THE STUFF THAT DREAMS ARE MADE OF! — CRIMINAL LAW AND THE CHARTER OF RIGHTS

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The practising criminal lawyer in general has to be quite happy with the application of the Canadian Charter of Rights and Freedoms *in criminal cases and the interpretation of the legal rights provisions of the* Charter. *The* Charter *has become everything that the* Canadian Bill of Rights *was not. This outcome was not necessarily predictable, and certainly not inevitable. The particular instance of section 8 — the unreasonable search and seizure prohibition — is used to illustrate how the courts could easily have interpreted the* Charter*'s legal rights in a fashion devoid of real meaning and real protections, the fate that befell the* Canadian Bill of Rights. *Several factors account for the different outcomes, including the difference in nature between the* Charter *and the* Bill of Rights, *but more importantly the difference in attitude and composition of the Supreme Court of Canada at the crucial time.*

En général, les juristes qui pratiquent en droit pénal peuvent se réjouir de l'application de la Charte canadienne des droits et libertés *dans les affaires de droit pénal et de l'interprétation des dispositions de la* Charte *portant sur les garanties juridiques, car la* Charte *a eu une portée plus grande que la* Déclaration canadienne des droits. *Ce résultat n'était pas nécessairement prévisible et certainement pas inévitable. A cet égard, les auteurs prennent comme exemple l'article 8, qui porte sur la protection contre les fouilles, les perquisitions et les saisies abusives, afin d'illustrer comment les tribunaux auraient pu facilement interpréter les garanties juridiques de la* Charte *en leur enlevant leur vraie signification et les protections véritables qu'elles accordent — sort qui a d'ailleurs été réservé à la* Déclaration. *Plusieurs facteurs expliquent les résultats différents auxquels on est arrivé, y compris la nature différente de ces deux textes et, surtout, le fait qu'à un moment crucial la composition de la Cour suprême du Canada a changé et que celle-ci a adopté une attitude différente.*

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In retrospect it is hard for the criminal law practitioner to do anything but rejoice at the impact of the *Canadian Charter of Rights and Freedoms*[1] on criminal law and the administration of criminal justice. It has been everything that could have been hoped for. It became everything the *Canadian Bill of Rights*[2] was not. It is fulfillment of expectations, where the *Bill of Rights* was continual disappointment. It brought forth elegant and literate judgments from the courts, whereas previously there had been only myopic, unprincipled, *ad hoc* decision-making. Numerous major aspects of criminal law, procedure, and evidence came to be measured against the standards embodied in the *Charter*. Matters found wanting have been remedied by declarations of statutory invalidity or other remedies appropriate to the particular problem. The appellate courts, following the lead of the Supreme Court of Canada, have applied the *Charter* in a robust and activist manner. But it was by no means obvious that such would become the *Charter* experience. In fact, a look back at the development of *Charter* jurisprudence will serve to remind how far we have come.[3]

In 1981 on the eve of the *Charter*'s coming into force, the following was written in the conclusion of an article about the possible impact of the *Charter* on legal rights in the criminal process: "Undoubtedly, the new Charter will be what the *judges* decide to make of it." (emphasis in original)[4]

Note that what was written was not simply that the *Charter* would be 'what the judges make of it', but what the judges *decide* to make of it. The point was that the future effectiveness of the *Charter* was not a matter of waiting to see how particular cases were decided, how things happened to work out as it were, so that after a hundred or so cases that, as a matter of chance, happened to raise *Charter* issues, and after a hundred or so decisions that, in accordance with various legal principles, happened to have outcomes this way or that, then an opinion could be reached whether this body of caselaw was good or bad, conservative or liberal, or anything else. Rather, there had to be a commitment in advance by the judiciary, especially the appellate courts, to a foundational view of the *Charter*, an *a priori* perception of it as an *instrumentality*, a *decision* about the *Charter* and what they would make of it, that preceded any particular cases, but informed the outcomes.

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[1] Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] R.S.C. 1985, App. III [hereinafter *Bill of Rights*].

[3] The various volumes of A.D. Gold, ANNUAL REVIEW OF CRIMINAL LAW (Toronto: Carswell), beginning in 1982 and extending to the present in *Part I: The Charter of Rights* provide a contemporaneous history of the growth and development of *Charter* jurisprudence. It is an interesting experience to revisit the early jurisprudence, especially that under the *Bill of Rights*, and contemplate not just how far we have come, but the alternative roads that beckoned back then.

[4] By the senior author in A.D. Gold, *The Legal Rights Provisions — A New Vision or Déjà Vu?* (1982) 4 SUP. CT. L. REV. 107 at 129.

In the case of the *Charter*, such a hoped-for decision would involve, in the criminal context, several interrelated ideas. First is the idea that a set of norms such as the *Charter* represents rules about, or limitations on, the State criminal law power, on the ways and means, methods and purposes by and for which the State can act against a citizen in its crime-fighting function. This idea recognizes that, at least in theory (though apparently not in reality as shown by the actual experience of totalitarian states) complete success against crime involves methods and rules that would create a state that is not worth living in. Everything that goes into the making of a democratic, and therefore worthwhile, state by its nature inevitably represents a limitation and hindrance on police and state powers and the ability to pursue criminals. Second is a related idea that recognizes the true beneficiaries of *Charter* rights: the citizenry, and not the criminal classes:

> While the most immediate and direct consequence of exclusion may be to benefit an individual defendant who might otherwise have been convicted, the goal of the exclusionary rule is "not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done." Rather, "[t]he defendant is at best an incidental beneficiary when exclusion occurs for the purpose, as the Supreme Court stated in *Stone* v. *Powell*, of 'removing the incentive' to disregard the Fourth Amendment so that 'the frequency of future violations will decrease.' Application of the exclusionary rule sometimes means that an apparently guilty defendant goes unpunished, but this occurs" to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions....The innocent and society are the principal beneficiaries of the exclusionary rule.[5]

In other words, the *Charter*'s legal rights are the rights of all citizens. Their scope will be delineated by courts in the context of criminal cases because those accused of crime have a powerful, albeit selfish, motive to litigate such issues. But in doing so those accused of crime really act as surrogate litigators for the entire community. Without them, the *Charter* rights might rest in peace on paper, never coming alive in the real world, because their lack of observance would go unchallenged by citizens too disinterested, or unable to afford, to litigate to vindicate *Charter* breaches. So persons accused of crime, acting in their own self-interest, but with the interests of all citizens at stake, become the vehicles for *Charter* litigation.

By way of contrast, exemplifying another possible foundational view, albeit a sterile one, was the attitude that courts adopted with regard to the *Bill of Rights*: that it was just another statute, neither intended nor effective to alter the tradition of Parliamentary supremacy. That statute did not contain the rules limiting the state vis-a-vis the citizenry, because

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[5] Y. Kamisar, *The Fourth Amendment and Its Exclusionary Rule*, Sept./Oct. 1991 THE CHAMPION 20 at 22 quoting R.B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering* (1973) 48 IND. L.J. 329 at 330-31.

there were no such rules in a state where Parliament was supreme. Criminal litigants pleading the *Bill of Rights* were just self-interested criminals, because there were no general rights of citizens to be delineated. It was obviously crucial whether a different view would be taken of the *Charter*.

