The Evolution of Impartiality and the Need for Cultural Competency When Assessing Credibility

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Impartiality in decision-making is fundamental to the Canadian justice system. Cultural competency is also critical. In this article, the relationship between judicial impartiality and cultural competency is explored, with a particular focus on the task of assessing credibility. It is suggested that as our understanding of implicit biases and human decision-making strengthens, it will be necessary to re-examine our understanding of what impartiality in decision-making requires. This reflection will be especially important for the assessment of credibility, particularly when there are cultural aspects to consider. This article also identifies two specific aspects of the assessment of credibility that require a more focused examination from a culturally competent lens — first, the assessment of the reasonableness or plausibility of a witness's testimony, and second, the role of demeanour evidence.

L'impartialité dans la prise de décisions est fondamentale pour le système de justice canadien. Les compétences culturelles sont également essentielles. Dans le présent article, l'auteure analyse l'interaction entre l'impartialité judiciaire et les compétences culturelles, en particulier en ce qui concerne l'appréciation de la crédibilité. Selon l'auteure, notre meilleure compréhension des préjugés inconscients et des processus décisionnels humains devrait nous emmener à revoir ce qu'implique un processus de décision impartial. Telle réflexion s'avère particulièrement importante en matière d'appréciation de la crédibilité, surtout lorsque l'on doit tenir compte de différences culturelles. L'auteure identifie également deux critères précis de l'appréciation de la crédibilité pour lesquels on doit plus particulièrement user de compétences culturelles : premièrement, l'évaluation du caractère raisonnable ou vraisemblable d'un témoignage et, deuxièmement, la valeur probante du comportement du témoin pendant son témoignage.

1. INTRODUCTION

The impartiality of decision-makers is critical to the justice system as it allows individuals to have confidence that their cases have been decided fairly and without bias.

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Cultural competency is also fundamental to justice. In a general sense, cultural competency often refers to the skills and attitudes required to deliver services to different clients. In the context of the justice system, cultural competency requires the acknowledgement that everyone has implicit biases and that direct action to limit the impact of these subconscious, stereotypical assumptions is necessary, particularly with respect to decision-making.

In this article, I explore the relationship between judicial impartiality and cultural competency, particularly in the context of assessing credibility.

Assessing a witness's credibility is often described as the most difficult task required of a decision-maker. This difficulty is only heightened when there are cultural aspects to consider. The individualistic nature of assessing credibility, and its dependence on "intangibles", makes it particularly vulnerable to the improper influence of implicit biases. However, just as with other aspects of decision-making, there are many steps that can be taken to ensure that implicit biases do not improperly effect the assessment of credibility generally.

In this article, I identify two aspects of the assessment of credibility that require more focused examination from a culturally competent lens.

The first aspect pertains to the assessment of the reasonableness or plausibility of a witness's testimony. I propose that the perspective of a "practical and informed person" must be evaluated carefully for this assessment to be free of implicit bias.

The second aspect pertains to demeanour. The Canadian justice system has deeply rooted ideas about the importance of seeing and hearing a witness, particularly when assessing credibility. As a result, demeanour evidence is still accepted as a relevant factor when assessing credibility despite the growing recognition of the fallibility of this evidence. In light of the growing research on implicit bias and its impact on decision-making, I propose that it may now be appropriate to re-examine the role of demeanour evidence when assessing credibility, acknowledging that such an endeavor will require extensive evidence and consideration, and likely collaboration between representatives. I also propose that as long as demeanour evidence remains a valid consideration in assessing credibility in the Canadian justice system, decision-makers should carefully consider the need for demeanour evidence, as well as what steps can be taken in order to minimize any negative impact.

2. JUDICIAL IMPARTIALITY

Judicial, or adjudicative, impartiality is fundamental to the Canadian justice system.[1] The right to an impartial decision-maker exists regardless of whether a matter is before a court of law or an administrative decision-maker.[2] The

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1 *Wewaykum Indian Band v. Canada*, 2003 SCC 45, 2003 CarswellNat 2822, 2003 CarswellNat 2823 (S.C.C.) [*Wewaykum*] at para. 57.

2 *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, 1996 CarswellQue 965, 1996 CarswellQue 966 (S.C.C.) [*Regie*] at para. 45.

impartiality of decision-makers is and must be presumed, and a high threshold must be met to find either actual or perceived bias.[3]

Impartiality relates to a decision-maker's state of mind and requires that decision-makers approach cases with an open mind and the absence of real or perceived bias.[4] Impartiality also requires that decision-makers not be influenced by irrelevant considerations to favour one side or the other.[5] Regardless of a decision-maker's background, gender, ethnic origin, or race, all decision-makers have a fundamental duty to render impartial decisions that are not only unbiased but also appear unbiased.[6]

Impartiality does not, however, require a decision-maker to have an "empty" mind or to abandon who they are or what they know, including past experiences.[7] As noted by former Chief Justice of Canada, Bora Laskin, in 1975, part of the strength of the common law arises from the fact that judges represent "in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties."[8]

Accordingly, decision-makers may, and do, have prior conceptions and opinions. When making decisions, however, they must not close their mind to the evidence and issues and must not rely upon inappropriate assumptions.[9] The obligation of impartiality also requires decision-makers "to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies."[10] As observed by Aharon Barak, judges are

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3 *Wewaykum, supra*, note 1, at paras. 59 and 60. The current test for determining whether there is a reasonable apprehension of bias was set out by de Grandpre J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) at p. 394.

4 *Ibid*., *Wewaykum,* at para. 58. See also *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25, 2015 CarswellYukon 37, 2015 CarswellYukon 38 (S.C.C.) [*Yukon*] at para. 22, quoting *R. v. Valente (No. 2)*, 1985 CarswellOnt 129, 1985 CarswellOnt 948 (S.C.C.).

5 *Ibid., Yukon*, at para. 24.

6 *Ibid*., at para. 31. This article focuses on individual impartiality, however, impartiality also has an institutional aspect — see for example *Regie, supra*, note 2 at para. 42. There is increasing awareness that diversity in decision-makers may lead to better and less biased decisions, as well as more confidence in the impartiality of the justice system in general, amongst other benefits. The potential benefits of a diverse judiciary on impartiality is explored in the article, Melissa L. Breger, "*Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*", 53 University of Richmond Law Review 1039 [Breger].

7 *Yukon, supra*, note 4, at paras. 32, 33, and 36. See also *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302 (S.C.C.) at paras. 38 and 39.

8 *Ibid., Yukon*, at para. 33, quoting "The Common Law is Alive and Well — And, Well?" (1975), 9 *L. Society Gaz*. 92 at p. 99.

9 *Ibid., Yukon*, at para. 33.

10 *Ibid*., at para. 36, quoting Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.

products of their time, "living and shaped by a given society in a given era."[11] Judges are encouraged to use all of their personal characteristics to reflect fundamental values of society. Judges must do this, however, in a way that is respectful of their unique position.[12]

Whether the obligation of impartiality has been breached in an individual case is contextual and fact-specific. Determining whether a decision-maker has violated this obligation involves an evaluation of both what type of information was relied upon by the decision-maker in reaching their decision and how the information was used.

In *R. v. S. (R.D.),*[13] a young black male had been charged with assaulting a police officer.

At the trial, the white police officer and accused were the only witnesses that testified about the incident. Their accounts differed widely. In an oral judgment, the Youth Court Judge, Justice Sparks, acquitted the accused. In response to a rhetorical question from the Crown, Justice Sparks remarked that police officers had been known to mislead the court in the past and that police officers had been known to overreact, particularly with non-white groups. However, Justice Sparks also confirmed that her comments were not tied to the specific police officer testifying in the case before her.

