The Everyday Practice of Canadian Criminal Law: The Criminal "As of Right" Jurisprudence of Justice Louise Charron

Kyle Kirkup*

I. INTRODUCTION

From admitting evidence, to evaluating the credibility of witnesses, to delivering jury instructions, to determining fit sentences, trial judges play an important role within the Canadian criminal justice system. Yet their work is often far-removed from decision-making at the Supreme Court of Canada. Through a careful reading of the practical issues that arise in criminal "as of right" decisions, this paper reflects on the influence that Justice Louise Charron's considerable experience as a trial judge had on her approach to appellate review in criminal cases. Criminal as of right decisions, where there has been a dissent in the Court of Appeal on a question of law or where the Court of Appeal has reversed the acquittal of an accused person, provide a window into the everyday practice of Canadian criminal law. Given that they are not controlled by a leave to appeal panel and vetted for their "public importance",[1] these are cases that often turn on practical points of law, such as assessing jury instructions or clarifying difficult and complex

* 2013 Trudeau Foundation Scholar and Social Sciences and Humanities Research Council Canada Graduate Scholar; S.J.D. candidate (Toronto), LL.M. (Yale), J.D. (Ottawa), B.Hum. (Carleton), of the Bar of Ontario. Kyle Kirkup wishes to thank Graham Mayeda, Peter Oliver, Jerald Sabin and the two anonymous reviewers for their thoughtful suggestions for revision on earlier drafts of this article. Kyle served as a law clerk to the Honourable Madam Justice Louise Charron at the Supreme Court of Canada in 2010-2011. He would like to thank Justice Charron most sincerely for her invaluable guidance, mentorship and support.

[1] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.

rules. The goal of this paper is to use this heterogeneous body of cases to explore the extent to which experience as a trial judge may affect decision-making at the Supreme Court and, in the process, to better appreciate the jurisprudential contributions of Justice Charron, one of the Court's most prolific writers in this area of law.

Prior to her appointment to the Ontario Court of Appeal in 1995, Justice Charron served as a District Court Judge and Local Judge of the High Court of Ontario in Ottawa from 1988 to 1990, and served as a Judge of the Ontario Court of Justice (General Division) from 1990 to 1995. With seven years of experience as a trial judge, Justice Charron was, perhaps with the exception of Chief Justice McLachlin, an anomaly during her tenure at the Supreme Court. While her colleagues undoubtedly had distinguished careers in law before becoming jurists, Justices Major, Bastarache, Binnie, LeBel, Fish and Cromwell never served as trial judges. Five were first appointed to their respective provincial Courts of Appeal, while Justice Binnie was appointed directly to the Supreme Court.[2] Four of Justice Charron's colleagues at the Supreme Court brought some level of experience as trial judges. Chief Justice McLachlin served as a trial judge for just over five years, first at the Vancouver County Court and later at the Supreme Court of British Columbia. Justice Deschamps sat as a judge of the Quebec Superior Court for just over two years. Justice Abella had a varied career that included time as a judge of the Ontario Family Court, while Justice Rothstein served on the Federal Court (Trial Division) for over six years.[3] Just as her colleagues brought unique perspectives from their experience as former members of the criminal defence bar, the academy and private practice, among others, Justice Charron came to the Supreme Court with considerable experience as a former trial judge.

In light of Justice Charron's experience as a trial judge, this paper considers the effect that her experience appears to have had on her approach to reviewing the work of, and providing guidance to, trial

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[2] *Current and Former Puisne Judges*, online: Supreme Court of Canada: <http://www.scc-csc.gc.ca>. Justice Major was appointed to the Alberta Court of Appeal in 1991; Bastarache J. was appointed to the New Brunswick Court of Appeal in 1995; Binnie J. was appointed to the Supreme Court of Canada in 1998; LeBel J. was appointed to the Quebec Court of Appeal in 1984; Fish J. was appointed to the Quebec Court of Appeal in 1989; and Cromwell J. was appointed to the Nova Scotia Court of Appeal in 1997.

[3] *Id*. Chief Justice McLachlin was appointed to the Vancouver County Court in April 1981 and the Supreme Court of British Columbia in September 1981; Deschamps J. was appointed to the Quebec Superior Court in 1990; Abella J. was appointed to the Ontario Family Court in 1976; and Rothstein J. was appointed to the Federal Court (Trial Division) in 1992.

judges. Grappling with this question, this paper carefully sifts through her criminal as of right jurisprudence to advance two central claims. First, it argues that Justice Charron's experience as a trial judge may account for her, at times, deferential approach to the work of trial judges. Second, it argues that her experience as a trial judge helps to explain her concern with clarifying difficult and complex rules for trial judges. Indeed, Justice Charron's lasting jurisprudential contribution may be that she had a deep understanding of the difficult work of trial judges and, as a result, authored opinions that could be readily put to work in courtrooms throughout the country. This paper also calls for further empirical research into the relationship between judicial experience, decision-making and the daily workings of the Supreme Court of Canada.

II. THE SUPREME COURT OF CANADA

1. In Defence of Criminal Appeals Heard as of Right

Since the overhaul of the Supreme Court's jurisdiction in the 1970s and the abolition of most as of right appeals,[4] some experts continue to suggest that further reform is necessary to ensure that the Court is able to manage its docket and has the resources necessary to grapple with complex issues of national importance. In addition to automatic rights of appeal heard by virtue of the *Criminal Code*,[5] the *Supreme Court Act*

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[4] For a discussion of the historical jurisdiction of the Supreme Court, see, *e.g.*, James G. Snell & Frederick Vaughan, *Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society for Canadian Legal History, 1985); M.J. Herman, "The Founding of the Supreme Court of Canada and the Abolition of Appeal to the Privy Council" (1976) 8 Ottawa L. Rev. 7; Bora Laskin, "The Supreme Court of Canada: A Final Court of Appeal of and for Canadians" (1951) 29 Can. Bar Rev. 1038; and Adam Dodek, *The Canadian Constitution* (Toronto: Dundurn, 2013).

[5] Section 691 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 provides the main grounds of appeal for accused persons:

> (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada
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> (a) on any question of law on which a judge of the court of appeal dissents; or
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> (b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.
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> (2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada
>
> (a) on any question of law on which a judge of the court of appeal dissents;
>
> (b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person; or

provides the Court with jurisdiction to hear intergovernmental disputes[6] and references made by the lieutenant governor in council without leave.[7] There are also automatic routes of appeal available under the *National Defence Act*,[8] the *Canada Elections Act*[9] and the *Competition Act*.[10] Abolishing as of right appeals, particularly criminal ones, has often

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(c) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Section 692 outlines additional grounds for an appeal as of right by a person who was found unfit to stand trial or not criminally responsible on account of a mental disorder. It states:

(1) A person who has been found not criminally responsible on account of mental disorder and

(a) whose verdict is affirmed on that ground by the court of appeal, or

(b) against whom a verdict of guilty is entered by the court of appeal under subparagraph 686(4)(b)(ii), may appeal to the Supreme Court of Canada.

