DIFFERENT DRUMMERS, DIFFERENT DRUMS: THE SUPREME COURT OF CANADA, AMERICAN JURISPRUDENCE AND THE CONTINUING REVISION OF CRIMINAL LAW UNDER THE *CHARTER*

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In a recent essay, the authors examined the Supreme Court of Canada's use of precedent from the Supreme Court of the United States in criminal law decisions involving Charter *issues. Confining themselves to the period ending February, 1989, they concluded that the Canadian Court's use of American case law gave the impression that the Court was less "rights oriented" than its American counterpart. However, a close comparison of similar cases from each jurisdiction revealed that the Supreme Court of Canada protected the interests of accused and suspected persons at least as much as the United States Supreme Court. In a number of instances the Canadian Court protected them more, and cited American precedent without appreciating the subtleties of American constitutional law.*

Dans un essai publié récemment, les auteurs ont examiné comment la Cour suprême du Canada avait utilisé, dans quelques affaires de droit pénal portant sur la Charte, *la jurisprudence élaborée par la Cour suprême des États-Unis. En limitant leur examen à la période se terminant en février 1989, ils en sont venus à la conclusion que la Cour suprême du Canada donnait l'impression de moins protéger les droits que la cour américaine. Cependant, une comparaison détaillée portant sur des affaires semblables dans chaque pays a révélé que la Cour suprême du Canada protégeait les intérêts des personnes accusées ou suspectées au moins autant que la Cour suprême des États-Unis. Dans plusieurs affaires, la cour canadienne les a même protégés plus, et a cité la jurispru-*

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This essay is the second and concluding part of the authors' comparison of criminal and constitutional issues in the Canadian and United States Supreme Courts. In it, they focus upon the role of section 24(2) and update the "rights" jurisprudence surveyed in the first essay. They conclude that the Supreme Court of Canada continues to protect the interests of accused and suspected persons as much as, and often more than, the Rhenquist, Burger and — what is more surprising — even the Warren Court in the United States. This is especially true, they argue, with respect to the right to counsel, the privilege against self-incrimination, and the definition of offenses. Nevertheless, the Supreme Court of Canada now refers to precedent from the Supreme Court of the United States with increasing sophistication, and it is developing an appreciation both for the complexities of American constitutional law and the difficulties of applying it in a Canadian context.

Cet essai est la deuxième et dernière partie de cette comparaison portant sur des affaires de droit pénal et de droit constitutionnel étudiées par la Cour suprême du Canada et celle des États-Unis. Les auteurs traitent ici du rôle du paragraphe 24(2) et mettent à jour la jurisprudence examinée dans le premier essai. Ils concluent que la Cour suprême du Canada continue de protéger les intérêts des personnes accusées et suspectées autant, et souvent plus, que la cour américaine, que ce soit la cour Rhenquist, Burger et même — ce qui est plus surprenant — la cour Warren. Ils maintiennent que cela est particulièrement vrai en ce qui concerne le droit à l'assistance d'un avocat ou d'une avocate, la protection contre l'auto-incrimination et la définition des infractions. Cependant, la Cour suprême du Canada connaît mieux maintenant la jurisprudence de la Cour suprême des États-Unis et comprend de plus en plus les complexités du droit constitutionnel américain ainsi que les difficultés de son application au contexte canadien.

I. INTRODUCTION

In a recent study, we looked into how, and how often, the Supreme Court of Canada has used American precedent in criminal cases involving *Canadian Charter of Rights and Freedoms*[1] issues. Confining ourselves to the period ending in February of 1989, we found that United States authority was cited in less than 50% of the Court's decisions and played a significant role in an even smaller percentage of the total. We also found, not surprisingly, that the ways in which the Court used American law in those decisions varied.[2]

Some citations were found in cases where the Court ruled for the defence and they referred to United States precedent as not inconsistent with the result.[3] A few were in cases where the Court held for the Crown, but pointed out American case law favouring the defence in order to reject it or, more often, to avoid it by suggesting that its broader protections are inapplicable in Canada.[4] A third category was the most interesting. In a number of significant cases where the Court ruled in favour of the defence, they did so without citing divergent United States precedent.[5] In our view, this tended to create the impression that, overall, the Court was either rejecting American precedent that was too "liberal" or, at least, was doing no more to protect the interests of accused persons than the United States Supreme Court had done. But in many cases that cite no American law the Court was doing more. They were simply *saying* less.

More than two years have passed since we presumed to pass judgment on such matters. There is now more information on how the Supreme Court of Canada will use sections 1 and 24(2) of the *Charter*, so we intend to look once again at selected decisons handed down by the Court since February 1989 and to compare them to United States

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

[2] *Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the Charter* (1990) 28 OSGOODE HALL L. J. 729.

[3] *E.g.*, *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97 [hereinafter *Hunter* cited to C.C.C.]; *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 [hereinafter *Oakes* cited to C.C.C.]. Unless otherwise indicated, all further page citations will be to the CANADIAN CRIMINAL CASES (C.C.C.), and appeal courts will be referred to as "they" rather than "it", even if only one court is signified.

[4] Virtually the only example of the former is *R.* v. *Hufsky*, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398 [hereinafter *Hufsky*]. An example of the latter is *R.* v. *Beare*, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57, wherein La Forest J. described the Fifth Amendment as conferring a much broader protection on American defendants than was the case under the *Charter* — now a somewhat ironic statement in light of *R.* v. *Hebert*, [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1 [hereinafter *Hebert*], discussed in Part III.A.2.(b), *infra*.

