

# Jeremy Bentham and Canadian Evidence Law: The Utilitarian Perspective on Mistrial Applications

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A L A N A H   J O S E Y \*

## ABSTRACT

This paper explores the tension between Canada's three evidence law goals, the search for truth, the protection of constitutional rights, and the proper administration of justice, by reference to the utilitarian philosophy and jurisprudential theory of Jeremy Bentham. At first glance, Bentham's theory and Canadian evidence law appear incompatible. Bentham's system of evidence is concerned primarily with the search for truth and the rectitude of decision. In this system, all relevant evidence is presumptively admissible. The exclusion of relevant evidence is contrary to the greatest good for the greatest number because exclusion frustrates the search for truth and risks false acquittals. Evidence can only be excluded from trial when exclusion is necessary to avoid a preponderant injustice, such as delay, expense, or vexation. The Canadian approach to the admission of evidence is less inclusionary. While all relevant evidence is presumptively admissible under Canadian law, the Canadian evidence system contains categorical exclusionary rules, Canadian trial judges possess the residual discretion to exclude evidence, and illegally obtained evidence may be excluded from trial pursuant to the *Charter*. This approach is justified on the grounds that the search for truth must be fair, constitutional, and consistent with the proper administration of justice.

This paper uses the example of the contemporary mistrial application to establish that Bentham's theory and Canadian law can be reconciled. While a successful mistrial application will bring an immediate end to the

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search for truth, Canadian law recognizes that the mistrial remedy may be necessary to avoid a greater injustice. Analysis of the mistrial application and Canadian evidence law goals from a Benthamite perspective demonstrates that Bentham's system of evidence and Canadian evidence law are reconcilable because the philosophy which underlies them is the same.

**Keywords:** evidence law; Jeremy Bentham; utilitarianism; admissibility; exclusion; search for truth; disclosure; full answer and defence; mistrial; section 24(2) *Charter*

## I. INTRODUCTION

Few legal scholars have impacted Canadian evidence law as profoundly as Jeremy Bentham. Bentham's principle that all relevant evidence is presumptively admissible is a fundamental tenet of the law of evidence. Under Canadian law, evidence must meet two basic requirements to be received at trial. First, it must be admissible in that the evidence is both relevant and not subject to an exclusionary rule. Second, the trial judge must not exercise their discretion to exclude the evidence on the grounds that its probative value is overborne by its prejudicial effect.<sup>1</sup> This analysis must always begin with the question of relevance. For Bentham, however, the analysis ultimately begins and ends with relevance. Bentham maintained that there is but "one mode of searching out the truth:...see everything that is to be seen; hear every body who is likely to know any thing about the matter."<sup>2</sup> The search for truth mandates that the grounds on which relevant evidence is properly excluded from trial are narrow and limited. Bentham ardently rejected categorical exclusionary rules such as the privilege against self-incrimination and the incapacity of certain witnesses to testify, considering these rules to be a "frequent source of impunity and encouragement of crime."<sup>3</sup> For Bentham, the truth-seeking function of the

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<sup>1</sup> Sidney N Lederman, Alan W Bryant, & Michelle K Fuerst, *Law of Evidence*, 4<sup>th</sup> edition (Markham: LexisNexis Canada Inc, 2014) at 51.

<sup>2</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, vol 5 (London: Hunt and Clarke, 1827) at 743 [*Rationale* vol 5].

<sup>3</sup> Jeremy Bentham, *A Treatise on Judicial Evidence: Extracted from the Manuscripts of Jeremy Bentham*, ed by Etienne Dumont (London: J W Paget, 1825) at 240 [*Treatise on Judicial Evidence*].

law is paramount and this requires a low threshold for admissibility.<sup>4</sup> So long as the evidence in question is relevant, Bentham says let it in.<sup>5</sup>

While historically influential, Bentham's radical inclusionary approach to the admissibility of evidence does not appear to reflect the current Canadian approach. It is now accepted that the goal of evidence law is threefold: to facilitate the search for truth, to maintain fairness to the accused, and to preserve the integrity of the justice system.<sup>6</sup> Section 24(2) of the *Canadian Charter of Rights and Freedoms*<sup>7</sup> [hereinafter "Charter"] provides that a court of competent jurisdiction may exclude illegally obtained evidence if its admission would bring the administration of justice into disrepute.<sup>8</sup> The search for truth must sometimes yield to countervailing principles which mandate the exclusion of relevant evidence.

The tension between the three competing evidence law goals has its ultimate and most significant expression in the mistrial remedy. A successful mistrial application will bring an immediate end to the search for truth by depriving the trier of fact of not only one singular piece of evidence, but of the case in its entirety. This paper will explore the tension between Canadian evidence law goals through a discussion of Bentham's jurisprudential theory and the contemporary mistrial application on the grounds of late Crown disclosure and the s. 7 *Charter* right to full answer and defence. Specifically, this paper will examine Bentham's utilitarian philosophy, his system of evidence, the contemporary mistrial application, and the utilitarian nature of Canadian evidence law goals. While Bentham's inclusionary approach to evidence appears to conflict with the Canadian approach, analysis of Bentham's theory and of the contemporary mistrial application demonstrates that Bentham and Canadian evidence law can be reconciled.

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<sup>4</sup> *Rationale* vol 5, *supra* note 2 at 303.

<sup>5</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, vol 4 (London: Hunt and Clarke, 1827) at 482 [*Rationale* vol 4].

<sup>6</sup> Lederman, Bryant & Fuerst, *supra* note 1 at 12-14.

<sup>7</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>8</sup> *Ibid*, s 24(2).

