Epistemological Justice in Strategic Challenges To Legislation under Section 7 of the *Canadian Charter Of Rights And Freedoms*

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Abstract

This dissertation responds to two recent developments in the landscape of Canadian constitutional litigation. First, the advent of the *Canadian Charter of Rights and Freedoms* has invited a wave of strategic constitutional challenges directed at systemic social reform, including many cases aligned with progressive social justice goals. Second, the focus of *Charter* litigation has shifted from legal interpretation and argument to the consideration of extensive evidence pertaining to social and legislative facts. The recent successes of a number of strategic *Charter* challenges to legislation brought on behalf of marginalized communities and involving voluminous evidentiary records suggests that the above developments hold considerable promise for progressive social movements. And yet, critical scholars and activists have persistently questioned the potential of constitutional litigation, and law generally, to effect progressive social change, pointing to a tension between the pursuit of positive legal outcomes and the broader transformation of social power relations.

Using a case study of *Bedford v Canada (AG),* along with interviews of constitutional litigators and judges, this project explores an under-theorized facet of the above-noted tension by asking about the epistemological implications of the wide-ranging fact-finding processes that have come to characterize progressive constitutional challenges to legislation, especially under section 7 of the *Charter*. This inquiry is premised on the contention that the realization of social justice depends, at least in part, on the realization of what I call "epistemological justice", defined as the just treatment of knowledge in legal processes. Drawing on the work of feminist epistemologists and other critical thinkers, the account of epistemological justice that I develop in this project centers on a commitment to fully hearing and giving due weight to the experiential knowledge of marginalized people who are directly affected by a given law or policy in decision-making processes. My analysis then asks whether the progressive promise of strategic *Charter* litigation is borne out at the level of epistemological justice in this sense. Ultimately, my findings suggest that there is reason to doubt this proposition, and thus further reason to doubt the value of strategic *Charter* litigation as a tool for social justice.

Dedication

for Carmen

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Preface: Constructing Knowledge About Knowledge

This dissertation is about the construction and treatment of knowledge in litigation. It is also, like all dissertations, itself a project of knowledge construction, arising from a particular (albeit not static) sociopolitical location. Driven as the project is by critical feminist commitments, this dimension of the act of research and writing cannot be ignored.

In her article "Speaking the Truth About Prostitution", May-Len Skilbrei urges feminist scholars to scrutinize not only the truth claims of others, but also our own—to "critically engage with the question of what is shaken up and what is silenced by how we see, ask, think, and write."[1] Skilbrei's call raises a host of questions that underlie and run parallel to the research questions at issue in this project. What experiences and interests have motivated me to pursue this research, and how have they shaped the process and the result? How have I mobilized, framed, and evaluated the knowledge of others? Whose voices have I centered, and to whom have I attributed expertise? What ideas about "good" knowledge have I perpetuated or challenged, in what ways? And what kind of authority have I sought and obtained through the completion of a PhD dissertation in law?

These are the questions I have grappled with under the surface of this work. In the end, I find myself able to answer some of them in a more satisfactory manner than others. Here is what I can say. This project is normatively driven by a commitment to the pursuit of

[1] May-Len Skilbrei, "Speaking the Truth About Prostitution" [Skilbrei, "Speaking the Truth"] in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (London; Routledge, 2017) at 44.

social justice and equality, grounded in feminist politics. It is at least partially informed my own lived experience as a woman—in particular by my struggle to believe in and assert my authority as a knower. At the same time, it is also limited by my experience as a highly privileged and formally educated person, who has had the benefit of great social and institutional support. There are many things that are difficult for me to know, or know well, as a result.

In this project, I have tried to bolster marginalized feminist and experiential knowledge, though I have also privileged the already-dominant voices of lawyers and judges in some respects. I have tried to challenge mainstream ideas about epistemic authority that value formal training, objectivity, and disinterestedness over direct engagement, experience, and contextualized knowledge, even while sometimes perpetuating those ideas myself. And I have made every effort to treat the words and thoughts of others carefully and fairly (especially keeping in mind the loss of context that occurs when spoken words are reduced to writing), even as I construct critiques for my own purposes.

I offer this honest accounting not to disparage my efforts, or the contribution I have made with this dissertation. Rather, I do so in the spirit of an approach to scholarship that accords with my own epistemological beliefs, developed and brought to fruition through this work. There is no transcendent position in knowledge-making. We are all limited, largely ignorant, and often conflicted. We all begin from somewhere, and we continue to be somewhere as we grapple with what we are doing.

Chapter 1: Introduction

1.1 INTRODUCTION

The landscape of Canadian constitutional litigation has been transformed by two notable developments in recent years. First, the advent of the *Canadian Charter of Rights and Freedoms*[1] has invited a wave of strategic constitutional challenges directed at reforming social policy on what are often politically contentious matters. In their progressive form, such challenges strive towards a vision of social justice premised on a more equitable distribution of material resources and sociopolitical power, often by asserting the rights of socially marginalized people.[2] Second, the focus of *Charter* litigation has shifted from legal interpretation and argument to social and legislative fact-finding—a shift reflected in the proliferation of evidence in recent strategic *Charter* cases.

In one sense, these developments appear to hold significant promise for the progressive social causes with which this project is allied. In the last decade, strategic *Charter* challenges supported by voluminous evidentiary records have yielded favourable court rulings for marginalized communities on issues ranging from prostitution[3] to supervised injection sites[4] to medically assisted dying.[5] On the other hand, critical scholars and activists have persistently questioned the potential of litigation, and law generally, to

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[2] By "socially marginalized people", I mean people who, as a result of their identification with a given social group or groups, have been denied full recognition and participation in society on equal terms with others. This denial may result from material deprivations and/or discriminatory attitudes and practices, often stemming from historical oppression.
[3] *Canada (AG) v Bedford,* 2013 SCC 72 [*Bedford* SCC].
[4] *Canada (AG) v PHS Community Services Society v Canada (AG)*, 2011 SCC 44 [*Insite* SCC].
[5] *Canada (AG) v Carter*, 2015 SCC 5 [*Carter* SCC].

advance social justice in a meaningful way. As I elaborate upon below, such critiques point to a tension between the pursuit of positive legal outcomes and the broader transformation of social power relations.

In this dissertation, I explore a facet of this tension that I believe merits further examination in light of the current landscape of strategic *Charter* litigation. Critical scholars have thoroughly analyzed the doctrinal, institutional, and practical limitations of constitutional litigation as a tool for social change, as well as its fraught relationship with social movement politics. However, little attention has been paid to the epistemological implications of the wide-ranging fact-finding processes that have come to characterize this area of litigation. What kinds of evidence, and what ideas about knowledge, have enabled recent *Charter* victories for marginalized groups? Is the progressive promise of recent strategic *Charter* litigation borne out at the level of epistemology? These questions, in my view, are importantly linked to broader concerns about social justice and equality. Indeed, it is my contention that the realization of social justice depends, at least in part, on the realization of what I call "epistemological justice".

"Epistemological justice" refers to an aspect of justice that is primarily concerned not with legal outcomes or their social consequences, but with the just treatment of knowledge in legal processes. The particular account of epistemological justice that I offer in this project is rooted in feminist theory—specifically, the work of feminist epistemologists, which I describe more fully in Chapter 3. At its heart, though, is an insistence on fully hearing and giving due weight to the experiential knowledge of those

directly affected by a given law or policy in decision-making processes, particularly those who have been systemically oppressed, marginalized, and/or discriminated against in Canadian society. While grounded in a particular literature with its own distinctive genealogy, this conception of epistemological justice is closely aligned with insights from a wide range of critical epistemologies that have sought to challenge dominant approaches to knowledge in the Western world.

The above body of thought gives rise to a set of political-epistemological commitments—most notably, the commitment to centering experiential knowledge—that I refer to broadly in this work as "progressive". I use this term in order to highlight the importance of a certain posture towards knowledge as an indispensable component of progressive social justice projects. In other words, I contend that the realization of a progressive vision of social justice entails certain epistemological commitments, which I also label as "progressive" in order to emphasize the link. This is not to suggest that the value of experiential knowledge within this framework depends on whether it advances politically progressive views. To the contrary, the set of epistemological commitments I am talking about emphasizes the importance, within legal and other decision-making processes, of hearing and taking seriously the experiential knowledge of directly affected people in all its diversity. That said, the importance ascribed to experiential knowledge within feminist and other critical epistemologies is undoubtedly linked to its role in driving progressive social movements, as I discuss further in Chapter 3.

We often make and hear such commitments to the centering of experiential knowledge from lawyers, scholars, and activists under the banner of social justice. Take, for example, the following quotations from two public interest litigators whom I interviewed for this project:

> the people who are most adversely affected by the laws have expertise in what the laws' effects are… […] They are experts in understanding that, and they can give both direct stories and accounts of how that happens, and views about how that works.[6]

> Those people [experiential witnesses in strategic *Charter* litigation] are the experts on their lives, and what's happened in their lives. And sometimes they are the experts on what's happened in their area or their neighborhood or their community. Nobody can speak better to it than they can.[7]

In posing the question of epistemological justice, I ask how commitments such as these fare in strategic *Charter* litigation directed at progressive social change. Of course, not everyone engaged in litigation of this sort consciously adopts the kinds of epistemological commitments exemplified above. My claim is not that all progressive *Charter* challengers actually hold progressive epistemological commitments, but rather that such commitments are essential to the social justice campaigns they are pursuing, whether they realize it or not. Examining the fate of these commitments in strategic

[6] Interview 12 (27 September 2018).
[7] Interview 8 (14 September 2018).

Charter litigation is thus essential to understanding the extent to which such litigation can achieve its social justice objectives.

I approach this inquiry via two research methods: 1) an in-depth case study of the record, submissions, and reasons issued in *Bedford v Canada (AG)*,[8] a recent strategic *Charter* challenge to Canada's former prostitution laws; and 2) semi-structured interviews with constitutional litigators and judges involved in *Bedford* and other strategic *Charter* litigation.[9] Drawing on literature in feminist epistemology, the case study traces the suppression, as well as the decontextualization and instrumentalization, of progressive epistemological commitments through the fact-finding process in *Bedford*. The interviews corroborate and contextualize the findings of the case study. They also shed light on aspects of legal process that impede epistemological justice in strategic *Charter* litigation more generally, including the myriad practical barriers to constructing a robust evidentiary record centered on experiential voices, and the long shadow cast by doctrinal law and judicial common sense over the fact-finding process. Ultimately, my analysis leads me to suggest that there is reason to doubt whether the progressive promise of strategic *Charter* litigation is borne out at the level of epistemological justice. This in turn suggests further reason to doubt the extent to which such litigation can contribute to the realization of social justice.

In this Introduction, I provide the background for the problem driving my research, explain my methodological approach, and provide an overview of the dissertation as a

[8] *Bedford v Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in *Bedford* SCC, *supra* note 3.
[9] Some interviewees consented to being directly identified in this project, and are thus referred to by name. The rest are referred to anonymously.

whole. I begin, in the following section, by expanding upon the two major developments in constitutional litigation noted above. In doing so, I underscore the important questions these developments raise for critical scholars and advocates committed to the pursuit of social justice, and situate those questions within the existing literature on the relationship between law and social change.

1.2 THE CONTEXT

1.2.1 Critiques of Constitutional Litigation as a Tool for Social Justice

This project is concerned with strategic *Charter* litigation as a form of progressive public interest litigation used to advance broad social justice goals. In a general sense, the descriptor "public interest" signals the concern of members of the public regarding issues that speak to deeply held social, political, and moral values. In this project, I use "public interest litigation" more specifically to describe what Abram Chayes first referred to as "public law litigation",[10] and what is often called "test case litigation" or "impact litigation"—cases that seek to advance systemic social change by setting new legal precedents. I am particularly interested in efforts to empower socially marginalized people by challenging laws that encroach upon their rights and interests.

The enactment of the *Charter* in 1982 laid a fertile ground for public interest litigation in both of the senses described above. As the Supreme Court of Canada (SCC) remarked not long after the *Charter*'s implementation, "Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian

[10] Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harvard Law Review 1281.

society."[11] While important to all Canadians, *Charter* rights are often thought to hold particular salience for minorities and other marginalized groups. In theory, the *Charter* provides a legal avenue for members of such groups to challenge majoritarian legislation and state actions that ignore or trample upon their constitutional rights.[12]

While the implementation of the *Charter* has catalyzed a great deal of public interest litigation, it is important to note that not all cases involving the *Charter* fall into this category. Often the *Charter* is invoked to defend or advance the interests of individuals, without the aspiration to effect broader social change. This is often the case where the constitutionality of state conduct against a particular individual or entity is at issue. Such cases can, of course, have important consequences for other similarly situated individuals down the line. As Lorne Sossin points out, the line between individual and systemic *Charter* litigation is somewhat artificial.[13] Nevertheless, the need to carefully scope my project has led me to hone in on *Charter* challenges that are intentionally broad in ambition—directed at something akin to what Gerald Rosenberg refers to as "significant social reform".[14] It is for this reason that I focus on challenges to legislation, which attack statutory provisions or regimes on the basis of their unconstitutional effects on entire classes of people (albeit framed in terms of individual rights). Within this subset of *Charter* litigation, I direct my attention specifically to cases brought under s.7 of the *Charter,* which has served as a recent hot bed for litigation on contentious social issues

[11] *Mackay v Manitoba*, [1989] SCJ No 88 at para 8 [*Mackay*].
[12] In the American context, Gerald Rosenberg presents this as the "Dynamic Court" view, according to which "courts offer the best hope to poor, powerless, and unorganized groups". Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed (Chicago: University of Chicago Press, 2008) at 24.
[13] Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid" (2007) 40 UBC Law Rev 727 at 727.
[14] Rosenberg, *supra* note 12 at 4.

driven by capacious evidentiary records. Finally, while the *Charter* has often been invoked to defend already-powerful actors or for other regressive ends,[15] I focus on cases that seek to advance social justice for socially marginalized groups.

The litigation that I am looking at, then, is strategic, *Charter*-based, and directed towards progressive, systemic legal and social change—what I refer to throughout this dissertation as "strategic *Charter* litigation". Strategic *Charter* litigation brought on behalf of marginalized people is often lauded as the highest form of progressive legal work in Canada, not unlike the idealized view of constitutional test case litigation in the United States.[16] In the eyes of many, cases like *Bedford* are groundbreaking, holding the potential to shift social norms and relationships in significant ways, and in doing so, to realize the law's loftiest ideals.[17] Where public interest litigators have succeeded in achieving favourable outcomes under the *Charter*, their "wins" have been widely celebrated by progressive lawyers, activists, and directly affected community members alike. *Bedford* is a case in point; the success of the challenge was, at least initially, widely lauded as a progressive victory for sex workers' rights.

On the other hand, some communities have long been wary of engaging law and lawyers

[15] Andrew Petter, *The Politics of the Charter: the Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 7, 12 [Petter, *Politics of the Charter*]. See also *infra* notes 34 to 36.
[16] Austin Sarat & Stuart A Scheingold, "What Cause Lawyers Do For, and To, Social Movements: An Introduction" [Sarat & Scheingold, "Introduction"] in Austin Sarat & Stuart A Scheingold, eds, *Cause Lawyers and Social Movements* (Stanford, CA: Stanford Law and Politics, 2006) at 1 [Sarat & Scheingold, *Cause Lawyers*]; Gerald P López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Boulder: Westview Press, 1992) at 12-13 and 24 [López, *Rebellious Lawyering*].
[17] Allan Hutchinson, in the late 1980s, described the perceived importance of the courts, particularly following the advent of the *Charter*, as the "overwhelming orthodoxy" in Canada. Allan C Hutchinson, "Charter Litigation and Social Change: Legal Battles and Social Wars" in Robert J Sharpe, ed, *Charter litigation* (Toronto: Butterworths, 1987) at 358.

to advance their cause.[18] Their suspicion is shared by critical legal scholars, who have cast doubt on the effectiveness of litigation as a tool for social change. This is not to suggest that public interest litigation is always misguided and hopeless; many of the most critical scholars still recognize that litigation likely has some role to play in broader struggles for social justice.[19] They emphasize, however, that that role is (a) highly dependent on the sociopolitical context; and (b) generally quite limited.[20]

Much of this literature finds roots in the critical legal studies (CLS) movement that originated in the United States in the 1970s. CLS scholars advanced a view of law as inseparable from the prevailing sociopolitical order and thus impotent as a means to transform it.[21] Some have tried to nuance this view, pointing to the opportunities that law affords to alter existing social arrangements and norms, even as it upholds the status quo in a more general sense. [22] Nevertheless, the CLS movement has left a legacy of deep skepticism towards legal solutions to sociopolitical problems among a certain subset of legal scholars (albeit not the mainstream). Within the broad domain of this movement,

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[18] López, *Rebellious Lawyering*, *supra* note 16 at 47.
[19] See for example: Tomiko Brown-Nagin, "Elites, Social Movements, and the Law: The Case of Affirmative Action" (2005) 105:5 Columbia Law Review 1436 at 1501 (conceding that litigation can help to raise the political consciousness of some communities); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 56 (noting that rights can be an effective strategy for progressive social change despite the limitations of liberal discourse); Hutchinson, *supra* note 17 at 359 (noting that constitutional litigation may be part of a broader social change strategy under certain conditions).
[20] See for example: Bakan, *ibid* at 9 (arguing for the need to examine how social context influences the operation of the *Charter*); Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17:3 Journal of Law and Society 309 at 319, 326; Sarat & Scheingold, "Introduction", *supra* note 16 at 4, 30; Rosenberg, *supra* note 12 at 31.
[21] For a helpful account of CLS as it relates to the relationship between law and social change, see Scott L Cummings & Ingrid V Eagly. "A Critical Reflection on Law and Organizing" (2001) 48:3 UCLA Law Review 443 at 451-454 [Cummings & Eagly, "Law and Organizing"]. See also Hutchinson, *supra* note 17, especially at 360-361, 380.
[22] Hunt, *supra* note 20 at 313-314, 320; Michael McCann, "Law and Social Movements," in Austin Sarat, ed, *The Blackwell Companion to Law and Society* (London: Blackwell Publishing, 2004) at 519.

feminist legal scholars in particular have pointed to the law's well-documented role in perpetuating historical inequalities as a reason to doubt its capacity to effect progressive social change.[23]

Building on this critical orientation, sociolegal scholars have extensively scrutinized the relationship between law and social change, drawing on theoretical, empirical, and practice-informed approaches. One of the most comprehensive empirical studies that has come out of the United States is Gerald Rosenberg's *The Hollow Hope,* in which Rosenberg draws on data from multiple case studies to find that American courts can "*almost never*" effect major social reform.[24] In his book *Just Words: Constitutional Rights and Social Wrongs*, Joel Bakan casts similar doubt on the power of the *Charter* in the Canadian context, arguing that its progressive potential has been thwarted by the institutional and social conditions in which it operates.[25] Andrew Petter goes further, suggesting in his early work that the *Charter* is an inherently regressive tool most likely to work against those with less social power,[26] and later concluding that "the *Charter*'s most powerful political influences have been its tendencies to legalize political discourse and to legitimize neo-conservative policies."[27] The concerns raised by these and other scholars about the use of constitutional litigation as a means to advance social justice goals can be helpfully organized along three general themes: 1) the courts' limited

[23] See for example: Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 5; Katharine T Bartlett, "Feminist Legal Methods" (1989) 103 Harv L Rev 829 at 830-831; Mary Heath & Ngaire Naffine, "Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law Reform" (1994) 3 Austl Feminist LJ 30 at 31.
[24] Rosenberg, *supra* note 12 at 338.
[25] Bakan, *supra* note 19 at 3.
[26] Petter, *Politics of the Charter, supra* note 15 at 7, referring to Andrew Petter, "The Politics of the Charter" (1986) Sup Ct L Rev 473.
[27] *Ibid* at 13.

receptivity to progressive social causes; 2) the failure of legal victories to produce meaningful social change; and 3) the detrimental effects of litigation-based strategies on client communities and broader social movements, as well as on democratic institutions. I expand briefly on each theme as it relates to my project below.

The Courts' Limited Receptivity to Progressive Social Causes

The first theme underscores the jurisprudential and institutional limitations of courts in responding to progressive social justice campaigns. This accords roughly with the first of three constraints on courts identified by Rosenberg in the *Hollow Hope*—what he describes as "the limited nature of constitutional rights".[28] Bakan makes a similar argument from a Canadian perspective. He explains that courts are steeped in a liberal rights discourse, "presenting government regulation as the primary threat to human liberty and equality, and individuals as abstract equals unaffected by structural forms of domination and exploitation".[29] These ideas, which Bakan refers to as "antistatism" and "atomism",[30] are deeply ingrained in Canadian jurisprudence, narrowing the progressive potential of the *Charter*.[31]

Antistatism imagines rights primarily as a shield against government action, and thereby limits courts' willingness to entertain positive rights claims that call upon governments to actively redistribute resources.[32] Not only does this understanding of rights limit the

[28] Rosenberg, *supra* note 12 at 10.
[29] Bakan, *supra* note 19 at 4. See also Hunt, *supra* note 20 at 315.
[30] Bakan, *ibid* at 47.
[31] *Ibid* at 4, 47-51 and 60. See also Allan C Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38:3 U Toronto LJ 278 [Hutchinson & Petter, "Liberal Lie"].
[32] Bakan, *supra* note 19 at 47-51; Petter, *Politics of the Charter, supra* note 15 at 19; Hutchinson & Petter,

scope of progressive claims and remedies available under the *Charter* (and under the American Constitution),[33] it also resonates with right-wing anti-government ideology, providing opportunities for regressive claims to succeed in court.[34] Indeed, courts in Canada and the United States have often used their powers of constitutional review to strike down laws that aim to protect vulnerable groups or otherwise promote more equitable social relations.[35] And, as Austin Sarat and Stuart Scheingold observe (from an American perspective), cause lawyers on the right have emulated the rights-based strategies of the left in ways that are "analytically indistinguishable".[36]

Atomism frames complex social conflicts as discrete disputes between particular individuals or groups, precluding judicial scrutiny of the broader social context and structural inequalities at play.[37] As a result, victories for public interest litigants under the *Charter* tend to be narrowly tailored to the particular parties.[38] What is more, because discrete two-party disputes do not present the full range of interests at play in *Charter* cases, a victory for one marginalized group may have unintended negative effects on others.[39] Similarly, case law that signals a progressive win in one context may be applied

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"Liberal Lie", *ibid* at 283.
[33] Rosenberg, *supra* note 12 at 10-11.
[34] Bakan, *supra* note 19 at 4; Hutchinson & Petter, "Liberal Lie", *supra* note 31 at 279, 283-284.
[35] Bakan, *ibid* at 87. In the Canadian context, see for example: *RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199 (striking down legislation banning the advertising of tobacco products as an unjustified violation of freedom of expression); *Chaouilli v Quebec,* 2005 SCC 35 (finding that a Quebec statute prohibiting private health insurance violated s.1 of the Quebec *Charter of Human Rights and Freedoms*).
[36] Sarat & Scheingold, "Introduction", *supra* note 16 at 8. See for example Kevin R den Dulk, "In Legal Culture but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization" in Sarat & Scheingold, *Cause Lawyers, supra* note 16 (showing how evangelical cause lawyers appropriated progressive rights discourse).
[37] Bakan, *supra* note 19 at 51-53; Rosenberg, *supra* note 12 at 12; Hunt, *supra* note 20 at 317-318.
[38] Bakan, *ibid* at 57.
[39] *Ibid* at 59. Raji Mangat, a public interest litigator interviewed for this dissertation research, made a similar point regarding the risk of relying exclusively on the firsthand experience of a particular individual or group in litigation: Interview 3 (14 September 2016).

regressively in another.[40]

Canadian courts have resisted atomism to some degree by hearing from a wide array of interveners in *Charter* cases,[41] emphasizing the importance of social context,[42] and showing deference towards legislation that protects vulnerable groups.[43] The recent increase in attention to social and legislative facts in *Charter* litigation suggests a further loosening of the atomistic framework of legal liberalism. However, concerns about institutional legitimacy limit how far courts can move in this direction; as Bakan argues, the fiction of a line between law and politics must be maintained to justify constitutional review by unelected officials.[44]

In addition to the influence of liberal rights discourse, Bakan points to the conservative nature of the judiciary as a further limiting factor in the pursuit of progressive social change through the courts.[45] Not only do judges reflect a highly privileged and relatively homogenous demographic,[46] they are educated, socialized and selected in ways that tend to shore up their support for the status quo.[47] "Judges", as Bakan puts it, "operate at or near the centres of social, economic, and political power and within an institutional

[40] Hutchinson, *supra* note 17 at 374.
[41] Daniel Sheppard, "Just Going Through the Motions: The Supreme Court, Interest Groups, and the Performance of Intervention" (2018) 82 SCLR (2d) 179 at 181.
[42] See for example: *MacKay, supra* note 11 at paras 8-9 and 20; *Edmonton Journal v Alberta (Attorney General),* [1989] 2 SCR 1326 at paras 51-52. See also Bakan, *supra* note 19 at 55 (recognizing the SCC's consideration of social context in equality rights litigation).
[43] Bakan, *ibid* at 98. See for example: *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927; *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877 at para 90.
[44] Bakan, *ibid* at 4.
[45] *Ibid* at 31-33, 103-113.
[46] *Ibid* at 104.
[47] *Ibid* at 103-104.

framework committed to perpetuating the existing social order."[48] This, combined with ever-present concerns about legitimacy, results in a judicial posture to social reform that is, at best, incremental. As Tomiko Brown-Nagin observes, even when courts rule in favour of public interest litigants, they tend to be more receptive to the centrist arguments advanced by elites than to the more radical claims of grassroots actors.[49] The social and institutional location of judges, then, further circumscribes the progressive potential of litigation as a tool for social change.

The literature discussed above focuses on how legal liberalism and judicial conservatism limit courts' willingness to entertain broad public interest claims aimed at progressive social change. As I argue in this dissertation, however, the same forces also constrain courts' receptivity to progressive epistemological norms and commitments in legal processes of proof. This too limits the potential of litigation as a tool for social justice. Just as liberalism leads courts to view individuals as abstract, independent, and autonomous equals, so too—as I will show—does it lead them to understand knowledge in terms of abstract propositions, the truth of which are discovered by autonomous, interchangeable knowers whose social identities and relationships are irrelevant to what they know.[50] And, just as judges tend to favour the status quo in terms of social ordering, so too, my research suggests, do they favour mainstream ideas about knowledge over more progressive views that challenge entrenched epistemic hierarchies.

[48] *Ibid* at 31.
[49] Brown-Nagin, *supra* note 19 at 1510.
[50] See Chapter 3 at 3.2.

The Failure of Legal Victories to Produce Meaningful Social Change

Beyond the courts' limited receptivity to progressive social justice claims, critics have cast doubt upon the extent to which court "wins" translate into real-world social change.[51] In part, this can be traced back to the liberal underpinning of *Charter* rights discussed in the previous section, which tends to preclude the kinds of broad redistributive remedies that meaningful social change arguably requires. In addition to the limited scope of remedies is the challenge of enforcement. As Rosenberg emphasizes, courts lack the power to execute or enforce their decisions.[52] Implementation, especially in cases where institutional reform is required,[53] depends on support from the other branches of government, which are in turn often beholden to public opinion.[54] Courts may thus only be able to effect meaningful social change where the cause at issue already benefits from widespread popular support.[55] The American civil rights campaign of the mid-20th century is often cited as a paradigmatic example; while the landmark 1954 Supreme Court decision in *Brown v Board of Education of Topeka*[56] put an end to racial segregation in education on the books, meaningful change on the ground did not occur until a decade later, when the 1964 *Civil Rights Act* threatened to cut off federal funding to schools that engaged in racial discrimination.[57]

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[51] Rosenberg, *supra* note 12 at 21; Bakan, *supra* note 19 at 57 (noting that rights won in court may be impossible to exercise in practice due to social, financial, and other barriers). As Hutchinson puts it, "the winning of the litigation battle is not always a reliable guide to the ultimate victor in the broader social war" (*supra* note 17 at 368-369).
[52] Rosenberg, *ibid* at 15. See also Hutchinson, *ibid* at 370.
[53] Rosenberg, *ibid* at 33. See also: Scott L Cummings, "Law and Social Movements: Reimagining the Progressive Canon" (2018) 2018:3 Wis L Rev 441 at 497 [Cummings, "Reimagining"]; Hutchinson, *ibid* at 379.
[54] Rosenberg, *ibid* at 16.
[55] *Ibid* at 16. Cummings points to the fight for marriage equality in the United States as an example of how the courts may serve to consolidate a shift in public opinion ("Reimagining", *supra* note 53 at 471).
[56] *Brown v Board of Education of Topeka,* 347 US 483 [*Brown*].
[57] Cummings, "Reimagining", *supra* note 53 at 446-447; Rosenberg, *supra* note 12 at 46-47.

Of course, direct implementation of court decisions is not the only way for litigation to effect social change. As Rosenberg notes, courts may also exert influence through "an *extra-judicial* path that invokes the court powers of persuasion, legitimacy, and the ability to give salience to issues."[58] This indirect form of influence is the focus of legal mobilization scholars such as Michael McCann, who argue that, while litigation rarely produces significant social change on its own, it can "provide a useful resource for social movement building and strategic political action".[59] In addition to the potential tactical advantages that can be wrought from litigation, such as compelling governments to disclose valuable information, legal mobilization scholars emphasize the symbolic power of favourable court decisions, and of legal rights discourse generally.[60]

Many scholars have critiqued such views as overly optimistic. While most concede that litigation can be helpful as a tool for political consciousness-raising, they point out that the general public pays little attention to the courts, limiting the symbolic import of their rulings.[61] Moreover, "symbolic victories may be mistaken for substantive ones",[62] appeasing activists and decreasing ongoing political mobilization efforts, as occurred

[58] Rosenberg, *ibid* at 7. Similarly, Sarat & Scheingold claim that "law can serve as a useful site for articulating and advancing alternative visions of the good" ("Introduction", *supra* note 16 at 9).
[59] Michael McCann, "Legal Mobilization and Social Reform Movements: Notes on Theory and its Application" in Michael McCann, ed, *Law and Social Movements* (Burlington, VT: Ashgate, 2006) at 4.
[60] See for example: Mark Galanter, "The Radiating Effects of Courts" in Keith O Boyum & Lynn M Mather, eds, *Empirical Theories About Courts* (New Orleans, Louisiana: Quid Pro Books, 2015); Michael W McCann, *Rights at Work: Pay Equity Reform and The Politics Of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Lucie E White, "Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak" (1988) 16:4 New York University Review of Law & Social Change 535 [White, "Mobilization"]; Stuart A Scheingold, *The Politics of Rights : Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974). Brown-Nagin provides a helpful summary of this literature (*supra* note 19 at 1498-1500). Note that Alan Hunt warns against conflating rights with litigation, arguing that litigation is but one tactic under the broad umbrella of rights-based political strategy (*supra* note 20 at 317).
[61] Rosenberg, *supra* note 12 at 338; Bakan, *supra* note 19 at 145; Hutchinson, *supra* note 17 at 375-378.
[62] Rosenberg, *ibid* at 340. Hutchinson makes the same point (*ibid* at 370).

following the historic 1973 Supreme Court rulings striking down restrictive abortion laws in the United States.[63] What is more, historical experience suggests that major victories in court often trigger a strong backlash from political opponents.[64]

However, there is another reason why courtroom victories may fail at a symbolic level to which legal mobilization scholars and their critics have not paid adequate attention. Litigation carries symbolic and discursive import not only for what courts say about rights, but for how courts and lawyers treat evidence, facts, and knowledge in legal fact-finding processes. This includes evaluations of evidence and findings of fact that appear in court rulings, but also the construction and framing of evidence on the record and in argument. My research in this dissertation suggests that even when progressive *Charter* victories seem to offer symbolically valuable rights rhetoric, the discursive effects of the underlying fact-finding process may be much less positive.

Given that evidentiary records and processes of proof are far less visible to the public than reported court decisions, it may be argued that their influence on public discourse is even more tenuous and thus unimportant. Still, the treatment of evidence by lawyers and courts does matter a great deal to those involved in litigation. Indeed, for witnesses who must directly bear this treatment, it may matter as much as, or even more than, the court's ultimate ruling. Moreover, the approach taken to evidence, facts, and knowledge in a given case has knock-on effects on the formulation of litigation strategies and the finding of facts going forward, influencing how truth claims will be constructed, and whose

[63] Rosenberg, *ibid* at 339.
[64] *Ibid* at 341-342; Sarat & Scheingold, "Introduction", *supra* note 16 at 12; Cummings, "Reimagining", *supra* note 53 at 447 (discussing the backlash against *Brown* in the United States).

knowledge will be deemed to matter, in future cases. Indeed, processes of proof often make up the bulk of litigation, and play a determinative role in the decisions made by courts. In my view, the power of these processes, combined with their relative invisibility, makes the assumptions that shape them all the more insidious and in need of scrutiny. In this dissertation, I examine the nature of these assumptions and their effects as they relate to the social justice goals of progressive public interest litigators under the *Charter.*

The Detrimental Effects of Litigation on Client Communities and Social Movements

Finally, engaging in litigation may have a multiplicity of detrimental effects on justice-seeking communities and social movements, as well as on democratic institutions. Perhaps most apparent is the risk of a loss in court, which, in addition to denying a remedy to the client community, can set a bad precedent for related social movements. Other detrimental effects arise regardless of the legal outcome of a case. For one thing, litigation is costly, and tends to divert resources away from other political strategies that may be more effective.[65] Some have argued that *Charter* litigation in particular has encouraged the legalization of politics at the expense of more robust engagement in democratic processes. It has thereby worked against progressive social movements and the democratic institutions that are arguably better positioned to support them.[66]

The atomistic form of lawsuits may also exacerbate the challenge of representing the

[65] Cummings & Eagly, "Law and Organizing", *supra* note 21 at 455; Rosenberg, *supra* note 12 at 12, 339.
[66] See for example: Andrew Petter, "Legalize This: The Chartering of Canadian Politics" in Petter, *Politics of the Charter*, *supra* note 15; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto, ON: Thompson Educational Publishing, 1994).

diverse views, interests, and experiences within a collective, and thereby aggravate internal movement conflicts.[67] As Cummings observes, public interest litigators faced with this challenge have "often made choices that suppressed marginalized voices and promoted incremental reform".[68] The institutional limitations of courts and the conservative nature of the judiciary undoubtedly contribute to such strategic decision-making.

The power that lawyers and judges come to exert over social movements through litigation points to another problem highlighted by critical scholars: the reproduction of subordination in relationships between lawyers and other movement participants (including but not limited to client communities).[69] As Brown-Nagin explains: "Professionals are accustomed to hierarchy, expect to occupy leadership roles, and expect to utilize their expertise; their perspectives can clash with those of lower-status participants in a social movement."[70] Take the example of *Brown* and the movement to desegregate schools in the United States. In his critique of this movement, Derek Bell argues that civil rights litigators intent on enforcing school desegregation in the years that followed *Brown* paid insufficient attention to how their efforts affected, sometimes negatively, the primary goal of many Black communities: to increase the quality of

[67] Cummings, "Reimagining", *supra* note 53 at 451.
[68] *Ibid* at 451. See also Brown-Nagin, *supra* note 19 at 1474-1475 (describing how affirmative action litigation in the United States reflects the privileging of elite interests within the movement for racial justice).
[69] Sandra R Levitsky, "To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements" in Sarat & Scheingold, *Cause Lawyers, supra* note 16; Cummings & Eagly, "Law and Organizing", *supra* note 21 at 456, 458; López, *Rebellious Lawerying*, *supra* note 16 at 48-51; Lucie E White, "Goldberg v. Kelly on the Paradox of Lawyering for the Poor Symposium: The Legacy of Goldberg v. Kelly: A Twenty Year Perspective" (1990) 56:3 Brook L Rev 861 at 861 [White, "Goldberg"]; White, "Mobilization", *supra* note 60 at 540-544.
[70] Brown-Nagin, *supra* note 19 at 1507.

education available to their children.[71] In other words, these litigators failed to see how their efforts to pursue a particular vision of racial justice in a particular manner worked against equality in other ways that were important to those they purported to represent.

One of the leading thinkers to address the power dynamics between lawyers and their clients is Gerald Lopez. Lopez critiques what he refers to as the "regnant idea" of public interest lawyering, according to which lawyers view themselves as preeminent experts who formally represent and solve problems *for* subordinated people, primarily through litigation.[72] He argues instead for an alternative ideal of "rebellious lawyering against subordination", wherein lawyers work *with* communities and other professional and lay allies, learning from each other and solving problems together.[73] Others have espoused similar ideals through concepts such as "community-based lawyering",[74] client "empowerment",[75] and "law and organizing".[76] To the extent that these approaches recognize and seek to bolster the experiential knowledge of marginalized people, they are closely aligned with my conception of epistemological justice. The focus of this literature, however, is on the dynamics of the lawyering process and associated relationships; there is little discussion of how these dynamics play out in processes of proof specifically.

[71] Derrick Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation" (1976) 85:4 Yale Law Journal.
[72] López, *Rebellious Lawyering*, *supra* note 16 at 23-24.
[73] *Ibid* at 37.
[74] Shin Imai, "A Counter-pedagogy for Social Justice: Core Skills for Community Lawyering" (2002) 9 Clinical Law Review 195.
[75] Luke W Cole, "Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law" (1992) 19 Ecology LQ 619; White, "Mobilization", *supra* note 60.
[76] Cummings & Eagly, "Law and Organizing", *supra* note 21.

The litigation process may also reproduce subordination by imposing an elitist discourse and set of procedures on the social justice claims of marginalized groups. According to Lucie White, the courtroom is a "hostile cultural setting" that has the effect of "silencing poor people."[77] Not only are the behavioural conventions and language of the courtroom unfamiliar and often intimidating to non-lawyers, the very concept of advocacy "presumes a 'client' who does not feel the power to speak for herself."[78] Lawyers, moreover, in their quest to construct the best legal case, often fail to attend carefully to the views and experiences of their clients, the richness of which is easily lost in translation.[79] Even when they do, the demands of litigation can pose a dilemma. In her article, "Subordination, Rhetorical Survivor Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," White uses the story of a low-income Black woman engaged in an administrative hearing at an American welfare office to illustrate how legal advocates, even with the best of intentions, may feel compelled to rework their clients' narratives of events in order to better fit doctrinal categories and social expectations.[80] As explained by public interest litigator Raji Manjat in her interview for this dissertation research: "[Y]ou're always walking a really fine line between your optimal litigation strategy and […] what are the interests of the community you're serving, or the community you're working with."[81]

An important contribution of the literature on social movements and alternative

[77] White, "Mobilization", *supra* note 60 at 542-543.
[78] White, "Goldberg", *supra* note 69 at 861.
[79] White, "Mobilization", *supra* note 60 at 544-5; Gerald P López, "Shaping Community Problem Solving Around Community Knowledge" (2004) 79 NYU L Rev 59 at 93 [López, "Community Knowledge"]; Brown-Nagin, *supra* note 19 at 1509-1510.
[80] Lucie E White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 Buff L Rev 1.
[81] Interview 3 (14 September 2016).

approaches to lawyering is to de-centre the role of law and lawyers in progressive social change campaigns. As Brown-Nagin observes, legal scholars often take a "juricentric" approach to struggles for social justice, in part because they "wrongly conflate politicized legal campaigns with 'social movements'". [82] Social science-based studies of social movements, however, demonstrate that they have their own identities and unique features.[83] Most importantly, in Brown-Nagin's view, social movements involve a struggle from a place of marginality that attains leverage by disrupting the usual course of politics.[84] While lawyers may have a role to play in such struggles, it is ancillary rather than central. [85]

Taken together, the above critiques make a compelling case for the limited and at times problematic real-world effects of progressive public interest litigation. However, they say almost nothing about the epistemological implications of social and legislative fact-finding as part of the litigation process. To be sure, some of the above scholars have touched upon epistemological issues, particularly in discussions of alternative approaches to lawyering. White, for instance, shines a light on the marginalization of client voices in court,[86] while Lopez emphasizes "the importance of community knowledge to effective community problem solving of all sorts".[87] Missing, however, is an in-depth critical account of how knowledge is constructed, mobilized, framed, and evaluated through the litigation process. This, I argue, is particularly important given a second development in

[82] Brown-Nagin, *supra* note 19 at 1501.
[83] *Ibid* at 1502
[84] *Ibid* at 1508.
[85] *Ibid* at 1522; Cummings & Eagly, "Law and Organizing", *supra* note 21 at 447, 460. Mangat also espoused this view: Interview 3 (14 September 2016).
[86] White, "Mobilization" (*supra* note 60) and "Goldberg" (*supra* note 69). See also Brown-Nagin, *supra* note 19 at 1509-1510.
[87] López, "Community Knowledge", *supra* note 79 at 60.

strategic litigation under the Canadian *Charter*, to which I turn below.

1.2.2 The Shift from Law to Fact

The importance of an epistemological inquiry into public interest litigation has been heightened in the Canadian constitutional context by what I call the "factification" of strategic *Charter* cases.[88] This trend was underscored by a number of my interviewees.[89] "In the early days of Charter, it was all about identifying the big principles. Not much evidence was needed […]. Today Charter litigation is really all about showing how the challenged law affects real people in real ways", observed one public interest litigator with whom I spoke.[90] "If you go back to the original *Charter* cases in the 80s, records were almost non-existent, and it was just pure legal argument. And over time, we've started a practice of having more and more evidence," explained another interviewee, this one a litigator for the Crown.[91]

Nowhere is the trend towards expanding evidentiary records more apparent than in recent cases brought under the s.7 right to life, liberty and security of the person. The 2011 reference on the constitutionality of criminal laws against polygamy in British Columbia included over 90 affidavits and expert reports, reflecting, according to the judge, "the

[88] Suzanne Goldberg describes a similar trend towards "fact-based adjudication" in constitutional litigation regarding the status of social groups in the United States: Suzanne B Goldberg, "Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication" (2007) 6 Dukeminier Awards: Best Sexual Orientation & Gender Identity L Rev 1.
[89] Interview 1 (6 September 2016); Interview 5 (25 July 2017); Interview 6 (30 August 2018); Interview 7 (13 September 2018); Interview 9 (17 September 2018); Interview 10 (21 September 2018); Interview 11 (24 September 2018); and Interview 12 (27 September 2018).
[90] Interview 1 (6 September 2016).
[91] Interview 10 (21 September 2018).

bulk of contemporary academic research into polygamy."[92] In *PHS Community Services Society v Canada (AG)*,[93] a challenge to the Minister of Health's refusal to extend an exemption that would allow the Insite supervised injection site in Vancouver to continue operating, counsel tendered 20 volumes of evidence.[94] The challenge to criminal laws surrounding prostitution in *Bedford* involved more than 25,000 pages of evidence in 88 volumes.[95] The applicants in *Tanudjaja v Canada (AG)*, a recent challenge to Canada and Ontario's housing policy, presented a record of nearly 10,000 pages, including 19 affidavits, 13 of which were from experts.[96] And, in the challenge to the constitutionality of criminal laws prohibiting assisted dying in *Carter v Canada (AG)*,[97] the record included 36 binders of material, including 116 affidavits.[98] These are but a few examples.[99] Indeed, some litigators have compared recent *Charter* litigation to political commissions of inquiry.[100]

There are a number of factors that have likely contributed to this trend. Not long after the *Charter* was implemented, the SCC emphasized the need for a robust factual context in cases that touch upon fundamental social issues.[101] However, as noted by the first

[92] *Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588 at para 27.
[93] *PHS Community Services Society v Canada (AG)*, 2008 BCSC 661 [*Insite* BCSC], varied in *Insite* SCC, *supra* note 4.
[94] Benjamin Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44:1 Queen's LJ 121 at 164.
[95] *Bedford* SCC, *supra* note 3 at para 15.
[96] *Tanudjaja v Canada (AG)*, 2014 ONCA 852 at para 66.
[97] *Carter v Canada (AG)*, 2012 BCSC 886 [*Carter* BCSC], affirmed in *Carter* SCC, *supra* note 5.
[98] *Carter* BCSC, *ibid* at para 114.
[99] More recently, extensive records were tendered in two challenges to the statutory regime governing administrative segregation in Canada: *British Columbia Civil Liberties Assn v Canada (AG)*, 2019 BCCA 228; *Canadian Civil Liberties Assn v Canada (AG)*, 2019 ONCA 243. For further examples, see Alan N Young, "Proving a Violation: Rhetoric, Research and Remedy" (2015) 67:0 Supreme Court Law Review 617 at 622, note 13.
[100] Young, *ibid* at 622 and 641; Interview 3 (14 September 2016).
[101] *MacKay, supra* note 11 at paras 8-9.

litigator quoted in this section, counsel and the courts in the early days were largely focused on sorting out the meaning of the *Charter*'s broadly worded provisions via legal argument and interpretation. As the jurisprudence on those interpretive issues has filled out, the focus has shifted to understanding the social context in which the *Charter* is being applied.[102]

As *Charter* litigation evolves, courts may also have "come to fully appreciate their sociopolitical role", in the words of one litigator I interviewed.[103] The recognition that judges make, rather than simply discover law, is nothing new in legal theory. But nowhere is this phenomenon more on display than in strategic *Charter* litigation. The very centrality of "legislative facts" (discussed in more detail in Chapter 2) in this context hints at the distinct role of the judge as lawmaker.[104] Given the widespread impact of decisions in strategic *Charter* cases, and the complex sociopolitical issues at play, it is no wonder that litigants and courts alike have been keen to proceed on the basis of a robust body of evidence. At the same time, reliance on purportedly objective facts helps the courts to dispel concerns that they may be overstepping their institutional role by engaging in the kind of political decision-making best left to democratically elected representatives.[105]

Expert evidence grounded in social science research has become especially prominent in strategic *Charter* litigation. The growth of relevant and accessible research from other

[102] Interview 1 (6 September 2016).
[103] Interview 7 (13 September 2018).
[104] See Chayes, *supra* note 10 at 1297.
[105] See Goldberg, *supra* note 88 at 5-6.

disciplines, and the trend towards empiricism and interdisciplinarity in legal thought, have undoubtedly encouraged this phenomenon.[106] Indeed, the contemporary pull of empiricism implores lawyers and judges to view social science as essential to the adjudication of constitutional issues. The appeal of social science in strategic *Charter* litigation may also be due in part to what Mariana Valverde describes as "the global crisis about ethnocentrism and phallocentrism, the crisis about the contents [sic] of social common sense".[107] As legal institutions and actors make efforts to account for a wider array of perspectives, we are no longer so sure of what we thought we knew, and we often turn to social science evidence to resolve that uncertainty. Consequently, matters that were once considered within the purview of legal reasoning or judicial common sense have now been "ceded […] to outside experts", as one of the judges I interviewed put it.[108]

The hostile political climate in which social justice advocates found themselves during the period of Stephen Harper's Conservative federal government (2006-2015) may have further intensified the push toward evidence-intensive public interest litigation in recent years (though it also limited the available funding for such challenges).[109] The Harper

[106] Allison Larsen, "Factual Precedents" (2013) 162 University of Pennsylvania Law Review 59 at 77-78; Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor YB Access Just 55 at 61; Interview 3 (14 September 2016).
[107] Mariana Valverde, "Social Facticity and the Law: a Social Expert's Eyewitness Account of Law" (1996) 5:2 Social & Legal Studies 201 at 205. Boyle and MacCrimmon similarly point to lawyers' growing consciousness of the need to question whose worldviews ground factual determinations in an increasingly diverse society (*ibid* at 61-62).
[108] Interview 11 (24 September 2018). Said the judge: "I think there's been this major shift to more reliance on expert evidence...more of an inclination to classify things as factual that we formally would have conceived to be legal": Interview 11 (24 September 2018).
[109] Les Whittington, "Conservatives dismantling social programs built over generations", *Toronto Star* (9 Dec 2013) online: <https://www.thestar.com/news/canada/2013/12/09/conservatives_dismantling_social_programs_built_over_generations.html>.

government was notoriously resistant to environmental, Indigenous, and minority rights, unreceptive to evidence-based policy, and uninterested in public dialogue.[110] Meanwhile, the SCC continued to emphasize the need for careful consideration of social context in *Charter* cases. In this political environment, public interest litigation became one of the only avenues available to challenge draconian laws and policies with empirical evidence.[111]

Finally, the SCC may have encouraged the proliferation of evidence in *Charter* cases by finding, in *Bedford*, that constitutional precedents can be revisited "if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[112] The Court in *Bedford* ultimately gave a different rationale for revisiting the constitutionality of Canada's prostitution laws—two of which had been previously upheld in *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*.[113] A change in social and legislative facts was, however, part of the Court's rationale for revisiting the constitutionality of the law against medically assisted dying in *Carter,*[114] despite having upheld the prohibition as constitutional in *Rodriguez v British Columbia (AG)*.[115] According to one of my interviewees, the SCC's loosening of *stare decisis* in this way

[110] For an overview, see: Terry Milewski, "Stephen Harper's legacy: Good, bad and a dose of ugly", *CBC News* (20 Oct 2015) online: <http://www.cbc.ca/news/politics/canada-election-2015-harper-political-obit-1.3273677>; Bruce Livesey, "Is Harper the worst prime minister in history?", *National Observer* (18 May 2015) online: <http://www.nationalobserver.com/2015/05/18/news/harper-worst-prime-minister-history>.
[111] As Cummings notes, "the way that litigation is used in campaigns depends on the strength of political alternatives to legal action, which changes over time" ("Reimagining", *supra* note 53 at 495). Rosenberg similarly observes that most social reform litigation occurs in the face of resistance to social change from other branches of government (*supra* note 12 at 13).
[112] *Bedford* SCC, *supra* note 3 at para 42.
[113] *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada),* [1990] 1 SCR 1123 [*Prostitution Reference*].
[114] *Carter* SCC, *supra* note 5 at paras 46-47.
[115] *Rodriguez v British Columbia (AG),* [1993] 3 SCR 519.

may be another factor driving the trend towards strategic *Charter* challenges founded upon voluminous records.[116]

Whatever the cause, one thing is clear: the adjudication of complex sociopolitical issues on the basis of voluminous evidentiary records has become a defining feature of Canadian constitutional litigation in the *Charter* era. In this dissertation, I query the epistemological implications of this phenomenon as they relate to the quest for social justice. On one hand, there is reason to believe that knowledge grounded in different disciplines and life experiences can challenge the assumptions embedded within statutory law and policy, legal doctrine, and judicial common sense, and thereby disturb status quo distributions of power. Voluminous evidentiary records may also be able to challenge dominant cultural narratives by telling a compelling alternative story.[117] As noted above, such a strategy has, of late, served some public interest litigants well.

And yet, the expanded role of social and legislative facts in constitutional litigation also raises certain dangers for those committed to social justice. On a practical level, bringing evidence is costly. Extensive fact-finding processes place a heavy burden on rights-seeking litigants and communities, with significant implications for access to justice.[118] On an epistemological level, and of central interest to this dissertation, the fact-finding process may also perpetuate hierarchies of knowledge that set back the broader

[116] Interview 10 (21 September 2018). Some interviewees also noted that the federal and some provincial governments have been increasingly inclined to insist on fuller litigation in strategic *Charter* cases, making extensive evidence a necessity: Interview 5 (25 July 2017); Interview 6 (30 August 2018); and Interview 8 (14 September 2018).
[117] Interview 1 (6 September 2016).
[118] Boyle & MacCrimmon, *supra* note 106 at 67. This problem was emphasized by several interviewees: Interview 1 (6 September 2016); and Interview 3 (14 Sept 2016).

transformation of social power relations, even while facilitating *Charter* victories in particular cases. While empirical studies and other forms of academic expertise can help to shatter misconceptions and stereotypes that normalize the unequal treatment of marginalized groups, bolstering the authority of social science research in the service of social justice raises other potential problems. Non-legal disciplines carry their own gaps and biases that may, too, entrench existing distributions of power, and that courts may have trouble discerning.[119] Overreliance on academic expertise may also discount the epistemic weight of direct, lived experiences of injustice. Indeed, the call for social science research may create an artificial hierarchy between the scientific knowledge of experts and lay knowledge derived from firsthand experience, further marginalizing the community whose rights are at issue.[120]

Given the centrality and epistemological significance of social and legislative fact-finding in strategic *Charter* litigation, it is surprising how little sustained attention has been paid to the matter, either in practice or scholarship. In cases such as *Bedford* and *Carter,* lawyers and judges engage in complex processes of constructing, mobilizing, framing, and evaluating knowledge. Yet, this work is undertaken with little jurisprudential or theoretical direction, and thus, little consistency.[121] This is perhaps unsurprising, given the under-emphasis in legal education and scholarship on fact-finding generally, and non-

[119] Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups" (2008) 6 JL & Equal 201 at 204; Joan Brockman, "Social Authority, Legal Discourse, and Women's Voices" (1991) 21 Manit Law J 213 at 230-234.
[120] See Amanda Dale, "Gun Control and Women's Rights in Context: Reflections of the Applicant on Barbra Schlifer Commemorative Clinic v. Canada" (2017) 13 JL & Equal 61.
[121] Young, *supra* note 99 at 637.

adjudicative fact-finding in particular.[122] As William Twining observes, traditional evidence scholarship "has devoted far more attention to the rules of admissibility than to questions about the collection, processing, presentation, and weighing of information that reaches the decision makers."[123] The tendency, moreover, has been to view the adjudication of "*particular* past events" as the paradigm for thinking about facts and evidence.[124] While there have been some recent efforts to examine the role of facts and social science evidence in constitutional cases, they have offered little insight on the epistemological effects of the fact-finding process.[125] This dissertation begins from the view that a commitment to social justice calls for greater critical attention to the epistemological dimensions of fact-finding in strategic *Charter* litigation. It is this premise that shapes my theoretical and methodological approach.

1.3 MY APPROACH

In this dissertation, I examine the treatment of evidence in strategic *Charter* litigation from an epistemological perspective grounded in feminist political commitments. My theoretical framework, which I develop in Chapters 2 and 3, brings insights from feminist

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[122] William Twining, *Rethinking Evidence: Exploratory Essays,* 2nd ed (New York: Cambridge University Press, 2006) at 15-16; 114.
[123] *Ibid* at 28.
[124] *Ibid* at 114.
[125] See for example: Perryman, *supra* note 94; Young, *supra* note 99; Jodi Lazare, "Judging the Social Science in Carter v Canada (AG)" (2016) 10:1 McGill JL & Health S35–S68; Ranjan Agarwal & Faiz Lalani, "Noting the Obvious: A Reflection on the Supreme Court of Canada's Application of Judicial Notice under Sections 7 and 15 of the Charter" (2016) 35:2 National Journal of Constitutional Law 131; Rebecca Sutton, "Dirty Puddles and Safety Valves: The Path from Fact to Remedy in Canada (A.G.) v. PHS Community Services Society" (2014) 33:1 National Journal of Constitutional Law 39; Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2014) 32:2 National Journal of Constitutional Law 173; Jula Hughes & Vanessa MacDonnell. "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32 National Journal of Constitutional Law 23; John David Lee, C Tess Sheldon & Roberto Lattanzio, "Law and Ordered C.H.A.O.S.: Social Science Methodology, and the Charter Claims of Persons with Disabilities" (2013) 32:1 National Journal of Constitutional Law 61. In the American context, see: David L Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford: Oxford University Press, 2008); Goldberg, *supra* note 88.

epistemology and Science & Technology Studies (STS) to the study of evidence in the tradition of the New Evidence Scholarship. Drawing on this framework, my aim is to examine the epistemic norms and practices at play in strategic challenges to legislation under section 7 of the *Charter*, and to consider their implications for the pursuit of progressive social change under the *Charter*. I pursue this inquiry through two research methods, described below, which address distinct but overlapping sets of questions. This mixed methods approach allows me to broaden the scope of my inquiry, and to triangulate my research findings by holding different sources of information up against each other. It thereby allows me to gain greater insight into the epistemological phenomena at play.

1.3.1 Case Study: *Bedford*

My main research method involves an in-depth discursive analysis of the written record, submissions, and reasons for decision issued in the *Bedford* case. In particular, I examine how various actors in *Bedford* construct, frame, and evaluate the evidence in the case by mobilizing different epistemic norms and paradigms. My focus is on the treatment of experiential evidence, expert evidence (including social science research), and common sense, as these categories are conventionally understood in the context of litigation. Through this analysis, I test the dynamics of the fact-finding process in *Bedford* against the epistemological commitments that I view as essential to the progressive campaigns of social justice advocates.

I began the case study portion of my research by reviewing and making notes on all of the materials filed in *Bedford.* This included the pleadings, affidavits and transcripts of

cross-examination, written submissions made by the parties and interveners, and rulings issued by the courts at all levels.[126] I also used Atlas.ti, a qualitative research software program, to code the submissions and court rulings. Following further engagement with my theoretical framework, I reworked my coding scheme and used it to code the notes from my initial review of the materials. I later found it necessary to rework my coding scheme again before coding select portions of the evidentiary record that I deemed to be the most interesting and important for my purposes. I also recoded the submissions of the parties and the court rulings at this point, using the revised scheme. My research process for the case study was thus highly iterative, involving constant toggling between the *Bedford* materials and the theoretical concepts and categories I was using to interpret them. In this way, my process reflected my belief—expounded throughout this dissertation—in the intertwined and mutually constitutive nature of theory and fact.

Bedford was a *Charter* challenge to three *Criminal Code* provisions that prohibited adult prostitution-related activities: operating or being in a common bawdy house ["bawdy house provision"]; living on the avails of prostitution ["living on the avails provision"]; and communicating in public for the purposes of prostitution ["communicating provision"].[127] The challenge was brought as an application by three women who identified as current or former sex workers: Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott. The applicants were represented by lawyer Alan Young. The central thrust of their case was that the impugned laws prevented them from taking measures to increase the safety of work that was itself lawful—measures such as working from a

[126] Due to limitations of time and scope, my review of the exhibits attached to the affidavits was more cursory.
[127] *Criminal Code*, RSC 1985, c C-46, ss 210, 212(1)(j), and 213(1)(c).

secure indoor location, hiring drivers and bodyguards, and carefully screening clients. The laws thus violated the right to liberty and security of the person under s.7 of the *Charter*, and could not be justified under s.1.[128] The applicants also argued that the SCC should revisit the *Prostitution Reference* ruling upholding the communicating provision as a "reasonable limit" on freedom of expression (s.2b) in light of new empirical evidence.[129]

While the challenge in *Bedford* overlapped to some extent with arguments made in the *Prostitution Reference*, it was allowed to proceed on the basis that the case raised different legal issues, and that the jurisprudence related to the principles of fundamental justice under s.7 had evolved significantly.[130] The application judge, Justice Susan Himel, also found that the SCC's previous decision to uphold the communicating provision under s.1 ought to be revisited due to the "breadth of evidence that has been gathered over the course of the intervening twenty years," and the fact that the "social, political and economic assumptions" underlying the *Prostitution Reference* may no longer be valid.[131] In the end, Himel J ruled in the applicants' favour on all counts, striking down all three laws as unconstitutional under s.7, and finding that the communicating provision's infringement of s.2b could no longer be upheld under s.1.

The SCC found that the application judge was bound by the *Prostitution Reference* with respect to s.2b, and declined to revisit the matter. However, the Court affirmed Himel J's

[128] *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of the Applicants at para 11).
[129] *Ibid* at para 15.
[130] *Bedford* ONSC, *supra* note 8 at para 75.
[131] *Ibid* at para 83.

ruling striking down the laws under s.7, leaving Parliament with 12 months in which to come up with a new legal regime to regulate prostitution. The resulting legislation, the *Protection of Communities and Exploited Persons Act,* was passed by the Harper government in 2014 with the aim of discouraging prostitution through the direct criminalization of buyers.[132] It has since been subject to several constitutional challenges.[133]

As a case study for this project, *Bedford* is an apposite choice for a number of reasons. First, the courts in *Bedford* were explicitly attentive to the role of social and legislative facts in constitutional litigation. As already noted, Himel J justified her decision to reconsider the s.2(b) issue on the basis of a shift in social facts and evidence. While overturning Himel J on this point, the SCC held that constitutional precedents can be revisited where there are sufficiently momentous evidentiary developments.[134] The Court also made two other important pronouncements pertaining to social and legislative facts. First, it held (somewhat controversially) that social and legislative facts are subject to the same standard of review as adjudicative facts.[135] Second, it emphasized that the inquiry at the s.7 stage is qualitative, focusing on the law's impact on the individual:

> The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly

[132] *Protection of Communities and Exploited Persons Act,* SC 2014, c 25.
[133] *R v Anwar*, 2020 ONCJ 103; *R v Boodhoo*, 2018 ONSC 7205.
[134] *Bedford* SCC, *supra* note 3 at para 42.
[135] *Ibid* at para 49.

> disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7. [136]

The law's impact on society as a whole, the Court clarified, comes into play only under section 1. This finding has important implications for the distribution of the burden of proof in *Charter* cases.

The second reason that *Bedford* makes a valuable case study relates to the nature of the social policy questions at issue in the case. In Canada and across the globe, the exchange of sex for money remains a deeply controversial social phenomenon. The debate over how to interpret and respond to this phenomenon has been heated, not only between feminist and other actors interested in social policy, but also within feminist circles. As Debra Haak observes, the controversy is often framed in terms of a polarized contest between those who view the sale of sex through the lens of sexual exploitation and gender inequality, and those who view it through the lens of a legitimately chosen form of labour and/or "a site to expand the boundaries of sexuality and gender."[137] Empirical research on the topic—a great deal of which was tendered as evidence in *Bedford*—has largely failed to transcend these competing viewpoints.[138] In Haak's words: "This ideology frames how empirical research is conducted, what is identified as problematic, and how it suggests law and policy should respond to articulated problems."[139] The social

[136] *Ibid* at para 123. See also paras 126-127.
[137] Debra Haak, "Re(de)fining Prostitution and Sex Work: Conceptual Clarity for Legal Thinking" (2019) 40 Windsor Rev Legal & Soc Issues 67 at 73.
[138] Skilbrei describes prostitution as "a field of policy-based evidence" ("Speaking the Truth", *supra* note 1 at 33). She observes: "it is very difficult operating in this field as a scholar without your truth claims being assigned to a particular power/truth constellation" (Skilbrei, "Speaking the Truth", *supra* note 1 at 44).
[139] Haak, *supra* note 137 at 70. See also Skilbrei, *ibid* at 34.

fact evidence in *Bedford* was thus heavily politicized and hotly contested, highlighting the blurriness of the boundary between normative theory and empirical fact, and leaving participants in the case with ample room (and motivation) to frame information in competing ways.

Bedford was also a case in which contestation over feminist commitments was already at play, not only in terms of the substantive issues surrounding the sex trade, but also in terms of the approach taken to addressing those issues through litigation. On one hand, one of the challenges of looking to *Bedford* to assess how feminist epistemological commitments fare in litigation for social justice is that the case itself was not conceived as part of a broader social movement grounded in such commitments. In his interview for this dissertation, lead counsel Alan Young was unequivocal in claiming the case as his own brainchild, driven by personal concerns and interests:

> It's my case. And, that poses problems sometimes for some people who want to believe it was a grassroots case coming from some social collective. It wasn't.[140]

At the same time, many of the community groups and researchers involved in the case viewed matters differently, leading to clashes with Young and his clients (see Chapter 8 at 8.2.1). This dissonance between Young's approach and the interests of sex workers' rights activists speaks to the heart of my concern about the epistemological implications of relying on litigation as a tool for social justice. *Bedford* also affords an illuminating

[140] Interview 5 (July 25 2017).

comparison to another similar *Charter* challenge brought at the same time on the other side of the country: *Downtown Eastside Sex Workers United Against Violence v Canada (AG)*.[141] In contrast to Young, the litigators in *SWUAV* took a much more community-based approach. While the constitutional challenge in *SWUAV* was never heard on the merits, leaving no evidentiary record to analyze, my interviews offer insight into the trajectory of the case as it compares to *Bedford*. This comparison offers a compelling illustration of how different epistemological choices play out in strategic *Charter* litigation.

The choice to focus on *Bedford* is also, admittedly, shaped by practical considerations. Most importantly, I had access to a full copy of the transcripts in the case, as well as to practitioners involved in both *Bedford* and *SWUAV*. Given the difficulty and expense of obtaining transcripts in most cases, my ability to access the requisite materials was an important factor to consider in selecting a case for study.

There are undoubted limitations to focusing on a single case study. As emphasized by one of my interviewees, every public interest case that comes before the courts has a unique history and social context,[142] significantly limiting the generalizability of analysis conducted with respect to it. For this reason, I had initially hoped to draw on multiple s.7 cases. Apart from the challenge of accessing transcripts, however, I quickly realized that the materials in *Bedford* alone were extremely voluminous and rich in content, and that the type of analysis I wished to undertake called for a deep dive into the transcripts.

[141] *Downtown Eastside Sex Workers United Against Violence v Canada (AG),* 2008 BCSC 1726 [*SWUAV* BCSC], reversed in 2012 SCC 45.
[142] Interview 4 (15 September 2016).

Indeed, it is the fine-grained nature of my analysis (among other things) that I believe makes this project unique and important. Such depth would simply not have been possible had I attempted to expand my sample of cases, though I am certainly open to this work being taken up by other scholars, with the possibility of confirming, complicating, or otherwise adding to the picture I have constructed here. To compensate for some of the weaknesses of my focus on a single case study, I do also widen the lens of my overall inquiry via my second research method.

1.3.2 Interviews

There is a great deal to learn from the written record in a strategic *Charter* challenge such as *Bedford.* But there are also parts of the story that transcripts cannot tell. Those involved in bringing forward litigation of this nature must grapple with myriad strategic and practical considerations about which the final record is largely silent. With this in mind, my second research method—a series of interviews with constitutional litigators and judges—attempts to get beneath the record in order to better understand how various contextual factors shape the treatment of evidence, facts, and knowledge in strategic *Charter* litigation. This method allows me to: 1) strengthen some of the findings from the case study while also exposing and disciplining that method's weaknesses via triangulation; 2) delve deeper into the roots of the tension between legal victory and epistemological justice that I uncover through the case study; and 3) gain a deeper and more contextualized understanding of the *Bedford* case and its relationship to other strategic *Charter* litigation.

For this component of my research, I conducted 18 in-depth, semi-structured interviews with 10 public interest litigators, 4 Crown litigators, and 2 judges, all of whom had been involved in strategic public interest litigation under the *Charter*. In order to gain an initial sense of how evidentiary and epistemological issues in strategic *Charter* litigation arise in practice, I began with a small set of early, exploratory interviews with public interest litigators in Vancouver and Victoria, British Columbia, where some of Canada's most momentous recent test case litigation has arisen. I then conducted a second round of interviews with litigators and judges across Canada once I was further along in my project. This second round of interviews was conducted mostly through Zoom online videoconferencing (except for interviewees located in Toronto), and included follow-up interviews with several participants from the first round.

In developing my list of interviewees, I used a purposive snowball sampling method, focusing on litigators and judges with experience in constitutional and other public interest litigation brought on behalf of marginalized groups. I endeavoured, in particular, to speak with those who had been involved in recent strategic challenges to legislation under s.7, including *Insite, Bedford,* and *Carter*. In this way, I was able to gain additional insight into my case study as it fits within the broader landscape of strategic *Charter* litigation.

In preparation for my first set of interviews, I developed a short interview guide that included a series of open-ended questions organized according to key themes of interest to me at the outset of the project. I later revised and refined this guide for the second

round of interviews, based on the data collected in the first round and other work done on the dissertation in the meantime. As with the case study, I used Atlas.ti to analyze and code my interview data. Because I undertook this analysis much later in the course of the project, my coding scheme was built largely, though not entirely, upon the dissertation structure and key concepts that I had already developed through my engagement with the case study and related theoretical literature. This ordering reflects the secondary role of the interviews as a supplement to the case study. At the same time, the interviews—particularly the early exploratory ones—also provided insights that guided my approach to the case study and the theoretical literature in important ways, once again reflecting the iterative nature of my methodology.

1.3.3 A Note on Terminology

While drawing heavily on the *Bedford* case, this dissertation does not seek to wade into the protracted policy debate surrounding the sale of sexual services in Canada. Rather, I am interested in how different forms and sources of knowledge are treated within this and other policy debates as they manifest in constitutional litigation. Nevertheless, with *Bedford* as my primary case study, I do make frequent reference to the issues, evidence, authorities, and stakeholders that come up in the particular context of commercialized sex. I must therefore grapple with the terminological choices involved, particularly around the terms “prostitution” and “sex work”.

The choice between these terms carries political connotations that are difficult to avoid, signaling one's position on either side of the polarized policy debate referred to above.[143] In Canadian jurisprudence, the two terms are increasingly used interchangeably,[144] perhaps in an effort to avoid an overtly political stance. According to Haak, however, they are not synonymous.[145] "Prostitution" is the term used in the *Criminal Code* and related legislation; it was defined in the *Prostitution Reference* as "the exchange of sexual services of one person in return for payment by another."[146] While "sex work" lacks a similarly clear definition in law or scholarship,[147] Haak notes that the term has political roots and is generally understood to refer to prostitution and other erotic services where the sellers are uncoerced, consenting adults.[148]

In this project, I have tried to remain faithful to the source material I am working with. While the challenges in *Bedford* and *SWUAV* attack laws related to "prostitution", and thus affect a wide range of stakeholders, they are framed around the rights of "sex workers".[149] Out of respect for the linguistic choices of the litigants, I use "sex work" to refer to their experiences and related arguments. I use "prostitution" when referring to legal and other materials that use the term.

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[143] Haak, *supra* note 137 at 72-73.
[144] *Ibid* at 86-87.
[145] *Ibid* at 70.
[146] *Prostitution Reference, supra* note 113 at para 45. Other courts have offered similar definitions (Haak, *supra* note 137 at 79).
[147] Haak, *ibid* at 87, 101.
[148] *Ibid* at 92, 101.
[149] The litigants in *Bedford* and *SWUAV* were adult women who had freely chosen to engage in the sale of sexual services, and who identified (with the possible exception of Terri-Jean Bedford) as "sex workers". It should be noted, however, that counsel for the applicants in *Bedford* uses the terms "prostitution" and "sex work" interchangeably in written and oral argument, as do some of the witnesses.

1.4 OUTLINE OF CHAPTERS

This dissertation proceeds in three parts. In Part I, I lay the doctrinal and theoretical foundation for my project. Following this Introduction, Chapter 2 situates my concerns about epistemological justice in strategic *Charter* litigation within the context of legal processes of proof and the New Evidence Scholarship. While traditional approaches to evidence focus on the rules of admissibility, Twining argues that the rules are relatively marginal to legal fact-finding in practice, and that the "law" of evidence should therefore be more broadly conceived to encompass norms of factual reasoning in addition to exclusionary rules.[150] Building on Twining's work, I contend that admissibility issues are especially attenuated in strategic *Charter* challenges to legislation due to the unique nature of fact-finding in this context. However, the very characteristics that diminish the direct force of exclusionary rules in litigation of this sort also underscore the influence of legal doctrines and processes of proof—including the law/fact dichotomy—over the construction and contestation of knowledge. Adapting Twining's notion of "information in litigation" as an organizing concept for the New Evidence Scholarship, I thus posit "knowledge in litigation" as a useful starting point for thinking about evidence in strategic *Charter* litigation.

Having made the case for why constitutional fact-finding in this moment calls for attention to questions of epistemology, Chapter 3 fleshes out the theoretical account of epistemological justice that I draw upon to analyze the treatment of knowledge in *Bedford* and other strategic *Charter* litigation. The first part of the chapter outlines (and thereby reconstructs) some of the key insights of feminist epistemologists and related

[150] Twining, *supra* note 122 at 211-217, 219.

scholars who have critiqued the implicit assumptions engrained in traditional Anglo-American approaches to knowledge. Drawing on this work, the second part of the chapter develops the concept of "experiential knowledge" as a central component of my theoretical approach, and explores its relationship to three conventional categories of proof in litigation: experiential evidence, expert evidence (including social science research), and common sense. By exploring, from a critical feminist perspective, how these categories are constructed and used to frame knowledge in litigation, I map out the epistemological terrain through which my analysis of *Bedford* will proceed.

Part II of the dissertation undertakes a fine-grained analysis of the written record, submissions, and reasons issued in *Bedford* as a means to examine the epistemological effects of fact-finding in strategic *Charter* litigation. This Part consists of four chapters. The first three chapters offer distinct analyses of each of the conventional categories of proof discussed in Chapter 3, drawing primarily on the affidavit evidence and transcripts of cross-examination in *Bedford*. In each chapter, I identify the key framing strategies used by participants in the case—mainly counsel and witnesses—to discount, bolster, or otherwise position the type of proof at issue. Drawing on the theoretical framework developed in Chapter 3, I interrogate the epistemic norms and paradigms that animate these strategies and critique how they are mobilized and resisted in litigation from a critical feminist perspective. The final chapter in Part II then examines how these categories of proof are considered and weighed against each other by the parties in written argument, and by the courts in their reasons.

I begin, in Chapter 4, by examining the treatment of evidence classified as "experiential" in *Bedford*—i.e. evidence from those who are (or have been) directly affected by the impugned laws. The main strategies employed to bolster or discount this evidence pertain to two issues: qualifications and reliability. In analyzing these strategies, I demonstrate the enduring influence of mainstream epistemic norms that perpetuate inequality in the fact-finding process, some of which find roots in legal doctrine. While valorizations of experiential knowledge also figure importantly in the treatment of the experiential evidence in *Bedford*, I suggest that the litigation context encourages a flattened and decontextualized mobilization of experientialism that fails to live up to progressive epistemological commitments.

Chapter 5 considers the treatment of evidence classified as "expert" in *Bedford*. In the first part of the chapter I examine strategies used to frame the social science research that grounds much of the expert opinion in *Bedford*, with a focus on issues of research methodology. Drawing on the work of STS scholars Thomas Gieryn and Sheila Jasanoff, I explore the treatment of social science research in *Bedford* as a process of "boundary work", through which science is demarcated from non-science (or at least bad science) as a means to further advocacy goals.[151] I demonstrate that, while the record in *Bedford* reveals complex and contested understandings of social science research methodology, the adversarial context of litigation encourages participants to simplify, decontextualize,

[151] Thomas F Gieryn, "Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists" (1983) American Sociological Review 781; Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, Mass: Harvard University Press, 1995).

and instrumentalize methodological norms and principles. The dominant set of framing strategies that emerges relies heavily on the mainstream epistemological paradigm outlined in Chapter 3. While some witnesses resist this paradigm, often in ways that align with feminist critiques, counsel's participation in the resistance is minimal, and inconsistent where it does occur. In the second part of the chapter, I turn my attention to framing strategies related to the role of the expert in litigation. The dominance of traditional epistemic norms, reinforced by doctrinal law, is even more apparent here. As in the preceding examples, some witnesses do attempt to resist these norms. Such witnesses are not, however, supported by counsel (even their own) in their efforts, and can often be seen reverting strategically to the dominant paradigm.

Chapter 6 investigates the distinct role and treatment of "common sense", broadly conceived, as a final mode of proof in litigation. Once again in this chapter, I demonstrate the influence of mainstream epistemic and legal norms—in particular, the imagined dichotomy between common sense and evidence—on the treatment of knowledge in litigation, despite resistance from some actors. My analysis also shows how participants in *Bedford* draw on the same framing strategies to intermittently mobilize and discount common sense for vastly different purposes, highlighting the category's function as a rhetorical tool that lacks a particular political valence.

Finally, in Chapter 7, I turn to the party factums and court reasons in *Bedford* in order to examine how the various categories of proof discussed in the previous chapters are weighed against each other in the case. Here I shift from a focus on framing strategies

used in particular instances to the overall assessment of different modes of proof in *Bedford*. My analysis in this chapter highlights the connection between the treatment of knowledge in litigation and the framing of the facts at issue. It also demonstrates the shifting nature of the weight accorded to different categories of proof in *Bedford*. My main finding, though, is that despite the seeming importance of the experiential evidence in *Bedford*, appeals to law, legal reasoning, and common sense, along with legislative and other government-generated reports, are what tend to prevail at the end of the day.

Ultimately, my analysis in Part II points to a tension between legal victory and epistemological justice in the *Bedford* case. In Part III, I delve further into the nature, causes, and implications of this tension. I do this in Chapter 8 by holding my analysis of the transcripts in *Bedford* up against my interview data. This allows me to examine the practical, legal, epistemological, and human constraints that impede the realization of epistemological justice in *Bedford* and other strategic *Charter* litigation. My analysis suggests that, due to the long shadow cast by judges over the fact-finding process, their epistemic beliefs, experiences, and common sense tend to trump the more progressive commitments of other participants in litigation. Nevertheless, I contend that factual interventions grounded in experiential knowledge can play an important, if indirect, role in litigation by shifting judicial common sense, and thereby changing the law. I conclude, in the following chapter, by briefly exploring some of the implications and questions raised by the dissertation for other legal contexts.

With this project, I make three contributions to the existing literature. First, I demonstrate the salience, within a particular litigation context, of the New Evidence Scholars' view that the significance of exclusionary rules has been exaggerated at the expense of attending to other important dimensions of the fact-finding process. Second, I expose the thoroughly constructed nature of conventional categories of proof in litigation, by showing how notions of experience, expertise, and common sense operate primarily as rhetorical tools in litigation, rather than as fixed ontological categories. Finally, and most importantly, I show how the law of evidence and the fact-finding process in strategic *Charter* litigation contribute to the fraught relationship between litigation and social justice, by failing to live up to the demands of epistemological justice.

Chapter 2: The Evidentiary Framework of Strategic *Charter* Challenges to Legislation

2.1 INTRODUCTION

In this project, I am interested in the epistemological effects of constitutional fact-finding processes. The work of feminist epistemologists—discussed in the next chapter—provides the theoretical framework for my analysis of these effects as they pertain to the social justice goals of marginalized groups in litigation. As a prior matter, however, I believe it is important to make the case for why such an analysis is necessary and worthwhile from a legal perspective. What is it, in other words, about processes of proof in strategic *Charter* litigation that calls for the kind of analysis offered in this project? I consider this prior question in this chapter by examining the legal context within which my concerns about epistemological justice arise. For this I turn to the field of evidence law and scholarship.

The close connection between evidence and epistemology has been recognized before. As Jeremy Bentham famously put it: "The field of evidence is no other than the field of knowledge".[1] There is, however, a modern tendency—owing perhaps to the nature of law school evidence courses—to associate the field primarily with the doctrinal rules governing the admissibility and use of evidence in litigation. In recent years, evidence scholars have challenged this tendency through an array of different approaches grouped

[1] Jeremy Bentham, *An Introductory View Of The Rationale Of Evidence* (Edinburgh: William Tait, 1843) ch 1 at 5. See also William Twining, *Rethinking Evidence: Exploratory Essays,* 2nd ed (New York: Cambridge University Press, 2006) at 108.

loosely under the umbrella of "The New Evidence Scholarship". [2] In this dissertation, I renew and build upon the New Evidence Scholars' case for a broader conception of evidence law—one that serves as a way into questions of epistemology in strategic *Charter* litigation.

