

R v Lufiau, R v Varennes, and *The Gamble of Litigating a “Right” to Jury Trials Outside of Section 11(f)*

Sandrine Ampleman-Tremblay*

I. Introduction

Offences included under section 469 of the *Criminal Code* (“Code”) — in our day and age, mostly murder — are typically tried before a jury.¹ However, section 473(1) provides that individuals charged with these offences can opt out of jury trial if they consent to such a change *and* obtain the consent of the Attorney General.² As a result, the Crown can compel an accused to face a jury trial by refusing to grant its consent.³ This paper will comment on recent decisions on Crown non-consent and their impact on the right to a jury trial under section 11(f) of the *Canadian Charter of Rights and Freedoms* (“Charter”).⁴ More precisely, the paper will argue that Canada should broaden the scope of section 11(f) to include a right to select one’s preferred mode of trial. It will also decry the strategy exhibited in recent cases and attribute this choice to the unsatisfactory state of the law under section 11(f).

In *R v Lufiau* and *R v Varennes*, the Quebec Court of Appeal examined whether courts can override Crown non-consent under section 473(1).⁵ The parties in these cases did not

* Assistant Professor, Faculty of Law, University of Alberta. I am grateful to Hamed Moghaddari, Krystin Hoffart, and Richard Mailey for their helpful editing of this piece. Any errors remain my own.

1 *Criminal Code*, RSC 1985, c C-46, ss 469, 471.

2 *Ibid*, ss 2 “Attorney General”, 473.

3 In this paper, I will refer to “Crown consent” rather than “parties consent” to discuss s 473(1).

4 *Canadian Charter of Rights and Freedoms*, s 11(f), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 *R v Lufiau*, 2022 QCCA 508 [*Lufiau*]; *R v Varennes*, 2023 QCCA 136 [*Varennes*].

challenge section 473(1) on the basis of section 11(f) and, consequently, missed an occasion to strengthen the constitutional protections offered to the accused. *R v Turpin* from the Supreme Court of Canada most likely explains this choice to avoid constitutional considerations, as this decision ruled that section 11(f) does not include a right to a non-jury trial.⁶ By failing to revisit *Turpin*, *Lufiau* and *Varennnes* continue to limit the possibility for accused persons to elect a trial before a judge alone. Such an outcome is particularly problematic when jury trials are more burdensome than beneficial to the accused.

In 2023, the Supreme Court granted leave to appeal in *Varennnes*.⁷ However, the Supreme Court cannot resolve all problems related to jury law and section 473(1). Indeed, when examining how the parties framed the argument before the Court of Appeal, the Supreme Court decision will most likely contain little to no constitutional discussions. In anticipation of the hearing in December 2024, this paper will offer a few comments underlining the importance of considering the rights of the accused under section 11(f) when adjudicating questions pertaining to section 473(1).⁸

In light of recent events, changes to criminal law, and the advancement of social science, a renewed conversation on the right to select one's mode of trial (or a right to a non-jury trial) under section 11(f) of the *Charter* is much needed. This paper aims to restart this conversation. For this purpose, section II(A) will briefly review *Lufiau* and *Varennnes* to provide more context. Section II(B) will then discuss the risks of framing arguments on the "right" to a jury trial outside of section 11(f), like the parties did in these Quebec cases. This last section will expand on the drawbacks of *Turpin* by contrasting the Supreme Court's argument with new social scientific studies and legal scholarship that challenge the impartiality and competence of juries.

II. Analysis

A. The Cases

In *Lufiau*, a murder trial was interrupted due to the medical issues of the accused. The accused offered to proceed before a judge alone for the new trial, but the Crown did not consent to this change.⁹ The trial judge held that the decision of the Crown was unreasonable and that the Court could intervene in the absence of an abuse of process.¹⁰ In contrast, the Court of Appeal ruled that a review of the Crown's refusal under section 473(1) could only occur in the case of an abuse of process.¹¹ To reach this conclusion, the Court of Appeal relied on the Supreme Court's decision in *R v Anderson*.¹² *Anderson*, at paragraph 44, explained the tenets of prosecutorial discretion in criminal matters.¹³ It then listed such powers:

6 *R v Turpin*, 1989 CanLII 98 (SCC) [*Turpin*].

7 *Pascal Varennnes v His Majesty the King*, 2023 CanLII 122404 (SCC).

8 Supreme Court of Canada, "Scheduled Hearings for the month of December 2024" (last modified 27 May 2024), online: <scs-csc.ca> [perma.cc/X575-V8N6].

9 *Lufiau*, *supra* note 5 at paras 7-10.

10 *Ibid* at paras 12, 36-41.

11 *Ibid* at paras 90-130.

12 *Ibid* at paras 90-130.

13 *R v Anderson*, 2014 SCC 41 at para 44 [*Anderson*].

