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Rewriting the *Canadian Charter of Rights and Freedoms*: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process

Peter Sankoff*

I. INTRODUCTION

Although only a quarter of a century old — still youthful in jurisprudential terms — the *Canadian Charter of Rights and Freedoms*¹ has cemented its place as a vital force in Canadian criminal justice. Charter arguments are raised across the country on a daily basis, and for the most part these arguments have helped to secure a much fairer trial and evidentiary process for criminal defendants than was available in 1982.² For all of the benefits it provides, the Charter can hardly be considered a flawless document, however. The drafting process that produced the *Constitution Act, 1982*³ involved considerable consultation and “give-and-take” between government officials from every jurisdiction,⁴ and although the final version has stood up reasonably well, 25 years of jurisprudence has revealed a few cracks in the foundation. If it were possible to draft a new Charter with the advantage of hindsight, one imagines that different language might be used to avoid difficulties that have confounded courts and critics alike. Notwithstanding the impediments

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

² For a general debate on the merits of what the Charter has achieved in this sphere, see C. L’Heureux-Dubé, “The Charter of Rights and the Administration of Criminal Justice in Canada — Where Have We Been and Where Shall We Go?” (2006) 3 *Ohio State J. of Crim. L.* 473; and P. Sankoff, “Generally Speaking, Canada Is Going in the Right Direction: A Response to the Honourable Claire L’Heureux-Dubé” (2006) 3 *Ohio State J. of Crim. L.* 491.

³ Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

⁴ See J. Weiler & R. Elliott, eds., *Litigating the Values of A Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986), at “Part I — The Making of the Charter”.

that make such changes unlikely to ever occur,⁵ I thought it would be useful to take advantage of this important anniversary and consider what the results of such a revised process might produce, something that will allow me simultaneously to reflect upon the successes and failures of the Constitution's first 25 years.

Owing to the nature and restricted length of this work, I have confined my examination to issues concerning the law of evidence and the trial process and chosen what I see to be four of the most significant aspects of the Charter requiring a fresh approach. It is in these areas that I suggest rewriting a "new" version of the Charter.

II. SECTION 24(2) — TWO ALTERATIONS FOR A FAIRER REMEDIAL CLAUSE

It is impossible to write about successes and failures without spending time focusing upon the part of the Charter that has most significantly affected the trial process: section 24(2), the exclusionary clause. Prior to the Charter's enactment, the law of evidence focused almost exclusively on the probative value and prejudicial effect of the proof tendered by the prosecution. No matter how a piece of evidence might have been obtained, the sole concern for the trial judge in resolving admissibility was its potential utility in court.⁶ Section 24(2) altered this situation dramatically. The Canadian Civil Liberties Association and other organizations fought diligently to have an exclusionary clause introduced into the Charter,⁷ and it is easy to see why. In addition to being a "boon" for defence lawyers,⁸ the clause gives teeth to the Charter's substantive rights, and provides state actors with a significant incentive to comply with Charter rulings.

However, the effectiveness of section 24(2) remains one of the most hotly disputed aspects of Canada's ongoing constitutional debate.⁹ Regardless of one's views on the importance of respecting an individual's

⁵ The difficulties of securing amendments to the Constitution are well known. See P. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 1997-), at 4-40 to 4-43.

⁶ *R. v. Wray* (1970), [1971] S.C.R. 272, [1970] 4 C.C.C. 1 (S.C.C.).

⁷ D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986), at 222-23.

⁸ See A. Gold & M. Fuerst, "The Stuff that Dreams are Made Of! — Criminal Law and the Charter of Rights" (1992) 24 *Ottawa L. Rev.* 13.

⁹ See, for example, the contrasting views of S. Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter" (2004) 49 *McGill L.J.* 105; and R. Fraser & J. Addison, "What's Truth Got to Do With It? The Supreme Court of Canada and Section 24(2)" (2004) 29 *Queens L.J.* 823.

rights, excluding probative evidence obtained via unconstitutional methods is an extremely controversial practice. The cost of occasionally letting a guilty defendant go free is a high one and clashes with the strong trend in the law of evidence towards making all relevant proof available to the trier of fact.¹⁰ It is hardly surprising that the Supreme Court has divided on numerous occasions regarding the optimal manner of applying this powerful clause.¹¹

Although reconciling the conflicting crime control and due process principles that are at the heart of the section 24(2) exercise will never be easy, the Supreme Court should be generally commended for having interpreted this clause in a way that balances respect for the Charter and law enforcement interests in determining whether exclusion is warranted in a particular case.¹² Nonetheless, in seeking to develop the best possible balance, the Supreme Court has made two critical decisions that have hindered the process. To rectify these deficiencies, I will suggest two amendments to the existing wording of section 24(2).

1. Widening the Current Standing Rules

The first alteration is as follows:

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms of any person guaranteed by this Charter, ...

With 25 years of Charter decisions to choose from, it is not easy to narrow down a manageable list of favourites. Coming up with my personal shortlist of disliked judgments is considerably easier, however, as on this register two section 24(2) cases leap right to the head of the queue: *R. v. Edwards*¹³ and *R. v. Belnavis*.¹⁴ Neither of these Supreme Court decisions is particularly complicated as both stand for the same proposition:

¹⁰ *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670, at 714 (S.C.C.); *Trammel v. United States*, 445 U.S. 40, at 50-51 (1980).

¹¹ See, for example, *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.); *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.); *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

¹² Although the Supreme Court has received tremendous criticism from all sides for its s. 24(2) jurisprudence, it should be acknowledged that the interpretation could have been much more narrow than what currently exists, and access to this remedy might have been cut off from the start had the dissenting judgments in *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.) or *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.) become the law.

¹³ [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

¹⁴ [1997] S.C.J. No. 341, [1997] 3 S.C.R. 341 (S.C.C.).

that access to a section 24(2) remedy is personal.¹⁵ To put it another way, a defendant is forbidden from bringing a challenge to exclude evidence obtained pursuant to a Charter violation unless it was his or her rights that were actually breached by the state.¹⁶

*Edwards*¹⁷ and *Belnavis*¹⁸ have been the subject of considerable academic criticism,¹⁹ and much of the disapproval has targeted the dearth of principled reasoning for the absolute prohibition against third party claims. In both cases, a majority of the Supreme Court ignored passionate and persuasive dissenting opinions from La Forest J. and relied instead upon American jurisprudence made in a very different context,²⁰ combined with a narrow interpretation of section 24(1) that permits a court to grant a remedy to “any person whose rights have been aggrieved”.²¹ The rationale for the stringent approach — such that there is one — seems to be to resist providing defendants with the “windfall” of a remedy for a constitutional violation they did not personally suffer, an approach that

¹⁵ It should be noted that this point is often characterized as an issue relating to the accused’s substantive right in that, to take one example, he or she cannot bring a s. 8 Charter challenge because that right is personal. But the need to establish a “reasonable expectation of privacy” sufficient to trigger such a Charter challenge only arises because of the courts’ refusal to permit challenges on behalf of others owing to the current interpretation of s. 24(1). See the discussion on this point in *R. v. Sandhu*, [1993] B.C.J. No. 1279, 82 C.C.C. (3d) 236 (B.C.C.A.).

¹⁶ Given the results this approach produces, it is not surprising that some judges have attempted to avoid it by concluding that the illegal activity or the admission of tainted evidence by the Crown constitutes an abuse of process under s. 7 of the Charter, or by simply refusing to follow *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.) altogether: *R. v. Trang*, [2001] A.J. No. 1498, 300 A.R. 105 (Alta. Q.B.); *R. v. Tran*, [2004] A.J. No. 1000, [2004] 3 W.W.R. 752 (Alta. Prov. Ct.). For further detail on how such an argument might proceed, see U. Hendel & P. Sankoff, “*R. v. Edwards*: When Two Wrongs Might Just Make a Right” (1996) 45 C.R. (3d) 330. This is not a real solution to the standing problem, however. There is no guarantee this “back door” method of challenging violations of third party rights will succeed and it is rejected as often as it is adopted: *R. v. Paolitto*, [1994] O.J. No. 1220, 91 C.C.C. (3d) 75 (Ont. C.A.); *R. v. Campbell*, [2002] A.J. No. 734, 318 A.R. 302 (Alta. Q.B.); *R. v. Adam*, [2006] B.C.J. No. 531 (B.C.S.C.). Moreover, the approach invites conflicting jurisprudence and a highly technical approach to the Charter. As L’Heureux-Dubé J. noted in *R. v. O’Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, at 462 (S.C.C.), “we should not invite schizophrenia into the law.” Abuse of process claims are no substitute for a properly considered balancing under s. 24(2).

