# THE CONSTITUTIONAL RIGHT TO PRESENT DEFENCE EVIDENCE IN CRIMINAL CASES

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*Section 7 and section 11(d) of the Charter of Rights and Freedoms should be interpreted to make unconstitutional any exclusionary rules of evidence that prevent an accused in a criminal case from adducing potentially exculpatory information, unless the exclusion of such evidence is demonstrably justifiable in the particular circumstances of that case. An examination of pre-Charter Anglo-Canadian authority reveals that the general principle that an accused be entitled to raise a reasonable doubt as to his guilt was a fundamental component of our non-constitutionalized criminal justice system. This article examines the impact that tthis principle had upon pre-Charter authority, discusses the similarities between that authority and American decisions which develop, at a constitutional level, a similar protection, and describes the impact that the constitutionalization of the principles of fundamental justice and the right to a fair hearing should have upon the role that this principle will play in Canadian jurisprudence.*

*L'intéprétation de l'article 7 et de l'article 11(d) de la Charte des droits et libertés devrait rendre inconstitutionnelle toute règle d'exclusion de la preuve qui empêche l'accusé, dans une affaire criminelle, de produire des renseignements qui pourraient le disculper, à moins que leur exclusion ne se justifie de façon évidente par les circonstances de l'affaire en question. Si l'on considère la jurisprudence anglo-canadienne qui faisant autorité avant la charte, il ressort que le principe selon lequel un accusé a le droit de créer un doute "raisonnable" sur sa culpabilité faisait partie intégrante du système de droit criminel avant l'avènement de la constitution. Dans cet article, l'auteur examine l'importance de ce principe dans la jurisprudence qui faisait autorité avant la Charte, discute les ressemblances qui existent entre cette jurisprudence et les jugements américains qui créent le même genre de protection au niveau constitutionnel et décrit l'importance que devrait avoir sur le rôle que ce principe jouera dans la jurisprudence canadienne le fait que les principes de justice fondammentale et le droit à être entendu impartialement font maintenant partie de la constitution.*

## *Introduction*

The Canadian Charter of Rights and Freedoms[1] is usually thought to make less evidence admissible than was the case prior to its proclamation. That is because section 24 represents the Charter's most patent effect upon the rules of admissibility. That section operates to exclude certain information tendered by the Crown because of the way in which it was

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[1] Constitution Act, 1982, Part I, enacted by Canada Act, 1982 c. 11 (U.K.), herein referred to as "the Charter".

obtained, a factor that had generally been considered irrelevant at common law.[2] Yet, the Charter may also have the effect of increasing the amount of evidence that is admissible. Both section 7 and section 11(d) have the potential, and should be interpreted, to guarantee the admission of some defence tendered evidence, even where there are exclusionary rules to the contrary.

The American Constitution[3] operates in this manner. It has been used by accused persons to call hearsay evidence in the absence of established hearsay exceptions.[4] It has also been used to override a rule purporting to exclude accomplice evidence tendered by an accused, and to disregard a rule prohibiting an accused person from cross-examining his own adverse but non-hostile witness.[5] These American holdings turned upon the general constitutional imperative that an accused person be given the right to present a defence. In the context of admissibility, that right protects the introduction of potentially exculpatory evidence. The Charter, it is submitted, provides a similar protection.

I realize that we must develop the Charter in its own uniquely Canadian context; if such a protection exists here, it must emerge from "our own Anglo-Canadian roots",[6] not from the fact that the Americans have deemed it essential to their fair trial process.[7] As Parker A.C.J.H.C. said in *R.* v. *Morgentaler et al.*[8] in the context of section 7:

> . . . a determination of the rights encompassed . . . should begin by an inquiry into the legal rights Canadians have at common law or by statute. If the claimed right is not protected by our system of positive law, the inquiry should then consider if it is so deeply "rooted in the traditions and conscience of our people as to be ranked as fundamental".

A comparative examination of the American constitutional right and of our pre-Charter "Anglo-Canadian roots" demonstrates that, like the

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[2] *Kuruma* v. *R.*, [1955] A.C. 197, [1955] 1 All E.R. 236, [1955] 2 W.L.R. 223 (P.C.). At common law there is a specific exception for involuntary confessions.

[3] U.S. Constitution.

[4] *Chambers* v. *Mississippi*, 410 U.S. 284, 35 L. ed. 2d 297 (1973). And see *Braswell* v. *Wainwright*, 463 F. 2d 1148 (C.A., 5th C., 1972).

[5] *Washington* v. *Texas*, 388 U.S. 14, 18 L. ed. 2d 1019 (1967).

[6] *R.* v. *MacIntyre* (1982), 69 C.C.C. (2d) 162, at p. 167 (Alta. Q.B.). See also *R.* v. *Carter* (1982), 144 D.L.R (3d) 301, at pp. 304-305, 39 O.R. (2d) 439, at p. 441, 31 C.R. (3d) 76, at p. 79 (Ont. C.A.), per Brooke J.A.; *R.* v. *Therens* (1983), 148 D.L.R. (3d) 672, [1983] 4 W.W.R. 385, 33 C.R. (3d) 204 (Sask. C.A.), per Tallis J.A.; aff'd (1985), 59 N.R. 122, [1985] 4 W.W.R. 286 (S.C.C.).

[7] But see *Law Society of Upper Canada* v. *Skapinker* (1984), 9 D.L.R. (4th) 161, at pp. 168-170, 53 N.R. 169, at pp. 180-183 (S.C.C.), where Estey J. encourages the study of the American experience; and see the reliance on American authority in *Southam Inc.* v. *Hunter* (1984), 11 D.L.R. (4th) 641, 54 N.R. 241 (S.C.C.).

[8] (1984), 47 O.R. (2d) 353, at pp. 405-406, 41 C.R. (3d) 193, at p. 252 (Ont. H.C.).

Americans, we too have considered the entitlement of an accused person to raise a reasonable doubt by the introduction of exculpatory evidence to be a fundamental component of our concept of essential justice, at least insofar as that was possible in our non-constitutionalized criminal justice system. With the proclamation of the Charter, that parallel takes on added significance for it forms the basis for the importation of protections for Canadians, similar to those possessed by Americans.

Technically, the language of the Charter can easily accommodate the right to adduce potentially exculpatory information. Section 7 provides that everyone has the right not to be deprived of "liberty"[9] "except in accordance with the principles of fundamental justice". Section 11(d) provides that where a person is charged with an offence, he or she has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". The entitlement to a "fair . . . hearing" in section 11(d) provides rights independent of the presumption of innocence, the provision of a public hearing, and the requirement that the decision be rendered by an independent and impartial tribunal, rights which are also guaranteed by that section.[10] Thus, the paramount question is whether the right to adduce potentially exculpatory evidence can be counted as "a principle of fundamental justice" or as essential to the concept of a "fair hearing".

The American constitutional right is based upon language different from that contained in section 7 and section 11(d). The American right is founded either upon the due process clauses,[11] or upon the compulsory process clause;[12] the precise source of the right is a matter of some

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[9] It is accepted and hardly contestable that the concept of a deprivation of "liberty" is broad enough to apply whenever a person is subjected to the risk of conviction of a criminal offence. The competing views as to the meaning of liberty were canvassed by Parker A.C.J.H.C. in *R.* v. *Morgentaler et. al.*, *ibid.*, at pp. 394-408 (O.R.), 238-255 (C.R.). Even the narrowest interpretation would apply whenever an individual is being tried for a criminal offence. The narrow model "views the words in s.7 as meaning freedom from arrest and detention, and protection against arbitrary interference with one's liberty."; *ibid.*, at pp. 394 (O.R.), 238 (C.R.). See *R.* v. *Video Flicks Ltd. et. al.*, (1984), 48 O.R. (2d) 399, 9 C.R.R. 193 (Ont C.A.), where Tarnopolsky J.A. said that the concept of "liberty...of the person would appear to relate to one's physical or mental integrity", an "integrity" that is certainly challenged by a criminal prosecution.

[10] See *Re Potma and the Queen* (1983), 144 D.L.R. (3d) 620, at p. 629, 41 O.R. 43, at p. 51, 18 M.V.R. 133, at p. 142 (Ont. C.A.), where Robins J.A., for the court, said that section 11(d) stipulates "that a person may be proven guilty only according to law in a "fair hearing"."

