Corbett Applications - A Research Paper 2000

Summary

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The Corbett Rule

A Corbett application is a procedure, used by accused persons who wish to testify in their jury trials, to attempt to prevent the Crown from relying on section 12 of the Canada Evidence Act. Section 12 of the Canada Evidence Act permits witnesses, including the accused, to be cross-examined about their prior convictions, and to have those convictions proved if they are denied.

The theory behind the admission of prior convictions is that they are relevant to the credibility or trustworthiness of a witness. Where the convictions are for offences of dishonesty, those convictions are thought to illustrate a dishonest or untrustworthy character. Where the convictions are for offences not involving dishonesty, the theory is that the convictions demonstrate that the witness is a person who disrespects societal norms and values and is therefore not the kind of person who should be readily believed. These beliefs are not supported by psychologists or validated by scientific method. They remain A common sense inferences, well entrenched in the common law tradition.

Where the accused is the witness, allowing the trier of fact to discover the prior criminal convictions through the operation of section 12 presents the risk that those convictions will be misused, in violation of the Abad character rule. The Abad character rule, a common law rule of evidence, prohibits triers of fact from relying on the bad character of accused persons to infer that, because they are the kind of person who would commit the offence charged, they are likely guilty. While Abad character is broadly conceded to be relevant to whether a person is apt to commit an offence, there is fear that a jury who learns about that bad character may jump to the conclusion that the accused is guilty, regardless of the strength of the specific evidence in the case. There is also concern that the jury may be less concerned about the presumption of innocence if they learn that the accused is a contemptible person. To use the character of the accused in either of these ways would involve unfair prejudgment, or prejudice.

The combination of section 12 and the Abad character rule lead to the paradox that where the accused is the witness, the trier of fact can use prior convictions to infer bad character, but it is to use that bad character solely in assessing the trustworthiness of the accused in his or her capacity as a witness. It is not to use that bad character in judging the guilt of the accused. Prior to Corbett, faith was placed in jury directions to prevent this form of prejudice from arising where the accused was the witness.

There has long been question about the efficacy of those warnings among psychologists, law reformers, commentators and even many judges. Despite the strong endorsement given by the majority in Corbett to the ability of jurors to deal with evidence and abide by directions, the very creation of the Corbett application demonstrates the belief of the Supreme Court of Canada that, in some cases, a jury direction will be inadequate and that trial judges must therefore have the authority to prevent the Crown from introducing prior convictions to test the credibility of the accused where to do so would be unduly prejudicial.

The Corbett rule can be summarized as follows:

Corbett confers a discretion on the trial judge, that can be exercised on the application by the accused before or during his or her testimony, to exclude all or part of the accused=s previous criminal record where the probative value of that record is outweighed by its prejudicial effect.

It is worth noting that even with availability of the Corbett application, the law in Canada is more receptive to the admission of the convictions of the accused as evidence of untrustworthiness, than is the law in England, Wales, Australia or New Zealand. In each of these countries, entirely different rules apply to the admissibility of prior convictions of the accused than to the admissibility of the prior convictions of other witnesses. The admission of prior convictions as proof of lack of credibility of accused persons is strictly controlled. Indeed, so long as the accused refrains from attacking the credibility of prosecution witnesses, his or her character is strictly inadmissible on the issue of credibility. Even in the United States, for convictions not involving dishonesty the law is more restrictive than it is in Canada. The burden falls on the prosecution to demonstrate that their probative value outweighs their prejudicial effect, and for convictions over ten years old, that their probative value substantially outweighs prejudicial effect.

Corbett and Law Reform

The law relating to Corbett applications has not inspired calls for law reform or amendment within the legal profession or by law reform bodies. Indeed, the development of the discretion has silenced calls, that were being made from time to time, to amend section 12 of the Canada Evidence Act to provide more protection to accused persons.

Recently the Corbett application fell into great controversy with the trial of Francis Roy for the rape and killing of Alison Parrott. There the trial judge ruled that the Crown could not cross-examine Mr. Roy about his two prior rape convictions. This ruling, along with other exclusionary decisions made in the case, caused a public furor and demand for law reform.