(2) A person who is found unfit to stand trial and against whom that verdict is affirmed by the court of appeal may appeal to the Supreme Court of Canada.

(3) An appeal under subsection (1) or (2) may be

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

The grounds on which the Crown may appeal as of right in a criminal matter are set out in s. 693(1) of the *Criminal Code*, which states:

(1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 or dismisses an appeal taken pursuant to paragraph 676(1)(a), (b) or (c) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

[6] Section 35.1 of the *Supreme Court Act*, *supra*, note 1, provides: "An appeal lies to the Court from a decision of the Federal Court of Appeal in the case of a controversy between Canada and a province or between two or more provinces."

[7] Section 36 of the *Supreme Court Act*, *id.*, states:

36. An appeal lies to the Court from an opinion pronounced by the highest court of final resort in a province on any matter referred to it for hearing and consideration by the lieutenant governor in council of that province whenever it has been by the statutes of that province declared that such opinion is to be deemed a judgment of the highest court of final resort and that an appeal lies therefrom as from a judgment in an action.

[8] Section 245(1)(a) of the *National Defence Act*, R.S.C. 1985, c. N-5, provides:

(1) A person subject to the Code of Service Discipline may appeal to the Supreme Court of Canada against a decision of the Court Martial Appeal Court

(a) on any question of law on which a judge of the Court Martial Appeal Court dissents;

[9] Section 532 of the *Canada Elections Act*, S.C. 2000, c. 9, states:

(1) An appeal from a decision made under subsection 531(2) lies to the Supreme Court of Canada on any question of law or fact, and must be filed within eight days after the decision was given.

(2) The Supreme Court shall hear the appeal without delay and in a summary manner.

(3) The registrar of the Supreme Court shall send copies of the decision to the persons mentioned in subsection 526(1), to any intervenor and to the Speaker of the House of Commons.

(4) The Speaker of the House of Commons shall communicate the decision to the House of Commons without delay.

[10] Subsection 34(3.1) of the *Competition Act*, R.S.C. 1985, c. C-34, provides:

been touted as one potential reform strategy to ensure that the Supreme Court continues to be able to effectively manage its workload. In two interviews with *The Lawyers Weekly*, for example, McLachlin C.J.C. expressed tentative support for the idea. In 2001, she noted that the Court's resources had become "stretched to the limit" and, in response, suggested that the Court should be given control over its docket by abolishing criminal as of right appeals.[11] One year later, she again reiterated this point, suggesting that criminal appeals as of right often fail to engage complex questions of national importance to Canadians.[12] To date, however, attempts to abolish criminal appeals as of right altogether have been unsuccessful. As I will explain, there are important reasons not only to avoid abolishing criminal appeals as of right altogether, but to more closely examine them. With her considerable experience as a trial judge, Charron J. appears to have readily appreciated the importance of criminal as of right cases as representing the messy, day-to-day realities of Canadian criminal law. While she never publicly expressed a position on maintaining the Court's jurisdiction to hear criminal as of right appeals, one suspects that Charron J. would be less keen than McLachlin C.J.C. in recommending that they be abolished altogether — these are the cases where the everyday issues facing trial judges are playing out.

2. The Work of the Supreme Court of Canada, 2004-2011

As noted by McLachlin C.J.C., appeals heard as of right occupy a considerable amount of space in the docket of the Supreme Court.[13]

(3.1) The Attorney General of Canada or the attorney general of the province or any person against whom an order is made under this section may appeal against the order or a refusal to make an order or the quashing of an order from the court of appeal of the province or the Federal Court of Appeal, as the case may be, to the Supreme Court of Canada on any ground that involves a question of law or, if leave to appeal is granted by the Supreme Court, on any ground that appears to that Court to be a sufficient ground of appeal.

[11] Cristin Schmitz, "SCC's Resources Now 'Stretched to the Limit,' McLachlin tells CBA" (2001) 21(15) *The Lawyers Weekly* (August 24, 2001), cited by Emmett Macfarlane, "Administration at the Supreme Court of Canada: Challenges and change in the Charter era" (2009) 52 Can. Public Admin. 1, at 10.

[12] Cristin Schmitz, "Chief Justice McLachlin Discusses Terrorism, Liberty, Live Webcasting of Appeals" (2002) 21(33) *The Lawyers Weekly* (January 11, 2002), cited by Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: University of British Columbia Press, 2012), at 86-87.

[13] *Supra*, notes 11 and 12.

During Charron J.'s tenure from August 30, 2004 to August 30, 2011,[14] the Supreme Court heard a total of 487 cases. Of those 487 cases, 111 — almost 23 per cent — were heard as of right.[15] From 2004 to 2011, the numbers by leave and as of right broke down as follows:[16]

Year	Number of Cases Heard By Leave	Number of Cases Heard As of Right
2004	70	13
2005	80	13
2006	67	13
2007	43	10
2008	66	16
2009	60	12
2010	50	15
2011	51	19

At the Supreme Court, Charron J. authored opinions in 46 criminal cases. Breaking the statistics down further, 27 of those 46 decisions were written in criminal cases given leave, and 19 were written in criminal cases heard as of right. In most of those cases, Charron J. penned the majority opinion. As a result, she played a significant role in shaping the contours of the Supreme Court's jurisprudential approach to criminal law. The relationship between Charron J.'s experience as a trial judge and the voice that emerges from her criminal as of right decisions forms the basis for the analysis that follows.[17]

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[14] *The Honourable Justice Louise Charron*, online: Supreme Court of Canada <http://www.scc-csc.gc.ca>.

[15] These cases were heard by virtue of the *Supreme Court Act*, *supra*, note 1; the *Criminal Code*, *supra*, note 5; the *National Defence Act*, *supra*, note 8; the *Canada Elections Act*, *supra*, note 9; and the *Competition Act*, *supra*, note 10.

[16] *Statistics 2002 to 2012*, online: Supreme Court of Canada <http://www.scc-csc.gc.ca>.