Yet, as was written in 1981, optimists could say that at least there was reason to hope for a better future under the *Charter* than the forensic suffering experienced under the *Bill of Rights*:

> The government of the day has not hesitated to proclaim far and wide the beneficence that will accrue to the citizenry from the *Canadian Charter of Rights and Freedoms* now entrenched in our new constitution. As the Attorney General of Canada has said, the government's position is that "[t]he *Charter* will give citizens and their lawyers, a *first rate instrument* to ensure the protection of fundamental freedoms and rights."[6]
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> If the *Canadian Charter of Rights and Freedoms* ultimately turns out to be more effective than its predecessors — the common law and the *Canadian Bill of Rights* — as "an instrument to ensure the protection of fundamental rights," in the Attorney General's words, there [may be]....two areas in which the improvement will be found: the first in the fact of entrenchment; the second in the wording of its provisions and their improvement, if any, on the language of the *Canadian Bill of Rights*.
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> The importance of the fact of entrenchment for ultimate judicial utilization cannot be overstated. The lack of entrenched character to the *Canadian Bill of Rights* has had a pervading influence on judicial interpretation throughout the *Bill*'s case law. There was some slight movement, at least in the eyes of Chief Justice Laskin, whose description of the *Canadian Bill of Rights* evolved from one of a mere "statutory jurisdiction"[7] to that of "quasi-constitutional" instrument.[8] But essentially, the cases under the *Canadian Bill of Rights* reflect an incessant genuflection to parliamentary supremacy, producing what has been called a "widespread sense of illegitimacy" and an "explicit unwillingness"[9] towards applying the *Canadian Bill of Rights*, as if Parliament, when it passed that particular statute, was not in the same right mind that it is usually in when it passes all other statutes.[10]
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> > [T]his sense [of illegitimacy] seems to be unique when the court is asked to apply the *Bill of Rights*. There is not a comparable unease

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[6] J. Chretien, *The Effect of An Entrenched Charter of Rights on the Legal Profession*, Address to a Special Convocation of the Law Society of Upper Canada, Ottawa, 13 April 1981 (on the occasion of the Call to the Bar) at 3 (emphasis added).

[7] *Curr* v. *R.*, [1972] S.C.R. 889, 26 D.L.R. (3d) 603.

[8] *Hogan* v. *R.* (1974), [1975] 2 S.C.R. 574, 18 C.C.C. (2d) 65.

[9] J.D. Whyte, *Civil Liberties and the Courts* (1976) 83 QUEEN'S QUARTERLY 655, reproduced in J.D. Whyte & W.R. Lederman, CANADIAN CONSTITUTIONAL LAW: CASES, NOTES AND MATERIALS, 2nd ed. (Toronto: Butterworths, 1977) 5-6 at 5-9.

[10] The impotence of the *Bill of Rights* because of judicial hesitancy was frankly acknowledged in *R.* v. *Therens*, [1985] 1 S.C.R. 613 at 638-39, 18 D.L.R. (4th) 655 at 675-76.

> when the Court is vindicating individual rights through striking down the decisions of administrative tribunals. Nor is there a tradition of unease in striking down legislation on other grounds. Canadian courts for almost a century have been declaring as unconstitutional legislation which violates the allocation of powers in the *British North America Act*.[11]

> Entrenchment should finesse this attitude, as well as related concerns, such as whether a Bill of Rights is tainted by being anti-majoritarian (it is not)[12].

> The particular provisions of the *Canadian Charter of Rights and Freedoms* demonstrate some evolution from the *Canadian Bill of Rights*, and even from an earlier version of the *Charter*. There is variation in the degree of specificity. Some provisions enumerate general principles for which the Court will have to develop a defining jurisprudence. But none of the provisions is different in kind from those that commonly come before a court for interpretation, and some assistance may be derived from precedents under the *Canadian Bill of Rights* or even the American Bill of Rights.

> In fact, a judge applying a statute is rarely a mere mechanic measuring a straight line with a ruler. Words are not inches. The provisions guaranteeing "legal rights" in the *Charter* appear to pose no unique or insurmountable difficulties, once one puts aside the dogma of parliamentary supremacy and replaces it with an acceptance of the gradual development of a coherent jurisprudence giving content and definition to each of these rights.[13]

In other words, the entrenched nature of the *Charter* and of its language, which in some cases echoed famous *Bill of Rights* provisions familiar to civil libertarians, provided some basis for at least the hopeful possibility that the judiciary would "decide" differently about the *Charter* than it did about the *Bill of Rights*.

Most relevant to the future well-being of the *Charter* was the primary judicial decision-maker: the Supreme Court of Canada. On that front too, matters were changing, and in the right direction. In a paper delivered in 1985 at Proceedings of the Supreme Court of Canada Conference, the Court's developments in criminal law matters were summarized as follows:

> Looking back to 1967, a recent historical study of the Supreme Court of Canada concluded with regard to the public perception of the Court in some quarters in that year, that the "Supreme Court appeared weak and ineffective."[14] Furthermore, the "concern was to some extent (though

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[11] Whyte, *supra*, note 9 at 5-9. *See, e.g., R.* v. *Saxell* (1980), 33 O.R. (2d) 78 at 83, 59 C.C.C. (2d) 176 at 180-81 (C.A.). *See also Chapter III: The Entrenchment Question and the Canadian Bill of Rights* in W.S. Tarnopolsky, THE CANADIAN BILL OF RIGHTS (Toronto: Carswell, 1966) at 60 *ff.*

[12] Whyte, *supra*, note 9 at 5-11 to 5-12. In any event, the "legislation override" provided for in s. 33 of the *Charter* should put an end to any American-style debates about the "legitimacy" of judicial review in this context.

[13] Gold, *supra*, note 4 at 107-10.

[14] J.G. Snell & F. Vaughan, THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION (Toronto: The Osgoode Society, 1985) at 226.

by no means exclusively) the alleged failure of the Court in prominent criminal cases".[15] If that description of public perception was true in 1967.... it only serves to emphasize how times have changed, how perceptions have changed. The Court's treatment of criminal cases in recent years has been generally acknowledged, regardless of one's view of the merits of the outcome in any particular case, as thoughtful, intellectual, and worthy of the highest court in a modern 20th century democracy.

At least three specific factors can be identified with some confidence by way of explanation for this change in the last two decades. First is the nature of the appointments to the court during that time.

It has already been elsewhere documented, the extent to which the appointments in the last decade have either studied law at the graduate level or, a related characteristic, taught law....The effect of such appointments is obvious.

Secondly, *stare decisis* is no longer an absolute with the Court: *Harrison* v. *Carswell*. The justices are willing to re-consider previous decisions and precedents. *Stare decisis* may provide certainty; it also creates inflexibility and the perpetuation of error if slavishly applied. With the rejection of the doctrine the Court cast off another fetter and some of its most applauded decisions have been reversals of previous precedent; for example, *Paquette* v. *The Queen*, and *Regina* v. *Ancio*. *Paquette* involved a successful appeal by the accused where the Court held that duress may negative the common intent required for liability as a party under s. 21(2) of the *Criminal Code*. Overruled was the case of *Dunbar* v. *The King*. *Ancio* involved a charge of attempted murder, and it was held that attempted murder requires the specific intent to kill and nothing less will suffice as *mens rea*, overruling *Lajoie* v. *The Queen*.

Thirdly, and this perhaps follows from the first two matters to some extent, is the overthrow of certain self-imposed limitations on the sources that may be consulted in the course of deciding a case. English authorities are no longer given automatic reverence (for example, *R.* v. *Sang*, was pejoratively rejected by Estey J. in *Amato* v. *The Queen*), but rather decisions from literally around the world will be consulted if relevant (see, for example, *Regina* v. *Gardiner*). It is the merits of a case or argument that are considered, not merely the formal characteristics. Similarly, non-judicial materials, such as reports of the Law Reform Commission, academic writings, even Parliamentary debates and explanatory notes are being consulted with regularity.

Judgments in recent years, as a result of these developments, in many cases have become global and exhaustive examinations of areas of criminal law, almost like chapters in a criminal law text. The first of these modern-era judgments is probably *Regina* v. *Sault Ste-Marie*, which considered in detail the requirement of *mens rea* in crimes, and the degree of fault required in regulatory offences. In that landmark decision, the Court unanimously accepted as the law of Canada in the area of so-called "statutory" or "regulatory" offences, the "half-way house" between absolute liability and full *mens rea* comprised of the defence of due diligence, or put another way, liability for fault based

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[15] *Ibid.* at 227.

