

Generally Speaking, Canada Is Going in the Right Direction: A Response to the Honorable Claire L'Heureux-Dubé

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I. INTRODUCTION

While perhaps a touch unconventional for an opening paragraph, I thought it appropriate to begin this Commentary with a disclosure. During the Supreme Court of Canada's 1996 term, I had the tremendous privilege to work as a law clerk for Claire L'Heureux-Dubé. As most former law clerks know, working at the Supreme Court is the legal equivalent of a September call-up to the majors in baseball. For a short period, you're in the "big time." Though only a supporting player, you are actually out on the field with all the names you read about in law school and the "games" matter. It is a heady experience, and it is hard not to bask a bit in the reflected glow of the legal stars around you.

Before you know it, however, it's all over, and you head back to the minor leagues, be it to a law firm, the government or, in my case, to law school. As the years go by, your "cup of coffee" in the majors becomes much more a part of your past than your present, and the glow of having been a law clerk fades a bit in importance. Still, while increasingly hazy, the memory of learning about the law from one of the true legends of the Canadian justice system lingers. When I was asked to critique my former boss's address on the Canadian Charter of Rights and Freedoms¹ ("Charter") and criminal justice,² I must confess that I felt a bit like a rookie asked to comment on Barry Bonds's swing and assess its weaknesses. Sure, there may be the odd shortcoming, but really, who am I to say anything about it? Like a young ballplayer, I also couldn't help feeling a bit disloyal to the person who gave me the "break" that helped kick-start my legal career.

These feelings were more difficult to resolve than you might imagine. Thankfully, in deciding to accept the offer to write this short piece, I remembered that as a dissenter herself, L'Heureux-Dubé has always been tremendously open-minded towards dissent, a fact that makes my job considerably easier. Indeed, although L'Heureux-Dubé and I have always shared a great deal of common ground in our approach to criminal justice, we have frequently disagreed on the

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¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

² Claire L'Heureux-Dubé, *The Charter of Rights and the Administration of Criminal Justice in Canada—Where Have We Been and Where Shall We Go?*, 3 OHIO ST. J. CRIM. L. 473 (2006).

correct methodology and application of the law on a number of issues, particularly in relation to the proper role played by the Charter.

My first thought regarding her address to Crown prosecutors is that it is vintage Claire L'Heureux-Dubé. It is straightforward, undoubtedly inspirational to its audience, and highly provocative. It displays her empathy and natural inclination towards the victims of criminal acts. Furthermore, it shows L'Heureux-Dubé's willingness to speak her own mind, regardless of the conventional wisdom. I have always believed that her many dissenting opinions were tremendously useful for Canadian jurisprudence. To begin with, I often agreed with them. But even in cases where I took a different view, the opinions forced opponents to apply incredible rigor to rebut her powerfully constructed arguments. Her presence on the Supreme Court and the unique perspective she brought to bear on criminal law issues has been sorely missed.

That said, I also believe that on many of the issues described in her speech to prosecutors, L'Heureux-Dubé remains a dissenting voice, and in that regard, I must confess to being pleased. Although she makes a number of compelling points, I do not share her view of the Charter's impact on the Canadian legal landscape. In general, I disagree with her implicit suggestion that the Charter has effectively hijacked Canada's trial system to the advantage of the accused and to the detriment of victims and the general public. It is not possible to comment upon every point raised in her address, but I will attempt to provide a different view on the Charter's impact in Canada and will also critique two of the particular issues she raised: the ability of corporations to use the Charter and the importance of seeking truth in the criminal trial.

II. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS HAS NOT TILTED THE BALANCE IN FAVOR OF CRIMINAL DEFENDANTS

Although the title of her address is neutral in tone, I think it is pretty clear where L'Heureux-Dubé thinks we have been and where we should go with the Charter in relation to criminal justice. While not expressly stated as such, the overwhelming inference from her remarks is disenchantment with the manner in which the Charter has been utilized by criminal defendants to distort the focus of trials at the expense of victims of crime and the "truth."

