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A ‘Bad Rap’: R. v. Skeete and the Admissibility of Rap Lyric Evidence

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A ‘BAD RAP’: *R. v. SKEETE* AND THE ADMISSIBILITY OF RAP LYRIC EVIDENCE

INTRODUCTION

The use of accused-authored rap lyric evidence is no longer rare in Canadian criminal proceedings. Adduced by Crown prosecutors, rap lyrics written or co-written by an accused are increasingly used in criminal trials as evidence of the accused's intent, knowledge, motive, identity, or confession to the commission of the specific offence charged. The practice is not without controversy.¹ The introduction of an accused's artistic work in the form of rap lyrics at trial engages trial fairness concerns. Without a keen awareness of the social and cultural context that produces rap music, trial actors risk inflating their probative value and underestimating their prejudicial effect. The 2015 Ontario Superior Court of Justice decision in *Campbell*² attempted to redress this problem by proposing a specific rule governing the admissibility of rap lyric evidence. Under this rule, rap lyrics would have to have a concrete nexus to the offence charged before those lyrics could be admissible at trial. This rule was not adopted by the Ontario Court of Appeal. In its 2017 *Skeete*³ decision, the Court instead held that rap lyric evidence is admissible where relevant, material, and not excluded by a specific rule of evidence.⁴ On this basis, the Court found that an accused-authored rap lyric was admissible and properly before the jury at trial.⁵ By failing to adopt a rap specific approach to the admissibility of rap lyric evidence, the decision represents a troubling paradigm for the reception of accused-authored rap lyric evidence.

This article analyses the current evidentiary threshold for the reception of accused-authored rap lyric evidence.⁶ It argues that the current threshold jeopardizes trial fairness by allowing the Crown to adduce highly prejudicial rap lyric evidence at trial. It proceeds in three parts: Part I provides a contextualization of the issues. Part II examines the *Campbell* decision. Part III evaluates how the *Skeete* decision differs from *Campbell*, and provides a relatively low admissibility threshold for accused-authored rap lyric evidence. This article concludes by advocating for the adoption of the *Campbell* approach with modifications.

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¹ See, David M. Tanovich, "R. v. *Campbell*: Rethinking the Admissibility of Rap Lyrics in Criminal Cases" (2015) 24 C.R. (7th) 27. For articles pertaining to the controversy surrounding the use of rap lyric evidence in the United States context, see Andrea L. Dennis, "Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence" (2007) 31 Colum J L & Arts 1; Sean-Patrick Wilson, "Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence at Criminal Trials" (2005) 12 UCLA Ent L Rev 345; Charis E. Kubrin and Erik Nielson, "Rap on Trial" (2014) 4:3 Race and Justice 185; and Jason E. Powell, "R.A.P.: Rule against Perps (Who Write Rhymes)" (2009) 41 Rutgers LJ 479.

² *R v Campbell*, 2015 ONSC 6199 [*Campbell*].

³ *R v Skeete*, 2017 ONCA 926 [*Skeete* Court of Appeal Decision].

⁴ *Ibid.*

⁵ *Ibid* at para 195.

⁶ This article exclusively considers the implications of the Crown adducing accused-authored rap lyric evidence. A consideration of the proper admissibility threshold for the reception of defence-adduced rap lyric evidence is beyond the scope of this article.

I. CONTEXTUALIZATION

This section examines the threshold by which rap lyrics were admitted as evidence in criminal trials prior to the *Campbell* decision. Before *Campbell*, there were at least 16 criminal cases in which rap lyric evidence was admitted for inculpatory purposes.⁷

The 2005 Ontario Superior Court of Justice’s decision in *Leslie*⁸ was one of the first reported cases to admit accused-authored rap lyric evidence.⁹ In that case, the Court admitted the accused-authored rap lyric containing the words, “Got a back up 40 Cal Kel-Tec,” as evidence that the accused had knowledge of and possessed the weapon used in the death of the deceased. In admitting the evidence, the Court noted:

Therefore, in my judgment, it is open to a jury to infer from the fact that Mr. Leslie was in possession of the rap lyrics making reference to a 40 caliber Kel-Tec, that Mr. Leslie had knowledge about this homicide that had never been made public. I appreciate that the lyric’s contents are open to other interpretations, but in my judgment that is what juries are for. Accordingly, I rule that that portion of Exhibit C that contains the lyric “Got a back up 40 Cal Kel-Tec” may be admitted into evidence and considered by the jury.¹⁰

The relatively low evidentiary threshold to admit rap lyric evidence used by the *Leslie* Court highlights the problems associated with the pre-*Campbell* approach to rap lyric evidence. First, pre-*Campbell* jurisprudence tended to overestimate the probative value of rap lyric evidence, while underestimating its prejudicial effect. For instance, important to the *Leslie* Court’s decision to admit the rap lyric tendered was the view that the lyric proved that the accused had knowledge of the murder weapon. This finding was made even though the lyric itself did not indicate whether the accused knew that a .40 caliber Kel-Tec was used in the deceased’s murder. The assumption that the lyric proved that the accused had this knowledge indicates that the trial judge interpreted the rap lyric literally and as inculpatory, an error that, as Professor Tanovich indicates, many trial actors make in assessing the probative value of rap lyric evidence.¹¹

The reason for this is that trial actors can lack the cultural competency to recognize rap as artistic expression¹² and to distinguish between a rap artist and their persona.¹³ This problem can cause trial actors to mistake rap lyrics for autobiographical depictions of the rap artist’s lived experiences or personal knowledge.¹⁴ However, rap lyrics are generally not authentic. Rap artists may engage in hyperbole with fictitious personas to entertain, create art, and exercise their right to free speech. Rap lyrics are no more likely to be truthful accounts of an artist’s actions than other artistic forms. No one would suggest that Picasso’s painting *Guernica* was somehow evidence that its author was

⁷ Tanovich, *supra* note 1 at 30.

⁸ *R v Leslie*, [2005] OJ No 2539 (SCJ) [*Leslie*].

⁹ It is important to note that this point is made in reference to reported cases on the admission of rap lyric evidence in which the utterance of the rap lyric itself is not the offence charged.