> on negligence. As was said elsewhere "[t]he Supreme Court as a whole emerges in *Sault Ste-Marie* as a mature and sophisticated institution[16]".[17]

The following conclusion was also offered:

> On the whole, the judgments written during the 1970s were simply of higher quality than earlier judgments. The justices have demonstrated a greater (though by no means complete) willingness to come to grips with the basic issues and principles involved in cases, rather than limiting themselves to technicalities or to superficial issues. Paul Weiler, who was so critical of the Court's judicial craftsmanship during the 1960s, was far more positive about the Supreme Court by 1979, pointing particularly to the improvement in 'the entire intellectual tone of the court'....[S]ome justices....have given every indication that they are aware of the creative role of the judicial function in the Supreme Court. There is a greater sense of intellectual self-confidence among the justices.[18]

Thus, the Supreme Court of Canada as an institution certainly seemed ready and able to make the right decision about the *Charter*. Was it willing as well? That same Conference certainly provided cogent evidence on that issue. Chief Justice Dickson in his address stated:

> The challenge of the *Charter* lies in the novelty of the responsibilities attendant to its interpretation. Creativity, imagination; open, clear and comprehensive discussion of policies and values; new types of sources and evidence — all of these are the vital ingredients for an understanding of the purposes of the provisions of the *Charter* and the document as a whole. And, as the Court has emphasized in the early cases under the *Charter*, it is these purposes which must provide the basis of *Charter* interpretation. The waters are uncharted and the Court will have to navigate with courage, open-mindedness and a willingness to challenge that which stands in the way of the *Charter*'s realization, while at the same time remaining ever diligent to the preservation and maintenance of our most valued traditions and principles.
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> I expect there will be a growing reliance by the Court on the writings of academics in law and other fields as the issues we face become more complex and the implications of our decisions more far-reaching. At the present we rely, and rely heavily on academic writing. Benjamin Cardozo once referred to the "treasures buried in the law reviews" and I agree with him that there are indeed many treasures to be found there, as well as in books, conferences and edited collections. My impression is that legal academics across Canada are thinking deeply and writing superbly about the *Charter*. I might add that creative and imaginative theoretical pieces on *Charter* issues which have not yet been the subject of extensive litigation are especially useful and to be encouraged.[19]

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[16] *Ibid.* at 244 (footnotes omitted).

[17] By the senior author in A.D. Gold, *The Supreme Court of Canada and Criminal Law* in G.-A. Beaudoin, ed., THE SUPREME COURT OF CANADA, PROCEEDINGS OF THE OCTOBER 1985 CONFERENCE (Quebec: Yvon Blais, 1986) at 139-43.

[18] *Ibid.* at 240-41.

[19] B. Dickson C.J.C., *Address of the Chief Justice of Canada* in G.-A. Beaudoin, ed., *supra*, note 17 at 382.

So, the battlefield was ready. The *Charter*, being entrenched, was an operationally appropriate mechanism from which to bring forth a regime of meaningful fundamental rights. Its language contained the phrases from which fundamental rights could be grown. The Supreme Court of Canada in all its aspects seemed institutionally competent to develop and administer a regime of fundamental rights under the *Charter*. Slowly criminal cases wound their way to that Court. It became apparent that the *Charter* "battlefield" had several "fronts", all of which represented this same fundamental struggle.

One "debate" was over the degree of change the *Charter* represented. The anti-*Charter* forces argued that the *Charter*, upon its adoption, was not intended to revolutionize Canadian law, but to codify the status quo.[20] This was an obvious echo from *Bill of Rights* cases. Another front on the same battlefield was the debate over the issue of Americanization: the anti-*Charter* forces argued that the *Charter* was not intended to Americanize Canadian criminal law. It was especially in the search and seizure context that these battles were joined and matters moved towards a "showdown".

Search and seizure in Canada before the advent of the *Charter* was a non-issue. Occasional motions to quash search warrants and obtain the return of seized property, generally where a criminal charge was not laid, were certainly not unheard of,[21] but these motions were far less frequent than the general inadequacy of search warrants deserved.[22] Canada's rules of evidence based on the common law's lack of concern with the source of proffered evidence made the adequacy of search warrants, not to mention the legality of warrantless searches or seizures, essentially of theoretical interest.

Even when the *Charter* first appeared on the legal horizon, the prospects for a serious and comprehensive search and seizure protection seemed remote. Originally, the search and seizure provision, section 8 in the Proposed Constitutional Resolution of October 1980, guaranteed:

> Everyone has the right not to be subjected to search or seizure except on grounds, and in accordance with procedures, established by law.

This wording for the search and seizure provision was essentially tautological: search procedures not forbidden by law were all that could be safely taken to be guaranteed. The present wording was amended by the Special Joint Committee on 27 January 1981, so that section 8 thereafter read:

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[20] *R.* v. *Altseimer* (1982), 38 O.R. (2d) 783 at 788, 1 C.C.C. (3d) 7 at 13 (C.A.).

[21] *See Re Chapman and the Queen* (1984), 46 O.R. (2d) 65, 9 D.L.R. (4th) 244 (C.A.); *Bergeron* v. *Deschamps* (1977), [1978] 1 S.C.R. 243, 33 C.C.C. (2d) 461.

[22] *See* Law Reform Commission of Canada, *The Issuance of Search Warrants* (Study Paper) (Ottawa: Supply & Services Canada, 1980), finding over 50% of search warrants examined were defective.

> Everyone has the right to be secure against unreasonable search or seizure.[23]

This is obviously a qualitatively superior guarantee, but what the courts would make of it remained to be seen, For several reasons, pessimism continued to be the reasonable attitude towards any prospect of a substantial and vibrant judicial approach to the guarantee in section 8.

First, no search or seizure guarantee or similar protection had appeared in the impotent predecessor, the *Bill of Rights*. This lack of previous recognition arguably signalled the absence of any such guarantee as part of our democratic heritage. Further, following along this conclusion, any *Charter* provisions dealing with this subject might be narrowly interpreted by the courts and thus be of limited effectiveness.

Secondly, a difference in wording from the American Fourth Amendment provided a facile rationalization for ignoring American precedents, which might otherwise be useful in establishing a potent and effective interpretation of section 8. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[24]

The first, or "reasonableness clause", corresponds to our section 8. But the second, or "warrant clause", was not carried over to section 8. Thus, in *R.* v. *Hamill*[25] this fact was relied on in the course of a judgment that interpreted section 8 in a sterile and nugatory fashion. The court said:

> It is significant that s. 8....includes no "warrant clause"....Had the Charter intended the prior issuance of a warrant to be a condition of a reasonable search, it would have said so.[26]

Hamill is considered further below, but this one portion of the judgment is a *non sequitur* based on a serious misunderstanding of the American Fourth Amendment.

In fact, the difference in wording is of no moment whatsoever and quite understandable. The Fourth Amendment's "warrant clause" does not govern the question of when a warrant is essential to satisfy the Fourth Amendment. That issue turns on an interpretation of the "reasonableness clause". The "warrant clause" merely specifies certain

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[23] Special Joint Committee on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 46: 8-9 (27 January 1981).

[24] U.S. CONST. amend. IV.

[25] (1984), 13 D.L.R. (4th) 275, 41 C.R. (3d) 123 (B.C.C.A.) [hereinafter *Hamill* cited to C.R.].

[26] *Ibid.* at 140-41.

requirements if and when a warrant is utilized: probable cause, oath or affirmation, and specificity. In Canadian law, the general warrant provisions in criminal matters, section 443 and following of the *Criminal Code*,[27] already contain those requirements, and thus coincide with the contents of the "warrant clause". Thus, the "warrant clause" was unnecessary to adopt in section 8 because its provisions were already generally understood as the law of the land. As well, a general guarantee of reasonableness could almost certainly be taken to require, having regard to the contents of section 443 and following, the contents of the "warrant clause" as the requirements of warrants generally. However, only time would tell if this reasoning would prevail and, as illustrated by *Hamill*, there was little objective basis for optimism.

