

Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence

David Paciocco

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Paciocco, David. "Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 40. (2008).
<http://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/12>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence

David Paciocco*

I. INTRODUCTION

Charter¹ tracks are all over the trial process, including the law of evidence. They are most evident in the “new rules” the Charter inspired. The most notorious new rule is, of course, section 24(2), the exclusionary remedy. While it has featured large in many major crime prosecutions² its primary impact has been in the impaired driving area where it has upended thousands of cases that once would have been routine convictions. An equally momentous “new rule” is the *Stinchcombe*³ disclosure obligation, coupled with the various related disclosure obligations it has engendered.⁴ Extensive disclosure to the defence has changed the way criminal law is practised. While sharing the fruits of the investigation and producing other relevant third party information has no doubt enhanced the ability to protect the innocent, it has done so at the cost of lengthening trials by

* Professor of Law, University of Ottawa.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter “the Charter”].

² Its most dramatic applications were in *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.), and *R. v. Feeney*, [1997] S.C.J. No. 49, [1997] 2 S.C.R. 13 (S.C.C.).

³ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

⁴ These include the *O'Connor* regime for securing third party records that are subject to a reasonable expectation of privacy in non-sexual offence cases (*R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.)); the *Mills* regime for obtaining third party records that are subject to a reasonable expectation of privacy in sexual offence cases (*Criminal Code*, R.S.C. 1985, c. C-46, as interpreted in *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.)), and the *McNeil* regime for securing third party records having no reasonable expectation of privacy (*R. v. McNeil*, [2006] O.J. No. 4746 (Ont. C.A.), leave to appeal to S.C.C. allowed [2007] S.C.C.A. No. 57 (S.C.C.)). While the first third two-party records regimes are well understood, I describe the *R. v. McNeil* regime in detail in D. Paciocco, “Filling the Seam between *Stinchcombe* and *O'Connor*: The “*McNeil*” Disclosure Application” (2007) 53 *Crim. L.Q.* 161.

requiring disclosure and production *voir dire*s, furnishing the fodder for exhaustive cross-examination, and by revealing issues and concerns that otherwise would have gone unexplored. Then there are the new self-incrimination rules. The only two evidence rules expressed in the Charter's legal rights provisions — section 11(c)'s non-compellability for accused persons and section 13's *quid pro quo* protection for prior witness testimony — appeared to largely mirror existing self-incrimination law.⁵ Section 7 has been used, however, to extend the concept of self-incrimination beyond mere statements to include both “products of the mind and products of the body”.⁶ Section 7 has also grounded new Charter-based rights including constitutional exemptions from being subpoenaed,⁷ the protection of accused persons from evidence derived from their prior testimony,⁸ the *prima facie* exclusion of other evidence discovered as a result of involuntary confessions,⁹ protection for detainees from elicited undercover conversations,¹⁰ a constitutional right to silence that some believe supplements the common law voluntariness rule¹¹ and constitutional standards for testing the validity of statutorily compelled conscriptive evidence.¹² Section 7 has also “constitutionalized” the common law voluntariness rule.¹³ Moreover, the Charter has ushered in novel but

⁵ These rules do largely mirror existing protection, but they have altered it in important ways. Most notably, s. 11(c) has, for all intents and purposes, removed the adverse inference from failing to testify (*R. v. Noble*, [1997] S.C.J. No. 40, [1997] 1 S.C.R. 874 (S.C.C.)), while s. 13 has made witness protection automatic and extended the protection to information that was not known to be self-incriminating at the time it was revealed (*R. v. Dubois*, [1985] S.C.J. No. 69, 48 C.R. (3d) 193 (S.C.C.)).

⁶ *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, [2003] 2 S.C.R. 678, at para. 34 (S.C.C.).

⁷ *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, (*sub nom. R. v. Bagri*) 184 C.C.C. (3d) 449, at para. 72 (S.C.C.). This right exists but its terms are so restrictive it is almost impossible to access.

⁸ *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, 36 C.R. (4th) 1 (S.C.C.), explained in *British Columbia (Securities Commission) v. Branch*, [1995] S.C.J. No. 32, 38 C.R. (4th) 133 (S.C.C.).

⁹ *R. v. Sweeney*, [2000] O.J. No. 3534, 50 O.R. (3d) 321 (Ont. C.A.).

¹⁰ *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.).

¹¹ A constitutional right to silence that can be breached by state agents overbearing the desire of individuals to refrain from speaking to authorities has been recognized. In my opinion, the test for a breach is functionally redundant to the voluntariness rule. See David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005), at 305-307.

¹² *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417 (S.C.C.), and see *R. v. B. (S.A.)*, [2003] S.C.J. No. 61, [2003] 2 S.C.R. 678 (S.C.C.), using those standards to determine the constitutional validity of DNA warrant legislation.

¹³ *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914 (S.C.C.). This constitutional right is impractical because it perfectly tracks the common law voluntariness rule. To access the constitutional right the burden of proof is on the accused to prove involuntariness on the balance of probability, whereas the common law rule provides a preferable way to vindicate self-incrimination

tightly controlled standing for complainants and witnesses under limited circumstances.¹⁴

As important, evident and deep as these tracks are, I will not discuss them here. They have all been closely followed. Instead, my interest is in those Charter tracks that circle statutory and common law rules. The received view is that there are few. During the last Cameron colloquium on criminal law in 1995, the Hon. Marc Rosenberg observed that “[o]verall . . . the *Charter* has not led to a profound re-examination of the basic evidentiary framework.”¹⁵ Without question, it was true then that few rules of evidence or criminal procedures had been struck down and declared to be of no force or effect, and this in fact remains so today. On the surface, it clearly does appear that what marks the savanna of trial process are not Charter tracks so much as the bleached bones of failed Charter challenges. To draw that conclusion, however, would be to overlook the fact that the broadest impact that the Charter has had on criminal trials is more furtive, and in fact, decidedly more profound than struck statutes; the Charter has altered the way criminal procedure rules operate. In subterranean fashion, the Charter has changed the very culture of proof and process by not only colouring our general conceptions of what is fair, but by changing relevant legal technique. The Charter has contributed to the rejection of the long-standing practice of treating the law of evidence and criminal procedure as a technical thing, replacing it with a contextual, discretionary approach that, properly applied, can be highly sensitive to the due process interests of the accused.¹⁶ Given that most of the rules look much the same as they did prior to the Charter it is fair to say that the Charter has not overhauled criminal procedure. Those rules, however, do not now work the same way. Those Charter tracks may be subtle but they are everywhere, and the effect of the Charter’s visit to the trial process has been profound. The place to begin, however,

concerns because it imposes its burden on the Crown to prove voluntariness, and uses an even stricter standard, proof beyond a reasonable doubt.

¹⁴ *A. (L.L.) v. B. (A.)*, [1995] S.C.J. No. 102, [1995] 4 S.C.R. 536 (S.C.C.).

¹⁵ The Hon. Marc Rosenberg, “The Impact of the *Charter* on the Law of Evidence in Criminal Cases,” in Jamie Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996), at 193.

¹⁶ Justice Rosenberg noted each of these developments in his article. He observed how “it has begun to . . . subtly change the understanding of trial fairness” and how, by provoking “discretion in applying exclusionary rules . . .”, the Charter has “equipped [courts] with the tools to relieve the most blatant unfairness”: the Hon. Marc Rosenberg, “The Impact of the *Charter* on the Law of Evidence in Criminal Cases,” in Jamie Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996), at 198, 191.

is with the caution and veneration of hostility which greeted the Charter's arrival and the case for Charter oversight.

II. CAUTION AND CHARTER OVERSIGHT

The Supreme Court of Canada, while mindful of the importance of individual rights in criminal cases, has always sought to place a governor on the speed the Charter travels. Comments clearly calculated to keep claimed Charter rights from destabilizing criminal procedure in general, and the trial process in particular, are common. To emphasize that the Charter has not given criminal procedure a monochromatic focus that reflects only shades of liberty, the Court has stressed that principles of fundamental justice "embrace interests and perspectives beyond those of the accused".¹⁷ The Court has reminded us on a number of occasions that "the fairness of the trial process must be made 'from the point of view of fairness in the eyes of the community and the complainant' and not just the accused",¹⁸ and that fundamental justice and section 11(d) entitle the accused to a "fair hearing" and not to "the most favourable procedures that could possibly be imagined".¹⁹

At times, jurists have gone beyond simply stressing the need for balance and have openly resisted the suggestion that constitutional oversight of the criminal process is required. In the early days, there were judges who revealed their belief that pre-Charter trials were fair enough. Some even considered the suggestion that the Charter could be used as an instrument for modifying criminal procedure to be a slur against the past; it would somehow "constitute a declaration that all criminal trials [had] heretofore been unfair"²⁰ or that the law had "for many years . . . subjected accused persons to fundamental injustice".²¹ It was therefore proclaimed boldly that "to import into the concept of procedural fair trial a means to control evidentiary law was not possible".²² In *R. v.*

¹⁷ *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at paras. 72, 73 (S.C.C.); *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143, at para. 17 (S.C.C.).

¹⁸ *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 72 (S.C.C.), citing *R. v. E. (A.W.)*, [1993] S.C.J. No. 90, [1993] 3 S.C.R. 155, at 198 (S.C.C.).

¹⁹ *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at para. 88 (S.C.C.), and *R. v. Darrach*, [2000] S.C.J. No. 46, 36 C.R. (5th) 223 (S.C.C.).

²⁰ *R. v. Piraino*, [1982] O.J. No. 3352, 37 O.R. (2d) 574, at 576 (Ont. H.C.J.).

²¹ *R. v. Balderstone*, [1982] M.J. No. 403, 2 C.C.C. (3d) 37, at 46 (Man. Q.B.), aff'd [1983] M.J. No. 207, [1983] 6 W.W.R. 438 (Man. C.A.), leave to appeal refused [1983] 2 S.C.R. v, 27 Man. R. (2d) 240 (S.C.C.).

²² *R. v. Shutiak* (1983), 10 W.C.B. 480 (Sask. Prov. Ct.).

L. (D.O.),²³ L’Heureux-Dubé J. cautioned that “[o]ne must recognize that the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice,”²⁴ and in *Germany v. Ebke*,²⁵ Vertes J. commented that he was “not aware of any evidentiary rule that can be said to be a fundamental principle of justice”.²⁶

Unwelcoming comments have even been made, on occasion, by some of Canada’s greatest criminal law judges. In *R. v. Williams*,²⁷ Martin J.A. spoke not of how the constitutional right to make full answer and defence would impact on the rules of proof, but instead of how “an accused in exercising his right to make full answer and defence must comply with the established rules of procedure and the rules respecting the admissibility of evidence.”²⁸ Even Sopinka J., one of the Charter’s great champions, was so emphatic in insisting that “[t]he right to full answer and defence does not imply that an accused can have, under the rubric of the *Charter*, an overhaul of the whole law of evidence” that he said it in identical words in two different judgments five years apart.²⁹

For my part, I have always found such statements to be discouraging. If there is a legitimate place for making the judiciary the “guardians of the constitution” and for using constitutional principles to test whether the balance found in legislation or common law rules is right, it is in matters of criminal procedure including its rules of proof. As American scholar, Alexander M. Bickel remarked close to 40 years ago in the American context:

[T]here was no question that basic matters of criminal procedure were ultimately the province of judges.

²³ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

²⁴ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, 25 C.R. (4th) 285, at 309 (S.C.C.).

²⁵ [2001] N.W.T.J. No. 13 (N.W.T.S.C.).

²⁶ *Germany v. Ebke*, [2001] N.W.T.J. No. 13, at para. 55 (N.W.T.S.C.). He allowed the possible exception of the voluntariness rule. The point is generally right but I think overstated. To take but one example, the right to cross-examine is also a principle of fundamental justice.

²⁷ [1985] O.J. No. 2489, 50 O.R. (2d) 321 (Ont. C.A.).

²⁸ *R. v. Williams*, [1985] O.J. No. 2489, 50 O.R. (2d) 321, at 337 (Ont. C.A.), leave to appeal refused, [1985] 1 S.C.R. xiv, 50 O.R. (2d) 321n (S.C.C.).