It is clear from an examination of the Parrott case and its aftermath that the objection to the exclusion of Mr. Roy=s prior rape convictions rested in the belief that they showed Mr. Roy to be the kind of person who would rape and kill a young girl. Those who objected to the exclusion of the convictions urged that jurors should know the kind of person they are trying. In Roy=s case, his past conduct as a rapist was considered to be highly relevant in the prosecution of a sexual killing.

Those familiar with the law of evidence will recognize immediately that this objection has nothing to do with the rule in Corbett. As explained, Corbett deals with a discretion to prevent the Crown from using prior convictions for the purpose of alerting jurors to the fact that the accused is likely to be a poor witness because he or she is, by character, a dishonest person - the kind of person who could not be trusted to tell the truth on any issue. Those who objected to the exclusion of Roy's convictions did not want them admitted solely to show he was not the kind of person who could be trusted to tell the truth when he testified. The jury was advised of Roy=s dishonesty through other convictions for dishonesty. They wanted the rape convictions admitted to prove that he was the kind of person who could rape and murder a child. Their arguments supported the admission of those convictions whether Francis Roy testified or not. The rule which prevents prior convictions from being used for this purpose is the Abad character rule. In effect then, although the Corbett rule was targeted in the media, it was the operation of the Abad character rule, along with the similar fact evidence rule (which controls those cases in which bad character evidence can be admitted as proof of guilt), that was being objected to.

Given that the public derision over the Corbett rule is misdirected, it would be an error to amend the Corbett rule to respond to those criticisms. The Corbett rule is not the culprit. If law reform is to occur in response to those criticisms that have been made in the wake of the Parrott trial, it should be the similar fact evidence rule that is modified. The similar fact evidence rule, in its present form, has existed for more than 100 years and is premised on principles that fairly characterize the current system of criminal justice. If it is going to be altered, it should be done only after a careful and sober review of that rule. I have not, in the lengthy paper I have prepared, undertaken that kind of review. I have been asked to review Corbett and that is what I have done. I have only described the similar fact evidence rule in enough detail to make clear the point that I have just made, and to ensure that the reasons for the exclusion of bad character evidence, including prior convictions, are properly understood.

Probative Value and Prejudice

In spite of the absence of law reform agitation relating to Corbett, a close examination of the case law, and of the theoretical underpinnings for the decision, demonstrates that there is indeed, inconsistency in its application. There is also confusion on the part of some judges about the operation of the relevant principles. I have appropriately been asked by Uniform Law Conference to develop guidelines on how to effectively balance the probative value versus prejudicial effect of the evidence in question, and to make appropriate recommendations.

The following model is premised on the existing law and provides guidance, in my view, in undertaking that balance. I would recommend that currents section 12 be amended by adding subsections containing the following substance:

12(3) Where the witness is the accused, no questions may be asked and no proof given of any previous conviction unless

- (a) that conviction is admissible apart from section 12, or
- (b) the admissibility of the conviction will not render the trial unfair.

(4) For the purposes of subsection (3)(b), the admission of a conviction will render the trial unfair where the probative value of that conviction on the issue of the credibility of the accused as a witness, either alone or together with other convictions, is not greater than the prejudicial effect that the conviction is likely to have.

(5) In assessing probative value, the judge shall determine whether the offence for which the accused has been convicted, either alone or in combination with other convictions, demonstrates that the accused is

- (a) a dishonest person, or
- (b) a person who by his nature has contempt for the law which he is legally and morally bound to obey.

(6) In making the assessment under subsection (5), the judge shall consider

- (a) whether the convictions are for offences of dishonesty;
- (b) the pattern of convictions;
- (c) the seriousness of the offence and/or record;

(4) the age of the convictions; and

- (e) the importance of the credibility of the accused to the resolution of the case, including whether any attacks by the accused on the character of prosecution witnesses have increased the importance of the credibility of the accused in the case.

(7) In assessing prejudice the judge shall consider

- (a) the tendency of the nature, seriousness, or pattern of convictions to inflame jurors against the accused;
- (2) the tendency of the convictions, given the similarity they may have to the offence for which the accused is charged, or given their nature, pattern or seriousness, to cause jurors to infer that the accused is the kind of person who could commit the offence charged; and
- (3) whether the risk of prejudice can be materially reduced by editing the record of convictions.