¹⁰ *Leslie*, *supra* note 8 at para 8.

¹¹ Tanovich, *supra* note 1 at 40; Kubrin and Nielson, *supra* note 1 at 204.

¹² In the context of assessing the probative value of rap lyric evidence, Tanovich defines cultural competency as such “Cultural competence, in this context, requires an understanding of the origins and nature of rap music.”: Tanovich, *supra* note 1 at 40.

¹³ Wilson, *supra* note 1 at 356-357.

¹⁴ Dennis, *supra* note 1 at 15.

implicated in that war crime. As a result, the contents of rap songs will lack the reliability and credibility criteria required to be probative or even relevant in most cases. As Professor David Tanovich warns:

[Courts] must carefully scrutinize prosecutorial claims of probative value and ensure that they do not overestimate the meaning or value of the evidence given the nature of rap music and concerns associated with using artistic expression as criminal evidence.¹⁵

The tendency to overestimate its probative value also explains the reluctance of courts in the pre-*Campbell* era to exercise their residual discretion to exclude highly prejudicial rap lyric evidence, even where the rap lyric evidence bore little to no connection to the offence charged. In this respect, the 2013 Ontario Superior Court of Justice decision in *Williams*¹⁶ is illustrative. In this case, the Crown sought to admit six accused-authored rap videos and their transcriptions as evidence of motive and gang affiliation. On the Crown's theory of the case, the rap videos showed that the two accused, Williams and Mills, had killed the deceased because of his membership in a rival gang and his involvement in the death of their gang associate. Both defence counsel contested the Crown's application on the basis that the rap videos and lyrics were highly prejudicial. In the alternative, counsel for Williams sought the exclusion of specific verses of the rap songs tendered that were highly violent and unnecessary to the Crown's case. The *Williams* Court rejected both arguments and admitted the rap songs without requiring the redaction of violent verses that made no mention of a killing, gang affiliation, or the motive alleged by the Crown.¹⁷

Another example is the 2013 decision in *Evans*¹⁸, where the Ontario Superior Court of Justice admitted an accused-authored rap lyric containing the words, "we do it for the paper rush, yeah it's all about the dough, getting money," as evidence of motive to commit a drug trafficking offence, when neither drugs nor drug trafficking were mentioned in the lyric.¹⁹ Finally, in *Leslie*, the lyric "Got a back up 40 Cal Kel-Tec" was introduced as evidence of the accused's knowledge of the murder weapon, when the lyric itself made no reference to the murder.

It is important to note that the problems associated with the judicial treatment of rap lyric evidence in pre-*Campbell* jurisprudence appear to begin with *Leslie*.²⁰ Prior to *Leslie*, there are at least two

¹⁵ Tanovich, *supra* note 1 at 38.

¹⁶ *R v Williams*, 2013 ONSC 1076 [*Williams*] (an addendum to these reasons are reported as *R v Williams*, 2013 ONSC 3100). It should be noted that *Williams* is currently on appeal to the Ontario Court of Appeal.

¹⁷ For instance, defence counsel for Williams objected to the admission of the following verse in one of the accused-authored rap songs: "30 30 mean machine Hitch you you cant stop it your [N-word] be runnin while were laughin and tauntin backin out and dumpins is what were doin if your plotin skeemin were just gonna half to leave you bleedin[.]" Her argument was that the lyric was irrelevant to the Crown's case and too violent to be admitted. In rejecting defence counsel's position, Justice Clark states in *R v Williams*, 2013 ONSC 3100 at para 96:

The words, "30 30 mean machine Hitch you you cant stop it your [N-word] be runnin while were laughin and tauntin backin out and dumpins is what were doin if your plotin skeemin were just gonna half to leave you bleedin...", demonstrate not only animus, but also that the author's hostility includes violent thoughts.

¹⁸ *R v Evans*, 2013 ONSC 2447. That case concerned six accused on trial for various drug offences, firearms offences, conspiracies and criminal organization offences. The accused-authored lyric tendered was the chorus of a rap performance in which one of the accused, Shane Evans and a non-accused person, were principal rappers.

¹⁹ *Ibid* at paras 98, 108-110. It should be noted that in finding the lyric admissible, the Court held that lyric was admissible as evidence against Evans and not the other accused.

²⁰ It is important to note that this point is made in reference to reported cases on the admission of rap lyric evidence.

reported cases in which courts problematized the reception of accused-authored rap lyric evidence. In *Bernardo*²¹, the Crown unsuccessfully sought to admit a number of accused-authored rap songs containing “blunt, graphic and on occasion violent” lyrics as evidence of the accused’s intent and motive to kill.²² On the Crown’s theory of the case, the songs depicted the accused as “a kidnapper, a rapist and a killer.”²³ The Ontario Court (General Division) refused to admit the evidence on the basis that the lyrics were irrelevant and highly prejudicial. The Court held that:

At this stage in the proceedings, I am far from convinced that the relevance of the audio tape “Deadly Innocence” or the accompanying one hundred and sixty selected pages of jottings, words, titles, designs, to go with the rap music is relevant to the degree that [its probative value] outweighs the prejudice that would probably flow from the admission of the tape and the writings. Subject to issues arising in the trial that would make this tape and material relevant to the extent that its probity would outweigh its prejudicial effect, I am not at this time prepared to find the items admissible.²⁴

The dissent in *Simard*²⁵ reached a similar result. In that case, the dissent held that the trial judge erred in admitting the accused-authored rap lyrics on its own motion for the reason that the lyrics amounted to inadmissible propensity evidence.²⁶ Justice Fish noted:

The respondent is correct in pleading the following in his factum [translation]:

The respondent furthermore admits that the court took into account evidence of propensity when it considered the lyrics of violence and attack engaged in by the accused with respect to women in his compact disk. However, evidence which is adduced solely to show disposition or propensity is, as a rule, inadmissible, unless the probative value of the proposed evidence outweighs its prejudicial effect. (*R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, 55 C.C.C. (3d) 1.) The trial judge should not have taken this evidence into account as the lyrics of the accused on the “CD” have no great probative value with respect to the central issue before the Court, being that of the guilt of the appellant.