While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution.¹⁴

With the benefits of having read *Anderson*, the Court of Appeal summarized discretionary powers of the Crown through the following elements: “(1) decisions regarding the nature and extent of proceedings; (2) the participation of the Attorney General in such decisions; (3) the discretion exercised by the Attorney General in matters falling within his jurisdiction.”¹⁵ While the list of discretionary powers from *Anderson* does not include the consent of the Attorney General under section 473(1), the Court of Appeal held the latter pertains to the participation of the Attorney General.¹⁶

The Court also went back to *Anderson*’s discussion regarding strategic decisions or conduct of the parties that are not part of the discretionary power of the Crown and are thus not reviewable before reaching the abuse of process stage.¹⁷ More precisely, the Court ruled that consent (or lack thereof) under section 473(1) is not strategic or related to the conduct before the court.¹⁸ Hence, courts should not intervene unless the absence of consent amounts to an abuse of process.¹⁹ Finally, the Court noted that judges should not draw adverse inferences from non-disclosure of the reasons for the refusal and should not intervene simply because Crown directives or concerns for state resources could have supported consent for a judge alone trial.²⁰ These circumstances do not — on their own — amount to an abuse of process. The bar to intervene in Crown consent under section 473(1) is thus notoriously high.

Lufiau, standing as the first appellate decision on this matter in Quebec, paved the way for *Varennnes*.²¹ However, without *Lufiau*, *Varennnes* would still have had strong guidance on how to dispose of the matter. Indeed, recognizing section 473(1) as a discretionary power of the Crown is consistent with a dominant trend within the case law on this provision.²² This conclusion is also aligned with some of the case law on sections 561 and 577 of the *Code*.²³

14 *Ibid* at para 44.

15 *Lufiau*, *supra* note 5 at paras 93-96 [translated by author].

16 *Ibid* at paras 80-81, 106-107.

17 *Ibid* at paras 103-104, citing *Anderson*, *supra* note 13 at paras 57-61.

18 *Lufiau*, *supra* note 5 at para 105. For judge shopping in relation to s 473(1) or similar provisions, see *R v Ng*, 2003 ABCA 1 at paras 104-150 [Ng], Fraser CJA; *R v Effert*, 2011 ABCA 134 at para 11 [Effert]; *R v L E*, 1994 CanLII 1785 (ONCA) at 11-12 [L E].

19 *Lufiau*, *supra* note 5 at paras 105-106.

20 *Ibid* at paras 107-111, 119.

21 *Ibid* at para 35; *Varennnes*, *supra* note 5 at para 2.

22 *Lufiau*, *supra* note 5 at paras 98-102; *R v McGregor*, 1999 CanLII 2553 (ONCA); *Ng*, *supra* note 18 at paras 21-68; *Effert*, *supra* note 18 at paras 9-15; *R v Ettinger*, [1986] NSJ No 359 (QL) (on the former s 430); *R v Hanneson*, [1987] OJ No 8 (QL); *R v Regis*, 2012 QCCS 4776 [Regis]. Cf *R v Khan*, 2007 ONCA 779 at paras 10-16 [Khan]; *R v Biddersingh*, 2022 ONCA 6 at paras 14-17; *R v Henderson*, 2001 CanLII 4540 (ONCA) at paras 3-6 [Henderson]; *R v Saleh*, 2013 ONCA 742 at paras 82-84, ruling that judges should only intervene in the clearest of cases.

23 See e.g. *R v Edwards*, 2024 MBCA 27 at para 38 (on s 577); *R v Bullhosen*, 2019 ONCA 600 at para 88 (on s 577); *Anderson*, *supra* note 13 at para 44 (on s 577); *Ng*, *supra* note 18 at paras 21-68 (on s 561); *L E*,

In *R v Varennes*, the accused was charged with second-degree murder of his partner.²⁴ Given the COVID-19 pandemic and restrictions occasioned by the virus, the judge informed parties that a judge-alone trial might be best for the case.²⁵ A change in circumstances later allowed for a jury trial, but the accused wished to be tried before a judge alone.²⁶ While the Crown did not consent, the Court granted Varennes' motion to be tried before a judge alone since it concluded that the Crown's non-consent constituted a strategic decision.²⁷

Before the Court of Appeal, the Crown argued that the trial judge erred in applying the "unfair or unreasonable decision" standard to review Crown non-consent under section 473(1).²⁸ *Lufiau* had not been rendered at that time but it provided a straightforward answer for the appeal.²⁹ The Court reaffirmed *Lufiau* and stated that there can be no intervention in the absence of an abuse of process.³⁰ It issued a reminder that *Lufiau* requires "an actual or anticipated infringement of the *Charter*" to override the decision of the Crown under section 473(1).³¹ The Court also held that Mr. Varennes had to demonstrate some "serious risk of a violation occurring" to succeed in showing an abuse of process and, consequently, allow a review of the discretionary power of the Crown.³² He did not meet this burden.