[17] Justice Charron's 19 criminal as of right decisions, in chronological order, are: *R. v. C. (P.E.)*, [2005] S.C.J. No. 18, [2005] 1 S.C.R. 290 (S.C.C.); *R. v. Pittiman*, [2006] S.C.J. No. 9, [2006] 1 S.C.R. 381 (S.C.C.); *R. v. Khelawon,* [2006] S.C.J. No. 57, [2006] 2 S.C.R. 787 (S.C.C.) [hereinafter "*Khelawon*"]; *R. v. Teskey*, [2007] S.C.J. No. 25, [2007] 2 S.C.R. 267 (S.C.C.); *R. v. Rhyason*, [2007] S.C.J. No. 39, [2007] 3 S.C.R. 108 (S.C.C.); *R. v. Beaudry*, [2007] S.C.J. No. 5, [2007] 1 S.C.R. 190 (S.C.C.); *R. v. Dinardo*, [2008] S.C.J. No. 24, [2008] 1 S.C.R. 788 (S.C.C.); *R. v. Devine*, [2008] S.C.J. No. 36, [2008] 2 S.C.R. 283 (S.C.C.); *R. v. Blackman*, [2008] S.C.J. No. 38, [2008] 2 S.C.R. 298 (S.C.C.); *R. v. Illes*, [2008] S.C.J. No. 59, [2008] 3 S.C.R. 134 (S.C.C.) [hereinafter "*Illes*"]; *R. v. Griffin*, [2009] S.C.J. No. 28, [2009] 2 S.C.R. 42 (S.C.C.) [hereinafter "*Griffin*"]; *R. v. Beaulieu*, [2010] S.C.J. No. 7, [2010] 1 S.C.R. 248 (S.C.C.); *R. v. Laboucan*, [2010] S.C.J. No. 12, [2010] 1 S.C.R. 397 (S.C.C.); *R. v. Pickton*, [2010] S.C.J. No. 32, [2010] 2 S.C.R. 198 (S.C.C.) [hereinafter "*Pickton*"]; *R. v. Tran*, [2010] S.C.J. No. 58, [2010] 3 S.C.R. 350 (S.C.C.) [hereinafter "*Tran*"]; *R. v. White*, [2011] S.C.J. No. 13, [2011] 1 S.C.R. 433 (S.C.C.); *R. v. A. (J.A.)*, [2011] S.C.J. No. 17, [2011] 1 S.C.R. 628 (S.C.C.); *R. v. Campbell*, [2011] S.C.J. No. 32, [2011] 2 S.C.R. 549 (S.C.C.); and *R. v. Katigbak*, [2011] S.C.J. No. 48, [2011] 3 S.C.R. 326 (S.C.C.).

III. DISPATCHES FROM A FORMER TRIAL JUDGE

In Canada, the empirical study of decision-making at the Supreme Court remains largely in its early stages. To date, the literature has tended to focus on the ideological preferences of individual members of the Court and the ways in which the Court ends up arriving at decisions.[18] Absent from this relatively new body of literature, however, is an empirical study of the effect that prior experience, including experience as a trial judge, has on appellate decision-making. In the United States, a number of legal scholars have started to explore this question. A survey of the literature suggests that prior experience influences the decision-making of appellate judges. For example, in "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court", scholars conducted a meta-analysis bringing together the findings of 22 studies about the relationship between prior experience and appellate decision-making.[19] Their meta-analysis concluded that close to 70 per cent of the studies found at least some correlation between prior experience and appellate decision-making.[20] Similarly, in "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning", scholars in the United States found that federal district-court judges with experience as trial judges at the state or local level were more likely to uphold the *Sentencing Reform Act of 1984* Guidelines than those who did not have such experience.[21] In other studies, however, the authors have been more skeptical about the effect of prior experience on appellate decision-making. For example, in "Politics and the Judiciary: The Influence of Judicial Background on

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[18] See, *e.g.*, Benjamin Alarie & Andrew Green, "Policy Preference, Change and Appointments to the Supreme Court of Canada" (2009) 47 Osgoode Hall L.J. 1; Benjamin Alarie & Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada" (2009) 47 S.C.L.R. (2d) 475; Benjamin Alarie & Andrew Green, "Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada" (2008) 58 U.N.B.L.J. 74; Benjamin Alarie & Andrew Green, "The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada" (2007) 57 U.T.L.J. 195; and Claire L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision-Making in the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2007).

[19] Lee Epstein, Jack Knight & Andrew Martin, "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court" (2003) 91 Cal. L. Rev. 903, at 961-65.

[20] *Id.*, at 954.

[21] Gregory C. Sisk, Michael Heise & Andrew P. Morris, "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning" (1998) 73 N.Y.U.L. Law Rev. 1377, at 1477.

Case Outcomes", the authors conclude that prior experience as a trial judge has no statistically-significant effect on federal district decision-making in the areas of civil rights and prison law.[22] At a minimum, these studies highlight the need for further empirical study in Canada.

Bringing this burgeoning Canadian literature into conversation with the empirical insights offered by legal scholars in the United States, this paper explores the influence that Charron J.'s experience as a trial judge appears to have had on her decision-making process. It uses her heterogeneous criminal as of right decisions as a window into the complicated, everyday realities of courtrooms throughout the country. As they are not controlled by a leave to appeal panel and not vetted for their "public importance",[23] these are the cases heard by the Supreme Court that often turn on practical points of law, such as assessing jury instructions or clarifying difficult and complex rules. Given the focus on a fairly small body of decisions authored by Charron J., this paper does not purport to make any definitive causal or even correlative claims about the relationship between experience as a trial judge and appellate review. Rather, the goal of the paper is somewhat more modest: it begins to connect the conceptual dots between Charron J.'s experience as a former trial judge and the approach she tended to bring when reviewing the work of lower courts and when clarifying difficult and complex legal rules.[24]

1. Appellate Review and the Daily Work of Trial Judges

The first story that emerges from a careful reading of Charron J.'s criminal as of right jurisprudence is her practical, common sense approach to judicial decision-making. Her writing in this area suggests that Charron J.'s experience as a trial judge may have influenced her concern for authoring appellate decisions that appreciated the complex, everyday workings of the Canadian criminal justice system. While there are a number of junctures at which this approach finds expression, the one I will focus on is her jury instruction decisions. Undoubtedly, some will read Charron J.'s decisions in this area and the, at times, deferential

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[22] Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, "Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes" (1995) 24 J. Legal Stud. 257, at 281.

[23] *Supreme Court Act*, *supra*, note 1.

[24] Further empirical research about the relationship between experience as a trial judge and appellate decision-making in Canada is necessary to support this tentative conclusion.

stance she adopted in relation to trial judges as reflecting a somewhat less robust approach to the rights of the accused than some of her colleagues, most notably Fish J.[25] While there may be some merit to this view, an appreciation of Charron J.'s considerable experience as a trial judge may provide a more nuanced reading.