This is patently inadmissible evidence.²⁷

On this basis, Justice Fish would have upheld the appeal.

²¹ *R v Bernardo*, 1995 CarswellOnt 7227 (Gen Div).

²² *Ibid* at para 21.

²³ *Ibid*.

²⁴ *Ibid* at paras 24-25.

²⁵ *R v Simard*, 2000 CarswellQue 3691(CA).

²⁶ It is important to note that the rap songs that the trial judge admitted in *Simard* were not tendered as evidence by either the Crown or defence. Justice Fish notes: “It should be underlined that, in the absence of the parties, and without their knowledge, the judge listened to the compact disk at an unspecified point in time during or after trial. Furthermore, it is an exhibit which was not filed for this purpose, the content of which was subject to no cross-examination of any witness, nor was it even mentioned in the pleadings or arguments of either party.”: *Ibid* at para 19.

²⁷ *Ibid* at paras 21-22 (as per Fish J.A.).

The majority in *Simard*, on the other hand, found that while the trial judge erred in his consideration of the rap lyric evidence, this error did not play a conclusive role in the verdict.²⁸ The appeal was dismissed. The majority’s ruling was later upheld in a short judgment by the Supreme Court.²⁹

Neither *Bernardo* or *Simard* are mentioned in *Leslie* or other pre-*Campbell* reported jurisprudence. There are two reasons for this omission. *Bernardo* was rendered by the Ontario Court (General Division) and thus was not binding on subsequent Ontario Superior Court of Justice decisions. With respect to *Simard*, the dissent lacks precedential value. This combined with the fact that neither the majority in the Quebec Court of Appeal nor the Supreme Court in *Simard* articulated an approach to the admissibility of rap lyric evidence explains why this case was not considered in the Ontario Superior Court of Justice jurisprudence that preceded *Campbell*. In absence of binding appellate court guidance, *Leslie* and other pre-*Campbell* reported cases set a low bar for the admission of rap lyric evidence. This low bar highlights the importance of the *Campbell* decision, which this article considers in the following section.

II. THE CAMPBELL DECISION AND THE ADOPTION OF A RAP SPECIFIC ADMISSIBILITY RULE

Pre-*Campbell* jurisprudence was marked by a low evidentiary threshold for the admission of rap lyric evidence. This threshold was revisited in *Campbell*. This case involved two accused, Campbell and David, who had been charged with murder. On the Crown’s theory of the case, Campbell killed the deceased for commencing a relationship with his girlfriend while he was in jail on other charges. As evidence of *actus reus*, the Crown sought to have the following violent lyrics from a rap video, in which Campbell was one of the performers, admitted as a confession to the murder:

I’m shooting three
Nah, I ain’t slipping with my wifey never
One shot, leave your brains on your Nikes
Broad day anywhere
One shot, make you flip like gymnastics
No stacks [N-word], the way I make it rain
You got your shots [N-word], like you Max Payne

The Crown urged the Court to interpret the lyrics literally and pointed to several alleged similarities between the rap lyrics and the murder charge: (1) the use of the word “wifey,” which supposedly referred to Campbell’s girlfriend; (2) the reference to “Nikes,” which the deceased was wearing at the time he was killed; (3) the mention of “Broad day anywhere,” which was consistent with the fact that the deceased was killed during the day; (4) the stanza “One shot, make you flip like gymnastics,” which was consistent with a witness’ account that the deceased turned and twisted as he was being shot; (5) the use of the word “rain” in the stanza “No stacks [N-word], the way I

²⁸ *Ibid* at para 4 (as per the Majority).

²⁹ *R v Simard*, 2000 SCC 61, [2000] 2 SCR 911.

make it rain,” which was one of the deceased’s street names; and (6) the reference to “You got your shots [N-word], like you Max Payne” which was consistent with the fact that the deceased was shot multiple times.

Judicial Reasoning

Writing for the Court, Justice Nordheimer refused to admit the accused-authored rap lyric evidence, finding that the lyrics did not qualify as a confession. He also cautioned against interpreting rap lyrics literally stating that, “As with lyrics generally, but especially when it comes to rap, it is risky to take any word literally.”³⁰ Rap lyrics, he noted, often refer to drugs, guns, shootings, and violence, which means that, “The mere fact that an artist records a rap with lyrics that refers to such activities cannot be taken as an admission by the artist that they were involved in such activities, even where the lyrics are used in the first person.”³¹ He concluded that rap lyric evidence should not be considered to be a confession, absent other evidence establishing that the artist is truly speaking about a personal experience.³²

He then proposed the adoption of a higher evidentiary threshold that would govern the reception of rap lyric evidence in a criminal proceeding, a threshold that had been set by the New Jersey Supreme Court’s 2014 decision in *Skinner*.³³ Under this threshold, rap lyric evidence is not probative of the offence charged absent a strong nexus between the specific details of the artistic composition and the circumstances of the offence.³⁴ Courts are to evaluate the nexus between the rap lyric evidence tendered and the offence charged in isolation from other evidence tendered. Courts are then required to determine whether the probative value of the evidence outweighs its prejudicial effect. Applying this threshold to the case, he found that the probative value of the rap lyrics tendered was low, since the similarities between the lyrics and the circumstances of the offence were generic and “common to any number of other murders.”³⁵ Furthermore, he found that the lyrics’ probative value was substantially outweighed by the highly prejudicial effect that their introduction would have on the integrity and fairness of the trial, an effect that even limiting instructions could not cure.³⁶ On this basis, Justice Nordheimer refused to admit the evidence and dismissed this aspect of the Crown’s application.

The importance of *Campbell* cannot be understated. *Campbell* is the first reported Canadian trial decision to problematize the admission of rap lyric evidence without first critically examining its probative value and its prejudicial effect. By endorsing a higher evidentiary threshold for admitting rap lyric evidence, the *Campbell* court recognized that rap lyrics are not generally probative or autobiographical and that there are pitfalls associated with interpreting rap lyrics literally. Its approach and endorsement of a rap specific admissibility rule recognized that rap lyric evidence can substantially prejudice the fairness of a criminal trial. Furthermore, *Campbell* sets a clear test for assessing the admissibility of rap lyric evidence. Unlike in *Bernardo* which is fact specific,

³⁰ *Campbell*, *supra* note 2 at para 15

³¹ *Ibid* at para 25.