B. Silencing Constitutional Considerations

While I do not criticize the Quebec Court of Appeal's interpretation of discretionary powers, *Lufiau* and *Varennes* have severe flaws in their strategy, specifically insofar as they focus on section 473(1) of the *Criminal Code* without challenging its constitutionality. Two problems emerge from this choice: 1) it ultimately weakens the accused's rights by maintaining the Crown's power to compel a jury trial; and 2) it fails to discuss the parameters of the constitutional right to a jury trial and, most importantly, revisit the idea that there is no right to select a trial mode. The next subsections will address these issues by respectively examining *Turpin*'s role in shaping section 11(f) and new studies on juries.

R v Turpin

In *Turpin*, the Supreme Court ruled on old versions of the *Criminal Code* provisions, which dictated that indictable offences had to be tried before a jury unless an accused charged in

supra note 18 at 14-15. As for the power of the Attorney General to compel jury trials under s 568, many decisions indicated that it lies outside of the pre-*Anderson* notion of core prosecutorial discretions. See e.g. *R v St-Pierre*, 2016 QCCA 545 at paras 21-27; *R v Vittorio (Vic) De Zen*, 2010 ONSC 974; *R v Godbout*, 2020 QCCS 1181 at para 11; *R v JSR*, 2012 ONCA 568 at paras 123-127. In the latter case, the Court reached the conclusion that s 568 was not a core prosecutorial discretion decision and applied this reasoning to s 67(6) of the *Youth Criminal Justice Act*. For a case deciding that the decision to try before judge and jury is unreviewable under the antecedent of s 568, see *R v Musitano*, 1982 CanLII 3190 (ONSC), aff'd 39 OR (2d) 733. See also Benjamin L Berger, "Peine Forte et Dure: Compelled Jury Trials and Legal Rights in Canada" (2003) 48:2 Crim LQ 205 at 210-212.

24 *Varennes*, *supra* note 5 at paras 3-4.

25 *Ibid* at paras 9-10.

26 *Ibid* at paras 12-14.

27 *Ibid* at paras 14-17.

28 *Ibid* at para 19 [translated by author].

29 *Ibid* at paras 21, 25, 76-77.

30 *Ibid* at paras 27-28.

31 *Ibid* at para 29, citing *Lufiau*, *supra* note 5 at para 129 [translated by author].

32 *Varennes*, *supra* note 5 at paras 41-42 [translated by author].

Alberta consented to a trial before a judge alone.³³ The trial court held that section 11(f) included the right to select one's mode of trial by waiving the right to a jury and electing a judge-alone trial and that accused persons should be able to opt out of jury trials even if charged outside Alberta.³⁴ On behalf of the Supreme Court, Wilson J retained a different interpretation of the constitutional right to a jury.

Justice Wilson started by recognizing that although society has an interest in jury trials, section 11(f) protects the accused.³⁵ She then moved to a textual analysis of the *Charter* provision and analyzed the meaning of the words "benefit of a jury trial."³⁶ Acknowledging that not all jury trials will benefit the accused person and that such trials may even "be a burden on the accused,"³⁷ Wilson J ruled that section 11(f) includes the right to waive a jury trial when such a waiver would be in the accused's best interests.³⁸ She pointed out that "an accused cannot be compelled to take advantage of rights intended for his or her benefit even if such rights may have a public aspect."³⁹ However, *Turpin* also ruled that even when waiving their rights, accused persons must comply with the legislation (here, the *Criminal Code* provisions dictating that jury trials were mandatory outside of Alberta). In other words, *Turpin* refused to equate the right to waive a jury trial to a right to a non-jury.⁴⁰

The provisions at play in *Turpin* are no longer in force, but the same argument applies to section 473(1). Mr. Lufiau and Mr. Varennes could waive their right to a jury trial, but the *Criminal Code* provides that the Crown's consent is required to do so in murder cases. Consequently, section 473(1) did not breach their right to section 11(f) — at least as currently construed.

I suggest that the interpretation of section 11(f) in *Turpin* is contradictory. What is the value of a waiver if one cannot escape section 473(1)? If the accused has the right to "the benefit of a trial by jury" and the right to waive such benefits (if any), the *Criminal Code* (which is not a constitutional instrument) should not dictate the parameters of the constitutional right to a jury. To be fair to the Court, Wilson J did not tie the right to a jury to the *Criminal Code* but rather expressed that there was no positive right to a judge-alone trial.⁴¹ In practice, the result will be the same: the possibility of forcing an accused to have a jury trial despite their wishes to be tried before a judge alone. *Varennes* and *Lufiau* were an occasion to determine whether Wilson J's insights pass or fail the test of time, especially as the burdens of a jury trial may be more prejudicial than once thought. The following subsection will expand on rationales for revisiting this precedent by challenging assumptions of impartiality and competence of jurors.

