

The Charter of Rights and the Administration of Criminal Justice in Canada—Where Have We Been and Where Shall We Go?

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Thank you for inviting me to be your keynote speaker. I see among you so many faces we do not get to see in the Supreme Court: the prosecutors who, like their colleagues at the defense bar, work so hard, for such long hours, on such important issues. I understand that perhaps as many as half of you are five years at the bar or less. This room includes so many who shoulder the unique pressures that come with the earliest years of courtroom practice and who will be the leaders of tomorrow in Canada's prosecution service.

I. WHO IS CLAIRE L'HEUREUX-DUBÉ?

I hope you all know me. When you read controversial Supreme Court criminal law decisions from 1987 to 2002, you know where you could often find me. I was frequently in the minority, often standing all alone, or perhaps with just one or two of my colleagues. I was often arguing that the Court went too far in enforcing legal rights, and did not go far enough to enforce equality and privacy rights.

I have written over sixty dissenting opinions, either by myself or jointly with another colleague, that touch upon criminal law. In several of these, I disputed the majority's decision to order a new trial at the defense's request. I have vigorously disagreed in a number of cases when the Court excluded inculpatory evidence that I felt should be admitted. I have dissented in some cases when the Court excluded inculpatory similar fact evidence in sexual assault cases, especially when the abuse of children is involved. I have dissented in some cases when the Court invalidated substantive criminal offense provisions. I have been more cautious than has the Court's majority about permitting civil actions against the prosecution for

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We believe it will be of interest, of course, to our Canadian readers, as well as to American scholars concerned with the direction of criminal procedure jurisprudence in Canada following the adoption of that nation's Charter of Rights. A response to Justice L'Heureux-Dubé's views, written by one of her former law clerks, Professor Peter Sankoff, immediately follows this Commentary. Peter Sankoff, *Generally Speaking, Canada Is Going in the Right Direction: A Response to the Honorable Claire L'Heureux-Dubé*, 3 OHIO ST. J. CRIM. L. 491 (2006).

malicious prosecution. I have argued against the Court's majority leaving sexual assault complainants too exposed to unwarranted intrusions by the defense, and by the Court into their sexual past and into their private medical and counseling records. I have been less willing than the Court's majority to let an accused, who had sex with a woman without her consent, ask a jury to consider a claim that he mistakenly thought she was consenting to sex. I have been more willing than some of my colleagues on the Court to give provincial governments more room to investigate suspected wrongdoing through the respected mechanism of public inquiries.

I was of course not always a dissenter. In twenty cases touching upon criminal law in which the Court opted to give detailed reasons, I wrote the majority opinion. I wrote concurring opinions in a further forty-eight cases that relate in a significant way to criminal law, perhaps because I was trying to push the envelope. And of course I also voted for the majority in many cases where I did not choose to write an opinion at all.

My positions in my opinions, taken together, do not make me a "pro-Crown" or "anti-defense" judge. I simply believe that the positions I took, often standing alone or only with one or two of my colleagues on the Court, best reflected the delicate balance between collective and individual rights that our Charter of Rights mandates. I agreed throughout that the accused's legal rights must of course be protected. However there is a point where a balance must be struck between the accused's rights and those of society, as particularly directed by Charter section 1.

It has now been more than two years since I became the beneficiary of mandatory retirement for Supreme Court judges. Although you may know me best for my criminal law dissents, I also dissented in the civil Charter case when our Court upheld the constitutionality of mandatory retirement.¹ Even though I voted against mandatory retirement in those cases, I am very much enjoying mine. I have had the privilege over the last two years of being on the Faculty of Law at Laval University, and of participating in the human rights training of judges in various parts of the world.

It is no secret that I have my own deeply held convictions about the Charter, and that my views did not always win the day in our Court. Some journalists oversimplify these kinds of issues, by asking me or some of my colleagues if they are "pro-Charter" or "anti-Charter." One reporter actually once asked one of my colleagues on national radio if they believed that the Charter was "sacred."

We judges also get over-simplistically pigeonholed as being "pro-Crown" or "pro-defense." In the real world, nothing is so black and white, especially when it comes to society's fundamental values.

I strongly believe that our Charter of Rights is a very important and very good thing for Canada. It is a well-written, carefully balanced instrument. My concerns

¹ See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 417 (L'Heureux-Dubé, J., dissenting).

are with how it is being interpreted. On this, reasonable people, including reasonable judges, can readily differ. Indeed we can genuinely and vigorously disagree, based on subtle, complex principles and values, without being shoved into some pre-labeled, all-encompassing slot, loaded with all sorts of connotations and innuendos.

II. THE CHALLENGES FACING FRONT-LINE CROWNS

Let me talk more personally to you as front-line Crowns, who work so hard day after day in the trenches. It is regrettably too easy for us judges to get isolated from what happens on your side of the bench. Whether it was during my several years as a trial judge, or on the Quebec Court of Appeal, or finally on the Supreme Court, I found that we judges are under relentless pressure to decide the case immediately before us, to not make errors, and of course, to achieve justice. While we are doing this, we must always worry about the long-run implications of our rulings.

We appeal judges are in the business of pointing out when something has gone wrong in a case. No one brings a case to our Court asking us to point out what has gone right. That is a necessary but unfortunate part of the appeal process.