³² *Ibid*.

³³ *State v Skinner*, 95 A.3d 236 (Sup Ct NJ 2014)

³⁴ *Ibid*; *Campbell*, *supra* note 2 at para 27.

³⁵ *Campbell*, *supra* note 2 at paras 23, 28.

³⁶ *Ibid* at paras 28-29.

Campbell provided a two-step test applicable for when the Crown sought to tender rap lyric evidence. For these reasons, the *Campbell* decision sought to provide a robust framework for balancing the desire to admit all evidence relevant to the offence with the need to safeguard trial fairness and integrity. The approach set in *Campbell* was virtually followed in the Ontario Superior Court of Justice’s decisions in *Millard*³⁷, *McCullough*,³⁸ and *Ranglin*.³⁹

III. THE SKEETE DECISION

As noted above, the approach set out in *Campbell* was not affirmed by the Ontario Court of Appeal in *Skeete*. In this section, the article discusses the *Skeete* decision in detail as it pertains to the admissibility of accused-authored rap lyric evidence.

Facts

In *Skeete*, the accused was charged with first-degree murder. The Crown’s case was that the accused killed the deceased in retaliation for the deceased’s prior cooperation with law enforcement on an earlier charge.⁴⁰ In addition to other evidence, the Crown sought to introduce a rap lyric from one of the accused’s rap songs containing the words, “Real [N-word] don’t crack to the coppers, muthafucka.”⁴¹ The rap lyric was part of a song that recounted the harsh conditions of the Toronto (Don) Jail, where the accused was held while awaiting trial on this murder charge.⁴² The Crown urged the trial judge to interpret the lyrics autobiographically. On the Crown’s theory of the case, the lyric showed that the accused had killed the deceased for breaching an alleged communal ‘code of silence’ that prohibited community members from cooperating with law enforcement.⁴³ The defence contested the lyric’s admission on the basis that it was inadmissible bad character evidence and that its prejudicial effect outweighed its probative value.⁴⁴

Trial Level Decision

The *Skeete* trial court accepted the Crown’s position and admitted the rap lyric evidence as an admission.⁴⁵ In rendering its decision, the trial judge found that the lyric was probative and relevant to the Crown’s theory that the accused believed in a code of silence that he would kill to enforce.⁴⁶ In rejecting the defence’s position, the Court found that the lyric was neither presumptively

³⁷ *R v Millard*, 2017 ONSC 5275.

³⁸ *R v McCullough*, 2016 ONSC 1014. It is important to note that while affirming the rap specific admissibility rule set out in *Campbell*, the *McCullough* Court indicated that corroborative evidence should be used to determine whether the nexus between the rap lyrics and the offence charged is strong enough to justify the lyrics’ admission. Its use of corroborative evidence to determine the admissibility of rap lyric evidence represents a shift from the *Campbell* approach, which evaluated the nexus between the rap lyric evidence and the offence charged in isolation from other evidence. The *McCullough* approach was followed in *Ranglin*.

³⁹ *R v Ranglin*, 2016 ONSC 3972.

⁴⁰ *R v Skeete*, 2012 ONSC 1643 at para 7 [*Skeete* Trial Decision].

⁴¹ *Ibid* at para 6.

⁴² *Ibid* at para 16.

⁴³ *Ibid* at para 7.

⁴⁴ *Ibid* at para 8.

⁴⁵ *Ibid* at paras 17-21.

⁴⁶ *Ibid* at paras 15, 18.

inadmissible bad character evidence⁴⁷ nor highly prejudicial.⁴⁸ Furthermore, in its view, the prospect of the jury misusing the lyric was low and could be circumvented by the accused offering an alternative explanation for the lyric in his own testimony.⁴⁹ In the event that the entire rap song was played to the jury, the potential prejudice that the jury might misapprehend the song could “be adequately addressed through a proper jury instruction.”⁵⁰ On this basis, the Court admitted the lyric as evidence of the accused’s murderous motive, even though the lyric itself made no mention of violence, a killing, or desire to kill to enforce a communal code of silence.

It is important to note that in rendering the lyric admissible, the Court distinguished the *Skeete* lyric from the lyric admitted in *Parsons*⁵¹, a case where a trial judge had improperly admitted a violent accused-authored heavy metal song containing the words “Kill your fuckin’ mother”. The accused was on trial for the murder of his mother. The song had been composed in collaboration with other persons two years prior to the murder. In distinguishing the cases, the Court found that, unlike *Parsons*, the *Skeete* lyric was probative to the Crown’s case, not inflammatory, not a production of a collaboration, and temporally connected to the murder.⁵² These factors were determinative in the Court’s decision to find that *Parsons* was not applicable and that the *Skeete* rap lyric was admissible.

At trial, the Crown, in addition to other evidence, led the lyric and expert evidence from a police officer regarding the code of silence.⁵³ The defence sought to contextualize the lyric tendered by filing the entire rap song as a trial exhibit and leading evidence by the accused on the meaning of the lyric. The accused indicated that the lyric referred to the code of silence existing in the Toronto (Don) Jail.⁵⁴ While subscribing to a code of silence himself, he denied enforcing adherence to it.⁵⁵ Following a trial by jury, the accused was convicted.

The Accused’s Position on Appeal

On appeal, the accused argued that the trial judge had erroneously admitted the accused-authored rap lyric as an admission. In his view, the trial judge had inflated the lyric’s probative value by not considering the social context in which it was produced and its status as artistic expression.⁵⁶ Furthermore, he argued that the trial judge had undervalued the lyric’s prejudicial effect by failing to appreciate the racial stereotypes associated with rap music, specifically the perception that rap is the vehicle by which young black criminals express themselves.⁵⁷ By allowing the lyric’s introduction at trial, the trial judge increased the risk that the jury would improperly rely on this unconscious anti-black bias when evaluating the lyric. The accused urged the Court to view the rap lyrics as a form of artistic expression that was neither autobiographical nor probative of its

⁴⁷ *Ibid* at para 16.