## II. PROBLEMS WITH ENGLISH EVIDENCE LAW: BENTHAM'S PERSPECTIVE

In order to explore the tension between competing evidence law goals from a Benthamite perspective, it is important to understand the legal context in which Bentham operated. Jeremy Bentham was born in London, England in 1748.<sup>9</sup> He completed much of his legal scholarship in the first decades of the nineteenth century, well before the creation of a regular police force.<sup>10</sup> At this time, evidence law was relatively new, highly fragmented, and full of exceptions. It was not a principled and consistent system of legislation and case law, but rather a product of *ad hoc* and often arbitrary judicial decision-making.<sup>11</sup> By the mid-nineteenth century, over 200 crimes were capital offences. As a result, juries were often reluctant to convict, and judges interpreted the law legalistically and developed categorical exclusionary rules to protect the accused from the severity of the substantive law.<sup>12</sup>

Bentham was one of the first scholars in English legal history to analyze the rules of evidence by reference to philosophy and logic.<sup>13</sup> He called English evidence law the 'technical fee-gathering system' whose obscure rules and formalities were repugnant to the ends of justice.<sup>14</sup> Evidence rules existed almost exclusively at common law, yet judges were not accountable for the decisions they rendered.<sup>15</sup> Bentham argued that judges and lawyers used their stations to produce expense and delay in legal proceedings in order to make better business for themselves. The augmentation of profit constituted the goal of the technical fee-gathering system, while diminution and resolution of crime was only a collateral concern.<sup>16</sup> For Bentham, this system was problematic because it was set up to further the financial and personal interests of a small professional class, rather than to further the

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<sup>9</sup> Silas Porter, *Jeremy Bentham* (1899) 7 Am Law 146 at 146.

<sup>10</sup> William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford: Stanford UP, 1985) at 2, 18.

<sup>11</sup> *Ibid* at 2, 21.

<sup>12</sup> *Ibid* at 21.

<sup>13</sup> *Ibid* at 22.

<sup>14</sup> *Rationale* vol 4, *supra* note 5 at 8.

<sup>15</sup> *Ibid* at 5, 7.

<sup>16</sup> *Ibid* at 16-19.

interests of society as a whole.<sup>17</sup> This point speaks both to Bentham's philosophy and to his solution to the technical fee-gathering system.

### III. THE PRINCIPLE OF UTILITY

In terms of Bentham's philosophy, he is first and foremost a utilitarian. Bentham maintained that man is governed by pain and pleasure, two sovereign masters which underlie the principle of utility. That principle dictates that all action and thought, as well as the extent to which action and thought are morally correct, are determined according to the desire to increase pleasure and to avoid pain.<sup>18</sup> In other words, the principle of utility approves or disapproves of every action according to its tendency to promote pleasure, good, and benefit, or to diminish pain, evil, and mischief.<sup>19</sup> Actions which result in the correct balance of pleasure and pain give rise to happiness, the ultimate end of utility. This understanding of happiness is not troubled by the mind-body dichotomy because pleasure is not limited to the physical. To achieve happiness, man must secure the optimal balance of pain and pleasure which may require foregoing immediate bodily gratification in order to obtain some later, greater benefit. While the drive to seek pleasure and to avoid pain is natural, for Bentham, it is importantly rational.<sup>20</sup>

Thus, the principle of utility is not solely concerned with the bodily or the immaterial: man has both a mind and a body, and the needs of each must be reconciled to the extent of their conflict in order to attain happiness. In a similar vein, man is not simply a natural being, but a civilized one. He is part of the original contract of society which provides that the community must guard the rights and interests of each individual who must in turn submit to the will of the collective.<sup>21</sup> This relates directly to the principle of utility. Bentham argued that an individual's action comports

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<sup>17</sup> Twining, *supra* note 10 at 41.

<sup>18</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 1999) at 14 [Principles of Morals].

<sup>19</sup> *Ibid* at 14-15.

<sup>20</sup> *Principles of Morals, supra* note 18 at 14: "The principle of utility recognizes this subjection [of man to pleasure and pain], and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law."

<sup>21</sup> Jeremy Bentham, *A Fragment on Government*, ed by F C Montague (Oxford: Clarendon Press, 1891) at 132 [*Fragment on Government*].

with utility when its tendency to augment the happiness of the community is greater than its tendency to diminish collective happiness.<sup>22</sup> Insofar as happiness is the end of utility, happiness is maximized when it arises from and inheres in society as a whole in accordance with its collective will. Utility in its ultimate and most complete expression therefore lies in the greatest happiness for the greatest number. However, Bentham warned that it is “vain to talk of the interest of the community, without understanding what is the interest of the individual.”<sup>23</sup> Just as man is comprised of both body and mind, society consists of the sum of its parts. The respective interests of each part must be reconciled. Man loses neither his agency nor his interests or rights after entering into the social contract, and so the pains and pleasures of each man must be weighed and balanced to give effect to the happiness of the whole. This means that the immediate interests of the few must be neglected if their fulfillment would give rise to disproportionately greater pain for the collective. The greatest happiness for the greatest number is only possible where the pains and pleasures of all citizens can be optimally balanced.

The principle of utility underlies not only Bentham’s philosophy, but his jurisprudential theory as well. He maintained that substantive law constitutes the creation of legal rights and obligations, where the former comprehends “all that is good and agreeable, everything that belongs to enjoyment and security,” while the latter comprehends “all that is painful and burdensome, everything that produces constraint and privation.”<sup>24</sup> For Bentham, it is the object of the substantive law to produce the happiness of the greatest possible number in the highest possible degree.<sup>25</sup> In the case of criminal law specifically, happiness is linked directly to the protection of society.<sup>26</sup> Where the application of substantive law is incapable of achieving this goal, the substantive law is repugnant to justice. Procedural law, including the law of evidence, accords with the principle of utility only to the extent that it facilitates the proper execution of the substantive law. For Bentham, this means that procedural rules must have reference to one of four ends: rectitude of decision, celerity, cheapness, or freedom from

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<sup>22</sup> *Principles of Morals*, *supra* note 18 at 15.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 1.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* at 244.

unnecessary impediments.<sup>27</sup> Where procedural rules obstruct the proper execution of the substantive law by hindering the correct decision or by causing expense or delay, those rules are false, repugnant to justice, and therefore inconsistent with utility.