What seems to emerge from Charron J.'s jury instruction cases is a deep understanding of the difficult task imposed on trial judges, particularly in long, complex jury trials. While she never appears to expressly make this point, the subtext of her decisions is that trial judges should be afforded some flexibility to go "off script" when delivering jury instructions in order to better facilitate basic legal comprehension. Moreover, she seems to appreciate that contextual human elements — such as facial cues made by jury members suggesting a lack of comprehension as the trial judge is delivering his or her instructions — may not be captured when the Supreme Court later reviews a lifeless trial transcript.

In this way, Charron J.'s understanding of the proper role of trial judges in jury cases echoes the approach taken by Dickson C.J.C. One suspects that, had they sat on the Supreme Court at the same time, the two jurists would have approached these cases in similar ways. Like Charron J., Dickson C.J.C.'s considerable experience as a trial judge appears to have influenced his approach to appellate decision-making. Noting the inherent difficulties of serving as a trial judge in criminal cases, he once told a law school audience: "For the new trial judge, a criminal jury case can be a somewhat harrowing experience. It is like a time bomb. One never knows when it will explode."[26] Describing the way his experience as a trial judge influenced his approach to reviewing the work of other judges, Dickson C.J.C. stated: "You realize the

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[25] See, *e.g.*, Cristin Schmitz, "Top court's 2009 record: Fish 'The Great Dissenter'" *The Lawyers Weekly* (January 29, 2010), online: The Lawyers Weekly <http://www.lawyersweekly.ca>. Describing Fish J.'s contributions to the Supreme Court during the 2009 term, Schmitz states:

> He wrote more opinions, and more dissents, than anyone else: 19 opinions, including nine dissents. More than any other judge, the former criminal law barrister concentrated on only one legal area: criminal law. Just two opinions were non-criminal. Important judgments of his included: the unanimous rulings in *R. v. Basi* on disclosure and informer privilege, and *R. v. Legare* on the mens rea for Internet luring; the majority ruling in *R. v. Khela* on Vetrovec warnings; and his dissent in *R. v. Bjelland*, in which he and two others deplored the majority's novel "unwarranted" constriction of trial judges' broad discretion under the Charter's s. 24(1) general remedy provision.

[26] Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 98 [hereinafter "Sharpe & Roach"].

pressures the trial judge is under and you don't nit-pick and you don't quibble about small, unimportant aspects … I think you learn perhaps a better understanding of how to write in a way which will be understood by the man in the street, the person who hasn't got legal training."[27]

To explore the relationship between Charron J.'s experience as a trial judge and her approach to appellate decision-making, I will carefully read three of Charron J.'s criminal as of right jury instruction cases: *Griffin*,[28] *Pickton*[29] and *Illes*.[30] In each case, Charron J.'s understanding of the proper role of the trial judge emerges as she reviews the work of those working in lower courts throughout the country.

Griffin[31] was a criminal as of right appeal about instructions on the burden of proof and "the permissible use of a statement made by the deceased shortly before his death".[32] In the decision, Charron J. rejects imposing a standard of perfection on the judge's instruction to the jury. Following his joint trial for first degree murder before a judge and jury, Griffin was found guilty as charged. His co-accused was found guilty of manslaughter.[33] Both appealed to the Quebec Court of Appeal, arguing that the "trial judge erred in his instructions on the burden of proof and its application to circumstantial evidence".[34] Moreover, they argued that the trial judge allowed the jury to impermissibly use the deceased's statement "[i]f anything happens to me it's your cousin's family" because it unfairly implicated them in the murder.[35] The majority of the Court of Appeal allowed the appeal. Justice Côté, writing in dissent, would have dismissed the appeal on both grounds.[36] Writing for the majority of the Court, Charron J. allowed the Crown's appeal and restored the convictions.[37]

A full treatment of the important issues raised by this case goes beyond the scope of this paper.[38] Yet Charron J.'s discussion of the

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27 *Id.*, at 101-102.
28 *Griffin, supra*, note 17.
29 *Pickton, supra*, note 17.
30 *Illes*, *supra*, note 17.
31 *Griffin*, *supra*, note 17.
32 *Id.*, at para. 1.
33 *Id.*
34 *Id.*, at para. 27.
35 *Id.*, at para. 48.
36 *Id.*, at para. 1.
37 *Id.*, at para. 2.
38 For a thoughtful discussion of *Griffin*, see Lisa Dufraimont, "R. v. Griffin and the Legacy of Hodge's Case" (2009) 67 C.R. (6th) 74.

permissible use of statements made by the victim shortly before his death provides one example of the emergence of her understanding of the role of the trial judge and her appreciation of the practical realities associated with jury cases. After deferring to the trial judge's decision that the probative value of the statement "[i]f anything happens to me it's your cousin's family" outweighed its prejudicial effect,[39] Charron J. deals squarely with the trial judge's limiting instruction to the jury. Among other things, the trial judge instructed the jury to approach statements made by the victim to others with caution — the victim's statements were not made under oath, and he was not present at trial to be observed or cross-examined.[40] With this instruction in place, the trial judge then directed the jury about the permissible uses of the statements. As part of a lengthy limiting instruction to the jury, the trial judge noted, "[y]ou can use that [statement] to eliminate other potential people who would want to do him harm, as far as he was concerned … And I emphasize again that you cannot use that evidence to impute a state of mind, to give a state of mind to Mr. Griffin."[41]

Writing for the majority at the Court of Appeal, Doyon J.A. held that, in light of the instruction about eliminating others who wanted to harm the victim, there was "a reasonable likelihood that the jury improperly used the statement of the deceased to actually eliminate other potential murderers, instead of limiting this conclusion to the victim's state of mind".[42] Writing in dissent, Côté J.A. refused to impose such an exacting standard on the trial judge's instruction, reasoning that the jury should be trusted to follow the instructions they were given.[43] Echoing the latter position, Charron J. explains:

> In my respectful view, the majority erred in finding that the distinction drawn by the trial judge in his limiting instruction "between actually eliminating other potential murderers and limiting this conclusion to the victim's state of mind" was "so tenuous that it is virtually impossible to conclude that the jury applied it" (para. 89). To make too much of the risk that the jury *might* misuse evidence is contrary to established principles of law regarding jury trials … [J]uries must be trusted to

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39 *Griffin*, *supra*, note 17, at paras. 49-66.
40 *Id.*, at para. 67.
41 *Id.*
42 *Id.*, at para. 68, citing [2008] Q.J. No. 3589, at para. 90 (Que. C.A.).
43 *Id.*, at para. 69, citing [2008] Q.J. No. 3589, at para. 174 (Que. C.A.).