[5] *See, e.g.*, *R.* v. *Ross*, [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129 [hereinafter *Ross*]; *R.* v. *Dyment*, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244 [hereinafter *Dyment*]; and *Dubois* v. *R.*, [1985] 2 S.C.R. 350, 22 C.C.C. (3d) 513 [hereinafter *Dubois*].

Supreme Court precedent, whether cited therein or not.[6] Most of these cases relate to issues canvassed in our earlier article and we have duplicated as closely as possible the format we adopted there. Because some issues are new the organization is not exactly the same, nor is this review intended to be comprehensive; there is simply not enough space.[7] Instead, we present an updated account of how the Supreme Court of Canada has used the *Charter* to revise Canadian criminal law in selected but extremely important areas, and we compare this to the equivalent United States approach. The result is, if not the clear picture we hoped for, at least a more complete one.[8]

The need for this sort of comparison is exemplified by the Supreme Court of Canada's decision in *R.* v. *Greffe*.[9] In that case, airport RCMP officers had been informed that the accused was in possession of heroin. But when a customs search came up empty, the police told the accused that he was under arrest for unpaid traffic tickets and they transported him to hospital for a rectal examination, hardly the standard procedure for this sort of offence. The examining physician found the narcotics, but the Supreme Court excluded the evidence because of the cumulative effect of a number of *Charter* violations, including a failure to state the real reason for the arrest (subsection 10(a)) and a lack of reasonable grounds for the rectal search (section 8). Chief Justice Dickson dissented. He was not prepared to hold that the officers lacked reasonable grounds for believing that the accused was in possession of heroin, and ruled that the search was at least "clothed in legality" notwithstanding the "trivial" violation of subsection 10(a). Given that when Greffe was arrested the Court had yet to pronounce on these issues, he found it "impossible to conclude that the conduct of the authorities amounted to a 'pattern of disregard'".[10] To exclude the evidence because of the subsection 10(b) violation — which he described as a "slip of the tongue by a police officer" — would be to emulate American excess. Citing *Mapp* v. *Ohio*,[11] he stated:

> To my mind, this type of infringement of the constitutional rights of an accused amounts to the kind of "technical" violation which the general public in the United States frequently derides when an unquestionably culpable accused in that country is acquitted of very serious charges.... The instant case provides a graphic example of a situation where the

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[6] We have also revisited, unavoidably, some of the Court's earlier decisions.

[7] It does not, for example, include the sort of quantitative analysis that was done in the first article. The problems involved in obtaining meaningful information that we alluded to there have only compounded with time, and such an analysis would yield increasingly diminished returns: *see supra*, note 2 at 737-40.

[8] For the text of the relevant provisions of the *Charter* and the American *Bill of Rights*, *see* App. I.

[9] [1990] 1 S.C.R. 755, 55 C.C.C. (3d) 161 [hereinafter *Greffe*]. For comment, *see* A. Young, *Greffe: A Section 8 Triumph or a Thorn in the Side of Drug Law Enforcement?* 75 C.R. (3d) 293.

[10] *Greffe*, *ibid.* at 168 & 171.

[11] 367 U.S. 643 (1961).

> [Canadian exclusionary] rule should lead to the opposite result from the disposition that might be reached had these facts been governed by the American Bill of Rights, as it has been interpreted in the past by the Supreme Court of the United States.[12]

The implication is clearly that American courts will exclude evidence if, during the course of an arrest or detention, a police officer mislabels an offence. In fact, this is not so.[13] Judges in that country adopt very much the same approach as that recommended by the Chief Justice: they determine whether there were reasonable grounds to arrest or sufficient suspicion to detain, regardless of the reason given for the arrest or detention.[14]

Greffe is not the only case in which Canadian Supreme Court justices have made this sort of comment about American law. We will discuss its complexities in more detail below.[15] Our purpose in mentioning it now is that it conveys a salutory warning to those — including us — who seek to navigate the swamps of comparative jurisprudence without getting too wet. Justice Holmes may have overstated the case a little when he said that no general proposition is worth a damn, but it is an aphorism worth bearing in mind when in the presence of apparently watertight conclusions.[16] The facts of criminal cases are many and varied, and the issues that the *Charter* has made justiciable in this area of the law are broadly political as well as narrowly legal. If one listens carefully, one can hear the sound — sometimes barely audible, sometimes loud and clear — of grinding axes. With this caveat in mind, we proceed to the odious work of comparison.

II. SUBSECTION 24(2) OF THE *CHARTER*

In our first article we concluded that in some respects the Supreme Court of Canada had gone beyond the United States Supreme Court in protecting the interests of suspected and accused persons. But we qualified this conclusion by noting that more Canadian cases on subsection 24(2) of the *Charter* had to be decided before a useful comparison with the American exclusionary rule could be made.[17] This subsection, which requires evidence to be excluded if to admit it would bring the admin-

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[12] *Greffe*, *supra*, note 9 at 173.

[13] There is no equivalent of s. 10(a) in the American *Bill of Rights*.

[14] *See*, *e.g.*, *Florida* v. *Royer*, 460 U.S. 491 (1983) at 507, where the U.S. Supreme Court concluded that "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause". On the two American standards and "*Terry* stops", *see* notes 64 and 79-83, *infra*, and accompanying text.

[15] *See* Part II.A.2.

[16] *See* the letter from Holmes to Pollock, 22 November 1920, in M. DeWolfe Howe, ed., HOLMES-POLLOCK LETTERS Vol. II (Cambridge: Harvard University Press, 1961) at 59.