The principle of utility establishes that the technical fee-gathering system is repugnant to justice. The *ad hoc* development of exclusionary rules designed both to shield the accused from the substantive law and to create delay and expense in favour of judges and lawyers is directly counter to the principle of utility. The technical fee-gathering system represents the very antithesis of the greatest happiness for the greatest number. As a solution, Bentham proposed a system of evidence law grounded firmly in utilitarianism and based on two fundamental principles: the law of evidence must originate in legislation, and the threshold for the admissibility of evidence is relevance.

#### IV. UTILITARIAN SOLUTION TO THE TECHNICAL FEE-GATHERING SYSTEM

##### A. The Enactment of an Evidence Code

For Bentham, a major concern with English common law exclusionary rules resided in their ostensible inconsistency with the will of the collective. As mentioned above, the social contract is constituted where men unite for the sake of convenience and protection, and agree in return to submit to a collective, uniform will. The responsibility of representing the collective will inheres in government, and it is both the right and the duty of that authority to make laws.<sup>28</sup> Insofar as legitimate government is the mouthpiece of the citizens, legislation is an expression of the collective will. On this basis, judge-made evidence law constitutes a usurpation of exclusive legislative authority.<sup>29</sup> For Bentham, the power of the legislature is paramount, and all other institutions should be curtailed and controlled. The proper role of the judiciary is to act as the cooperative agent of the legislature; judges are not to make the law, but to implement it in accordance with the collective will as expressed by statute.<sup>30</sup>

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<sup>27</sup> *Ibid* at 1-3.

<sup>28</sup> *Fragment on Government*, *supra* note 21 at 201.

<sup>29</sup> *Rationale* vol 5, *supra* note 2 at 741.

<sup>30</sup> Twining, *supra* note 10 at 24-25.

Thus, to be fully consistent with utility, both substantive and procedural law must originate in legislation as a manifestation of the collective will. This would remedy the severity of the English criminal law as well as limit the ability of lawyers and judges to develop false evidence rules for their own personal benefit. Bentham was adamant that the lenient administration of severe law must be replaced with strict enforcement of less stringent legislation.<sup>31</sup> However, to state that Bentham favoured an evidence code containing bright-line rules for the reception of evidence is to misrepresent him fundamentally. Bentham abhorred categorical exclusionary rules not simply because they are judge-made, but also because overly formal rules are inherently repugnant to justice. For example, Bentham maintained that “the path of precedent is the path of constant error...the decision pronounced will be almost always wrong and mischievous.”<sup>32</sup> Categorical rules and precedent which dictate preordained legal outcomes are too rigid to accord with utility.

To ensure that procedural law is capable of fulfilling its objective, Bentham called for the abolition of common law evidence rules and for the enactment of flexible guidelines to govern the reception of evidence at trial. Rather than imposing binding rules, Bentham argued that the legislature should provide instructions of a general nature to trial judges for the resolution of evidentiary issues on a case-by-case basis.<sup>33</sup> Bentham stated that:

[I]t is incumbent on legislative authority to leave, or rather to place, in the hands of the judicial, such a latitude of discretionary power, as shall enable it to form the estimate on both sides, and thence to draw the balance in each individual instance, on the occasion of each individual suit.<sup>34</sup>

Bentham perceived a risk in providing judges with too much discretion to determine the admissibility of evidence in individual cases. The English common law of evidence was itself a testament to the abuses attendant on broad judicial authority to admit or to exclude evidence. However, Bentham distinguished between arbitrary abuses of power and judicial discretion properly exercised, stating that the real danger lies in powers which judges “usurp in opposition rather than those which they receive from the law and

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<sup>31</sup> *Ibid* at 21.

<sup>32</sup> *Rationale* vol 4, *supra* note 5 at 513.

<sup>33</sup> Twining, *supra* note 10 at 34.

<sup>34</sup> *Rationale* vol 4, *supra* note 5 at 512.



which they can exercise under the eyes of the public.”<sup>35</sup> So long as judicial discretion is delegated by the legislature and exercised to fulfil the objective of the substantive law, that discretion accords with utility. Thus, the first matter to which the legislature must attend in terms of enacting an evidence code is to furnish judges with the requisite discretion to consider evidentiary issues according to the facts of each individual case.

Bentham conceived of this evidence code not as the beginning of a new system of procedure, but as a return to a natural system. For Bentham, the proper system of evidence law is not some unachievable utopian ideal of what evidence law should be. He noted that much of his proposed system existed independently from his own pen and paper, directly within “every man’s observation and experience: within the range of every man’s view; within the circle of every private man’s family.”<sup>36</sup> Bentham conceived of his system of evidence as a reflection of the domestic model of adjudication. Similar to the judge, the patriarch regulates and decides the disputes which arise between his family members.<sup>37</sup> To do so, the patriarch must hear evidence, but he pays no regard to rules and formalities respecting admissibility. For example, the privilege against self-incrimination has no place in this system. The silence of a child who is suspected of wrongdoing is tantamount to a confession; if he were innocent, he would naturally be inclined to offer relevant facts and information so as to establish his innocence.<sup>38</sup> The patriarch understands that allowing the child to remain silent and declining to treat his silence as evidence against him will yield an unreasonable decision as to the child’s guilt. For Bentham, this logic clearly extends to the criminal justice system. Reason dictates that guilt is the only inference which can be drawn from the accused’s silence. Both the domestic model of adjudication and Bentham’s system of procedure are based on utility, empiricism, and common-sense reasoning.<sup>39</sup> In order to arrive at the correct decision, the decision-maker must be provided with all relevant evidence on the matter to find out the truth. If there is to be one rule in Bentham’s natural system of procedure, other than the proposition that

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<sup>35</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 237.

<sup>36</sup> *Rationale* vol 5, *supra* note 2 at 740.

<sup>37</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 6.

<sup>38</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, Vol 3 (London: Hunt and Clarke, 1827) at 85-86 [*Rationale* vol 3].

<sup>39</sup> Twining, *supra* note 10 at 3.

there are to be no rules at all, it is a rule which provides that all relevant evidence is presumptively admissible.

