ legal rulings, even where they defer to their factual findings. While the evidentiary record is

¹²⁶ Sterling, *supra* note 9 at 73.

¹²⁷ Jamal, *supra* note 9 at 13.

the most important gift trial courts in references can give to appeal courts, an initial answer to the question does not pose a significant problem for appeal courts. The opposite may be true; where a decision on admissibility and weight of evidence is written by the trial court, a further description of how the trial court views its implications can be useful both for further clarifying how the evidence is to be used and for delimiting possible approaches to the constitutional question that the court of appeal can consider.

Cost Benefits of Shortening the Appeal Process

The cost of a lengthy trial process in addition to appeals is a worthy consideration in opposition to trial level determinations. In a reference, however, one side will always have deep pockets: the government. Where an issue is contentious enough to warrant a reference, its resolution is identified as valuable enough to warrant government spending. While other litigants may face high costs, a framework where experts can also be advocates could help to diminish cost, assuming that the advocates would be willing to provide expert evidence *gratis*. The role of advocate/expert has been discussed above, and should be unproblematic, since advocates can be both advocates and unbiased experts in the court. Where opposing parties cannot fund their cases, interveners with deep pockets may be called upon to cover the costs of litigation.

VIII. CONCLUSION

Trial courts are best placed to hear and receive evidence, and have a strong track record of doing so in contentious constitutional cases where a strong evidentiary record is necessary. References, almost by definition, deal with contentious issues with legislative solutions of questionable constitutional validity. Often, a strong evidentiary record is necessary to determine these cases. Historically, facts have been difficult to prove in references due to reference initiation at appellate courts. The establishment of trial level references is a strong move towards ensuring that references feature strong expert evidence and social science data in support of arguments that reflect national values. Their creation is preferable to the extension of appellate courts' evidentiary powers for reasons related to both expertise and economics. Once created, trial level references should be the default reference format. This will ensure conformity with our understanding of both the purpose of a reference and the law of fresh evidence.