²⁹ *Dersch v. Canada (Attorney General)*, [1990] S.C.J. No. 113, [1990] 2 S.C.R. 1505, at 1515 (S.C.C.); *R. v. Crawford*, [1995] S.C.J. No. 30, 37 C.R. (4th) 197, at 214 (S.C.C.). As Don Stuart points out, his words, even though spoken twice, seem totally at odds with his later positions: *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough, ON: Carswell, 2001), at 190.

It took no violent stretching of democratic theory to suppose . . . that the political branches would abide by the judge's sense of what was mete and decent in the way of procedure.³⁰

Since it is judges who are expert in assessing the impact of process on justice, they are best suited to find the balance between criminal law enforcement ambitions, and due process.³¹ It is no coincidence that when section 7 of the Charter was being debated, the worry was not that it would be used to support procedural "due process"; that much was expected. The concern was that the Charter might be interpreted to empower courts to override substantive rules of criminal law.³² In truth, contrasting the sometimes reticent embrace of procedural review in criminal cases with the robust declaration that the principles of fundamental justice give courts the responsibility to vet substantive rules of criminal law³³ seems positively curious.

Not only does criminal procedure fall within the natural zone of competence of judicial oversight, procedure has long been recognized as the cornerstone of justice. As American Supreme Court Justice Frankfurter observed in *McNabb v. U.S.*,³⁴ "the history of liberty has largely been the history of observance of procedural safeguards."³⁵ If process falls short, justice will. And when justice falls short in a liberty-regarding society it is often either because of a failure to translate the culture of liberty from the traditions of Western legal thought into the ethos of some judges and lawyers, or because of the poor design of rules. My early and continued enthusiasm for identifying and using Charter principles in matters of criminal procedure³⁶ arose, not only because those principles reify the

³⁰ A.M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970), at 32.

³¹ To the contrary, see David Doherty (now the Hon. Justice David Doherty of the Ontario Court of Appeal) "The Charter and Reforming the Law of Evidence" (1987) 58 C.R. (3d) 314.

³² See the comments of the Assistant Deputy Minister of Department of Justice to the special joint committee of the Senate and the House of Commons, *Minutes of Proceedings and Evidence*, 32nd Parliament, 1st Session, January 27, 1981, at 43:32, The Deputy Minister and the then federal Minister of Justice, The Hon. Jean Chrétien, all recorded in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 504-505 (S.C.C.), where the Supreme Court of Canada rejected the apparent intent of the framers to confine s. 7 to matters of procedural review.

³³ See *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

³⁴ *McNabb v. U.S.*, 318 U.S. 332 (1942).

³⁵ *McNabb v. U.S.*, 318 U.S. 332, at 347 (1942), cited in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 513 (S.C.C.).

³⁶ See "The Constitutional Right to Present Defence Evidence in Criminal Cases" (1985) 63 Can. Bar Rev. 519; *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987);

priority that history has shown us should be given to fundamental individual rights in criminal cases, but also because Charter principles provide a clear opportunity to salvage from the tyranny of inadequate rules, the base underlying notion that makes Canadian criminal law such a noble thing in spite of the damage it can do to those who are convicted — the “principle . . . that the innocent must not be convicted”.³⁷

It is not that established procedural rules had been designed with the goal of obstructing this principle. Quite the opposite has been true. Most pre-Charter rules of procedure were liberty regarding. It is just that rules are, by their nature, “general” in the sense that they are to be applied where their conditions are met; the “rule of law” demands no less. Yet criminal trial procedure does not work well when it is rigid. This is mainly because criminal trial process is less about outcomes than it is about facts, and facts vary, and circumstances are dynamic. It is also because the criminal trial process is largely about “due process” or, as Bickel described it, “elemental justice to the individual”;³⁸ generalized and strictly limited rules of the kind expected in substantive law do not work well in matters of process because they can overreach, or underperform, losing their liberty-regarding function. Even with the best of intentions, the shortcomings of language and foresight invariably mean that general rules will catch cases that do not advance their underlying purposes, and miss cases that would. Charter oversight provides an important opportunity to correct this when it happens. This has largely occurred, but not in the way that one might have expected, and admittedly, not using the mode I had imagined.

“The Charter and the Rape Shield Provisions of The Criminal Code: More About Relevance and the Constitutional Exemptions Doctrine” (1989) 21 Ottawa L. Rev. 119.

³⁷ *R. v. Liepert*, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281, at para. 24 (S.C.C.). For a fuller description of this principle and its impact on criminal procedure see D. Paciocco, “Balancing the Rights of the Individual and Society in Matters of Truth and Proof: Part II – Evidence about Innocence” (2002) 81 Can. Bar Rev. 39. In “Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof” (2001), 80 Can. Bar Rev. 433, I make the case for securing the criminal law enforcement goal of permitting the truth about guilt to be established through the principle of access to evidence.

³⁸ A.M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970), at 32.

III. UNUSED 52: PROTECTING EXISTING RULES

When the Charter was initially proclaimed in force, it was natural to assume that it would be section 52 of the *Constitution Act, 1982*³⁹ that would temper the rules of criminal procedure. That was certainly my assumption.⁴⁰ In *R. v. Albright*,⁴¹ Lamer J. also anticipated this kind of impact when he said:

The conduct of a trial in general, including the application of the rules of evidence in a given case, must not result in the trial being unfair . . . If a rule of law, statutory or common law, were framed in such a way that it would be *per se* a violation of the right to a fair trial, then the statute would be declared inoperative or the common law declared to be otherwise.⁴²

For the most part, though, section 52 has had little work to do in this field; few rules of evidence or criminal procedure have been struck down or changed overtly because of recognized Charter breaches. Indeed, where existing rules have been struck down, they have, at times, been replaced by other rules or have engendered practices that in some respects provide less protection to accused persons.

The most obvious target for Charter challenge was the mandatory presumptions and reverse onus provisions that salted Canadian law. These rules, in turn, either put the onus on the accused to raise a reasonable doubt about a material fact (mandatory presumptions) or required the accused to actually prove a material fact (reverse onus provisions). Initially, the Charter looked as though it would sweep them all away. The guarantee of a constitutional presumption of innocence in section 11(d) raised that possibility and then *R. v. Oakes*⁴³ created the expectation. In *Oakes*, the Court struck down the presumption in section 8 of the *Narcotics Control Act*⁴⁴ that those who possessed narcotics did so for the purpose of trafficking. That section effectively called on the accused to disprove the intent to traffic in order to avoid conviction, even though not all those who were caught by its terms had possessed enough narcotic, or possessed it in circumstances, where intent to traffic could fairly be inferred. The

³⁹ Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

⁴⁰ *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987), at 15-16.

⁴¹ [1987] S.C.J. No. 56, 60 C.R. (3d) 97 (S.C.C.).

⁴² *R. v. Albright*, [1987] S.C.J. No. 56, at para. 25, 60 C.R. (3d) 97 (S.C.C.).

⁴³ [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁴⁴ R.S.C. 1985, c. N-1, now repealed and replaced by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, on May 14, 1997, SI/97-47.

provision therefore suffered from the frailty I describe above. It was over-inclusive. Given the burden it placed on the accused, the rule contemplated the conviction of those accused persons who could not fully persuade judges or juries that they had no intent to traffic but who could nonetheless raise a reasonable doubt about the reason for their possession. Since proof beyond a reasonable doubt is the minimum standard of conviction that is tolerated in a system intent on ensuring that the innocent not be convicted,⁴⁵ a conviction for trafficking in such a case would *prima facie* violate the Charter. In *Oakes*, the government could not justify section 8 using section 1 of the Charter, and so section 8 fell.

One could have been forgiven for assuming in the aftermath of *Oakes*⁴⁶ that it would be an imposing if not insurmountable burden for the state to justify provisions that tolerate conviction in the face of reasonable doubt. Yet this has not proved to be true. While some sections that have fallen,⁴⁷ there has been a “very clear trend” to upholding them.⁴⁸ Indeed, the Supreme Court of Canada has on several occasions on its own adopted the stratagem of reversing the onus of proof to protect public law enforcement interests.⁴⁹ Section 11(d) has not had the cleansing effect on presumptions that one may have initially thought. Indeed, this is an area where Charter law has backfired. Since presumptions and reverse onus provisions have been given effective constitutional approval, they

⁴⁵ The standard of proof beyond a reasonable doubt is protected constitutionally by the presumption of innocence: *R. v. Dubois*, [1985] S.C.J. No. 69, [1985] 2 S.C.R. 350 (S.C.C.).

⁴⁶ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁴⁷ See, for example, *R. v. Laba*, [1994] S.C.J. No. 106, [1994] 3 S.C.R. 965 (S.C.C.), striking down s. 394(1)(b) that possessed previous metal is unlawfully possessed. The section was not struck down because it imposed a burden on the accused, but instead because imposing a less onerous burden would have sufficed to protect the state interest. In *R. v. Curtis*, [1998] O.J. No. 467, 14 C.R. (5th) 328 (Ont. C.A.), s. 215(2), the burden of proof imposed on the accused relating to a lawful excuse for failing to provide the necessities of life was read down to include a lesser burden. *R. v. Boyle*, [1983] O.J. No. 3031, 35 C.R. (3d) 34 (Ont. C.A.), is one of the few cases to strike down a presumption in its entirety. The case found unconstitutional a presumption in s. 312(2) of R.S.C. 1970, c. C-34 (now s. 354(2)), that a person possessing a vehicle with a defaced serial number knows that it was obtained by an indictable offence.

⁴⁸ Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough: ON: Carswell, 2001), at 348.

⁴⁹ *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.), reversing the onus on the defence of extreme intoxication; *R. v. Stone*, [1999] S.C.J. No. 27, [1999] 2 S.C.R. 290 (S.C.C.), reversing the onus on automatism defences; *R. v. Audet*, [1996] S.C.J. No. 61, 48 C.R. (4th) 1 (S.C.C.), presuming a position of authority for teachers relative to students where consent is pleaded in defence of sexual interference charges.

have proliferated.⁵⁰ As Don Stuart has remarked, Canadian law is “conspicuous for its overuse of reverse onus causes”.⁵¹

Without question, the most dramatic occasion on which section 52 was used to strike down a rule of trial procedure was in *R. v. Seaboyer*,⁵² where again the problem was over-inclusiveness. *Seaboyer* involved a challenge to section 276 of the *Criminal Code*,⁵³ the so-called “rape shield” provision. That provision prevented accused persons from cross-examining sexual assault complainants about, or presenting evidence of, their past sexual experience unless the case fell into one of three tightly defined exceptions. While these exceptions inherently recognized that there would be some situations where evidence revealing the past sexual experience of sexual assault complainants would be helpful in raising a doubt about the guilt of the accused, the section was too restrictive. Parliament had not succeeded in identifying all cases where such evidence

⁵⁰ In 1997, Parliament reversed the onus on bail release for all drug traffickers (*Criminal Code*, R.S.C. 1985, c. C-46, s. 515(6)(d)) and those charged with criminal organization offences (*Criminal Code*, s. 515(6)(a)(ii)). In 2001, the *Anti-Terrorism Act* did the same for terrorism offences (*Anti-Terrorism Act*, S.C. 2001, c. 41, s. 19(4), see *Criminal Code*, s. 515(6)(a)(iii)) and for designated offences under the *Security of Information Act*, R.S.C. 1985, c. O-5 (*Anti-Terrorism Act*, S.C. 2001, c. 41, s. 19(4), see *Criminal Code*, s. 515(6)(a)(iv) and (v)). Parliament also created a public interest defence for the release of protected information by persons permanently bound to secrecy under the *Security of Information Act* but made it a reverse onus defence (*Anti-Terrorism Act*, S.C. 2001, c. 41, s. 29). That same statute placed an onus on the accused in criminal prosecutions for offences against protected persons. The accused must cast doubt on the truth of an assertion contained in a certificate issued by the Minister of Foreign Affairs that the crime victim was entitled under international law to protection from attack “against his or her person, freedom or dignity” (*Anti-Terrorism Act*, S.C. 2001, c. 41, s. 3(4), see *Criminal Code*, s. 7(10)). As a result of the cultural shift, reversing the onus to the accused is currently a favoured strategy for law and order reform proposals. Bill C-27 will reverse the onus for bail release for those charged with firearm offences (Bill C-27, *An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace*, 1st Sess., 39th Parl., 2006)). Bill C-35 proposes to reverse the onus in dangerous offender proceedings for repeat offenders (Bill C-35, *An Act to amend the Criminal Code (reverse onus in bail hearings for firearm-related offences*, 1st Sess., 39th Parl., 2006)). And Bill C-25 reverses the onus in money-laundering cases (Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make consequential amendment to another Act*, 1st Sess., 39th Parl., 2006 (S.C. 2006, c. 12, assented to December 14, 2006)). Without question, the penchant to get tough in this way has been influenced by the perceived approval found in constitutional jurisprudence. During Parliamentary debates, the Hon. Peter Milliken defended the government’s initiative to reverse the onus in dangerous offending proceedings by chiding an opposition member that “[h]e is fully aware that reverse onus provisions in the code already have been challenged and upheld as constitutionally strong” (the Hon. Peter Milliken, *House of Commons Debates*, Official Report (*Hansard*) Thursday, November 29, 2006, at 1629, referencing Bill C-27 during the second reading debate).