⁴⁸ *Ibid* at para 19.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* at para 20.

⁵¹ *R v Parsons*, 1996 CarswellNfld 298 (CA) [*Parsons*].

⁵² *Skeete* Trial Decision, *supra* note 40 at para 15.

⁵³ *Skeete* Court of Appeal Decision, *supra* note 3 at para 126.

⁵⁴ *Ibid* at para 129.

⁵⁵ *Ibid* at para 130.

⁵⁶ *Ibid* at para 133.

⁵⁷ *Ibid* at para 136.

contents and cautioned the Court against applying a literal interpretation to the rap lyric. Counsel for the accused advocated for the Court to endorse a higher evidentiary threshold for the admission of rap lyric evidence that would render rap lyric evidence admissible only where there is a concrete nexus between the specific details of the lyrics and the offence charged.⁵⁸ Under this approach, the rap lyric tendered should not have been admitted into evidence as it lacked the probative value required for admission.⁵⁹ The Crown resisted the appeal, arguing that the trial judge had properly evaluated the lyric's probative value and its prejudicial effect.⁶⁰

Court of Appeal for Ontario's Decision

The Court of Appeal in *Skeete* held that even though the trial judge erred in principle in assessing the lyric's probative value and prejudicial effect⁶¹, the lyric was ultimately admissible and properly before the jury at trial. In rendering its decision, the Court articulated three important principles with respect to assessing the admissibility of rap lyric evidence. First, the Court affirmed that rap lyrics are a form of artistic expression that do not necessarily reflect the state of mind of their author.⁶² On this basis, the Court found that the trial judge had erred by finding that the lyric was an admissible admission without first considering the nature of the evidence, particularly that the lyric was a form of artistic self-expression.⁶³ Second, the Court affirmed that the fact that an accused can testify in his defence is not a relevant consideration when assessing the prejudicial effect of rap lyric evidence⁶⁴ and it was an error for the trial judge to determine otherwise. Third, though recognizing rap lyrics as art, the Court chose not to subject rap lyrics to a specific rule of admissibility. Instead, it found that rap lyrics are admissible in a criminal trial where relevant, material, and not excluded by a rule of evidence.⁶⁵ Applying this evidentiary threshold to the rap lyric tendered, the Court found that the lyric met these criteria. The lyric was relevant because it could be interpreted as describing a code of silence to which the appellant subscribed to and would kill to enforce. This relevance was further bolstered by the Crown expert's testimony on the code of silence.⁶⁶ The lyric was also material since it assisted in establishing the Crown's theory that the accused had a retaliatory motive for killing the deceased.⁶⁷ Finally, there was no rule of evidence precluding the lyric's admission at trial given that it was not *prima facie* inadmissible bad character evidence. On this point, the Court held:

The rap lyrics did not reveal the appellant as a person who had committed other crimes, or who had participated in other disreputable conduct apt to support a conclusion that he had a propensity or disposition to do the type of acts charged and was therefore guilty of the offence charged. Nor did the lyrics refer to other incidents likely to cause confusion in the minds of jurors. The lyrics reflected a state of mind, not an unrelated course of conduct.

⁵⁸ *Ibid* at para 137.

⁵⁹ *Ibid* at para 135.

⁶⁰ *Ibid* at para 138.

⁶¹ *Ibid* at paras 178-179.

⁶² *Ibid* at paras 156, 182.

⁶³ *Ibid* at paras 180-183.

⁶⁴ *Ibid* at para 184.

⁶⁵ *Ibid* at para 144.

⁶⁶ *Ibid* at para 166.

⁶⁷ *Ibid* at para 169.

They were largely concerned with conditions in a detention centre and the conduct of the persons confined there.⁶⁸

Instead, the lyric qualified as an admissible admission with a probative value that outweighed its prejudicial effect.⁶⁹ In the Court’s view, the timing of the lyric’s composition and its expression of a code of silence that was open to interpretation were determinative factors in the Court’s finding that the lyric was probative.⁷⁰ In finding that the lyric’s prejudicial effect was minimal, the Court was persuaded by the lack of extrinsic misconduct contained in the lyric.⁷¹ In its view, this lack of extrinsic misconduct demonstrated that the lyric was not prejudicial. Additionally, any incidental prejudicial effect that might have resulted from the lyric’s introduction had been circumvented by the jury instruction provided by the trial judge.⁷²

IV. PROBLEMS WITH THE *SKEETE* APPROACH

Though the *Skeete* Court of Appeal strongly cautioned trial judges against readily presuming that accused-authored rap lyrics accurately reflect the state of mind of their author, its approach offers a lower threshold of protection against the introduction of low probative rap lyric evidence at trial than the *Campbell* approach.

First, unlike *Campbell*, the *Skeete* approach declined to root the admission of rap lyric evidence on its resemblance to the offence charged, instead allowing for its admissibility to be dictated by its relevance, materiality, and admissibility. In theory, this approach should guard against the introduction of low probative rap lyric evidence at trial. However, this approach is ineffective in practice as illustrated by pre-*Campbell* jurisprudence. For instance, even though the *Williams* and *Evans* decisions proceeded on the basis that the rap lyric evidence is only admissible where it is relevant, material and not excluded by a rule of evidence, the application of this approach in both cases resulted in the admission of inflammatory rap lyric evidence that bore little to no connection to the specific offence charged. *Skeete* itself also illustrates this problem. The *Skeete* rap lyric was found material, relevant, and admissible as proof of the accused’s murderous motive, even though the lyric itself does not mention violence, a killing, or a desire to kill to enforce the code of silence set out therein. The finding that a lyric that made no reference to violence, a killing or an intention to kill was probative of an accused’s retaliatory and murderous motive demonstrates the problems associated with evaluating the admissibility of rap lyric evidence without first evaluating whether the rap lyric has a concrete nexus to the offence charged.