### **B. Relevance: The Threshold of Admissibility**

The maxim that all relevant evidence is presumptively admissible is the crux of the system of procedure for which Bentham advocated. Bentham maintained that relevant evidence should not be excluded from consideration at trial because evidence is the basis of justice; to exclude evidence is to exclude justice itself.<sup>40</sup> The presiding judge or jury must be presented with all relevant information in order to arrive at a correct decision. When evidence is excluded from trial, the rectitude of decision is put at risk because the likelihood of a false decision increases substantially. Excluding evidence may render a conviction impossible even where a conviction is the correct outcome in fact.

For Bentham, the inherent risk of false acquittals demonstrates that exclusionary rules ultimately provide a license for the commission of crime. This is contrary to the principle of utility insofar as the goal of the substantive criminal law is to protect society. The technical fee-gathering system categorically excluded the testimony of women and children, although a woman's testimony could be heard if it was corroborated by another person.<sup>41</sup> Bentham asserted that excluding whole classes of witnesses amounts to allowing "every species of transgression in the presence of a witness of this class...[and] to require two witnesses for conviction is to allow every species of transgression in the presence of only one."<sup>42</sup> Exclusionary rules are therefore repugnant to justice because they frustrate rather than facilitate the proper execution of the substantive criminal law. This renders the substantive criminal law incapable of fulfilling its mandate to protect society whenever exclusionary rules apply.

Like Bentham's philosophy, his system of procedure is both rationalist and utilitarian. Justice for Bentham hinges on the rectitude of decision. A decision is only just to the extent that it is factually correct and therefore true. If exclusion of evidence perverts the rectitude of decision, a rule which mandates exclusion is a false rule. From a utilitarian perspective, evidence

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<sup>40</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, Vol 1 (London: Hunt and Clarke, 1827) at 1 [Rationale vol 1]; *Rationale vol 4*, *supra* note 5 at 490.

<sup>41</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 228.

<sup>42</sup> *Ibid.*

which is relevant to the issues to be decided at trial must be admitted so as to give effect to the substantive criminal law and its mandate. Only then is the greatest happiness for the greatest number possible. As a general rule, reason and utility demand that all of the available evidence relating to a case be admitted at trial. However, insofar as formal and rigid rules are inconsistent with utility, that rule must be sufficiently flexible. Bentham acknowledged that even relevant evidence may be properly excluded from trial when its admission would give rise to preponderant inconvenience which outweighs the benefits provided by its admission.<sup>43</sup> Exclusion is always an evil because it is contrary to the rectitude of decision and the search for truth, but it may constitute an evil that is inferior to another evil which should be avoided for the sake of utility.<sup>44</sup> If the mischief arising from the admission of evidence outweighs the injustice caused by a lack of evidence, the evidence in question should be excluded.<sup>45</sup>

### C. When Relevant Evidence is Properly Excluded

Bentham recommended a number of guidelines on exclusion to include in an evidence code. First and foremost, exclusion is always proper when the evidence is irrelevant or superfluous.<sup>46</sup> The admission of such evidence provides no benefit because it cannot facilitate the search for truth and only misleads or distracts. Thus, nothing is lost by its exclusion while time and expense are saved.<sup>47</sup> Where the proffered evidence is relevant to an issue to be decided at trial, it should only be excluded where its admission causes preponderant delay, expense, or vexation. The injustice which arises from any one of those three grounds must be sufficiently prejudicial so as to outweigh the risk of a false decision.<sup>48</sup>

Where delay is the evil to be avoided, Bentham noted that the presiding judge should consider whether evidence which has not yet been delivered is forthcoming such that it will be available for admission at trial within a reasonable amount of time. If the evidence is important to the accused's case, the presiding judge should endeavor to wait for its delivery.<sup>49</sup> On the

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<sup>43</sup> *Rationale* vol 4, *supra* note 5 at 482.

<sup>44</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 229.

<sup>45</sup> *Rationale* vol 1, *supra* note 40 at 31.

<sup>46</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 230.

<sup>47</sup> *Rationale* vol 4, *supra* note 5 at 571-572.

<sup>48</sup> *Ibid* at 482.

<sup>49</sup> *Ibid* at 568.

other hand, if delay will cause other pieces of evidence to be lost or put beyond the reach of the court in the interim, the forthcoming evidence should be excluded so that the trial may proceed. This is especially important where the evidence which stands to be lost is essential to an issue to be decided.<sup>50</sup>

Expense will justify exclusion in two cases only: (1) where the expense attendant on the delivery of evidence is not defrayed by the proffering party, but must fall without compensation on some third person, or (2) where the expense falls upon the defendant but the expense associated with delivery is “too great to be defensible on the score of punishment.”<sup>51</sup> Expense is a narrow ground for exclusion because the mischief it causes may be easily remedied where the party who proffers the evidence takes the expense of its delivery upon themselves.<sup>52</sup> Thus, evidence should generally be admitted where the proffering party is able to pay for any of the associated costs.

The third ground for exclusion, vexation, constitutes “useless fatigue and trouble which may be inflicted on different persons...who may occasionally be called to take active part in the judicial investigation.”<sup>53</sup> In terms of the vexation inflicted on the presiding judge or jury, evidence is properly excluded where it could produce hesitation or perplexity because this risks a false decision.<sup>54</sup> Evidence should also be excluded where its admission is prejudicial to the public interest or the interests of individuals who have no connection with the case, although this guideline is relaxed if the evidence is absolutely necessary to the case.<sup>55</sup> In terms of vexation inflicted on witnesses, minor inconveniences such as embarrassment are insufficient to warrant the exclusion of a witness’ testimony.<sup>56</sup> Even major inconveniences, such as testimony which incriminates the declarant or subjects them to a legal obligation will generally not constitute grounds for exclusion. In the case of legal obligations, Bentham maintained that the vexation inflicted on the witness is more than counterbalanced by the good that flows from the fulfilment of the substantive law which imposed the obligation.<sup>57</sup> While the presiding judge should be wary of testimony which

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<sup>50</sup> *Ibid* at 552, 555.