⁵¹ Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005), at 401.

⁵² [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

⁵³ R.S.C. 1985, c. C-46.

would be needed to present full answer and defence, and so it was contrary to the principles of fundamental justice guaranteed by section 7. This provision overshoot the mark by excluding probative evidence that would not be sufficiently prejudicial to justify excluding, and so it had to fall.

In some respects even the *Seaboyer*⁵⁴ challenge backfired. It was in *Seaboyer* that the Supreme Court of Canada recognized, for the first time, a judicial discretion to exclude defence evidence,⁵⁵ although it limited that power to cases where the probative value of the proof is substantially outweighed by the prejudice it causes.⁵⁶ Moreover, the Court signalled that rape-shield protections should apply even in cases involving prior sexual relations between the accused and the complainant, which had been unregulated by section 276.⁵⁷ As a result of *Seaboyer*, Parliament passed a replacement provision which incorporated that protection. While the *Seaboyer* challenge did reclaim some ground for those accused, it did so at the price of giving other important ground away.

To be sure, there have been other cases where modest section 52 victories have occurred. In *R. v. Bain*,⁵⁸ for example, the Supreme Court of Canada struck down a provision that permitted the Crown to exercise unlimited “stand asides” during jury selection. And in *R. v. Branco*,⁵⁹ a constitutional limit was read into section 650(2) of the *Criminal Code*⁶⁰ restricting the use of commission evidence against the accused at his trial to cases where the accused was both present and afforded an opportunity to cross-examine when that evidence was taken.

Beyond this modest array of cases, attempts to use the Charter to strike down legislated rules of evidence have largely foundered. In *R. v. Lyons*,⁶¹ special procedures in place relating to the identification of dangerous offenders survived. In *R. v. Corbett*,⁶² a constitutional challenge to section 12 of the *Canada Evidence Act*,⁶³ which permits the accused to be confronted when testifying with his or her prior criminal convictions,

⁵⁴ *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

⁵⁵ Previously the law had denied judges a discretion to exclude defence evidence based on its prejudice: *R. v. Valley*, [1986] O.J. No. 77, 26 C.C.C.(3d) 207 (Ont. C.A.); *R. v. Hawke*, [1975] O.J. No. 2200, 22 C.C.C. (2d) 19, at 54-55 (Ont. C.A.).

⁵⁶ *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 117, at 139 (S.C.C.).

⁵⁷ *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 117, at 158 (S.C.C.).

⁵⁸ [1992] S.C.J. No. 3, 10 C.R. (4th) 257 (S.C.C.).

⁵⁹ [1988] O.J. No. 120, 62 C.R. (3d) 371 (Ont. C.A.).

⁶⁰ R.S.C. 1985, c. C-46.

⁶¹ [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.).

⁶² [1988] S.C.J. No. 40, 64 C.R. (3d) 1 (S.C.C.).

⁶³ R.S.C. 1970, c. E-10.

failed to render the provision of no force or effect. In *R. v. Potvin*,⁶⁴ a constitutional challenge to section 715, which permits hearsay evidence from the preliminary inquiry to be admitted at trial in cases of necessity where the accused was given an opportunity to cross-examine, came up short. In deciding the case the Court refused to accept that fundamental justice includes a right to confront witnesses at trial.⁶⁵ In *R. v. L. (D.O.)*,⁶⁶ section 715.1, which permits videotaped statements that have been adopted by child witnesses to be used as proof of guilt, was upheld.⁶⁷ In *R. v. Levogiannis*,⁶⁸ section 486(2.1), permitting some complainants under 18 to testify from behind screens or to use closed circuit telecast facilities in sexual offence cases, survived a Charter attack. In *R. v. Rose*,⁶⁹ section 651(3) of the *Criminal Code*,⁷⁰ requiring those accused persons who lead evidence to address the jury first in closing submissions, was preserved. In *R. v. Mills*,⁷¹ a constitutional challenge to sections 278.1-278.91, statutory provisions imposing limits on the disclosure of the private records of complainants and witnesses in sexual offence cases, was upheld in the face of full answer and defence claims. In *R. v. Darrach*,⁷² a constitutional challenge to the successor provision to the one struck down in *Seaboyer*,⁷³ the “new” section 276, failed. In *R. v. Pan*,⁷⁴ the Supreme Court of Canada upheld the jury secrecy rule in section 649 of the *Criminal Code*,⁷⁵ and in *R. v. Pires*,⁷⁶ a constitutional challenge to the common law *Garofoli*⁷⁷ test used to secure leave to cross-examine search warrant affiants was dismissed.

In lower courts the results of challenges to trial procedures are no more impressive. In *R. v. Czuczman*⁷⁸ now section 475(1)(a), which permits trials *in absentia* of absconding accused, failed. Section 548 permitting

⁶⁴ [1989] S.C.J. No. 24, 68 C.R. (3d) 193 (S.C.C.).

⁶⁵ *R. v. Potvin*, [1989] S.C.J. No. 24, 68 C.R. (3d) 193 (S.C.C.).

⁶⁶ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

⁶⁷ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

⁶⁸ [1993] S.C.J. No. 70, 25 C.R. (4th) 325 (S.C.C.).

⁶⁹ [1998] S.C.J. No. 81, [1998] 3 S.C.R. 262 (S.C.C.).

⁷⁰ R.S.C. 1985, c. C-46.

⁷¹ [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

⁷² [2000] S.C.J. No. 46, 36 C.R. (5th) 233 (S.C.C.).

⁷³ *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

⁷⁴ [2001] S.C.J. No. 44, [2001] 2 S.C.R. 344 (S.C.C.).

⁷⁵ R.S.C. 1985, c. C-46.

⁷⁶ [2005] S.C.J. No. 67, 33 C.R. (6th) 241 (S.C.C.).

⁷⁷ *R. v. Garofoli*, [1990] S.C.J. No. 115, [1990] 2 S.C.R. 1421 (S.C.C.).

⁷⁸ [1986] O.J. No. 44, 49 C.R. (3d) 385 (Ont. C.A.), *affd* using different reasoning in *R. v. Tzimopoulos*, [1986] O.J. No. 817, 54 C.R. (3d) 1 (Ont. C.A.).

preliminary hearing judges to commit the accused to trial on offences not charged where those offences arise out of the same transaction the accused was charged with was also upheld in *R. v. Cancor Software Corp.*⁷⁹ Section 568, permitting the Crown to require jury trials for offences carrying penalties of more than five years, received constitutional endorsement.⁸⁰ And the power to indict directly under section 577 has survived.⁸¹

To a degree, even leaving aside those backfires where Charter challenges have ultimately reduced liberty interests,⁸² this paltry record of successful Charter litigation does lend some support to those early Charter bashers who said, “We don’t need this.” Charter oversight opponents were right in cautioning us that the very ideals that underlie the Charter “have been with us as root principles of our common law for many years”,⁸³ diminishing the utility of the exercise. It is not surprising, then, that most rules of trial process hold up well in the face of Charter challenge. As Quigley observes, for example, “section 11(a) had added nothing to the statutory and common law requirements for indictments and informations.”⁸⁴ As described above, sections 11(c) and 13 of the Charter, its expressed self-incrimination provisions, largely track in their text the protection that the law already recognized, and the constitutionalization of the voluntariness rule has added nothing. In *R. v. Cohn*,⁸⁵ Goodman J., whom Stuart credited with furnishing “the most general pronouncement as to what is meant by procedural fairness”,⁸⁶ described the accused as having:

the right to be presumed innocent until proven guilty beyond a reasonable doubt, to be informed without unreasonable delay of the specific offence with which he is charged, to have counsel, to have a reasonable time to prepare a defence, to call witnesses and not be compelled to give

⁷⁹ [1990] O.J. No. 1287, 79 C.R. (3d) 22 (Ont. C.A.), leave to appeal refused, [1991] 1 S.C.R. vii, 3 C.R. (4th) 194n (S.C.C.).

⁸⁰ *R. v. Hanneson*, [1987] O.J. No. 8, 31 C.C.C.(3d) 560 (Ont. H.C.J.).

⁸¹ *R. v. Moore*, [1986] M.J. No. 56, 50 C.R. (3d) 243 (Man. C.A.); *R. v. Arviv*, [1985] O.J. No. 2602, 45 C.R. (3d) 354 (Ont. C.A.), leave to appeal refused, [1985] 1 S.C.R. v (S.C.C.).

⁸² I explore this phenomenon, which I call “constitutional deflation” and the “rebound effect” in “Charter Vertigo: Losing Constitutional Balance in Criminal Cases” in J.E. Magnet, ed., *The Canadian Charter of Rights and Freedoms: Perspectives at Twenty-Five Years* [publication pending].

⁸³ *R. v. Gallant*, [1982] O.J. No. 3481, 70 C.C.C. (2d) 213, at 222 (Ont. Prov. Ct.).

⁸⁴ Tim Quigley, *Procedure in Canadian Criminal Law* (Scarborough, ON: Carswell, 1997), at 376.

⁸⁵ [1984] O.J. No. 3344, 42 C.R. (3d) 1 (Ont. C.A.).

⁸⁶ Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough, ON: Carswell, 2001), at 177.

evidence. [And] he has the right to be tried by an independent and impartial tribunal.⁸⁷

We had all of these things prior to the Charter. To be sure, it would have been a condemnation of our past commitment to fundamental justice had the Charter washed through the criminal trial process bowling laws over in its wake. Still, to draw the conclusion that the missing clap of section 52 declarations shows that the Charter has done little is incorrect, even forgetting about the new trial process rules I describe above.

First, to rely on failed challenges to conclude that the Charter has had little impact would be to fail to recognize the interpretative impact it has had on the operation of law. Consider, for example, the interpretation that has been given to the sexual offence provisions in sections 276 and 278.1-278.91. The constitutional challenge in *Darrach*⁸⁸ to new section 276 “failed” for one reason alone; although the heart of the section was open to two interpretations, one constitutional⁸⁹ and the other unconstitutional,⁹⁰ consistent with now basic canons of interpretation the provisions were read so that they would reflect the minimum constitutional requirements articulated in *R. v. Seaboyer*.⁹¹ It is unlikely they would have been interpreted this cautiously in a non-Charter milieu.

Similarly, the constitutional challenge to sections 278.1-278.91 “failed” in *R. v. Mills*⁹² only because the Supreme Court of Canada veritably tortured some of its provisions into constitutionally compliant construction, including, for example, by (1) reading a list of 11 “[i]nsufficient grounds” of relevance⁹³ as amounting to no more than a prohibition on making bald assertions unsupported by evidence or context;⁹⁴ (2) by interpreting the requirement that a judge *shall* consider a list of factors in assessing “the interests of justice”⁹⁵ as a “do what you can in light of the information you have available to you” provision;⁹⁶ and (3) by regarding a section

⁸⁷ *R. v. Cohn*, [1984] O.J. No. 3344, 42 C.R. (3d) 1 (Ont. C.A.).

⁸⁸ *R. v. Darrach*, [2000] S.C.J. No. 46, 36 C.R. (5th) 233 (S.C.C.).

⁸⁹ See “The New Rape Shield Provisions in Section 276 Should Survive Charter Challenge” (1993) 21 C.R. (4th) 223, where I advanced this interpretation.

⁹⁰ See Ron Delisle, “Potential Charter Challenges to the New Rape Shield Law” (1992) 13 C.R. (4th) 390.