The issue of whether Justice Sparks' comments constituted a reasonable apprehension of bias was appealed all the way to the Supreme Court of Canada. The first appeal was considered by the Nova Scotia Supreme Court (Trial Division). Although the appellate judge found that Justice Sparks had made clear findings of credibility, she nonetheless found that a reasonable person would conclude that there was a reasonable apprehension of bias on the part of Judge Sparks and therefore ordered a new trial.[14]

At the Court of Appeal, a majority confirmed that Justice Sparks' comments gave rise to a reasonable apprehension of bias and therefore dismissed the appeal. However, Justice Freeman dissented, finding that Justice Sparks' comments did not "rise to a perception that she was biased."[15]

At the Supreme Court of Canada, a majority of the Court allowed the appeal and restored the acquittal, finding that Justice Sparks' comments did not give rise to a reasonable apprehension of bias. There were two judgments that formed the majority judgment, one of Justices McLachlin and L'Heureux-Dube, with Justices Gontheir and LaForest concurring, and the other of Justices Cory and Iacobucci. The distinction between the two judgments pertained to whether Justice Sparks' comments were inappropriate.

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[11] *Ibid., Yukon*, at para. 36, quoting Aharon Barak in "*The Judge in a Democracy*" (Princeton, New Jersey: Princeton University Press, 2006) at pp. 103-4.

[12] *Ibid.*

[13] *R. v. S. (R.D.), supra*, note 7.

[14] *Ibid.*, at paras. 78 and 79.

[15] *Ibid.*, at paras. 80-88.

Justices McLachlin and L'Heureux-Dube stated that impartiality must be distinguished from the concept of neutrality.[16] True objectivity or neutrality is as impossible for judges as it is for other humans. Like other humans, judges are a product of their social experiences, education, and human contacts, operating from their own perspectives.[17] In a multiracial and multicultural society, it is beneficial for judges to approach the task of judging from their varied perspectives and use the valuable knowledge gained throughout their careers and lives.[18] At the same time, however, when adjudicating, judges are required to recognize and even question their pre-conceived perceptions, as it is the law that must govern judicial matters, and not a judge's individual beliefs.[19] Therefore, notwithstanding that a judge's own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must only make those determinations after considering and being open to the views of all of the parties before them.[20]

In this particular case, the majority found that Justice Sparks approached the matter with an open mind and properly used her experience and knowledge of the community to understand the reality of the situation, while still properly applying the principle of proof beyond a reasonable doubt.[21]

Justices Cory and Iacobucci agreed that Justice Sparks' comments did not create a reasonable apprehension of bias but found that the comments were unfortunate. Justices Cory and Iacobucci acknowledged that the requirement of neutrality does not require a judge to discount their life experiences, as it is these experiences that are part of what qualifies them to preside over disputes. At the same time, they cautioned that decision-makers must avoid judging credibility based on generalizations or upon matters not in evidence.[22]

In *R. v. J.M.*,[23] a recent decision of the Court of Appeal for Ontario, the Court likewise cautioned that judges should exercise restraint when drawing on their specific experiences to determine a contested issue in a case.

In that case, the appellant appealed his conviction on a single count of sexual assault. The appellant argued that the trial judge had erred in his use of judicial notice, specifically relying upon his personal experience as a Crown counsel, when assessing the credibility of the complainant.[24]

The Court of Appeal allowed the appeal. It concluded that the trial judge had erred by exceeding the bounds of judicial notice when making findings

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16 *Ibid.*, at para. 34.

17 *Ibid.*, at para. 35.

18 *Ibid.*, at para. 38.

19 *Ibid.*, at paras. 35 and 40.

20 *Ibid.*, at para. 40.

21 *Ibid.*, at para. 59.

22 *Ibid.*, at paras. 119 and 129.

23 2021 ONCA 150, 2021 CarswellOnt 3180 (Ont. C.A.).

24 *Ibid.*, at paras. 1 and 2.

central to the assessment of credibility, including improperly drawing on previous personal experience as a Crown counsel. As a result, the credibility findings were tainted with improper considerations.[25]

In reaching its decision, the Court discussed the different categories of judicial notice, including the employment of "tacit judicial knowledge". Referring to *R. v. S. (R.D.),* the Court acknowledged that Canadian law recognizes that judges are shaped by and gain insight from their different experiences and they cannot be expected to forget these experiences when appointed.[26] However, there is a distinction between referencing general knowledge and relying on personal knowledge in a specific case. Although it can be difficult to know where to draw the line, unless the criteria of notoriety or immediate demonstrability are present, a judge cannot take judicial notice of a fact within his or her personal knowledge.[27] The only facts that can be considered in making a decision are based on the evidence that is presented or those that meet the criteria for judicial notice. Procedural fairness demands both judicial restraint and judicial transparency for all other conclusions drawn from a judge's personal and specific experiences.[28]

As these two decisions show, while it is beneficial for judges to have varied perspectives and experiences, judges must nonetheless be cautious when relying on their personal knowledge. Unless the personal knowledge of a judge is transparently presented to the parties, it can operate as an unchecked assumption. Every situation will be fact-specific and dependent on context. In general, limited reliance on specific knowledge, particularly with respect to determining a central issue, is critical to ensure both the appearance of and actual impartiality.

3. CULTURAL COMPETENCY — RECOGNIZING AND ADDRESSING IMPLICIT BIASES

"Culture" can be hard to define.[29] In general, culture is a set of beliefs, practices, and histories that inform our assumptions about and shape our reactions to the world around us. Culture is a source of both group and individual identity.[30]

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[25] *Ibid*., at paras. 3 and 54.

[26] *Ibid*., at para. 34, quoting *R. v. S. (R.D.)*, *supra*, note 7, at para. 38.

[27] *Ibid., R. v. J.M*., at para. 34.

[28] *Ibid*., at paras. 50 and 51.

[29] Pooja Parmar, "*Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence,*" (2019) 97-3 Canadian Bar Review 526, 2019 CanLIIDocs 3803 [Parmar].

[30] *Ibid.*

(a) What is Cultural Competency?

"Cultural competency" often refers to the skills, behaviours, attitudes, and knowledge that enables professionals to deliver services that are appropriate to a diverse range of clients.[31]

Both the understanding of what cultural competency is, and the best way to promote it, have evolved over time. Initially, cultural competency training was focused on increasing an individual's knowledge about different cultures and the best way to deploy this culturally specific knowledge.[32] More recently, training has evolved to focus on critical self-reflection, particularly with respect to one's own implicit biases.[33] Individuals are encouraged to closely examine themselves and better understand their impact on others.[34] The shift in focus is "quite fundamental as it moves from a universal paradigm back towards an individualistic one."[35]

Cultural competency has been recognized as being essential to the effective delivery of services in many different fields, including but not limited to the justice system.[36] As part of its 2015 final report, the Truth and Reconciliation Commission of Canada recommended 94 Calls to Action, including that legal professionals, health professionals, medical and nursing schools, all levels of government, and the Canadian corporate sector receive appropriate cultural competency training.[37] The Commission specifically suggested that this training include the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal—Crown relations, as well as skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.[38]

Cultural competency in the context of the justice system can include:

- The ability to recognize that humans are prone to stereotyping;

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[31] *Ibid.*

[32] Jowsey, T., "*Three zones of cultural competency: surface competency, bias twilight, and the confronting midnight zone*," (2019) 19 BMC Medical Education 306 [Jowsey]. In this article, the author notes that a training approach focused on education of other cultures can result in a "propensity for simplistic interpretations of people through a cultural lens" as well as distancing and stereotyping.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.* In this article, the author talks of three zones of cultural competency: surface competency, bias twilight, and confronting midnight. The surface and bias zones are generally described above. In the confronting midnight competency zone, individuals are encouraged to challenge their assumptions and look closely at how their own privilege informs their worldview, agency, and power.