33 *Turpin*, *supra* note 6 at 1301-1302, citing *Criminal Code*, *supra* note 1.

34 *Ibid* at 1304 (part of the argument rested on s 15 of the *Charter*, which will not be discussed here).

35 *Ibid* at 1310-1311. On the interests of society in compelling a mode of trial, see *Ng*, *supra* note 18 at para 121, Fraser CJA.

36 *Turpin*, *supra* note 6 at 1311-1314.

37 *Ibid* at 1312.

38 *Ibid* at 1313, 1315-1316, 1320-1324.

39 *Ibid* at 1316.

40 *Ibid* at 1321-1324.

41 *Ibid* at 1321.

Impartiality and Competence of (Compelled) Juries

Given the format of this paper, I will not be able to provide an exhaustive account of jury biases and other problems that may result from jury trials. However, I wish to highlight a few concerns, including most notoriously new research in social science, studies on the capacity of jurors to understand and apply the law, and issues with jury representativity, especially in light of the Gerald Stanley trial, which led to the abolition of peremptory challenges because of their discriminatory uses.⁴² All of these concerns call for shedding light on the problematic effects of section 473(1) on the accused.

A 2022 study in the United Kingdom underlined potential sources of bias in jury trials, including but not limited to pre-trial publicity, cognitive bias associated with defendant/victim characteristics, and expert evidence (e.g. perceived value of forensic data, partial presentation of evidence, subjective biases of experts).⁴³ In the Canadian context, a 2015 study on challenges for cause and peremptory challenges cast doubt on whether jurors are apt to admit or identify their biases, particularly when asked about it in open court.⁴⁴ Justices Moldaver and Brown, commenting on the results of this research, indicated that trial judges can make use of section 640(2) of the *Criminal Code*, which allows for excluding jurors from the courtroom during challenges for cause.⁴⁵ However, remedying all issues highlighted in the 2015 study cannot be done with similar ease. For instance, the research noted that judges render decisions on the acceptability of a juror based on very little information.⁴⁶ Given the emphasis on jurors' privacy, it is improbable that judges will ever be able to make decisions based on more information, including potentially relevant details.⁴⁷ Decisions based on minimal information, while preserving privacy, may be insufficient to detect the unconscious biases of jurors or those lying deep beneath the surface.

Another Canadian study asked participants to read a neutral or racially charged news article and a mock trial transcript.⁴⁸ This study did not find any difference in verdicts. Still, it concluded that: "When the defendant was Black, the race-specific article appeared to backfire, producing the harshest sentencing recommendation compared to the race-neutral and general race articles. Conversely, for the Indigenous defendant, any mention of race (whether specific or general) produced harsher recommended sentences relative to no

42 *R v Chouhan*, 2021 SCC 26 at para 41 [*Chouhan*] (see also para 201 by Abella J, dissenting in part but not on this point); for a broader comment on the Gerald Stanley trial and the issues of racial injustice that it raised, see Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal-Kingston: McGill-Queen's University Press, 2019).

43 Lee J Curley, James Munro & Itiel E Dror, "Cognitive and Human Factors in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making" (2022) 62:3 *Med Sci Law* 206.

44 Regina A Schuller et al, "Challenge for Cause: Bias Screening Procedures and Their Application in a Canadian Courtroom" (2015) 21:4 *Psychol Pub Pol'y & L* 407.

45 *Chouhan*, *supra* note 42 at para 67; *Criminal Code*, *supra* note 1, s 640(2).

46 Schuller et al, *supra* note 44.

47 See e.g. *Chouhan*, *supra* note 42 at para 66, Moldaver & Brown JJ; *Chouhan*, *supra* note 42, at paras 119-121, Martin J; *R v Pan*; *R v Sawyer*, 2001 SCC 42 at para 52 [*Pan*].

48 Laura McManus, Evelyn Maeder & Susan Yamamoto, "The Role of Defendant Race and Racially Charged Media in Canadian Mock Juror Decision Making" (2018) 60:2 *Canadian J Criminology & Crim Just* 266 at 275, 279.

mention of race.”⁴⁹ Several other studies in Canada hinted at forms of jury biases, including biases related to race,⁵⁰ gang affiliation,⁵¹ as well as gender, myths about sexuality, and unattractiveness in sexual assault cases.⁵²

Further research is required to test jury biases with regard to more circumstances, including different criminal offences and intersectional considerations. However, the effect of additional research on court decisions is limited. Indeed, courts would be more likely to accept jury research should scholars study actual jurors, something currently prohibited by section 649 of the *Criminal Code*.⁵³ Canada is therefore in a catch-22 situation where research is not widely accepted by courts because it does not study actual jurors but where such jurors cannot be studied. While none of the research cited above can be taken as irrefutable evidence

49 *Ibid* at 284. Of note, jurors in Canada are not typically involved in recommended sentences except for parole eligibility under ss 745.2-745.3 of *Criminal Code*, *supra* note 1.