The second difficulty with the *Skeete* approach concerns its use of corroborative evidence.⁷³ The Court heavily relies on corroborative evidence to find that the rap lyric tendered was probative and

⁶⁸ *Ibid* at para 173.

⁶⁹ *Ibid* at paras 176, 186-191.

⁷⁰ *Ibid* at paras 186-189; In the *Skeete* Court of Appeal Decision at para 187, the Court states that: “there was a significant nexus between the lyrics tendered for admission and the offence with which the appellant was charged.” It should be noted that the “significant nexus” referred to in the abovementioned paragraph concerns the timing of the *Skeete* lyric’s composition and the lyric’s expression of a code of silence.

⁷¹ *Ibid* at para 191.

⁷² *Ibid* at paras 192-194.

⁷³ This article uses the term “corroborative evidence” to refer to evidence that courts may rely on to confirm a rap lyric’s probative value.

admissible. However, unless corroborative evidence establishes the truthfulness of the rap lyric evidence tendered, such an approach can result in a misapprehension and inflation of a rap lyric's probative value. *Skeete* is illustrative of this problem. Important to the decision that the rap lyric tendered was admissible was the view that the timing of the deceased's murder, which occurred shortly after his cooperation with law enforcement, and the timing of the lyric's composition corroborated the Crown's position that the rap lyric was evidence that the accused killed the deceased for breaching a communal code of silence. This finding was made even though the temporal nexus between the timing of the deceased's murder and the composition of the lyric had no bearing on whether the accused believed in a communal code of silence that he would kill to enforce. The assumption that the timing of the deceased's murder proved that the accused had this belief highlights the dangers associated with relying on corroborative evidence to interpret rap lyric evidence. It also demonstrates that not all evidence that corroborates the accused's guilt or the Crown's theory of the case will be of assistance in assessing the truthfulness of rap lyrics tendered as evidence. Through its approach to corroborative evidence in assessing the probative value of rap lyric evidence, *Skeete* unreasonably lowers the protection that had been previously afforded by *Campbell* against the admission of low probative value rap lyric evidence.

Furthermore, *Skeete*'s use of corroborative evidence is inconsistent with the view that rap lyrics should not be presumed truthful. The belief that all corroborative evidence can aid in deciphering the truthfulness of rap lyric evidence is partially based on the view that the meaning of rap lyrics can be gleaned from a literal interpretation. However, rap lyrics generally should not be interpreted literally given their status as artistic expressions. As Professor Andrea Dennis states:

Rap music lyrics consist of constructed images, metaphor, braggadocio, or exaggerated storylines. At times, a defendant-lyricist may incorporate the experiences of another - either in whole or in part - into his lyrics. On top of this, the artist's effort to maintain authenticity - to "keep it real" - creates confusion regarding what is or is not the truth about a defendant artist and his life.⁷⁴

For this reason, applying a literal approach to rap lyric evidence will result in a misconstruction of the lyrics and an overestimation of their relevance in a criminal proceeding. The notion that courts should not interpret lyrics literally is not specific to rap music. The problems associated with assessing the probative value of artistic works was recognized by the Supreme Court in *Terry*.⁷⁵ In that case, the accused had been charged with fatally stabbing a man. The Crown sought to admit an accused-authored poem referring to the killing of an unidentified person with a knife. The poem was entered into evidence without objection at trial. On appeal to the Supreme Court, the Court held that the trial judge had not erred by admitting the poem, but problematized the use of the poem as evidence, stating that:

The probative value of the poem on the ultimate issue is not great. As a form of artistic expression, a poem is not necessarily probative of the "truth" expressed therein; an author may have any number of motivations for expressing him- or herself in a given fashion, only one of which is to recite what he or she did. Moreover, this poem's connection with known events is tenuous. No names were mentioned. The poem is undated. No details of

⁷⁴ Dennis, *supra* note 1 at 25-26

⁷⁵ *R v Terry*, [1996] 2 SCR 207.

the “crime” described in the poem were provided other than a reference to the use of a “knife”. At the same time, its prejudicial effect was considerable. The danger existed that the jury would accept the poem's oblique factual similarity with actual events to infer directly that the appellant was the author of both the poem and the events.⁷⁶

For this reason, the Court held that an accused's poetry is only admissible where its probative value outweighs its prejudicial effect.⁷⁷

The rejection in *Campbell* of the literal approach to assessing the probative value of rap lyric evidence may explain why the *Campbell* Court focused on the similarities between the rap lyrics tendered and the murder charge in isolation of the other evidence tendered. By refusing to adopt a similar approach, the *Skeete* approach is less able to guard against the risk that low probative rap lyric evidence will be led at trial.

The final difficulty with the *Skeete* approach is its lack of appreciation for the prejudicial impact associated with the introduction of inflammatory rap lyric evidence at trial. However, the prejudicial impact of inflammatory lyrical evidence can be high. Its introduction can jeopardize the fairness of a trial and increase the risk of a wrongful conviction.⁷⁸ In this respect, the *Parsons* decision, which involved violent heavy metal lyrics, is illustrative. In that case, the accused had been charged with the first-degree murder of his mother. The Crown sought to admit a heavy metal song by the accused and his band as evidence of motive. The song had been composed approximately two years before the murder and contained the following words:

You're fucking crazy,
I was home one day trying to smoke my dope.
When the bitch walked in, I took her with a rope.
Ha, Ha, Ha, Ha. Yeah, Yeah.
Kill your fuckin' mother, kill your fuckin' father.
Stab once, stab twice. Ha, Ha, Ha, Ha.
Kill your parents.
You know who walked in and saw her lying on the floor,
He said what did you do?
I said I killed the whore.
Ha, Ha, Ha, Ha. Yeah, Yeah, Yeah.
Kill your parents.
He looked at me and said you're fucking nuts,
So I drew my knife and stabbed him in the guts.
Ha, Ha, Ha, Ha. Kill your parents. Kill your parents.
Kill your fuckin' mother, kill your fuckin' father,

⁷⁶ *Ibid* at para 29.

⁷⁷ *Ibid* at para 28; Sopinka, Lederman & Bryant: *Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2014), at 371.

