

A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?

Kent Roach

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

Roach, Kent. "A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 40. (2008).
<http://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/23>

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.

A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?

Kent Roach*

I. INTRODUCTION

It is undeniable that the *Canadian Charter of Rights and Freedoms*¹ constitutes a fundamental change to the Canadian legal system and that the Charter's greatest influence is on the criminal justice system.² Canada went from a system populated with writs of assistance, felony murder, admission of illegally obtained evidence and discretionary disclosure to a system with constitutionally required warrants and fault standards, exclusion of improperly obtained evidence and constitutional disclosure obligations. These Charter developments restrained the state and required it to justify its actions in relation to the imposition of the criminal sanction.

Yet the time for celebrating the Charter may be over. This paper was originally prepared for one of the many conferences that reflected on the 25th anniversary of the Charter. I was fortunate enough to have attended a number of these conferences. Nevertheless, I was struck by the sombre atmosphere that surrounded much of the discussion, especially when

* Prichard and Wilson Chair in Law and Public Policy and Professor of Law and Criminology, University of Toronto. I thank Andrew Martin for excellent research assistance and Jonathan Rudin for helpful comments. Thanks also to Jamie Cameron and James Stribopoulos for inviting me to give the closing address for the excellent conference on criminal justice and the Charter that they organized. The financial assistance of the Social Sciences and Humanities Research Council of Canada is also gratefully acknowledged.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

² Almost two-thirds of the Court's decisions between 1982 and 2003 involved legal rights: James Kelly, *Governing with the Charter* (Vancouver: University of British Columbia Press, 2005), at 107. In addition, many of the most important fundamental freedom cases, as well as some equality cases, have arisen in the criminal process. See generally Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996); Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Thomson Carswell, 2005).

contrasted with a number of conferences that celebrated the 20th anniversary of the Charter. This atmosphere may reflect diminishing enthusiasm for the performance of courts under the Charter and perhaps even for the Charter itself. The bold idealism of the Dickson and Lamer Court that produced *R. v. Morgentaler*,³ *R. v. Vaillancourt*,⁴ *R. v. Stinchcombe*⁵ and *R. v. Smith*⁶ has been replaced by the more cautious contextualism of the McLachlin Court as represented by decisions such as *R. v. Malmo-Levine*,⁷ *R. v. Creighton*,⁸ *R. v. Mills*⁹ and *R. v. Morrisey*.¹⁰ The possibility that the Supreme Court will use the forthcoming *Grant*¹¹ decision to overrule or modify the *R. v. Stillman*¹² exclusionary rules would also fall into a trend towards a more contextual and cautious jurisprudence. These changes may be more related to the lifespan of the Charter than the changing composition of the Court. Scholars are starting to ask whether everything has been decided under the Charter.¹³ Although everything has not been decided, it is instructive that some of the most noteworthy recent decisions have actually overruled previous Charter decisions.¹⁴

Although some of the present directions of Charter jurisprudence make me uneasy, it is important to have a sense of perspective about both the role of the Charter and the changes that we are seeing in the Court's approach to the interpretation of the Charter. To that end, this paper will not focus on the minutiae of Charter jurisprudence. Rather, it will examine how relevant the Charter has been to the justness of our justice system. To even ask the question of whether the Charter is fundamental to the justness of our criminal justice system may offend some passionate supporters of the Charter. Because the Charter has become

³ [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

⁴ [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

⁵ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

⁶ [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

⁷ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.).

⁸ [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

⁹ [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

¹⁰ [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.).

¹¹ Leave granted June 21, 2007, case to be heard April 24, 2008.

¹² [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

¹³ James Stribopoulos, "Has Everything Been Decided? Certainty, the Charter and Criminal Justice" (2006) 34 S.C.L.R. (2d) 381.

¹⁴ See for example, *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609 (S.C.C.) overruling *R. v. Mannion*, [1986] S.C.J. No. 53, [1986] 2 S.C.R. 272 (S.C.C.); *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 (S.C.C.) overruling *R. v. Cook*, [1998] S.C.J. No. 68, [1998] 2 S.C.R. 597 (S.C.C.); and *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.) overruling *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.).

such a pervasive part of our criminal justice system and because it has manifestly been able to achieve just results in some important cases, there is a tendency to assume that what is good for the Charter must be good for the criminal justice system and what ignores the Charter must be bad for the justice system. In this paper, I wish to question these assumptions and argue that some of the greatest successes, as well as some of the greatest failures, of our criminal justice system over the last quarter of a century have had little to do with the Charter.

There is an institutional dimension to my arguments about the limited relevance of the Charter. The Charter is interpreted and enforced by the courts. The independent courts play a fundamental role in our criminal justice system and I am a proponent of vigorous judicial review that defends the rights of the unpopular, including the rights of those accused of crime.¹⁵ That said, Parliament still plays a dominant role in our criminal justice system. It establishes much of the context for Charter decisions. Even when the Supreme Court makes a Charter ruling, Parliament still retains and often exercises the ability to respond to the ruling with new legislation.¹⁶ It decides many questions of criminal justice policy over which the Charter is silent. The Charter may smooth out the rough edges of criminal justice and respond to some errors in the administration of justice, but much of what Parliament or even police, prosecutors and courts do is not affected by the Charter.

Parliament deserves much of the credit or blame for the state of our justice system. Indeed, even in those areas where the courts have been most active, most of this activism can be explained by the failure of Parliament to revise and modernize the *Criminal Code*.¹⁷ Although the Court has emerged as a stronger player, Parliament still plays the dominant role in our criminal justice system. This means that those who are interested in the future of the criminal justice system should pay close attention to recent developments which suggest that Parliament may be about to embark

¹⁵ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

¹⁶ Much of the dialogue between the Court and Parliament occurs in the criminal justice area and some of it is not caught by measures of dialogue based on responses to legislative invalidation of laws. See for example Peter Hogg, Allison Thornton & Wade Wright, "Charter Dialogue Revisited — or 'Much Ado about Metaphors'" (2007) 45 Osgoode Hall L.J. 1. For example measures of dialogue based on legislative responses to judicial invalidation of laws fail to capture the dialogue that resulted when the Court ruled a variety of warrantless searches to be unconstitutional and Parliament responded with participant wire, DNA and body impression warrants.

¹⁷ R.S.C. 1985, c. C-46.

on a more punitive approach to criminal justice policy-making. This policy trend will in all likelihood not be restrained by the Charter and the courts.¹⁸

The next four sections of this paper will examine the effects of the Charter on rates of imprisonment. Rates of imprisonment are one of the most important and well-measured indicators of our justice system. Section II will focus on rates of imprisonment after sentence while section III focuses on rates of imprisonment before sentence. The next two sections will focus on the imprisonment rate among two specific groups: young people and Aboriginal people. The remaining sections of the paper will assess the effects of the Charter on a number of important topics and themes in the criminal justice system. They include crime victimization and the treatment of crime victims, wrongful convictions, anti-terrorism law, trial delay and finally the state of Canada's *Criminal Code*. By examining these topics rather than focusing on particular sections of the Charter, I hope to provide some sense of perspective about the relevance of the Charter to many of the most important concerns of our criminal justice system.

II. THE CHARTER AND RATES OF IMPRISONMENT AFTER SENTENCE

I agree with my colleague Marty Friedland that the fact that Canada has not followed the American lead in massive increases in imprisonment “is probably the most important development — or more accurately, non-development — in criminal justice in Canada in the past 40 years”.¹⁹ The United States imprisons more than 2.2 million people for a rate of imprisonment of 750 per 100,000 population.²⁰ In contrast, the incarceration rate in Canada has just increased from 107 to 110 per 100,000 population.²¹ Canada's rate of imprisonment also is significantly lower than that of

¹⁸ A number of bills before Parliament speak to this punitive trend. They include Bill C-2, *Tackling Violent Crime Act*, 2nd Sess., 39th Parl., 2007 (S.C. 2008, c. 6), a mega bill that has been passed by the House of Commons and includes increased mandatory minimum sentences for firearm offences and a raised age of consent for sexual activity; Bill C-25, *An Act to amend Youth Criminal Justice Act*, 2nd Sess., 39th Parl., 2007, providing that deterrence and denunciation should be considered when sentencing young offenders; Bill C-26, *An Act to amend the Controlled Drugs and Substances Act*, 2nd Sess., 39th Parl., 2007, providing for mandatory minimum sentences for serious drug offences and Bill S-3, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Sess., 39th Parl., 2007, providing for the reinstatement of preventive arrests and investigative hearings in terrorism investigations.

¹⁹ Martin L. Friedland, “Criminal Justice in Canada Revisited” (2004) 48 *Crim. L.Q.* 419, at 458.

²⁰ World Prison Brief, online: <<http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief>>.

²¹ Statistics Canada, *The Daily*, November 21, 2007.

the United Kingdom at 145 per 100,000 population or Australia at 125 per 100,000 population. Does the Charter explain this comparative Canadian restraint in the use of imprisonment?

In the 25 years of the Charter, Canada's imprisonment rate has fluctuated considerably. Canada's highest rate of imprisonment was in the mid-1990s.²² The Charter was not at a low point during that time. Indeed, it could be argued that the mid-1990s may have constituted the peak of the Supreme Court's Charter activism in the criminal justice area.²³ Julian Roberts and his colleagues have related the prison growth and increased punitiveness in a number of democracies to what they call "penal populism". Penal populism affects legislatures more than courts. Penal populism helps explain why prison populations and fear of crime have increased even while crime rates have often declined. It helps explain increases in maximum and minimum penalties and get-tough policies with respect to adults and youths. In their comparative study of the United States, the United Kingdom, Australia and New Zealand, they conclude that penal populism has "exercised a more muted influence on policy development in Canada". They cite statistics that suggest that while prison populations increased 90 per cent in the United States from 1988 to 1998, they increased 24 per cent in Canada during that time with almost no growth from 1994 to 1998. Prison populations in Australia and New Zealand increased 58 per cent and 55 per cent respectively between 1988 and 1998, and the British rate increased 31 per cent. In contrast, the Canadian growth rate was 24 per cent.²⁴ To be sure, Professor Roberts and his colleagues find examples of penal populism in Canada, but these examples are often less dramatic than in the other countries that they study.

To what extent has the Charter influenced Canadian policy-makers to eschew the mandatory minimum sentences and the general punitiveness that has led the United States to rely on imprisonment more than any other industrialized democracy? One could cite the Supreme Court's 1987 decision in *R. v. Smith*²⁵ that held that the mandatory minimum sentence of seven years' imprisonment for importing narcotics was cruel and

²² Canadian Centre for Justice Statistics (Statistics Canada), *Adult Correctional Services Survey* (Ottawa: Minister of Industry, 2006).

²³ See, for example, *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.); *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.) and *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

²⁴ Julian V. Roberts *et al.*, *Penal Populism and Public Opinion* (Oxford: Oxford University Press, 2003), at 16, 39.

²⁵ [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

unusual punishment under section 12 of the Charter because it could be applied to a person who imported one joint of marijuana. I was a student in the United States at the time that the *Smith* case was decided and I recall that the consensus in my sentencing seminar was that seven years' imprisonment for importing narcotics would be an exceptionally light sentence in the United States, not one that would be invalidated by the Supreme Court as cruel and unusual. The Court's *Smith* decision was vintage Dickson/Lamer Court. The Court reached out to make this Charter decision even though the case involved not a naïve teenager who brought a joint across the border, but a repeat offender who imported a significant amount of cocaine but who nevertheless had his seven-year sentence reduced by a year when his case was returned to the British Columbia courts.²⁶

Although *Smith*²⁷ may symbolize the Canadian approach to punishment, it cannot account for it. *Smith* only invalidated a mandatory minimum sentence and judges still retained the discretion to sentence importers to life imprisonment. Indeed there is some evidence that importing charges increased after *Smith*.²⁸ Other symbols of Canada's comparative resistance to American-style penal populism are the Supreme Court's rejection of the death penalty in *Burns*²⁹ and its rejection of prisoner disenfranchisement in *Sauvé*.³⁰ I must confess that these two decisions are perhaps my favourite Charter decisions. To my mind they are manifestly just and something to be proud about. That said, the fact that prisoners can vote and they cannot be executed in Canada cannot explain the day-to-day differences in prison population and prison growth between the two countries.