[11] The Fifth Amendment houses the federal due process guarantee. The Fourteenth Amendment applies to the states and contains its own due process clause.

[12] The Sixth Amendment states in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . compulsory process for obtaining witnesses in his favour.

debate.[13] Regardless of the proper resolution of that dispute, however, the technical differences between the American Constitution and section 7 and section 11(d) of the Charter are insufficient to require us to disregard the American authority as irrelevant or to consider that there is no room in the Charter for a protection similar to that which exists in the United States. The American phrase, "due process", defies definition. Those attempting to describe its coverage come back consistently to phrases like "the fundamental principles of justice . . . deeply rooted in tradition . . .",[14] or the "fundamental principles of private rights",[15] or "those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights".[16] As was stated by the United States Supreme Court in *Rochin* v. *California*:[17]

> These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are "so rooted in the traditions and conscience of our people to be ranked as fundamental," . . . or are "implicit in the concept of ordered liberty".

The ideas encompassed by the "principles of fundamental justice" in section 7 and the concept of a "fair hearing" in subsection 11(d) cannot, at a linguistic level, differ meaningfully from the expressions used in the above dictum. Nor would it matter if the American constitutional right to present evidence was based exclusively upon the compulsory process clause. As the incorporation doctrine demonstrates, the compulsory process clause is seen to be one specifically articulated aspect of the due process of law,[18] or, in the words of those who seek to define that term, one of the fundamental principles of justice.

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[13] The United States Supreme Court used a due process analysis in *Cooke* v. *United States*, 267 U.S. 517, 69 L. ed. 767 (1925); *In Re Oliver*, 333 U.S. 257, 92 L. ed. 682 (1948); and arguably in *Webb* v. *Texas*, 409 U.S. 95, 34 L. ed. 2d 330 (1972), and *Chambers* v. *Mississippi*, *supra*, footnote 4. A compulsory process approach was used in *Washington* v. *Texas*, *supra*, footnote 5, and endorsed in *Faretta* v. *California*, 422 U.S. 806, 45 L. ed. 2d 562 (1975). Commentators disagree as to the appropriate base for the right. Compare R.N. Clinton, The Right to Present a Defence: An Emergent Constitutional Guarantee in Criminal Trials (1976), 9 Indiana L. Rev. 711, and P. Westen, The Compulsory Process Clause (1974-75), 73 Michigan L. Rev. 73; Compulsory Process II (1975), 74 Michigan L. Rev. 191.

[14] *R.* v. *Martin* (1961), 35 W.W.R. 385, at p. 399, 35 C.R. 276, at p. 290 (Alta. C.A.), per McDonald J.A. See also *Endicott Johnson Corp.* v. *Smith*, 266 U.S. 291, 69 L. ed. 293 (1924).

[15] *State* v. *Green*, 360 Mo. 1249, 232 S.W. (2d) 897, 24 A.L.R. (2d) 340 (S.C., 1980).

[16] Black's Law Dictionary 590 (revised 4th ed., 1968).

[17] 342 U.S. 165, at p. 169, 96 L. ed. 183, at p. 188 (1952).

[18] According to the incorporation doctrine, the fourteenth amendment due process clause, applicable to the states, is seen to incorporate the specifically articulated protections applicable at the federal level. See *Pointer* v. *Texas*, 380 U.S. 400, 13 L. ed. 2d 923 (1965); *Washington* v. *Texas*, *supra*, footnote 5.

Thus, there are no technical impediments to the Charter's inclusion of a right like that which exists in the United States. If there are differences in our constitutional protections in this context, then it is because of disparities in our respective notions of what constitutes fundamental justice. In fact there are far more similarities than differences.

## I. *The American Constitutional Right to Adduce Exculpatory Evidence*

The American constitutional doctrine that ensures the admissibility of some defence tendered evidence is but one aspect of the constitutional right to a "full defence".[19] In general terms, the right to a full defence includes an entitlement to reasonable notice and an opportunity to be heard.[20] Particular rights exist to make the opportunity to be heard a meaningful one. An accused person has the right to be represented by counsel[21] and the right to examine the witnesses against him[22] and to thereby test the prosecutor's case. In addition, an accused person has a right to testify at trial and to call and interrogate favourable witnesses.[23] To make this latter right effective, the accused is entitled to state assistance in securing the attendance of those witnesses at trial.[24] And, most importantly for present purposes, an accused has the constitutional right to "the orderly introduction of evidence".[25] This aspect of the constitutional right to a full defence means that state or court action[26] or inaction[27] that affects the accused's ability to adduce exculpatory evidence may be unconstitutional. Similarly, procedural rules may be unconstitutional if they deprive an accused of exculpatory evidence,[28] and, "[i]n a given

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[19] *Faretta* v. *California*, *supra*, footnote 13, at pp. 818 (U.S.), 572 (L. ed.).

[20] In *Re Oliver*, *supra*, footnote 13, at pp. 273 (U.S.), 694 (L. ed.).

[21] *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. ed. 2d 799 (1963).

[22] The Sixth Amendment states in relevant part:

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him...

In *Faretta* v. *California*, *supra*, footnote 13, this right was recognized as an essential aspect of the right to a full defence.

[23] See *Re Oliver*, *supra*, footnote 13, at pp. 273 (U.S.), 694 (L. ed.).

[24] Some commentators feel that this is the sole guarantee of a properly interpreted compulsory process clause. See J.H. Wigmore, Evidence § 219 (Chadbourn Rev. 1961), pp. 68-69.

[25] *Faretta* v. *California*, *supra*, footnote 13, at pp. 818 (U.S.), 572 (L. ed.).

[26] See *Webb* v. *Texas*, *supra*, footnote 13.

[27] The failure to compel the attendance of defence witnesses violates the Sixth Amendment; *supra*, footnote 24.

[28] In *Braswell* v. *Florida*, 400 U.S. 873, 27 L. ed. 2d 111 (1970), a rule prohibiting witnesses, who had heard the testimony of other witnesses, from testifying was unconsti-

case [a] . . . Court's decisions may require that exculpatory evidence be admitted . . . despite . . . evidentiary rules to the contrary''.[29]

The most significant examples of exclusionary rules of evidence being overridden by the constitutional right to present exculpatory evidence occurred in the United States Supreme Court cases of *Washington* v. *Texas*[30] and *Chambers* v. *Mississippi*.[31] *Washington* v. *Texas* involved an appeal by the accused Washington, from his conviction for murder arising out of the shooting death of a boy who had been dating Washington's ex-girlfriend. Charles Fuller, who was present with Washington at the shooting, had earlier been convicted of murder as a result of the same incident. At his trial, Washington attempted to call Fuller, who would apparently have testified that he, and not Washington, had fired the fatal shot. Fuller was prohibited from giving evidence because of a Texas statute that rendered accomplices incompetent to testify on behalf of one another.[32] The United States Supreme Court ultimately held that the accused:[33]

> . . . was denied his right to have compulsory process for obtaining witnesses in his favor because the state arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

In the case of *Chambers* v. *Mississippi*, Chambers had been convicted of murder even though another person, McDonald, had, on several occasions, confessed that he and not Chambers had killed the deceased police officer. These confessions had later been repudiated by McDonald. At trial, Chamber's counsel, on the basis of a questionable evidentiary ruling, managed to have a sworn, out of court confession of McDonald's admitted and read to the jury.[34] Chambers was precluded, however, from

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tutional when applied against a defence witness. See *United States* v. *Nobles*, 422 U.S. 225, 45 L. ed. 2d 141 (1975) for the limits of this application of the constitutional right.

[29] *Israel, LaFollette* v. *McMorris*, 455 U.S. 967, 71 L. ed. 2d 684 (1981). The constitutional right applies to documentary evidence as well. See Westen, The Compulsory Process Clause, *loc. cit.*, footnote 13, at pp. 124-125, citing *United States* v. *Nixon*, 42 U.S.L.W. 5237 (U.S. July 23, 1974).

[30] *Supra*, footnote 5.

[31] *Supra*, footnote 4.