My argument is twofold. First, I posit that the doctrinal rules of admissibility work alongside a much broader set of norms, procedures, and practices that shape the treatment of evidence, facts, and knowledge in litigation, and that ought to be considered within the domain of evidence law. Second, I posit that what makes the doctrinal rules important, particularly in the context of strategic *Charter* litigation, is not their power to regulate admissibility, but rather their influence as a source of epistemology.

Perhaps nowhere are these arguments more compellingly substantiated than in recent strategic challenges to legislation under the *Canadian Charter of Rights and Freedoms*[3]—what I call "strategic *Charter* litigation". In this chapter I take a closer look at the special features of fact-finding in this context that call for a broader and more epistemologically-oriented approach to evidence. I begin by adapting William Twining's theory of "information in litigation" to posit "knowledge in litigation" as a useful starting point for thinking about evidence in strategic *Charter* litigation. I go on to consider Twining's argument about the exaggerated importance of the doctrinal rules of evidence in legal fact-finding generally. While Twining bases his argument on broad trends across

[2] See *infra* note 5.
[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

the legal system, I suggest that the force of admissibility rules is especially attenuated in strategic *Charter* litigation.

Having established a theoretical foundation for my approach to evidence, I proceed to examine the special nature of the factual issues, and of the judicial role, in strategic *Charter* litigation. I then describe a number of consequences that flow from this. First, I demonstrate the relative impotence of the rules of admissibility in strategic *Charter* litigation, drawing on my case study of *Bedford v Canada (AG)*[4] for illustrative purposes. Observations from my research interviews add further insight into the nature and implications of admissibility issues in strategic *Charter* cases more broadly. Second, I show how the special nature of the factual issues in this context leads to uncertainty regarding the demands of proof. The result, I suggest, is an expansive, open-ended, and flexible fact-finding process, with ample room for legal actors—i.e. lawyers and judges—to manoeuvre in strategic ways.

This state of affairs may be read as an instance of lawlessness—a situation where the law of evidence simply fails to play much of a role. In my view, however, the openness and malleability of fact-finding in strategic *Charter* litigation is better understood as bringing different modes of factual regulation, and thus a different dimension of evidence law, to the fore. The strategic manoeuvres alluded to above play a key role in shaping the treatment of knowledge in strategic *Charter* litigation, with important practical and epistemological consequences for marginalized groups seeking social justice through litigation. They are moreover, informed by epistemological assumptions embedded in

[4] *Bedford v Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in 2013 SCC 72 [*Bedford* SCC].

evidentiary doctrine, as well as by the practical and institutional constraints of the fact-finding process—all of which may be understood to fall within the law of evidence broadly conceived. I thus advance a conception of evidence law that attends not only or primarily to rules of admissibility, but to the strategic practices of participants in litigation and their implications in context.

2.2. THE NEW EVIDENCE SCHOLARSHIP

2.2.1 From "Information in Litigation" to "Knowledge in Litigation"

The impetus to look beyond doctrinal rules of evidence to the broader fact-finding process reflects a relatively recent turn in evidence scholarship—what Richard Lempert in 1986 coined "the New Evidence Scholarship".[5] Part of the movement to examine law in its social context, the New Evidence Scholarship shifts the study of evidence away from legal doctrines pertaining to admissibility and use, and towards the actual processes by which legal actors engage in information-gathering and factual reasoning in legal contexts. As Lempert put it in 1986: "Evidence is being transformed from a field concerned with the articulation of rules to a field concerned with the process of proof."[6] In this way, evidence scholarship has followed other areas of legal scholarship in moving towards a more realist and empirical orientation.[7]

Twining uses the concept of "information in litigation" (IL) to capture this new approach to the study of evidence. In his view, the New Evidence Scholarship movement signals an

[5] Richard Lempert, "The New Evidence Scholarship: Analyzing the Process of Proof Symposium" (1986) 66 Boston Univ Law Rev 439.
[6] *Ibid* at 439.
[7] Twining, *supra* note 1 at 138.

interest not only in how evidence is used to prove facts in court, but in how information is used to make various decisions throughout the course of litigation, seen as a "total process."[8] As Twining observes, a case that culminates in a full hearing in court is the exception, not the rule; attention must also be paid to the role of information at other stages of proceedings.[9] A case, moreover, is itself often an unclearly bounded event within a longer-term relationship or social process.[10] And, while "evidence" evokes the formal court record, "information" is more easily understood as playing multiple roles throughout the litigation process, and "transcends sharp distinctions between 'fact' on the one hand and 'value', 'law' and 'opinion' on the other".[11]

Twining's theorization of IL as a "mapping theory" for the New Evidence Scholarship helpfully illuminates the shift—and broadening of focus—in recent evidence scholarship.[12] As he notes, this shift revives epistemological questions that have been largely neglected by the orthodox tradition.[13] Indeed, while Twining is drawn to the nimbleness of "information" as an organizing concept, "knowledge" might serve as an equally helpful concept for thinking more broadly about processes of proof in context. Not only does "knowledge" denote something beyond evidence and facts, it can—at least in some usages—include human capacities such as skills, intuitions, and relationships (knowledge of others), that "information" does not seem to effectively capture. Using knowledge as a key concept for thinking about evidence also helps to connect legal

[8] *Ibid* at 249.
[9] *Ibid* at 193.
[10] *Ibid* at 250.
[11] *Ibid* at 253.
[12] *Ibid* at 248-249.
[13] *Ibid* at 108, 255.

scholarship to questions of power and authority raised by feminist epistemologists and other critical scholars. I therefore adapt Twining's model for the purposes of this project to think not only in terms of "information in litigation", but of "knowledge in litigation."

2.2.2 Twining's Argument of Exaggerated Importance

Twining's description of the law of evidence in England builds on the work of American evidence scholar James Bradley Thayer. Following Thayer, Twining suggests that "our rules of evidence consist of a series of disparate exceptions to a single principle of freedom of proof"—a view that he purports to share with most modern common law evidence scholars.[14] For Twining, it follows that we ought to focus first on understanding the main principle of free proof, prior to examining the exceptions. Such an approach is reflected in the work of Thayer's disciple John Henry Wigmore, who saw general principles of proof (i.e. logical reasoning) as anterior to doctrinal rules of evidence, and taught the subject of evidence to his students accordingly.[15]

Twining, however, takes the Thayerite view a step further, through what he calls the "argument of exaggerated importance."[16] He contends that Thayer and Wigmore's conception of evidence is basically sound but does not go far enough, especially in light of recent developments in the nature of litigation. Adding what he refers to as a "realist gloss" to these scholars' accounts, Twining focuses on how evidentiary rules are actually

[14] *Ibid* at 192.
[15] *Ibid* at 209-210.
[16] *Ibid* at 192.

applied in legal decision-making.[17] From this angle, he argues that doctrinal rules play an even less important role in litigation than Thayer imagined, in both civil and criminal contexts.[18] Twining likens the Thayerite view of the rules to a piece of Gruyère—something that consists of more holes than cheese. From a realist perspective, however, he suggests that it is actually more like *Alice in Wonderland*'s Chesire cat,

> who keeps appearing and disappearing and fading away, so that sometimes one could see the whole body, sometimes only a head, sometimes only a vague outline and sometimes nothing at all, so that Alice was never sure whether or not he was there or, indeed, whether he existed at all.[19]

This ephemeral quality can be attributed, according to Twining, to the fact that: 1) most cases never reach the stage of a contested hearing where evidentiary rules would apply; 2) even when there is a hearing, it often takes place in a forum where some or all of the rules are not binding (with robust application of the rules occurring mainly only in serious criminal cases); and 3) even in a criminal trial, the rules are frequently ignored in practice.[20] Twining also observes a long-term trend away from precisely defined rules and towards more flexible, discretionary standards, such that few hard and fast rules remain, even in the law on the books.[21] Given these realities, he argues that evidence

[17] *Ibid* at 211-213.
[18] *Ibid*.
[19] *Ibid* at 211-212.
[20] *Ibid* at 212-214.
[21] *Ibid* at 201, 215.

scholars have overemphasized "paper rules" at the expense of more important questions about factual reasoning and processes of proof in various legal contexts.[22]

While Thayer, working from a framework of legal positivism, viewed such questions as extraneous to the law of evidence itself, Twining argues for a broader conception of evidence law that would encompass not only doctrinal rules but also the procedures and practices of proof.[23] As Twining notes, such topics have received little attention in traditional legal education and scholarship, perhaps because they seem to focus on everyday principles and practices of reasoning that are not unique to law. There is, in his words, "relatively little about it that is unique or in special need of demystification."[24] To be sure, legal processes of proof are strongly informed by elements of factual reasoning that transcend the law. However, it is a mistake, in my view, to discount the role of legal doctrines, institutions, norms, and conventions in shaping how such processes unfold. One must also consider the unique social consequences of factual arguments and conclusions in legal contexts. As Mary Eberts points out, "[s]tatements emanating from courts about what is so and what is not so are invested with great authority".[25] This in itself makes processes of proof in litigation worthy of study from a legal perspective.

For Twining, the exaggerated importance of the rules of evidence stems in part from a failure to recognize and grapple with the host of diverse procedural contexts in which

[22] *Ibid* at 213.
[23] *Ibid* at 193, 217, 219.
[24] *Ibid* at 262.
[25] Mary Eberts, "New Facts for Old: Observations on the Judicial Process" in Richard Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) at 471.

modern day legal decision-making actually occurs.[26] By focusing mainly on criminal jury trials, which make up a tiny subset of all legal proceedings, evidence scholars have ignored how evidentiary rules operate in the vast bulk of litigation that occurs outside of this special context. Thus Twining suggests that evidence scholarship may be "over-generalized";[27] rather than a single picture of the law of evidence, different empirical and theoretical accounts may be required for different legal contexts.

In this project, I take up Twining's call by focusing on processes of proof in the specific context of strategic *Charter* challenges to legislation in Canada, with an emphasis on challenges brought under s.7. Because this area is newly and rapidly developing, and in many ways uniquely Canadian (though there are some shared characteristics with constitutional litigation in the United States), Twining's work does not grapple with it. It thus presents an opportunity to both test and extend his theory. Building on Twining, I contend that the argument of exaggerated importance holds particular salience in strategic *Charter* litigation, due to the special nature of the issues and facts at play. As I demonstrate below, formal evidentiary doctrines do little to regulate the admission and use of evidence in this arena of litigation. At the same time, I argue that the doctrinal rules of evidence—along with a range of other legal norms, procedures, and practices—do play an important role in terms of their epistemological influence over the fact-finding process in this context. I thereby illuminate a connection between doctrinal rules and factual reasoning processes that is missing from Twining's realist account. I begin, in the

[26] Twining, *supra* note 1 at 137.
[27] *Ibid* at 137.

next section, by elucidating what makes the facts in strategic *Charter* litigation so exceptional.

2.3 THE NATURE OF THE FACTS IN STRATEGIC CHARTER LITIGATION

To understand the limitations of the traditional view of evidence law in the context of strategic *Charter* litigation, one must first consider the nature of the issues and facts at play in this arena. In 1942, Kenneth Culp Davis famously drew a distinction between "adjudicative facts" which relate to the particular case at hand, and "legislative facts," which relate to more general questions of law and policy.[28] One of the most important features of strategic *Charter* litigation from an evidentiary perspective is the starring role of the latter. This differs from the norm in most litigation contexts, where the focus is on case-specific, adjudicative facts.[29] These may be informed or supplemented by more general kinds of facts, in an effort to account for the broader social and legal context of the case. At the end of the day, however, it is the adjudicative facts that take centre stage, as these are the facts that need to be decided in order to resolve the case. In strategic *Charter* litigation, however, the roles are reversed. Facts about the particular litigants are relevant but largely uncontested. The main points of controversy instead relate to general facts about the impugned legislation and the social world in which it operates.[30]

Davis viewed the distinction between adjudicative and legislative facts as significant mainly for administrative agencies that had to fulfill various law and policy-making

[28] Kenneth Culp Davis, "An Approach to Problems of Evidence in the Administrative Process" (1941) 55 Harv L Rev 364 at 402.
[29] *Infra* note 56.
[30] *R v Spence*, [2005] 3 SCR 458 at para 64 [*Spence*]; Brian G Morgan, "Proof of Facts in Charter Litigation" in Robert J Sharpe, ed, *Charter litigation* (Toronto: Butterworths, 1987) at 162-163.

functions in addition to deciding particular cases. However, he noted that the courts were also faced with legislative facts on occasion, and that they had implicitly been treating such facts differently.[31] The courts had failed to draw an explicit distinction between the different types of facts they were determining, with one exception: the category of "constitutional facts", which had arisen to refer to facts relevant to deciding matters of constitutional law.[32] The constitutional context was thus one of the earliest sites where the role of non-adjudicative facts in litigation was explicitly recognized.

The Supreme Court of Canada (SCC) picked up on Davis' distinction in the 1990 case of *Danson v Ontario (AG)*:

> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". […] Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context.[33]

While the initial distinction was between adjudicative and legislative facts, a further division of non-adjudicative facts has since become established in Canadian

[31] Davis, *supra* note 28 at 402-403.
[32] *Ibid* at 403.
[33] *Danson v Ontario (AG),* [1990] 2 SCR 1086 at para 27 [*Danson*].

jurisprudence. As the SCC in *R v Spence* noted: "Such non-adjudicative facts are now generally called "social facts" when they relate to the fact-finding process and "legislative facts" in relation to legislation or judicial policy."[34] The Court in *Spence* went on to explain the concept of "social fact" as follows:

> "Social fact" evidence has been defined as social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case […] As with their better known "legislative fact" cousins, "social facts" are general. They are not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, they help to explain aspects of the evidence.[35]

Social facts, then, can be understood as assisting in the interpretation of adjudicative facts, while legislative facts assist in the formulation of law and policy. As I discuss below, other scholars have developed variations on this taxonomy that, while not widely taken up by Canadian courts, can nevertheless be helpful in illuminating the nature of the facts at play in constitutional cases and the means relied upon to establish them.

The central role of social and legislative facts in strategic *Charter* challenges to legislation reflects the special nature of the issues and judicial task in these kinds of

[34] *Spence, supra* note 30 at para 56.
[35] *Ibid* at para 57.

cases.[36] Unlike most litigation, the role of courts in this context is not to resolve disputes between private individuals, or even between individuals and the state (though the cases are often framed in this way for standing purposes). Rather, the court must determine whether a given legislative provision or regime accords with the rights and freedoms enshrined in the constitution. While the allegation may be that the legislation infringes the right or freedom of a particular individual or individuals, those individuals are typically standing in for a much larger class of people whose rights are at stake. Furthermore, in addressing whether a *Charter* violation is justified under s.1, the court must consider the objectives and effects of the law in relation to the public as a whole. The task at hand involves broad policy considerations, and is arguably more akin to law-making than to dispute resolution—hence the anxiety that the *Charter* has often invoked with respect to the institutional role of the courts.[37] Just like Davis' administrative agencies, courts presiding over strategic *Charter* challenges can be understood as engaged in a different kind of institutional function—one that is more aptly characterized as legislative, rather than adjudicative in nature. Accordingly, they are called upon primarily to make findings about social and legislative, rather than adjudicative facts.

One of the main things that sets strategic *Charter* litigation apart is the blurring of the boundary between fact-finding and law-making itself. Indeed, the very concept of a "legislative fact" signals a disruption of the fundamental division between law and fact engrained in the common law and inherent in what Twining calls the "Rationalist

[36] See Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harvard Law Review 1281.
[37] For a more thorough discussion of this issue, see Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 15 onwards.

Tradition" of common law evidence scholarship.[38] According to this tradition, the purpose of adjudication is "rectitude of decision": the correct application of substantive law to proven facts.[39] This accords with the notion that only matters of fact are subject to proof through evidence, while matters of law are to be decided according to precedent and legal reasoning. It also accords with the separation of the functions of judge (as trier of law) and jury (as trier of fact), and the different standards of review that apply to legal versus factual findings at the first instance.[40] The descriptor "legislative", on the other hand, indicates that a fact serves a law-making purpose. This type of fact does not exist separately from a law that then applies to it; rather, it informs the construction of the law itself. To the extent that "social facts" purport to offer general truths about the world that are not specific to the case at hand but that serve to inform legal decision-making, "social facts" too have a law-like quality.

Social and legislative facts, then, sit in a kind of grey zone between law and fact, highlighting the instability of this commonly invoked dichotomy. Of course, the blurriness of the boundary between law and fact is hardly a new insight in legal scholarship. While courts draw a sharp line between matters of law and fact for certain purposes in a case, legal scholars have long recognized that the division belies a much murkier reality.[41] John Dickinson once wrote: "Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law."[42] More

[38] Twining, *supra* note 1 at 199.
[39] *Ibid* at 199.
[40] Kim Lane Scheppele, "Facing Facts in Legal Interpretation" (1990) 30 Representations 42 at 42.
[41] For a helpful overview of the literature on this point, see Allison Larsen, "Factual Precedents" (2013) 162 Univ Pa Law Rev 59 at 67-68. See also Scheppele, *ibid* at 43.
[42] John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (New York: Russell & Russell Inc, 1927) at 55.

recently, Henry Monaghan expresses the view that "law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience."[43] These statements reflect an understanding of law and fact as distinct categories that are fuzzy at the edges—more like end points on a spectrum than dichotomous opposites. Kim Lane Scheppele, for her part, views the relationship as more complex and intertwined, arguing that law and fact are "mutually constituting—not simply hard to tell apart."[44] Others have gone so far as to deny any meaningful difference between law and fact, at least at the level of ontology. Danielle Pinard has stated that the distinction "does not seem to respond to pre-existing essential imperatives, but rather to fulfill a precise function, that of assuring to certain questions a particular status in the juridical order."[45] Ronald Allen and Michael Pardo offer a detailed argument to this effect, contending that there is no ontological, epistemological, or analytical difference between law and fact, and that the decision to categorize an issue in one way or the other is purely functional.[46] David Faigman makes a similar argument in his recent book about constitutional facts in the United States.[47] The distinction between law and fact has thus been widely exposed as a legal fiction.

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[43] Henry P Monaghan, "Constitutional Fact Review" (1985) 85 Colum L Rev 229 at 233.
[44] Scheppele, *supra* note 40 at 62.
[45] Translated from original: "[La distinction du fait et du droit] ne semble pas répondre à des impératifs essentiels pré-existants, mais bien plutôt remplir une fonction précise, soit d'assurer à certaines questions un statut particulier dans l'ordre juridique". Danielle Pinard, "Le Droit et le Fait dans l'Application des Standards et la Clause Limitative de la Charte Canadienne des Droits et Libertes" (1989) 30 Cah Droit 137 at 139.
[46] Ronald J Allen & Michael S Pardo, "The Myth of the Law-Fact Distinction" (2003) 97:4 Northwest Univ Law Rev 1769.
[47] David L Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford: Oxford University Press, 2008) at 117-118. See also Scheppele, *supra* note 40 at 43.

Still, in many cases, the distinction remains largely untroubled. In a traffic court hearing about an alleged speed limit violation, one can say without much doubt that the speed at which the defendant was driving when pulled over is a matter of fact, while the question of whether they violated the speed limit is a matter of law. It is upon entering the terrain of social and legislative facts that things become more muddled.[48] For example, in the context of constitutional litigation, Canadian courts have recently considered matters such as the importance of facial demeanour in assessing a witness' testimony,[49] the extent to which the dangers faced by sex workers and illicit substance users can be traced back to personal choice,[50] and the potential effects of permitting medically assisted dying on vulnerable people.[51] These issues call upon courts to consider information about social and legal context, but also to draw on analogous precedents and to engage in normative reasoning and judgment. They thus bear attributes of both law and fact.

2.4 CONSEQUENCES FOR THE FACT-FINDING PROCESS

The "in-between" nature of social and legislative facts has a number of consequences for the fact-finding process in strategic *Charter* litigation. First, it renders the doctrinal rules of admissibility relatively impotent, demonstrating the applicability of Twining's argument of exaggerated importance in this context. Second, it leads to a great deal of uncertainty regarding the process of proof. Together, these effects underscore the limitations of the traditional approach to evidence law in strategic *Charter* litigation. In

[48] Speaking of strategic *Charter* challenges to legislation specifically, one judge who I interviewed observed, "the line between the law and facts, I think is very blurred in a lot of these cases": Interview 11 (24 September 2018).
[49] *R v NS*, 2012 SCC 72.
[50] *Bedford* SCC, *supra* note 4 at paras 85-86; *PHS Community Services Society v Canada (AG)*, 2008 BCSC 661 at para 142.
[51] *Canada (AG) v Carter,* 2015 SCC 5 [*Carter* SCC].

this section, I discuss each of these consequences in turn. I go on, in the final section, to examine the resulting dynamics of the fact-finding process as they relate to concerns about epistemological justice.

2.4.1 The Impotence of the Rules of Admissibility

The first consequence of the centrality of social and legislative facts in strategic *Charter* litigation is the altered—and ultimately diminished—role of the doctrinal rules of evidence as regulators of admissibility. In *Danson,* the SCC found that legislative facts are "of a more general nature, and are subject to less stringent admissibility requirements" than adjudicative facts.[52] It is easy to understand the rationale for this relaxed standard. As the Court observed in *Spence*, matters of social and legislative fact can be difficult to prove with any degree of precision.[53] Given that such matters are complex, and cannot be definitely established or disproven by any single piece of information, the dangers of relying on imperfect evidence, or on extra-record materials, may be less pressing than they are with respect to adjudicative facts.[54] The challenge of determining social and legislative facts also seems to encourage a more open posture to whatever information is at hand.[55]

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[52] *Danson*, *supra* note 33 at para 28. It is not entirely clear whether "less stringent admissibility requirements" means that the requirement to prove non-adjudicative facts is itself less stringent (i.e. such facts are more easily subject to judicial notice) or that the evidence marshaled to support such facts is subject to a less stringent standard for admissibility. However, as the Ontario Court of Appeal noted in *R v Zundel (No 1)*, [1987] OJ No 52, the distinction blurs somewhat in practice, since judges may equip themselves to take judicial notice by consulting reference works or hearing sworn testimony, which is then not subject to the hearsay rule.
[53] *Spence, supra* note 30 at paras 56, 64.
[54] Morgan, *supra* note 30 at 204.
[55] Brianne J Gorod, "The Adversarial Myth: Appellate Court Extra-Record Factfinding" (2011) Duke Law J 1 at 43.

The attenuated role of the rules of admissibility in the *Charter* context may stem in part from their origins. The traditional role of courts has been to determine factual issues related to particular disputes—i.e. adjudicative facts.[56] It is this type of fact-finding that the common law rules of evidence were developed to regulate. Because the rules contemplate witnesses giving testimony about particular past events or states of affairs in dispute, rather than about general socio-legal phenomena, they are often maladapted to the latter scenario, as the examination of *Bedford* in the following section makes clear.[57]

The frequent use of written application procedures in strategic *Charter* cases may also contribute to the muted force of rules that have evolved within the hallmark common law setting of the *viva voce* trial. According to the *Ontario Rules of Civil Procedure*, civil proceedings in Ontario are generally brought as actions.[58] However, Rule 14.05(3) authorizes a proceeding to be brought by application in certain circumstances, including where the relief sought is a remedy under the *Charter.*[59] Applications are made to a judge[60] and heard on the basis of affidavit or other documentary evidence.[61] Parties may choose to cross-examine affidavit deponents, often out of court.[62] In British Columbia (BC), where much recent test case litigation under the *Charter* has arisen, the *Supreme*

[56] David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, the Institutional Competence of Courts and the Prospects for Anti-Poverty Charter Claims" (2014) 33 Natl J Const Law 1 at 16; A Christopher Bryant, "Foreign Law as Legislative Fact in Constitutional Cases" (2011) 2011 Brigh Young Univ Law Rev 1005 at 1008; Gorod, *ibid* at 10; Allan C Hutchinson, "Charter Litigation and Social Change: Legal Battles and Social Wars" in Sharpe, *supra* note 30 at 368.
[57] Gorod, *ibid* at 38.
[58] *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, r 14.02 [*Ontario Rules*].
[59] *Ibid*, r 14.05(3)(g.1). Interestingly, the list of enumerated circumstances and the basket clause under rule 14.05(3) suggest that applications are generally allowed "where it is unlikely that there will be any material facts in dispute requiring a trial." That *Charter* challenges are allowed to proceed in this manner once again highlights the special nature of the facts and issues in these cases, and shows how this opens up different procedural options.
[60] *Ibid*, r 38.02
[61] *Ibid*, r 39.01(1). See also r 38.04(c) and r 38.09(2).
[62] *Ibid,* r 29.02(1). For example, the cross-examinations in *Bedford* all took place out of court.

Court Civil Rules allow a party to an action in which a response has been filed to bring a summary trial application,[63] wherein parties may tender evidence by affidavit.[64] In the case of *Hryniak v Mauldin,* the SCC emphasized the importance of such alternatives to a conventional trial as a means of upholding the principle of proportionality in civil procedure and thereby ensuring meaningful access to justice.[65] And indeed, the use of application procedures to bring evidence by affidavit has become a preferred method for bringing strategic *Charter* challenges to legislation.[66] The challenge in *Bedford* was brought as an application under Ontario Rule 14.05(3),[67] while counsel in *PHS Community Services Society v Canada (AG)* and *Carter* brought summary trial applications under BC Rule 9-7*,* allowing them to tender evidence by affidavit.[68] As discussed below, the use of such alternative procedures may help to explain the attenuated force of the rules of admissibility in *Bedford* and other strategic *Charter* challenges.[69]

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[63] *Supreme Court Civil Rules,* BC Reg 168/2009, r 9-7(1) and (2) [*BC Rules*].
[64] *Ibid,* r 9-7(5). However, the Court may decline to grant judgment where it is unable to find the necessary facts on the basis of the evidence presented through this procedure (r 9-7(15)(a)).
[65] *Hryniak v Mauldin,* 2014 SCC 7 [*Hryniak*]. While the analysis in *Hryniak* was focused on the proper interpretation of the Ontario rule allowing for summary judgment motions (*Ontario Rules, supra* note 58 at r 20), the case speaks to the broader issue of when legal disputes may be resolved via alternative written procedures without the need for a *viva voce* trial.
[66] Interview 9 (17 September 2018) and Interview 11 (24 Septemer 2018). For a discussion of the rules governing application procedures in Ontario and British Columbia, see Chapter 2 at 2.4.1.
[67] *Ontario Rules*, *supra* note 58*,* r 14.05(3)(g.1).
[68] *PHS Community Services Society v Canada (AG),* 2008 BCSC 661, varied in 2011 SCC 44 [*Insite*]; *BC Rules, supra* note 63, r 9-7(1), (2) and (5). A large volume of evidence was submitted via affidavit in *Carter*, however the parties also had the opportunity to examine and cross-examine witnesses before the court—an example of a hybrid procedure, which, according to one interviewee, is becoming increasingly common. Interview 9 (17 September 2018). Another example of a hybrid procedure occurred in *Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588 [*Polygamy Reference*]. Interview 7 (13 September 2018).
[69] See Chapter 8 at 8.3.1 for further discussion of written versus oral procedures and their implications.

Three Evidentiary Doctrines in Bedford

To demonstrate the limited force of the rules of admissibility in the context of strategic *Charter* litigation, it is useful to offer a concrete example. I do so here by examining the role of three key evidentiary doctrines—hearsay, opinion evidence, and relevance—in the *Bedford* case. As I show, these doctrines do remarkably little to circumscribe the admission and use of evidence in *Bedford*. I go on to situate my observations about the role of the rules in *Bedford* within the broader landscape of strategic *Charter* litigation, drawing on insights from my research interviews.

Hearsay

Hearsay has been defined by the SCC as "an out-of-court statement tendered for the truth of its contents."[70] It is considered presumptively inadmissible as evidence, in part because it can "threaten the integrity of the trial's truth-seeking process".[71] Of course, not every instance of arguable hearsay will be subject to challenge in court, even in a highly contested criminal trial. Nevertheless, the rule against hearsay is one of the main legal tools available to regulate the admission of evidence in court. It is thus remarkable to observe the degree to which this rule is ignored in the *Bedford* case.

Some of the clearest examples come from witnesses who, in the course of giving evidence, convey the secondhand accounts of sex workers not involved in the case. Such accounts appear frequently in the testimony of the applicants and other experiential witnesses, as well as some of the academic expert witnesses. Take, as an example, the testimony of Valerie Scott and Amy Lebovitch, two of the applicants in the case whose

[70] *R v Bradshaw*, 2017 SCC 35 at para 1 [*Bradshaw*].
[71] *Ibid* at para 1.

evidence is central to the experiential claims being advanced. In her affidavit, Scott repeatedly describes the experiences of other sex workers with whom she has been in contact,[72] including reports of abuse at the hands of a particular police officer.[73] No objection is raised to this evidence, despite its hearsay nature. Similarly, in her evidence, Lebovitch describes being told by peers in the sex trade about incidents where they would enter a client's car and find that the locks were removed.[74] In cross-examination, counsel for Canada poses to Lebovitch that "this is a story that someone told you had happened," as though to emphasize its hearsay nature.[75] However, no objection is raised to the evidence, and it is later cited in the Attorney General of Ontario's factum at the Ontario Superior Court without comment or concern.[76]

There is an argument to be made that, in at least some instances, these secondhand accounts of what other sex workers have said would meet the necessity criterion for principled exceptions to the hearsay rule.[77] One can imagine that, in some cases, the original declarants might be unable to testify directly due to geographic location, illness, or personal vulnerability. It may also be considered a poor use of court resources to call all of these declarants as witnesses, given that their evidence is not central to the disposition of the case and that it would significantly lengthen the proceedings. This type of hearsay would not, however, likely meet the reliability criterion for principled

[72] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Valerie Scott at paras 17, 18, 22 and 30) [Scott affidavit].
[73] *Ibid* at para 22.
[74] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Amy Lebovitch at para 2); *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Amy Lebovitch at paras 73-77) [Lebovitch cross].
[75] Lebovitch cross, *ibid* at paras 74.
[76] *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of Intervener AG Ontario at para 38) [Factum of AG Ontario].
[77] See *R v Khelawon,* 2006 SCC 57 at paras 49 and 78 [*Khelawon*].

exceptions to the hearsay rule.[78] There are no procedural substitutes for testing the truth of such statements, or substantive indicia of trustworthiness, that would alleviate concerns about reliability.[79] Of course, this criterion was developed to address concerns that arise with respect to facts of a different nature. It does not carry the same urgency when it comes to broad social and legislative facts, and thus does not prevent secondhand accounts from figuring routinely in the evidentiary record in *Bedford*.

The question of hearsay is more complicated when it comes to expert opinion evidence. Like the witnesses above, academic experts in *Bedford* frequently relate what sex workers not involved in the case have told them, either via informal conversations, or in the course of qualitative research. For example, key Crown witness Melissa Farley states in her affidavit: "Some women in prostitution have told me that they felt safer in street prostitution as compared to indoor brothels in USA and in New Zealand where they were not permitted by legal pimps to reject potential johns".[80] While hearsay is admissible as a basis for expert opinion,[81] it is not admissible for the truth of its contents—e.g. that the women Farley spoke to were prohibited from rejecting customers in indoor settings—and must be independently proven for the resulting opinion to hold any weight, unless it is within the scope of the expert's expertise.[82] The case law suggests that qualitative research data would likely fall within that scope,[83] however the status of informal

[78] *Bradshaw, supra* note 70 at para 26; *Khelawon, ibid* at para 49.
[79] *Bradshaw, ibid* at para 27.
[80] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Melissa Farley at para 96).
[81] *R v Lavallee,* [1990] 1 SCR 852 at para 66 [*Lavallee*]; *R v Abbey,* [1982] 2 SCR 24.
[82] *Lavallee, ibid* at paras 66 and 82-83.
[83] Survey evidence has been found admissible by Canadian courts in many circumstances. In dealing with such evidence, courts tend to concern themselves more with research methodology than with the hearsay nature of the data. Sidney N Lederman, Alan W Bryant, & Michelle K Fuerst, *The Law of Evidence in Canada* (Markham, Ontario: LexisNexis, 2014) at 854.

conversations is less clear. Again, however, such concerns do not seem to register in *Bedford.* This too may be explained by the poor fit between the rules and the litigation context. Generally speaking, the rules of admissibility have contemplated a different kind of expert opinion altogether from the one at work in cases like *Bedford*. Under the traditional model, an expert is brought in to assess a particular person or event, based on case-specific facts. The admissibility of such facts may well affect the outcome of a case, and thus raises an important issue. The same level of concern does not arise where an expert draws on unproven information to support an opinion about a general matter of social or legislative fact.

Opinion

As with hearsay, the parameters of opinion evidence in *Bedford* extend well beyond the boundaries established by legal doctrine. The sheer amount of opinion evidence on the record in *Bedford* is striking, given the traditional wariness of the common law towards this type of evidence. Doctrinally, it is well established that opinion evidence is only exceptionally admissible.[84] First, only properly qualified experts are permitted to give opinions within the scope of their expertise.[85] In her reasons in *Bedford*, Justice Himel clearly affirms this rule by drawing a sharp boundary between "expert" and "lay" witnesses: "Qualified expert witnesses are granted a right to give opinions for the assistance of the court. Lay witnesses are not granted this right."[86] In order to be admissible, expert opinion must also meet threshold requirements of relevance and

[84] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 14 [*WBLI*]; *R v KA,* 137 CCC (3d) 225 at para 71.
[85] *WBLI, ibid* at paras 14-15; *R v Mohan*, [1994] 2 SCR 9 at para 27 [*Mohan*]*; R v Abbey,* 2009 ONCA 624 at para 62 [*Abbey* ONCA].
[86] *Bedford* ONSC, *supra* note 4 at para 101.

necessity (as well as the absence of an exclusionary rule).[87] Where the opinion is based on "novel or contested science", there is an added threshold requirement of reliability.[88] And yet, opinions from all sorts of witnesses on a variety of matters at issue in the case are routinely offered, and indeed solicited, in *Bedford* without much regard for these requirements.

Of particular note is the prevalence of lay opinion in *Bedford.* Many witnesses characterized on the record as "experiential" give opinions, in their affidavits, about important factual issues in the case, including the relative safety of indoor versus outdoor sex work,[89] and the effects of the impugned laws on sex workers.[90] For example, sex worker and advocate Kara Gilles states that "the safety risks with respect to indoor worksites is significantly less serious and frequent than outdoor street prostitution […] I form this belief based on my conversations with hundreds of sex workers…"[91] Here Gilles offers what amounts to an opinion formed on the basis of hearsay evidence. In another example, Scott states: "The law in effect deters sex workers from reporting the violence, making the apprehension of 'bad dates' who perpetuate this violence unlikely."[92] In offering inferences about general matters of social fact, such assertions

[87] *WBLI, supra* note 84 at para 23.
[88] *Ibid*. See also: *Mohan, supra* note 85 at paras 21-25; *Abbey* ONCA, *supra* note 85 at paras 87-96, 142.
[89] See for example: *Bedford v Canada (AG),* 2012 ONCA 186 (Factum of the Respondents at para 46); *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Linda Shaikh at para 11) [Shaikh affidavit]; *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Kara Gillies at para 8) [Gillies affidavit]; Factum of AG Ontario, *supra* note 76 at para 97, citing Affidavit of HC.
[90] See for example: Scott affidavit, *supra* note 72 at paras 30-31; *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Wendy Harris at para 7); Shaikh affidavit, *ibid* at para 12; Gillies affidavit, *ibid* at para 6; *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Susan Davis at para 16); Factum of AG Ontario, *supra* note 76 at para 50, citing Affidavit of Natasha Falle at para 69.
[91] Gillies affidavit, *ibid* at para 8.
[92] Scott affidavit, *supra* note 72 at para 3.

extend beyond the limits of lay opinion articulated in *R v Graat*.[93] Yet they are not subject to the scrutiny that would normally apply to expert opinion evidence, either, given the classification of the witnesses as "experiential".

Such opinions, moreover, are not limited to the affidavit evidence in *Bedford*. In cross-examination, counsel on both sides routinely ask experiential and other non-expert witnesses for their opinions about general matters such as the effects of the impugned laws, the relative safety of sex work in different locations, and the most effective responses to prostitution.[94] In one especially interesting exchange, counsel for the applicants, Alan Young, asks police officer Eduardo Dizon whether he would agree that street workers are easy targets for sex offenders or serial killers.[95] Counsel for Canada interjects at this point to ask whether Young is asking the witness "for his opinion or for information based on his experience".[96] Young's reply is telling: "They're all mixed up together, everything is his opinion based on his experience."[97] With this response, Young highlights the blurry parameters between experiential observation and opinion in the case at hand. The questioning proceeds without further comment from opposing counsel.

As Young hints at in the above exchange, the loose regulation of opinion evidence in *Bedford* reflects a breakdown of the traditional boundary between expert and lay witnesses. The blurring of these categories is facilitated in *Bedford* by the lack of formal

[93] *R v Graat*, [1982] 2 SCR 819.
[94] See for example: Lebovitch cross, *supra* note 74 at paras 265-282; *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Eduardo Dizon at paras 139-140) [Dizon cross].
[95] Dizon cross, *ibid* at para 139.
[96] *Ibid.*
[97] *Ibid* at para 140.

qualifying procedures for the experts in the case.[98] However, the point arguably applies to other strategic *Charter* cases as well, even where such formal procedures are undertaken. Because the factual issues in this context are closely linked to normative questions of policy, they invite opinions from a range of different perspectives and sources of knowledge, none of which can easily be said to offer a determinative answer. As one of the judges I interviewed explained:

> the expert evidence rules assume more of a scientific model, where someone has done experiments and can prove this thing or that thing, and they have this rarefied specialized knowledge. And a lot of these questions are not like that. They're much more matters of debate and argument.[99]

So-called "lay" witnesses in these cases are often the only ones with direct, lived experience related to the issues under consideration. They have also, in many cases, been involved in frontline work, activism, and/or research related to the issue. These witnesses may thus be perceived as offering a kind of expertise based on experience—a point I return to in Chapter 3. The resultant blurriness between expert and lay witnesses may allow for opinion evidence to slip in without being subject to the usual evidentiary challenges.

[98] While the witnesses in *Bedford* were classified under different headings in the joint application record, there were no formal qualifying procedures for the experts, as their expertise was never subject to challenge. *Bedford v Canada (AG),* 2010 ONSC 4264 (Index to Joint Application Record); Interview 14 (2 October 2018).
[99] Interview 11 (24 September 2018).

In addition to the leeway afforded to the opinions of non-expert witnesses in *Bedford*, witnesses characterized as "expert" are sometimes invited to give opinions that exceed the scope of their expertise, contrary to both the common law of evidence and the *Ontario Rules of Civil Procedure*.[100] This raises the concern that expert authority may serve to bolster opinions not actually grounded in expert knowledge and training. For instance, counsel for Canada asks Elliot Leyton, an applicant-side expert whose research focuses on serial killers, for his opinion on what "system" he would propose to address prostitution.[101] The question is posed and answered without objection (or later comment from the application judge), despite Leyton's acknowledgment that he is not an expert on the subject of prostitution.[102]

As the above examples demonstrate, opinion evidence in *Bedford* not only exceeds its allowed scope*,* but often touches upon dispositive factual issues. Although a bar on ultimate opinion evidence no longer exists in Canadian evidence law, the SCC has noted that opinions that approach ultimate issues should be carefully scrutinized, so as to avoid usurpation of the trier of fact's role.[103] Nevertheless, such opinions are freely given in *Bedford,* often at the behest of counsel.[104] John Lowman, one of the key expert witnesses for the applicants, even goes so far as to frame his opinion directly in terms of a key legal issue in the case. He states in his affidavit: "it is my belief that the Criminal Code

[100] *Abbey* ONCA, *supra* note 85 at para 62; *R v Bingley*, 2017 SCC 12 at para 17; *Ontario Rules, supra* note 58, r 4.1.01(1)(b).
[101] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Elliot Leyton at para 188).
[102] *Ibid* at para 56.
[103] *Mohan, supra* note 85 at paras 24-25.
[104] See for example: *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of John Lowman at para 1140) [Lowman cross]; *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Gayle MacDonald at para 220 onwards).

operates in a manner which violates the security of person for prostitutes in Canada."[105] This assertion seems to clearly usurp the role of the judge as finder of law, and yet it is entered into and remains on the record without objection. Many opinions are also framed as normative judgments about whether the laws *should* be struck down or not.[106]

Relevance

Finally, *Bedford* reflects a very relaxed application of relevance as a fundamental restriction on the admissibility of evidence. Relevance is the cardinal rule of evidence. By excluding information that has no bearing on the truth of a fact in issue, it preserves court time and resources, and avoids reasoning grounded in harmful myths and stereotypes.[107] In strategic *Charter* litigation, however, the factual issues are broad and complex, making the boundaries of relevance far from clear. The response in cases such as *Bedford* has often been to allow for a wide range of evidence within the general sphere of the issues at hand. Relevance, in other words, is given a very broad scope, to the point where it does not act as much of a constraint on the fact-finding process at all.

In *Bedford,* for example, the record includes information about diversion programs for johns, and general statistics about the sex trade in various places that do little to advance the debate on contested factual issues.[108] In several instances, statistical figures are

[105] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of John Lowman at para 7). See also Lowman cross, *ibid* at para 1122).
[106] See for example: Factum of AG Ontario, *supra* note 76 at paras 66, 78, 91, and 97, citing the Affidavits of DS, TD, and HC.
[107] See for example: *R v Seaboyer*, [1991] 2 SCR 577 at para 91 (finding that "evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent"); *R v Barton,* 2019 SCC 33 at para 60 (explaining the rationale for restrictions on the use of sexual history evidence as grounded in relevance) and at paras 206-207 (suggesting that the description of the deceased as a "Native woman" at trial was irrelevant and risked invoking prejudice against her).
[108] See for example *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Renna Weinberg at paras 31-33).

offered without an appropriate basis for comparison. For example, in her affidavit, Crown expert Mary Sullivan claims that the legalization of prostitution in Australia has normalized and thus increased demand for sexual services. She supports this claim by citing research findings that one in six men have paid for sex in Australia, and that 3.1 million sexual services are purchased per year in the state of Victoria's legalized prostitution regime.[109] However, without any pre-legalization figures as a basis for comparison, it is questionable whether these findings can be said to support her claim. Janice Raymond pursues a similar line of reasoning in her affidavit, offering information about the number of German men engaged in prostitution and sex tourism, again without comparative figures.[110]

The broad scope of relevance in *Bedford* also allows counsel to delve into some of the opinion evidence discussed in the previous section, such as witness' views about what kinds of laws or polices ought to replace the challenged provisions, should they be struck down. While important in terms of policy-making, and possibly relevant with respect to the minimal impairment analysis under s.1, such opinions are largely peripheral to the s.7 issues that are the court's focus in *Bedford*. As Himel J states in her decision, "the court has not been called upon to decide […] which policy model regarding prostitution is better. That is the role of Parliament."[111] Nevertheless, counsel takes significant liberties to explore different witness' views regarding prostitution policy, without any objection raised as to relevance.

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[109] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Mary Sullivan at para 96). See also at para 44, where a similar issue arises.
[110] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Janice Raymond at paras 59, 61-62).
[111] *Bedford* ONSC, *supra* note 4 at para 25.

Where counsel do invoke relevance in an effort to circumscribe certain lines of questioning in cross-examination, the exception seems to prove the rule. One exchange between counsel in the course of Crown expert Janice Raymond's cross-examination is of particular interest. Young is in the middle of asking Raymond for her views on abortion, reproductive technologies, and cross-dressing, when counsel for Canada interjects to ask about the relevance of this line of questioning.[112] Young justifies his questioning as an attempt to demonstrate that Raymond's work is based on her moral and political beliefs, rather than empirical observation, but refuses to put the point to the witness directly. The exchange proceeds as follows:[113]

> MS. SINCLAIR: …If you want to ask questions directly about moral or religious views, then I can see relevance, but to ask a number of questions about issues that have no bearing on the matters at issue in this constitutional challenge, I don't see the relevance.
>
> MR. YOUNG: I'm a little troubled with your position considering when you have my witnesses you ask their backgrounds, about their education, and about their home life and all that. How is that relevant to anything?

Here Young implies that, because he has taken a relaxed approach to relevance throughout the case, the Crown should afford him similar leeway. The episode reveals the highly selective and strategic invocation of relevance as a means to limit the scope of the

[112] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Janice Raymond at para 138).
[113] *Ibid* at para 138.

record.

Interviewee Perspectives on Admissibility Issues in Strategic Charter Litigation

The above survey illustrates the minimal constraints imposed upon the evidentiary record by the rules of admissibility in *Bedford*. Some of the most fundamental doctrines relied upon to exclude or otherwise manage evidence in the common law tradition do little to regulate admissibility in this case. Instead, hearsay and opinion evidence are common, expertise is stretched, and relevance is broad.

As noted above, the limited force of the rules in this context may be linked in part to the use of written application procedures. In some ways, the common law rules of admissibility apply less strictly in applications than they do in *viva voce* actions. For instance, in Ontario the content of affidavits is generally restricted to "facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court",[114] however in the case of affidavits on an application, the rules allow "statements of the witness's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit."[115] The BC rules provide for a similar exception, not restricted to non-contentious facts, although it only applies where the application is not seeking a final order.[116] Such provisions provide significant latitude for secondhand accounts that might otherwise qualify as hearsay to be entered as evidence. And, while not allowing a witness

[114] *Ontario Rules, supra* note 58, r 4.06(2).
[115] *Ibid,* r 39.05(5).
[116] *BC Rules, supra* note 63, r 22(13).

to speak to contested facts that bear upon ultimate issues in the case, they afford some leeway for lay opinion as well.

Counsel may also be less likely to object to potentially problematic evidence in cases that proceed by application, simply because the mechanisms available to do so are more cumbersome. For instance, where cross-examinations on affidavits occur out of court (as they did in *Bedford*), challenges to given lines of questioning cannot be immediately resolved except by agreement of the parties. While the Ontario rules allow counsel to register an objection to questions posed in cross-examination on an affidavit,[117] and to adjourn cross-examination where the examiner is acting improperly, [118] these actions require independent court rulings and possibly extra motions (the Ontario Rules are silent regarding how to object to inadmissible evidence given by a witness in an affidavit or upon cross-examination). According to Young, such objections were never raised in *Bedford* for this reason.[119]

This is not to say, however, that the rules of admissibility no longer matter in strategic *Charter* litigation. Nor can the treatment of evidence in one case be taken as representative of all strategic *Charter* challenges. Indeed, my research interviews suggest that the rules and their enforcement vary significantly by jurisdiction as well as by case. For instance, unlike in Ontario, the BC rules allow for a party at a hearing to object to the admissibility of "any question and answer in a transcript or video recording tendered in

[117] *Ontario Rules, supra* note 58, r 34.12(2) and (3).
[118] *Ibid,* r 34.14(1).
[119] Interview 5 (25 July 2017).

evidence, although no objection was taken at the examination."[120] This may increase the practicality of objecting to potentially inadmissible evidence, since it can be done at a later time in open court. While the practical effect of this particular rule is unknown, my interviews suggest that objections to written evidence might be more common in BC. "I think it depends on the context and the counsel, but you definitely would have people objecting to that type of evidence in an affidavit, even in a written proceeding for sure here", opined one BC-based interviewee.[121] This difference in approach is borne out in two recent BC cases—*Carter v Canada (AG)*[122] and *British Columbia Civil Liberties Association v Canada (AG)*[123]—where, unlike in *Bedford*, the courts held separate pre-trial hearings to address an array of admissibility issues.[124]

In some instances, moreover, admissibility issues can thwart, or at least threaten to thwart, the advancement of experiential knowledge in strategic *Charter* litigation, and thereby raise concerns regarding epistemological justice. In *Carter*, for instance, the Crown objected to the plaintiffs' experiential evidence from sick individuals other than the parties—what the Crown referred to as "blood and guts" evidence—on the grounds that it was intended to shock the court.[125] However, the plaintiffs argued that according to the ruling in *R v Ferguson,* a litigant can rely not only on the breach of their own rights, but also on a breach of the rights of a third party, to establish the unconstitutionality of a law. The court ultimately allowed the evidence, finding that it was relevant to the inquiry

[120] *BC Rules, supra* note 63, r 9-7(6) and r 12-5 (56).
[121] Interviewee 12 (27 September 2018).
[122] *Carter v Canada (AG)*, 2012 BCSC 886, affirmed in *Carter* SCC, *supra* note 51.
[123] *British Columbia Civil Liberties Assn v Canada (AG),* 2018 BCSC 62, varied in 2019 BCCA 228.
[124] Interview 1b (3 October 2018) and Interview 6 (30 August 2018). See *Carter v Canada,* [2011] BCJ No 1897 [*Carter* admissibility].
[125] Interview 1b (3 October 2018).

under s.1 and also possibly at the stage of determining whether there was infringement of *Charter* rights.[126]

In *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence*,[127] the key experiential evidence came from the affidavits of sex workers in the Downtown Eastside of Vancouver. In order to protect the identities of these highly stigmatized and vulnerable women, the affidavits were anonymous. However, this created a barrier to tendering them directly as evidence.[128] In the application on the issue of public interest standing (the issue that ultimately took over the case), the plaintiffs were able to tender this evidence indirectly by attaching it to the affidavit of a volunteer for PIVOT—the non-profit helping to organize the litigation. However, former executive director of PIVOT and research interviewee Katrina Pacey surmised that hearsay concerns would likely have prevented the affidavits from being tendered in a similar manner at trial. Rather, to be admissible as part of the record, the individuals who gave the evidence would have had to name themselves and make themselves available for cross-examination.[129] For this reason, Elin Sigurdson, another PIVOT lawyer and research interviewee, posited that the affidavits would likely have been tendered as a "collection of information" attached to an expert report that would have provided an

[126] *Ibid*, referring to *R v Ferguson*, 2008 SCC 6; *Carter* admissibility, *supra* note 124 at para 13.
[127] *Downtown Eastside Sex Workers United Against Violence v Canada (AG),* 2008 BCSC 1726, reversed in 2012 SCC 45.
[128] Interview 4b (18 September 2018). This issue has arisen in several other strategic *Charter* challenges with mixed results. In the *Polygamy Reference, supra* note 68, the court allowed testimony from anonymous witnesses who would not otherwise have been able to participate, on the basis that the value of the evidence outweighed its deleterious effects. Interview 7 (13 September 2018); *Reference re: Criminal Code, s. 293,* 2010 BCSC 1351. In *Carter,* on the other hand, interviewee Sheila Tucker described attempting, without success, to tender an anonymized affidavit from a person who had participated in a medically assisted death. Interview 6 (30 August 2018).
[129] Interview 4 (15 September 2016).

analysis of their content.[130] In this way, rules of admissibility and procedure, combined with the challenges of participating in litigation (discussed further in Chapter 8), would have resulted in the foregrounding of expert over experiential knowledge. Even if the affidavit authors had been able to come forward directly, Sigurdson speculated that their affidavits might have given rise to objections regarding lay opinion evidence, given that many of the affiants had gone beyond their direct experience to articulate views about the state of the law.[131]

Still, on the whole, my interviewees affirmed the tendency for admissibility issues to figure less prominently in strategic *Charter* litigation. "I don't think generally speaking that there are that many fights about the evidence", observed one Crown litigator.[132] "It's probably loosier goosier in constitutional cases than it is otherwise," remarked another former Crown.[133] As noted by several interviewees, the extent to which potential evidentiary objections actually materialize depends largely on the approach of counsel. Litigators must pick their battles when raising such objections, focusing on the evidence that is likely to be most damaging to their case.[134] In the context of strategic *Charter* litigation, there are two important factors encouraging them to tread lightly. First, given the large volume of evidence and broad factual questions at issue in these cases, it is often more efficient to address concerns about the record in argument as a matter of weight, rather than through resource-intensive admissibility motions unlikely to affect the

[130] Interview 12 (27 September 2018).
[131] *Ibid.*
[132] Interview 10 (21 September 2018).
[133] Interview 7 (13 September 2018).
[134] Interview 6 (30 August 2018); Interview 7 (13 September 2018); Interview 10 (21 September 2018); Interview15 (19 October 2018).

final determination.[135] In *Bedford,* for instance, the parties were encouraged by the case management judge to avoid unnecessary evidentiary challenges as a matter of efficiency—part of the reason why expert qualifications went uncontested.[136]

Second, growing concerns about access to justice have driven counsel and the courts to avoid overly technical applications of the rules of admissibility in systemic cases involving vulnerable groups. As constitutional litigator Craig Jones remarked, regarding the experiential accounts of sex workers in *Bedford*: "maybe you have to permit some hearsay around the edges, maybe you have to permit them some sort of anonymity, if you actually want to get to the truth of what they're living."[137] Another Crown-side interviewee offered the following observation:

> I would say government lawyers are increasingly aware of our need to litigate cases in a way that is more sensitive, that allows these voices to be brought to bear, that doesn't unduly burden the process with preliminary or technical motions. […]

However, this interviewee also warned that the SCC's decision to heighten the standard of review for social and legislative facts in *Bedford* may work against this trend:

> But on the other side, you know, what's pushing against that is […] the incredible priority and imperative now put on first instance fact-finding,

[135] Interview 10 (21 September 2018); Interview 13 (28 September 2018); Interview 15 (19 October 2018).
[136] Interview 15 (19 October 2018).
[137] Interview 7 (13 September 2018). Note that Jones was not directly involved in the case.

> and that, to the extent that there's a problematic evidentiary issue, it really needs to be dealt with at first instance or it gets baked into a case forever and ever, and there's less and less scope to bring that challenge.[138]

In other words, given less opportunity to challenge findings of social and legislative fact on appeal, Crown counsel may be inclined to take a harder line on the admissibility of evidence at first instance.

2.4.2 Uncertainties Regarding the Process of Proof

In addition to diminishing the potency of the rules of admissibility, the exceptional nature of the facts at issue in strategic *Charter* litigation creates a number of uncertainties regarding the process of proof. Combined with the volume of evidence at play and the lack of constraints on the record, these uncertainties afford strategic opportunities for counsel and the courts to approach the fact-finding process in different ways, with important implications for epistemological justice. In this section, I illuminate the uncertain terrain of fact-finding in strategic *Charter* litigation by tracing the efforts of legal scholars and the courts to address the demands of proof with respect to social and legislative facts. I go on, in the following section, to analyze the resulting dynamics of the fact-finding process through the lens of epistemological justice.

The indeterminate nature of social and legislative facts has led to a great deal of uncertainty regarding the appropriate procedures for establishing them, especially in the constitutional context. Should these facts be addressed via legal argument or through

[138] Interview 15 (19 October 2018).

extrinsic material such as social science research? If the latter, should the relevant research be included in a factum (or "Brandeis Brief", in the American terminology), or presented through an expert witness? Can the court take judicial notice of such material, whether independently researched or presented by counsel? Uncertainty has also arisen regarding the status of the court's findings with respect to social and legislative facts. On what standard should appellate courts be allowed to review such findings? Do the findings carry precedential value, or must they be established anew in each new case? Because the "facts" at issue are in some ways quite law-like, the proper approach is far from clear.

In the 1980s, John Monahan and Laurens Walker attempted to address some of this confusion by considering the proper role of social science research in litigation. In doing so, they expanded on Davis' taxonomy, albeit in a somewhat different direction than the SCC. Monahan and Walker argued that social science research ought to be characterized and treated differently depending on its relationship to the litigation.[139] Research conducted to address a case-specific issue, such whether a trademarked product is easily mistaken for another similar product, was a matter of "social fact"—a special type of adjudicative fact established on the basis of social science research. [140] (This concept differs from the one adopted in Canadian law, wherein "social facts" are understood as non-adjudicative in nature, and include a wider array of background social context.)

[139] John Monahan & Laurens Walker, "Social Science Research in Law: A New Paradigm" (1988) 43:6 Am Psychol 465 [Monahan & Walker, "A New Paradigm"].
[140] *Ibid* at 469.

Research directed at legislative facts, on the other hand, had a dual character: it was empirical like fact, but general like law. On practical grounds, Monahan and Walker argued that such research ought to be treated as a law-like source of authority—what they called "social authority."[141] This meant that general social science research would come before the courts via briefs or independent judicial research, rather than expert testimony, and would be evaluated in a similar manner to legal precedent.[142] These thinkers saw their proposal as a clear improvement over the confusion that persisted—and continues to persist today—about the appropriate procedures by which social science research should be obtained, evaluated, and established as precedential in litigation.

Monahan and Walker also identified a third use of social science research in litigation, coining the term "social framework" to indicate 'the use of general conclusions from social science research in determining factual issues in a specific case.'[143] This is the concept that most closely resembles the Canadian courts' notion of a "social fact." As an example of social framework, they pointed to a murder case where expert evidence was called regarding the factors that affect the accuracy of eyewitness testimony, given that such testimony was crucial to the case.[144] Monahan and Walker proposed that social framework be treated in two stages, reflecting its mixed character as general research applied to a specific case: first, judges should receive and appraise social framework as

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[141] *Ibid* at 466. See also: John Monahan & Laurens Walker, "Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law" (1985) 134 Univ Pa Law Rev 477 at 483 [Monahan & Walker, "Social Authority"]. Justice L'Heureux-Dubé picks up on this concept in *Willick v Willick,* [1994] 3 SCR 670, at paras 45-52 [*Willick*].

[142] Monahan & Walker, "A New Paradigm", *supra* note 139 at 467-468; Monahan & Walker, "Social Authority", *ibid* at 495, 498.

[143] Monahan & Walker, "A New Paradigm", *ibid* at 470. See also Laurens Walker & John Monahan, "Social Frameworks: A New Use of Social Science in Law" (1987) 73 Va Law Rev 559 at 560 [Monahan & Walker, "Social Frameworks"].

[144] Monahan & Walker, "A New Paradigm", *ibid* at 470.

social authority; second, the trier of fact should apply the relevant authority as laid out by the judge to the particular facts of the case.[145] While the general concept of social framework has been widely taken up, and has been cited by the SCC (along with the concept of social authority),[146] Monahan and Walker's proposal to treat general social science research in the same way as legal precedent has been largely rejected by courts and scholars, leading the authors to alter their initial proposal.[147]

Meanwhile, Canadian courts have offered their own guidance on social and legislative fact-finding in the constitutional context, without resolving the above uncertainties (apart, perhaps, from the standard of review). On the one hand, the SCC has repeatedly emphasized the need for *Charter* challenges to legislation to be considered within a concrete and well-developed factual context, especially where the effects of the legislation are under attack.[148] The Court has generally associated an appropriate factual context with an adequate evidentiary record, suggesting that legal arguments alone will generally not suffice to establish or defend a *Charter* claim. As the Court stated in *MacKay:* "Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel."[149] While the Court has acknowledged that there may be some cases

[145] Monahan & Walker, "Social Frameworks", *supra* note 143 at 585-588; 592.
[146] John Monahan, Laurens Walker & Gregory Mitchell, "Contextual Evidence of Gender Discrimination: The Ascendance of Social Frameworks Essay" (2008) 94 Va Law Rev 1715 at 1727-1729 [Monahan, Walker & Mitchell, "Contextual Evidence"]; *Willick, supra* note 141 at para 47 (citing Monahan & Walker's concept of "social framework") and at paras 45-52 (citing the concept of "social authority").
[147] Monahan, Walker & Mitchell, "Contextual Evidence", *ibid* at 1718.
[148] *MacKay v Manitoba,* [1989] 2 SCR 357 at paras 8-9 and 20 [*MacKay*]; *Danson, supra* note 33 at para 26; *Edmonton Journal v Alberta (AG),* [1989] 2 SCR 1326 at paras 51-52.
[149] *MacKay, ibid* at para 9.

where the constitutionality of legislation can be determined as a matter of law alone, it has deemed this to be an exceptional circumstance.[150]

On the other hand, the SCC has, on several occasions, interpreted *Danson* as supporting a relaxed standard for taking judicial notice of legislative facts in constitutional and other contexts.[151] In a concurring judgment in the early *Charter* case of *R v Edwards Books and Art Ltd,* Justice La Forest stated:

> The admonition in Oakes and other cases to present evidence in Charter cases does not remove from the courts the power, where it deems it expedient, to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them.[152]

La Forest observed that while there are risks inherent in taking judicial notice of such facts, it can also be problematic to rely exclusively on the evidence presented by counsel in *Charter* cases.[153] A relaxed approach to judicial notice in constitutional cases has also

[150] *Manitoba (AG) v Metropolitan Stores Ltd,* [1987] 1 SCR 110 at para 49.
[151] *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 28 [*Malmo-Levine*]; *Polygamy Reference, supra* note 68 at para 63; *Spence, supra* note 30 at paras 59-66. The power of judicial notice as a means of receiving social and legislative facts was affirmed in several non-constitutional cases throughout the 1990s, wherein judges deemed it necessary to conduct their own independent research in order to properly account for the social context surrounding an issue of societal importance. See for example: *Willick, supra* note 141; *Moge v Moge,* [1992] 23 SCR 813*; R v Parks*, (1993), 84 CCC (3d) 353 (Ont CA).
[152] *R v Edwards Books and Art Ltd,* [1986] 2 SCR 713 at para 190.
[153] *Ibid* at para 191. On this point, see also Gorod, *supra* note 55 at 10.

found support amongst constitutional scholars from the early days of the *Charter*,[154] and has even deeper roots in the United States.[155]

The complexity and difficulty of proving matters of social and legislative fact has also led courts to grant more leeway on the demands of proof, especially when combined with concerns about deference to the legislature at the s.1 stage of *Charter* analysis.[156] Thus, while the SCC in *Oakes* called for "cogent and persuasive" evidence to justify a *Charter* violation under s.1,[157] and a rigorous application of the civil standard of proof,[158] the Court has since clarified that proof to a scientific standard is not required,[159] and that common sense, reason, and logic may support a successful s.1 justification where the social science evidence is inconclusive or where the proposition at issue is not readily measurable in a scientific sense.[160] In a recent s.2(b) challenge to provisions of the *Election Act* in BC, the Court went so far as to find that the Attorney General was able to meet its burden under s.1 on the basis of logic and reason without any evidence at all.[161] While the Court has continued to frame justification under s.1 as a factual exercise, dispensing with the need for evidence in this way arguably gestures towards a more "legal" and less "factual" treatment of the analysis.

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[154] Morgan, *supra* note 30 at 172.
[155] John Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Sharpe, *supra* note 30 at 218.
[156] Morgan, *supra* note 30 at 179.
[157] *R v Oakes,* [1986] 1 SCR 103 at para 68.
[158] *Ibid* at para 67.
[159] *RJR-MacDonald v Canada (AG)*, [1995] 3 SCR 199 at para 137 [*RJR MacDonald*].
[160] *Ibid* at paras 137, 154; *Thomson* Newspapers *Co v Canada (AG),* [1998] 1 SCR 877 at para 90 [*Thomson Newspapers*]; *R v Butler,* [1992] 1 SCR 452 at paras 103-108*; Harper v Canada (AG),* [2004] 1 SCR 827 at para 77.
[161] *BC Freedom of Information and Protection of Privacy Association v British Columbia, (AG)* 2017 SCC 6.

Much of the discussion about the demands of proof under s.1 has taken place in the context of s. 2(b) challenges, where the violation of freedom of expression is often established with little or no evidence. This debate may appear to hold less salience in s.7 cases, given that a s.7 violation has almost never been upheld under s.1.[162] However, the SCC in *Bedford* made a point of emphasizing that the violation of a single individual's right in a manner contrary to the principles of fundamental justice is enough to make out a claim under s.7, negating the need to establish broad social and legislative facts at this stage.[163] As anticipated by some of my interviewees, this has shifted questions of social and legislative fact, and the burden of proving them, over to the s.1 analysis.[164]

The above jurisprudence suggests that, in comparison to adjudicative facts, social and legislative facts can be more readily established on the basis of less compelling evidence (or no evidence at all)—treatment that seems to reinforce the special, law-like nature of such facts. At the same time, the SCC has warned against making too much of the distinction between adjudicative and non-adjudicative facts in determining the proper approach to fact-finding. In *R v Malmo-Levine*, the Court found that in spite of the finding in *Danson,* "courts should nevertheless proceed cautiously to take judicial notice even as 'legislative facts' of matters that are reasonably open to dispute, particularly where they relate to an issue that could be dispositive."[165] This was reaffirmed in *Spence*, wherein the Court clarified that the key consideration in determining the appropriate standard for judicial notice is not the type of fact at issue, but the purpose for which the

[162] Note, however the recent exception in *R v Michaud*, 2015 ONCA 585.
[163] *Bedford* SCC, *supra* note 4 at para 127.
[164] Interview 1 (6 September 2016) and Interview 1b (3 October 2018).
[165] *Malmo-Levine, supra* note 151 at para 28.

fact is being advanced—in particular, how central it is to the disposition of the case.[166] The Court in *Spence* also interpreted previous jurisprudence as supporting a preference for social and legislative facts to be established via expert testimony, rather than judicial notice.[167]

The distinction between adjudicative and non-adjudicative facts has been further eroded by recent developments in the jurisprudence. Most notably, in *Bedford* the SCC made the controversial finding that social and legislative facts are subject to the same standard of review as adjudicative facts.[168] This ran counter to the Court's earlier suggestion in *RJR MacDonald* that such facts may call for less deference from appellate courts[169]—an approach supported by many commentators.[170] The Court in *Bedford* justified this shift by noting that "the use of social science evidence in *Charter* litigation has evolved significantly since *RJR-MacDonald* was decided. In the intervening years, this Court has expressed a preference for social science evidence to be presented through an expert witness".[171] This suggests an increasing inclination to treat social and legislative facts as more fact-like than law-like, in spite of warnings from some quarters about the dangers of affording social scientists and other experts[172]—and trial judges[173]—too much power in constitutional decision-making.

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[166] *Spence, supra* note 30 at paras 58-65.
[167] *Ibid* at para 68.
[168] *Bedford* SCC, *supra* note 4 at para 49.
[169] *RJR MacDonald, supra* note 159 at paras 140-141. The point was made more forcefully by Justice La Forest in dissent (see paras 79-81).
[170] Morgan, *supra* note 30 at 186; Interview 11 (24 September 2018).
[171] *Bedford* SCC, *supra* note 4 at para 53.
[172] See for example: Katherine Swinton, "What Do the Courts Want from the Social Sciences?" in Sharpe, *supra* note 30 at 200, 207.
[173] Interview 11 (24 September 2018).

As the above account demonstrates, the appropriate characterization and treatment of social and legislative facts in strategic *Charter* litigation is shifting and unclear. This uncertainty is compounded, in strategic *Charter* cases, by a general lack of doctrinal guidance on matters of weight. While policing the boundaries of the record, evidentiary doctrine, by and large, leaves questions of weight to the logic of the trier of fact. Where litigation is centred on broad and complex factual issues that invite information from multiple sources in multiple forms, with minimal constraints on admissibility, this creates a great deal of open space. How, for instance, do the experiences and opinions of directly affected people weigh in against the findings of social science research in proving the social and legislative facts at issue in strategic *Charter* cases? Which kinds of research studies, drawing on which methodologies and from which disciplines, are most probative of the factual issues at play? These are important questions to which the rules of admissibility offer no direct answer.

The end result of these uncertainties, combined with the lack of constraints imposed by the rules of admissibility (particularly relevance), is a process of proof that is expansive, open-ended, and often unpredictable. In the words of Alan Young, post-*Bedford*, "there is a lack of clarity and consistency with respect to the nature, scope and manner of admitting legislative fact evidence in Canadian constitutional litigation", with "no certain rules and principles governing the manner of admission and the probative value of the evidence."[174] As I show in the next section, this creates ample room for strategic

[174] Alan N Young, "Proving a Violation: Rhetoric, Research and Remedy" (2015) 67:0 Supreme Court Law Review 617 at 637.

manoeuvring on the part of lawyers and judges—manoeuvring that deserves the attention of evidence scholars for what it can show about the treatment of knowledge in litigation.

2.5 A DIFFERENT APPROACH TO EVIDENCE

Looking at fact-finding in strategic *Charter* litigation through the lens of doctrinal rules of admissibility suggests that the law of evidence has a limited role to play in this context. From a broader perspective, however, this area of litigation brings to the fore other dimensions of evidence law closely linked to questions of epistemological justice. As I demonstrate below, the indeterminate character of social and legislative facts affords strategic opportunities for counsel and the courts to frame these facts in different ways, with important consequences for the demands of proof. At the same time, the lack of admissibility constraints in strategic *Charter* cases, and the lack of doctrinal guidance on matters of weight, creates significant space for different approaches to constructing and framing the record. These strategic choices, I argue, merit close attention as part of the study of evidence in strategic *Charter* litigation for several reasons. First, they play a central role in shaping the process of proof in this context—far more so than the rules of admissibility. Second, they are informed by the epistemological assumptions embedded in doctrinal rules, as well as by practical and institutional factors that shape the litigation context. Finally, and most importantly for my purposes, they carry significant consequences in terms of epistemological and social justice for marginalized groups engaged in strategic *Charter* litigation.

2.5.1 The Framing of Facts

The "in-between" position of social and legislative facts within the law/fact dichotomy creates opportunities to strategically characterize them in different ways to accomplish different purposes. After all, while the division between law and fact may lack a principled basis, most scholars agree that it carries significant practical consequences.[175] Matters of fact and law are treated very differently in litigation. The former are restricted to the case at bar, subject to proof through evidence, decided by the trier of fact, and rarely appealable; the latter are general (they hold precedential value), not subject to proof through evidence, decided by the judge, and appealable. Christine Boyle and Marilyn MacCrimmon argue that the allocation of matters between law and fact "may affect fundamental values such as equality and access to justice."[176] I suggest that it may do so in two ways: 1) by controlling the kind of knowledge that can be brought to bear on an issue; and 2) by tacitly shifting the demands of proof.

Legal versus Factual Knowledge

Characterizing a matter as factual rather than legal shifts the knowledge brought to bear on that matter away from traditional legal sources.[177] Where a case turns on facts, the authority of precedent, judicial reasoning, and "common sense" give way, at least partially, to the experiential and empirical observations (and often, opinions) of differently positioned individuals. To be sure, the admissibility of such observations and opinions, and the inferences to be drawn from them, will still be determined through the

[175] Twining, *supra* note 1 at 277; Allen & Pardo, *supra* note 46 at 1769; Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor YB Access Just 55 at 63; Pinard, *supra* note 45 at 22; Scheppele, *supra* note 40 at 42.
[176] Boyle & MacCrimmon, *ibid* at 63.
[177] Larsen, *supra* note 41 at 70.

lens of legal authority and judicial common sense. Nevertheless, characterizing a matter as one of fact opens the door to knowledge originating outside the legal order. Such a move may prove vital for those seeking to challenge the legal status quo. In addition to inviting empirical scrutiny of the issues at stake, Goldberg observes that determining matters on a factual basis provides institutional license for courts to make progressive decisions, by obfuscating controversial normative judgments: "…when breaking with tradition, the Court has led with facts and left norms aside."[178] Those who wish to unsettle an aspect of legal doctrine may do well to frame the issue as ultimately grounded in fact.

On the other end of the spectrum, where the goal is to preserve legally established or "common sense" understandings, it may be best to keep the focus on legal reasoning, rather than factual proof. In Goldberg's account, the process of social change involves not only the unsettling of legal norms via fact-based adjudication—but also the preservation of favourable findings of fact through their re-integration into law.[179] From this perspective, the focus on facts serves only as a catalyst—an essential but temporary stopover on the way to social change. In the same vein, a law-oriented approach may prove crucial to preserve progressive legislative advances achieved through the political process. For example, feminist efforts to eradicate the sexist norms of past rape law have led to the establishment of strict statutory standards for consent to sexual activity in

[178] Suzanne B Goldberg, "Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication" (2007) 6 Dukeminier Awards Best Sex Orientat Gend Identity Law Rev 1 at 26. Wiseman makes a similar point, *supra* note 56 at 12.
[179] Goldberg, *ibid* at 21.

Canada.[180] At the same time, discriminatory myths and stereotypes about sexual violence remain pervasive in society at large. In this context, framing the question of consent as a matter of law rather than fact can help to delegitimize interpretations of sexual behaviour that are grounded in discriminatory reasoning, both within legal proceedings and in social discourse more generally.[181]

The level of generality at which factual issues are framed—what Faigman calls "frames of reference"—can also affect the progressive potential of litigation.[182] In his work on constitutional fact-finding in the American context, Faigman identifies three types of facts at work in constitutional cases, each of which is treated differently from an evidentiary perspective.[183] Constitutional case-specific facts play a similar role to Davis' adjudicative facts. They are, according to Faigman, usually decided by the trier of fact following a strict application of the rules of evidence and procedure, and they have limited precedential value.[184] Constitutional reviewable facts help to determine how pre-defined rules and standards apply to a law or state action under challenge in a given case.[185] Reviewable facts, at least in the American context, are usually decided by judges,

[180] Dana Phillips, "Let's Talk About Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse" (2017) 54:4 Osgoode Hall L J 1133 at 1144-1145. See also *An Act to amend the Criminal Code and the Department of Justice Act and make consequential amendments to another Act*, SC 2018, c 29 at s 10 (clarifying, in the context of sexual exploitation, that consent must be present at the time of the sexual activity in question, and that consent is negated as a matter of law under certain enumerated circumstances).
[181] See Boyle & MacCrimmon, *supra* note 175 at 63-65. See for example *R v Barton,* 2019 SCC 33 at para 95 onwards, and at paras 116-119.
[182] Faigman, *supra* note 47 at 65.
[183] *Ibid* at 46-49.
[184] *Ibid* at 49.
[185] As an example, Faigman points to an American case wherein the US Supreme Court had to determine whether Congress had the authority to regulate home production of marijuana (*Gonzales v Raich,* 545 US 1 (2005)). The pre-defined standard under the Commerce Clause was whether the law at issue "substantially affects interstate commerce." The Court thus had to consider whether home marijuana production affects interstate commerce as a reviewable fact. *Ibid* at 47.

often following rules of evidence and procedures but also sometimes via amicus briefs or independent judicial research. They hold substantial precedential force.[186] Finally, constitutional doctrinal facts establish the meaning of constitutional provisions, by setting out applicable rules and standards. Tightly intertwined with normative arguments, they are decided by judges, and set a binding precedent.[187]

Following Faigman's taxonomy, one particularly salient framing choice requires legal actors to consider whether a given issue calls for proof of case-specific or reviewable facts.[188] Faigman offers numerous examples of how this has played out in the American constitutional context. Take, for instance, the case of *McCleskey v. Kemp*, wherein a Black man sentenced to death claimed that the administration of Georgia's capital sentencing scheme was racially discriminatory, and thus in violation of the constitution.[189] As evidence, McCleskey presented a statistical study showing that in Georgia, Black defendants who murdered White victims were the most likely to receive the death penalty. The Court, however, held that McClesky had to demonstrate that his particular case was decided in a discriminatory manner. The evidence presented was insufficient for that purpose, and the constitutional challenge was denied. In this case, the decision to frame the fact in issue as an adjudicative fact about the particular case, rather than a reviewable fact about the general existence of systemic discrimination, thwarted the constitutional challenger's case. In *Bedford,* on the other hand, the same framing choice plays out in the opposite direction. There the SCC's framing of the s.7 inquiry as a

[186] *Ibid* at 49.
[187] *Ibid*.
[188] *Ibid* at 97.
[189] *McClesky v Kemp,* 481 US 279, discussed in Faigman, *ibid* at 50.

qualitative assessment of the law's effect at an individual rather than systemic level facilitates the finding of a *Charter* breach, by easing the pressure on contested, and methodologically limited, social science evidence.

The Demands of Proof

The allocation of matters between law and fact—or between more law-like and more fact-like types of "facts"—also affects the demands of proof in ways that can be important for equality-seeking litigants and would-be litigants. Framing an issue as a matter of fact may allow for consideration of extra-legal knowledge with respect to the issue, but it also puts a burden on litigants to furnish that knowledge as evidence. When it comes to the kinds of social and legislative facts at play in *Charter* challenges to legislation, that burden can be especially heavy, owing in part to the relaxed approach to relevance and the lack of clear guidelines regarding the manner of proof or the weight of different kinds of evidence. In this context, the characterization of an issue in terms of the law/fact dichotomy may be used to try to alter "who benefits from the status quo."[190] This can be seen in ongoing debates over the kind and degree of proof required to justify a *Charter* violation under s.1.

Interestingly, in *Thomson Newspapers Co v Canada (AG)*, the SCC recognized the need to consider normative contextual factors in determining whether the government has met its burden to justify a rights violation under s.1. In particular, Justice Bastarache found that in assessing whether a violation was "demonstrably justified" it was necessary to consider the vulnerability of the group being protected by the impugned legislation as

[190] Boyle & MacCrimmon, *supra* note 175 at 63.

well as their subjective apprehension of harm.[191] The implication was that legislation aiming to protect vulnerable groups merited more deference and might therefore require less evidence to uphold under s.1.[192] According to Wiseman, however, the contextual factors outlined in *Thomson Newspapers* have not been robustly applied in subsequent cases, thwarting their progressive potential.[193]

The cost of bringing evidence is an important practical factor that may push litigants to avoid characterizing an issue as factual in nature, or at least as necessitating proof via evidence. Public interest litigants may instead hope to bypass Goldberg's fact-based stage of social change altogether, by shifting the tacit generalizations upon which judicial reasoning relies through argument rather than evidence. Alternatively, they may frame the matter at issue as an undisputed fact of which the court can take judicial notice, or as a matter of "common sense". As discussed above, judicial notice can also provide a mechanism for courts to consider relevant social science research and other novel information without hearing it as evidence. Of course, it may also be used to bolster the status quo.[194]

Whether social change favours a more factual or legal characterization of the issues in any particular instance depends on the context. What is clear is that the dual nature of social and legislative facts affords opportunities for counsel to strategically manipulate

[191] *Thomson Newspapers, supra* note 160 at para 90.
[192] Wiseman, *supra* note 56 at 7.
[193] *Ibid* at 9-11.
[194] Patricia Cochran, "Taking Notice: Judicial Notice and the Community Sense in Anti-Poverty Litigation" (2007) 40 UBC Law Rev 559 at 560.

the demands of proof in strategic *Charter* challenges to legislation, with potentially important consequences for the groups whose rights are at stake.

2.5.2 The Framing of Evidence

As demonstrated above, the way social and legislative facts are framed can affect the type of knowledge used to establish them in litigation, as well as the demands of proof. Even when framed in a particular way, however, the facts at issue in strategic *Charter* cases are often open to proof via many different forms and sources of knowledge. For example, the question of whether indoor sex work is safer than outdoor sex work—a key issue in *Bedford*—might be proved via firsthand experiential evidence, social science evidence adduced via expert witnesses, legislative evidence (e.g. reports produced by legislative committees or evidence heard by such committees, Hansard), research reports produced or commissioned by government bodies (including foreign governments), reports from civil society organizations, or some combination of these.