[17] *Supra*, note 2 at 735, 769 & 782.

istration of justice into disrepute, applies to evidence obtained in violation of any one or more of the *Charter*'s guaranteed rights. In marked contrast, the American *Bill of Rights*[18] has no such rule; instead, the jurisprudence has generated a judge-made one, designed to protect the underlying values of particular amendments.[19] In both jurisdictions, however, the decision whether to exclude evidence at trial depends upon the purpose served by the exclusionary rule. The main difference is that the wording of subsection 24(2) has led the Canadian Court to interpret it as aimed at protecting the reputation of the judicial system, primarily by ensuring the fairness of trials.[20] This is much less true in the United States, where this rationale has been subordinated to deterrence — especially of late.[21]

In *Collins* the Supreme Court of Canada held that three sets of factors are involved in deciding whether to exclude evidence obtained in violation of the *Charter*.[22] The first concerns the fairness of the trial. If the evidence would tend to affect this, it generally should be excluded. Real evidence, however, is said to rarely have this effect. The second set of factors concerns the seriousness of the *Charter* violation, and usually comes down to whether the violation was committed in good faith. The third set inverts subsection 24(2) and is directed to whether *excluding* the evidence would tend to bring the administration of justice into disrepute. According to *Collins*, this might be the case where the breach is trivial, especially if the offence is serious; but if admitting the evidence might affect the fairness of the trial, the seriousness of the offence will not enter the balance so as to render the evidence admissible.[23] The essence of *Collins*, therefore, appears to be that evidence tending to affect the fairness of the trial is generally inadmissible, but that evidence that cannot be so characterized is generally admissible

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[18] U.S. CONST. amends I-X.

[19] This has occurred with respect to the First, Fourth, Fifth, Sixth and Fourteenth Amendments. However, in *United States* v. *Leon*, 468 U.S. 897 (1984) [hereinafter *Leon*], the U.S. Supreme Court held that the rule is not constitutionally required in Fourth Amendment cases.

[20] *R.* v. *Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1 [hereinafter *Collins*].

[21] *E.g.*, *Leon*, *supra*, note 19.

[22] These are set out in *Collins*, *supra*, note 20 at 19-21; in *R.* v. *Jacoy*, [1988] 2 S.C.R. 548 at 558-59, 45 C.C.C. (3d) 46 at 54; and in *R.* v. *Kokesch*, [1990] 3 S.C.R. 3 at 21, 61 C.C.C. (3d) 207 at 221 [hereinafter *Kokesch*].

[23] This position was recently re-emphasized by Lamer J. in *R.* v. *Brydges*, [1990] 1 S.C.R. 190 at 211, 53 C.C.C. (3d) 330 at 346. The third set of factors, however, seems doomed to virtual irrelevance. Once it is decided that evidence tends to affect the fairness of the trial, even the seriousness of the offence does not count against exclusion. If the evidence does *not* affect the fairness of the trial but the violation is serious (not trivial), this also means that the evidence should be excluded. One reaches the third set of factors only if one has already concluded that the evidence does not affect the fairness of the trial and the breach is not serious. If so, it can be admitted without further analysis.

unless the violation is serious.[24] Of course, the word "generally" leaves considerable room for flexibility.

On first reading, *Collins* seems to suggest that the distinction between evidence that affects the fairness of the trial and evidence that does not is equivalent to the distinction between incriminating statements and real evidence. But this is not quite true: evidence affecting trial fairness includes not only confessions but any evidence that "emanates" from the accused, if the effect of the violation is to "conscript" the accused against himself or herself. Such evidence will "generally" be obtained through a violation of the right to counsel and will "generally" be excluded.[25] Thus, the Court has excluded both breathalyzer results and line-up evidence obtained in violation of subsection 10(b), citing its self-incriminatory nature.[26] This casts the net of exclusion more widely than in the United States, where protection against self-incrimination, which lies at the heart of the Fifth Amendment, refers to testimonial evidence only.[27]

A. *Evidence Not Affecting the Fairness of the Trial*

As we have seen, in the Supreme Court of Canada's view, previously existing real evidence will rarely be excluded because it is unlikely to affect the fairness of the trial: it does not usually emanate from the accused and, therefore, does not involve using a *Charter* violation to conscript the accused against himself or herself.[28] It will, therefore, be admitted unless the *Charter* breach is serious, i.e., unless the behaviour of the police constitutes such a "flagrant and serious violation" of the accused's rights that to admit it would bring the administration of justice into disrepute.[29] Although even in *Collins* some reservations were expressed about the wisdom of this distinction between evidence that affects the fairness of the trial and that which does not,[30] it has taken root; the Court reserves the former characterization for statements and other evidence that do not exist independently

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[24] This distinction, at least as it is explained in *Collins* and exemplified in subsequent decisions, hardly seems self-evident. Why does a statement obtained in violation of the right to counsel affect the fairness of the trial but not an item of real evidence seized in violation of the right to be secure from unreasonable searches? In both cases, the police would not have secured the evidence — at least not at that time — if they had obeyed the law. For further comment *see* R.J. Delisle, *Collins: An Unjustified Distinction* (1987), 56 C.R. (3d) 216.

[25] *Supra*, note 20 at 19-20.

[26] *See, e.g., R.* v. *Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481 [hereinafter *Therens*]; *Ross*, *supra*, note 5.

[27] *Supra*, note 2 at 747 & 755-58.

[28] *Supra*, note 20 at 19.

[29] The Supreme Court's view of what is flagrant and serious, however, has been controversial since their first decision to exclude evidence in *Therens*, *supra*, note 26, especially where police acted in reliance on pre-*Charter* case law: *see infra*, note 305.