Finally, and most importantly, section 8 of the *Charter* had to overcome a strong sentiment, bordering on prejudice, regarding American search and seizure law. This sentiment is a mix of simple anti-Americanism[28] and an attitude that can be described as anti-exclusionary rule. The exclusion of evidence and the freeing of dangerous criminals because of technicalities is a widespread image of the American justice system, created to no little extent by political opportunists. Whatever the reality, and whatever the merits of the exclusionary rule debate, search and seizure law has a bad name because of these sentiments. In *R.* v. *Carter*,[29] the fact that an argument was based on American precedents was virtually single-handedly held sufficient to merit its rejection. In *R.* v. *L.A.R.*,[30] a vitriolic and scathing denunciation of American doctrine appears for those who enjoy such reading. Even in *R.* v. *Rao*,[31] a case that can fairly be described as sympathetic to American doctrine in this area and positive in its treatment of section 8, American search and seizure precedent is described as "almost overwhelming" in "volume and complexity".[32] Later, the case law under the Fourth Amendment is described as "replete with refined distinctions which....ought to be avoided in developing our jurisprudence under section 8 of the Charter."[33] This temperate caution is, of course, quite reasonable in light of significant controversies over Fourth Amendment doctrine that exist even within the United States. But it is perhaps also fair to point out that in Canada other factors will go a long way to lessening the opportunities for "refined distinctions" under section 8. There is the

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[27] R.C.S. 1985, c. C-46, s. 287.

[28] *See* Anon., *The Use of American Legal Literature* (1943) 21 CAN. BAR REV. 57. *See generally* D.V. MacDougall, *Canadian Legal Identity and American Influences* (1991) 15 LEGAL STUD. F. 15 at fns 72-96 and accompanying text for references and examinations of the use of American authorities by Canadian courts at various times.

[29] (1982), 39 O.R. (2d) 439, 31 C.R. (3d) 76 (C.A.).

[30] (1983), 4 D.L.R. (4th) 720, 9 C.C.C. (3d) 144 (Man. Q.B.).

[31] (1984), 46 O.R. (2d) 80, 40 C.R. (3d) 1 (C.A.) [hereinafter *Rao* cited to C.R.].

[32] *Ibid.* at 24.

[33] *Ibid.* at 29.

considerably smaller volume of cases, the significantly lesser number of courts, as well as the fact that in Canada criminal jurisdiction is national so that there are not fifty state laboratories each mixing their own homebrew of search and seizure doctrine.

In any event, it was for these reasons that the defence bar, along with those others who believe that catching criminals is not the only reason for a society to exist, and that laudable ends do not justify any and all means, awaited with considerable trepidation the first judicial enunciation of section 8 doctrine. As if reflecting the fundamental importance of section 8, the Supreme Court of Canada's first criminal *Charter* decision was a search and seizure case under section 8.[34] It was a pivotal case. The outcome would signal the Supreme Court of Canada's attitude and approach to the *Charter* generally, and section 8 specifically.

That case was *Hunter* v. *Southam Inc.*,[35] which was decided on 17 September 1984. In an ironic twist of fate, as if to remind how precarious are developments in this context, it was preceded by a decision that was as dismal as *Southam Inc.* was brilliant. *Hamill*, already mentioned, was decided on 4 September 1984. For those 13 days, *Hamill* had the potential, if generally adopted, to create a judicial view of section 8 that was so sterile and impotent as to make the previous *Bill of Rights* appear by comparison as positively pivotal as the presumption of innocence. Since *Hamill* is now a mere historical curiosity, it need not be described in detail. It is sufficient to say that *Hamill*, in upholding drug searches under writs of assistance as valid, held that section 8 contained no warrant requirement; in fact, it had no procedural component whatsoever. Further, the onus was on an accused to prove the unreasonableness of a given search or seizure, and if such was pursuant to a legislative authority, regardless of how barren in procedural protection it was, such proof was going to be most difficult indeed.

The following passage from *Hamill* is illustrative:

> It is no doubt true that the law in Canada and in other common law jurisdictions has generally required a search warrant for a legal search of premises and that has been regarded as the most effective protection against unreasonable searches. It does not follow that legislation which authorizes searches without warrant is in breach of s. 8. What s. 8 forbids is an unreasonable search....Section 8 says nothing as to the procedures to be required in order to prevent unreasonable searches. That remains a matter for Parliament. Specifically, it is for Parliament to decide whether the initial determination of the existence of reasonable grounds is to be made by the judicial or quasi-judicial or administrative personage who has power to issue search warrants or by the police officer. It is for Parliament to decide what exceptions should be made to the general rule requiring search warrants. For courts to lay down a condition that

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[34] The text that follows is based somewhat on a paper by A.D. Gold, *Search and Seizure in Canada* (Delivered at the Stanford Lectures, Stanford University, California, August 1986).

[35] [1984] 2 S.C.R. 145, 41 C.R. (3d) 97 [hereinafter *Southam Inc.* cited to C.R.].

> a search warrant must be obtained unless it is not practicable to do so is....to exercise a jurisdiction which the Charter has not removed from Parliament.[36]

This was *déjà vu*; this was how courts talked in the era of the *Bill of Rights*. It only lasted thirteen days because in *Southam Inc.* the unanimous Supreme Court of Canada did the very things that *Hamill* claimed were forbidden, and thereby breathed strong and healthy life into section 8.

Southam Inc. provided a general search warrant model that was held to be required by section 8, and stressed the primacy of the search with a warrant. Borrowing from the American experience, the Court made privacy and its protection a core value of section 8. In the United States, this took several decisions and forty years.[37] Benefiting from that experience, our Supreme Court was able to reach that result in its first effort. Rejected by the Court was the narrow and unfruitful English view that concerns itself only with the vindication of trespasses and property interests.[38] As in the United States, therefore, a "search" under section 8 can be defined as a governmental infringement of a reasonable/legitimate expectation of privacy; a "seizure" is an interference with possessory interests.

The fundamental paradigm for search and seizure in Canada, imported from the United States, became that of search with warrant. As held in *Southam Inc.*, a search or seizure under section 8 of the *Charter* to be *reasonable* must be *prima facie* (1) authorized in advance by a warrant; (2) issued by a neutral officer capable of acting judicially; (3) founded upon evidence under oath only upon a showing of credibly-based probability that an offence has been committed and there is evidence that will be found at the location to be searched.[39]

The importance of American case law in considering the rights guaranteed under section 8 of the *Charter* was put beyond doubt by the Supreme Court of Canada in *Southam Inc.* Dickson J. (as he then was) for the Court expressly justified the relevance of the American experience before proceeding to extensively examine and adopt American doctrine:

> [T]he crux of this case is the meaning to be given to the term "unreasonable" in the s. 8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in

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[36] *Supra*, note 25 at 135.

[37] *Katz* v. *U.S.*, 389 U.S. 347 (1967), overruling *Olmstead* v. *U.S.*, 277 U.S. 438 (1928) [hereinafter *Katz*].

[38] *Malone* v. *Metropolitan Police Commissioner*, [1979] 1 Ch. 344, [1979] 2 ALL E.R. 620.

[39] As well, the law authorizing the warrant and the manner of execution must be reasonable. *See also R.* v. *Dyment*, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348; *R.* v. *Kokesch* (1990), 61 C.C.C. (3d) 207, 1 C.R. (4th) 62 (S.C.C.) [hereinafter *Kokesch* cited to C.R.].

> the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices, from which to draw out the nature of the interests protected by that amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.[40]

The phrase "unreasonable search and seizure" in the years prior to the adoption of the *Charter*, developed a core meaning as a well-known phrase, like "cruel and unusual punishment", and it seems most unreasonable to suggest that the use of that very phrase in the *Charter* was made in ignorance of this reality. Surely, as the Court says in *Southam Inc.*, it is more reasonable to suppose the phrase was adopted with its gloss and history. As well, as noted above, *Southam Inc.* expressly adopts the *Katz* decision and the central aspects of Fourth Amendment doctrine. After *Southam Inc.* the relevance of American case law to any discussion of section 8 doctrine is no longer arguable.