¹⁷ *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

¹⁸ *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.).

¹⁹ D. Schwartz, “*Edwards* and *Belnavis*: Front and Rear Door Exceptions to the Right to be Secure from Unreasonable Search and Seizure” (1997) 10 C.R. (5th) 100; G. Luther, “Of Excision, Amplification and Standing: Making Sense of the Law of Evidence in the Context of Challenges to Warranted Searches” (2006) 11 Can. Crim. L. Rev. 1.

²⁰ As La Forest J. pointed out in *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128, at 157 (S.C.C.), the strict approach to standing in the U.S. “seems largely motivated by the social costs attendant upon the application of the strict exclusionary rule in the United States”.

²¹ Section 24(2), however, has no such wording and it would have been possible for the Court to read this provision in a different manner.

might make sense if the purpose of the Charter's remedial clause was to vindicate or compensate individual claims. This is not what section 24(2) is designed to do, however.²² The wording of the clause requires an expansive assessment of circumstances and whether admission of the disputed evidence would bring the administration of justice into disrepute, a task that has always focused upon broader public objectives beyond the individual accused, concentrating on the need to dissociate the judiciary from unconstitutional conduct,²³ or to deter state actors from contravening the Charter over the long term.²⁴

Whether or not a particular defendant "profits" is largely irrelevant to the exercise, as the focus is primarily on the institutional benefits of exclusion. With that in mind, what reason is there for barring third party claims as a matter of course? That answer is hard to come by, but one thing is certain on the other side of the ledger: the direct consequence of this approach is to permit and arguably even encourage²⁵ state agents to violate the Charter rights of third parties, secure in the knowledge that the real target of their searches or inquiries will be unable to object at any stage.

A study of the post-*Edwards*²⁶ and *Belnavis*²⁷ jurisprudence confirms this trend. Evidence will not be excluded where the police detain and search one individual unconstitutionally, and then use the information to pursue another.²⁸ Illegal wiretapping of conspiratorial conversations is also permissible, as the Charter only mandates exclusion of evidence obtained from the speakers, and the information can still be used against members of the conspiracy whose phones were not tapped and who were not part of the conversation.²⁹ Where the police are not interested in a detained person as a suspect, they can deliberately refrain from providing access to counsel and question at length, subsequently relying upon any answers provided to investigate a secondary target.³⁰ Regardless

²² S. Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter" (2004) 49 McGill L.J. 105, at 111-13.

²³ *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at 280-81 (S.C.C.).

²⁴ *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206, at 242 (S.C.C.).

²⁵ Where the police are not targeting a particular individual, the standing jurisprudence provides them with an incentive to breach that person's rights in the hope that these persons might have incriminating evidence to offer against another.

²⁶ *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

²⁷ *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.).

²⁸ *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

²⁹ *R. v. Cheung*, [1997] B.C.J. No. 2282, 119 C.C.C. (3d) 507 (B.C.C.A.).

³⁰ *R. v. Hyatt*, [2003] B.C.J. No. 63, 171 C.C.C. (3d) 409 (B.C.C.A.); *R. v. Scott*, [2004] N.S.J. No. 451, 191 C.C.C. (3d) 183 (N.S.C.A.). Derivative evidence obtained from such questioning can also be used against another target.

of how intentional, serious or abusive an unconstitutional action might be in the abstract, there is little risk of an investigation being compromised by resort to section 24(2) so long as there is another target against whom the fruits of these illegal activities can be utilized. It is not at all uncommon to see cases involving jointly tried accused where evidence is excluded against one defendant and admitted against another.³¹

This approach is both disappointing and unnecessary, especially considering that section 24(2) has a built-in mechanism allowing judges to consider the remoteness of a defendant's claim in assessing whether to exclude the evidence. In direct contrast to the American jurisprudence upon which *Edwards*³² and *Belnavis*³³ rely, exclusion does not automatically follow the finding of a Charter violation. The courts could easily address standing issues in the same way as they currently deal with the causal link between the violation and the discovery of evidence: as one factor to consider in the overall balancing process.³⁴

This is exactly the approach that has been taken in New Zealand under the *New Zealand Bill of Rights Act 1990*.³⁵ Until 2002, New Zealand courts applied the strict American approach to exclusion, whereby *any* evidence discovered pursuant to a rights violation had to be excluded from the proceeding.³⁶ Courts naturally latched on to the U.S. approach to standing as well, reasoning that claims advanced by third parties were less directly connected to the Bill of Rights violation, and arguably less serious as a result. Faced with the harsh consequence of exclusion every time *any* person's right was violated during the course of obtaining evidence, the courts imposed a harsh standing requirement instead.³⁷ In 2002 however, the New Zealand Court of Appeal revisited the rule of automatic exclusion and replaced it with a more flexible test crafted along

³¹ For example, *R. v. Le*, [2005] B.C.J. No. 2898 (B.C. Prov. Ct.). See also *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.), *per* Iacobucci J.

³² *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

³³ *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.).

³⁴ *R. v. Strachan*, [1988] S.C.J. No. 94, [1988] 2 S.C.R. 980 (S.C.C.); *R. v. Goldhart*, [1996] S.C.J. No. 76, [1996] 2 S.C.R. 463 (S.C.C.), adopting an expansive approach to the nexus between breach and obtaining of evidence, specifically rejecting the American approach, which requires a strong causal link. See also K. Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, ON: Canada Law Book, 1994-), at 10-32 to 10-33.

³⁵ No. 109 of 1990.

³⁶ *R. v. Butcher*, [1992] 2 N.Z.L.R. 257 (N.Z.C.A.); *R. v. Goodwin*, [1993] 2 N.Z.L.R. 153 (N.Z.C.A.).

³⁷ *R. v. Bruhms* (1994), 11 C.R.N.Z. 656 (N.Z.C.A.); *R. v. Holford*, [2001] 1 N.Z.L.R. 385 (N.Z.C.A.). For a compelling critique of this approach in the New Zealand context, see P. Rishworth, *et al.*, *The New Zealand Bill of Rights* (Auckland: Oxford University Press, 2003), at 788-99.

the lines of section 24(2) of the Charter.³⁸ In a subsequent decision, the Court of Appeal reconsidered the standing requirement in light of the new test and concluded that continuing to exclude third party claims without considering their merits was neither desirable nor necessary. The Court of Appeal specifically examined and refused to follow the Supreme Court of Canada's reasoning in *Edwards*,³⁹ holding quite succinctly that:

Having "standing" as an "all or nothing" concept risks encouraging unlawful behaviour on the part of the police In a civilised society, it is vital that those entrusted with the enforcement of the law be required to follow it themselves.⁴⁰

This approach is preferable to that which currently prevails in Canada. Section 24(2) is a balancing exercise permitting consideration of a multitude of factors and there is no principled reason to make standing a threshold concern. Doing so significantly diminishes the Charter's power as a deterrent by sanctioning unconstitutional behaviour undertaken against anyone who is not a target of the police investigation.⁴¹ Amending section 24(2) in such a way so as to permit the courts to grant standing to anyone facing conviction by unconstitutionally obtained evidence would help achieve one of the exclusionary clause's main objectives: ensuring that state actors obey the supreme law of the land and making such obeisance a primary characteristic of their investigative work.

2. A Better Balance

The second alteration is as follows:

24(2)... the evidence shall be excluded if it is established that, having regard to all the circumstances, the seriousness of the violation warrants excluding the evidence.

Although many aspects of the section 24(2) test of exclusion have come under scrutiny over the past 25 years, no part of the exercise has been a source of greater controversy than the treatment of conscripted

³⁸ *R. v. Shaheed*, [2002] 2 N.Z.L.R. 377 (N.Z.C.A.). For an overview of this decision and its ramifications, see S. Optican & P. Sankoff, "The New Exclusionary Rule: A Preliminary Assessment of *R. v. Shaheed*", [2003] N.Z.L. Rev. 1.

³⁹ *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 (S.C.C.).

⁴⁰ *R. v. Williams*, [2007] NZCA 52, at para. 66 (N.Z.C.A.).