⁹¹ *R. v. Darrach*, [2000] S.C.J. No. 46, 36 C.R. (5th) 233, at paras. 32-33 (S.C.C.); *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

⁹² [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

⁹³ See s. 278.3(4) of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁹⁴ See *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at paras. 118, 120 (S.C.C.).

⁹⁵ See s. 278.5(1), (2) of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁹⁶ See *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 134 (S.C.C.).

requiring that the accused “has established” the preconditions for disclosure⁹⁷ as an “err on the side of disclosure” provision.⁹⁸

Although not a fair trial case, *per se*, *United States v. Ferras*⁹⁹ provides yet another example. The Supreme Court of Canada interpreted the requirement that evidence must “justify committal” that is found in section 29(1) of the *Extradition Act*¹⁰⁰ as requiring judges in extradition cases to ensure that the evidence presented is not so unreliable that it would be dangerous or unsafe to convict upon,¹⁰¹ this notwithstanding a long history of denying extradition judges the authority to consider the credibility and reliability of proof.¹⁰² The Court arrived at this surprising interpretation because of its conclusion that the Charter requires, at a minimum, that there must be a meaningful judicial decision based on an assessment of the evidence before one’s liberty is denied.¹⁰³

The Charter’s impact on the interpretation and application of trial procedures is not confined to cases where Charter challenges have been brought. For example, the right of the accused to cross-examine has been a right since long before the Charter but is now given more vitality than it had at common law.¹⁰⁴ Indeed, in *R. v. Potvin*,¹⁰⁵ Wilson J. cautioned courts that the “Charter casts doubt on the continued validity of pre-Charter decisions which did not construe the right to full opportunity to cross-examine in the broad and generous manner befitting its constitutional status”,¹⁰⁶ and the Supreme Court of Canada has held that the right to cross-examine Crown witnesses “without significant and unwarranted constraint” is an important part of the right to full answer and defence as understood in a Charter milieu.¹⁰⁷

⁹⁷ See s. 278.5(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁹⁸ See *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 94 (re the balance), paras. 120, 137 (re relevance) (S.C.C.). And see *R. v. Shearing*, [2002] S.C.J. No. 59, 165 C.C.C. (3d) 225, at 264 (S.C.C.).

⁹⁹ [2006] S.C.J. No. 33, 209 C.C.C. (3d) 353 (S.C.C.).

¹⁰⁰ S.C. 1999, c. 18.

¹⁰¹ *United States v. Ferras*, [2006] S.C.J. No. 33, 209 C.C.C. (3d) 353, at para. 54 (S.C.C.).

¹⁰² *United States of America v. Sheppard*, [1976] S.C.J. No. 106, [1977] 2 S.C.R. 1067 (S.C.C.).

¹⁰³ *United States v. Ferras*, [2006] S.C.J. No. 33, 209 C.C.C. (3d) 353, at paras. 25-26 (S.C.C.).

¹⁰⁴ *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595, at paras. 157-161 (S.C.C.).

¹⁰⁵ *R. v. Potvin*, [1989] S.C.J. No. 24, 68 C.R. (3d) 193 (S.C.C.).

¹⁰⁶ *R. v. Potvin*, [1989] S.C.J. No. 24, 68 C.R. (3d) 193, at 231 (S.C.C.).

¹⁰⁷ *R. v. Lytle*, [2004] S.C.J. No. 8, [2004] 1 S.C.R. 193, at para. 41 (S.C.C.). Still, the constitutional right to cross-examine is not without limits. It is confined to relevant and material information (*R. v. Pires*, [2005] S.C.J. No. 67, 33 C.R. (6th) 241 (S.C.C.)) and does not include either a right to contemporaneous cross-examination: *R. v. B. (K.G.)*, [1993] S.C.J. No. 22, [1993]

In *R. v. Salituro*,¹⁰⁸ as the Hon. Marc Rosenberg points out,¹⁰⁹ the equality provisions of the Charter emboldened the Supreme Court of Canada to revise the law of spousal evidence by holding that hopelessly irreconcilable separation removes the bar on spousal competence.

In *R. v. P. (M.B.)*,¹¹⁰ the Supreme Court of Canada addressed the long-standing rule empowering judges to permit the Crown to reopen its case. The guidelines that emerged are overtly Charter sensitive, with the Court advertent not only to the constitutional demands of the principle of a case to meet but also to concern about the indirect compulsion of the accused.

Developments in the challenge for cause rules relating to jury selection also have their genesis in the Charter right to a fair trial¹¹¹ and, without question, much of their inspiration in the race-based context rests in equality rights influence.¹¹²

In short, the first reason why the poor section 52 performance cannot be taken as a sign that there are few Charter tracks in matters of criminal process is that even when the Charter does not produce declarations of unconstitutionality, it changes things.

The key reason, however, why the feeble section 52 results do not demonstrate the failing impact of the Charter is that the Charter has, in critical ways, been able to work its magic, furtively, behind the scenes, through the operation of three techniques that it has either inspired or contributed to; the rise of a two-pronged “exclusionary discretion”, the growth of what can perhaps be called the “inclusionary discretion” which is manifest in those principled rules of admissibility that are inherently flexible enough to operate in ways that respect the Charter; and the more general “Charter adjustment power”. Together, these Charter-inspired practices have changed the culture of legal rules. It is not wrong to say

1 S.C.R. 740 (S.C.C.), or the right to conduct prejudicial cross-examinations of vulnerable witnesses: *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595 (S.C.C.).

¹⁰⁸ [1991] S.C.J. No. 97, 68 C.C.C. (3d) 289 (S.C.C.).

¹⁰⁹ The Hon. Marc Rosenberg, “The Impact of the *Charter* on the Law of Evidence in Criminal Cases” in Jamie Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996), at 198.

¹¹⁰ [1994] S.C.J. No. 27, 29 C.R. (4th) 209 (S.C.C.).

¹¹¹ *R. v. Sherratt*, [1991] S.C.J. No. 21, [1991] 1 S.C.R. 509, at 532 (S.C.C.).

¹¹² See *R. v. Parks*, [1993] O.J. No. 2157, 15 O.R. (3d) 324 (Ont. C.A.), and *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128 (S.C.C.).

that they have changed both lawyering during the trial process, as well as the business of judging.¹¹³

IV. THE CHARTER-INSPIRED EXCLUSIONARY DISCRETION

1. The Long Road to Recognition

The story of the rise of the exclusionary discretion begins with the decision in *R. v. Corbett*.¹¹⁴ As indicated, *Corbett* involved a failed Charter challenge to section 12 of the *Canada Evidence Act*.¹¹⁵ This is the provision that allows witnesses, including those who are accused, to be cross-examined using their prior criminal convictions. Section 12 permits this to be done solely for the purpose of showing that a witness's testimony should not be believed because of their discreditable character. Yet the unquestionable reality is that there will be cases where the nature of the convictions used during cross-examination will do far less to show the accused's dishonesty and far more to show his or her criminal propensity, making it likely that juries will be improperly influenced. In *Corbett's* case, for example, the primary conviction at issue was for manslaughter. Given the murder charge he faced, that conviction seemed to tell the jury more about his capacity for violence than his honesty. *Corbett* therefore argued that the section was unconstitutional contrary to the fair trial guarantee in section 11(d) of the Charter. He urged that it "unfairly prejudices an accused, in the sense that it presents the trier of fact with evidence, not otherwise admissible, which the trier of fact will inevitably take into account not only on the issue of credibility but also [impermissibly] on the ultimate issue of guilt or innocence".¹¹⁶

Even though there would obviously be cases where the risk of misuse of the evidence would be overwhelming, none of the judges found the provision to be systemically unfair and so the constitutional challenge failed. Four¹¹⁷ of the six agreed,¹¹⁸ however, that a trial judge

¹¹³ Indeed, the change has been so profound that in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996), the Hon. Michael Moldaver penned a scathing speech decrying what the Charter has done to the criminal trial process, in which he longed for pre-Charter days. See "The Impact of the *Charter* on the Criminal Trial Process — A Trial Judge's Perspective".

¹¹⁴ [1988] S.C.J. No. 40, 64 C.R. (3d) 1 (S.C.C.).

¹¹⁵ R.S.C. 1985, c. C-5.

¹¹⁶ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 15 (S.C.C.).

¹¹⁷ Chief Justice Dickson and Lamer, Beetz and La Forest JJ.

¹¹⁸ Justices McIntyre and Le Dain disagreed.

has an exclusionary discretion to disallow the cross-examination of the accused on his prior convictions in order to prevent prejudice from undermining a fair trial, but only one judge, La Forest J., felt that the provision operated unfairly in Corbett's case. The thing that hurt Corbett's unfairness claim was that he had himself made generous use of the criminal convictions of Crown witnesses to urge that their character made them incredible. Given that, he could hardly maintain his protest that it was unfair to permit the Crown to show that he, too, suffered from the same discreditable character he was relying on to discredit Crown witnesses. Even though Corbett's conviction was affirmed and the section survived, the recognition of an exclusionary discretion represented a significant victory for due process.

Although history would prove it to be significant, the Charter "victory" in *Corbett*¹¹⁹ was, without question, a cautious, even grudging one. It is interesting that when *Corbett* was decided the practice of the Supreme Court of Canada had been to strike down statutes in their entirety where they could produce unconstitutional results in some cases, even though they would operate appropriately in a majority of cases.¹²⁰ I think it is a fair read that the decision of the Court not to follow its then usual practice and declare section 12 to be of no force or effect discloses its reluctance to get into the business of using the Charter to recast rules of criminal procedure and evidence. Without question, the recognition of an exclusionary discretion was a strategy intended to preserve section 12 from Charter attack, even in the face of its difficulties.

Justice La Forest, in the key decision, acknowledged that it is "[t]he recognition and proper exercise of this discretion [that] . . . ensures that s. 12 is constitutionally valid"¹²¹ but, curiously, he scrupulously avoided

¹¹⁹ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 15 (S.C.C.).

¹²⁰ See the discussion in Don Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough, ON: Carswell, 1991), at 417-25, where he describes the practice of the Supreme Court of Canada in its first decade of striking down statutes in their entirety, rather than "reading down", "reading in", or creating constitutional exemptions. For example, in *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.), the presumption of intent to traffic was struck down even though many cases could factually support that inference; it was struck to protect those that did not. In *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.), the seven-year minimum sentence for trafficking was struck in its entirety even though Smith, similar to many others caught by the provision, deserved that sentence; it was struck to protect those who did not. And in *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.), decided three years after *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1 (S.C.C.), s. 276 was taken down to ensure that those relatively few cases where evidence would be admissible were not caught by a provision that could have withstood complaint in the majority of cases it caught.

¹²¹ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 56 (S.C.C.). Justice Beetz made the same observation, at 23.

grounding that discretion in the Charter.¹²² At times, he seemed to rest the discretion on the interpretation of the statute.¹²³ At other times, he focused on the common law, although ultimately the decision seems to have turned on a common law inspired interpretation of the Act.¹²⁴ In any event, the reasoning in the case leaves the impression that the Court was simply anxious to find a way to avoid tearing down an evidentiary provision. The truth be told, there are in fact serious technical problems with finding the discretion either in the statute or the common law, or in a combination of the two. Prior to Corbett's Charter challenge, the received position was that section 12 could not be interpreted to admit of an exclusionary discretion.¹²⁵ While the provision does employ the word "may", it is obvious on reading section 12 that "may" is used to describe the permission the section gives to the cross-examiner. There is no natural construction that permits it to be read as signalling that the procedure is dependent on the permission of the judge, a point that McIntyre and Le Dain JJ. relied upon in dissenting from the claim that section 12 permitted of any such discretion.¹²⁶ As for the common law source, McIntyre and Le Dain JJ. make the trenchant point that the common law is subject to statutory provisions; it cannot control their field of operation.¹²⁷ Moreover, there were outstanding issues about the reach of any common law exclusionary discretion, as common law courts, uncomfortable with the idea, placed strict limits on any such power. While Charter courts have, at times, cited the old Privy Council *dicta* in *Kuruma v. R.*¹²⁸ as supporting the notion that common law judges had the "discretion to exclude evidence . . . 'if the strict rules of admissibility would operate unfairly against the accused'"¹²⁹ that was decidedly not the pre-Charter practice in this country. We were the sons and daughters of *R. v. Wray*,¹³⁰ where the Supreme Court of Canada had defined that authority in such limited fashion as to render it virtually useless. Suffice

¹²² *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 52 (S.C.C.).