<sup>51</sup> *Rationale* vol 4, *supra* note 5 at 543.

<sup>52</sup> *Ibid* at 544.

<sup>53</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 232.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* at 234.

<sup>56</sup> *Ibid* at 233.

<sup>57</sup> *Rationale* vol 4, *supra* note 5 at 488.

incriminates the witness, the testimony may be admitted if it is necessary to the case. This is because the eventual condemnation of a criminal is directly within the purview of the law, and penal condemnation produces far more good than evil.<sup>58</sup> It seems that the inconvenience of travel constitutes one of the only types of vexation which readily warrants the exclusion of a witness' testimony. This is because the injustice caused by exclusion may be easily remedied by the delivery of affidavit evidence so that nothing is lost by the absence of *viva voce* evidence.<sup>59</sup>

Bentham's recommendations for the proper exclusion of evidence ultimately amount to a balancing test. Just as man must attempt to balance pleasurable and painful actions, the presiding judge must attempt to strike a balance between the inconveniences and advantages attendant on both admission and exclusion.<sup>60</sup> Where the balance lies depends entirely on the facts of the case. This exercise is similar in nature to the residual discretion of a trial judge at common law in Canada to exclude evidence where its probative value is outweighed by its prejudicial effect. Bentham's balancing test is also similar to the test adopted by the Supreme Court of Canada in *R v Grant*<sup>61</sup> [hereinafter "*Grant*"] for excluding illegally obtained evidence under s. 24(2) of the *Charter*. Both of these balancing tests consider the public interest, prejudice, and necessity, where the latter constitutes the importance of the evidence to a determination of the case on its merits. An important difference between Bentham's test and the *Grant* test lies in the focus of the prejudice in question. The *Grant* test is concerned with the severity of the breach of the accused's rights, while Bentham's test is concerned with the vexation that the admission of evidence may inflict on the judge, jury, or witness.<sup>62</sup> Given Bentham's position on the vexation which arises from subjecting a witness or the accused to legal obligations or self-incrimination, he may not support the exclusion of evidence under s. 24(2) of the *Charter*. Bentham is largely unsympathetic to those who have committed wrongdoing because their breaches of the substantive law are contrary to the principle of utility, while conviction, punishment, and deterrence are aimed at protecting society which accords with utility. For Bentham, the vexation caused by a breach of a criminal offender's rights

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<sup>58</sup> *Treatise on Judicial Evidence*, *supra* note 3 at 234.

<sup>59</sup> *Ibid* at 233.

<sup>60</sup> *Ibid* at 229.

<sup>61</sup> *R v Grant*, 2009 SCC 32 [*Grant*].

<sup>62</sup> *Ibid* at paras 70, 76, 79, 83.

would be counterbalanced by a conviction because this enhances the greatest happiness of the greatest number.

However, this does not necessarily mean that the principles contained in Bentham's system are irrelevant in contemporary times. As discussed above, Bentham maintained that the judicial discretion to exclude evidence is consistent with utility when that power is delegated from government. From a utilitarian perspective, Canada's Constitution represents the will of the collective which has chosen to recognize certain rights as fundamental. Affirming those rights accords with utility because, following the enactment of the *Charter*, substantive and procedural law are not exclusively concerned with the rectitude of decision and the protection of society. Together, the three goals of Canadian evidence law provide that the purpose of the law of evidence "is to promote the search for truth in a fair and constitutional manner."<sup>63</sup> Bentham acknowledged that the search for truth and the rectitude of decision might have to be sacrificed at times to avoid a greater injustice. Given the flexibility of Bentham's system and the utilitarian nature of Canadian evidence law, Bentham's system and Canadian law can be reconciled.

The remainder of this paper is dedicated to exploring the tension between Canadian evidence law goals from a Benthamite perspective. The analogy between Bentham's system of procedure and s. 24(2) of the *Charter* will not be pursued further. Bentham's jurisprudential theory on the exclusion of evidence mirrors more closely the contemporary mistrial application under s. 24(1) of the *Charter*. While Bentham's test for exclusion is flexible, the threshold is far more stringent than the *Grant* test. Bentham maintained that even if exclusion is justified based on delay, expense, or vexation, the presiding judge must find that all milder remedies are insufficient to cure the prejudice in question before the evidence may be properly excluded.<sup>64</sup> Bentham viewed the exclusion of evidence as wholly destructive to the search for truth and the rectitude of decision. Similarly, the contemporary mistrial application constitutes an abrupt and an

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<sup>63</sup> David Tanovich, "*R v Hart: A Welcome New Emphasis on Reliability and Admissibility*" (2014) 12 CR (7<sup>th</sup>) 298 at 298.

<sup>64</sup> *Rationale* vol 4, *supra* note 5 at 594. For example, the testimony of a witness who must travel long distances may be excluded so long as affidavit evidence can be tendered (see *Treatise on Judicial Evidence*, *supra* note 3 at 233). The inconvenience arising from delay caused by forthcoming evidence can be remedied by granting the accused bail (see *Rationale* vol 4, *supra* note 5 at 571).

immediate end to the search for truth which prevents the case from being tried on its merits. An analysis of the contemporary mistrial application on the grounds of late Crown disclosure will demonstrate that Canadian evidence law is philosophically consistent with Bentham's jurisprudential theory.