[36] Parmar, *supra*, note 29.

[37] Truth and Reconciliation Commission of Canada, "*Truth and Reconciliation Commission of Canada: Calls to Action*" (2015).

[38] *Ibid.*, Calls 23, 24, 27, 57 and 92.

- The acknowledgment of the harmful effects of discriminatory thinking and behaviour upon human interaction; and
- The acquisition and performance of the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice.[39]

(b) Implicit Bias

The intersection of implicit bias and decision-making is a growing area of research that draws from several different areas, including the law, brain science, psychology, and human behaviour.[40]

Bias is often categorized as either explicit or implicit. Explicit bias concerns the stereotypes that an individual maintains and consciously expresses towards a particular person, group or situation.[41] Implicit bias concerns the subconscious, stereotypical associations that an individual has about a particular person, groups, or situations that are so subtle the individual that holds them might not even be aware of them.[42]

Although explicit bias is distinct from implicit bias, the two can coexist.[43] Bias is also multifaceted and can include other, often overlapping categories, such as confirmation bias or hindsight bias.[44] This article focuses on implicit bias in the general sense.

Implicit biases develop from cultural and social cues that individuals learn through various interactions throughout their lives. Implicit bias is not necessarily negative in every context, as these stereotypical associations often help individuals navigate the world, including processing information quickly without needing to rebuild connections repeatedly.[45] However, these mental

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[39] Rose Voyvodic, "*Lawyers Meet the Social Context: Understanding Cultural Competence*", (2006) 84-3 Canadian Bar Review 563, 2006 CanLIIDocs 152.

[40] Breger, *supra*, note 6, at p. 1041.

[41] *Ibid*., at p. 1043-1044. See also David L. Faigman, Jerry Kang, Mark W. Bennett, Devon W. Carbado, Pamela Casey, Nilanjana Dasgupta, Rachel D. Godsil, Anthony G. Greenwarld, Justin D. Levinson, and Jennifer Mnookin, "*Implicit Bias in the Courtroom*", (2012) 59 UCLA L. Rev. 1124 at p. 1132 [Faigman et al].

[42] Rachlinski, Jeffrey J.; Johnson, Sheri; Wistrich, Andrew J.; and Guthrie, Chris, "*Does Unconscious Racial Bias Affect Trial Judges*?" (2009), 84 Notre Dame L. Rev. 1195 at p. 1196 [Rachlinski et al]. See also, Anona Su, "*A Proposal to Properly Address Implicit Bias in the Jury*", (2020) 31 Hastings Women's L.J. 79 at p. 81 [Su].

[43] Faigman, *supra*, note 41, at p. 1132.

[44] Breger, *supra*, note 6, at p. 1043. Generally, confirmation bias is the tendency of individuals to look for information that confirms their initial position, rather than looking for information on both sides of an issue - see for example, Jonathan Haidt, "*Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence*" (2013) 64 Alta. L. Rev. 867 at 873. Hindsight bias is the tendency of individuals to overstate the inevitability or predictability of past events — see for example, *Ibid*., Faigman, at p. 1128.

[45] Su, *supra*, note 42, at p. 81.

"shortcuts" can be negative when they prevent individuals from fully assessing a person or situation, leading to broad over-generalizations.[46]

Implicit biases can begin to form in childhood and often increasingly solidify over time.[47] Implicit biases are also often reinforced through institutional and systemic bias in society.[48] Although implicit biases can be harmful, they are not necessarily rooted in hate.[49]

Over the past two decades, social cognitive psychologists have discovered ways to measure the existence of implicit biases.[50] One of the most famous tests to measure implicit bias is the Implicit Association Test ("IAT"). The IAT measures implicit biases by examining the split-second decisions that individuals make when not consciously deliberating or reflecting. The IAT tests for the existence of implicit biases, but not the likelihood that an individual will act on those biases.[51]

(c) The Impact of Implicit Bias on Decision-Making

Enormous amounts of data have been collected through the IAT.[52] The results show that implicit bias is pervasive — all individuals, including judges or other decision-makers, harbor implicit biases in one way or another.[53]

There is also a growing body of research that supports a link between implicit bias and intuitive decision-making.[54]

In his renowned book, "Thinking, Fast and Slow",[55] Daniel Kahneman describes two distinctive systems of decision-making: intuitive, sometimes referred to as "System 1", and deliberative, sometimes referred to as "System 2".[56]

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[46] *Ibid*., at p. 82.

[47] Breger, *supra*, note 6, at p. 1045.

[48] *Ibid*., at p. 1045;

[49] *Ibid*., at p. 1045.

[50] Faigman, *supra*, note 41, at p. 1126.

[51] Berger, *supra*, note 6, at p. 1149 and 1051. Although there are questions and criticisms about whether IATs accurately test for implicit bias, the test continues to be extensively used.

[52] Faigman, *supra*, note 41, at p. 1130. One of the most famous studies is Project Implicit: https://www.projectimplicit.net/

[53] *Ibid*., Faigman, at p. 130. See also, Breger, *supra*, note 6, at p. 1041 and Rachlinski et al., *supra*, note 42.

[54] See for example, Wistrich, Andrew J. and Rachlinski, Jeffrey John, Implicit Bias in Judicial Decision Making How It Affects Judgment and What Judges Can Do About It, Chapter 5 in Sarah E. Redfield, ed., *Enhancing Justice: Reducing Bias* (Chicago, Illinois: ABA Book Publishing, 2017) [Wistrich and Rachlinski].

[55] Danial Kahneman, "Thinking Fast and Slow" (Toronto, ON: Anchor Canada, 2011) [Kahneman].

[56] Wistrich and Rachlinski, *supra*, note 54, at p. 90, referring to Kahneman.

Intuitive or System 1 decision-making involves relying upon one's first instinct and is described as emotional. System 1 produces "rapid, effortless, confident judgments and operates outside conscious awareness."[57] The human brain's ability to quickly absorb new information and update beliefs is part of the reason that intuition is such a powerful force. Interestingly, researchers have found that when people try to ignore information, they actually pay more attention to it. This finding is also reflected in studies involving judges who have been exposed to inadmissible information.[58]

In contrast, deliberative, or System 2 decision-making, is of a higher order that is slower and more conscious. It also requires more effort — individuals that are distracted, tired, or rushed have been found to use System 2 less.[59]

System 1 and System 2 decision-making are not necessarily exclusive. Intuitive decision making can "bleed over" into deliberative decisions. In addition, some cognitive processes that start out requiring System 2 reasoning can become System 1 processes over time — this conversion underlies many kinds of expertise.[60] Some mental processes are also hard to classify.

It is important to remember that biases, including implicit biases, are not necessarily negative in every context.[61] However, in the specific context of judicial decision-making, intuition has been identified as the "chief source" of unwanted influences, such as racial or gender bias, that affect decision-making.[62] An excessive reliance on intuition can also create a greater opportunity for emotional reactions, which can facilitate the influence of more harmful influences, such as "ingroup" preferences and "invidious biases".[63] More system 1 decision-making can also result in decisions being made without an assessment of all information.