[32] Texas Penal Code Art. 82. While overturning the conviction, the Court did not declare the statutory provision to be unconstitutional, a fact explained by the provision's repeal in 1967 prior to the decision being rendered. See Clinton, *loc. cit.*, footnote 13, at p. 765, n.271.

[33] *Supra*, footnote 5, at pp. 23 (U.S.), 1025 (L. ed.).

[34] A transcript of the confession was read to the jury when the accused called McDonald to the stand and a copy was made an exhibit, ostensibly for the purpose of challenging McDonald as an adverse witness.

calling witnesses to whom the confession had been made, or from examining McDonald as a hostile witness after McDonald repudiated the confession. These exclusionary rulings were based upon the hearsay and voucher rules respectively. On appeal, the Supreme Court overturned the conviction. The pith of the judgment was Justice Powell's conclusion that "the application of these evidentiary rules rendered [Chambers'] trial fundamentally unfair and deprived him of due process of the law".[35] This "denial of due process rests on the ultimate impact [of the application of the voucher rule] in conjunction with the trial court's refusal to permit him to call other witnesses".[36]

One commentator observed that *Washington* v. *Texas* yields "a result pregnant with potential but deficient in doctrinal analysis".[37] Similar observations have been made with respect to *Chambers* v. *Mississippi*: "At first glance, one could easily conclude that this decision is of immense constitutional proportions, guaranteeing criminal defendants the right to introduce *any* exculpatory evidence".[38] Yet, the reaction to the case has been "mixed. At the extremes, some courts have welcomed *Chambers* as a landmark while others have limited it to its facts. The trend, however, has been a gradual expansion of the accused's . . . rights".[39] Notwithstanding the obscure doctrinal analysis and the chequered reception of this line of authority, a method of analysis can be gleaned from these, and subsequent cases.

### A. *The First Stage Weighting Process: Assessing the Evidence Itself*

The threshold condition that an accused person must satisfy before invoking the American constitutional protection is that he "must at least make some plausible showing of how [the tendered evidence] would have been both material and favorable to his defense".[40] In other words, the evidence must have some tendency in logic to diminish the possibility of guilt. There is uncertainty, however, as to how compelling that inference of innocence must be. The strength of such an inference depends, of course, upon two distinct things, the importance or probity of the evidence on the assumption that it is true, and upon its credibility.

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[35] *Chambers* v. *Mississippi*, *supra*, footnote 4, at pp. 289-290 (U.S.), 305 (L. ed.).

[36] *Ibid.*, at pp. 298 (U.S.), 310 (L. ed.).

[37] Clinton, *loc. cit.*, footnote 13, at p. 783.

[38] S.G. Churchwell, The Constitutional Right to Present Evidence: Progeny of *Chambers* v. *Mississippi*, (1983) 19 Crim. L. Bull 131, at p. 137.

[39] *Ibid.*, at p. 138.

[40] *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, at p. 867, 73 L. ed. 2d 1193, at p. 1202 (1982).

(1) *Importance or Probity*

According to one view, the evidence must be "extremely important or highly probative".[41] In *Washington* v. *Texas*,[42] the majority recognized that the excluded testimony was *vital* to the defence. Similarly, the excluded evidence in *Chambers* v. *Mississippi*[43] was characterized as *critical* to Chambers' case. In neither case, though, did the court state explicitly that the evidence had to warrant such descriptions to have its admissibility constitutionally supported. Indeed, in *Washington*, at one point in the decision, it seemed as though all that was required of the evidence was that it be relevant and material to the defence.[44] Moreover, in *Chambers*, the exclusion of the evidence would not have left the accused totally defenseless as it was cumulative evidence, serving to bolster already adduced information.[45] Yet, the *Chambers* characterization of the evidence has not been lost upon lower courts. "The impact of *Chambers* . . . has been greatest in forcing admission of critical evidence which a state law would have excluded".[46]

A competing view holds that the evidence need simply be material to the accused's defence. In principle, this position is compelling:

> [I]n a proceeding in which the prosecution must prove all essential elements of the crime beyond a reasonable doubt . . . even evidence with only slight probative value may prove sufficient to introduce doubt into the juror's mind. The real question, then, is whether the state has constitutional authority to exclude evidence that may make the difference between guilt and innocence in order to make the criminal process more congenial to those who seek to use it.[47]

(2) *Credibility*

The need for a relatively rigorous assessment of credibility has some support in United States Supreme Court authority. In *Chambers* v. *Mississippi*,[48] Justice Powell, for the majority, noted that "the testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness". That observation appears to take on significant proportions when

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[41] P.L. Dempsey, Third Party Declarations Against Penal Interest: *State* v. *Defreitas* and *State* v. *Gold* (1981-82), 14 Connecticut L. Rev. 173, at p. 191. In *United States* v. *Valenzuela-Bernal*, *ibid.*, the court, in stating the threshold test italicized the word "vital" in the phrase "vital to the defense".

[42] *Supra*, footnote 5, at pp. 16 (U.S.), 1021 (L. ed.)

[43] *Chambers* v. *Mississippi*, *supra*, footnote 4, at pp. 302 (U.S.), 313 (L. ed.).

[44] *Supra*, footnote 5, at pp. 23 (U.S.), 1025 (L. ed.).

[45] See the discussion *supra*, footnote 34.

[46] Churchwell, *loc. cit.*, footnote 38, at p. 139.

[47] Westen, Compulsory Process II, *loc. cit.*, footnote 13, at pp. 209-210.

[48] *Chambers* v. *Mississippi*, *supra*, footnote 4, at pp. 302 (U.S.), 313 (L. ed.).

it is noted that the Court expressly limited its holding to the "facts and circumstances of the case".[49]

It is rather unusual for a court, in the context of a question of law, to weigh the credibility of evidence. This is generally a matter for the trier of fact. One commentator, Westen, argues, in part because of this, that anything more than a minimal inspection of credibility does not form part of the test for constitutional protection; "[t]o state the general standard, the defendant has a constitutional right to produce any witness whose ability to give reliable evidence is something about which reasonable people can differ".[50] He supports that conclusion by citing the judgment in *Washington* v. *Texas*,[51] in which the United States Supreme Court held that the Texas accomplice bar "arbitrarily denied Washington the right to put the witness on the stand". For Westen:[52]

> [B]y use of the term "arbitrary" the Court was referring to the fact that the Texas rule imposed an *unnecessary* burden on the defendant's right to present witnesses because the rule wholly excluded evidence *that might have been reliable* instead of permitting it to be heard, weighed and judged by the fact-finder.

### B. *The Second Stage Weighing Process: Assessing the Importance of Exclusionary Considerations*

Once the first stage weighing process has been passed successfully by the accused, the authorities require "a balancing test weighing the state's interest in applying its rules governing evidentiary competency [or admissibility] against the defendant's interest in introducing the [potentially] excluded evidence".[53] A court must therefore identify the state interest that is supposedly furthered by the exclusionary rule. In both *Washington* v. *Texas* and *Chambers* v. *Mississippi*, it is safe to say that the court found there to be no state interest advanced by the exclusionary rules it faced. The court in *Washington* conceded that the accomplice rule was intended to prevent perjury, a valid state interest, but ruled that it was over-inclusive in that it treated all accomplices as untrustworthy, a generalization not supported by the state.[54] In *Chambers* v. *Mississippi*, the court found unconvincing the state's theory that out of court statements

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[49] *Ibid.*, at pp. 303 (U.S.), 313 (L. ed.).

[50] Westen, Compulsory Process II, *loc. cit.*, footnote 13, at p. 203.

[51] *Supra*, footnote 5, at pp. 23 (U.S.), 1025 (L. ed.).

[52] Westen, Compulsory Process II, *loc. cit.*, footnote 13, at p. 200 (emphasis added).

[53] Churchwell, *loc. cit.*, footnote 38, at p. 144.