⁷⁸ In *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544, at para 8, the Supreme Court noted: “Experience in Canada and elsewhere teaches that wrongful convictions are often traceable to evidence that is either unreliable or prejudicial. When the two combine, they make for a potent mix — and the risk of a wrongful conviction increases accordingly. Wrongful convictions are a blight on our justice system and we must take reasonable steps to prevent them before they occur.”

Kill your parents.⁷⁹

On the Crown's theory of the case, the song proved that the accused held malicious feelings towards his mother. The defence objected to its admission, contending that the song was highly prejudicial and inadmissible bad character evidence. The trial judge rejected the defence's argument and admitted the song as evidence of the accused's motive, despite there being only a tenuous connection between the song lyrics and the murder. Following a trial by jury, the accused was wrongfully convicted of second-degree murder.

On appeal to the Newfoundland Court of Appeal, the Court found that the trial judge erred in admitting the lyrical evidence, stating that:

When one considers the evidence as to the composition of the piece, the number of persons involved, the type of music which is a recognized, if not widely accepted one ... in my view, there are some very serious deficiencies in its probative value. The prejudicial effect is a very great one and, in my view, substantially outweighs whatever probative value there might be. That situation cannot be corrected by any instructions which may be given to the jury with respect to its consideration of it. In my view, the trial judge was in error in admitting this tape into evidence.⁸⁰

On this basis, the Court overturned the conviction and ordered a new trial. Shortly after the decision was rendered, the accused was exonerated by DNA evidence. The *Parsons* case is indicative of how the admission of violent lyrical evidence can affect the fairness of a trial and lead to a wrongful conviction.⁸¹

Important to the *Skeete* trial court's decision to admit the lyric tendered was the view that the *Parsons* decision was distinguishable.⁸² However, the lyrical evidence in *Parsons* and *Skeete* have important similarities. First, as in *Parsons*, the *Skeete* lyric was tendered as evidence of a murderous motive despite the serious defects in its probative value. In *Parsons*, those defects concerned the number of persons involved in the composition and the type of music involved. In *Skeete*, the defects also concerned the type of music involved and the fact that the lyric itself bears little resemblance to the offence charged. Second, like in *Parsons*, the *Skeete* lyric is highly inflammatory. Even though the lyric does not explicitly refer to extrinsic misconduct, its use of profanities, a racial epithet, and its pronouncement of a code of silence prohibiting cooperation

⁷⁹ *Parsons*, *supra* note 51 at para 45.

⁸⁰ *Ibid* at para 63.

⁸¹ Important to this decision is the recognition that certain lyrical evidence is so violent that its prejudicial effect cannot be overcome by a limiting instruction. In certain situations, jury instructions are unable to cure the prejudicial effect associated with a particular piece of evidence. This point is noted by Chief Justice Lamer in *The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken* (2006). He states:

In my view, the recent spate of demonstrated convictions of innocent persons is proof that juries are not always reliable. It is no longer acceptable for the criminal justice system to place blind faith in the perceived, innate good sense of juries. Increasingly complicated jury instructions are not the answer. [...] An important response to this problem would be to raise the threshold for permitting cases to be considered by the jury. The test for a Directed Verdict should be modified to allow trial judges to throw out cases where the evidence can colloquially be characterized as "garbage."

⁸² It is important to note that in finding that the prejudicial effect of the *Skeete* lyric was minimal, the *Skeete* Court of Appeal Decision did not cite the *Parsons* decision.

with the police risks playing on the biases that trial actors may unconsciously hold about rap music, its authors, and young black men. As a result, rap lyric evidence such as the lyric admitted in *Skeete* has the same potential to jeopardize trial fairness as the lyrical evidence admitted in *Parsons*.

Furthermore, the risk that admitting highly inflammatory lyrical evidence could cause a wrongful conviction is particularly concerning where the accused is black. American scholarship demonstrates that rap lyrics can prime negative racial stereotypes.⁸³ For instance, in their study on the relationship between anti-black racism and rap music, Professors Christine Reyna, Mark Brandt and Tendayi Viki found that:

The stereotypes associated with rap and hip-hop are perfect candidates for legitimizing anti-Black attitudes and discrimination. These stereotypes not only overlap with already entrenched stereotypes of Black males as violent and criminal-minded but, more important, they suggest that this behavior is completely under the volition of the offender.⁸⁴

When introduced at trial, the jury may unconsciously rely on these racial stereotypes when determining the weight to accord rap lyric evidence. These unconscious views may cause the jury to improperly view the rap lyric evidence tendered as proof of a black accused's 'heightened' criminality or propensity to commit crime. The extent of this problem is encapsulated by a 1999 study conducted in the United States by Professor Stuart Fischhoff, who found that the introduction of a black accused's inflammatory rap lyrics at trial unfairly affected the jury's perception, even where the lyrics had little connection to the offence charged. The study concluded that "the defendant was seen as more likely to have committed a murder than had he not been presented as authoring such lyrics."⁸⁵ On this basis, Professor Fischhoff states:

Study results clearly indicate that showing participants the rap lyrics exerted a significant prejudicial impact on the evaluation of a person, and particularly so when the person has been accused of murder.⁸⁶

The study highlights the prejudicial effect associated with rap lyric evidence by showing that its inclusion can influence a jury's decision beyond its actual content, especially where the accused is black.

All of these reasons demonstrate the serious risks associated with introducing low probative value rap lyric evidence at trial. The problem with *Skeete* is that its approach increases the likelihood of this occurrence. It is difficult to justify exposing an accused to such a substantial interference with his or her right to a fair trial. This is especially the case when the rap lyric tendered bears little resemblance to the offence charged and when the corroborative evidence tendered in support of its admission does not establish its truthfulness and renders the tendering of the rap lyric evidence itself unnecessary. Furthermore, this combined with the fact that there are certain circumstances

⁸³ Kubrin and Nielson, *supra* note at 1 at 201.

⁸⁴ Christine Reyna, Mark Brandt, and Tendayi Viki, "Blame it on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice" (2009) 12 Group Processes & Intergroup Relations 361 at 364.