[30] *See* the concurring judgment of LeDain J. in *Collins*, *supra*, note 20 at 23.

of the accused. The reason is, according to at least one of the justices, that only this sort of evidence "infringes the accused's privilege against self-incrimination....by supplying information that would not otherwise be available."[31] As a result, when counsel seek to have the Court exclude real evidence that was obtained in violation of the Constitution, the question is not one of trial fairness but whether police behaved in "good faith".[32]

1. *Invalid Warrants and Statutes*

In the United States, the law until 1984 was that real evidence obtained in violation of a defendant's constitutional rights was inadmissible as part of the prosecution's case-in-chief. In that year, the United States Supreme Court decided *United States* v. *Leon*, where the magistrate who issued the search warrant wrongly concluded that police had adduced sufficient evidence of probable cause. The Court held that evidence seized under the authority of an invalid warrant should nonetheless be admitted, and thereby created the so-called "good faith" exception to the Fourth Amendment exclusionary rule.[33] Three years later in *Illinois* v. *Krull*, the Court went even further. They ruled (in a five to four decision) that evidence seized by an officer who conducted a warrantless administrative search relying on a statute which was later declared unconstitutional was also admissible.[34] In both of these cases the search violated the Fourth Amendment, but the evidence was admitted because the officers had acted in good faith reliance upon either a warrant (*Leon*) or an unconstitutional statute (*Krull*).[35]

In defining good faith, Justice White, writing for the majority in *Leon*, eschewed any inquiry into the subjective beliefs of the officers who actually seized the evidence. Although he conceded that motive might occasionally be relevant, he noted that the Court had decided as early as 1968 that judicial exploration of the minds of police officers was pointless:

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[31] Per McLachlin J. in *R.* v. *Evans* (1991), 63 C.C.C. 289 at 309, 4 C.R. (4th) 144 (S.C.C.) [hereinafter *Evans*].

[32] The relationship between trial fairness and good faith appears asymmetrical: fair evidence can be affected by bad faith, but unfair evidence cannot be saved by good faith: *see* text accompanying *infra*, note 90.

[33] *Leon*, *supra*, note 19 and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). One is tempted to wonder about cross-border influences here, because *Leon* was the case in which the U.S. Supreme Court held that whether the Fourth Amendment had been violated was a separate question from whether the evidence ought to be excluded — which is the approach mandated by the *Charter*. This has attracted criticism, and a number of state courts have refused to follow *Leon*. The Supreme Court of Mississippi was especially critical, asserting that *Leon*'s cost-benefit approach is "defensible only if we are prepared to rename the first ten amendments the 'Bill of Interests'": *Stringer* v. *Mississippi*, 491 So. 2d 837 (1986) at 848n.

[34] 480 U.S. 340 (1987) [hereinafter *Krull*].

[35] Prior to *Krull*, the evidence would probably have been excluded: *see* *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), which is discussed in *Krull* at 355n-57n.

> Accordingly, our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.[36]

This would appear to mean that, so long as the reasonably well trained officer would have known the search was illegal, well intentioned ignorance on the part of the officer actually executing it is irrelevant; and, conversely, that if the hypothetically reasonable officer would have believed the search valid, the fact that the officer executing the search knew better is equally irrelevant. Until quite recently, Canadian judges have been less clear than Justice White as to what they mean by "good faith".[37]

The Supreme Court of Canada has not yet addressed the precise point at issue in *Leon*, i.e., whether police officers acting in good faith can rely upon a magistrate's (or justice of the peace's) erroneous conclusion that reasonable grounds existed.[38] But they have decided cases that are similar to *Krull*, admitting unconstitutionally obtained evidence either because police relied in good faith upon a statute later declared unconstitutional, or relied (allegedly) upon the wrong statute. Thus, in

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[36] *Leon*, *supra*, note 19 at 922n. One of the main criticisms of *Leon* is that the facts were ill-suited to the reasoning. In the previous term, the Court had overruled their earlier, more stringent test for assessing whether information amounts to probable cause for a warrant, substituting a "totality of the circumstances" approach: *Illinois* v. *Gates*, 462 U.S. 213 (1983) [hereinafter *Gates*]. Thus, if a warrant were found objectively unreasonable under the new test, it would be extremely difficult to go on to find that the officers' reliance upon it was objectively reasonable. The dissent in *Leon*, therefore, criticized the Court's unwillingness to remand the case "for reconsideration in light of *Gates*", maintaining that such a reconsideration would "find no violation of the Fourth Amendment" and thus, no need for an ideologically motivated good faith exception: *see* the reasons of Marshall J. at 958-59 and Stevens J. at 961-62.

[37] Now *see Kokesch*, *supra*, note 22 discussed under Part II.A.2. immediately following. On occasion the Canadian Supreme Court has contemplated looking into the "subjective beliefs" of police, either to mitigate or exacerbate the import of the *Charter* violation. For example, in *R.* v. *Storrey*, [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316 [hereinafter *Storrey*], Cory J. (for a unanimous Court) cited U.S. precedent to support his conclusion that the reasonableness of the delay involved in charging a suspect will depend on the facts of each case, but did not cite U.S. precedent when he discussed compliance with the requirements of s. 9 of the *Charter*. In suggesting that the subjective bias of a police officer might render an otherwise lawful arrest invalid, *Storrey* diverges from the strictly objective test in such American cases as *Scott* v. *United States*, 436 U.S. 128 (1978).