Canadian prison populations remain significantly lower despite Canadian attempts to wage a war on drugs that has fed American prison growth. For example, marijuana offences, largely possession offences, rose by 81 per cent between 1992 and 2002. Although this trend might have been stopped by the invalidation of marijuana possession offences

²⁶ Kent Roach, "*Smith* and the Supreme Court: Implications for Sentencing Policy and Reform" (1989) 11 S.C.L.R. 433.

²⁷ *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

²⁸ Sonia Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2007) 56 U.T.L.J. 285, at 305.

²⁹ *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.).

³⁰ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.). I acted as counsel for Aboriginal Legal Services of Toronto, which intervened and argued that the restriction on voting rights was an unjustified violation of the equality rights of Aboriginal persons.

in *R. v. Malmo-Levine*,³¹ we know that the Court decided to uphold the offences and that the demand for marijuana reform law has decreased with that decision and the election of a new government.

Leaving *R. v. Malmo-Levine*³² aside, however, why has this dramatic increase in drug prosecutions not led to steep growths in our prison populations? The answer is not in the Charter, but in the sentencing policy of Parliament and of trial judges. The *Controlled Drugs and Substances Act*³³ continues to recognize rehabilitation and treatment as objectives of sentencing and it provides no mandatory minimum sentences. It also allows the Crown to elect summary conviction for even the serious offences of trafficking and importing.³⁴ Only 12 per cent of all possession offences result in imprisonment.³⁵ My point is not to suggest that Canada has optimal drug policies, but only that it could have much harsher ones. Indeed this is not an academic point as Bill C-26³⁶ presently before Parliament would introduce mandatory minimum sentences into the *Controlled Drugs and Substances Act*. Once Parliament stakes a claim with such mandatory sentences, then it is much more likely that these sentences will be raised by Parliament in the future. Indeed, this is happening with Bill C-2,³⁷ which will raise the many mandatory minimum sentences that already exist for gun crimes.

Would the Charter stop Parliament from pursuing draconian drug strategies that relied on long prison terms? Parliament could, if it so desired, take Canadian drug policy in an American direction by eliminating summary conviction options and by enacting mandatory minimum sentences for drug offences. The elimination of the summary conviction option could probably not be successfully challenged under the Charter. The decision to allow prosecution by way of the more lenient summary conviction route is a matter of Parliamentary and prosecutorial policy. Courts have also been reluctant to review prosecutorial discretion to employ the more lenient procedure.³⁸ New mandatory minimum sentences would be challenged under the Charter and the accused would undoubtedly

³¹ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.).

³² [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.).

³³ S.C. 1996, c. 19.

³⁴ *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 4-10.

³⁵ Norm Desjardins & Tina Hotton, "Trends in Drug Offences and the Role of Alcohol and Drugs in Crime" (2004) 24:1 *Juristat* 1, at 1, 6-7, 16.

³⁶ *An Act to amend the Controlled Drugs and Substances Act*, 2nd Sess., 39th Parl., 2007.

³⁷ *Tackling Violent Crime Act*, 2nd Sess., 39th Parl., 2007 (S.C. 2008, c. 6).

³⁸ See generally Kent Roach, "The Attorney General and the Charter Revisited" (2000) 50 *U.T.L.J.* 1.

rely on the still good precedent of *Smith*.³⁹ At the same time, however, it must be acknowledged that the Court has been much more deferential towards mandatory penalties since *Smith*. The most important case in this regard is *R. v. Morrissey*⁴⁰ where the Court decided that a mandatory four-year sentence for a depressed, drunken and suicidal man who killed his friend when his gun accidentally discharged did not violate section 12 of the Charter. The Supreme Court affirmed this approach and even eliminated constitutional exemptions as a remedy that could mitigate mandatory sentences in the *R. v. Ferguson*⁴¹ case, which involves a police officer caught by a four-year mandatory minimum sentence for an offence committed with a firearm. Even if the Court changes direction and recaptures some of the essence of its *Smith* decision, however, Parliament could easily Charter proof mandatory sentences by allowing judges to order exceptions in appropriate cases.

My point is not that Parliament should adopt a harsher and more punitive approach that would provide for longer sentences and attempt to eliminate prosecutorial and judicial discretion, but only that the Charter, at least as it is interpreted today, would not prevent it from doing so. This observation underlines the continuing importance of politics and elections in determining Canadian penal policy. It will be interesting to see whether Canada will start to catch up to the prison growth rates seen in other democracies over the next decade. I predict that it will. Canada may never approach the extraordinarily high levels of imprisonment seen in the United States, but we could in relatively short order match the higher per capita levels of imprisonment in the United Kingdom and Australia. There is little reason to think that the Charter would restrain prison growth in Canada.

III. THE CHARTER AND RATES OF IMPRISONMENT BEFORE SENTENCE

It can be argued with some justification that it is unfair to expect the Charter to determine how much Canada uses imprisonment as a sanction. The section 12 right against cruel and unusual punishment is designed

³⁹ *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

⁴⁰ [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.). For criticisms of the Court's approach see Kent Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" (2001) 39 Osgoode Hall L.J. 367.

⁴¹ [2008] S.C.J. No. 6 (S.C.C.).

to respond to the most egregious cases of abuse. It is not designed to determine sentencing policy. The Charter should, however, play a much more significant role with respect to pre-trial detention. Section 11(e) of the Charter directly addresses pre-trial detention by providing a right not to be denied reasonable bail without just cause. The bail system has also been subject to Charter review with the Supreme Court striking down the tertiary public interest ground of bail as excessively vague in the 1992 *R. v. Morales*⁴² decision while upholding most of a reformulated tertiary ground in its 2002 *R. v. Hall*⁴³ decision. From 1992 to 1997, Canada had no tertiary ground for the denial of bail as a result of Charter litigation.

Despite this Charter victory, remand populations in Canada dramatically increased during that time. In 1986/1987, there were 68,000 custodial remands in Canada whereas in 2000/2001 there was more than double the number: 118,600. Indeed the number of remands in the later period constituted 59 per cent of admissions to provincial prisons for those serving less than two years.⁴⁴ In 2004/2005, there were on average 9,600 people detained in pre-trial custody awaiting trial. This meant that half of the inmates in provincial institutions were un-sentenced remand prisoners whereas in 1995-1996, such un-sentenced prisoners constituted only 28 per cent of inmates in provincial institutions.⁴⁵

Dramatic increases in remand populations have occurred at the same time that prison populations levelled off. This means that the likelihood of accused persons being denied bail has increased. Since 1991/1992, the remand rate of adults charged increased 33 per cent.⁴⁶ There is also evidence that people are being held in remand for longer periods.⁴⁷ Perhaps influenced by well publicized cases of crimes being committed while people are out on bail, both prosecutors and justices of the peace appear to have become more risk adverse when deciding whether to grant bail. The increase in pre-trial remands will affect provincial correctional budgets. It will also affect the sentencing practices of judges given that time spent on remand, due to harsh conditions without programming,

⁴² [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

⁴³ [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.).

⁴⁴ Sara Johnson, "Custodial Remand in Canada 1986/87 to 2000/01" (2003) 23:7 *Juristat* 1, at 1.

⁴⁵ Karen Beattie, "Adult Correctional Services in Canada 2004-2005" (2006) 26:5 *Juristat* 1, at 1, 4-5.

⁴⁶ Karen Beattie, "Adult Correctional Services in Canada 2004-2005" (2006) 26:5 *Juristat* 1, at 1, 4-5.

⁴⁷ Sara Johnson, "Custodial Remand in Canada 1986/87 to 2000/01" (2003) 23:7 *Juristat* 1, at 11-12.

will normally be counted against the eventual sentence at a 2-1 rate and sometimes at higher rates. Finally, we should not ignore that some people held on remand — 18 per cent in one study⁴⁸ — will not be convicted at trial.

The increase in remand populations and denial of bail since 1991/1992 is particularly interesting from a Charter perspective because between 1992 and 1997 there was no tertiary ground for the denial of bail as a result of the Supreme Court's decision in *R. v. Morales*.⁴⁹ In other words, denials of bail increased during this time despite judges having to decide the case on the primary ground concerning attendance in court and the secondary ground of substantial likelihood that a person would if released commit a criminal offence or interfere with the administration of justice. The Supreme Court upheld the secondary ground for denial of bail as consistent with the Charter in *Morales*. The primary and secondary grounds for the denial of bail were sufficiently flexible to accommodate the increasing rate of accused being denied bail.

In the companion case of *R. v. Pearson*,⁵⁰ the Court also upheld reverse onuses for those charged with drug trafficking offences. The Court reached this decision without the benefit of data produced by the Ontario Commission on Systemic Racism that found that the remand admission rates for people classified as black, South Asian, Asian or Arab was at least twice as high as their sentenced admission rate in 1992/1993. A study done for that Commission found that those charged with reverse onus offences were more likely to be denied bail and that the overrepresentation of black as compared to white accused in remand was most dramatic in drug cases.⁵¹ The Commission also found that the unemployed were also much more likely to be denied bail.⁵² This suggests that some of the intent behind the 1972 *Bail Reform Act*⁵³ in preventing discrimination against the poor may not have been realized.⁵⁴

The Ontario Commission on Systemic Racism made a number of recommendations including the repeal of the reverse onuses and more

⁴⁸ *Report of the Commission on Systemic Racism in the Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995), at 123.

⁴⁹ [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

⁵⁰ [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.).

⁵¹ *Report of the Commission on Systemic Racism in the Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995), at 123.

⁵² *Report of the Commission on Systemic Racism in the Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995), at 139.

⁵³ S.C. 1970-71-72, c. 37.

⁵⁴ M.L. Friedland, *Detention Before Trial* (Toronto: University of Toronto Press, 1965).

resources for bail supervision programs, but remand populations continue to increase despite the Commission's 1995 report. Unfortunately, there are no readily available statistics on whether blacks or other racialized groups continue to be overrepresented in the remand population. Others have recommended increased use of bail hostels that are used in the United Kingdom or electronic monitoring as an alternative to pre-trial detention.⁵⁵ These reforms seem to be sensible and one would think pressing given the costs of rising remand populations. They are, however, not likely to be ordered as Charter remedies.

At the same time, the Charter could be used more effectively to challenge and change bail practices. The *Pearson*⁵⁶ case represented a missed opportunity and it is possible that the Court might reopen the issue in light of new data about the social context and effects of reverse onuses on disadvantaged groups. At the same time, Bill C-2 has already been passed and will expand reverse onuses on bail by applying them to gun crime.⁵⁷ The government can confidently argue that the new reverse onuses are Charter proof on the basis of *Pearson*. Too often debate stops at this point.

Although reverse onuses may be more warranted for gun than drug offences, it is unlikely that a government would repeal the reverse onuses for many drug offences especially after they have been sustained under the Charter. Such an approach would run the risk of making the government look "soft on crime". One is tempted to say that Parliament should be required to take something out of the *Criminal Code*⁵⁸ every time they add something to it, but we all know that the *Criminal Code* only gets thicker every year. Although the Charter speaks directly to bail, the bottom line so far has been that remand populations and denial of bail have increased dramatically in the Charter era.

IV. THE CHARTER AND RATES OF IMPRISONMENT OF YOUNG PEOPLE

Despite popular perceptions that the *Young Offenders Act*⁵⁹ was overly lenient, Canada had one of the highest rates of imprisonment of young

⁵⁵ Gary Trotter, *The Law of Bail in Canada*, 2d ed. (Toronto: Carswell, 1999), at 43.

⁵⁶ *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.).

⁵⁷ Bill C-2, *Tackling Violent Crime Act*, 2nd Sess., 39th Parl., 2007 (S.C. 2008, c. 6).

⁵⁸ R.S.C. 1985, c. C-46.

⁵⁹ R.S.C. 1985, c. Y-1.

people among the democracies under the Act. A 1997 House of Commons study indicated that Canada's youth incarceration rate was twice that of the United States and 10 to 15 times that of Australia or New Zealand.⁶⁰ The stringent due process protections in the YOA especially with respect to the taking of statements were not inconsistent with high imprisonment rates.