⁴¹ As La Forest J. pointed out in *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128, at 153 (S.C.C.), this would actually "accord greater protection to the right of privacy to the accused or other wrongdoer than to a person against whom there may be no reasonable suspicion of wrongdoing".

evidence. In *Collins*,⁴² Lamer J. famously decreed that the impact upon the fairness of the trial would be a pre-eminent concern in deciding whether to exclude unconstitutionally obtained evidence pursuant to section 24(2). More importantly, he also concluded that the admission of “conscriptive” evidence — as opposed to other forms of proof — had the potential to render the trial unfair. It was a surprising conclusion that has played a determinative role in focusing the direction of section 24(2) jurisprudence, and since *Collins*, the fair trial criterion has only become more powerful. While *Collins* suggested that the fairness of the trial was merely one criterion — albeit a highly persuasive one — to consider in the overall calculus, subsequent authority transformed it into a distinct exclusionary rule,⁴³ a result that was somewhat inevitable from the start, as Lamer J.’s use of the term “fair trial” had the effect of ratcheting up the stakes in the exclusionary analysis. In *Stillman*,⁴⁴ for example, Cory J. noted the importance of excluding evidence of this nature:

A consideration of trial fairness is of fundamental importance . . . A fair trial for those accused of a criminal offence is a cornerstone of our Canadian democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. To uphold such a conviction would be unthinkable. It would indeed be a travesty of justice.⁴⁵

It is difficult to argue with such convincing rhetoric. One would be hard pressed to find a Canadian — even among vocal critics of the Charter — who would disagree with the notion that every person is entitled to a fair trial. A trial that is not fair simply cannot be countenanced.

The problem, of course, is that it is by no means clear that conscripted evidence actually renders a trial unfair in accordance with the common understanding of this term,⁴⁶ and since this reasoning was first adopted in *Collins*,⁴⁷ a relentless barrage of criticism has contested the conceptual

⁴² *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

⁴³ *R. v. Elshaw*, [1991] S.C.J. No. 68, [1991] 3 S.C.R. 24 (S.C.C.); *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615 (S.C.C.).

⁴⁴ *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

⁴⁵ *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, at 651 (S.C.C.).

⁴⁶ As Professor D. Paciocco notes in “*Stillman*, Disproportion and the Fair Trial Dichotomy” (1997) 2 Can. Crim. L. Rev. 163, at 167, “the logic leading to this conclusion is impressive. Indeed, it is irrefutable. If the admission of evidence will render a trial unfair, of course it must be excluded. What is not so impervious to rational criticism, however, is the more basic notion that the admission of unconstitutionally obtained evidence can render a trial unfair.”

⁴⁷ *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

accuracy of this approach.⁴⁸ Immediately after the release of *Collins*, Professor R.J. Delisle wrote a scathing critique of the Supreme Court's discussion of what could threaten a "fair trial":

It is difficult, if not impossible, to understand why the fairness of a trial would or would not be affected by the admission of evidence obtained as the result of a Charter violation depending on the type of evidence obtained during the investigation. The knowledge of the accused's involvement in the offence existed prior to the Charter violation but was produced for our examination by his self-incriminatory statement following the Charter violation; the real evidence existed prior to the violation but was produced for our examination only by its discovery through the unconstitutional search ... The majority seek to make a distinction on the basis that the fundamental right against self-incrimination is paramount ... Both [the right against self-incrimination and the right against unreasonable search and seizure] are rooted in the concept of privacy. The majority does not explain why one right is to be regarded more highly than the other.⁴⁹

Indeed, despite adopting the fair trial criterion as the cornerstone of its jurisprudential approach to section 24(2), the Supreme Court has never gone to any lengths to explain what is so foul about conscripted evidence that its presence almost invariably renders a trial unfair. It is true that on many occasions reference has been made to self-incriminatory evidence, and the historic protection of the right to remain silent, but it is unclear what, if anything, turns on this.

In fact, what seems to have influenced Lamer J. in *Collins*⁵⁰ was the then recent decision of *R. v. Sang*,⁵¹ where a deeply divided House of Lords drew a distinction between illegally obtained evidence and evidence procured in violation of a person's right to remain silent, holding that only the latter sort had an impact on the fairness of a defendant's trial. This judgment, of course, was made in a conservative, common law environment and in the absence of any constitutional document. Its effect,

⁴⁸ See, for example: D. Paciocco, "The Judicial Repeal of S. 24(2) and the Development of the Canadian Exclusionary Rule" (1990) 32 Crim. L.Q. 326; C. Brewer, "*Stillman* and Section 24(2): Much To-Do About Nothing" (1997) 2 Can. Crim. L. Rev. 239; R. Mahoney, "Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery" (1999) 42 Crim. L.Q. 443; J. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24 (Part II)" (2000) 44 Crim. L.Q. 34, at 46-58; S. Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter" (2004) 49 McGill L.J. 105.

⁴⁹ R.J. Delisle, "*Collins*: An Unjustified Distinction" (1987) 56 C.R. (3d) 216, at 217-18.

⁵⁰ *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

⁵¹ [1980] A.C. 402 (H.L.).

as Professor Delisle pointed out, was to create a hierarchy of rights — something the Supreme Court has strived to avoid on other occasions.⁵²

Distilled down to its central essence, the fair trial analysis rests on the notion that obtaining evidence from an accused prior to trial is somehow similar to compelling the accused to testify at trial, a proposition that does not really withstand serious scrutiny. Suspects are regularly persuaded to confess their crimes and provide bodily substances with the blessing of the courts and the only problem in section 24(2) cases lies in the manner by which this is done. As Professor Penney has noted, “[t]he *Collins* distinction is unworkable because it fails to recognize that it is the effect of the evidence, not its inherent ‘nature’, which implicates the fairness interests of the accused.”⁵³

If the fair trial designation turns on nothing more than the manner in which the proof was gathered, it is unclear why evidence such as statements and bodily substances deserve any special treatment. The protection afforded to “evidence of the body” is particularly unusual. As the *Stillman*⁵⁴ analysis makes clear, conscriptive evidence includes substances obtained from an accused’s person. Where, for example, the police unconstitutionally pluck a hair from the accused’s head, admission of this evidence renders the trial unfair, for the accused has been “compelled” to provide a bodily sample. If the same hair is unconstitutionally seized from the accused’s pillow, however, the trial is not rendered unfair.⁵⁵

The treatment of breath samples leads to equally peculiar results. The Supreme Court has held that where a Charter violation occurs prior to the taking of a breath sample, the sample will generally be deemed to have been conscripted. Essentially, the reasoning is that the accused’s participation in breathing into a machine renders the sample unfair.⁵⁶ The same result would not occur, however, if science were able to provide a machine that measured the air emanating naturally out of the accused’s

⁵² *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 878 (S.C.C.).

⁵³ S. Penney, “Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence under s. 24(2) of the Charter” (1994) 32 *Alta. L. Rev.* 782, at 801. See similarly D. Paciocco, “*Stillman*, Disproportion and the Fair Trial Dichotomy” (1997) 2 *Can. Crim. L. Rev.* 163, at 169.

⁵⁴ *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

⁵⁵ *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.); *R. v. Pope*, [1998] A.J. No. 925, 129 C.C.C. (3d) 59 (Alta. C.A.).

⁵⁶ The breath sample issue may be the most contentious of all, and despite long-standing precedent suggesting this type of evidence is conscriptive, a number of lower court cases in recent years have moved in an alternative direction, often on the grounds that samples should be excluded from the general presumption of excluding conscriptive evidence. See *R. v. Padavattan*, [2007] O.J. No. 2003, 45 C.R. (6th) 405 (Ont. S.C.J.), which sets out the relevant jurisprudence.

mouth, simply because breathing is involuntary. Such a sample would in no way be “compelled” and would not affect trial fairness.⁵⁷ These types of bizarre results confirm Professor Paciocco’s suspicion that the more one examines the fair trial designation, the more one is left with the conclusion that “there is no clear or compelling theoretical basis for [it]. Without a theoretical basis, the truism that we have to exclude evidence where its admission would undermine the fairness of the trial is empty, pointless and irrelevant.”⁵⁸

Even more damaging than the absence of a clear theoretical basis for exclusion is the possibility that the existing approach to section 24(2) has helped to perpetuate a negative view of the exclusionary rule as a whole. Over the past 20 years, conscriptive evidence has been routinely excluded from trials of all types. Without any consideration of the gravity of the breach, or the effects of exclusion, this sort of evidence has regularly been banished. In light of these results, it is no wonder that critics of the Charter point to section 24(2) as having effected an unbalanced approach in favour of accused persons, given that even technical violations of the right to counsel lead to exclusion of valuable and probative evidence on the altar of speculative concerns about “fairness”.