R. v. *Hamill*,[39] *R.* v. *Sieben*,[40] *R.* v. *Lamb*,[41] *R.* v. *Duarte*,[42] *R.* v. *Wiggins*,[43] and *R.* v. *Thompson*,[44] the Court ruled that the officers' mistakes were reasonable and admitted unconstitutionally obtained narcotics and electronically monitored conversations.[45] In these cases, however, the statutes all required the police to have reasonable grounds (they simply dispensed with the need for a warrant or wire-tap authorization), and the Court found that they had such grounds. The searches were, in a sense, both unreasonable and reasonable at the same time: unreasonable because the searches were conducted without warrant, but reasonable because the police had good grounds for believing that an offence had been committed. Had the police not relied on the statutes and sought a warrant, one would have been issued. In *Krull*, on the other hand, the statute required licenced automotive parts sellers to permit state officials to inspect certain required records at any reasonable time, day or night; the statute did not require probable cause or a warrant, and the officer had neither.[46] But because the law was not "clearly" unconstitutional, the fact that the officer relied upon it in objective good faith (as defined in *Leon*) was sufficient.[47] This factual difference means that the Supreme

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[38] The Court has, however, dealt with the sufficiency of the material presented to the justice and the manner in which the warrant is executed: *see R.* v. *Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161; and *R.* v. *Genest*, [1989] 1 S.C.R. 59, 45 C.C.C. (3d) 385 [hereinafter *Genest*].

[39] [1987] 1 S.C.R. 301, 33 C.C.C. (3d) 110 [hereinafter *Hamill*].

[40] [1987] 1 S.C.R. 295, 32 C.C.C. (3d) 574 [hereinafter *Sieben*]. In *Hamill* and *Sieben*, RCMP officers used writs of assistance which were authorized under what was then s. 10(3) of the *Narcotic Control Act*. The Crown admitted that this section violated s. 8 of the *Charter*.

[41] [1989] 1 S.C.R. 1036, 96 N.R. 238. In this case the search was ostensibly conducted under the wrong statute, but the evidence was admitted because the officer acted in good faith relying upon informal legal advice. In fact, the advice turned out to be sound: *see R.* v. *Multiform Mfg Co.*, [1990] 2 S.C.R. 624, 58 C.C.C. (3d) 257.

[42] [1990] 1 S.C.R. 30, 53 C.C.C. (3d) 1 [hereinafter *Duarte*].

[43] [1990] 1 S.C.R. 62, 53 C.C.C. (3d) 476 [hereinafter *Wiggins*].

[44] [1990] 2 S.C.R. 1111, 59 C.C.C. (3d) 225 [hereinafter *Thompson*].

[45] In *Hamill*, *supra*, note 39, the Court sent the case back to the trial court to determine if the officer had reasonable grounds to conduct the search. *Duarte*, *supra*, note 42 and *Thompson*, *supra*, note 44 are discussed in more detail in Part IV.B., *infra*.

[46] Again, prior to *Krull*, this would have been sufficient to exclude: *see supra*, note 35 and *Ybarra* v. *Illinois*, 444 U.S. 85 (1979) [hereinafter *Ybarra*].

[47] Justice O'Connor, dissenting in *Krull*, *supra*, note 34 at 367, was especially critical of this aspect of the majority opinion. Because the constitutionality of the Illinois statute was still unclear, she said, it is "not apparent how much constitutional law the reasonable officer is expected to know."

Court of Canada has not addressed the precise point at issue in *Krull*, either.[48]

The dissent in *Leon* criticized the notion that a search could be both unreasonable and reasonable in this sense, i.e., that evidence obtained in violation of the constitution could nevertheless be admitted because the officer acted in good faith.[49] As Justice Stevens put it:

> [I]f the Court's assumption is correct — if there was no probable cause — it must follow that it was "unreasonable" for the authorities to make unheralded entries into and searches of private dwellings and automobiles. The Court's conclusion that such searches undertaken without probable cause can nevertheless be "reasonable" is totally without support in our Fourth Amendment jurisprudence.[50]

In Canada, of course, this is precisely what subsection 24(2) contemplates, especially in light of the Court's view that admitting real evidence will rarely bring the administration of justice into disrepute.[51] The question is whether the jurisprudence on unreasonable search and seizure (section 8) bears out this generalization.

2. *Warrantless Searches*

The most vexing problem with the good faith doctrine in the United States concerns warrantless searches where there is no question of authorization by an unconstitutional statute. The issue is whether a version of the good faith doctrine should be applied when the officers who conduct the warrantless search believe they have reasonable grounds, but a court subsequently determines that they did not. American commentators, focusing on the deterrence rationale, have argued that extending the good faith exception to this sort of search dilutes the standard of probable cause and makes the warrant process less attrac-

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[48] The question of whether statutes authorizing warrantless administrative searches are constitutional has yet to come squarely before the Supreme Court. But statutory demands to produce documents have passed muster and so, probably, do searches: *see Thomson Newspapers Ltd* v. *Canada (Dir. of Investigation and Research, Restrictive Trade Practices Comm'n)*, [1990] 1 S.C.R. 425, 54 C.C.C. (3d) 417 [hereinafter *Thomson Newspapers*]; *R.* v. *McKinlay Transport Ltd*, [1990] 1 S.C.R. 627, 55 C.C.C. (3d) 530. In the latter, Wilson J. cited appellate decisions authorizing what amounted to administrative searches and commented at 544-45 that she did so:

> [n]ot to approve or disapprove the results achieved but rather as evidence of the need to take a flexible and purposive approach to s. 8 of the *Charter*. It is consistent with this approach, I believe, to draw a distinction between seizures in the criminal or *quasi*-criminal context to which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review.