In 2003, the much criticized YOA was replaced by the new *Youth Criminal Justice Act* ("YCJA").⁶¹ The new law was in part designed to respond to criticisms that the YOA was not tough enough on youth crime. Judges were allowed to admit statements if there was only a "technical irregularity" in the due process rules for taking statements from youths.⁶² The YCJA presumes that young offenders 14 years of age and older would receive "adult sentences" for murder, attempted murder, manslaughter and aggravated sexual assault. It even has a diluted version of American-style "three strikes" laws by presuming that offenders would receive an adult sentence for a third serious violent offence. There are reasons to believe that this provision will be mainly symbolic,⁶³ but it does demonstrate the potential for punitive "penal populism"⁶⁴ in the area of youth crime. The very phrase "adult sentences" suggested a willingness to abandon the idea that teenaged offenders should be treated differently from adults.

The bill as first introduced was presented by the federal government in a manner that highlighted its more punitive aspects.⁶⁵ Both the American and British experiences suggest that penal populism may be attractive to left-of-centre political parties either as an affirmative strategy to appeal to voters who fear victimization by crime or as a defensive strategy to fend off criticisms that they are "soft on crime" or not sensitive enough to the concerns of both crime victims and the law-abiding majority. The YCJA,⁶⁶ however, is complex legislation that goes beyond media talking points about adult sentences. Professor Roberts and his

⁶⁰ Nicholas Bala & Sanjeev Anand, "The First Months under the Youth Criminal Justice Act" (2004) 46 Can. J. Crim. & Crim. J. 251, at 252.

⁶¹ S.C. 2002, c. 1, repealing *Young Offenders Act*, R.S.C. 1985, c. Y-1.

⁶² Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003), at 226.

⁶³ Anthony Doob & Carla Cesaroni, *Responding to Youth Crime in Canada* (Toronto: University of Toronto Press, 2004), at 188-89.

⁶⁴ Julian Roberts *et al.*, *Penal Populism and Public Opinion* (Oxford: Oxford University Press, 2003), c. 7.

⁶⁵ Anthony Doob & Carla Cesaroni, *Responding to Youth Crime in Canada* (Toronto: University of Toronto Press, 2004), at 23.

⁶⁶ S.C. 2002, c. 1.

colleagues have concluded that “[a]lthough it talks tough, in reality, the bill is not an example of populist legislation”.⁶⁷ The YCJA encourages diversion in non-violent cases with new provisions allowing young offenders to be referred to agencies, cautioned by the police or the prosecutor, given extra-judicial sanctions or given sentences of deferred custody. The three strikes provision was balanced by new provisions that presumed that extra-judicial sanctions would be adequate for non-violent first offences and that these measures could still be used even if the young person had a prior conviction. Deferred custody provides a youth version of the conditional sentence. The YCJA also responds to overincarceration by imposing restrictions on the use of prison as a sentence and the use of pre-trial detention for welfare or mental health purposes.

The use of imprisonment under the YCJA⁶⁸ is dramatically decreasing. In 2004/2005 there was a 10 per cent decrease in sentenced custody for youth and on any given day that year, 87 per cent of youth in the system were on supervision in the community, 10 per cent were in sentenced custody and 3 per cent were in custody awaiting trial.⁶⁹ In 2005/2006, there was another 12 per cent drop in young offenders in sentenced custody with just over 1,100 young offenders on average in sentenced custody on any given day. This constituted a dramatic 58 per cent decline from 2002/2003, the year before the YCJA came into effect.⁷⁰ This development is not attributable to the Charter, but rather to the decisions made by Parliament and the sentencing decisions of youth court judges. This means, however, that Parliament could change youth sentencing policy tomorrow. Indeed the process is already starting.

The sentencing principles in the YCJA⁷¹ do not include the emphasis on deterrence, denunciation and incapacitation found in the *Criminal Code*.⁷² The Supreme Court subsequently concluded that the decision not to include general or specific deterrence as a sentencing purpose was one that Parliament was entitled to make.⁷³ The new Conservative government has, however, introduced a bill to respond to this ruling by

⁶⁷ Julian Roberts et al., *Penal Populism and Public Opinion* (Oxford: Oxford University Press, 2003), at 155.

⁶⁸ S.C. 2002, c. 1.

⁶⁹ Donna Calverley, “Youth Custody and Community Services in Canada, 2004/2005” (2007) 27:2 *Juristat* 1, at 1.

⁷⁰ “Adult and Youth Correctional Services: Key Indicators”, Statistics Canada, *The Daily*, November 21, 2007.

⁷¹ S.C. 2002, c. 1.

⁷² R.S.C. 1985, c. C-46.

⁷³ *R. v. BWP*, [2006] S.C.J. No. 27, [2006] 1 S.C.R. 941 (S.C.C.).

adding deterrence and denunciation as sentencing purposes under the YCJA.⁷⁴ It remains to be seen whether this bill will be enacted and what its effects will be on the use of custody under the YCJA. My point is only that much criminal justice policy-making that impacts on the use of imprisonment is not directly affected by the Charter.

V. THE CHARTER AND RATES OF IMPRISONMENT OF ABORIGINAL PEOPLE

In 1999, the Supreme Court of Canada recognized in *R. v. Gladue* that the overrepresentation of Aboriginal people in Canada's jails "may fairly be termed a crisis in the Canadian criminal justice system".⁷⁵ The case was not a Charter case, but rather one involving the interpretation of a sentencing provision that was added to the *Criminal Code*⁷⁶ in 1996 along with the introduction of conditional sentences. Section 718.2(e) instructed judges to consider all reasonable alternatives to imprisonment for all offenders and "with particular attention to the circumstances of aboriginal offenders". The Charter only played an indirect role in *Gladue* as the Court considered and rejected arguments that section 718.2(e) discriminated against non-Aboriginal offenders.

At the time that *Gladue*⁷⁷ was decided, Aboriginal people represented 12 per cent of all federal inmates.⁷⁸ This overrepresentation has increased so that in 2004/2005 Aboriginal people accounted for 22 per cent of admissions to provincial sentenced custody and 17 per cent of admissions to federal custody. The admission of Aboriginal people to probation and conditional sentences, sentencing options that were supposed to be encouraged by *Gladue*, have remained stable.⁷⁹ The problem of Aboriginal overrepresentation is worse among young offenders despite the Senate's last-minute addition of the equivalent of section 718.2(e) to the *Youth Criminal Justice Act*.⁸⁰ In 2004/2005, Aboriginal male teenagers constituted

⁷⁴ Bill C-25, *An Act to amend Youth Criminal Justice Act*, 2nd Sess., 39 Parl., 2007.

⁷⁵ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 64 (S.C.C.). I was counsel for Aboriginal Legal Services of Toronto in this case.

⁷⁶ R.S.C. 1985, c. C-46.

⁷⁷ *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁷⁸ *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 58 (S.C.C.), citing statistics for 1997.

⁷⁹ Karen Beattie, "Adult Correctional Services in Canada 2004-2005" (2006) 26:5 *Juristat* 1, at 15-16.

⁸⁰ S.C. 2002, c. 1.

24 per cent of sentenced admissions to secure and open custody. Aboriginal female teenagers constituted 35 per cent of sentenced admissions to secure custody.⁸¹ In other words, one-quarter of imprisoned male teenagers are Aboriginal and more than one-third of imprisoned female teenagers are Aboriginal. The figures are shocking and tragic.

It would be unfair to blame the Charter for the overrepresentation of Aboriginal people in our jails. As suggested above, the Charter does not determine penal policy. The problem of Aboriginal overrepresentation seems especially intractable in comparison to the reductions in non-Aboriginal adult and youth incarceration that have been achieved in part through initiatives such as the introduction of conditional sentences and the *Youth Criminal Justice Act*.⁸² Some of the problems may be a lack of resources for implementation of intensive alternatives to incarceration for Aboriginal people that are encouraged by *Gladue*.⁸³

Section 718.2(e) could be repealed by Parliament tomorrow and so long as it was done equally for adult and youth offenders, it would be difficult to challenge such a regressive decision under formalistic approaches that now seem to apply to equality rights under the Charter.⁸⁴ Should such a regressive development occur, the best remaining approach might simply be to ask judges to take account of *Gladue*⁸⁵ factors relating to the offender as part of their sentencing discretion. It might be difficult if not impossible for Parliament to abolish sentencing discretion including the ability of trial judges to consider factors relating to rehabilitation or the circumstances that led to the commission of the offence. That said, the Court in *Gladue* was certainly influenced by the fact that Parliament has enacted legislation designed to redress Aboriginal overrepresentation.

Although it is difficult to know whether the situation would be even more dire without it, section 718.2(e) in itself is not sufficient to respond to Aboriginal overrepresentation. The bottom line, however, is that Aboriginal overrepresentation is one of the biggest challenges facing the criminal justice system and solutions for it have not been found in the Charter.

⁸¹ Donna Calverley, "Youth Custody and Community Services in Canada 2004-2005" (2007) 27:2 *Juristat* 1, at 6-7.

⁸² S.C. 2002, c. 1.

⁸³ *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.); Jonathan Rudin, "Incarceration of Aboriginal Youth in Ontario 2004 to 2006 — The Crisis Continues" (2007) 53 C.L.Q. 260.

⁸⁴ On the difficulties of using the Charter to require the government to take positive action see *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.).

⁸⁵ *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

Indeed, the same might be said for the overrepresentation of other groups including other racialized groups and the mentally ill.

VI. THE CHARTER AND VICTIMIZATION BY CRIME

Aboriginal people are not only overrepresented in prison, but among victims of crime. Victimization studies have shown that Aboriginal people are three times more likely to experience violence than non-Aboriginal people. These higher rates mean that 40 per cent of Aboriginal people report being victimized by crime in the last year and 21 per cent report being victimized two times or more in the last year. The comparable figures for the non-Aboriginal population are 28 per cent and 11 per cent. The homicide rate for Aboriginal people is seven times that of non-Aboriginal people.⁸⁶ Although some invoke the Charter and its reference to life and security of the person as rhetorical reinforcement for crime control,⁸⁷ the Charter does not directly address the harms that crime victims suffer at the hands of other individuals in our society.

The Charter has an uneasy relation with crime victims. The Charter does not include rights for crime victims. If the Charter was drafted today, however, organized groups of crime victims would likely be able to obtain some recognition of victim rights.⁸⁸ Some groups of victims or potential crime victims, most notably women and victims of hate crimes, have been able to convert their demands into Charter terms, but many other victims have not. In *R. v. Mills*,⁸⁹ the Supreme Court accepted that the issue of access to a complainant's private records in a sexual assault case implicated the rights of complainants to privacy and equality as well as the accused's right to full answer and defence. In the result, the Court upheld legislation that has been characterized as an in-your-face-response to its early decision in *R. v. O'Connor*.⁹⁰ At the same time, the Court left open the possibility that the accused could still gain access to private records and in a subsequent case took a more traditionally liberal

⁸⁶ Jodi-Anne Brzozowski, Andrea Taylor-Butts & Sara Johnson, "Victimization and Offending among the Aboriginal Population in Canada" (2006) 26:3 *Juristat* 1, at 1, 4-5, 7.

⁸⁷ See, for example, Irwin Cotler, "Thinking Outside the Box" in R. Daniels, P. Maklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

⁸⁸ See "Victims' Rights" (2004) 49 C.L.Q. 377ff for a symposium on victims' rights and the Charter.

⁸⁹ [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

⁹⁰ [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

approach that emphasized the rights of the accused against the state.⁹¹ A subsequent study conducted by the Department of Justice indicates that accused were successful in gaining access to the records in a majority of reported cases.⁹² These results may be justified, but they do indicate that invocation of Charter and statutory rights for victims may not necessarily change life on the ground for even those few crime victims who have their rights recognized under the Charter.

The startling 36 per cent decline in sexual assaults reported to the police between 1993 and 2002 is an intriguing finding, but the reasons for the decline remain a matter of debate.⁹³ Some would argue that many victims of sexual assault still fear and distrust the adversarial process. Others might view the matter more optimistically and see it as a sign of the partial success of “no mean no” laws enacted in 1992. Those reforms were largely a response to the Supreme Court’s Charter decision in *R. v. Seaboyer*⁹⁴ that struck down the previous “rape shield” law. Even on this optimistic account, Parliament more than the Charter responded to the concerns of victims.