It is also possible, though admittedly much more speculative, to contend that the jurisprudence has had another troublesome effect: the promotion of an extremely high standard for exclusion of evidence that is said not to impact upon trial fairness. In other words, in order to effect some sort of realistic compromise between evidence that is admitted against that which is excluded, the courts have set an unusually high threshold for non-conscriptive evidence, effectively to offset the regular

⁵⁷ The *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.) categorization can also be critiqued as being internally inconsistent. The decision limits conscripted evidence to “a statement, the use of the body or the production of bodily samples”: *R. v. Cook*, [1998] S.C.J. No. 68, 128 C.C.C. (3d) 1, at para. 69 (S.C.C.). It certainly makes the classification process easier to state authoritatively that only statements and uses of the body implicate trial fairness. If, however, the rationale is designed to protect the unconstitutional “participation” by the accused, why are the classified participations the only actions that trigger the analysis? Without a sound basis for distinguishing the “fair trial” participations from those that are said not to have a similarly ill effect, the basic proposition begins to lose much of its force. See D. Tanovich, “Making Sense of the Meaning of Conscriptive Evidence Following *Stillman*” (1999) 20 C.R. (5th) 233.

⁵⁸ D. Paciocco, “*Stillman*, Disproportion and the Fair Trial Dichotomy” (1997) 2 Can. Crim. L. Rev. 163, at 170. Professor R. Mahoney, “Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery” (1999) 42 Crim. L.Q. 443, at 454, has suggested that the fair trial rationale “may contain a grain of truth”. He concludes that “Canadians may rightly view as unfair any contest where one participant has been severely handicapped by earlier, disgraceful conduct by his or her opponent.” Mahoney, however, appears to agree with Paciocco in the sense that using this approach does not justify distinguishing between the type of evidence that is obtained.

exclusion of conscriptive evidence. As a result, violations of the right to be secure against unreasonable search and seizure, which generally tend to involve non-conscriptive evidence, have traditionally been much less likely to be “protected” by the exclusionary rule.

The time has come to abandon the distinction between conscriptive and non-conscriptive evidence.⁵⁹ What should replace the dichotomy remains to be seen, but the most compelling approach would be to focus exclusively on the seriousness of the violation, and the objective of preventing future Charter breaches. In a detailed recent essay, Professor Penney set out a cogent argument for deterrence being the only rational justification for excluding unconstitutionally obtained evidence.⁶⁰ This proposal would focus solely upon the nature of the breach in question, and whether it was the product of an action that either intentionally or negligently contravened the defendant’s Charter rights. Such an approach would promote adherence to the Charter over the long term while maintaining police flexibility in situations of urgency or uncertain legal status.⁶¹ At the very least, it would operate on the basis of a clear and defensible rationale, rendering the exclusionary process a great deal more fair, predictable and acceptable.

⁵⁹ It is worth noting that in *R. v. Shaheed*, [2002] 2 N.Z.L.R. 377, at 420 (N.Z.C.A.), the New Zealand Court of Appeal was tasked with recreating their exclusionary remedy from the ground up and examined the Canadian jurisprudence in some detail. Although they took guidance from this experience, the Court of Appeal flatly rejected the “fair trial” criteria, stating that “[a] trial is not to be regarded as potentially unfair by reason of the admission of evidence unless that evidence may lead to an unsafe verdict.” Many Canadian courts are also becoming frustrated with this approach, and a change may well be in the offing. The Supreme Court looks set to revisit this issue in *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 99 (S.C.C.) (June 21, 2007). See also *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 29 C.R. (6th) 205 (S.C.C.), *per* LeBel J.; *R. v. Shepherd*, [2007] S.J. No. 119, 45 C.R. (6th) 213 (Sask. C.A.).

⁶⁰ S. Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under Section 24(2) of the Charter” (2004) 49 McGill L.J. 105. See also D. Stuart, “Threats to Charter Rights of Accused in Making the Test for Exclusion of Evidence under Section 24(2) More Flexible” (2007) 45 C.R. (6th) 262.

⁶¹ Effectively, the approach is an incremental one. The police are granted leeway in situations where the law is unclear, or where the situation prevents them from acting in accordance with it. Once the law is clarified by a particular judgment, the police are “put on notice”, and must comply in future instances.

III. SECTION 11(f) — QUESTIONING THE SECTION'S PROTECTION OF THE JURY TRIAL

The right to trial by jury is one of defining features of the English common law trial, protected by section 11(f) of the Charter, which guarantees the right in any case where the offence for which the defendant is being tried is subject to a maximum penalty of five years or greater. Notwithstanding its well-entrenched status in Canadian law, I believe that the right to trial by jury as expressed in section 11(f) is ill crafted. As it currently exists, the right is under-inclusive in failing to protect the accused's right to *choose* a trial by jury in all cases. On a different and more provocative note, I believe there is also a reasonable case to be made for abolishing this Charter clause altogether.

1. Fine-tuning the Right to Trial by Jury

11. Any person charged with an offence has the right... (f) except in the case of an offence under military law tried before a military tribunal, to the choice of a trial before judge alone or by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

In its current form, section 11(f) effectively operates as a shield, prohibiting the government from abolishing trial by jury in cases of a serious nature. In the vast majority of cases, the combined effect of section 11(f) and the *Criminal Code*'s⁶² many procedural provisions on the subject is to guarantee the defendant a choice between a trial by jury and a trial by judge alone. Although a trial by jury is technically the default procedure for indictable offences,⁶³ sections 536 and 558 give the defendant the right to elect a trial by judge alone in these cases. The ability to elect is qualified in three specific situations, however. Where the defendant is charged with a section 469 offence — which in modern times almost invariably means a murder count of some sort — and in any case where the Crown prefers a direct indictment, the defendant *must* have a trial by jury unless the prosecution consents to a trial by judge alone.⁶⁴ Additionally, the Attorney General retains the discretion to compel a trial

⁶² R.S.C. 1985, c. C-46.

⁶³ Section 471 of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁶⁴ Section 473 of the *Criminal Code*, R.S.C. 1985, c. C-46 (in relation to s. 469 offences); s. 565(2) (in relation to direct indictments).

by jury in any proceeding where the defendant is charged with a crime punishable by a period of more than five years in prison.⁶⁵

The effect of these provisions is that the defendant's ability to choose whether to proceed before a jury or by judge alone is limited in most instances by the Crown's readiness to let such an election stand or proceed and, as it is currently constructed, section 11(f) provides no assistance. In *R. v. Turpin*,⁶⁶ the Supreme Court concluded that the Charter provided no right to a non-jury trial. For a unanimous court, Wilson J. held that:

There is a constitutional right to a jury trial and there may be a "right", using that term loosely, in an accused to waive the right to a jury trial. An accused may repudiate his or her s. 11(f) right but such repudiation does not, in my view, transform the constitutional right to a jury trial into a constitutional right to a non-jury trial so as to overcome the mandatory jury trial provisions of the *Criminal Code*.⁶⁷

As a consequence, section 11(f) does not guarantee a defendant the right to choose which mode of trial he or she prefers, but simply ensures that a right to trial by jury is available in serious cases.⁶⁸

The reason for leaving the ultimate choice of trial forum with the Crown in the vast majority of cases is nothing more than a historical preference for jury trials combined with the belief that the public interest tends to be best served by this mode of proceeding in serious crimes. Jury trials are said to be "for the benefit of the community as a whole as well as for the benefit of the particular accused".⁶⁹ A jury verdict is regarded as providing a particular legitimacy that is not available from a judge sitting alone.⁷⁰

⁶⁵ Section 568 of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁶⁶ [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.).

⁶⁷ *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1321 (S.C.C.).

⁶⁸ Professor Berger makes a compelling argument for revisiting *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.), on the grounds that the courts are far more willing to imply negative rights than they were in 1989, especially where such an interpretation is necessary to uphold other Charter values. See B. Berger, "Peine Forte et Dure: Compelled Jury Trials and Legal Rights in Canada" (2003) 48 *Crim. L.Q.* 205.