(d) Minimizing the Negative Effects of Implicit Bias on Decision-Making

The potential consequence of implicit bias shaping a judicial outcome in any specific case is serious.[64] It is critical that steps be taken to minimize the inappropriate impact of implicit bias in all stages of the justice system.

Researchers have found that judges, and people generally, have the ability to compensate for the effects of implicit bias and make judgments free from biases, even implicit ones.[65] More careful System 2 thinking can and often does result in the avoidance of unwanted reliance on intuitive cognitive processes.[66]

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57 Kahneman, *supra*, note 55; See also *Ibid*., Wistrich and Rachlinski.

58 *Ibid*., Wistrich and Rachlinski, at pp. 94 and 95.

59 *Ibid*., at p. 90.

60 *Ibid*.

61 Breger, *supra*, note 6, at p. 1062.

62 Wistrich and Rachlinski, *supra*, note 54, at p. 91. See also *Ibid*., at p. 1055.

63 *Ibid*., Wistrich and Rachlinski, at p. 104. One example of an "ingroup preference" is racial bias.

64 See for example, Breger, *supra*, note 6, at pp. 1052-1053.

In the first study of implicit racial bias in judges,[67] it was confirmed that judges harbour implicit biases like other individuals. However, the study also showed that explicit references to race triggered System 2 thinking.[68] Accordingly, when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear capable of doing so. The lessons from this study have been described as straightforward: it is better to think about race, and presumably other factors related to implicit biases, explicitly, than to try to ignore such elements.[69] Overall, System 2 thinking can reduce or eliminate undesirable intuitive influences.[70]

As is evident from this study and numerous others, it is critical for judges to take direct action to confront implicit biases. More deliberative decision-making can be promoted in several ways.

Training on implicit bias and cultural competency is important and necessary — studies repeatedly show that being aware of one's own implicit biases is critical to lessening the effect of bias.[71] Research also shows that when a person believes that they are objective, that belief somewhat ironically makes the individual less objective and more susceptible to biases.[72] Training should therefore stress the importance of doubting the extent of one's own objectivity.[73]

Increasing motivation is also important in order to minimize biased decision-making. Faigman et al suggest that a powerful way to increase judicial motivation is to convince judges that a genuine problem exists by providing scientific knowledge about implicit social cognitions.[74]

Other potential solutions include using metrics to track outcomes,[75] improving the conditions of decision-making,[76] increasing exposure to counter-stereotypical associations,[77] altering courtroom practices, requiring the provision

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65 Rachlinski et al, *supra*, note 42, at p. 1202.

66 Wistrich and Rachlinski, *supra*, note 54, at p. 104.

67 Rachlinski et al, *supra*, note 42.

68 Wistrich and Rachlinski, *supra*, note 54, at p. 102.

69 *Ibid.*

70 *Ibid.*, at p. 103.

71 It is important that this training include less obvious sources of implicit bias and also be provided to all individuals involved in the justice system, not just judges. It has also been proposed that training be tailored and specific in order to be most effective — see *Ibid.*, Wistrich and Rachlinski at p. 107. See also, Breger, *supra*, note 6, at p. 1057.

72 Faigman, *supra*, note 41, at p. 1173.

73 *Ibid.*

74 *Ibid.*, at p. 1174.

75 Breger, *supra*, note 6, at p. 1058.

76 Faigman, *supra*, note 41, at p. 1177.

77 *Ibid.*, at p. 1168. See also Breger, *supra*, note 6, at p. 1068.

of written reasons, and making scripts, checklists and multifactor tests available.[78]

Overall, the goal of these measures is to break the link between implicit bias and behaviour, recognizing that everyone has implicit biases and while they cannot be expected to be eliminated, they can be managed.[79]

(e) The Canadian Justice System

The growing recognition of the importance of cultural competency is evident in the Canadian justice system specifically.[80]

In June 2021, the Canadian Judicial Council published new and modernized "Ethical Principles for Judges".[81] The previous version of these principles had been in place since 1998. The updating of the principles began in 2016 and involved consultation with both the judicial community and the public.[82]

Not surprisingly, the principles emphasize the fundamental requirement for all judges to be impartial.[83] The principles also implicitly incorporate statements made *in R. v. S. (R.D.)* about what judicial impartiality involves:

> Judges have a fundamental obligation to be and to appear to be impartial. This obligation of impartiality does not presuppose that judges are free of life experiences, sympathies or opinions. Rather, it requires judges to be sensitive to their own biases and to consider different points of view with an open mind. Judges should interact with all parties fairly and even-handedly.[84]

The principles also very specifically state that judges must avoid unintentional reliance on stereotypes. In order to do this, judges are directed to educate themselves on the extent to which their assumptions rest on stereotypical thinking and must also take steps to remain informed about changing attitudes and values. Judges should also take advantage of opportunities to learn about cultures and communities that are different from their own life experiences.[85]

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78 Wistrich and Rachlinski, *supra*, note 54, at pp. 105-119.

79 Faigman, *supra*, note 42, at p. 1172. These suggestions are focused on changing the behaviour of judges. It is important to also consider how the implicit biases of other members of the justice system, including juries, may impact the ultimate outcome in a situation — see for example, Su, *supra*, note 41.

80 Another example of this recognition is the requirement for licensed representatives in certain jurisdictions to complete training focused on cultural competency and related principles. For example, in Ontario, beginning in 2020, licensees have been required to complete professionalism hours focused on equality, diversity and inclusion - https://lso.ca/about-lso/initiatives/edi/cpd-equality,-diversity-and-inclusion-requirement.

81 CJC_20-301_Ethical-Principles_Bilingual FINAL.pdf (cjc-ccm.ca).

82 *Ibid.*, at p. 8-10.

83 *Ibid.*, at p. 39, 5.A.1.

84 *Ibid.*, 5.A.4.

The appreciation of the need for cultural competency in the Canadian justice system is also reflected in numerous decisions that have both acknowledged the harm caused by implicit biases, as well as the need to take concrete steps to address inappropriate assumptions.

For example, in *Mitchell v. M.N.R.*,[86] a majority of the Supreme Court of Canada cautioned that in claims involving aboriginal rights, judges must acknowledge and address any implicit biases about the format of historical accounts.

In that decision the majority acknowledged that aboriginal right claims can give rise to unique and inherent evidentiary difficulties as claimants are "called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records."[87]

As a starting point, the majority confirmed that courts render decisions on the basis of evidence and that this principle applies to aboriginal claims as much as to any other claim.[88] At the same time, however, the rules of evidence are meant to be appropriately flexible and should be applied purposively to facilitate justice, not stand in its way.[89] Accordingly, rules of evidence must be adapted to accommodate oral histories, but admissibility is not assumed — oral histories should be admitted on a case by case basis in situations where they are both useful and reasonably reliable, subject to the exclusionary discretion of the trial judge.[90]

When assessing the usefulness and reliability of oral histories, the majority warned that judges must take steps to resist relying on assumptions about histories based on "Eurocentric" traditions of gathering and passing on historical facts and traditions:

> Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.[91]

This case is an example of the importance of not relying upon implicit biases pertaining to a different culture when making a judicial determination about the admittance of evidence.

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[85] *Ibid.*, at p. 36, 4.C.2 and 4.C.3.

[86] 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874 (S.C.C.).

[87] *Ibid.*, at para. 27.

[88] *Ibid.*, at para. 29

[89] *Ibid.*, at para. 30.