The equality rights of victims of hate crimes have been recognized under the Charter and played a role in the Court’s 4-3 decision to uphold hate propaganda offences.⁹⁵ The designation of hate as an aggravating factor at sentencing, as well as the creation of a new offence of hate-motivated destruction of religious property, would also likely be sustained under the Charter. That said, we have only recently been studying hate crimes and the value of these Charter consistent provisions remains unknown. A 1999 victimization study found that 4 per cent of all crimes were perceived by the victim to be motivated by hate and a more recent study suggests that only 13 per cent of hate crimes reported to the police involved hate propaganda. Most hate crimes involved hate-motivated assaults by strangers,⁹⁶ matters long considered to be aggravating at sentencing.⁹⁷

⁹¹ *R. v. Shearing*, [2002] S.C.J. No. 59, [2002] 3 S.C.R. 33 (S.C.C.).

⁹² Susan McDonald & Andrea Wobick, *Bill C-46: Records Applications Post-Mills: A Caselaw Review* (2004) online: <<http://www.justice.gc.ca/en/ps/rs/rep/2006/rr06-vic2/index.html>>.

⁹³ Rebecca Kong *et al.*, “Sexual Offences in Canada” (2003) 23:6 *Juristat* 1, at 1.

⁹⁴ [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.).

⁹⁵ *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

⁹⁶ Warren Silver, Karen Mihorean & Andrea Taylor-Butts, “Hate Crime in Canada” (2004) 24(4) *Juristat* 1.

⁹⁷ *R. v. Ingram*, [1977] O.J. No. 531, 35 C.C.C. (2d) 376 (Ont. C.A.).

Concerns about the equality rights of the disabled played a role in sustaining Robert Latimer's life sentence from Charter challenge.⁹⁸ Nevertheless, the Latimer sentence remains controversial as Mr. Latimer remained in prison much longer than many, including perhaps the Supreme Court which upheld his sentence with reference to the executive power of commutation, expected.

The claims of other victims and potential victims have been more resistant to the process of being embraced under the Charter than the claims of female or disabled victims. In 2004, a majority of the Supreme Court rejected claims that section 43 of the *Criminal Code*,⁹⁹ which authorized the use of corrective force against children, violated section 7, 12 or 15 of the Charter. The majority of the Court brushed aside the idea that the Charter might contain enforceable procedural rights for victims by concluding:

Thus far, jurisprudence has not recognized procedural rights for the alleged victims of an offence. However, I need not consider that issue. Even on the assumption that alleged child victims are constitutionally entitled to procedural safeguards, the Foundation's argument fails because s. 43 provides adequate procedural safeguards to protect this interest. The child's interests are represented at trial by the Crown. The Crown's decision to prosecute and its conduct of the prosecution will necessarily reflect society's concern for the physical and mental security of the child. There is no reason to suppose that, as in other offences involving children as victims or witnesses, the Crown will not discharge that duty properly. Nor is there any reason to conclude on the arguments before us that providing separate representation for the child is either necessary or useful. I conclude that no failure of procedural safeguards has been established.¹⁰⁰

Although the media has been able to use the Charter to gain standing in criminal trials to the extent that freedom of expression is affected,¹⁰¹ victims have generally been shut out. The Court's assumption that the Crown adequately represents the interests of the victim would be a controversial one among many victims. It also increases the dangers that

⁹⁸ *R. v. Latimer*, [2001] 1 S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.). I acted for the Canadian Civil Liberties Association in this case.

⁹⁹ R.S.C. 1985, c. C-46.

¹⁰⁰ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 6 (S.C.C.).

¹⁰¹ *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

victims' rights will be used as the new face for the crime control interests of police and prosecutors as opposed to an invitation to rethink the standard operating procedures of the criminal justice system to make it less punishing on victims and witnesses.¹⁰²

Victims' rights are an important part of discourse about criminal justice that are not going to go away. Although the concerns of some victims and potential victims such as victims of sexual assault and hate crimes can be translated into Charter rights, the claims of many other victims cannot.

VII. THE CHARTER AND WRONGFUL CONVICTIONS

The recognition of the reality of wrongful convictions has been one of the most important developments in our criminal justice system over the last 25 years. The growing experience with wrongful convictions has influenced Charter jurisprudence. The Court justified its landmark *R. v. Stinchcombe*¹⁰³ decision constitutionalizing a broad right to disclosure in part because a lack of disclosure had contributed to the wrongful conviction of Donald Marshall Jr. In 2001, the Supreme Court overruled its prior precedents that allowed extradition to face the death penalty on the basis of the experience of wrongful convictions both in Canada and abroad.¹⁰⁴ The Court has also recognized the dangers of false confessions¹⁰⁵ and of junk science.¹⁰⁶

The need to avoid the conviction of the innocent lies at the heart of the Court's mandate to protect the integrity of the justice system and the principles of fundamental justice. As I have argued elsewhere, the courts have done much under section 7 of the Charter to attempt to reduce the risk of wrongful convictions, but they could do more on matters such as ineffective assistance of counsel, the exclusion of unreliable evidence and jury secrecy.¹⁰⁷ For example, the Court has not ruled that statements

¹⁰² On the potential of a punitive model of victims' rights to re-legitimate the crime control powers of police and prosecutors over victims and the potential of non-punitive models to stress issues such as crime prevention and restorative justice that may produce greater victim satisfaction. See Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999).

¹⁰³ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

¹⁰⁴ *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.) overruling *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.).

¹⁰⁵ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

¹⁰⁶ *R. v. Trochym*, [2007] S.C.J. No. 6, [2007] 1 S.C.R. 239 (S.C.C.).

¹⁰⁷ Kent Roach, "The Protection of Innocence under Section 7 of the Charter" (2006) 34 S.C.L.R. (2d) 249.

from jailhouse informers are inadmissible¹⁰⁸ and it has not modified its rules against juror secrecy to represent something like an innocence at stake exception.¹⁰⁹ The Court's recent decision in *R. v. Trochym*,¹¹⁰ however, reveals how concerns about wrongful convictions can be placed front and centre in the Court's evidentiary decisions.

At the same time, scrupulous regard for the Charter will not ensure that wrongful convictions will not occur. The Supreme Court recognized this when it held that David Milgaard had received a fair trial.¹¹¹ A recent study in the United States found that the first 200 people exonerated by DNA in that country had no more success than a comparison group with respect to their appeals based on claims of rights violations or indeed other errors of law.¹¹² Although Charter litigation can ensure that full disclosure is made and provide remedies for the worst defence lawyers, it cannot guard against all the errors that can occur in the criminal process. Institutional and legislative reform remains necessary.

The leading cause of wrongful conviction is faulty eyewitness identification and Charter standards of disclosure will not guard against witnesses who genuinely but wrongly believe they can identify the perpetrator. The Court's recent recognition of a tort of negligent investigation in *Hill v. Hamilton-Wentworth Regional Police Services Board*¹¹³ that applies to identification practices may encourage police forces to use better identification procedures such as sequential photo line-ups conducted with police officers who have no knowledge of the case. Nevertheless, the Court refused to find liability in that case. Moreover, it is unclear where the Court will look to for standards of reasonable conduct in this critical area of police practice. Unfortunately Parliament has failed to provide guidance in this area even though nothing would stop it from requiring the use of the sequential photo line-ups or other

¹⁰⁸ *R. v. Brooks*, [2000] S.C.J. No. 12, [2000] 1 S.C.R. 237 (S.C.C.).

¹⁰⁹ *R. v. Pan*, [2001] S.C.J. No. 44, [2001] 2 S.C.R. 344 (S.C.C.).

¹¹⁰ [2007] S.C.J. No. 6, 2007 SCC 6, at para. 1 (S.C.C.), Deschamps J. prefaced her decision excluding post hypnosis and similar fact evidence in part by noting that:

In recent years, a number of public inquiries have highlighted the importance of safeguarding the criminal justice system — and protecting the accused who are tried under it — from the possibility of wrongful conviction. As this Court has previously noted, “[t]he names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case”: *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1. In the case at bar, we consider once again the need to carefully scrutinize evidence presented against an accused for reliability and prejudicial effect, and to ensure the basic fairness of the criminal process.

¹¹¹ *Reference re Milgaard*, [1992] S.C.J. No. 35, [1992] 1 S.C.R. 866 (S.C.C.).

¹¹² Brandon Garrett, “Judging Innocence” (2008) 108 Colum. L. Rev. 55.

¹¹³ [2007] S.C.J. No. 41, 2007 SCC 41 (S.C.C.).

reforms. The concern is that cases like *Hill* may make Parliament even more cautious about providing legislative guidance with respect to best identification practices.

Although the courts have integrated some learning about false confessions into the confessions rule,¹¹⁴ the results are controversial. Full compliance with the right to counsel does not ensure that someone will not waive the right to counsel and make a false confession. Parliament could assist with mandating videotaping interrogations, but again it has failed to do so, perhaps out of a false sense that the courts and the Charter have occupied the field when it comes to regulating interrogations.

Finally, the challenge of wrongful convictions invites a rethinking of our approach to the finality of verdicts and perhaps even the nature of verdicts. Reforms such as the creation of a Criminal Case Review Commission to investigate alleged wrongful convictions or the creation of a forum in which the wrongfully convicted could, if they wanted, seek a determination of their innocence depend upon parliamentary action. Such reforms will not come from a Charter which has been interpreted not even to include a right to an appeal.¹¹⁵ The Charter cannot be abandoned by those concerned about wrongful convictions, but more than respect for the Charter will be required to prevent and remedy wrongful convictions in the future.

VIII. THE CHARTER AND ANTI-TERRORISM LAW

One of the greatest challenges facing the criminal justice system globally is the pressure to prevent and respond to terrorism in the post-9/11 era. Some argue that the criminal justice system is not up to the task of preventing and prosecuting terrorism and that we should move to alternative models based on the laws of war, the laws governing emergencies, administrative preventive detention or the contracting out of anti-terrorism to states that do not respect human rights.¹¹⁶ Canada is not immune from the attractions of such short cuts around the traditional safeguards of the criminal justice system. From 2001 to 2003, the Canadian

¹¹⁴ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

¹¹⁵ *R. v. Mills*, [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863 (S.C.C.). For a holding that existing appeal mechanism do not allow courts to determine and declare whether a person is innocent see *R. v. Mullins-Johnson*, [2007] O.J. No. 3978, 2007 ONCA 720 (Ont. C.A.).

¹¹⁶ Proponents of these alternatives to criminal justice are by no means limited to supporters of the Bush administration. See for example, Bruce Ackerman, *After the Next Attack* (New Haven: Yale University Press, 2006).

government relied on immigration law with its lower standards of proof, wider liability rules and greater protection of secrets, as the main means of incapacitating terrorist suspects detained under security certificates.¹¹⁷ The Canadian government was also prepared at this time to supply Syrian officials with questions to ask Canadian terrorist suspects detained in that country.¹¹⁸ Canadian troops in Afghanistan handed off some of their captives to the United States for possible detention in Guantanamo Bay, Cuba, a practice that the British refused to follow for fear of violating international law.¹¹⁹ The A-O Canada investigation of suspected terrorists provided American officials with CDs of their investigative files without imposing caveats that restricted the use of the information that they shared so that some of this information was likely used in the American immigration proceedings that rendered Maher Arar to Syria, where he was subjected to torture and held for almost a year before being released.¹²⁰ The Supreme Court in 2002 was reluctant to close off the possibility that in some exceptional circumstances it might be consistent with the Charter to deport a non-citizen suspected of involvement with terrorism to a country such as Egypt or Syria which uses torture.¹²¹ The Canadian and United States governments implemented a safe third country agreement that would for Canada have the effect of dramatically decreasing the number of refugees it received and deflecting them back to the American border.¹²² All of these developments focused on alternatives to the criminal law that did not respect the restraints of the criminal law or its focus on the proof of guilt beyond a reasonable doubt.