Doctrinal law offers little guidance regarding the appropriate manner of proof or the weight to be accorded to different types of evidence in this context. At the same time, the rules of admissibility do little to constrain the scope of the record. This leaves ample room for legal actors and witnesses to construct and frame the record in competing ways. As I discuss further in the next chapter, and in Part II of the dissertation, these framing strategies are often influenced by the epistemological assumptions embedded in doctrinal law, such as the conception of objectivity central to the test for a properly qualified expert. They are, moreover, importantly connected to concerns about epistemological

justice. In the process of constructing, bolstering, and attacking evidence, legal actors mobilize particular ideas about knowledge—ideas that affirm the authority of some institutions, disciplines, methodologies, and, ultimately, knowers, over others. In doing so, they perpetuate—or challenge—existing social hierarchies.

2.6 CONCLUSION

In this chapter, I have explored some of the exceptional characteristics of strategic *Charter* litigation that shape the fact-finding process in this area of litigation. Building on Twining's theory of exaggerated importance, I have argued that the broad, complex and indeterminate nature of the social and legislative facts at the heart of strategic *Charter* litigation diminishes the potency of the rules of admissibility, while at the same time amplifying uncertainties regarding the appropriate demands of proof. The result is an expansive, open-ended and flexible fact-finding process that leaves ample room for strategic manoeuvring on the part of legal actors, with potentially significant effects on epistemological justice for marginalized groups. It is these manoeuvres and their effects, I suggest, that matter most for the study of evidence in strategic *Charter* litigation.

Still, there are a number of details missing from the picture. What kinds of considerations, assumptions, norms, and practices inform the manoeuvres I am talking about? How do they actually play out in the fact-finding process? And how do they affect the realization of epistemological justice in strategic *Charter* litigation? It is to these questions that I turn in the rest of the dissertation. To answer them effectively, however, I must first develop a fuller theoretical account of epistemological justice, as it relates to constitutional fact-finding.

Chapter 3: Epistemological Frameworks in Strategic *Charter* Litigation

3.1 INTRODUCTION

In Chapter 2, I made the case for an approach to evidence in strategic *Charter* litigation focused on the treatment of knowledge, rather than on doctrinal rules of admissibility. I stressed the need to pay attention, in particular, to how legal actors frame facts and evidence in this context, and to the effects of these framing choices on the social justice goals of marginalized groups. As I have already noted, I am particularly interested in the epistemological dimension of these effects. What counts as knowledge in this context, and what attributes are thought to render it of more or less value? Whose knowledge matters and for what purposes? And how does the treatment of knowledge in litigation affect those seeking to transform social power relations through strategic *Charter* litigation?

In this chapter, I develop a theoretical framework for this inquiry centered on the concept of "epistemological justice". This framework draws on a range of literature that has sought to challenge foundational ideas about knowledge in the Western World, including critical legal scholarship and scholarship in Science & Technology Studies (STS). However, the work of feminist epistemologists, in particular Lorraine Code, ties these diverse strands together and sits at the heart of my approach.

The choice of feminist epistemology as my theoretical anchor reflects a particular political orientation shared with many other critical thinkers. While the "feminist" label tends to be associated with gender-specific concerns, feminist approaches to epistemology in fact encompass a much broader set of insights about the relationship between knowledge, power, and social change. Central to these insights is the recognition that progressive social change depends fundamentally on knowledge that arises from lived experiences of marginalization—what I refer to as "experiential knowledge". As noted in the Introduction to this dissertation, many progressive organizations, lawyers, advocates and scholars adopt some version of this epistemic ideal as part of their political commitment to social justice.[1] A key question for my research then is this: to what extent do the dynamics of the fact-finding process in strategic *Charter* litigation allow for the realization of feminist—and more broadly, progressive—epistemological commitments, and thereby, of epistemological justice?

In order to respond to this question, I must first set out in more detail the key features of the epistemological commitments I am talking about. I do so in this chapter, first by describing the field of feminist epistemology and outlining some of its key critiques of the mainstream Anglo-American epistemological tradition, and second, by developing the concept of "experiential knowledge" that I will employ in my analysis. I then go on to consider how the concept of experiential knowledge relates to three conventional categories of proof in litigation: experiential evidence, expert evidence (including social science research), and common sense. Discussions about constitutional fact-finding often

[1] This is often reflected in efforts to develop community-based models of research (see *infra* fn 77) and lawyering (see Chapter 1 at 1.2.1).

refer to these categories as givens, without interrogating how or why they are constructed as they are. In this chapter, I demonstrate how the boundaries between these categories serve a rhetorical function, rather than reflecting ontological truths. Furthermore, I demonstrate how this rhetorical function reinforces mainstream epistemological assumptions at the expense of a more progressive approach to knowledge in litigation.

3.2 FEMINIST EPISTEMOLOGY

Feminist epistemologists bring a critical, power-sensitive lens to popular conceptions of knowledge in Western society, and to the disciplinary traditions in which such conceptions are rooted. They thereby offer valuable insights into the implicit epistemological assumptions that govern processes of factual reasoning in a wide variety of contexts, and to their sociopolitical implications. Many of these assumptions can be traced back to the Enlightenment-era dawning of modern science, and subsequent intellectual currents of positivism and empiricism, within which modern political conceptions of democracy and constitutionalism are also rooted.[2] These influences are apparent in the mainstream philosophical tradition of Anglo-American epistemology.[3] In this tradition, knowledge claims are paradigmatically expressed through the formulation "S knows that P", where S is an individual knower and P is a proposition,

[2] Sandra G Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986) at 140-141 [Harding, *Science Question*]; Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (Ithaca, NY: Cornell University Press, 1991) at 112-115 [Code, *What Can She Know?*]; Roslyn Mounsey, "Social Science Evidence as Proof of Legislative Fact in Constitutional Litigation: A Proposed Framework for a Reliability Analysis" (2014) 32:2 National Journal of Constitutional Law 127 at 142.

[3] Harding, *ibid* at 140-141; Lorraine Code, *Rhetorical Spaces: Essays on Gendered Locations* (New York: Routledge, 1995) at xii [Code, *Rhetorical Spaces*].

and where knowledge is generally understood to require justified true belief. The precise criteria required for knowledge and justification are central preoccupations of the field.[4]

A number of subfields of epistemology have arisen that point to the limitations of the traditional approach, and that seek either to extend or to radically disrupt it. One of the most relevant for my purposes is social epistemology, which challenges the individualistic orientation of traditional epistemology, and within which feminist epistemology can generally be understood to fall.[5] Social epistemologists study various social dimensions of knowing, including issues of social evidence (i.e. testimony from other people rather than individual perceptions, intuitions, or memories) and social systems and institutions.[6] Unlike sociologists of knowledge/science, they seek not only to describe knowledge practices in particular social contexts, but to advance normative accounts of how such practices might be improved. [7] Given the institutional character of law, and the role of testimony as the paradigmatic form of evidence in legal proceedings, social epistemology has the potential to offer important insights to evidence scholars.

Within the terrain of social epistemology, the work of feminist epistemologists stands out as offering especially critical accounts of social knowledge practices, rooted in explicit political commitments.[8] Feminist epistemologists come from a variety of disciplinary

[4] Code, *What Can She Know?, supra* note 2 at 1.
[5] Heidi E Grasswick & Mark Owen Webb, "Feminist Epistemology as Social Epistemology" (2002) 16:3 Social Epistemology 185 at 186. For a helpful overview, see also Stanford Encyclopedia of Philosophy (online), "Social Epistemology", 26 Feb 2001, <https://plato.stanford.edu/index.html>.
[6] Grasswick & Webb, *ibid* at 185; Helen Longino, "Feminist Epistemology" in *The Blackwell Guide to Epistemology* (Malden, Mass: Blackwell Publishers, 1999) at 337.
[7] Donna Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective" (1988) 14:3 Feminist Studies 575 at 579; Code, *Rhetorical Spaces, supra* note 3 at 177.
[8] Grasswick & Webb, *supra* note 5 at 186-187.

backgrounds, but share a common interest in the relationship between knowledge practices and gender relations, and by extension, power relations more generally.[9] Along with other late 20th century thinkers, they have challenged many of the foundational assumptions of traditional Anglo-American epistemology, albeit through more explicitly normative projects.

Indeed, exposing and articulating these assumptions, which are often taken for granted and thus tend to remain invisible, has been one of the main contributions of feminist epistemology.[10] Feminist thinkers have embarked on this project with a set of particular political concerns about how dominant conceptions of knowledge have shored up gendered and other social hierarchies.[11] On this basis, they set out to historicize, and thereby denaturalize, deeply engrained conceptual frameworks. As Harding explains: "Once we stop thinking of modern Western epistemologies as a set of philosophical givens, we can begin to examine them instead as historical justificatory strategies."[12] Similarly, for Code, feminist epistemological projects are not so much about articulating a singular feminist theory of knowledge, as they are about

> finding the voices of the epistemology makers, uncovering the processes of theory- and knowledge-production, relocating epistemic activity from the 'no-one's land' that it has seemed to occupy, into human speaking and

[9] *Ibid* at 186, 188-189; Longino, *supra* note 6 at 328, 330-331.
[10] Code, *What Can She Know?, supra* note 2 at 149, 158.
[11] Longino, *supra* note 6 at 331.
[12] Harding, *Science Question, supra* note 2 at 141.

> listening spaces where dominant conceptions of experience, knowledge subjectivity have systemically suppressed other contenders.[13]

Code goes on to explain that, "feminists examine *practices* of knowledge construction to produce critical retellings of what historically and materially 'situated' knowers actually do."[14] The above descriptions give a sense of feminist epistemology as a primarily critical field. However, feminist thinkers have also embarked upon important theory-constructing projects that try to imagine alternative ways of knowing in the world.[15]

In this dissertation, I draw on the critical and constructive work of feminist epistemologists to interrogate the effects of the fact-finding process in strategic *Charter* litigation on the social justice goals of participating marginalized groups. I am thus engaged in a project of feminist epistemology myself—one that brings feminist insights about knowledge to bear on the field of evidence law, broadly conceived. By grounding my conception of epistemological justice, these insights provide a normative standard against which I critically assess the treatment of knowledge in *Bedford v Canada*[16], and in strategic *Charter* litigation more generally. This includes both how the record in such cases is constructed, and how legal actors mobilize different epistemic norms to frame and evaluate the evidence tendered.

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[13] Code, *Rhetorical Spaces, supra* note 3 at 155.
[14] *Ibid* at 176. See also Grasswick & Webb, *supra* note 5 at 187.
[15] See for example: Nancy Hartsock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in Sandra G Harding & Merrill B Hintikka, eds, *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (London: D Reidel Publishing Company, 1983) [Harding & Hintikka, *Discovering Reality*]; Haraway, *supra* note 7; Lynn Hankinson Nelson, *Who Knows: From Quine to a Feminist Empiricism* (Philadelphia: Temple University Press, 1990).
[16] *Bedford v Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in 2013 SCC 72 [*Bedford* SCC].

In what follows, I prepare the groundwork for this analysis by reviewing the main critiques levied by feminist thinkers against the dominant epistemological tradition—critiques that I will be drawing from throughout my dissertation and especially in my analysis of the transcripts in *Bedford* in Part II. At the same time, I canvas some of the alternative approaches to thinking about knowledge that feminists have developed, which will serve as important theoretical tools for my analysis.

In offering this brief overview, I do not wish to suggest that feminist epistemologists all espouse the same basic views, or that "feminist epistemology" constitutes anything approaching a singular theory.[17] Many thinkers in the field are wary of such implications. According to Lorraine Code, while "epistemological questions are fundamental to feminist inquiry",[18] positing a general theory of "feminist epistemology" is problematic, as this would remove theory from particular social practices and politics—the very move that feminists critique in traditional epistemology.[19] Similarly, Helen Longino argues that rather than pointing to any particular theoretical content, "feminist epistemology" ought to amount simply to "doing epistemology as a feminist."[20] Taking account of these concerns, my purpose is not to provide a comprehensive account of a unified field, but to present some of the key critical insights and theoretical contributions of feminist epistemologists that are of relevance to my own project.

[17] Nor, of course, does traditional epistemology, which encompasses many competing views about the nature of knowledge. Arguably, however, these debates take place within a fairly narrow terrain, the general parameters of which are widely agreed upon. As Code explains (*infra* note 19), establishing such general theoretical parameters raises particular problems for feminist epistemology because of the nature of the critiques it raises.
[18] Code, *What Can She Know?, supra* note 2 at 315.
[19] *Ibid* at 315.
[20] Longino, *supra* note 6 at 349. See also Grasswick & Webb, *supra* note 5 at 185-186.

3.2.1 Objectivity

The concept of objectivity lies at the heart of both the dominant epistemological tradition and feminist responses to it. Following the positivist-empiricist foundations of the modern scientific enterprise, traditional epistemologists approach knowledge as a set of universal and objective truths about the world, discovered by autonomous individuals investigating the world from a neutral and impartial stance. As Lorraine Code notes, this paradigm is deeply ingrained in Western thought, throughout which there is a "constant thread of belief in the importance of detachment, impartiality, neutrality, and cognitive self-reliance for knowers worthy of that name."[21] As she puts it elsewhere:

> The assumption prevails that knowledge properly so-called consists of facts, information, neutrally (=objectively) found and observationally testable: facts whose 'factuality' depends on the extent to which they are free of the taint of subjectivity, and hence are value-neutral.[22]

In the late 20th century, however, the tides of postmodernism brought attacks on established notions of truth and objectivity from various quarters. For many feminists, such challenges were necessary to recognize the failure of purportedly universal and objective theories to account for the experiences of women and other marginalized people. Indeed, feminists have long observed that those who purport to offer objective, universally generalizable accounts of the world often represent the perspectives and

[21] Code, *What Can She Know?, supra* note 2 at 112; Harding, *Science Question, supra* note 2 at 137.
[22] Code, *Rhetorical Spaces, supra* note 3 at 163.

interests of only a small and privileged segment of it. Skepticism about the existence of a neutral epistemic stance has thus grounded feminist critiques in a wide range of forums, including critiques of androcentrism, ethnocentrism, and other forms of unacknowledged partiality in science and in law.[23]

As I explain further below, feminist insights into the partiality of purportedly universal knowledge claims have depended in a crucial sense on the collective mining of women's own lived experiences.[24] Thus, in contrast to the traditional paradigm of knowledge as a set of value-neutral and universally true general propositions about the world, feminist knowledge has been rooted in particular, subjective accounts of experience interpreted through an explicitly political lens. At the same time, most feminist thinkers have been wary of sliding into total "subjectivism" or relativism, a charge often levied against those who challenge the ideal of absolute objectivity at the heart of the dominant epistemological tradition.[25] Nor have feminists abandoned all aspirations to objectivity in inquiry, though many have attempted to reform the concept. As Donna Haraway puts it, "[r]elativism and totalization are both 'god tricks' promising vision from everywhere and nowhere" and are thus both epistemically irresponsible positions.[26] The problem of objectivity has thus posed a significant challenge for feminist epistemologists. While

[23] See for example: Code, *What Can She Know, supra* note 2 at x; Haraway, *supra* note 7 at 583-584; Harding, *Science Question, supra* note 2 at 137; Katharine T Bartlett, "Feminist Legal Methods" (1989) 103 Harv L Rev 829 at 862; Joan W Scott, "Experience" in Judith Butler and Joan W Scott, eds, *Feminists Theorize the Political* (New York: Routledge, 1992) at 30; Mary Eberts, "New Facts for Old: Observations on the Judicial Process" in Richard Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) at 468; Longino, *supra* note 6 at 328.
[24] Dana Phillips, "Let's Talk about Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse" (2016) 54 Osgoode Hall L J 1133 at 1149 and 1152.
[25] See for example: Haraway, *supra* note 7 at 579, 584; Code, *What Can She Know?, supra* note 2 at 27-28; Harding, *Science Question, supra* note 2 at 27.
[26] Haraway, *ibid* at 584.

responses to this challenge have been myriad, they are often helpfully grouped into three baskets: feminist empiricism, feminist standpoint theory, and feminist postmodernism.[27] I review each in turn, before discussing some important theoretical developments that seek to address the tensions between them.

A) Feminist Empiricism

One feminist response to the androcentrism of the dominant scientific and epistemological traditions has been to try to construct an improved empiricism, rid of gender and other social biases, via a more power-sensitive approach. Those who take this approach continue to place stock in the traditional methods and goals of scientific inquiry. However, contrary to the traditional view of knowers as interchangeable individuals, they argue that greater objectivity demands attention to the social location of knowers, and in particular, that the participation of women and other marginalized groups in science is critical to eliminating biases and thereby improving the objectivity of scientific knowledge. [28] Thus, rather than eschewing any role for values or politics in science, feminist empiricists (along with standpoint theorists) contend that "*some* politics—the politics of movements for emancipatory social change—can increase the objectivity of science."[29] Feminist legal empiricists have applied the above insights to suggest that correcting biases in law can increase law's rationality and objectivity according to its own standards.[30]

[27] Grasswick & Webb, *supra* note 5 at 189, 194.
[28] Code, *Rhetorical Spaces, supra* note 3 at 178; Harding, *Science Question, supra* note 2 at 24-25.
[29] Harding, *ibid* at 162.
[30] Bartlett, *supra* note 23 at 868-872.

B) Feminist Standpoint Theories

Like feminist empiricists, feminist standpoint theorists offer a path towards greater objectivity by reforming how we understand the concept of objectivity itself. Their solution builds on the Marxian idea that the material circumstances of the proletariat afford workers superior insight into class relations. Nancy Hartsock—one of the founders of feminist standpoint theory—picked up on this idea to argue that, in a similar way, women's material experiences of subjugation through the sexual division of labour give them access to a privileged standpoint on patriarchal social relations.[31] More generally, the idea is that materially oppressed people may, through conscientious political struggle, come to occupy a standpoint that gives them an enhanced understanding of social relations *as they really are*, if not absolute objectivity. In this way, the epistemic privilege that allows for claims of objectivity is shifted from dominant social groups to the socially marginalized and oppressed.[32] While early formulations of standpoint theory (such as Hartsock's) rely to some extent on essentialist ideas about female biology and experience, and neglect important differences between women,[33] they provide an important foundation for further thinking about how women's embodied experiences might serve as a ground for critiquing dominant social theories and institutions, and how experiences of oppression may afford unique insight into some aspects of social relations.

C) Feminist Postmodernism

Given the efforts of feminist empiricism and standpoint theories to preserve the ideal of objectivity at the heart of the dominant scientific and epistemological traditions, albeit in

[31] Hartsock, *supra* note 15 at 284.
[32] Longino, *supra* note 6 at 338.
[33] *Ibid* at 334; Harding, *Science Question, supra* note 2 at 26.

altered forms, Harding refers to these strands of thought as "successor science" projects.[34] Feminist postmodernism, by contrast, reflects a deeper skepticism towards universal claims about the way the world is, and thus about the possibility of achieving a more objective vantage point on reality. For postmodern thinkers, there is no essential female subject or experience; rather, these are socially constructed through multiple overlapping discourses that are constantly in flux.[35] As Harding explains, such an approach "requires embracing as a fruitful grounding for inquiry the fractured identities modern life creates,"[36] rather than seeking alternate foundations from which to better grasp the nature of reality. In the legal academy, feminist postmodernism has found voice within the Critical Legal Studies movement, which emphasizes the indeterminacy of law and the socially constructed nature of legal frameworks.[37] While appealing to many feminist thinkers, postmodernism also presents some potential dangers; if we reject the existence of a fixed external reality and thus the reality of women's experiences, on what ground can feminist politics claim the legitimacy and authority necessary for action in the world? I discuss one way in which feminist thinkers have attempted to address this challenge below.

D) Positionality and Situated Knowledge

In an influential early article, Donna Haraway points to a fundamental tension between attempts to construct a feminist version of objectivity through successor science projects, and the postmodern abandonment of objectivity in favour of a strong version of social

[34] Harding, *ibid* at 142.
[35] Bartlett, *supra* note 23 at 877-878.
[36] Harding, *Science Question, supra* note 2 at 28.
[37] Bartlett, *supra* note 23 at 878.

constructivism.[38] Haraway recognizes that each approach contributes something essential to feminist theorizing about knowledge, despite their incommensurability. The problem, as she poses it, is

> how to have *simultaneously* an account of radical historical contingency for all knowledge claims and knowing subjects, a critical practice for recognizing our own 'semiotic technologies' for making meanings, *and* a no-nonsense commitment to faithful accounts of a 'real' world…[39]

Building on standpoint theory, Haraway's answer is to equate feminist objectivity with "situated knowledges"[40]—a concept that has come to occupy a central place in feminist epistemology. As she explains it, "objectivity turns out to be about particular and specific embodiment and definitely not about the false vision promising transcendence of all limits and responsibility. The moral is simple: only partial perspective promises objective vision."[41] Haraway thus flips the mainstream approach to objectivity on its head, insisting that it calls for specificity and contextualization, rather than generalization and abstraction. She goes on to identify "positioning" as a key practice for responsible knowing.[42]

[38] Haraway, *supra* note 7 at 576. She is not the first or only one to do so; see for example, Harding, *Science Question, supra* note 2 at 194-5.
[39] Haraway, *ibid* at 579.
[40] *Ibid* at 581.
[41] *Ibid* at 582-583.
[42] *Ibid* at 587.

While not directly crediting Haraway, law professor Katherine Bartlett draws from her ideas, as well as those of Linda Alcoff, in developing the epistemological theory of "positionality."[43] This theory responds to the tension between successor science projects and postmodernism by incorporating aspects of both. As Bartlett explains:

"The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision."[44] Positionality, according to Bartlett, is not relativistic or arbitrary because it continues to ground knowledge in experience, and thus provides "some means of distinguishing between better and worse understanding".[45] At the same time, it rejects the "perfectibility, externality, or objectivity of truth",[46] recognizing instead that because individual perspectives are necessarily limited, truth is always "situated and partial."[47] It follows that individuals should try to extend their knowledge by seeking to better understand the perspectives of others.[48] In this way, positionality continues to view experience as a powerful means by which to affirm the interests of marginalized people, even while acknowledging its constructed nature.

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[43] Bartlett, *supra* note 23 at 880. Bartlett indicates that she has adapted the term "positionality" from Linda Alcoff: Barlett at 868, note 160, citing Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory" (1988) 13:3 Signs 405.
[44] Bartlett, *ibid* at 880.
[45] *Ibid* at 885.
[46] *Ibid* at 880.
[47] *Ibid.*
[48] *Ibid* at 881-882.

3.2.2 Ethical and Political Dimensions of Knowing

In articulating her theory of situated knowledges, Haraway appeals not only to the ideal of objectivity, but also to a kind of ethical responsibility that accompanies efforts to know. For Haraway, knowledge claims grounded in a "gaze from nowhere"[49] (absolute objectivity, or what she calls "totalization")[50] or from everywhere (relativism) are "unlocatable" and thus "irresponsible."[51] This accords with her view that "politics and ethics ground struggles for and contests over what may count as rational knowledge."[52] Haraway is not alone in this view. Indeed, one of the hallmarks of feminist epistemology has been the recognition of ethical and political dimensions to knowing. This contrasts with the traditional approach, wherein questions of epistemology are viewed as strictly separate from ethics and politics, resulting in a stark dichotomization of facts and values.[53] From the traditional perspective, scientific and other knowledge is considered independently from the social uses to which it is or might be put, and thus from its ethical-political consequences.[54]

Haraway and other feminist thinkers have strongly rejected the separation of epistemology from ethics and politics inherent in the dominant tradition. Code, for instance, identifies as guiding principles of her work "that ethical-political and epistemological questions are inextricably intertwined; that ethical-political action is

[49] Haraway, *supra* note 7 at 581.
[50] *Ibid* at 584.
[51] *Ibid* at 583.
[52] *Ibid* at 587.
[53] Jane Flax, "Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics" in Harding & Hintikka, *supra* note 15 at 248; Grasswick & Webb, *supra* note 5 at 185.
[54] Code, *What Can She Know?, supra* note 2 at 35; Harding, *Science Question, supra* note 2 at 40; Thomas F Gieryn, "Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists" (1983) American Sociological Review 781 at 789.

dependent on the quality of epistemic activity that informs it; and that epistemological questions invoke ethical requirements."[55] Harding, for her part, views moral and political discussions as paradigmatic of rational discourse from a feminist point of view.[56] In these ways, feminist epistemologists insist that knowledge practices have real-world political consequences, and thus place ethical obligations on knowers. This insight constitutes a key premise of my project, which examines the sociopolitical implications of the knowledge practices at work in constitutional fact-finding. It also serves as an important criterion for my analysis; one of the things I ask in undertaking this research is whether the fact-finding process in strategic *Charter* litigation can accommodate such an ethically integrated vision of knowledge.

3.2.3 Relationship Between Knowers and the Known

The responsibility to know ethically shapes feminist responses to another key characteristic of traditional epistemology—the conception of the relationship between knowers and the known. Closely tied to the ideal of absolute objectivity in the dominant epistemological tradition is the assumption of a stark division between knowers, conceived as independent and autonomous epistemic agents, and objects of knowledge, conceived as static elements of the external world waiting passively to be discovered. As Code notes, this conception derives much of its force from the norms of modern science:

> Implicit in the veneration of objectivity central to *scientific* practice is the conviction that objects of knowledge are separate from knowers and

[55] Code, *Rhetorical Spaces, supra* note 3 at xiii.
[56] Harding, *Science Question, supra* note 2 at 12 and 251.

> investigators, and that they remain unchanged throughout investigative, information-gathering, and knowledge-construction processes.[57]

A related assumption is that "knowledge is a *product* of inquiry that stands alone in the sense that details of the processes of its production are irrelevant to its structure, content, and/or evaluation."[58] Indeed, traditional epistemologists and scientists alike not only assume a separation between knowers and the known, but insist on its importance, on the grounds that the knower's detachment from their field of inquiry helps to preserve objectivity. Thus, "[e]xemplary knowledge is 'of' things that have no particular significance for the knower".[59] By the same logic, the social identity of any particular knower is thought to be irrelevant to the project of inquiry,[60] because the same external reality awaits discovery by any individual with a sufficiently inquiring and open mind.

Feminist epistemologists have observed that knowledge in this framework constitutes a form of domination and control over the domain of things known.[61] In this way, the mainstream tradition reinforces oppressive social relationships at the level of epistemology.[62] In response to the traditional view, feminist epistemologists have characterized knowers as embodied and socially situated[63] (and in some cases as

[57] Code, *What Can She Know?, supra* note 2 at 32.
[58] *Ibid* at 110.
[59] Code, *Rhetorical Spaces, supra* note 3 at 164.
[60] Code, *What Can She Know?, supra* note 2 at 34.
[61] *Ibid* at 139; Longino, *supra* note 6 at 329; Haraway, *supra* note 7 at 592.
[62] According to Evelyn Fox Keller, the active knower and the activity of knowing itself are coded as masculine in scientific ideology, thereby shoring up an understanding of gender roles that perpetuates inequality. Evelyn Fox Keller "Gender and Science" in Harding & Hintikka, *supra* note 15 at 190-191.
[63] Haraway, *supra* note 7; Longino, *supra* note 6 at 334.

communal rather than individual subjects)[64] while conceiving of the world to be known—whether consisting of people, animals or inanimate objects—as active and agentic.[65] In this way, they have sought to transform the relationship of detachment and domination characteristic of traditional epistemology into one of connection and mutual understanding. Thus Haraway speaks of the "need for a logic of conversation rather than discovery in accounts of the world."[66] As Code explains, one of feminism's key insights is "that an inquirer is located on the same plane as the inquiry; indeed, that she *must* locate herself there if she is to fulfill the responsibilities that the very position of inquirer invokes."[67] From this perspective, knowing does not just demand a certain cognitive posture—it also entails an ethical obligation to know well through critical self-reflexivity.

From a feminist perspective, the traditional conception of the knower-known relationship raises particular concerns for social science research where human beings are the focus of inquiry, as it threatens to objectify people and deny their agency in the process by which knowledge about them is produced.[68] As Code observes, this approach provides a rationale for treating people as "cases" or "types", rather than as "active, creative cognitive agents".[69] Feminist critiques in this regard overlap with and inform efforts to develop alternative orientations to research in the social and health sciences that promote more equitable partnerships between professional researchers and community

[64] Nelson, *supra* note 15.
[65] Haraway, *supra* note 7 at 592-3; Harding, *Science Question, supra* note 2 at 145.
[66] Haraway, *ibid* at 593.
[67] Code, *Rhetorical Spaces, supra* note 3 at 18-19.
[68] Code, *What Can She Know?, supra* note 2 at 21, 34; Haraway, *supra* note 7 at 592.
[69] Code*, ibid* at 21.

stakeholders[70]—sometimes referred to as action research, Participatory Action Research (PAR), Community-Based Research (CBR) or Community-Based Participatory Research (CBPR).[71] These initiatives encompass a broad range of approaches to research, drawing from a wide array of theoretical and practical influences.[72] Common among them, however, is a commitment to pursuing research collaboratively to address real-world problems, rather than as a unilateral, expert-driven process of discovery focused on producing knowledge "for its own sake."[73]

The "participatory" aspect of this family of approaches to research signals the importance of meaningful participation by all actors (including those who would traditionally be viewed as mere "subjects") in research and the construction of knowledge, while "action" recognizes the explicit political grounding of research directed at social change.[74] Action research and PAR practitioners also emphasize the importance of critical reflection as part of the research process, drawing on Paulo Freire's notion of "conscientization" as

[70] Marlene Spanger & May-Len Skilbrei, "Exploring Sex for Sale: Methodological Concerns" [Spanger & Skilbrei, "Exploring Sex for Sale"] in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (London: Routledge, 2017) at 4 [Spanger & Skilbrei, *Prostitution Research*]; Lorraine Nencel, "Epistemologically Privileging the Sex Worker: Uncovering the Rehearsed and Presumed in Sex Work Studies" in Spanger & Skilbrei, *Prostitution Research* at 72-73.
[71] See for example: Bev Gatenby & Maria Humphries, "Feminist Participatory Action Research: Methodological and Ethical Issues" (2000) 23:1 Women's Studies International Forum 89 at 89-90; Alice McIntyre, *Participatory Action Research* (Thousand Oaks California: SAGE Publications, Inc, 2008) at 3; Bonnie Jeffery, *Journeys in Community-Based Research* (Regina: University of Regina Press, 2014) at xxi; Brenda Roche, Wellesley Institute, *New Directions in Community-Based Research*, Canadian Electronic Library (Toronto: Wellesley Institute, 2008) at 3-4; Shauna MacKinnon, *Practising Community-Based Participatory Research: Stories of Engagement, Empowerment, and Mobilization* (Vancouver: Purich Books, 2018) at 4-5; Steven Scott Coughlin et al, *Handbook of Community-Based Participatory Research* (New York, NY: Oxford University Press, 2017) at 3-4. For more on the taxonomy of related initiatives in this area, see McIntyre, *ibid* at 4-5.
[72] McIntyre, *ibid* at 1-3; Peter Reason & Hilary Bradbury, *The SAGE Handbook of Action Research* (London: SAGE Publications Ltd, 2008), Introduction at 3, 7 (see also Chapter 1 generally); Coughlin, *ibid* at 11.
[73] McIntyre, *ibid* at 1; Gatenby & Humphries, *supra* note 71 at 90; Reason & Bradbury, *ibid*, Introduction at 3-5; Coughlin, *ibid* at 12; Roche, *supra* note 71 at 4.
[74] Reason & Bradbury, *ibid*, Introduction at 1, 4-5, 9; Gatenby & Humphries, *supra* note 71 at 89; McIntyre, *ibid* at 5.

well as feminist and other critical theories.[75] Indeed, following Freire and Kurt Lewin, action research is often described as a cyclical process of reflection and action.[76] As in feminist epistemology, the value of local knowledge and lived experience—especially of marginalized people—is central to this orientation to research.[77]

The link between epistemology and research orientations points to an important site for analysis in *Bedford* and other strategic *Charter* litigation, wherein legal actors draw upon an array of social science research to support factual arguments and conclusions. Indeed, participatory approaches have gained particular traction in sex work research in recent years[78]—research that figures prominently in the *Bedford* case. While some of the studies on offer as evidence in *Bedford* adopt methodologies that reflect the traditional view of the knower-known relationship, others break with this orthodoxy to varying degrees in order to foster deeper engagement with the people whose lives the research is about. For instance, some of the studies involve sex worker-led advocacy organizations as research partners, or employ sex workers as research assistants. The views expressed by expert witnesses about questions of research methodology reflect this range of approaches. Attending to how these differing approaches to social science research are mobilized, framed, and evaluated in *Bedford* gives important insight into the epistemic norms at play in the case. In particular, such an analysis offers insight into how feminist perspectives on the relationship between knowers and the known fare in strategic *Charter* litigation.

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[75] McIntyre, *ibid* at 3; Reason & Bradbury, *ibid*, Chapter 1 at 16, 19-20.
[76] McIntyre, *ibid* at 6; Reason & Bradbury, *ibid*, Introduction at 1 and 4, Chapter 1 at 16.
[77] Gatenby & Humphries, *supra* note 71 at 89; MacKinnon, *supra* note 71 at 6; Coughlin, *supra* note 71 at 10.
[78] Spanger & Skilbrei, "Exploring Sex for Sale", *supra* note 70 at 4; Isabel Crowhurst, "Troubling Unknowns and Certainties in Prostitution Policy Claims-Making" in Spanger & Skilbrei, *Prostitution Research, supra* note 70 at 49.

3.2.4 Paradigmatic Forms of Knowledge

The dominant conception of the knower-known relationship described above has been shaped in part by what traditional epistemologists have understood to constitute paradigmatic forms of knowledge. Two points are worthy of note as they inform my analysis in the dissertation: 1) the tendency to view science as the preeminent form of knowledge, and physics and mathematics as the paradigm for all scientific activity; 2) the emphasis on knowledge derived from direct observation over knowledge gained from the testimony of others.[79]

There is no doubt that the philosophical field of epistemology has been fundamentally shaped by the enterprise of modern science.[80] As Code observes:

> The rhetorical spaces of mainstream epistemology are staked out so as to grant pride of place to the cognitive products of the 'exact' sciences; the discursive spaces of the late-twentieth–century affluent societies echo and mirror that respect in the presumption of credibility that immediately accrues to any findings reported with the assurance that they are based on scientific research.[81]

[79] Note that "testimony" here is not confined to its legal meaning, but rather tracks the use of the term in the epistemological literature to refer to any account given by one person to another/others. See CAJ Coady, *Testimony: A Philosophical Study* (Oxford: Oxford University Press, 1994).
[80] Harding, *Science Question, supra* note 2 at 16; Code, *What Can She Know?, supra* note 2 at 31-32.
[81] Code, *Rhetorical Spaces, supra* note 3 at xii.

Due perhaps to their historical significance in the Enlightenment era, physics and mathematics are commonly viewed as the archetype of "pure" scientific inquiry.[82] Accordingly, a high degree of generality and abstraction from concrete social contexts has come to represent a kind of scientific ideal, and by extension, a broader epistemological ideal to which all forms of knowledge should aspire. By the same token, experimental and quantitative methods have taken pride of place as the most scientifically "rigorous."[83] Other domains of science fall along a hierarchy according to the extent to which they meet these ideals.[84] The social sciences generally sit low on this hierarchy (though perhaps above disciplines in the humanities), given the myriad, hard-to-control variables that complicate efforts to understand social relations, and the acknowledged difficulty of extricating social and political values from these projects (as well as their frequent reliance on qualitative methods). Still, the assumption is that knowledge of social relations is best obtained by following the same methods as in physics and other natural sciences. The goal is thus to "establish social scientific inquiry on a 'properly scientific' basis"—i.e. through experiment and quantitative observation of human behaviour.[85]

The influence of modern science can also be seen in the tendency of traditional epistemologists to focus on empirical over testimonial sources of knowledge.[86] As Code points out, propositions that express simple and immediate sensory observations, such as "the book is red", have provided the main fodder for the articulation and resolution of

[82] Harding, *Science Question, supra* note 2 at 43; Code, *What Can She Know?, supra* note 2 at 32.
[83] Code, *ibid* at 160, 162.
[84] See *ibid* at 243.
[85] *Ibid* at 162.
[86] As an exception, see however Coady, *supra* note 79.

epistemological problems.[87] Furthermore, epistemologists tend to view direct observation as a far more trustworthy source of knowledge than testimony, which comes second hand and is frequently associated with opinion or hearsay.[88] This accords with the view of knowers as primarily independent and autonomous. The problem, as Code notes, is that this orientation "obscures how much people depend on others for what they claim to know"[89] and thus how important assessments of cognitive authority and credibility are to knowing well in everyday life.[90] Such assessments merit particular scrutiny from the perspective of this project, given their tendency to reflect and reinforce existing social hierarchies.

Reconsidering what ought to count as paradigmatic knowledge is one tool that feminist epistemologists have used to reveal the historical contingency of traditional epistemological assumptions. For instance, in contrast to the traditional view, Harding argues that moral and political reflexivity ought to serve as the criteria for paradigmatically objective science. According to her: "A maximally objective science, natural or social, will be one that includes a self-conscious and critical examination of the relationship between the social experience of its creators and the kinds of cognitive structures favored in its inquiry."[91] The effect of this model is to reverse the traditional knowledge hierarchy: "a critical and self-reflective social science"[92] becomes the paradigm for all science, while physics and mathematics are relegated to "the far end of

[87] Code, *What Can She Know?, supra* note 2 at 6, 111.
[88] *Ibid* at 65 and 111.
[89] *Ibid* at 131.
[90] *Ibid* at 182.
[91] Harding, *Science Question, supra* note 2 at 250.
[92] *Ibid* at 44.

the continuum of value-laden inquiry traditions."[93] Code, for her part, proposes an alternative epistemological paradigm based on knowledge of other people, rather than of objects. In this way, she urges a fundamental rethinking of the relationship between knowers and the "things" they know.[94] By re-embedding knowledge in socially situated experience, and reintegrating it with political and ethical considerations, such approaches attend to the otherwise overlooked connection between epistemology and social justice. They thus provide a blueprint for what epistemological justice might look like.

As I illustrate in later Chapters of this dissertation, perceived hierarchies between scientific disciplines and methodologies, and between scientific and non-scientific kinds of knowledge, play an important role in the framing of evidence in *Bedford* and other strategic *Charter* challenges. The role of moral and political values in the production of social science research is also highly contested in the case. As I have shown in this section, such judgments reflect particular, historically contingent ideas about what constitutes knowledge in its ideal form. These ideas, moreover, are closely linked to political ideologies that can shore up existing social inequalities. How they play out in the fact-finding process thus has an important bearing on the realization of epistemological justice in strategic *Charter* litigation.

3.2.5 Gendered Dichotomies

Underlying many of the above-noted features of traditional Anglo-American epistemology is a basic dualism that feminists have observed as hierarchically

[93] *Ibid* at 47.
[94] Code, *What Can She Know?, supra* note 2 at 38-39.

gendered.[95] Within this framework, imagined divisions between objective/subjective, theory/practice, reason/emotion, universal/particular, mind/body, abstract/concrete, and fact/value track the division between male/female. In each case, the male-associated side of the equation is valued over the female. According to Code, these dichotomous pairs distinguish knowledge "from aspects of experience deemed too trivial, too particular, for epistemological notice" in a highly gendered manner.[96] In this way, they perpetuate ideologies of gender inequality.

Dichotomous thinking underlies many of the dominant tradition's foundational assumptions, such as the imagined division between knowers and the known. On a somewhat different plane, Code has argued that traditional epistemology's forceful insistence on the ideal of pure objectivity stems from the tendency to view absolute subjectivity (i.e. relativism) as the only possible alternative.[97] Once again here, a foundational dualism constrains the dominant approach. Unearthing and thereby rendering contingent this conceptual framework has enabled feminists to construct new theoretical approaches to knowledge.

One need not look far to observe the strong influence of dualism in the legal context. As I hinted at in Chapter 2, the law of evidence is grounded in certain key conceptual dichotomies, most notably between law and fact, and between lay experience and expert opinion. At the same time, the nature of fact-finding in strategic *Charter* challenges raises

[95] Hartsock, *supra* note 15 at 297; Code, *what Can She Know?, supra* note 2 at 28-30; Harding, *Science Question, supra* note 2 at 23, 136.
[96] Code, *ibid* at 29.
[97] *Ibid* at 27-28.

some inherent challenges to these dichotomies, exposing grey areas that are less visible in other contexts. Feminist efforts to reveal the contingency of dualistic thinking provide resources for explaining these slippages, and for critiquing the ongoing use of legally sanctioned dichotomies as rhetorical devices in constitutional fact-finding from a social justice perspective.

3.2.6 Summary

In this section, I have reviewed some of the foundational assumptions of traditional Anglo-American epistemology that have been subject to feminist critique, and noted some of the ways in which feminist epistemologists have responded to them. In brief, the traditional approach espouses a view of knowledge as consisting of a set of universally true propositions about the world that have been objectively discovered by autonomous individuals, while feminist responses have emphasized the embodied and socially situated nature of knowers and the resultant partiality of all knowledge claims, the connection between knowers and the known, and the ethical and political dimensions of knowledge practices. The insights of feminist epistemologists provide a powerful critical framework through which to analyze the knowledge norms and practices at play in strategic *Charter* litigation from a social justice perspective. This literature also constitutes an important theoretical backdrop to the progressive epistemological commitments held by many social justice advocates, whether it is explicitly recognized as informing those commitments or not. In particular, the work of feminist epistemologists provides a theoretical foundation for the common concern regarding the treatment of

knowledge that arises from the lived experiences of marginalized people—i.e. experiential knowledge. It is to this key category of analysis that I turn next.

3.3 EXPERIENTIAL KNOWLEDGE

There are many different ways in which knowledge can be said to turn on experience, and many different kinds of experience. In this dissertation I define "experiential knowledge" in a particular way: as knowledge that is grounded in lived experiences of social marginalization, defined as the denial of full recognition and participation in society on equal terms with others that results from identification with a given social group or groups.[98] Informed by feminist approaches to epistemology, this concept forms the linchpin of my vision of epistemological justice. Why does experiential knowledge take on such significance in my account of epistemological justice, and how does it relate to the conventional categories of proof in litigation, many of which are also tied to experience in some way? In this section, I expand upon my conception of experiential knowledge and explore its relationship to three such categories: experiential evidence, common sense, and expert opinion evidence (including social science research). I thereby build a foundation for my analysis of the treatment of knowledge within these same three categories in *Bedford.*

It is important to note at the outset that I do not attach my conception of experiential knowledge to any single, clearly defined group whose interests are at stake in *Bedford* or other strategic *Charter* litigation. Experiences of marginalization and oppression are, of course, closely correlated to gender, race, class, ability, occupation, and other markers of

[98] See Chapter 1 at note 3.

difference. In *Bedford,* for instance, they arise largely with respect to people who sell sex, upon whose behalf the case was brought. As Justice Himel points out in her decision, however, this encompasses an extremely diverse group of people, with a wide range of experiences and perspectives.[99] Given the identity of the applicants and the framing of the issues in the case, would it be more appropriate to identify the relevant marginalized group as *women* who sell sex, or (even more narrowly) women who identify as sex workers? On the other hand, some of the arguments made in *Bedford* raise issues of gender equality writ large, suggesting that the relevant group should actually be broadened to include all women. As this example demonstrates, the identities of those subject to social marginalization are not precisely demarcated, and often overlapping, making decontextualized attempts to delineate a particular group as the locus of experiential knowledge unhelpful.

Nor do I wish to reify experiential knowledge as something that exists out in the world in a way that is clearly distinguishable from other kinds of knowledge. Indeed, such a move would run counter to my overall theoretical approach, which challenges the sharp distinctions that undergird traditional epistemology and constitutional fact-finding alike. Instead, I emphasize here that "experiential knowledge" is a consciously constructed category, employed in this project as heuristically useful to facilitate a particular kind of analysis. Rather than reflecting any ontological theory, my use of this category is rooted in a critical feminist perspective that insists upon the epistemic value of the lived experiences of marginalized people in ongoing struggles for social justice.

[99] *Bedford* ONSC, *supra* note 16 at para 88.

3.3.1 Experience as a Form of Knowledge

The conjunction of experience and knowledge itself owes much to the contributions of feminist theorizing, and cannot be taken for granted. As Code discusses, traditional approaches to epistemology have often upheld a hierarchical dichotomy between knowledge and experience, whereby "knowledge properly so-called transcends experience, whose particularity can only sully and muddle its purity and clarity."[100] This dichotomy is gendered in that experience—understood as particular, subjective and practical—has traditionally been associated with women/femininity, while knowledge—understood as objective, universal and theoretical—has been associated with men/masculinity.[101] Code and Longino both give the example of the medical profession, wherein (predominantly female) nurses have been thought of as having experience, and (historically predominantly male) doctors as having knowledge.[102] Drawing on the work of Alice Baumgart, Code notes how this understanding was borne out in the Canadian Grange Inquiry of 1984. The lawyers in the proceeding called doctors as expert witnesses and asked them what they "knew", while asking nurses (treated as non-experts) to answer questions "based on your experience."[103] In this way, doctors were afforded greater epistemic authority in the proceedings.

Still, there is a sense in which dominant approaches to knowledge do recognize the epistemic relevance of experience. Indeed, as Code observes, experience plays a central role in modern science and the philosophical tradition of epistemology that it

[100] Code, *What Can She Know?, supra* note 2 at 111. See also at 242.
[101] *Ibid* at 242.
[102] *Ibid* at 222; Longino, *supra* note 6 at 337.
[103] Code, *What Can She Know?, supra* note 2 at 222 and note 3.

underwrites, to the extent that these are grounded in empirical strains of thought that privilege direct sensory observations over other sources of knowledge:

> Empiricists, avowedly, put great store in first-person perceptual and observational reports, maintaining that a 'privileged access' to one's experiences confers on such reports a special claim to credibility.[104]

In a somewhat different manner, the value of experience is also deeply ingrained in the common law tradition. As Oliver Wendell Holmes Jr. famously put it: "The life of the law has not been logic; it has been experience."[105] The common law develops not (or at least not only) through the formulation and interpretation of universal principles, but through the consideration of particular cases in social and historical context. Moreover, in legal proceedings, firsthand observations often constitute the preferred form of evidence. In the more specific context of strategic *Charter* challenges to legislation, the courts' interest in hearing from people with direct experience of the law's impacts can hardly be doubted.

And yet, as feminist and other critical scholars have extensively documented, the experiential accounts of at least some groups of people have been consistently dismissed as not credible, not plausible, not reliable, or simply not important in these contexts.[106] For Code, this points to a somewhat baffling contradiction:

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[104] *Ibid* at 213. See also Code, *Rhetorical Spaces, supra* note 3 at 156.
[105] Oliver Wendell Holmes Jr, *The Common Law* (Boston: Little, Brown, and Company, 1881) at 1.
[106]See for example: Code, *What Can She Know?, supra* note 2 at 211, 214, 217-8; Deborah Epstein, & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing

> The assumption that there is a sharp break between experience and knowledge, such that accumulated experience neither counts as knowledge nor is regarded as its source, is curious, if not paradoxical, in view of the persistent esteem accorded to empiricist methodology as productive knowledge.[107]

Furthermore, in the context of public interest litigation, legal and scientific valorizations of experience have often clashed conspicuously both with each other and with the experientially grounded critiques of feminist and other critical scholars and activists. What can explain these apparent contradictions?

Despite her expressed perplexity at the failure of empiricists to recognize women's first-person experiential accounts as knowledge, Code herself offers an insightful explanation. By her own account, empiricist conceptions of epistemically significant experience differ quite substantially from feminist conceptions, suggesting that the sense of contradiction results at least in part from a kind of equivocation. The primary form of "experience" of interest to empiricists, and by proxy to traditional epistemologists, consists of basic sensory observations about the external world—especially those collected according to a systematic (i.e. scientific) method thought to facilitate more general knowledge claims.[108]

Their Experiences" (2018) 167:2 U Pa L Rev 399; Lucie E White "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 Buff L Rev 1. In the latter article, White offers an illuminating historical account of how the doctrinal law of evidence in the United States and Europe has historically excluded—or explicitly discounted—evidence from women and non-white people (9-13).

[107] Code, *ibid* at 241.

[108] *Ibid* at 243, 245.

In this conception of experience, the identity of the subject of experience is irrelevant, because the types of experiences at issue are thought to be equally accessible to all.[109] Indeed, for empiricists, objectivity and universality are essential characteristics of epistemically relevant experience.

One can understand the difference between empiricist and feminist conceptions of experience as resulting both from feminist challenges to empiricist characterizations of experience, and from the centering of an entirely different form of experience in feminist discourse. Beginning with the former, feminists have argued for an understanding of experience as fundamentally socially situated and embodied. From this perspective, even systematically collected sensory observations cannot be divorced entirely from the individual who makes them.[110] Feminist insights in this regard align with the work of STS scholars, who have observed that despite its claims to universal and objective knowledge, science is constructed in particular social and material spaces,[111] through processes that involve a great deal of tinkering, ad hoc decision-making, and subjective judgment.[112] Given the need for accountability in knowledge practices, feminists have rejected the empiricist notion that true knowledge arises only when experiential observations transcend these concrete origins to offer generalized truths about the world.[113]

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[109] *Ibid* at 6.
[110] See *infra* note 125.
[111] Sergio Sismondo, *An Introduction to Science and Technology Studies* (Malden MA: Blackwell Pub., 2003) at 170-171.
[112] *Ibid* at 125.
[113] See Code, *What Can She Know?, supra* note 2 at 242.

At the same time, feminist discourses tend to focus on an entirely different plane of experience. The paradigmatic form of experience in feminist theorizing is not basic sensory observations; it is women's narrative accounts of their lived experience. Code helpfully describes these as "experiential stories of how it is for cognitive or moral agents to be located as they are, and to experience the world from there."[114] The epistemic salience of these accounts depends on their social and political meaning (hence the significance of the social location and identify of the subject). One could argue that such accounts are ultimately grounded in the mass of sensory data that constitutes daily life. However, they have clearly moved a long way from that starting point, reflecting the extensive process of interpretation and filtering needed to produce a socially intelligible human story.

From the perspective of traditional epistemology, the narrative accounts of interest to feminists are too particular and subjective to form a basis for knowledge. They are, accordingly, often dismissed as "anecdotal"—"the stuff of which folklore, gossip, as opposed to knowledge 'proper,' is made."[115] Code argues, however, that the details of experiential stories are essential for "achieving the imaginative understanding that is often a prerequisite for acting well both epistemically and morally."[116] Thus, from a feminist perspective, the concrete particularity of experiential accounts actually facilitates the generation of good knowledge, rather than detracting from it.

[114] Code, *Rhetorical Spaces, supra* note 3 at 158.
[115] *Ibid.*
[116] *Ibid* at 168.

The primacy of experiential narratives in feminist approaches to knowledge can be traced back to the phenomenon of second-wave consciousness-raising, wherein women collectively generated knowledge of their own social subordination through the sharing of everyday personal experiences in small groups.[117] Through this practice, women were able to point out the gaps and distortions in dominant, purportedly objective accounts of reality. As Joan Scott explains, feminists have appealed to the authority of subjective experience as a means to "unmask all claims to objectivity as an ideological cover for masculine bias."[118] This idea has been extended to include bias not only on the basis of gender but also other markers of social privilege, such as race and class. To the extent that certain social groups have been excluded from knowledge-making institutions, the resultant knowledge claims have failed to reflect their lived realities.[119] Prioritizing the experiential accounts of members of these groups (which are of course diverse in themselves) has thus served as an important strategy to challenge dominant worldviews and the institutions that uphold them.[120]

This is not simply a matter of correcting innocent ignorance on the part of those with the power to construct authoritative accounts of the world. Rather, the cognitive authority of the privileged has been actively maintained through the persistent discrediting of those with less social power. Thus Code writes of the "*incredulity* that works, unevenly across the social order, to invalidate some processes of would-be truth production, and to disqualify certain speakers, individually and collectively, from full membership in

[117] See Phillips, *supra* note 24 at 1152.
[118] JW Scott, *supra* note 23 at 30.
[119] Eberts, *supra* note 23 at 468.
[120] Phillips, *supra* note 24 at 1149.

companies of truth-tellers."[121] Drawing together the philosophical traditions of ethics and epistemology, Miranda Fricker theorizes the resultant incredulity towards certain speakers on the basis of their social identity as a form of "epistemic injustice."[122] It is this phenomenon that feminist valorization of the experiential accounts of marginalized people seeks to counteract.

At the same time, feminists and other critical scholars influenced by postmodernism have resisted overly simplistic conceptions of experiential narratives as a source of knowledge. They have pointed out that viewing experience as a direct window on truth merely replicates the myth of apolitical, objective knowledge that critical experiential accounts have sought to challenge.[123] Such a view, moreover, fails to account for the well-established insight that the interpretation and narration of experience in a way that is intelligible to others depends upon a shared language or discourse, which constrains what it is possible to think and say. In other words, pre-existing social discourses shape both our original perceptions of experience, and the narratives by which we communicate those perceptions.[124] Even at the level of basic sensory observations, Harding contends

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[121] Code, *Rhetorical Spaces, supra* note 3 at 59. See *supra* note 106. Writing from a legal perspective, Lucie White helpfully connects this phenomenon of incredulity to features of the mainstream epistemological tradition described above that are entrenched in the law of evidence. For instance, White describes the paradigm of the competent witness at law as "a speaker who can disregard the listener, presume his own objectivity, and make pronouncements about the state of the world." According to White, "this paradigm correlates with the typical language habits of socially privileged speakers; its effect is to transform the speech style of the dominant group into the norm against which the value of all testimony is assessed". White, *supra* note 106 at 13. See also at 17-18.

[122] Miranda Fricker, *Epistemic Injustice: Power and The Ethics of Knowing* (Oxford: Oxford University Press, 2009). Note that this concept is distinct from, albeit related to, my own conception of epistemological justice.

[123] JW Scott, *supra* note 23 at 26-27; Mary E Hawkesworth, "Knowers, Knowing, Known: Feminist Theory and Claims of Truth" (1989) 14:3 Signs 533 at 544-546; Code, *What Can She Know?, supra* note 2 at 256.

[124] Phillips, *supra* note 24 at 1149-1151; Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1994) at 183-184; Code, *What Can She Know?, supra* note 2 at 58.

that "[s]tudies of the social construction of what we count as real […] make it highly implausible to believe that there can be any kind of value-free description of immediate experience to which our knowledge claims can be 'reduced' or thought equivalent."[125] Experience cannot be separated from language, and thus, "[f]acts cannot be separated from their meanings."[126] Value-laden theoretical frameworks are already at work in the simplest acts of perception.

Insights about the discursive construction of experience leave feminist epistemologists in somewhat of a bind. On the one hand, the feminist turn to experiential narratives as a source of knowledge is premised on the understanding that the lived experience of women and other marginalized groups has been persistently ignored, misconstrued and discredited by mainstream authorities, with significant social and material consequences. On the other hand, insistence upon unconditional belief in the truth of such accounts threatens to replicate the problem in a different guise. The dilemma, as articulated by Code, is

> how feminists and others, who know they are not operating on a level playing field, can negotiate legitimate demands that they (we) take one another's experiences seriously, and yet can resist the temptation to

[125] Harding, *Science Question, supra* note 2 at 37. For a more in-depth discussion of this point, see Elizabeth Potter, "Gender and Epistemic Negotiation" in Linda Alcoff & Elizabeth Potter, eds, *Feminist Epistemologies* (New York, NY: Routledge, 1993). STS and legal scholars have made similar observations. See for example: Sismondo, *supra* note 111 at 15-16; Dennis R Klinck, *The Word of the Law* (Ottawa: Carleton University Press, 1992) at 11-12.
[126] Harding, *Science Question, supra* note 2 at 37.

> substitute a new tyranny of 'experientialism' immune to discussion for the old and persistent tyrannies of incredulity, denigration, and distrust.[127]

Code's response calls for a " responsible" and "respectful" practice of listening to experiential accounts, without denying a role for incredulity or reinterpretation on the part of the listener.[128] Fricker, for her part, advocates a "reflexive awareness" on the part of the listener in order to correct for deeply ingrained forms of social prejudice and discrimination.[129] My goal here is not to provide a definitive answer to the problem of how to treat experiential narratives from a feminist perspective, but simply to highlight the nuanced understanding of experiential knowledge that a feminist epistemology demands. It is this conception of experiential knowledge—as something grounded in the first-person experiential narratives of marginalized people, but also shaped by, and subject to interpretation through, a variety of overlapping social discourses—that I adopt for the purposes of my analysis in this dissertation.

3.4 EXPERIENCE, KNOWLEDGE, AND PROOF IN LITIGATION

How, then, does experiential knowledge arise in litigation, in particular strategic *Charter* litigation? How does the concept of experiential knowledge elaborated above relate to other kinds of experience-based knowledge at play in this context, and to the conventional categories of proof used to delineate them? In this section, I explore the relationship between experiential knowledge and three well-established forms of proof in

[127]Code, *Rhetorical Spaces, supra* note 3 at 64. See also Code, *What Can She Know?, supra* note 2 at 291.
[128] Code, *What Can She Know?, ibid* at 165-166, 169.
[129]Fricker, *Epistemic Injustice, supra* note 122 at 169.

strategic *Charter* litigation: experiential evidence, common sense, and expert opinion evidence (including social science research).

3.4.1 Experiential Evidence and other Sources of Experiential Knowledge

I begin with the category of proof most intuitively associated with experiential knowledge: what legal actors often refer to as "lay" or "experiential" evidence. This includes the accounts of litigants and others directly affected by the issues under consideration in a given case. In the joint application record in *Bedford*, for instance, several witnesses for both sides were characterized as "experiential". These witnesses, all of whom were or had been involved in the sale of sex, were thereby distinguished from "experts", police officers, and others by the marker of "experience".[130] In addition to the accounts of experiential witnesses, experiential evidence may also be relayed second hand through other witnesses. In *Bedford*, for instance, police officers, researchers, community activists and others who gave evidence commented extensively on what they had learned from women who sell sex in the course of their work. While the accounts of these women made their way into the record through intermediaries, I treat them as experiential evidence because they, too, arose from people who were directly affected by the issues under consideration.

Like experiential knowledge, "experiential evidence" in this context clearly refers to something other than the methodically gathered sensory observations of interest to empiricists—otherwise, those witnesses brought to speak about their social science

[130] Interestingly, the respondent characterized one set of witnesses under the heading "International Experience and Expertise". *Bedford v Canada (AG),* 2010 ONSC 4264 (Index to Joint Application Record).

research would be the "experiential" ones, or at least be counted among them. Indeed, the use of the descriptor "experiential" in cases like *Bedford* seems to refer to witnesses who offer something akin to the feminist conception of experience described above: a narrative account of their own lived experience, often (though not always) from a place of social marginalization. This reflects, in part, the value placed in our common law adversarial system on hearing from those most directly affected by a dispute. Aligning with feminist discourses, experience here takes the form of highly processed social narratives, where the particular social location of the subject matters.

This does not mean, however, that references to experiential evidence in public interest cases carry the same connotations as political theorizations of experience within feminist and other critical discourses. For one thing, experiential witnesses, like all non-expert witnesses, are expected to furnish only the "facts" of their experience; they are explicitly prohibited from delving into the territory of "opinion", where only experts are allowed to go.[131] This rule, depending as it does on the assumption of a stark dichotomy between fact and opinion, demonstrates the deep influence of the dominant epistemological tradition on the law of evidence. Feminist epistemologists have long rejected this dichotomy in favour of more nuanced understandings that recognize the inevitable role of theory-laden interpretation in even the most factual accounts of experience. Experiential accounts, after all, have always been an explicitly political resource for feminists, as well as a source of knowledge. Despite these differences, however, there is a shared recognition in feminist and legal discourses that it is essential to hear directly from those

[131] *R v Mohan*, [1994] 2 SCR 9 at para 27 [*Mohan*]*; R v Abbey,* 2009 ONCA 624 at para 62. The trial judge in *Bedford* reiterates this rule in her decision: *Bedford* ONSC, *supra* note 16 at para 101.

most affected by an issue about their lived experiences, especially when those people are socially marginalized.

While experiential knowledge appears most obviously through experiential evidence, it also comes up in a number of other ways that do not seem to accord with the traditional taxonomy of proof in litigation. For instance, experiential knowledge can figure importantly in the legal arguments of public interest organizations acting as parties or interveners in a case. As I discuss further below (see section 3.4.2), it also arises in qualitative social science studies relied on by expert witnesses. These studies may in turn be cited as evidence in governmental and other reports, adding further layers of epistemic packaging to the original experiential accounts (which are themselves already the product of interpretation and construction, as discussed above). In this way, experiential knowledge is reframed by a variety of different actors and institutions with their own epistemological and/or political commitments. Social scientists, for instance, must display fidelity to the epistemic norms established within their disciplines and institutions, while NGOs, government actors, and community activists are usually bound to particular political agendas. All of these influences are then further framed by the dictates of the legal process itself, putting ultimate control in the hands of lawyers and judges. As I will show, these layers of framing often take power and authority away from those most directly affected by an issue, even as they purport to allow their voices to be "heard".[132]

[132] In discussing the field of sex work research, Nencel writes: "Ample evidence exists demonstrating that in general, sex workers have had, and have, little control over what is written about them. Consequently, they are represented in ways that do not accord with their lived experiences and that contribute further to their marginalisation and stigmatization". Nencel, *supra* note 70 at 71.

Thus far, I have been speaking about experiential knowledge conceived in terms of a feminist politics that privileges the firsthand experiential accounts of marginalized people. But there is another, often conflicting, category of experience-based knowledge that plays an equally important role in strategic *Charter* litigation. Indeed, marginalized people have often looked to their particular individual and collective experiences as a means *to expose* the partiality of legal determinations based on purportedly universal experience, or "common sense." The invocation of "common sense" in legal proceedings thus raises important questions about the relationship between different kinds of experience, knowledge, and social justice in litigation. How ought we to understand the concept of "common sense" as it relates to experiential knowledge, and to the other conventional categories of proof outlined in this chapter? And what, exactly, is its significance with respect to the question of epistemological justice in strategic *Charter* litigation?

3.4.2 Common Sense

Conceptions of Common Sense

As a concept, "common sense" carries almost as many meanings, and as many layers of theorizing, as the notion of "experience" itself. In her extensive treatment of the topic, feminist legal scholar Patricia Cochran draws on the work of three thinkers from different times and places to offer a "perspicuous representation" of common sense as (a) a kind of shared quotidian knowledge (drawing on Thomas Reid), (b) a historically and politically constructed worldview subject to transformation (drawing on Antonio Gramsci) and (c) a

community-based standard for the legitimacy of judgments (drawing on Hannah Arendt).[133] For the purposes of this project, her discussion of Reid and Gramsci is especially helpful.

Reid's view in particular helps to illuminate the link between common sense, experience, and knowledge. For Reid, "common sense" refers to widely held, non-expert knowledge grounded in everyday experience.[134] There are democratic and egalitarian connotations to this understanding: common sense is framed as the knowledge of ordinary people who make up the community-at-large, in contrast to specialized expert knowledge. [135] As Cochran observes, this accords with how common sense is often understood in legal discourse.[136] Indeed, the democratic impulse underlying the common law's valorization of common sense can be seen in a number of areas of the law of evidence. The law on expert opinion evidence closely guards against the incursion of expert opinion into matters that can adequately dealt with through the common sense of the trier of fact.[137] The doctrine of judicial notice empowers courts to dispense with the need for proof of facts that are widely known and uncontroverted within a given community.[138] And the test for relevance reflects the law's fundamental reliance on "logic and human

[133] Patricia Cochran, *"Common Sense" and Legal Judgment: Community Knowledge, Political Power and Rhetorical Practice* (PhD Thesis, University of British Columbia, 2013) [unpublished]. Note that this work has now been published as a book: Patricia Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power, and Rhetorical Practice* (Montreal: McGill-Queen's University Press, 2017). References in this chapter are to the original thesis manuscript.
[134] *Ibid* at 112-113.
[135] *Ibid* at 112, 114, 126.
[136] *Ibid* at 112.
[137] Sidney N Lederman, Alan W Bryant, & Michelle K Fuerst, *The Law of Evidence in Canada* (Markham, Ontario: LexisNexis, 2014) at 784. See for example *R v DD*, 2000 SCC 43 at paras 49-50.
[138] *R v Find,* 2001 SCC 32 at para 48.

experience" as a means to manage the fact-finding process.[139] Some scholars also view the common law tradition itself as a kind of "embodiment of the 'common sense' of a given community".[140]

And yet, critics have noted that the invocation of common sense in law can be deeply problematic for marginalized people.[141] The trouble, as they note, arises in considering whose experience and knowledge actually counts as "common." Thus Cochran observes that, "feminist thinkers from various disciplines have crucially identified how claims about universality and commonality – claims that sit at the heart of "common sense" as an idea – can actually function to exclude and marginalize."[142] These critiques parallel, in many ways, feminist critiques of the objectivity and universality of knowledge as portrayed by traditional epistemologists.

One might argue in response that legal valorizations of common sense are founded on respect for the knowledge of a particular community where legal judgment is being passed. Arguably, such knowledge claims *are* locally rooted in some sense. However, even when a community is truly localized—a questionable proposition in light of contemporary references to large and amorphous groups such as the "Canadian community"—the assumption of a unified common sense within that community is virtually guaranteed to have exclusionary effects. Indeed, as Cochran observes, by

[139] *R v White,* 2011 SCC 13 at para 36.
[140] Cochran, *supra* note 133 at 33.
[141] See for example: Marilyn MacCrimmon, "Fact Determination: Common Sense Knowledge, Judicial Notice, and Social Science Evidence" (1998) 1 Int'l Comment on Evidence 31 at 32; Suzanne B Goldberg, "Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication" (2007) 6 Dukeminier Awards: Best Sexual Orientation & Gender Identity L Rev 1 at 11-16.
[142] Cochran, *supra* note 133 at 59.

making a rhetorical claim to represent the knowledge of a given community, appeals to common sense actually shape the boundaries of that community, determining who is deemed to be in and out.[143] Furthermore, as Mariana Valverde points out, the law in practice leaves it to judges, who are often quite removed from community life, to determine and articulate the common sense of the community with little or no evidence of what ordinary people actually think.[144] In this way, courts insert their own preferred narrative of community experience and knowledge, erasing the plurality of views and internal disagreements at play on the ground.[145]

Cochran asks: "If common sense is rooted in the fundamental reality and equal legitimacy of daily life knowledge, what happens when peoples' daily lives differ dramatically?"[146] In a similar vein to my own project, her concern arises from her examination of constitutional cases that address issues of poverty, inequality and social marginalization. She contends that in this context, the knowledge deemed to constitute common sense may not actually reflect the experiences of the marginalized group in question.[147] While purporting to speak for all in a universal register, it may in fact reflect only the experiences and perspectives of a particular, socially privileged community (in the legal context, the community of judges and lawyers). As Cochran argues, "The consequences of attributing a false consensus in this context are not just to paper over *difference*, but also to reiterate inequality and hierarchy."[148]

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[143] *Ibid* at 250.
[144] Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003) at 31, 46, 48 [Valverde, *Common Knowledge*].
[145] *Ibid* at 48.
[146] Cochran, *supra* note 133 at 164.
[147] *Ibid* at 141.
[148] *Ibid* at 159.

We are thus "challenged to ask the critical question: 'common to whom?'"[149] Asking this question emphasizes the hegemonic function of common sense as a rhetorical tool, but it also points to the potential for progressive transformations of common sense through feminist appeals to experiential knowledge. What is experiential knowledge, after all, but a newly emerging form of common sense within a particular community, being constructed and advanced as a political challenge to other, more established forms? As Alan Hunt puts it:

> The achievement of real social change requires the securing of what I have termed 'local hegemony', that on grounds of political contestation, ethical justification and legal recognition, some claim which at one time was controversial and contestable becomes self-evident and thus secure. Such claims become secure when they achieve hegemonic status, that is, they become a component of 'good sense'.[150]

Gramsci's theory of common sense, as elaborated by Cochran, helps to develop this point. For Gramsci, a thinker in the Marxian tradition, "common sense" denotes a historically constructed, fragmentary and constantly shifting worldview that varies from one social location to another.[151] Common sense is bound up with power relations in that it serves as a means for dominant social groups to assert their understandings of the world as universal.[152] At the same time, there exists a kind of "organic" common sense that emerges from daily life experiences, and that may conflict with hegemonic forms of

[149] *Ibid* at 7, 22.
[150] Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17:3 Journal of Law and Society 309 at 323.
[151] Cochran, *supra* note 133 at 173-175.
[152] *Ibid* at 176.

common sense.[153] This conflict can disempower socially oppressed people by obfuscating their ability to understand their own lives.[154] However, according to at least some interpretations of Gramsci, the conflict may also serve as a basis for critique, and for the construction of alternative worldviews.[155] Thus Cochran argues that critical scholars should not reject "common sense" outright, despite its oppressive capacities, as this would "relinquish 'common sense' to a specific, dominant political ideology"[156] when in fact it can serve both hegemonic and progressive political purposes.[157]

It is important to pay attention to these different faces of common sense when considering how it is treated as knowledge in litigation. Common sense occupies a unique role in legal fact-finding processes. On the one hand, its defining feature is a refutation of the need for proof. Appeals to common sense thus play a role akin to the doctrine of judicial notice (albeit less formalized), invoking a boundary similar to the boundary between law and fact. And yet, the role of common sense in fact-finding is well recognized—not as a type of evidence, exactly (though it is sometimes referred to in this way), but as the substratum that undergirds, bounds, and fills gaps in the evidence on offer. In this sense, common sense provides an answer to the doctrinal question of relevance. Because it informs the fact-finding process in this way, common sense can also be understood as a mode of proof.

[153] *Ibid* at 176-177.
[154] *Ibid* at 179.
[155] *Ibid* at 182-185.
[156] *Ibid* at 8.
[157] *Ibid* at 186.

By setting out which claims are to be tacitly or explicitly accepted in litigation absent proof to the contrary, common sense frames the contours of factual reasoning in litigation, with varying possible political effects. As Cochran puts it, "the foreclosure of debate on certain points can be used to transparently establish the normative values that will ground fact-determination for legal judgment; certain things are simply not up for discussion in a court of law, and this might serve either progressive or oppressive ends, depending on the context".[158] In considering how to evaluate the normative values being advanced by appeals to common sense, Marilyn MacCrimmon suggests that we ought to look to the *Charter*, and in particular the s.15 right to equality, for substantive guidance.[159] While embracing the spirit of MacCrimmon's approach, this project turns instead to the notion of epistemological justice and the related concept of experiential knowledge as means to assess the operation of common sense in strategic *Charter* litigation. More specifically, I examine whether appeals to common sense in this context work against, or in support of, experiential knowledge (see Chapter 6).

Despite the clashes that can sometimes arise between general appeals to common sense and particular experiential accounts, both of these categories are often thought of as occupying the same side of yet another, deeply entrenched dichotomy—the one between lay experience and expert opinion. Expert opinion, of course, plays a critical role in much strategic *Charter* litigation. How, though, are its role and parameters defined in relation to experiential evidence and common sense? Who counts as an expert in the first place, and why does it matter?

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[158] *Ibid* at 156.
[159] Marilyn MacCrimmon, "Developments in the Law of Evidence: The 1995-1996 Term: Regulating Fact Determination and Commonsense Reasoning" (1997) 8(2d) Supreme Court Law Review 367 at 371-372.

3.4.3 Expert Opinion

My approach to expert opinion evidence in this project differs in two important respects from much of the legal literature to date. First, while scholarship in this area tends to focus on the role of forensic experts in criminal cases,[160] I shift attention away from this paradigmatic context to consider the emergence of a broader array of social science experts in constitutional litigation. Second, I eschew the traditional focus on reliability and the capacity of courts to assess expert opinion evidence.[161] Instead, my interest lies in the legal framing of witnesses and evidence as "expert." Following Sheila Jasanoff and other STS scholars, I am concerned with how legal actors draw upon notions of expertise to advance competing knowledge claims in litigation.[162]

The Experience/Expertise Dichotomy

The dichotomy between lay experience and expert opinion at common law can be understood as operating along two dimensions, tracking the two categories of lay experience discussed in the previous subsections. First, expert opinion is distinguished from the "common sense" of the trier of fact. To be admissible, expert opinion evidence must provide specialized scientific or technical knowledge beyond the understanding of an ordinary person.[163] Experts, moreover, are expected to apply this specialized knowledge in a particular way. As the Supreme Court of Canada explained in *R v Abbey*: "An expert's function is precisely this: to provide the judge and jury with a ready-made

[160] Mariana Valverde, "Social Facticity and the Law: a Social Expert's Eyewitness Account of Law" (1996) 5:2 Social & Legal Studies 201 at 203 [Valverde, "Social Facticity"].
[161] Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, Mass: Harvard University Press, 1995) at xiii.
[162] *Ibid* at xiv.
[163] *R v DD, supra* note 137 at paras 49-50; *R v Marquard,* 4 SCR 223 at para 35.

inference which the judge and jury, due to the technical nature of the facts, are unable to formulate."[164] As Emma Cunliffe notes, the legal test for admissibility thereby presumes a clear distinction between expert and lay processes of reasoning about a given set of facts.[165]

A second dimension of the dichotomy distinguishes expert opinion evidence from the experiential evidence of lay witnesses. This distinction rests both on professional credentials and on the type of information that a particular witness is thought to contribute to the case. While experts furnish opinions on the basis of specialized knowledge or training (i.e. professional experience), lay witnesses describe factual particulars that arise directly from their individual life experience. This second dimension of the experience/expertise dichotomy differs from the first dimension in that particular experiential evidence may or may not accord with the general experience or common sense of the trier of fact (as discussed in the previous section).

In many ways, the dichotomy between lay experience and expert opinion parallels the subjective/objective dichotomy that divides experience from knowledge in traditional epistemology. As Code observes:

> Established claims to authoritative expertise, in present-day western societies, are commonly articulated against the background of just that regulative ideal of a neutral, detached, impartial scientific knowledge, in

[164] *R v Abbey*, [1982] 2 SCR 24 at p 42. See also *R v Parrott*, 2001 SCC 3 at para 55.
[165] Emma Cunliffe, *Murder, Medicine and Motherhood* (Oxford: Hart Publishing, 2011) at 11.

> whose acquisition political and other 'subjective' factors are scrupulously eliminated.[166]

This ideal is reflected not only in how expertise tends to be identified and framed in litigation, but in the doctrinal law of expert opinion evidence itself. It is well settled that expert witnesses have a duty to provide objective assistance to the court in an impartial and independent manner.[167] Indeed, the Supreme Court of Canada (SCC) has recently affirmed that concerns about independence and impartiality fall within the question of whether an expert is properly qualified—a threshold requirement for the admissibility of expert opinion evidence.[168] As the SCC stated, citing the influential English case *Ikarian Reefer*:

> An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise […] An expert witness in the High Court should never assume the role of an advocate.[169]

The duty of expert witnesses has also been codified in a number of Canadian jurisdictions. In Ontario, for instance, the *Rules of Civil Procedure* require experts to sign a form acknowledging their duty to "provide opinion evidence that is fair, objective and

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[166] Code, *What Can She Know?, supra* note 2 at 204.
[167] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*WBLI*]; *National Justice Compania Naviera SA v Prudential Assurance Co*, [1993] 2 Lloyd's Rep 68 (Eng QB), reversed on other grounds [1995] 1 Lloyd's Rep 445 (Eng CA) [*Ikarian Reefer*].
[168] *WBLI, ibid* at para 53.
[169] *Ibid* at para 27, cting *Ikarian Reefer*.

non-partisan".[170] This legally defined duty of expert witnesses aligns notably with the ideals of scientific objectivity that underpin traditional epistemology. Indeed, the expectation that an expert will offer "objective, unbiased opinion" maps perfectly onto empiricist/positivist notions of science, according to which scientists act as neutral and interchangeable investigators of the social world, following established methods to discover objective truths. In this way, expert opinion is associated with objectivity, while lived experience remains subjective, and thus (so the implication goes) of less epistemic value.

It is no wonder, then, that courts and litigators have turned increasingly to expert evidence as a means to address complex social issues. As Valverde observes, there is a desire in many cases to "establish a purely empirical basis for a legal judgment that, especially these days, shys [sic] away from making strictly moral or philosophical pronouncements…"[171] So long as expertise is equated with objectivity, reliance on this type of evidence seems to prevent value judgments from entering the fact-finding process, and thereby seems to enhance the legitimacy of the process. The problem, of course, is that the dichotomy between objective expert opinion evidence and subjective experiential evidence turns out to be far less stable than it appears. As noted in the previous chapter, this becomes especially apparent in the context of social and legislative fact-finding in strategic *Charter* litigation.

[170] *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, r 53.03 (2.1-7) and form 53.
[171] Valverde, *Common Knowledge, supra* note 144 at 58.

Ultimately, I argue that the legal entrenchment of the dichotomy between experience and expertise obfuscates its real instability, creating opportunities for legal actors to manipulate how evidence is perceived. Rather than mapping ontological categories, the dichotomy serves as a key framing device for legal actors to bolster or discount evidence in strategic *Charter* litigation. In some instances, this is done by appealing to the rhetorical power of experiential knowledge or common sense. In other instances, however, legal actors assert epistemic authority through appeals to expertise, defined in opposition to experience-based forms of knowledge.

Appeals to expertise serve different purposes in different litigation contexts. In some cases, so-called experts give opinions that clash directly with experiential accounts of a given phenomenon, raising questions about who is "allowed to have 'knowledge'."[172] For instance, in the context of environmental disputes, Dayna Scott notes the tendency for legal forums to favour the findings of accredited scientists over information collected by directly affected citizens in communities facing pollution.[173] In other cases, though, including many *Charter* cases, rights-seeking litigants use accredited experts to bolster their own credibility as experiential witnesses.[174] While potentially invaluable in securing a favourable legal outcome, the latter use of expert opinion gives rise to similar questions

[172] Dayna N Scott, "We Are the Monitors Now: Experiential Knowledge, Transcorporeality and Environmental Justice" (2015) Soc Leg Stud, online: <http://sls.sagepub.com/cgi/doi/10.1177/0964663915601166> at 2.
[173] *Ibid* at 2. Indeed, it was in the context of toxic and other mass tort litigation involving high amounts of damages that concerns about purported "junk science" brought by plaintiffs arose in the United States, leading the courts to establish a stricter standard for the admissibility of expert evidence, to the general advantage of defendants. Margaret A Berger, "Upsetting the Balance between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation Complex Litigation at the Millennium" (2001) 64:2-3 Law and Contemp Probs 289 at 290. A similar standard was later adopted in Canada. See *R v J-LJ,* 2000 SCC 51 at para 33.
[174] Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor YB Access Just 55 at 80.

about whose knowledge is seen as authoritative in legal proceedings. As Code points out, women have often had to rely on experts due to their own assumed lack of cognitive authority, "even when they have good reason to believe that they *know* as well as, or better than, experts do".[175] Thus Graham Mayeda worries that even when experts are used to advance a marginalized perspective, "the firsthand stories of individuals from equality-seeking groups who have lived through injustice and marginalization are ignored in favour of the accounts of experts."[176] Such reliance on expert opinion evidence may prove particularly dangerous when there are gaps in research such that a layperson "has no 'expert' voice to speak for her."[177]

Experts themselves may have qualms about playing this kind of role in litigation, especially when they are driven to support a given group or social cause through their work. Drawing from her own experience testifying as an expert sociologist in LGBT rights cases, Valverde reflects upon how she

> unwittingly disempowered the movements which had originally given rise to my academic research interests in sexual and moral regulation. While appearing to promote legal and social change, then, I in fact colluded with law's claim that oppressed peoples cannot represent themselves but must be represented by others.[178]

[175] Code, *What Can She Know?, supra* note 2 at 181.
[176] Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups" (2008) 6 JL & Equal 201 at 202.
[177] *Ibid* at 203.
[178] Valverde, "Social Facticity", *supra* note 160 at 214.