I certainly understand whence this perspective arises. The Canadian criminal justice system, like that of all countries that derived from the British model, has never been all that friendly to victims of crime. It remains a highly adversarial process, where the interest of prosecuting rests in the hands of the State rather than in the hands of the victim. Victims' interests have never figured that prominently in the equation, and prior to the Charter's enactment, it is probably accurate to say that they were mostly ignored.

This refusal to consider the needs of crime victims was exacerbated when the Charter came into force. Things were bad enough when trials were focused exclusively on deciding whether the charge in question was proven beyond a

reasonable doubt, and the role of victims was simply to show up in court and be grilled in cross-examination. After 1982, however, this narrow perspective changed. Suddenly the Canadian criminal trial had a second focus: to determine whether the defendant's guilt had been proven by constitutionally acceptable means. To a certain extent, every criminal proceeding became as much a trial of the State as one about the accused. Especially in the early years of the Charter, it seemed as if not a day would pass without a court declaring that one legal procedure or method of obtaining evidence was unconstitutional on the grounds that it was unfair to the defendant. This ten to fifteen year early period—which coincided with much of L'Heureux-Dubé's tenure on the Supreme Court—was a remarkably active one for the judiciary, as courts were asked to reconsider previously accepted methods of criminal investigation and trial procedure and determine whether they were fair to the accused. Coupled with a fairly liberal Supreme Court bench that was sympathetic to this approach, it certainly made for a lot of focus upon the defendant.

Against this backdrop, it is not at all unusual to think that the Charter had suddenly skewed the system in favor of the defendant. Victims of crime, already a marginalized group, seemed to be less and less the focus of the trial process. Instead, judges became fixated with ensuring a fair trial for the accused, and rights arguments became the “flavor *du jour*,” providing a bonanza for defense lawyers who in older days would have been forced to plead their client guilty or conduct a hopeless trial.³

Nonetheless, I do not believe this description provides a complete representation of this period of time, for the reaction to these events was in many ways as interesting as the events themselves. Prior to the Charter's enactment, legal reform of the criminal justice system was limited generally to sporadic and rather random involvement by the federal government.⁴ Parliament rarely addressed controversial issues unless the politics of the day forced them onto its radar screen. Criminal defendants were not the only people with reason to be concerned about the trial process. As mentioned previously, it is not as if the pre-Charter period was any picnic for victims either. For the most part, witnesses and victims of crime were treated as necessary evils of the system more than anything else. Enactment of the Charter—albeit in an indirect way—actually helped to change this. In effect, the refocusing of the criminal trial and the flurry of challenges against different components of the process forced the judiciary and the government to undertake a comprehensive reassessment of the criminal justice

³ As Justice Southin eloquently noted in *R. v. Leipert*, [1996] 106 C.C.C. (3d) 375, 378 (B.C.C.A.), “Question: What is a narcotics case without a Charter argument? Answer: A plea of guilty.” See also Alan Gold & Michelle Fuerst, *The Stuff that Dreams are Made Of!—Criminal Law and the Charter of Rights*, 24 OTTAWA L. REV. 13, 37 (1992).

⁴ In Canada it is the federal government—and not that of the provinces—that has responsibility for establishing the law governing criminal proceedings.

system, a reassessment that ultimately considered the interests of all of the “players” within the system’s sphere of influence.⁵

In other words, as noteworthy as it was for the initiatives taken by the Court in favor of criminal defendants, I believe the Charter era has been equally important in helping to develop positive judicial attitudes towards victims in the criminal process and for the large number of legislative initiatives taken by Parliament in response. In this way, as some commentators have already suggested, the courts were effectively engaged in a process of “dialogue” with Parliament.⁶ The jolt to the system caused by the enactment of the Canadian Charter of Rights and Freedoms woke Parliament up to some of the inequities in the criminal process, and, as L’Heureux-Dubé points out in her address, a number of useful reactions occurred.