¹²³ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 45-46, 48-49 (S.C.C.).

¹²⁴ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 33-35, 45, 47 (S.C.C.).

¹²⁵ *R. v. Stratton*, [1978] O.J. No. 3536, 21 O.R. (2d) 258 (Ont. C.A.).

¹²⁶ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 23 (S.C.C.).

¹²⁷ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 24 (S.C.C.).

¹²⁸ *Kuruma v. R.*, [1955] A.C. 197 (P.C.).

¹²⁹ See, for example, *R. v. Harrer*, [1995] S.C.J. No. 81, at paras. 21, 41, 42 C.R. (4th) 269, at 287 (S.C.C.).

¹³⁰ [1970] S.C.J. No. 80, [1971] S.C.R. 272 (S.C.C.), whose grudging discretionary formula required the unlikely triumvirate of grave prejudice, tenuous admissibility and trifling probative value.

it to say that the common law did not provide a hospitable environment for the discretion called upon in *Corbett*.¹³¹

Although it was largely left unsaid, there therefore seems to be little question that the discretion in *Corbett*¹³² was fashioned creatively as a way to avoid striking the provision down. The Hon. Justice Rosenberg hailed resort to this kind of discretion as a way of relieving the most blatant unfairness while avoiding “the unpalatable result of admitting that all trials in Canada since time immemorial have been unfair”.¹³³ The exclusionary discretion in *Corbett* owes its recognition less to statutory construction or true common law reasoning than it does to the constitutional sword of Damocles that hung over the provision; had the discretion not been recognized somehow, anyhow, the Court would have had no choice but to strike it down, yet the Court was simply not ready yet to attribute exclusionary discretion to the constitution, where it could become a generally available tool. *Corbett* was a court trying to take baby steps, but instead stumbling over the threshold of profound change.

In *R. v. Potvin*,¹³⁴ the Court again divined a saving exclusionary discretion from a controversial statutory interpretation.¹³⁵ In doing so, it was able to uphold section 715 of the *Criminal Code*,¹³⁶ a hearsay exception that ordinarily assists the Crown by allowing the admission of testimony from a preliminary inquiry to be admitted during trial, provided the witness is unavailable within the meaning of the statute and the accused had a real opportunity to cross-examine. In spite of the Court holding that the discretion was forged from the words of the provision, the *Potvin* discretion was also unquestionably Charter-born. Only this time the relationship was made modestly more overt. Justice Wilson relied on Charter values exhibited in section 24(2) to affirm that the statutory discretion had to be broad enough to support the rejection of evidence

¹³¹ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 15 (S.C.C.).

¹³² *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 15 (S.C.C.).

¹³³ The Hon. Marc Rosenberg “The Impact of the *Charter* on the Law of Evidence in Criminal Cases” in Jamie Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996), at 191.

¹³⁴ [1989] S.C.J. No. 24, 68 C.R. (3d) 193 (S.C.C.).

¹³⁵ The discretion had been denied as a matter of statutory interpretation in *R. v. Kaddoura*, [1987] A.J. No. 1021, 41 C.C.C. (3d) 371 (Alta. C.A.), leave to appeal refused 42 C.C.C. (3d) vi (S.C.C.), but accepted in *R. v. Sophonow (No. 2)* (1986), 25 C.C.C. (3d) 415 (Man. C.A.), leave to appeal refused 54 C.R. (3d) xxvii (S.C.C.). The language of the provision, for reasons similar to those advanced above relating to s. 715, hardly seems to support that construction.

¹³⁶ R.S.C. 1985, c. C-46.

that was unfairly obtained.¹³⁷ This was a major development, as previously, with the exception of some secondary *dictum* in *R. v. Clarkson*,¹³⁸ the parsimonious exclusionary discretion that had been recognized in the law of evidence operated only to protect the integrity of the trial from evidence that would distort its outcome. In the end, the Court adopted the exclusionary formula that is now ubiquitous in the law of evidence, namely, the power of courts to exclude evidence where its prejudice outweighs its probative value, and it endorsed a sweeping concept of prejudice. Only this open and generous standard, the Court felt, could enable the “two competing and frequently conflicting concerns’ of fair treatment of the accused and society’s interest in the admission of probative evidence in order to get at the truth of the matter in issue” to be balanced.¹³⁹

The following year, 1990, the decision in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*¹⁴⁰ was released. I consider it to be a significant decision even though the Charter challenge again failed. Its importance comes from the acknowledgment by La Forest J. that sections 7,¹⁴¹ and 11(d)¹⁴² of the Charter give judges the residual discretion to relax the rules of evidence to ensure that the accused is given a fair trial, and that this is a generic exclusionary discretion that can be used, even when not contemplated in statutory language.¹⁴³ The case involved a constitutional challenge to section 17 of the *Combines Investigation Act*¹⁴⁴ that required individuals to attend under order and answer questions posed by the regulator. While that statute included a “use immunity” protection in section 20(2) preventing any answers given from being used in subsequent criminal proceedings, it did not provide for the exclusion of evidence found as a result of those answers. Justice La Forest reasoned that the principles of fundamental justice would require

¹³⁷ *R. v. Potvin*, [1989] S.C.J. No. 24, 68 C.R. (3d) 193, at 237 (S.C.C.).

¹³⁸ [1986] S.C.J. No. 20, 50 C.R. (3d) 289 (S.C.C.); see R.J. Delisle, “Annotation to *Clarkson v. R.*” (1986) 50 C.R. (3d) 290.

¹³⁹ *R. v. Potvin*, [1989] S.C.J. No. 24, 68 C.R. (3d) 193, at 238 (S.C.C.).

¹⁴⁰ [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425 (S.C.C.).

¹⁴¹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 563 (S.C.C.), citing *R. v. Williams*, [1985] O.J. No. 2489, 44 C.R. (3d) 351 (Ont. C.A.).

¹⁴² *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 560 (S.C.C.).

¹⁴³ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 562-63 (S.C.C.).

¹⁴⁴ R.S.C. 1970, c. C-23, since repealed.

some immunity for this kind of derivative evidence, but resisted an absolute rule. In order to save the statute he had to find a way to permit exclusion of derivative evidence where it would operate unfairly. Since there was no way to ground that exclusion in the statute, he had to link it to the Charter, and, in the process, recognized a general exclusionary authority. He combined the statutory discretion that was employed in *Corbett*¹⁴⁵ with the formula endorsed in *Potvin*¹⁴⁶ and converted them into a generic, non-statute dependent, constitutional tool by saying:

I see no reason why an approach like that in the now constitutionalized rule adopted in the case of prejudicial evidence should not be extended to derivative evidence which, like other prejudicial evidence within the rule, can only be dealt with having due regard to the need to balance the right of the accused and that of the public in a specific context.¹⁴⁷

While the decision of La Forest J. in *Thomson Newspapers* represented an important recognition that the true locus of this kind of discretion in a constitutional system has to be in the Charter, his comments were *obiter* as the Charter challenge failed on other grounds. Three years later, in *R. v. L. (D.O.)*,¹⁴⁸ this general constitutional tool was in fact put to overt use by the Court to save section 715.1 of the *Criminal Code*,¹⁴⁹ a provision that permitted the adopted videotaped testimony of young sexual assault complainants to be admitted as evidence during trial. The majority held without pretence to construction or common law gloss, that:

the incorporation of judicial discretion into s. 715.1 which permits a trial judge to edit or refuse to admit videotaped evidence where its prejudicial effect outweighs its probative value, ensures that s. 715.1 is consistent with fundamental principles of justice and the right to a fair trial protected by ss. 7 and 11(d) of the *Charter*.¹⁵⁰

The same day that *L. (D.O.)* was released, the Court issued its decision in *R. v. Levogiannis*,¹⁵¹ upholding section 486(2.1) [now section 486.2(4), as am. S.C. 2005, c. 2005, c. 32, s. 15] of the *Criminal Code*¹⁵² against

¹⁴⁵ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 15 (S.C.C.).

¹⁴⁶ *R. v. Potvin*, [1989] S.C.J. No. 24, 68 C.R. (3d) 193 (S.C.C.).

¹⁴⁷ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 560-61 (S.C.C.).

¹⁴⁸ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

¹⁴⁹ R.S.C. 1985, c. C-46.

¹⁵⁰ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, 25 C.R. (4th) 285, at 291 (S.C.C.).

¹⁵¹ [1993] S.C.J. No. 70, 25 C.R. (4th) 325 (S.C.C.).

¹⁵² R.S.C. 1985, c. C-46.

Charter attack. That section permits, among other things, children to give their evidence from behind a screen in sexual offence cases. The accused claimed that this procedure could prejudice him and compromise his ability to cross-examine effectively. The Court did not dismiss the possibility that use of a screen could work unfairly in this way. Instead, it noted that the power to use the screen was discretionary and not mandatory. Since the provision in issue in *R. v. Levogiannis* had been crafted by Parliament to require a discretionary determination that can be used to take account of Charter interests, there was no need to create an exclusionary power to save the section. Its inherent flexibility would be enough to protect Charter interests.

V. THE SCOPE AND NATURE OF THE EXCLUSIONARY DISCRETION

1. The General Balance and the Requisite Priority on Liberty Interests

In 1995, the authority to exclude technically admissible evidence to preserve Charter interests was again affirmed in *R. v. Harrer*¹⁵³ where the Court featured the reach and flexibility of the balancing process. Harrer had been apprehended by American immigration authorities. While being questioned she implicated herself in a Canadian crime. Since the Charter applies solely to the activities of Canadian state agents, the Court held that she could not use Charter rights to impugn the way those American authorities had questioned her. She argued, in the alternative, that the Charter could be used to prevent the admission of that evidence at her Canadian trial, and she invoked the exclusionary discretion claiming that it would render her trial unfair for a Canadian court to rely on statements she made in the United States in circumstances that would not have respected her Charter rights, had those statements been secured in the same fashion in Canada by Canadian state agents.¹⁵⁴

The Court rejected the claim that admission would be unfair in her case, but La Forest and McLachlin JJ. described the constitutional authority to exclude in sweeping terms. Justice La Forest cautioned that the “general principle that an accused is entitled to a fair trial cannot be

¹⁵³ [1995] S.C.J. No. 81, 42 C.R. (4th) 269 (S.C.C.).

¹⁵⁴ Specifically, American authorities, while complying with American standards, had failed to meet Charter standards by not readvising her of her right to counsel when the purpose of their questioning changed from her immigration status to a different form of legal jeopardy, namely, her complicity in the crime of assisting another to escape lawful custody in Canada.

entirely reduced to specific rules”.¹⁵⁵ Justice McLachlin gave the discretion equal breadth but more detailed content. Fairness, she explained, is to be determined contextually, bearing in mind not only the interests of the accused, but also the interests of the community. It is a search for balance.¹⁵⁶ She then illustrated in a non-exhaustive way the wide range of factors that could impel exclusion:

Evidence may render a trial unfair for a variety of reasons. The way in which it was taken may render it unreliable. Its potential for misleading the trier of fact may outweigh such minimal value it might possess. Again, the police may have acted in such an abusive fashion that the court concludes the admission of the evidence would irremediably taint the fairness of the trial itself.¹⁵⁷

Quite clearly, when it comes to balancing the exclusion of evidence tendered by the state against these broad-based kinds of consideration, the state-based interest in admission will relate to its ability to demonstrate the guilt of the accused. At times the Supreme Court of Canada has articulated that interest with precision given the specific context of the case. In *R. v. L. (D.O.)*,¹⁵⁸ for example, in describing the state interest in relying on the adopted videotaped evidence of children who were having difficulties presenting their versions through conventional testimony, L’Heureux-Dubé J. spoke of state interest in adopting rules to “ensure reliability” of the evidence presented, and to make child witness evidence available.¹⁵⁹ More often in balancing competing state-based inclusionary considerations, judges tend to speak in broader terms, using phrases such as the “Crown’s interest in obtaining the evidence”,¹⁶⁰ “the principle . . . that, in a search for truth, relevant evidence should be available to the trier of fact”,¹⁶¹ and the state interest in “having the trial process arrive at the truth”.¹⁶²

These are, of course, vitally important state interests. The ultimate point of the criminal trial is to arrive at the truth, subject to those qualifications required to make it “just”, and it is obvious that the best

¹⁵⁵ *R. v. Harrer*, [1995] S.C.J. No. 81, 42 C.R. (4th) 269, at para. 23 (S.C.C.).