50 Evelyn M Maeder, Susan Yamamoto & Laura A McNabus, “Methodology Matters: Comparing Sample Types and Data Collection Methods in a Juror Decision-making Study on the Influence of Defendant Race” (2018) 24:7 *Psychology, Crime and L* 687. This research states that in-lab participants were more likely to convict White defendants, whereas online participants were less likely to convict White participants, which they believed could be linked to the correction of racial bias in the presence of other persons. See also Evelyn M Maeder & Susan Yamamoto, “Social Identity Theory in the Canadian Courtroom: Effects of Juror and Defendant Race” (2019) 61:4 *Can J Corr* 24, which concluded that “positive personal stereotypes were associated with a decreased likelihood of a guilty verdict for white mock jurors judging an Indigenous defendant” (at 34, see also 37). The authors also believed the race of the jurors was relevant to processing court information and that representativity within the jury should be pursued. *Cf* Evelyn M Maeder & Laura A McManus, “Mosaic or Melting Pot? Race and Juror Decision Making in Canada and the United States” (2022) 37:1-2 *J Interpersonal Violence* 991. They found that mock jurors linked cultural criminal stereotypes to Black and Indigenous people but that it did not affect their verdict.

51 Evelyn M Maeder & Joel Burdett, “The Combined Effect of Defendant Race and Alleged Gang Affiliation on Mock Juror Decision-Making” (2013) 20:2 *Psychiatry, Psychology and L* 18. The gang affiliation led to harsher recommended sentences for Black and White individuals, but not Indigenous persons. This is not an exhaustive list of recent research on juries. This topic should be further explored especially in light of the *Vareennes* appeal, which indirectly calls for questioning the unfairness of some jury trials.

52 Cassandra Starosta, Evelyn Maeder & Craig Leth-Steenson, “The Role of Complainant/Defendant Gender and Form of Sexual Assault on Jurors’ Perceptions of Prototypicality and Verdicts” (2024) 00:0 *J Interpersonal Violence* 1, which concluded that there was a higher likelihood of conviction in the female complainant-male defendant dyad. See also Evelyn M Maeder, Susan Yamamoto, & Paula Saliba, “The Influence of Defendant Race and Victim Physical Attractiveness on Juror Decision-making in a Sexual Assault Trial” (2014) 21:1 *Psychology, Crime & L* 6, which reported that men participants rendered more guilty verdicts when the victim was unattractive and were less likely to attribute blame to a defendant charged of sexually assaulting an attractive victim. There was no finding that race influenced the outcomes or degree of responsibility, but jurors recommended longer sentences for Indigenous persons. The attractiveness of the victim and the race of the defendant also had some impact on the perceived degree of responsibility of the victim.

53 *R v Find*, 2001 SCC 32 at para 87 [*Find*]; *Pan*, *supra* note 47 at para 100; Marie Comiskey, “Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the Stagnant Pool be Revitalized” (2010) 35:2 *Queen’s LJ* 625 at 635-636, 663-665; Richard Jochelson & Michelle Bertrand, “Canada’s Inscrutable Jury Research: Do Canadian Juries Understand Judicial Charges” (October 2016), online (blog): <www.robsoncrim.com> [perma.cc/S4GU-FR8M]; Michelle I Bertrand & Richard Jochelson, “Mock-Jurors’ Self-Reported Understanding of Canadian Judicial Instructions (Is Not Very Good)” (2018) 66:1-2 *Crim LQ* 136 at 136-138; Ryan Ellis, “Unlikable and Before the Jury: Does Non-Probative Character Evidence Increase the Risk of Wrongful Convictions” (2016) 63 *C.L.Q.* 567, section 3(c).

that jurors are necessarily biased, they call for at least questioning the law's assumption of impartiality.⁵⁴ Indeed, the Ontario Court of Appeal recently recalled that: "There is a strong presumption of juror impartiality. The presumption of juror impartiality can be rebutted only if a reasonable observer would conclude that the juror's conduct made it more likely than not that the juror, whether consciously or unconsciously, would not decide fairly."⁵⁵ This is not an easy bar to meet.

Partiality does not suffice to explain concerns with juries. Academic research has recognized various other issues, including that juries might not follow judicial instructions nor understand the legal principles they contain, and that the law focuses too much on the accuracy of the instructions as opposed to actual understanding of the legal concepts by individual jurors.⁵⁶ In contrast with these findings, in *R v Corbett*, Dickson CJ introduced a presumption of competence by concluding that judicial instructions are sufficient to counterbalance any potential prejudice made by entering the accused's criminal record into evidence,⁵⁷ and declaring that "[j]ury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law."⁵⁸ Chief Justice Dickson did not support these assertions with any source.