Taking the entire series of events into account, I believe it is fair to say that in many ways enactment of the Charter was actually *beneficial* to victims, as it forced a detailed reassessment of the criminal trial process, ushering in needed changes to the law concerning investigation, procedure, evidence, sentencing, and substantive crimes. As L’Heureux-Dubé points out, there is still plenty of work to be done, and there will inevitably be controversial decisions that require reflection to ensure that a proper balance between the defendant’s, the victim’s and the State’s interests has been correctly set.⁷ Still, I see little evidence to suggest that the Charter has been used to relentlessly advance the cause of defendants at the expense of a wider conception of “justice.”

If anything, my real concern is the continued promotion of just such a concept, for it fuels the notion that even more radical reform of the criminal justice system is required to ensure that the guilty get their just deserts—an argument that seems currently to possess considerable attraction, and one that prompts unnecessary judicial and legislative (over)reaction. In hindsight, defense lawyers might not be so happy about having used the Charter so vigorously, and having consequently awoken Parliament from its criminal justice slumber. Nowadays,

⁵ The Charter has also been instrumental in giving victims of crime a legal tool to assert their claims in court. Prior to the Charter’s enactment, victims were routinely denied standing to contest any aspect of a criminal trial. In other words, the Charter has helped to overcome the strict barriers of the adversarial process. See JOAN BARRETT, *BALANCING CHARTER INTERESTS: VICTIMS’ RIGHTS AND THIRD PARTY REMEDIES* 1–5 (2001); Alan Young, *Crime Victims and Constitutional Rights*, 49 CRIM. L.Q. 432, 447–50 (2005).

⁶ In Canada, the notion of constitutional review as a “dialogue” between Parliament and the judiciary (first suggested in Peter W. Hogg & Alison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75, 79–82 (1997)), has become a rather complicated and controversial topic. See Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV. (2d) 7, 34–39 (2004). For my purposes here I am simply referring to the manner in which constitutional review has provoked government reform and reassessment of established procedures the legislature would often rather avoid addressing. See Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUP. CT. L. REV. (2d) 49, 54 (2004) (“Dialogic judicial review may serve as a means of placing important and uncomfortable issues on the legislative agenda.”).

⁷ L’Heureux-Dubé, *supra* note 2, at 474.

hardly a year goes by without significant new initiatives designed to target crime and make defending a criminally accused more difficult, with many measures specifically targeted to reduce the very inequities L'Heureux-Dubé discusses in her Commentary.

Frankly, my impression on the whole is that these days the Canadian Charter of Rights and Freedoms acts more like a life raft for defendants than a bludgeon, protecting them from the very worst of the legislated initiatives, as opposed to wreaking havoc with fair and balanced measures. More than ever, as judges retrench from earlier more generous interpretations of rights, the Charter is becoming little more than the guarantee of a minimum "bottom line" of fair procedure. In many areas (the protection against cruel and unusual punishment, and the protection against unreasonable search and seizure, to name two) this bottom line seems to sink lower with each passing year.⁸

As someone who has worked on both sides of the criminal trial fence,⁹ I cannot see the Charter in the same light as L'Heureux-Dubé. Indeed, with each new legislative proposal, I find myself saying thanks for even the minimal protection the Charter does provide, for any remaining naiveté about the government's ever increasing appetite to impose measures that are designed to "suppress crime at all costs" has long since disappeared.¹⁰ I say this as a practitioner currently working in New Zealand, where in the absence of a fully entrenched Charter,¹¹ the government continues to float initiatives designed to appease a law-and-order climate by moving to eliminate many cherished due process protections, by proposing changes to unanimous jury verdicts, by acting to minimize the flow of criminal disclosure, and by creating exceptions to the rule against double jeopardy, amongst other plans.¹²

While setting a proper balance is important and there are undoubtedly areas where use of the Charter has gone awry, I do not see the Canadian criminal justice system as a place where rights have gone out of control. If anything, my greater

⁸ See David M. Paciocco, *Competing Constitutional Rights in an Age of Deference: A Bad Time to Be Accused*, 14 SUP. CT. L. REV. (2d) 111, 136–37 (2001); Don Stuart, *Eight Plus Twenty-Four Two Equals Zero*, 13 C.R. (5th) 50, 59–61 (1998).

⁹ Prior to joining the Faculty of Law, I worked first as defense counsel and subsequently as counsel with the Federal Department of Justice.