¹⁵⁶ *R. v. Harrer*, [1995] S.C.J. No. 81, 42 C.R. (4th) 269, at para. 45 (S.C.C.).

¹⁵⁷ *R. v. Harrer*, [1995] S.C.J. No. 81, 42 C.R. (4th) 269, at para. 46 (S.C.C.).

¹⁵⁸ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

¹⁵⁹ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, at para. 53, 25 C.R. (4th) 285 (S.C.C.).

¹⁶⁰ *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, at para. 315 (S.C.C.).

¹⁶¹ *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, at para. 108 (S.C.C.); *R. v. Jarvis*, [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757, at para. 68 (S.C.C.).

¹⁶² *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 74 (S.C.C.).

way to arrive at the truth is by furnishing access to as much relevant information as possible. When it comes to fair trial balancing, however, there is an important consideration that must be respected: the state interests and those of the accused are not in equal calibration. As the Supreme Court of Canada has made clear, while the public interest is always to be measured in achieving constitutional balance, in a criminal trial the “primary emphasis [is] on the rights of the accused because . . . of the requirement of a fair trial to avoid the wrongful conviction of the innocent.”¹⁶³ The highest principled value in balancing competing considerations in the criminal process has to be the protection of the innocent. Where Crown evidence is admissible under ordinary rules of admission, though, the law will have already signalled that in ordinary circumstances admission is appropriate. All of these considerations translate well into the generic formula adopted by the majority in *R. v. Potvin*¹⁶⁴ and that has now become truly familiar. The Charter gives trial judges the power to exclude otherwise admissible Crown evidence where its probative value is outweighed by its prejudicial effects, whatever they might be, always bearing in mind the importance of particularly protecting the innocent.

2. The Special Case of Unreliability

In spite of the generality of the constitutional discretion, care has to be used in grounding pro-exclusionary prejudice in concerns about the inherent reliability of evidence. It has to be remembered that evidence is submitted to two kinds of assessment, admissibility and deliberation. There have been long-standing efforts made in Canadian law to prevent judges from usurping the role of the trier of fact, whose ultimate function it is to assess reliability. The fact that judges or juries will assess the reliability of admitted evidence before using it does diminish the force of requests for reliability-based discretionary exclusion.

The case of *R. v. Buric*,¹⁶⁵ however, appears to take that caution too far. There the police tainted the evidence of their key witness by showing him witness statements and other fruits of their investigation before securing his version. The trial judge was of the view that this witness,

¹⁶³ *R. v. Shearing*, [2002] S.C.J. No. 59, 165 C.C.C. (3d) 225, at 264 (S.C.C.); *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 89 (S.C.C.).

¹⁶⁴ *R. v. Potvin*, [1989] S.C.J. No. 24, 68 C.R. (3d) 193, at 237 (S.C.C.).

¹⁶⁵ [1996] O.J. No. 1657, 28 O.R. (3d) 737, at 748 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

already unsavoury, and who had swung a deal with the police in exchange for his testimony, appeared to have tailored his proof to meet the evidence he had been shown. The trial judge stopped short of finding an abuse of process, but held that the admission of such unreliable evidence would render the trial unfair. That exclusionary decision was overturned. The Ontario Court of Appeal, in a decision upheld by endorsement in the Supreme Court of Canada, ruled without apparent qualification that: “[t]he admission of evidence which may be unreliable does not *per se* render a trial unfair. It is for the jury to assess the quality of the evidence.”¹⁶⁶

That proposition is questionable, stated, as it is, in such apparently absolute terms. Recall that in *R. v. Harrer*¹⁶⁷ McLachlin J. said that the “way in which [evidence is] taken may render it unreliable”,¹⁶⁸ thereby supporting fair trial exclusion, which was exactly the complaint made in *Buric*.¹⁶⁹

In spite of this, the *Buric*¹⁷⁰ holding has influenced the way that courts have exercised their exclusionary discretion where the essential prejudice concern rests with unreliability. In *R. v. Campbell*,¹⁷¹ for example, the Ontario Court of Appeal held that “it was not open to him to conduct a *voir dire* on the question of admissibility” of the evidence of a jail house informant based on reliability concerns, as reliability was for the trier of fact to determine.¹⁷² Similarly, courts tend not to use their discretion to exclude voluntary confessions,¹⁷³ or confessions not made

¹⁶⁶ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737, at 750 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.). Similar reasoning was employed in the extradition case of *United States of America v. Ferras*. While developing the law so as to ensure that judges would not act on unreliable evidence when assessing a *prima facie* case for extradition, the Court reasoned that judges assessing *prima facie* cases during preliminary hearings do not need the same authority to reject unreliable proof because, where they commit the accused, the tier of fact will assess the evidence during trial deliberations to ferret out the unreliable: *United States of America v. Ferras*, [2006] S.C.J. No. 33, 209 C.C.C. (3d) 353, at paras. 47-48 (S.C.C.).

¹⁶⁷ [1995] S.C.J. No. 81, 42 C.R. (4th) 269 (S.C.C.).

¹⁶⁸ *R. v. Harrer*, [1995] S.C.J. No. 81, 42 C.R. (4th) 269, at para. 46 (S.C.C.).

¹⁶⁹ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

¹⁷⁰ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

¹⁷¹ [2005] O.J. No. 4669 (Ont. C.A.).

¹⁷² *R. v. Campbell*, [2005] O.J. No. 4669, at para. 11 (Ont. C.A.), and see *R. v. Mazija*, [2006] O.J. No. 2838 (Ont. S.C.J.).

¹⁷³ See *R. v. McCreery*, [1996] B.C.J. No. 2403 (B.C.S.C.).

to persons in authority,¹⁷⁴ because of potential unreliability. The appropriate legal mechanism, they hold, is for judges to warn juries about the frailties that raise those reliability concerns, and let the juries decide.¹⁷⁵

While courts should always factor in the reality that a trier of fact will consider reliability of all admitted evidence, it is difficult to treat any of this as a legitimate absolute prohibition on using the discretion to exclude unreliable Crown proof. After all, in both *R. v. Potvin*¹⁷⁶ and *R. v. L. (D.O.)*,¹⁷⁷ the pro-exclusionary concerns that were balanced by the Court related to the fear that the hearsay evidence being admitted would be unreliable without cross-examination. And Courts have, for example, reserved the right to exclude “in dock” identifications where their prejudice outweighs their probative value, and the “prejudice” in such cases has a fast link to reliability.¹⁷⁸ Moreover, as will be described below, threshold “unreliability” is a key consideration in excluding hearsay, expert opinion evidence, and even similar fact evidence.¹⁷⁹

It is difficult to reconcile these practices with the apparently unequivocal reasoning in *Buric*.¹⁸⁰ Justice Weiler attempted in her concurring decision to distinguish the exclusionary discretion from the operation of exclusionary rules by noting that where the latter rules apply, evidence is presumptively inadmissible, but where the discretion is invited, the evidence is presumptively admissible.¹⁸¹ This is certainly true but these fixed rules and the exclusionary discretion share the goal of increasing the accuracy of judicial outcomes. It is difficult to see why the prejudgment about reliability that is inherent in general rules of

¹⁷⁴ In *R. v. Wells*, [1996] B.C.J. No. 1233, 107 C.C.C. (3d) 504 (B.C.C.A.), the Court relied on the Charter-based discretion to support the exclusion of a coerced confession made to the father of a sexual assault victim, but at the Supreme Court of Canada, the Court made a fast link to admissibility based on whether the father could be perceived to be a person in authority, and if so, whether the statement was voluntary: *R. v. Wells*, [1998] S.C.J. No. 67, [1998] 2 S.C.R. 517 (S.C.C.).

¹⁷⁵ *R. v. Wells*, [1998] S.C.J. No. 67, [1998] 2 S.C.R. 517, at para. 14 (S.C.C.).

¹⁷⁶ [1989] S.C.J. No. 24, 68 C.R. (3d) 193 (S.C.C.).

¹⁷⁷ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

¹⁷⁸ See *R. v. Vivar*, [2003] O.J. No. 5100 (Ont. S.C.J.), where Dambrot J. examines *R. v. Gagnon*, [2000] O.J. No. 3410 (Ont. C.A.); *R. v. Wang*, [2001] O.J. No. 1491, 153 C.C.C. (3d) 321 (Ont. C.A.); *R. v. Tat*, [1997] O.J. No. 3579, 117 C.C.C. (3d) 481, at 498 (Ont. C.A.); and *R. v. Holmes*, [2002] O.J. No. 4178, 169 C.C.C. (3d) 344 (Ont. C.A.).

¹⁷⁹ See *R. v. Handy*, [2002] S.C.J. No. 57, [2002] 2 S.C.R. 908, at paras. 111-12 (S.C.C.).

¹⁸⁰ I intend no disrespect by pointing out that Weiler J.A. supported leaving questions of reliability to the jury in *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737, at paras. 33-41 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.), but nonetheless supported the operation of an exclusionary discretion in “dock” identification cases in *R. v. Gagnon*, [2000] O.J. No. 3410 (Ont. C.A.).

¹⁸¹ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737, at paras. 33-41 (Ont. C.A.).

exclusion should forge a legitimate basis for reliability-based inadmissibility, but the unreliability that may be manifest on a case-by-case assessment should not. It is certainly not in keeping with the preference expressed by courts in recent years for contextual decision-making to reason this way.

Of more concern is that courts consider unreliability to be an important pro-exclusionary factor at the behest of the Crown when exercising discretion whether to admit evidence of the prior sexual experiences of complainants.¹⁸² As a simple matter of principle, it is inappropriate to exclude defence evidence on a case-by-case basis because it appears to be unreliable, but to leave dangerous Crown evidence to the trier of fact to reject. Moreover, in *R. v. L. (D.O.)*,¹⁸³ the state-based interest relied upon to defeat the Charter challenge to section 715.1 was the interest in securing reliable evidence. Why should access to reliable evidence be an inclusionary consideration in Charter balancing, but unreliability not be an exclusionary one?

Perhaps the explanation for the uneven state of authority is the simple observation furnished in *Germany (Federal Republic) v. Schreiber*,¹⁸⁴ by Watt J., who observed that “there is no single organizing or justificatory principle that underlies every rule” and “no general requirement of reliability applicable to each item of evidence tendered for admission”.¹⁸⁵ As a description of the state of law, this is no doubt true and it is perhaps not surprising given that the law of evidence grew in the common law fashion on a case-by-case basis, at times losing the thread of consistent principle. Yet the failing of rules of proof provides the very justification for the development of the constitutional exclusionary discretion, not a reason to deny it. It is unprincipled to make reliability taboo as an exclusionary consideration in some cases, yet to treat it as an appropriate reason for having exclusionary rules in others. Judges should be trusted to show restraint in excluding evidence under their discretion based on unreliability concerns, but should not be disentitled from protecting the fair trial interests of the accused from unreliable evidence in appropriate cases.

¹⁸² See *R. v. Darrach*, [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443, at para. 63 (S.C.C.), and *R. v. McIntyre*, [1993] O.J. No. 2971 (Ont. C.A.).

¹⁸³ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

¹⁸⁴ [2002] O.J. No. 5845, 170 C.C.C. (3d) 184 (Ont. S.C.J.).

¹⁸⁵ *Germany (Federal Republic) v. Schreiber*, [2002] O.J. No. 5845, 170 C.C.C. (3d) 184, at paras. 44–46 (Ont. S.C.J.). This decision involved an interim ruling in the context of an extradition application. Extradition was subsequently ordered in the main application [2004] O.J. No. 2310 (Ont. S.C.J.) and upheld on appeal: *Germany (Federal Republic) v. Schreiber*, [2006] O.J. No. 789, 206 C.C.C. (3d) 339 (Ont. C.A.).