This is not to suggest that there is no legitimate role for experts in litigation or other knowledge-producing processes, but that the epistemological effects of relying on expert authority ought to be carefully considered. For one thing, as Code points out, most forms of expertise are actually highly contestable.[179] We should, moreover, be wary of too easily accepting the epistemic authority of purported experts without considering the social and institutional structures (often hierarchical ones) that support their claims to expertise. There is, in other words, a need for critical scrutiny of who is deemed to be an expert on what grounds, and how such designations might both reflect and reinforce existing social hierarchies.[180] This calls, in part, for critical scrutiny of the experience/expertise dichotomy itself.

Deconstructing the Dichotomy

In her book, *Law's Dream of a Common Knowledge*, Valverde underscores the limitations of analyzing legal knowledge in terms of the experience/expertise dichotomy. She argues: "The knowledges that are constituted in and circulate through law are rarely so coherent and bounded as to allow classification into one of the two traditional categories (expertise and experience)."[181] The nurse witnesses in the Grange Inquiry may help to illustrate this point. As Code observes, nurses testifying in their professional capacity are ascribed a kind of "practical experience".[182] However, they are not generally categorized as "experiential" witnesses, nor are they expected to recount personal life stories. The same goes for police officers, journalists, and leaders of community organizations in *Bedford,* who are treated neither as experts nor as experiential

[179] Code, *Rhetorical Spaces, supra* note 3 at 19.
[180] See Longino, *supra* note 6 at 337-338.
[181] Valverde, *Common Knowledge, supra* note 144 at 26. See also at 27.
[182] Code, *Rhetorical Spaces, supra* note 3 at 245.

witnesses.[183] These witnesses, and the experience accorded to them, thus seem to occupy a kind of middle ground between subjective personal experience and objective expertise. And yet, despite the presence of many such hybrid or "in-between" forms of knowledge,[184] the dichotomy between experiential and expert evidence continues to carry rhetorical weight, thanks in part to its legal entrenchment.

Given the weight it carries in litigation, it is worth considering the basis for the experience/expertise dichotomy in both its dimensions. Along the first dimension, the test for admitting expert opinion evidence requires a line to be drawn between the domain of the expert, and the domain of the trier of fact operating according to lay or common sense reasoning. Indeed, it is often argued that expert opinion can provide important opportunities to reassess or correct faulty common sense[185] (just as common sense may serve as a check on expert opinion). And yet, efforts to draw a line between the two have been notoriously fraught. Legal scholars have expressed fervent disagreements over the proper range of facts about which ordinary people can make judgments, as opposed to those that call for expert knowledge.[186] Knowledge about human behaviour that was once thought to fall within the realm of common sense has later been subject to challenges via

[183] While police officers are sometimes treated as experts, the admissibility of police evidence as expert opinion is often contested. See for example: *R v Sekhon*, 2014 SCC 15; *R v Lee,* 2010 ABCA 1.
[184] I draw on Valverde in using this terminology: Valverde, *Common Knowledge, supra* note 144 at 22, 27.
[185] See for example: Eberts, *supra* note 23 at 473-474, discussing the case of *R v Lavallee,* [1990] 1 SCR 852 [*Lavallee*]; Cochran, *supra* note 133 at 148, discussing the case of *R v DD*, *supra* note 137.
[186] William Twining, *Rethinking Evidence: Exploratory Essays,* 2nd ed (New York: Cambridge University Press, 2006) at 85; Lederman, Bryant & Fuerst, *supra* note 137 at 786.

expert evidence. [187] And, experts themselves often draw heavily upon common sense, significantly blurring the boundary between the two.[188]

In her study of criminal infant death cases, which focuses on the Australian case of *R v. Folbigg*,[189] Emma Cunliffe demonstrates the latter point by showing how scientific investigations of infant deaths are influenced by social norms around mothering,[190] and in some cases, by a general suspicion that mothers are getting away with murder under the guise of Sudden Infant Death Syndrome.[191] In *Folbigg,* one of the experts who was influenced by such suspicions sought to validate his opinion by appealing to its acceptance by courts in other cases. Cunliffe explains:

> [He] drew upon law's ideological power when he asserted that if a court agreed with his findings, those findings were very likely to be correct. By virtue of being objectified through the criminal trial process, the belief that mothers can and do murder their children without detection was discursively detached from the expert communities who initially promoted the idea.[192]

Cunliffe's analysis, here and in other parts of her work, calls into question the sharp division between expert and lay reasoning enshrined in the law of expert opinion. At the

[187] See for example *Lavallee, supra* note 185 (wherein expert psychological evidence about battered women was allowed to help the jury assess whether the accused reasonably feared for her life and thus could be said to have killed her abusive partner in self-defence).
[188] Valverde, *Common Knowledge, supra* note 144 at 172.
[189] Cunliffe, *supra* note 165; *R v Folbigg,* [2003] NSWSC 895 (24 Oct 2003).
[190] Cunliffe, *ibid* at 47.
[191] *Ibid* at 56-57, 68.
[192] *Ibid* at 68.

same time, she demonstrates how this division is used rhetorically to render the influence of normative, common sense views over expert opinion invisible.

Kimberley White-Mair similarly explodes the dichotomy between expert and common sense knowledge in her historical study of expert witnessing in cases of battered women who kill or harm their abusive partners.[193] She writes: "Common sense beliefs about women not only guided the judicial use and interpretation of expert evidence, as the law stipulates it should, but was, and still is, deeply inculcated in 'expertise' itself."[194] White-Mair's historical research illustrates the flexible and selective qualification of experts in battered women cases, and the selective taking up of expert views by the court depending on their accordance with the social mores of the time.[195] At the same time, her research shows that women accused's own accounts of what led them to kill abusive partners were often dismissed in favour of the common sense views affirmed by experts.[196]

White-Mair observes that while expert opinion purportedly extends the trier of fact's knowledge beyond common sense, the trier of fact is ultimately left to evaluate such opinion according to that very standard.[197] She explains: "…during a scientific age, when objectivity constituted legal truth, and experts claimed to be objective, the explicit appeal to expertise served to simultaneously cast the law as outwardly objective, while maintaining its implicit appeal to popular opinion and common sense."[198] This analysis

[193] Kimberley White-Mair, "Experts and Ordinary Men: Locating R. v. Lavallée, Battered Woman Syndrome, and the 'New' Psychiatric Expertise on Women within Canadian Legal History" (2000) 12:2 Can J Women Law 406.
[194] *Ibid* at 408.
[195] See Eberts, *supra* note 23 at 474-475 and 485 for more examples of this.
[196] White-Mair, *supra* note 193 at 425.
[197] *Ibid* at 423.
[198] *Ibid* at 426.

shows how the framing of evidence as "expert" projects an image of objectivity, even while such evidence remains infused with, and contained by, lay views. To the extent that such views affirm status quo understandings of marginalized groups, the influx of expert opinion evidence in litigation may prove less progressive than it seems.

In some cases, expert appeals to common sense may be hardly veiled at all. Drawing from her own experience as an expert witness, Valverde notes how expert qualifications may be used simply to lend authority to views that are intentionally framed as commonsensical:

> In my own expert intervention, I presented myself more as the reasonable person than as the erudite scholar. In keeping with the practice of self honed over a decade of similar interventions, I arrived […] ready to deploy a knowledge of lesbian/gay styles of life that was more anecdotal and commonsensical than social-scientific.[199]

Of course, experts are not always so reflexive about their own mobilization of common sense. Regardless, there can be little doubt that the boundary between expert opinion and common sense blurs significantly upon closer inspection.

Nor does the second dimension of the experience/expertise dichotomy—the division of experiential and expert witnesses—hold up very well to critical scrutiny. A compelling basis for the distinction is hardly to be found in the legal test for the qualification of experts, at least in the context of strategic *Charter* litigation. To be qualified, experts

[199] Valverde, *Common Knowledge, supra* note 144 at 135.

must "have acquired special or peculiar knowledge through study or experience" likely to be beyond that of the fact-finder (emphasis added).[200] Experience, then, is part of the very definition of expertise. Experience in this context may refer to scientific research conducted on the basis of sensory observations, but it more often connotes the practical application of established (i.e. theoretical) knowledge to real life cases.[201] It thus amounts to a kind of practice-based professional experience. Interestingly, this kind of experience is understood as distinct from the "lay" experience that grounds experiential evidence, common sense, and even other kinds of professional experience, such as the experience of nurses in the Grange Inquiry.

Taking the above definition at face value, however, one could easily argue that the experiential knowledge of sex workers, illicit drug users, and other marginalized people in recent s.7 *Charter* cases ought to count as a form of expertise, arising as it does from specialized experience-based knowledge unfamiliar to the trier of fact. Indeed, feminist scholars working in a variety of contexts have called attention to the expertise that some "lay" witnesses have acquired through community advocacy, citizen science, and direct experiences of injustice.[202] In *Bedford,* many of the witnesses presented as "experiential" had also participated not only in advocacy but also in the production of research studies and reports, undertaken either through non-profit organizations or through academic-

[200] *Mohan, supra* note 131 at para 27; *Marquard, supra* note 163 at para 35.
[201] Code, *What Can She Know?, supra* note 2 at 243.
[202] Amanda Dale, "Gun Control and Women's Rights in Context: Reflections of the Applicant on *Barbara Schlifer Commemorative Clinic v Canada*" (2017) 13 Journal of Law & Equality 61; DN Scott, *supra* note 172 at 13, 16; Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in Bedford and Bill C-36" (2015) 30 Can J Law Soc 5 at 5; Linda Alcoff & Laura Gray, "Survivor Discourse: Transgression or Recuperation?" (1993) 18:2 Signs 260 at 282.

community partnerships. Such witnesses may thus be viewed as offering a kind of expertise grounded in both experience and in research.

At the same time, the formally credentialed academic witnesses recognized as experts in *Bedford* (and in many other cases) often ground their opinions in qualitative social science research based on methodically collected experiential narratives. I argued earlier that such narratives can be distinguished from the sensory experience upon which empirical or scientific knowledge relies. However, when we move away from paradigmatic conceptions of science, which privilege the natural sciences and especially physics, the distinction begins to break down. The data of interest to social scientists often cannot be gleaned from basic sensory observations. Rather, in many cases, social scientists make observations on the basis of the testimony of others, gathered through surveys, interviews and other methods. As the record in *Bedford* shows, in social science research related to the sale of sex, qualitative interviews of sex workers and others involved in the industry are common. The data collected in such projects can be read as a kind of experiential knowledge. This is not to say that social science research and related expertise is, itself, experiential knowledge, but rather to illustrate how these categories are actually deeply intertwined. Social scientists use experiential knowledge to construct a different kind of knowledge entirely, following different epistemic norms. Nevertheless, the one draws fundamentally upon the other.

Legal Constructions of Science

It is clear from the above discussion that notions of expertise in litigation are tied heavily to the epistemic norms and institutional markers of science. Indeed, according to Sergio

Sismondo, the typical model of expertise in public controversies attributes most knowledge to science, based on notions of universal applicability.[203] Likewise, scientific norms such as universalism, disinteredness, and the "scientific method" play an important role in demarcating expert knowledge in litigation. And, as noted above, experts in many cases rely directly on social science research to ground their opinions.

In line with the legal doctrine on expert opinion, scientific research is often framed as universal, objective and disinterested, in opposition to the subjectivity and particularity of knowledge grounded in experience. However, observations of laboratory scientists in action have led STS scholars to question the characteristics commonly attributed to science.[204] As discussed above (see section 3.3.1), these scholars have observed that despite science's claims to universal and objective knowledge, the actual work of science unfolds in particular, concrete contexts, [205] and demands a great deal of ad hoc decision-making and interpretation, most of which is erased in the final reporting of results.[206] Thus, "rhetoric always mediates material actions like experiments and observations, standing between readers and the material world."[207] Nor can science be purified of normative beliefs and assumptions.[208]

Rather than trying to identify the inherent attributes of science, STS scholars illustrate how ideas about the nature of science are used as "rhetorical resources" to assert

[203] Sismondo, *supra* note 111 at 170.
[204] See Bruno Latour & Steve Woolgar, *Laboratory Life: The Social Construction of Scientific Facts* (Beverly Hills: Sage Publications, 1979).
[205] Sismondo, *supra* note 111 at 170-171.
[206] *Ibid* at 125.
[207] *Ibid* at 101.
[208] *Ibid* at 132; Jasanoff, *supra* note 161 at 207 .

epistemic authority.[209] In this vein, Robert Merton argued that science serves the social function of "certifying knowledge".[210] Building on this idea, Thomas Gieryn coined the term "boundary work" to describe how scientists strategically demarcate science from other forms of intellectual activity in order to bolster their authority and professional resources.[211] According to Gieryn, "'science' is no single thing: characteristics attributed to science vary widely depending upon the specific intellectual or professional activity designated as 'non-science,' and upon particular goals of the boundary-work."[212] Thus, science has been characterized as practical, empirical and skeptical in comparison to religion,[213] but as foundational, experimental and theoretical in comparison to the engineering.[214] Boundary work also operates to divide the production and consumption of scientific knowledge, thereby shielding scientists from responsibility for how science is applied to solve non-scientific problems.[215]

The concept of boundary work can also be instructive for thinking about other categories of knowledge in litigation. Efforts to delineate expert opinion from lay experience, for instance, may be subject to a similar kind of analysis. A philosophical heritage of dualistic thought underlies these dynamics, creating opportunities for boundary work between a whole series of conceptual dichotomies.[216] In this project, I examine how legal

[209] Sismondo, *ibid* at 29.
[210] *Ibid* at 6-7, citing Robert King Merton & Norman W Storer, *The Sociology of Science: Theoretical and Empirical Investigations* (Chicago: University of Chicago Press, 1973).
[211] Gieryn, *supra* note 54 at 782.
[212] *Ibid*.
[213] *Ibid* at 785.
[214] *Ibid* at 786.
[215] *Ibid* at 789.
[216] See section 3.2.5 (Gendered Dichotomies) above.

actors strategically exploit such opportunities, in part by drawing on the boundary work of scientists and others.

Jasanoff is helpful in this regard as she extends the idea of boundary work directly to the legal context.[217] She identifies legal disputes as "sites where society is busily constructing its ideas about what constitutes legitimate knowledge."[218] "Different types of evidence routinely elicit different credibility judgments from fact-finders", Jasanoff writes.[219] "[S]uch credibility judgments incorporate the fact-finder's own tacit understandings of science and expertise, although these private judgments may be hidden from critical review by rhetorically effective boundary work."[220] According to Jasanoff, the process of adjudication not only relies on common ideas about science and expertise, but plays an active role in their construction. Legal cases can also stimulate new scientific work, which may in turn be interpreted in the legal realm.[221] Thus, law and science are "mutually constitutive."[222]

This way of thinking presents a challenge to the common notion that knowledge from other disciplines is simply welcomed into the fact-finding process as an aid to decision-making. To be sure, the epistemic posture of constitutional law (and other areas of law) has shifted, exhibiting greater openness to knowledge from other disciplines. However, the ongoing power of law in the processes by which judges and litigators recognize these

[217] Jasanoff, *supra* note 161.
[218] *Ibid* at xv.
[219] *Ibid* at 209.
[220] *Ibid* at 209.
[221] *Ibid* at 50. Arthur Ray discusses this phenomenon in his reflections on serving as an expert witness in Aboriginal rights litigation: AJ Ray, "Native History on Trial: Confessions of an Expert Witness" (2003) 84 Can Hist Rev 253 at 273.
[222] Jasanoff, *supra* note 161 at 8.

other sites of knowledge should not be underestimated. As Valverde puts it, law incorporates scientific and other knowledge by "transmuting such alien knowledges into legal formats and frameworks" and thereby "shapes the world it claims to adjudicate."[223] Scholars of evidence, for instance, have long observed the distortions of scientific knowledge that result from the adversarial system's reliance on partisan expert witnesses.[224] From this perspective, the structural features of our legal system condition the scientific opinions heard in court in significant ways. Thinkers like Jasanoff and Valverde have gone further, arguing for an understanding of science and law as co-constructed. Speaking from her own experience testifying as an expert witness, Valverde observes both how the law has certified her as an expert sociologist, by repeatedly qualifying her as such,[225] and how she has felt compelled to frame her opinions more definitively in the legal context and to present an image of sociological knowledge that she herself does not believe in.[226] Thus she contends that, "social science, purportedly courted because it can inject useful 'facts' into the legal process, is through the legal process reduced to the status of mirror for law's narcissistic deliberations."[227]

What links these insights is the recognition that social science (along with other extra-legal knowledge) is never simply imported, wholesale, into law. Rather, law, through its structures, procedures and norms, renders its own version of social science. What we see in strategic *Charter* challenges such as *Bedford* is not simply the opening up of law to

[223] Valverde, *Common Knowledge, supra* note 144 at 6.
[224] Glenn R Anderson, *Expert Evidence*, 3rd ed (Markham, Ontario: LexisNexis Canada, 2014) at 22-30.
[225] Valverde, "Social Facticity", *supra* note 160 at 211.
[226] *Ibid* at 208.
[227] *Ibid* at 202.

social science, but the active construction and instrumentalization of ideas about social science (and science more generally) through the legal process.

Given the close connection between scientific norms and ideas about knowledge generally, these moves can have important implications for epistemological justice. For instance, as I show in Chapter 5, qualitative research methods are persistently discounted in *Bedford* as inferior to quantitative methods. Such arguments often boil down to attacks on the reliability and probative value of firsthand experiential accounts gathered through interviews and other methods. They thus work against the feminist, and more broadly progressive, commitment to taking experiential knowledge seriously. Constructions of social science in *Bedford* also frequently serve to bolster mainstream understandings of objectivity, the relationship between knowers and the known, and the strict separation of facts from politics, though not without resistance from some actors.

3.5 CONCLUSION

In this Chapter, I have laid the theoretical groundwork for my project by exploring, from a critical perspective, some of the central epistemological frameworks, norms, and categories at work in strategic *Charter* litigation. Building upon the work of feminist epistemologists, I have developed the concept of "experiential knowledge" as central to my vision of epistemological justice, and used this as a springboard to examine and critique three conventional categories of proof in litigation. By considering how these categories are constructed in relation to each other, and used to frame knowledge in litigation, I have exposed the rhetorical, rather than ontological, nature of their role in the adversarial process, and raised a question about the epistemological work that they do. In

these ways, I have established a foundation from which to critically analyze the treatment of knowledge in *Bedford* as it relates to the case's social justice goals.

Chapter 4: The Treatment of Experiential Evidence in *Bedford*

4.1 INTRODUCTION

In the first Part of this dissertation, I made the case for investigating the epistemological effects of the fact-finding process in strategic *Charter* litigation through a social justice lens, and laid a legal and theoretical foundation for doing so. In the second Part, I use *Bedford v Canada (AG)*[1] as a case study to conduct this investigation. I do so first, in Chapters 4 to 6, by closely examining the rhetorical framing strategies used by counsel and other participants in the case with respect to each of the conventional categories of proof discussed in Chapter 3.[2] Specifically, I examine how each of these modes of proof is mobilized, bolstered, attacked, or otherwise framed in particular instances on the record in *Bedford*. I go on, in Chapter 7, to consider how the parties, in their facta, and the courts, in their reasons, weigh these different modes of proof against each other in responding to the factual questions at issue in the case. Throughout my analysis in this Part, I unearth and scrutinize the epistemological norms and paradigms at work in *Bedford* as they map onto the critical feminist framework developed in Chapter 3. I thereby consider how the treatment of knowledge in *Bedford* stacks up to progressive epistemological commitments that I contend are essential to the realization of social justice—in particular, the commitment to take seriously and prioritize (but not to idealize) the experiential knowledge of marginalized people.

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[1] *Bedford v Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in 2013 SCC 72 [*Bedford* SCC].
[2] While my discussion in Chapter 3 moved from experiential evidence to common sense and then to expert opinion, I have found it more suitable, in this Part, to leave common sense until the end—a reflection of what I have found to be its unique nature and special importance in strategic *Charter* litigation.

I wish to emphasize at the outset of this Part that my purpose in tracing these rhetorical manoeuvres and their epistemological effects is not (or at least not primarily) to criticize counsel, the courts, or other participants in *Bedford* for their approach to the fact-finding process, nor to suggest what a better approach might be. Rather, my purpose is to demonstrate how the legal context and process of strategic *Charter* litigation drives participants to approach evidence, facts and knowledge in certain ways—ways that often conflict with feminist epistemological insights and commitments. While I draw on specific examples to illustrate my arguments, my ultimate aim is not to attribute fault to individual actors but rather to illuminate the epistemological perils of engaging in strategic *Charter* litigation as a tool for social change.

As in Chapter 3, I begin my investigation by examining the category of proof most closely associated with the concept of experiential knowledge: the experiential evidence of those directly affected by the impugned laws. This is the focus of the current chapter. Because the evidence of the Crown-side experiential witnesses in *Bedford* falls under a confidentiality order and publication ban, my analysis is limited to the treatment of the applicants and applicant-side experiential witnesses. While it would have been preferable to examine the treatment of the Crown-side experiential witnesses as well, it should be noted that only one of these witnesses was cross-examined, suggesting that their evidence was largely uncontested.[3] In addition to the applicant-side experiential witnesses, I also consider secondhand experiential accounts relayed through other witnesses, including accounts gathered via qualitative research, to the extent that such accounts are treated as a

[3] *Bedford v Canada (AG),* 2010 ONSC 4264 (Index to Joint Application Record).

source of experiential evidence. As a result, there is some overlap between the type of evidence discussed here and in Chapter 5.

As my analysis demonstrates, many of the strategies used to frame experiential evidence in *Bedford* rely upon, and thereby perpetuate, epistemic norms that have long served to prop up social inequalities, including sexist stereotypes. These norms find roots in mainstream Anglo-American epistemology as well as in law. At the same time, I point to instances in which participants in *Bedford* resist these norms in ways that display sensitivity to the importance of experiential knowledge. For some witnesses, this resistance seems to arise from genuinely held progressive epistemological commitments. And yet, I show how, in the context of adversarial litigation, the valorization of experiential knowledge is often oversimplified and unmoored from its political roots, serving primarily as an instrumental tool of advocacy rather than a thoughtfully held political-epistemological commitment.

4.2 FRAMING STRATEGIES

The main strategies used to frame the experiential evidence in *Bedford* focus on two general issues: 1) qualifications; and 2) reliability. Framing strategies related to qualifications scrutinize the source(s) of an individual's epistemic authority. In particular, I canvas framing strategies that focus on an individual's level of formal education, knowledge of relevant law and policy, the immediacy of their experience, and the representativeness of their experience. Framing strategies related to reliability ask whether a given experiential account can be trusted as an accurate reflection of reality.

These strategies speak to concerns about veracity and consistency, as well as the proper interpretation of experience.

4.2.1 Qualifications

Formal Education

"Qualifications" is admittedly a strange place to start when thinking about experiential evidence, reserved as this evaluative factor normally is for experts. The seeming mismatch here highlights the slippage between the categories of experiential and expert evidence in *Bedford* and other strategic *Charter* litigation (see Chapter 2 at 2.4.1 and Chapter 3 at 3.4.3). The first set of qualifications-based strategies in *Bedford* exploits this slippage to frame experiential witnesses as akin to unqualified experts. One such strategy appeals to the mainstream privilege accorded to formal education, to discount the epistemic authority of experiential witnesses. All three applicants in *Bedford* are subject to questioning about their education in this vein, sometimes in an evidently demeaning manner. For instance, counsel for the Attorney General of Ontario begins her cross-examination of Terri-Jean Bedford by asking: "It's not clear to me what grade you actually achieved in school."[4] She questions Valerie Scott in a similar manner about her efforts to obtain a university degree, emphasizing the fact that she only finished four courses over a period of 13 years.[5]

[4] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Terri-Jean Bedford at para 139) [Bedford cross].
[5] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Valerie Scott at paras 410-423) [Scott cross]. See also *Bedford v Canada (AG)*, 2010 ONSC 4264 (Cross-Examination of Amy Lebovitch at paras 38-48 and 462-46) [Lebovitch cross].

Given Bedford and Scott's purported status as non-expert experiential witnesses, such questions are arguably irrelevant.[6] Doctrinally speaking, experiential witnesses do not require special educational credentials, restricted as they are to offering immediate observations of fact. As discussed in the previous two chapters, however, the line between experiential fact evidence and expert opinion becomes significantly blurred in strategic *Charter* litigation. In *Bedford*, the applicants and other experiential witnesses offer opinions about matters of social and legislative fact that extend well beyond firsthand sensory observations. Rather than arguing that these opinions are beyond the scope of experiential evidence, counsel here challenges the qualifications of the witnesses to give them. From a feminist perspective, the necessary qualifications may be legitimately located in firsthand experience. The traditional approach at common law, however, has been to privilege formal education and training as the most appropriate bases for opinion evidence. Informed by this idea of whose knowledge counts, counsel highlights the applicants' (and other experiential witnesses') lack of educational credentials as a means to discount their epistemic authority.

In some ways, the applicants themselves play into the privilege accorded to formal education as a ground for epistemic authority in the fact-finding process, despite their own position as experiential (rather than expert) witnesses. Scott, for instance, repeatedly emphasizes the importance of school and expresses her regret about not finishing high school.[7] And, when asked her views about how prostitution should be regulated,

[6] This is precisely what Young argues at another moment on the record when he suggests to counsel for Canada that questions about the educational background of the applicant-side experiential witnesses are irrelevant (see Chapter 2 at 2.4.1 under Relevance).
[7] Scott cross, *supra* note 5 at paras 153, 273-276 and 503.

applicant Amy Lebovitch seems to qualify her authority on the topic: "Myself, personally, as a sex worker and not a lawyer who understands, you know, the law like you would, I'm someone who believes…"[8] In other instances, however, resistance to this norm arises through assertions of the significance of knowledge gained through lived experience. For example, when asked about her level of education, Bedford remarks, "I have a PhD in hard knocks."[9] While speaking from a different perspective and kind of experience, Crown witness and anti-prostitution advocate Kathleen Quinn positions herself in similar way. When asked, under cross-examination, whether she has studied the sex trade in an academic context, she responds: "I have learned from the school of life."[10] Remarks such as these push back on the call for expert-like qualifications from experiential and other lay witnesses by emphasizing the distinct epistemic value of experience. An alternative epistemic norm emerges here—one that understands experiential knowledge as on par with conventional forms of education and expertise. The influence of the feminist epistemological insights discussed in Chapter 3 is apparent in these moments.

Knowledge of Relevant Law and Policy

In addition to highlighting the applicants' lack of formal education, another strategy employed by Crown counsel in *Bedford* is to frame the applicants and other experiential witnesses as ignorant of the laws and policies at issue in the case. Here it is the lawyers themselves who elicit opinion evidence from the experiential witnesses, only to suggest

[8] Lebovitch cross, *supra* note 5 at para 277. See also *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Carol-Lynn Strachan at p 44) [Strachan cross].
[9] Bedford cross, *supra* note 4 at para 140.
[10] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Kathleen Quinn at p 3) [Quinn cross].

that they are not qualified to give it, or at least that what they offer is of little value. In this way, they cast doubt on the epistemic authority of the witnesses, without giving due weight to their experiential knowledge.

Counsel for the Attorney General of Canada, for instance, challenges Scott and Lebovitch on their understanding of the living on the avails provision, so as to highlight their relative lack of knowledge about the law being challenged.[11] Counsel for Ontario asks Lebovitch if she has obtained legal advice about the risk posed to her by the bawdy house laws, to similar effect.[12] The implication in each case is that the applicants have misunderstood the extent to which the law negatively affects them. Probing the legal understanding of the applicants themselves, however, is (once again) arguably irrelevant given their role as experiential witnesses. The only purpose of such inquiries seems to be to underscore the applicants' ignorance, and thereby to undermine their authority.

Counsel for Ontario also poses a number of policy questions to the applicants and other experiential witnesses in cross-examination, only to frame their responses as unsophisticated. For instance, when Scott responds to a question about how to deal with minors engaged in survival sex work, counsel retorts: "You haven't really defined any sort of program, any specific program that you think these kids would benefit from. […] This is just sort of some thoughts in your mind. Is that right?"[13] After questioning a number of experiential witnesses affiliated with sex work organizations about their

[11] Lebovitch cross, *supra* note 5 at paras 172-175; Scott cross, *supra* note 5 at paras 46, 85-88 and 637-642. Young flags this as "sort of a strange question", though he does not object: Scott cross, *ibid* at para 46.
[12] Lebovitch cross, *ibid* at paras 571, 607.
[13]Scott cross, *supra* note 5 at paras 504-505.

preferred prostitution policy, counsel for Ontario points out in argument that none of these organizations "appeared to have developed a specific platform concerning how prostitution businesses would operate post-decriminalization."[14] The experiential witnesses and their associated organizations are thereby portrayed as ignorant of the nuances of relevant policy debates, despite the fact that these questions are arguably outside the scope of experiential evidence, and irrelevant to the facts at issue in the case.

The applicants resist this strategy not by reinforcing the boundary between experiential and expert evidence, but by pointing to their lived experience as a vital source of expertise for decisions about how to regulate the sex trade. Contrary to counsel's insinuation that they lack the requisite knowledge for law and policy-making, they assert that women in the trade are actually the "most knowledgeable" about how to regulate it.[15] There is also a normative component to this view. As Scott and Lebovitch emphasize, women in the trade *should* have input into policy decisions that directly affect them.[16] By framing firsthand experience as an important source of expertise, and by linking the treatment of knowledge to ethical and political considerations, these claims challenge the epistemological assumptions embedded in doctrinal law, and reflected in the fact-finding process.

Immediacy of Experience

So far, I have discussed framing strategies in which counsel privilege conventional expert qualifications as the proper basis for opinion evidence, and thereby implicitly discount experiential knowledge. However, as I discuss further in section 4.2.2, there is also some

[14] *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of Intervener AG Ontario at para 32) [Factum of AG Ontario].
[15] Lebovitch cross, *supra* note 5 at para 94; Scott cross, *supra* note 5 at para 584.
[16] Scott cross, *ibid* at para 189; Lebovitch cross, *ibid* at para 128.

recognition amongst counsel in *Bedford* of the importance and progressive connotations of experiential knowledge in the fact-finding process. In light of this understanding, other qualifications-based framing strategies take the opposite approach to those described above: rather than discounting the epistemic value of lived experience, they co-opt the progressive valorization of experiential knowledge, only to narrow the parameters of its legitimacy, or to use it as a means of essentializing those whose rights are at stake.

One way in which counsel police the boundaries of proper experiential knowledge is to suggest that a witness' experience is too indirect. This strategy appeals to traditional concerns about hearsay to discount the authority of experiential witnesses. For instance, in cross-examining Scott, counsel for Ontario emphasizes that she hasn't worked as a sex worker since 1993, and is therefore relying on the secondhand accounts of other sex workers to support her views on the trade.[17] Similarly, counsel for Canada challenges applicant witnesses Susan Davis and Carol-Lynn Strachan on their description of the conditions faced by sex workers on the streets, by highlighting that they themselves have not recently worked there, even though they have been closely involved in helping others who have.[18] Rather than discounting experiential knowledge as inadequately informed or objective, the contention here is that the witness' experience is not immediate or personal enough.

When confronted with this strategy, Davis and Strachan respond by emphasizing their

[17] Scott cross, *ibid* at para 429 onwards.
[18] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Susan Davis at para 104) [Davis cross]; Strachan cross, *supra* note 8 at pp 22 and 29. See also Lebovitch cross, *supra* note 5 at paras 74-75.

ongoing connections to the community of street sex workers where they live.[19] Scott also resists this strategy by turning it back against counsel in another part of the cross-examination. When asked to confirm counsel for Ontario's depiction of what happens to trafficked women in Canada, she responds: "I've heard that, though I do not have any direct evidence."[20] In this way, she highlights the instrumentality of counsel's approach to the experiential evidence. In one moment, experiential witnesses are invited to offer general opinions about the experiences of women in prostitution; in the next, their observations are discounted as insufficiently grounded in direct, personal experience.

Representativeness of Experience

Another, closely connected and similarly shifting set of strategies focuses on the extent to which a witness' experiences and views are representative of the larger population whose rights are at stake.[21] The salience of this issue stems in part from the nature of strategic *Charter* litigation itself. Taking *Bedford* as my example, it is widely recognized that the experiences of people in prostitution are extremely diverse.[22] The notion that this group constitutes a cohesive community is itself questionable,[23] let alone an individual's claim

[19] Davis cross, *ibid* at para 104; Strachan cross, *ibid* at p 23.
[20] Scott cross, *supra* note 5 at para 627.
[21] This question of representativeness connects to issues of standing and participation in litigation that I address in Chapter 8. It also bears some parallels to the issue of sampling and generalization in social science research, which I discuss in Chapter 5.
[22] This is affirmed at several points on the record. See for example: *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Wendy Harris at para 200) [Harris cross]; *Bedford v Canada (AG),* 2010 ONSC 4264 Cross-Examination of Kara Gillies at para 243); *Bedford* ONSC, *supra* note 1 at para 88.
[23] May-Len Skilbrei historicizes this notion by describing how, in Norway, targeted social services aimed at prostitution contributed to the construction of people who sell sex as a cohesive group, beginning in the late 1970s. May-Len Skilbrei, "Speaking the Truth About Prostitution" in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (London: Routledge, 2017) at 37-38 [Spanger & Skilbrei, *Prostitution Research*]. Mariana Valverde similarly describes how LGBT rights litigation contributed to the construction of "sexual orientation" as a "natural or

to represent that community. And yet, the applicants and other experiential witnesses inevitably do play a representative role in the litigation, standing in as they do for a much larger group of people whose rights are affected by the impugned laws. In *Bedford*, some of the experiential witnesses also give evidence in their capacity as directors of organizations that purport to represent sex workers, adding a further layer of representation.[24]

One way in which counsel exploit the problem of representativeness in strategic *Charter* litigation is to frame certain experiential narratives as exceptional, and thus unrepresentative of the wider population whose rights are at issue. This strategy relies on the assumption that experiential evidence matters only to the extent that it can be generalized to the wider population (an assumption that the Supreme Court of Canada (SCC) in *Bedford* ultimately rejects as inappropriate to the determination of s.7 rights).[25] For example, when Scott talks in her evidence about aspiring to be a sex worker from a young age, counsel for Canada seizes on this point to suggest that she is "pretty exceptional"—i.e. not representative of most sex workers.[26] On the other side of the litigation, the applicants' (respondents on appeal) factum at the Ontario Court of Appeal argues that the experiential evidence tendered by the Crown is largely irrelevant to the

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quasi-natural entity preexisting law". Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003) at 114.

[24] For instance, at the time of the litigation, Scott and Lebovitch were the Executive Director and Spokesperson, respectively, for Sex Professionals of Canada (SPOC), an organization founded by Scott. *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Valerie Scott at para 27) [Scott affidavit]; Lebovitch cross, *supra* note 5 at para 210.

[25] *Bedford* SCC, *supra* note 1 at paras 123, 126-127.

[26] Scott cross, *supra* note 5 at para 75. Counsel pursues a similar strategy with experiential witness Carol-Lynn Strachan: Strachan cross, *supra* note 8 p 13.

factual issues at play in the case, since only 4 out of the 9 Crown-side experiential witnesses had experience doing in-call work.[27]

In other instances, however, counsel take the opposite tack. Here, counsel draw on particular experiential accounts to bolster a more general narrative about prostitution, suggesting that a given account is indeed typical of the wider population. This strategy assumes that the experiences of people who sell sex are homogenous enough to be knowable through particular, representative individuals. An especially striking example occurs in the cross-examination of Lebovitch by counsel for Ontario. Having first asked Lebovitch if she has ever been diagnosed with attention deficit disorder,[28] counsel launches into a series of questions about why she was crying earlier in the cross (the crying was in response to a different counsel's questions). Noting that Lebovitch cried "about five times"[29] during the cross, counsel suggests that she may be experiencing "some emotional disturbance about your experiences in prostitution"[30] and eventually asks Lebovitch if she thinks she might be suffering from PTSD, which Lebovitch denies.[31] Given that the judge will only receive a transcript of the cross-examination, counsel here goes out of her way to paint a descriptive picture of Lebovitch's distraught demeanour, thereby recreating the compelling human drama of a *viva voce* experiential witness. In this way she uses Lebovitch's testimony to reinforce the Crown's general narrative about the traumatic effects of prostitution.

[27] *Bedford v Canada (AG)*, 2012 ONCA 186 (Factum of the Respondents at para 72).
[28] Lebovitch cross, *supra* note 5 at para 327.
[29] *Ibid* at para 351.
[30] *Ibid* at para 349.
[31] *Ibid* at para 352.

While framing experiential narratives in opposing ways (exceptional versus representative), these two strategies rely on a common epistemological approach—one that privileges generalization over contextualized accounts of experience, and thereby sits in tension with feminist epistemological commitments. Several participants in *Bedford* resist this approach and the archetypal narratives about prostitution that it gives rise to. For instance, when asked to affirm that people often enter the sex trade due to various forms of abuse, Wendy Harris, an applicant-side experiential witness, responds:

> Well, I find all of these are the negative aspects of the sex trade and, yes, there is that faction of the sex trade population, that these things have possibly affected the outcomes of their lives. But there's also the other ones that it doesn't pertain to at all, so I'm stuck for an answer here because in certain cases this is very true. In other cases, it's totally irrelevant. I cannot lump everybody together.
>
> […]
>
> I don't find that this is the basic description of a sex trade worker.[32]

And, while Scott does not shy away from playing a representative role in litigation,[33] Lebovitch and Strachan make a point of noting that they do not purport to speak for others in the trade. [34]

[32] Harris cross, *supra* note 22 at paras 200, 203.
[33] Scott cross, *supra* note 5 at paras 666-671.
[34] Lebovitch cross, *supra* note 5 at para 636; Strachan cross, *supra* note 8 at pp 13 and 37.

In her reasons on the application, Justice Himel similarly refuses to lump the experience of all people in prostitution together. As a result, however, she finds the experiential evidence in *Bedford* to be of limited value. Having summarized the evidence of the experiential witnesses (excluding the applicants), she states:

> While this evidence provided helpful background information, it is clear that there is no one person who can be said to be representative of prostitutes in Canada; the affiants are an extremely diverse group of people whose reasons for entry into prostitution, lifestyles, and experiences differ.[35]

As I discuss further in Chapter 7, for Himel J, the inevitable failure of the experiential witnesses in *Bedford* to represent all people in prostitution gives reason to discount the weight of their evidence in favour of other types of evidence. The assumption that experiential evidence is significant only to the extent that it is generalizable returns again here. Given this assumption, essentialized ideas about prostitution cannot be complicated without rendering the experiential evidence meaningless.

Himel J's treatment of the experiential evidence here illustrates the conundrum presented by such evidence in the context of strategic *Charter* litigation. On the one hand, firsthand experience is often viewed as central to a *Charter* challenge. It is at the heart of understanding the law's potentially unconstitutional effects; without it, there could be no rights violation. On the other hand, individual experience is inevitably idiosyncratic. This

[35] *Bedford* ONSC, *supra* note 1 at para 88.

presents a problem for courts tasked with adjudicating systemic socio-legal issues that affect large swaths of the population.

4.2.2 Reliability

Apart from qualifications, the other main focus of the framing strategies used on the experiential evidence in *Bedford* is reliability. Included here are strategies related to: 1) veracity and consistency; and 2) the proper interpretation of experience. While raising legitimate concerns in some instances, these strategies (like many of those above) tend to bank on mainstream assumptions that undermine the experiential knowledge of marginalized people. This includes longstanding sexist stereotypes of women as manipulative, untrustworthy, and not knowing their own minds.[36] As in the previous section, my analysis here is complicated by the fact that these framing strategies are employed in shifting ways, alongside appeals to the importance of attending carefully to firsthand experiential accounts. As I will show, however, the latter norm is often mobilized only instrumentally, without regard for its political roots and associated commitments.

Veracity and Consistency

One framing strategy used to challenge the reliability of the experiential evidence in *Bedford* is to raise doubts about its veracity. For the most part, such challenges are not aimed directly at the experiential witnesses in the case, but rather at secondhand experiential accounts relayed or discussed by other witnesses. A related strategy points to

[36] See: Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2018) 167:2 U Pa L Rev 399; Lucie E White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 Buff L Rev 1 at 39.

perceived errors and inconsistencies in experiential accounts as a means to discount their reliability.[37] Underlying both of these strategies are longstanding stereotypes of women, and of sex workers, as dishonest, untrustworthy, ignorant, and/or confused.[38]

Of course, it may be objected that attacks on credibility, along with allegations of error or inconsistency, are simply standard fare in adversarial proceedings, and thus unremarkable. To this I offer two responses. First, the fact that these strategies are a typical component of the adversarial process is precisely what makes a close analysis of their epistemic assumptions and effects worthwhile. Second, it is important to remember that strategic *Charter* challenges to legislation differ significantly from other forms of litigation. Where a case centres on adjudicative facts, attacks of this nature are indeed to be expected. In the context of strategic *Charter* challenges to legislation, however, where the focus is on social and legislative facts, such attacks are arguably much less essential. Indeed, several of the litigators I interviewed, including Alan Young (counsel for the applicants in *Bedford*), suggested that it is often not necessary or helpful to question the credibility of experiential witnesses in strategic *Charter* challenges, or even to cross-examine them at all.[39]

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[37] See for example: *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of John Lowman at para 943) [Lowman cross] (emphasizing that the memories of sex workers who participate in qualitative research can be inaccurate); Scott cross, *supra* note 5 at paras 171-172 and 306-307 (pointing to purported inconsistencies between how Scott describes her lived experiences of prostitution in her affidavit and what she says in cross-examination).

[38] See *supra* note 36.

[39] Interview 5b (12 September 2018); Interview 6 (30 August 2018); Interview 7 (13 September 2018); and Interview 10 (21 September 2018). According to one interviewee (a Crown litigator), cross-examination can be useful to contextualize the experiential evidence, however it should be done "extremely sensitively": Interview 15 (19 October 2018).

In some instances, doubts about the veracity of experiential accounts in *Bedford* are raised in ways that do not trade on stereotypes about women's and/or sex workers' general lack of credibility. For instance, in their scholarship on sex work research methodology (included in the record in *Bedford*), applicant-side experts Frances Shaver and Cecilia Benoit note that the stigmatization of sex work may lead sex workers to give untruthful or otherwise unreliable information to researchers due to concerns about protecting their identity and other personal information.[40] To the extent that these concerns are acknowledged as legitimate, characterizing the resulting research data as unreliable does not show a lack of respect for experiential knowledge, but rather highlights the challenges of effectively accessing it. In other words, the underlying assumption here is not that sex workers are liars, but that they may have good reason to lie in particular circumstances.

On the other hand, negative stereotypes may also play a role in challenges to the veracity of sex workers' responses in the context of qualitative social science research. Take, for example, the following exchange from the cross-examination of key applicant expert John Lowman, regarding one of his research studies:

[40] *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of the Applicants at para 127) [Factum of Applicants], citing: Frances Shaver, "Sex Work Research: Methodological and Ethical Challenges" (2005) 20:3 Journal of Interpersonal Violence 296 at 297; and Cecilia Benoit et al, "Community-Academic Research on Hard-to-Reach Populations: Benefits and Challenges" (2005) 15:2 Qual Health Res 263 at 264.

> Q. And am I also correct that you yourself indicated a very important limitation, namely, there's no way of knowing if or how much your respondents underreported their own violent behaviour, correct?
>
> A. There is no way of knowing in any of these prostitution surveys that we're talking about the veracity of the respondents. Some people, for example, say that women on the street exaggerate their miserable circumstances in order for researchers to feel sorry for them. I don't believe that for one minute, but you hear those kinds of arguments made about all forms of interview research.[41]

In this passage, Lowman indicates how negative stereotypes about sex workers may inform arguments about the reliability of research data. Indeed, Lowman himself seems to be banking on the stereotype at issue here to make a point (that women on the streets are not as miserable as they report), even while explicitly disavowing it.

Beyond the context of qualitative research, the question of veracity arises where witnesses (experiential and otherwise) describe impressions they have formed on the basis of more informal interactions with sex workers. Scott, for example, relies on information received from "contacts in the industry" to ground her opinion about the ongoing difficulties faced by sex workers as a result of the impugned laws.[42] In cross-examination, counsel for Ontario suggests that these women may be lying to her:

[41] Lowman cross, *supra* note 37 at para 1107.
[42] Scott affidavit, *supra* note 24 at para 30.

Q. Whom do you rely on to provide your information?

A. I rely on the women in the business, as opposed to social workers and people like that.

Q. Where do you meet these women?

A. Oh, either on the street, either at Maggie's, either at my house, or often on the phone, or at other girls' houses, too.

438. Q. But you have really no way of checking whether or not what they tell you is the truth.

A. No.

Q. You have to rely on them and really you don't know whether they're telling you the truth.

A. I don't.

Q. You believe them.

A. I do.

Q. And you're asking us to believe them because you believe them.

[…]

A. Look, when a girl is calling me and when I'm really trying to get her to report a bad client and she's terrified because she's terrified she'll be arrested, and this happens often, do you really think she's lying? I don't think she's lying.

Q. You don't think she's lying.

A. No.[43]

Counsel's line of questioning here may be interpreted as raising general concerns about the reliability of hearsay evidence. However it also arguably invokes a stereotype-infused view of sex workers as lacking credibility. In her responses, Scott resists this underlying norm. Not only does she affirm her belief in the truthfulness of her peers' accounts, she frames them as a better source of information than others who may purport to speak on their behalf, like social workers. In this way, Scott displays her commitment to the prioritization of experiential knowledge. It is important to note that Scott's confidence in the truthfulness of the accounts at issue here also arises from her own position as a listener. As evidenced by her statement about the circumstances in which she might receive a call from a sex worker, Scott's own experience and engagement with the community at issue puts her in a better position to elicit truthful experiential accounts, compared, for instance, to researchers with limited ties to the community. I discuss this point further in Chapter 5.

In his cross-examination of various police officers, counsel for the applicants, Alan Young, also seems to resist the notion that sex workers cannot be trusted to tell the truth, suggesting instead that they should be believed and taken seriously. Young, however, advances this idea in a much more instrumental fashion. His exchange with officer Jim Morrissey is illustrative. In his affidavit, Morrissey suggests that sex workers often lie to

[43]Scott cross, *supra* note 5 at paras 436-445.

him at first, but become more honest as they get to know him—an assertion also made by officer Eduardo Dizon and others: [44]

> It is typical for prostitutes who I encounter for the first time to claim to like what they are doing. However as I build relationships with these women and gain their trust, they tell a different story of unfortunate personal circumstances which led to prostitution.[45]

In cross-examination, Young probes Morrissey on this point, suggesting that rather than taking sex workers at their word when they claim to be engaging in the sex trade by choice, Morrissey searches for dark stories from their past (Young makes a similar accusation against both Dizon and Crown expert Richard Poulin).[46] But then, when Morrissey repeats the explanation from his affidavit, Young suggests that perhaps he has it backwards: perhaps when these women tell Morrissey that they actually don't like prostitution and want to leave the trade, they are only saying the things that Morrissey wants to hear so that he will help them with whatever problem they are facing in the moment.[47] Young makes a similar suggestion in his cross-examination of officer Sonia

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[44] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Eduardo Dizon at para 82) [Dizon cross].
[45] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Jim Morrissey at para 5). This is similar to framings that mobilize the notion of "false consciousness", discussed in the next section. However, in this instance, the suggestion is that the worker is dishonest at first, only to reveal the truth later.
[46] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Jim Morrissey at p 15) [Morrissey cross]; Dizon cross, *supra* note 44 at para 83; *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Richard Poulin at para 118) [Poulin cross].
[47] Morrissey cross, *ibid* at p 17.

Joyal.[48] In this way, Young too perpetuates the stereotype of sex workers as lying and manipulative—only to make a different point.

Nevertheless, Young continues to admonish Morrissey for refusing to believe sex workers throughout the rest of the cross-examination. One exchange is particular telling. It begins when Morrissey asserts that most street workers don't account for police presence in choosing where to work, even though that is what they claim. The exchange proceeds as follows:

> Young: You know, that is the second time since we have been talking that you said they claim something and you don't believe it. You discount a lot of things they tell you that you don't agree with; isn't that right?
>
> Morrissey: Well, we've already discussed they lie to me every day.
>
> Young: So when they are claiming choice, you don't see it. When they claim they care about police presence, you are saying, no, that is not their consideration?
>
> […]
>
> Morrissey: I don't discount what they say when I think they're being truthful.[49]

[48] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Sonia Joyal at p 57) [Joyal cross].

By framing Morrissey's disbelief of sex workers as troubling, Young appeals to critical insights about the importance of taking experiential accounts seriously. In one sense, this view accords with his explanation for not cross-examining most of the Crown-side experiential witnesses in *Bedford*. As he put it in an interview for this project: "I never denied there's two narratives, my witnesses and theirs. They're both narratives. And they're both real […] So I didn't see a need to question these people about horrors they had in their work."[50] A certain respect for the experiential knowledge of people in the sex trade can be gleaned from this comment. At the same time, the notion that experiences of prostitution can be boiled down to two essential narratives illustrates the extent to which feminist insights about experiential knowledge are flattened and oversimplified in the context of adversarial litigation. Young's own suggestion that sex workers may be lying to police in a different way also reveals the instrumentality of his appeal to experiential knowledge in the litigation context. Whatever his personal views, Young in *Bedford* shows a readiness to mobilize shifting epistemic postures as suits the needs of his case. Progressive insights about the importance of experiential knowledge are thereby decontextualized and instrumentalized through the adversarial process of litigation.

Interpretations of Experience

A second framing strategy aimed at the reliability of experiential accounts in *Bedford* casts doubt on how sex workers interpret their own experiences. This strategy is informed by the assumption, ingrained in common law doctrine, that factual observation and interpretation are distinct and readily separable components of the process by which

[49] Morrissey cross, *supra* note 46 at p 50.
[50] Interview 5b (12 September 2018).

knowledge is formed. Speaking of qualitative research, Lorraine Nencel observes, "there are a significant number of studies that retell the stories of sex workers through the moral lens of the researcher, claiming that sex workers who think they choose freely to work in the trade suffer from 'false consciousness'".[51] In litigation, non-experiential witnesses and counsel mobilize similar notions of false consciousness, or at least false interpretation of experience, to advance their own narratives of what sex workers' lives are like. In doing so, they discount the experiential knowledge of sex workers' themselves.

This strategy can be seen in the evidence of several Crown police officers. Officer Dizon, for instance, asserts in his affidavit: "If you were to ask a sex worker, 'Do you want to be here?', the initial response for virtually every one would be 'Yes'. […] The reality couldn't be further from this initial response."[52] Dizon goes on to offer a number of sweeping generalizations about the "reality" of sex workers' lives before explaining that, "'Yes' is more appropriately viewed as a psychological defence mechanism".[53] Officer Jim Morrissey frames the secondhand accounts of women who sell sex in a similar way in his cross-examination. In the course of a discussion about pimping, Young asks Morrissey if he disagrees with studies indicating that most adult sex workers work independently. In response, Morrissey claims that "those girls" will say they are independent operators when they are really not, because "their man" is arranging their

[51] Lorraine Nencel, "Epistemologically Privileging the Sex Worker: Uncovering the Rehearsed and Presumed in Sex Work Studies" in Spanger & Skilbrei, *Prostitution Research, supra* note 23 at 71.
[52] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Eduardo Dizon at paras 23-24).
[53] *Ibid* at paras 23-24.

dates and controlling their money.[54] "That's not an independent operator. She can try and justify this any way she wants, because they do with me all the time, but I'm sorry…"[55] The implication is that women who sell sex are either in denial about their situation, or misinterpreting what it means to operate independently.

As Dizon's comment about psychological defence mechanisms illustrates, some witnesses draw on a pathologizing discourse to cast doubt on the self-interpreted experience of those who sell sex. Further examples of this occur in the evidence of several Crown experts. For instance, Poulin, a Canadian sociologist, states in his affidavit that because prostituted persons suffer from emotional dissociation, "what they say is generally extremely ambivalent"[56]—a term Poulin defines as "the simultaneous existence of contradictory psychological states".[57] Similarly, Alexis Kennedy, a Crown expert in psychology, claims that women often have "cognitive distortions" about how or why they began working. [58] These opinions are later cited in the Attorney General of Ontario's factum at the Ontario Superior Court of Justice (ONSC).[59]

In some instances, the experts in *Bedford* reinterpret the firsthand accounts of women in the sex trade so as to construct a general narrative about prostitution that accords with their own political views. This is illustrated by the evidence of Melissa Farley and Janet Raymond, two key Crown witnesses who draw on notions of false consciousness to

[54] Morrissey cross, *supra* note 46 at p 19.
[55] *Ibid.*
[56] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Richard Poulin at para 76).
[57] *Ibid* at paras 76-77. Poulin also suggests that women in prostitution may be coerced into claiming they like what they do (at para 117).
[58] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Alexis Kennedy at para 11).
[59] Factum of AG Ontario, *supra* note 14 at paras 147 and 150.

advance their view of prostitution as a form of exploitation. In discussing her research in cross-examination, Raymond explains, "I have spoken with women who say they have chosen this, but as I speak with them more, it becomes very clear that they have been abused..."[60] Raymond goes on to challenge researchers who rely on one-time interactions with sex workers to collect data, and thus "don't work with women over a period of time when you really begin to hear the truth about their lives."[61] The assumption, of course, is that Raymond herself is well positioned to discern that truth. Farley similarly asserts that those who are interviewed for research may "underestimate the extent of the traumatic circumstances and the violence they were subjected to."[62] As pointed out by the applicants in argument, however, she accepts women's accounts of violence and fear in the sex trade without reservation. [63]

Counsel for Canada and Ontario also draw on the notion that sex workers falsely interpret their experience as a framing strategy to discount experiential evidence as unreliable in *Bedford.* One example occurs in Lowman's cross-examination, where he is describing a study of off-street sex workers conducted by his master's student, Tamara O'Doherty. Lowman explains that the study targeted women who had previously said they took offence to the assumption that all prostitutes were victims. Counsel for Canada then suggests that the interviewees may have minimized their experience of violence, given

[60] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Janice Raymond at para 398).
[61] *Ibid* at para 398.
[62] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Melissa Farley at para 615) [Farley cross].
[63] Factum of Applicants, *supra* note 40 at para 422. According to Carol Harrington, Farley's research "takes a positivist epistemological approach and uses standardised questionnaires to diagnose traumatic symptoms rather than exploring individual sex workers' subjective interpretation of their experience." Carol Harrington, "Collaborative Research with Sex Workers" in Spanger & Skilbrei, *Prostitution Research, supra* note 23 at 95.

their resistance to being labeled as victims.[64] The interviewees' accounts are thus framed as politically constructed, while the expert narrative of prostitution as victimization remains unchallenged in this way. In another instance, counsel for Ontario questions Scott's firsthand evidence about her negative experiences with police, asking "Were they just doing their job? Is that what you consider negative?"[65] While the interviewees in O'Doherty's study are alleged to have minimized experiences of violence, Scott is thereby accused of exaggerating hers when it comes to encounters with the police.

As the above examples suggest, the notion that people who sell sex falsely interpret their experience is deployed mainly by the Crown in *Bedford.* Nevertheless*,* examples can also be found from the applicant side of the case. For instance, in her affidavit, applicant expert and sociologist Eleanor Maticka-Tyndale describes the findings of a major study she co-conducted as follows:

> While some street-based workers reported feeling safer on the street because they were more visible, our study determined that the perceptions of these particular workers are not aligned with the reality, which is that street-based workers do experience the greatest degree of violence of all sex workers.[66]

[64] Lowman cross, *supra* note 37 at para 998.
[65] Scott cross, *supra* note 5 at para 385.
[66] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Eleanor Maticka-Tyndale at para 7).

In this passage, Tyndale discounts the reliability of sex workers' experiential reports by measuring them against her own research findings. Of course, one might argue that her research provides a broader perspective on "reality" than any one individual can offer. However, to suggest that people's reports of feeling safer "are not aligned with reality" not only discounts feelings of security as real and significant in themselves, but ignores local variations in safety conditions that may not be captured by generalized research findings, but would be well known by those on the ground.

The notion that sex workers falsely interpret their experience, then, is widely mobilized in *Bedford*, especially but not exclusively by the Crown, to discount the reliability of experiential accounts. By privileging their own experience, research and judgment in these instances, witnesses and counsel bolster their own authority as knowers at the expense of those with firsthand experience in the trade. The latter thereby lose control over their narratives through the fact-finding process. Still, as with most of the other framing strategies discussed so far, this strategy does not operate monolithically. In many instances, participants in *Bedford* (sometimes the same ones) resist the notion of false consciousness, and/or appeal to progressive ideas about the importance of experiential knowledge that seem to run counter to it. As discussed in Chapter 3, these ideas can be traced back to critical feminist politics and scholarship. However, while some witnesses display a genuine commitment to this alternative epistemological approach, others—including counsel—invoke it only in a highly selective and instrumental manner.

As might be expected, one can clearly see this alternative approach at work in the applicants' case. In some instances, applicant-side experts adopt progressive epistemological commitments on a seemingly principled basis, as guiding their approach to research. Lowman is a good example. In his affidavit he sets out a classification scheme to reflect what he views as a spectrum of choice to participate in the sex trade.[67] In cross-examination, counsel for Canada asks Lowman where on this spectrum a teenage runaway recruited by a pimp would fit. Lowman responds: "I would need to interview the young person to see what they felt about the situation. That's the point of research."[68] Rather than claiming the authority to assess the level of choice exercised by a sex worker, as counsel implies he should, Lowman affirms the worker's own authority to interpret her level of choice. As he puts it, "unlike many researchers, particularly prohibitionists, I recognize the degree of choice that women themselves insist that they make."[69]

Another expert witness for the applicants, Deborah Brock, also describes her approach to research as one that pays attention to how women portray their own experiences in the sex trade. In describing the trajectory of her research, Brock recounts speaking to sex workers who did not endorse the views of prostitution that she had been exposed to through sociology and radical feminist scholarship, and feeling the need to account for that.[70] Again here, there is an appeal to the firsthand knowledge of sex workers as a foundation for responsible research.

[67] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of John Lowman at para 3).
[68] Lowman cross, *supra* note 37 at para 1172. See also at paras 896, 1151 and 1676.
[69] *Ibid* at para 1154.
[70] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Deborah Brock at para 43).

As counsel for the applicants, Young too draws on the progressive valorization of experiential knowledge to frame the evidence of various Crown witnesses as problematic. For instance, in cross-examining Farley, he invokes this idea to cast doubt on her claim that women in prostitution tend to minimize their negative experiences:

> Q: […] Is this this idea that because of dissociation, unhappy people aren't aware that they are unhappy? Is that what you're saying?
>
> A. No.
>
> Q. Why would these people not be able to tell you…[71]

In another instance, Young challenges Crown expert Alexis Kennedy's use of indirect sources to support her claim that women do not enter prostitution as a fully informed and free choice:

> Q. So you're drawing conclusions about whether a woman has made a free choice based on what third parties are saying women are doing.
>
> A. No, ten of the women were women who were prostituted.
>
> Q. But you also had police officers, social workers, and others. Do you think they're a valuable source of understanding what goes on in the mind of a sex trade worker?
>
> A. Well, they're a source, not as strong a voice as the women themselves.
>
> Q. Do you think there's a problem in sex trade research that a lot of people make assumptions about what sex workers want and think? Do you think

[71] Farley cross, *supra* note 62 at paras 316-317.

that's a problem in the literature you've read?

A. Yes.[72]

Young also challenges the manner in which Crown police witnesses impose their own interpretations onto sex workers' lived experience, rather than taking what they say at face value. As he puts it to officer Sonia Joyal: "You said once you hear their story, you realize it is not a choice. So it is a conclusion you drew. It wasn't what they said."[73] Young thus presents himself as a defender of sex workers' experiential knowledge. However, as with the framing strategy targeting veracity, Young invokes progressive epistemological insights in a selective manner here, bolstering only those experiential accounts that emphasize work satisfaction and choice.

The emphasis on attending carefully to what sex workers say about their own experience is, moreover, not restricted to applicant-side witnesses. Indeed, despite her reliance on notions of false consciousness, Farley also makes a point of adopting this epistemic posture throughout her affidavit and cross-examination, noting the importance of "listening carefully to women in prostitution" and "paying careful attention to what people tell us happens to them".[74] In cross-examination, she justifies her claim that people in prostitution tend to minimize the abuses they face not by citing her research data or clinical expertise, but by directly quoting one of her research subjects—a woman

[72] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Alexis Kennedy at paras 104-106), responding to a claim made in Kennedy's affidavit at para 13. Young also challenges Poulin for treating the accounts of sex workers who say they are happy in their jobs with suspicion. Poulin cross, *supra* note 46 at paras 118-119; Factum of Applicants, *supra* note 40 at para 322.
[73] Joyal cross, *supra* note 48 at pp 57-58. See also Dizon cross, *supra* note 44 at para 80.
[74] Farley cross, *supra* note 62 at paras 94 and 705. See also *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Melissa Farley at para 4, and generally).

formerly involved in prostitution—who explains: "There's a protective denial. You have to convince yourself and everyone around you that it's great. You tell the lie – 'I like it' – so much that you believe it yourself."[75] In this instance, Farley aligns her approach with the feminist commitment to centering experiential knowledge. However, she does so in a highly selective way, mobilizing one experiential account to cast doubt on others.

Anti-prostitution advocate and Crown witness Kathleen Quinn also mobilizes progressive epistemological commitments to support her views in cross-examination. When Young suggests that her organization (the Prostitution Awareness and Action Foundation of Edmonton, or PAAFE) relies upon literature produced by the likes of Farley and Raymond, Quinn responds that in fact PAAFE relies on "the stories of women and families".[76] In describing PAAFE's mission, Quinn underscores the organization's efforts "to create spaces for people to express their voice" and "to give voice to those experiences".[77] Like Young, then, Farley and Quinn also appeal to the notion that firsthand experiential accounts ought to be prioritized and taken seriously. They just have a different set of accounts in mind—those that describe suffering and exploitation, rather than choice and autonomy. In either case, the self-interpreted accounts of those with firsthand experience of the sex trade are valorized only to the extent that they accord with a particular political stance.

The above examples suggest that, regardless of their position in the litigation, or their actual epistemological commitments, participants in *Bedford* recognize and draw upon

[75] Farley cross, *ibid* at para 617.
[76] Quinn cross, *supra* note 10 at p 19.
[77] *Ibid* at p 27.

the power of the experiential knowledge paradigm. Indeed, the very same actors who discount experiential accounts that do not accord with their view as false interpretations of experience often also recognize and bank on the perceived importance of experiential knowledge in some other way. The quickly shifting nature of these rhetorical moves betrays their instrumentality. While feminist epistemologists such as Code grapple with how to challenge the mainstream discounting of marginalized voices without resorting to a naïve experientialism, the litigation context seems to impel actors to alternate between these two opposing inclinations according to the needs of the moment. In this way, progressive feminist insights are either frustrated, or instrumentalized through the fact-finding process.

4.3 CONCLUSION

In this chapter, I have canvassed a number of strategies used by participants in *Bedford* to frame the experiential evidence of those directly affected by the laws at issue in the case. As I have demonstrated, these strategies reflect and perpetuate mainstream epistemic norms—some of which are reinforced by evidentiary doctrine—that run counter to the demands of epistemological justice. At the same time, I have also pointed to instances in which witnesses and counsel resist the above strategies by appealing to progressive insights about the importance of experiential knowledge. As I have shown, however, the adversarial context of litigation tends to encourage oversimplified and decontextualized appeals to experientialism that fail to live up to the more nuanced and principled insights of feminist epistemologists. These conclusions are further supported by my analysis of the strategies used to frame social science research and expert opinion evidence in *Bedford*, to which I turn next.

Chapter 5: The Treatment of Expert Opinion Evidence and Social Science Research in *Bedford*

5.1 INTRODUCTION

In the previous chapter, I began my examination of how progressive epistemological commitments fare in *Bedford v Canada (AG)*[1] by considering the treatment of experiential evidence—a seemingly obvious starting point given the centrality of experiential knowledge to my analysis. As it turns out, however, other categories of proof offer even richer insights into the fate of these commitments in litigation. The treatment of expert opinion evidence in *Bedford* is particularly illuminating in this regard, in part because of how closely bound Anglo-American epistemology is to notions of science and expertise. There is also significant overlap between experiential evidence and qualitative social science research in *Bedford*, both of which serve as source of experiential knowledge. It is thus to expert opinion evidence and the social science research upon which it is founded that I now turn.[2]

Building on the theoretical framework developed in Chapter 3, this chapter begins from the understanding that what we see in strategic *Charter* litigation is not simply scientific knowledge informing legal decision-making, but the active construction and strategic mobilization of ideas about (social) science and expertise through the legal process. In

[1] *Bedford v Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in 2013 SCC 72 [*Bedford* SCC].
[2] Given the order established in Chapter 3, I might be expected to move from experiential evidence to common sense as a related "lay" mode of proof. However, because of the overlap between experiential evidence and qualitative social science research, I have found it more fitting to turn first to expert opinion evidence. Leaving common sense to the end also suits what I have found to be its unique nature and special importance in strategic *Charter* litigation.

this I follow Sheila Jasanoff, who, as discussed earlier, critiques the notion that legitimate science and expertise "are presumed to exist unproblematically in a world that is independent of the day-to-day workings of the law."[3] According to Jasanoff, legal proceedings contribute significantly to the process through which scientific knowledge is constructed and disseminated.[4] Importantly for this project, the legal treatment of science and expertise also has broader epistemological effects. As Jasanoff puts it: "legal disputes around scientific 'facts' often appear as sites where society is busily constructing its ideas about what constitutes legitimate knowledge, who is entitled to speak for nature, and how much deference science should command in relation to other modes of knowing."[5] Starting from this insight, I ask how ideas about science and expertise are constructed, reinforced, and/or resisted through the fact-finding process of strategic *Charter* litigation, and with what implications for epistemological justice.

To begin to answer these questions, I identify the main strategies employed by participants in *Bedford* to frame the expert opinion evidence in the case, and consider the underlying epistemic norms that these strategies rely upon and perpetuate. Drawing on the work of Jasanoff and Thomas Gieryn discussed in Chapter 3, I explore the treatment of this type of evidence as a process of boundary work, wherein actors in litigation draw lines between good, bad, and non-science as a means to bolster or discount different parts of the record. My analysis shows that, in doing this work, participants in *Bedford* repeatedly bank on, and thereby reinforce, a set of hierarchical dichotomies that are

[3] Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, Mass.: Harvard University Press, 1995), Preface at xiii.
[4] *Ibid* at xv-xvi.
[5] *Ibid* at xv.

deeply entrenched in mainstream science and epistemology (and sometimes also in legal doctrine). These include: quantitative versus qualitative research; empirical observation versus experiential anecdote; researcher versus research subject; expert versus experiential witness; research versus advocacy; and fact versus opinion. Each of these pairs can be mapped onto a more fundamental division between objective and subjective knowledge, and in each case, the former is privileged over the latter.

By reinforcing these hierarchical dichotomies, participants on both sides of the case in *Bedford* promote an epistemic ideal of detachment at the expense of knowledge that is contextualized, sociopolitically engaged, and grounded in firsthand experience. Underlying this ideal is the assumption—contrary to the feminist epistemological perspective outlined in Chapter 3—that direct experience and engagement diminishes, rather than enhancing, one's understanding of a social phenomenon. As in the previous chapter, attempts to resist and/or complicate this mainstream ideal also arise in *Bedford*, revealing an alternative epistemological paradigm aligned with critical feminist insights. In most cases, however, the adversarial context of the litigation drives counsel and other actors to either suppress this alternative paradigm, or to mobilize it in a highly instrumental manner.

The chapter proceeds in two sections. In the first section, I examine the treatment of the social science research upon which expert opinions in *Bedford* are often founded, focusing on issues of research methodology. Here I show how, despite the efforts of some witnesses to underscore the complex and contested nature of methodological issues in

social science research, the fact-finding process in *Bedford* encourages 1) the construction of simplistic accounts of scientific methodology that reflect mainstream epistemological and legal norms, and 2) the instrumentalization of such accounts in a highly decontextualized manner. In the second section of the chapter, I examine framing strategies related to the expert's role, with a particular focus on issues of bias. Once again here, I demonstrate the influence of mainstream epistemic norms rooted in the objective/subjective dichotomy, and bolstered by doctrinal law. While some witnesses resist these norms, their efforts are both subdued by the adversarial context of the litigation and overridden by counsel.

Although I draw from the entirety of the record in *Bedford*, I focus primarily on two important exchanges between opposing experts: the exchange of key applicant expert John Lowman with Crown research methodology expert Ronald-Frans Melchers; and the exchange of key Crown experts Melissa Farley and Janice Raymond with applicant reply expert Ronald Weitzer. In these exchanges, experts with formal training in the social sciences are called upon to articulate and apply disciplinary norms and principles of research methodology to defend their own research and opinions, while discrediting those of opposing experts, in a process that is carefully orchestrated by counsel. I also draw on the written arguments of counsel, focusing on the facta of the applicants and the respondent Attorney General of Canada.[6]

[6] Although only an intervener, the Attorney General of Ontario also played a significant role in the case. My analysis of the record thus includes cross-examinations conducted by both the Attorney General of Canada and the Attorney General of Ontario. For practical reasons, however, and given the similarity of the arguments made by both governments, I focus primarily on Canada's facta.

Before going on, a word of clarification is in order. There are many possible approaches to examining the treatment of social science in *Bedford* and like cases. For instance, one might follow the example of evidence scholars who have long raised concerns that legal actors are poorly equipped to recognize good science from bad, and that they often get it wrong.[7] In this vein, it is tempting to shine a light on the many seeming misconceptions of science, or errors in scientific reasoning, that arise in *Bedford*. To do so, however, would be to jump wholeheartedly into the very boundary work that I seek to critique. To be sure, my own judgments about science do, inevitably, inform this project. Still, it is important to note that my interest is not in assessing how well legal actors understand science, but in analyzing how they bank on common ideas about science in the course of legal advocacy and judgment, and with what implications for the marginalized groups whose interests are at stake. While there is undoubted value in scrutinizing the competence (or lack thereof) of legal professionals in handling scientific information, I leave this project to other, differently orientated scholars.

5.2 SOCIAL SCIENCE RESEARCH METHODOLOGY

Discussions of social science research on the record in *Bedford* are an important site for the construction and mobilization of epistemic norms. This occurs both through generalized articulations of scientific norms, and through the framing of particular research studies. I begin this section with some preliminary remarks about how the fact-finding process in *Bedford* shapes the construction of scientific norms generally, before

[7] See for example: Learned Hand, "Historical and Practical Considerations regarding Expert Testimony" (1901) 15:1 Harvard Law Review 40 at 54-55; David Paciocco, "Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence," (1994) 27 CR (4th) 302; Gary Edmond, "Forensic Science and the Myth of Adversarial Testing" (2020) 32:2 Current Issues in Criminal Justice 146.

turning to the substantive content of those norms. My focus is on the explicit construction of principles of research methodology. As I will show, the fact-finding process in *Bedford* encourages simplistic and decontextualized articulations of methodological principles grounded in a positivistic understanding of social science. While many of the academic experts called as witnesses highlight points of contestation, complexity, and uncertainty regarding methodological issues, these tend to be dismissed or minimized by counsel in favour of more definitive articulations of key principles, and further diluted or simply rendered invisible by the courts.

5.2.1 The Explicit Construction of Scientific Norms

One need not look far to observe how ideas about social science are explicitly constructed and certified through the fact-finding process in *Bedford*. This often occurs at the behest of counsel, who invite academic experts to describe the parameters and methodologies of their home disciplines, and sometimes of science itself. The foundational definitions that result, imbued with the authority vested in legally recognized experts, then serve as a basis for attacks on specific pieces of research as "unscientific."

The exchange between applicant expert John Lowman and Crown expert Ronald-Frans Melchers offers one of the most interesting examples of how ideas about social science, and research methodology in particular, are explicitly constructed in *Bedford.* Lowman, a professor of criminology at Simon Fraser University, is the applicants' principal expert on commercialized sex. In his affidavit, he makes the following assertion:

> Based on my research, it is my belief that the Criminal Code operates in a manner which violates the security of person for prostitutes in Canada. My conclusion is threefold: 1) these provisions force survival sex workers outside and into vulnerable areas, such as isolated streets and industrial areas; 2) street-involved prostitution is more violent than working in off-street venues; 3) in spite of this increased vulnerability, prostitutes do not benefit from the same level of protection and response from police authorities, especially when compared to other citizens.[8]

Lowman also claims that the communicating law has led to an increase in violence against sex workers, without reducing street prostitution.[9]

Counsel for Canada calls on Melchers as an expert to critique Lowman's findings. The nature of Melchers' role in the litigation is itself telling of how the fact-finding process shapes the construction of social scientific norms. As he candidly acknowledges in his affidavit (and as counsel also acknowledges),[10] Melchers has no research expertise in commercialized sex. Rather, he is called on the basis of his expertise in research methodology generally.[11] Melchers thus serves as a kind of meta-expert. His entire contribution is grounded on the premise that there are agreed upon general principles of research methodology that can be applied to evaluate specific research projects without

[8] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of John Lowman at para 7) [Lowman affidavit].
[9] *Ibid* at paras 10; 18.
[10] *Bedford v. Canada (AG),* 2010 ONSC 4264 (Affidavit of Ronald-Frans Melchers at para 3) [Melchers affidavit]; *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of the Respondent at para 186) [Factum of Respondent].
[11] Factum of Respondent, *ibid* at para 186.

any knowledge of the particular context of such projects (a premise questioned by counsel for the applicants in cross-examination)[12]. The same is true of the Crown's other research methodology expert John Pratt,[13] though his role in the case is less central.

In his affidavit, Melchers sets out to examine "to what extent the empirical evidence submitted in support of Dr. Lowman's conclusions can be said to be the valid and reliable results of independent, bias-free observations conducted following accepted standards of social science research."[14] The framing of this question itself reveals a great deal about the understanding of social science being put forward—one in which the researcher operates as an independent epistemic agent, there are clear "accepted standards" of research, a given set of observations ought to lead anyone to the same conclusions, and where "bias-free observation" is possible (though Melchers does qualify the latter point somewhat later in his affidavit).[15] Not surprisingly, Melchers finds that Lowman's conclusions fail to meet this test. In order to explain his assessment, he sets out a ten-page exposition on "Research Methods in Social Science" in which he outlines "Key Structural Elements of Scientific Method"[16] and includes a half-page flow chart entitled "Is it Science?"[17] Applying these general principles to Lowman's research, Melchers concludes that Lowman's findings "do not meet even the minimal threshold that would qualify them

[12] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Ronald-Frans Melchers at paras 10-13) [Melchers cross]. See also *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of the Applicants at paras 188-199) [Factum of Applicants].
[13] Factum of Respondent, *supra* note 10 at para 187.
[14] Melchers affidavit, *supra* note 10 at para 3.
[15] *Ibid* at para 17.
[16] *Ibid* at para 11.
[17] *Ibid* at para 15.

as scientific statements of fact."[18]

In a response given via supplementary affidavit, Lowman challenges Melchers' description of scientific research methodology. He notes that, "Dr. Melcher's *positivistic* view of social science has been the subject of intense controversy for the past 150 years."[19] In particular, Lowman claims that Melchers has inappropriately applied experimental and quantitative research standards to qualitative research.[20] Counsel for the applicants, Alan Young, reinforces this critique in cross-examination, implicitly accusing Melchers of "scientism".[21] By highlighting differing approaches and ongoing debates in the field, these responses complicate Melchers' portrayal of scientific norms.

At the same time, Lowman advances his own explanation of research methodology, based on his preferred textbook, and focusing on qualitative methods.[22] While Lowman volunteers much of this alternative account, counsel for Canada also elicits it by asking Lowman to affirm several passages from a methods textbook in which the purpose and methods of social science are broadly defined.[23] Portions of Lowman's account of qualitative methods are later recited in written argument at the Ontario Superior Court of Justice (ONSC).[24] In this way, Lowman too participates in the articulation of a set of general, decontextualized methodological principles for the purposes of the litigation.

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[18] *Ibid* at para 80.
[19] *Bedford v Canada (AG),* 2010 ONSC 4264 (Supplementary Affidavit of John Lowman at para 17) [Lowman supp affidavit].
[20] *Ibid* at paras 15, 19.
[21] Melchers cross, *supra* note 12 at paras 2-3.
[22] Lowman supp affidavit, *supra* note 19 at paras 21-33; Lowman reiterates these general principles of qualitative research at many points in cross-examination, in the course of defending particular studies. See for example *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of John Lowman at paras 122, 339, 770, 823, 1247, and 1475) [Lowman cross].
[23] Lowman cross, *ibid* at para 88 onwards.
[24] Factum of Applicants, *supra* note 12 at paras 191-192; Factum of Respondent, *supra* note 10 at paras 164-165.