Matters may have improved in recent years, but short cuts around the criminal law still remain attractive. The Supreme Court's 2007 decision in *Charkaoui v. Canada (Citizenship and Immigration)*¹²³ requires some

¹¹⁷ A similar flight to the short cuts of immigration law occurred with respect to suspected war criminals after *R. v. Finta*, [1993] S.C.J. No. 137, [1993] 1 S.C.R. 1138 (S.C.C.). But see now the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

¹¹⁸ Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *Analysis and Recommendations* (Ottawa: Minister of Supply and Services, 2006), c. 7.

¹¹⁹ Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queens University Press, 2003), at 158-63.

¹²⁰ Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *Analysis and Recommendations* (Ottawa: Minister of Supply and Services, 2006).

¹²¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.).

¹²² See *Canadian Council for Refugees v. Canada*, [2007] F.C.J. No. 1583, 2007 FC 1262 (F.C.) holding that this agreement violates the Charter and the authorizing legislation because of concerns that the United States would engage in practices that violate international law.

¹²³ [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

form of increased adversarial challenge to the intelligence that is used to justify security certificates under immigration law. Bill C-3¹²⁴ provides for the use of security-cleared special advocates, but has been criticized on the grounds that the special advocate may not be able to consult with the affected person after having seen the secret evidence without the judge's permission, and because the special advocate only has access to all of the secret evidence but not necessarily full disclosure of all the material held by the state and its allies about the detainee. Nevertheless, Bill C-3 is likely consistent with the Charter because the judge retains the discretion to allow the special advocate to consult with the detainee after the special advocate has seen the secret information.

It will be interesting to see if the government makes more frequent use of a Charter proof security certificate system in those cases where terrorist suspects are non-citizens. No security certificate has been issued against a terrorist suspect since 2003. Civil society and media campaigns against "secret trials" may be more effective in discrediting security certificates than Charter litigation. Marginal Charter-inspired improvements to security certificates may help legitimate their use. Similarly, Canadian practices of handing off prisoners first to American and now to Afghan officials may be immune from Charter challenge in light of the Supreme Court's ruling in *R. v. Hape*¹²⁵ that the Charter no longer applies to the activities of Canadian officials outside of Canada, but they still should cause Canadians to engage in much soul searching. We should recall that there was a time when Canadian governments were willing to go beyond the minimal standards of fairness that the courts were prepared to enforce on matters of conscience such as the death penalty.

A conclusion that security certificates have been made consistent with the Charter does not necessarily mean that they are a wise or even a proportionate response to terrorism. Indeed, security certificates may not even be rationally connected to the prevention of terrorism given that they only apply to terrorism suspects who happen to be non-citizens. In addition, the security certificate process may not be sustainable given our reluctance so far to deport people to countries such as Syria or Egypt where they are likely to be tortured. At some point in the future, perhaps spurred by Charter litigation, there may be an eventual recognition that

¹²⁴ *An Act to amend the Immigration and Refugee Protection Act (Special Advocates)*, 2nd Sess., 39th Parl., 2007 (S.C. 2008, c. 3).

¹²⁵ [2007] S.C.J. No. 26, [2007] SCC 26 (S.C.C.). See *Amnesty International v. Canada*, [2008] F.C.J. No. 356, 2008 FC 336, holding that the Charter does not apply to Canadian transfer of prisoners to Afghan authorities.

indefinite detention or strict controls in the community cannot be imposed on the basis of secret intelligence that the detainee and his lawyer has never seen. At the end of the day, immigration law short cuts may be no replacement for criminal prosecutions of suspected terrorists. That said, the disturbing post-9/11 trend to administrative detention constitutes a fundamental challenge to the criminal justice system and traditional understandings of guilt and innocence.

Parliament took account of Charter standards when drafting the *Anti-terrorism Act* (“ATA”).¹²⁶ The result was an Act that was more restrained than those found in Australia or Britain. For example, terrorism offences under the ATA require subjective fault. At the same time, Parliament inserted questionable interpretative clauses that qualify the fault levels and deem some evidence to be admissible regardless of its prejudicial effect. These provisions have so far been sustained from Charter challenge, but they display a distrust of the ability of the judiciary to make sensible interpretative and evidentiary decisions in terrorism prosecutions.¹²⁷ They also help make the ATA a dauntingly complex piece of legislation, something that may add to delays in terrorism prosecutions and facilitate judicial error in its administration. The judge hearing the first prosecution under the ATA has found that the requirement for proof of a religious or political motive resulted in an unjustified violation of section 2 of the Charter. This ruling eliminates the need for the prosecutor to establish such motives and restores the discretion of the trial judge to determine whether the prejudicial effects of evidence relating to extremist religious or political views outweighs its probative value in a terrorism prosecution.¹²⁸ That said, the effect of the trial judge’s Charter remedy is to leave a very broad definition of terrorist activities on the books that could apply not only to violence designed to intimidate populations and compel governments to act, but also to violence that is designed to compel individuals to act. Canada’s broad definition of terrorism creates risks that protesters and even ordinary criminals could be charged under its many broadly worded crimes. The Charter has only partially restrained the ATA.

¹²⁶ S.C. 2001, c. 41.

¹²⁷ *R. v. Khawaja*, [2006] O.J. No. 4245, 214 C.C.C. (3d) 399 (Ont. S.C.J.), leave to appeal refused [2006] S.C.C.A. No. 505 (S.C.C.). For analysis, see Kent Roach, “Terrorism Offences and the Charter: A Comment on *R. v. Khawaja*” (2007) 11 Can. Crim. L. Rev. 271.

¹²⁸ *R. v. Khawaja*, [2006] O.J. No. 4245, 214 C.C.C. (3d) 399 (Ont. S.C.J.), leave to appeal refused [2006] S.C.C.A. No. 505 (S.C.C.).

One of the most controversial parts of the ATA¹²⁹ was the creation of investigative hearings that allow judicial orders to be made to compel people with information relevant to a terrorism investigation to provide information and documents to authorities. The government was rightly concerned that these provisions be consistent with the Charter and to that end provided those subject to investigative hearings with a right to counsel and use and derivative use immunity for any information that was compelled at the investigative hearing. The government was successful in making investigative hearings consistent with the Charter as the Supreme Court upheld the procedure when an attempt was made to use it in relation to a possible Crown witness in the middle of the Air India trial. In upholding the provisions, however, the Court interpreted the use and derivative use immunity provisions as absolute and not even subject to an independent source exception. It also extended the immunity provisions so that they would apply not only in subsequent criminal proceedings, but also in subsequent extradition and immigration proceedings. The Court stressed that both judges and lawyers at the investigative hearing should apply the ordinary rules of evidence and the presumption that the hearing would be held in open court.¹³⁰ Questions have been raised about how workable these Charter-inspired concepts will be with respect to what was intended to be an investigative rather than an adjudicative procedure.¹³¹ Critics of bills of rights have expressed fears that they can distort governmental policies¹³² and there were no reported use of investigative hearings including in the Air India investigation.

In February 2007, the government lost its motion to renew investigative hearings and preventive arrests. These provisions expired, not as a result of the Charter, but as a result of parliamentary decisions. Although the parliamentary debate on the expiry of investigative hearings degenerated into partisan accusations and counter-accusations,¹³³ the result harkened back to a previous era when Parliament decided to repeal capital punishment even though the Supreme Court held that it was consistent

¹²⁹ *Anti-terrorism Act*, S.C. 2001, c. 41.

¹³⁰ *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248 (S.C.C.); *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.).

¹³¹ Hamish Stewart "Investigative Hearings into Terrorist Offences: A Challenge to the Rule of Law" (2005) 50 *Crim. L.Q.* 376, at 386-92.

¹³² Mark Tushnet, "Policy Distortion and Democratic Debilitation" (1995) 94 *Mich. L. Rev.* 245.

¹³³ For an account of the legislative debate see Kent Roach, "Better Late than Never: The Canadian Parliamentary Review of the Anti-Terrorism Act" (2007) 13(5) *Choices* 1.

with the *Canadian Bill of Rights*.¹³⁴ What Parliament takes away, however, it may also restore.

A new bill is before Parliament to restore both investigative hearings and preventive arrests.¹³⁵ It does not incorporate the Supreme Court's decision that use and derivative use immunity should apply not only in subsequent criminal prosecutions in Canada but also in extradition and immigration proceedings. Even if such protections are read in under the Charter, there is nothing to guarantee that the results of investigative hearings could not be used in foreign proceedings.¹³⁶ The new bill incorporates a *Criminal Code*¹³⁷ provision that is designed to limit the detention of witnesses who may flee to a maximum of 90 days.¹³⁸ Although this provision is in a sense an improvement from the repealed provision which placed no limit on such detention, it reveals the potential for investigative hearings to be used to bypass the 72-hour limit on detention under the companion preventive arrest provisions. It appears likely that the new bill will be enacted. Although the opposition voted against the renewal of investigative hearings and preventive arrests in February 2007, the reasons for the vote revolved mainly around partisan wrangling rather than matters of principle. It will remain difficult for the opposition to vote against an anti-terrorism measure such as investigative hearings that has been found by the Court to be consistent with the Charter. Once left-of-centre political parties fear that they are vulnerable to criticism that they are "soft on crime" or "soft on terrorism", there is a real danger of a punitive spiral in criminal justice policies. The fuel for such spirals is often social anxiety rather than evidence about either the threat or the effectiveness of a punitive response.

Too much of the debate about anti-terrorism measures has focused on the issue of whether the measures are consistent with the Charter. To be sure, the Minister of Justice has obligations to ensure that laws are consistent with the Charter¹³⁹ and it is better to enact laws that are consistent

¹³⁴ S.C. 1960, c. 44.

¹³⁵ Bill S-3, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Sess., 39th Parl., 2007.

¹³⁶ David Paciocco, "Constitutional Casualties of September 11" (2002) 16 S.C.L.R. (2d) 185.

¹³⁷ R.S.C. 1985, c. C-46.

¹³⁸ Bill S-3, *An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)*, 2nd Sess., 39th Parl., 2007 incorporating s. 707 of the *Criminal Code*, R.S.C. 1985, c. C-46.

¹³⁹ *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1, discussed in Kent Roach, "Not Just the Government's Lawyer: The Attorney General as the Defender of the Rule of Law" (2006) 31 *Queens L.J.* 598.

with the Charter than laws that are not consistent with the Charter. That said, compliance with the Charter does not exhaust the obligations to ensure that laws are wise and effective. For example, investigative hearings in particular should be placed into the broader context of the adequacy of witness and source protection programs. Concerns about the protection of witnesses have adversely affected a number of terrorism prosecutions in Canada.¹⁴⁰ The most recent annual report on Canada's federal witness protection program suggests that there are serious causes for concern. While 53 people have come into the program in the last year, 15 witnesses refused to enter it, 21 voluntarily left the program and seven were kicked out of the program.¹⁴¹ The program was run at a cost of just under \$2 million. Some of the resources that have been devoted to Charter proofing investigative hearings might be better spent on making the witness protection program more flexible and attractive. Investigative hearings may also be a blunt substitute for the careful cultivation of sources and even the enlightened exercise of prosecutorial discretion to help turn those on the periphery of a terrorist plot so that they provide evidence for the Crown. There were no reports of the use of investigative hearings with respect to the Toronto terrorism arrests. Rather, authorities worked with two informants, one who has surprisingly gone public and the other who is reported to be in witness protection. The fact that investigative hearings can be made consistent with the Charter does not mean that they will be effective.

Another feature of the ATA¹⁴² that was designed with Charter standards in mind was section 38 of the *Canada Evidence Act*.¹⁴³ It provides a procedure for the government to prevent the disclosure of information, often secrets from our allies, that would harm national security, national defence or international relations. Mandatory publication bans under section 38 have been found to be inconsistent with the Charter,¹⁴⁴ but the ability of the Attorney General to make *ex parte* arguments to the specially designated Federal Court judge has been upheld under the Charter.¹⁴⁵

¹⁴⁰ *R. v. Parmar*, [1987] O.J. No. 567, 31 C.R.R. 256 (Ont. H.C.J.), affd [1989] O.J. No. 2314, 53 C.C.C. (3d) 489 (Ont. C.A.); *R. v. Khela*, [1998] Q.J. no 2035, 126 C.C.C. (3d) 341 (Que. C.A.); *R. v. Malik*, [2005] B.C.J. No. 521, 2005 BCSC 350 (B.C.S.C.).