The law, then, presumes that jurors are impartial and competent. Relatedly, appellate courts rely on a test to substitute a jury verdict also laid out in *Corbett* and fine-tuned in *R v Yebes* and *R v Biniaris*.⁵⁹ The latter permits intervention if the verdict is not one that a properly instructed jury could reasonably have rendered and is seen as "[t]he greatest safeguard against a perverse jury."⁶⁰ Ironically, Mr. Yebes' conviction is now a registered wrongful conviction.⁶¹ Yet, the Supreme Court had found the verdict reasonable.⁶²

By contrast, some cases seem to soften the confidence of the law in jurors' competence. For example, *R v WH* ruled that judicial experience may, in some circumstances (including

54 See e.g. *R v Sherratt*, [1991] 1 SCR 509 at 523-524 [*Sherratt*]; *R v Spence*, 2005 SCC 71 at para 21; *R v Kokopenace*, 2015 SCC 28 at para 53 [*Kokopenace*]; *Find*, *supra* note 53 at para 26, see also paras 41-42 and 96, which held that the trial process suffices to counteract emotions and prejudices.

55 *R v Tutiven*, 2022 ONCA 97 at paras 22-24; *SJL v R*, 2024 NBCA 76 at para 61 [*SJL*].

56 See e.g. Berger, *supra* note 23 at 208, 220-223; Comiskey, *supra* note 53 at 627; Bertrand & Jochelson, *supra* note 53. On the use of extra-legal considerations contrary to judicial instructions, see Maeder & Burdett, *supra* note 51 at 199.

57 *R v Corbett*, [1988] 1 SCR 670 at 690-693 [*Corbett*]. See also *Chouhan*, *supra* note 42 at paras 49-59; *SJL*, *supra* note 55 at para 19.

58 *Corbett*, *supra* note 57, at 693.

59 *Ibid*; *R v Yebes*, 1987 CanLII 17 (SCC) [*Yebes*]. See also *R v Biniaris*, 2000 SCC 15 at para 36 [*Biniaris*], which restates *Yebes* in the following way: "[the test] requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence." In 2013, the Supreme Court restated the test as: "The court must ask itself whether the jury's verdict is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury" — *R v WH*, 2013 SCC 22 at paras 2, 25-29 [*WH*] [Emphasis in original]. See also *R v Gagnon*, 2006 SCC 17 at paras 43-44, Deschamps & Fish JJ, dissenting but not on this point.

60 *Pan*, *supra* note 47 at para 93.

61 Canadian Registry of Wrongful Convictions, "Tomas Yebes — Case Summary", online: <www.wrongfulconvictions.ca/cases/tomas-yebes>.

62 *Yebes*, *supra* note 59.

judicial directives on jailhouse informants), justify appellate intervention in jury verdicts.⁶³ Nevertheless, the Supreme Court still regularly relies on the *Corbett* presumption to assume that juries follow judicial instructions, and the test for appellate intervention remains focused on the reasonableness of the jury's verdict.⁶⁴

Comments on jury biases and competence should be combined with new developments under jury law, notably the end of peremptory challenges, which recognized that jury composition may contribute to racial injustice.⁶⁵ Roach has commented on the risk of wrongful convictions and miscarriages of justice that flows from the lack of representation of Indigenous jurors due to challenge for cause, peremptory challenges, and systemic issues, including locality, provincial jury law, and the absence of Indigenous languages on juries.⁶⁶ While Canada recently abolished peremptory challenges, representativeness does not require mixed juries or any form of actual representation on the jury panel, which renders many of Roach's comments still very much alive.⁶⁷

While Roach proposed several reforms aimed at better representativeness, he did not discuss whether a right to opt out of jury trial could counteract the potential absence of proportional representativeness of a jury panel. Other scholars have attacked the existence of jury trials more explicitly. Berger has suggested, for example, that section 11(f) and *Turpin* are not exhaustive in discussing the rights of the accused and proposed that, given the advancement of social science, sections 7 and 11(d) are also involved.⁶⁸ For instance, Berger criticized compelled jury provisions as a breach of section 7 since they prevent the accused from making a meaningful choice about their defence. This would be especially true in cases where the theory of the defense departs from the common experiences of jurors, who may, in turn, be prone to rejecting the defense's arguments.⁶⁹ This paper was written in 2003, and social science has continued to evolve in the last 21 years. Nevertheless, most concerns in relation to the defence of the accused and the fairness of the trial persist, including the undue reliance on forensic evidence, racial biases, and the influence of pre-trial publicity.⁷⁰ In addition, Sankoff described the protection offered by section 11(f) as "ill-crafted" and "underinclusive" since it does not

63 *WH*, *supra* note 59 at para 29; *R v Gopie*, 2017 ONCA 728 at paras 43-46. See also *Biniaris*, *supra* note 59 at para 40. Hannah Freeman argued that the tendency to presume jurors competent in Canadian law is slowly shifting and pointed to *R v Sarrazin*, 2011 SCC 54 [*Sarrazin*], as an example: Hannah Freeman, "The Presumption of Jury Competence: Sarrazin's New Acknowledgement of Cognitive Biases and Its Implication for Counsel" (2015) 71:2 UT Fac L Rev 10. *Sarrazin*, however, dealt with an instruction that omitted to present the jury with a relevant included offence — not with the capacity of jurors to follow proper instructions. The decision nevertheless hints at jurors being influenced by the legal consequences of their verdict, at para 36.