⁶⁹ *R. v. Brown* (1986), 19 A. Crim. R. 136, at 156 (H.C.A.).

⁷⁰ See, e.g., *R. v. Sherratt*, [1991] S.C.J. No. 21, [1991] 1 S.C.R. 509, at 523 (S.C.C.); D. Brown & D. Neal, "Show Trials: The Media and the Gang of Twelve" in M. Findlay & P. Duff, eds., *The Jury Under Attack* (Sydney: Butterworths, 1988) 126, at 130-32.

Although this reasoning has prevailed for centuries and tends to be followed in other common law jurisdictions,⁷¹ it is hardly irrefutable. Leaving aside historical preference, the view that a jury trial is somehow better for the community than a trial by judge alone amounts to little more than assertion. There is little in the way of hard data to support it, and the general trend away from jury trials on a systemic level renders it increasingly questionable in the modern era. Although juries were once the norm where serious criminal offending was being resolved, this is no longer the case.⁷² Trial by judge alone is so common today that it is difficult to accept on faith that any type of charge *requires* a jury verdict to be legitimate. Judges deal with serious charges on a regular basis — even occasionally deciding murder cases — and there would seem to be little, if any, outcry.

More importantly, arguments against imposing jury trials are mounting. To begin with, it is accepted by almost everyone involved in the justice process that the choice of judge or jury as fact-finder is a significant one that can make a difference to the ultimate outcome. It follows that the tactical decision of which forum to choose is of considerable import, and not one that is made lightly. Matters to be considered include the nature of the case, the evidence to be presented, the complexity of the issues, the “charisma” of the defendant, his or her criminal record and a multitude of other factors.⁷³ As much as we might like to imagine that the particular forum has no impact on the likelihood of a conviction, our long experience with juries makes this position difficult to maintain, and even the jurisprudence recognizes that there are variances between what is permissible or risky in a jury trial and one before a judge alone.⁷⁴ With

⁷¹ See, e.g., New Zealand *Crimes Act 1961*, No. 43 of 1961, s. 361B(5), which requires a jury trial in any case where the offence is punishable by imprisonment for a term of 14 years or more. Cf. South Australia, *Juries Act 1927*, s. 7, which permits trial by judge alone on any charge.

⁷² One source estimates that 90 per cent of defended trials are now heard before judge alone: N. Vidmar, “The Canadian Criminal Jury” in N. Vidmar, ed., *World Jury Systems* (Oxford: Oxford University Press, 2000), at 218-19.

⁷³ J. Olah, *The Art and Science of Advocacy*, looseleaf (Toronto, ON: Carswell, 1990-), at 7-31 to 7-32; L. Stuesser, “Lawyers Judge the Jury” (1990) 19 Man. L.J. 52; P. Taskier, “Judge or Jury” (1997) 24 A.B.A. Litigation 20; V. Waye, “Judicial Fact Finding: Trial by Judge Alone in Serious Cases” (2003) 27 Melbourne U.L. Rev. 423. Professor Berger goes somewhat further, suggesting that in cases where certain types of evidence are admitted, the accused’s right to a fair trial is at risk if he or she is tried by a jury: B. Berger, “*Peine Forte et Dure*: Compelled Jury Trials and Legal Rights in Canada” (2003) 48 Crim. L.Q. 205, at 216-23.

⁷⁴ To take just one example, the issue of pre-trial publicity, and the prejudice caused thereby, is only material where a jury trial is involved: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] S.C.J. No. 36, [1995] 2 S.C.R. 97 (S.C.C.). Even where these

all that in mind, does the abstract benefit gained by providing the prosecution with the ability to ensure a jury trial in the “public interest” outweigh the potential prejudice suffered by the accused?

The case for a broader section 11(f) right is also warranted by worries about increasing public access to information about criminal offending prior to trial. The release of inadmissible information to the public is likely to be a problem that will only get worse,⁷⁵ with increasing access to online information and the almost rabid interest in crime stories from traditional media outlets combining to make the disinterested observer a vanishing breed. Once again, this interest in pre-trial information is often highest in the very crimes where the defendant is compelled to have a jury trial. In these cases, the defendant is left to fight for an impartial decision-maker through a variety of measures, including a change of venue, better challenge for cause and strict publication bans, but is precluded from choosing the strongest possible method of avoiding a prejudiced jury: skipping one altogether.

Perhaps the most serious challenge to the Code exceptions is that they are not even that consistent with the “legitimacy” rationale under which they were originally enacted, in that jury trials are not actually mandatory. Instead, the exceptions render the defence election to proceed by judge alone subject to prosecutorial consent.⁷⁶ While the Crown obviously will consider the public’s interest in having a jury trial, it is difficult to imagine some thought not being given to the strategic concerns mentioned above,⁷⁷ which places the prosecution at a distinct tactical advantage before the trial even begins. The ironic result is that accused persons charged with the most serious offences under Canadian law are

risks can be controlled via charges to the jury or other means, it is still generally accepted that the best way of eliminating the risk rather than minimizing it, is to opt for a professional trier of fact.

⁷⁵ See: B. Berger, “*Peine Forte et Dure*: Compelled Jury Trials and Legal Rights in Canada” (2003) 48 *Crim. L.Q.* 205, at 226-32; J. Freedman & T. Burke, “The Effect of Pretrial Publicity: The *Bernardo* Case” (1996) 38 *Can. J. Crim.* 253.

⁷⁶ Any refusal to consent is practically unreviewable, unless there is evidence to indicate that the Crown has acted in an arbitrary, capricious or ill-motivated manner: *R. v. Bird*, [1996] 107 C.C.C. (3d) 186 (Alta. Q.B.); *R. v. Dalton*, [1999] N.J. No. 86, 174 Nfld. & P.E.I.R. 247 (Nfld. S.C.); *R. v. Ng*, [2003] A.J. No. 489, 173 C.C.C. (3d) 349 (Alta. C.A.). Relying upon the Crown’s good faith to act in the public interest is not an answer to this problem. As Cory J. noted in *R. v. Bain*, [1992] S.C.J. No. 3, [1992] 1 S.C.R. 91, at 103-104 (S.C.C.), “whenever the Crown is granted statutory power that can be used abusively, then on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control.”

⁷⁷ Berger concludes the same: B. Berger, “*Peine Forte et Dure*: Compelled Jury Trials and Legal Rights in Canada” (2003) 48 *Crim. L.Q.* 205, at 241-42.

actually in the weakest position regarding their right to choose the forum under which they will be tried.

It is unusual and somewhat anachronistic that when the stakes are highest, we prohibit the defendant from deciding upon how he or she would like to be tried, and give this power to the defendant's primary adversary instead. By all means, a defendant who wishes to have a jury trial in a murder case should have the benefit of one, but our system of criminal justice would be better served by rendering our system of election consistent in all cases, and a change to section 11(f) transforming it into a right to *elect* a trial by judge or jury would accomplish this important objective.

2. A More Extreme Suggestion: Abolishing Section 11(f) Altogether

There is of course one radical alternative to making section 11(f) more expansive, and that is to abolish section 11(f) altogether. Before going any further, I wish to make it clear that I am not suggesting that the jury system be abolished or that juries themselves are somehow evil or incompetent. I am not even convinced that abolishing section 11(f) is a sound course of action, as doing so requires the very constitutional reform I suggest below is at the heart of the problem with the clause, rendering my argument somewhat circular in nature.⁷⁸ Notwithstanding these reservations, I believe this point is worthy of discussion in a paper reviewing the strengths and weaknesses of the Charter for the following reason: if I were ever provided with the opportunity to redesign the Constitution from the ground up, or to create a similar document in another jurisdiction, I would have real hesitation about enacting a clause drafted along the lines of section 11(f).

My difficulty with section 11(f) is less principled than it is practical, and relates to the burden this clause imposes through its imposing nature as a constitutional requirement. Although section 11(f) might not seem out of place when one considers the long-standing Canadian attachment to jury trials,⁷⁹ its form and use of particular terminology make it an unusual Charter clause. Unlike the other sections of the Charter enumerated under the heading of "Legal Rights", most of which tend to focus upon

⁷⁸ My argument, in effect, is that we need to abolish s. 11(f) because its presence and the difficulty of abolishing it renders meaningful policy discussions impossible, and is clearly circular.