¹⁴¹ Witness Protection Program Act — Annual Report: 2005-2006, online: <<http://securitepublique.gc.ca/abt/dpr/le/wppa2005-6-en.asp>>.

¹⁴² *Anti-terrorism Act*, S.C. 2001, c. 41.

¹⁴³ R.S.C. 1985, c. C-5.

¹⁴⁴ *Toronto Star Newspapers Ltd. v. Canada*, [2007] F.C.J. No. 165, 2007 FC 128 (F.C.).

¹⁴⁵ *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 648, 2007 FC 463 (F.C.), affd [2007] F.C.J. No. 1635, 2007 FCA 388 (F.C.A.).

Chief Justice Lutfy in his judgment suggested that security-cleared lawyers could be appointed if necessary to save the procedure under the Charter. The Federal Court of Appeal, however, upheld his judgment without stressing this possibility. In any event, Bill C-3¹⁴⁶ does not contemplate that special advocates will be appointed as part of the section 38 process. Special advocates could play a role in challenging governmental claims of secrecy, but they may never be as familiar with the accused's case as the accused's own lawyer. The Air India trial went to verdict in part because counsel negotiated an innovative procedure that gave defence counsel access to secret material on conditional undertakings that the material not be shared with the client.¹⁴⁷ This procedure avoided the need to disrupt the already long trial with section 38 litigation in the Federal Court, but it is not clear whether this procedure will be used in future terrorism trials.

Consistent with section 24(1) of the Charter, section 38.14 of the *Canada Evidence Act*¹⁴⁸ provides that a trial judge can order any appropriate remedy including a stay of proceedings that is necessary to protect the accused's right to a fair trial in light of a non-disclosure order by the Federal Court or an Attorney General's certificate overriding a court order for disclosure. This provision could provide a valuable safeguard especially in light of the role that non-disclosure has played in wrongful convictions in terrorism cases such as those of the Guildford Four and the Birmingham Six.¹⁴⁹ Something like section 38.14 has been used in at least one terrorism prosecution that was stayed after the Crown resisted for almost a decade making full disclosure about a police agent who was a critical witness and may have acted as an agent provocateur.¹⁵⁰ At the same time, it will take a courageous trial judge who is prepared to stay proceedings on the basis of the non-disclosure of information that he or she (as opposed to the specially designated Federal Court judge) has not been allowed to see.

¹⁴⁶ *An Act to amend the Immigration and Refugee Protection Act (Special Advocates)*, 2nd Sess., 39th Parl., 2007 (S.C. 2008, c. 3).

¹⁴⁷ Michael Code & Kent Roach, "The Independence of the Bar and the Public Interest: The Scope of Privilege and Confidentiality in the Context of National Security" in Lorne Sossin, ed., *In the Public Interest* (Toronto: Irwin Law, 2007).

¹⁴⁸ R.S.C. 1985, c. C-5.

¹⁴⁹ Kent Roach & Gary Trotter, "Miscarriages of Justice in the War Against Terror" (2005) 109 Penn St. L. Rev. 967.

¹⁵⁰ *R. v. Khela*, [1998] Q.J. no 2035, 126 C.C.C. (3d) 341, at 345 (Que. C.A.) in which the late Justice Proulx declared "To put it bluntly, 'enough is enough'."

Although section 38 can perhaps be saved under the Charter, Charter standards are only minimal standards of fairness. They were never intended to guarantee the wisdom or workability of a law. From this perspective, section 38 is a disaster waiting to happen. Indeed, the credibility of the national security confidentiality process is very much in doubt. Section 38 applies to a wide range of material, including material that is being safeguarded by the government, but that may not necessarily cause harm if disclosed. The harms that section 38 are meant to prevent are articulated only in the broad generalities of injury to national security, international relations or national defence. The breadth of section 38 may encourage the government to overclaim national security confidentiality. Justice O'Connor found that the government engaged in overclaiming during the Arar Commission and some of the government's objections to the release of the full public report were subsequently found by the Federal Court not even to satisfy the broad test of injury to national security, national defence or international relations.¹⁵¹ Although he upheld some of the government's claim, Mosley J. of the Federal Court also found that the government had overclaimed national security confidentiality in the Khawaja prosecution, including some mechanical redactions of the name CSIS.¹⁵² The Federal Court of Appeal has subsequently upheld most of Justice Mosley's decision while also finding that his attempt to list some of the evidence that he ordered not to be disclosed to the accused had the effect of revealing secrets.¹⁵³

A fundamental problem with section 38 is the requirement that disclosure issues be taken away from the trial judge and litigated before the Federal Court only to be effectively relitigated before the trial judge under section 38.14. The United Kingdom, the United States and

¹⁵¹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services, 2006); *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar — O'Connor Commission)*, [2007] F.C.J. No. 1081, 2007 FC 766 (F.C.).

¹⁵² *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 622, 2007 FC 490, at para. 150 (F.C.), *var* [2007] F.C.J. No. 1473, 2007 FCA 342 (F.C.A.), noting that "those holding the black pens seem to have assumed that each reference to CSIS must be redacted from the documents even when there is no apparent risk of disclosure of sensitive information such as operational methods or investigative techniques or the identity of their employees".

¹⁵³ *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 1473, 2007 FCA 342 (F.C.A.). The effect of this decision may be to provide the trial judge in the case with even less information with which to make his or her other decision under s. 38.14 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 about what, if any, remedy the accused should receive for the Federal Court's non-disclosure order.

Australia all allow the trial judge to determine claims of national security confidentiality. In the United Kingdom, for example, Khawaja's alleged conspirators have already been tried with five of the seven being convicted after one of the longest trials in British history. Claims of national security confidentiality or public interest immunity were decided by the trial judge who sees the secret information and can revisit a non-disclosure order as the trial evolves. In contrast, in Khawaja's Canadian trial, the Federal Court has made a non-disclosure decision that was subject to pre-trial appeal to the Federal Court of Appeal, but must be accepted by the trial judge. The trial judge will then be in the unenviable position of having to decide whether a fair trial is possible in light of the Federal Court's non-disclosure or partial disclosure order even though the trial judge will not have seen the secret information that the Federal Court has ordered need not be disclosed to the accused. If late disclosure issues arise during Khawaja's trial, the entire section 38 process including litigation in the Federal Court and possible appeals to the Federal Court of Appeal may have to start again.

Section 38 may well be consistent with the Charter. The courts have already trimmed some of its excesses with respect to mandatory publication bans and they might appoint special advocates to challenge the government's claims for secrecy. Section 38.14 respects the trial judge's section 24(1) powers to order remedies to ensure a fair trial. Although the section 38 process has been able to limp to a verdict in a few cases,¹⁵⁴ it is a recipe for delay and for decisions in which the trial judge either under or overestimates whether disclosure of secret material is necessary to ensure a fair trial. The system may be Charter proof, but it may also be unworkable. This is not a trivial point because a failure to resolve inevitable national security claims, perhaps in the high-profile *Khawaja* case,¹⁵⁵ will only bolster the case of those who argue that the criminal justice system cannot handle the challenge of terrorism prosecutions.

¹⁵⁴ In one case a trial judge accepted the Federal Court's order that CSIS wires and surveillance not be disclosed but was clearly troubled by the procedure and his own ruling: *R. v. Kevork*, [1986] O.J. No. 294, 27 C.C.C. (3d) 523 (Ont. H.C.J.). In another case, the accused was convicted but after a six-year delay involving numerous s. 38 decisions by the Federal Court and a declaration of a mistrial: *R. v. Ribic*, [2005] O.J. No. 4261 (Ont. S.C.J.).

¹⁵⁵ *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 1473, 2007 FCA 342 (F.C.A.).

IX. THE CHARTER AND TRIAL DELAY

The Charter speaks directly to issues of trial delay. Section 11(b) provides for the right to a trial in a reasonable time and the Supreme Court's 1990 decision in *R. v. Askov*¹⁵⁶ sparked a process that led to over 50,000 charges being stayed in Ontario and the appointment of more judges and prosecutors to deal with the backlog. There was, however, no formal legislative response to *Askov*. Some of the pressure to reform the system dissipated with the Court's 1992 decision in *R. v. Morin*,¹⁵⁷ which took a more flexible approach to trial delay. Court decisions, particularly section 11(b) decisions that are enforced by the inflexible and blunt remedy of stays of proceedings, may not be the best way to reform the criminal trial justice system. Ontario responded with the Martin Committee report and the subsequent Criminal Justice Review, but a recent report suggests that the recommendations of these two bodies were not always followed.¹⁵⁸ To be sure, the *Criminal Code*¹⁵⁹ still lacks the clarity of legislated speedy trial or disclosure standards.¹⁶⁰ These issues are litigated again and again, often through pre-trial motions that cause delay to trials.

There are signs that the efficiency gains produced by the administrative reforms of *R. v. Askov*¹⁶¹ have been lost and there is much concern about the length of criminal trials. In a series of well-publicized and in some quarters controversial speeches, Justice Moldaver of the Ontario Court of Appeal has raised the alarm bells about criminal trials and appeals that have become bogged down in motions and an impossible quest for perfection.¹⁶² There is a need for more empirical work to be done on the causes of delay, but there is some evidence that the criminal trial process is becoming less efficient throughout Canada. In 2003/2004, the average time

¹⁵⁶ [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.).

¹⁵⁷ [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771 (S.C.C.).

¹⁵⁸ *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court*, May 2006, online: Ontario Courts <<http://www.ontariocourts.on.ca/scj/en/reports/ctr/index.htm>>.

¹⁵⁹ R.S.C. 1985, c. C-46.

¹⁶⁰ See Michael Code, *Trial in a Reasonable Time* (Toronto: Carswell, 1992) on the importance of such *ex ante* statutory remedies.

¹⁶¹ [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.).

¹⁶² The Hon. Justice Michael Moldaver, "Long Criminal Trials: Masters of a System They Are Meant to Serve" (2005) 32 C.R. (6th) 316; The Hon. Justice Michael Moldaver, "The State of the Criminal Justice System in 2006: An Appellate Judge's Perspective" (Remarks to the Justice Summit, November 15, 2006), online: Ontario Courts <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/state.htm>>; But see also Don Stuart, "The Charter is a Vital Living Tree Not a Weed To Be Stunted — Justice Moldaver Has Overstated" (2006) 40 C.R. (6th) 280.

to dispose of a criminal case was 220 days and 16 per cent of cases took a year to dispose. Although the number of cases has dropped 9 per cent since 1994, the average number of appearances to dispose of a case has increased from 4.1 to 5.9.¹⁶³ For the first time, most cases involved multiple charges and 24 per cent of all cases had three or more charges. The accused was convicted in just under two-thirds of these cases. Nevertheless in 36 per cent of cases, the most serious charge was withdrawn or stayed. This indicates serious problems with the adequacy of Crown charge screening. In only 3 per cent of cases were people acquitted, but in 4 per cent they received other dispositions which are classified to include not only Charter stays, but also special pleas and waivers out of province.¹⁶⁴ The available evidence suggests that the criminal trial process is quite inefficient.

As Justice Moldaver has suggested, a significant (but unknown) number of pre-trial motions have contributed to the length of criminal trials. Examples would include motions to exclude evidence under section 24(2), motions for third party records, motions about disclosure and lost evidence, *Corbett*¹⁶⁵ applications, *Dagenais*¹⁶⁶ applications by the media, challenges to the quality of interpretation under section 14, section 11(b) applications for a stay, challenges for cause of jurors, and defensive lawyering to avoid ineffective assistance claims. It would be foolish to deny that the Charter has not added complexity to the criminal trial process.