[54] Westen, The Compulsory Process Clause, *loc. cit.*, footnote 13, at p. 116, where Westen convincingly explains *Washington* on this basis.

against penal interest were prone to be misleading[55] and then went on to destroy the assumptions said to support the voucher rule.[56]

Once the state interest is identified and recognized as effectively advanced, it must then be weighed against the accused's evidence on the assumption that such evidence could raise a reasonable doubt and thereby establish the accused's innocence. In *Davis* v. *Alaska*,[57] a case dealing with the confrontation clause[58] but which involved a similar analysis, the United States Supreme Court acknowledged the validity of Alaska's desire to protect the anonymity of juvenile offenders but required that the accused be permitted to discover the identity of such a person during cross-examination where the information might establish a defence. In *Braswell* v. *Florida*,[59] the court recognized that the Florida witness rule, which resulted in the refusal of the testimony of witnesses who were present in court during the testimony of other witnesses in contravention of an order prohibiting this, furthered the valid objective of contributing to the search for the truth, but that that consideration was outweighed by the accused's need to adduce the evidence.

In considering the state interest, it appears that a court must ask itself whether any alternative means, short of the exclusion of evidence, exist for the protection of that state interest.[60] In *Washington*, the exclusionary rule was described as "arbitrary".[61] In that case, and in *Braswell*, "instructing the fact-finder to screen the evidence [was] a less drastic alternative than outright exclusion".[62]

### C. *Summary of the Scope of the American Constitutional Right to Present Exculpatory Defence Evidence*

Subject to the possibility that to have its admission constitutionally protected defence evidence must be both trustworthy and crucial to the case for an accused, the constitutional right to adduce defence evidence can be summarized as follows:

> An accused has a constitutional right to adduce evidence material and favourable to his defence where it is sufficiently trustworthy that a reasonable trier of fact could

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[55] *Chambers* v. *Mississippi*, *supra*, footnote 5, at pp. 301 (U.S.), 312 (L. ed.).

[56] *Ibid.*, at pp. 296-298 (U.S.), 309-311 (L. ed.).

[57] 415 U.S. 308, 39 L. ed. 2d 347 (1974).

[58] See *supra*, footnote 22.

[59] *Braswell* v. *Florida*, *supra*, footnote 28.

[60] Westen explains this requirement. See, Compulsory Process II, *loc. cit.*, footnote 13, at pp. 200 *et seq.*

[61] *Supra*, footnote 5, at pp. 23 (U.S.), 1025 (L. ed.).

[62] Westen, Compulsory Process II, *loc. cit.*, footnote 13, at p. 207.

find it reliable, provided that the importance of a state interest in excluding such evidence, which cannot be protected by means less drastic than exclusion, does not outweigh the accused's fundamentally important right to present a defence, on the assumption that the evidence could raise a reasonable doubt.

Treating that as the American Constitutional rule, then, are there sufficient parallels between it and our "Anglo-Canadian roots" that such a rule must be recognized as existing under our Charter?

## II. *Parallels Between the American Constitutional Right and Our Pre-Charter "Roots"*

There are no pre-Charter Canadian examples of courts overriding exclusionary rules to admit evidence favourable to the case for an accused. This is simply because, prior to the Charter, apart from the narrow judicial discretion[63] to exclude technically admissible evidence, there was no power in a court to avoid a rule of evidence.[64] Notwithstanding this major difference between the Canadian pre-Charter system and the American system, the Americans have used a constitutional law analysis to arrive at many of the same conclusions that our common law reasoning has brought us to. More importantly though, the principle that is being protected by the American constitutional analysis, that an accused should be entitled to adduce potentially exculpatory evidence, is reflected in a fundamental way in both our pre-Charter right of full answer and defence, and in the development and application of various rules of evidence.

### A. *The Right to Full Answer and Defence*

The Criminal Code[65] provides that an accused shall have the right to make full answer and defence.[66] Inherent in that right is "the premise that an accused is entitled to call such witnesses [and presumably evidence] as he may consider necessary".[67] Because the statutory right does not have

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[63] The narrow exclusionary discretion was conceded in *R.* v. *Wray*, [1971] S.C.R. 272, (1970), 11 D.L.R. (3d) 673 and operates only to exclude evidence tendered by the Crown. See the discussion *infra*, text accompanying footnote 89.

[64] In *Sparks* v. *The Queen*, [1964] A.C. 964, at p. 978, [1964] 1 All E.R. 727, at p. 733 (P.C.), it was said that "the course of justice is...best served by adherence to rules which have long been recognized and settled". That sentiment helps to explain the narrowness of the discretion to exclude and will doubtlessly keep the reception of the constitutional right advocated here from being a smooth process.

[65] R.S.C. 1970, c.C-34.

[66] Section 577(3) does so for indictable offences. Section 737(1) does so for summary conviction offences.

[67] *R.* v. *Cook* (1960), 31 W.W.R. 148, at p. 160, 127 C.C.C. 287, at p. 298 (Alta. A.D.), per Johnson J.A.

constitutional status, that entitlement is subject to any limitation "supported by cogent authority".[68] Yet, the right has been invoked to overturn convictions occurring after an accused was denied the right to call defence evidence where no exclusionary rule required exclusion,[69] and where court[70] or state action[71] has indirectly deprived an accused of potentially exculpatory information.

In *R.* v. *Pestell*,[72] a Justice of the Peace, after rejecting a defence motion for a directed verdict of innocence, acted too hastily in finding the defendant guilty without inviting defence evidence. The Ontario High Court held that the judgment violated the defendant's right to "call witnesses and adduce evidence".[73] That result is similar to the constitutionally based holdings arrived at in the United States Supreme Court cases of *Cooke* v. *United States*[74] and *In Re Oliver*.[75]

*R.* v. *MacDonald*[76] is a case where the exclusion of *some* defence evidence was held to violate the right to make full answer and defence. There the Nova Scotia Court of Appeal overturned the accused's conviction under section 236 of the Criminal Code, because the judge had refused to permit the accused to return to the stand to provide a factual basis for the opinion of an expert defence witness who had testified. The trial judge's decision had amounted to an unnecessary interference with the presentation of the accused's case. That reasoning is like the analysis employed in the American constitutional decision of *Webb* v. *Texas*[77] where a judge's decision to admonish a witness not to lie, resulted in the verdict being displaced on the grounds that the admonition was so strong as to cause the witness to refuse to testify, thereby depriving the accused of the evidence.

In the Newfoundland case of *R.* v. *Howell*,[78] the trial judge precluded a witness from testifying because the witness had been present in court during the testimony of other witnesses. On appeal, it was held that ruling violated the accused's right to full answer and defence. The trial

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[68] *Ibid.*

[69] See *R.* v. *Sproule* (1887), 14 O.R. 375 (Ont. H.C.); *R.* v. *MacDonald* (1982), 53 N.S.R. (2d) 178 (N.S.A.D.).

[70] *R.* v. *Picariello* (1922), 68 D.L.R. 574, [1922] 2 W.W.R. 872, (1922), 37 C.C.C. 285 (Alta. A.D.).

[71] *R.* v. *Steinbach* (not yet reported, Ont. Co. Ct., 9 Feb. 1984).

[72] (1976), 31 C.C.C. (2d) 436 (Ont. H.C.).

[73] *Ibid.*, at p. 437.

[74] *Cooke* v. *United States*, *supra*, footnote 13.

[75] *In Re Oliver*, *supra*, footnote 13.

[76] *R.* v. *MacDonald*, *supra*, footnote 69.

[77] *Supra*, footnote 26.

[78] (1977), 11 Nfld. & P.E.I.R. 246 (Nfld. A.D.).

judge should have treated the matter as one of weight, not admissibility. The identical result was arrived at in *Braswell* v. *Florida*[79] where the United States Supreme Court used the American Constitution to decide the matter.

Thus, we, in Canada, have advanced, through our non-constitutional doctrine of full answer and defence, the same principle that the Americans protect at the constitutional level; an accused should be entitled to adduce potentially exculpatory information. That principle has also influenced the development and application of our exclusionary rules of evidence.

### B. *The Principle, and the Development and Application of Exclusionary Rules of Evidence*

The general rule that all relevant evidence is admissible is the starting point of the law of evidence. Exclusionary rules pare away at it only where the information is considered to be too unreliable or too potentially misleading to risk admitting, or, occasionally, where considerations of policy unconnected to the accuracy of the information so require. Thus in a very real sense, there is a presumption against the exclusion of evidence. Yet, the principle in question here is more precise than a general predisposition to admissibility; it is the more vital principle that an accused should be entitled to adduce potentially exculpatory evidence. In *Sparks* v. *The Queen*,[80] the Privy Council appeared to deny that the latter principle exists independently of the former. In refusing the accused's claim to exculpatory information it said: "[N]or can the principle of the matter vary according as to whether a remark is helpful to or hurtful to an accused person".[81] That denial is not borne out when the rules of evidence are examined.