Southam Inc. represented a turning point and a bellweather. It signalled that the primary judical interpreter of the *Charter*, the Supreme Court of Canada, intended to administer a regime of fundamental rights and freedoms, and to do so from the perspective of all citizens. It would not make the mistake of thinking that the *Charter* was merely about the rights of criminals. After *Southam Inc.*, the Court never looked back.

In fairness, another source of support for a vigorous *Charter* should be acknowledged. In the Ontario Court of Appeal, MacKinnon A.C.J.O. initially, and Martin J.A. especially were instrumental in several decisions that made positive contributions to *Charter* jurisprudence. Prior to *Southam Inc.*, MacKinnon A.C.J.O. in an early case[41] and Martin J.A. in several cases dealing with subsections 11(b) (unreasonable delay) and 11(d) (fair trial and presumption of innocence)[42] showed absolutely no aversion to American jurisprudence, nor any inclination to treat the *Charter* as little more than the *Bill of Rights* in disguise. Even Martin J.A.'s search and seizure decisions under section 8 substantially

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[40] *Supra*, note 35 at 110.

[41] *Re Southam Inc. and the Queen* (No. 1) (1983), 41 O.R. (2d) 113, 146 D.L.R. (3d) 408 (C.A.); MacKinnon A.C.J.O. presided on the only appeal decision that ever excluded, in pre-*Charter* days, derivative evidence from a wiretap: *R.* v. *Braga* (1982), 26 C.R. (3d) 269 (Ont. C.A.). The senior author was counsel for the accused in that case. *See also* the later case of *R.* v. *Duguay* (1985), 50 O.R. (2d) 375, 18 D.L.R. (4th) 32 (C.A.), *aff'd* [1989] 1 S.C.R. 93, 67 C.R. (3d) 252 where MacKinnon A.C.J.O. (Martin J.A. concurring) debated the merits of the exclusionary rule with Zuber J.A. dissenting.

[42] *R.* v. *Antoine*, 148 D.L.R. (3d) 149, 34 C.R. (3d) 136 (Ont. C.A.); *R.* v. *Beason*, 1 D.L.R. (4th) 218, 36 C.R. (3d) 73 (Ont. C.A.); *R.* v. *Oakes*, 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339 (Ont. C.A.); *R.* v. *Boyle*, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.).

anticipated *Southam Inc.*[43] Needless to say, however, these laudable efforts would have died fruitless if the Supreme Court of Canada had not decided in the same vein.

R. v. *Therens* was another important Supreme Court of Canada decision handed down the same year as *Southam Inc.*[44] In that case the right to counsel in subsection 10(b) of the *Charter* was nurtured by a majority of the Court in the context of a breathalyzer case (a context that had almost single-handedly destroyed the *Bill of Rights*). The Court interpreted "detention" under the *Charter*, gave it a purposive and reasonable interpretation, and most important, rejected the interpretation that it had given that same term under the *Bill of Rights*. Furthermore, *Therens* was an important decision with respect to the exclusion of evidence under subsection 24(2) of the *Charter*. In *Therens*, six members of the Court held that the breathalyzer evidence obtained in violation of subsection 10(b) should be excluded, notwithstanding the reliance by the police on the Court's prior decision under the *Bill of Rights* which supported the police position. Exclusion on those facts clearly signalled that subsection 24(2) would be given a meaningful interpretation by the Supreme Court.

As said, since then, the Supreme Court has rarely looked back. Obviously disagreement can be had with some of the Court's decisions. For example, the Court has probably been overly sympathetic to government claims in the drinking and driving area: *R.* v. *Hufsky*;[45] *R.* v. *Thomsen*;[46] *R.* v. *Ladouceur*;[47] and *R.* v. *Wilson*.[48] Some day in a future judgment the minority dissenting views in the prostitution cases[49] will probably prevail as majority views. Nevertheless there can be little quarrel with the Court's fundamental approach, attitude, or perspective towards the *Charter*.

The Court has carried through on the promises of the *Southam Inc.* decision. In *Kokesch*,[50] a search of the yard surrounding the accused's house was carried out by the police without a warrant and without

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[43] *Supra*, note 31; *see also* the post-*Southam Inc.* case of *R.* v. *Noble*, 14 D.L.R. (4th) 216, 42 C.R. (3d) 209 (Ont. C.A.) where Martin J.A. clearly welcomed *Southam Inc.* and used the decision to end the notorious writs of assistance. The senior author was counsel for the accused on appeal in that case. In *R.* v. *Finlay and Grellette*, 23 D.L.R. (4th) 532, 48 C.R. (3d) 341 (Ont. C.A.), Martin J.A. "read down" the wiretap provisions to accord with *Southam Inc.* standards and also planted the seed by way of *obiter* that resulted in subsequent judicial recognition of defence access to the wiretap sealed packets. The senior author was counsel for the accused on appeal in that case.

[44] [1985] 1 S.C.R. 613, 45 C.R. (3d) 97 [hereinafter *Therens*].

[45] [1988] 1 S.C.R. 621, 63 C.R. (3d) 14.

[46] [1988] 1 S.C.R. 640, 63 C.R. (3d) 1.

[47] [1990] 1 S.C.R. 1257, 77 C.R. (3d) 110.

[48] [1990] 1 S.C.R. 1291, 77 C.R. (3d) 137.

[49] *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, 77 C.R. (3d) 1; *R.* v. *Skinner*, [1990] 1 S.C.R. 1235, 77 C.R. (3d) 84; *R.* v. *Stagnitta*, [1990] 1 S.C.R. 1226, 56 C.C.C. (3d) 17.

[50] *Kokesch*, *supra*, note 39.

reasonable and probable grounds, and this was unanimously held to be an unreasonable search and seizure contrary to section 8. The majority simply accepted this obvious conclusion while the minority judgment, which disagreed as to the result under subsection 24(2), analyzed the matter as follows:

> [T]he absence of prior [judicial] authorization raises a presumption of unreasonableness which must be rebutted by the party seeking to justify the warrantless search.
>
> Given the concession....that [the police] did not have reasonable and probable grounds sufficient to obtain a search warrant, the inevitable conclusion is that the police lacked statutory authority to conduct the perimeter search.[51]

It must be emphasized that the foregoing is *not* authority for the constitutionality of section 10 of the *Narcotic Control Act*[52] because the conclusion of a section 8 violation made further consideration logically irrelevant. It can be pointed out that, to the extent that section 10 purports to authorize a search without warrant whereby only a police officer, and not a judicial officer, decides the issue of reasonable and probable grounds in advance of the search, it is inconsistent with the important holding in *Southam Inc.* that the protection of privacy requires assessment by a judicial officer *in advance* and not merely after the fact of the search.

The minority also cleared up a confusion concerning a certain passage in *Southam Inc.*, where the Court adopted language from the American Supreme Court that "the Fourth Amendment protects people, not places".[53] The court below had relied on this to hold that the perimeter search, where no one was present, was a search of a place and therefore lawful. The proper understanding of this dictum was emphasized as follows:

> [T]he adoption of [this] dictum....was not intended to inhibit the reasonableness of the expectation of privacy of the individual with respect to his or her activities on private property. The point....was that the reasonableness of a citizen's expectation of privacy cannot be confined to those situations which involve the enjoyment of property.[54]

The argument was also rejected that the perimeter search was carried out under lawful authority pursuant to the common law powers of the police, on the basis that the Court "consistently had held that the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language."[55]

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[51] *Ibid.* at 80-82.
[52] R.S.C. 1985, c. N-1.
[53] *Katz, supra*, note 37 at 351.
[54] *Supra*, note 39 at 82.
[55] *Ibid.* at 82-83.

The wiretap legislation contained in Part IV.1 [now Part VI] of the *Criminal Code* has been an important context for the Supreme Court of Canada's search and seizure analysis, and once again demonstrates the Court's commitment to a principled interpretation of *Charter* provisions.