But many other factors that are not related to the Charter have contributed to trial delay and complexity. These challenges include increased use of expert witnesses, ineffective and perfunctory pre-trial conferences, scheduling problems with busy defence counsel, poor boilerplate pleading in pre-trial motions, late pre-trial motions, inexperienced or overly aggressive defence lawyers or prosecutors, self-represented litigants, lack of effective pre-charge or pre-trial screening, the incentives created by hourly rates with no caps on hours spent in court, a last-minute culture within the legal profession, juror illness, lack of adequate court and correctional facilities, relitigation of pre-trial issues when a trial collapses, unduly complex and duplicative *Criminal Code*¹⁶⁷ provisions and common law rules, last-minute guilty pleas, and longer sentencing

¹⁶³ Mikhail Thomas, "Adult Criminal Court Statistics, 2003/04" (2004) 24:12 Juristat 1, at 9-10.

¹⁶⁴ Mikhail Thomas, "Adult Criminal Court Statistics, 2003/04" (2004) 24:12 Juristat 1, at 1.

¹⁶⁵ *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670 (S.C.C.).

¹⁶⁶ *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

¹⁶⁷ R.S.C. 1985, c. C-46.

hearings involving dangerous or long-term offender designation, remand credit or conditional sentences. If the Charter were to be abolished tomorrow, many of the problems that result in trial delay would remain.

Justice Moldaver has acknowledged that the problem of trial delay and complexity is much more complicated than the Charter. When it comes to remedies, he has stated:

Time does not permit me to go into detail but by way of example, I can foresee a day when the self-defence provisions that clutter our *Criminal Code* will be replaced by a single provision, akin to what we now have in s.7, with the jury being asked two questions: (1) Was the accused entitled to use force; and (2) if so, was the force he used excessive in the circumstances as he reasonably perceived them to be.

I can foresee a day when *KGB voir dres*, that often go on for days at a time, will become unnecessary because we will trust jurors to decide whether an out-of-court statement, made by the very person who has just been cross-examined before their eyes, is so inherently unreliable that it is not worthy of consideration — just as we now trust jurors to decide whether such statements are ultimately reliable and worthy of belief.

I can foresee a time when trial judges will no longer be required to spend endless hours rummaging through boxes of illegible medical, psychiatric and social work records, generated by complainants in sexual assault cases, because we will impress such records with a privilege akin to solicitor and client privilege and they won't be produceable absent an initial showing of innocence at stake.

And when we come to understand that the jurors are intelligent and that our job is to alert them to dangers, not hold their hand every step along the way, I can foresee a day when charges will be much shorter and trial judges will not wince at the prospect of charging on such things as similar act evidence and the co-conspirator exception to the hearsay rule.¹⁶⁸

Most of these remedies address the role of Parliament in not reforming the *Criminal Code*¹⁶⁹ to make it simpler and clearer and the role of the appellate courts in developing complex rules. They do not suggest that

¹⁶⁸ The Hon. Justice Michael Moldaver, “The State of the Criminal Justice System in 2006: An Appellate Judge’s Perspective” (Remarks to the Justice Summit, November 15, 2006), online: <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/state.htm>>.

¹⁶⁹ R.S.C. 1985, c. C-46.

the Charter is either the main cause or the main remedy for trial delay and complexity.

The Chief Justice's Advisory Committee on Criminal Trials in the Ontario Superior Court chaired by Justices Durno and Watt has issued an important report on the problems confronting trials in that court and their recommendations have been embraced in new rules.¹⁷⁰ The remedies they stress, such as more effective pre-trial conferences and more extensive pleadings, affidavits and support for all pre-trial motions, will affect Charter motions but also extend to all other motions. At their base, the attempt of the new rules is to change the behaviour of all of the participants in the criminal trial. The success of the new rules remains to be seen, but the issue is more complex than simply the effect of the Charter.

One factor in the mega trial problem is whether trial judges will have adequate experience with criminal justice matters in order to manage increasingly complex criminal trials. The Ontario Advisory Committee commented that "[i]n some cases, assigned judges have little experience in criminal law, particularly in complex prosecutions, invariably resulting in longer trials. Concerns were also expressed regarding the fact that specialized judges are not being assigned for all or some criminal trials."¹⁷¹ The committee also recognized

that the Superior Court of Justice is a generalist, circuiting court with judges appointed from a wide variety of backgrounds. However, given the enhanced significance of judicial pre-trial conferences, it is essential that, where feasible, the judges assigned to conduct pre-trial conferences should be experienced, knowledgeable, and interested in criminal law. They should also be able to provide counsel with appropriate ranges of sentences for the offences.¹⁷²

¹⁷⁰ *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court*, May 2006, online: Ontario Courts <<http://www.ontariocourts.on.ca/scj/en/reports/ctr/index.htm>>.

¹⁷¹ *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court*, May 2006, online: Ontario Courts <<http://www.ontariocourts.on.ca/scj/en/reports/ctr/index.htm>>, at para. 47.

¹⁷² *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court*, May 2006, online: Ontario Courts <<http://www.ontariocourts.on.ca/scj/en/reports/ctr/index.htm>>, at para. 176. The committee qualified its comments by noting (at para. 305) that:

The fact that a judge did not practice criminal law should not preclude the judge from presiding over criminal trials. Indeed, some judges who acquire exceptional reputations for their conduct of criminal trials in the Superior Court, did not practice criminal law prior to their appointment. While prior experience in criminal law is a significant attribute upon

One problem that may affect the selection of superior judges, as well as explain part of the delay in the criminal cases decided by that court, is the declining number of criminal trials in the superior courts. In 1993, there were over 1,000 jury trials in the Ontario Superior Court; in 2002 and 2003 there were under 500.¹⁷³ The cases that remain in the superior court may well be the most difficult of all cases.

Although there are experienced former prosecutors and former defence lawyers who are superior trial judges, it is also a reality that many superior court judges are appointed with little or no experience with the criminal justice system. Moreover, the process of appointment of superior court judges remains less transparent and more controversial than the appointment process used in most provinces for provincial court judges who hear the vast majority of criminal cases. Although the Supreme Court has expended much capital and time in establishing constitutional standards and procedures with respect to the determination of judicial salaries at the lower court levels,¹⁷⁴ the Charter has not yet addressed the more important issue of judicial appointments.

Another important issue is to what extent trial delay and the length of mega trials are associated with problems with legal aid funding. Although legal aid funding has increased significantly in the Charter era and part of this increase is likely attributed to the Charter, the Charter has been a blunt instrument to respond to the funding issues. Both *Rowbotham*¹⁷⁵ and *Fisher*¹⁷⁶ applications in relation to Charter rights to representation at trial are made on the specific facts of the case. Judicial decisions in this area are influenced by a sensitivity towards making

appointment, it is not a guarantee that the judge will conduct more efficient and focused trials than a judge without criminal law experience upon appointment.

¹⁷³ *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court*, May 2006, online: Ontario Courts <<http://www.ontariocourts.on.ca/scj/en/reports/ctr/index.htm>>, at para. 441; see also Anthony N. Doob & Cheryl Marie Webster, "The Superior/Provincial Criminal Court Distinction: Historical Anachronism or Empirical Reality?" (2003) 48 Crim L.Q. 77.

¹⁷⁴ *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [2005] S.C.J. No. 47, [2005] 2 S.C.R. 286 (S.C.C.); *Reference re Remuneration of Judges of Provincial Court of P.E.I.*; *Reference re Independence and Impartiality of Judges of Provincial Court of P.E.I.*; *R. v. Campbell*; *R. v. Ekmecic*; *R. v. Wickman*; *Manitoba Prov. Judges Assn. v. Manitoba (Min. of Justice)*, [1998] S.C.J. No. 10, [1998] 1 S.C.R. 3 (S.C.C.); *Reference re Remuneration of Judges of the Provincial Court of P.E.I.*; *Reference re Independence and Impartiality of Judges of the Provincial Court of P.E.I.*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.).

¹⁷⁵ *R. v. Rowbotham*, [1988] O.J. No. 271, 63 C.R. (3d) 113 (Ont. C.A.).

¹⁷⁶ *R. v. Fisher*, [1999] S.J. No. 622, 139 C.C.C. (3d) 418 (Sask. Q.B.).

decisions that may have budgetary implications.¹⁷⁷ The Supreme Court in *R. v. Prosper*¹⁷⁸ paid attention to the fact that earlier drafts of the Charter had included a specific right to legal aid funding. The Court declined to require the provision of toll-free telephone numbers to ensure that detainees had access to duty counsel. The Court's holding off requirements, of course, meant that almost all jurisdictions adopted the practical solution of 1-800 numbers, but the Court's caution in this area may reappear when it comes to the more expensive problem of unrepresented accused at trial. A quarter-century after the Charter, Canada still does not have its *Gideon v. Wainwright*¹⁷⁹ articulating a clear basis for when the Charter requires legal aid funding.

Although the Charter has contributed to some of the problems of trial delay and could be used more effectively to remedy trial delay, it would be simplistic either to blame the Charter for the entire problem or to expect that section 11(b) litigation alone will solve the complex problems of trial delay. There is a need to address the multiple determinants of trial delay, including the political economy produced by hourly rates, the last-minute culture of the criminal bar and its resistance to meaningful pleadings and pre-trial conferences. There is also a need to address the role of the *Criminal Code*¹⁸⁰ in contributing to the problems of complexity and delay.

X. THE CHARTER AND THE *CRIMINAL CODE*

The Charter has made a significant impact on the *Criminal Code*¹⁸¹ over the last 25 years. Its most important role has been to provide a vehicle to strike down outdated laws that Parliament was unwilling to reform. The striking down of the constructive murder, abortion and false news provisions stand out as the most dramatic examples.¹⁸² The judicial appetite for invalidation of criminal laws has, however, waned with the majority of the Court refusing to invalidate laws against the possession

¹⁷⁷ *R. v. Peterman*, [2004] O.J. No. 1758, 19 C.R. (6th) 258 (Ont. C.A.); *Quebec (Procureur général) v. C. (R.)*, [2003] J.Q. no 7541, 13 C.R. (6th) 1 (Que. C.A.).

¹⁷⁸ [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236 (S.C.C.).

¹⁷⁹ 372 U.S. 335 (1963).

¹⁸⁰ R.S.C. 1985, c. C-46.

¹⁸¹ R.S.C. 1985, c. C-46.

¹⁸² *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.).

of marijuana because of concerns about engaging in “micromanagement” of the parliamentary agenda.¹⁸³ The Court’s activism has not, however, totally faded as it has used strong interpretative remedies to reshape parts of the *Criminal Code* in accordance with Charter values so as to ensure that they survive Charter scrutiny. The most dramatic examples would be the modernization and trimming of overbroad pornography offences in *Butler* and *Sharpe*,¹⁸⁴ the modernization of indecency offences in *R. v. Labaye*,¹⁸⁵ the modernization of the correction by force provisions in the *Children’s Foundation*¹⁸⁶ case and the reformulation of the restrictive duress defence in *R. v. Ruzic*.¹⁸⁷ These judicial saves¹⁸⁸ have taken the pressure off Parliament to revise and modernize large portions of the *Criminal Code*, including the archaic morals and indecency provisions and the overly complex general part of the *Criminal Code*. For example, it is possible that a decision by the Supreme Court to strike out either the restrictive duress defence or the overbroad correction of children by force provisions in the *Criminal Code* could have forced Parliament to reform not only these defences, but also the needlessly complex provisions relating to self-defence and defence of property. Parliament, however, can avoid this task because the Court has corrected the most egregious problems of legislation through the process of Charter litigation.

My colleague Marty Friedland has argued that the Court’s activism under the Charter has contributed to Parliament’s decision not to engage in a wholesale revision of the *Criminal Code*.¹⁸⁹ Parliament’s lack of interest in this subject is indeed troubling. Much of the foundation was laid by the work of the former Law Reform Commission of Canada which was then continued and enriched by the work of Don Stuart and his

¹⁸³ *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, 2003 SCC 74, at para. 133 (S.C.C.).

¹⁸⁴ *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.); *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.).

¹⁸⁵ [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728 (S.C.C.).

¹⁸⁶ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

¹⁸⁷ [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.).

¹⁸⁸ I have expressed reservations about the Court’s increased reliance on interpretative remedies on the basis that they do not result in democratic dialogue that can occur when the courts invalidate legislation under the Charter but then leave the task of reconstruction to Parliament. Kent Roach, “Sharpening the Dialogue Debate” (2007) 45 Osgoode Hall L.J. 169; see also Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, “Charter Dialogue Revisited — Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 1.