But now I have no bench between me and you. I can say things that need to be said and that are not said often enough. I want to thank you so very much for the hard work that you do. I want to thank you for taking on the long hours and stresses that your work imposes. It is not unduly melodramatic to say that the prosecutor's job is too often a thankless one. I have been so very impressed over the years at the work and the professionalism of Canada's prosecution services, including yours in British Columbia. Some talk about the State's supposedly endless resources. You know better than anyone how limited are the resources available to you.

Your hard work and dedication is always worth it. It is worth it to the public you serve when you devote your career to public service. It is worth it for the innocent victims of crime who depend on you for their public vindication. It is worth it for the innocent members of the public whom you protect from crime through the effective prosecution of wrong-doers. It is worth it for the judges and juries whom you serve and help. It is worth it for your colleagues at the defense bar who vigorously oppose you in court, and who so often respect your courage, dedication and professionalism. I repeat: Any difficult moments you may experience along the road frustrate you at the time, but fade as the plentiful fruits of your public service come to fruition. I have made Nellie McClung's words my own when she said: "Never retreat, never apologize . . . get the job done, and let them howl." In French we say "*bien faire et laisser braire*."

III. THE CHARTER AFTER TWENTY YEARS

A. *Generally*

Three years ago was the Charter's twentieth anniversary. So much has been written and spoken about its impact. The past two years since I left the Court have given me a good opportunity to reflect on where we have gone with the Charter and where we could go in the future. I can now do this without the pressure of keeping up with the Court's relentless pace. I can also express my views without the restrictions that necessarily must be imposed on judges who are still serving in that office.

I want to point out three areas where we could make important improvements. These all touch you in your daily work. These comments derive largely from my dissents.

B. *The Charter as a Human Rights Document*

I first ask the question: "Whose rights are these anyway?" I believe the Charter is fundamentally a human rights document. This means first and foremost that the Charter is a code of fundamental rights that belong to human beings.

In some areas, we have done well to fulfill this mandate. In others, I fear we may have somewhat lost our focus.

I have some concerns about the current state of the Charter jurisprudence. We have not sufficiently and systematically considered when we should extend Charter rights beyond human beings, their intended beneficiaries. When should we also extend Charter rights to corporations, and if so, why? Sometimes we should. Sometimes we should not. We need to consider this more closely, especially as white collar crime becomes a heightened focus of attention. We must remember that a corporation is not a human being. It is a legal fiction created to facilitate certain human activities such as commerce.

In *RJR-Macdonald, Inc. v. Canada*,² a majority of the Court struck down a federal law banning tobacco advertising. It held that the law was an unjustified restriction on the freedom of expression. I voted for the dissenting opinion. To me, corporate speech is not at the core of human rights. Protecting kids as well as adults from the ravages of cancer and heart disease is far closer to core Charter values.

The Supreme Court's landmark freedom of expression case, *Irwin Toy Ltd. v. Quebec*, correctly held that "[f]reedom of expression was entrenched in our Constitution . . . so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular,

² [1995] 3 S.C.R. 199.

distasteful or contrary to the mainstream.”³ Yet that very case held that corporations have the constitutional right under section 2(b) to target TV ads at children under the age of thirteen. Only under section 1 was the constitutionality of a provincial ban on such advertising sustained.

In *Hunter v. Southam, Inc.*,⁴ the Supreme Court decided (before my time on the Court) that section 8 of the Charter was all about protecting individual privacy. Yet that case allowed a major media corporation to use section 8 to resist a federal investigation of alleged monopolistic practices. While I support a strong, vigorous, and independent media, there are real and serious issues about concentration of ownership in the media which merit public concern. The interests actually at stake in that famous case seem to me a far distance from human rights values.

In *R. v. Big M Drug Mart, Ltd.*,⁵ also decided before my time on the Supreme Court, a corporation successfully invoked freedom of religion to avoid a conviction for breaching Sunday closing laws. Yet corporations do not profess religious beliefs, human beings do. *Big M Drug Mart* ostensibly held that the Charter was based on “respect for the inherent dignity and the inviolable rights of the human person.”⁶ Isn’t a business corporation, seeking to do business on Sunday, somewhat removed from this core constitutional aim?

C. Protection of Equality Rights in the Criminal Justice System

I believe we need to expand the protection of the Charter’s guarantee of equality rights, especially in the criminal justice system. This follows naturally from a full recognition of the Charter as a human rights document. The field of equality rights is one important area where the Charter marks a major departure from Canada’s past before 1982. It is an area where the Charter has so much potential and where there is so much more to do. It is an area where I have been a vocal dissenter when the Court did not go as far as I felt the Charter required.

Our jurisprudence has amply recognized that the Charter should have an impact on the criminal justice system. It has given a prominent role to one Charter right, the accused’s right to a fair trial. This has come in a natural and robust way. In some cases I dissented because I believed it had in fact gone too far. One major example was *R. v. Carosella*.⁷ The Supreme Court overturned a conviction for sexual abuse because an outside party, a sexual assault crisis center, had destroyed notes of an interview with the complainant prior to the defense taking any legal

³ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 968.

⁴ [1984] 2 S.C.R. 145.

⁵ [1985] 1 S.C.R. 295.