> have the requisite intelligence to perform their duties in accordance with the instructions given to them by the trial judge.[44]

Highlighting the ability of juries to appropriately perform their duties, Charron J. notes:

> [T]here was nothing particularly complex about the limited use the jury could make of this evidence. That a statement made [*by the victim*], about the person *he* feared at the time, could only go to establishing *his* state of mind and not that of Griffin or anyone else, is at its core a proposition that entirely accords with common sense, the very attribute which gives the jury its strength.[45]

Conversely, in his dissenting opinion, Fish J. — with the support of LeBel J. — would have ordered a new trial, reasoning that the trial judge made errors in his jury instruction regarding the burden of proof and should not have admitted the statement made by the victim shortly before his death at all.[46]

One could, of course, account for the disagreement between Charron J. and Fish J. in *Griffin* as little more than one of competing conceptions about the rights of the accused. While this is the conventional story of the Supreme Court's two criminal law experts, it seems incomplete. Another way to read the stand-off between the two is that they disagree about the level of perfection that should be imposed on jury instructions. Like Dickson C.J.C., who has been described as "a great believer in the jury system",[47] Charron J. had faith that jury members would take their roles seriously and act in accordance with the legal principles set out by the trial judge. Like Dickson C.J.C., Charron J.'s understanding of the jury appears to have been informed by her considerable experience as a trial judge — this experience gave her confidence in the capabilities of juries. In this case, Fish J. would have refused to admit the statement in question altogether, reasoning that it is difficult to trust that a jury would have been able to avoid using the statement in an impermissible fashion. Differing from the approach taken by jurists such as Dickson C.J.C. and Charron J., Fish J. states: "This great risk of prejudice could not be attenuated by a limiting instruction. It is difficult to justify admitting the statement for a marginally probative and tangential purpose while

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44 *Id.*, at para. 72 (emphasis in original).
45 *Id.*, at para. 74 (emphasis in original).
46 *Id.*, at para. 77.
47 Sharpe & Roach, *supra*, note 26, at 100.

insisting that the jury not use it in the most obvious and prejudicial way possible."[48] This statement appears to reflect less faith in juries.

Through a close reading of these competing approaches, it becomes apparent that there is something deeper than simply competing conceptions of the rights of the accused at work in this decision. Justice Charron, who served as a trial judge from 1988 until her appointment to the Ontario Court of Appeal in 1995, and Fish J., whose first role as judge came with his appointment to the Quebec Court of Appeal in 1989, fundamentally disagree about the ability of the jury to execute their duties appropriately. One wonders whether these competing conceptions are informed, at least in part, by the experiences Charron J. and Fish J. had before reaching the Supreme Court. While it is impossible to draw clear causal connections between their experiences and their judicial approaches, one account we might offer for this disagreement is that, having served as a trial judge for several years and having delivered jury instructions of her own, Charron J. recognizes just how difficult it is to deliver them in their idealized form. To use the language offered by Dickson C.J.C. about appellate review of jury instructions, Charron J. learned not to "nit-pick" and "quibble about small, unimportant aspects".[49] Indeed, while Fish J. was a member of the criminal defence bar for 27 years, it seems plausible that never having delivered a jury instruction himself might have had some influence on the level of scrutiny he applied to the work of others.

In *Pickton*,[50] Charron J. makes a similar point about the inherent complexities of jury instructions, one that again seems deeply informed by her experience as a trial judge. In this case, which became notorious for its horrific facts about the murders of sex workers in Vancouver's Downtown Eastside, Robert Pickton was initially charged with 26 counts of first degree murder. Over the course of pre-trial hearings, the trial judge quashed one count of first degree murder and severed another 20. As a result, the trial proceeded with the six remaining counts of first degree murder. After a complex and lengthy trial, the jury found Mr. Pickton not guilty of first degree murder but found him guilty of second degree murder on the six remaining counts.[51]

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48 *Griffin*, *supra*, note 17, at para. 108.
49 Sharpe & Roach, *supra*, note 26, at 101.
50 *Pickton*, *supra*, note 17.
51 *Id.*, at paras. 2-3.

After being convicted of six counts of second degree murder, Mr. Pickton appealed to the Court of Appeal for British Columbia.[52] In essence, Mr. Pickton argued that, when read together, a series of events during the course of jury deliberations occasioned a miscarriage of justice. Throughout the trial, the Crown's theory of the case was that Mr. Pickton had actually shot and killed the six women in question. Conversely, the defence argued that the Crown had failed to prove that Mr. Pickton was the sole perpetrator of the six murders — in essence, their theory of the case was that others were potentially involved in the murders, perhaps even to the exclusion of Mr. Pickton.[53] During the fourth and final day of jury instructions, the defence requested that the trial judge instruct the jury about the competing theories of the case put forward by the Crown and the defence. This additional jury instruction came to be known as the "actual shooter" instruction. The Crown consented to the request and, as a result, the trial judge delivered the following instruction to the jury:

> If you find that Mr. Pickton shot [name of victim], you should find that the Crown has proven [element 3, the identity of the killer]. On the other hand, *if you have a reasonable doubt about whether or not he shot her, you must return a verdict of not guilty* on the charge of murdering her.[54]

Following a question from the jury on the sixth day of deliberations that related to the "actual shooter" instruction, the trial judge retracted the initial instruction and told the jury that they could also find that Mr. Pickton was the killer if he "was otherwise an active participant" in the killings.[55] As Charron J. put it in her decision to dismiss his appeal, Mr. Pickton's argument "turned on whether the trial judge's responses to a question by the jury undermined the fairness of the trial by introducing, as the defence contended, an alternate, ill-defined route to conviction" late in the trial.[56]

In rejecting Mr. Pickton's argument that the "actual shooter" jury instruction occasioned a miscarriage of justice, Charron J. again appears to draw upon her experience as a trial judge, noting the difficulties

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52 The Crown also appealed to the British Columbia Court of Appeal.

53 *Pickton*, *supra*, note 17, at para. 6.

54 *Id.* (emphasis added by Charron J.).