64 See e.g. *R v Griffin*, 2009 SCC 28 at para 72; *R v Doxtator*, 2022 SCC 40; *R v Sinclair*, 2011 SCC 40 at paras 43-45 [*Sinclair*]; *WH*, *supra* note 59 at para 26.

65 See e.g. *Chouhan*, *supra* note 42; Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75" (2020) 98:2 Can Bar Rev 315; Roach, "Canadian Justice, Indigenous Injustice", *supra* note 42.

66 Roach, "Juries, Miscarriages of Justice and the Bill C-75", *supra* note 65.

67 *Kokopenace*, *supra* note 54; *Chouhan*, *supra* note 42 at paras 40, 47, 68-82, Moldaver and Brown JJ; *Chouhan*, *supra* note 42 at para 316, Côté J; *R v Azzi*, 2022 ONCA 366 (on the fact that stand aside power should not be used to increase diversity of a jury panel).

68 Berger, *supra* note 23 at 216-240.

69 *Ibid* at 233-236.

70 For example, compare *ibid* at 217-219, 225-232 and Curley et al, *supra* note 43.

offer a right to select a mode of trial.⁷¹ He further argued that section 473(1) leaves the individuals facing the most serious charges in Canada with the weakest capacity to select their mode of trial and added that section 473(1) amounts to a tactical advantage for the prosecution.⁷²

Both Sankoff and Berger pointed to *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, a decision ruling that pre-trial publicity is relevant to jury trials (as opposed to judge-alone trials), to make their point that compelled juries can be burdensome to the accused.⁷³ The recognition of partiality in the face of pre-trial publicity expressed in *Phillips* is concerning, especially in the era of technology and social media, where information is readily available to many potential jurors.⁷⁴ Nevertheless, *Phillips* is not the only indicator that jury trials may burden the accused. The case law noted other reasons for which a person may prefer to have their case heard by a judge alone. For instance, Fraser CJA recognized that the defence might wish for a judge-alone trial to ensure the trier of fact's understanding of complex cases or to mitigate biases stemming from race, pre-trial publicity, or other "strong feelings."⁷⁵ Chief Justice Fraser also argued that the written reasons of a judge are more easily appealable.⁷⁶ Relatedly, in *R v Beaudry*, Justice Fish indicated that because judges provide reasons that shed light on their reasoning, it is possible to find that the verdict is unreasonable even if supported by the record.⁷⁷ While a judge may also be biased, written judicial reasons provide some (imperfect) insight into their legal reasoning and biases.⁷⁸ In contrast, jurors cannot provide insights as to the deliberations leading to the verdict, even upon allegations that the deliberation left room for racist comments against one of the accused persons.⁷⁹

In addition, Sankoff has criticized one of the rationales behind the *Criminal Code*'s provisions for compelled jury trials, like section 473(1), namely that the public interest in prosecuting serious offences.⁸⁰ Berger has also decried public involvement and partiality from friendly judges as compelling justifications.⁸¹ Without disputing their claims, I would like to add to their comments. In *R v Chouhan*, Côté J reviewed the advantages of juries compared to judge-alone trials, namely excellence at fact-finding, good representation of the conscience of the community, protection of the accused against oppression and immoral laws, and public edu-

71 Peter Sankoff, "Rewriting the *Charter*: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process" (2008) 40:1 SCLR (2d) 349 at 361-363.

72 *Ibid* at 364-365.

73 *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at 110-111, where the majority indicated that there was no reason to think pre-trial publicity would influence a judge sitting alone (see also Cory J at 123, 171-172, 174), L'Heureux-Dubé J expressed more explicit concerns about juries at 122-123; Sankoff, *supra* note 71 at 363; Berger, *supra* note 23 at 230.

74 Sankoff, *supra* note 71 at 364.

75 Ng, *supra* note 18 at para 139, Fraser CJA (concurring). See also *R v Ruston*, 1991 CanLII 2758 at 7-8.

76 See also WH, *supra* note 59 at para 26.

77 *R v Beaudry*, 2007 SCC 5 at paras 91-98. Justice Fish's dissent in this case is now the state of the law on this matter: Sinclair, *supra* note 64 at paras 43-45. See also WH, *supra* note 59 at para 26.

78 See e.g. Curley et al, *supra* note 43 at 212.

79 *Criminal Code*, *supra* note 1, s 649; Pan, *supra* note 47.