## V. MISTRIAL APPLICATIONS: THE DUTY TO DISCLOSE AND THE RIGHT TO FULL ANSWER AND DEFENCE

The importance that the *Charter* gives to the accused's rights and to the integrity of the justice system has had significant implications for the law of evidence. In *R v Stinchcombe*<sup>65</sup> [hereinafter "*Stinchcombe*"], the Supreme Court of Canada formally recognized the duty of the Crown to disclose to the accused all relevant, non-privileged evidence within its control. Information is relevant and subject to disclosure if it could reasonably be used by the accused to meet the Crown's case, to advance a defense, or otherwise to make a tactical decision which might affect the way in which the defence is conducted.<sup>66</sup> Evidence which meets the *Stinchcombe* standard must be disclosed regardless of whether it is inculpatory or exculpatory, even if the Crown does not intend to call the evidence at trial.<sup>67</sup> Unlike the privilege against self-incrimination, which may be seen as benefiting the accused while frustrating the search for truth, the Crown's duty to disclose safeguards both the accused's rights and the proper administration of justice in addition to facilitating the search for truth. Pre-trial disclosure ensures that the case can be adjudicated on its merits. It saves time and resources because both the Crown and the defence will be prepared to address the relevant issues. This prevents the need for adjournment and increases the number of guilty pleas, withdrawal of charges, and waiver of preliminary inquiries.<sup>68</sup> Crown disclosure also supports the accused's s. 7 *Charter* right to make full answer and defence which constitutes a pillar of criminal justice because it helps to ensure that the innocent are not convicted.<sup>69</sup>

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<sup>65</sup> *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CarswellAlta 192 [*Stinchcombe* cited to CarswellAlta].

<sup>66</sup> *R v Egger* [1993] 2 SCR 451, 141 AR 81 at para 20.

<sup>67</sup> *Stinchcombe*, *supra* note 65 at paras 29-33.

<sup>68</sup> *Ibid* at paras 10, 13.

<sup>69</sup> *Ibid* at para 17.

Insofar as the Crown's duty to disclose is capable of satisfying all three evidence law goals, Crown disclosure accords with the principle of utility because it gives rise to the greatest happiness of the greatest number. When the Crown fails to disclose evidence that meets the *Stinchcombe* standard, the search for truth, the proper administration of justice, and the accused's rights are all negatively affected. For example, if the Crown withholds exculpatory evidence, the accused's ability to make full answer and defence may be greatly frustrated. The integrity of the justice system is tarnished by the lack of trial fairness, and the case cannot be tried on its merits which risks a false decision. Non-disclosure by the Crown is therefore repugnant to justice and to utility. The implications of Crown disclosure for the three evidence law goals becomes more complicated when the Crown withholds pre-trial disclosure from the accused or discovers new evidence and then calls that evidence at trial. The court in *Stinchcombe* found that disclosure should occur before the accused is called upon to elect the trial mode or to plead as these are crucial steps in the criminal trial process which impact upon the accused's rights.<sup>70</sup> Discovering the strengths and weaknesses of the Crown's case through timely disclosure allows the accused to exercise their rights in a meaningful way. While late disclosure ensures that the case is tried on its merits, it forces the accused to develop new strategies and tactics *ad hoc* during the course of the trial. In other words, while late Crown disclosure still facilitates the search for truth, it may hinder trial fairness and the accused's ability to make full answer and defence.

The tension between the goals of evidence law which is occasioned by late Crown disclosure can be settled by the provision of a remedy pursuant to s. 24(1) of the *Charter*. Section 24(1) provides that anyone whose *Charter* rights have been "infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."<sup>71</sup> Similar to the exclusion of evidence in Bentham's system of evidence, a remedy that is properly granted under s. 24(1) will be discretionary and rendered on a case-by-case basis. When an appellate court is called upon to review Crown non-disclosure, it may order a new trial where it finds that the withheld information, if disclosed, could have affected the outcome at the court of first instance.<sup>72</sup> Where the Crown makes late disclosure and a remedy is sought at trial, it is open to the trial

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<sup>70</sup> *Ibid* at para 28.

<sup>71</sup> *Charter*, *supra* note 7, s 24(1).

<sup>72</sup> *Stinchcombe*, *supra* note 65 at para 45.



judge to grant an adjournment, to call witnesses, to recall witnesses for further cross-examination, or to grant a mistrial. The remedies of adjournment and calling or recalling witnesses will reconcile the tension between the competing evidence law goals. While the accused is entitled to receive a fair trial, the Supreme Court of Canada in *R v Bjelland*<sup>73</sup> held that the trial must be seen as fair from both the perspective of the accused and from the perspective of society.<sup>74</sup> This conception of fairness is fundamentally utilitarian. Fairness requires the satisfaction of the public interest in the search for truth while mandating the preservation of basic procedural fairness for the accused.<sup>75</sup> This comports with the proper administration of justice. Adjournment and calling or recalling witnesses, if sufficient to remedy the prejudice occasioned by the late Crown disclosure, are therefore consistent with utility insofar as these remedies maximize the happiness of the greatest number.

The mistrial remedy, however, is incapable of reconciling the tension between evidence law's competing goals. By its very nature, the mistrial remedy represents the triumph of constitutional rights and the integrity of the justice system over the search for truth. This imbalance may suggest that a successful mistrial application violates the principle of utility. However, the mistrial remedy may still accord with utility despite the fact that it can be viewed as furthering the interests of a few rather than the collective. The principle of utility is prospective and forward looking; its focus is on long-term happiness. This is why man must at times sacrifice immediate gratification in order to obtain a greater benefit at a later time. Society's interest in a determination of the case on its merits and the accused's interest in the protection of their *Charter* rights are usually focused on the instant case. This is a relatively narrow focus. The proper administration of justice, which contemplates both the search for truth and fairness to the accused, has a far broader focus which transcends the outcome of a particular case. The proper administration of justice must necessarily concern itself with the continuing, long-term integrity of the justice system. Happiness for society as a whole, including all future generations and all accused persons, is maximized when the justice system is beyond reproach. Thus, the principle of utility acknowledges that the search for truth may have to give way to the protection of constitutional rights and the proper

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<sup>73</sup> *R v Bjelland*, 2009 SCC 38.

<sup>74</sup> *Ibid* at para 22.

<sup>75</sup> *Ibid*.

administration of justice in order for society to achieve ultimate happiness. A successful mistrial application cannot reconcile the competing goals of evidence law, but if it is properly granted, it is consistent with utility.