55 *Id.*

56 *Id.*, at para. 5.

associated with jury instructions, particularly in complex cases such as this one. She explains:

> There is no question that the trial judge could have instructed the jury more fully on the different modes of participation that could ground criminal liability, including the law on aiding and abetting. In hindsight and from a legalistic standpoint, it is easy to argue that he probably should have done so. However, the adequacy of the jury instructions must be assessed in the context of the evidence and the trial as a whole. There is nothing wrong, particularly in complex or lengthy jury trials, with the trial judge and counsel's narrowing the issues for the jury by focussing on what is actually and realistically at issue in the case, provided that, at the end of the day, the jury is given the necessary instructions to arrive at a just and proper verdict.[57]

Justice Fish, with the support of Binnie and LeBel JJ., authored a concurring opinion. In it, he notes that the jury was not properly informed of the legal principles in respect of aiding and abetting, which would have provided them with an alternative means of imposing liability on Mr. Pickton for the murders.[58] Ultimately, however, Fish J. reached the same outcome in the case as Charron J. by applying the curative proviso set out in section 686(1)(b)(iii) of the *Criminal Code*.[59]

As I noted in my analysis of *Griffin*, one way to account for the stand-off between these two criminal law experts is to simply assert that Charron J. holds a less robust view of the rights of the accused than does Fish J. While there may be some wisdom to this explanation, it seems incomplete. Indeed, there are a number of cases where Charron J. bolstered the rights of accused persons during her tenure at the Supreme Court. In *McNeil*,[60] for example, Charron J. held that the Crown's obligation to disclose all relevant information in its possession to an accused person under *Stinchcombe*[61] included disciplinary records and criminal investigation files in the possession of the police.[62] Similarly, in *Shoker*,[63] Charron J. explained that a sentencing judge had "no authority under the *Criminal Code* to authorize a search and seizure of bodily

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57 *Id.*, at para. 10.
58 *Id.*, at paras. 70-83.
59 *Id.*, at paras. 84-87.
60 *R. v. McNeil*, [2009] S.C.J. No. 3, [2009] 1 S.C.R. 66 (S.C.C.) [hereinafter "*McNeil*"].
61 *R. v. Stinchcombe*, [1995] S.C.J. No. 21, [1995] 1 S.C.R. 754 (S.C.C.).
62 *McNeil*, *supra*, note 60, at paras. 11-23.
63 *R. v. Shoker*, [2006] S.C.J. No. 44, [2006] 2 S.C.R. 399 (S.C.C.).

substances as part of a probation order".[64] These cases suggest that the conventional account that Charron J. did not bolster the rights of the accused is more complicated than some have admitted.

Returning to the stand-off between Charron J. and Fish J. in *Pickton*, the two jurists deploy competing understandings about the appropriate role of the trial judge in long, complex jury cases, and the level of perfection imposed when reviewing his or her work. Again, one wonders whether Charron J.'s experience as a trial judge — which included delivering complex jury instructions of her own — might have informed the approach she took in *Pickton*. The argument put against me, of course, is that Fish J.'s 27 years as a member of the criminal defence bar meant that he, too, was keenly aware of the difficult work of trial judges in long, complex jury cases. While it may not be possible to draw clear causal connections between Charron J.'s experience as a trial judge and the standard she brought to bear in *Pickton*, one wonders whether the actual experience of crafting jury instructions, delivering them in Court and later having her work reviewed by appellate courts shaped Charron J.'s approach to appellate review. A careful reading of Charron J.'s criminal as of right cases, it seems, provides support for this account.

In *Illes*,[65] we again see the stand-off between Charron J. and Fish J., this time in a decision co-authored with LeBel J., about the level of perfection that should be expected of jury instructions. In this case, Mihaly Illes was convicted of first degree murder following his trial by judge and jury. While in custody, Mr. Illes fabricated a number of letters to friends where he proclaimed his innocence. The police later uncovered his plan to fabricate the letters and, at trial, the defence admitted that Mr. Illes had concocted a plan to create a "paper defence".[66] The Crown argued that the fabricated letters could be treated as impugning post-offence conduct, while the defence argued that the "proclamations of innocence contained in the letters were nonetheless true".[67]

During the course of her jury instruction about the permissible use of the fabricated letters, the trial judge explained that "the law *presumes* any incriminating part of the accused's statement is likely to be true,

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64 *Id.*, at para. 3.
65 *Illes*, *supra*, note 17.
66 *Id.*, at paras. 46-47.
67 *Id.*, at para. 49.

otherwise why would an accused say so".[68] This instruction drew upon a jury charge initially developed by the English Court of Appeal in *Duncan*.[69] On appeal, Mr. Illes argued that the trial judge made several errors in her jury instruction, including her *Duncan*-type description.[70] The Court of Appeal for British Columbia accepted Mr. Illes' argument that the trial judge erred in her *Duncan*-type instruction. While the Court agreed that it was "dangerous to instruct the jury in a manner that suggests that inculpatory and exculpatory statements ought to be weighed differently, particularly when the instruction is couched in presumptive terms",[71] the majority and dissent disagreed about the influence the error had on the trial. The majority held that the outcome would have been the same regardless of the error and, as such, applied the curative proviso set out in section 686(1)(b)(iii) of the *Criminal Code*. Writing in dissent, Rowles J.A. held that the error made in the jury instruction could not be characterized as a harmless one and therefore would have ordered a new trial.

As we might expect, the point of departure between the majority opinion authored by Charron J. and the dissenting opinion authored by Fish and LeBel JJ. again seems to be underpinned by the level of perfection that they expect of trial judges tasked with delivering jury instructions. Like Fish J., LeBel J. first became a judge with his appointment to the Quebec Court of Appeal.[72] Of course, it would be imprudent to attempt to draw clear causal connections between these three jurists' varying experience as trial judges and the level of perfection they appear to have expected when reviewing the work of judges in lower courts. That said, a careful reading of the heterogeneous body of the Supreme Court's criminal as of right decisions suggests that Charron J.'s experience as a trial judge influenced her approach to the work of others. More empirical research, however, is necessary to draw definitive conclusions about the relationship between experience as a trial judge and decision-making at the Supreme Court.

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[68] *Illes*, *supra*, note 17, at para. 40 (emphasis added by Charron J.).

[69] *R. v. Duncan* (1981), 73 Cr. App. R. 359.

[70] Alleging a material non-disclosure on the part of the Crown, the accused person also brought an application to adduce fresh evidence at the Court of Appeal. This ground of appeal goes beyond the scope of the analysis in this paper.

[71] *Illes*, *supra*, note 17, at para. 41.

[72] *Supra*, note 2.