80 Sankoff, *supra* note 71 at 362-363.

81 See Berger, *supra* note 23 at 246.

cation.⁸² Given the advancement of social scientific research on biases, the few studies available on juries' understanding of legal principles and compliance with judicial instructions, as well as the disadvantages of jury trials noted by the case law and academic commentaries, it is time to question whether juries have such benefits.

To the best of my knowledge, there is no evidence that juries are better at fact finding than judges. Moreover, representation under section 11(f) serves to achieve the jury's role as "conscience of the community." Yet, communities may vary in their composition, and the law does not require absolute representation of the community's diversity. The state of the law of representativeness thus adds concerns as to whether juries necessarily capture the "conscience of the community," if such a uniform "community conscience" even exists.⁸³ As for the argument of public education, the latter pertains to the community as opposed to the rights of the accused under section 11(f). It may be helpful in the grand scheme of things but the connection with section 11(f) is difficult to see. Finally, as pointed out by Nowlin, protection against unjust laws might be the only benefit of jury trials for the accused.⁸⁴ A question remains: Does this benefit suffice to maintain a tool that has proven to be detrimental to the accused?

Given the reasons casting doubt on the benefits of jury trials over judge-alone ones, it is time to consider the possibility that section 11(f) and section 473(1) create a constitutional prison depriving the accused of the "benefit" of a jury trial and rendering section 11(f) mostly ineffective.⁸⁵ Protecting the accused against all burdens would require a novel interpretation of section 11(f). This interpretation should be cognizant of the frailties of humans sitting on juries and should protect the right of the accused person to select another mode of trial.

III. Conclusion

Varenes may initially seem like a decision that has little to no constitutional effect due to its focus on section 473(1) of the *Criminal Code*. While it is true that parties did not invoke section 11(f) in *Varenes* (or *Lufiau*), this strategy invites broader discussions on the state of the law under section 11(f). The decision to avoid constitutional considerations may be an attempt to circumvent *R v Turpin*. Indeed, the Ontario Court of Appeal, in 1994, had indicated that given *Turpin* "there can be no constitutional objection to provisions in the *Code* respecting other offences which impose restrictions on when an accused can waive his right to a jury and elect another mode of trial."⁸⁶ This could explain why the parties' strategies in both *Lufiau*

82 *Chouhan*, *supra* note 42 at paras 250-254 (dissenting but not on this point). These have long been expressed by the Supreme Court. See e.g. *Sherratt*, *supra* note 54 at 523.

83 *Kokopenace*, *supra* note 54 at paras 2, 55-56, 59-66; *Chouhan*, *supra* note 42 at para 75, Moldaver & Brown JJ; see also Evelyn M Maeder & Susan Yamamoto, "Social Identity Theory in the Canadian Courtroom: Effects of Juror and Defendant Race" (2019) 61:4 Can J Corr 24 at 25-26.

84 Christopher Nowlin, "The Real Benefit of Trial by Jury for An Accused Person in Canada: A Constitutional Right to Jury Nullification" (2008) 58 CLQ 290 at 300-330.

85 The word "prison" refers to *Turpin*, *supra* note 6, citing *Adams v United States ex rel McCann*, 317 US 269 (1942) at 260: "To compel an accused to accept a jury trial when he or she considers a jury trial a burden rather than a benefit would appear, in Frankfurter J's words 'to imprison a man in his privileges and call it the Constitution.'"

86 *L E*, *supra* note 18 at 16. See also *R v Sobotiak*, 1994 ABCA 177 at paras 3-9 (ss 7, 11(f)); *Khan*, *supra* note 22 at paras 10-16 (ss 7, 11(d)); *Henderson*, *supra* note 22 at paras 3-6 (ss 7 and 11(d)); *Regis*, *supra* note 22 (ss 7, 11(d), 11(f)).

and *Vareennes* tried to subject section 473(1) to a standard of reasonableness instead of arguing that a non-jury trial should be part of section 11(f).⁸⁷

While I can hypothesize reasons behind the chosen strategy, by not arguing section 11(f), the parties painted themselves in a corner: one leaving a robust series of appellate cases concluding that abuse of process is the most logically applicable doctrine to deal with the issue at hand. In December 2024, *Vareennes* will ask the Supreme Court to go against a well-established trend of case law on discretionary powers. Since constitutional considerations were excluded from the trial and the appeal, there is doubt that the Court will be able to resolve this problem satisfactorily. The answer to the question of compelled juries' future in Canadian law is thus two-fold (and unfortunately disappointing). First, Parliament may be in a better position to provide a quick solution by reconsidering the value of section 473(1). Second, even if section 473(1) were removed from the *Code*, only the Court can revisit *Turpin* and expand the right to a jury as currently understood. Hopefully, *Vareennes* will restart the debate of the benefits of a jury trial.

⁸⁷ Berger, *supra* note 23 at 214.