[90] *Ibid.*, at para. 31.

[91] *Ibid.*, at para. 34.

The need to avoid improper reliance on stereotypical assumptions about Indigenous women specifically was highlighted in the more recent decision *R. v. Barton,*[92] which centered on the death of Cindy Gladue.

Ms. Gladue, an Indigenous woman and a sex worker, was found dead in the bathroom of Mr. Barton's hotel room. Mr. Barton was charged with first degree murder.

At the trial, the Crown pursued the first degree murder charge but also argued in the alternative that Mr. Barton had committed the unlawful act of manslaughter by causing Ms. Gladue's death in the course of a sexual assault.[93] The jury acquitted Mr. Barton of first degree murder and the offence of manslaughter.[94] The Court of Appeal allowed the Crown's appeal, set aside Mr. Barton's acquittal, and ordered a new trial on first degree murder.[95]

At the Supreme Court of Canada, both the majority and the minority agreed that a new trial on the manslaughter charge was required. The majority allowed the appeal in part, finding that a new trial on the first degree murder charge was unnecessary. The minority found that the entire trial was rendered unfair and that there should be a new trial on both the murder and manslaughter charges. However, both the majority and minority expressed concerns about the inflammatory language used throughout the trial to describe Ms. Gladue, as well as the lack of action taken by the trial judge to correct evident racial biases that arose throughout the trial.[96]

In reaching these conclusions, both the majority and minority acknowledged that the existence of racial prejudice is well established and that racism against Indigenous persons specifically is "invasive, elusive and corrosive" in nature.[97]

Trial judges have an important role to play in keeping biases, prejudices and stereotypes out of the courtroom, including by providing careful instructions to juries to best expose biases and prejudices, and by encouraging jurors to directly address these prejudices.[98]

In sexual assault cases where the complainant is an Indigenous woman or girl, the majority stated that trial judges would be well advised to provide express instructions to juries aimed at countering conscious and subconscious stereotypical assumptions about Indigenous women and girls.[99]

These decisions, as well as the updated Ethical Principles, all reflect progress towards the goal of eliminating the impact of implicit biases on decision-making.

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92 2019 SCC 33, 2019 CarswellAlta 985, 2019 CarswellAlta 986 (S.C.C.).

93 *Ibid*., at para. 3.

94 *Ibid*, at para. 36.

95 *Ibid*., at para. 41. The Court of Appeal identified a list of errors that independently justified a new trial — see paras. 39 and 40.

96 *Ibid*., at paras. 210 and 234.

97 *Ibid*., at paras. 196 and 223.

98 *Ibid*., at paras. 197 and 233.

99 *Ibid*., at paras. 200 and 233.

However, there is no doubt that there is still much work to be done to support both individual and systemic[100] cultural competency in the Canadian justice system. This work will require acknowledgement and direct confrontation of many deep-rooted assumptions. As explained in the next sections, these considerations are particularly relevant to the assessment of credibility.

4. ASSESSING CREDIBILITY

It is well established that assessing credibility is very difficult.[101] Assessing credibility can be particularly challenging when it is necessary to evaluate the credibility of two witnesses whose testimony is diametrically opposed.[102]

Credibility and reliability differ. Credibility relates to the honesty and truthfulness of a witness's testimony; reliability relates to the accuracy of the witness's testimony, including their ability to accurately observe, recall, and recount. A witness can provide evidence that is credible but not reliable, but a witness's testimony cannot be reliable if it is not credible.[103] A trial judge's determination to accept witness evidence includes an implicit assessment of both truthfulness and accuracy.[104]

In the Canadian justice system, a trial judge's credibility findings are given special deference, in part due to the recognition that the trial judge is the fact finder and has the benefit of the "intangible impact" of conducting the trial.[105] The Supreme Court of Canada has recognized that it can be very difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events".[106] This is why absent a palpable and overriding error, appellate courts respect a judge's factual findings.[107]

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[100] There has also been acknowledgement of systemic issues in Canadian jurisprudence, particularly with respect to sentencing of Aboriginal or black individuals - see for example, *R. v. Ipeelee*, 2012 SCC 13, 2012 CarswellOnt 4376, 2012 CarswellOnt 4375 (S.C.C.), *R. v. Morris*, 2021 ONCA 680, 2021 CarswellOnt 13803 (Ont. C.A.), and *R. v. Anderson*, 2021 NSCA 62, 2021 CarswellNS 570 (N.S. C.A.). These cases confirmed that sentencing judges must consider the unique circumstances of Aboriginal and Black Canadians when determining a fit sentence, including systemic prejudice, racism and disadvantage (as well as specific statutory provisions in the *Criminal Code*).

[101] See for example —*Shaath v. Zarifa*, 2005 CarswellOnt 3123 (Ont. S.C.J.) at para. 2 and *R. v. Ramos*, 2020 MBCA 111, 2020 CarswellMan 448 (Man. C.A.) at para. 145, affirmed 2021 CarswellMan 132, 2021 CarswellMan 133 (S.C.C.).

[102] *R. v. S. (R.D.), supra*, note 7, at para. 128.

[103] *R. v. H.C.*, 2009 ONCA 56, 2009 CarswellOnt 202 (Ont. C.A.) at para. 41.

[104] *R. v. G.F.*, 2021 SCC 20, 2021 CarswellOnt 6892, 2021 CarswellOnt 6893 (S.C.C.) at para. 82.

[105] *Ibid.,* at para. 81.

[106] *R. v. Gagnon*, 2006 SCC 17, 2006 CarswellQue 3559, 2006 CarswellQue 3560 (S.C.C.) at para. 20, positively quoted in *R. v. G.F.* at para. 81.

[107] *Ibid.*, at para. 20.

In the 1951 decision of the British Columbia Court of Appeal, *Faryna v. Chorny*,[108] the court set out guiding principles for assessing credibility, including that the testimony of a witness should be assessed for its harmony "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".[109]

Courts have recognized that there is no singularly correct method for assessing credibility.[110] The courts have, however, identified three broad factors that are helpful to consider in these types of assessments.

First, it can be helpful to consider the overall consistency of the evidence given by a particular witness. This includes examining the consistency between what a witness said while testifying and what they said on other occasions, even if they were not previously under oath.[111] However, it is also important to appreciate that inconsistencies vary in their nature and importance, and not all inconsistencies will materially impair a witness's credibility or reliability.[112]

Second, it can also be helpful to consider whether a witness has appeared to embellish their evidence[113] or relatedly, has any motive to lie.[114]

These three factors - consistency, embellishment, and motive - all have the benefit of potential clear articulation in a decision, which is very helpful when trying to explain the reasons for credibility findings.

Difficulties in assessing credibility are often only heightened when there are cultural aspects to consider:

> Assessing credibility is perhaps the most difficult task facing a judge. This is especially so when the judge is assessing the credibility of those who are members of a different cultural community from that of the judge, where norms or mores different from those of which the judge may be more familiar, may govern the beliefs, attitudes and interactions of the members of that community. The backdrop against which a judge will assess credibility is a shifting and flexible presence and one

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[108] 1951 CarswellBC 133 (B.C. C.A.).

[109] *Ibid.* at p. 357.

[110] See for example, *R. v. Khan*, 2019 ONSC 7397, 2019 CarswellOnt 21737 (Ont. S.C.J.) at para. 44.

[111] *Ibid.*, at para. 46 relying upon *R. v. M. (A.)*, 2014 ONCA 769, 2014 CarswellOnt 15263 (Ont. C.A.) at paras. 12-14.