One-party consent wiretaps were held to constitute an invasion of privacy and a violation of section 8 of the *Charter* in *R.* v. *Duarte* (*sub nom. R.* v. *Sanelli*),[56] a case that American lawyers envy because our Supreme Court 'got it right' and expressly rejected an American Supreme Court decision to the contrary. In *R.* v. *Wong*,[57] video surveillance was similarly categorized applying the same principles. The following are some important passages from the judgment of La Forest J. in the Supreme Court of Canada:

> *R.* v. *Sanelli* approached the problem of determining whether a person had a reasonable expectation of privacy in given circumstances by attempting to assess whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the agents of the state were bound to conform to the requirements of the *Charter* when effecting the intrusion in question. This involves asking whether the persons whose privacy was intruded upon could legitimately claim that in the circumstances it should not have been open to the agents of the state to act as they did without prior judicial authorization....[T]he adoption of this standard invites the courts to assess whether giving their sanction to the particular form of unauthorized surveillance in question would see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society.
>
> I think, with respect, that the conclusions of the Court of Appeal cannot be reconciled with the implications of this Court's subsequent decision in *R.* v. *Sanelli*. The Court of Appeal has, in effect, applied a variant of the risk analysis rejected by this Court in that case, for it has chosen to rest its conclusion on the notion that the appellant, by courting observation by the other persons in the room, has effectively relinquished any right to maintain a reasonable expectation of freedom from the much more intrusive invasion of privacy constituted by surreptitious video surveillance on the part of the state.
>
> Moreover, it is clear from the excerpt cited above that the Court of Appeal, in assessing the constitutionality of the search has allowed itself to be influenced by the fact that the appellant was carrying on illegal activities. By way of expansion on my earlier references to *Sanelli*, I would note that that decision places considerable emphasis on the fact that the answer to the question whether persons who were the object of an electronic search had a reasonable expectation of privacy cannot be made to depend on whether or not those persons were engaged in illegal activities; see [[1990] 1 S.C.R.] pp. 51-52. If reliance were to be placed on such ex post facto reasoning, and the courts to conclude that persons

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[56] [1990] 1 S.C.R. 30, 74 C.R. (3d) 281 [hereinafter *Sanelli*]. The senior author was counsel for the accused on appeal in that case.

[57] [1990] 3 S.C.R. 36, 1 C.R. (4th) 1 [hereinafter *Wong* cited to C.R.]. The senior author was counsel for the accused on appeal in that case.

who were the subject of an electronic search could not have had a reasonable expectation of privacy because the search revealed that they were in fact performing a criminal act, the result would inevitably be to adopt a system of subsequent validation for searches. Yet it was precisely to guard against this possibility that this Court in *Hunter* v. *Southam Inc.*, supra, at [[1984] 2 S.C.R.] p. 160, stressed that prior authorization, wherever feasible, was a necessary precondition for a valid search and seizure....Accordingly, it follows logically from what was held in *R.* v. *Sanelli* that it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engaged in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether, in a society such as ours, persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy.

Viewed in this light, it becomes obvious that the protections of s. 8 of the *Charter* are meant to shield us from warrantless video surveillance when we occupy hotel rooms. Clearly, our homes are places in which we will be entitled, in virtually all conceivable circumstances, to affirm that unauthorized video surveillance by the state encroaches on a reasonable expectation of privacy. It would be passing strange if the situation should be any different in hotel or motel rooms. Normally, the very reason we rent such rooms is to obtain a private enclave where we may conduct our activities free of uninvited scrutiny. Accordingly, I can see no conceivable reason why we should be shorn of our right to be *secure* from unreasonable searches in these locations which may be aptly considered to be our homes away from home. Moreover, *R.* v. *Sanelli* reminds us that unless the question posed in the preceding paragraph is answered in neutral terms as I have suggested, it follows not only that those who engage in illegal activity in their hotel rooms must bear the risk of warrantless video surveillance, but also that all members of society when renting rooms must be prepared to court the risk that agents of the state may choose, at their sole discretion, to subject them to surreptitious surveillance; see again [S.C.R.] at pp. 51-52.

Nor, with respect, can I attach any importance to the fact that in the circumstances of this case the appellant may have opened his door to strangers, or circulated invitations to the gaming sessions. I am simply unable to discern any logical nexus between these factors and the conclusion that the police should have been free to videotape the proceedings in a hotel room at their sole discretion. It is safe to presume that a multitude of functions open to invited persons are held every week in hotel rooms across the country. These meetings will attract persons who share a common interest but who will often be strangers to each other. Clearly, persons who attend such meetings cannot expect their presence to go unnoticed by those in attendance. But, by the same token, it is no part of the reasonable expectations of those who hold or attend such gatherings that as a price of doing so they must tacitly consent to allowing agents of the state unfettered discretion to make a permanent electronic recording of the proceedings.

We must be prepared to live with the first risk but, in a free and open society, need not tolerate the spectre of the second. As I have intimated above, this seminal distinction between what is constitutionally acceptable and unacceptable follows inexorably from the point made in *R.* v.

> *Sanelli* that it would be an error to equate the risk of having one's words overheard with the risk of having the state, at its sole discretion, make a permanent electronic recording of those words. At [S.C.R.] p. 48 of that decision, it was said that these threats to privacy are of a different order of magnitude and involve different risks to the individual and the body public. The same must be true of the risk of being the object of private scrutiny, and the risk of having a permanent electronic recording made of one's presence in a given location at the behest of the state.[58]

What is important about *Wong*, as a matter of general principle, is the recognition that the police and other state agencies cannot do something, merely because it is not illegal, where *Charter* violations are involved. In *Wong*, video surveillance was the case in point. When such constitutes a search and seizure within the *Charter* because it violates a reasonable expectation of privacy, the Supreme Court held that the police cannot engage in such activity unless Parliament has prescribed a legal framework constitutionally sufficient (under section 1) for its performance.

In the future, as technology gives the police newer and better ways to invade privacy, the *Charter* will be a protection to forbid such activities absent a legislative framework. In short, Parliament will have to become more proficient in the carrying out of its responsibilities under the *Charter*, namely, the consideration and provision of constitutionally valid procedures for state agencies to carry out law enforcement activities.

With regard to wiretaps generally, the Supreme Court has essentially remedied a decade and a half of Parliamentary inactivity with regard to the disgracefully-drafted legislative provisions, and created a new code of procedure. In four appeals, the Supreme Court of Canada considered various aspects of the law relating to the interception of private communications ("wiretaps"), under Part IV.1 [now Part VI] of the *Criminal Code*.[59] The Supreme Court's decisions together represent a major overhaul of the relevant legislative provisions and procedures as they have previously been interpreted, an overhaul which the Court held was required by sections 7 and 8 of the *Charter*. A major change was to recognize an expanded right for the accused to access the supporting affidavits in wiretap cases.

The Supreme Court of Canada held that an accused person is entitled to have the packet opened and, subject to editing, to have its contents produced in order to enable him or her to make full answer and defence. The pre-*Charter* cases that had found a legislative intent in the statutory provisions to deny access to an accused, the Court said, had to be reconsidered in light of the *Charter*. The Court held that denial of

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[58] *Ibid.* at 9-13.

[59] *Dersch* v. *Canada (A.G.)*, 77 D.L.R. (4th) 473, 80 C.R. (3d) 299 (S.C.C.); *R.* v. *Zito* (1990), 80 C.R. (3d) 311, 60 C.C.C. (3d) 216 (S.C.C.); *R.* v. *Garofoli* (1990), 80 C.R. (3d) 317, 60 C.C.C. (3d) 161 (S.C.C.) [hereinafter *Garofoli*]; *R.* v. *Lachance* (1990), 80 C.R. (3d) 374, 60 C.C.C. (3d) 449 (S.C.C.) [hereinafter *Lachance*].

access constitutes denial of full answer and defence. Withholding information from an accused which enables that accused to assert the inadmissibility of evidence on statutory or constitutional grounds denies full answer and defence. The Supreme Court confirmed that *prima facie* evidence of misconduct is not required before the defence can access the sealed packet. The assertion that the admission of the evidence is challenged and that access is required for full answer and defence is sufficient.