What, then, would be an appropriate case? In my view, it would be where it is not possible for the trier of fact to assess apparently unreliable evidence. While it is fair enough to rely on triers of fact to discard unreliable evidence, where they are not in a position to come to a rational decision to rely upon it because they do not have adequate data for evaluation or because the evidence is attended by other forms of prejudice, judges should be permitted to prevent such dangerous proof from becoming part of the trial record. When I first analyzed the principles of proof to identify what I consider to be an appropriate standard, I concluded that the law of evidence tends to exclude unreliable evidence where there will be difficulties inhibiting the ability to assess it properly, and urged that the exclusionary Charter principle should operate the same way.¹⁸⁶ This was the focus of Laskin J.A.'s dissent in *R. v. Buric*.¹⁸⁷ The trial judge had concluded that the evidence of the police informant could not be properly assessed because the police had not kept adequate records of the way his version of events was secured and any meaningful cross-examination would require that the defence trot out the very suggestive and prejudicial information the police had relied upon to secure the informant's suspect version; this coupled with its inherent unreliability supported exclusion of the witness's testimony.¹⁸⁸ The majority in *Buric* disagreed. In the end, though, that decision should not be taken as expressing disagreement with the proposition I am advancing here. After all, the majority concluded that in *Buric* the judge had gotten it wrong and the evidence could in fact be evaluated fairly and meaningfully on the record available.¹⁸⁹

Of interest, when the case went back to retrial after the failed Supreme Court of Canada appeal, the Crown withdrew the charges. It apparently considered that its evidence was too unreliable to secure a conviction.

In sum, there is an issue about the propriety of using unreliability as a form of pro-exclusionary prejudice that can be relied upon by the accused. Principle and consistency suggests that it should be a fit consideration, albeit one to be used in a guarded manner and in conjunction with other

¹⁸⁶ *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987), at 359.

¹⁸⁷ [1996] O.J. No. 1657, 28 O.R. (3d) 737 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

¹⁸⁸ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737, at paras. 54, 69 (Ont. C.A.), *per* Laskin J.A., dissenting, affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

¹⁸⁹ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737, at para. 25 (Ont. C.A.), *per* Labrosse J.A., and paras. 48-50 (Weiler J.A., concurring), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

considerations. In all events, *Buric*¹⁹⁰ should not be read as preventing judges from using their constitutional discretion in cases where the evidence is not only apparently unreliable, but it is so under circumstances where its reliability cannot safely be assessed or where unreliability is combined with other forms of prejudice.

3. Summary: The Exclusionary Discretion

Together the series of decisions beginning with *Corbett*¹⁹¹ and ending with *Harrer*¹⁹² mark a cultural shift in the law. Admissibility of Crown evidence is not simply a matter of applying rules of proof, as it once was. It is a matter of judgment, certainly directed by rules of proof but ultimately informed by the nature of the impact admission could have on the fairness of the trial, bearing in mind state interests to be sure, but with intent focus on the liberty interests that the Charter was meant to protect — those of the accused. Considerations as diverse as the inflammatory nature of the proof, its potential to mislead, the confusion it will cause, the respect it reflects for self-conscription considerations, the fairness of the way the state acted while acquiring that proof and, yes, its reliability are all features that can and do override the technical law of proof. That is, by any measure, a profound change. And it has not gone ignored. *Harrer*, which has curiously come to be treated as the font of the exclusionary discretion has been cited, as of the time of this writing, in 290 electronically reported cases. Without question, the way the law of proof operates in criminal cases has undergone a quiet revolution because of the Charter. And that is not all. There is a flip side to that Charter coin, the “inclusionary discretion”.

VI. THE CHARTER-AIDED INCLUSIONARY DISCRETION

The incremental march of the authorities to the recognition of a Charter-based exclusionary discretion revealed a truism about fact-finding and fairness: that rules of proof “should [not] be interpreted in a restrictive manner which may essentially defeat their purpose of seeking

¹⁹⁰ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

¹⁹¹ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 15 (S.C.C.).

¹⁹² *R. v. Harrer*, [1995] S.C.J. No. 81, 42 C.R. (4th) 269 (S.C.C.).

truth and justice".¹⁹³ Just as Charter rights may have value in different contexts¹⁹⁴ so too can the interests sought to be secured by the rules of evidence. As the *Corbett*¹⁹⁵ line of authority shows, there are times when truth and justice can be advanced best by excluding proof. More often, though, truth and justice can be secured by admitting proof, a reality demonstrated dramatically by the Charter decision of *R. v. Seaboyer*¹⁹⁶ in which a rigid rule that would have prevented the admission of what would be in some cases, important defence evidence, was struck down. Charter jurisprudence in the late 1980s was at the vanguard in showing that rigid rules of proof are to be avoided in the interests of justice.

Yet the Charter did not march alone in the quest to loosen rules of proof. It had an unlikely partner in the law and order objective of securing better protection of sexual assault victims, particularly children, a march the Charter rule-loosening jurisprudence may well have inspired. In *R. v. L. (D.O.)*,¹⁹⁷ while giving stalwart defence to the need to avoid classic exclusionary rules that would otherwise prevent videotaped evidence from being admitted, L'Heureux-Dubé J. remarked:

The modern trend in this field has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence in order to arrive at a result that will be just. A just result is best achieved when the decision-makers have all relevant and probative information before them. . . . Consequently, adherence to . . . strict rules . . . may result in valuable information not being brought to the court's attention. Moreover, the Court has recently sought to further remove obstacles to the truth seeking process, in a genuine attempt to return to the basic goal of truth-finding. . . . Rules of evidence . . . are not cast in stone and will evolve with time.¹⁹⁸

A case she cited in support? It was the Charter decision in *R. v. Seaboyer*.¹⁹⁹ If the Charter gave birth to the exclusionary discretion and the contextual balancing of competing state and due process interests, it no doubt played a significant role in the development of the principled

¹⁹³ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, 25 C.R. (4th) 285, at 309 (S.C.C.), per L'Heureux-Dubé J. concurring.

¹⁹⁴ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, 25 C.R. (4th) 285, at para. 27 (S.C.C.).

¹⁹⁵ *R. v. Corbett*, [1988] S.C.J. No. 40, 64 C.R. (3d) 1, at 15 (S.C.C.).

¹⁹⁶ [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

¹⁹⁷ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

¹⁹⁸ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, 25 C.R. (4th) 285, at 310-11 (S.C.C.), per L'Heureux-Dubé J. concurring.

¹⁹⁹ [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

approach to proof that now characterizes the law of evidence. Its link between flexibility and justice was contributing to the legal culture surrounding proof.

The principle approach is now intimately familiar to criminal lawyers. It has been with us in increasing measure since *R. v. Khan*,²⁰⁰ where the admission of hearsay was invited if it met the necessity and threshold reliability requirements. Gradually, the movement expanded, first engaging privilege,²⁰¹ and then opinion evidence,²⁰² and then voluntariness,²⁰³ and then bad character evidence,²⁰⁴ Ultimately, the principled approach took on quasi-constitutional dimension when the Supreme Court of Canada decided in *R. v. Starr*²⁰⁵ to measure the integrity and application of fixed exceptions to hearsay using the principles of necessity and reliability. In *Buric*,²⁰⁶ Weiler J.A. observed:

It is when a judge is dealing with evidence which is generally not admissible but which may exceptionally be admitted that the exercise of the trial judge's discretion is most likely to be invoked.²⁰⁷

She is right. The principled approach amounts, in substance, to an “inclusionary discretion”.

The thing about discretion, of course, is that it best enables Charter values to be secured. It is therefore where there is discretion to admit that Charter challenges are therefore most likely to fail, because discretion can be exercised in a way that respects those values. This is why the Charter challenge failed in *R. v. Darrach*²⁰⁸ dealing with the admission of the past sexual history of complainants. As interpreted, that provision empowered judges to make a contextual assessment of admissibility, bearing in mind the constitutional interests of the accused. It is also why the Charter challenge to the *Garofoli*²⁰⁹ test failed in *R. v. Pires*.²¹⁰ That

²⁰⁰ [1990] S.C.J. No. 81, [1990] 2 S.C.R. 531 (S.C.C.).

²⁰¹ *R. v. Gruenke (sub nom. R. v. Fosty)*, [1991] S.C.J. No. 80, 8 C.R. (4th) 368 (S.C.C.).

²⁰² *R. v. Mohan*, [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9 (S.C.C.).

²⁰³ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

²⁰⁴ *R. v. Handy*, [2002] S.C.J. No. 57, [2002] 2 S.C.R. 908 (S.C.C.).

²⁰⁵ [2000] S.C.J. No. 40, [2000] 2 S.C.R. 144 (S.C.C.).

²⁰⁶ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

²⁰⁷ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737, at para. 33 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

²⁰⁸ [2000] S.C.J. No. 46, 36 C.R. (5th) 233 (S.C.C.).

²⁰⁹ *R. v. Garofoli*, [1990] S.C.J. No. 115, [1990] 2 S.C.R. 1421 (S.C.C.).

²¹⁰ [2005] S.C.J. No. 67, 33 C.R. (6th) 241 (S.C.C.).

procedure provided the court with discretion to permit cross-examination where it was truly needed to vindicate section 8 constitutional rights.

Not surprisingly, the Charter's role has gone beyond helping to open the law of evidence to discretion. It has also contributed to the shape those rules take. In *R. v. B. (K.G.)*,²¹¹ the principles were designed to take account of the demands of the Charter.²¹² And although the exceptions are narrowly circumscribed, privileges tend to come post-Charter with "innocence exceptions" as is the case with police informant privilege,²¹³ and solicitor-client privilege.²¹⁴

More importantly, it has come to be broadly accepted since the Charter that where the defence is seeking to admit exculpatory evidence, those principled rules should be applied less rigidly than they would where the Crown seeks admissibility. Acceptance of this basic principle grew in the early days of the Charter. In *R. v. Lucier*,²¹⁵ the Supreme Court of Canada restricted access to a fixed exception to the hearsay rule to accused persons, given the importance of their liberty interests; the Crown is unable to use this declaration against penal interest exception but the accused can. Then, in *R. v. Williams*, Martin J. softened the blow of his observation that the accused persons must comply with the ordinary rules of proof in making full answer and defence,²¹⁶ by observing that judges have the discretion to relax the rules of exclusion in certain cases to ensure that an accused is given a fair trial and can make full answer and defence.²¹⁷ It was in the Charter case of *R. v. Seaboyer*,²¹⁸ however, where the firmest foundation for this principle evolved:

Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental

²¹¹ [1993] S.C.J. No. 22, [1993] 1 S.C.R. 740 (S.C.C.).

²¹² [1993] S.C.J. No. 22, [1993] 1 S.C.R. 740 (S.C.C.). See the Hon. Marc Rosenberg, "The Impact of the Charter on the Law of Evidence in Criminal Cases" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996), at 198-99.

²¹³ *R. v. Liepert*, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281, at para. 24 (S.C.C.).

²¹⁴ *R. v. McClure*, [2001] S.C.J. No. 13, 151 C.C.C. (3d) 321 (S.C.C.); *R. v. Brown*, [2002] S.C.J. No. 35, 162 C.C.C. (3d) 257 (S.C.C.).

²¹⁵ [1982] S.C.J. No. 109, [1982] 1 S.C.R. 28 (S.C.C.).

²¹⁶ *R. v. Williams*, [1985] O.J. No. 2489, 50 O.R. (2d) 321, at 337 (Ont. C.A.), leave to appeal refused, [1985] 1 S.C.R. xiv, 50 O.R. (2d) 321n (S.C.C.).

²¹⁷ *R. v. Williams*, [1985] O.J. No. 2489, 50 O.R. (2d) 321, at 343 (Ont. C.A.), leave to appeal refused, [1985] 1 S.C.R. xiv, 50 O.R. (2d) 321n (S.C.C.), and see *R. v. Rowbotham*, [1988] O.J. No. 271, 63 C.R. (3d) 113, at 164 (Ont. C.A.), and *R. v. Cruikshanks*, [1990] B.C.J. No. 1562, 58 C.C.C. (3d) 26 (B.C.C.A.).