⁸⁵ Stuart P. Fischhoff, "Gangsta' Rap and a Murder in Bakersfield" (1999) 29 Journal of Applied Social Psychology 795 at 795.

⁸⁶ *Ibid* at 803.

in which the prejudice associated with rap lyric evidence cannot be redressed by limiting instructions demonstrates the relatively low threshold of protection that *Skeete* provides against the risk of a wrongful conviction. However, *Skeete* provides fertile ground for re-conceptualizing the test for admitting rap lyric evidence.

V. WAY FORWARD

By not adopting a rap specific admissibility rule and by enabling courts to improperly rely on corroborative evidence to admit rap lyric evidence with little to no resemblance to the offence charged, *Skeete* perpetuates the problems associated with the admission of inflammatory rap lyrics at trial. There are three potential approaches to correcting the issue presented in *Skeete*. The first would be to prohibit the admission of rap lyric evidence in criminal trials (the prohibition approach). The second would be to adopt the *Campbell* approach with respect to assessing the admissibility of rap lyric evidence (the pure *Campbell* approach). A third option would be to adopt the *Campbell* approach, but allow for the use of corroborative evidence in the admissibility analysis, where such evidence establishes the truthfulness of the rap lyric evidence tendered (the modified *Campbell* approach). This article advocates for the adoption of the modified *Campbell* approach.

The prohibition approach would render rap lyrics inadmissible unless the lyrics are the basis of the offence charged.⁸⁷ Adopting this approach presents three difficulties. First, the approach would prevent the introduction of probative rap lyric evidence that is not unreasonably prejudicial to the fair trial rights of the accused, for instance, an accused-authored rap detailing his or her involvement in the damage of public property. Second, this approach is inconsistent with the Supreme Court's decision in *Terry*, which holds that an accused-authored poem is admissible so long as its probative value outweighs its prejudicial effect. Given rap's similarities to poetry, there is no principled reason to ban one form of evidence and not the other. Third, the approach underestimates trial judges by presuming that they cannot develop the cultural competency required to differentiate between fictitious and autobiographical rap lyrics. However, *Campbell* contradicts this premise and shows the growing awareness among Canadian courts of the artistic nature of rap and its contents. This growing awareness, combined with the evidentiary difficulties associated with adopting a complete ban on rap lyric evidence, demonstrates why this approach should not be followed.

The pure *Campbell* approach would require that rap lyrics tendered as evidence at trial have a concrete nexus to the offence charged before allowing their introduction at trial. While the pure *Campbell* approach would prevent the inclusion of rap lyric evidence bearing little resemblance to the offence charged, it would also eliminate the use of corroborative evidence when assessing the probative value of rap lyric evidence, since the probative value of rap lyric evidence tendered would be based solely on the symmetry between the specific details of the lyrics and the circumstances of the offence. The problem with this approach is that assessing rap lyrics' probative

⁸⁷ Some authors have advocated for a prohibition on the use of rap lyrics as evidence in criminal trials: see Powell, *supra* note 1 at 524.

value without first considering the other evidence presented can lead to an overvaluation of the lyrics' truthfulness. For instance, in *Leslie*, the Court's decision to admit the rap lyric, "Got a back up 40 Cal Kel-Tec," as evidence of the accused's knowledge of the murder weapon was based on a .40 caliber handgun being the murder weapon, even though the rap lyric and other evidence adduced did not establish that the accused had this knowledge. Given the weakness of a pure *Campbell* approach to guard against such a result, this article does not recommend it.

The modified *Campbell* approach would adopt the rap specific admissibility rule advocated in *Campbell*, but would also allow the use of corroborative evidence when assessing rap lyrics' probative value. To prevent its misuse, this approach would impose two restrictions on the use of corroborative evidence. First, corroborative evidence would only be considered where it establishes the truthfulness of the rap lyric evidence tendered. Second, the corroborative evidence relied on would have to demonstrate that the accused was rapping about a personal experience. If the corroborative evidence is equally consistent with the view that the rap lyrics tendered are fictitious, then the corroborative evidence could not be relied on. Adopting the modified *Campbell* approach has four benefits. First, the approach follows the 2017 Supreme Court majority holding in *Bradshaw*,⁸⁸ a case that concerned the use of corroborative evidence to determine the reliability of a hearsay statement under the principled approach to the admission of hearsay evidence. In rendering its decision, the majority held that trial judges could only rely on corroborative evidence to conclude that a hearsay statement was sufficiently reliable if such evidence established the statement's accuracy or the declarant's truthfulness. Given that rap lyrics are hearsay, the *Bradshaw* approach to corroborative evidence is useful and should apply. Second, given that corroborative evidence would only be permitted if it establishes the truthfulness of the rap lyric evidence, the modified *Campbell* approach would guard against the use of corroborative evidence that does not assist in ascertaining the lyric's probative value. In so doing, the approach ensures that trial judges only rely on corroborative evidence to conclude that rap lyrics are probative, where such evidence indicates that the rap lyrics are likely autobiographical. Third, by restricting the use of corroborative evidence in this assessment without prohibiting it, this approach would redress the problems associated with the improper reliance on corroborative evidence illustrated in *Skeete*, while allowing corroborative evidence where its use would enhance the court's understanding of the rap lyrics tendered. For this reason, the modified *Campbell* approach would better balance the competing societal interests arising from the use of rap lyric evidence while guarding against the reception of low probative rap lyric evidence.

CONCLUSION

Skeete demonstrates the need to rethink the current approach to the admission of rap lyric evidence at trial. Its approach to the evaluation of rap lyric evidence allows for the admission of inflammatory rap lyrics that can distort the fairness and integrity of criminal proceedings. When this issue again comes to the attention of an appellate court, this article strongly urges the adoption of the modified *Campbell* approach, or at the very least a rap specific approach to evaluating the probative value and prejudicial effect of rap lyric evidence, thereby reducing the risk that low

⁸⁸ *R v Bradshaw*, 2017 SCC 35, [2017] 1 SCR 865.

probative rap lyrics will be introduced at trial. In so doing, courts can better protect against the risk that an accused's conviction was solely due to a 'bad rap.'