(8) In assessing prejudice the judge shall not consider the extent to which a jury direction may remove the risk of that prejudice.

(9) Where convictions are admitted under this section, the trial judge shall direct the jury that those convictions have been admitted solely to assist the jury in the assessment of the credibility of the accused as a witness, and are not to be used to infer that, based upon his character, the accused is the kind of person who might commit the offence with which he is charged.

Draft Subsection 12(3)

12(3) Where the witness is the accused, no questions may be asked and no proof given of any previous conviction unless

- *(a) that conviction is admissible apart from section 12, or*
- *(b) the admissibility of the conviction will not render the trial unfair.*

Subsection (a) is necessary because evidence of prior convictions of the accused can be admitted, according to the law of evidence, for two purposes apart from section 12. Prior convictions can be used under section 666 of the Criminal Code to rebut the good character of the accused who puts that character in issue, and prior convictions may sometimes be admissible according to the similar fact evidence rule. A Corbett application should never prevent otherwise admissible evidence of previous convictions from being used for these purposes.

Subsection (b), coupled with the balance of subsection (3), are intended to remove ambiguity inherent in the fact that the Corbett rule is couched as a discretion. The power to prevent section 12 from operating is understood by many to be a matter of choice, left with individual trial judges. Corbett does indeed speak of the discretion to exclude. Indeed, the very existence of the power to exclude is premised in that case on a common law discretion to refuse to admit technically admissible evidence. Discretion, though, is an ambiguous word. At the one extreme, discretion can describe the absolute right to choose. At the other it can simply describe the authority to pass judgment in the application of settled criteria. A review of the authority, and the simple application of common sense, reveals that the Corbett discretion is of the weak variety. It is the authority to pass judgment about whether the probative value of the evidence is outweighed by the prejudice it may cause, thereby rendering the trial unfair. It is not the power to choose to allow the questioning or to admit the evidence, even if its probative value is outweighed by its risk of prejudice. In other words, it is not a discretion whether to give the accused a fair trial. I think this should be made clear and I believe the wording of draft subsection (3) does so.

Draft Subsection (4)

(4) For the purposes of subsection (3)(b), the admission of a conviction will render the trial unfair where the probative value of that conviction on the issue of the credibility of the accused as a witness, either alone or together with other convictions, is not greater than the prejudicial effect that the conviction is likely to have.

While Corbett is intended to ensure that trials remain fair, the test for admission is stated in this subsection. There has been some confusion about this. Some judges have simply claimed the authority to deny cross-examination where its admission would render the trial unfair. While this expresses well the purpose behind the Corbett discretion, it does not describe the test that is to be used. Subsection (4) does, and it is important that it be stated. Subsection (4) also states expressly what the prior conviction must be probative of, in order to gain admission under section 12, namely, the credibility of the accused as a witness.

There is strong reason to suggest that the law should require that before the risk of prejudicing the accused=s trial is run in the interests of providing information about the accused=s credibility as a witness, the probative value of the convictions should significantly outweigh the prejudicial impact that admission would have. This is the law relating to similar fact evidence. Since most Corbett cases do not use this more guarded formula, I have not included it in the draft subsection, but, in the background paper I do invite consideration to be given to whether or not this is a more appropriate formula for the rule.

Draft Subsection (5)

(5) In assessing probative value, the judge shall determine whether the offence for which the accused has been convicted, either alone or in combination with other convictions, demonstrates that the accused is

- *(a) a dishonest person, or*
- *(b) a person who by his nature has contempt for the law which he is legally and morally bound to obey.*

At present, many of the decision purport to analyze probative value without identifying why convictions are considered relevant to credibility. An analysis of the case law and commentaries reveals these separate lines of relevance. It is important that they be stated so that the assessment of probative value remains focused.