#### (1) *Character Evidence*

Generally speaking, where evidence called by the Crown has a tendency to cause the accused's conviction because it leads to the general inference that the accused is a discreditable person, rather than because it is illuminating as to the specific facts of the case, the Crown is denied the right to adduce such evidence. In those cases where an *accused* is permitted to call character evidence against a co-accused, which would be inadmissible if called by the Crown, the operation of the principle favouring the admission of exculpatory evidence can be seen.

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[79] *Braswell* v. *Florida*, *supra*, footnote 28.

[80] *Supra*, footnote 64.

[81] *Ibid.*, at pp. 980 (A.C.), 734 (All E.R.).

In *R.* v. *Miller*,[82] counsel for an accused adduced evidence that a co-accused had been in prison at the time of an alleged conspiracy. That fact made the Crown theory of a conspiracy between the accused and the co-accused unlikely. In dealing with an objection to the evidence, Devlin J. said that the prejudicial nature of the evidence may have precluded the Crown from calling it but that:[83]

> [N]o such limitation applies to a question asked by counsel for the defence. His duty is to adduce any evidence which is relevant . . . and assists his client, whether or not it prejudices anyone else.

The high water mark of the application of that rule was *Lowery* v. *The Queen*.[84] Lowery and King were accused jointly of murdering a young girl. Each claimed that the other committed the murder, and further, that each could not have prevented the other from doing so. King called a psychologist who testified in terms which indicated that, if the murder was committed under such circumstances, Lowery's personality made it more likely that he was the perpetrator.[85] The Privy Council upheld the admission of the evidence, relying upon the rule cited in *R.* v. *Miller*. Lord Morris adopted the language of the Court of Criminal Appeal:[86]

> It is, we think, one thing to say that such evidence is excluded when tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof of his own guilt.

Earlier Lord Morris had said that "[i]t would be unjust to prevent either [accused] from calling any evidence of probative value which could point to the probability that the perpetrator was one rather than the other".[87]

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[82] (1952), 36 Cr. App. R. 169 (Cir. ). This case has twice been cited with approval in Canada but on a different point: see *R.* v. *Quiring*, [1974] 6 W.W.R. 13, (1974), 27 C.R.N.S. 367 (Sask. C.A.); *R.* v. *Sternig* (1975), 31 C.R.N.S. 272 (Ont. C.A.).

[83] *R.* v. *Miller*, *ibid.*, at p. 171. Devlin J. noted that the rule does not "open the field" to this type of evidence. Such evidence should only be called where essential to the defence of an accused; the matter should not be pursued beyond the extent necessary to the case and prior to trial the co-accused who may be prejudiced by the evidence should be notified that it will be presented.

[84] [1974] A.C. 85, [1973] 3 All E.R. 662, (1974), 58 Cr. App. R. 35 (P.C.).

[85] The trier of fact decided that the murder had not been committed by one over the protestations of the other and convicted them both.

[86] *Supra*, footnote 84, at pp. 102 (A.C.), 672 (All E.R.) 52 (Cr. App. R.).

[87] *Ibid.*, at pp. 101 (A.C.), 671 (All E.R.), 51 (Cr. App. R.). Although the case can arguably be explained on grounds other than the rule in *R.* v. *Miller*, these passages indicate that the rule in *Miller* was being relied upon. This was the view of the Ontario Court of Appeal when it interpreted *Lowery* and cited it with approval in *R.* v. *McMillan* (1975), 7 O.R. (2d) 750, at p. 764, 29 C.R.N.S. 191, at pp. 202-204 (Ont. C.A.). See also *R.* v. *Williams* (1985),50 O.R. (2d) 321, at pp. 330-331 (Ont. C.A.).

While several cases have demonstrated a reluctance to apply the rule and have avoided doing so by taking strict views of what evidence is relevant to the case for a co-accused,[88] the recognition of a rule that permits an accused to call relevant evidence, even where the probative value of that evidence is outweighed by the prejudice it causes to a co-accused, vouches for the presence and strength of the principle of admitting exculpatory evidence.

(2) *The Exclusionary Discretion*

A trial judge has a discretion to exclude technically admissible evidence where it is tenuously admissible, of trifling probative value, and prone to be gravely prejudicial.[89] The narrow discretion is justified by the trial judge's duty to ensure that an accused receives a fair trail.[90] Consequently, as O'Sullivan J.A. said in *Lucier* v. *The Queen*,[91] "there is no suggestion . . . that the rules [of evidence] can be relaxed *against* an accused" by the use of this exclusionary discretion.

The judicial treatment of section 1(f) of the English Criminal Evidence Act, 1898[92] also demonstrates the accused's higher right to adduce evidence. Subject to exceptions contained therein, that section prohibits both the Crown and accused persons from adducing evidence of the bad character, or the previous convictions, of any witness. Where an exception expressly permits the prosecution to adduce such evidence, it is accepted that the Court has an overriding discretion to deny the prosecution that evidence.[93] On the other hand:

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[88] See *R.* v. *Neale* (1977), 65 Cr. App. R. 304 (Div.C.); *R.* v. *Nightingale*, [1977] Cr. L.R. 744 (C.A.); *R.* v. *Bracewell* (1978), 68 Cr. App. R. 44 (C.A.); and see the criticism of the *Miller* rule in S.L. Phipson on Evidence (13th ed., 1982), pp. 185-188.

[89] *R.* v. *Wray*, *supra*, footnote 63.

[90] *Ibid.*, at pp. 293 (S.C.R.), 689-690 (D.L.R.).

[91] (1979), 1 Man. R. (2d) 182, at p. 202, 50 C.C.C. (2d) 535, at 552 (Man. C.A.), per O'Sullivan J.A. dissenting on another point (emphasis added). (The decision of the Manitoba Court of Appeal was reversed on appeal; see *Lucier* v. *The Queen*, [1982] 1 S.C.R. 28, (1982), 132 D.L.R. (3d) 244.) In *R.* v. *Wray (No. 2)*, [1971] 3 O.R. 843, (1971), 4 C.C.C. (2d) 378 (Ont. C.A.), Jessup J.A., dissenting in the Court of Appeal, also denied that the discretion could be used to exclude evidence tendered by the accused. In partial contradiction to O'Sullivan J.A., the majority in *R.* v. *Wray (No. 2)* seemed to accept that it could where the accused's own evidence prejudices his case. In *R.* v. *Williams*, *supra*, footnote 87, at p. 343, Martin J.A. specultes that courts have a discretion to *relax* strict rules of evidence to let accused persons adduce evidence where it is necessary to prevent a miscarriage of justice.

[92] 61 & 62 Vict., c.36.

[93] *R.* v. *McGuirk* (1963), 48 Cr. App. R. 75 (C.A.); *Murdoch* v. *Taylor*, [1965] A.C. 574, at p. 593, [1965] 1 All E.R. 406, at p. 415 (H.L.), per Lord Donovan for the majority.

> [W]hen it is the co-accused who seeks to exercise the right conferred by [an exception] different considerations come into play. He seeks to defend himself . . . The right to do this cannot . . . be fettered in any way.[94]

(3) *Rules Denying Access to Witnesses*

The notion that an accused should have access to potentially exculpatory information, even where its credibility is somewhat suspect, caused the removal of incompetencies based upon interest[95] and rendered accused persons and their spouses competent for the defence. Beyond this early but substantial influence, the present rules of competence and compellability provide little sign of the operation of the principle that the accused may adduce all exculpatory evidence. In *R.* v. *Wickham*,[96] though, the English Court of Appeal held that an accused could comment upon the failure of a co-accused to testify even where the judge or the prosecutor could not. Fenton-Atkinson L.J. said that it seemed "right to this Court that . . . a co-accused ought to be free through his counsel to put his case as he . . . thinks fit".[97]

The principle can be seen to operate in the application of evidentiary privileges. In *R.* v. *Barton*,[98] Caufield J. relied upon it to create an exception to the solicitor-client privilege. He said:[99]

> If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man . . . no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed . . . would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown.