²¹⁸ [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

tenet of our judicial system that an innocent person must not be convicted.²¹⁹

As a result, it was recognized subsequently in *R. v. Finta*²²⁰ that hearsay evidence that the Crown would not be permitted to call would be available to the defence, because the exclusionary discretion attached to the rule would operate differently. In *R. v. Folland*,²²¹ the accused won a retrial on other grounds, but Rosenberg J.A. alerted the new trial judge to bear in mind when considering Folland's request to admit the prior inconsistent statements of his friend as proof of their truth, that:

while the trial judge must be satisfied that the prior out-of-court utterances have some reliability, the strict standards set, in the context of an application by the Crown to make substantive use of prior inconsistent statements incriminating the accused . . . do not apply.²²²

Similarly, courts are more generous in applying the *Mohan*²²³ standards for the admission of opinion evidence when they are considering defence evidence. With respect to the "relevance" analysis, the Ontario Court of Appeal noted in *R. v. M. (B.)*²²⁴ that "a trial judge should be particularly cautious in excluding expert defence evidence on the basis of a cost-benefit analysis."²²⁵ Dealing with the "necessity" requirement, the Northwest Territories Court of Appeal said in *R. v. Bell*:²²⁶

Where, as here, expert evidence is offered by the defence, in its efforts to make full answer and defence, a trial judge should not impose as noted in *Mohan*, too strict a standard for the necessity of such evidence.²²⁷

And when it comes to matters of privilege and privacy, the liberty of the accused are given paramount interest. In third party records cases, although there is extensive protection afforded to privacy interests, the discretion provided for by those regimes in a criminal trial is to be undertaken with the "primary emphasis on the rights of the accused

²¹⁹ *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 119, at 139 (S.C.C.).

²²⁰ [1992] O.J. No. 823, 14 C.R. (4th) 1 (Ont. C.A.), affd [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 (S.C.C.).

²²¹ [1999] O.J. No. 143, 132 C.C.C. (3d) 14 (Ont. C.A.).

²²² *R. v. Folland*, [1999] O.J. No. 143, 132 C.C.C. (3d) 14, at 31 (Ont. C.A.).

²²³ *R. v. Mohan*, [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9 (S.C.C.).

²²⁴ *R. v. M. (B.)*, [1998] O.J. No. 4359, 130 C.C.C. (3d) 353 (Ont. C.A.).

²²⁵ *R. v. M. (B.)*, [1998] O.J. No. 4359, 130 C.C.C. (3d) 353, at 385 (Ont. C.A.).

²²⁶ *R. v. Bell*, [1997] N.W.T.J. No. 18, 115 C.C.C. (3d) 107 (N.W.T.C.A.).

²²⁷ *R. v. Bell*, [1997] N.W.T.J. No. 18, 115 C.C.C. (3d) 107, at 118 (N.W.T.C.A.).

because . . . of the requirement of a fair trial to avoid the wrongful conviction of the innocent”²²⁸.

The same holds true with discretionary exclusion of defence evidence. The standards are more halting than when applied against the Crown, since prejudice must substantially outweigh probative value to warrant exclusion of defence evidence, where simply imbalance of probative value and prejudice will support a discretion to exclude Crown evidence.²²⁹ And it has long been understood, but again, has taken on Charter urgency, that cross-examination by the accused is to be given special latitude so that full answer and defence and the demonstration of innocence are not frustrated.²³⁰

This is not, of course, to say that the accused has *carte blanche* to avoid rules of exclusion. They *prima facie* apply, and when a court is balancing competing considerations, it is to take into account state interests including the principle that “the exclusion of relevant evidence can be justified on the ground that the potential prejudice to the trial process of admitting the evidence clearly outweighs its value”,²³¹ and “the complainant’s and witness’s right to privacy”²³² as well as “the encouraging of reporting and the protection of the security . . . of witnesses”.²³³ Other factors include controlling the “proximity of proceedings” and the “need to protect informants”.²³⁴ This list is not exhaustive. These and other state-based interests are to be weighed against the principle that a trier of fact should have access to relevant evidence, coupled with the lower standards applicable to the admissibility of defence evidence, and the need to ensure access to evidence so as to be able to access the remedial scheme of the Charter.²³⁵

In sum, the Charter, along with an unlikely law and order partner agitating in favour of truth about guilt in sexual offence cases, contributed to the breakdown in pigeonhole admissibility determinations. The Charter has done no less than to help usher in an era of principled rules of admissibility. It has helped change the way we think about admission,

²²⁸ *R. v. Shearing*, [2002] S.C.J. No. 59, 165 C.C.C. (3d) 225, at 264 (S.C.C.); *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 89 (S.C.C.).

²²⁹ *R. v. Seaboyer*, [1991] S.C.J. No. 62, 7 C.R. (4th) 117, at 139 (S.C.C.).

²³⁰ *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595 (S.C.C.).

²³¹ *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 606 (S.C.C.).

²³² *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 17 (S.C.C.).

²³³ *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 611-12 (S.C.C.).

²³⁴ *R. v. Pires*, [2005] S.C.J. No. 67, 33 C.R. (6th) 241, at para. 33 (S.C.C.).

²³⁵ *R. v. Pires*, [2005] S.C.J. No. 67, 33 C.R. (6th) 241, at para. 24 (S.C.C.).

and it has altered how those rules operate; when that principled era arrived, the Charter's value and authority resulted in guidelines from appellate courts which ensure that the application of the law is sensitive to the full answer and defence concerns of the accused.

VII. THE GENERAL POWER TO ACHIEVE CHARTER COMPLIANCE

I have focused in discussing the "exclusionary discretion" and the "inclusionary discretion" on the laws of evidence, to the exclusion of other trial procedures. In fact, it is not only rules of admissibility that have been affected. The truth is that the Charter has ushered in an era of discretion that can be used in the application of any trial procedures to ensure Charter compliance. The "exclusionary discretion" brought on by the Charter includes the discretion to exclude the operation of other rules of process, and the inclusionary discretion encompasses the power to include rights not found in settled law where it is required to do so to ensure fairness.

When the *Levogiannis*²³⁶ challenge was being taken to the use of screens to shield sexual offence complainants, the Court was challenged with unique procedural problems that could occur where the accused is self-represented and might therefore be prevented from observing the witness while cross-examining. The Court responded in a passage of critical importance to understanding the Charter's impact on the criminal process:

the trial judge has discretion to adopt whatever procedure or device is best suited to prevent the infringement of an accused's rights and to ensure a fair trial.²³⁷

And with that, the need to strike down rules of criminal procedures was removed; keep the rules, but leave them open to whatever tinkering the demands of fundamental justice or a fair trial may require.

²³⁶ *R. v. Levogiannis*, [1993] S.C.J. No. 70, 25 C.R. (4th) 325 (S.C.C.).

²³⁷ *R. v. Levogiannis*, [1993] S.C.J. No. 70, 25 C.R. (4th) 325, at para. 35 (S.C.C.).

In *R. v. Rose*,²³⁸ the attempt by the accused to strike down section 651 of the *Criminal Code*,²³⁹ which dictates that the accused must address the jury first, was upheld in the face of a Charter challenge that this violates his right to full answer and defence. Again, the majority of the Court put faith in the inherent jurisdiction of the court, enshrined in section 11(d) of the Charter, to take remedial action, including by permitting the accused to reply to an improper Crown address, to assist in upholding the provision.

It is noteworthy that when saving the evidentiary provision in section 715.1 from Charter challenge in *R. v. L. (D.O.)*,²⁴⁰ L'Heureux-Dubé J. relied on *Baron v. Canada*,²⁴¹ a decision in which a Charter challenge to a search warrant provision was avoided by reading discretion into the issuance process. She said that it supported the application of an exclusionary discretion in section 715.1 applications because in "*Baron v. Canada* . . . this Court held that residual judicial discretion may be constitutionally required in order to provide a mechanism for balancing the rights of the accused and those of the state".²⁴²

Where the initial discretion in matters of criminal procedure is not vested in the court but instead in the Crown, the same basic approach prevails. Given that prosecutors can use that discretion in a manner that will vindicate constitutional rights, there is no need to declare the provisions conferring that discretion to be unconstitutional. Abuse of process authority or other Charter relief appropriate to the case at hand is relied upon to control abusive decisions or misuse of those procedural rules that are flexible enough to permit their use consistently with the requirements of the Charter.²⁴³

²³⁸ *R. v. Rose*, [1998] S.C.J. No. 81, 129 C.C.C. (3d) 449, at paras. 130-37 (S.C.C.). To be precise, four of nine judges recognized this authority. Justice L'Heureux-Dubé, who agreed with those four that the provision is not unconstitutional, would have held that the discretion to rectify this unfairness had been removed by Parliament in the language of the section. It has to be wondered how Parliament can remove a discretion enshrined in the Charter and *ex hypothesi*, necessary to full answer and defence. Four dissenting justices would have struck the provision down in its entirety.

²³⁹ R.S.C. 1985, c. C-46.

²⁴⁰ [1993] S.C.J. No. 72, 25 C.R. (4th) 285 (S.C.C.).

²⁴¹ *Baron v. Canada*, [1993] S.C.J. No. 6, [1993] 1 S.C.R. 416 (S.C.C.) involved a constitutional challenge to a provision that, contrary to established Charter standards, *required* justices to issue search warrants, where the decision to do so was to be left to the discretion of the issuing justice. The Court avoided the constitutional challenge by creating a constitutionally mandated discretion in issuing justices to refuse to issue warrants, where doing so would produce unconstitutional consequences.

²⁴² *R. v. Levogiannis*, [1993] S.C.J. No. 70, 25 C.R. (4th) 325, at para. 33 (S.C.C.).

²⁴³ See, for example, *R. v. Parkin*, [1986] O.J. No. 203, 28 C.C.C. (3d) 252 (Ont. C.A.), leave to appeal refused (1986), 28 C.C.C. (3d) 252n (S.C.C.), relating to abusive use of the power to elect to prosecute indictably; *R. v. Cardinal*, [1996] A.J. No. 92, 47 C.R. (4th) 74 (Alta. Q.B.), and *R. v. McGregor*, [1999] O.J. No. 919, 134 C.C.C. (3d) 570 (Ont. C.A.), relating to abuse of the

In short, the Charter gives the courts the flexibility to insert and use the discretion needed to ensure that criminal processes other than the rules of proof are used in a Charter compliant way.

VIII. CONCLUSION

Rules of criminal procedure, if read literally, will at times be too tight to ensure access to probative defence evidence or too loose to prevent unreliable evidence of guilt. And they will be too rigid to prevent unfair consequences. Ironically, their underlying purpose will be defeated by their own authority. Many of our pre-Charter rules read as if they should produce such results. They therefore seemed ripe for section 52 Charter challenge. Many jurists were apprehensive in the early days of the Charter, not only about the disruptive effect this would have but the message it might send about pre-Charter justice. They therefore resisted. Charter jurisprudence succumbed to this pressure, and failed to produce the expected thunder of striking down over- or under-inclusive rules of proof and criminal procedure. It is therefore true that the Charter has not overhauled the *laws* of evidence and trial process.

Still, it would be a mistake to treat these unsuccessful section 52 challenges as the bleached bones of Charter failure. The truth is that most of these provisions did not survive Charter challenge because they were Charter sensitive, or because the Charter was too infirm to fix them. In almost every case, the rules survived because the Charter was used creatively and discretely to forge enough flexibility into the criminal process to control outcomes on a contextual, case-by-case basis. While, with the exception of the new principled rules of exclusion, the *laws* of evidence and trial process remain much the same after a quarter-century, but the *law* of evidence and trial process has been profoundly altered and it has happened precisely because of the Charter. The Charter has liberated rules from their technical shackles and changed the way they are applied. It has dredged underlying principles from beneath wooden language so that those principles would become the guideposts for procedural decisions. As a result, rules are no longer checklist procedures

Crown discretion to consent to a non-jury trial under s. 473 of the *Criminal Code*, R.S.C. 1985, c. C-46 or to Charter-based interference; see *R. v. Scott*, [1990] S.C.J. No. 132, 2 C.R. (4th) 153 (S.C.C.), for recognition of the use of abuse of process to control improper exercise of the Crown discretion to stay proceedings, and *R. v. Arviv*, [1985] O.J. No. 2602, 45 C.R. (3d) 354 (Ont. C.A.), leave to appeal refused [1985] 1 S.C.R. v (note) (S.C.C.), recognizing the authority of a court to interfere with a direct indictment when it undermines the ability to make full answer and defence.

that apply when each of their elements are met. And legal debate in matters of criminal procedure is no longer about the application of technical rules. It is about whether discretion should be exercised to modulate those rules in the interests of fair hearings and full answer and defence. If the rules have not all been changed in their terms, their authority has been.

Simply put, discretion to protect Charter interests has worked its way into the fabric of the trial process at every stage. When things are understood in this way it is apparent that the Charter's impact has not been modest. It has been profound. Even leaving aside the dramatic "new" rules the Charter has engendered, Charter tracks are all over the trial process.