Draft Subsection (6)

(6) In making the assessment under subsection (5), the judge shall consider

- (a) whether the convictions are for offences of dishonesty;
- (b) the pattern of convictions;
- (c) the seriousness of the offence and/or record;

(5) the age of the convictions; and

- (e) the importance of the credibility of the accused to the resolution of the case, including whether any attacks by the accused on the character of prosecution witnesses have increased the importance of the credibility of the accused in the case.

A review of the authority, law reform comments, and the law in other jurisdictions reveals that these are the crucial factors in assessing probative value of prior convictions on credibility.

Draft Subsection (6)(a) - Offences of Dishonesty

It is generally accepted that offences for dishonesty tend to be of more relevance to the credibility of the accused as a witness than other offences. Indeed, the American Federal Rules of Evidence treat offences of dishonesty as absolutely admissible, while other offences are only provisionally admissible, with the burden falling to the prosecutor to justify their use. Some law reformers have urged that unless an offence is one of dishonesty, it has no relevance and should not be admitted at all. While the Corbett case law does not go that far, it clearly gives priority to offences of dishonesty, so I have retained this as a factor. I note in the background paper that thought should be given to whether offences other than dishonesty should be admissible at all, but I make no recommendation in that regard.

Draft Subsection 6(b) - The Pattern of Convictions

Similarly, the pattern of convictions can be important in influencing the decision, including the number of offences, and whether they are clustered in time or nature. To illustrate, a record containing several older offences of dishonesty, followed by a gap, followed by a driving offence, will generally be regarded as less probative of credibility than a record of consistent offending, including periodic offences of dishonesty.

Draft Subsection 6(c) - The Seriousness of the Conviction

Where the probative value of a criminal record depends on the inference that the accused is Aa person who by his nature has contempt for the law which he is legally and morally bound to obey that record will be more probative if the convictions are for serious offences. The same holds true where the record is for offences of dishonesty and the probative value depends on the inference that the accused is shown to be a dishonest person. The more serious the offence, the more dishonest the conduct is likely to have been. The seriousness of offences is reflected as a factor in comparable statutory provisions internationally and has featured in Corbett decisions.

Draft Subsection 6(d) - The Age of the Conviction

The age of convictions is also a factor that has featured in the Corbett case law, for self-explanatory reasons. In a phrase, it is assumed that sometimes people change.

Draft Subsection 6(e) - The Importance of Credibility

The last factor (e), is more complicated. The first phrase is clear. The more a case turns on credibility, the more important the record of the accused will be. Although it is difficult to conceive of the credibility of the testimony of the accused as being unimportant, some cases turn entirely on credibility. Where this is so, authority suggests that the character of the accused for honesty takes on added importance.

The second phrase in draft subsection (e), whether any attacks by the accused on the character of prosecution witnesses have increased the importance of the credibility of the accused in the case requires more explanation. In England, Australia, New Zealand and under the American Federal Rules of Evidence, the key factor in being able to admit the record of an accused person to demonstrate a lack of credibility, is how the accused has conducted their case. If an accused person attacks the character of a prosecution witness, their own prior convictions become admissible to demonstrate their own lack of character. Two rationales have been advanced for this. The first is simple fairness. If the accused wants to attack the character for credibility of Crown witnesses, it would be unseemly for him or her to seek the protection of the law to prevent his or her own character for credibility from being attacked. The second rationale is premised on relevance theory. The argument is that the accused has made his or her own credibility of particular relevance by choosing to defend himself or herself based on the lack of credibility of a prosecution witness.

There are problems with each of these theories. It is my view that the fairness rationale, although intuitively appealing, is inappropriate. If the probative value of the criminal convictions of the accused is outweighed by their prejudicial effect such that the admission of those convictions will render the trial unfair, does it become any more acceptable to give the accused an unfair trial because he or she has chosen to rely on evidence about the prosecution witnesses that is ex hypothesi admissible and relevant according to the law of evidence?

The relevance theory, in turn, is not without its own problems. According to settled rules of law relating to burdens of proof, trials are not to be considered contests of credibility. The trier of fact is not to judge the case by deciding who is more credible, the accused or the prosecution witnesses. It is an error of law to do so. Yet the relevance rationale depends on the premise that if the accused challenges the credibility of prosecution witnesses, his relative credibility should be made known.