[49] *Leon, supra*, note 19 at 960.

[50] *Ibid.* at 966-67.

[51] *Supra*, note 20.

tive.[52] The United States Supreme Court has not dealt with this issue. In Canada, on the other hand, the *Charter* does not distinguish between searches with and without warrant the way the Fourth Amendment appears to: good faith under subsection 24(2) appears to be relevant to all breaches of section 8. A couple of examples should suffice.

In *Greffe*, referred to earlier, the RCMP had information that the accused was about to enter Canada with heroin in his possession.[53] They also knew what flight he was supposed to be on, his physical description, and the clothes he was wearing.[54] They alerted Canada Customs, who detained Greffe at the Calgary airport and, without advising him of his right to counsel, subjected him to a body search. No drugs were discovered. When Greffe was turned over to the RCMP they told him that he was under arrest for unpaid traffic tickets and advised him of his right to counsel. Then they took him to hospital where a physician conducted a rectal search that revealed a quantity of narcotics.

The Crown conceded that the police violated Greffe's rights under sections 8, 10(a) and 10(b) of the *Charter* but, despite this, contended that there had been reasonable grounds for the search and that the evidence should not be excluded.[55] Justice Lamer disagreed. He found (a) that the Crown led insufficient evidence to establish that the officers had reasonable grounds for believing that Greffe was in possession of narcotics, so the warrantless search could not be justified under paragraph 10(1)(a) of the *Narcotic Control Act*; and (b) that a rectal search could not, by any stretch of the intellect, be regarded as a legitimate incident of an arrest on outstanding traffic warrants. He concluded that the cumulative effect of the violations, and especially the artifice of using the traffic arrest to conduct a rectal examination, required exclusion. Although the events took place before the Court's major *Charter* decisions, the Chief Justice found no evidence of good faith, and held that admitting the evidence would bring the administration of justice into disrepute.

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[52] *See, e.g.*, D. Dripps, *Living with Leon* (1986) 95 YALE L. J. 906. The dissent in *Leon* and the majority in *Kokesch, supra*, note 22 at 227 also expressed concerns about the prosecution's tendency to concede the violation and then argue good faith.

[53] *See supra*, note 9.

[54] At trial, the Crown was given the opportunity to adduce more testimony about the information that led the police to believe that Greffe was carrying narcotics, but declined to do so. There was, therefore, no evidence of the informant's reliability or how the officers knew that the suspect was a "balloon swallower".

[55] *Greffe, supra*, note 9 at 176 & 182. The Crown seems to have accomplished the difficult feat of conceding a s. 8 violation yet arguing that the search was reasonable by relying upon the trial judge's finding of fact to that effect. But the Supreme Court ruled that, in the absence of evidence, one could conclude that the police's confidential information was reliable only by improperly reasoning backwards from the fact that narcotics were discovered.

Good faith is thus relevant to warrantless searches in Canada, even when both sections 8 and 10(b) are involved.[56] But this has not meant that real evidence obtained in violation of section 8 will be as readily admitted as the generalization in *Collins* might lead one to believe. In fact, it sits somewhat uneasily with some of the results of the section 8 cases that have reached the Supreme Court, including the ruling on admissibility in *Collins* itself.[57] It is true that the repute of the justice system will be affected only if the violation is serious, but if there were no reasonable grounds for the search the emerging law would appear to be that the violation *is* serious, especially if bodily integrity is involved.[58] Indeed, *Greffe* is only the last in a series of cases involving bodily intrusions, and in all of them the Court has excluded the evidence.[59] Even where this is not a factor, the Court is obviously aware of the tension, noted by Justice Stevens in *Leon*, between finding a search unreasonable and then admitting the evidence. This tension is much more acute where warrantless searches are concerned, because the police cannot say they were misled by a justice of the peace or the legislature. If the search is unreasonable, it is because the police searched without reasonable grounds or carried out the search in an unreasonable manner, and it may be difficult to do either of these things in good faith.[60]

Kokesch is a second, and even better, example. Although the evidence in that case was obtained by means of a search warrant, the police

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[56] *See also R.* v. *Simmons*, [1988] 2 S.C.R. 495, 45 C.C.C. (3d) 296 [hereinafter *Simmons*]; *R.* v. *Strachan*, [1988] 2 S.C.R. 980, 46 C.C.C. (3d) 479 [hereinafter *Strachan*]; *Jacoy*, *supra*, note 22; *R.* v. *Debot*, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193 [hereinafter *Debot*], where the evidence was admitted. For further discussion, see Part III.B., *infra*.

[57] In the Supreme Court, both the search and the decisions of the lower courts had to be characterized as unreasonable in order to justify interfering with the result: *see* the test enunciated in *R.* v. *Duguay*, [1989] 1 S.C.R. 93 at 94-95, 46 C.C.C. (3d) 1 at 5 [hereinafter *Duguay*] and re-affirmed in *Greffe*, *supra*, note 9 at 182. That the trial judge and a unanimous Court of Appeal had ruled in favour of admitting the evidence suggests that *Collins* sets a relatively low threshhold for serious violations.

[58] In *Collins*, *supra*, note 20; at 14 & 23, the Court held that a search is reasonable "if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable." The insufficient evidence of reasonable grounds in that case, coupled with the search method (a throat hold), constituted a "flagrant and serious violation" of the accused's rights.