The same analysis was employed by the United States Supreme Court in *Rovario* v. *United States*.[100]

There is an example of *R.* v. *Barton* being applied outside of the solicitor-client setting. In *Re Girouard and The Queen*,[101] counsel for the

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[94] *Murdoch* v. *Taylor*, *ibid.*

[95] The Canada Evidence Act, 1893, 56 Vict. c.31, s.4. In England this occurred in the Criminal Evidence Act, 1898, 61 & 62 Vict., c.36, s.1(f).

[96] (1971), 55 Cr. App. R. 199 (C.A.).

[97] *Ibid.*, at p. 204.

[98] [1972] 2 All E.R. 1192, [1973] 1 W.L.R. 115 (Crown Ct.).

[99] *Ibid.*, at pp. 1194 (All E.R.), 118 (W.L.R.). In *R.* v. *Dunbar and Logan* (1982), 68 C.C.C. 13 (Ont. C.A.), it was held that where the documents help the case of one accused at the expense of a co-accused, the interests of each accused must be balanced against each other to determine whether *R.* v. *Barton* will apply.

[100] 353 U.S. 153, 1 L. ed. 2d xxx (1957). While *Rovario* was not decided on the basis of the American Constitution, Westen sees the case as based on constitutional law reasoning; Compulsory Process II, *loc. cit.*, footnote 13, at p. 210.

[101] (1982), 68 C.C.C. (2d) 261 (B.C.S.C.).

accused overheard a conversation between a Crown prosecutor and a police officer in which the latter expressed some insecurity about his ability to identify the accused. Defence counsel attempted to call the Crown prosecutor who successfully invoked a claim of privilege. On appeal, McEachern C.J.S.C. ruled that the case was not one of solicitor-client privilege but, at best, was one emerging from the public interest in protecting the candour of Crown witnesses. Even so, he indicated that the principle expressed in *R.* v. *Barton* applied and that the evidence ought not to have been excluded.

With respect to "Crown privilege", the principle of exculpatory evidence has not created a general *Barton*-like exception, but rather has added an important counterweight in assessing a governmental claim to disclosure. The protection for accused persons has been qualified because of the potential sensitivity of the allegedly privileged information. As Kellock J. said in *R.* v. *Snider*:[102]

> [T]here is, . . . not only public interest in maintaining the secrecy of documents where the public interest would otherwise be damnified, . . . but there is also a public interest which says that "an innocent man is not to be condemned when his innocence can be proved . . .". It cannot be said, however, that either the one or other must invariably be dominant.

Where, on the other hand, it is not the contents of the communication that are being protected, there is room for a *Barton*-like exception. This has been recognized in the context of the so-called "police informant privilege". With respect to the identity of a police informant:

> . . . the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in the case only, the balance falls upon the side of disclosure.[103]

That result, and the reasoning employed, mirror the constitutional analysis used by the United States Supreme Court in *Davis* v. *Alaska*[104] where the court compelled the disclosure of the identities of juvenile witnesses, thereby overriding an Alaska statute that had purported to keep these identities privileged.

### (4) *Hearsay*

One would expect the law pertaining to the creation of hearsay exceptions to reflect the principle that an accused should be entitled to have admitted reasonably reliable exculpatory information. It is difficult,

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[102] [1954] S.C.R. 479, at p. 487, (1954), 109 C.C.C. 193, at p. 201.

[103] *D.* v. *National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171, at p. 218, [1977] 1 All E.R. 589, at p. 595 (H.L.).

[104] *Supra*, footnote 57.

however, to gauge the impact that the principle has had in this area. Courts have tended to support hearsay exceptions upon general theories of trustworthiness, not upon the more specific basis that a brand of information is trustworthy enough that, should it be exculpatory, it would be unjust to deprive an accused person of its use.

That analysis was employed, however, in *Myers* v. *Director of Public Prosecutions*.[105] There, Lord Pearce, in dissent, referred to the principle of exculpatory evidence and used it to turn the tables on the majority, who had excluded admittedly reliable hearsay evidence tendered by the Crown.[106] Lord Pearce noted that the same technical bar to admissibility would have arisen if the accused had been able to prove his innocence through such evidence.[107] He suggested that it "is indeed a sad thing [if the machinery of justice] must condemn an accused by excluding evidence that to the eyes of any reasonable man would prove his innocence".[108] On that basis, he argued that courts must retain power to create new hearsay exceptions, a conclusion that commended itself to the Supreme Court in *Ares* v. *Venner*.[109]

In *Lucier* v.*R.*,[110] the Supreme Court of Canada avoided express endorsement of the principle of exculpatory evidence as a vital force in the development of hearsay exceptions. The case involved an effort by a Crown prosecutor to adduce an out of court statement implicating the accused, made by a person deceased by the time of trial. The Crown sought to rely upon the "statements against interest" exception to the hearsay rule. In particular, it cited those cases that had extended the exception to cover statements against penal interest.[111] The Supreme Court ruled that the extension applied only to evidence tendered by the defence. In doing so, however, "[t]he Court failed to discharge its duty to give good reasons for its decision . . . ".[112] As Marc Gold has argued, "[w]ithout some reliance on the value of liberty, the decision in *Lucier* cannot be justified".[113] Indeed, protection of liberty is the analysis that the United

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[105] [1965] A.C. 1001, [1964] 2 All E.R. 881 (H.L.).

[106] *Ibid.*, at pp. 1019, 1021, 1022 (A.C.) 884, 885, 886 (All E.R.).

[107] *Ibid.*, at pp. 1037 (A.C.), 895 (ALL E.R.).

[108] *Ibid.*

[109] [1970] S.C.R. 608, (1970), 14 D.L.R. (3d) 4. The Supreme Court did not cite this passage with specific approval but did adopt Lord Pearce's conclusion in preference to that of the majority.

[110] *Supra*, footnote 91.

[111] *The Queen* v. *O'Brien*, [1978] 1 S.C.R. 591, (1977), 76 D.L.R. (3d) 513; *Demeter* v. *The Queen*, [1978] 1 S.C.R. 538, (1977), 34 C.C.C. (3d) 137.

[112] Marc Gold, Case Comment: *Lucier* v. *The Queen* (1983), 21 Osgoode Hall L.J. 142.

[113] *Ibid.*, at p. 155.

States Supreme Court used in the constitutional case of *Chambers* v. *Mississippi*[114] in arriving at precisely the same conclusion.

This satisfactory basis for such a decision was advanced in *Lucier* at the appellate level by O'Sullivan J.A.[115] He noted that the claim that justice works both ways does not state a useful principle of law.[116] While he considered it to be a monstrous proposition that an accused could be convicted on the basis of the out of court statements of a deceased declarant, he did not see it as monstrous that an accused person could be acquitted because of such statements. The law must favour "the liberty of the citizen".[117] In other words, an accused's claim to have potentially exculpatory evidence admitted has greater force than a prosecutor's claim to have inculpatory information accepted by a court.

C. *The Fundamental Nature of the Principle*

Both the full answer and defence cases, and the development and application of our rules of evidence, demonstrate that the principle that an accused should be entitled to adduce potentially exculpatory evidence forms parts of our "Anglo-Canadian roots". Yet, not every principle of law has become entrenched by the Charter. Whether this principle has depends upon whether it is "fundamental" as a principle of justice or essential to a "fair hearing". That it is can hardly be doubted.

A consistent refrain in the full answer and defence cases is that the right to present exculpatory evidence is essential to our system of justice. Indeed, in *R.* v. *Pestell*,[118] Maloney J. described the right to present a defence, within which the principle is surely included, as a "facet of natural justice, so fundamental to our law as to exist even apart from express statutory provision". The Court decided as much in *Re Holland*.[119] In *R.* v. *Howell*,[120] Furlong C.J.N. noted that "[a]ny failure to observe this strikes at the very root of a judicial determination of the guilt of an accused".

That fundamental nature of the principle emerges out of the very starting point of our system of justice, the presumption of innocence and the protection of the innocent. The Court realized this in *R.* v. *Picariello*.[121]

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[114] *Chambers* v. *Mississippi*, *supra*, footnote 4.

[115] *R.* v. *Lucier*, *supra*, footnote 91.

[116] *Ibid.*, at pp. 200 (Man. R.), 550 (C.C.C.).