⁶ *Id.* at 336.

⁷ [1997] 1 S.C.R. 80, 114 (L’Heureux-Dubé, J., dissenting).

steps to obtain them. These notes had been taken before the accused was charged. In my dissent I asked: “Does an accused automatically have the right to every piece of potentially relevant evidence in the world?”⁸

The right to a fair trial existed long before the Charter. Of course the elevation of that right in 1982 to the lofty status of a constitutional entitlement required our courts to look afresh at how we conducted criminal trials in the past. Yet the Charter also injected an entirely new right, the right to equality as guaranteed by Charter section 15, into the criminal justice system. This was a right with which our courts did not have comparable experience.

Unfortunately, the judicial implementation of the Charter’s introduction of equality rights into the criminal justice system, including the equality rights of women and children who are the targets of sexual violence, has not been as fulsome and robust as its implementation of the Charter’s guarantee of the accused right to a fair trial. It has been slow, difficult and incomplete.

Several of my former colleagues on the Supreme Court did not always share my vision of the law in this area. You might perhaps believe me if I told you that I won the first prize in Criminal Law when I was a law student. However, you might be surprised to learn that the two women in our class of forty were given a week’s holiday when our male colleagues were lectured on crimes of a sexual nature. If some academics had known this, it might have become an additional point in their criticism of my dissents in that area of the law. Might some in the defense bar have lodged a complaint of incompetence against me before the Canadian Judicial Council?

Armed with all my resulting ignorance, I dissented in *R. v. Seaboyer*.⁹ I recently read somewhere that a leading member of an Association of Criminal Defense Lawyers had come to realize that it may have been a mistake for the defense to attack the legislation preventing an accused from questioning a sex offense complainant’s sexual past. Such a retrospective is quite correct from the defense’s perspective. The legislation which *Seaboyer* struck down had, as you know, permitted the defense at least to question the complainant about her

⁸ *Id.* at 120. I continued:

My colleague suggests that this is in fact the case. Despite the difference between this situation and cases of disclosure, as previously outlined, he suggests that there will be a breach of the right to full answer and defence and therefore an unfair trial anytime material is unavailable that would have been disclosed if in the hands of the Crown. Therefore, whenever information in the hands of a third party has the reasonable possibility of being of some use to the defence (as per *Stinchcombe, supra*) the fact that it is unavailable immediately causes a violation of the Charter. In my view, the adoption of this rationale could quite possibly lead one to the conclusion that there has never been a fair trial in this country. It goes against the grain of this Court’s Charter jurisprudence and is contrary to basic underlying notions of how the criminal justice system actually operates.

Id.

⁹ [1991] 2 S.C.R. 577, 643 (L’Heureux-Dubé, J., dissenting in part).

previous relationship with the accused, including their past sexual encounters. In sharp contrast, the newer post-*Seaboyer* legislation does not.

In *R. v. Seaboyer*, I disagreed with the Court striking down our rape shield law. Among other things, I disagreed with the majority's view that a woman's prior sexual history could be admitted on a "similar fact" theory.¹⁰ In *R. v. Carosella*, I dissented when the Court overturned a sex abuse conviction because a rape crisis center had in good faith destroyed counseling notes well before the defense sought access to them.¹¹ In *R. v. Osolin*, I dissented when the Court ordered a new trial because a man accused of sexual assault was not allowed, at his first trial, to cross-examine the complainant on her private medical records.¹²

I believe that equality in a sense underpins and is wedded to all other Charter rights. Equality cannot be subordinated to other Charter rights, or given some second-class status. As I wrote in dissent in *M. (A.) v. Ryan*: "[A] hierarchy of values cannot be created. Privacy and equality values cannot be assumed to be of lesser importance than the value of a fair trial in determining whether and to what extent to order the production of private documents."¹³

Put simply, our jurisprudence needs to better protect equality rights in the criminal justice system, to remove the barriers to access to justice that too many now face. I encourage Crowns to make as much use as possible of Charter section 15 in your day to day work. Just as it is wrong to pigeonhole judges as either pro-Crown or pro-defense, it is wrong to pigeonhole the Charter as solely a tool to be used by the defense bar, and never by the Crown. Section 15 of the Charter is in fact an important tool for Crowns to use if a private party such as the accused seeks to have the Criminal Code or the common law used in a way that would create a barrier to equal protection of the law against members of the public, such as crime victims.

How does the Crown get standing to invoke the Charter? Our common law has long recognized that the Attorney General has "public interest" standing to advance the public interest before Courts. Our Court has been liberal in granting standing to corporations to invoke Charter rights that they themselves do not enjoy.¹⁴ Why should the Crown have any less standing to advance the public interest as expressed through important Charter provisions such as section 15? It is axiomatic that the Charter, like the rest of the Canadian Constitution, applies to all laws, whether those laws are invoked by the Crown or by the defense.

Where is there room for improvement in the infusion of equality rights into the criminal justice system? Let me offer some examples. Dissenting in part in *R*

¹⁰ See *infra* note 31 and accompanying text.

¹¹ *Carosella*, [1997] 1 S.C.R. at 114 (L'Heureux-Dubé, J., dissenting).

¹² *R. v. Osolin*, [1993] 4 S.C.R. 595, 608 (L'Heureux-Dubé, J., dissenting).