[59] *See Collins*, *supra*, note 20; *Dyment*, *supra*, note 5; and *R.* v. *Pohoretsky*, [1987] 1 S.C.R. 945, 33 C.C.C. (3d) 398. As early as *Hunter*, *supra*, note 3 at 114-15, the Court suggested a hierarchy of investigatory circumstances, indicating that searches affecting bodily integrity might be held to a higher standard. *Simmons*, *supra*, note 56 may be regarded as an exception, but it involved a less serious intrusion: a strip search by customs officers (arguably at the other end of the *Hunter* hierarchy). Moreover, it was the violation of the accused's s. 10(b) rights that rendered the manner of the search unreasonable: *see* Part III.B., *infra*.

[60] *Genest*, *supra*, note 38 is a warrant case where obvious defects in the warrant, combined with excessive force in its execution, led to the exclusion of real evidence. The Court held that police should be aware of what is required for a valid warrant.

based their application for the warrant on information gained by going onto the accused's property — without a warrant — to look in the windows. They saw nothing, but *smelled* marijuana. At trial, the police conceded that, prior to doing this they did not have grounds for a warrant, only a suspicion that an offence was being committed; nonetheless, they maintained that they had acted lawfully. The Court excluded the evidence obtained as an indirect result of the perimeter search, holding that where police powers are constrained by statute or case law, police officers cannot "test the limits" by ignoring the law and then claim to have been "in the execution of [their] duties".[61] Moreover, the Court held this irrespective of whether the police knew that they were proceeding unlawfully or simply ought to have known. The search was objectively unreasonable and although subjective considerations might aggravate the transgression, they were not necessary for the evidence to be excluded.[62] In the words of Justice Sopinka, for the majority:

> Either the police knew they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in "good faith", as that term is understood in s. 24(2) jurisprudence.... [Because of previous Court decisions any] doubt they may have had about their ability to trespass in the absence of specific statutory authority to do so was manifestly unreasonable, and cannot, as a matter of law, be relied upon as good faith for the purposes of s. 24(2).[63]

As American law presently stands, the United States Supreme Court would also have excluded the evidence, even if the good faith exception is a relevant consideration: the reasonably well trained officer would have known that the search was illegal, whether this officer did or did not.[64]

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[61] *Kokesch*, *supra*, note 22 at 231. Unlike *Genest*, *supra*, note 38, in *Kokesch* there was no suggestion of excessive force in executing the search.

[62] *Ibid.* at 230.

[63] *Ibid.* at 230-31 citing *Genest*, *supra*, note 38, in support. As he did in *Greffe*, *supra*, note 9, Dickson C.J.C. dissented, arguing at 222 that *Kokesch* was analogous to the *Sieben*, *Hamill*, *Duarte* and *Wiggins* line of cases.

[64] Would this be the result in *Greffe*, as well? The answer depends upon which of the two standards that the U.S. Court has developed for warrantless searches applies to rectal examinations at the border. Lower federal courts have held that involuntary x-ray examinations may be made based upon the sort of suspicion first spelled out in *Terry* v. *Ohio*, 392 U.S. 1 (1968) [hereinafter *Terry*], but the higher, "probable cause" standard contained in the Fourth Amendment may well be required before a warrantless rectal examination, so much more intrusive, may be performed. Thus, although in *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985) the Supreme Court held that customs officers needed only a reasonable suspicion for a detention that lasted 16 hours, a warrant was eventually obtained for the rectal examination in that case — a procedure that is available in Canada only for blood samples.

Vagueness about the location of the narcotics and why the police believed Greffe was in possession make it likely that the U.S. Supreme Court would have found that the search violated the Fourth Amendment and suppressed the evidence. Chief Justice Dickson was, therefore, correct in believing that American courts would exclude, but not because officers mislabelled the offence.

B. *Evidence Affecting the Fairness of the Trial*

As we have seen, the Supreme Court of Canada takes a rather different attitude toward evidence that might affect the fairness of the trial. Unlike real evidence that exists independently of the accused and prior to the violation, it is presumptively inadmissible. The Court has also noted that it will generally "arise in the context of an infringement of the right to counsel", and has provided a working definition of such evidence. It is not confined, as in the United States, to statements, but includes all evidence that "emanates" from accused persons by being obtained through "conscripting" them against themselves.[65] The result has been that evidence obtained in violation of subsection 10(b) is usually, but not always, excluded. The case law reveals two situations where there is a possibility of admission: (i) where the evidence obtained in violation of the right to counsel is real evidence (even if it emanates from the accused);[66] and (ii) where the emanating evidence (even if it is an incriminating statement) is obtained by a violation of a *Charter* right other than the right to counsel.[67] But if the emanating evidence is an incriminating statement obtained in violation of subsection 10(b), it has, without exception, been excluded.[68] This, at least, is the *effect* of the Court's decisions; the justices themselves are reluctant to make the point quite so plainly. Two recent cases are instructive.

The first, *R.* v. *Evans*, was a murder case where the police arrested the accused on a marijuana charge in the hope that he would provide evidence that his brother had committed the murders. During the first of three intensive interviews the police began to suspect Evans instead, so in the second interview they told him — falsely — that his fingerprints had been found at the crime scene. Another problem was that, although he was a young man of subnormal mental capacity, the police made no

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[65] *Supra*, note 20 at 19. Thus, in *Ross*, *supra*, note 5, line-up evidence that would have been admissible in the United States was excluded under this doctrine: *see*, *supra*, note 2 at 755-58.