2. Guidance for Trial Judges

The second theme that emerges from a careful reading of Charron J.'s criminal as of right decisions is her awareness of the importance of authoring decisions that clarified difficult and complex rules for trial judges. In October 2011, shortly after she retired from the Supreme Court, Charron J. gave her only media interview since before joining the Court in 2004. In the interview, she explained that the maxim "think widely, but write narrowly" captured her approach to judicial writing.[73] In explaining this maxim, Charron J. seemed to be suggesting that one of her goals when authoring decisions was to ensure that trial judges could readily understand her writing. By thinking widely, but carefully considering how trial judges would actually interpret her decisions once they left the Supreme Court, Charron J. was able to clarify difficult and complex rules for lower court judges. As she put it in the interview, "[s]ometimes we can just say [something] differently and then it may be interpreted [as] 'Oh my God, the Supreme Court has changed the law. And the court's reaction is: 'No we haven't! It wasn't an issue.' But you have to be extremely careful that way."[74] To develop this claim, I will examine two cases where Charron J. took notoriously difficult areas of law and transformed them in ways that simplified and clarified their application for trial judges: *Khelawon*[75] and *Tran*.[76]

In *Khelawon*,[77] Charron J. clarified a complex issue related to the law of evidence. In this case, five elderly residents of a retirement home claimed that they had been assaulted by the manager of the home, Ramnarine Khelawon. By the time of Mr. Khelawon's trial, however, four of the complainants had died of causes unrelated to the alleged assaults, while the fifth complainant was no longer competent to testify. As a result, the central issue at trial was whether the hearsay statements provided by the five complainants had sufficient threshold reliability and, therefore, could be admitted. The trial judge admitted the hearsay statements, reasoning that their similarities rendered them sufficiently reliable. The trial judge found Mr. Khelawon guilty of offences related to two of the complainants and acquitted him on the remaining counts.

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[73] Cristin Schmitz, "Charron praises system that others 'envy'" *The Lawyers Weekly* (November 18, 2011), online: The Lawyers Weekly <http://www.lawyersweekly.ca>.

[74] *Id*.

[75] *Khelawon*, *supra*, note 17.

[76] *Tran*, *supra*, note 17.

[77] *Khelawon*, *supra*, note 17.

At the Ontario Court of Appeal, Rosenberg J.A. (Armstrong J.A. concurring) excluded the statements and acquitted Mr. Khelawon. Writing in dissent, Blair J.A. would have upheld the convictions related to one of the complainants. The Crown appealed to the Supreme Court as of right.[78]

In clear and accessible prose, Charron J. cuts through a tangled line of cases[79] that had come to perplex lawyers, judges, and academics alike. Perhaps most importantly, she provides guidance about the factors that should be considered when determining whether a hearsay statement is sufficiently reliable to be admissible. She notes that the Court's decision in *Starr*[80] came to be interpreted in lower courts as meaning that circumstances "extrinsic" to the taking of the statement go only to ultimate reliability and, thus, could not be considered by the trial judge as part of the admissibility inquiry. Lower courts not only found that the definition of "extrinsic" circumstances was difficult to apply, but they also perceived an inconsistent approach between the decision in *Starr* and the Court's earlier decisions in *Khan*,[81] *Smith*[82] and *U. (F.J.)*.[83]

To clarify this area made unnecessarily difficult by *Starr*, Charron J. opens the decision in *Khelawon* by abandoning the somewhat formalistic approach that had developed to categorizing threshold and ultimate reliability as part of the admissibility inquiry. At the outset, Charron J. moves away from this approach by articulating the underlying purpose that led to the jurisprudential distinction in the first place. She explains:

> The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction

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78 *Id.*, at paras. 5-6.

79 See, in particular, *R. v. Khan*, [1990] S.C.J. No. 81, [1990] 2 S.C.R. 531 (S.C.C.); *R. v. Smith*, [1992] S.C.J. No. 74, [1992] 2 S.C.R. 915 (S.C.C.); *R. v. U. (F.J.)*, [1995] S.C.J. No. 82, [1995] 3 S.C.R. 764 (S.C.C.); *R. v. Starr*, [2000] S.C.J. No. 4, [2000] 2 S.C.R. 144 (S.C.C.); and *R. v. Mapara*, [2005] S.C.J. No. 23, [2005] 1 S.C.R. 358 (S.C.C.).

80 *Id.*

81 *Khan*, *supra*, note 79.

82 *Smith*, *supra*, note 79.

83 *U. (F.J.)*, *supra*, note 79.

> would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process.[84]

While recognizing the important reasons for the distinction between threshold and ultimate reliability, most notably the avoidance of the "undue prolongation of admissibility hearings" at trial, Charron J. rejects relying upon the distinction as part of the admissibility inquiry. She states:

> [T]he factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.[85]

In a mere four sentences, Charron J. covers a significant amount of judicial terrain. She tells us that, when conducting the admissibility inquiry, factors cannot be categorized in terms of threshold and ultimate reliability, that contrary jurisprudential statements made by the Court should no longer be followed, and that all relevant factors should be considered in order to tailor the inquiry to address the particular dangers presented by the evidence. With four sentences in this appeal as of right, Charron J. goes a significant way to clarifying what had become an unwieldy legal issue.

A full survey of the hundreds of reported decisions citing *Khelawon* goes beyond the scope of this paper. That being said, a cursory review suggests that lower courts have, indeed, found it relatively easy to put the decision to work in their courtrooms.[86] For example, in *R. v. Riley*, a decision of the Superior Court of Ontario, Dambrot J. notes: "In *R. v. Khelowan* [sic], *supra*, Charron J., for the Court, made it clear that in cases involving the admissibility of the prior testimony of a witness at

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[84] *Khelawon*, *supra*, note 17, at para. 3.

[85] *Id.*, at para. 4.

[86] For further discussion of *Khelawon*, see, *e.g.*, Hamish Stewart, "Khelawon: The Principled Approach to Hearsay Revisited" (2007) 12 Can. Crim. L. Rev. 97; Suhail Akhtar, "R. v. Khelawon: Corroboration Clarified" (2007) Crim. L.Q. 227; Dale E. Ives, "R. v. Khelawon — continuing reform of the law of hearsay in Canada" (2007) 11 International Journal of Evidence and Proof 213; Robert J. Currie, "The Evolution of the Law of Evidence: Plus ça change ...?" (2011) 15 Can. Crim. L. Rev. 213; Glen Crisp, "Khelawon" (2007-2008) 39 Ottawa L. Rev. 213; and Shawn Moen, "Seeking More Than Truth: A Rationalization of the Principled Exception to the Hearsay Rule" (2010-2011) 48 Alta. L. Rev. 753.

a preliminary hearing, it is not the task of the trial judge to inquire into the likely truth of the prior statement."[87] Similarly, in *R. v. Faid*, a decision of the Supreme Court of British Columbia, Melnick J. praises Charron J. for clarifying the law of evidence in *Khelawon*. He notes: "In *R. v. Khelawon*, the Supreme Court helpfully summarized the law relating to the admission to evidence of hearsay statements … In this decision written by Madam Justice Charron, the court emphasizes that, as a general principle, all relevant evidence is admissible but that hearsay evidence is presumptively inadmissible."[88] In *R. v. Harbin*, a decision of the Ontario Court of Justice, we again see *Khelawon* being applied with ease. Justice Brown notes: "[F]ollowing the comments of Charron, J., the factors to be considered should not be categorized as threshold and ultimate reliability. Instead, I follow the suggestion of adopting a more functional approach, and I focus on particular dangers raised by the hearsay evidence, and on the attributes or circumstances relied upon by the Crown to overcome those dangers."[89] These cases provide support for the proposition that Charron J. — the great simplifier — clarified complex and difficult areas of law. Her considerable experience as a trial judge, where she was regularly tasked with understanding and applying decisions of the Supreme Court in her own courtroom, appears to have played a significant role in shaping her approach to appellate decision-making.