¹³ *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, 209 (L'Heureux-Dubé, J., dissenting).

¹⁴ See, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

v. Seaboyer,¹⁵ I went further than did the Court in outlining the wide range of myths and stereotypes which have had deep roots in our law in the area of sexual assault. For years these stereotypes have plagued sex crime victims who are predominantly women. These stereotypes reach far beyond the twin rape myths that the majority in *Seaboyer* had correctly identified. They have created a substantial barrier to equality, especially for women. I regret that some courts have fastened on those two rape myths that the *Seaboyer* majority emphasized, as if they were the only ones to root out, and as if legislation such as the new section 276 of the Criminal Code solely aimed at those twin myths and no others.¹⁶

In my opinion, the Charter requires that all these stereotypes be entirely rooted out of the justice system. My opinion in *Seaboyer* shows how Parliament has had a clear history of being ahead of the courts in promoting equality in this area of the criminal justice system.¹⁷ I felt it necessary to dissent when our Court would not go as far as it might have to fulfill this important Charter mandate.

In addition to challenging the Court's approach to equality rights in this area, I have also in my dissents challenged how far the Court has taken the accused's right to make full answer and defense, particularly at the expense of equality. I refer you again to the quotation I mentioned earlier from my dissent in *Carosella*.¹⁸

I certainly do not want it to sound as if Canada has made no progress in this area. For example, I was very encouraged when my views on the test for deciding when the defense should get access to a sex assault complainant's third party records, though rejected by a majority of the Court in *R. v. O'Connor*,¹⁹ largely won the day in Parliament. I was delighted that the Court ultimately approved the constitutionality of these post-*O'Connor* Criminal Code amendments in *R. v. Mills*.²⁰ I am happy that the views that I have offered on when a person accused of

¹⁵ [1991] 2 S.C.R. 577, 643 (L'Heureux-Dubé, J., dissenting in part).

¹⁶ In my dissent in the later case of *R. v. Osolin*, [1993] 4 S.C.R. 595, 625, I focused on a clear example of inequality in the way some have approached sexual assault complainants:

There is absolutely no evidence to suggest that false allegations are more common in sexual assaults than in other offences; indeed, given the data indicating the strong disincentives to reporting, it seems much more likely that the opposite is true. Nonetheless, myths about the extraordinary need for caution with respect to the credibility of complainants continue to play a role in the prosecution of sexual assaults. To illustrate their persistence, it is only necessary to point out that, apart from cases of sexual assault, it is rare to encounter a suggestion that the psychiatric history of a witness is at all relevant to the trial of the issue. Moreover, trial judges are normally unlikely to even entertain such submissions unless the defence is able to conclusively establish beforehand that an inquiry into a witness's medical history is crucial to the determination of the issue at bar.

¹⁷ See *Seaboyer*, [1991] 2 S.C.R. at 670 (L'Heureux-Dubé, J., dissenting in part).

¹⁸ *Supra* note 8.

¹⁹ [1995] 4 S.C.R. 411.

²⁰ [1999] 3 S.C.R. 668.

sex assault should be permitted to raise the so-called defense of mistaken belief in consent are being increasingly, albeit at times slowly, echoed in judicial rulings.²¹ Yet there is still much to do.

D. The Charter's Impact on the Search for Truth at a Criminal Trial

I increasingly question whether the way the Charter has been interpreted and implemented may have weakened the criminal trial's core aim, namely the search for the truth. I do not believe that it is necessarily implicit in our Charter that it must do this. Indeed, the core aim of the "principles of fundamental justice" in section 7 of the Charter is the fair and accurate determination of the truth.

None of my dissents have been stronger than in cases where a majority has decided to take away from the jury evidence which is clearly relevant, and which would help the trial court find the truth.²² Sometimes I disagreed with the majority that an accused's Charter right was violated.²³ Sometimes I disagreed that section 24(2) required the exclusion of the evidence, even if there was a Charter breach.²⁴ Sometimes I disagreed with the majority when it revisited purely factual matters into which some appeal judges too readily intrude.²⁵ As I wrote in one dissent in this area: "One cannot over-emphasize the commitment of courts of justice to the ascertainment of the truth."²⁶

²¹ My views in my concurring opinion in *R. v. Park*, [1995] 2 S.C.R. 836, 842 (L'Heureux-Dubé, J., concurring) are cited with approval, for example, in *R. v. O. (M.)*, [1999] 138 C.C.C. (3d) 476, 500 (Ont. C.A.) (Rosenberg, J., dissenting). Justice Rosenberg's reasons were adopted on appeal by the Supreme Court in that case. See *R. v. M.O.*, [2000] 2 S.C.R. 594, 594. See also *R. v. Esau*, [1997] 2 S.C.R. 777, 786–87; *R. v. Livermore*, [1995] 4 S.C.R. 123, 137–38; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 348, 354–55, 360–61.

²² See, e.g., *R. v. Noël*, [2002] 168 C.C.C. (3d) 193, 227 (S.C.C.) (L'Heureux-Dubé, J., dissenting); *R. v. Starr*, [2000] 2 S.C.R. 144, 166 (L'Heureux-Dubé, J., dissenting).