⁷⁹ See C. Granger, *The Criminal Jury Trial in Canada*, 2d ed. (Scarborough, ON: Carswell, 1996), at 11-26.

principles like the right to “reasonable” bail and the need for a trial within a “reasonable” time, section 11(f) is phrased in an extremely precise manner.⁸⁰ Unlike section 11(g)-(i), which impose limited restrictions of a principled nature upon the government’s ability to retroactively impose liability or try a person twice, section 11(f) dictates a specific mode of decision-making and mandates the availability of this forum for a wide range of offences. As a constitutional document that constitutes the “supreme law of Canada”,⁸¹ this particular form of procedure is effectively immutable and leaves little room for future debate on the role of the jury in Canada.

Adopting a right of this kind has a number of drawbacks. As the Supreme Court has repeated on a number of occasions, the constitution is a “living tree” that needs to breathe and adapt to changing times as well as the evolving needs of the populace.⁸² This flexibility is important because the view of what composes an essential part of the criminal process tends to change over time. Over the past few years we have witnessed a number of occasions where the Supreme Court has reconsidered its earlier Charter views and altered long-standing precedent in light of experience and changing circumstances. As Professor Stribopoulos has written, this is a positive development, as “the long-term viability of any common law constitutional system very much depends on the authority and willingness of its final court of appeal to revisit established doctrine when experience has demonstrated that one of its earlier judgments is either being misconstrued or was wrongly decided.”⁸³ Still, change of this sort can only happen when the Charter provides enough flexibility for it to occur.

Unlike just about every other Charter right, however, section 11(f) is incapable of adapting. Regardless of what we might learn about the effectiveness of the jury process and how we may one day wish to reassess our mechanisms of deciding criminal trials over the coming decades and centuries, the truth is that we remain tied to a system of

⁸⁰ The other sections that use similarly precise phraseology are s. 11(c), which enshrines the limited right against self-incrimination, and s. 14, which promises the right to an interpreter. Neither has the sort of impact on the overall administration of justice as does s. 11(f).

⁸¹ Section 52(1) of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸² *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 136 (P.C.); *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155-56 (S.C.C.).

⁸³ J. Stribopoulos, “Has Everything Been Decided? Certainty, the Charter and Criminal Justice” (2006) 34 S.C.L.R. (2d) 381, at 385.

trial by jury for eternity. To a certain extent, the Charter even prohibits meaningful debate about the value of this institution. Over time, we may change our stance about various rules of evidence, what we consider a crime, and the appropriate way to sentence, but the permissible range of trial options will remain untouched. Leaving aside the unlikely possibilities of amending the Charter or using the notwithstanding clause, we are forever locked into the jury process as the primary option for resolving serious criminal trials.

This might be appropriate if jury trials were universally accepted and unassailable, but this is hardly the case. Although trial by jury is historically familiar and has many supporters, the institution has come under attack for a variety of reasons too numerous to list fully here.⁸⁴ Briefly, however, there are concerns about the effectiveness of juries as decision-makers,⁸⁵ the manner in which juries extend trial length and heighten the prospect of successful appeals owing to the need for a jury charge, and even how the cost of the process diminishes the overall pool of money available to criminal justice objectives.⁸⁶ Trials in remote communities, especially those in the North, also pose huge problems for the right to trial by jury.⁸⁷ Often the community is too small to put together a functional jury at all, as most residents are related in some way to either the victim or the accused, or both.⁸⁸

It is somewhat ironic that the “permanent” enshrinement of the right to a jury trial in Canada occurred at about the very moment that serious research into the deliberative process of jurors first began taking place internationally. Generally speaking, Canada has lagged behind in this

⁸⁴ The jury system evokes passionate views from supporters and detractors internationally as well. See, for example, S. Lloyd-Bostock & C. Thomas, “The Continuing Decline of the English Jury” in N. Vidmar, ed., *World Jury Systems* (Oxford: Oxford University Press, 2000), at 53.

⁸⁵ See B. Hrycan, “The Myth of Trial by Jury” (2006) 51 *Crim. L.Q.* 157, who suggests that: [J]ury verdicts are less likely the reflection of some transcendent communal wisdom and more truly the application of the lowest common denominator in the community — individual jurors’ persistently wrong notions of justice formed by conviction-driven models promoted by the media, clouded by misunderstanding of their judicial instructions and multiplied by twelve. See also B. Berger, “*Peine Forte et Dure*: Compelled Jury Trials and Legal Rights in Canada” (2003) 48 *Crim. L.Q.* 205, who raises concerns about jury decision-making as well.

⁸⁶ S. Lloyd-Bostock & C. Thomas, “The Continuing Decline of the English Jury” in N. Vidmar, ed., *World Jury Systems* (Oxford: Oxford University Press, 2000), at 53.

⁸⁷ Trials involving large criminal organizations or terrorism offences pose concerns as well.

⁸⁸ C. Gora, “Jury Trials in the Small Communities of the Northwest Territories” (1993) 13 *Windsor Y.B. Access Just.* 156; N. Vidmar, “The Canadian Criminal Jury” in N. Vidmar, ed., *World Jury Systems* (Oxford: Oxford University Press, 2000), at 244-48. Some of the other major problems include an unusually high trend towards acquittals, and the serious reluctance many potential jurors have to serving at all.

investigative trend, but a number of American researchers have spent the last two decades examining how well jurors are actually able to perform their primary task, and the output being generated is raising questions about the value of the jury system.⁸⁹ For the first time in history, people are actually considering what exactly jurors do within the secret confines of the jury room, and asking pertinent questions about their effectiveness as decision-makers.

But what will Canadians do with this information? Because of section 11(f), we will find it immensely difficult to have any sort of productive conversation about trial alternatives,⁹⁰ as any such discussion will begin from the premise that the jury system is unassailable. This conclusion may strike many as the correct manner of proceeding, both today and for all time,⁹¹ but personally, I remain unconvinced about the wisdom of beginning a discussion of this sort from an imperative position, and would at least like to have the ability to examine all procedural options unconstrained by an irrevocable constitutional requirement.⁹² Down the road, the choice to stick with juries indefinitely may prove a significant impediment to large-scale improvement of the criminal justice system. As Marcus Gleisser wrote in the preface to *Juries and Justice*,⁹³ a book that questioned the status of the jury in America:

It is time for a good hard look at what has long been the sacred cow of justice and regarded by many as fundamental in a democracy — the American system of trial by jury. Too many persons regard it as an

⁸⁹ The emerging social science research on juries is voluminous, and though most of it has been confined to U.S. studies, there have been a few efforts from the rest of the world as well. The first serious research was published in H. Kalven & H. Zeisel, *The American Jury* (Boston: Little Brown and Co., 1966), but concerted study has really been the product of the last two decades or so. For a sampling of this fascinating research, see V. Rose & J. Ogloff, "Evaluating the Comprehensibility of Jury Instructions: A Method and an Example" (2001) 25 *Law and Human Behavior* 409; V. Hans & N. Vidmar, *Judging the Jury* (New York: Plenum Press, 1986). Another valuable source of information is the Arizona Jury Research Project. See V. Hans, "Inside the Black Box: Comment on Diamond and Vidmar" (2001) 87 *Va. L. Rev.* 1917.

⁹⁰ It should not be assumed that trial by judge alone is the only alternative to the jury. In certain jurisdictions (*e.g.*, Israel), trial before a panel of judges is frequently utilized for serious crimes, and other examples of varied trial processes exist.

⁹¹ As Sir Patrick Devlin has written (P. Devlin, *The Judge* (Chicago: University of Chicago Press, 1981), at 176), "if we lose the jury in the twentieth century we shall not be given it back in the twenty-second."

⁹² Incidentally, resort to s. 1 would not solve the problem. It is difficult to imagine how change to the jury system in a way that conflicted with s. 11(f) on the grounds that other types of decision-making are preferable in the overall scheme would qualify as a pressing and substantial objective. Although some tinkering might be possible where there are demonstrable gains to be had, s. 1 is probably meaningless in terms of achieving large-scale reform.

⁹³ M. Gleisser, *Juries and Justice* (London: Yoseloff Publications, 1968).

inviolable institution, a sovereign never to be questioned, something not to be disturbed.

Unfortunately for those who take such views, democratic systems invite challenge and thrive on questions. Invasion of the darkest corner is welcomed. Long-standing idols may be examined to see if they deserve continued respect or if they have been left behind by changing times.⁹⁴

This comment is equally relevant to Canada. We shall see over the coming decades and centuries whether section 11(f) remains the beginning and end of any discussion about the jury process.