¹⁰ One obvious and recent example involves the government's legislation on anti-terrorism, which has been heavily critiqued as a draconian measure that ignores basic due process values. See Kathy Grant, *The Unjust Impact of Canada's Anti-Terrorism Act on an Accused's Right to Full Answer and Defence*, 16 WINDSOR REV. LEGAL & SOC. ISSUES 137, 166–68 (2003); W. Wesley Pue, *The War on Terror: Constitutional Governance in a State of Permanent Warfare*, 41 OSGOODE HALL L.J. 267, 271–72 (2003).

¹¹ New Zealand's Bill of Rights Act 1990 offers some protection for defendants, but is expressly made subordinate to other legislation by section 4 of the Act. See PAUL RISHWORTH ET AL., *THE NEW ZEALAND BILL OF RIGHTS* ch.4 (2003).

¹² Criminal Procedure Bill 2004, NEW ZEALAND PARLIAMENTARY LIBRARY BILLS DIGEST, No. 1119 (2004), available at <http://www.clerk.parliament.govt.nz/Content/BillsDigest/1119CriminalProcedure.pdf>.

concern relates to a diminishing culture of rights application, a culture created in part by the suggestion that the wielding of rights by criminal defendants has gone too far.

III. THE CHARTER IS A HUMAN RIGHTS DOCUMENT, AND HUMAN RIGHTS ARE PROTECTED WHEN CORPORATIONS BRING CHARTER CHALLENGES

The first significant point in L'Heureux-Dubé's address suggests that the Charter should be viewed strictly as a "human" rights document and, consequently, the courts should be wary of acceding to claims raised by non-human legal entities. Specifically, L'Heureux-Dubé expresses concern about the use of the Charter by corporations, with the implicit suggestion that the Charter is being utilized to advance the interests of those who already benefit from power and advantage not available to ordinary people.¹³ While attractive on the surface, I find this proposition highly questionable. I could attempt to rebut it by contending that the rights in the Charter need to be applied to all, and that corporations are no less deserving of protection than individuals. Still, I prefer to look at the issue from a utilitarian perspective, for I believe that allowing corporations to bring these challenges is positive for the very individuals about whom L'Heureux-Dubé expresses the greatest concern.

It is simply not clear to me that the advancement of human rights issues in Canada would have come as far as it has if not for the very challenges by corporations that L'Heureux-Dubé seems inclined to halt or temper. It should come as no surprise that securing access to justice in Canadian courts is an immensely expensive proposition. Many Charter challenges would never arise if corporations were barred from advancing claims, as individuals would be completely unable to fund them.¹⁴ As L'Heureux-Dubé points out in her address, Big M Drug Mart possessed no particular religion when it challenged the mandatory Sunday closing laws that had been founded for a purely religious purpose, but it is unfathomable to think that its position was not shared by many individuals and smaller businesses who were disadvantaged by the same discriminatory law and who were unable to challenge it because of financial restrictions.¹⁵

Naturally, in a system that relies so heavily on the concept of *stare decisis*, judicial decisions on these important challenges not only benefit corporations, but also assist the interests of individuals who will profit from the entrenchment of

¹³ L'Heureux-Dubé, *supra* note 2, at 476–77.

¹⁴ It is impossible to list all of the constitutional challenges raised by corporations, but one particularly important claim—raised in the quasi-criminal setting of customs law—involved a corporation successfully raising an equality claim (of discriminatory treatment against homosexuals) on behalf of its customers, exposing significant problems with the customs scheme. See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.R. 1120.

¹⁵ L'Heureux-Dubé, *supra* note 2, at 477.

human rights norms into the law. *Hunter v. Southam, Inc.*,¹⁶ a case referred to by L'Heureux-Dubé in her address,¹⁷ is a case in point. This remains one of the Charter's landmark decisions that enshrined the importance of privacy rights in the face of government action. L'Heureux-Dubé seems disheartened by the fact that a corporation was able to benefit from a right designed to protect individual privacy, but if the corporation had been barred from bringing the Charter claim, it would never have bothered to raise the important—and well-argued—issues on the appeal, potentially delaying full recognition of the rights in question indefinitely.