²³ See, e.g., *R. v. Cook*, [1998] 2 S.C.R. 597, 640 (L'Heureux-Dubé, J., dissenting); *R. v. Carosella*, [1997] 1 S.C.R. 80, 114, (L'Heureux-Dubé, J., dissenting); *R. v. Durette*, [1994] 1 S.C.R. 469, 502 (L'Heureux-Dubé, J., dissenting); *R. v. Brown*, [1993] 2 S.C.R. 918, 921 (L'Heureux-Dubé, J., dissenting); *R. v. Généreux*, [1992] 1 S.C.R. 259, 319 (L'Heureux-Dubé, J., dissenting).

²⁴ See, e.g., *R. v. Ross*, [1989] 1 S.C.R. 3, 18 (L'Heureux-Dubé, J., dissenting); *R. v. Duguay*, [1989] 1 S.C.R. 93, 98 (L'Heureux-Dubé, J., dissenting); *R. v. Bartle*, [1994] 3 S.C.R. 173, 221 (L'Heureux-Dubé, J., dissenting); *R. v. Elshaw*, [1991] 3 S.C.R. 24, 47 (L'Heureux-Dubé, J., dissenting).

²⁵ See, e.g., *R. v. Feeney*, [1997] 2 S.C.R. 13, 71 (L'Heureux-Dubé, J., dissenting).

²⁶ See *R. v. Howard*, [1989] 1 S.C.R. 1337, 1360 (L'Heureux-Dubé, J., dissenting). I continued:

The just determination of guilt or innocence is a fundamental underpinning of the administration of criminal justice. The ends of the criminal process would be defeated if trials were allowed to proceed on assumptions divorced from reality. If a careless disregard for the truth prevailed in the courtrooms, the public trust in the judicial function, the law and the administration of justice would disappear. Though the law of

I am concerned that the exclusion of evidence under section 24(2) may at times distort the truth-seeking process particularly when the defense is entitled to adduce comparable evidence that is denied to the Crown.²⁷ Any interpretation of section 24(2) of the Charter which automatically excludes relevant evidence is to me contrary to the letter and the spirit of the Charter. Charter section 24(2), like Charter section 1, is written in terms that signal the appropriateness of a case-by-case discretion in this area, not interpretations that automatically exclude categories of probative evidence that would help find the truth in a case.²⁸ I bemoaned the direction the law is going under section 24(2) in *R. v. Stillman* in these words:

criminal evidence often excludes relevant evidence to preserve the integrity of the judicial process, it is difficult to accept that courts should ever willingly proceed on the basis of untrue facts.

²⁷ For example, in *Cook*, I wrote in dissent:

In the context of this trial, where the credibility of other witnesses was also impugned with prior inconsistent statements, without admission of this evidence the jury would have been given the mistaken impression that the accused had been consistent in his testimony, while other witnesses had changed their stories. This could distort, rather than contribute to the truth-finding process.

[1998] 2 S.C.R. at 656 (internal citation omitted).

²⁸ I draw support for my thinking in this area by analogy to a recent dissenting judgment in the Privy Council, *HM Advocate and Another v. R.*, [2004] 1 A.C. 462, 473–74 (P.C. 2002) (appeal taken from Scot.) (Steyn, L., dissenting). In that appeal to the Privy Council under the Scottish devolution legislation, the majority held that the accused could not be tried on charges laid as long ago as 1995 (reasonable delay). The Presiding judge, Lord Steyn, said in dissent, at paras. 17–18:

For my part the interpretation advocated by the appellant would result in severe disruption of the effective and just functioning of the criminal justice system. It is significant that since the commencement of the Scotland Act 1998 out of 1727 devolution minutes 675 raised issues of delay, i.e. 39%. If such a view were to be adopted in England . . . , the result would be a huge increase in stay applications in criminal courts at every level, with detrimental effect on the administration of justice. . . .

A characteristically elegant observation of L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4 S.C.R. 411 is relevant. She said p. 461, (para. 69):

It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe—a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

The moral authority of human rights in the eyes of the public must not be undermined by allowing them to run riot in our justice systems. In working out solutions under the Scotland Act 1998 and the Human Rights Act 1998 courts in Scotland and England should at all times seek to adopt proportionate remedies.

The framework set out in *Collins*,²⁹ in my opinion, represents the proper approach to s. 24(2) and efforts since then to explain, clarify, refine, extend, add to or distinguish *Collins*, have only served to further muddy the waters. The inquiry has now become such a complicated exercise that I wonder how trial judges will ever be able to resolve the issues arising under s. 24(2) in order to ensure that justice is done.³⁰

²⁹ R. v. Collins, [1987] 33 C.C.C. 1 (holding that evidence may be excluded at a criminal trial, applying a three factor standard: (1) the nature of the evidence; (2) the seriousness of the violation of the Charter; and (3) the costs of excluding the evidence).