[112] *Ibid., R. v. Khan*. See also *R. v. Dinardo*, 2008 SCC 24, 2008 CarswellQue 3451, 2008 CarswellQue 3452 (S.C.C.) in which a unanimous seven-member panel of the Supreme Court of Canada emphasized that a trial judge must explain how inconsistencies in a witness's testimony are reconciled when the truthfulness of the witness (in that case, the complainant) is a live issue.

[113] *R. v. Russell and Alleyne*, 2020 ONSC 7574, 2020 CarswellOnt 18457 (Ont. S.C.J.) at para. 75.

[114] *Ibid.*, at para. 78. As acknowledged in this decision, it is important to recognize the difference between the absence of proved motive and proved absence of motive — see para. 78.

> that is particularly nebulous when strong cultural differences are present.[115]

Courts have therefore stressed the need to avoid assessing credibility on the basis of stereotypical impressions.[116] This has been particularly established in the assessment of the credibility of sexual assault complainants, as the Supreme Court of Canada has repeatedly observed that any reliance on myths and stereotypes in these cases results in impermissible reasoning.[117]

Overall, in any assessment of credibility, a decision-maker must consider all of the evidence and what is probable and reasonable. However, as will be explained in detail further in this paper, the consideration as to what is reasonable requires careful reflection to ensure that any assessment is free of implicit bias.

(a) Demeanour Evidence

Demeanour can be broadly described as "every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex".[118]

Appellate courts defer to a trial judge's factual findings, especially their credibility findings, at least in part because the trial judge has the opportunity to see and hear the witnesses testifying.[119]

In *R. v. N.S.*, the Supreme Court of Canada had to decide whether a Muslim woman who had accused two individuals of sexual assault was required to remove her niqab while testifying during the criminal trial. The niqab covered her face except for her eyes. The Supreme Court of Canada approached the issue as a conflict between the woman's freedom of religion rights and the accused's fair trial rights.[120]

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[115] *Shaath v. Zarifa*, *supra*, note 101, at para. 2.

[116] *R. v. Khan, supra*, note 110, at para. 44.

[117] *Ibid.*, at para. 45.

[118] *R. v. N.S.*, 2012 SCC 72, 2012 CarswellOnt 15763, 2012 CarswellOnt 15764 (S.C.C.) [*R. v. N.S.*] at para. 98, quoting Barry R. Morrison, Laura L. Porter and Ian H. Fraser, "*The Role of Demeanour in Assessing the Credibility of Witnesses*" (2007), 33 Advocates' Q. 170, at p. 179.

[119] *Ibid.*, *R. v. N.S.*, at para. 25.

[120] *Ibid.*, at paras. 1-2. Following a *voir dire*, the preliminary inquiry judge concluded that N.S.'s religious belief was "not that strong" and ordered her to remove her niqab. N.S. appealed. At the Superior Court of Justice, Justice Marrocco quashed the order and held that N.S. should be allowed to testify wearing a niqab but her evidence could be excluded if the preliminary inquiry judge found the niqab prevented true cross-examination. N.S. appealed and one of the accused cross-appealed. The Ontario Court of Appeal for Ontario returned the matter to the preliminary judge to be decided in accordance with its directives — see paras. 4-6.

The majority of the Court dismissed the appeal and ordered that the issue be returned to the preliminary inquiry judge to be determined in accordance with its reasons.[121]

The majority also declined to confirm a hard and fast rule of either always requiring the removal of the niqab while testifying or always allowing it to be worn. Instead, the majority directed that it is appropriate to weigh the competing interests of the right to religious freedom and the right to a fair trial in individual cases when the two rights cannot be reconciled.[122]

In reaching this conclusion, the majority acknowledged the long-standing assumption in the criminal justice system that it is important to see a witness's facial expressions for a trial to be fair, particularly when assessing credibility and conducting cross-examination.[123] The majority also noted the "settled axiom" of appellate review that a trial judge's findings on credibility should be shown deference because they have the "overwhelming advantage" of seeing and hearing the witness, which cannot be replicated by reading a written transcript.[124]

The majority noted that it is possible for these types of long-standing common law assumptions to be displaced when shown to be erroneous or based on groundless prejudice, as seen by the elimination of the many myths that once "skewed" the law of sexual assault. However, in this case, the majority concluded that the court did not have sufficient evidence to show that these long-standing assumptions were unfounded or erroneous.[125] In particular, the majority stated that a long-standing assumption of this kind, which is deeply rooted in the criminal justice system, could not be set aside without compelling evidence.[126]

Since the release of *R. v. N.S.* in 2012, Canadian jurisprudence has continued to accept that a witness's demeanour is still a factor that may be taken into consideration when assessing a witness's credibility.[127]

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[121] *Ibid.*, at para. 57.

[122] *Ibid.*, at paras. 46-56.

[123] *Ibid.*, at para. 22.

[124] *Ibid.*, at para. 25, referencing *Housen v. Nikolaisen*, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, [2002] 2 S.C.R. 235 (S.C.C.) at para. 24. See also *R. v. White*, 1947 CarswellOnt 8 (S.C.C.) at p. 272 and *R. v. W. (R.)*, 1992 CarswellOnt 991, 1992 CarswellOnt 90 (S.C.C.) at p. 131, reconsideration / rehearing refused (November 18, 1992), Doc. 21820 (S.C.C.).

[125] *Ibid.*, *R. v. N.S.* at para. 22.

[126] *Ibid.*, at para. 27.

[127] *R. v. R.D.*, 2016 ONCA 574, 2016 CarswellOnt 11531 (Ont. C.A.) at para. 25. See also *R. v. Hemsworth*, 2016 ONCA 85, 2016 CarswellOnt 1268 (Ont. C.A.) at para. 45; *R. v. D.P.*, 2017 ONCA 263, 2017 CarswellOnt 4401 (Ont. C.A.) at para. 26, leave to appeal refused *R. v. D.P.*, 2017 CarswellOnt 18262, 2017 CarswellOnt 18263 (S.C.C.); *R. v. Ramos*, *supra*, note 101 at para. 112; and *R. v. O'Dea*, 2021 ONSC 3706, 2021 CarswellOnt 11029 (Ont. S.C.J.) at para. 15.

At the same time, however, there is also a growing and consistent appreciation of the potential unreliability of demeanour evidence and the dangers of relying upon it as a primary or exclusive ground for assessing credibility.[128] Accordingly, decision-makers have advised that demeanour evidence should be approached cautiously.[129]

In particular, demeanour evidence is recognized as not being a good predictor of a witness's credibility as it can be affected by a number of factors, including:

- The culture of the witness;
- Stereotypical attitudes; and
- The pressure and artificiality associated with testifying in a courtroom and the different ways that individuals may respond to this stress.[130]

In *R. v. T.M.*,[131] the Court of Appeal for Ontario acknowledged that witnesses, and particularly accused, testify in an unfamiliar and stressful environment. Without a baseline to judge how an individual reacts to a stressful situation, their demeanour, even while testifying, is susceptible to misinterpretation.[132]

Overall, the evaluation of demeanour often involves the reliance on subjective impressions and the interpretation of behaviour.[133] Lower courts have accepted the principles set out in *R. v. N.S.* while at the same time addressing the concerns with demeanour evidence by cautioning that such evidence should not be the sole or even primary basis for assessing credibility.[134]

5. CONFRONTING IMPLICIT BIASES WHEN ASSESSING CREDIBILITY

The lessons learned from research about human decision-making processes and implicit bias are consistent with the Canadian justice system's long-standing approach to impartiality generally. However, the new and evolving research emphasizes more so than before that everyone, including judges, has implicit

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[128] *Ibid. R. v. R.D.* See also *ibid., R. v. Hemsworth*, at paras. 44 and 45; *ibid., R. v. D.P.*, at para. 26; *Ibid., R. v. Ramos* at paras. 112-113; and *Ibid., R. v. O'Dea* at para. 15.