Furthermore, just as Melchers accuses Lowman of drawing unscientific conclusions, so too does Lowman levy this accusation at Melchers, arguing that, "his claim that 'prostitution is dangerous' is informed by neither science nor social science."[25]

Applicant expert Ronald Weitzer also makes a notable contribution to the construction of methodological principles in *Bedford*. Like Melchers, Weitzer's main role in the litigation is to attack the evidence of the other side's experts, in this case Melissa Farley and Janice Raymond. (Weitzer, however, does have research expertise in commercialized sex). In his affidavit, Weitzer contends that Farley and Raymond make claims that are "based on an unscientific, ideological perspective" and that "violate some standard canons of scientific research", without directly stating what those canons are.[26] In cross-examination, counsel for Canada explicitly articulates the principles that Weitzer implies are canonical and asks him to affirm them.[27] For instance, he asks Weitzer to affirm the following statements: "Research should avoid the use of sweeping generalizations"; [28] "Research should avoid the use of unscientific and deterministic language";[29] and "Research should use random, representative samples, where available".[30] Counsel also asks Weitzer to explain how a scientific study differs from an unscientific one.[31]

The above examples illustrate how the fact-finding process in *Bedford* encourages experts to engage in scientific boundary work, resulting in a highly definitive,

[25] Lowman supp affidavit, *supra* note 19 at para 7.
[26] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Ronald Weitzer at para 4) [Weitzer affidavit].
[27] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Ronald Weitzer at para 103 onwards) [Weitzer cross].
[28] *Ibid* at para 103.
[29] *Ibid* at para 105.
[30] *Ibid* at para 107.
[31] *Ibid* at para 93.

decontextualized and positivistic portrayal of social science research methodology. In part, this can be attributed to how experts frame their opinions to meet the demands of litigation. Jasanoff, for instance, speaks of "the problem of 'aggrandizement': the temptation of experts to give definitive rather than qualified answers, to deemphasize the existence of other schools of thought, and to exaggerate the significance of their own inferences."[32] Valverde's description of her experience as an expert sociologist in LGBT rights cases supports this observation. Under pressure to help the cause for which she was testifying, and recognizing the positivistic understanding of social science at work in the case, she found herself trying "to retain some intellectual integrity, for instance by introducing unsolicited complexities serving to educate my interlocutors…", only to end up "undermining the theoeretical move I had just made and restoring the appearance of the kind of social science I instinctively knew the law wanted."[33] This kind of dilemma might explain Lowman's inclination to both complicate Melchers' summary of scientific principles and to substitute his own account.

On top of the implicit pressure exerted by the adversarial context of litigation, however, are the more deliberate efforts of counsel, in their quest for a clear and settled foundation from which to mount attacks on opposing expert evidence, to minimize whatever complications and nuances do arise in the accounts of social science on offer. Through such efforts, often enacted in cross-examination, the more or less tentative explanations of scientific norms and principles given by experts are hardened into "the facts" about

[32] Jasanoff, *supra* note 3 at 48.
[33] Mariana Valverde, "Social Facticity and the Law: a Social Expert's Eyewitness Account of Law" (1996) 5:2 Social & Legal Studies 201–217 at 208.

science. For instance, in cross-examination, counsel for Canada asks Lowman whether he has ever conducted research to disprove alternate hypotheses for the differing experiences of street and off-street sex workers (i.e. that differential levels of violence between these two arenas are actually just a reflection of the different demographics of the workers).[34] Lowman embeds his answer within an extensive explanation of the iterative nature of both quantitative and qualitative research, noting that it is "not quite as simple as it looks in the textbooks."[35] Rather than acknowledging or engaging with this explanation, however, counsel simply concludes "I'll take that as a no."[36] In this way, the nuances of the research process being interrogated are dismissed in favour of clear-cut answers that better serve the adversarial goals of litigation.

The cross-examination of applicant expert Deborah Brock provides a particularly striking example of the tendency for counsel to erase complexities in the definition of social science in order to facilitate boundary work. When asked to define " 'sociology' in general", Brock launches into a discussion of the many possible ways of doing research in this field.[37] Counsel responds to Brock's extended explanation by attempting to distill it down, and to confirm that sociology involves "the application of scientific principles to a study of social context."[38] Brock agrees, but, taking an approach similar to the one in this project, also notes that some researchers examine "how notions of science itself are

[34] Lowman cross, *supra* note 22 at para 122.
[35] *Ibid* at para 122.
[36] *Ibid* at at para 123.
[37] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Deborah Brock at para 16 onwards) [Brock cross]. Counsel for the Canada poses the same question to applicant expert Cecilia Benoit: *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Cecilia Benoit at para 8) [Benoit cross].
[38] Brock cross, *ibid* at para 18.

socially constituted."[39] This comment gestures towards scholarship in sociology of science, Science & Technology Studies (STS), and feminist epistemology, among other fields. It has the potential to disturb, or at least complicate, descriptions of social science offered by other experts. Counsel, however, is quick to brush the comment aside: "So apart from this study of science itself, it's important to sociology that scientific rigour be brought to bear in the discipline."[40] In this way, counsel marginalizes the core insights of STS and related fields, suggesting they can simply be hived off from mainstream sociological research, where a clear standard of "scientific rigour" continues to prevail unproblematically.

Scientific principles constructed through the fact-finding process are further hardened in legal argument. In *Bedford*, this phenomenon is especially apparent on the Crown side. Canada's factum at the ONSC, for example, includes a section entitled *What the expert affiants agree are the principles governing social science research methodology – and how these principles should be applied to research on prostitution in Canada and abroad*. Glossing over the kinds of contestation and nuance described above, the factum declares that the experts in *Bedford* agree on many of these principles in the abstract, if not their application.[41] Not only do Canada's facta make repeated reference to "*the* principles of research methodology" (emphasis added) and their proper application—as though these principles are clearly defined and agreed upon by all—they also suggest that

[39] *Ibid* at para 18.
[40] *Ibid* at para 19.
[41] Factum of Respondent, *supra* note 10 at paras 8-9. See also *Canada (AG) v Bedford,* 2013 SCC 72 (Factum of the Appellant AG Canada at para 7).

Melchers, along with Dr. Pratt are in the best position to evaluate these principles.[42] Based on the views of these two methodologists, the factum confidently asserts that the Crown's experts have complied with *the* principles of research methodology, while the applicants' experts have not.[43] Any contestation over scientific principles, for instance in the exchange between Melchers and Lowman, is thereby dismissed in service of a more clear-cut narrative that serves the adversarial objective.

The subtleties of how experts construct the world of social science research in *Bedford* are even more obscured in the reasons of the court. In her decision on the application, Justice Himel does recognize some disagreement between the experts in *Bedford* over methodological issues—specifically, what kinds of inferences can be drawn from qualitative data.[44] At the same time, she also recites, and thereby publicly certifies, some of the general principles articulated on the record and in legal argument. [45] Most notable in her reasons, however—and certainly in the reasons of the courts above—is the almost complete invisibility of the whole discourse on scientific methods and norms that takes place on the record and in argument. In this way, the whole process by which scientific norms are constructed and mobilized in litigation becomes submerged, operating covertly in the background to influence decision-making (or not), without exposure to critique.

[42] See Factum of Respondent, *supra* note 10 at paras 128, 162, 174-178, 186-187, and at Annex Five at paras 5, 14, 23; *Bedford v Canada (AG)*, 2012 ONCA 186 (Factum of the Appellant AG Canada at paras 30, 84) [Factum of Appellant ONCA].
[43] Factum of Respondent, *supra* note 10 at paras 161-175; 178.
[44] *Bedford* ONSC, *supra* note 1 at para 98.
[45] *Ibid* at paras 97-98.

5.2.2 Mobilizing Scientific Norms: Four Key Framing Strategies

Having discussed the general manner in which principles of social science research are constructed in *Bedford*, I turn now to the substantive content of these principles as they are articulated and mobilized to attack particular research studies. Here I focus on four methodological norms rooted in mainstream epistemology that serve as the ground for key framing strategies in *Bedford:* 1) the privileging of quantitative over qualitative research; 2) the idealization of random sampling; 3) the division of researchers and research subjects; and 4) the privileging of primary over secondary research.

The Privileging of Quantitative over Qualitative Research

The first framing strategy banks on the privilege traditionally accorded to quantitative research methods as more "rigorous", "empirical" or "scientific" than qualitative methods. As discussed in Chapter 3, this epistemic hierarchy is rooted in the paradigmatic status of physics and mathematics in the history of science. It is, moreover, tied to a particular ideal of objectivity that strives for the exclusion of all subjective influence. As Isabel Crowhurst explains:

> Numbers are construed as superior epistemological units, because they are not viewed as interpreting reality - a process that is seen as liable to subjective bias - rather they are assumed to accurately and truthfully describe it. They are believed to be pre-interpretive and even non-interpretive, even though, of course, they are themselves interpretations, which are embedded in and reflect particular epistemological and

ontological perspectives.[46]

In *Bedford*, the purported superiority of quantitative research serves as an important ground for boundary work, while also inviting resistance and challenge in some instances. Given the close connection between qualitative research and experiential knowledge, these rhetorical moves have important implications for epistemological justice, as my analysis demonstrates.

Some of the most explicit affirmations of the privilege accorded to quantitative research occur in Melchers' affidavit evidence. There he states:

> In statistical studies, there are commonly accepted tests, criteria and thresholds for the making of confident conclusions. In qualitative designs, it is more difficult to assess whether the work of exploring alternative explanations was thoroughly and properly done. Reasoning fallacies abound in such work.[47]

Melchers expresses particular wariness towards qualitative projects that rely upon accounts of lived experience. In his view, reasoning fallacies are especially likely to occur "when the observer defines her task as that of 'unearthing' understandings or

[46] Isabel Crowhurst, "Troubling Unknowns and Certainties in Prostitution Policy Claims-Making" in Marlene Spanger & May-Len Skilbrei, *Prostitution Research in Context: Methodology, Representation and Power* (London; Routledge, 2017) at 57 [Spanger & Skilbrei, *Prostitution Research*].
[47] Melchers affidavit, *supra* note 10 at para 18. Melchers reiterates these concerns in his supplementary affidavit, noting the lack of "quality standards" for qualitative research in comparison to the "well-established standards for methods such as the classical experiment". *Bedford v Canada (AG),* 2010 ONSC 4264 (Supplementary Affidavit of Ronald-Frans Melchers at para 16) [Melchers supp affidavit].

revealing the subjective experience of those observed.[48] In the same vein, he warns that research observations,

> may rely excessively upon the memory or perspectives of subjects of often unique, lived events not clearly representative of the larger concepts they seek to inform, as in the case of anecdotal evidence. If any of these assurances are found wanting, one is faced with either unsupported opinions, appeals to the authority of the observer, or spontaneous (informal or clinical) and irreproducible observations rather than with scientific statements.[49]

The connection between the privilege afforded to quantitative research and the devaluation of experiential knowledge becomes apparent here.

Despite his concerns, Melchers does recognize the value of qualitative methods for researching certain kinds of questions, namely "the understandings social actors have of their experiences and environment, and how these constitute their beliefs and inform their decisions."[50] His wariness regarding the use of qualitative research in *Bedford* arises largely from his view that such methods are "not suited for purposes of inference or generalization."[51] Melchers' mobilization of the quantitative/qualitative hierarchy to attack Lowman's evidence is thus closely related to how Lowman frames his own conclusions, which is in turn linked to the framing of the facts at issue in the case. According to Melchers, qualitative research cannot support Lowman's claim that the

[48] Melchers affidavit, *supra* note 10 at para 18.
[49] *Ibid* at para 14.
[50] Melchers supp affidavit, *supra* note 47 at para 9. See also Melchers cross, *supra* note 12 at para 271.
[51] Melchers supp affidavit, *ibid* at para 10. This view is reiterated in Canada's factum at the ONSC: Factum of Respondent, *supra* note 10, Annex Three at para 53.

Criminal Code provisions "endanger prostitutes", because the claim is "quantitative and causal in nature."[52] This leads him to find that Lowman's affidavit "is speculative and offers no empirical testing of hypotheses or valid and reliable evidence in support of its conclusions."[53] Despite the large body of qualitative work cited by Lowman (including both his own studies and those of other researchers), Melchers focuses his assessment on a single table of numerical data about homicide rates in British Columbia, which he identifies as "the only empirical evidence" that Lowman presents in support of his claim[54] (a characterization later adopted in Canada's factum at the Ontario Court of Appeal (ONCA)).[55] Having cast doubt upon the reliability of the data in the table, he concludes that Lowman's opinion is unfounded.

However, neither the framing of Lowman's conclusions, nor the framing of the underlying facts at issue, remains static throughout the litigation. With respect to the latter, the degree of causality that must be demonstrated between the impugned laws and the dangers faced by sex workers to make out a security of the person violation under section 7 is highly contested in *Bedford.* The law on this issue determines the fact that must be proved, which in turn determines the nature of the evidence required. According to Melchers and counsel for Canada, the language used in Lowman's affidavit tends to suggest a direct causal connection between the laws and the endangerment of sex workers. This accords with counsel's argument regarding the nature of the connection that must be proved by the applicants. Under cross-examination, however, Lowman

[52] Melchers supp affidavit, *ibid* at para 21.
[53] Melchers affidavit, *supra* note 10 at para 30.
[54] *Ibid* at para 30; Melchers supp affidavit, *supra* note 47 at para 21. Melchers reasserts this view in cross-examination: Melchers cross, *supra* note 12 at para 134.
[55] Factum of Appellant ONCA*, supra* note 42, Appendix at para 17.

expresses repeated dissatisfaction with how the affidavit was drafted, and reframes his opinion in weaker terms. Rather than asserting direct causation, he claims that the law "materially contributes" to the endangerment of sex workers.[56] This phrasing aligns with what Young, as counsel for the applicants, argues is the appropriate legal test under s.7. It also makes Lowman's opinion easier to justify on the basis of qualitative evidence, while rendering Melchers' critique less compelling.[57] Hence the applicants' argument that Melchers "has asked the wrong question and assessed the wrong conclusion."[58]

While driven in part by the language used in Lowman's original affidavit, Melchers' insistence on a purely quantitative approach to the facts nevertheless relies on a view of qualitative data as too trapped in subjectivity to provide *any* empirical evidence of broader claims about the world. Qualitative observations, he suggests, may provide insight into the experiences and perspectives of others, but they "cannot be taken as evidence of the existence […] of phenomena."[59] Hence his repeated assertion under cross-examination that the experiential accounts collected through Lowman's interviews, while "certainly valuable information"[60], do not provide any evidence of whether the impugned laws actually endanger prostitutes.[61]

Counsel for Canada invokes this view at many points in cross-examination to attack the research of Lowman and others. Take, for instance, the following exchange discussing

[56] Lowman cross, *supra* note 22 at para 10.
[57] I discuss the significance of this episode from a legal process perspective in Chapter 8.
[58] Factum of Applicants, *supra* note 12 at para 197.
[59] Melchers affidavit, *supra* note 10 at para 9.
[60] Melchers cross, *supra* note 12 at para 87.
[61] *Ibid* at paras 87, 368, 432, and 435.

Lowman's research finding that working for an escort agency is safer than street prostitution:

> Q: …that observation was based on what the women were telling you in the interviews you were conducting. Is that correct?
>
> A. Right.
>
> Q. You didn't do an empirical measure of that, as you may have in other circumstances.
>
> A. Not at this point.[62]

Counsel pursues the point again a few paragraphs later:

> Q: …is it really possible to draw any factual conclusions in an empirical way comparing the rates of violence suffered by one population as against any other?
>
> A: those interviews do provide important empirical observations on the basis of what women tell you about their experiences. [63]

A similar exchange occurs later in the cross-examination, when counsel for Canada turns to *Beyond Decriminalization*—a study by Pivot Legal Society in which Lowman and others interviewed over 80 sex workers, as well as a few owners of indoor

[62] Lowman cross, *supra* note 22 at paras 409-410.
[63] *Ibid* at para 420.

establishments.[64] In his affidavit, Lowman cites this study to support his conclusion that street sex workers are much more likely to face serious violence than off-street workers.[65] To challenge this claim, counsel suggests that the study merely recorded "the overall impression" of participants regarding the difference in violence between locations, without "any actual comparison in terms of stats from one group or another."[66] In response, Lowman explains that statistical analysis was not needed because the two business owners could not recall a single violent incident on their premises. Counsel, however, persists:

> Q: I'm sorry, were there statistical analyses done here? My question is, you're just recording overall impressions, correct, from the group?
>
> A: Well, there's not much of a statistical analysis to do. […]
>
> Q: So again I go back to my point, there is no objective measuring of one versus another. This is overall impressions of people telling you…
>
> A: This is not an impression. This is an objective report of the circumstances of the happenings in these environments.[67]

Lowman, here, affirms the capacity of his interviewees to provide reliable empirical observations that form the basis for social scientific findings. In spite of this, Canada's factum at the ONSC goes on to assert that because *Beyond Decriminalization* is based on

[64] *Ibid* at paras 719-720.
[65] Lowman affidavit, *supra* note 8 at para 15.
[66] Lowman cross, *supra* note 22 at para 744.
[67] *Ibid* at para 746. See also at para 824, where counsel suggests that Lowman's methodology involves "reasoning by anecdotes". Lowman's response: "Well, you could call these anecdotes, but I would call them observation points."

interviews and not statistical comparisons, it offers "no findings" and "no empirical data" on violence in indoor versus outdoor prostitution.[68]

Counsel for Canada pursues a similar strategy with other applicant witnesses. For instance, in the cross-examination of applicant expert Cecilia Benoit, counsel emphasizes that Benoit offers only qualitative, and not quantitative data on the relative safety of different venues,[69] and that her conclusions are "entirely from the self-reported comments that were made by respondents to the interviewer."[70] Canada's factum at the ONSC then argues that according to "principles of research methodology", Benoit's study ought to be discounted because "[d]ata in several instances is based on qualitative statements as opposed to quantitative data, which calls into question the study's usefulness."[71] The factum makes a similar argument regarding the evidence of applicant expert Gayle MacDonald, suggesting that because her study is qualitative and ethnographic, it is "less empirical and more descriptive", and thus fails to support her expert opinion.[72] In questioning sex worker and advocate Kara Gillies on her government-funded report about the impact of Canadian prostitution laws on women, counsel once again discounts the value of qualitative research, putting to Gillies: "So, in fact, there are no findings of this study - as you say, the study was just qualitative."[73]

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[68] Factum of Respondent, *supra* note 10, Annex Three at para 25.
[69] Benoit cross, *supra* note 37 at para 230.
[70] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Kara Gillies at para 235) [Gillies cross].
[71] Factum of Respondent, *supra* note 10, Annex Five at para 8.
[72] *Ibid* at para 11.
[73] Gillies cross, *supra* note 70 at para 245. See also *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Barbara Sullivan at paras 442-443) [B Sullivan cross].

These are but a few examples of how the mainstream privilege accorded to quantitative research is invoked to do boundary work in *Bedford*, at the expense of feminist epistemological insights and associated commitments.[74] In these examples, counsel discounts the epistemic value of qualitative data—and the experiential knowledge that underlies it—by excluding it from the realm of "objective", "empirical" science. This framing strategy rests upon an imagined dichotomy between the empirical observations of researchers and the experience-based "impressions" of research subjects, the latter being understood to carry little weight as evidence. In this way, the strategy denies people with firsthand experience of the sex trade a role in the production of knowledge about their own social world.

Still, as Lowman's responses to counsel in the above examples show, the quantitative/qualitative hierarchy does not stand uncontested in *Bedford*. In addition to his resistance in cross-examination, Lowman raises an extensive challenge to this epistemic norm in his supplementary affidavit, in response to Melchers' critique. He explains that since the 1920s, "alternative social scientific approaches have led to the development of qualitative research methods which challenge the claim that experimental and quasi- experimental methods are the only way to produce social scientific 'truth'."[75] According to Lowman, Melchers' account of methodological principles fails to canvas qualitative methods, despite the fact that they are "widely accepted among social

[74] For other examples, see: B Sullivan cross, *ibid* at paras 442-443 (where counsel emphasizes that street workers' reports regarding the increased safety provided by safe house brothels are based on "their own anecdotal or personal experience", and that there is no global study of this type of initiative); *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Melissa Farley at paras 161-162) [Farley affidavit] (privileging quantitative studies with large samples over "anecdotal reports").
[75] Lowman supp affidavit, *supra* note 19 at para 20.

scientists."[76] In contrast to "purists" such as Melchers, he positions himself in the camp of social scientists who take an "integrative approach", viewing qualitative and quantitative methods as complementary.[77] In this way, Lowman constructs a counter-narrative of research methodology in the social sciences—one that reframes Melchers' account as marginal to the field.[78]

In opposition to Melchers, Lowman also asserts at several points that qualitative research offers empirical information relevant to the facts at issue before the court,[79] including information capable of supporting causal inferences.[80] He critiques Melchers' focus on the homicide data table as the only empirical evidence capable of speaking to the effects of the impugned laws, arguing that Melchers "recognizes as 'empirical' only that which is 'quantitative' "[81]—a point reinforced by Young in the applicants' factum at the ONSC.[82]

Young further bolsters Lowman's resistance to the quantitative/qualitative hierarchy in his cross-examination of Melchers. In his affidavit, Melchers states that Lowman "provides no empirical support for the proposition that the Criminal Code provisions on prostitution cause the endangerment of street prostitutes or that the communicating offence introduced in 1985 was the cause of increased danger to street prostitutes."[83]

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[76] *Ibid* at para 19. Counsel for the applicants reiterates this point in written argument: Factum of Applicants, *supra* note 12 at para 190.
[77] Lowman supp affidavit, *supra* note 19 at para 21.
[78] See also Lowman cross, *supra* note 22 at paras 1124 and 1192.
[79] Lowman supp affidavit, *supra* note 19 at para 19; Lowman cross, *ibid* at paras 1121-1124.
[80] Lowman supp affidavit, *ibid* at paras 25-28; Lowman cross, *ibid* at paras 1123-1124.
[81] Lowman supp affidavit, *ibid* at para 36; Lowman cross, *ibid* at paras 1124 and 1192.
[82] Factum of Applicants, *supra* note 12 at paras 194-195.
[83] Melchers affidavit, *supra* note 10 at para 4.

With his very first question, Young asks Melchers to define "empirical".[84] Later in the cross-examination, he uses the answer—"something that's available to observation using the five senses"[85]—to challenge Melchers' assertion about Lowman:

> Q: …where you say there is no empirical support for the proposition, you don't think that's a very overstated statement.
>
> A: Not at all.
>
> Q: Let's go back to your definition of empirical: observation. Why are Professor Lowman's surveys and interviews with sex workers, police officers, social workers, not empirical support? [86]

In response, Melchers concedes that the surveys and interviews are indeed "empirical", but asserts that they are not "support"[87]—not even "weak support", as Young tries to suggest.[88] Young presses the point:

> Q: If I interview a sex worker and the sex worker says, "I don't want to work on the streets, the police don't protect me, I'd like to be able to work inside but the law doesn't permit me," that's no evidence of anything.[89]
>
> A: […] It's not support for a conclusion as to the actual effect of the law as causing endangerment. It is an opinion, but it's not support. Now, I don't

[84] Melchers cross, *supra* note 12 at para 1.
[85] *Ibid* at para 1.
[86] *Ibid* at paras 137-138.
[87] *Ibid* at para 138.
[88] *Ibid* at paras 139-141.
[89] *Ibid* at para 140.

> mean to be flippant, but if I were to ask a member of the Elvis Sighting Society whether Elvis lives, the answer would not be support for the proposition that Elvis is alive.

In this exchange, Young defends accounts of firsthand experience as a legitimate source of empirical evidence, against Melchers' dismissive approach. Later in the cross-examination, he goes on to affirm the value of qualitative research to the case by challenging Melchers' quantitative characterization of the facts at issue (and his attendant focus on quantitative evidence):

> Q: Not only is the experience of the sex trade amenable to qualitative research, would you agree with me, that when you're asking what is the impact of the law, it would be very hard to measure that in any quantifiable way.
>
> […]
>
> Q. And you would agree that quantitative research, despite best efforts, has not yielded a clear and consistent answer to the question of does the law deter. Will you agree with me?
>
> A. I agree with you, yes.

[…]

> Q. I'm just trying to establish that there are difficult questions that quantitative research won't necessarily answer. Even something as simple as crime rate, raw data numbers, there are some problems with just using the quantified numbers, correct?[90]

In this way, Young not only defends the value of qualitative research, but underscores the limits of a purely quantitative approach. His final comment in particular highlights the dangers of relying on decontextualized quantitative data in legal decision-making. This accords with Crowhurt's observation of how the contextual details of quantitative data are often omitted from policy reports, resulting in "a process of simplification, which entails the loss of depth and analytical complexity, while at the same time unreliable, incomplete, or context-specific data become popular and generalised via their public repetition, eventually acquiring the status of timeless 'fact'."[91]

So far, the discussion in this subsection suggests that the Crown side of the litigation in *Bedford* tends to lean heavily on the epistemic privilege traditionally accorded to quantitative research, while the applicant side resists the dominant paradigm. However, it would be misleading to portray these opposing epistemic norms as tracking neatly onto the two sides of the litigation. To the contrary, the instrumentality of Young's strategy in cross-examining Melchers is apparent when compared to the approach he takes with Crown witnesses Richard Poulin and Melissa Farley. Despite having attacked Melchers

[90] *Ibid* at paras 271-276.
[91] Crowhurst, *supra* note 46 at 57.

for overemphasizing quantitative data at the expense of qualitative, Young does the same thing to these witnesses. In his cross-examination of Poulin, he attempts to discount the weight of informal research interviews by suggesting that they fail to produce "any data, empirical data of percentages."[92] (To which Poulin responds: "You're empirical also when you do this kind of interview. It's not only because you have percentages that you are empirical."[93]) In a discussion about Farley's research on legalized brothels in Nevada, Young puts to her: "…this is a purely qualitative, impressionistic study. There are no quantitative data that come out of this, are there?"[94] The factum of the applicants at the ONSC also disparages Farley for her reliance on "anecdotes" told by her research subjects.[95] While admitting that these stories "do constitute some qualitative data", the factum draws on Weitzer to discount their value as evidence:

> As noted by Dr. Weitzer, an expert witness called by the applicant in reply, presenting anecdotes as definitive evidence "violates most of the criteria for meaningful, serious, systemic, scientific thinking" and will inevitably produce "questionable findings and spurious conclusions."[96]

Thus, the applicant side too is willing to invoke the dominant paradigm where it suits their case. In the hands of counsel, the defense of qualitative research and experiential

[92] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Richard Poulin at para 95) [Poulin cross].
[93] *Ibid* at para 95.
[94] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Melissa Farley at para 556) [Farley cross]. Interestingly, despite her emphasis on the value of qualitative data and experiential knowledge throughout the record, Farley uses a similar framing strategy in response to Lowman: Farley affidavit, *supra* note 74 at para 162.
[95] Factum of Applicants, *supra* note 12 at para 293.
[96] *Ibid*.

knowledge turns out to be no more than a tool of advocacy, to be advanced or discarded according to the needs of the moment.

The Idealization of Random Sampling

The privileging of quantitative research methods in *Bedford* is closely linked to another key framing strategy that banks upon the perceived superiority of large-scale probability (i.e. random) sampling. While often touted as the "gold standard" for scientific research, the ideal of random sampling applies mainly to quantitative research, where the goal is to generate numerical data that is as representative as possible of the larger population. Qualitative studies, on the other hand, tend to sacrifice scale and representativeness in order to gather richer, more-depth information. The idealization of random sampling thus accords with the quantitative/qualitative hierarchy mobilized throughout the record.

Interestingly, the invocation of random sampling as a methodological ideal in *Bedford* occurs despite clear acknowledgment from all sides that such an approach is impractical if not impossible in the context of research on the sex trade (and a great deal of other social science research). As noted in the materials on the record, the illicit and stigmatized nature of sex work impedes researchers' ability to ascertain the size and boundaries of the population in a given location, and thus to obtain a random sample.[97] It is also extremely difficult to yield a representative sample via other methods.[98] Despite

[97] See: House of Commons, Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006) at 8-10 [*Challenge of Change*], cited in Factum of Applicants, *supra* note 12 at para 124; Frances Shaver, "Sex Work Research: Methodological and Ethical Challenges" (2005) 20:3 Journal of Interpersonal Violence 296 at 296, cited in Factum of Applicants, *supra* note 12 at para 127; Weitzer affidavit, *supra* note 26 at para 10.
[98] Shaver, *ibid* at 296.

the consensus on this point in *Bedford*, actors on both sides of the litigation (albeit more on the Crown side) instrumentalize the ideal of random or representative sampling to discount research studies that work against their interest in the litigation, often in highly decontextualized manner. When seeking to defend or bolster helpful research, on the other hand, witnesses and counsel (primarily on the applicant side) take a far more nuanced and contextualized approach to sampling methods.

Counsel for Canada's cross-examination of Lowman is once again illustrative here. Despite counsel's own acknowledgement that representative sampling is "difficult, if not impossible" to achieve in prostitution research,[99] and despite Lowman's readiness to concede that his research findings are not based on representative samples,[100] counsel repeatedly invokes the ideal of the random sample to attack Lowman's research and the research he relies upon. When asked if he has pursued "next best" alternatives to random sampling discussed in a given methodology textbook,[101] Lowman explains that such methods are "effectively not possible" in a field setting, and emphasizes that there are many other ways to examine the factual questions at issue, including qualitative methods.[102] Nevertheless, with each new study addressed in the cross-examination, counsel asks Lowman to confirm that the sample used was not representative. In a response that becomes rote, Lowman agrees: "It has that characteristic, along with every other field study of prostitution in the world."[103] This exchange repeats itself at least 14 times throughout the cross-examination, to the point where Lowman begins to anticipate

[99] Lowman cross, *supra* note 22 at para 98.
[100] *Ibid* at para 129.
[101] *Ibid* at paras 102-114.
[102] *Ibid* at para 116.
[103] *Ibid* at para 170.

the question, and counsel the answer.[104]

In addition to stressing the practical limitations on representative sampling, Lowman points out that a random sample may be unnecessary to achieve the goals of a given study, and thus not part of the research design.[105] A good example arises later in his cross-examination when counsel for Canada addresses the work of Lowman's Masters student, Tamara O'Doherty. Lowman relies on O'Doherty's study, which examines high-end off-street prostitution in Vancouver, to support his conclusion that prostitution can be conducted safely.[106] In cross-examination, counsel asks Lowman to affirm that the sample used was not random or representative of all off-street sex workers.[107] Despite Lowman's immediate acknowledgement of these points, counsel spends the next 50 paragraphs of transcript reinforcing them through extensive questioning about the nature of the study. Lowman, for his part, emphasizes that O'Doherty's sample was not intended to be representative, but rather purposive, as it was "deliberately targeted in order to show variation among different types of sex work venues during a period when very strong claims are being made by certain researchers about the general nature of prostitution".[108] He adds: "There are many, many different kinds of research questions, some of which probabilistic sampling is not relevant to."[109] Nevertheless, counsel continues to reiterate the non-representative nature of the study sample, both in cross-examination and in

[104] *Ibid* at paras 166, 170, 259, 319, 485-486, 670, 942-944, 1067, 1106, 1211, 1315, 1332-1333, 1423, and 1435-1436. Counsel for Canada also emphasizes the non-representative nature of the studies in argument at the ONSC: Factum of Respondent, *supra* note 10 at para 174 and at Annex Three at paras 21-22.
[105] Lorraine Nencel makes a similar point in her article "Epistemologically Privileging the Sex Worker: Uncovering the Rehearsed and Presumed in Sex Work Studies" in Spanger & Skilbrei, *Prostitution Research, supra* note 46 at 79.
[106] Lowman cross, *supra* note 22 at para 904.
[107] *Ibid* at para 942.
[108] *Ibid* at para 968.
[109] *Ibid* at para 969.

written argument.[110]

A similar exchange occurs when counsel for Canada questions applicant witness Kara Gillies on her government-funded report, which was based on a study involving interviews and focus groups with sex workers. In addressing the report, counsel decides to ask Gillies "some general questions about research methodology" not specific to the study at hand.[111] In the exchange that follows, Gillies is repeatedly asked to affirm the virtues of large and random sampling as the gold standard of "traditional research methodology."[112] In response, she emphasizes the impossibility of large and random sampling when studying a "hard-to-reach" population such as sex workers.[113] Gillies defends the value of her study by specifying its particular objectives: "It was a small, qualitative study, not to generate large numbers, but to get really rich, nuanced understandings of women's experiences…"[114] However, counsel's response to this point is simply to reiterate Gillies' agreement that "in an ideal world, […] large sample size and random sample would be best."[115] As in the O'Doherty example above, counsel here invokes the random sampling ideal in order to discredit Gillies' study, without any attention to the study's actual goals, or the limitations of the context in which it was undertaken. Canada's factum at the ONSC goes on to argue that the study ought to be discounted due to its small sample size and use of a snowball sampling technique.[116]

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[110] *Ibid* at paras 969, 1001, and 1067; Factum of Respondent, *supra* note 10 at para 170 and at Annex Three at para 26; Factum of Appellant ONCA, *supra* note 42 at paras 25-26.
[111] Gillies cross, *supra* note 70 at para 173.
[112] *Ibid* at paras 173-180.
[113] *Ibid* at para 173-174.
[114] *Ibid* at para 178.
[115] *Ibid* at para 180.
[116] Factum of Respondent, *supra* note 10, Annex Five at para 23.

While counsel for Canada instrumentalizes the perceived superiority of random sampling in an especially persistent and decontextualized fashion, applicant-side witnesses and counsel also draw strategically upon this ideal at certain points in the record. Weitzer's evidence provides one example. Like Melchers, Weitzer does not hesitate to identify random sampling as an abstract methodological ideal within the "canons of scientific research."[117] In his affidavit, he mobilizes this ideal to attack Melissa Farley's conclusions for being based on studies with non-representative samples,[118] despite his own acknowledgment that random sampling of sex workers is "typically impossible". [119] Weitzer's main concern, however, appears to be the sweeping nature of the generalizations that Farley makes on the basis of these studies—a concern also emphasized in the applicants' factum at the ONSC.[120]

Indeed, actors in *Bedford* often attack non-representative sampling techniques not for being invalid in any absolute sense, but because they serve as improper grounds for the broad generalizations they are being used to support. This reflects a principle agreed upon and reiterated by all at a general level: that findings based on non-random samples must be properly qualified.[121] As the application judge puts it, researchers must "limit their conclusions to the discrete sample studied and avoid making generalizations."[122] Like the random sampling ideal, this principle is uncontroversial in the abstract, but becomes problematic, and subject to challenge, when invoked without careful attention to the

[117] Weitzer cross, *supra* note 27 at paras 102 and 107.
[118] Weitzer affidavit, *supra* note 26 at para 7.
[119] *Ibid* at para 10. See also Weitzer cross, *supra* note 27 at para 191.
[120] Factum of Applicants, *supra* note 12 at para 290.
[121] See for example: *ibid* at para 126; Factum of Respondent, *supra* note 10 at para 9.
[122] *Bedford* ONSC, *supra* note 1 at para 98.

research context and the nature of the facts the research is being used to support. Without such care, the fear of drawing unwarranted generalizations from data may lead to the improper discounting of experiential knowledge advanced in litigation through the qualitative research of experts.

For example, in attacking the research of Lowman and others, counsel for Canada focuses largely on the geographic limitations of the study samples. Thus counsel argues that because Lowman's research focuses on the Lower Mainland of British Columbia, it cannot be relied upon to support generalizations about prostitution nation-wide.[123] Lowman resists this strategy in two ways. First, he points out that he is not using his research to support such broad generalizations. Here Lowman distinguishes broad research questions, which require "geographically comprehensive" approaches, from the more narrow factual issue in *Bedford,* namely "the material contribution of law to violence against prostitutes and other forms of victimization".[124] According to Lowman, a case study of a particular region can properly ground a finding on this issue by identifying the "causal mechanisms" through which the law endangers sex workers.[125] This response once again highlights the connection between the framing of the facts at issue and assessments of the evidence.

Secondly, while counsel for Canada attacks each unfavourable study in isolation, arguing that it cannot serve as a basis for generalization, Lowman contextualizes particular

[123] See for example: Factum of Respondent, *supra* note 10 at para 167 and at Annex Three at para 1; Factum of Appellant ONCA*, supra* note 42, at para 19. Canada makes similar arguments about the research of Benoit and MacDonald: Factum of Respondent, *supra* note 10, Annex Five at paras 8 and 11.
[124] Lowman cross, *supra* note 22 at para 1125.
[125] *Ibid* at paras 1125-1127.

studies within a larger body of research. He explains:

> It's the cumulative weight. The cumulative weight of various samples does allow you to start the process of generalization. When you take any one study and you ask that question, can it be generalized, is it a probability sample, the answer is always no. That doesn't mean to say that generalization is impossible.[126]

This accords with Lowman's emphasis on "triangulation" as key to the process of qualitative research.[127] As he puts it later in the cross-examination: "The whole trick with qualitative research is the triangulation, not necessarily every individual piece. It is the jigsaw puzzle, it is the picture that they're putting together."[128] Triangulation is thereby posited as a counter-norm to the ideal of representative sampling—one that Canada casts doubt on, [129] but that Young appeals to in order to defend Lowman's method and findings.[130]

At the same time, Young also attempts to minimize unfavourable social science research by pointing to its lack of representativeness. In some instances, he follows the same approach as counsel for Canada by pointing to geographic limitations, albeit of a different

[126] *Ibid* at para 1317.
[127] See for example *ibid* at para 1318.
[128] *Ibid* at para 1475.
[129] Factum of Respondent, *supra* note 10 at para 164 and at Annex Four at para 30; Factum of Appellant ONCA*, supra* note 42 at para 38.
[130] Melchers cross, *supra* note 12 at paras 177, 279 and 371; Factum of Applicants, *supra* note 12 at para 192.

sort. Hence his argument that the Crown's social science evidence comes "from jurisdictions which bear little relationship to Canada, both culturally and legally".[131] Young's emphasis, however, is on other types of sampling biases. In particular, he suggests at several points that the sampling methods of Farley and Raymond tend to target those who are most vulnerable and have experienced the most violence and trauma in the sex industry, in part by focusing almost exclusively on street workers[132] (a point picked up on by the application judge in her reasons).[133] Young then critiques Farley for making unqualified generalizations about sex workers without expressly noting the limitations of her samples.[134] The thrust of these arguments is captured in the applicants' factum at the ONSC: "it is submitted that virtually all of the research presented by Crown witnesses is tainted by the fundamental mistake of generalizing about the nature and risks of ALL sex work from studies conducted with street prostitutes, children and trafficked women."[135] As explained in the methodological literature reviewed in the applicants' factum, such generalizations can reinforce the stereotypical view of all prostitutes as victims, glossing over important differences in working conditions across the industry.[136] Unlike geographic variations, these kinds of differences are arguably central to the facts at issue in *Bedford* case, suggesting that Young's invocation of concerns about

[131] *Bedford v Canada (AG)*, 2012 ONCA 186 (Factum of the Respondents at para 73) [Factum of Respondents ONCA].
[132] Farley cross, *supra* note 94 at paras 356, 370-373, 394, 408, 619 and 667; *Bedford v Canada (AG)*, 2010 ONSC 4264 (Cross-Examination of Janice Raymond at para 168) [Raymond cross]; Factum of Applicants, *supra* note 12 at paras 298 and 317; Factum of Respondents ONCA, *ibid* at para 80. Counsel for Canada also critiques applicant expert Frances Shaver for making overgeneralized claims based mainly on research involving street workers: Factum of Respondent, *supra* note 10, Annex Five at para 5.
[133] *Bedford* ONSC, *supra* note 1 at para 134.
[134] Factum of Applicants, *supra* note 12 at paras 290-291.
[135] *Ibid* at para 129.
[136] *Ibid* at para 125.

representativeness here is more appropriately contextualized as compared to counsel for Canada.

The Division of Researchers and Research Subjects

The role of Gillies and other sex workers in conducting research on the sex trade gives rise to a third framing strategy at play in *Bedford* with respect to research methodology. This strategy banks on the assumed importance of a strict boundary between researchers and research subjects as a means to discount a number of studies on the record in which these roles overlap. As discussed in Chapter 3, this ideal of a strict separation between knowers and the known has been subject to extensive critique from feminist epistemologists for its reinforcement of an oppressive social dynamic wherein some individuals wield epistemic agency over others.

Research on the sex trade presents a particular challenge to the commonly imagined boundary between researchers and research subjects. As noted in the materials on the record in *Bedford*, academic researchers working alone have been unable to access large swaths of the relevant population. Research conducted by, in partnership with, or with the assistance of sex trade participants has thus proved essential to filling gaps in the field (in addition to reaping other benefits – see Chapter 3).[137] The research on offer as evidence in *Bedford* reflects this development in two ways. First, several of the sex workers who gave evidence as experiential witnesses had also contributed to the production of research studies and reports, undertaken either in partnership with academics, or in association with government or civil society organizations, that were filed in the case. Second,

[137] *Challenge of Change, supra* note 97 at 8-10. See also Crowhurst, *supra* note 46 at 48-49.

academic experts on both sides of the litigation relied upon studies that involved current or former sex trade participants as interviewers or research assistants/consultants. In the context of litigation, this blurring of the line between researchers and research subjects also blurs the boundary between experiential and expert witnesses.

The contribution of sex trade participants to the production of research about the sex trade provides ammunition for attacks on unfavourable evidence in *Bedford* through the reassertion of the traditional boundary between researchers and research subjects. Indeed, counsel on both sides of the litigation (and some witnesses) repeatedly point to the involvement of current or former sex trade participants in carrying out research as an indication of potential bias. One example comes from the cross-examination of applicant expert Cecilia Benoit, who conducted a study in Victoria, BC, in partnership with a community organization run by former sex workers. Former sex workers were involved in various parts of the research, including conducting interviews.[138] In cross-examination, counsel for Canada suggests to Benoit that, "by opening up the definition of who qualifies as a researcher, you yourself can be criticized for undermining traditional scientific standards of objectivity."[139] Counsel goes on to suggest that those not trained in sociology may have difficulty "understanding the rigorousness of the scientific process."[140]

[138] Cecilia Benoit & Alison Millar, "Dispelling Myths and Understanding Realities: Working Conditions, Health Status, and Exiting Experiences of Sex Workers" (October 2001) at iv; Benoit cross, *supra* note 37 at para 161.
[139] Benoit cross, *ibid* at para 163.
[140] *Ibid* at para 165. Canada's factum at the ONSC raises a similar concern regarding Frances Shaver's proposed "controversial use of recruiting prostitutes" as a means to overcome methodological challenges in sex work research: Factum of Respondent, *supra* note 10, Annex Five at para 5.

In her response, Benoit strikes a delicate balance between affirming and challenging the core pillars of her discipline as constructed by the legal process. On the one hand, she acknowledges the weaknesses of involving community partners in research, and the need to put measures in place to overcome potential bias.[141] On the other hand, she notes that sociologists themselves have recognized the limitations of traditional scientific methods when studying populations such as sex workers, and have developed "refined" methodologies that seek to balance effective access with scientific rigour.[142] In this way Benoit resists counsel's decontextualized understanding of "scientific process", albeit leaving the notion of "scientific rigour" unpacked.

A less explicit mobilization of the traditional boundary between researchers and research subjects arises in Lowman's cross-examination. There, counsel for Canada draws attention to Lowman's employment of sex workers as interviewers in his 1989 study of street prostitution in Vancouver, questioning their experience and training, and asking whether Lowman himself "evaluated" the interviews.[143] Counsel for the Attorney General of Ontario returns to this theme later in the cross-examination, putting to Lowman, "the facilitators of your research were prostitutes who were also the research subjects?", and asking him to affirm that the women involved in conducting interviews were "practicing prostitutes".[144] In resistance to this strategy, Lowman explains, at several points in his cross-examination, that working with sex workers was essential to

[141] Benoit cross, *supra* note 37 at paras 163 and 166.
[142] *Ibid* at paras 165-167.
[143] Lowman cross, *supra* note 22 at paras 277, 286-294. Counsel raises a similar concern about the training of outreach workers involved in circulating a survey that formed part of another one of Lowman's studies: *Ibid* at para 543, discussing Department of Justice, *Violence Against Persons Who Prostitute: The Experience in British Columbia* by John Lowman and Laura Fraser (Ottawa: 1995).
[144] Lowman cross, *ibid* at para 1708.

ensuring that the language used in his research instruments would make sense to the population, and thus lead to reliable findings.[145]

Interestingly, the fact that Lowman, Benoit, and other applicant experts (e.g. Brock) did research in collaboration with sex workers does not stop Young from attacking the research of Crown experts on the same basis. In cross-examining Farley, for instance, Young suggests that allowing sex trade "survivors" and others who take an abolitionist position to conduct research interviews risks importing bias into the process even when they receive training, and asks why Farley didn't just use "neutral graduate students" instead.[146] This concern is reiterated in the applicants' facta at the ONSC and ONCA.[147] Like Benoit, Farley in some ways aligns herself with the prevailing view of social science at work in the case; hence her affirmation of the need to avoid bias in the collection of research data.[148] At the same time, she suggests that the life experience of sex trade workers and frontline service workers may actually enable them to be more "neutral" than graduate students with "unknown biases."[149] She also emphasizes the benefits of choosing interviewers with a common racial and experiential background to the interviewees, in order to establish a comfortable rapport.[150]

In a similar vein to Young's questioning of Farley, applicant experts Lowman and Weitzer attack one of the most important studies that Farley, and the Crown side generally, relies upon—a study comparing indoor and outdoor prostitution venues by

[145] *Ibid* at paras 366, 529, and 1708.
[146] Farley cross, *supra* note 94 at paras 211-216. Young also raises this concern in his cross-examination of Melchers: Melchers cross, *supra* note 12 at para 162.
[147] Factum of Applicants, *supra* note 12 at para 297; Factum of Respondents ONCA, *supra* note 131 at para 80.
[148] Farley cross, *supra* note 94 at para 214.
[149] *Ibid* at para 216.
[150] *Ibid* at para 291.

Jody Raphael and Deborah Shapiro[151]—for employing survivors with a negative view of the sex trade as interviewers.[152] In her response, Farley once again challenges the notion that survivors who have exited the sex trade are more prone to bias than other interviewers.[153] She also points out the hypocrisy of the attack by noting that Lowman relies on data from a researcher (Libby Plumridge) who takes a similar approach, employing current sex workers to conduct research.[154] Indeed, as counsel for Canada highlights elsewhere, members of the New Zealand Prostitutes Collective—an advocacy group supporting decriminalization—administered the questionnaire used in Plumridge's study.[155]

Similar exchanges occur where counsel challenges the research contributions of certain experiential witnesses. For instance, when questioning Gillies about the research she conducted for her report, counsel for Canada dwells on her sampling methodology, which involved using some subjects known to Gillies personally, as well as a snowball sampling technique.[156] The implication is that such methods are problematic, raising the risk of confirmatory bias.[157] Gillies, however, frames her "personal location" as a boon to the project, noting that, "as a sex worker, I was well-positioned to break down some of the

[151] Jody Raphael and Deborah Shapiro, "Violence in Indoor and Outdoor Prostitution Venues" (2004) 10:2 Violence Against Women 126.
[152] Lowman affidavit, *supra* note 8 at para 46 (citing Weitzer); Lowman cross, *supra* note 22 at para 1524; Weitzer affidavit, *supra* note 26 at para 13; Weitzer cross, *supra* note 27 at para 306.
[153] Farley affidavit, *supra* note 74 at para 163.
[154] *Ibid* at para 163; Libby Plumridge and Gillian Abel, "A 'Segmented' Sex Industry in New Zealand: Sexual and Personal Safety of Female Sex Workers" (2001) 25 Australian and New Zealand Journal of Public Health 78.
[155] Weitzer cross, *supra* note 27 at paras 330-333.
[156] Gillies cross, *supra* note 70 at para 85 onwards.
[157] Indeed, Canada's factum at the ONSC argues that this sampling technique "undermines the reliability of the data": Factum of Respondent, *supra* note 10, Annex Five at para 23.

barriers of resistance that many researchers face."[158] She goes on to demonstrate the significance of her involvement in the research project. When asked whether the median age of the study participants (42) was "relatively old for sex workers",[159] Gillies explains that it seems old due to the skewed samples often used in sex work research. She notes that for most researchers not involved in community-based participatory research, the easiest sex workers to access are those who are doing street sex work, incarcerated, or involved in exit programs—all of whom tend to be younger than average.[160] Gillies goes on to explain:

> Over my 20 years of sex work experience and sex work advocacy and support, there are many, many workers who are aged 35 and above, but to date those numbers haven't been reflected in a lot of the formal research simply because of access problems.[161]

This type of insight demonstrates how Gillies' experiential knowledge and personal connection to the research participants could actually enhance her effectiveness as a researcher, rather than diminishing it, as counsel's line of questioning seems to assume.[162]

Thus, while counsel on both sides of the litigation, and some expert witnesses, appeal to the traditional boundary between researchers and research subjects as a framing strategy, several witnesses also challenge this boundary. (Lowman, for his part, does both in

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[158] Gillies cross, *supra* note 70 at para 91.
[159] *Ibid* at para 94.
[160] *Ibid.*
[161] *Ibid.*
[162] For another example, see *Bedford v Canada (AG)*, 2010 ONSC 4264 (Cross-Examination of Wendy Babcock at paras 130-136) (demonstrating the value of experiential knowledge in interpreting statistical data on charges laid under the communicating provision).

different moments). These witnesses do so both by questioning the assumption that formally trained researchers have no biases, and by extoling the value of experiential knowledge to the research process. These responses to the framing strategy at issue advance an alternative understanding of the relationship between research participants, aligned with the critiques of feminist epistemologists. This alternative view is not, however, picked up by counsel on either side of the case.

The Privileging of Primary over Secondary Research

A final framing strategy used with respect to social science evidence in *Bedford* centers on the distinction between primary or "original" research and secondary research. As with the distinction between quantitative and qualitative research, counsel and witnesses draw on the primary/secondary divide to do boundary work around what counts as "scientific", "empirical", and "expert." To the extent that these actors favour primary research conducted directly by the researcher, they engage a framing strategy that reflects and reinforces the traditional view of knowledge as produced principally by individuals through immediate observation, rather than as a social process wherein individual knowledge depends heavily on the knowledge of others. Once again here, the mainstream epistemic norm prevails over the insights of feminist epistemologists. As with the other framing strategies discussed in this subsection, however, resistance to this strategy and the norm that underlies it also arises at some points in the litigation.

The best example of how the privilege accorded to primary over secondary research is wielded in *Bedford* occurs in the cross-examination of applicant expert Ronald Weitzer. Having established that Weitzer's work is primarily "synthetic" (with the exception of a

few studies),[163] counsel for Canada pursues an extended line of questioning on this issue, asking Weitzer repeatedly to affirm that he hasn't "primarily conducted primary, original, empirical research on the sex industry per se",[164] and that no such research has been appended to his affidavit.[165] This point is then reiterated in Canada's factum at the ONSC to discount Weitzer's claim that indoor prostitution is less dangerous than street prostitution.[166]

When counsel for Ontario gets the chance to cross-examine Weitzer, she returns to this theme. Having asked him to define "synthetic",[167] she follows up:[168]

> Q: Do you consider this kind of research to be sufficient to determine the level of harm to an individual of a particular activity such as prostitution?
>
> A: It depends upon the research that I'm basing my review on […] So, yes, I think that doing a literature review […] is a solid piece of work, and there's a role for that, a need for that, in addition to, of course, the empirical studies.

When counsel presses the point, asking whether there are disadvantages to basing public policy on synthetic work,[169] Weitzer says no, and goes on to explain that the role of his work is " not necessarily policy related, it's scientific. What do we know about X, what do we have yet to know, what kinds of research in the future is recommended based on

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[163] Weitzer cross, *supra* note 27 at paras 45-47 and 56-57.
[164] *Ibid* at para 55. See also at paras 61 and 90-91.
[165] *Ibid* at para 88.
[166] Factum of Respondent, *supra* note 10, Annex Five at para 26.
[167] Weitzer cross, *supra* note 27 at para 549.
[168] *Ibid* at para 550.
[169] *Ibid* at para 551.

the lack of information that we have on that today?"[170] Weitzer thereby resists the underlying premise of the framing strategy being advanced.

The issue of primary versus secondary research arises again, in a slightly different way, in Young's cross-examination of Melchers. Here Young challenges Melchers' assertion that Lowman provides no empirical evidence in support of his conclusions, by suggesting that the citations Lowman gives to studies done by other researchers around the world ought to count as supportive empirical evidence.[171] Young questions why Melchers did not look at these studies in his assessment of Lowman's opinion (a point reiterated in the applicants' factum at the ONSC).[172] Melchers counters: "It's secondary sources"[173]—the implication being that these carry less weight than Lowman's own research—and ultimately puts the blame on Lowman for failing to provide enough detail about the studies he relies upon to facilitate such an assessment. He (Melchers) later makes his adoption of the primary/secondary hierarchy more explicit:

> You know, I'm not sure that I would consider secondary evidence to be empirical evidence in the same sense that I mean here. Lowman having read other articles and citing (--), that citation, it's a perfectly reasonable thing to do in social research. […] but I wouldn't qualify that as empirical evidence. That's secondary sources.[174]

[170] *Ibid* at para 553.
[171] Melchers cross, *supra* note 12 at para 192.
[172] Factum of Applicants, *supra* note 12 at para 199.
[173] Melchers cross, *supra* note 12 at para 192.
[174] *Ibid* at para 429.

Melchers thus draws the boundary of what counts as "empirical evidence" for a claim based on whether a study was conducted directly by the person making the claim (in this case, Lowman) or not.[175]

In another exchange on the same issue, Melchers draws on his understanding of the role of an expert in litigation to reinforce the prioritization of primary research:[176]

> Q. But he [Lowman] says he relied upon these studies and you haven't looked at them.
>
> A. No, he read those studies, that's fine. Forgive me if I'm wrong, but I don't think you become an expert simply by reading other studies, at least I've been told that by....
>
> Q. I agree.
>
> A. You become an expert by doing research and applying and honing those other skills. So it's the evidence on Dr. Lowman's research that supports his contention and his value to you as a researcher, not someone who's read a whole bunch of other studies. Is that not true?

While not entirely clear from the context, Melchers' reference to what he has "been told", and the affirmation he seeks from Young, suggest that he may be drawing on his understanding of the legal definition of an expert to support the privilege he accords to

[175] This view is reiterated in Canada's factum at the ONSC: Factum of Respondent, *supra* note 10, Annex Three at para 58.
[176] Melchers cross, *supra* note 12 at para 385.

primary research. In this instance, perceived legal norms and scientific norms mutually reinforce one another.

The framing strategy at work in the above examples banks on a view of scientific research as a highly individualistic enterprise; it thereby fails to account for feminist insights about the social nature of knowing, and the value of collectively constructed knowledge—including experiential knowledge. The latter example also highlights, once again, how Melchers' role in the litigation itself reflects a decontextualized approach to social science research and expertise. In order to make his task manageable, Melchers limits himself to assessing Lowman's own research findings, without considering how those findings are corroborated by other research that Lowman cites. This is undoubtedly a practical approach, given limited time and resources, and the fact that he is not an expert on the sex trade. The result, however, is to buttress the privilege accorded to primary research, and the underlying view of knowledge as something produced mainly by individual researchers in isolation from others, rather than as a collective enterprise.[177]

Counsel for Canada further promulgates this notion in argument, suggesting that due to the flaws in Lowman's own findings, "there is little for these other studies to affirm."[178] This accords with the approach taken in Canada's factum at the ONSC more generally, which focuses on the number and quality of the primary studies relied upon by applicant expert witnesses.[179] Other sources that might inform these experts' opinions are thereby discounted. In addressing the evidence of applicant expert Deborah Brock, Canada goes

[177] Lowman counters this view not only by contextualizing his findings within the broader research field, but by stressing that he never conducts research alone: Lowman cross, *supra* note 22 at para 1257.
[178] Factum of Respondent, *supra* note 10 at para 173.
[179] *Ibid* at Annex 5.

so far as to suggest that because her scholarship is "not empirical" and "not supported by any social science evidence of her own", "clearly her claims should be accorded little weight, and they need not be addressed."[180]

Nor is the use of this framing strategy restricted to the Crown side in *Bedford*. While bolstering the value of corroborative studies as support for Lowman's claims, Young's resistance to the primary/secondary hierarchy is ultimately weak, and highly instrumental. As seen in the passage above, Young agrees with Melchers' suggestion that expertise cannot be founded on secondary research alone. And, in cross-examining Crown-side experts, he too invokes the privilege accorded to primary over secondary research. In fact, he challenges Farley on the very same practices that he defends on behalf of Lowman, putting to her: "Beyond the primary research you've done, you would agree that you, in your affidavit and your articles, you rely a lot on secondary sources to support some of your claims."[181] Young employs a similar strategy with Poulin, suggesting that he is "primarily a literature review scholar."[182] The applicants' factum at the ONSC also emphasizes the lack of primary empirical research conducted by several Crown experts, including Raymond.[183] This last point is picked up by the application judge in her reasons, where it is noted that Raymond has not conducted any empirical research to support her claim about the "illusory" difference between indoor and outdoor prostitution.[184] The privilege accorded to primary research, and the epistemic norm that underlies it, is thereby endorsed to some extent by the court as well.

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[180] *Ibid* at Annex 5 at para 16.
[181] Farley cross, *supra* note 94 at para 120.
[182] Poulin cross, *supra* note 92 at para 76.
[183] Factum of Applicants, *supra* note 12 at paras 317, 318, 369 and 408.
[184] *Bedford* ONSC, *supra* note 1 at para 322.

In this section, I have discussed the construction of scientific principles in *Bedford* and mapped out several specific framing strategies used to attack social science research in the case. These strategies bank on epistemic norms that are deeply rooted in mainstream epistemology—norms that have been critiqued by feminist scholars for their tendency to perpetuate inequality. I have also shown how some witnesses in *Bedford* attempt to counter or complicate mainstream norms by invoking insights similar to those raised by feminist epistemologists. Ultimately, however, I argue that these insights fail to prevail in the fact-finding process. Instead, they are decontextualized and instrumentalized by counsel, who revert back to the dominant paradigm whenever it suits their needs.

5.3 THE ROLE OF THE EXPERT

Having examined the main strategies used to frame the social science research upon which expert opinion evidence is founded in *Bedford,* I turn now to framing strategies that relate to the role of the experts themselves and their opinions. This section is divided into two subsections. In the first, I consider a set of framing strategies grounded in concerns about expert bias. Underlying these strategies is a particular notion of objectivity, rooted in mainstream epistemology, which requires knowers to strive for disinterest and detachment from the things they know. As discussed in Chapter 3, the legally defined role of experts as neutral assistants to the court both reflects and reinforces this view. In the second subsection, I examine a strategy that relies upon similar epistemic norms, but focuses on the character of particular claims made by experts—in particular, whether they are statements of "fact" or "opinion".

5.3.1 Expert Bias

Given the common law's insistence on the independence, objectivity, and impartiality of experts, it is perhaps unsurprising that allegations of bias are one of the main methods used by both parties to discount expert opinion evidence in *Bedford*, as well as one of the main factors considered by the application judge in assessing the expert evidence. The focus on expert bias in *Bedford* is likely further heightened by the deeply controversial nature of prostitution, the close link between research and law and policy-making in this area, and the methodological challenges that necessitate novel approaches and that often lead to disparate findings—all of which contribute to a highly politicized field of study.[185]

Despite their differing perspectives, the parties and the application judge in *Bedford* each rely on four closely related framing strategies to discount expert evidence on grounds of bias. One pair of strategies focuses on the expert as researcher, the other on the expert's role in litigation. Because these strategies are often entangled in practice, I will describe them at the outset before canvassing specific examples from the *Bedford* case.

First are attempts to peg experts as primarily engaged in activism or advocacy work, as opposed to research. While most of the participants in *Bedford* (including counsel) acknowledge that academic researchers can legitimately be involved in at least some forms of advocacy, the predominant view advanced in the case is that this should only occur where the advocacy arises from a foundation of objective and disinterested research. This idealization of a sharp boundary between research and advocacy tracks

[185] Marlene Spanger & May-Len Skilbrei, "Exploring Sex for Sale: Methodological Concerns" in Spanger & Skilbrei, *Prostitution Research, supra* note 46 at 7-8; Crowhurst, *supra* note 46 at 48.

onto the dichotomization of science from politics, facts from values, and, ultimately, objectivity from subjectivity, in mainstream epistemology. By the same token, it discounts approaches to research that strive to address real-world problems, such as Participatory Action Research (see Chapter 3).

Closely related to accusations of activism or advocacy are suggestions that a given expert holds ideological views that predate their research, and give rise to confirmatory bias. Underlying this strategy is the notion that researchers can, and should, approach their work without any preconceived views or interests—an ideal that counsel and the courts hold firm to in *Bedford*. While many of the academic experts in the case challenge, or at least qualify this view somewhat, as participants in litigation, they are largely pressed into acknowledging that detached objectivity is the theoretical ideal, if not the practical reality. The fact-finding process in *Bedford* thereby perpetuates the devaluation of knowledge informed by personal experience and engagement.

Another pair of strategies relates to the role of the expert witness in court. First there is the allegation that an expert's participation in the case is in the nature of advocacy, and thus fails to provide neutral assistance to the court. In this case, the operational dichotomy is between advocacy and expert opinion (rather than advocacy and research). In a similar vein, it is sometimes suggested that an expert's opinion has been influenced by the demands of the litigation and is thus not independent. In *Bedford*, counsel on both sides accuse certain expert witnesses of tailoring their evidence to the litigation.[186] This

[186] Benoit cross, *supra* note 37 at para 425; Raymond cross, *supra* note 132 at para 479; Factum of Applicants, *supra* note 12 at para 317.

strategy invokes longstanding concerns about expert partisanship. Unlike the first pair of strategies, the epistemic norms at work here are directly enshrined in law, leaving even less room for the transgression of boundaries.

Having briefly outlined the key framing strategies related to bias, I now turn to the *Bedford* case to illustrate how these strategies are operationalized in practice. I begin by examining the applicant side's use of these strategies, and the Crown side's responses, before turning to the Crown's approach and elicited responses, and finally, to the approach of the application judge.

Applicant Side Allegations of Bias

The applicant side's use of framing strategies related to bias is apparent throughout the their factum at the ONSC. There it is argued that much of the expert opinion evidence tendered by the Crown—especially on the key issue of whether prostitution can be made safer indoors—is tainted by "a distinct political ideology" which views sex work as inherently violent and exploitative.[187] The factum specifically targets Crown experts Farley, Raymond, Poulin and Mary Sullivan, for bringing this predetermined standpoint to their research and opinions.[188]

These arguments are consistent with Young's approach in cross-examination, where he accuses Farley and Raymond of holding strong political opinions that predate and taint

[187] Factum of Applicants, *supra* note 12 at paras 22-23. See also Factum of Respondents ONCA, *supra* note 131 at para 79.
[188] Factum of Applicants, *ibid* at paras 277, 287, 317 and 351.

their research.[189] As noted in Chapter 2, Young goes so far as to question Raymond's views on a range of tangential issues, such as abortion, reproductive technologies and cross-dressing, in order to portray her as a political reactionary. The exchange that ensues between counsel is worth revisiting here:

> MS. SINCLAIR: …If you want to ask questions directly about moral or religious views, then I can see relevance, but to ask a number of questions about issues that have no bearing on the matters at issue in this constitutional challenge, I don't see the relevance.
>
> MR. YOUNG: I'm a little troubled with your position considering when you have my witnesses you ask their backgrounds, about their education, and about their home life and all that. How is that relevant to anything?
>
> MS. SINCLAIR: Those are not experts, those are experiential witnesses.
>
> MR. YOUNG: Experts also have experience. It's fine, I'm finished[190]
>
> [emphasis added]

With this last remark, Young challenges the conventional boundary between expert and experiential evidence in litigation. At the same time, however, he casts the experiential aspect of expertise as a dangerous source of bias, and thereby reiterates the mainstream ideal of expert objectivity via detachment.

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[189] Farley cross, *supra* note 94 at paras 89-90; Raymond cross, *supra* note 132 at paras 90 and 138.
[190] Raymond cross, *ibid* at para 138.

Beyond suggesting that Crown experts hold predetermined views, Young portrays them as driven largely by political goals, highlighting their direct involvement in activism and advocacy work.[191] To each of Farley, Raymond and Poulin, he poses the question: "Do you consider yourself a researcher or an activist?"[192] Similarly, after noting that the stated goal of Farley's organization is to abolish prostitution (according to the organization's website), Young asks her: "Is that a research statement or is that your statement as an advocate?"[193] While a statement about abolishing prostitution may seem an obvious target, at times Young's use of this framing strategy is more subtle, for example in his cross-examination of Mary Sullivan, where he remarks: "You're not just doing this as an abstract exercise, you want to see a change for women, right?"[194] With this line of questioning, Young strategically invokes a paradigm of research as fundamentally disinterested and divorced from normative goals.

In mounting these attacks, Young draws upon the evidence of Weitzer, called by the applicants specifically to critique the opinions of Farley and Raymond. In his affidavit, Weitzer opines that Farley and Raymond's conclusions are "based on an unscientific, ideological perspective" that views prostitution as inherently oppressive and violent.[195] On this basis, he describes them as not only biased, but as falling outside the realm of "mainstream" scholarship on the sex trade. As becomes clear in cross-examination, Weitzer's opinion is founded on a particularly staunch belief in the importance of a

[191] See for example Factum of Applicants, *supra* note 12 at para 278.
[192] Farley cross, *supra* note 94 at para 63; Raymond cross, *supra* note 132 at para 4; Poulin cross, *supra* note 92 at para 66.
[193] Farley cross, *ibid* at para 94.
[194] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Mary Sullivan at para 20).
[195] Weitzer affidavit, *supra* note 26 at para 4.

disinterested approach to research. When asked what makes a study "scientific",[196] he not only emphasizes the need for objectivity and neutrality on the part of the researcher, but goes so far as to note that he discourages students from choosing research topics in which they have a strong personal interest or investment in order to ward against the threat of bias.[197] According to Weitzer, a strong view or personal connection is itself sufficient to taint research[198] (though he softens this somewhat under further questioning, acknowledging that researchers are not "necessarily a blank slate politically", and drawing a distinction between those who form political views on the basis of research, and those who come to research with pre-established views).[199] In the same vein, he praises the work of researchers who "let the data speak for themselves" rather than adopting a "paradigm" at the outset.[200]

Interestingly, Young also enlists the views of Crown expert Melchers as a means to reinforce his attacks on other Crown experts (particularly Farley).[201] In a passage from cross-examination later cited in the applicants' factum at the ONSC, Young gets Melchers to affirm that where a researcher expresses strong views that predate their research, one must be "on guard".[202] Unlike Weitzer, however, Melchers recognizes bias as an inevitable aspect of research that must be consciously addressed by the researcher:

> every researcher, regardless of what their potential source of bias is, needs

[196] Weitzer cross, *supra* note 27 at para 93.
[197] *Ibid* at paras 93-96.
[198] *Ibid* at paras 95-96.
[199] *Ibid* at paras 122; 214.
[200] *Ibid* at para 513. Weitzer makes similar comments when asked to define a "mainstream scholar": *Ibid* at para 199.
[201] Melchers cross, *supra* note 12 at para 169; Factum of Applicants, *supra* note 12 at para 288.
[202] Melchers cross, *ibid.*

> to recognize those, needs to state them up front, and needs to demonstrate to the reader how those biases have been dealt with, have been managed in such a way that the results of that research can be considered valid and reliable.[203]

In other words, biases exist, but can be set aside with some effort in order to ensure objectivity. While not raising a deep challenge to the mainstream epistemic ideal of detachment, Melchers' view here differs notably from Weitzer. Young, however, mobilizes both opinions without distinction, once again underscoring how the adversarial process encourages the instrumentalization of a range of epistemic norms. Nor does Young's use of Melchers in the above example prevent him from attacking Melchers' opinion as tainted by partisanship at another point on the record. Indeed, at an earlier point in the cross-examination, Young asks Melchers a series of questions about the nature of the work he does (mostly contract work)[204] and the terms of his current contract, with the implication that he is merely a "hired gun" for the Crown.[205]

A final noteworthy example of how applicant-side actors invoke framing strategies related to bias pertains to the study by Raphael and Shapiro, discussed earlier in this Chapter. The attack in this instance is fueled in part by the authors' distinct approach to the issue of bias in research. Rather than presuming their own neutrality, Raphael and Shapiro make their political perspective explicit at the outset, stating that their research

[203] *Ibid* at para 169.
[204] *Ibid* at paras 55-57.
[205] *Ibid* at paras 64-66 and 90.

project was "designed within a framework of prostitution as a form of violence against women". They go on to warn:

> Every attempt has been made to interpret the data objectively, but the survey questions and administration were likely biased to some degree by working within this framework and by employing surveyors who had left prostitution. We do not believe that this conceptualization of prostitution detracts from the importance of the findings presented.[206]

By acknowledging the background perspective that they bring to their research, these authors take an alternative epistemological approach—one that openly recognizes research-based knowledge as politically situated, and thereby aligns with feminist epistemological views and commitments.[207] This approach, however, does not fare well in *Bedford*. Not only do Lowman, Weitzer and Young seize on Raphael and Shapiro's admission of bias to discredit the study at issue,[208] the application judge picks up on, and appears to adopt, their critiques in her assessment of the evidence.[209]

Young also banks on Raphael and Shapiro's transparency about their political framework as a means to further attack Farley. In cross-examination, Farley agrees that she has made

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[206] Raphael and Shapiro, *supra* note 151 at 132. See *Bedford v Canada (AG),* 2010 ONSC 4264 (Joint Application Record, Volume 20, Tab AC at 5616).
[207] In a sense, this accords with Melchers' admonition to state biases up front, however Raphael and Shapiro go further, rejecting the notion that such biases can be easily set aside.
[208] Lowman affidavit, *supra* note 8 at para 46; Lowman cross, *supra* note 22 at para 1524; Weitzer affidavit, *supra* note 26 at para 13; Weitzer cross, *supra* note 27 at paras 306-309; Farley cross, *supra* note 94 at para 209 onwards; Raymond cross, *supra* note 132 at para 470; Factum of Applicants, *supra* note 12 at para 218.
[209] *Bedford* ONSC, *supra* note 1 at para 323.

similar "framework" statements in her work, but rejects the notion that such a framework leads to potential bias (disagreeing with Raphael and Shapiro).[210] In the applicants' factum at the ONSC, Young emphasizes this point: "Unlike other researchers who share this framework, she [Farley] denies that it introduces true risk of bias into her research on the subject."[211] According to Young's logic here, once an expert admits that they bring a particular perspective to their work, they lose credibility whether they admit a resultant risk of bias or deny it.

Responses from the Crown Side

In response to the applicant side's allegations of bias, some Crown experts raise a challenge to the ideal of the disinterested researcher. Farley and Raymond, for instance, reject the line Young attempts to draw between researcher and activist by identifying themselves as both.[212] Farley also makes the following comment in her affidavit: [213]

> All research is permeated with values. Researchers have our opinions, especially where gross violations of human rights are studied. It is dangerously naive for any researcher to assume that he or she is capable of absolute neutrality. […] I have made my perspectives and the hypotheses that I was evaluating clear in my research.

[210] Farley cross, *supra* note 94 at paras 206-210.
[211] Factum of Applicants, *supra* note 12 at para 280.
[212] Farley cross, *supra* note 94 at para 63; Raymond cross, *supra* note 132 at para 4.
[213] Farley affidavit, *supra* note 74 at para 138.

At the same time, Farley emphasizes at several points in her affidavit and in cross-examination that her opinions about prostitution are based upon her research.[214] She also tries to portray her opinions as more qualified and evidence-based than other advocates in the field.[215] Farley thus seems to hedge her resistance to the epistemic ideal of detachment, challenging but also aligning herself with it. Raymond, on the other hand, does not deny that she held strong opinions about prostitution policy prior to conducting research. Her response to this framing strategy is simply to explain that her expert opinion has been informed not only by empirical research, but by her practical experience as director of the Coalition Against Trafficking in Women, and her "scholarly" conversations and interviews with women in many countries.[216]

While Raymond, and to some extent Farley, resist the mainstream ideal of a sharp boundary between research and advocacy, counsel for Canada reasserts it on their behalf. While acknowledging that many of the Crown's experts have taken positions against prostitution, and that they have been involved in advocacy, counsel insists that: a) their political positions and activities stem from their research, and not the other way around, unlike the applicant experts;[217] and/or b) they are professionals who are able to separate their political views and advocacy from their research.[218] Canada's defensive strategy when faced with allegations of expert bias is thus to realign the experts with the

[214] *Ibid* at paras 3, 10 and 11; Farley cross, *supra* note 94 at para 52.
[215] Farley cross, *ibid* at para 160.
[216] Raymond cross, *supra* note 132 at paras 88-90. It should be noted that Farley takes a similarly holistic view, pointing to research as one source among others that has informed her expert opinion.
[217] Factum of Respondent, *supra* note 10 at para 178 (see also at paras 182 (re Poulin) and 185 (re Sullivan)); Factum of Appellant ONCA*, supra* note 42, at paras 38 (re Sullivan) and 45 (re Poulin).
[218] Factum of Respondent, *supra* note 10 at para 181 (re Raymond) and at Annex 5 at para 25 (re Sullivan); Factum of Appellant ONCA*, supra* note 42 at para 41 (re Farley).

mainstream epistemological paradigm, even where this clashes with the experts' own views.

Furthermore, rather than challenging Weitzer on his strong beliefs about disinterested research in cross-examination, counsel for Canada gets him to double down on these views and then seizes upon them to attack Weitzer and other applicant experts who support decriminalization for failing to meet their own standard of objectivity. By emphasizing the political nature of the views held by Weitzer, Lowman and others, and highlighting moments where they appear to engage in advocacy, counsel challenges the notion that it is only the Crown experts who bring a political perspective to their work.[219] As counsel puts to Lowman in cross-examination: "Are you saying there is no moral imperative or perspective behind what you call the decriminalization model? One is moral and the other is objective, empirical."[220] Similarly, in response to the attack on the Raphael and Shapiro study, counsel points to an article cited by Weitzer and other applicant experts, in which the author, Ine Vanwesenbeeck, states that she is reviewing the literature from "a 'pro-sex work feminist frame of reference'".[221] As counsel remarks, the caveat here sounds a lot like the one given by Raphael and Shapiro, suggesting a double standard on Weitzer's part.[222]

Canada's strategy here might be read as underscoring that all researchers are politically

[219] See for example Weitzer cross, *supra* note 27 at paras 120, 122, 236, 241-269, 311-321, 323, and 546-548.
[220] Lowman cross, *supra* note 22 at para 1139.
[221] Weitzer cross, *supra* note 27 at para 311.
[222] *Ibid* at paras 312-317. Though, as Weitzer notes, the Vanwesenbeek article is a literature review, not an empirical study: *Ibid* at para 314.

situated, and thus as aligned with the approach of feminist epistemologists. For instance, in defending the Raphael and Shapiro study against Weitzer, counsel comments: "They themselves are putting their perspective out there and acknowledging it, correct?"[223] Placed within the broader context of Canada's response to allegations of expert bias, however, counsel's goal is better read as leveling the two camps of experts, rather than as challenging the underlying ideal of detachment being advanced. As Canada's own mobilization of bias-based framing strategies makes clear, the resort to alternative epistemic norms is at best partial and instrumental.

Crown Side Allegations of Bias

In addition to the examples just discussed, Canada's reliance on the same bias-related framing strategies and underlying norms as the applicants is well demonstrated in its facta at the ONSC and ONCA. The factum at the ONSC, for instance, argues that the alleged link between the impugned laws and the endangerment of prostitutes is based on applicant evidence that is "more in the nature of advocacy than expert opinion".[224] Specific allegations of bias focus mostly on Lowman, and, to some degree, Frances Shaver.[225] Melchers also accuses Lowman of bias in his affidavit evidence. [226]

At the outset of Lowman's cross-examination, counsel for Canada suggests that Lowman has long advocated for a constitutional challenge to prostitution laws, and that his

[223] *Ibid* at para 309.
[224] Factum of Respondent, *supra* note 10 at para 13.
[225] Re Lowman, see: Factum of Respondent, *supra* note 10 at paras 159-160; Factum of Appellant ONCA, *supra* note 42 at paras 23-24. Re Shaver, see: Factum of Respondent, *supra* note 10, Annex Five at para 4; Factum of Appellant ONCA, *supra* note 42, Appendix at para 49.
[226] Melchers cross, *supra* note 12 at paras 330-336.

research may have been designed with this objective in mind.[227] The notion that Lowman's opinions predate and taint his research, leading to predetermined results, arises again and again throughout his cross-examination,[228] as well as in written argument.[229] In Canada's factum at the ONSC, it is further argued that Lowman's affidavit and testimony is "in the nature of advocacy, rather than objective expert opinion", and is "replete with deliberately partisan arguments". In support of this contention, the factum points to the central role of students in drafting Lowman's affidavit, as well as Lowman's own description of his affidavit evidence as "argument".[230] All four framing strategies outlined at the beginning of this subsection are thus mobilized to attack Lowman as biased. Canada's facta make similar arguments about Shaver, portraying her scholarship as focused mainly on advocating for particular prostitution policies, and emphasizing that, contrary to what she says in her affidavit, her policy positions predate her empirical research.[231]

Responses from the Applicant Side

Lowman meets the suggestion of confirmatory bias in his research with persistent denial, repeatedly emphasizing that his opinions have always been based on his research,[232] and framing his research as beginning from hypotheses rather than entrenched political views.[233] He also banks on his professional status to deflect allegations of bias, asserting:

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[227] Lowman cross, *supra* note 22 at paras 67 and 72-77.
[228] See for example *ibid* at paras 64-66, 210, 213, 339, 344-345, 439, 994, 1000-1001 and 1681-1689.
[229] Factum of Respondent, *supra* note 10 at para 159; Factum of Appellant ONCA, *supra* note 42 at paras 23-24.
[230] Factum of Respondent, *ibid* at para 160.
[231] *Ibid* at Annex Five at para 4. See also Factum of Appellant ONCA, *supra* note 42, Appendix at para 49.
[232] See for example Lowman cross, *supra* note 22 at paras 213, 344, 1650 and 1676.
[233] *Ibid* at paras 339 and 345.

"I am a professional researcher and it is my responsibility not to let that kind of thing happen."[234] At times, Lowman does seem to recognize and defend a role for advocacy in his work, remarking, for instance: "I feel it is my responsibility as a public academic to articulate some of the implications of the research that I do. It's actually part of my job."[235] However, he insists that his advocacy proceeds only on a firm foundation of disinterested research, and thereby reinforces the boundary between the two.

Young defends Lowman against the charge of bias on a similar basis. Indeed, he makes a point of explicitly countering the Crown's depiction of Lowman and Weitzer as advocates via the re-examination of both witnesses.[236] Young also deals aggressively with Melchers' allegation of bias against Lowman in cross-examination, remarking that this is a "strong suggestion" and pressing Melchers to justify it.[237] In a move similar to counsel for Canada's treatment of Weitzer, Young ultimately flips Melchers' argument around, suggesting that he (Melchers) may be the one displaying confirmation bias in his assessment of Lowman, given the latter's reputation as an advocate for decriminalization.[238] When it comes to the issue of bias, then, the applicant side remains firmly moored to the mainstream epistemological paradigm, opting not to challenge the epistemic ideal of detachment even on an instrumental basis.