IV. PROPOSED SUBSECTION 11(j) — A NEW RIGHT TO A TRIAL FREE OF UNRELIABLE EVIDENCE

Over the past 25 years, the Charter's influence on criminal justice issues has been so dramatic that it becomes easy to conclude that no area of law has been immune. That impression is inaccurate, however. With the obvious exception of the impact caused by section 24(2), the law of evidence has remained generally free from Charter scrutiny. Leaving aside sections 11(c) and 13, which address very particular issues relating to the privilege against self-incrimination, none of the Charter rights specifically target evidentiary concerns, and the absence of such a provision has prevented the Charter from having a major effect in this area.

Despite a lack of Charter interference the law of evidence has undergone its own radical transformation over the past 25 years. Around 1982, a series of significant Supreme Court decisions began making major alterations to Canada's evidentiary framework,⁹⁵ and two trends bear particular mention. First was the principled revolution,⁹⁶ the

⁹⁴ M. Gleisser, *Juries and Justice* (London: Yoseloff Publications, 1968), preface.

⁹⁵ The development of the principled approach was, of course, a dynamic process that occurred gradually as judges began exploring the treatment of various evidentiary problems. Still, if one had to pinpoint a "starting date", the most credible is probably 1982, when the Supreme Court revamped the rules on corroboration and non-expert opinion in *R. v. Vetrovec*, [1982] S.C.J. No. 40, 67 C.C.C. (2d) 1 (S.C.C.) and *R. v. Graat*, [1982] S.C.J. No. 102, 2 C.C.C. (3d) 365 (S.C.C.). See also M. Rosenberg, "Developments in the Law of Evidence: The 1992-93 Term: Applying the Rules" (1994) 5 S.C.L.R. (2d) 421, at 421-22; C. Hill *et al.*, *McWilliams' Canadian Criminal Evidence*, 4th ed., looseleaf (Toronto: Canada Law Book, 2003-), at 3-8.

⁹⁶ The term appears to have been first coined by Lamer C.J.C. in *R. v. Smith*, [1992] S.C.J. No. 74, [1992] 2 S.C.R. 915, at 930 (S.C.C.), where he referred to the Supreme Court's new approach to hearsay as "the triumph of a principled analysis over a set of ossified judicially created categories". In truth, "[t]he description is perhaps overstated to the extent that it implies that the law of evidence, before this new approach began in earnest, lacked a principled core": P. Healy,

judicial movement away from prescribed rules and exceptions towards admissibility premised on the discretionary measurement of particular circumstances and applicable principles in individual cases.⁹⁷ The second tendency involved a strengthening faith in jurors, and the decision to eschew exclusion in marginal cases in favour of admitting potentially prejudicial evidence with a strong warning to the jury.⁹⁸

For the most part, both changes have been positive ones. The move to a principled approach swept away outmoded concepts of proof that had become “preposterously rigid”⁹⁹ and simultaneously forced a reconsideration of the governing tenets of admissibility. The courts revisited the established rules in almost every area of evidence law, and recognized that many were obstructing the search for truth — often for spurious reasons — and keeping the jury from achieving its primary task. During this period, the law governing experts, hearsay, character evidence, prior criminal history, corroboration and many more were all substantially revised, with the common thrust being a greater reliance on the application of discretion at the expense of fixed rules, and more evidence being provided to the jury for consideration.

Nonetheless, in spite of the flexibility spurred by these reforms, neither trend has been impervious to criticism,¹⁰⁰ with perhaps the most significant charge claiming that both developments ignore a number of larger systemic issues in the law of evidence. The principled approach gives judges a fair amount of discretion and asks them to make decisions based on the needs of individual cases. In theory, this allows judges to weigh all the competing factors tending towards admission or exclusion and come to a balanced decision grounded in principle. In the real world of busy trial courts, however, judges are often forced to make decisions quickly on

“Developments in the Law of Evidence: The 1993-94 Term: Admissibility, Discretion and the Truth of the Matter” (1995) 6 S.C.L.R. (2d) 379, at 382.

⁹⁷ For general commentary on the widespread development of the principled approach across the law of evidence, see D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999), chapter 2; C. Hill *et al.*, *McWilliams’ Canadian Criminal Evidence*, 4th ed., looseleaf (Toronto: Canada Law Book, 2003-), chapter 3; S. Lederman & A. Bryant, *The Law of Evidence in Canada, Second Edition. Supplement* (Markham, ON: LexisNexis Canada, 2004), at 1-5.

⁹⁸ See, *e.g.*, *R. v. Corbett*, [1988] S.C.J. 40, [1988] 1 S.C.R. 670 (S.C.C.).

⁹⁹ D. Paciocco, “Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence” (1994) 27 C.R. (4th) 302, at 304.

¹⁰⁰ See, *e.g.*, P. Healy, “Developments in the Law of Evidence: The 1993-94 Term: Admissibility, Discretion and the Truth of the Matter” (1995) 6 S.C.L.R. (2d) 379; S.A. Schiff, *Evidence in the Litigation Process*, Master ed., 4th ed. (Scarborough, ON: Carswell, 1993), vol. 1, at 660-61; M. Rosenberg, “Developments in the Law of Evidence: The 1992-93 Term: Applying the Rules” (1994) 5 S.C.L.R. (2d) 421, at 485-88.

the fly. In this environment, there is a risk that discretionary application permits judges and lawyers to ignore important systemic factors that should play a role in the decision-making process.¹⁰¹

The shift towards providing more evidence to juries raises similar issues. Once again, the trend has been towards greater admissibility, especially where the concern is with probative evidence that a jury might use improperly. Judges now tasked with making decisions on admission are told to lean in favour of letting juries have the evidence, with a warning not to draw a prejudicial inference. As Dickson J. stated in *Corbett*:¹⁰²

There is perhaps a risk that if told of the fact that the accused has a criminal record, the jury will make more than it should of that fact. But concealing the prior criminal record of an accused who testifies deprives the jury of information relevant to credibility, and creates a serious risk that the jury will be presented with a misleading picture.

In my view, the best way to balance and alleviate these risks is to give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information. Rules which put blinders over the eyes of the trier of fact should be avoided except as a last resort. It is preferable to trust the good sense of the jury and to give the jury all relevant information, so long as it is accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value.¹⁰³

These two trends have clearly had a transforming impact on the law of evidence, but their development has occurred at exactly the same time as another powerful trend came to the attention of the Canadian public: the tragic reality of wrongful convictions. For better and worse, Canada has been one of the world's leaders in investigating this area, as it is home to a number of high-profile cases that have gone awry, and also the site of detailed and fruitful inquiries into what went wrong.¹⁰⁴ The result has

¹⁰¹ D. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'" in *Law Society of Upper Canada, Special Lectures 2003: The Law of Evidence* (Toronto: LSUC, 2004), at 52-55; P. Sankoff, "Corbett Revisited: A Fairer Approach to the Admission of an Accused's Prior Criminal Record in Cross-Examination" (2006) 51 *Crim. L.Q.* 400.

¹⁰² *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670 (S.C.C.).

¹⁰³ *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670, at 690-91 (S.C.C.).

¹⁰⁴ See, e.g., Hon. Fred Kaufman, *Commission on Proceedings Involving Guy Paul Morin: Report* (Toronto: Queen's Printer, 1998); Hon. Peter Cory, *The Inquiry Regarding Thomas Sophonow* (Winnipeg: Queen's Printer, 2001).

been a rich and developing scholarship surrounding the sources of wrongful convictions.¹⁰⁵

Not surprisingly, there is no set or predictable framework outlining the causes of every wrongful conviction, but there is little doubt that the law of evidence has been an important contributor. Careful study has revealed that some species of proof have disturbing correlations to miscarriages of justice. Jailhouse informants, identification evidence and certain types of expert opinion — to name just a few — have all been identified as causes.¹⁰⁶

As the scholarship in this area continues to progress, there is growing reason to believe that the principled revolution and the trend towards granting juries access to potentially prejudicial evidence have been unwilling partners in heightening the risk of wrongful convictions. The move to discretionary admissibility asks judges to make decisions on evidence by focusing on the risk factors present in an individual case. What we have learned from the study of wrongful convictions, however, is how difficult it can be to spot the trends that create a risk of a miscarriage of justice by looking at isolated fact patterns.¹⁰⁷

The decision to put more evidence in the hands of the jurors and trust them to use it properly raises similar concerns. The current test of principled admissibility only permits judges to exclude evidence when its prejudicial effect outweighs the probative value. But the admissibility test measures these values purely by assessing the hypothetical impact

¹⁰⁵ See, e.g., B. MacFarlane, “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31 Man. L.J. 403; C. Sherrin, “Comment on the Report on the Prevention of Miscarriages of Justice” (2007) 52 Crim. L.Q. 140.