[129] *Ibid., R. v. Hemsworth* at para. 45.

[130] *R. v. Rhayel*, 2015 ONCA 377, 2015 CarswellOnt 7586 (Ont. C.A.) at para. 85. See also *R. v. McDougall*, 2009 CMAC 2, 2009 CarswellNat 7052, 2009 CarswellNat 6357 (Can. Ct. Martial App. Ct.) at para. 44 and *R. v. Ramos*, *supra*, note 101, at paras. 112 and 158.

[131] 2014 ONCA 854, 2014 CarswellOnt 16750 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 9260, 2015 CarswellOnt 9261 (S.C.C.).

[132] *Ibid.,* at para. 64. In this case, the Court of Appeal also considered the trial judge's reliance on the accused's demeanour when not testifying and said that the risk of misinterpretation is even higher when evaluating an accused who is simply sitting in the courtroom.

[133] *R. v. Ramos, supra*, note 101, at para. 112.

[134] *R. v. R.D., supra*, note 127, at para. 25. See also *R. v. T.M.*, *supra*, note 131, at para. 67; *R. v. Hemsworth, supra*, note 127, at para. 45; and *R. v. D.P., supra*, note 127, at para. 26.

biases. Further, research shows that direct action is required to limit the improper influence of these biases on decision-making.

Assessing credibility is often described as more of an "art" rather than a science.[135] It is recognized that it can be difficult for judges to articulate with precision the complex intermingling of their impressions after listening and watching witnesses.[136] The assessment of credibility is also a highly individualistic exercise that has been described as being dependent on "intangibles".[137] It is these aspects of assessing credibility that in part explain why appellate courts generally defer to a trial judge's factual findings, particularly credibility findings. At the same time, however, it is also these characteristics that make the assessment of credibility particularly vulnerable to the improper influence of implicit biases.

As set out above, there are many steps that can be taken to ensure that implicit biases do not improperly influence decision-making, including the assessment of credibility. This includes having awareness of the pervasiveness of implicit biases and taking explicit steps to addresses these stereotypical associations. The assessment of credibility can specifically be enhanced by focusing any assessment on factors that can be more easily weighed and articulated, such as consistency, embellishment and motive. With proper awareness, motivation, and action, credibility assessments, like other aspects of decision-making, can be made in a culturally competent manner.

There are, however, two aspects of the assessment of credibility that require more focused examination from a culturally competent lens.

The first aspect pertains to the assessment of the reasonableness or plausibility of a witness's testimony. I propose that for this assessment to be free of implicit bias, it is necessary to evaluate the perspective of a "practical and informed person" carefully.

The second aspect pertains to demeanour. In light of the growing recognition of the dangers of demeanour evidence, as well as our increased understanding about implicit bias and its impact on decision-making, I propose that it might now be an appropriate time to re-consider whether any reliance on demeanour evidence when assessing credibility should be rejected. While demeanour remains a factor that may be taken into consideration, I also propose two broad issues that decision-makers should consider to minimize any negative impact of relying upon demeanour evidence.

(a) Assessing Reasonableness and Cultural Competency

In the *Faryna* decision, the Court of Appeal for British Columbia stated that the truth of a witness's story relates to its harmony with the preponderance of probabilities. Whether a witness's testimony is reasonable should be determined

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[135] See for example, *R. v. S. (R.D.) supra*, note 7, at para. 128.

[136] *R. v. Gagnon, supra*, note 106, at para. 20.

[137] *R. v. S. (R.D.)*, *supra*, note 7, at para. 128.

with reference to a "practical and informed person."[138] Although this decision was released in 1951, this guiding principle to assessing credibility is still often used. One of the advantages of the approach is that it allows a decision-maker to reject certain explanations deemed unbelievable without having to rebut the witness's testimony with specific evidence.

However, more recent jurisprudence has cautioned about finding certain actions or explanations implausible, especially when assessing the credibility of a witness of a different cultural background. Actions perceived as far-fetched when judged from the decision-maker's own perspective and experiences might be perfectly reasonable when considered from the perspective of the witness's culture and personal background.[139]

Decision-makers should therefore be cautious when determining what is plausible and reasonable and should consider any personal assumptions they may have as to what is reasonable in a particular situation. Decision-makers should also ensure that they understand as best as possible the perspective and background of the witness – what is considered reasonable and plausible will likely depend on not just the individual's culture and characteristics, but also the individual circumstances of the situation.[140]

This approach is also consistent with developments in other areas, such as sexual assault cases. Many decisions determining sexual assault charges have also emphasized the importance of avoiding relying on stereotypical assumptions about how "true" complainants "should" act when assessing credibility in sexual assault cases.[141]

Many of the tests developed in the justice system make reference to reasonable, practical, or informed persons. As our understanding of not just implicit biases but systemic issues impacting the justice system develops, it is important to carefully examine the perspectives relied upon to inform these tests.

(b) Demeanour Evidence

As our understanding of implicit biases develops, and the dangers of demeanour evidence are better understood, it seems appropriate to question

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[138] *Faryna v. Chorny, supra*, note 108, at p. 357.

[139] See for example, *Valtchev v. Canada (Minister of Citizenship & Immigration)*, 2001 FCT 776, 2001 CarswellNat 1534, 2001 CarswellNat 5929 (Fed. T.D.) at para. 7.

[140] This is reflected in sexual assault jurisprudence which already recognizes that the credibility of complainants should not be adversely judged based on how they reacted following an alleged assault.

[141] David M Tanovich, Regulating Inductive Reasoning In Sexual Assault Cases in Benjamin L. Berger, Emma Cunliffe, and James Stribopoulos, eds. *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters Canada, 2017), 2017 CanLIIDocs 4027 at pp. 81-87. Many decisions have also highlighted the need to scrupulously avoid assessing the credibility and reliability of complainants in sexual assault cases based on stereotypes about disability, age, gender, homelessness, sexual orientation, race, or addiction —Tanovich, pp. 78-81.

whether it is now time to reject any reliance on demeanour evidence when assessing credibility.

It has been almost ten years since the release of *R. v. N.S.* In her dissenting judgment in *R. v. N.S.*, Justice Abella questioned whether it is necessary to see a witness when assessing credibility for a trial to be fair, noting that there are many examples of situations in which trial judges have accepted the testimony of witnesses whose demeanour can only be partially observed.[142] Justice Abella also acknowledged the well-established limitations of assessing credibility on the basis of demeanour.[143]

More recently, the importance of being able to observe parties and witnesses, particularly for the purpose of assessing credibility, has also been questioned. One impact of the COVID-19 pandemic has been the increased and necessary use of remote and virtual hearing methods, including teleconference, in order to ensure that matters may proceed. *R. v. K.Z.*[144] is just one of many cases in which the suitability of a remote, virtual hearing method is considered.