The Court on Bias

Whatever doubt remains about the dominance of mainstream epistemic norms around

[234] *Ibid* at para 1006. See also at para 246.
[235] *Ibid* at para 75.
[236] *Ibid* at para 1841; Weitzer cross, *supra* note 27 at para 605.
[237] Melchers cross, *supra* note 12 at para 335.
[238] *Ibid* at paras 348-349. Lowman also accuses Melchers of bias for failing to give a proper account of methodological principles governing qualitative research: Lowman supp affidavit, *supra* note 19 at para 19.

bias in *Bedford* is laid to rest in the application judge's reasons. At the outset, Justice Himel emphasizes the "attitude of strict independence and impartiality" required of an expert by law, and the need for courts to ward against bias and advocacy.[239] She then goes on to make the following statement with respect to the international evidence in the case:

> I was struck by the fact that many of those proffered as experts to provide international evidence to this court had entered the realm of advocacy and had given evidence in a manner that was designed to persuade rather than assist the court. For example, some experts made bold assertions without properly outlined bases for their claims and were unwilling to qualify their opinions in the face of new facts provided. While it is natural for persons immersed in a field of study to begin to take positions as a result of their research over time, where these witnesses act primarily as advocates, their opinions are of lesser value to the court.[240]

Himel J makes similar comments in her conclusion on the expert evidence regarding whether the impugned laws violate the right to security of the person. There Himel J finds that some of the expert evidence did not meet the requisite standard of admissibility.[241] Though she does not clearly specify what she is referring to, she proceeds to identify problems in Farley's evidence, remarking that, "her advocacy appears to have permeated

[239] *Bedford* ONSC, *supra* note 1 at paras 101-102. See also at para 114. Himel J also lists "[p]rior history as an advocate on the topic" as a factor relevant to assessing the weight of expert evidence generally, at para 114.
[240] *Ibid* at para 182.
[241] *Ibid* at para 352.

her opinions",[242] and noting that, as admitted by Farley herself in cross-examination, some of her views on prostitution predate her research.[243] Himel J assigns less weight to Farley's evidence on this basis.[244] Similarly, she finds that Crown experts Raymond and Poulin "were more like advocates than experts offering independent opinions to the court."[245] (She goes on to address Lowman's evidence, but focuses on the problems with Lowman's original affidavit, making no comment about Canada's allegations of bias and advocacy on Lowman's part).[246]

As in the other examples in this subsection, Himel J acknowledges that experts may legitimately form views on the basis of their research. In line with common law doctrine, however, she emphasizes the need to maintain a firm boundary between advocacy and expert opinion. From a feminist perspective, insistence on this boundary perpetuates a problematic fiction of total objectivity as both a feasible and desirable goal. In the words of Sonia Lawrence, this standard "should give any careful scholar serious pause. It reveals the strict limits of the frame in which the law seeks and receives expertise—a frame in which a whole truth is possible and the limits of the 'whole' are ascertainable."[247] As Himel J's reasons demonstrate, however, critiques of this nature ultimately fail to gain traction in the fact-finding process in *Bedford*, surrendering instead to the mainstream epistemological paradigm and the legal doctrine that reinforces it.

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[242] *Ibid* at para 353.
[243] *Ibid* at para 355.
[244] *Ibid* at para 356.
[245] *Ibid* at para 357.
[246] *Ibid* at para 358.
[247] Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in Bedford and Bill C-36" (2015) 30 Can J Law Soc 5 at 5.

This is not to suggest that Himel J's treatment of the expert evidence in *Bedford* is wrong. Indeed, it is difficult to imagine how she, as a judge in our legal system, could have approached the issue of expert bias much differently. My point is rather to show how judges in cases like *Bedford* act as part of a legal system that promotes and perpetuates certain epistemic norms—norms that do not square well with progressive epistemological commitments.

5.3.2 Fact Versus Opinion (and Related Dichotomies)

In the previous subsection, I discussed a set of framing strategies centred on allegations of bias in *Bedford*. I move on now to examine a strategy that banks on similar epistemic norms, but focuses on the character of specific claims made by experts, rather than on the expert's general political orientation and approach to research or litigation. This strategy discounts the claims of experts by framing them as mere "opinion" or "argument", rather than matters of "fact".

The invocation of a dichotomy between fact and opinion in this way seems strange given the doctrinal understanding of experts as witnesses whose role is precisely to offer opinions on matters of fact. From a doctrinal perspective, the direct observations of lay witnesses and the opinions of experts both ultimately contribute to the fact-finding process. The difference is that experts are granted the privilege of drawing inferences from direct observations to more general factual conclusions. As noted by Himel J, citing David Paciocco, this calls for a certain level of transparency on the part the expert about

their reasoning process.[248] Nevertheless, a properly elucidated expert opinion is expected to be objective, and is understood to inform the court's determinations of fact. In the actual fact-finding process in *Bedford*, however, where evidence is tendered and parsed, the term "opinion" is often used to discount a given claim by removing it from the realm of objective fact. Instead of reflecting the privilege accorded to experts, the gap between direct observations and inferred conclusions becomes a potential source of bias, and a weakness to exploit. "Opinion" thus comes to signal a subjective, value-inflected judgment rather than an impartial, reasoned assessment of the facts.

This wariness towards expert judgment often manifests in subtle ways, such as in counsel for Canada's repeated reference to Lowman's "theories".[249] But there are also more explicit attempts to attack expert opinions that extend beyond the reporting of empirical data (itself assumed to be judgment-free). For example, in cross-examining Lowman on one of the research reports he prepared for the Department of Justice, counsel for Ontario seizes on a boilerplate disclaimer that the views expressed in the report are solely those of the author to suggest that the report "contains not just empirical data, but opinions, views, correct?"[250] Counsel for Canada pursues a similar strategy in his questioning on the same report, pointing to a passage where Lowman expresses the need to go

> …beyond the confines of a purely instrumental and empiricist conception of what it means to 'evaluate' the new street prostitution law to a

[248] *Bedford* ONSC, *supra* note 1 at para 102.
[249] Factum of Respondent, *supra* note 10 at paras 150 and 169; Lowman cross, *supra* note 22 at paras 345, 786, 816 and 1128.
[250] Lowman cross, *ibid* at para 1700.

> consideration of the way that moral and political considerations have aligned to create a constellation of prostitution laws which, when examined historically and logically, appear to be contradictory and self-defeating.[251]

Counsel then puts to Lowman:

> Q. So in order to assess the prostitution laws, according to this, you had to go beyond fact-based empirical assumptions. Is that correct? You had to enter the realm of moral and political considerations.[252]
>
> A. Well, but we're still dealing with observation, we're still dealing with empirical tasks, which is looking at the nature of the law, the purposes of the law, the purposes stated in the laws, the legislative debates talking about what law is supposed to achieve.[253]

The concern about value judgments polluting expert opinion is apparent here. Lowman's response attempts to diffuse this concern by framing his analysis as still within the realm of the empirical.

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[251] *Ibid* at para 244, citing Department of Justice, *Street Prostitution: Assessing the Impact of the Law: Vancouver* by John Lowman and Laura Fraser (Ottawa: Communications and Public Affairs, Dept. of Justice Canada, 1989).
[252] Lowman cross, *supra* note 22 at para 248.
[253] *Ibid* at para 248.

As the above example demonstrates, attacks on expert opinion evidence in *Bedford* bank not just on concerns about the application of judgment in the inference-drawing process, but about what kind of information actually informs a given opinion in the first place. Opinions based on experience, informal study, secondary literature, reasoned analysis, and other sources are thus discounted in favour of opinions based on empirical research, which are no longer labeled "opinions" at all but rather "empirically-based" or "fact-based" assertions. The mainstream privileging of quantitative over qualitative research also comes into play here, further narrowing what counts as "empirical" or "factual".

Counsel on both sides in *Bedford* repeatedly draw upon the resultant dichotomy between fact and opinion as a framing strategy to discount various claims made by expert witnesses. For instance, in asking Farley about her claim that women and children can be better controlled in indoor prostitution than on the street, Young asserts: "that's a statement of opinion. That doesn't come from any study, correct?"[254] Young repeats the question a few lines later with respect to her claim that prostitution damages women's sexuality.[255] Nor does he reserve this strategy for claims that seem politically inflected or controversial. In his written cross-examination of Dutch social historian Lotte Constance van de Pol, he banks on the same dichotomy to attack what seem like non-contentious statements about the physical vulnerability of people engaged in the sale of sex (due to services being performed in private), and the potential forms of violence they face,

[254] Farley cross, *supra* note 94 at para 309. This exchange is later recited in written argument: Factum of Applicants, *supra* note 12 at para 306.
[255] Farley cross, *ibid* at para 315.

repeatedly asking: "Is this a statement of opinion or an empirically-based statement?"[256] Counsel for Canada uses a similar strategy to discount the evidence of several applicant experts. For instance, when questioning Weitzer about his claim that the internet insulates sex workers from violence, counsel remarks: "But this is maybe your opinion, then, but this isn't based on any objective or empirical study of the subject. Am I correct?"[257] Further examples abound throughout the record.[258]

This strategy is also mobilized in written argument. The applicants' factum at the ONCA, for instance, argues that the conclusion of the Crown experts on indoor sex work "is primarily an expression of opinion and not one based upon their research."[259] At the Supreme Court of Canada, the applicants attack Canada's claim that prostitution is inherently dangerous in part by noting that this is "not an evidence-based proposition but rather a mere statement of opinion."[260] Canada makes similar arguments about many of the claims advanced by Lowman and other applicant experts, though not couched in terms of a dichotomy between fact and opinion. Instead, counsel for Canada simply argues that there is "no evidence" for many of these claims. [261] Of course, the use of this framing strategy does not stop either party from advancing expert claims that lack, or are simply not amenable to, empirical support, where it suits their interest.

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[256] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Lotte Constance van de Pol at paras 8-9).
[257] Weitzer cross, *supra* note 27 at para 474.
[258] See for example: Poulin cross, *supra* note 92 at para 494; Weitzer cross, *supra* note 27 at para 474; *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Alexis Kennedy at para 102); *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Valerie Scott at paras 397-398); *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Elliot Leyton at paras 65-89).
[259] Factum of Respondents ONCA, *supra* note 131 at para 73.
[260] *Canada v Bedford (AG)*, 2013 SCC 72 (Factum of the Respondents/Appellants on Cross Appeal at para 7).
[261] Factum of Respondent, *supra* note 10 at paras 170 and 236.

The response of various expert witnesses to this framing strategy reveals their own internalization of the dichotomy at issue. For instance, when Weitzer asserts, contrary to Farley and Raymond, that there is not actually a lot of overlap between sectors of prostitution, counsel for Ontario remarks: "That's your opinion." To which Weitzer responds: "That's not my opinion. It's based upon the research that I've reviewed."[262] Similarly, when asked to reaffirm her opinion that the law exacerbates women's vulnerability, applicant expert Cecilia Benoit responds that her research supports this claim, adding: "It's not my opinion. My opinion is something quite different than my research."[263] Underlying these retorts is the assumption that "opinion" connotes a kind of epistemic devaluation, and that a conclusion based on research amounts to something different and better.

Thus far, I have canvased examples in which the claims made by experts are disparagingly framed as mere "opinion" because they lack empirical support. Underlying this strategy is a concern that purportedly factual claims are actually grounded in, or at least influenced by, subjective or political factors. But there are also instances where expert claims are attacked as expressly moral, political, or normative on their face. The distinction between fact and opinion at this point gives way to the dichotomies that have always underlain it: science versus morality and politics; research versus advocacy.

The treatment of Farley and Raymond is once again illustrative. For instance, in

[262] Weitzer cross, *supra* note 27 at para 593.
[263] Benoit cross, *supra* note 37 at paras 324-325.

addressing the claim that prostitution is inherently dehumanizing, Young puts to Farley: "Would you also agree that this statement is really a value or morally-charged statement? It's not a scientific statement, is it?"[264] In his affidavit Weitzer similarly asserts that the terminology used by Farley and Raymond to describe the world of prostitution—e.g. "paid rape", "prostituted women", "survivors", "predators", "sex offenders", and "batterers"—is "emotionally laden and lacking in scientific objectivity."[265]

On the other side of the litigation, counsel for Canada spars with Weitzer over how to characterize the views he expresses in an article about prostitution policy. When counsel describes Weitzer as "advocating" for a particular policy in the article, Weitzer responds defensively, insisting that he is not advocating but drawing reasoned conclusions. As he puts it, "it's not my political or ideological view here, it's objective tests to current public policy".[266] It is not until later in the cross-examination, when counsel presents a passage from another article in which Weitzer himself says that he has advocated for the model in question, that he acquiesces to this characterization.[267] Weitzer's defensive posture here demonstrates his commitment to the prevailing norm separating research from the realm of the political.

The framing strategies discussed in this section derive their power from mainstream epistemology's insistence on a strict separation between what is objective (facts,

[264] Farley cross, *supra* note 94 at para 696. The question is repeated in different words at para 703.
[265] Weitzer affidavit, *supra* note 26 at para 15.
[266] Weitzer cross, *supra* note 27 at para 285.
[267] *Ibid* at para 323.

research, empirical evidence, science, and expert opinion in the legal sense) and what is subjective and normative (values, politics, advocacy, and opinion in the colloquial sense). Boundary work between these categories both obfuscates the positionality of all knowers, and discounts the value of knowledge that is consciously grounded in firsthand experience. While there is some push back against the operative paradigm from the academic experts in *Bedford,* the litigation context often compels them to align themselves with it. Moreover, unlike some of the examples in the first section of the chapter, where counsel's mobilization of epistemic norms and counter-norms shifted strategically, the set of dichotomies at work in this section are consistently enforced by counsel and the courts in *Bedford.*

5.4 CONCLUSION

In this chapter, I have mapped out some of the key strategies and underlying epistemic norms used to frame expert opinion evidence in the *Bedford* case. My analysis gives rise to two overall observations. First, mainstream epistemic norms tend to prevail over feminist epistemological insights and associated commitments in the treatment of expert evidence in *Bedford*. In particular, the strategies used to frame this type of evidence reflect and reinforce an epistemic ideal of detachment, expressed via a range of hierarchical dichotomies, all of which are rooted in the mainstream objective/subjective divide. Second the fact-finding process encourages the decontextualization and instrumentalization of epistemic norms of all kinds. As a result, alternative epistemological approaches—including those aligned with feminist insights—become mere tools of advocacy, unmoored from their sociopolitical roots. Once again, this is not a critique of the actions of counsel and the courts in *Bedford,* most of which come as no

surprise in the context of adversarial litigation. Rather, it is a critique of strategic *Charter* litigation itself as a process that encourages the treatment of evidence and knowledge in particular ways. The combination of mainstream boundary work and instrumentalization observed in this chapter reappears in the treatment of common sense in *Bedford*, discussed in the next chapter.

Chapter 6: The Treatment of Common Sense in *Bedford*

6.1 INTRODUCTION

Thus far in Part II, I have examined the treatment of two conventional categories of proof in litigation that are often conceived as dichotomous opposites, but that in fact overlap significantly: experiential evidence and expert opinion evidence. By identifying the most common strategies used to frame these types of evidence, I have analyzed the epistemic norms at work in *Bedford v Canada (AG)*[1] as they relate to the progressive epistemological commitments entailed by progressive campaigns for social justice. To round out my analysis, I turn now to one last category of proof, of a somewhat different nature—common sense.

As discussed in Chapter 3, common sense plays a unique role in legal fact-finding, representing both a refutation of the need for evidence and a particular mode of proof whose role is to fill evidentiary gaps and to support inferential reasoning. From an epistemological perspective, common sense is often conceived as a form of lay knowledge that sits in opposition to expert opinion. In this way it is similar to experiential evidence and knowledge. While the latter are particular to those who offer it, however, appeals to common sense assume an abstracted universality of experience, raising questions about the imagined community for whom the relevant experience is shared.[2] As

[1] *Bedford v. Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in 2013 SCC 72 [*Bedford* SCC].
[2] Isabel Crowhurst puts it this way: "In essence, a matter of common sense is expected to make sense no matter where or when its 'sense' actually originated". "Troubling Unknowns and Certainties in Prostitution Policy Claims-Making" in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (London; Routledge, 2017) at 52.

a rhetorical tool, common sense is often invoked to shore up socially privileged worldviews, and has thus been the subject of much critique and general wariness on the part of feminist scholars.[3]

In Part I of this dissertation, I posited that the shift in focus from law to facts and evidence in strategic *Charter* litigation holds the potential to contest such worldviews, by challenging the common sense assumptions engrained in legal policy, doctrine, and reasoning. As discussed in Chapter 3, experiential knowledge has an especially important role to play in this endeavour from a feminist perspective (though it should not be taken simply as an alternate source of objective truth). On the other hand, as Patricia Cochran argues, appeals to common sense may also serve to advance previously subjugated forms of experiential knowledge.[4]

How do these conflicting aspects of common sense play out in *Bedford*, and with what consequences for epistemological justice? In this chapter, I examine how participants in *Bedford* both invoke and challenge common sense as a means to respond to this question. The scope of my inquiry is broad, including both explicit references to "common sense", and implicit appeals to common sense via language such as "assumptions", "beliefs", "notions", "myths", and "stereotypes". My analysis suggests that the treatment of common sense in *Bedford* generally rests on a presumed dichotomy between common sense and evidence—a dichotomy that closely parallels the one between law and fact, as well as the one, discussed in Chapter 5, between opinion and fact. Like the other

[3] Patricia Cochran, *"Common Sense" and Legal Judgment: Community Knowledge, Political Power and Rhetorical Practice* (PhD Thesis, University of British Columbia, 2013) [unpublished] at 59. See Chapter 3 at 3.4.2.
[4] *Ibid* at 182-187.

dichotomies discussed in this dissertation, the dichotomy between common sense and evidence serves as an important conceptual device used to organize knowledge in strategic *Charter* litigation. As I demonstrate, however, its terms are both vague and ambiguous, creating rhetorical opportunities for participants on both sides of the case in *Bedford* to do strategic boundary work in different ways. Experiential knowledge, in particular, is associated with different sides of the dichotomy at different moments on the record.

As a result—and despite longstanding feminist concern about appeals to common sense serving to shore up privileged social perspectives—common sense in the fact-finding process in *Bedford* carries no particular political-epistemological valence. Rather, invocations and critiques of common sense are each used instrumentally by both sides of the litigation to advance a range of differing and often opposing ideas. In some cases, the mobilization of evidence—experiential and expert—*does* help the applicants to challenge problematic forms of common sense, in service of broader social justice goals. In other instances, however, appeals to evidence work against the experiential knowledge of the applicants and their peers. By the same token, appeals to common sense as a check on evidence work to both bolster and discount experiential knowledge.

While diverse in their purposes and effects, what these rhetorical moves do share is their reliance upon and reinforcement of the dichotomy between common sense and evidence itself. On the surface, this dichotomy may seem to accord with feminist efforts to challenge common sense via experiential or other evidence. Recall, however, that critical

feminists have largely resisted what Code calls the "tyranny of 'experientialism'"[5] in favour of a more nuanced view that understands the construction of all knowledge—including expert and experiential evidence—as a deeply social and contextual process, inevitably shaped by background assumptions and normative values.[6] This understanding is reflected in the work of several feminist legal scholars, whose research, discussed in Chapter 3, has raised a challenge to the legally engrained dichotomy between expert evidence and common sense in particular.[7] In this way, I argue, the boundary work between evidence and common sense in *Bedford* works against feminist epistemological insights.

The Chapter proceeds in four sections. In the first, I discuss a framing strategy which draws on feminist critiques of common sense, and which I refer to as "partializing" common sense. In the second, I look at strategies that pit evidence against common sense, with privilege granted to the former. In the third, I consider strategies that reverse this hierarchy, banking on the intuitive appeal of common sense to cast doubt various pieces of evidence. Finally, I demonstrate the inextricability of evidence and common sense on the record in *Bedford*, and point to moments where this is explicitly, albeit fleetingly, recognized.

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[5] Lorraine Code, *Rhetorical Spaces: Essays on Gendered Locations* (New York: Routledge, 1995) at 64.
[6] See Chapter 3 at 3.3.1. Implied in this view is the understanding that particular experiential evidence and general common sense are co-constructed.
[7] Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003); Emma Cunliffe, *Murder, Medicine and Motherhood* (Oxford: Hart Publishing, 2011); Kimberley White-Mair, "Experts and Ordinary Men: Locating R. v. Lavallée, Battered Woman Syndrome, and the 'New' Psychiatric Expertise on Women within Canadian Legal History" (2000) 12:2 Can J Women Law 406. See Chapter 3 at 3.4.3, under *Deconstructing the Dichotomy*.

6.2 PARTIALIZING COMMON SENSE: COMMON TO WHOM?

As discussed in Chapter 3, the invocation of common sense relies on an appeal to shared experience, with both community-building and exclusionary effects. Because the power of common sense lies in its claim to universality, an important strategy used to discount appeals to common sense is to reframe the "common sense" at issue as in fact particular to a specific actor or group, and thus not really "common" at all. To the extent that this move situates and contextualizes knowledge, it aligns strongly with the ethos of feminist epistemology. Indeed, feminist and other critical scholars have often looked to experiential knowledge in order to partialize common sense in this way. They have thereby exposed the exclusionary effects of appeals to common sense that in fact only reflect and perpetuate socially privileged worldviews.[8]

Given its critical connotations, one might expect to see this strategy being used, in the context of strategic *Charter* litigation, by those seeking progressive social change through the *Charter*, as a means to challenge status quo assumptions engrained in law and legal reasoning. And indeed, examples of this can be found on the record in *Bedford.* For instance, in the course of cross-examining applicant sex worker Amy Lebovitch, counsel for Canada asks her about the safety measures that she takes when working from home or at other in-call locations.[9] Lebovitch proceeds to explain how she screens client phone calls, relies on building surveillance at her condo, records the names and numbers of

[8] Dana Phillips, "Let's Talk about Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse" (2016) 54 Osgoode Hall L J 1133 at 1149 and 1152; Joan W Scott, "Experience" in Judith Butler and Joan W Scott, eds, *Feminists Theorize the Political* (New York: Routledge, 1992) at 30. See Chapter 3 at 3.2.1 and 3.3.1.
[9] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Amy Lebovitch at para 136 onwards) [Lebovitch cross].

clients, and makes a safe call to her partner or a friend once a client arrives. Counsel then continues:

> Q. But after that call is made, you're alone with the customer.
>
> A. I am.
>
> Q. There is a level of risk in terms of a potential attack that could happen.
>
> A. Yes, there's a potential risk of me getting hit by a car, right. There's a potential risk of me inviting a relationship date from a bar over to my house and being raped. That's probably bigger than sex work, I would imagine, from my eyes, from where I'm sitting and from what - the safety measures I take.[10]

Counsel in this exchange relies upon a common sense assumption about the risky nature of sex work regardless of where or how it is conducted (the implication being that decriminalizing in-call work would not necessarily enhance safety). In response, Lebovitch invokes her own situated, experience-based perspective to challenge the universality of the assumption that sex work is inherently risky and violent in a way that other everyday activities are not. Lebovitch's experiential knowledge thus serves to partialize counsel's common sense argument.

Another example arises where counsel for Canada questions applicant expert John Lowman about a survey of people in the sex trade conducted as part of his 1995 Violence

[10] *Ibid* at para 154.

Study.[11] Having asked Lowman a series of questions about the precise definitions of and distinctions between various terms used in the survey, counsel suggests that the respondents may not have been clear on the exact meaning of the terms at issue, or shared the same understanding of them:

> Q. I just stand back and think we - and maybe I'm thick but we just spent the last 20 minutes debating the term and it wasn't crystal clear to me. Now, it's true, I'm not in the business, but I would think there would be some level of uncertainty as to what exactly we're talking about.
> A. And I suggest that basically that is a reflection of your lack of understanding of the street argot, the subculture […].[12]

With this response, Lowman emphasizes the limits of counsel's perspective, pointing to an alternate (albeit partial) common sense rooted in the day-to-day experience of people in the sex trade.

The strategy of partializing common sense, however, is not always mobilized in *Bedford* in a way that invokes the experiential knowledge of directly affected people to challenge hegemonic social norms. An example from the Ontario Court of Appeal (ONCA) majority decision makes this clear. In the relevant passage, the majority is reviewing the issue of whether the communicating provision, which criminalizes public communication

[11] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of John Lowman at para 502 onwards) [Lowman cross], referring to: Department of Justice, *Violence Against Persons Who Prostitute: The Experience in British Columbia* by John Lowman and Laura Fraser (Ottawa: 1995).
[12] *Ibid* at para 533.

for the purposes of prostitution, is grossly disproportionate, and thus contrary to the principles of fundamental justice under s.7 of the *Charter*. In coming to the conclusion that the law is grossly disproportionate, the application judge, Justice Himel, relied on her finding that the provision "can increase the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction."[13] She also referred to screening as "an essential tool to enhance safety".[14] The ONCA majority, however, casts doubt on these findings:

> …[The application judge] failed to point to evidence in the record that would support her finding that face-to-face communication with a prospective customer is essential to enhancing prostitutes' safety. On our reading of the record, such a finding was not available.
>
> There was anecdotal evidence from prostitutes that they often felt rushed in their negotiations with potential customers, and would quickly get into the customers' cars to avoid detection by the police. To the extent that the application judge relied on that evidence, informed by her own common sense, to find that screening customers is essential to enhancing the safety of street prostitutes, we think her conclusion reaches well beyond the limits of the evidence.[15] [emphasis added]

In the above passage, the ONCA majority challenges the universality of the common sense that Himel J purportedly relies on by reframing it as merely "her own". Rather than

[13] *Bedford* ONSC, *supra* note 1 at para 421.
[14] *Ibid* at para 432.
[15] *Bedford v Canada (AG)* 2012 ONCA 186 at para 311.

invoking experiential knowledge as a means to challenge common sense, though, the court here lumps experiential (i.e. "anecdotal") evidence and common sense together and then uses the partialization strategy to attack both. The strategy is thereby detached from its feminist roots and wielded instrumentally against the experiential knowledge of people in the sex trade. It is worth emphasizing that the relationship between common sense and experiential knowledge shifts significantly in this last vignette. In the first example given above (citing Lebovitch), experiential knowledge is cast as raising a challenge to mainstream common sense. In the latter passage, however, experiential knowledge is itself associated with common sense, and thereby excluded from the realm of evidence proper. Whatever progressive political-epistemological valence the partialization strategy has outside the litigation context is lost in the process.

6.3 PRIVILEGING EVIDENCE OVER COMMON SENSE

To the extent that the partialization of common sense does rely upon experiential evidence to cast doubt on purportedly universals, it can be read as a special case of a more general set of strategies in which evidence is invoked as a means to challenge common sense. In this section, I discuss two such strategies: 1) the mobilization of evidence to contest common sense assumptions; and 2) the framing of common sense claims as unsubstantiated by evidence. Generally speaking, these strategies bank upon the privileging of evidence over common sense, where "evidence" refers either to evidence tendered in litigation, or to information—most often empirical research—perceived as offering legitimate grounds for belief in a given proposition. They thereby reflect the

increasing importance accorded both to the tendering of evidence generally, and to social science research specifically, in strategic *Charter* challenges to legislation.[16]

While feminist epistemological commitments are most clearly linked to the mobilization of experiential evidence and knowledge, the invocation of other forms of evidence—particularly expert social science evidence—in litigation is often also perceived as holding the potential to disrupt conservative common sense assumptions embedded in law and legal reasoning.[17] Once again, then, one might expect to see this set of strategies being mobilized by the applicants as a means to challenge the laws under scrutiny in *Bedford*. As I show, however, the invocation of expert evidence to challenge common sense is not attached to any particular position with respect to the impugned laws in *Bedford*. Furthermore, to the extent that this set of strategies reinforces the perceived boundary between common sense and expert evidence, it actually works against critical feminist insights.

6.3.1 Evidence Contesting Common Sense

The progressive potential of evidence as a challenge to common sense in *Bedford* is most apparent where participants in the litigation draw on expert evidence—often grounded in social science research—to actively debunk what they deem to be erroneous common sense assumptions. Often, the claims being challenged or debunked in this way are framed not only as incorrect, but as harmful stereotypes. The turn to evidence is thus

[16] See Chapter 1 at 1.2.2.
[17] See for example: Mary Eberts, "New Facts for Old: Observations on the Judicial Process" in Richard Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) at 473-474, discussing the case of *R v Lavallee,* [1990] 1 SCR 852; Cochran, *supra* note 3 at 148, discussing the case of *R v DD*, 2000 SCC 43. See also Chapter 1 at 1.2.2.

presented as an equality-promoting move. This is most readily observed in the discourse of actors on the applicant side in *Bedford*.

Applicant expert Frances Shaver, for instance, in cross-examination, repeatedly expresses her desire to dispel various stereotypes about sex workers and sex work through her research. This point is captured in the following passage:

> I think one of the most important parts of the work I have done right since the very early days is to show the diversity in the sex trade […] I think that that's really essential for undermining this homogeneous stereotype about they're victims and they are all exploited and they're (--) which seems to pervade a lot of that literature, perhaps less now than before, but has been pervasive, and is certainly pervasive in the minds of the public.[18]

Later in the cross-examination, Shaver ties this concern specifically to the policymaking context: "…we do know that policymakers and others are making decisions based on some of the stereotypes of these particular individuals, and so our concern is that there be good research and good evidence based decisions made on what's happening."[19] Shaver thus highlights the practical importance of evidence, conceived as social science research, as a check on common sense stereotypes in public decision-making.

[18] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Frances Shaver at para 62). See also at para 206.
[19] *Ibid* at para 118.

The following comment from applicant expert Deborah Brock further illustrates how the use of evidence as a check on common sense is tied to concerns about social equality:

> Many of the problems in securing a protective working environment for sex-trade workers relates to fundamental misconceptions about the nature of sex work. In a study I conducted a few years back, I find that many women enter the sex-trade not because of desperation or degradation, but because they see it as a legitimate means for them to earn a living. When we treat prostitution as a social problem, relying uncritically on knowledge derived from 'authoritative' sources like the police, the courts, and the media, we unwittingly participate in the silencing, marginalization, and control of prostitutes.[20]

In their factum at the ONSC, the applicants reiterate the stereotype-checking power of the evidence on offer in *Bedford*. Brock's research, for instance, is framed as debunking the "all-encompassing view of the 'prostitute-as-victim'"[21], and "the mainstream assumption that prostitution is immoral and harmful."[22] Sex worker and advocate Kara Gillies' study is cited as challenging the assumed prevalence of pimping, which, according to Gillies, "really holds a place in people's mythologies and perceptions about the sex trade."[23] The factum also refers to the legislative report of the Prostitution Law Review Committee in New Zealand, itself informed by multiple social science research projects, as

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[20] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Deborah Brock at para 5).
[21] *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of the Applicants at para 148) [Factum of Applicants].
[22] *Ibid* at para 149.
[23] *Ibid* at para 77, citing *Bound By Law: How Canada's Protectionist Public Policies in the Areas of Both Rape and Prostitution Limit Women's Choices, Agency and Activities*, 2007. *Bedford v Canada (AG),* 2010 ONSC 4264 (Application Record, Vol. 6, Tab 24(A), p 1358).

"documenting and refuting many industry stereotypes", including the notion that most prostitutes are coerced into the industry, and the imagined link between decriminalization and youth prostitution.[24]

The effectiveness of the applicant side's rhetorical appeal to expert evidence as a means to challenge mainstream views about the sex trade is apparent in the following passage from Himel J's reasons on the application:

> Many of the applicants' experts gave opinions on stereotypes and misperceptions about the sex trade in Canada. For example, some experts challenged the notion of the prostitute as a victim, maintaining that some turn to prostitution not out of desperation, but because they see it as a better option than other opportunities, such as unskilled labour. As well, evidence was led that homeless, drug-addicted prostitutes represent a small percentage of prostitutes, also known as "survival sex workers." Some experts opined that pimping is far less prevalent in Canada than some popular literature and media depictions would hold, and that the "mythology of the pimp" is rooted in racial and sexual bias.[25]

It is important to note, however, this strategy is not the exclusive preserve of the applicants in *Bedford*. Take for instance the evidence of key Crown expert Melissa Farley. In her affidavit, Farley points to research to debunk various claims that she frames

[24] Factum of Applicants, *supra* note 21 at paras 357-361, referring to New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, (May 2008).
[25] *Bedford* ONSC, *supra* note 1 at para 120.

as "misconceptions" or "myths"—for instance, the notion that drug addiction tends to precede prostitution.[26] Similarly, she frames the notion that sex work involves only physical violence as "an erroneous assumption", pointing to her own affidavit evidence—in which she describes various other kinds of violence (e.g. emotional violence)—as evidence to the contrary.[27] Farley, too, then, mobilizes evidence as a means to challenge what she views as problematic common sense assumptions.

Nor do the applicants demonstrate any kind of epistemic fidelity to the privileging of evidence over common sense throughout the course of the litigation. To the contrary, as I discuss further below and in the next chapter, they draw actively on a different kind of common sense to challenge the Crown's evidence, and ultimately to lay the foundation for their own case.

6.3.2 Common Sense as Unsubstantiated by Evidence

Another way that actors in *Bedford* pit evidence against common sense is by framing unfavourable claims advanced by the opposing side as "theoretical", "speculative", and ultimately, not grounded in evidence. The key accusation in this case is not that the claim at issue is wrong, but that it is unsubstantiated.

In some instances, this strategy is mobilized by applicant-side actors to challenge assumptions about the sex trade that do not accord with the experiential knowledge of the applicants and their peers. In her affidavit, for instance, Crown expert Melissa Farley

[26] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Melissa Farley at para 60). See also at para 75, where Farley challenges the assumption that most clients use condoms.
[27] *Ibid* at para 150.

opines that most women in prostitution have pimps whose behaviour towards them is akin to torture or domestic violence.[28] Under cross-examination, applicant expert Ronald Weitzer frames Farley's depiction of pimping as a "stereotype" that is "unsubstantiated given the lack of data".[29] Another example can be seen in the evidence of Crown expert Janice Raymond. In her affidavit, Raymond compares figures on sex trafficking in Sweden—which criminalizes the purchase but not the sale of sex—to figures from Finland and Denmark. According to the evidence she cites, the rate of sex trafficking in the latter two countries is much higher, despite their populations being smaller.[30] Raymond uses this evidence to support her claim that the Swedish model of regulating prostitution is most effective at reducing sex trafficking.[31] In cross-examination, however, Young notes that the source of Raymond's data on Finland—the Finish Criminal Intelligence Division—actually states the number of women from different countries that are *prostituted* in Finland every year, not the number that are *trafficked*. Young proceeds to challenge Raymond's assumption that all of these women must be victims of sex trafficking.[32]

In many other instances, however, it is the Crown that frames claims made by the applicants (and accepted by the court) as unsubstantiated, in a way that discounts the evidence of experiential witnesses. The use of this strategy is especially apparent in

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[28] *Ibid* at para 13.
[29] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Ronald Weitzer at para 171) [Weitzer cross].
[30] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Janice Raymond at para 72) [Raymond affidavit].
[31] *Ibid* at paras 71-72.
[32] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Janice Raymond at paras 380-381) [Raymond cross]. See also at para 73-80 for a similar example. Poulin makes a similar inference that is also challenged by Young: see Factum of Applicants, *supra* note 21 at para 322.

Canada's written arguments in *Bedford*. In its factum at the SCC, for instance, Canada argues: "While the OCA found it a matter of common sense that allowing off-street prostitution to take place in bawdy-houses will make it safer for women, the evidence did not support that conclusion."[33] The factum goes on to describe the evidence on this point as "inconclusive".[34] The same rhetorical strategy is repeated a few paragraphs later:

> …while the OCA was prepared to accept, on the basis of common sense, logic and anecdote, that many street prostitutes would avail themselves of the opportunity to work indoors if it were legal, this finding was not supported by the evidence.[35]

The framing of "anecdote" as something other than "evidence" in this example is telling, once again shifting experiential evidence away from the "evidence" side of the common sense/evidence dichotomy. This framing calls to mind Crown expert Ronald-Frans Melchers' assertions that qualitative research interviews do not provide any actual evidence of the dangers posed by the prostitution laws (see Chapter 5 at 5.2.2 under *the Privileging of Quantitative over Qualitative Research*). As in that case, boundary work is used here to discount the weight of experiential evidence and knowledge in *Bedford*.[36]

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[33] *Bedford* SCC, *supra* note 1 (Factum of the Appellant AG Canada at para 74).
[34] *Ibid* at para 75.
[35] *Ibid* at para 78.
[36] The effectiveness of this strategy seems to depend on equivocation between the two meanings of evidence described at the outset of this section: anecdotes are distinguished from empirical evidence, which is then referred to simply as "evidence", suggesting that there is no support on the record for the proposition being advanced—despite the fact that the "anecdote" at issue is a form of tendered evidence on the record.

The inevitable role of background assumptions and inferential reasoning in social science research and expert opinion provides further rhetorical opportunities for Canada to challenge applicant-side claims as unsubstantiated. In this context, the framing strategy at issue closely resembles the boundary work between fact and opinion discussed in Chapter 5 (see section 5.3.2). Take for instance, the moment on the record where counsel for Canada challenges applicant expert Ronald Weitzer's claim that advertising on the internet enhances the safety of sex workers, by helping them to better screen clients. As noted in Chapter 5, counsel for Canada attacks this claim by framing it as merely Weitzer's opinion, unsupported by empirical evidence (the opinion/fact dichotomy).[37] Just prior to that passage, counsel for Canada asks Weitzer: "Where did you get that information from? Is that all logic or is it based on a particular scientific study?"[38] The use of the term "logic" here can be understood as referring to a kind of common sense inference, which is discounted as epistemically inferior to empirical evidence. Counsel for Canada mobilizes a similar strategy again later in the cross-examination. In this instance, Weitzer is defending a conclusion reached by other researchers that brothels are the safest environment for prostitution by arguing that brothel owners have a vested interest in keeping their workers safe and healthy. Counsel for Canada attacks this point as "highly speculative",[39] once again describing it pejoratively as "a logical inference, not based on any evidence."[40] In response, Weitzer describes his opinion as "based on the logic in terms of owners wanting to keep their workers safe, and the evidence out there

[37] See Chapter 5, section 5.3.2 at note 257.
[38] Weitzer cross, *supra* note 29 at para 473.
[39] *Ibid* at para 418.
[40] *Ibid* at para 419.

regarding legal brothel systems."[41] He thus points to common sense as working alongside the available evidence to inform his expert opinion.

In Lowman's cross-examination, too, counsel for Canada repeatedly invokes the language of "speculation" to cast doubt on expert claims that are somehow informed by common sense and logic.[42] This framing builds on Melchers' critical assessment of Lowman's opinion. Regarding Lowman's research findings about homicide rates against prostitutes in Canada, for instance, Melchers comments: "The level of assumptions in what he does go beyond anything that I can reasonably assess. It comes down to a matter of belief and that's really all I can point out."[43] The framing of Weitzer and Lowman's claims as unsubstantiated in these examples is a reflection of strategic boundary work, premised on the detachment of social science research and expert opinion from the common sense assumptions that inevitably inform them.

A final example helps to illustrate the shifting use of this strategy by actors on both sides of the litigation in *Bedford*. The exchange, in this case, is between Young and Melchers. In the course of a discussion about the homicide rate against prostitutes in Canada, Melchers suggests that the reported homicide rate of 50 for the most recent period (1995-1999) is overinflated by the Pickton murders.[44] Young counters that the rate may in fact

[41] *Ibid*.
[42] See for example Lowman cross, *supra* note 11 at paras 206, 825, 839, 1371, and 1377.
[43] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Ronald-Frans Melchers at para 392) [Melchers cross].
[44] *Ibid* at para 232.

be underinflated due to a high number of ongoing investigations of missing women.[45] Melchers, however, refuses to draw the inference required to make this argument:

> Q. That's not a matter of logic. Eighty missing women, surely some of them were killed.
>
> A. But we don't know how many, we just don't know.
>
> Q. You need evidence of that before you would admit that some of them would be killed.
>
> A. Of course I do.
>
> Q. You don't find it to be implausible as a hypothesis that 80 women would just go missing.
>
> A. It's not a question of plausibility or not plausibility. I'm not asked to access the plausibility of things, I'm asking to assess the evidence of things. That's been my role here.
>
> Q. But I told you the evidence is that there are 80 missing women. You haven't contested that.
>
> […]
>
> Q. …You can't use common sense to conclude this or you just don't want to answer it?[46]

In this passage, Melchers denies a place for common sense reasoning in his own expert opinion, restricting himself strictly to the known data, while Young suggests that the

[45] *Ibid* at para 235.
[46] *Ibid* at paras 239-246.

application of common sense is necessary to draw appropriate inferences. However, in the applicants' factum at the ONSC, the roles are reversed. There Young argues that Melchers relies on "the erroneous factual assumption" that Pickton was largely responsible for the 50 homicides.[47] According to Young, the error stems from the fact that Pickton was only charged with 26 of the homicides, and only convicted of 6. Young asserts that there is "no evidence Pickton is believed to be responsible" for the other homicides[48]—even though Pickton claimed to have murdered 49 women in a jail cell conversation with an undercover police officer.[49] At this point, it is Young who critiques Melchers for relying on assumptions to draw conclusions beyond the narrow confines of the data on charges and convictions.

As the above examples show, the framing of common sense claims as unsubstantiated in *Bedford* is invoked instrumentality by both parties to advance different and sometimes opposing claims. Regardless of how this strategy is mobilized, however, it reinforces a kind of boundary work that insists on a sharp divide between common sense and evidence, and thereby fails to recognize how these two categories are actually inextricably intertwined. In this way, the use of this strategy reflects and perpetuates the mainstream epistemological paradigm at the expense of feminist epistemological commitments.

[47] Factum of Applicants, *supra* note 21 at paras 200-201.
[48] *Ibid* at para 201.
[49] *The Canadian Encyclopedia,* "Robert Pickton Case" by Edward Butts, (published 26 July 2016; last edited 24 April 2017), online: < https://www.thecanadianencyclopedia.ca/en/article/robert-pickton-case>.

6.4 PRIVILEGING COMMON SENSE OVER EVIDENCE

In the above sections, I examined how actors in *Bedford* bank on an implicit privilege accorded to evidence in the dichotomy between evidence and common sense. There are some moments in the case, however, where the hierarchical order of this dichotomy is reversed. In these instances, common sense is invoked to challenge the evidence being tendered, instead of the other way around. Rather than highlighting the speculative and unfounded nature of common sense, this framing strategy banks on its intuitive appeal.

Just as one might expect the applicants in *Bedford* to mobilize evidence as a progressive check on legally embedded common sense, one might expect the opposing strategy to be advanced by the Crown, in defence of the status quo. Once again, this is sometimes the case. Take, for example, the following moment in the cross-examination of applicant sex worker Amy Lebovitch, in which counsel for Ontario attempts to highlight a contradiction in Lebovitch's account of how the bawdy house laws have affected her. In her affidavit, Lebovitch explains how she began selling sex on the street, but later transitioned to working independently from home, or from rented hotel rooms, in order to gain more control over her work and to better protect herself from potentially dangerous clients.[50] Now that she has purchased her own home and is living with her life partner, however, she is afraid of being charged under the bawdyhouse and living off the avails provisions. Lebovitch states: "This fear has forced me on several occasions to venture back onto the streets in the past few years."[51] In cross-examination, counsel presses her on why she does not just rent a hotel room to work from, as she has done in the past:

[50] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Amy Lebovitch at paras 5-6).
[51] *Ibid* at para 9.

Q. Do you not feel that there's a contradiction there?

A. No, I don't.

Q. Why are you choosing to practice such an unsafe form of prostitution when there is the alternative that you have resorted to before, that is renting a hotel room?

A. I don't know, but I don't think there's a contradiction.[52]

In this passage, counsel frames Lebovitch's stated choices as irrational, thereby casting doubt on the severity of the law's effect on her. In other words, she appeals to common sense and logic, as she sees it, to cast doubt on Lebovitch's experiential account.

In other cases, however, it is the applicants who mobilize common sense to contest the evidence tendered by the Crown in *Bedford*. For instance, in his cross-examination of Crown expert Richard Poulin, Young appeals to how the "common person" would define violence in order to cast doubt on Poulin's definition—and the statistics he produces based on this definition—as overly broad.[53] Poulin in turn suggests that a survey would have to be conducted to be sure of the common meaning, thereby challenging Young's confidence in his own assessment of common sense. [54] Notably, the argument here is not only about research methodology, but about the framing of the facts at issue—i.e. how "violence" is defined in debates over the differential rates of violence in indoor versus outdoor prostitution. Young invokes common sense in order to advance a narrow

[52] Lebovitch cross, *supra* note 9 at paras 612-613.
[53] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Richard Poulin at para 390).
[54] *Ibid* at para 390.

definition limited to physical violence, for which the data on differential rates is most compelling.

The applicants also mobilize common sense as a check on certain kinds of evidence from experience (albeit not the experiential accounts of people in the sex trade, as far as I can tell from the available portions of the record and from my interviews with Young). One example comes from an exchange about the relative dangers of outdoor versus indoor prostitution in Young's cross-examination of Crown witness and police officer Jim Morrissey. In the relevant passage, Morrissey opines that the violence is similar in both locations, but emphasizes that he can only speak to the cases he himself has worked on.[55] In an attempt to challenge Morrissey's stated opinion, Young asks:

> Q: And besides any of your experience, wouldn't common sense -- forgetting what you think you know, but wouldn't common sense suggest that basically the street is where more danger lurks than inside? Common sense.
>
> A. Obviously.
>
> […]
>
> Q. And you are saying your experience contradicts what would be the common sense view, which happens?[56]

[55] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of Jim Morrissey at pp 27-28).
[56] *Ibid* at p 31.

Interestingly, Young goes on to blur the dichotomy between the experience at issue and common sense later in the cross:

> ...let me ask you this as a matter of common sense and you being a cop for 30 years. What is more likely for someone to commit an assault? In a dark car somewhere where no one is seeing you or in a location where people have taken your name as you have come in and maybe even had a camera at the door?[57]

Like experiential knowledge in some of the examples above, a subtle shift in the framing of Morrissey's professional experience occurs here. In the first passage, Young questions Morrissey's experience as contradicting "the common sense view". In the second, he merges Morrissey's experience of "being a cop for 30 years" into everyday common sense. In both cases, common sense is privileged as the predominant way of knowing—one that either discounts or assimilates Morrissey's firsthand experience. I offer further examples of how common sense works to assimilate other forms of proof in the next chapter.

[57] *Ibid* at p 72.

6.5 EXPOSING THE ENTANGLEMENT OF EVIDENCE AND COMMON SENSE

6.5.1 Common Sense Informing Evidence

Thus far, I have shown how actors in *Bedford* draw strategically on the dichotomization of common sense and evidence as the foundation for a variety of rhetorical framing strategies. In doing so, they bank alternately on the privileged status of evidence, and the intuitive appeal of common sense. In either case, however, the strategies discussed so far reinforce an imagined boundary between common sense and evidence, similar in kind to the boundary between law and fact (and between opinion and fact). There is, in other words, a continuous pattern to these moves at a higher epistemic order. In this way, I argue, the framing of common sense in *Bedford* runs counter to the feminist insight that all knowledge arises from a particular sociopolitical and experiential context, and that background assumptions and normative values pervade observation and analysis at every level. From this perspective, evidence and common sense are inextricably intertwined.

A close look at the expert opinion evidence and associated social science research on the record in *Bedford* makes this interconnection apparent. Take, for instance, Lowman's description of his 1989 study: "Street Prostitution: Assessing the Impact of the Law in Vancouver", a study commissioned by the Department of Justice to assess the impact of the then recently passed communicating provision.[58] As part of this study, Lowman's research team performed "counts" of street-based sex workers, to be compared to previously collected baseline data in order to measure changes in the levels and

[58] Department of Justice, *Street Prostitution: Assessing the Impact of the Law: Vancouver* by John Lowman and Laura Fraser (Ottawa: Communications and Public Affairs, Dept. of Justice Canada, 1989).

geography of the street sex trade.[59] The findings from these counts are part of what informs Lowman's opinion that the communicating provision has facilitated the displacement of survival sex workers in a way that places them at greater risk of harm.[60] In explaining how his research team conducted the counts, Lowman notes that they relied in part on mode of dress and behaviour to identify people engaged in the sale of sex.[61] In other words, common sense assumptions, in this case about how sex workers look and act, informed the research data underlying Lowman's opinion regarding the law's displacement effects—an opinion relied upon by the application judge, and ultimately by the Supreme Court of Canada, in the decision to strike down the communicating provision as unconstitutional.[62]

On the other side of the litigation, one can see how common sense informs expert opinion evidence in the example cited earlier from Raymond's cross-examination.[63] Raymond, in that instance, draws on her own common sense assumptions about how women come to sell sex in a foreign country to inform her expert opinion about the rate of sex trafficking in Finland. She draws a similar inference about the rate of sex trafficking in the Netherlands at another point in the record. The source she relies upon states: "Experts estimate that as many as 60 percent of the women working in prostitution are foreigners,

[59] Lowman cross, *supra* note 11 at paras 378-384.
[60] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of John Lowman at para 10).
[61] Lowman cross, *supra* note 11 at paras 387-388.
[62] *Bedford* ONSC, *supra* note 1 at para 385; *Bedford* SCC, *supra* note 1 at 155. Note that the SCC does not rely directly on Lowman's opinion about displacement effects in its reasons, referring instead to a report of the House of Commons Standing Committee on Justice and Human Rights, Subcommittee on Solicitation Laws called *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006). However, the report in turn cites Lowman (along with others) on the issue of displacement and isolation caused by the communicating provision (p. 63). See also *Bedford v Canada (AG),* 2010 ONSC 4264 (Supplementary Affidavit of John Lowman at para 48) for another example of how common sense inferences play an important role in the formulation of Lowman's expert opinion.
[63] *Supra* note 31.

but no one knows how many of these women are illegal immigrants or how many are coerced into the business."[64] From this, Raymond concludes that most of the women selling sex in the Netherlands "are women from other countries who were probably trafficked into the Netherlands".[65] When questioned on this inference by Young, Raymond responds: "Well, I would agree that it's a loose interpretation, but certainly I think one could draw that conclusion from that statement, yes."[66] Based on such inferences, Raymond opines that decriminalizing prostitution results in higher rates of sex trafficking compared to other policy approaches.[67]

The intertwined nature of common sense and evidence illustrated in the above examples does not go entirely unrecognized in *Bedford*. While the predominant strategies used to frame common sense exploit the blurriness between these categories to reassert a dichotomy between them in various ways, there are some instances in which participants in the case resist this type of boundary work. One of the clearest examples of this resistance comes from Lowman, who repeatedly underscores the legitimate role of common sense and logic in the process of qualitative research, and thereby in his expert opinion.[68] Indeed, Lowman explicitly points to "common sense" as "very important in the process of understanding how qualitative research works."[69]

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[64] Suzanne Daley, "New Rights for Dutch Prostitutes, but No Gain" *New York Times* (12 August 2001), A1 and 4, cited in Raymond cross, *supra* note 32 at para 76.
[65] Janice Raymond, "Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution" in Melissa Farley, ed, *Prostitution, Trafficking and Traumatic Stress* (Binghamton: *Haworth Press*, 2003), cited in Raymond cross, *ibid* at para 75.
[66] Raymond cross, *ibid* at para 77.
[67] Raymond affidavit, *supra* note 30 at para 17. See also paras 71-72.
[68] See for example Lowman cross, *supra* note 11 at paras 1261, 1377, 1455, and 1684.
[69] *Ibid* at para 1261.

Lowman's stance is further illustrated in the following passage from his cross-examination, which addresses one of the research articles that he relies upon in his affidavit—a small-scale qualitative study of women in the sex trade in Melbourne, Australia.[70] According to the study's findings, women working in brothels generally felt safer than those working on the street, but those working in massage parlours reported a constant threat of rape.[71] As Lowman notes, however, those working in massage parlours also reported an ongoing threat of police raids.[72] The exchange between Lowman and counsel for Canada proceeds as follows:

> Q. ….you're not suggesting that the constant threat of rape is due to the police raids.
>
> A. There may well be some kind of link. If those women work in a circumstance where they're worried about raids all the time and what they're trying to do is make a living, it may be that they are more susceptible to certain kinds of violence because of the way that they're worried about law enforcement. […]
>
> Q. Am I correct that you're speculating here? There's nothing in the study that would indicate that link that you are speculating about.
>
> A. Correct.[73]

[70] Priscilla Pyett and Deborah Warr, "Women at Risk in Sex Work: Strategies for Survival" (1999) 35:2 *Journal of Sociology* 183.
[71] *Ibid* at 187.
[72] *Ibid*, discussed in Lowman cross, *supra* note 11 at para 1369.
[73] Lowman cross, *ibid* at paras 1370-1371.

A few paragraphs later, Lowman repeats his theory about the possible link between the women's fear of police raids and their fear of rape, to which counsel retorts:

> Q. Again, that's sheer speculation on your part, is it not?
>
> A. I think we have - well, it's interesting - no, it's not. I'm looking at the evidence that we have here.
>
> […]
>
> A. Well, we can call it speculation, but […] we are involved in various kinds of reasoning processes throughout this exercise, as we should be, as far as I can see.[74]

With this response, Lowman legitimizes the role of common sense reasoning both in his own evidence, and in the fact-finding process more generally.

Young makes a similar point in his cross-examination of Melchers. In the course of discussing research methods for ascertaining crime rates, Young observes that the final step in the research process involves the drawing of inferences, which, he puts to Melchers, is "really a matter of logic and application of rationality"[75]:

> Q. And you can gain, say, the significance of some common sense in drawing inferences. Sometimes it's just a matter of common sense.

[74] *Ibid* at para 1377.
[75] Melchers cross, *supra* note 43 at para 282.

> A. There's reasoning. I don't know if you call it common sense, reasoning is not very common sometimes. It's reasonable argument.[76]

Melchers' response questions the equation of inferential reasoning with common sense by questioning its universality. This may be read as another instance of the partialization of common sense, discussed earlier in this chapter. Young, however, persists, using an example from one of Melchers' own statements to the media to show how his expertise is permeated by common sense.[77]

Like Lowman, Young, in this example seems to be pointing to the legitimate role of common sense in the formulation of expert opinion evidence. In the next portion of the cross-examination, however, it becomes apparent that his aim is not so much to resist the boundary work between evidence and common sense as to emphasize the primacy of the latter. In this subsequent passage, Young points to the following statement made by Melchers in his affidavit, regarding Lowman's research interview data: "Interviews found a consistent lack of support among prostitutes for the criminal law. Support was found among prostitutes for legalization of off-street prostitution. Such opinions are not entirely unexpected."[78] Young rephrases Melchers' claim as follows:

> Q. Professor Lowman has evidence that many prostitutes support indoor legalization and you find that to be a not surprising comment because common sense suggests people would prefer to work indoors than on the

[76] *Ibid* at para 284.
[77] *Ibid* at para 289.
[78] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Ronald-Frans Melchers at para 39).

street. Is that what you're saying?[79]

[…]

Q. I'm just asking you, when you read the interviews, you just thought common sense, yes, of course they're going to say they want to move indoors. It just makes sense.[80]

Common sense here is framed as an independent form of knowledge that accords with the evidence, rather than as something with which evidence is inevitably infused. This suggests that Young's resistance to the dominant paradigm (i.e. the dichotomization of evidence and common sense) is instrumental and transient at best.

6.5.2 Evidence Informing Common Sense

It may seem counterintuitive, but just as the examples in the above section show the infusion of evidence with common sense, the common sense at play in *Bedford* can at times be read as driven by evidence. For instance, in the literature on research methodology included in the record and highlighted by the applicants in their factum at the ONSC, Ine Vanwesenbeeck and Frances Shaver comment on how unrepresentative sampling in sex trade research constructs a distorted portrait of the industry as

[79] Melchers cross, *supra* note 43 at para 292.
[80] *Ibid* at para 293.

characterized by victimization.[81] In this way, social science research actually informs "common sense" stereotypes about the sex trade.

On the other hand, this area of research also gives rise to a different kind of common sense, supportive of the applicants' position. Take the following example from Lowman's cross-examination, addressing differential rates of violence in different forms of prostitution. The relevant passage begins with Lowman offering a description, based upon his research, of escort prostitution in which women are assisted by drivers and/or check in with the escort agency.[82] Seeking clarification, counsel for Canada asks: "Just so I understand, then, that would be a safer form, *obviously* of prostitution, because it would have this built-in safety mechanism in it".[83] At this point, Lowman seizes on counsel's phrasing: "Well, it was interesting that a common sense understanding of that situation told you immediately that it was safer, hence your use of the word obviously".[84] A few paragraphs later, counsel goes on to ask:

> Q. …is it really possible to draw any factual conclusions in an empirical way comparing the rates of violence suffered by one population as against any other?
>
> A. Yes, I'd do it the way that you did it, which was to say once you see that description from those women describing why the escort service

[81] Ine Vanwesenbeeck, "Another Decade of Social Scientific Work on Sex Work: A Review of Research 1990-2000" (2001) 12:1 *Annual Review of Sex Research* 242 at 279; Frances Shaver, "Sex Work Research: Methodological and Ethical Challenges" (2005) 20:3 Journal of Interpersonal Violence 296-319 at 297. Cited in Factum of Applicants, *supra* note 21 at paras 125 and 127.
[82] Lowman cross, *supra* note 11 at para 414.
[83] *Ibid* at para 415.
[84] *Ibid* at para 416.

> situation where you've got that monitor, the driver, your word was "obviously" safer, I agree with you.[85]

With this response, Lowman once again recognizes common sense as a component of the empirical research process. However, he also points to qualitative interviews as illuminating this new version of common sense. The common sense at issue is, in other words, grounded in an understanding of the lived experience of sex workers. As I argue in Chapter 8, this is in fact where experiential knowledge holds its greatest power in strategic *Charter* litigation.

6.6 CONCLUSION

In this chapter, I have shown how the treatment of common sense in *Bedford* banks largely on the assertion of a fundamental dichotomy between common sense and evidence. I began from the feminist intuition, expressed at the outset of this dissertation, that appeals to common sense have a conservative valence, serving to shore up already dominant worldviews, and that such worldviews may be fruitfully challenged via experiential or expert evidence in litigation. My analysis, however, suggests that common sense in *Bedford* is a rhetorical chameleon, sometimes pitted against experiential knowledge but sometimes aligned with it, and invoked or attacked to advance an array of different views from one moment to the next. It is perhaps for this reason that, as I argue in the next two chapters, common sense plays such a dominant role in the fact-finding process.

[85] Lowman cross, *supra* note 11 at para 420.

Chapter 7: The Weight Accorded to Different Categories of Proof in *Bedford*

7.1 INTRODUCTION

In the previous three chapters, I examined how participants in *Bedford v Canada (AG)*[1] frame experiential evidence, expert opinion evidence, and common sense respectively within the fact-finding process. My analysis of these three categories of proof drew on the feminist theoretical framework developed in Chapter 3 to identify and critique the underlying epistemic norms and paradigms at work on the record in *Bedford*, and to consider how they align with feminist epistemological commitments and associated social justice goals. Having considered the treatment of each of these categories of proof individually, I conclude Part II by examining how they are weighed against each other by the parties in their facta and by the courts in their reasons.

This chapter serves two key purposes. First, it provides a space to examine the interaction between experiential evidence, expert evidence, and common sense in *Bedford*, and thereby to transcend individual categories of proof, the boundaries of which I have been questioning all along. Second, it allows me to consider the relative importance accorded to different categories of proof, as they are conventionally constructed, in the fact-finding process as a whole. In particular, it provides insight into the weight accorded to experiential evidence in *Bedford* in relation to other forms of proof, giving a proximate sense of how experiential knowledge itself is valued in the case.

[1] *Bedford v Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in 2013 SCC 72 [*Bedford* SCC].

One important outcome of my analysis is to highlight the link between how evidence is weighed in *Bedford* and how the facts at issue are framed. This harkens back to my discussion of Faigman's "frames of reference" in Chapter 2 (see 2.5). Beyond this, my analysis leads to a few key findings. First, the weight accorded to different categories of proof in *Bedford* often shifts instrumentally within a given set of arguments or reasons. Thus, like the epistemic norms discussed in previous chapters, the categories of proof are themselves mobilized instrumentally through the fact-finding process. The same information is also sometimes weighed differently depending on the form in which it is packaged—i.e. whether as experiential evidence, expert evidence, legislative or government-generated evidence, or common sense. This once again underscores how different categories of proof serve as rhetorical tools rather than as ontological givens. Most importantly, however, my analysis leads me to find that, with one or two exceptions, experiential evidence is not explicitly accorded much weight in *Bedford*, including in the arguments of the applicant rights-seekers. Rather, it is appeals to law, legal reasoning, and common sense, along with legislative and other government-generated reports—a more legally familiar and judicially noticeable form of evidence—that tend to take precedence in the fact-finding process. This, I suggest, casts doubt on the capacity for outside sources of knowledge to disrupt the legal status quo in strategic *Charter* litigation. By the same token, it raises concerns about the alignment of the fact-finding process in such cases with feminist epistemological commitments.

The chapter proceeds in two sections. In the first, I canvas the main arguments made by the parties in *Bedford* in their facta, with attention to the role and weight ascribed to different categories of proof. My analysis here shows how, contrary to my intuition at the outset of this dissertation, the applicants rely heavily on legal reasoning and common sense to advance progressive litigation, while the Crown leans on the importance of expert evidence (along with deference to the legislature) to preserve the status quo. This once again demonstrates common sense's shifting political valence in the fact-finding process, as discussed in the previous chapter. While often thought of as upholding the prevailing sociolegal order, appeals to common sense largely serve the opposite purpose in *Bedford*. In the second section, I examine how the courts weigh the various categories of proof in their reasons. Here I show how the courts rely on a shifting combination of expert evidence, legislative and other government-generated evidence, and common sense to draw findings of fact, with experiential evidence—particularly the evidence of the experiential witnesses in the case—largely left by the wayside. I also consider how the Supreme Court of Canada (SCC)'s reframing of the facts at issue under section 7 versus section 1 may affect the weight accorded to different categories of proof in future cases.

7.2 THE PARTIES

7.2.1 The Applicants

As noted in the previous chapter, I began this project with the intuition that the shift in focus from law to fact in strategic *Charter* litigation, and the concomitant trend towards increasingly voluminous evidentiary records, could support progressively oriented

Charter challengers to disrupt the legal status quo. Drawing on feminist theory, I pointed to experiential knowledge, in particular, as holding the potential to challenge dominant norms and assumptions in a way that accords with progressive epistemological commitments. [2] If my intuition was correct, one would expect to see progressive public interest litigants emphasizing the weight and importance of evidence tendered in strategic Charter litigation, with a particular emphasis on experiential evidence.

At first blush, the applicants' case in *Bedford* appears to fit these expectations. The record brought by the applicants is undoubtedly extensive, including evidence from 11 experiential witnesses, 10 expert witnesses, and 3 reply witnesses, and totaling over 9000 pages.[3] As described in previous chapters, this evidence is invoked to disrupt common stereotypes about the sex trade, and to demonstrate that the risks associated with the sale of sex vary greatly depending on the circumstances—a key premise of the applicants' case. It also provides some of the impetus for the application judge to revisit the s.1 analysis undertaken in the *Prostitution Reference*.[4] In their facta, the applicants draw from the full gamut of evidence tendered, pointing to experiential accounts, expert opinion and social science research, and government reports to support their arguments.

However, a closer look at the applicants' written arguments in Bedford casts doubt on the centrality and importance of evidence—experiential and expert—to the applicants' case.

[2] See: Chapter 1 at 1.2.2; Chapter 3 at 3.3 and 3.4.1.
[3] *Bedford v Canada (AG),* 2010 ONSC 4264 (Index to Joint Application Record).
[4] *Bedford* ONSC, *supra* note 1, referring to *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123 [*Prostitution Reference*].

At the outset of their factum at the ONSC, the applicants remark upon the social and legislative fact evidence tendered in the case as follows:

> It is respectfully submitted that the proposition that street prostitution is far more dangerous than indoor prostitution being conducted with the assistance of third parties is primarily a matter of common sense and simple inference. Nonetheless, the Applicants have presented a substantial body of supporting evidence to comply with the Supreme Court of Canada's admonition that Charter arguments should not be advanced in a "factual vacuum" in the absence of legislative facts to provide some context and information as to the operation of the law.[5]

The evidentiary record is thereby framed as secondary to the applicants' case—a matter of legally compelled background context rather than a critical driving force. This minimization of the importance of the record appears once again in the applicants' review of the expert opinion evidence, which begins with a lengthy discussion of the methodological limitations of research on the sex trade.[6] While purporting to illuminate the deficiencies of the research tendered by Crown experts,[7] this section of the factum arguably also serves another, broader purpose: to decentre the role of social science and expert opinion in the case altogether.

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[5] *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of the Applicants at para 16) [Factum of Applicants].
[6] *Ibid* at paras 123-129.
[7] *Ibid* at para 129.

The applicants begin this section by remarking that in an ideal world, "empirical research in the area of sex work should be able to provide clear statistical data which can demonstrate whether or not the anecdotal information provided by the Applicants' experiential witnesses is representative of the general population of sex workers."[8] This statement is notable in itself for reflecting, once again, the privilege accorded to quantitative research, and for reinforcing the notion that the value of experiential evidence depends on its generalizability.[9] The statement also acknowledges the potential power of social science research and associated expert opinion evidence as a bridge between adjudicative facts and social facts in strategic Charter challenges to legislation. As Young explains, however, the research on offer in Bedford falls short of this ideal, and thus cannot provide a complete answer to the factual questions at issue in the case:

> It is respectfully submitted that the body of empirical research tendered in the case at bar does support the claim that the law does contribute to the risk of harm by prohibiting safe avenues of work; however, it is recognized that the empirical research conducted to date on sex work, while voluminous, is fraught with methodological limitations. In light of these limitations it must also be then recognized that the constitutional issues to be decided in this case cannot solely be resolved by asking this Honourable Court to make specific findings of facts on issues which have eluded researchers for decades. It is submitted that the empirical research data provided by both Applicant and Respondent should be seen as

[8] *Ibid* at para 123.
[9] See: Chapter 5 at 5.2.2 under *The Privileging of Quantitative over Qualitative Research*; Chapter 4 at 4.2.1 under *Representativeness of Experience*.

> constituting one piece of the puzzle to be considered along with the anecdotal evidence, government reports and studies and common sense.[10]

One might read this as potentially augmenting the role of experiential evidence relative to expert opinion evidence in *Bedford*. And indeed, the applicants draw extensively from experiential evidence in their factum, alongside expert social science evidence and legislative evidence. At the end of the day, however, these various sources of information are framed as bolstering a case that is fundamentally grounded in common sense and legal reasoning. This is evident not only in the assertion made at the outset of the applicants' factum that the key facts at issue in the case are "primarily a matter of common sense and simple inference",[11] but also in the factum's later discussion of the legal issues in *Bedford*. Here the applicants submit that, even if the court is not persuaded by the evidence, the case can still be decided on the basis of a "reasonable hypothetical".[12] Indeed, the applicants argue, constitutional adjudication on the basis of reasonable hypotheticals is well-suited to the proportionality analysis required in a case like *Bedford,* where the target is the legislative means used to achieve a state objective (rather than the objective itself).[13] Once again here, the suggestion is that the court need not rely on the evidentiary record at all in order to find in the applicants' favour.

Part of the impetus behind this approach seems to be to remove the potential obstacle that the complexity of the expert evidence tendered in *Bedford* presents to the courts,

[10] Factum of Applicants, *supra* note 5 at para 123.
[11] *Supra* note 5.
[12] Factum of Applicants, *supra* note 5 at para 432.
[13] *Ibid* at para 433.

especially for those not well versed in social science research and methodology. For instance, in discussing Crown expert Ronald-Frans Melchers' critique of applicant expert John Lowman, the applicants' factum makes a point of arguing that the court ultimately "need not address the qualitative vs. qualitative issue, nor is it necessary to address the thrust and content of Professor Melchers' critique."[14] This is not necessary, according to the applicants, because Melchers' critique is directed at the wrong question of fact; while Melchers' assessment focuses on whether there is a direct causal connection between the law and the increased risk of harm, Lowman merely asserts that the law "materially contributes" to the risk of harm.[15] In this way, the applicants subtly shift the court's focus from technical debates about research methodology to the appropriate framing of the facts necessary to meet the legal test for a s.7 *Charter* violation. Of course, the framing of the facts bears significantly on the adequacy of the evidence tendered.

The desire to make things easier for the courts comes through again in the applicants' factum at the Ontario Court of Appeal (ONCA), though the concern here is more about the complexity of the relevant policy issues than of the social science evidence. The applicants address this concern as follows:

> Although the policy issues surrounding many aspects of the sex trade are controversial, divisive and the subject-matter of endless debate, it must be remembered that the factual issues raised in this application are far more simple: can safety be enhanced by moving indoors, recruiting assistance

[14] *Ibid* at para 197.
[15] *Ibid* at paras 197-198.

> and communicating with clients? In light of the simple nature of these factual questions, it is important not to overlook the role of common sense in their resolution.[16]

Once again here, the applicants give the court permission to skip over the messy details of the debates between experts and other witnesses, in favour of a simpler and more familiar way of knowing.

What are the implications of this approach for marginalized groups seeking social justice through the courts? There is little doubt that, on a practical level, minimizing the importance of the evidence in *Bedford* has the potential to ease the burden of proof for other *Charter* challengers, for whom the costs of bringing an extensive record are often prohibitive. On an epistemological level, however, the implications are less clear. On the one hand, what the applicants put forward as common sense in *Bedford* aligns, in many ways, with the perspectives of the experiential witnesses in the case, at least on the applicant-side. The applicants may thus be viewed as invoking common sense in a epistemologically progressive way to normalize and legitimize the experiential knowledge of people in the sex trade. On the other hand, the rhetorical appeal to common sense erases differences in this experiential knowledge, and evades any commitment to situated knowledge in favour of traditional claims to universality. Giving courts permission to rely on their own common sense also poses a threat to equality-seekers in future cases, where the views of decision-makers may not align with experiential knowledge holders.

[16] *Bedford v Canada (AG)*, 2012 ONCA 186 (Factum of the Respondents at para 98).

7.2.2 The Attorney General of Canada

While the applicants promote common sense and reasonable hypotheticals as sufficient to establish a violation under section 7, the Attorney General of Canada insists on the applicants' burden to establish the facts necessary to make out their case on the basis of conclusive scientific evidence—evidence that Canada suggests is lacking in *Bedford* due to the methodological limitations of the applicable social science research. According to Canada, the applicants' de-centering of social science and expert opinion amounts to no more than an attempt to be improperly relieved of this burden.[17] Canada thus invokes the perceived importance of expert social science evidence not to challenge but to preserve the legal status quo, discounting the applicants' appeals to common sense and experiential evidence in the process.

In written argument at every level of court, Canada repeatedly points to the applicants' own acknowledgement of the weaknesses in the social science research as a means to argue that they have not met their burden of proof under s. 7.[18] In its words, a section 7 violation should not be founded on social science evidence that is "disputed", "contested", "speculative", and "rife with conflicting opinion"[19]—evidence that "does not provide any scientific basis" for the causal link alleged.[20] For Canada, these acknowledged limitations and gaps in the research on the sex trade support a broader

[17] *Bedford v Canada (AG),* 2010 ONSC 4264 (Factum of the Respondent at para 4) [Factum of Respondent].
[18] *Ibid* at paras 4 and 225; *Bedford v Canada (AG)*, 2012 ONCA 186 (Factum of the Appellant AG Canada at paras 7 and 34) [Factum of Appellant ONCA]; *Canada v Bedford (AG),* 2013 SCC 72 (Factum of the Appellant AG Canada at para 71) [Factum of Appellant SCC].
[19] Factum of Appellant SCC, *ibid* at para 71; Factum of Respondent, *supra* note 17 at para 225.
[20] Factum of Respondent, *ibid* at para 267.

strategy of emphasizing the extent to which our knowledge about prostitution is contested and incomplete[21] (though, according to Canada's factum at the ONSC, the social science does show that prostitution is inherently risky).[22] In particular, Canada argues that we simply do not know enough about indoor prostitution to draw the conclusion that it is safer than street prostitution.[23] Canada draws on this lack of knowledge not only to argue that the applicants have not met their burden of proof under section 7, but to advocate a general posture of deference to Parliament on the "complex" matter of regulating prostitution.[24] In this way, Canada portrays the extensive evidentiary record tendered in *Bedford* as inadequate to disrupt the legal status quo.

According to the applicants, other sources of proof—most importantly common sense and logic—are sufficient to bridge the gaps and uncertainties in the social science research on the sex trade in *Bedford*. Canada argues, however, that these other sources are insufficient to meet the high standard of proof required in a sweeping constitutional challenge. In its factum at the SCC, for instance, Canada argues that there was "considerable dispute" about the link between the violence experienced by people in the sex trade and the impugned laws.[25] The factum goes on:

[21] See for example Factum of Appellant SCC, *supra* note 18 at para 75.
[22] Factum of Respondent, *supra* note 17 at paras 1 and 12.
[23] *Ibid* at para 170. See also Annex 3 at para 8.
[24] See for example: *Ibid* at paras 265-267; Factum of Appellant SCC, *supra* note 18 at paras 1, 84-86 and 128.
[25] Factum of Appellant SCC, *ibid* at para 71.

> In circumstances such as these, where a particular fact that lies at the heart of the dispute is a matter on which reasonable and informed people disagree, it is not appropriate for the Court to circumvent the usual standard of proof by inferring a dispositive fact under the auspice of logic and common sense. […] It is these very inferences that are the subject of considerable disagreement among experts. It is only by applying a rigorous standard of proof that courts can avoid usurping Parliament's essential role in weighing complex policy choices.[26]

Similarly, Canada dismisses the applicants' reasonable hypothetical argument as an "attempt to escape their onus of proof" in a manner "completely unsupported by the jurisprudence."[27]

While disparaging the applicants' reliance on common sense, there are some moments where Canada points to the experiential evidence in *Bedford* as capable of responding to the facts at issue. In its factum at the ONCA, for instance, Canada argues that the application judge erred by failing to adequately consider the experiential evidence, and in particular, by privileging anonymous experiential accounts cited in a 2006 Subcommittee Report over the direct experiential evidence adduced by the Crown in the case:

> By not considering the evidence of the experiential affiants, the court below overlooked a rich body of direct evidence which was properly

[26] *Ibid* at para 72. See also Factum of Respondent, *supra* note 17 at para 267.
[27] Factum of Respondent, *ibid* at para 245.

> entered by way of affidavits, including evidence which related directly to the major issues in dispute, such as whether there is a hard divide between street and off-street prostitution; whether off-street prostitution is less dangerous; and whether the impugned provisions "materially contribute" to the risk of harm suffered by prostitutes.[28]

When it comes to the experiential evidence tendered by the applicants, however, Canada is quick to dismiss this form of proof as inadequate to establish key facts at issue in the case. Take, for instance, the following passage from Canada's factum at the SCC, discussed in the previous chapter:

> …while the OCA was prepared to accept, on the basis of common sense, logic and anecdote, that many street prostitutes would avail themselves of the opportunity to work indoors if it were legal, this finding was not supported by the evidence".[29]

The weight Canada accords to experiential evidence, then, does not reflect a consistent epistemic position, but rather a rhetorical strategy that depends on the nature of the account being advanced. Nor does the experiential evidence tendered in *Bedford* play an important role in Canada's arguments generally. Rather, Canada's main focus is on the need for conclusive expert evidence to justify striking down the impugned laws as unconstitutional.

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[28] Factum of Appellant ONCA, *supra* note 18, Appendix at para 4.
[29] Factum of Appellant SCC, *supra* note 18 at para 78.

7.2.3 Shifting Approaches

On both sides of the litigation in *Bedford*, then, the treatment of experiential evidence is at best instrumental, and at worst outright dismissive. The respective parties' positions with respect to expert opinion evidence and common sense are more fixed. In general, and contrary to my intuition at the outset of the dissertation, it is the applicants who invoke common sense as a means to challenge the status quo, and Canada who dismisses it in favour of expert opinion evidence (which it ultimately finds to be inadequate).

Still, there are moments when even these relatively consistent approaches shift. In particular, when it comes to the Crown's burden to demonstrate a rational connection between the communicating law and its objective under section 1, the applicants contend that common sense will not suffice:

> The Courts have allowed the Crown to rely upon "common sense" in demonstrating a rational connection between law and objective if the available social science data is inconclusive, but it is submitted that common sense alone cannot defeat the growing body of evidence demonstrating lack of effectiveness with the communication law.[30]

Thus, while the applicants center common sense as the lynchpin of their case under section 7, they invoke the record as a challenge to common sense under section 1. Canada in turn asserts—amongst other arguments—that according to the jurisprudence, "an

[30] Factum of Applicants, *supra* note 5 at para 487.

analysis based solely on logic and common sense is acceptable" to demonstrate a rational connection under section 1.[31] In this interaction, we see once again how the parties strategically shift their approach to different modes of proof according to their adversarial objectives.

7.3 THE COURTS

Having examined how different categories of proof are weighed in the arguments of the parties, I turn now to the approach taken by the courts. The most interesting observations about the judicial treatment of different categories of proof in *Bedford* arise at the first two levels of decision-making, where the courts engage fully with the record and factual issues. I have already offered some examples from the ONSC and ONCA decisions throughout the previous chapters of Part II, in the course of discussing various framing strategies. I bring those examples together here, along with some additional observations, to consider the overall interaction and weighing of different forms of proof in the courts' reasons.

7.3.1 The Ontario Superior Court of Justice

Although agreeing with the position of the applicants, Justice Himel, the application judge at first instance, does not appear to take up their invitation to rely primarily on common sense arguments, nor does she find it necessary to base her decision on reasonable hypotheticals, given the available evidence.[32] The role of different forms and pieces of evidence in her decision, however, is somewhat difficult to say. This is partly a

[31] Factum of Respondent, *supra* note 17 at para 321.
[32] *Bedford* ONSC, *supra* note 1 at para 365.

result of the extensive nature of the record, and the procedure used to bring the application. As Himel J explains with regard to the expert opinion evidence:

> The procedure used in this application was to place large volumes of expert opinion on the record. Simply placing this evidence before the court does not automatically render it admissible. In a trial, any inadmissible information would be distilled and segregated. The application process is not generally amenable to that same process.[33]

While Himel J reviews the law on the admissibility of expert opinion evidence in some detail, she does not ultimately analyze the admissibility of discrete pieces of expert evidence, opting instead to deal with questions of admissibility as a matter of weight for practical reasons.[34] Furthermore, as argued by Canada on appeal, Himel J does not always specify what evidence she relies on in making key findings of fact.[35] For example, in addressing whether the harm faced by people in the sex trade can be reduced, she concludes, following a review of the relevant legislative and expert evidence (including social science research relied upon by the experts):

> These studies, as with the other prostitution-related studies before me, must be viewed in context and the discreet findings cannot be generalized. That said, upon a consideration of the evidence as a whole presented on this issue, in my view, the applicants have established on a balance of

[33] *Ibid* at para 104.
[34] *Ibid* at para 113.
[35] Factum of Appellant ONCA, *supra* note 18, at paras 84-85.