It is undoubtedly true that corporations are different from humans, and there will be situations where it is inappropriate to treat them in the same way. But the Charter is sophisticated enough to address these distinctions, and it is hardly necessary to bar corporations as a threshold matter. As L'Heureux-Dubé points out in her address,¹⁸ section 1 of the Charter, which allows the government to impose “reasonable limits” on constitutional freedoms, tends to take into account the nature of the interest held by the challenger of legislation. In *Attorney General of Quebec v. Irwin Toy, Ltd.*,¹⁹ for example, the court recognized that certain forms of speech—and in particular commercial speech—did not warrant the *same* level of protection as other types. Nonetheless, this is a far cry from suggesting that the speech should not be protected at all because it was engaged in by a corporation, a finding which would allow unlimited restriction by the State.

The Canadian Charter of Rights is the supreme law of Canada, and I see little reason why the government should not have to respect it, whether it turns its sights on corporations or individuals. In the criminal sphere, the freedoms expressed in the Charter reflect the fact that crime cannot be fought at all costs, and the government must adhere to basic standards of justice in pursuing it. Applying this standard to individuals and not to corporations would encourage different levels of compliance with the Charter depending upon the target of the investigation. It would also restrict and delay challenges to unconstitutional processes. In short, it is an undesirable and haphazard way to approach our supreme law.

IV. THE CHARTER DOES NOT UNDULY IMPACT THE SEARCH FOR TRUTH BECAUSE THE TRIAL HAS NEVER BEEN SOLELY ABOUT THE SEARCH FOR TRUTH

A second major theme of L'Heureux-Dubé's address bemoans the manner in which the Charter has been interpreted and implemented, contending that it “may have weakened the criminal trial's core aim, namely the search for the truth.”²⁰ In this regard, she expresses particular concern about the use of section 24(2) (the Charter's remedial clause that permits the exclusion of unconstitutionally obtained

¹⁶ [1984] S.C.R. 145, 145–46.

¹⁷ L'Heureux-Dubé, *supra* note 2, at 477.

¹⁸ *Id.*

¹⁹ [1989] S.C.R. 927, 933–34.

²⁰ L'Heureux-Dubé, *supra* note 2, at 481.

evidence), the approach of appellate courts to jury charges, the ability of the defense to raise grounds of appeal that were not contested at trial, and the judiciary's exaggerated concern over the jury's tendency to draw prejudicial inferences.

As always, there is validity to many of L'Heureux-Dubé's concerns. I share her view that the current interpretation of section 24(2)—to automatically exclude certain categories of evidence while using a balancing process to consider other types of evidence—is both unprincipled and needlessly complicated.²¹ Similarly, I agree that appellate courts have too frequently applied a magnifying glass to jury charges, citing microscopic error as a reason for allowing a defendant's appeal. It is certainly accurate to suggest that in these instances the search for truth suffers, as the jury is deprived of probative evidence, or a verdict is quashed for reasons that likely never concerned the jury at all.

Nonetheless, although it seems trite to say, the search for the truth is not the sole objective of the criminal trial. It is important to reiterate that this search for truth marches hand in hand with other policy goals, most critically the need to protect due process interests of the accused, an objective that often demands suppressing the best version of the truth. While not expressly stating it as such, L'Heureux-Dubé appears to be putting forth a view of the criminal trial that puts the search for truth above all other objectives, a vision that has never been the paradigm under which the common law criminal trial has been conducted. For centuries, the criminal trial has placed major obstacles in front of the search for truth when competing interests demanded it. The law concerning privilege, the doctrine of abuse of process, and the rules on spousal competence, are just three examples of instances where judges and Parliament have recognized that truth occasionally needs to be subjugated to other important goals.