Although the application for access to the sealed packet may sometimes go to a judge other than a trial judge, all applications for review, according to *Garofoli*, will be made to the trial judge. All issues concerning admissibility of wiretap evidence are for the trial judge.

Notwithstanding the vague generalized language of paragraph 178.13(1)(a) [now paragraph 186(1)(a) of the *Criminal Code*] referring to the "best interests of the administration of justice", *Sanelli* made it clear that, wiretaps being a form of search and seizure, the provision must satisfy section 8 of the *Charter*. Therefore, the proper interpretation of the provision requires "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of search". Thus, the constitutional requirements and the statutory test under paragraph (a) are identical, plus the "last resort" requirements of paragraph (b) must also be met.

The grounds for review by a trial judge of a wiretap authorization are founded upon the above described statutory (and constitutional) requirements: paragraph (a) a specified crime has been or is being committed, and the interception of the private communication in question will afford evidence of the crime; and paragraph (b) other investigative procedures have been tried and failed or are unlikely to succeed or urgency renders such impracticable. The trial judge does not review these issues *de novo*, but ascertains from the material before him or her whether the judge issuing the authorization *could have* been satisfied of the required matters.

If the Crown can support the authorization on the basis of the material as edited, the authorization is confirmed. If the editing renders the authorization unsupportable, then the Crown can apply to have the trial judge consider so much of the edited material as is necessary to support the authorization. The trial judge should accede to such request only if satisfied that the accused is sufficiently aware of the excised material to challenge it in argument or by evidence. Again, a judicial summary should be provided if it will fulfill that function.

If the trial judge decides that the issuing judge could not have been satisfied of any of those matters, then the wiretaps are unlawful. There is no need to determine whether the authorization is set aside. Its legal underpinnings have been removed and the wiretaps, being unlawful, must be excluded from evidence under paragraph 178.16(1)(a) [now paragraph 189(1)(a)] of the *Criminal Code*. Subsection 24(2) of the *Charter* is never reached because wiretaps have their own exclusionary rule. Subsection 24(2) is an exclusionary, not inclusionary, rule and it

cannot make admissible what is inadmissible by virtue of some other exclusionary rule.

This is a very important part of the Supreme Court's reasoning. Since the *Charter* requirements and the statutory requirements are congruent (because the *Charter* was used to "interpret" and define the statutory language), references to the *Charter* to argue non-compliance and unlawfulness of wiretaps is logical and appropriate. But the defect being established is not just a *Charter* defect, but statutory noncompliance with Part IV.1. Not just *Charter* "unreasonableness" but statutory "unlawfulness" is being shown. Thus, mandatory exclusion under paragraph 178.16(1)(a) is the remedy and optional exclusion under subsection 24(2) is never reached.

Garofoli and its companion cases held decisively that the accused can cross-examine on the wiretap affidavit at the trial *voir dire* to attempt to discredit the existence of one of the preconditions to the authorization, e.g., the existence of reasonable and probable grounds or the availability of other investigative techniques. In *Lachance*, the accused was held entitled to cross-examine to impeach the affiant's claim that it was not possible to use an undercover agent, when in fact the police already had and were using an undercover agent. In *Garofoli*, the accused was held entitled to cross-examine to impeach the affiant's reliance upon an informant. If the informant were discredited, then the factual basis for the authorization is undermined. If it is shown the informant lied, then it could raise the inference that the police knew or ought to have known that. If the police were not warranted in their belief that the information were true, then the basis for belief that a crime was to be committed disappears.

What is important to note is that the foregoing, which applies in the search warrant context as well as the wiretap context, involved an express rejection by the Supreme Court of Canada of the higher threshold that was imposed in American federal law by the American Supreme Court in *Franks* v. *Delaware*.[60] Sopinka J. for the Court in *Garofoli* described the *Franks* standard as "too restrictive". *Franks* had previously been used by the Ontario Court of Appeal in the search warrant context in two cases[61] to limit cross-examination by the accused. Based on *Garofoli* both of these cases are now overruled.[62]

The Court in *Garofoli*, however, following its lengthy denunciation of any denial of cross-examination, also went on, rather surprisingly, to hold, in a few brief paragraphs, that *leave* must be obtained to cross-examine the affiant. Leave is granted, Sopinka J. held, in the trial judge's discretion. It should be granted where necessary to enable the accused to make full answer and defence. A basis must be shown by the accused

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[60] 438 U.S. 154 (1978) [hereinafter *Franks*].

[61] *Re Church of Scientology* v. *R. (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) [hereinafter *Scientology*]; *Re Corr and the Queen*, 43 D.L.R. (4th) 100, 36 C.C.C. (3d) 116 (Ont. C.A.).

[62] *Scientology* was expressly rejected by Sopinka J. in *Garofoli*.

for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization.

This requirement of leave from the trial judge to cross-examine the affiant is the only disappointing aspect of these judgments from an accused's point of view. In practice, it is difficult to see how the limitation will have any real impact in the hands of any trial judge who follows these judgments as a whole. Leave, it is said, should be granted to enable an accused to make full answer and defence, and litigating the admissibility of wiretap evidence is expressly stated by the judgments to be part of full answer and defence. Thus, the real hurdle is the requirement that *a basis be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization.* Note the low hurdle: evidence "tending to discredit". The requirement would appear to dissolve, especially given Sopinka J.'s earlier strong words about cross-examination and how defence counsel must be unrestrained in performing their function, into the simple one that counsel have one or more specific goals in mind based on the contents of the authorization and the specific evidence in the affidavit. If counsel cannot generate the requisite basis, then counsel probably should not be cross-examining in any event. Still, it would have been neater and more consistent not to have imposed this leave requirement; a rather unique limitation on the right to cross-examine in Canadian criminal law.

In other contexts, the Supreme Court of Canada has shown equal determination to interpret the *Charter* purposefully and vigorously to protect fundamental rights on behalf of society at large, even though it might mean in the particular context, that one alleged to have committed serious crimes such as murder, extortion, sexual or drug offences, might incidentally benefit to the extent of having a conviction reversed and a new trial ordered, or even of being set free by the entering of an acquittal.

The right to counsel was developed meaningfully in cases beginning with *R.* v. *Manninen*,[63] *R.* v. *Leclair*[64] and *R.* v. *Brydges*[65] among others.[66] In a recent decision, *R.* v. *Elshaw*,[67] the Court made clear its view of both the significance of the right and the necessity for compliance with subsection 10(b) of the *Charter*. In that case Mr. Justice Iacobucci on behalf of the Court rejected the argument that the accused, who had been charged with sexually assaulting children, was not prejudiced by the violation of his right to counsel because the self-incriminating statement probably would have been made even if there had been compliance with subsection 10(b). Iacobucci J. said:

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[63] [1987] 1 S.C.R. 1233, 58 C.R. (3d) 97. *Compare R.* v. *Baig*, [1987] 2 S.C.R. 537; *see* D. Stuart, *Annotation* at 61 C.R. (3d) 97.

[64] (1989), 31 O.A.C. 321, 67 C.R. (3d) 209 (S.C.C.).

[65] [1990] 1 S.C.R. 190, 74 C.R. (3d) 129.

[66] *See, e.g., R.* v. *Smith*, [1989] 2 S.C.R. 368, 71 C.R. (3d) 129, criticized in S.A. Cohen, *Police Interrogation of the Wavering Suspect* 71 C.R. (3d) 148.

[67] [1991] 3 S.C.R. 24, 67 C.C.C. (3d) 97 [hereinafter *Elshaw* cited to C.C.C.].