¹⁸⁹ Martin L. Friedland, “Criminal Justice in Canada Revisited” (2004) 48 *Crim. L.Q.* 419, at 447-49. See also M.L. Friedland, *My Life in Crime and Other Academic Adventures* (Toronto: University of Toronto Press, 2007). *Criminal Code*, R.S.C. 1985, c. C-46.

colleagues at Queens.¹⁹⁰ Nevertheless successive federal governments have ignored this work. Alas, it is not as if they simply ignored the *Criminal Code*. Every year, the *Criminal Code* is opened up to amendments, many of an ad hoc and topic du jour variety. For example, some of the most recent amendments relate to issues such as amending the criminal interest provisions to allow pay day loan shops and new offences targeting film piracy. These amendments may be sensible on their own terms, but the result is a *Criminal Code* that becomes thicker and more incoherent with each passing year. I fear that the very idea of revising the Code is now dismissed as a pet project of the legal academy.

The lack of interest in *Criminal Code*¹⁹¹ revision is extremely shortsighted because a modern *Criminal Code* could respond to many of the problems of complexity, lack of clarity and delay in the criminal trial process. The Court's creation of police powers has aided and abetted parliamentary neglect of the *Criminal Code*. At the same time, the Court's growing jurisprudence raised many more questions than it resolved. The Court's case-by-case jurisprudence means that citizens and police officers have to live with a lack of clarity about the extent of their powers.¹⁹² A case like *Mann*¹⁹³ invites further judicial interpretation. A Quicklaw search conducted in August 2007 revealed 419 cases that mentioned the *Mann* decision, with the landmark case being followed in 74 cases and distinguished in 14 cases. The more recent case of *R. v. Clayton*¹⁹⁴ will undoubtedly spawn its own satellite jurisprudence. A *Criminal Code* provision or a PACE style guideline could provide more advance guidance and certainty.

*Criminal Code*¹⁹⁵ revisions could also address the problems created by the multiple and confusing warrant provisions in the *Criminal Code*. The numbers of warrants have proliferated in the Charter era as Parliament has responded in an ad hoc manner to various Charter decisions on consent intercepts, use of video cameras, the taking of body impressions, entry to dwellings and seizure of DNA. It is difficult for law professors

¹⁹⁰ Don Stuart, Ronald J. Delisle & Allan Manson, eds., *Towards A Clear and Just Criminal Code* (Toronto: Carswell, 1999).

¹⁹¹ R.S.C. 1985, c. C-46.

¹⁹² James Stribopoulos, "The Limits of Judicially Created Police Powers" (2007) 52 *Crim. L.Q.* 299. For an account of how Canadian courts have used the common law to expand police powers in a manner that British courts have not see Patrick Healy, "Investigative Detention in Canada", [2005] *Crim. L.R.* 98.

¹⁹³ *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.).

¹⁹⁴ [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

¹⁹⁵ R.S.C. 1985, c. C-46.

who specialize in criminal procedure to keep the plethora of new warrants straight, let alone busy police officers, prosecutors or justices of the peace. A revised *Criminal Code* is not just an aesthetic reform that could make the *Criminal Code* look less like the *Income Tax Act*.¹⁹⁶ It could prevent police, prosecutors and judges from making understandable mistakes that may needlessly place cases at risk.

The general part of the *Criminal Code*¹⁹⁷ also needs revising. The self-defence provisions are notoriously complex, but so too are the duress provisions. The Supreme Court would have been better to strike section 17 in its entirety and have allowed the common law defence of duress to apply across the board rather than have reformulated it in the uncertain and confusing manner that it has. I pity a judge who has to instruct a jury on common law and statutory duress, the parties provisions and self-defence thrown in for good measure. The mental and verbal gymnastics may or may not make for good law school exams (my students routinely invoke section 12 of the Charter when I ask them to interpret Parliament's product) but they are an unnecessary landmine for the judge, let alone the jury.

One factor in longer trials is the increased likelihood of the accused facing multiple charges. This process has been assisted by the tendency to add new crimes to the *Criminal Code*¹⁹⁸ in order to make a point that Parliament has responded to a social problem. The *Anti-terrorism Act*¹⁹⁹ is a particularly good example. The accused in both of Canada's ongoing terrorism prosecutions face multiple and overlapping offences that are likely to present many hurdles for the prosecution even though a conviction on one offence might be enough to secure a very long sentence including life imprisonment.²⁰⁰ The process of overloading both the *Criminal Code* and indictments with multiple offences has also been aided by the Court's double jeopardy jurisprudence under section 11(h) of the Charter which has allowed multiple convictions from the same transaction so long as the Crown has to prove some distinguishing feature.²⁰¹ A triage of offences

¹⁹⁶ R.S.C. 1985, c. 1 (5th Supp.).

¹⁹⁷ R.S.C. 1985, c. C-46.

¹⁹⁸ R.S.C. 1985, c. C-46.

¹⁹⁹ S.C. 2001, c. 41.

²⁰⁰ See the discussion of the multiple and complex charges laid in the first case under the *Anti-Terrorism Act*. Kent Roach, "Terrorism Offences and the Charter: A Comment on *R. v. Khawaja*" (2007) 11 Can. Crim. L.R. 271, at 273-78.

²⁰¹ *R. v. Prince*, [1986] S.C.J. No. 63, [1986] 2 S.C.R. 480 (S.C.C.).

might have benefits for the trial process. The *Criminal Code* needs to be put on a diet.

Although the Charter has played a beneficial role in pruning the most egregious excesses of the *Criminal Code*,²⁰² it has not inspired Parliament to revise and simplify the *Criminal Code*. The Court has rejected the idea that the requirement of codification is a principle of fundamental justice under the Charter²⁰³ and its efforts in modernizing some provisions of the Code through interpretative remedies have likely made it easy for Parliament to ignore the need for root and branch revision.

XI. CONCLUSION

The Charter has made important improvements to the justice system. The legislature no longer has supremacy when defining offences and it must now respect constitutional standards of fault and free expression. Police misconduct can be challenged through the exclusion of unconstitutionally obtained evidence. Charter standards of disclosure and procedural fairness provide important standards for the trial process. The Charter has addressed injustices in the administration of the criminal justice system and the substantive criminal law that would have otherwise gone without remedy. The Charter places valuable restraints on the criminal law in an age that is fuelled by claims of victims' rights, heightened anxiety about crime and post-9/11 security fears.

Nevertheless there is a need for a reality check and a sense of perspective on the importance of the Charter including changes in Charter jurisprudence. One can easily get lost in the many trees that now compose Charter jurisprudence and lose sight of the forest that is our criminal justice system. Likewise it may be a mistake to assume that the nuances of the Supreme Court's judgments directly shape how the criminal justice system operates. There are also dangers in assuming that once a Charter argument has been lost, all legal or political argument has run out. We should not assume that laws and practices that comply with the minimal standards of the Charter are necessarily the best that we should expect from our elected legislatures.

Although the Charter may play some role in explaining why Canadian rates of imprisonment have not followed the alarming post-1982 American

²⁰² R.S.C. 1985, c. C-46.

²⁰³ *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] S.C.J. No. 37, [1992] 1 S.C.R. 901 (S.C.C.).

trends, the Charter has likely not been a major factor. The Charter cannot take the credit for this modest Canadian success story, including recent reductions in imprisonment under the YCJA.²⁰⁴ Parliament still very much matters when it comes to Canada's penal policy. This means that developments such as Bill C-25,²⁰⁵ which proposes to add deterrence and denunciation to the sentencing purposes for young offenders, could have a more significant impact on justice policy than most Charter cases.

The Charter also has not been able to address some of the greatest failures of the criminal justice system. The Charter, even assisted by legislative reforms such as the enactment of section 718.2(e) of the *Criminal Code* and conditional sentences, has not been able to address the Canadian tragedy of growing Aboriginal overrepresentation in our prisons. Charter decisions on bail were not able to prevent a dramatic increase in remand populations. Indeed, much of this increase occurred during the 1992-1997 period in which the Court had effectively removed tertiary grounds for the denial of bail.²⁰⁶

The Charter is not central to the way that the criminal justice will deal with the challenges presented by crime victims demanding justice and better treatment. A few groups of victims and potential victims have been able to use parts of the Charter to defend legislation from Charter challenge by the accused,²⁰⁷ but most crime victims have not benefited from the Charter. Much remains to be done in terms of crime prevention, victim services, witness protection and reforms to the process to make it less punishing on victims while still ensuring fair treatment of the accused.

Even in areas where Charter concerns seem to have taken centre stage, the Charter has not provided all or perhaps most of the answers. The Charter has been both a cause and a cure for trial delay, but only a partial cause and a partial cure. Although Charter motions and standards contribute to Charter delay, so too do many other structural features of the system, including inadequate charge screening and pre-trial conferences, hourly rates and an adversarial and last-minute legal culture. Charter cures for trial delay stemming from *R. v. Askov*²⁰⁸ have not prevented the problem from reappearing. Fundamental legislative, organizational and cultural changes appear to be needed to respond to the issue of trial

²⁰⁴ S.C. 2002, c. 1.

²⁰⁵ *An Act to amend Youth Criminal Justice Act*, 2nd Sess., 39th Parl., 2007.

²⁰⁶ *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

²⁰⁷ *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.); *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

²⁰⁸ [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.).

delay and complexity. For example, there is a need for a dramatic revision and simplification of the *Criminal Code*.²⁰⁹ Such reform will not occur through Charter litigation. Indeed, the use of the Charter to modify the most archaic and overbroad parts of the *Criminal Code* may arguably have made it easier for Parliament to avoid the task of thoroughly revising the *Criminal Code*.

Although the Charter has played an important and largely beneficial role in restraining Canadian anti-terrorism law, it has not addressed some of the most important structural challenges. The two-court system for determining national security confidentiality claims that has delayed the Khawaja terrorism prosecution may respect the Charter, but it is inefficient and not as fair as following the practices of our allies in allowing trial judges to decide such questions. The Charter has required the use of special security-cleared counsel to challenge secret evidence used by the government,²¹⁰ but many problems remain not only with respect to whether special advocates will be able to ensure fair treatment for security certificate detainees, but also with respect to the fairness and the effectiveness of using immigration law as anti-terrorism law. Investigative hearings were Charter-proofed by Parliament when first introduced by provisions for counsel and use and derivative use immunity. The Supreme Court has supplemented these restraints with an expansion of immunity and the presumption of an open court.²¹¹ The end result, however, may have made it very difficult for the state to use investigative hearings without alerting the public and creating broad swaths of immunity. In any event, investigative hearings only touch the surface of larger questions about the protection of sources and witnesses and there are signs that limited resources may be better devoted to improving these programs. There is a danger that the minor adjustments that the Charter has made to both security certificates and investigative hearings will make it difficult to question the wisdom, necessity or effectiveness of these anti-terrorism policies.

The Charter has played a role in recognizing the reality of wrongful convictions and reducing the risks of them in the future. Canadians should be proud of decisions such as *R. v. Stinchcombe*²¹² and *United States*

²⁰⁹ R.S.C. 1985, c. C-46.

²¹⁰ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

²¹¹ *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248 (S.C.C.); *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.).

²¹² [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

*of America v. Burns*²¹³ that attempt to prevent wrongful convictions and reduce their devastating consequences. That said, more can be done under the Charter in recognizing the multiple causes of wrongful convictions, including the role played by bad defence lawyering, and various forms of unreliable evidence such as evidence from jailhouse informers or expert opinion that is not adequately supported by scientific evidence. That said, even the most robust approach to the Charter will not address many of the major causes of wrongful convictions such as faulty identification and tunnel vision. It will also not produce new systems to investigate claims of wrongful convictions or to provide vehicles for exonerating and compensating the wrongly convicted. Respect for the Charter may be a necessary response to wrongful convictions, but it is not sufficient. The Charter can increase the justness of our justice system, but it cannot guarantee it. There is much work to be done. Much of it will not involve the Charter.

²¹³ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.).