To be sure, the Charter has given the courts greater power to advance other goals—most notably the State's need to comply with the Constitution—at the expense of the truth. Certainly, the judiciary should not use—and in my view, generally speaking, it has not used—this power recklessly. Still, its existence is simply testament to a vision of criminal justice that recognizes that the ends do not always justify the means, hardly an unreasonable proposition. Once again, this vision, albeit to a lesser extent prior to the Charter's enactment, has always existed in Canadian law. For example, more than one Crown prosecutor has sat in frustration knowing full well that the key evidence to convict an offender was locked up in the unreachable mind of the person's spouse. Getting at the truth, in

²¹ 2 ALAN W. MEWETT Q.C. & PETER J. SANKOFF, WITNESSES ch. 21.3(f)(vii) (Supp. 2001). One of my concerns, however, is unlikely to be shared by L'Heureux-Dubé, in particular the fact that the automatic rule of exclusion for conscriptive evidence, leads to a “discriminatory approach to non-conscriptive evidence [as] in order to set a balance between evidence that is admitted against that which is excluded, the courts have set an unusually high threshold for non-conscriptive evidence, effectively to balance the regular exclusion of conscriptive evidence.” *Id.* at ch. 21, 21–97.

essence, is deemed to be less important than promoting marital harmony between spouses.²²

I also question whether L'Heureux-Dubé is entirely consistent with her vision of promoting truth at the expense of other goals. Her point that defense counsel should be restricted from being able to raise new grounds on appeal, for example, suggests that where the defense "decides . . . as a matter of tactics . . . not to put forward a defence that is available, he must abide by that decision."²³ Frankly, this seems to me to advocate the potential suppression of truth solely for the purpose of avoiding the trouble and expense of a new trial. I am not suggesting that the tactical choices of defense counsel should be ignored on appeal or that retrials are desirable, but surely a lawyer's decision at trial cannot stand in the way of a potential miscarriage of justice. From what I have seen, most appellate judges are already too reluctant to ignore potential questions of "truth" on the basis of a defense counsel's strategic choice.

We also seem to disagree about what actually promotes truth seeking, for L'Heureux-Dubé's version rests upon "a strong fundamental confidence in jurors' capacity to receive evidence, to weigh it fairly and to follow a judge's legal instructions."²⁴ L'Heureux-Dubé is critical of evidentiary principles that seek to keep evidence from the jury, on the basis that this prevents jurors from getting at the truth. Once again, there is nothing inherently wrong with suggesting that juries should have access to evidence that assists them in coming to a proper resolution on the facts, but I am concerned with the suggestion that rules designed to prevent evidence from going to the jury implicitly hinder truth-seeking. To the contrary, most evidence is kept from the jury for the very purpose of ensuring that the jury does not draw an inappropriate or incorrect inference. This sentiment was well expressed by Justice Arbour in *R. v. Noël*:

I am not casting doubt on the jury's ability to sort out complicated evidence and its permissible uses. This Court has consistently expressed its faith in the institution of the jury

While this Court has insisted over the years that jurors be made privy to as much evidence as possible, we have also recognized the necessity to exclude evidence in appropriate cases where the prejudicial effect . . . would overshadow its probative value.²⁵

²² In Canada, a spouse in most instances is neither competent nor compellable to testify at the bequest of the State. See Evidence Act, R.S.C., ch. C-5, § 4 (1985); *Salituro v. The Queen*, [1991] S.C.R. 654, 655 (permitting this exception to the general concept of "getting the truth" in the interests of "marital harmony").

²³ L'Heureux-Dubé, *supra* note 2, at 485.

²⁴ *Id.* at 486.

²⁵ *R. v. Noël*, [2002] S.C.R. 433, 470. See also *Starr v. R.*, [2000] S.C.R. 144, 240; *R. v. Handy*, [2002] S.C.R. 908, 958 (Binnie, J., noting: "This is not to undermine our belief in the ability

This approach seems to me to more closely agree with traditional concerns regarding prejudicial evidence. It is one thing to believe that with proper direction juries can avoid drawing prejudicial inferences in most cases, and something else altogether to say that our faith in juries justifies putting prejudicial evidence in the hands of jurors at will.²⁶