Because of the weaknesses of each rationale, I suggest that consideration be given to removing, as a relevant factor, the conduct of the accused in challenging the

credibility of prosecution witnesses. I recognize, however, that this factor was seminal in Corbett itself, is intuitively appealing, and is supported by strong international consensus. I therefore stop short of recommending that this factor be abolished, although it is troubling analytically. Since the fairness rationale conflicts with basic principles relating to the criminal justice process, I have tied the conduct of the case for the accused to the relevance rationale, which I believe to be what Chief Justice Dickson intended in Corbett.

Draft SubSection (7)

(7) In assessing prejudice the judge shall consider

- (a) the tendency of the nature, seriousness, or pattern of convictions to inflame jurors against the accused;
- (b) the tendency of the convictions, given the similarity they may have to the offence for which the accused is charged, or given their nature, pattern or seriousness, to cause jurors to infer that the accused is the kind of person who could commit the offence charged; and
- (c) whether the risk of prejudice can be materially reduced by editing the record of convictions.

Subsections (a) and (b) of this provision are designed to make explicit the relevant ways in which proof of prior convictions are understood to operate prejudicially. It is preferable, in my opinion, to state these overtly.

Subsection (c) provides recognition that courts frequently reduce the prejudicial impact of convictions by editing the record to expunge the most prejudicial information. While this does present the risk of misleading the trier of fact into believing that the record of the accused is less repugnant than it actually is, editing is common practice and it is justifiable pragmatically. Absent the power to edit, if a criminal record is too prejudicial to admit without editing, the prosecution would lose the entire record. It is better to communicate relevant character through a partial record than to lose the ability to do so entirely.

Draft Subsection (8)

(8) In assessing prejudice the judge shall not consider the extent to which a jury direction may remove the risk of that prejudice.

The chief cause of inconsistency in the application of Corbett is the variable faith that particular judges have in the jury direction. Some believe it can remove the risk of prejudice. Others believe it cannot. The result is different levels of tolerance. What makes this unacceptable is that it breeds unprincipled inconsistency. It becomes a matter of taste in which the fortunes of a Corbett application will depend on the judge who happens to be deciding the case. This kind of variation in result from judge to judge happens in the application of many rules of law, and it is endemic in the fact finding process, but the law should not build judicial subjectivity in as an acceptable feature of a rule. If a factor provides no guidance, it should not be used as a factor.

As discussed, the very existence of Corbett stands as recognition that a jury direction will not always remove the risk of prejudice. Clearly, judges have no way of knowing whether a particular jury is apt to follow such a direction, so the decision to allow the Crown to use the record or not must depend on the probative value of the record and the risk of prejudice raised by the nature of the convictions. In other words, based on a review of the authority and a study of the principles involved, it is my view that the correct position is that where probative value outweighs the risk of prejudice, a jury direction can be relied on to remove that remaining risk of prejudice, but where probative value is outweighed by the risk of prejudice, a jury direction cannot be counted on to do so. The existence of the direction should not, therefore, be an independent factor in evaluating prejudice, probative value and admissibility. This must be stated overtly because many judges rely on their personal theories about the efficacy or lack of efficacy of a jury direction to justify admitting or excluding a record, irrespective of probative value and the prejudicial nature of the convictions at hand.

Draft Subsection (9)

(9) Where convictions are admitted under this section, the trial judge shall direct the jury that those convictions have been admitted solely to assist the jury in the assessment of the credibility of the accused as a witness, and are not to be used to infer that, based upon his or her character, the accused is the kind of person who might commit the offence with which he or she is charged.

This is the optimal warning that should be provided to jurors. It reflects the law. Although the insertion of statutory warning requirements raise the specter of encouraging appeals, the law requires a warning in any event. There is a precedent for including mandatory warning provisions in statutory provision dealing with the rules of evidence, in section 276.

Conclusion

The attached background paper is lengthy and detailed. In it I have attempted to explain each relevant concept, to discuss related rules, and to provide a comprehensive analysis of the law. Authorities, relevant provisions and international regimes only mentioned in passing in this summary, are described in detail. Any matters left unclear in this summary will hopefully be better explained in the background paper.

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