> probabilities that there are ways in which the risk of violence towards prostitutes can be reduced.[36]

In other instances, Himel J is even less specific, for instance when, in the course of determining whether the impugned laws are grossly disproportionate, she lists a number of relevant findings of fact made "after weighing all of the evidence presented to me".[37] Given the monumental volume of evidence in the case, and the practical constraints on court time and resources, such imprecision is understandable, and indeed, sensible. However, it makes it hard to see how different forms of proof are weighed against each other in the decision-making process, and to uncover the epistemic norms at work in this process. While not my main focus in this chapter, this lack of transparency is itself concerning from a feminist epistemological perspective intent on exposing and articulating the assumptions that underlie knowledge practices in various contexts, including through self-reflexivity on one's own practices (see Chapter 3 at 3.2).

Still, a few significant points can be gleaned from Himel J's decision as articulated. First, in her reasons on the application, Himel J accords little explicit weight to the evidence of the experiential witnesses on either side of the case. While she does spend some time reviewing the biographies of the applicants, she summarizes the evidence of the 17 other experiential witnesses in four short paragraphs, and ultimately frames this evidence as limited to providing "helpful background information". [38] As Canada notes in its factum before the ONCA, Himel J does not make any further reference to the evidence of the

[36] *Bedford* ONSC, *supra* note 1 at para 326.
[37] *Ibid* at para 421.
[38] *Ibid* at para 88. See Chapter 4 at 4.2.1 under *Representativeness of Experience*.

experiential affiants.[39] Interestingly, Himel J does however draw on secondhand experiential accounts tendered via experts in the form of social science research, and via legislative reports.[40] This suggests that experiential evidence may carry more weight when it comes repackaged and framed by legal or academic experts.

That said, the expert opinion evidence and underlying social science research does not entirely carry the day in the first instance decision either. In her summary of the applicants' expert evidence, Himel J does recognize the potential of this evidence to disrupt "stereotypes and misperceptions about the sex trade in Canada".[41] However, she also acknowledges the methodological limitations of the relevant social science research, as described in the record and agreed to by the parties.[42] And, as already discussed in Chapter 5, she discounts the weight of the evidence given by a number of experts on account of concerns about bias. While such concerns are directed mainly at experts on the Crown-side of the case,[43] Himel J also expresses some reservations about the carelessly drafted affidavit of key applicant expert John Lowman.[44]

On the other hand, Himel J does seem to rely heavily on, and indeed to favour, the legislative and other government-generated evidence (e.g. reports commissioned by the Canadian Department of Justice and analogous institutions abroad) attached as exhibits to the affidavits of various witnesses. It is worth noting, for instance, that her initial

[39] Factum of Appellant ONCA, *supra* note 18 at para 45.
[40] See for example *Bedford* ONSC, *supra* note 1 at paras 128, 170, 212, 298, 308, 313, 322-340 and 345.
[41] *Ibid* at para 120.
[42] *Ibid* at paras 97-98.
[43] *Ibid* at paras 182 and 352-357.
[44] *Ibid* at para 358.

summary of the evidence from government debates and reports in Canada is over twice as long as her rather cursory summary of the expert opinion evidence. Furthermore, in light of her concerns that many of the international experts "had entered the realm of advocacy",[45] Himel J notes that she has "relied significantly upon the underlying government reports in summarizing the experiences of foreign jurisdictions."[46] Of course, many of these reports in turn rely heavily on social science research, a good deal of it from the very experts called to give opinion evidence in *Bedford*. What is interesting is that Himel J prefers to receive this information secondhand via a form of evidence that is produced and controlled by lawmakers, and that is routinely judicially noticed by the court.[47]

Ultimately, it is a combination of expert and government evidence that appears to prevail in the first instance decision in *Bedford.* This is reflected in Himel J's finding on the question of whether the impugned laws violate the applicants' right to security of the person under s.7, the primary issue to which the evidence in *Bedford* was addressed:

> Despite the multiple problems with the expert evidence, I find that there is sufficient evidence from other experts and government reports to conclude that the applicants have proven on a balance of probabilities, that the

[45] *Ibid* at para 182.
[46] *Ibid* at para 184.
[47] Alan N Young, "Proving a Violation: Rhetoric, Research and Remedy" (2015) 67:0 Supreme Court Law Review 617 at 634. On appeal, Canada argues that Himel J erred in relying on this untested evidence (Factum of Appellant ONCA, *supra* note 18 at paras 91-92)—an argument that is ultimately unsuccessful.

> impugned provisions sufficiently contribute to a deprivation of their security of the person.[48]

The experiential evidence of the affiants is notably left by the wayside here, as are the applicants' appeals to common sense.

That said, a couple of important caveats to the above finding bear mentioning. First, the influence of common sense is not entirely absent from the reasons given at first instance. This is apparent in Himel J's decision on the issue of *stare decisis*. In finding that she should revisit the Supreme Court of Canada's earlier decision on the constitutionality of the bawdy house and communicating provisions in the *Prostitution Reference*, Himel J relies partly on developments in the jurisprudence under s.7—a rationale affirmed by the courts above.[49] However, when it comes to revisiting the SCC's s.1 justification of the violation found under s.2b, she finds as follows:

> In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the Prostitution Reference are no longer valid today. […] I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me. As will become evident following

[48] *Bedford* ONSC, *supra* note 1 at para 359.
[49] *Ibid* at para 75, affirmed in *Bedford v Canada (AG)*, 2012 ONCA 186 [*Bedford* ONCA] at para 52, and in *Bedford* SCC, *supra* note 1 at para 45.

> a review of the evidence filed by the parties, there is a substantial amount of research that was not before the Supreme Court in 1990.[50]

This passage points to the availability of new evidence, both in the world and in the courtroom, as raising a doubt about the SCC's earlier ruling. At the same time, though, Himel J identifies a shift in "social, political, and economic assumptions" as an added justification for revisiting the SCC's s.1 analysis. In other words, the challenge to legal precedent comes not only from new evidence, but from a newly emerging common sense that differs from what came before.

Second, and more interestingly, when I spoke to the application judge in *Bedford*, she made it clear that she does indeed view the experiential evidence of directly affected people as critical to the adjudication of *Bedford*, and of *Charter* cases more generally.[51] This suggests that the experiential evidence in *Bedford* may well have been deeply influential on the outcome of the case, despite not being presented as such in the written reasons on the application. It also raises an important question about the reason for the apparent discrepancy between the views expressed by the judge about the significance of different forms of proof in her interview, and the expression those views find in her formal ruling—an issue that I return to in the next chapter.

[50] *Bedford* ONSC, *supra* note 1 at para 83.
[51] Interview 14 (2 October 2018).

7.3.2 The Ontario Court of Appeal

While Himel J's remark about changing assumptions hints at the possible role of common sense in her decision, the weight of common sense in the fact-finding process becomes more apparent at the Court of Appeal (ONCA). Prior to demonstrating this, though, it is first necessary to address the ONCA's approach to reviewing the application judge's findings of fact. Generally speaking, appellate courts are required to defer to findings of fact made at the first instance, absent "palpable and overriding error".[52] As noted in Chapter 2, however, the Supreme Court in *RJR MacDonald Inc v Canada (AG)* suggested that social and legislative facts call for less deference.[53] In its decision, the ONCA majority, speaking for the Court, finds that Himel J's s.7 analysis in *Bedford* rests upon social and legislative facts, to which no deference is owed. As the Court explains:

> This was not litigation about whether a particular person's security of the person was infringed by a specific event. This litigation approached the constitutional claims from a much broader societal perspective. The findings made by the application judge reflect that perspective, as should the review of those findings by this court. We do not defer to the application judge's findings, but rather assess the record to come to our own conclusion on the social and legislative facts underlying the application judge's finding that the respondents' security of the person is

[52] *Housen v Nikolaisen*, 2002 SCC 33.
[53] *RJR MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at paras 140-141 [*RJR MacDonald*]. The point was made more forcefully by Justice La Forest in dissent at paras 79-81. See Chapter 2 at 2.4.2.

impaired by the relevant legislation.[54]

This passage is noteworthy both for its characterization of the facts underlying Himel J's decision under s.7, which affects the type of proof required to make out a *Charter* violation, and for its non-deferential approach to the review of social and legislative facts, which affects how authority over the fact-finding process is distributed. As I discuss in the next section, both of these elements of the ONCA decision are ultimately overturned by the Supreme Court of Canada.

Although the ONCA does not defer to the findings of social and legislative fact made at first instance, the Court does defer to Himel J's findings on credibility and expert bias, [55] and ultimately agrees with her assessment of the evidence on most issues.[56] The Court also rejects Canada's argument that Himel J did not adequately explain her assessment of the expert evidence, finding that "she understood the thrust of the expert evidence and she carefully assessed it […] As she repeatedly indicated, her findings were ultimately based on the entirety of the record."[57] Thus, the concerns about transparency noted above do not hold water at the ONCA.

When it comes to weighing the different categories of proof at issue in this dissertation, however, the approach taken by the ONCA majority (speaking for the Court on all but one issue) differs somewhat from Himel J. One of the most notable aspects of the ONCA

[54] *Bedford* ONCA, *supra* note 49 at para 129.
[55] *Ibid* at para 130.
[56] As I discuss below, the main exception is her findings related to the impact of the communicating provision.
[57] *Bedford* ONCA, *supra* note 49 at para 138.

decision is its shifting treatment of different categories of proof. At the outset of its reasons, the majority makes a point of explicitly centering the firsthand experiential evidence, in line with feminist epistemological commitments:

> The application record is replete with testimony from individuals who have firsthand knowledge of how the present legal regime operates and the impact it has on prostitutes engaged in prostitution. In our view, that experiential evidence, buttressed by observations in several government reports, makes a very strong case for the respondents' claim that the legislation puts them at added risk of serious physical harm. [58]

This passage suggests that the ONCA, unlike Himel J, relies primarily on the experiential evidence to resolve the key issues in the case, with the governmental evidence playing only a supporting role. The majority, however, hastens to add:

> We also agree with counsel for the respondents' submission that much of what the experiential witnesses said about the impact of the challenged *Criminal Code* provisions on their lives as prostitutes is self-evident and exactly what one would expect. Everyone agrees that prostitution is a dangerous activity for prostitutes. It seems obvious that it is more dangerous for a prostitute if she goes to some unknown destination controlled by the customer, rather than working at a venue under the prostitute's control at which she can take steps to enhance safety. The advantages of "home field" are well understood by everyone. The non-

[58] *Ibid* at para 133.

> exploitative conduct criminalized by the living on the avails provision and the communicative conduct criminalized by the communicating provision contribute in an equally self-evident manner to potential risks to prostitutes.[59]

The ONCA, in other words, takes the experiential evidence tendered by the applicants seriously in part because it accords with their own common sense.

Later in the decision, when assessing the impact of the bawdy-house provisions on people in the sex trade, the ONCA majority goes on to privilege expert social science evidence over the experiential evidence: "Because empirical evidence is so difficult to come by in this area, the appellants and the respondents resorted to anecdotal evidence to support their positions".[60] The language of "resorted to" clearly implies the inferiority of the "anecdotal" (i.e. experiential) evidence in comparison to empirical evidence. This framing also reinforces the boundary work used to exclude experiential observations from the realm of the empirical in *Bedford*, despite the important role such observations play in qualitative research.[61]

When addressing the constitutionality of the law against communicating for the purposes of prostitution, the majority (this time countered by two dissenting judges) once again casts the experiential evidence of people in the sex trade as merely "anecdotal" and thus

[59] *Ibid* at para 134.
[60] *Ibid* at para 210.
[61] See Chapter 5 at 5.2.2 under *The Privileging of Quantitative over Qualitative Research*.

of limited weight. This passage was discussed in the previous chapter, but bears repeating here:

> There was anecdotal evidence from prostitutes that they often felt rushed in their negotiations with potential customers, and would quickly get into the customers' cars to avoid detection by the police. To the extent that the application judge relied on that evidence, informed by her own common sense, to find that screening customers is essential to enhancing the safety of street prostitutes, we think her conclusion reaches well beyond the limits of the evidence.[62]

In this passage, the majority excludes both experiential evidence and common sense from "the evidence" that counts, presumably expert social science or government-generated evidence. Interestingly, however, the majority goes on to draw tacitly on its own common sense and logic—"its own speculative assessment", in the words of the Supreme Court of Canada (SCC)[63]—to suggest that screening might not prevent a violent encounter with a client:

> While it is fair to say that a street prostitute might be able to avoid a "bad date" by negotiating details such as payment, services to be performed, and condom use up front, it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway. It is also possible that the prostitute may proceed even in the

[62] *Bedford* ONCA, *supra* note 49 at para 311.
[63] *Bedford* SCC, *supra* note 1 at para 157.

> face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk.[64]

The majority also points to evidence suggesting that prostitutes may rely on other tools apart from face-to-face communication, such as intuition, assessments of the customer and vehicle's appearance, and the recording of license plate numbers.[65] At the same time, the majority draws on a different kind of experiential evidence—from residents of neighborhoods where prostitution occurs—to find, contrary to the application judge, that the communicating prohibition has been effective in reducing social harms. [66] The shift in focus here from the experience of people in the sex trade to the experience of neighborhood residents once again displays the instrumentality of the majority's appeals to experiential evidence. While seeming to affirm the importance of experiential knowledge, the majority in fact draws selectively on experiential accounts to affirm its own common sense about the communicating law.

In their factum at the SCC, the applicants respond to the ONCA majority's reasoning on the communicating provision by arguing that the link between the law and the increased risk of harm to people in the sex trade "is not only supported by the evidence, but it accords with common sense."[67] They also specifically refute the soundness of the majority's reasoning regarding other screening techniques: "…there is no evidence, and it

[64] *Bedford* ONCA, *supra* note 49 at para 312.
[65] *Ibid* at para 313.
[66] *Ibid* at para 289.
[67] *Canada v Bedford (AG),* 2013 SCC 72 (Factum of the Respondents/Appellants on Cross Appeal, at para 9).

seems contrary to common sense, to suggest that these techniques could be effectively executed without the use of some degree of verbal communication, or the time that communication grants to the sex worker to meaningfully assess her surrounding circumstances."[68] Rather than drawing on experiential or other evidence to partialize the majority's common sense, the applicants in this instance attempt to reclaim common sense as aligned with their point of view. Despite the different positions of the ONCA majority and the applicants, then, their epistemic strategy remains the same. In this way, universalizing appeals to "common sense" prevail—at least rhetorically—over other categories of proof and forms of knowledge in litigation, including experiential knowledge.

This is not to say that the triumph of common sense at the ONCA is absolute. In dissent on the communicating provision issue, MacPherson JA (with Cronk JA concurring) objects to the ONCA majority's characterization of the experiential evidence on screening as inadequate. Like Himel J, he first points to indirect evidence from the 2006 Subcommittee hearings, in which several prostitutes testified that screening is an essential safety tool. MacPherson JA notes that the evidence of several experts in *Bedford* further supports this view.[69] Unlike Himel J, however, he goes on to emphasize the importance of the evidence submitted directly by the experiential affiants:

> In my view, the affidavit evidence in this case provides critical insight into the experience and knowledge of people who have worked on the

[68] *Ibid* at para 35.
[69] *Bedford* ONCA, *supra* note 49 at para 349.

> streets, and who have been exposed to the risk of violence first-hand. This type of evidence should not be set aside lightly.[70]

With this, MacPherson JA reaffirms the centrality of the firsthand experiential evidence provided by affiants in the case. Unfortunately, this passage is not reiterated by the SCC, despite that Court's general endorsement of MacPherson JA's reasons.

7.3.3 The Supreme Court of Canada

As noted above, the Supreme Court of Canada ultimately approves MacPherson JA's reasoning with respect to the communicating provision, including his assessment of the evidence supporting screening as an essential safety tool. In doing so, however, the Court does not specifically underscore the importance of the experiential evidence presented in the case. Rather, it relies primarily on two key holdings about social and legislative facts in *Charter* cases—holdings that constitute the most interesting and important aspects of the SCC's treatment of evidence and knowledge in *Bedford*.

The first key holding, already touched upon above and in Part I of this dissertation, is the deferential standard of review accorded to social and legislative facts by the SCC in *Bedford.* As Chief Justice McLachlin, writing for the Court, states at the outset of the decision:

> Absent reviewable error in the trial judge's appreciation of the evidence, a

[70] *Ibid* at para 350.

> court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.[71]

While acknowledging that *RJR-MacDonald* suggested a less deferential standard of review for social and legislative facts, the Court in *Bedford* notes that the role of social science evidence in *Charter* cases has "evolved significantly" since then.[72] In particular, the jurisprudence has established a preference for social science research to be presented via expert evidence, the assessment of which relies primarily on the judge at first instance.[73] In addition to this justification, the Court offers two practical reasons for maintaining a single deferential standard of review regardless of the type of fact at issue. First, to do otherwise would require judges to duplicate the time-consuming work of reviewing extensive evidentiary records, and thereby add cost and delay to litigation.[74] Second, social and legislative facts are difficult to disentangle from adjudicative facts, and from issues of expert credibility.[75]

Guided by this holding, the SCC defers heavily to the application judge's findings of fact throughout its decision in *Bedford.* To the extent that the Court at this level comments on the record*,* it does so largely to affirm Himel J's findings. The Court's agreement with

[71] *Bedford* SCC, *supra* note 1 at para 49.
[72] *Ibid* at para 53.
[73] *Ibid* at para 53.
[74] *Ibid* at para 51.
[75] *Ibid* at para 52.

MacPherson JA on the issue of screening is largely grounded in this deferential approach. As McLachlin CJ explains:

> …the majority of the Court of Appeal erroneously substituted its assessment of the evidence for that of the application judge. […] This was linked to its error, discussed above, in according too little deference to the application judge on findings of social and legislative facts. MacPherson J.A. for the minority, correctly countered that the evidence on this point came from both prostitutes' own accounts and from expert assessments, and provided a firm basis for the application judge's conclusion.[76]

The Court goes on to note that the majority ignored the application judge's finding regarding the displacement effects of the communication law, a finding supported by evidence from the report of the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws.[77] While the Court here points to experiential, expert and legislative evidence as supporting the finding that screening is an essential safety tool, its main focus in is on deferring to the application judge.

What is the significance of the SCC's deference to the application judge's findings of fact from the perspective of epistemological justice? A couple of points are worthy of note here. First, the Court's holding with respect to the standard of review disregards the in-

[76] *Ibid* at para 154.
[77] *Ibid* at para 155, referring to House of Commons, Standing Committee on Justice and Human Rights, Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006).

between nature of social and legislative facts in favour of maintaining a sharply delineated dichotomy between law and fact. Indeed, the Court justifies its holding in part by the need for a clear "division of labour" between trial courts and appellate courts.[78] While recognizing the inextricability of social and legislative facts from adjudicative facts,[79] the Court does not extend this same recognition to the distinction between law and fact itself. To the extent that the law/fact dichotomy tracks onto other dichotomies engrained in mainstream epistemology—such as the dichotomy between subjective, value-laden norms and objective, universal facts—the Court's approach here runs counter to feminist epistemological insights.

Second, the deferential standard of review established by the Court in *Bedford* leaves the fate of epistemological justice largely in the hands of trial judges, for better or worse. This is a risky move. As discussed in the previous chapter, assessments of evidence inevitably call for the application of common sense and logic—the contents of which may vary significantly from one person to the next. They also depend on the epistemological assumptions and approach of the decision-maker. Granting primary authority over the facts to the judge at first instance may bode well in some cases, however it also puts a lot of stock in a single individual's interpretation of the record. In the *Bedford* case, the result is to reinforce the approach of Himel J, which leads to a legal victory for a progressive *Charter* challenger, but in way that arguably fails to give due weight to experiential knowledge.

[78] See note 71 above.
[79] *Bedford* SCC, *supra* note 1 at para 52.

The SCC's second key holding involves reframing the type of fact at issue—and thus the type of proof required—under s.7 of the *Charter*, as compared to section 1. This finding, already touched upon in Part I,[80] is perhaps the most significant and promising aspect of the SCC decision in terms of the treatment of experiential knowledge in litigation. The SCC's key point here is to clarify that the inquiry under s.7 is qualitative, focusing on the law's impact on individual rights rather than on society as a whole. As the Court states:

> The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.[81]

The point is reiterated a few paragraphs later:

> The inquiry into the impact on life, liberty or security of the person is not quantitative -- for example, how many people are negatively impacted -- but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7.[82]

According to the Court, it is only under s.1 that the law's impact in terms of society as a whole comes into play. The inquiry at this second stage is both quantitative and

[80] See: Chapter 1 at 1.3.1; Chapter 2 at 2.4.2.
[81] *Bedford* SCC, *supra* note 1 at para 123.
[82] *Ibid* at para 127.

qualitative.[83]

This reframing of the facts at issue, and concomitant demands of proof, at different stages of the *Charter* analysis carries important doctrinal, practical, and epistemological consequences. Doctrinally, as noted in Chapter 2, it shifts questions of social and legislative fact over to the s.1 analysis, and thereby increases the potential importance of the s.1 inquiry in s.7 cases.[84] Practically, it reduces the burden on *Charter* claimants to tender extensive evidence, including expert and social science, in order to demonstrate a violation of their constitutional rights, while potentially increasing the onus on the Crown to justify rights violations with such evidence. Indeed, the Court explicitly points to the relative resources of the Crown as compared to *Charter* claimants as a justification for its approach:

> the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole."[85] […] To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.[86]

[83] *Ibid* at para 125-126.
[84] This shift was anticipated by some of my research interviewees: Interview 1 (6 September 2016) and Interview 1b (3 October 2018). See Chapter 2 at 2.4.2.
[85] *Bedford* SCC, *supra* note 1 at para 126.
[86] *Ibid* at paras 127-128.

Most important for my purposes however, are the epistemological consequences. Under this approach, academic experts are no longer required to demonstrate the existence of a rights violation. In theory, a single experiential account from a directly affected person will suffice. The Court's holding thus suggests the potential to augment the weight of experiential evidence in proving a *Charter* rights violation—not only in *Bedford,* but in all s.7 cases.[87] In this way, it could be read as taking a significant stride towards the realization of feminist epistemological commitments.

Still, there are some reasons to doubt whether this development ultimately favours experiential knowledge or epistemological justice more broadly. First, the Court's holding may simply shift the focus of *Charter* cases from s.7 to s.1, and thereby trivialize the violation of *Charter* rights along with the experiential evidence used to establish them. As one of the public interest litigators I interviewed for this dissertation explained:

> That gives a lot of authority to that one person's voice. But what it opens is this much bigger role for section 1 probably. And so I think because of that, it gives both more and less authority to an individual's voice […] it's hard for one person's voice to be very authoritative under section 1.[88]

As discussed in Chapter 2, the government has often been granted substantial leeway in justifying *Charter* violations under s.1, including being allowed to lean heavily on

[87] This was noted by several of my interviewees: Interview 1 (6 September 2016) and Interview 4 (15 September 2016). See also: Young, *supra* note 47 at 619.
[88] Interview 1 (6 September 2016)

common sense and logic.[89] The Court's reframing of the standard of proof under s.7 could thus result in the reinforcement of common sense as the prevailing form of knowledge in litigation.

Second, while experiential evidence may provide a complete answer to a qualitative inquiry focused on individual rights, it is not the only form of evidence to which litigators and courts may turn at this stage. To the contrary, in affirming that the impugned laws violate the s.7 right to security of the person in *Bedford*, the SCC refers to findings of fact made on the basis of a range of evidence, including expert social science evidence and government-generated evidence.[90] For example, in reasoning that the bawdy-house provision prevents the most vulnerable people in the street sex trade from resorting to "safe houses" provided by others, and thereby infringes security of the person, the Court directly cites the expert evidence given by applicant criminologist John Lowman. [91] It is perhaps not surprising, then, that the litigators I interviewed generally agreed that a robust evidentiary record, including both expert and experiential evidence, remains essential to putting forward a strong case in practice.[92] I return to this issue in the next chapter.

[89] See for example: *RJR MacDonald, supra* note 53 at paras 137, 154; *Thomson Newspapers Co v Canada (AG),* [1998] 1 SCR 877 at para 90; *R v Butler,* [1992] 1 SCR 452 at paras 103-108*; Harper v Canada (AG),* [2004] 1 SCR 827 at para 77; *BC Freedom of Information and Protection of Privacy Association v British Columbia (AG)* 2017 SCC 6. See Chapter 2 at 2.4.2.
[90] *Bedford* SCC, *supra* note 1 at paras 63-72.
[91] *Ibid* at para 64.
[92] Interview 3 (14 September 2016); Interview 4 (15 September 2016); Interview 4b (18 September 2018); Interview 5b (12 September 2018) and Interview 9 (17 September 2018).

7.4 CONCLUSION

In this chapter, I have examined how the parties and the courts weigh different categories of proof in the course of their arguments and reasons for decision. My key findings are twofold. First, my analysis once again highlights the instrumentality with which evidence and knowledge are treated in the fact-finding process in *Bedford*. In particular, I have shown how the approach taken by the parties and the courts to different categories of proof often shifts from one moment to the next, depending on the demands of the adversarial process or the dictates of common sense. This closely parallels my observations in earlier chapters of Part 2 of how different epistemic norms are instrumentalized through the fact-finding process. Second, just as the fact-finding process in *Bedford* tends to bolster mainstream epistemic norms at the expense of feminist epistemological insights, so too does it encourage a rhetorical emphasis on hegemonic forms of knowledge. Thus, I find that the weight accorded to experiential evidence in the case is minimal, while legislative and other government-generated evidence, legal reasoning, and common sense are highly valued. In these ways, my observations in this chapter offer further reason to doubt whether *Bedford* can in fact be counted as a progressive victory when it comes to epistemological justice. As I discuss in the next and final part of the dissertation, my interview data supports, extends, and helps to explain these findings.

Chapter 8: The Legal Process in Strategic *Charter* Litigation

8.1 INTRODUCTION

In Part II of this dissertation, I used the record in *Bedford v Canada (AG)*[1] as a case study to examine how feminist—and more broadly, progressive—epistemological commitments fare in strategic *Charter* challenges to legislation under s.7. I focused on the rhetorical treatment of three conventional categories of proof: experiential evidence, expert evidence (including social science research), and common sense. My analysis brought to light two ways in which the fact-finding process in *Bedford* fails to uphold feminist epistemological commitments: 1) by bolstering dominant epistemic norms and categories of knowledge; and 2) by decontextualizing and instrumentalizing epistemic norms and categories of all kinds. Ultimately, I argued that there is good reason to doubt whether legal victories such as *Bedford* are also victories at the level of epistemological justice. This in turn gives reason to doubt the value of such litigation in the broader pursuit of social justice.

In this final part of the dissertation, I delve deeper into the roots of the tension between legal victory and epistemological justice. What about the context of fact-finding in strategic *Charter* challenges to legislation reinforces dominant ideas about and forms of knowledge? What thwarts the potency of experiential knowledge as a source of critical resistance? What about this context impels actors to detach both dominant and critical epistemic norms from the broader frameworks that give them meaning, and to wield them

[1] *Bedford v Canada (AG),* 2010 ONSC 4264 [*Bedford* ONSC], affirmed in 2013 SCC 72.

instrumentally? In this Part, I respond to these questions by exploring the broader dynamics of the legal process through which the record in *Bedford* and like cases is constructed and framed. Returning to Twining's expansive view of evidence as "information in litigation,"[2] I examine the practical, legal, institutional, epistemological, and human factors that sit in tension with feminist epistemological commitments in strategic *Charter* litigation.

The questions of legal process at issue in this chapter cannot be answered solely on the basis of evidentiary records, let alone the record of a single case study. While abstract theorizing may allow for some insight on these issues, I turn to a different methodology, drawing on a series of in-depth semi-structured interviews with public interest litigators (PILs), Crown litigators, and judges who have been involved in litigation under the *Charter*.[3] These interviews allow me to speak to aspects of the fact-finding process that lie beyond the record, and to broaden my inquiry to include other strategic *Charter* challenges, including recent challenges under s.7 with which my interviewees were involved such as *PHS Community Services Society v Canada (AG)*[4], *Carter v Canada (AG),*[5] *British Columbia Civil Liberties Assn v Canada (AG),*[6] and *Downtown Eastside Sex Workers United Against Violence v Canada (AG)*.[7] The latter case in particular serves as an important point of comparison with *Bedford* throughout this chapter. The interview

[2] William Twining, *Rethinking Evidence: Exploratory Essays,* 2nd ed (New York: Cambridge University Press, 2006), ch 7. See Chapter 2 at 2.2.1.
[3] Some of my interviewees agreed to be directly named in this project, while others chose to remain anonymous. I have drafted this Chapter accordingly.
[4] *PHS Community Services Society v Canada (AG),* 2008 BCSC 661, varied in 2011 SCC 44 [*Insite*].
[5] *Carter v Canada (AG),* 2012 BCSC 886, affirmed in 2015 SCC 5 [*Carter*].
[6] *British Columbia Civil Liberties Assn v Canada (AG)*, 2018 BCSC 62, varied in 2019 BCCA 228 [*BC solitary confinement*].
[7] *Downtown Eastside Sex Workers United Against Violence v Canada (AG)*, 2008 BCSC 1726 [*SWUAV* BCSC], reversed in 2012 SCC 45 [*SWUAV* SCC].

data also allows me to hold up my analysis in Part II against a different set of sources, and thereby to triangulate my research findings.

The chapter proceeds in three sections. In the first, I offer a comparative account of the origins and framing of the litigation in *Bedford* and *SWUAV,* respectively, as described by counsel in those cases. This section serves several purposes. First, it puts the *Bedford* transcripts into fuller context. Second, it illustrates the tensions that can arise between the pursuit of legal victory and epistemological justice at various stages of litigation, pointing to a number of legal process issues that call for further exploration via my interview data. It thereby provides a compelling narrative prelude, and a helpful point of reference, for the rest of the chapter. Finally, the comparison between *Bedford* and *SWUAV* demonstrates how, prior to the construction and framing of the evidentiary record, epistemology factors into the initiation and framing of the litigation itself. Who decides to go to court in the first place? Who determines how to frame the issues, what arguments to make, what evidence to tender, and even what kind of language to use? The answers depend largely on the lawyering approach of counsel, with significant implications for epistemological justice. The critiques, discussed in Chapter 1, of the power dynamics between lawyers and other social movement participants resurface here.[8] While not the main focus of my project, the comparative story of *Bedford* and *SWUAV* provides a window into this important aspect of legal process.

[8] See Chapter 1 at 1.2.1 under *The Detrimental Effects of Litigation on Client Communities and Social Movements*.

The second section of this chapter draws on examples, comments, and reflections from my interview data to discuss two distinct, albeit closely related, sets of constraints on feminist epistemology that arise from the legal process in strategic *Charter* litigation: 1) practical constraints that impede the construction of a comprehensive record centered on experiential voices; and 2) epistemological constraints that compel litigators to compromise progressive epistemological commitments when framing knowledge in litigation. In the third and final section, I bring my analysis of legal process to its culmination by turning my attention back to the relationship between law, fact, and common sense. Here I demonstrate the persistent influence of law and common sense in constitutional fact-finding, despite the perceived prominence and importance of tendered evidence as a means to disrupt the status quo in recent strategic *Charter* litigation.

My analysis reveals tensions between the pursuit of legal victory and epistemological justice at every stage of the legal process in strategic *Charter* litigation, from the initiation and planning of a case, to the construction of the record, to the framing of knowledge. It also underscores significant internal tensions within both legal strategy and feminist epistemology. A recurring theme throughout the chapter is the long shadow cast by judges, and the realities of human judgment, over the fact-finding process. My interviews suggest that for litigators, decisions about how to approach facts and evidence are largely an exercise in anticipating how judges will respond. As a result, I argue, the epistemic beliefs, experiences, and common sense of judges tend to trump the progressive epistemological commitments of litigators, as well as the experiential knowledge of directly affected community members. At the same time, I suggest that experiential

knowledge can play an influential role in strategic *Charter* litigation, by inducing shifts in judicial common sense.

8.2 TWO LITIGATION STORIES: BEDFORD AND SWUAV

8.2.1 Bedford

The story of *Bedford*, as told by lead counsel Alan Young in an interview, begins in the early 2000s; it was then that Young conceived of the *Charter* challenge while watching the case of serial killer Robert Pickton unfold in British Columbia.[9] A few years later, Young found himself with a surplus of student resources from another project, and decided to launch the challenge. With the help of his students, he researched the case and collected the affidavit evidence over the course of approximately four months. Only then did he secure the applicants who would carry the litigation, largely through personal connections. Terry-Jean Bedford was a former client of Young who had been enthusiastic about the prospect of the case since Young had first conceived of it. Young then reached out to Valerie Scott, wanting to include someone whom he knew to be a long-time advocate for sex workers. Neither Bedford nor Scott, however, was currently working in the sex trade. Concerned about standing, Young asked Scott to find someone currently working in the trade who would be directly impacted by the impugned laws. Amy Lebovitch thus became the third applicant. [10] The Notice of Application was filed in the Ontario Superior Court of Justice on March 20, 2007.[11]

[9] Interview 5 (25 July 2017).
[10] *Ibid.*
[11] *Bedford v Canada (AG),* 2010 ONSC 4264 (Notice of Application).

Young's account of how *Bedford* arose suggests that the case was heavily driven and controlled by him, rather than by the applicants or their communities. When asked how the experiences and perspectives of the applicants contributed to the way the issues were framed, Young responded: "I don't think the litigants framed the issues. I think the issues framed the litigants."[12] As he explained elsewhere: "I don't do constitutional litigation based on people coming to me saying they have issues. I pick the issues I'm interested in and then I find the people to be the figureheads or spokespeople."[13] While not stated as such, a similar approach was taken by many of the other litigators I spoke to in the strategic *Charter* cases they had worked on. For instance, the idea for *Carter* was sparked by a few prominent PILs in the course of preparing and delivering a talk at the British Columbia Civil Liberties Association (BCCLA)'s Annual General Meeting.[14] The BCCLA's expressed interest in supporting the case then paved the way for the challenge to proceed.[15] It was only later that counsel enlisted individual plaintiffs Lee Carter and Hollis Johnson, Dr. William Shoichet, and Gloria Taylor, to carry the litigation—what Sheila Tucker, one of the counsel working on the case, described as an "if you build it, they will come" approach.[16]

According to Young, Bedford and Scott gave him a wide berth to approach the *Bedford* case as he saw fit. However, as the case gained momentum, some sex worker organizations began to express concerns about Young's representation, asking what gave

[12] Interview 5 (25 July 2017).
[13] *Ibid.*
[14] Interview 1b (3 October 2018).
[15] *Ibid* and Interview 6 (30 August 2018).
[16] Interview 6, *ibid*. While the precursor to the challenge to administrative segregation in BC was a suit brought by an individual inmate, the case that ultimately made it to court was similarly planned and initiated by prominent PILs in collaboration with the John Howard Society and the BCCLA. Interview 1b (3 October 2018).

him the authority to speak on behalf of women in the trade. Given the initiative he took and his willingness to work pro bono, Young was taken aback. In his view, the case had brought attention to issues that were previously flying under the radar, such as Pickton and the plight of murdered and missing women. [17]

Still, these organizations sought to become more actively involved, giving rise to conflict between different groups and Young. Young recalled one particularly challenging meeting where a number of such groups provided him with a list of sex work-positive words and phrases to use in court: "I was trying to explain to them: I'm not going to court to convince the court sex work is good – I'll lose the case. [….] Don't ask the litigant to give the positive message. I'm going to alienate people."[18] The sex worker groups wanted Young to avoid using the word "prostitute". In Young's view, however, it was important to consciously switch back and forth between "prostitute" and "sex worker" in order to appear neutral to the court[19]—to come across, in his words, as "an advocate for the *Charter*" rather than for sex workers.[20]

Further conflict arose when Young suggested he was less concerned about losing the argument with respect to the communicating provision at the Court of Appeal. In Young's estimation, access to an indoor location was a much more effective safety measure than allowing communication on the street. "That's when actually people turned

[17] Interview 5 (25 July 2017).
[18] *Ibid.*
[19] Interview 5 (25 July 2017) and Interview 5b (12 September 2018).
[20] Interview 5b, *ibid*.

on me. And they politicized it. Because then, you were bringing a case for the elites."[21] Interestingly, in his interview Young drew on arguments similar to those made by the Crown in the *Bedford* case to support his position, describing survival sex work as primarily a "social services issue", rather than a legal issue.[22]

The above vignettes illustrate the challenges, discussed in Chapter 1, of representing a diverse set of experiences and interests within the confines of atomistic litigation, and the tendency for the litigation process to suppress more marginalized and/or grassroots voices within a social movement.[23] They also demonstrate how Young's own lawyering style influenced the framing of the litigation in *Bedford* in epistemologically significant ways. Ultimately, Young described the conflict between members of the sex work community and himself as follows:

> There was a fundamental misunderstanding, between me and everyone else about what this case was. […] My case was not about sex work. Not at all. It's the context in which the case was brought. My case is about the rationality of government policy. […] that is where the fight started was the groups and SWUAV and everybody thought I wasn't promoting sex work enough. And I kept saying, I do that, I'm losing the case. I can't go to the court as if I'm trying to suggest your decision is going to open the doors for women to go into something they don't like. I need to talk about

[21] Interview 5 (25 July 2017).
[22] *Ibid.*
[23] See Chapter 1 at 1.2.1 under *The Detrimental Effects of Litigation on Client Communities and Social Movements*.

> the rationality of the law, how the government's own law undercuts their very objective, and then impairs other rights and interests.[24]

For Young, then, the case was ultimately centered on legal arguments about the *Charter*, rather than the lived experiences and circumstances of sex workers, despite the wealth of evidence tendered with respect to the latter. This is not to say that Young was unconcerned about the effects of the impugned laws on sex workers. To the contrary, comments made by Young during an earlier interview suggest that the mistreatment of sex workers was an important part of his emotional motivation for pursuing the case.[25] Nevertheless, Young's approach in *Bedford* seems to reflect the lawyer-dominated style of public interest lawyering critiqued by Scott Cummings, Tomiko Brown-Nagin, Derrick Bell, Lucie White, Gerald Lopez and others (see Chapter 1 at 1.2.1 under *The Detrimental Effects of Litigation on Client Communities and Social Movements*), according to which lawyers view themselves as experts tasked with representing, speaking for, and resolving the problems of subordinated people, primarily through the pursuit of litigation "wins".

8.2.2 SWUAV

Young's conception of, and control over the litigation in *Bedford* stands in notable contrast to *SWUAV's* community-driven origin. Indeed, the origin story of *SWUAV* reveals an approach to litigation that more closely resembles Lopez' notion of "rebellious lawyering against subordination" than the lawyer-dominated approach of Young in

[24] Interview 5b (12 September 2018).
[25] Interview 5 (25 July 2017).

Bedford.[26] As explained by Katrina Pacey and Elin Sigurdson, two of the lead counsel in the case, *SWUAV* arose through ongoing dialogue between Pivot Legal Society (Pivot)—at that time a fledging organization composed mostly of law students (including Pacey and Sigurdson)—and women from the Downtown Eastside (DTES) of Vancouver.[27] Pivot was initially concerned about the violence and lack of police protection that women in the neighbourhood seemed to be facing, and wanted to find out how best to serve them. They began hosting meetings with women from the community, distributing flyers to invite people, and providing food and honoraria to all those who participated.[28] Through these meetings, Pivot learned that many of the challenges facing women in the DTES were closely linked to the criminalization of sex work.[29] As Pacey put it: "[I]t was really an early identification by women in the community that this was a key cause of the violence that they were experiencing as well as the lack of police protection that they could access…"[30] Discussion then turned to different possible avenues for addressing the problem.

Around the same time, a Parliamentary process to review Canada's prostitution laws was beginning.[31] Pivot was also in the midst of an affidavit project in Vancouver to collect stories from neighbourhood residents about police mistreatment and other issues.[32] In anticipation of the Parliamentary review, and other possible legal action, Pivot worked

[26] Gerald P López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Boulder: Westview Press, 1992) at 37. See Chapter 1 at 1.2.1 under *The Detrimental Effects of Litigation on Client Communities and Social Movements.*
[27] Interview 4b (18 September 2018) and Interview 12 (27 September 2018).
[28] Interview 4b, *ibid.*
[29] *Ibid* and Interview 12 (27 September 2018).
[30] Interview 4b (18 September 2018).
[31] *Ibid*. See House of Commons, Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006).
[32] Interview 12 (27 September 2018).

with their community partners to collect 91 affidavits from sex workers.[33] The affidavits were then used to support a constitutional analysis of the laws at issue, in a report titled *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws*.[34] Following the meetings and the affidavit project, some of the women involved wanted to continue organizing together. They formed an advocacy group that eventually became known as Sex Workers United Against Violence (SWUAV).[35]

Meanwhile, faced with disappointing results from the Parliamentary process, Pivot and their community partners turned to litigation. They were committed to bringing a claim that focused on those most severely impacted by the prostitution laws—the heavily marginalized street-sex workers of the DTES (though Pacey also stressed the importance of illustrating the full panoply of women's experiences in the sex trade through the evidentiary record).[36] Another key commitment was to proceed "as safely as possible for the individuals involved and for the community that was going to be […] ultimately impacted by the litigation."[37] In the early days of planning, Pivot met with many individuals in the hope of finding someone who would be in a position to carry the litigation without compromising this principle, with no luck. The SWUAV organization was thus formalized as a means to bring the action collectively, with shared support and resources.[38] The statement of claim was filed on behalf of SWUAV on August 3, 2007,

[33] Interview 4b (18 September 2018).
[34] *Ibid*; Pivot Legal Society, Sex Work Subcommittee, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* (April 2004) [*Voices for Dignity*].
[35] Interview 4b (18 September 2018) and Interview 12 (27 September 2018).
[36] *Ibid.*
[37] Interview 4b (18 September 2018).
[38] *Ibid.*

just a few months after the filing of the application in *Bedford*.[39] Later on, former sex worker Sheryl Kiselbach agreed to join the litigation as an additional plaintiff.[40]

Unlike in *Bedford*, the framing of the legal issues in *SWUAV* was heavily influenced by the litigants themselves. As explained by Sigurdson, the SWUAV organization was composed principally of female-identified, street-level sex workers in the DTES, including a high number of Indigenous and otherwise racialized people, and people with addiction, mental illness, and other disabilities. The particular needs and circumstances of this group drove the approach taken to attacking the laws. [41] According to Pacey and Sigurdson, it was important to the members of SWUAV and Kiselbach to bring a broadly scoped challenge, attacking as many of the harmful provisions as possible, because they saw the laws working together as an interlocking scheme.[42] "[I]t was really part of how this group thought about what the problem was", explained Sigurdson.[43] The litigants also felt that it was important to make an equality argument under s.15 of the *Charter*, despite the expected difficulty of succeeding on this point from a legal perspective.[44]

Had the case gone to a hearing on the merits, counsel in *SWUAV* were committed to centering the experiences of sex workers in the fact-finding process. They believed it was important for the court to hear directly from sex workers, and thus planned to have

[39] *Downtown Eastside Sex Workers United Against Violence v Canada (AG)*, 2008 BCSC 1726 (Statement of Claim).
[40] Interview 4b (18 September 2018).
[41] Interview 12 (27 September 2018).
[42] Interview 4b (18 September 2018) and Interview 12 (27 September 2018).
[43] Interivew 12, *ibid*.
[44] Interview 4b (18 September 2018).

experiential witnesses testify *viva voce*, despite the practical challenges this would pose.[45] This would have differed from the approach taken in *Bedford*, where the challenge was brought as an application via written evidence.

8.2.3 Interplay and Outcome

Counsel in *SWUAV* and *Bedford* were aware of each other's cases and were in communication, but did not closely collaborate or coordinate their efforts.[46] In their interviews with me, Pacey and Sigurdson's comments about *Bedford* were generally positive or neutral.[47] Young, on the other hand, expressed some concerns about the *SWUAV* case, though he acknowledged that it advanced the rules of standing in a helpful way. In Young's view, the challenge in *SWUAV* was too ambitious, going after provisions such as the one on procuring that courts would be reluctant to strike down, and making an equality claim under s.15 that Young was sympathetic to but thought was "a stretch".[48] *SWUAV* also attacked provisions that Young felt ought to remain on the books, such as protection against the most dangerous, traditional pimps. "[T]hey were going after pimping and procuring and section 15 […] It was an overreach."[49] These, of course, were the aspects of the litigation that the community being represented in *SWUAV* had specifically called for.

Ultimately, the *SWUAV* case was diverted by a challenge to standing that went up to the Supreme Court of Canada (SCC). In the meantime, Young succeeded in having the

[45] Interview 4 (15 September 2016) and Interview 4b (18 September 2018). Had counsel wished to proceed via affidavit evidence, they could have brought a summary trial application under rule 9-7 of the *Supreme Court Civil Rules,* BC Reg 168/2009.
[46] Interview 4b (18 September 2018) and Interview 5b (12 September 2018).
[47] Interview 4b, *ibid* and Interview 12 (27 September 2018).
[48] Interview 5 (25 July 2017).
[49] Interview 5b (12 September 2018).

communicating, living on the avails, and bawdy house provisions struck down as unconstitutional, in a ruling upheld by that same Court. By the time the litigants in *SWUAV* were granted public interest standing, the result in *Bedford* had rendered much of the BC case moot, and the action did not proceed further.[50]

Without overgeneralizing from the above comparison, one can certainly see how the commitment to a community-oriented process in *SWUAV*—a process that sought to center the experiential knowledge of marginalized people— came along with certain risks in terms of securing a favourable legal outcome. The scope of the challenge called for by SWUAV was indeed ambitious, as was the s.15 equality argument. Moreover, the decision to bring the action as a collective left them vulnerable to a challenge on standing. In this sense already, the story of *Bedford* and *SWUAV* hints at the tension between the pursuit of legal victory and epistemological justice in strategic *Charter* litigation.

Of even greater interest to my project, though, is counsel in *SWUAV*'s acceptance of the need to make epistemological compromises in the litigation context, even while taking great care to centre community voices as much as possible. This can be seen partly in how they planned to bring the case on the merits in *SWUAV*, had it gone ahead. For instance, despite their unequivocal identification of SWUAV members as experts on the impacts of the prostitution laws, counsel accepted that they would have to frame their

[50] Although it is worth noting that the SCC was willing to grant public interest standing in *SWUAV* despite the ongoing litigation in *Bedford* in part because the perspectives from which the challenges were being brought in the two cases were different—one revolving mainly around street-level sex workers (*SWUAV*), the other not (*Bedford*). *SWUAV* also sought to challenge a number of additional statutory provisions on additional *Charter* grounds. See *SWUAV* SCC, *supra* note 7 at para 64.

evidence somewhat differently in court, conforming to more traditional ideas of what an expert looks like[51]—a point that I discuss further in the second section of this chapter. According to Sigurdson, if the trial on the merits had gone ahead, they would probably have tendered the experiential affidavit evidence they had previously collected through just such an expert.[52] Indeed, when asked whether their approach to the experiential and expert evidence would have differed from what was done in *Bedford*, Pacey opined that it would likely have been similar. Pacey also noted that they engaged many of the same expert witnesses as in *Bedford*, though they also included some additional experts, and drafted separate expert reports.[53]

Counsel's acceptance of epistemological compromise is also reflected in their expressed views on Young's effort in *Bedford*. For instance, when asked about the mobilization of common sense in *Bedford*, Pacey was quick to praise Young's approach, remarking: "he's relatable for the court and he's, you know, got wonderful credentials and he's a very compelling advocate and he was able to, through his advocacy style, to make this out to be a really straightforward decision".[54] When asked whether *Bedford* achieved what *SWUAV* was trying to achieve, both Pacey and Sigurdson answered affirmatively, expressing strong support for the outcome in *Bedford*. While noting that some problematic provisions were left unchallenged (and that the political context led to a host of new problems), Pacey was sympathetic to Young's strategy of wanting to argue "a clean, clear case", describing the result as a "very successful and important outcome and

[51] Interview 4b (18 September 2018) and Interview 12 (27 September 2018).
[52] Interview 12, *ibid*.
[53] Interview 4b (18 September 2018).
[54] *Ibid.*

a wonderful decision."[55] For Sigurdson, *Bedford* achieved most of what was sought by SWUAV, with the notable exception of the discrimination argument under s.15, which the applicants in *Bedford* weren't well positioned to advance.[56] "You know, that being missing, it really captured a lot of our intentions. A lot of our clients' goals were met."[57] Sigurdson also pointed to SWUAV's intervention in *Bedford* as an indication of her clients' support for the case.[58]

To be fair, counsel in *SWUAV* may not have viewed their support for *Bedford* as an epistemological compromise at all. As far as Sigurdson could recall, the experiences of the applicants were "front and centre" in *Bedford*; without knowing for sure, she imagined that the case was animated by similar concerns and intentions as was *SWUAV*.[59] This suggests that Sigurdson (and perhaps her co-counsel as well) was simply unfamiliar with the details of how the litigation in *Bedford* unfolded. Nevertheless, this lack of attention to the very different epistemological approach taken in *Bedford* is itself telling. At the end of the day, even those lawyers most committed to grassroots advocacy accorded prime significance to the legal outcome of the litigation, over and above the manner in which it was achieved.

[55] *Ibid.*
[56] It is worth noting that Maggie's, a not-for-profit organization representing sex workers in Toronto, sought to intervene at the Ontario Court of Appeal (ONCA) in *Bedford* in order to raise a s.15 challenge to the impugned laws. However their application to intervene was opposed by the Attorneys General of Canada and Ontario, and ultimately rejected by the ONCA for improperly raising a new *Charter* ground: *Bedford v Canada (AG)*, 2011 ONCA 209. Motions to intervene brought by Maggie's and several other sex worker organizations were also dismissed at the SCC: *Canada (AG) v Bedford*, [2012] SCCA No 159.
[57] Interview 12 (27 September 2018).
[58] *Ibid.*
[59] *Ibid.*

8.3 THE CONSTRAINTS OF LEGAL PROCESS

8.3.1 Practical Constraints

The comparison between *Bedford* and *SWUAV* in the section above illustrates both how feminist epistemological commitments may or may not animate strategic *Charter* litigation efforts, and how tensions can arise between upholding such commitments in litigation and pursuing a winning legal strategy. In this next section, I draw on my interviews to identify and examine a number of factors that contribute to these tensions. I begin by examining some of the practical challenges that arise in strategic *Charter* litigation. While there is much that could be said in this regard, my focus is on how practical constraints affect the ability to bring an ample evidentiary record centred on the experiential knowledge of directly affected communities. After addressing some preliminary points about procedural context and the law of standing, I turn my attention to the construction of evidentiary records, examining the intertwined issues of cost, the availability of evidence, the selection of witnesses, the burdens of participating in litigation, and the form in which evidence is tendered in litigation.

Preliminary Issues

Type of Proceeding

Before focusing in on the construction of evidentiary records in strategic *Charter* litigation, I pause to acknowledge some preliminary contextual factors, an in-depth exploration of which is beyond the scope of this dissertation. First, it is important to note that the fate of feminist epistemological commitments in a strategic *Charter* case depends, in part, on the nature of the proceeding and the manner in which the *Charter*

challenge is raised. The challenge in *Bedford* was brought by way of a civil application for declaratory relief under the *Charter*. However, a strategic *Charter* challenge to legislation can also arise in a number of other ways—for example, in the course of defending a criminal charge or a civil action,[60] or in the form of a constitutional reference—with important consequences for the fact-finding process. For instance, a *Charter* challenger who initiates, rather than responding to, a proceeding likely has more control over the case's timing, the framing of the legal issues, the scope of the record tendered, and the procedures for bringing evidence (though this may be contested), all of which may assist the challenger to uphold a given set of epistemological commitments.[61]

In comparison to a criminal or reference case, moreover, a civil action or application may be an easier setting in which to anchor constitutional issues to a robust and relevant factual context (the difference between actions and applications is discussed further below: see *Tendering Evidence*). Because reference cases lack the adjudicative facts associated with traditional parties, and are almost always heard by appellate courts (with the important exception of the *Polygamy Reference*),[62] they pose the risk of being highly removed from the lived experiences of directly affected people. In criminal trials, on the other hand, courts may take a stricter approach to admissibility, given the high stakes for the accused person(s). The adjudicative facts, moreover, may be only tenuously connected to the social and legislative facts relevant to the *Charter* challenge. For

[60] See for example *Victoria (City) v Adams,* 2008 BCSC 1363, varied in 2009 BCCA 563 [*Adams*].
[61] Interview 7 (13 September 2018) (noting how public interest litigants often have more time to prepare and bring their cases than the Crown does when responding to a *Charter* challenge); Interview 9 (17 September 2018) (noting that plaintiffs generally get to choose their process).
[62] *Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588 at para 27 [*Polygamy Reference*].

instance, in two recent *Charter* challenges to the *Protection of Communities and Exploited Persons Act*[63]—Canada's current legislation governing prostitution, passed in response to the *Bedford* ruling—the arguments raised by defense counsel about the unconstitutional impact of the new laws on sex workers were based on reasonable hypotheticals which bore little relationship to the situation of the accused themselves, who were not sex workers but rather third party managers.[64]

A civil proceeding such as *Bedford*, then, arguably offers the best avenue for *Charter* challengers hoping to advance an in-depth and appropriately contextualized record centred on experiential knowledge. Examining the many factors that put pressure on feminist epistemological commitments even in this "best-case scenario" allows me to make a strong case for the tension between legal victory and epistemological justice in strategic *Charter* litigation.

Standing

Another important preliminary issue concerns the law of standing, which constrains who can bring a strategic *Charter* challenge. Traditionally, the law of standing has required litigants to have a direct interest in the issues they raise before the courts.[65] In recent years, however, Canadian courts have allowed litigants without a direct interest to

[63] *Protection of Communities and Exploited Persons Act*, SC 2014, c 25.
[64] Debra Marie Haak, *The Wicked Problem of Prostitution and Sex Work Policy in Canada* (PhD Thesis, Queen's University, 2019) [unpublished] at 202-206, discussing *R v Boodhoo* 2018 ONSC 7205 and *R v Anwar*, 2020 ONCJ 103.
[65] Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Vancouver: Carswell, 1986) at 9.

proceed on the basis of public interest standing in certain circumstances.[66] In *SWUAV*, the SCC relaxed the test for public interest standing, significantly attenuating the challenges posed by standing in strategic *Charter* litigation, according to my interviewees.[67] Still, the traditional approach to standing at common law has often created a barrier to both legal victory and epistemological justice in strategic *Charter* litigation, and may continue to do so in some cases.

On the one hand, the standing requirement ensures that a *Charter* challenge is rooted in the lived experiences of directed affected individuals—something seemingly essential to upholding feminist epistemological commitments. As noted by several interviewees, there may also be good strategic reasons to name directly affected individuals as litigants, regardless of the law. For instance, individuals help to personalize the litigation for the public,[68] and can create a sense of urgency that leads to a more efficient resolution of the case—factors that influenced the decision to name individual plaintiffs in *Carter* and *Insite*.[69]

On the other hand, the traditional emphasis on private standing aligns poorly with the nature of the issues at stake in strategic *Charter* challenges to legislation, which affect not

[66]See for example: *Thorson v Canada (AG)*, [1974] SCJ No 45, [1975] 1 SCR 138; *Nova Scotia (Board of Censors) v McNeil*, [1975] SCJ No 77, [1976] 2 SCR 265; *Canada (Minister of Justice) v Borowski*, [1981] SCJ No 103, [1981] 2 SCR 575; *Finlay v Canada (Minister of Finance)*, [1986] SCJ No 73, [1986] 2 SCR 607.
[67] *SWUAV* SCC, *supra* note 7; Interview 3 (14 September 2016) and Interview 8 (14 September 2018).
[68] Interview 1b (3 October 2018) and Interview 6 (30 August 2018).
[69] Interview 1b, *ibid* and Interview 8 (14 September 2018).

just individuals but entire communities.[70] This harkens back to the critiques of atomism under the *Charter* discussed in Chapter 1.[71] By discouraging collective forms of representation in favour of an individualistic approach, the law can create problems for those hoping to centre marginalized experiential knowledge in litigation. One problem is how to present the experiential knowledge of a large and diverse population through the voice of a single, or only a few, individuals[72]—what I refer to in Chapter 4 as the problem of representativeness[73]—though this may be mitigated somewhat by the participation of experiential witnesses.[74] Another problem, underscored by many of my interviewees, is the heavy burden of carrying constitutional litigation, which can make it difficult to find appropriate individual litigants, especially where the population at issue is highly marginalized or vulnerable.[75] I discuss this issue further below (see The Challenges of Participating in Litigation).

The comparison between *Bedford* and *SWUAV* illustrates the dilemma that the traditional approach to standing can pose in light of the above challenges. In *Bedford*, the applicants represented a relatively privileged echelon of the sex trade, whose experiences, concerns and interests likely differed from other, more marginalized women and girls involved in the trade. Even then, only one of the applicants—Amy Lebovitch, whom Young recruited

[70] As Young put it, "…the Charter is all about how the law affects third parties. And you as the litigant should be standing in the shoes of third parties as a proxy for how the law affects them". Interview 5 (25 July 2017).
[71] See Chapter 1 at 1.2.1 under *Critiques of Constitutional Litigation as a Tool for Social Justice.*
[72] Interview 2 (13 September 2016) and Interview 4b (18 September 2018).
[73] See Chapter 4 at 4.2.1 under *Representativeness of Experience.*
[74] For example, Tucker noted the deliberate attempt in *Carter* to select experiential witnesses with an array of representative illnesses. Interview 6 (30 August 2018).
[75] Interview 1b (3 October 2018); Interview 3 (14 September 2016); Interview 4b (18 September 2018); Interview 8 (14 September 2018); Interview 12 (27 September 2018); and Interview 13 (28 September 2018).

specifically to address concerns about standing—was currently engaged in the sale of sex at the time of the litigation. The lawyers and community members involved in bringing *SWUAV*, on the other hand, were committed to bringing a claim that focused on the heavily marginalized street-sex workers of the DTES. [76] In the end, the only way to do that was to proceed with SWUAV as an organizational plaintiff.[77] From a feminist perspective concerned with epistemological justice, this approach had clear advantages. Not only did it allow community members to protect their individual identities from public scrutiny, it empowered them to share resources and construct collective knowledge. Legally, however, naming an organization as the primary litigant in the case was risky, as evidenced by the government's immediate challenge to standing—a challenge that ultimately derailed the case (albeit producing another important legal outcome).

Even when vulnerable people are able to participate as individual parties in litigation, reliance on such litigants can present a number of challenges, according to the PILs I interviewed. For one thing, the instability of some people's lives can present challenges in terms of maintaining contact and clear lines of communication.[78] Such clients may also have urgent personal interests that conflict with the longer-term interests of the social movement. [79] For example, when Gloria Taylor was named as a plaintiff in *Carter*, there was pressure to expedite the case so that she could get an order permitting her to obtain a

[76] Intervew 4b, *ibid* and Interview 12 (27 September 2018).
[77] Interview 4b, *ibid.*
[78] Interview 1b (3 October 2018); Interview 2 (13 September 2016); and Interview 8 (14 September 2018).
[79] Interview 1b, *ibid*; Interview 3 (14 September 2016); and Interview 6 (30 August 2018).

medically assisted death.[80] As noted by one interviewee, the expedited process that followed may not have served the broader community interest in a thorough and comprehensive fact-finding process.[81] The recent BC-based challenge to administrative segregation in federal prisons provides another example.[82] As recounted by two different interviewees, the precursor to that case was a *Charter* challenge brought by a woman named Bobby Lee Worm, who was subject to a highly restrictive form of solitary confinement.[83] Because the challenge was focused on Ms. Worm's situation, however, a confidential resolution was quickly reached, precluding the court from addressing the systemic issues raised by the challenge. Following this experience, counsel decided to start a challenge on behalf of the BCCLA and the John Howard society, rather than on behalf of individual inmates.[84]

In contrast to individual litigants, institutional litigants offer a number of advantages, according to my interviewees.[85] In addition to relieving the burden on individual litigants, and bringing financial and human resources to a case, organizations often have systemic knowledge of the relevant issues, in part as a result of working directly with communities over an extended period of time.[86] They may thus play a very helpful role in gathering evidence[87] (though individual litigants can sometimes also be helpful in this way when they have spent time advocating for their cause).[88] In the BC administrative segregation

[80] Interview 6, *ibid* and Interview 10 (21 September 2018).
[81] Interview 10, *ibid.*
[82] *BC solitary confinement*, *supra* note 6.
[83] Interview 1b (3 October 2018) and Interview 3 (14 September 2016).
[84] Interview 1b, *ibid.*
[85] *Ibid*; Interview 3 (14 September 2016); and Interview 6 (30 August 2018).
[86] Interview 1b (3 October 2018).
[87] *Ibid* and Interview 6 (30 August 2018).
[88] Interview 13 (28 September 2018).

case, for instance, the John Howard Society directed counsel to correctional officers who were willing and able to provide evidence about the culture in federal prisons.[89] Organizations can also serve as a helpful point of contact for the media, and for community members who may wish to become involved in the case as witnesses or as individual parties.[90] Given these benefits, and the recently relaxed standard for public interest standing established in *SWUAV*, institutional litigants have become an important part of the landscape of strategic *Charter* litigation in Canada. In the end, the best approach for those concerned about epistemological justice may be to name both individual and institutional litigants, as was done in *Carter.* Such an approach secures the strategic benefits of institutional support while mitigating the legal risk of a challenge to standing, and ensuring that the experiences of at least some directly affected individuals remain front and centre.[91]

Building the Record

Having addressed the preliminary issues of procedural context and standing, I now turn my attention to factors affecting the construction of the evidentiary record in strategic *Charter* litigation. I begin by addressing some of the key practical considerations that influence the scope and content of the record. I then move on to examine how these same considerations affect the form in which evidence is tendered.

Cost, Scope, and Access to Justice

One of the biggest challenges of bringing (or defending) strategic *Charter* litigation is the need to allocate scarce time and resources to a process that invites an almost limitless

[89] Interview 1b (3 October 2018).
[90] *Ibid* and Interview 6 (30 August 2018).
[91] Note, however, that naming multiple litigants—especially when they are as differently positioned as individual and institutional litigants are—may heighten the risk of conflicts of interest.

quantity of potential evidence. In this dissertation, I have made clear that the proliferation of evidence in strategic *Charter* litigation is no guarantee of epistemological justice. Nevertheless, an approach to litigation informed by feminist epistemology undoubtedly calls for a robust factual context in which to consider the legal issues at hand, with due weight given to evidence that advances experiential knowledge in particular. And calling evidence takes time and money. While test case funding, law students, and pro bono counsel can all help somewhat,[92] cost remains one of the biggest barriers to bringing a rich body of experientially-grounded evidence in strategic *Charter* litigation—a factor underscored by many of my interviewees.[93]

> Today Charter litigation is really all about showing how the challenged law affects real people in real ways. And that requires a lot of evidence. […] And so on the one hand in order to show, to succeed for people who are most deserving of Charter protection […] you actually have to engage in a fact-finding process that's expensive, that most marginalized people can't afford. That's kind of the conundrum.[94]

The time needed to tender a comprehensive record presents a similar challenge, especially where there are litigants or community members in need of an urgent legal remedy, as in *Carter* and *Insite*.[95]

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[92] Interview 5 (25 July 2017) and Interview 13 (28 September 2018). Young, for instance, obtained test case funding from Legal Aid Ontario, and also relied heavily on students to collect the evidence in *Bedford*. Interview 5, *ibid.*
[93] Interview 1 (6 September 2016); Interview 3 (14 September 2016); Interview 6 (30 August 2018); and Interview 12 (27 September 2018) (extending the point to Aboriginal rights cases).
[94] Interview 1, *ibid*.
[95] Interview 6 (30 August 2018) and Interview 10 (21 September 2018) (re *Carter*); Interview 8 (14 September 2018) (re *Insite*).

The conundrum articulated above points not only to the competing demands of legal victory and epistemological justice, but also to a tension within the pursuit of legal victory itself. On the one hand, a successful *Charter* challenge to legislation increasingly depends on a rich and compelling evidentiary record. On the other hand, the ballooning costs of constructing such a record may prevent a case from launching or moving forward, at which point "your process of adjudicating for justice is actually now a barrier to access to justice for lots of groups…"[96], as Raji Mangat, feminist PIL and Executive Director of West Coast LEAF, put it.

An additional constraint on the scope of the record arises from the human nature of judges. As noted by several interviewees, litigators who attempt to tender copious amounts of evidence may encounter resistance from judges reluctant to wade through it all.[97] "[W]e're dealing with human beings with their own resources and their own ability to…so they want it concise and clear and to the point", explained Pacey.[98] A good legal strategy may thus call for self-imposed limitations on the amount of evidence tendered, regardless of cost, so as not to frustrate the court or dilute the most important information. At the same time, several interviewees pointed to a lack of guidance from the court on the relevant issues and evidence needed in systemic *Charter* cases. [99] This, combined with the impossibility of knowing what courts will find persuasive, [100] heightens the temptation to bring a variety of evidence on a broad array of issues in order

[96] Interview 3 (14 September 2016).
[97] Interview 1 (6 September 2016); Interview 4 (15 September 2016); Interview 5 (25 July 2017); Interview 12 (27 September 2018); and Interview 13 (28 September 2018).
[98] Interview 4, *ibid*.
[99] *Ibid;* Interview 3 (14 September 2016); and Interview 5 (25 July 2017).
[100] Interview 2 (13 September 2016); Interview 3, *ibid*; Interview 9 (17 September 2018); and Interview 10 (21 September 2018).

to cover all of the bases[101]—particularly the most familiar ones—rather than focusing on the experiential knowledge of the community at issue. This unpredictability and lack of guidance from courts might also explain the temptation to mobilize a plurality of epistemic norms throughout the fact-finding process, as I observed the parties doing on the record in *Bedford* (see Part II). Without knowing the relevant judicial perspectives on evidence and knowledge, espousing different epistemic norms at different moments provides judges with multiple pathways to make a desired finding. By contrast, staking one's case too firmly on a particular set of epistemological commitments is a risky strategy within such an uncertain process.

Gathering Evidence

According to my interviewees, cost and time constraints in a strategic *Charter* challenge affect not only the scope but also the quality of the evidence that counsel can gather. For instance, several of the PILs I spoke to remarked that they cannot be overly selective about experts because they (unlike the Crown, presumably) usually have to rely on people willing to work for free, or at minimal cost.[102] Counsel must also find experts who are willing to accept the reputational risks of giving evidence in a public proceeding and being cross-examined on their research. Time limitations can place further constraints on the selection process, especially when hearings are expedited, as in *Carter*.[103] All of these

[101] Interview 3, *ibid* and Interview 4 (15 September 2016).
[102] Interview 1 (6 September 2016); Interview 3 (14 September 2016); Interview 5 (25 July 2017); Interview 6 (30 August 2018); and Interview 12 (27 September 2018). As noted by one PIL, having asked an expert to work for free can also make it difficult for litigators to change their mind about using the expert. Interview 1, *ibid.*
[103] Interview 6 (30 August 2018). One interviewee emphasized that Crown litigators in particular often find themselves scrambling to gather evidence in response to a constitutional challenge, despite the public perception of the Crown as having infinite resources. Interview 7 (13 September 2018).

factors may preclude counsel from hiring leading experts in the field. Of course, an expert's attentiveness to epistemological justice in their work does not necessarily align with their professional status. But if counsel cannot afford to be picky about the credentials of experts, they can hardly afford to be picky about their epistemological attitudes.

Another limitation arises from the availability of appropriately contextualized research and expertise on the subject matter at issue—let alone more epistemologically conscientious forms of research such as participatory action research or community-based research—which can vary greatly from one case to another.[104] The *Insite* case, for instance, was unique in being centred on a heavily researched social experiment in drug decriminalization. As noted by several interviewees, extensive funding had been allocated to study the supervised injection site at the heart of the case from multiple perspectives, drawing on both quantitative and quality methods, which facilitated the construction of an exceptionally compelling evidentiary record.[105] In *Bedford* and *SWUAV*, on the other hand, the available research was more limited and did not, for the most part, directly address the effects of criminalization in Canada.[106] For Pacey and Sigurdson, this underscored the importance of the firsthand experiential evidence.[107]

[104] Interview 3 (14 September 2016); Interview 9 (17 September 2018); and Interview 12 (27 September 2018).
[105] Interview 4 (15 September 2016); Interview 6 (30 August 2018); Interview 7 (13 September 2018); and Interview 8 (14 September 2018).
[106] Interview 4, *ibid* and Interview 12 (27 September 2018).
[107] *Ibid.*

Gathering experiential evidence, however, raises its own set of practical challenges. In some cases, experiential accounts may be buried in confidential reports or documents, raising access to information issues. Counsel in the BC administrative segregation case, for instance, struggled to gain access to data about inmates and the inmate population through the discovery process.[108] More significant to my project, however, are the challenges that arise when litigators seek to gather evidence directly from marginalized community members. On the Crown side, this is partly due to the difficulty of finding experiential witnesses who are able and willing to speak to the salutary effects of a law—*Bedford* being an exception.[109] Even on the side of the *Charter* challenger, however, it can be difficult to engage experiential witnesses due to the heavy burden of participating in litigation. The next subsection is devoted specifically to this issue.

The Challenges of Participating in Litigation

One of the most significant practical barriers to the advancement of experiential knowledge discussed by my interviewees was the heavy burden of participating in litigation, especially as a party bringing a *Charter* challenge, but also as a witness.[110] This was a major obstacle in *SWUAV* in particular. As Pacey explained, "sex workers are actively criminalized, they experience all sorts of stigma, and everything else they experience was going to make it really hard for them to take the stand".[111] To give evidence in a *Charter* challenge, individuals must publicly identify themselves as

[108] Interview 1b (3 October 2018).
[109] Interview 7 (13 September 2018); Interview 9 (17 September 2018); Interview 10 (21 September 2018); and Interview 15 (19 October 2018). One Crown litigator also noted that Crown-side experiential evidence may face admissibility objections. Interview 15, *ibid.*
[110] Interview 1b (3 October 2018); Interview 2 (13 September 2016); Interview 3 (14 September 2016); Interview 4 (15 September 2016); Interview 4b (18 September 2018); Interview 6 (30 August 2018); Interview 8 (14 September 2018); Interview 12 (27 September 2018); and Interview 13 (28 September 2018).
[111] Interview 4, *ibid*.

members of a marginalized community, share personal (and often painful) details about their lives in court, and subject themselves to possible cross-examination. While these requirements are difficult for anyone to meet, they are especially prohibitive for highly vulnerable people.

People from marginalized communities may also be reluctant to participate in litigation due to previous negative experiences with the justice system. As Cathie Boies Parker explained regarding the homeless population she worked with to defend litigation seeking injunctions against tent cities in Victoria:[112]

> …there's an enormous reluctance to engage with the justice system because they have very justifiable concerns about what's happened and that their voices haven't been heard in the past, and that, sort of, nothing good can come from it. Right? So one of the things that's really critical when you want to get evidence from that group is to have the conditions in which they can speak.[113]

According to Boies Parker, the community bonds formed within tent cities were a crucial form of empowerment in this sense. In *Victoria (City) v Adams*, [114] in which the city of Victoria sought an injunction against a tent city at Cridge Park, law students were initially able to collect evidence from tent city residents to fight the city's injunction. When the first injuction application was lost, however, and the tent city was broken up, it

[112] *Adams, supra* note 60; *British Columbia v Adamson,* 2016 BCSC 1245 and 2016 BCSC 584.
[113] Interview 2 (13 September 2016).
[114] *Adams, supra* note 60.

became very difficult to collect affidavits from former residents given their reluctance to participate further in the legal process, and in particular, to subject themselves to cross-examination.[115]

It may also be difficult for highly vulnerable people to appear for scheduled meetings and court dates, or to meet other procedural deadlines, for a variety of reasons. According to Pacey, the homeless population whose rights were at stake in *Abbotsford (City) v Shantz*[116]—another case in which a municipality sought an injunction against homeless tent encampments—suffered from such severe mental health and addiction issues that it was difficult to predict whether they would be cogent on any given day, or even where to find them.[117] Former Crown litigator Craig Jones similarly described the challenges of tracking down boys and men expelled from polygamous communities in the *Polygamy Reference.*[118] Limited literacy and/or computer and internet access may exacerbate such challenges, all of which creates barriers to tendering a rich and diverse array of experiential evidence in strategic *Charter* litigation.

When it comes to serving as a party, the burden of participating in litigation is even greater. In addition to the time, cost, and public scrutiny involved in carrying litigation, parties must subject themselves to a potentially onerous discovery process.[119] These requirements can make it very difficult, if not impossible, for members of vulnerable and

[115] Interview 2 (13 September 2016).
[116] *Abbotsford (City) v Shantz,* 2015 BCSC 1909 [*Shantz*].
[117] Interview 4 (15 September 2016).
[118] Interview 7 (13 September 2018).
[119] Interview 1b (3 October 2018) and Interview 2 (13 September 2016).

marginalized communities to attach their names to litigation, as became the key issue in *SWUAV*.

Cognizant of these challenges, several interviewees expressed their commitment to shielding vulnerable community members, as much as possible, from the harms that participating in litigation can entail.[120] As already noted, this was one of the key commitments informing the litigation in *SWUAV*.[121] Similarly, in describing the selection of experiential witnesses in *Carter*, Sheila Tucker explained, "you pick the ones […] that are well enough to give a statement—where it's not going to be of any harm to them to be participating".[122] Monique Pongracic-Speier described the search for individual plaintiffs in *Insite* in similar terms:

> our chief concern was a "do no harm" sort of point of view. Because the intense scrutiny and the political battleground that surrounded this site, we were very concerned could harm people who just did not have a lot of resources to draw on personally, and who could be subject to pretty intrusive scrutiny by the media […] our key concern was to find folks who were probably resilient enough to be able to participate in the litigation, through the tenure of the litigation, with supports from the institutional plaintiff PHS.[123]

[120] Interview 4b (18 September 2018); Interview 6 (30 August 2018); and Interview 8 (14 September 2018).
[121] Interview 4b, *ibid*. See *supra* at 8.2.2. It was also a key component of Pivot's general philosophy. Interview 4 (15 September 2016).
[122] Interview 6 (30 August 2018).
[123] Interview 8 (14 September 2018).

The commitment to "do no harm" in litigation undoubtedly reflects feminist values. One might even argue that it aligns with the ethical imperative of feminist epistemology to *know responsibly*.[124] As Lorraine Code emphasizes, "epistemological questions invoke ethical requirements."[125] Feminist observations about the oppressive nature of the relationship between knowers and the known in the mainstream epistemological tradition are especially pertinent in this regard.[126] According to Donna Haraway, the mainstream tradition "turns everything into a resource for appropriation, in which an object of knowledge is finally itself only matter for the seminar power, the act, of the knower." Careful attention to the circumstances and needs of potential experiential witnesses and litigants arguably constitutes a form of resistance to this exploitative dynamic in the knowledge-constructing process of litigation. This commitment, however, is in tension with another feminist objective in litigation: the pursuit of epistemological justice via the advancement of experiential voices. In an effort to protect people from the burdens and harms of participating in litigation, litigators may exclude the most vulnerable and marginalized people from having a say in the process, whether as plaintiffs or as witnesses. Alternatively, they may constrain the form their evidence takes, as discussed in the next subsection.

Tendering Evidence

Not only do the challenges of limited resources and the burdens of participating in litigation affect which witnesses are included in the litigation process, they also,

[124]See Chapter 3 at 3.2.2.
[125] Lorraine Code, *Rhetorical Spaces: Essays on Gendered Locations* (New York: Routledge, 1995) at xiii.
[126] See Chapter 3 at 3.2.3.

according to my interviewees, affect the form in which evidence is tendered. This too, can affect the fate of feminist epistemological commitments in strategic *Charter* litigation.

In *SWUAV*, for instance, the key experiential evidence came from the anonymous affidavits gathered from sex workers in the DTES. In the standing application, the plaintiffs were able to tender this evidence indirectly by attaching it as an exhibit to the affidavit of a Pivot volunteer.[127] However, Pacey surmised that hearsay concerns would have prevented them from relying on experiential evidence attached in the same manner at trial; in order for such evidence to be admissible as a basis for fact-finding, it would have to come from individuals who were willing to name themselves and be available for cross-examination.[128] As Sigurdson explained, however, "the rationale behind that collection of affidavits […] was to give them the weight of sworn information from individuals who were too vulnerable to actually attend the [Parliamentary] committee."[129] It was thus going to be difficult to tender much of this evidence directly. While the plaintiffs may have been able to bring forward other experiential witnesses, they would presumably have had to be less vulnerable. The anonymous affidavits, meanwhile, would still have been included in some way, but likely as an exhibit attached to an expert report that would have analyzed their content, according to Sigurdson.[130] In this way, the

[127] *Downtown Eastside Sex Workers United Against Violence v Canada (AG)*, 2008 BCSC 1726 (Affidavit of Nicole Capler).
[128] Interview 4 (15 September 2016). In her account of *Carter*, Tucker described attempting, without success, to tender an anonymized affidavit from a person who had participated in a medically assisted death. Interview 6 (30 August 2018).
[129] Interview 12 (27 September 2018).
[130] *Ibid.*

challenges of participating in litigation, combined with the rules of admissibility, would have resulted in the foregrounding of expert over experiential knowledge.

Written versus Oral Forms of Evidence

One of the most significant differences in terms of the form evidence takes relates to whether a *Charter* challenge is brought as an action or an application, and consequently whether evidence is tendered *viva voce* or in writing (or some hybrid of the two, where the rules allow it). This affects the process by which witnesses give evidence as well as the form in which the evidence appears before the court, all of which can have an important bearing on the fate of feminist epistemological commitments in litigation.

As discussed in Chapter 2, the use of application procedures to bring evidence by affidavit has become a preferred method for bringing strategic *Charter* challenges to legislation.[131] Application procedures are well suited to such challenges, in part due to the unique nature of fact-finding in these cases discussed in Chapter 2.[132] While social and legislative facts are often (albeit not always) contested in strategic *Charter* litigation, the accounts of experiential witnesses are rarely so.[133] Moreover, the evidence tendered to establish social and legislative facts does not generally raise the same kinds of credibility issues as evidence directed at contested adjudicative facts, attenuating the need for an oral hearing.[134]

[131] Interview 9 (17 September 2018) and Interview 11 (24 September 2018). See Chapter 2 at 2.4.1.
[132] See Chapter 2 at 2.3 and at note 59.
[133] Interview 1 (6 September 2016); Interview 5b (12 September 2018); Interview 6 (30 August 2018); Interview 7 (13 September 2018); and Interview 10 (21 September 2018). According to Pongracic-Speier, an important part of the rationale for proceeding by summary trial in *Insite* was the fact that both the experiential and expert evidence was uncontested by the government. Interview 8 (14 September 2018).
[134] Interview 5 (25 July 2017) and Interview 9 (17 September 2018).