My own research on this matter suggests that, in Canada, reliance on the jury's purported ability to ignore the prejudicial effects of evidence has been a major factor in permitting the admission of evidence that is excluded in other jurisdictions.²⁷ For example, Canada's leading decision on whether it is permissible to cross-examine a defendant on prior convictions once he or she takes the witness stand is peppered with references that echo the sentiments in L'Heureux-Dubé's address.²⁸ In light of this belief in the jury's ability, it is hardly surprising that Canada has developed the most liberal regime in the common law world in terms of admitting this sort of evidence. L'Heureux-Dubé undoubtedly approves, but I am troubled about judicial pronouncements that admit evidence by relying on the unproven assumption that "jurors can do it" in light of a great deal of experience to the contrary²⁹—experience supported by numerous research studies suggesting that juries are unable to avoid drawing prejudicial inferences from prior convictions.³⁰

In essence, I am concerned with L'Heureux-Dubé's vision regarding how "truth-seeking" plays a role in the criminal trial. In my view, a true search for truth occasionally requires keeping evidence from the jury and allowing defense counsel to raise new grounds of argument on appeal. Moreover, important as the truth is, I

of the jury to do its job, but it underlines the poisonous nature of propensity evidence, and the need to maintain a high awareness of its potentially prejudicial effect.").

²⁶ The problem is of course exacerbated by the fact that jurors do not have to provide reasons for the decisions they make, and it is not possible to tell whether they have drawn an improper inference or not.

²⁷ See Peter Sankoff, Corbett, *Crimes of Dishonesty and the Credibility Contest: Challenging the Accepted Wisdom on What Makes a Prior Conviction Probative*, 11 CAN. CRIM. L. REV. (forthcoming 2006); Peter Sankoff, Corbett *Revisited: A Fairer Approach to the Admission of an Accused's Prior Criminal Record in Cross-Examination* (forthcoming 2006).

²⁸ Corbett v. R., [1988] S.C.R. 670, 695 (Dickson, C.J., stating: "I do not feel that . . . one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence . . .").

²⁹ The experience I speak of refers to international comparisons and centuries of case law concerning the worries of admitting potentially prejudicial evidence.

³⁰ See Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 43-47 (1985); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2001 CRIM. L. REV. 734, 753-55; Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 422-23 (1995); Diana R. Grant, *From Prior Record to Current Verdict: How Character Affects Jurors' Decisions* (1996) (unpublished Ph.D. thesis, University of California, Irvine) (on file with Langson Library, University of California, Irvine).

am quite comfortable with the notion that this value will be subordinated occasionally to other vital goals.

V. CONCLUSION

As I stated in the introduction to this Commentary, Claire L'Heureux-Dubé is a woman of vision who is not afraid of challenging the status quo. She looks at the criminal justice system, sees shortcomings, and is not worried about who she might offend by speaking out about them. It is one of the things I admire most about her. I certainly share her overall belief that too many aspects of the criminal justice system simply continue unchallenged, owing to habit or tradition. I agree that it is extremely healthy for the conventional wisdom to be tested, as the mechanisms that we have come to take for granted must be questioned frequently in order to ensure that they are providing proper service to the overall system.

However, having been prompted to reconsider the Charter's place in the Canadian criminal law universe by L'Heureux-Dubé's address to prosecutors, I find that on this occasion I cannot come to the same conclusion she does and choose to respectfully dissent. L'Heureux-Dubé's address gives the impression of a Charter that deeply needs to be reined in on the ground that its power risks being abused by criminal defendants.

My own perception remains quite different. In my view, the Canadian Charter of Rights and Freedoms continues to be an important and useful tool and one that has been a boon to Canadian criminal justice. It defines boundaries over which the State cannot cross and in the process ensures fairer treatment for those accused of crimes. At the same time, it has forced legislators, judges and lawyers to think deeply about their optimal view of justice, and has also provided an impetus for reform. Unquestionably, there are areas that need clearer scrutiny, and not every Charter decision will be welcomed with open arms. Over time, certain of our constitutional doctrines will undoubtedly evolve and change with the benefit of hindsight and experience. Nonetheless, I suppose my primary message is that, much like the title of this article suggests, as a general matter, the Charter is taking us in the right direction.