¹⁰⁶ B. MacFarlane, “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31 Man. L.J. 403; C. Sherrin, “Comment on the Report on the Prevention of Miscarriages of Justice” (2007) 52 Crim. L.Q. 140. See also K. Roach, “Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions” (2007) 52 Crim. L.Q. 210.

¹⁰⁷ The belief that discretion can ignore wider systemic issues by focusing too closely on the facts of an individual case has been expressed in relation to a number of wrongful conviction factors. See, e.g., P. Sankoff, “The Search for a Better Understanding of Discretionary Power in Evidence Law” (2007) 32 Queens L.J. 487; C. Sherrin, “False Confessions and Admissions in Canadian Law” (2005) 30 Queens L.J. 601. Again, the problem is not discretion *per se*, but a concern that the existing use of this power permits too much flexibility to consider factors unique to a particular case, and too little consideration of broader systemic issues germane to a specific type of evidence. See P. Sankoff, “The Search for a Better Understanding of Discretionary Power in Evidence Law” (2007) 32 Queens L.J. 487; K. Roach, “Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions” (2007) 52 Crim. L.Q. 210, at 222-23.

of the evidence, and does not consider its potential *reliability*.¹⁰⁸ All questions of credibility are left to the jury, even when the nature of the evidence or the reliability of the witness is subject to known systemic flaws.¹⁰⁹ In determining admissibility, judges generally do not consider whether the evidence being given to the jury is of a type that has been shown to be unreliable in the past. The evidence suggests that jurors lacking professional experience in fact-finding are not always able to draw these sorts of nuanced conclusions in rendering verdicts.¹¹⁰ More and more, one has a sneaking suspicion that our treatment of evidence is playing an important role in causing wrongful convictions.¹¹¹

Until now, the Charter has played a very limited role in this debate, as the courts have rejected the suggestion that section 7 or section 11(d) encompasses a protection against unreliable evidence that might taint the jury.¹¹² This needs to be remedied. A specific Charter protection against evidence with the potential to cause a miscarriage of justice would force judges to recognize that charges to the jury and discretionary decisions on admission are no solution in preventing wrongful convictions.¹¹³ Occasionally, evidence must be excluded to ensure a fair trial, and it is necessary to use the emerging research detailing the common causes of wrongful convictions in the search for a more principled admissibility framework.

¹⁰⁸ *R. v. Buric*, [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.), affg [1996] O.J. No. 1657, 106 C.C.C. (3d) 97 (Ont. C.A.); *R. v. Mezzo*, [1986] S.C.J. No. 40, 27 C.C.C. (3d) 97 (S.C.C.).

¹⁰⁹ K. Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 *Crim. L.Q.* 210.

¹¹⁰ As former Chief Justice Lamer has recently concluded, "the recent spate of demonstrated convictions of innocent persons are proof that juries are not always reliable. It is no longer acceptable for the criminal justice system to place blind faith in the perceived innate good sense of juries": *The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken: report and annexes* (St. John's: [Govt. of] Newfoundland and Labrador, 2006), at 167-68.

¹¹¹ Leaving aside the evidence uncovered by various inquiries, the ongoing research into what juries actually do in deliberations is calling our faith in juries into question: P. Sankoff, "Corbett Revisited: A Fairer Approach to the Admission of an Accused's Prior Criminal Record in Cross-Examination" (2006) 51 *Crim. L.Q.* 400, at 444-48; B. Berger, "*Peine Forte et Dure*: Compelled Jury Trials and Legal Rights in Canada" (2003) 48 *Crim. L.Q.* 205, at 220-23.

¹¹² *R. v. Buric*, [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.), affg [1996] O.J. No. 1657, 106 C.C.C. (3d) 97 (Ont. C.A.).

¹¹³ As Kent Roach points out in "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 *Crim. L.Q.* 210, at 212-13, the Charter would not be required to obtain these results, as the courts could reach the same conclusions by tightening up the common law. Still, an amendment of the kind I am suggesting would send a strong message to judges about the importance of the issue, and give considerable force to the arguments.

The proposed subsection 11(j) would read as follows:

11. Any person charged with an offence has the right ... (j) not to be confronted with evidence where that evidence is unreliable or causes a prejudicial effect that outweighs the evidence's probative value, especially where the type of evidence in question has the demonstrated potential of causing a miscarriage of justice.

The proposed subsection would accomplish two important goals. First, it would give courts a power they do not currently possess: to exclude evidence of an unreliable nature, with the wording of the section emphasizing a difference between evidence that is unreliable, and evidence with the potential to prejudice the accused. Such a clause would provoke courts to impose stricter measures of admissibility where the evidence in question is of a type that demonstrably raises the risk of wrongful convictions. Moreover, it would effectively reverse existing jurisprudence precluding judges from drawing conclusions on admissibility relating to the reliability of evidence.

The second objective served by the provision is the specific enshrinement of the principle that evidence should not be admitted where its prejudicial effect outweighs its probative value. On its own, this might not sound particularly ambitious, since this principle is well established at common law, but the proposed subsection 11(j) would compel judges to reconsider their current manner of exercising the discretion to admit evidence in cases where the nature of the evidence has the established potential of causing miscarriages of justice. Hopefully, this clause would encourage the judiciary to reconsider the existing approach to discretion so as to apply clearer standards of admissibility and recognize systemic factors that go beyond the strict confines of the case before them.

V. CONCLUSION

The enactment of the *Constitution Act, 1982*¹¹⁴ was a watershed moment in Canadian history, one that through the *Canadian Charter of Rights and Freedoms*¹¹⁵ changed the criminal justice system forever. For the most part, this has been a positive modification, but the decision to create an immutable Constitution comes with certain costs as well. The

¹¹⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.)*, 1982, c. 11.

¹¹⁵ Schedule B to the *Canada Act (U.K.)*, 1982, c. 11.

enduring character of a constitutional document enshrines its standards permanently through the country's judicial framework, and while this is generally regarded as beneficial, in that it robs the ability of legislatures to tinker with what are seen as accepted norms, permanence of this kind can be problematic, especially where the choice to enact or the wording of a particular constitutional clause turns out to be less than ideal.

Twenty-five years after its enactment, we can now see that the Charter's drafting has generally held up well, though certain aspects have proven troublesome. In some cases, the wording of the clauses has led to difficulties, while in other instances, it is the courts themselves, through interpretation of these clauses, that have created the obstacles. Over time, of course, many of these kinks should be ironed out of the process. While it may seem long to lawyers striving to remember the pre-Charter era, it is important to remember that 25 years remains a short time period to assess the overall value of a constitutional document. As much as a revision of some aspects of the Charter's wording might be desirable as a theoretical matter, the varied interests that would inevitably use such an occasion to attack protections that currently exist render such a "cure" much less palatable than the "disease", especially in an era that seems to place so much prominence on matters of collective security at the expense of individual rights. For that reason, as much as it would be useful to rectify problematic aspects of our constitutional equation, I am thankful that rewriting the Charter is likely to be an exercise that remains tied to the realm of the imagination, at least in the Canadian context.

Still, that does not render the exercise valueless. Reconceptualizing Charter guarantees and the remedies that enforce them is a necessary part of any constitutional dialogue. Examining alternative ways of drafting particular clauses may alert us to the real meaning of the existing rights, and force judges to reconsider whether current interpretations accord with the real purpose of a specific guarantee. Additionally, the Charter's usefulness is not confined to Canada, as the Constitution also provides a valuable framework for rights documents in other jurisdictions.¹¹⁶ Considering our experience with the Charter may prove useful in helping these countries decide whether to adopt the Canadian wording in its entirety or with some modifications. In both instances, using the imagination to consider how the Charter might look if we started the process afresh is

¹¹⁶ See A.M. Dodek, "Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007) 36 S.C.L.R. (2d) 309.

one good way of thinking about what has worked, what has not, what rights are still required and where we might wish to have greater flexibility in future.