³⁰ See R. v. Stillman, [1997] 1 S.C.R. 607, 697 (L'Heureux-Dubé, J., dissenting) (citations omitted). A more extensive quotation from that case amply depicts my views in this area at pp. 698–99:

I am strongly of the view, in particular, that the classification of evidence proposed by my colleague Cory J., under the trial fairness aspect of the s. 24(2) analysis, in terms of “non-conscriptive ‘real’ evidence” and “conscriptive evidence” (which includes “derivative evidence”), with their possible extension to all kinds of unforeseen situations, is, in my view, an unfortunate development. As I said in *Burlingham*, *supra*, where I expressed my concerns at length, at paras. 108–09:

The thrust of my criticism of this Court’s recent jurisprudence on s. 24(2) is that we may be digging ourselves into a hole. *If we are to create a test of absolute exclusion to further the purposes of s. 24(2), then I believe that we must not define that test so broadly as to risk frustrating the text of s. 24(2), which calls upon courts to evaluate “all of the circumstances” in preserving the reputation of the justice system.* I therefore prefer to formulate any absolute exclusionary rules more narrowly than most of my colleagues.

In my view, it is most consistent both with our common law approach to exclusion and with the purposes of s. 24(2) of the Charter to confine an absolute exclusionary rule to circumstances in which the unconstitutional conduct of state authorities is responsible for evidence which may possibly be unreliable. *I do not feel that the nature of the evidence (real vs. self-incriminatory, or discoverable vs. undiscoverable) should be determinative of absolute exclusion.* For my part, I believe that a viable distinction can and must be drawn between evidence whose admission potentially touches upon the adjudicative fairness of the hearing and evidence which is obtained in a manner which does violence to the integrity of the judicial system. Whereas the former must almost inevitably be excluded, the latter must be evaluated “having regard to all of the circumstances”. [Emphasis added.]

And later, I wrote, at 702:

Therefore, inasmuch as the nature of the evidence is relevant under s. 24(2), I am of the view that it is only where the accused is compelled to participate in the creation or discovery of “evidence which tends to establish the accused’s guilt by his own admission, or based upon his own communication” that the admission of such evidence could, under some circumstances, bring the administration of justice into greater disrepute than its exclusion.

Building further on a theme I talked about earlier in connection with equality rights, I would note here that the criminal trial's truth-seeking process is also potentially distorted by a continued use of some stereotypical reasoning regarding sexual assault complainants. An example of this, which I mentioned earlier, is where "similar fact" reasoning may unfortunately still be permitted as a basis for letting the defense tender evidence about the complainant's sexual history. In *R. v. Seaboyer* I said this in my partial dissent: "I am of the firm opinion that such evidence is almost invariably irrelevant and, in any event, is nothing more than a prohibited propensity argument, besides being highly prejudicial to the integrity and fairness of the trial process."³¹

The current approach to interpreting the Charter is not the only factor which causes me concern vis-à-vis the court's truth-seeking function. I am also concerned about the current scope of appellate review of trials in general, and especially jury trials. As I wrote in dissent in *R. v. Bevan*:

Jury trials should not be presided over by courts of appeal who are removed from the atmosphere of a particular trial, who have no possibility of appreciating the personality, level of sophistication and understanding, or other traits of a particular jury and who do not have the benefit of hearing counsels' addresses to the jury but only of reading them Almost every accused in an appeal challenges the judge's charge to the jury in the hope of winning a new trial or an acquittal. Judges' charges to the jury are easy targets and if courts give in too easily to those alleged errors, the courts of appeal will take over a trial judge's function.³²

³¹ *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 685 (L'Heureux-Dubé, J., dissenting in part). The full passage where I discuss this stated, at 685–86:

Many argue that the most convincing support for the argument that the provision is drawn too narrowly is provided by so-called "similar fact evidence," or "pattern of conduct evidence," i.e., that the complainant has had consensual sexual relations in circumstances that look an awful lot like those supporting the assault allegation and, hence, such evidence is probative of consent. I am of the firm opinion that such evidence is almost invariably irrelevant and, in any event, is nothing more than a prohibited propensity argument, besides being highly prejudicial to the integrity and fairness of the trial process.

Such arguments depend for their vitality on the notion that women consent to sex based upon such extraneous considerations as the location of the act, the race, age or profession of the alleged assaulter and/or considerations of the nature of the sexual act engaged in. Though it feels somewhat odd to have to state this next proposition explicitly, consent is to a person and not to a circumstance. The use of the words "pattern" and "similar fact" deny this reality. Such arguments are implicitly based upon the notion that women will, in the right circumstances, consent to anyone and, more fundamentally, that "unchaste" women have a propensity to consent.

³² *R. v. Bevan*, [1993] 2 S.C.R. 599, 621 (L'Heureux-Dubé, J., dissenting).

I am especially troubled when counsel raises a ground of appeal which was not raised at trial. Appeal courts should be more reluctant to entertain such grounds. In *R. v. Brown* I cited with approval the decision of Judge Lambert of the British Columbia Court of Appeal:

An accused must put forward his defences at trial. If he decides at that time, as a matter of tactics or for some other reason, not to put forward a defence that is available, he must abide by that decision. He cannot expect that if he loses on the defence that he has put forward, he can then raise another defence on appeal and seek a new trial to lead the evidence on that defence.³³

You as trial Crowns know perhaps better than anyone in the justice system that when an appeal court orders a new trial, this can well mean that instead of there being a new trial, there will be no trial. A new trial does not simply mean replaying the old trial once again verbatim, like re-watching a movie on video. As I wrote in dissent in *R. v. B. (F.F.)*:

The Court cannot be blind to the ramifications of sending this matter back for re-trial. Apart from the time and expense to the public purse in terms of courts, prosecutors and defense lawyers, the complainant and her family have already lived through an experience of unspeakable violence as well as the trauma of a trial. A new trial will require them to once again re-live experiences that should not be experienced even once. Given that there was no miscarriage of justice in the first trial, this would be more than “regrettable.” In the circumstances of this case, a new trial would itself, in my view, be a miscarriage of justice, the very type of miscarriage that the curative provision of the Code was meant to prevent.³⁴

Even when a new trial is in fact held, this is not without hardships to innocent people. I attended a judicial education conference shortly after I was appointed to the Supreme Court. At the end of the conference, one judge asked to speak to me. He and his wife asked me if I remembered a particular case in which I had been the sole dissenter. I indeed remembered this case. A taxi driver was killed by the accused. This judge and his wife told me that the taxi driver who was murdered was their son. He was a university student who drove a taxi at night to earn extra money. They said: “We have lived with your dissent for the eleven years it has taken for him to be convicted again after new trials and he is still before the courts

³³ *R. v. Brown*, [1993] 2 S.C.R. 918, 926 (L’Heureux-Dubé, J., dissenting) (citing *R. v. Vidulich*, [1989] 37 B.C.L.R. (2d) 391, 398 (C.A.)).

³⁴ *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, 720 (L’Heureux-Dubé, J., dissenting).

contesting his sentence.” I had tears in my eyes. So did they. This is the human side of ordering new trials when the Crown’s evidence is overwhelming but where the first trial had some technical problem.

At bottom, I retain a strong fundamental confidence in jurors’ capacity to receive evidence, to weigh it fairly and to follow a judge’s legal instructions. In my last dissent before I left the court, *R. v. Noël*, the Court invoked Charter section 13 and overturned a conviction where the Crown had cross-examined the accused on prior inconsistent statements he made in testimony at an earlier trial on charges against the accused brother.³⁵ I reiterated my confidence in the jury system, stating:

[I]t is not proper for this Court to base its decision on a misconception of the jury as a body incapable of properly dealing with difficult evidence. No evidence was before the Court in the present case to suggest that juries are, as a whole, unable to use prior testimony in an appropriate manner. Absent such evidence, there does not appear to be a pressing need to make a fundamental change in the law of evidence so as to exclude in all cases a whole series of prior inconsistent statements made while testifying.³⁶

E. *Where to Go from Here with the Charter?*

Here are some thoughts on where I hope the Charter will take us in the future, or perhaps better put, where I would like to see us taking the Charter. I am confident that it can make a huge and positive impact on the lives of Canadians. We can be a real beacon to countries around the world still more than we are at present.

³⁵ *R. v. Noël*, [2002] 168 C.C.C. (3d) 193, 227 (S.C.C.) (L’Heureux-Dubé, J., dissenting).

³⁶ *Id.* at 237. My fuller comments on point were as follows:

Given this appraisal and affirmation of the jury as a body fully capable of discerning the truth from the facts presented to it, and given the fact that Parliament has not seen fit to abolish the jury system in Canada, it is not proper for this Court to base its decision on a misconception of the jury as a body incapable of properly dealing with difficult evidence. No evidence was before the Court in the present case to suggest that juries are, as a whole, unable to use prior testimony in an appropriate manner. Absent such evidence, there does not appear to be a pressing need to make a fundamental change in the law of evidence so as to exclude in all cases a whole series of prior inconsistent statements made while testifying. I reiterate that evidence that the jury as an institution is fundamentally incapable of properly using this evidence is needed before such a sweeping change should be made.

Later in that case I stated, at 239: “This Court ought to be wary of any arguments that proceed to exclude evidence on the basis of the jury’s inability to handle it.”

For the Charter to have its full beneficial impact, there are a few important steps I would encourage. First, we need to re-focus the Charter jurisprudence to make the Charter the fulsome human rights document it was meant to be.

Second, we need the right to equality to be more fully and effectively implemented, not only in cases that private parties bring via civil proceedings under section 15 of the Charter, but also in criminal law cases where the rights and privacy of complainants and other witnesses are being directly affected. In this regard, equality rights should not take a back seat to any other Charter right. We need Crowns to continue to be an effective voice for this, as they have done so effectively before the Supreme Court in cases like *Carosella*, *Osolin*, *Seaboyer* and *O'Connor*.³⁷

Front-line prosecutors will face some tough choices, despite the strong and salutary wording of recent Criminal Code amendments enacted after *Seaboyer*, *Osolin* and *O'Connor*. Those amendments provide much-needed legislative protection for the equality and privacy rights of sexual assault complainants. What do you do if the defense tries to go where it shouldn't despite these provisions, by probing too far into a complainant's medical, psychological or sexual history? Do you dig in and fight all the way? You might fear that if you do so, this could manufacture grounds of appeal that the defense would later press if the accused is convicted at trial. You might reluctantly feel that it would be tactically better to just give in to the defense applications, rather than face the risk of an appeal. Trial judges too might be tempted to err on the side of inappropriately letting the defense see medical records, or intrusively explore a sexual assault complainant's sexual past, out of fear of otherwise handing the defense a potential ground of appeal.