> No one can speculate what the appellant might have said or done at the time of his detention had he been advised of his right to counsel or even of his right to remain silent. To base admission on the ground that he *might* have confessed completely undermines the enshrinement of the right to counsel in the *Charter*.[68]

Similarly, the right to trial within a reasonable time under subsection 11(b) was given meaning in *R.* v. *Askov*.[69] The presumption of innocence began to control and eliminate presumptions in criminal cases in *R.* v. *Oakes*[70] and *R.* v. *Whyte*.[71] Mandatory minimum sentences, or at least the notorious seven-year minimum sentence in drug importing cases, were struck down in *R.* v. *Smith*.[72]

Criminal intent or *mens rea* became constitutionalized, generally in *Reference re s. 94(2), B.C. Motor Vehicle Act*,[73] and specifically in the murder context in *R.* v. *Vaillancourt*.[74] Subsequently, in *R.* v. *Martineau*[75] it was held that the prohibition against constructive liability for murder meant that subsection 213(a) of the *Criminal Code* (and realistically, all of section 213, as well as 212(c)) contravened sections 7 and 11(d) of the *Charter*, and could not be saved under section 1. In *R.* v. *Logan*[76] it was held that sections 7 and 11(d) meant that attempted murder required a subjective intent, and therefore subsection 21(2) of the *Criminal Code*, imposing objective liability for parties to an offence, was unconstitutional to the extent that it allowed the conviction of a party to the offence of attempted murder on the basis of objective foresight. Again, section 1 does not apply to save the provision in such cases where the offence charged requires subjective foresight of consequences, such as murder.

In *R.* v. *Hess*; *R.* v. *Nguyen*,[77] the offence contrary to subsection 146(1) [now subsection 153(1)] of the *Criminal Code* of having sexual intercourse with a female person under the age of fourteen years was held by a majority of the Supreme Court of Canada to violate section 7 because it expressly removed the defence that the accused *bona fide* believed that the female was fourteen or older. Again section 1 did not save the provision.

The topic of statements obtained from an accused by trickery, previously given the stamp of approval by the Court's pre-*Charter*

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[68] *Ibid.* at 128.
[69] [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273.
[70] [1986] 1 S.C.R. 103, 50 C.R. (3d) 1.
[71] [1988] 2 S.C.R. 3, 64 C.R. (3d) 123.
[72] [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193.
[73] [1985] 2 S.C.R. 486, 48 C.R. (3d) 289.
[74] [1987] 2 S.C.R. 636, 60 C.R. (3d) 289.
[75] [1990] 2 S.C.R. 633, 79 C.R. (3d) 129. *See also R.* v. *Luxton*, [1990] 2 S.C.R. 711, 79 C.R. (3d) 193; *R.* v. *Arkell*, [1990] 2 S.C.R. 695, 79 C.R. (3d) 207; *R.* v. *Rodney*, [1990] 2 S.C.R. 687, 79 C.R. (3d) 187; *R.* v. *J.(J.T.)*, [1990] 2 S.C.R. 755, 79 C.R. (3d) 219.
[76] [1990] 2 S.C.R. 731, 79 C.R. (3d) 169 and *Rodney*, *supra*, note 75.
[77] [1990] 2 S.C.R. 906, 79 C.R. (3d) 332.

decision in *R.* v. *Rothman*,[78] was revisited in *R.* v. *Hebert*,[79] and the practice was found wanting and contrary to the *Charter*. *Hebert* concerned the issue whether a statement made by a detained person to an undercover police officer violated the rights of the accused under the *Charter*. The accused, after consulting counsel and advising the police that he did not wish to make a statement to them, was tricked into making a statement by the ruse of an undercover police officer placed in the cell to which he was taken. The Court held that this conduct by the police violated the accused's right to remain silent under section 7. Thereafter, the evidence was excluded by the Court pursuant to subsection 24(2). More recently, the Court has addressed the logical extension of *Hebert*, namely, the use of a civilian informant to elicit admissions from an accused held in detention. In *R.* v. *Broyles*,[80] the Court found this mechanism to be equally unconstitutional where the informant was acting as an agent of the state[81]. In *R.* v. *Chambers*[82] the Supreme Court of Canada held that the accused's right to silence was violated in the circumstances by the Crown's cross-examination of him at his trial about his pre-trial silence concerning certain matters to which he testified.

The privilege against self-incrimination in section 13 of the *Charter* was delineated in *R.* v. *Dubois*[83] and *R.* v. *Mannion*.[84] The latest case in this area, however, is less satisfactory.

In *R.* v. *Kuldip*,[85] it was held that *Mannion* does not apply and section 13 does not prevent such use of prior testimony where the *purpose* of the cross-examination is to challenge and impeach the accused's credibility, rather than to incriminate him or her. The majority decision in *Kuldip* made an express policy decision: that it would advantage an accused too much to allow that accused to testify at the first trial, be convicted, obtain a new trial, and testify again with impunity in a manner inconsistent with the prior evidence, by preventing disclosure to the trier of fact, for credibility purposes, of the different evidence given by the accused. One might ask whether the marginal benefit to the Crown of being able to cross-examine in such fashion is worth the price. Especially in jury trials, the instructions required to ensure that the jury understands the limited purpose to the cross-examination will undoubtedly be the subject of many appeals to come. Nevertheless, *Kuldip* represents the law (and policy) in its sphere of application.[86]

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[78] [1981] 1 S.C.R. 640, 20 C.R. (3d) 97.

[79] [1990] 2 S.C.R. 151, 77 C.R. (3d) 145 [hereinafter *Hebert*].

[80] (1991), 68 C.C.C. (3d) 308 (S.C.C.).

[81] *See generally* A.D. Gold, *Charter of Rights — Self-Incrimination — Jailhouse Informant* (1991) 34 C.L.Q. 9.

[82] [1990] 2 S.C.R. 1293, 89 C.R. (3d) 235.

[83] (1985), 48 C.R. (3d) 193, 27 C.C.C. (3d) 325 (S.C.C.).

[84] [1986] 2 S.C.R. 272, 53 C.R. (3d) 193 [hereinafter *Mannion*].

[85] [1990] 3 S.C.R. 618, 1 C.R. (4th) 285 [hereinafter *Kuldip*].

[86] *See* A.D. Gold, *Charter of Rights — Self-Incrimination — Prior Testimony* (1991) 33 C.L.Q. 403.

Cross-examination by the Crown of an accused regarding any prior criminal record is no longer automatic after *R.* v. *Corbett*.[87] The exclusion of evidence under subsection 24(2) of the *Charter* was considered in detail and the principles enunciated in a trilogy of simultaneous decisions: *R.* v. *Collins*,[88] *R.* v. *Hamill*[89] and *R.* v. *Sieben*,[90] as well as in subsequent cases such as *R.* v. *Greffe*.[91]

The latter case provides a good example of the Supreme Court of Canada's attitude towards deliberate police deception. In *Greffe* the deliberate deception of an accused as to the reason for his arrest was condemned in the strongest terms and led to the exclusion of heroin from evidence under subsection 24(2) of the *Charter*. Chief Justice Lamer in the majority decision held that "the integrity of our criminal justice system and the respect owed our Charter are more important than the conviction of this offender", notwithstanding the offender's "manifest culpability....of a crime that I consider heinous".[92]

This quote from *Greffe* is perhaps a good note on which to conclude. Prior to the *Charter* our courts simply did not talk that way in criminal cases. Even with the advent of the *Charter*, defence counsel's dreams of hearing such talk from our courts might objectively have been characterized as wishful thinking. Our judiciary simply did not speak in those principled terms in the context of criminal cases. To actually see such notions expressed in black and white in a Supreme Court of Canada decision is clearly the stuff that defence counsel's dreams are made of. To the practising criminal lawyer there can be no doubt that the *Charter* has in large measure become a case of expectations fulfilled. The challenge which lies ahead in the *Charter*'s second decade is to ensure the preservation of the achievements of its first ten years.

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[87] [1988] 1 S.C.R. 670, 64 C.R. (3d) 1.
[88] [1987] 1 S.C.R. 265, 56 C.R. (3d) 193.
[89] [1987] 1 S.C.R. 301, 56 C.R. (3d) 220.
[90] [1987] 1 S.C.R. 295, 56 C.R. (3d) 225.
[91] [1990] 1 S.C.R. 755, 75 C.R. (3d) 257 [hereinafter *Greffe* cited to C.R.].
[92] *Ibid.* at 292.