In *Tran*,[90] a case heard by the Supreme Court as of right after the Ontario Court of Appeal substituted a second degree conviction for a manslaughter conviction,[91] Charron J. again emerges to clarify the law of provocation. After considerable and, at times, seemingly unhelpful debate about the number of steps set out in the analysis under section 232 of the *Criminal Code*,[92] Charron J. pithily notes that, "[t]hese various formulations do not differ in substance."[93] Using clear, accessible language

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87 *R. v. Riley*, [2009] O.J. No. 2474, at para. 9 (Ont. S.C.J.).

88 *R. v. Faid*, [2010] B.C.J. No. 2900, 2010 BCSC 1986, at para. 21 (B.C.S.C.) [citations omitted].

89 *R. v. Harbin*, [2008] O.J. No. 2158, 2008 ONCJ 263, at para. 22 (Ont. C.J.).

90 *Tran*, *supra*, note 17.

91 *Id*., at para. 5.

92 See, in particular, *R. v. Hill*, [1986] S.C.J. No. 25, [1986] 1 S.C.R. 313 (S.C.C.); *R. v. Thibert*, [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37 (S.C.C.); and *R. v. Parent*, [2001] S.C.J. No. 31, [2001] 1 S.C.R. 761 (S.C.C.). In *Tran*, *supra*, note 17, at para. 10, Charron J. noted: "The requirements of the defence contained in s. 232 have been described variously by the Court as comprising either two, three or four elements."

93 *Tran*, *supra*, note 17, at para. 11.

that could be readily put to work in courtrooms throughout the country, Charron J. lays out the analysis in two steps. The first step is objective and the second step is subjective.[94] Under the objective branch of the test, she explains that there are two elements: "(1) there must be a wrongful act or insult; and (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control".[95] Once the objective branch of the test has been met, the analysis turns to a subjective inquiry. She notes: "The subjective element can also be usefully described as two-fold: (1) the accused must have acted in response to the provocation; and (2) on the sudden before there was time for his or her passion to cool."[96]

Like *Khelawon*, where she rejected a rigid approach to categorizing the admissibility inquiry factors in terms of threshold and ultimate reliability, Charron J. again refuses to opine, at length, about whether the provocation defence should be framed as a two-, three-, or four-step inquiry. Indeed, while she notes that it may be "conceptually convenient in any given case to formulate the requirements of the defence in terms of distinct elements and to treat each of these elements separately", Charron J. refuses to allow this type of discussion to distract her from the "substance" at the heart of the various formulations of the defence.[97] By refusing to wade into this somewhat unhelpful debate, Charron J.'s decision is ultimately clearer and more accessible than it may otherwise have been. Given that *Tran* is still a relatively recent decision of the Supreme Court, there are currently only a handful of lower court cases that have applied it. The more straightforward analysis proposed by Charron J., however, appears to have made it easier to consider the provocation defence in courtrooms throughout the country.[98] Thus, Charron J.'s

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94 *Id*., at para. 23.

95 *Id*., at para. 25.

96 *Id*., at para. 36.

97 *Id*., at para. 11.

98 See, *e.g*., *R. c. Dennett*, [2013] Q.J. No. 2329, 2013 QCCS 1123, at para. 117 (Que. S.C.); *R. v. Getachew*, [2013] O.J. No. 1674, 2013 ONSC 2107, at fn 1 (Ont. S.C.J.); *R. v. Land*, [2012] O.J. No. 6077, 2012 ONSC 6562, at para. 8 (Ont. S.C.J.); and *R. c. Laperrière*, [2012] J.Q. no 18234, 2012 QCCS 6712, at paras. 26-28 (Que. S.C.). For thoughtful commentary on the decision in *Tran*, see, *e.g*., Rosemary Cairns Way, "Attending to Equality: Criminal Law, the Charter and Competitive Truths" (2012) 57 S.C.L.R. (2d) 39, at 51-52; and Jennifer Koshan, "Domestic Violence and Provocation: The Door Remains Open" *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (December 6, 2010) online: ABlawg <http://ablawg.ca>.

experience as a trial judge seems to have influenced the common-sense approach she brought to cases such as *Khelawon*[99] and *Tran*.[100]

IV. CONCLUSION: THE LEGACY OF JUSTICE LOUISE CHARRON

To summarize, the goal of this paper has been to explore the influence that Justice Charron's considerable experience as a trial judge had on her approach to reviewing and providing guidance to trial judges. A careful reading of her criminal as of right decisions — decisions that were not controlled by a leave to appeal panel and vetted for their "public importance"[101] — provide a unique window into the everyday issues facing trial judges in courtrooms throughout the country. In doing so, the paper uncovered two related themes about the relationship between trial judges and appellate review. First, the paper argued that Justice Charron's experience as a trial judge appears to have influenced the, at times, deferential way she approached reviewing the work of trial judges. Second, the paper began to connect the conceptual dots between Justice Charron's experience as a trial judge and her ability to craft decisions that clarified difficult and complex legal rules.

Ultimately, the voice that emerges from Justice Charron's criminal as of right jurisprudence is not one preoccupied with witty literary references or abstract theoretical accounts of Canadian criminal law. Rather, Justice Charron's lasting jurisprudential contribution, one that is perhaps best embodied by her heterogeneous body of criminal as of right cases, may be that she was uniquely positioned to grasp the realities of trial judges and to craft workable solutions to assist them. By beginning to draw out connections between Justice Charron's experience as a trial judge and her approach to the body of criminal as of right decisions she penned during her tenure at the Supreme Court, we might uncover the subtle, often underappreciated contributions she made to the everyday practice of Canadian criminal law.

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99 *Khelawon*, *supra*, note 17.
100 *Tran*, *supra*, note 17.
101 *Supreme Court Act*, *supra*, note 1.