I encourage you not to give in to such tactical temptations. You are the front line voice to make sure that sexual assault complainants get the full benefit of those provisions. It will take some time before all levels of court give those provisions their full effect. As I wrote in dissent in *R v. Osolin*:

Despite the fact that there is much wider recognition, both among those involved in the administration of justice and among the public at large, that unfounded beliefs about sexual assault victims prejudicially affect both the victims and the trial of the issue, their force and effect has not been eliminated. Of their very nature, beliefs will inform notions of relevance. However, as they often function unconsciously, their effect can be unacknowledged and identifying them may be a difficult and elusive process.³⁸

³⁷ *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Osolin*, [1993] 4 S.C.R. 595.

³⁸ *Osolin*, [1993] 4 S.C.R. at 626–27 (L'Heureux-Dubé, J., dissenting).

You can play an important role in the improvement of our justice system by educating judges, case by case, on the importance of giving all the new Criminal Code provisions their full effect. That is part of your important role as Crowns in the full and effective implementation of the Charter.

Third, we need to ensure that the implementation of the Charter does not undermine the criminal trial's core goal of effectively finding the truth. The truth makes sure that the guilty are convicted. The truth equally ensures that the innocent are acquitted.

Perhaps we should consider the idea of thinking less frequently about the need to let some guilty persons go free in order to protect the innocent from wrongful convictions. Of course, avoiding the travesty and tragedy of wrongful convictions is a fundamental, vitally important goal on which we should not compromise. But to achieve this goal, we might focus more effort at developing procedures and safeguards which will simultaneously ensure both that the guilty will be rightfully convicted and that the innocent will never be wrongfully convicted all at the same time, without having to sacrifice conviction of the guilty to avoid wrongful conviction of the innocent.

Fourth, it is time to reconsider with the benefit of two decades' experience how our jurisprudence has approached several Charter rights. All parties, including the Crown, should be prepared to question before the Supreme Court the formulations and tests which the Court has established over the past twenty years and to offer reforms and refinements. In *R. v. Sharpe*, I co-wrote³⁹ that it was "unfortunate" that the Attorneys General who intervened in the case conceded before the Court that the Criminal Code's child pornography provisions violated section 2(b)'s guarantee of freedom of expression, and argued instead that it was justified under section 1 as a reasonable limit.⁴⁰ I of course understood in light of our Court's earlier decisions that such a concession would seem necessary to the Crown. In my joint opinion with Justices Gonthier and Bastarache, we recognized that "at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of child pornography cannot be the basis for excluding it from the scope of the section 2(b) guarantee."⁴¹

However, we have now had enough experience to reconsider the various tests that the Supreme Court has been using, whether for freedom of expression or other important Charter rights. The Supreme Court has the mandate to re-evaluate and refine these tests in light of Canada's evolving experience with the Charter.

³⁹ In a joint opinion, concurring with the result but partially dissenting.

⁴⁰ *R. v. Sharpe*, [2001] 1 S.C.R. 45, 128 (L'Heureux-Dubé, Gonthier, and Bastarache, JJ., dissenting in part, concurring in the result).

⁴¹ *Id.* at 128–29 (L'Heureux-Dubé, Gonthier, and Bastarache, JJ., dissenting in part, concurring in the result).

We need legal scholars to offer the Court new options. We need skilled litigants including the Crown to bring new ideas forward, fueled with your practical experience.

We need our courts to hear more about how their previous rulings have been operating in practice on the front lines. We need our judges to hear more about solutions that have been tried by courts and legislatures elsewhere around the world, such as in England, South Africa, Israel, India, and Australia, as I explored in a number of cases such as *R. v. Noël*.⁴² Courts are now engaged in a robust international dialogue. Its common denominator is the Universal Declaration of Human Rights on which Canada's Charter and similar national human rights instruments around the world are based.

Fifth, just a short word on an important practical matter in constitutional cases. We judges expect a lot of the Crown. At times, we perhaps may expect too much. At trials you are expected to fully respond to Charter applications, sometimes on unacceptably short notice. In appeal courts, the defense or the bench may spring on you new arguments or new theories that were not covered in the notice of appeal or the factums. Of course, we are all trying to ensure that the liberty of the individual is given full protection. However, this must be done in a judicial system whose procedures are scrupulously fair to all parties, including to the Crown, which represents the public interest.

If you are caught off guard by a new, last-minute constitutional argument, whether from the defense or from the Court, and if the public interest would be prejudiced by forcing you to respond without adequate time to prepare, I encourage you to respectfully but firmly seek an adjournment. Put your reasons fully and clearly before the Court. If your need to prepare is not properly accommodated, make sure this is put on the record, for the benefit of reviewing courts. In the long run, it will help all in the difficult task of improving and ensuring constitutional justice to all.

IV. CONCLUSION

Let me finish by commending the excellent program that has been planned for you. It is so important that busy Crowns get a chance to get updated on recent developments.

It is wonderful that you have chosen to dedicate yourselves to public service. Our public is indebted to you for your choice. Please keep forging forward, with determination and optimism. There is simply no career like yours.

⁴² *R. v. Noël*, [2002] 168 C.C.C. (3d) 193, 246–53 (S.C.C.) (L'Heureux-Dubé, J., dissenting).