[117] *Ibid.*, at pp. 199 (Man. R.), 550 (C.C.C.).

[118] *Supra*, footnote 72, at p. 437. See also *Gilberg* v. *A.G. Alta.* (1974), 26 C.R.N.S. 201, at p. 205 (Alta. S.C.).

[119] (1875) 37 Upp. Can. Q.B.R. 214.

[120] *Supra*, footnote 78, at p. 247.

[121] *Supra*, footnote 70.

There Hyndman J.A., in support of his ruling, observed that even if the evidence against the accused was such as to satisfy the court that no injustice was done in that "particular instance, nevertheless if the principle is departed from, a great injustice might happen in the case of some other innocent person".[122]

The paramount importance of the right to present a full defence is rarely articulated in the evidence cases as it is in the full answer and defence rulings. In *R.* v. *Barton*,[123] however, Caufield J. clearly treated the specific principle that an accused be entitled to adduce exculpatory evidence as fundamental. He considered it "to be [among] the rules of natural justice".[124] More frequently, the status of the specific principle as fundamental can only be observed in the evidence cases because of its significant impact in areas where one might have expected it to be operating. Its record is an impressive one, particularly when it is considered that each case where it has operated represents a court's decision, free from any constitutional imperatives, to honour the principle over otherwise compelling considerations. That record shows that the principle of the admission of exculpatory evidence, which is a hand-maiden of the presumption of innocence and a foundation for the basic rule of evidence, is beyond doubt a principle of fundamental justice and a necessary consideration for our fair trial system. As such, it must be recognized as having been entrenched in our Constitution.

## III. *Operation of the Charter*

Charter authority to date has been quick to embrace the general notion that an accused person has a constitutional right to present a defence. The basic right to a hearing has been protected in proceedings less critical to liberty than criminal trials.[125] The right to attend one's criminal trial has, not surprisingly, been recognized as constitutionally protected.[126] And the

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[122] *Ibid.*, at pp. 584 (D.L.R.), 882-883 (W.W.R.), 295 (C.C.C.).

[123] *Supra*, footnote 98.

[124] *Ibid.*, at pp. 1194 (All E.R.), 118 (W.L.R.). And see the discussion of the principle by courts dealing with evidence tendered by an accused that is prejudicial to a co-accused, *supra*.

[125] The right has been recognized with respect to prison disciplinary hearings (see, for example, *Tonner* v. *The Director of Mountain Institution* (not yet reported, B.C.S.C., 12 April 1984), parole hearings (see, for example, *Hewitt* v. *National Parole Board* (not yet reported, F.Ct. T.D., 25 April 1984) and bail hearings (see, for example, *R.* v. *Marshall* (1984), 13 C.C.C. (3d) 73 (Ont. H.C.).

[126] See *McLeod* v. *The Queen* (1983), 49 A.R. 321, 36 C.R. (3d) 378 (N.W.T.S.C.); *R.* v. *Rogers*, [1984] 6 W.W.R. 89 (Sask. C.A.); *R.* v. *Tarrant* (1984), 10 D.L.R. (4th

right to make full answer and defence and the full panapoly of protections that it afforded prior to the Charter have found a place in the Constitution.[127] Yet, courts have been much more reserved in accepting, or recognizing, that a right to a full defence includes the right to call potentially exculpatory information, and that this might render certain exclusionary rules and rulings unconstitutional. In *R.* v. *Shutiak*,[128] the least welcoming statement was made: "to import into the concept of a procedural fair trial a means to control evidentiary laws was not possible".

In two cases where there have been constitutional challenges made to simple exclusionary rules or rulings that view has received some support. In *The Attorney-General of Newfoundland* v. *Trahey et al*,[129] section 7 was raised to challenge an application by the Attorney-General, made under section 36.1 of the Canada Evidence Act,[130] to prevent a trial judge from permitting the disclosure of the identity of a police informant. The Newfoundland Supreme Court granted the application without the analysis of section 7 on the basis that in *Bisaillon* v. *Keable and Attorney-General of Quebec et al*,[131] the Supreme Court of Canada had endorsed the police informant privilege. Even if the Charter analysis advocated here had been employed, however, the decision would probably have been correct. The accused had not raised the possibility that a disclosure of the identity of the informant would have been relevant and material to their defence. Had they done so, the court, which referred to the common law exception in such cases with approval, would have required disclosure.

The second case is less ambiguous in its challenge to the constitutional right advocated here. In *Bird and Peebles* v. *The Queen*,[132] the accused challenged the constitutionality of section 246.6 and section 246.7 of the Criminal Code,[133] the "rape shield" provisions that seriously restrict the right of accused persons to adduce evidence related to the prior sexual conduct of the victim. The trial judge, Simonson J., denied the challenge and applied the sections. The Manitoba Court of

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751, 13 C.C.C. (3d) 219 (B.C.C.A.) which demonstrate permissible limits upon holding a trial in *absentia*.

[127] See *Re Potma and the Queen*, *supra*, footnote 10; *Re Mason and the Queen* (1983), 1 D.L.R. (4th) 712, (1983), 43 O.R. (2d) 321, 7 C.C.C. (3d) 426 (Ont. H.C.); *R.* v. *Langevin* (1983), 45 O.R. (2d) 205, 11 C.C.C. (3d) 336 (Ont. C.A.); *R.* v. *Williams*, *supra*, footnote 87.

[128] (1983), 10 W.C.B. 480 (Sask. Prov. Ct.).

[129] (Not yet reported, Nfld. S. Ct., 28 Sept. 1984).

[130] R.S.C. 1970, c.E-10, as amended.

[131] (1983), 51 N.R. 81 (1983), 7 C.C.C. (3d) 385 (S.C.C.).

[132] (1984), 27 Man. R. (2d) 241, 12 C.C.C. (3d) 523 (Man. C.A.). See the criticism of the trial decision by Daniel H. Doherty, Sparing the Complainant Spoils the Trial (1985), 40 C.R. (3d) 55.

[133] *Supra*, footnote 65.

Appeal refused to deal with the merits of that ruling, holding that if it provided a ground for appeal at all, that appeal would have to come at the end of the trial.

In another case dealing with the rape-shield provisions of the Code, *R.* v. *Oquantaq*,[134] Marshall J.of the Northwest Territories Supreme Court upheld their application on the facts before him. In the course of his decision, he concluded that the constitutional right to present a defence existed and that it required the provisions to be read so as to enable a court to assess the probative value of proferred evidence, and to admit it where its probity outweighed its prejudicial impact.

In the most important case to date, *R.* v. *Williams*,[135] the Ontario Court of Appeal demonstrated a grudging acceptance of an exceedingly narrow constitutional right to adduce at least some potentially exculpatory evidence. In the process of denying a constitutional challenge to two evidentiary rulings the court gave little reason to think that the constitutional doctrine would be treated as a vital one.

During the course of her arson trial, Williams was refused the opportunity to adduce evidence that a third party, Miller, had confessed to the crime, as well as to several other similar offences. She was also denied the opportunity to cross-examine Miller about his prior confessions after she called him as her witness. The Court of Appeal, in its judgment, conceded that, atypically, the constitutional right to full answer and defence could be violated by a refusal to hear technically inadmissible hearsay evidence,[136] or by a refusal to permit cross-examination of a technically non-adverse witness.[137] With respect to the hearsay confessions in the instant case, however, the American rule that was applied in *Chambers* v. *Mississippi*[138] could not assist the accused:[139]

> In *Chambers* v. *Mississippi* the facts were unusual and it is clear that the Supreme Court of the United States confined itself to the facts and circumstances of that case where the assurances of trustworthiness underlying the recognized exceptions to the hearsay rule had been met. In that case a mechanical application of the letter of the

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[134] (Not yet reported, N.W.T.S.C., 7 February 1985.)

[135] *Supra*, footnote 87.

[136] *Ibid.*, at p. 337. This represented a concession by implication. Martin J.A. said that "generally speaking" full answer and defence will have been provided notwithstanding the proper application of the hearsay rule.

[137] *Ibid.*, at p. 343.

[138] *Supra*, footnote 4.

[139] *Supra*, footnote 87, at p. 340.