## VI. THE TEST FOR MISTRIAL ON THE GROUNDS OF LATE CROWN DISCLOSURE

This raises the question: when is the mistrial remedy properly granted? First and foremost, a mistrial is not automatically warranted whenever the Crown makes late disclosure. Insofar as the Crown's duty to disclose is relatively broad in scope, evidence which is relevant and therefore subject to disclosure may only have a marginal value in relation to the ultimate issues to be decided at trial. The Crown may fail to disclose evidence which meets the *Stinchcombe* standard, yet timely disclosure of that evidence may have been incapable of affecting the overall fairness of the trial process.<sup>76</sup> To ground a successful mistrial application, the accused must establish that the late disclosure gave rise to a breach of the accused's right to full answer and defence under s. 7 of the *Charter* by proving unfairness or prejudice. Specifically, the accused must demonstrate that the late Crown disclosure substantially reduced their ability to meet the Crown's case, to advance a defence, or otherwise to make a decision which could have affected how the defence conducted their case.<sup>77</sup> It is insufficient for the accused to raise prejudice generally. The accused must outline in detail the specific prejudice inflicted on the defence's trial strategy, including what defence counsel would have done differently in terms of strategy if disclosure had been timely.<sup>78</sup> If the defence strategy would not have significantly differed but-for the late disclosure, a mistrial is not warranted because it cannot be said that substantial unfairness or prejudice was inflicted on the accused.

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<sup>76</sup> *R v Dixon* [1998] 1 SCR 244, 166 NSR (2d) 241 at para 23.

<sup>77</sup> *R v Selwanayagampillai* 2010 ONCJ 278 at para 8 [*Selwanayagampillai*]. This includes the decision to hold a preliminary inquiry, to choose an alternate trial mode or plea, to examine additional witnesses, or to examine existing witnesses differently.

<sup>78</sup> The British Columbia Court of Appeal in *R v Muller* 2013 BCCA 528 at para 54 found that it was not enough for defence counsel to submit that he would have shifted his defence strategy if he had received timely disclosure. Defence counsel should have articulated in detail the way in which his strategy would have shifted by establishing how his cross-examination of witnesses would have differed or if he would have recalled any Crown witnesses.

The principle of utility mandates that the remedy which is ordered to cure any prejudice inflicted on the accused be proportionate to the actual prejudice itself. Given the drastic nature of the mistrial remedy, substantial unfairness or prejudice is required for a successful mistrial application. Less substantial prejudice calls for less drastic remedies. The timeline of the late Crown disclosure can be helpful for evaluating the nature of the prejudice in question. For example, it is generally less prejudicial for late disclosure to take place before the trial commences or during the early stage of the prosecution's case. Late disclosure occurring after the defence has closed its case or otherwise near the end of the trial can be far more prejudicial.<sup>79</sup> If the prejudice in question relates to timing concerns such as the need for adequate time to prepare to address an important issue, an adjournment is the suitable remedy and a mistrial cannot be ordered. Similar to Bentham's test for the exclusion of evidence, less drastic remedies must always be considered before a mistrial can be properly granted. The Ontario Court of Appeal has held that the mistrial remedy can only be granted as a remedy of last resort and in the clearest of cases where no remedy short of that relief will adequately cure the actual prejudice occasioned.<sup>80</sup> As such, the presiding judge must consider and dismiss all alternative, reasonable methods of redressing the prejudice that has arisen due to the late Crown disclosure. If there are viable alternatives which allow for the trial to continue, a mistrial cannot be granted.<sup>81</sup>

In terms of the ultimate question to be answered, the Supreme Court of Canada has held that the trial judge must determine whether trial fairness or the right to full answer and defence has been impaired to such a degree that there is a real danger of substantial prejudice or a miscarriage of justice.<sup>82</sup> In making this determination, the trial judge must balance "injustice to the accused...against other relevant factors, such as the seriousness of the offence, protection of the public and bringing the guilty to justice."<sup>83</sup> Similar to Bentham's test for the exclusion of evidence, the contemporary mistrial test amounts to a balancing act. The costs associated with a successful mistrial application (the frustration of the search for truth) must be weighed against the benefits (protecting and affirming the accused's

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<sup>79</sup> *Selvanayagampillai*, *supra* note 77 at para 12.

<sup>80</sup> *R v Toutisanni* 2007 ONCA 773 at para 9.

<sup>81</sup> *Selvanayagampillai*, *supra* note 77 at para 17.

<sup>82</sup> *R v Burke*, 2002 SCC 55 at 75.

<sup>83</sup> *Ibid.*

rights as well as maintaining the integrity of the justice system). The presiding judge must determine where the balance lies, and this depends entirely on the facts of the case.<sup>84</sup>

Through the *Charter*, the collective will maintain that a person who is deprived of the ability to make full answer and defence is deprived of fundamental justice. They are entitled to a remedy. However, the collective will has only guaranteed a fair hearing; it has not guaranteed the most favourable procedures and remedies imaginable.<sup>85</sup> The proper remedy to be granted on a mistrial application must be proportional. It must adequately cure the prejudice in question, but it can do no more because such a windfall is repugnant to justice and to utility. What is fair and just is not evaluated from the perspective of the accused alone. Society has a substantial interest in obtaining a determination of guilt or innocence on the merits of the case. As Bentham would put it, this is because society has an interest in its own protection through the execution of the substantive criminal law. Accordingly, the threshold for a successful mistrial application must be high because the mistrial remedy prevents society from having its interest in the search for truth fulfilled. Unlike less drastic remedies, the mistrial remedy cannot reconcile the competing goals of Canadian evidence law. This does not mean that a mistrial runs afoul of the principle of utility. Indeed, a properly granted mistrial is fully consistent with utility. The principle of utility acknowledges that the search for truth must sometimes yield to competing evidence law goals in order to avoid greater injustice. The test for mistrial as espoused by the Supreme Court of Canada requires the trial judge to balance carefully the goals of Canadian evidence law as they relate to the instant case in order to determine which goal must prevail. This accords with the principle of utility because the ultimate objective of this balancing act is to secure the greatest happiness of the greatest number.