In that case, the defendant had been charged with sexual assault and uttering threats. The complainant, who was 6 months pregnant and living in British Columbia, requested to testify in the Ontario proceeding by video conference. In challenging the use of this technology, the defence highlighted that the central issue in the case was the credibility of the complainant and the accused.[145]

Justice Kenkel considered s. 714.1 of the *Criminal Code* and ultimately allowed the complainant to testify by video conference. In support of this determination, Justice Kenkel noted the limitations of demeanour evidence, particularly that it can be affected by many factors.[146] Justice Kenkel further stated that even if it is assumed that "some things" are lost in a virtual courtroom as compared to an in-person trial, the evidence important to assessing credibility is more often found in the questions posed and the answers provided, rather than observing the demeanour of the witness.[147]

This decision reflects changing societal values about both the necessity of in-person hearings, as well as the limitation of demeanour evidence.

Of course, as identified in *R. v. N.S.*, direct, extensive evidence, including expert evidence, is required to overturn the long-standing common law assumptions about the relevance of demeanour when assessing credibility.[148]

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[142] *R. v. N.S.*, *supra*, note 118, at paras. 82 and 102. Justice Abella noted one exception to her position, cases where a witness's face is directly relevant to the case, such as when a witness's identity is at issue — see para. 83. It is also important to note that some administrative tribunals primarily determine matters in writing even though these decisions often require determinations of credibility.

[143] *Ibid.*, at paras. 99-101.

[144] 2021 ONCJ 321, 2021 CarswellOnt 8213 (Ont. C.J.).

[145] *Ibid.*, at para. 4.

[146] *Ibid.*, at para. 19.

[147] *Ibid.*, at para 20.

[148] *R. v. N.S., supra*, note 118, at paras. 17 and 20.

Any challenge to this assumption would also likely require comment on the well-established deference provided to the factual findings, including credibility determinations, of trial judges by appellate courts. Both of these issues are complex and significant, and any change to one or both of these assumptions would require substantial consideration, including assessing whether the unique circumstances of a criminal matter impacts the consideration of demeanour evidence in a different way than in a civil matter.

For representatives, the issue of whether it is still appropriate to rely upon demeanour evidence when assessing credibility provides an opportunity for opposing counsel and possibly intervenors to work together in order to provide the court with a full record to consider the issues. As the cultural competency of individuals within the justice system develops, and systemic issues are better understood, there will likely be more and more opportunities for representatives to partner to help the courts grapple with the impact of these changing societal norms and values on the justice system.[149]

In the meantime, while demeanour remains a valid consideration in assessing credibility, there are two broad issues that decision-makers can consider to limit the negative impact of relying on demeanour when evaluating the credibility of witnesses.

(i) When assessing the credibility of a particular witness, do you need to consider demeanour? What are you actually relying upon demeanour for?

Decision-makers can take into account a number of different factors when assessing the credibility of a witness, including the consistency of the witness's evidence and whether the testimony reflects embellishment or self-justification. As a starting point, decision-makers should consider whether they really need to consider demeanour at all when assessing credibility, including what they are actually relying upon this evidence for.

Is it important to see witnesses in order to determine whether they are being truthful, or does the value of being able to see and hear the participants in a proceeding relate to something else, such as hearing management?

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[149] A recent decision of the Nova Scotia Court of Appeal, *R. v. Anderson*, *supra*, note 100, is a good example of different counsel working together to support the evolution of the law in response to changing societal values, and in that case specifically, the recognition of systemic issues. Mr. Anderson, an African Nova Scotia man, had received a conditional sentence in relation to firearms offences. In determining the appropriate sentence, the trial judge considered an Impact of Race and Culture Assessment and also heard evidence. At the trial, the Crown sought a federal penitentiary term of two to three years. At the appeal, the Crown counsel conceded that the conditional sentence was fit and proportionate. Instead of challenging the sentence, both the Crown counsel and intervenors emphasized the need for guidance in applying the principles of sentencing to offenders of African descent, recognizing the systemic discrimination and racism against Black and Indigenous individuals, including in the criminal justice system. In the tribunal context, an active adjudication approach could possibly be used to direct parties, when appropriate, towards collaboration.

There is no doubt that being able to hear and see the social cues of participants in a hearing can help a decision-maker manage a hearing, including knowing whether a witness is uncomfortable, upset, or angry, and whether a break might be required. It is also easier to control proceedings when everyone can be seen, including managing contention between parties or stopping inappropriate behaviour.[150] However, these visual and even audio cues are not necessarily relevant to the specific determination of whether a witness's testimony is credible and reliable. Therefore, it is important for decision-makers to consider whether it is actually necessary to rely upon the demeanour of a witness at all when assessing their credibility in a particular case.[151]

Overall, if a decision-maker is able to assess credibility without reference to demeanour evidence, demeanour evidence should not be relied upon. When making this determination, decision-makers should carefully consider why the evidence is specifically needed.

(ii) When assessing credibility, how can any potential detrimental impacts of relying upon demeanour be minimized?

If a decision-maker finds it is necessary to rely upon demeanour evidence when assessing credibility, cultural competency is required. That is, decision-makers must accept and acknowledge their own implicit biases, and then take active steps to limit any inappropriate influence these assumptions might have on their credibility assessments.

As a starting point, decision-makers must exercise restraint when relying upon any personal knowledge or beliefs. Decision-makers should also be transparent with all parties if they intend to rely upon personal experience in their decision and consider whether parties are capable of responding to the evidence of personal experience.[152]

Decision-makers must also actively reflect on the assumptions that they are making based on their observation of a witness's demeanour, including any implicit biases related to the individual's race and gender, but also other factors, such as their attractiveness.[153] Instead of relying upon assumptions, they should ask questions to establish the evidentiary basis for their perceptions. Decision-makers should ask themselves why they are interpreting the witness's demeanour

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[150] It should be noted that it can also be important for the parties to be able to see and hear the individuals determining their case and to know that they themselves have been seen and heard, which can help them feel that their case is being taken seriously. However, while the preference or needs of an agency's "users" are relevant to determining the appropriate hearing format, this preference is a distinct consideration from what a decision-maker needs in order to assess credibility

[151] This type of approach is reflected in many decisions in which decision-makers have stated they do not need to rely upon demeanour evidence or they rely upon it as little as possible — see for example, *R. v. Rhayel, supra*, note 130, at paras. 85-89.

[152] See for example, *R. v. J.M. supra*, note 23, at paras. 55-57.

[153] Wistrich and Rachlinski, *supra*, note 54, at p. 107.

as a sign of truthfulness. In this regard, checklists and bench cards can be helpful tools for decision makers to assess the factors influencing their thinking and decisions. It can also be helpful for decision-makers to consider how they will explain their credibility findings and specifically reliance on demeanour evidence in a written decision in order to ensure that no stereotypical assumptions are being relied upon.

6. CONCLUSION

The importance of judicial impartiality to the Canadian justice system cannot be overstated. As our understanding of implicit biases and human decision-making develops, and our appreciation of the importance of cultural competency is strengthened, it will be necessary to re-examine our understanding of what impartiality in decision-making means. This reflection will be particularly critical for the difficult task of assessing credibility, especially when there are cultural aspects to consider.

There are many steps that can be taken to support cultural competency in decision-making, including supporting diversity throughout all levels of the justice system.[154] There are also direct actions that decision-makers can take with respect to the assessment of credibility, including considering whether it is necessary to rely upon demeanour evidence, and if so, how to limit any of the dangers that might arise.

Impartial decision-making does not require an empty mind, but an open one that is shaped but not limited by past experiences, always focused on the evidence presented in a particular case, and diligently on guard for the potential danger of implicit bias.

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[154] Wistrich and Rachlinski, *supra*, note 54, at p. 109.