> rule excluding hearsay, *in combination* with the "voucher" rule, had deprived the accused of a fair trail. In the present case . . . none of the assurances underlying the recognized exceptions to the hearsay rule were present.

With respect to the decision to deny Williams an opportunity to cross-examine, since Miller had not provided any evidence that could have hurt the accused's case, she had no need to assail his credibility.[140]

Both the restrictive interpretation of the *Chambers* doctrine and the application of that interpretation to the facts in *Williams* are unfortunate. It is true that some American Courts have read *Chambers* as narrowly as did the Ontario Court of Appeal.[141] Read in the context of other "exculpatory evidence" cases, however, such a reading seems not only unduly restrictive, but even artificial, particularly when importance is attached to the fortuitous fact that in *Chambers* the hearsay and voucher rules combined to prevent Chambers from presenting his case. The point in *Chambers* and other cases of its kind is surely that an accused should have the opportunity to try to raise reasonable doubt by adducing available evidence. While that principle may tolerate some quality control, requiring "assurances of trustworthiness" seems extreme when an accused need merely cast a shadow on the Crown's case to warrant acquittal.

Even on the basis of the *Chambers* rule as interpreted by the court, there is reason to feel uncomfortable with the ultimate holding in *Williams*. *Williams* was, every bit as much as *Chambers*, a case where "the assurance of trustworthiness underlying the recognized exceptions to the hearsay rule had been met".[142] Miller's confessions failed to be admitted not because they did not satisfy the trustworthiness preconditions of the "statements against penal interest" exception, but because they did not meet the "unavailability" requirement.[143] The confessions were as trustworthy as the hearsay exception required them to be. Moreover, it was even safer to admit them on the constitutional basis advanced than it would have been pursuant to the rule itself, for Miller was available to explain, verify or deny the statements attributed to him.[144] *R.* v. *Williams* therefore paid guarded lip service to the constitutional principle but failed to take it seriously enough.

In cases where an accused has been denied the right to adduce *any* evidence with respect to a particular question of fact, the reception accorded the constitutional right to adduce exculpatory evidence has also been mixed. *R.* v. *Demelo*[145] represents what I believe to be the correct analysis.

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[140] *Ibid.*, at p. 343.

[141] *Supra*, footnote 46.

[142] *Supra*, footnote 87, at p. 340.

[143] *Ibid.*, at p. 333.

[144] Indeed, during a *voir dire* Miller sought to explain away certain confessions he admitted making.

[145] (1982), 3 C.R.R. 376 (B.C. Prov. Ct.).

There, Overend Prov. Ct. J. held that section 88.1(4) of the British Columbia Motor Vehicle Act[146] contravened the principles of fundamental justice. That section provides that, with respect to a charge made under subsection 88.1(2) of knowingly driving after the Superintendent of Motor Vehicles revoked or suspended a licence, proof that the driver "personally received a document containing notice of suspension of his driver's licence" was conclusive proof that the defendant had knowledge of the suspension. Overend Prov. Ct.J. said:[147]

> The overall effect of s.88.1 is to create an offence wherein proof of a guilty mind is required but at the same time to deny the defendant the opportunity to offer evidence of the absence of such guilty mind . . .
>
> Fundamental justice requires that every defendant charged with an offence under s.88.1 be afforded the opportunity to lead evidence which would negate guilty intent.

Dealing with the same issue, however, Cooper C.C.J. arrived at a different conclusion in *R.* v. *Toering*.[148] Because there was a "rational connection" between the established fact (personal receipt of a notice) and the presumed fact (knowledge of the suspension), the section passed the test arrived at by the Ontario Court of Appeal in *R.* v. *Oakes*.[149] With respect, that test is inappropriate where the provision conclusively deems a fact to exist, as opposed to simply placing the burden of disproof on the accused. While it may be rational to conclude that the accused had knowledge of the suspension, other information, or the sincerely presented denial of an accused person, may establish to the satisfaction of the court that the rational conclusion is not the correct one. The provision prohibits the accused from raising a reasonable doubt; it does not simply put the obligation on him to do so as reverse onus provisions do.

Similar issues emerge where a statute restricts the method of disproving guilt. In *R.* v. *Jones*,[150] the accused had been charged with three courts of truancy under the School Act of Alberta.[151] He had refused to send his children to public school. If the children were nonetheless "under efficient instruction", no offence would have occurred. Yet, by section 143(1)(a), proof of efficient instruction was limited to a written certificate from a Department of Education inspector or a school board superintendent. Fitch P.C.J. held at the trial level that "the fairness and the decency

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[146] R.S.B.C. 1979, c.288, as amended S.B.C. 1981, c.21, s.55.

[147] *Supra*, footnote 145, at p. 382.

[148] (Not yet reported, B.C.Co.Ct., 8 Feb. 1984).

[149] (1983), 145 D.L.R. (3d) 123, 40 O.R. (2d) 660, 2 C.C.C. (3d) 339 (Ont. C.A.).

[150] (1983), 49 A.R. 135 (Alta. Prov. Ct.). The case was argued earlier (see (1983), 43 A.R. 64), but had to be reheard because a section 7 argument was entertained without the Attorney General having been notified.

[151] R.S.A. 1980, c.S-3.

of a procedure in which the only evidence to show the accused is complying with the purpose of the statute, is in the hands of the prosecutor to grant or withhold as the prosecutor sees fit, is illusory''.[152]

That conclusion seems based upon two separate concerns. On the one hand, it amounts to an objection to refusing an accused person the right to adduce other potentially exculpatory evidence. On the other hand, it reveals concern over the nature of the permitted proof, that proof resting effectively in the hands of the complainant. When the matter went to the Alberta Court of Appeal, it was held that the accused could ensure that his defence was presented by applying for a certificate and by resorting to prerogative remedies if the certificate was wrongly withheld. Since he had not done so, he had nothing to complain about.[153] While the right to apply for a certificate and access to prerogative remedies might be answers to concerns over the neutrality of the authority granting the certificate, they do nothing to answer the more fundamental objection that the accused was denied by the statute from adducing other available and potentially exculpatory evidence before the court that was trying him. Any evidence that might raise a reasonable doubt or establish a defence to the charge should have been available to the accused.

If anything can be concluded on the basis of the Charter authority to date, it is that the Charter is seen to ensure that the accused receive a fair trail and that this involves the right to present a defence. What the cases have yet to do, though, is to come to grips with the fact that a trial will seldom be fair if the accused has the means available to raise a reasonable doubt or to establish a defence and is prohibited from doing so.

## *Conclusion*

The principle that an accused person should be entitled to adduce exculpatory evidence is a necessary component of the more general right to present a full defence. Both the specific principle and the general right are well grounded in the pre-Charter case law. Their influence in the ''Anglo-Canadian'' context largely mirrors that of the American constitutional right to present defence evidence. Where it does not, it is generally because, in the past, the principle of exculpatory evidence was subject to rules of exclusion that had developed; unlike the American rule, the principle had no constitutional force. As a technical matter, the principle can now find refuge in our Charter. Indeed, calling as it does for the constitutionalization of the principles of ''fundamental justice'', and for

[152] *Supra*, footnote 150, at p. 149.

[153] (1984), 10 D.L.R. (4th) 765, 33 A.L.R. (2d) 281, 13 C.C.C. (3d) 261 (Alta. C.A.).

the provision of a "fair . . . hearing", the Charter compels us to recognize the role that the principle has played in our law by giving it constitutional status.

In the final analysis, the vast majority of our evidentiary rules and rulings would survive Charter based challenges largely unscathed. After all, the principle was probably consulted to one extent or another and considered outweighed by exclusionary considerations when each exclusionary rule was first adopted. Yet, our rules of evidence have been less benign to the accused in the past than they now are.[154] There is, therefore, merit in recognizing the constitutional right to adduce exculpatory information and in using it to give our rules of evidence the test of fire: Is it demonstrably justifiable in a given case to deprive an accused of the opportunity to try to raise a reasonable doubt by calling the information in question? In purging our exclusionary rules in this manner, we will be much closer to keeping evidentiary rules consistent with our most fundamental principle of justice — that an accused be presumed innocent until *proven* guilty.

[154] For example, prior to the turn of the century, accused persons could not testify. See the discussion, *supra*, footnote 95. Most of our present rules of evidence have their roots in that same period of history.