## VII. CONCLUSION

Bentham's principle of utility is not simply a metaphysical doctrine without practical application. It is also far more than an account of human

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<sup>84</sup> The approach described in this paper to mistrial applications on the grounds of late Crown disclosure and a breach of the right to full answer and defence has been followed consistently across Canadian jurisdictions. For recent examples, see *R v Sandeson* 2017 NSSC 196; *R v Folker* 2016 NLCA 1; *R v Akumu* 2017 BCSC 384.

<sup>85</sup> *R v O'Connor* [1995] 4 SCR 411, 103 CCC (3d) 1 at para 109.

behavior or sociology. The principle of utility transcends the boundary between disciplines and practices, relating to philosophy, psychology, political science, and law. This paper has explored the principle of utility as it relates to Bentham's system of evidence and the tension between Canada's evidence law goals. This has revealed the utilitarian underpinnings of evidence law in Canada. Together, the three goals of evidence law establish that the law's truth-seeking function must operate in a manner that is fair to the accused while preserving the integrity of the justice system. This is a fundamentally utilitarian idea. In accordance with its collective will, Canada has provided for the acknowledgment and protection of certain rights and freedoms. Following the enactment of the *Charter*, the rectitude of decision and the protection of society are not the only objectives of the law. The search for truth still bears fundamental importance for the law of evidence, but the law is concerned with more than the outcome of the instant case. The law also seeks to maintain the proper administration of justice. Legal decisions must respect the accused's rights and foster the public's long-term confidence in the justice system. These are the considerations which the presiding judge must keep in mind when faced with an evidentiary issue. The presiding judge must attempt to reconcile the competing evidence law goals to the extent of their conflict, although full reconciliation may not be possible, and one goal must necessarily yield to another. Striking the optimal balance will give rise to the greatest happiness for the greatest number.

This is the objective of the mistrial remedy. The mistrial remedy will be properly awarded on the grounds of late Crown disclosure where the prejudice inflicted on the accused's rights is so extreme that the proper administration of justice finds that the trial cannot proceed. This is fully consistent with utility and constitutes exactly what Bentham intended in his jurisprudential theory when he addressed the exclusion of relevant evidence. Bentham stated:

Let not in the light of evidence: not in every case, more than the light of heaven. Even evidence, even justice itself, like gold, may be bought too dear. It is always bought too dear, if bought at the expense of a preponderant injustice. Grant even that the dictates of justice were paramount to those of utility in its most comprehensive shape, – that the sacrifice of ends to means were an eligible sacrifice – and that the aphorism, *fiat justitia, ruat caelum*, instead of a rhetorical flourish, were an axiom of moral wisdom: even thus, supposing the choice to be between

injustice and injustice, the preferability of the less injustice to the greater would scarcely be contested.<sup>86</sup>

Under both Bentham's system of evidence and Canadian law, the frustration of the search for truth is always an evil. However, the principle of utility maintains that some evils may have to be tolerated in order to forego greater injustice. This justifies both the exclusion of evidence for Bentham and the mistrial remedy in Canadian law. Justice cannot be pursued at any and all costs. This is contrary to utility and therefore destructive to the greatest happiness of the greatest number.

The utilitarian philosophy which underpins both Bentham's system of evidence and Canadian evidence law highlights the substantial similarities between the two. While the specific rules and guidelines may differ, Bentham's system and Canadian law are philosophically far more similar than they are different. The differences arise largely from the time and space which separates Bentham from contemporary Canadian law. Bentham envisioned preponderant injustice as delay, expense, and vexation. He abhorred categorical exclusionary rules such as the privilege against self-incrimination and had little empathy for individuals accused of criminal wrongdoing. The Canadian legal and social context is crucially different from Bentham's era. Canada has both a *Charter* of rights and militarized police forces. The common law in Canada has long recognized the reliability dangers inherent in coerced police statements.<sup>87</sup> Canadian law is clear that compelling an individual to incriminate themselves at trial or at the police station is repugnant to the rectitude of decision and to justice and fairness.<sup>88</sup> It is beyond the scope of this paper to explore specifically and in detail the privilege against self-incrimination from a Benthamite perspective.<sup>89</sup>

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<sup>86</sup> *Rationale* vol 4, *supra* note 5 at 482.

<sup>87</sup> See e.g. *Prosko v R* (1922), 63 SCR 226, 66 DLR 340, which adopted the rule in *Ibrahim v R* [1914] All ER Rep 874, [1914] AC 599.

<sup>88</sup> See e.g. *R v Hebert* [1990] 2 SCR 151, 57 CCC (3d) 1; *R v Oickle* 2000 SCC 38.

<sup>89</sup> Bentham could likely tolerate the privilege against self-incrimination and the voluntary confession rule/the right to silence on a case-by-case basis. The privilege against self-incrimination, while an overriding maxim of Canadian criminal law, is also found in legislation and the *Charter* under the name 'principle against self-incrimination' (see *Canada Evidence Act*, RSC 1985, c C-5, s 5(2); and s 13 of the *Charter*). Under legislation and under the *Charter*, the principle against self-incrimination is far narrower than the general overriding privilege (see *R v Nedelcu* 2012 SCC 59). The right to silence enshrined under s. 7 of the *Charter* is functionally equivalent to the voluntary confessions rule, the former of which has been given a very narrow interpretation (see *R v Singh* 2007 SCC 48). The voluntary confessions rule is concerned with reliability,

Regardless of whether Bentham and Canadian law could agree on the utility of this privilege, it is clear that Bentham's system of evidence and Canadian evidence law can be reconciled to a substantial degree. The philosophic similarities between these systems are remarkable. Bentham's influence on Canadian evidence law therefore extends far beyond the principle that all relevant evidence is presumptively admissible. His utilitarian ideas permeate the philosophical principles which underlie Canadian evidence law and the three goals which it always seeks to fulfill. Like Bentham's system, Canadian evidence law earnestly pursues the greatest happiness for the greatest number. Canadian evidence law is therefore philosophically consistent with Bentham because it is consistent with the principle of utility.

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and by extension, with the rectitude of decision. This suggests that Bentham could accept the principle against self-incrimination and the right to silence/the voluntary confession rule.