However, the trend towards written evidence in *Charter* cases of this nature is also a response to the practical challenges discussed above. One of the major advantages of proceeding via application, as emphasized by my interviewees, is the much greater efficiency of written proceedings. Tendering evidence via affidavits and out-of-court cross-examinations, rather than through in-court testimony, avoids potentially onerous discovery requirements,[135] clarifies the issues and evidence prior to a hearing, saves a great deal of court time, and ultimately allows the litigation to advance more quickly and at less expense to the parties.[136]

Written hearings also give counsel more control over the evidence, and more opportunity to build an ample record than might otherwise be permitted.[137] Young, for instance, recounted facing judges in the early years of his career who were inclined to decide constitutional issues on the basis of legal argument, without hearing the accompanying social and legislative fact evidence (despite the SCC's directions regarding the importance of such evidence in *Charter* cases).[138] He explained that after one such experience in the early 1990s, he changed his process to bring evidence by affidavit early in a case: "So if a court's gonna say 'I don't wanna hear this evidence' then still it's in front of them, you know."[139] Young also noted how written procedures can create leeway for counsel to bring tenuously admissible evidence that might not otherwise be heard by

[135] Interview 9, *ibid* and Interview 15 (19 October 2018).
[136] Interview 1b (3 October 2018); Interview 3 (14 September 2016); Interview 5 (25 July 2017); Interview 6 (30 August 2018); Interview 8 (14 September 2018); Interview 9 (17 September 2018); Interview 11 (24 September 2018); and Interview 14 (2 October 2018). Similar observations can be found in the SCC decision in *Hryniak v Mauldin,* 2014 SCC 7 (see Chapter 2 at 2.4.1).
[137] Interview 5 (25 July 2017); Interview 5b (12 September 2018); and Interview 11 (24 September 2018).
[138] Interviews 5 and 5b, *ibid.*
[139] Interview 5, *ibid.*

the court—a point reinforced by others I interviewed, including two judges.[140] Thus, faced with judicial resistance or barriers to admissibility, proceeding by application may be an effective strategy to ensure the inclusion of certain evidence on the record, including experiential and other evidence that furthers feminist epistemological commitments.

Affidavits may also be the only, or at least the most feasible way to tender experiential evidence from vulnerable and marginalized witnesses. As noted above, it may be difficult for some witnesses to give cogent testimony at a scheduled court date. By contrast, one PIL described the process of drafting affidavits as helpful in eliciting more accurate and coherent life stories when working with severe opioid addicts.[141] Experiential witnesses may also be reluctant to testify in court for fear of public exposure, personal hardship, and/or as a result of previous negative experiences with the justice system. As Boies Parker observed, giving evidence in court, rather than via affidavit, can be "very disturbing and anxiety-making for people".[142] Even when individuals are willing and able to testify, avoiding the experience of taking the stand may best respect the "do no harm" principle central to the philosophy of at least some PILs, and arguably also to the ethical imperative of feminist epistemology.

The decision to proceed via written evidence, however, may come at a cost in terms of centering experiential knowledge. For one thing, as some interviewees noted, most

[140] *Ibid;* Interview 11 (24 September 2018); Interview 13 (28 September 2018); and Interview 14 (2 October 2018).
[141] Interview 1 (6 September 2016).
[142] Interview 2 (13 September 2016).

affidavits are drafted in a highly stylized form, often by, or with significant guidance from, lawyers and law students.[143] As a result, the content of an affidavit may be more strongly shaped by legal considerations, and less reflective of how the witness would have expressed their own experiences and views. In discussing the construction of the record in *Bedford*, for instance, Young observed that the experiential affidavits were purposely framed to speak to the key legal issues in the case: "it was very pointed to prove those points", he stated.[144] The advantages of written evidence must thus be weighed against the potential compromise to the full and free expression of experiential voices.

The dangers of drafting affidavits on behalf of witnesses are illustrated by the evidence of applicant expert John Lowman in *Bedford*. In his cross-examination, Lowman repeatedly expressed dissatisfaction with the wording of his affidavit, which had been drafted by Young's students, noting that it failed to capture the nuances of his research findings.[145] Indeed, even Ronald-Frans Melchers, Lowman's main critic in *Bedford,* acknowledged that Lowman's actual research reports were much more carefully qualified than the statements made in his affidavit.[146] While Lowman initially approved the affidavit, he explained that had he fully appreciated the nature of expert testimony and the purpose of

[143] Interview 3 (14 September 2016) and Interview 5 (25 July 2017). Young explained that taking on the work of drafting is part of how he gets experts to work for free (Interview 5, *ibid*), though others were more inclined to let experts draft their own affidavits, in part to safeguard their independence (Interview 8 (14 September 2018)). Pongracic-Speier also noted that the general practice in British Columbia is now to submit expert evidence via formal reports rather than affidavits. Interview 8, *ibid.*
[144] Interview 5, *ibid.*
[145] *Bedford* ONSC (Cross-Examination of John Lowman at paras 22-29, 455, 626, 807, 836, 858, 919, 1105, 1266, and 1622).
[146] *Bedford v Canada (AG),* 2010 ONSC 4264 (Affidavit of Ronald-Frans Melchers at para 50).

the affidavit at the time, he would have been more careful; indeed, he would have drafted it himself.[147]

The transformation of carefully qualified research findings into oversimplified conclusions through the drafting process raises serious concerns from the perspective of feminist epistemology (and even from the perspective of mainstream epistemology).[148] In addition, though, Lowman's story serves as a cautionary tale for the tendering of experiential evidence via affidavit, where the commitment to centering experiential knowledge is more directly at stake. This concern may be significantly mitigated by a conscientious approach to lawyering. Tucker and Pongracic-Speier, for instance, both emphasized the importance of working carefully with experiential witnesses to produce affidavits that accurately reflect their experience in their own words.[149] As Pongracic-Speier put it, "It's very important that it's in their voice".[150] Still, she acknowledged, "the role of counsel can get a little bit complicated in that area in the sense of balancing what it is that the witness wants to say with what is legally pertinent."[151]

Beyond the potential pitfalls of the drafting process lays the question of how persuasive written evidence will be. While recognizing that affidavit evidence can be compelling, as

[147] *Bedford v Canada (AG),* 2010 ONSC 4264 (Cross-Examination of John Lowman at paras 22-29). See also at paras 131, 267, 377, 1266, 1495 and 1622 (where Lowman refers to his misunderstanding of the process of producing the expert affidavit).
[148] In discussing the use of quantitative research in law and policymaking related to the sex trade, Isabel Crowhurst warns that the omission of such contextual details "contributes to a process of simplification, which entails the loss of depth and analytical complexity, while at the same time unreliable, incomplete, or context-specific data become popular and generalised via their public repetition, eventually acquiring the status of timeless 'fact'." Isabel Crowhurst, "Troubling Unknowns and Certainties in Prostitution Policy Claims-Making" in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (London: Routledge, 2017) at 57.
[149] Interview 6 (30 August 2018) and Interview 8 (14 September 2018).
[150] Interview 8, *ibid*.
[151] *Ibid.*

it was in *Bedford*,[152] many interviewees suggested that there is something more powerful about *viva voce* testimony.[153] "I think there's something just deeper that happens when you hear somebody tell their story. You have to assess the risk of that to that individual and whether that's worth it, but I think it's a powerful thing", said Pacey.[154] Speaking of the use of video affidavits in the *Polygamy Reference*, Jones opined, "it's so much more powerful to actually show, you know, an emotional survivor of harm talking about that harm, rather than affidavits that I think everyone sort of assumes are drafted by lawyers anyway."[155] Others (including one judge) suggested that *viva voce* evidence may be important for the court to gain a fuller appreciation of the factual context.[156]

The importance of leading *viva voce* evidence may depend on judges' familiarity with the lived experiences at issue. For instance, in Tucker's view the experiential evidence in *Carter* could be effectively conveyed via affidavit in part because the experience of being sick is already so relatable.[157] In *SWUAV*, on the other hand, Pacey worried that the court might not appreciate the reality of her clients' lives and the harms they faced without hearing directly from them, and having the chance to ask questions—in part because this was how she herself had come to question her initial beliefs and assumptions about sex work. It was partly for this reason that she and her colleagues planned to tender the experiential evidence in the form of *viva voce* testimony, rather than via affidavits and

[152] Interview 1 (6 September 2016) and Interview 4 (15 September 2016).
[153] Interview 3 (14 September 2016); Interview 4, *ibid*; Interview 6 (30 August 2018); Interview 7 (13 September 2018); Interview 12 (27 September 2018); and Interview 13 (28 September 2018).
[154] Interview 4, *ibid*.
[155] Interview 7 (13 September 2018).
[156] Interview 1b (3 October 2018); Interview 9 (17 September 2018); and Interview 14 (2 October 2018).
[157] Interview 6 (30 August 2018).

out-of-court cross-examinations (though in the end the approach taken in *Bedford* proved sufficient to persuade the courts).[158]

Choosing to proceed orally, however, presented a major challenge in *SWUAV*. As Pacey remarked, "[g]oing via the root of *viva voce* evidence was obviously going to raise a bunch of very real issues about how do we support sex workers to walk into that environment? And how can they testify in a way that feels empowering and safe for them and not retraumatizing?"[159] Sigurdson articulated the dilemma this way:

> The group of people that were involved have a sufficient level of vulnerability. It would be very hard to attend as witnesses consistently, and to bear the burden of that. On the other hand, their evidence was so compelling, that for a judge to see them in person and to have access to the truth of both their words and the ways that they are able to respond with the resilience and the strength and the concern that they have about their lives and the lives of their sisters and brothers in the neighborhood, we felt would have been very powerful, and I think would have been really consistent with some of the goals of that community, which included getting their voices heard.[160]

Had the case gone to trial, counsel in *SWUAV* were hoping to ease the burden of testifying in court by securing some special protections for the witnesses with the

[158] Interview 4 (15 September 2016) and Interview 4b (18 September 2018).
[159] Interview 4b, *ibid*.
[160] Interview 12 (27 September 2018).

agreement of the court, such as not having to testify publicly.[161] There is some precedent for this kind of extraordinary measure. Take, for instance, the account given by several of my interviewees about the hearing in *Shantz*.[162] Knowing how difficult it would be to ensure the attendance and effective participation of the highly vulnerable and marginalized homeless community whose rights were at issue in that case, counsel brought an application to hold the hearings in the basement of an Abbotsford motel. On the eve of the hearing, they lodged their clients at the motel, providing food and whatever other supports they could to ensure that people would be prepared to testify the following day. The result was what Pacey described as "the most powerful evidence I've ever heard, anywhere, anytime." Nevertheless, she added, "It was still so hard on our people, on our clients, man was it hard."[163]

In the same vein as the issue of participation in litigation, then, the choice of procedure (where there is one) brings out a tension between conflicting feminist values. On the one hand, proceeding *viva voce* allows experiential witnesses to have a more direct, and arguably more compelling voice in the fact-finding process. On the other hand, tendering experiential evidence in writing may protect vulnerable individuals from harm, and may, in some cases, be the only feasible way for people to participate in litigation at all.

8.3.2 Epistemological Constraints

In the previous subsection, I considered how practical challenges arising from limited resources, limited available evidence, and the burdens of participating in litigation, put

[161] *Ibid.*
[162] *Ibid;* Interview 3 (14 September 2016); and Interview 4 (15 September 2016).
[163] Interview 4, *ibid.*

pressure on feminist epistemological commitments in strategic *Charter* litigation. I now shift my focus from practical to epistemological factors, drawing from my interviews to examine how ideas about knowledge engrained in law and judicial consciousness influence the framing of knowledge in litigation. As in the rest of the dissertation, my focus here is specifically on the framing of expertise as it relates to experiential knowledge. I begin by examining how litigators and judges conceptualize and construct these categories. I go on to discuss how my interviewees understand the respective roles of these categories of proof, so constructed, in strategic *Charter* litigation, and how this understanding is shaped by the need to persuade human judges as decision-makers.

Constructing Categories

Who Counts as an Expert?

At the heart of feminist epistemology is an insistence that particular, concrete, lived experience is an important and authoritative source of knowledge—an insistence that arises in response to the perpetuation of social inequalities via false claims to universal and objective knowledge.[164] In a world in which experiential accounts are often discounted as "merely" subjective and anecdotal, one way to promote this idea is by framing experience as a source of expertise. In writing about the *Bedford* case, for instance, feminist legal scholar Sonia Lawrence refers to the evidence given by current and former sex workers as a "body of experiential expertise."[165] Describing experiential knowledge in this way challenges the common equation of "expert" (i.e. authoritative) knowledge with formal academic training.

[164] See Chapter 3 at 3.3.1.
[165] Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in Bedford and Bill C-36" (2015) 30 Can JL & Soc 5 at 5.

Beyond the world of scholarship, this linking of experience with expertise is central to the politics of many social justice activists and advocates. Nowhere is this more clearly expressed than in Pivot's *Voices for Dignity* report, which emphasizes the key role of sex workers' experiences and opinions in the evaluation of criminal laws related to prostitution.[166] To underscore the point, Pivot repeatedly refers to sex workers as offering "expertise" on the effects of the laws at issue.[167] This use of the term "expertise" is not merely rhetorical, nor is it intended to be semantically distinct from the meaning of expertise in law. Rather, the report describes the 91 affidavits sworn by sex workers from the DTES as "expert opinion evidence" that "would be presented as such in a parliamentary hearing or a court of law."[168]

Pacey and Sigurdson reinforced this view in their interviews. Take, for instance, the following remark from Sigurdson:

> my view is, and the view of the group of sex workers that I've worked with, and the counsel that I've worked with […] is that the people who are most adversely affected by the laws have expertise in what the laws' effects are […]. They are experts in understanding that, and they can give

[166] *Voices for Dignity*, *supra* note 34 at 2-3. See also López, *supra* note 26 at 50 (arguing that "subordinated people can and should claim expertise in the culture in which they, the law, and their difficulties coexist").
[167] *Voices for Dignity, ibid* at 3, 6, 7 and 35.
[168] *Ibid* at 3.

> both direct stories and accounts of how that happens, and views about how that works.[169]

Nor were Pacey and Sigurdson the only counsel to express such views. Speaking generally of marginalized groups engaged in strategic *Charter* litigation, Pongracic-Speier opined: "Those people are the experts on their lives, and what's happened in their lives. And sometimes they are the experts on what's happened in their area or their neighborhood or their community. Nobody can speak better to it than they can."[170] Comments like these demonstrate the serious commitment of at least some PILs to a feminist vision of epistemological justice.

And yet, in the standing application in *SWUAV*, the 91 affidavits from sex workers in the DTES were attached as an exhibit to the affidavit of a Pivot research assistant, without ever being identified as a form of expert evidence.[171] According to Sigurdson, moreover, if the trial on the merits had gone ahead, counsel would probably have attached this affidavit evidence as an exhibit to an academic expert report.[172] To be sure, part of the reason for this falls back to the practical challenges discussed in the previous section; because the affidavits were anonymous, they could not be directly tendered.[173] Still, no attempt was made to frame this evidence as a source of expertise even rhetorically, or to suggest that the direct testimony of sex workers in the case on the merits would be presented as such. As Pacey explained:

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[169] Interview 12 (27 September 2018).
[170] Interview 8 (14 September 2018).
[171] See *supra* note 127.
[172] Interview 12 (27 September 2018).
[173] Interview 4 (15 September 2016) and Interview 12, *ibid*. See 8.3.1 under *Tendering Evidence*.

> [W]hen we did *Voices for Dignity*, we say I think at the outset of that report, sex workers are experts on their lives and should be understood as such. We were not going to take that same approach before the court in so far as trying to get them qualified as experts. Even though philosophically that doesn't sit well with me, that wasn't the battle we were going to fight.[174]

Sigurdson added:

> The assumptions that are made by our system about whether people in vulnerable circumstances are qualified to give a category of information, or category of evidence that would be hard for a judge to understand, aren't consistent with our view that these folks are experts in the effects of the prostitution laws, as they were then called. So yeah, it's a definition that competes with the courts' definition of what an expert is, but I kind of believe in both.[175]

In other words, when it came to bringing strategic *Charter* litigation, counsel felt compelled to adhere to a more narrow conception of expertise, and thereby to retreat from the strong feminist epistemological stance taken in the *Voices for Dignity* Report.

[174] Interview 4b (18 September 2018).
[175] Interview 12 (27 September 2018).

The tension between the pursuit of legal victory and epistemological justice is palpable here.

Where, though, does this narrow conception of expertise in litigation come from? As Tucker observed, and as I noted previously in Chapter 3, the definition of a properly qualified expert at law is actually quite broad.[176] According to the SCC in *R v Mohan*, an expert must "have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (emphasis added).[177] There is precedent to support the notion that expert qualifications may arise from practical training and observation.[178] While the courts have been reluctant to recognize personal experience as a basis for expertise,[179] a clear and principled distinction between specialized knowledge grounded in practical observation, and specialized knowledge grounded in lived experiences of marginalization, has yet to be articulated in the jurisprudence.

One source of pressure to adhere to a more narrow definition of expertise might be the procedural rules and requirements surrounding expert evidence. The need to file expert reports by a given date, to have experts formally acknowledge their duties to the court,[180]

[176] Interview 6 (30 August 2018). See Chapter 3 at 3.4.3 under *Deconstructing the Dichotomy*.
[177] *R v Mohan*, [1994] 2 SCR 9 at para 27.
[178] Regarding practical training as a ground of expertise, see *R v Marquard,* [1993] 4 SCR 223 at para 35. Regarding practical observation, see *Rice v Sockett,* [1912] OJ No 49 at para 22, where the Ontario High Court of Justice suggests that an "old hunter" would be as well qualified to give expert testimony as a "highly-educated and skilled gunsmith".
[179] See for example *R v Bedford*, [2000] OJ No 887 (a case involving bawdy house charges against Terri-Jean Bedford) at paras 33-54, especially at para 51.
[180] See for example *Ontario Rules of Civil Procedure,* RRO 1990, Reg 194*,* r 53.03 (2.1).

and to restrict the number of expert witnesses tendered in a case,[181] may compel litigators to draw a firmer boundary around a smaller number of expert witnesses than they otherwise would. On the other hand, one of the Crown litigators I interviewed affirmed that in at least some strategic *Charter* cases—*Bedford* and *Carter* included—the fact-finding process has allowed for considerable ambiguity in the delineation of experts from experiential witnesses.[182] The above comments from counsel in *SWUAV*, moreover, do not refer merely to procedural constraints. Rather, they point to the epistemic norms that animate the law and judicial consciousness. It is to this that I turn below.

What Counts as Legitimate Expert Knowledge?

One of the defining ideas we have about expert knowledge in law is that it should be objective. Indeed, for many of my interviewees, the most important distinction between experiential and expert evidence was the expectation of objectivity with respect to the latter.[183] This expectation is enshrined not only in common law, as discussed in Chapter 3,[184] but also in judicial conceptions of expertise. For instance, when asked whether the sex trade participants who gave evidence in *Bedford* might be viewed as experts (especially those who had been involved in the production of social science research themselves), one of the judges I interviewed said: "they're entitled to tell their story. But […] do we give that the aura of an expert? Which as I say is, at least notionally, this more objective sense of expertise. I mean that's the definition of expert evidence." [185] This judge was particularly wary of confounding people engaged in advocacy with those

[181] See for example: *Canada Evidence Act*, RSC 1985, c C-5, s 7; *Evidence Act*, RSO 1990, c E 23, s 12.
[182] Interview 15 (19 October 2018).
[183] Interview 7 (13 September 2018); Interview 9 (17 September 2018); Interview 11 (24 September 2018); Interview 13 (28 September 2018); and Interview 15 (19 October 2018).
[184] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23. See Chapter 3 at 3.4.3 under *The Experience/Expertise Dichotomy.*
[185] Interview 11 (24 September 2018).

providing "objective" expertise—a concern shared by the other judge I spoke to.[186]

Implicit in such comments is a conception of objectivity that calls for disinterest and detachment—what I describe in Chapter 5 as the "epistemic ideal of detachment". At the heart of this view are the familiar dichotomies that form the bedrock of mainstream epistemological thought: objectivity versus subjectivity; expertise versus advocacy; knowledge versus experience. This epistemological framework runs counter to the insights of feminist thinkers like Donna Haraway, Katherine Bartlett, and Sandra Harding, who have challenged the above dichotomies by positing a conception of objectivity that insists upon contextualization and critical reflexivity.[187] As Lawrence puts it, the strict separation of expertise from advocacy "should give any careful scholar serious pause. It reveals the strict limits of the frame in which the law seeks and receives expertise—a frame in which a whole truth is possible and the limits of the 'whole' are ascertainable."[188] This limited conception of expertise not only facilitates boundary work between expert and experiential evidence; it also informs the strategies used to challenge or otherwise frame particular instances of expert evidence (narrowly conceived) in litigation.

Lawrence's comment is particularly apt in the context of strategic *Charter* litigation, where the focus is on social science experts responding to complex matters of social fact.

[186] Interview 14 (2 October 2018).
[187] See Chapter 3 at 3.2.1 and 3.2.4. Curiously, the interest created by the financial compensation of experts—often imbalanced in favour of Crown experts—does not seem to factor into this conception of objectivity.
[188] Lawrence, *supra* note 165 at 5.

As noted by more than one interviewee, most social scientists called to speak to social facts in this type of litigation have reached relatively settled views on the issues they study, and have engaged in public advocacy—realities that do not square well with the legal conception of experts as offering objective and detached opinions on matters of no particular interest to them.[189]

This point was underscored by Tucker, who described her response to allegations of expert bias in *Carter*. As she recounted, one of the key experts in that case—a prominent medical ethicist named Marcia Angel—created a composite of previously written opinion pieces as a time-saving measure. Canada, however, objected that the witness was biased because she was simply repeating a previously formed opinion. In response, Tucker reported arguing:

> She doesn't have to come to the sociological facts with an open mind and no opinion. In fact, you can't—you are never going to find somebody on an extremely contentious social issue who you could treat as an expert, who has no pre-existing opinion on abortion, or euthanasia. That person doesn't exist. And if they did exist, it would only prove that they were unbelievably poorly informed for their field.[190]

She went on:

[189] Interview 1b (3 October 2018) and Interview 6 (30 August 2018). One former Crown litigator remarked, "we always tried to get experts that didn't come across as advocates, but that was hard". Interview 7 (13 September 2018).
[190] Interview 6, *ibid*.

> You're thinking of the wrong construct of an expert. You're thinking of an expert from personal injury [cases]. You have to think of an expert for sociological facts in a different way. […] if they didn't already have an opinion and they hadn't already considered information aside from our case, I wouldn't want them at all.[191]

The judge in *Carter* ultimately agreed with Tucker's argument and allowed the evidence.[192] Nevertheless, the judges I spoke with expressed considerable wariness about the legitimacy of this type of social science expertise, precisely because of its tendency to bleed into advocacy.[193] Indeed, according to one of the judges, this was a key challenge raised by strategic *Charter* litigation where social, rather than adjudicative facts, are central.[194]

The mainstream epistemological assumptions embedded in law and judicial consciousness, then, influence which types of expertise are considered more or less authoritative in litigation. As Boies Parker and Mangat observed, courts tend to view certain disciplines, e.g. medicine and psychology, as more authoritative than others, e.g. sociology or social work.[195] While Mangat attributed this to judges' own educational background,[196] the tendency to discount social science expertise may also arise from its

[191] *Ibid.*
[192] *Ibid.*
[193] Interview 11 (24 September 2018) and Interview 14 (2 October 2018).
[194] Interview 11, *ibid.*
[195] Interview 2 (13 September 2016) and Interview 3 (14 September 2016).
[196] Interview 3, *ibid*.

perceived lack of objectivity, conceived in the particular way noted above.[197] As a feminist advocate, Mangat did not necessarily agree with these assumptions; she noted, for instance (albeit with respect to family law rather than strategic *Charter* litigation) that many psychologists lack a nuanced understanding of family violence, and use highly problematic tests in their assessments of family dynamics. Nevertheless, she observed, such an expert may offer the best chance of legal success, especially when the expert has already been qualified in a previous proceeding.[198]

The epistemic beliefs of judges and other legal actors may similarly influence the relative authority ascribed to different kinds of social science evidence in litigation. According to Pacey, for instance, the type of quantitative research that was offered in *Insite* tends to be privileged over the more qualitative forms of research that made up the bulk of the record in *Bedford*.[199] This accords with my analysis of the epistemic norms mobilized to frame social science research in *Bedford* (see Chapter 5 at 5.2.2 under *The Privileging of Quantitative over Qualitative Research*). Indeed, some of the interviewees themselves espoused such views.[200] Take, for instance, the following anecdote from former Crown litigator Craig Jones, in which he describes challenging the expertise of an opposing witness in the *Polygamy Reference*:

[197] Harding has resisted this view by suggesting that "a critical and self-reflective social science should be the model for all science". Sandra G Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986) at 44.
[198] Interview 3 (14 September 2016).
[199] Interview 4 (15 September 2016). Sigurdson made a similar comment: Interview 12 (27 September 2018).
[200] Interview 5b (12 September 2018) and Interview 7 (13 September 2018).

> we'd already heard a lot about qualitative and quantitative research and I got the sense that the judge had a bit of a healthy skepticism about [the] qualitative end of the spectrum. And so when this witness [described research on the] bodily experience of earthquakes, I said, 'bodily experience of earthquakes?' and she said, 'Yes, sociology is a very broad field.' And I said, 'Was that qualitative research?' She said, 'Yes, that's on the very qualitative end of the spectrum.' And then I couldn't resist, I said, 'Was that SSHRC funded?' […] that was a way of alerting the judge, in a very non-hostile way, to this idea that maybe common sense or, or popular wisdom or whatever it is ought to make one a bit skeptical of anecdote being presented as expertise.[201]

Jones' remark exemplifies the kind of boundary work that operates to exclude experientially-grounded qualitative research from the realm of legitimate expertise in litigation. In this case, the boundary work was motivated both by Jones' own epistemological assumptions, and by his perception of the judge's views on the matter.

Meanwhile, as one PIL observed, the poor fit between the realities of social science research and the ideal of expert objectivity enshrined in law creates plenty of opportunities for counsel to frame experts in strategic *Charter* cases as biased.[202] Indeed, several interviewees alluded to accusations of bias on the basis of past advocacy as an

[201] Interview 7, *ibid*.
[202] Interview 1 (6 September 2016).

important strategy in this type of litigation.[203] Interestingly, such accusations were not described as raising doubts about the accuracy of particular expert claims, so much as destroying an expert's overall credibility.[204] Young attributed the effectiveness of this strategy to the adversarial context of litigation: "even though destroying the credibility or value of an expert doesn't mean you establish your proposition - like they don't connect - it helps a lot, because the legal system's very binary and adversarial. There's a tendency if you don't believe one you believe the other, because you have to make a decision…", he explained.[205] This comment offers useful insight on the phenomenon observed in Part II whereby epistemic norms, frameworks and categories are decontextualized and instrumentalized in *Bedford.* As Young points out, the adversarial imperative of litigation encourages the parties to detach the mainstream ideal of objectivity from the goal of truth-seeking, and to instead wield it instrumentally to achieve a desired legal outcome. Although not explicitly discussed by my interviewees, one can easily see how the adversarialism of the legal process might similarly encourage the parties to detach progressive epistemic norms and commitments from their political roots, as a means of enhancing their rhetorical toolkits.

The Role of the Constructed Categories in Strategic Charter Litigation

Thus far in this subsection, I have drawn on my interview data to examine how the categories of experiential and expert evidence are constructed by litigators and judges. In what follows, I look at how my interviewees view the respective roles of these categories of proof in strategic *Charter* litigation, and how these views are importantly shaped by

[203] Interview 5b (12 September 2018); Interview 6 (30 August 2018); and Interview 15 (19 October 2018).
[204] *Ibid.*
[205] Interview 5b (12 September 2018).

the need to persuade the court. This analysis further illuminates the nature of the boundary constructed between experiential and expert evidence. It also helps to illustrate the competing epistemological frameworks at play in the fact-finding process, and to once again underscore the tensions that can arise between the pursuit of legal victory and epistemological justice in this area of litigation.

Experiential Evidence: The Heart and Soul of a Case

Interestingly, almost everyone I interviewed identified experiential evidence as very, if not the most, important evidence in a strategic *Charter* challenge.[206] Regarding *Bedford* specifically, two interviewees (a Crown litigator and a judge) described the firsthand experiential evidence as critical to the adjudication of the issues.[207] Such views arguably speak to the value accorded to firsthand accounts of experience at common law, discussed in Chapter 3 (see 3.3.1).

Others emphasized the compelling nature of experiential evidence in court.[208] "You can have all the data in the world, all the scientists, all the qualitative researchers say 'oh well I spoke to…'. But nothing changes hearts and minds, even judges' hearts and minds, like hearing from somebody directly affected", remarked Pacey.[209] As she put it in another interview, "if you don't have the individuals, you don't have the heart and soul of the case. You don't have the sort of individual story that you hope will elicit the compassion

[206] Interview 4 (15 September 2016); Interview 5 (25 July 2017); Interview 7 (13 September 2018); Interview 10 (21 September 2018); Interview 12 (27 September 2018); Interview 13 (28 September 2018); Interview 14 (2 October 2018); and Interview 15 (19 October 2018).
[207] Interviews 14 and 15, *ibid.* Young, too, described the experiential witnesses in *Bedford* as "very important". Interview 5 (25 July 2017).
[208] Interview 4 (15 September 2016); Interview 4b (18 September 2018); Interview 5, *ibid*; Interview 10 (21 September 2018); and Interview 13 (28 September 2018).
[209] Interview 4, *ibid*.

of the court and the desire to do what is sometimes a courageous thing."[210] Similar opinions were voiced on the Crown side. "[T]o me, the most compelling evidence is always the stories of individuals. […] And my view is that judges are much more likely to decide on the basis of human stories than theories from experts," said one Crown litigator.[211] Expert evidence, in turn, was widely described as playing a supportive role. "[W]e've often used it as […] a way to kind of bolster what our, what the individual litigants are testifying about their experience", commented Mangat.[212] Others described expert evidence as "corroborating" or "buttressing" experiential accounts.[213]

On the other hand, many interviewees saw limitations in what experiential evidence could offer to establish social facts. According to Mangat, for instance, individuals may be unfamiliar with the systemic context of the issue under scrutiny, such as the mechanisms by which a legal regime operates.[214] Furthermore, as one PIL explained, the Crown tends to dismiss experiential evidence as too anecdotal to justify striking down a law, especially one that forms part of a complex regulatory regime.[215] This was where expert evidence came in.

Expert Evidence: Efficient and Systemic

Expert evidence was often described as compensating for the above limitations. Mangat, for instance, observed that experts can provide important evidence about the broader

[210] Interview 4b (18 September 2018). Feminist advocate and PIL Mary Eberts similarly opined: "I think it's the most important kind of evidence that there is. And, the reason is that you have to motivate the judge to rule in your favour. And the lived experience evidence will do that for you in a way that nothing else will". Interview 13 (28 September 2018).
[211] Interview 10 (21 September 2018).
[212] Interview 3 (14 September 2016).
[213] Interview 4 (15 September 2016) and Interview 10 (21 September 2018).
[214] Interview 3 (14 September 2016).
[215] Interview 1b (3 October 2018).

context of a rights violation, such as the structural features of the Canadian correctional system that gave rise to the violation of inmates' rights in the BCCLA's challenge to administrative segregation.[216] With respect to *Bedford*, she noted that, while the s.7 violation hinged on experiential evidence (in her view), social science research was essential to illuminating the shifting social landscape that justified revisiting the issue in the first place.[217]

Expert evidence also "makes your people's evidence less anecdotal", remarked one PIL (the same one quoted above as observing the Crown's tendency to dismiss experiential evidence as too anecdotal).[218] As explained by Boies Parker with reference to her tent city cases, a multitude of legally extraneous factors may contribute to the personal challenges faced by any given homeless person in ways that are difficult to disentangle. An expert, on the other hand, can present a more aggregate picture of the homeless population, helping to illuminate systemic problems that cannot be efficiently established on the basis of idiosyncratic individual accounts.[219] In her words, "sometimes expert evidence is a way to get a cluster of information before the court that would just take forever if you were trying to lead it."[220] This observation harkens back to the practical challenges discussed in the previous section. It is certainly possible to marshal a large enough body of experiential accounts to demonstrate systemic forms of injustice. Indeed, there is longstanding feminist tradition of doing just that, exemplified by the second-wave feminist phenomenon of consciousness-raising (see Chapter 3 at 3.3.1). Given the

[216] Interview 3 (14 September 2016).
[217] *Ibid.*
[218] Interview 1 (6 September 2016).
[219] Interview 2 (13 September 2016).
[220] *Ibid.*

resource constraints that arise in the context of strategic *Charter* litigation, however, experts—including qualitative researchers who have already collected experiential data—offer a more efficient way of demonstrating the requisite facts.

Social science research in particular helps to show that the direct experiential accounts tendered as evidence in litigation are in fact representative of broader social phenomena. For this reason, some interviewees viewed expert social science evidence as vital to address the systemic issues at play in strategic *Charter* litigation, especially under s.1.[221] Speaking of *Bedford*, for instance, one Crown litigator opined, "what alternative do you have in that case but to use social science evidence, despite its limitations. You have to, because the very issue the court has to decide about the nature of the harm and its sources, comes down to a social science question."[222]

Some of the more critically reflexive PILs I spoke to, however, questioned the amount of expert evidence needed in strategic *Charter* litigation, at least at the stage of establishing a *Charter* breach. As Pongracic-Speier put it:

> I think there is something that we have to really seriously grapple with in this type of litigation, as to, you know, how many of the official experts we require, and why we require them. Are they adding something novel,

[221] *Ibid*; Interview 1b (3 October 2018); Interview 3 (14 September 2016); and Interview 15 (19 October 2018).
[222] Interview 15, *ibid*.

> versus something that has an alphabet soup on the end, because they're PhDs or they hold an MA or whatever the case may be.[223]

Pacey, for her part, was critical of the Court of Appeal (ONCA) majority in *Bedford*'s remarks concerning the limitations of "anecdotal" experiential evidence on screening (see Chapter 7 at 7.3.2), asking: "[W]hat are you saying about sex workers' voices and the people who come forward when you're saying 'how do we know if they're really representative?'"[224] On the other hand, Mangat observed that reliance on experiential evidence alone to demonstrate a *Charter* violation may pose risks for broader legal and social justice goals, "because what if the experience is an experience that is quite damaging to other equality rights' seekers?"[225] Concerns about representativeness are, in other words, not just related to truth, but also to equality broadly conceived.

Mangat's point is an important one. It would be a mistake to simply equate the promotion of experiential evidence with a progressive, feminist approach, especially where there are competing experiential accounts that remain unheard or underemphasized. Indeed, as noted above, where practical factors limit the number and range of experiential accounts that can be heard in litigation, expert evidence may prove critical to facilitating a broader, more systemic—albeit mediated—understanding of a given phenomenon of social marginalization. Still, paying attention to the perceived roles of experiential versus expert evidence as modes of proof, or *ways of knowing* in litigation, reveals how the dynamics

[223] Interview 8 (14 September 2018). Mangat similarly questioned whether so much expert and legislative fact evidence is really necessary in *Charter* litigation. Interview 3 (14 September 2016).
[224] Interview 4 (15 September 2016). See also Interview 8 (14 September 2018).
[225] Interview 3 (14 September 2016).

of strategic *Charter* litigation sometimes work against the advancement of feminist epistemological commitments.

As the discussion above demonstrates, litigators' views on the role played by different categories of proof in litigation arise partly from their own epistemic beliefs, commitments, concerns, and professional experiences. However, these views are also importantly shaped by the demands of the adversarial process, and, in particular, by the need to frame knowledge in a way that appeals to judges' own experiences and epistemic beliefs. The remainder of this section is devoted specifically to developing this key point.

Persuading the Court

Perhaps the strongest factor influencing the framing of knowledge in litigation, according to my interview data, is the need to persuade judges as human decision-makers. Of course, it is impossible to predict what kind of evidence any particular judge will find persuasive or not—a reality underscored by many of my interviewees.[226] Still, the litigators' I spoke to pointed to a number of common tendencies in how judges respond to evidence, tendencies that shaped their own approach to the fact-finding process.

For instance, several interviewees observed that judges tend to be wary of social science evidence, partly because of the difficulties of evaluating competing research studies and claims as a non-expert.[227] In light of this observation, it is not surprising that some litigators flagged the ability to present technical or complex evidence in a clear and

[226] *Ibid*; Interview 2 (13 September 2016); Interview 6 (30 August 2018); Interview 9 (17 September 2018); and Interview 10 (21 September 2018).
[227] Interview 1 (6 September 2016); Interview 5 (25 July 2017); and Interview 10, *ibid*.

simple manner as an important consideration when selecting experts.[228] For instance, long-time feminist advocate and PIL Mary Eberts remarked that, while statistical evidence from experts can be very helpful, "as soon as they start getting inconclusive or muddy, you have to drop them."[229] The preference for clear and definitive constructions of science noted in Chapter 5 emerges again here, thwarting a more nuanced and carefully contextualized epistemological approach.[230]

The litigators I interviewed also generally agreed that judges are most heavily influenced by firsthand experiential accounts, rather than by expert evidence.[231] At the same time, however, some interviewees observed that experiential evidence may not always resonate with courts. Young, for instance, pointed to a lack of respect for sex workers as a potential cause for concern in *Bedford*, a factor that made him wary of relying on experiential evidence alone.[232] Young's fear points to one of the more blatant ways in which the experiential knowledge of marginalized people may be discounted in strategic *Charter* litigation—through the biased attitudes of judges.

Countering Young's concern were comments about the open-minded, thoughtful and attentive approach taken by judges in several recent *Charter* cases.[233] Even with the best of intentions, however, judges might have difficulty relating to the firsthand experiences of marginalized people whose lives differ greatly from their own. Professional experts

[228] Interviews 10, *ibid* and Interview 13 (28 September 2018).
[229] Interview 13, *ibid*.
[230] See Chapter 5 at 5.2.1.
[231] Interview 4 (15 September 2016); Interview 7 (13 September 2018); and Interview 10 (21 September 2018).
[232] Interview 5b (12 September 2018).
[233] Interview 1b (3 October 2018) (speaking of *Carter, supra* note 5 and *BC solitary confinement*, *supra* note 6); Interview 8 (14 September 2018) (speaking of *Insite, supra* note 4).

whose lived experiences more closely resemble those of judges may then serve as a bridge between experiential witnesses and the court. Boies Parker gave the example of using expert evidence to help judges understand the realities of the homeless population in Victoria in her tent city cases. She explained:

> I always say that our most important role as lawyers in these sorts of cases is to make sure that the voice of the individuals is given expression in a way that the court can understand, and that it can put into the legal framework that it needs to in order to come to the right result, right? And, and, sometimes the experts can help with that, right, because they can talk about those impacts in a way that make it easier for the court to understand.[234]

Young made a similar comment in comparing *Bedford* to his cases on medical marijuana. As he observed, everybody can understand what it's like to get sick, especially judges, given their generally advanced age. This made the experiential evidence of individuals who used marijuana to alleviate illness highly compelling, in Young's view.[235] *Bedford*, however, was a different story. "There's no identification with sex workers that a judge would go, 'I understand that.' They wouldn't. So you had to dress it up then with empirical", he explained.[236] Here we see how the limitations of judicial experience affect the weight ascribed to the experiences of others in litigation. In order to persuade elite

[234] Interview 2 (13 September 2016).
[235] Interview 5b (12 September 2018). Tucker gave the same explanation for why it was adequate to bring the experiential evidence in *Carter* via affidavit, rather than *viva voce*. Interview 6 (30 August 2018).
[236] Interview 5b, *ibid*.

judges, PILs may thus find themselves bolstering the epistemic authority of academic experts at the expense of marginalized people. In this way, a strategy that is effective in achieving a sought after legal outcome may come at the cost of furthering epistemological justice.

The remarks of Boies Parker and others demonstrate their awareness of the epistemological concerns that such strategies give rise to. Boies Parker, for instance, stressed that counsel has an obligation to make sure that expert evidence does not usurp the firsthand accounts of individuals.[237] Mangat articulated the tension as follows:

> I think there's always a tension there between optimal litigation strategy, in how you present the case, how you buttress and bolster individual experience in a way that is going to be viewed […] as credible by the court, without in some way, you know, inadvertently sending a message that the individuals' experience is tertiary.[238]

She went on to emphasize the need for "thinking creatively about how we can keep those voices very much front and centre" in light of the increasing role of expert evidence in strategic *Charter* litigation.[239]

Even when judges do find the experiential evidence in a case persuasive in its own right, several interviewees described expert evidence as a means to make them feel safer or

[237] Interview 2 (13 September 2016).
[238] Interview 3 (14 September 2016).
[239] *Ibid.*

more comfortable in making bold decisions. "I always think that […] if a court wants to believe that a thing is true, expert evidence helps them do that. It gives them a basis on which they can make the finding that is, I think feels safer to them than just drawing conclusions from individuals' experiences", said Boies Parker.[240] In part, this may be a product of the concerns about representativeness discussed above. As Pacey opined:

> [W]hile judges may find the individual stories very compelling, when they're dealing with these broad, very systemic questions, or they're looking at big pieces of legislation, and these are big changes, big questions, they're very comforted to know that there is a broader basis of evidence and research that they can rely on. I think that provides a certain level of comfort.[241]

The judicial inclination to ground decisions in expert evidence, however, may also arise from mainstream epistemological assumptions about who counts as an authoritative knower. In speaking of *SWUAV,* for instance, Pacey explained:

> it's important that the court know and feel comforted by […] who is helping them with the findings of fact and the decision-making […] so they can really trust as reliable and trustworthy knowledge holders. And so sometimes that involves trying to find people that are...who they can really identify with and know that they feel trust in. And so we knew that sex

[240] Interview 2 (13 September 2016).
[241] Interview 4b (18 September 2018).

> workers were going to have a really strong and compelling voice because they were going to be the central story and the central experience. But we also wanted others to corroborate that and make the court feel comfortable and confident in the decision they were going to make...we were hoping they were going to make.[242]

Experts, then, are needed not only to facilitate judicial understanding, but also to instill confidence via a familiar and trusted form of authority. Not only does this exert pressure against the feminist epistemological commitment to centering experiential knowledge in litigation, it reinforces the "institutionalized hierarch[ies] of cognitive authority" that feminists seek to resist through the advancement of experiential knowledge.[243] As Code explains:

> The matter of determining what human sources of knowledge are trust*worthy* is vital to responsible knowing. The construction of knowledge is an intersubjective process, dependent for its achievement on communal standards of legitimation and implicated in the power and institutional structures of communities and social orders.[244]

The impetus to lean on mainstream perceptions of authority in litigation may also influence the selection of experts by counsel in ways that run counter to, or at least do not

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[242] *Ibid.*
[243] Helen Longino, "Feminist Epistemology" in *The Blackwell Guide to Epistemology* (Malden, Mass: Blackwell Publishers, 1999) at 337.
[244] Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (Ithaca, NY: Cornell University Press, 1991) at 132.

prioritize, feminist epistemological commitments. In discussing *Carter*, for instance, Tucker spoke of looking for medical expert witnesses who are "extremely well respected" to express their support for assisted dying, and their willingness to engage in the practice. She said nothing about seeking out experts who are particularly epistemologically conscientious.[245]

In addition to their own assumptions about epistemic authority, judges may be inclined to rely on purportedly objective expert evidence as a means to legitimate their decision-making in the eyes of the public. As Jones put it, "courts like to paint their decisions with at least the veneer of rationality and objective fact".[246]

> I think that judges often decide emotionally and then explain rationally. And, the personal, anecdotal, heartstrings evidence is highly influential on the outcome of the case and the decision. But it's often completely absent from the reasons, where they rely heavily on the objective and the demonstrable, academic, expert, statistical, whatever, right.[247]

To the extent that judges rely on expert evidence to rationalize their decisions, litigators who wish to win their cases must emphasize this evidence. As Pacey put it, "you want to make it as safe and easy as possible for a judge to do the right thing".[248] The cost of this

[245] Interview 6 (30 August 2018).
[246] Interview 7 (13 September 2018).
[247] *Ibid.*
[248] Interview 4 (15 September 2016).

strategy, however, may be to downplay the importance of experiential knowledge, a pillar of feminist epistemology and progressive epistemology more broadly.

8.4 LAW, FACT AND COMMON SENSE

The power of judges as the human focal point of the fact-finding process not only influences how litigators select and frame different kinds of evidence; it also affects the extent to which evidence matters at all. In Part II of this dissertation, I demonstrated how, despite the extensive evidentiary record tendered in *Bedford*, including both expert and experiential evidence from numerous witnesses on both sides, much of the fact-finding process collapsed back into legal or "common sense" reasoning. The resilience of the fact-finding process to new and potentially disruptive forms of knowledge in this way, I argued, signals a danger for feminist epistemological justice. At the same time, the *Bedford* example demonstrates how the persistent power of common sense in litigation can present an opportunity for previously marginalized experiential knowledge to gain a foothold in law. In the final section of this chapter, I bring the analysis of legal process in strategic *Charter* litigation offered in the previous sections to its culmination by returning to a core theme of this dissertation: the relationship between law, fact, and common sense. Drawing once more on my interviews, I show how the dynamic I observed in *Bedford* applies to strategic *Charter* challenges to legislation more broadly. In doing so, I offer further support for the inextricability of legally enshrined categories of knowledge and proof.

8.4.1 The Power of Evidence

I began this dissertation by pointing to a striking trend in recent strategic *Charter* litigation: a shift in focus from legal to factual issues, accompanied by a notable expansion in the size of evidentiary records.[249] As I noted, this trend can be understood as arising from a number of factors, including what Mariana Valverde refers to as a "crisis about the contents of social commons sense".[250] As legal institutions and actors make efforts to account for a wider array of perspectives, we are no longer so sure of what we thought we knew. Consequently, matters that were once considered within the purview of lawyers and judges have now been "ceded […] to outside experts", as one of the judges I interviewed put it.[251]

At the outset of this project, I posited that the trend towards more extensive social and legislative fact-finding in strategic *Charter* litigation could assist social justice seekers, by illuminating the daily realities of marginalized people and by challenging legally entrenched assumptions that perpetuate inequality.[252] In one sense, these intuitions were affirmed by many of the litigators I spoke to, who emphasized the heightened importance of a comprehensive evidentiary record in bringing a successful *Charter* challenge.[253] "[I]t's really important", commented one PIL, "I don't think anybody could win a *Charter* case today without a lot of evidence…".[254] Sigurdson similarly remarked, "to be

[249] See Chapter 1 at 1.1 and 1.2.2.
[250] Mariana Valverde, "Social Facticity and the Law: a Social Expert's Eyewitness Account of Law" (1996) 5:2 Social & Legal Studies 201 at 205.
[251] Interview 11 (24 September 2018).
[252] See Chapter 1 at 1.2.2.
[253] Interview 1 (6 September 2016); Interview 5 (25 July 2017); Interview 5b (12 September 2018); Interview 11 (24 September 2018); Interview 12 (27 September 2018); and Interview 13 (28 September 2018).
[254] Interview 1, *ibid*.

successful in any Charter litigation […], the record is everything."[255] Noting the persuasive power of the records in *Bedford* and *Carter* specifically, one of the judges I interviewed opined, "…they probably wouldn't have won those cases any other way". [256]

Furthermore, several interviewees affirmed the power of evidence, both experiential and expert, to disturb judicial preconceptions.[257] In discussing *SWUAV*, for example, Sigurdson emphasized the need for the court to hear directly from sex workers to "unpack the assumptions about what those people are like".[258] Eberts similarly noted how direct experiential evidence can disrupt stereotypes about a community—she spoke of Indigenous women—by humanizing its members.[259] Another PIL gave the example of *Carter*, where the plaintiffs had to counter the assumption that the prohibition on assisted dying saves lives, and that such an objective is unassailable. This was most powerfully accomplished, in this PIL's view, through the firsthand accounts of people seeking to end their own suffering, and their family members: "much of that evidentiary record is, sort of just haunting from those people, from those perspectives, talking about fates worse than death."[260] Boies Parker noted how experts can also help to unpack judicial assumptions in this way, pointing, as an example, to the crucial role they have played in debunking the notion that homelessness and drug addiction are a matter of choice.[261] Still

[255] Interview 12 (27 September 2018).
[256] Interview 11 (24 September 2018).
[257] Interview 1 (6 September 2016); Interview 1b (3 October 2018); Interview 2 (13 September 2016); Interview 12 (27 September 2018); and Interview 13 (28 September 2018).
[258] Interview 12, *ibid*.
[259] Interview 13 (28 September 2018).
[260] Interview 1b (3 October 2018).
[261] Interview 2 (13 September 2016).

others noted how social and legislative fact evidence can disrupt the legal status quo by persuading courts to revisit previous rulings, as occurred in *Carter* and *Bedford*.[262]

8.4.2 The Persistent Influence of Law and Common Sense

At the same time, however, my interviews, like the transcripts in *Bedford*, highlighted the persistent influence of law and common sense over the fact-finding process, casting doubt on the potential of the latter to disrupt the former.

Law and Policy

Law's ongoing influence over fact-finding in strategic *Charter* litigation manifests in a number of ways, many of which I have already alluded to throughout this dissertation. For one thing, jurisprudential developments, such as the SCC in *Bedford*'s holding that a breach of s.7 can be established by the violation of a single individual's rights, may affect the type of proof required at different stages of a *Charter* case.[263] For another, legally enshrined epistemic norms, such as the expectation of objectivity on the part of experts, influence both the type of evidence tendered in litigation and how that evidence is framed.[264] Prominent court cases can also significantly shape the trajectory of research and scholarship, the products of which may in turn be relied upon as evidence in future litigation.[265] Sigurdson, for instance, emphasized how *Insite, SWUAV,* and *Bedford* contributed to a growing body of scholarship on the impacts of criminalization.[266]

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[262] Interview 3 (14 September 2016) and Interview 10 (21 September 2018).
[263] See Chapter 7 a 7.3.3.
[264] See *supra* at 8.3.2.
[265] Interview 12 (27 September 2018). See also: Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, Mass.: Harvard University Press, 1995) at 50; AJ Ray, "Native history on trial: Confessions of an expert witness" (2003) 84 Can Hist Rev 253 at 273.
[266] Interview 12, *ibid*.

The persistent influence of law is even more apparent where the resolution of cases involving extensive evidence nevertheless falls back on legal reasoning and argument. In some instances, this may be due to the Crown's approach to defending legislation. For example, Pongracic-Speier described how in *Insite*, Canada declined to cross-examine any of the plaintiffs' witnesses, including the experts, choosing to focus instead on public policy arguments about drug consumption.[267] Several other interviewees observed that the Crown has often relied on a "reasoned apprehension of harm" to justify laws under s.7 and s.1, in lieu of a robust evidentiary record.[268]

Courts, too, have often preferred to decide constitutional issues primarily on a legal basis, rather than engaging too deeply with complex factual questions, though my interviews suggest that this is changing. As mentioned above, for instance, Young recounted facing judges in the early years of his career who simply refused to hear the social and legislative fact evidence he sought to bring, or to review evidence filed by affidavit.[269] Eberts similarly recalled how the SCC majority in *Symes v Canada*[270]—a s.15 case about whether tax deductions for child care should be allowed as a business expense—failed to mention the evidence her and her client had tendered about women running small businesses.[271] In this way, courts may simply ignore, or at least fail to explicitly acknowledge, the evidence tendered in a strategic *Charter* challenge.

[267] Interview 8 (14 September 2018).
[268] Interview 1 (6 September 2016) and Interview 6 (30 August 2018). One Crown litigator suggested that this is in part due to the difficulties that arise for Crown litigators in trying to prove speculative harms. Interview 9 (17 September 2018).
[269] Interview 5 (25 July 2017) and Interview 5b (12 September 2018). See 8.3.1 under *Tendering Evidence*.
[270] *Symes v Canada,* [1993] 4 SCR 695.
[271] Interview 13 (28 September 2018).

From Jones' perspective, facts and evidence in constitutional cases are rarely the heart of the matter; rather, their main role is to provide a basis upon which normative argumentation can proceed.[272] In other words, it is not only the Crown's approach to defending legislation, or the courts' approach to deciding cases, but something about the nature of constitutional litigation itself that ensures the persistent centrality of law and policy-based reasoning in the process. The tendency for the facts to be sidelined on appeal, especially in light of the deferential standard of review established in *Bedford*, only heightens this phenomenon:[273] "[S]ometimes when stuff gets to the Supreme Court of Canada you wonder if really the facts matter at all", stated Jones.[274] In a similar vein, even when extensive evidence is tendered, challenged, and thoroughly considered, the arguments and outcomes in strategic *Charter* litigation often still fall back on "common sense" reasoning—as illustrated in *Bedford*.

Judicial Common Sense

Perhaps the most powerful influence over the fact-finding process that emerged from my interviews was the common sense of judges themselves, real or perceived—linked by many interviewees to the personal experience of judges. This is most apparent in moments where judges favour their own assumptions and intuitions over serious engagement with the evidentiary record. Pacey, for instance, recounted how, despite the extensive evidence brought on the standing application in *SWUAV* about the lives and circumstances of sex workers in the DTES, the chambers judge could not grasp that these

[272] Interview 7 (13 September 2018).
[273] Interview 10 (21 September 2018) and Interview 11 (24 September 2018).
[274] Interview 7 (13 September 2018).

women would be unable to name themselves as plaintiffs in the case on the merits.[275] The ONCA majority in *Bedford*'s analysis of the communicating provision's effects, discussed in the previous chapter, is also illustrative of this phenomenon.[276]

Even when judges do attend carefully to the evidentiary record, however, their background assumptions and views inevitably shape how they interpret the evidence. As one of the judges I interviewed put it, "you have to filter what you're getting in court through your sense, your understanding of the world."[277] According to one Crown litigator, the difficulty of sorting out conflicting expert evidence may actually heighten the influence of common sense in judicial decision-making:

> at the end of the day, where you have a conflict between experts that has sort of denigrated into a shouting match, then really what a decision maker's left with is first impression, and their own common sense, filtered through whatever evidence they've established. And so in some sense common sense, really, is absolutely, at the end of the day, *the* most important consideration to take into account.
>
> So...you know, a good litigator's going to be mindful of that, that the arguments that they're going to be making, either in their factum or orally,

[275] Interview 4 (15 September 2016).
[276] See Chapter 7 at 7.3.2.
[277] Interview 11 (24 September 2018). Eberts made a similar comment, remarking, "the facts are strained through that judge's particular worldview". Interview 13 (28 September 2018).

> have to really speak to that common sense, and are absolutely laser focused on it.[278]

The above comment points to the influence of judicial common sense not only at the level of decision-making, but also at the level of advocacy. Counsel, my interviews suggest, are keenly aware of the extent to which the common sense of decision-makers influences the outcome of a case, and this shapes the way they frame knowledge in litigation in a number of ways. For one thing, both Crown litigators and PILs acknowledged that invoking common sense, while perhaps not sufficient on its own,[279] is a powerful advocacy strategy.[280] Interviewees also described how the particular experience (or lack thereof) of judges influenced the way they, as litigators, framed the facts in some cases.[281] Take, for instance, the following anecdote from Young about his advocacy at the ONCA in *Bedford*:

> I think the line that worked to get them to accept the factual predicates of the constitutional challenge wasn't nothing to do with evidence […] I knew two of the three judges were sports people, because I've seen them at games. I said, 'everybody knows the concept of home court advantage. Why doesn't that apply here? Clearly if someone's working out of a controlled environment that's theirs, they're going to be safer. Everybody knows that. Just like teams win more frequently at home.' And it actually

[278] Interview 15 (19 October 2018).
[279] Interview 10 (21 September 2018) and Interview 13 (28 September 2018).
[280] Interview 4 (15 September 2016); Interview 4b (18 September 2018); Interview 7 (13 September 2018); and Interview 12 (27 September 2018).
[281] Interview 5b (12 September 2018); Interview 6 (30 August 2018); and Interview 8 (14 September 2018).

made its way into the judgment, the Court of Appeal judgment.[282]

Examples like this one illustrate how judicial common sense, grounded in the firsthand experience (or lack thereof) of judges, casts a shadow over the whole fact-finding process.

8.4.3 Shifting Common Sense

From a feminist perspective, the persistent influence of law and common sense in strategic *Charter* litigation raises a serious worry, especially where the arbiters of both are judges whose life experience tends to be far removed from marginalized communities. The heart of this worry, as articulated by Patricia Cochran, is that "*those things we believe without reasons* might be structured, not just by their reliability in daily living, but by their reliability as parts of a structure of inequality."[283] Where the marginalization of certain social groups is at issue, Cochran notes, "common sense is especially likely to overstep its jurisdiction because the knowledge in question may not be shared between majority and minority groups. And so it is here that injustice is especially likely to be unnoticed, reified or reinforced."[284] In litigation aimed at progressive social reform, the persistence of common sense thus seems to signal a failure to successfully challenge relations of inequality embedded in the status quo.

On the other hand, many of my interviewees, including progressively oriented PILs who described evidence as critical to disrupting the legal and judicial status quo, also

[282] Interview 5b, *ibid*.
[283] Patricia Cochran, *"Common Sense" And Legal Judgment: Community Knowledge, Political Power and Rhetorical Practice*" (PhD Thesis, University of British Columbia, 2013) [unpublished] at 152.
[284] *Ibid* at 141.

recognized the important role that common sense can play in advancing the rights and interests of marginalized people under the *Charter*.[285] This accords with Cochran's point about the progressive potential of common sense, despite its hegemonic tendencies.[286] In speaking of how to help judges make courageous decisions, for instance, Pacey commented: "we don't frame them as courageous, we say this is the obvious thing that you should be doing, but they are courageous decisions…".[287] When asked about the mobilization of common sense in *Bedford*, moreover, she was quick to praise Young's approach: "I think that Alan was smart […] to say, this is just the right thing to do and the logical thing to do and the rational thing to do, and to not make this out to be some big courageous move by the court that required a whole bunch of mental leaps, like it was just obvious."[288] According to Sigurdson, the common sense argument in *Bedford* was also the premise in *SWUAV*: "our thesis was that common sense was 100% on our side", she affirmed.[289] As Jones put it in his interview: "If you have a winning position it's because that has become the common sense".[290]

The reflections of my interviewees, then, point to two seemingly contradictory sets of observations about the relationship between law, fact, and common sense in strategic *Charter* challenges to legislation. On the one hand is the notion that facts and evidence have become vital to bringing a successful *Charter* challenge, in part because of their capacity to challenge both legal precedents and judicial assumptions. On the other hand,

[285] Interview 4 (15 September 2016); Interview 4b (18 September 2018); Interview 5 (25 July 2017); Interview 7 (13 September 2018); Interview 8 (14 September 2018); Interview 12 (27 September 2018); and Interview 13 (28 September 2018).
[286] Cochran, *supra* note 283 at 182-185. See Chapter 3 at 3.4.2.
[287] Interview 4 (15 September 2016).
[288] Interview 4b (18 September 2018).
[289] Interview 12 (27 September 2018).
[290] Interview 7 (13 September 2018).

however, is the persistence of law and common sense in shaping the fact-finding process, and the potential power of these forces as means to advance the cause of social justice.

So long as fact and evidence are imagined in dichotomy with law and common sense, these two sets of reflections appear conflicted. It is only upon recognizing the intertwined relationship between these categories that the apparent contradiction fades away. When we imagine law and fact, or common sense and evidence, as mutually constitutive, it becomes possible to see how experiential evidence and knowledge does wield influence in strategic *Charter* litigation, even when its epistemological force is muted. My interviewees, after all, did not perceive experiential knowledge as powerless in this context—far from it. While not triumphing as an epistemological category in its own right, experiential knowledge, in their view, played a crucial role in shaping judicial opinion. It did so not by directly disrupting and supplanting, but rather by reforming legal and common sense reasoning.

Drawing on Gramsci, sociologist of law Alan Hunt argues for a conception of counter-hegemony that depends upon "the 'reworking' or 'refashioning of elements which are constitutive of the prevailing hegemony".[291] According to Hunt, "it is precisely in the engagement with the actually existing terrain, in particular, with its discursive forms, that the possibility of their transformation and transcendence becomes possible."[292] Reading *Bedford* in this way provides insight into Young's strategy of tendering an extensive evidentiary record and yet insisting that the case could be decided on a common sense

[291] Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17:3 Journal of Law and Society 309 at 313.
[292] *Ibid* at 320.

basis. There are different versions of common sense at play in *Bedford*. Young's version, premised largely on his "home field advantage" argument, aligned with the evidence of his clients and other experiential witnesses. He worried, however, that some judges might come with a different set of background assumptions about the nature of the sex trade. "I was afraid of a court not having the same common sense that I had."[293] In bringing a wealth of experiential and expert evidence to back up his arguments, Young sought to persuade the courts not just that the facts were on his side, but that his argument was indeed commonsensical. He sought, in other words, to shift the court's very idea of what constitutes common sense.

Young's strategy resonates with Suzanne Goldberg's account of how American courts absorb social change in constitutional cases. According to Goldberg, newly established facts about a given social group can provide a cloak of legitimacy for judges to shift their normative approach to the constitutional rights of the group.[294] Over time, as the new approach becomes more firmly established, the relevant facts become integrated into law (or, we might imagine, at least into judicial common sense).[295] In this way, facts serve as a catalyst for changing legal norms.

One of the most compelling illustrations of this comes from my interviewees' observations about the influence of one legal fact-finding process on the next. Pacey and

[293] Interview 5 (25 July 2017).
[294] Suzanne B Goldberg, "Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication" (2007) 6 Dukeminier Awards Best Sex Orientat Gend Identity Law Rev 1 at 26.
[295] *Ibid* at 21.

Sigurdson, for example, both spoke of how *Insite* paved the way for *SWUAV*, which in turn helped to set the stage for *Bedford* at the SCC. In Pacey's words:

> They [courts] aren't supposed to really rely on findings of fact from previous judgments. But I think that there was a level of judicial education that happened. Like when I stood up in the *Bedford* case – we were interveners – I didn't feel like I had to really explain who my clients were. Because we'd done that in *SWUAV* in such excruciating detail that I really felt like they knew that, […] and we were able to rely on the education they received through *Insite* about the context of the neighbourhood. So I think that was very valuable.[296]

Pongracic-Speier expressed a similar view, noting how the findings of fact in *Insite* had "filled in some of the background for *Bedford* in a way that made it unnecessary to start painting the picture from the beginning".[297] She went on:

> And so I suppose, from the point of view of doing strategic litigation that is aimed at improving the lives of really poor people, marginalized people within society, each piece can build on the next by having this canvas that for each successive case has the recognition of certain social, fundamental social facts already painted on it. […] And so I think there is a kind of

[296] Interview 4 (15 September 2016).
[297] Interview 8 (14 September 2018).

> judicial education that happens by helping judges expose themselves […] to experiences that are different from their own.[298]

Pongracic-Speier's experience in *Insite* led her to believe that courts can be quite open to hearing and integrating experiential evidence in this manner. "[T]here was this very basic curiosity about wanting to understand how this worked, and what was happening, and understanding something about the people whose rights were at issue", she recounted.[299]

The potential influence of experiential evidence on judicial common sense may also provide an avenue for such evidence to overcome practical challenges and/or admissibility restrictions. Sigurdson, for instance, recounted how, despite tendering experiential evidence through anonymous affidavits in the *SWUAV* standing application—a practice that raised "red flags" for the court—the stories told were "so compelling, and so consistent with an understanding of human experience, that it can tap into the judicial mind…".[300] In her view, Justice Cromwell's decision on the application was ultimately grounded in this evidence.[301] This form of influence is, of course, no substitute for giving due weight to the experiential accounts of marginalized people as an authoritative source of knowledge in itself. Still, it demonstrates the progressive potential of common sense in litigation where it is infused with experiential knowledge, and thus the power of such knowledge to nudge the legal status quo forward.

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[298] *Ibid.*
[299] *Ibid.*
[300] Interview 12 (27 September 2018).
[301] *Ibid.*

8.5 CONCLUSION

In this chapter I drew on interviews with constitutional litigators and judges to show how both practical and epistemological factors give rise to a tension between the pursuit of legal victory and epistemological justice in strategic *Charter* litigation. While the practical challenges of limited resources, limited available evidence, and the burdens of participating in litigation create barriers to the construction of a comprehensive record centred on experiential voices, the epistemic norms engrained in law and judicial consciousness put pressure on litigators to compromise progressive epistemological commitments in the selection and framing of evidence.

Returning to the questions raised at the outset of the dissertation about the consequences of the shift in focus from law to fact in strategic *Charter* litigation, I observed two seemingly contradictory dynamics: 1) the widely acknowledged power of experientially-grounded evidence to disrupt the common sense assumptions engrained in law and legal reasoning, and thereby to support progressive *Charter* challenges to legislation; and 2) the remarkable persistence of law and common sense in this type of litigation, which suggests that the above shift may promise less than imagined for social justice seekers hoping to disturb the status quo. I argued, however, that by recognizing the intertwined nature of law and fact, and similarly, of evidence and common sense, we can see how evidence grounded in experiential knowledge might induce a shift in judicial common sense, and thus how the two phenomena described above can co-exist. In this way, we can understand both the progressive potential, and the limits, of strategic *Charter* litigation as a tool for social justice, through the lens of epistemological justice.

Chapter 9: Conclusion

9.1 INTRODUCTION

At the heart of this dissertation is a concern about law's ways of knowing in constitutional cases. This concern can be traced back to an early intuition that, in our focus on the legal possibilities and limitations presented by the *Charter*, progressive social justice-seekers were paying too little attention to the treatment of evidence, facts, and knowledge in constitutional litigation. Given the recent shift in focus from law to social and legislative facts in strategic *Charter* challenges, and the corresponding proliferation of evidentiary records, this aspect of the pursuit of social justice under the *Charter* could no longer be ignored. In this concluding chapter, I sum up the key elements of the dissertation that has resulted from this initial concern, consider its limitations, and explore the possibilities it opens up for further scholarship. I end with a call for greater epistemological consciousness as we continue to engage in and with constitutional litigation as a tool for social change.

9.2 SUMMING UP

In Chapter 1, I outlined a well-established set of critiques that point to a fundamental tension between litigation and social justice in the constitutional context. In this dissertation, I have developed and explored the concept of epistemological justice as a further, under-examined factor in this relationship. This exploration has been rooted in two distinct theoretical frameworks. First, I have framed my project as building upon the New Evidence Scholars' broad view of evidence as "information in litigation"—or in my

adaptation, "knowledge in litigation". As discussed in Chapter 2, the special nature and dynamics of social and legislative fact-finding in strategic *Charter* litigation necessitates, and underscores the value of, such an approach.

Second, I have grounded my assessment of how knowledge is treated in strategic *Charter* litigation in the work of feminist epistemologists. As elaborated in Chapter 3, my conception of epistemological justice is rooted in this literature, which advances an understanding of knowledge as necessarily situated, grounded in dynamic relationships, and ethically and politically inflected. At the heart of this approach is a commitment to centering the experiential knowledge of socially marginalized people, without losing sight of the complex ways in which experiential accounts are themselves shaped by broader social norms and discourses.

Progressive scholars, lawyers, advocates and activists often espouse some version of this conception of epistemological justice as part of their broader commitment to social justice. In this dissertation, I have sought to examine how such epistemological commitments fare in the context of strategic *Charter* litigation—specifically, challenges to legislation under section 7. In Part II, I undertook a thorough examination of the record, submissions, and reasons issued in *Bedford v Canada (AG)*[1] as a means to respond to this question. My analysis revealed that, while feminist approaches to knowledge are at play in the fact-finding process in *Bedford*, they are generally overpowered by the mainstream epistemological framework that they seek to critique—a framework that understands knowledge in terms of abstract universal propositions,

[1] *Bedford v. Canada (AG),* 2010 ONSC 4264, affirmed in 2013 SCC 72.

detached from particular knowers and social contexts. The latter framework, I suggested, finds support not only in the doctrinal rules of admissibility, but also in how the law constructs categories of proof, most notably through the dichotomization of law and fact, experience and expertise, and common sense and evidence.

What is more, I argued, the adversarial dynamic of strategic *Charter* litigation encourages lawyers and other legal actors to instrumentalize epistemic norms and categories in a highly decontextualized manner, regardless of their position in the litigation. It thereby encourages the strategic reinforcement of the above-noted boundaries between categories of proof. By the same token, the instrumentality of the fact-finding process takes both experiential knowledge itself, and the progressive feminist epistemology that supports it, out of the hands of communities and witnesses, and into a rhetorical toolkit for counsel and the courts. This raises a doubt as to whether the epistemological commitments that form an essential component of progressive social justice campaigns can survive when those campaigns enter the realm of litigation.

Drawing on interviews from constitutional judges and litigators, Part III corroborated and contextualized the findings of Part II. It also provided further insight into how various aspects of the legal process in strategic *Charter* litigation work against feminist epistemological commitments. In particular, the interview data highlighted the many practical barriers to constructing a comprehensive evidentiary record centered on experiential evidence, and the persistent epistemic influence of doctrinal law and judicial common sense over the fact-finding process. Nevertheless, I suggested that the experiential knowledge so important to feminist epistemology—and to progressive

epistemologies more broadly—does play an important, if indirect role, in strategic *Charter* challenges, by shifting the contents of the common sense upon which the legal process in these cases continues to so heavily rely.

9.3 LIMITATIONS AND POSSIBILITIES

With this project, I have endeavoured to offer a "critical retelling" of the "*practices* of knowledge construction" that shape recent strategic *Charter* litigation in Canada.[2] Of course, as noted in my preface, this retelling is also a form of socially situated knowledge construction, with all the limitations and possibilities that entails. It is on these limitations and possibilities that I find myself reflecting as I come to the end of the process of writing my dissertation.

One of the most important contributions of this project, in my view, is its in-depth analysis of the record in *Bedford*. This analysis offers rare insight into the nuanced dynamics of the constitutional fact-finding process. What makes the project rich in one sense, however, is also what limits it in another. My decision to undertake a deep dive into the transcripts in *Bedford* meant that I had to significantly constrain the breadth of my research, focusing, in the end, on a single case study. While my interviews helped to expand this breadth somewhat, my findings remain significantly tethered to the particular context and idiosyncrasies of the *Bedford* case. Studies of evidence, facts and knowledge in other constitutional cases, and in other legal contexts, are thus crucial to testing and building upon this work. While this could be done in many ways, there are a few sites of

[2] Lorraine Code, *Rhetorical Spaces: Essays on Gendered Locations* (New York: Routledge, 1995) at 176. See also Heidi E Grasswick & Mark Owen Webb, "Feminist Epistemology as Social Epistemology" (2002) 16:3 Social Epistemology 185 at 187.

study that present themselves as especially ripe for further investigation from the perspective developed in this dissertation.

9.3.1 The Story of *Bedford* Continued

The first is the continuation of the litigation story that began in *Bedford.* The federal government responded to the Supreme Court of Canada's ruling in *Bedford* by enacting the *Protection of Communities and Exploited Persons Act* [*PCEPA*].[3] As is evident from its Preamble, this legislation aims to denounce and discourage participation in the sex trade based on a view of prostitution as inherently exploitative and violent, and as an affront to human dignity and equality. The *PCEPA* amends the *Criminal Code* to make the actual act of prostitution illegal, criminalizing buyers, advertisers, and those who materially benefit from the practice, but exempting sellers from prosecution.[4] Constitutional challenges to the *Criminal Code* amendments made by the *PCEPA* have led to two noteworthy decisions, both from Ontario courts. In *R v Boodhoo,* three individuals convicted of advertising sexual services, procuring a person under 18, and materially benefiting from sexual services provided by a person under 18 argued that the relevant *Criminal Code* provisions violated ss.7 and 2b of the *Charter* based on a series of reasonable hypotheticals involving sex workers taking measures to increase their safety and autonomy.[5] The Ontario Superior Court of Justice upheld the constitutionality of the provisions. In *R v Anwar*, a common law couple charged with procuring, advertising, and receiving a material benefit from sexual services as a result of running an escort business challenged those provisions as violating the ss. 7, 2(d) and 2(b) rights of

[3] *Protection of Communities and Exploited Persons Act*, SC 2014, c 25.
[4] *Ibid,* Summary and Preamble.
[5] *R v Boodhoo*, 2018 ONSC 7205.

sex workers, once again on the basis of reasonable hypotheticals. The Ontario Court of Justice agreed with the applicants and found the provisions to be constitutionally invalid for the purposes of the case, but did not have the power to strike down the laws under s.52(1) of the *Constitution Act.* [6]

According to Deborah Haak, a legal scholar who extensively studied these cases and consulted for the Crown in *Anwar*, the reasonable hypotheticals presented in *Boodhoo* and *Anwar* were far removed from the actual circumstances of the sellers who were working for the accused.[7] What is more, while expert evidence was presented by both parties in *Anwar* and extensively discussed by the court in its reasons, neither decision makes mention of *any* experiential evidence from people currently or formerly engaged in the sale of sex, despite the fact that their rights were at the heart of these challenges. The predominance of abstract reasonable hypotheticals over the actual facts of these cases, and the complete absence of experience evidence from those whose rights were directly implicated, reinforces and heightens the concerns raised in this dissertation regarding the tension between legal and epistemological justice in strategic *Charter* challenges to legislation. The framing of the expert evidence in *Anwar* also reinforces some of my findings from *Bedford* regarding the dominance of mainstream epistemic norms—particularly norms related to objectivity, expert bias and quantitative versus qualitative research—in strategic *Charter* litigation.[8] A more in-depth examination of

[6] *R v Anwar*, 2020 ONCJ 103 [*Anwar*].
[7] Debra Marie Haak, *The Wicked Problem of Prostitution and Sex Work Policy in Canada* (PhD Thesis, Queen's University, 2019) [unpublished] at 202-206.
[8] See *Anwar, supra* note 6 at paras 76-82.

these and related *Charter* challenges could productively strengthen and extend this dissertation's main conclusions.

9.3.2 The Intersection of Evidence and Epistemology with Legal Process

The nature of the fact-finding process in *Boodhoo* and *Anwar* can be partially attributed to the distinct procedural context in which these *Charter* challenges arose: i.e. as part of defences to criminal charges, rather than civil applications for declarations of unconstitutionality.[9] This points to another site of study that merits more in-depth treatment than the scope of this project has allowed: the intersection of evidence and epistemology with legal process. Indeed, as discussed in Chapter 8, the type of proceeding is but one of many legal process factors that can influence how the fact-finding process unfolds in strategic *Charter* litigation, and with what epistemological consequences. Other important (and often intertwined) factors include the cost and time constraints faced by counsel, the nature of the parties, the nature of the procedure used to tender evidence, and the general approach taken to lawyering and judging in the case.

My interviews also yielded important insights about the challenges of participating in constitutional fact-finding processes, especially for vulnerable and marginalized people. Interviewee reflections on the recent *Charter* litigation surrounding tent cities in British Columbia were particularly compelling in this regard. As noted in Chapter 8, counsel involved in this litigation identified multiple challenges that impeded the affected homeless community from giving evidence, ranging from mental health and addiction

[9] See Chapter 8 at 8.3.1 under *Preliminary Issues,* Type of Proceeding.

issues to distrust of the legal system.[10] At the same time, their comments revealed how such challenges were at least partially overcome through extraordinary efforts to push the conventional boundaries of the fact-process—such as the decision to hold hearings about the constitutionality of city by-laws against homeless tent encampments in the basement of a local motel room in *Abbotsford (City) v Shantz*.[11] Examples like this point to the potential value of engaging more deeply with questions of legal process, institutional design and access to justice as they relate to the study of evidence in constitutional and other contexts.

9.3.3 The Treatment of Indigenous Knowledge in Aboriginal Rights Litigation

Moving beyond the realm of the *Charter,* the evidentiary and epistemological (and legal process) concerns at the heart of this dissertation suggest one additional site for further exploration: Aboriginal rights litigation. As several commentators have emphasized upon hearing about my work-in-progress, the questions and themes that drive my dissertation resonate strongly with this area of litigation. While Aboriginal rights cases raise unique and complex issues that find no perfect analogy in other legal contexts, concerns about the onerous burden of proof on claimants, the tension between the interests of individual Nations and the pursuit of broader Aboriginal rights, and the treatment of Indigenous knowledge, do bear some resemblance to the challenges that arise in strategic *Charter* litigation brought on behalf of marginalized communities.

[10] See Chapter 8 at 8.3.1 under *Building the Record*.
[11] *Abbotsford (City) v Shantz,* 2015 BCSC 1909.

Of particular interest is the treatment of Indigenous knowledge in Aboriginal rights litigation as it relates to the law/fact dichotomy ingrained in the common law of evidence. In recent years, the movement to recognize and give due consideration to Indigenous legal traditions has gained significant momentum.[12] However, the question of how colonial Canadian courts ought to become versed in Indigenous law remains unclear. To tender Indigenous legal knowledge as evidence, as has been the historical practice, carries implications that must be carefully thought through. To what extent does this practice obscure the status of Indigenous legal knowledge as a source of domestic law? What does it mean to treat Indigenous legal orders as a kind of foreign law to be proved in court via evidence? Indigenous ways of knowing law also challenge the epistemological assumptions that underpin the dichotomy between law and fact in the Canadian common law tradition, where "law" is confined to abstract expressions of general principles, and "fact" to purportedly neutral descriptions of real-life events. Indeed, the inextricability of factual description from interpretation, and of normative principles from their real-world application in at least some Indigenous oral traditions bears noteworthy parallels to the insights of feminist epistemologists discussed in this work, helping to underscore my critiques of the law/fact dichotomy.[13] Deeper engagement with Indigenous legal traditions and related knowledge may thus enrich the concept of epistemological justice I have developed here and provide further insight into its relationship to legal and social justice.

[12] Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725.
[13] See for example: John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall Law Journal 1; Justin B Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008).

9.4 TOWARDS EPISTEMOLOGICAL CONSCIOUSNESS

Given the limitations noted above, and the need for further research in some of the directions I have suggested, my conclusions in this dissertation about epistemological justice in constitutional litigation are deliberately tentative. I have also avoided providing normative guidance on how epistemological justice could be better realized in this area (though my elaboration of the concept of epistemological justice is certainly normative in nature). And yet, feminist epistemologists have refused the renunciation of a knower's ethical responsibility via the detachment of knowledge from how it applies in the world.[14] Let me, then, conclude with a reflection on what this dissertation calls for in practice: Despite all the remaining uncertainties, and all the work left to be done, what I hope to have clearly conveyed through this work is the need for advocates, litigators, witnesses, judges, and scholars to give due consideration to the epistemological effects of how facts and evidence are treated in litigation, especially litigation directed at progressive social change. It may be that the pursuit of positive legal outcomes for marginalized people will always sit in some tension with the broader demands of social justice, including epistemological justice. Still, the development of more conscious thought about the construction, mobilization, framing and evaluation of knowledge in litigation holds the promise of bringing them closer together.

[14] See Chapter 3 at 3.2.2.

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