[66] Thus, in *Strachan*, *supra*, note 56, narcotics obtained in violation of s. 10(b) were admitted and, notwithstanding that it emanated from the accused, so was a breath sample in *R.* v. *Tremblay*, [1987] 2 S.C.R. 435, 37 C.C.C. (3d) 565 [hereinafter *Tremblay*]. The latter is a truly exceptional case, in which the ruling was prompted by the accused's "violent, vulgar, and obnoxious" behaviour (at 567).

[67] Thus, in *Duarte* and *Wiggins*, *supra*, notes 42 & 43, evidence obtained in violation of s. 8 was admitted, notwithstanding that it consisted of recorded conversations.

[68] However, *see* Chief Justice Lamer's concurring and somewhat unusual judgment in *R.* v. *Schmautz*, [1990] 1 S.C.R. 378, 53 C.C.C. (3d) 556. Professor Paciocco has suggested that *Duarte* and *Wiggins* may signal a retreat from what he has called the absolute rule of exclusion for evidence emanating from the accused: *see The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule* (1990) 32 CRIM. L. Q. 326 [hereinafter Paciocco]. In our view, there has never been such an all-inclusive rule. *Collins* speaks in general terms, and the only "absolute" rule of exclusion that seems to have emerged, in deed if not in word, is where a statement has been obtained in violation of s. 10(b): *see* succeeding text.

attempt to explain his rights after he said that he did not understand them. This strategy eventually elicited a confession that formed virtually the whole of the Crown's case, but it had been obtained in such an "aggressive" and "deceptive" manner that, according to McLachlin J., the interviews "apparently left [Evans] feeling as if he had 'no choice' but to confess".[69] The Court also found that the accused's right to counsel had been violated not once but three times, so admitting a confession obtained in consequence thereof would render the trial unfair. Still, McLachlin J. would only say that, "generally speaking", an incriminating statement obtained in violation of the *Charter* should be excluded.[70] Accordingly, before ruling that Evans's statements were unreliable as well as constitutionally tainted, the Court considered the second and third group of factors set out in *Collins* before opting for exclusion.

This decision to engage in what was, technically, an unnecessarily detailed *Collins* analysis appears to have been prompted by the Court's genuine doubts about Evans's guilt and by their desire to address the startling reasons given by the British Columbia Court of Appeal for affirming the accused's conviction. The B.C. Court had ruled (Hutcheon J.A., dissenting) that there was no breach of subsection 10(b) and that, if there were, admitting the statement would not bring the administration of justice into disrepute. According to Justice Southin, admission was necessary because nothing could affect the repute of the justice system more adversely "than letting the accused, a self-confessed killer, go free to kill again on the basis of such infringements".[71] Clearly she did not share the doubts that the Supreme Court of Canada had about the trustworthiness of the confession and the guilt of the accused. Justice McLachlin commented as follows:

> The fallacy [in the Court of Appeal's] reasoning, with the greatest respect, is that it rests on the questionable assumption that the confessions were reliable and true. More fundamentally, it rests on the assumption that the appellant is guilty. But the very question before the Court of Appeal was whether the appellant was, in fact, guilty — that is, whether the jury, after a trial conducted in accordance with the law, had properly found him guilty....To justify the unfairness of his trial by presuming his guilt is to stand matters on their head....Few things could be more calculated to bring the administration of justice into disrepute than to permit the imprisonment of a man without a fair trial. Nor.... would [it] achieve the end sought by Southin J.A., namely, the preven-

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[69] *Evans*, *supra*, note 31. Evidence was also led of a conversation between Evans and an undercover officer posing as a cellmate. Asked why he confessed, Evans replied that the police would not give him a rest until he did. He also said (at 310): "You know it's funny, I don't remember killing them...Usually I won't forget somein [sic] like that." In another interview, police suggested Evans had committed the murders because he was frustrated with women, and he subsequently told a doctor who had come to take hair and blood samples that this was why he had done it. There was psychiatric evidence to the effect that Evans's mental deficiency bordered on retardation and that he was easily influenced.

[70] *Ibid.* at 309, citing Lamer J. in *Collins*, *supra*, note 20.

[71] (1988), 45 C.C.C. (3d) 523 at 564 [hereinafter *Evans (1988)*].

> tion of further murders by the killer of [the two victims]. Only a conviction after a fair trial based on reliable evidence could give the public that assurance.[72]

The second case, *R.* v. *Elshaw*, also involved overturning the B.C. Court of Appeal, but here the decision to go beyond the first set of *Collins* factors cannot be attributed to a desire to emphasize the unreliability of the accused's confession.[73] Two adult witnesses had observed Elshaw behaving very suspiciously with two little boys in a public park, and called the police. When confronted by one of the witnesses Elshaw attempted to leave the park by jumping a fence, but was stopped and placed in the back of a police van. Five minutes later, after questioning both the adult witnesses and the little boys, one officer returned to the van, opened the door, and asked him what would have happened if they had not intervened. In response, Elshaw made an incriminating statement. Then and only then did the police advise him of his right to counsel. He was never told of his right to silence. The Court of Appeal nonetheless upheld the trial judge's decision to admit the evidence, stressing that the events pre-dated the Supreme Court of Canada's decisions in *Therens* and *Collins* and that pre-*Charter* law supported what the police had done.[74] The police had acted in good faith, they concluded, and notwithstanding the violation the evidence would "probably" have been obtained "in any event".[75]

The Crown conceded that Elshaw had been detained and that his subsection 10(b) rights were violated, and the majority in the Supreme Court of Canada were of the view that the only issue before them was whether the statement should be excluded under subsection 24(2). Given the facts of the case and the principles laid down in *Collins* and its progeny, it should have been a simple matter to reverse.[76] But perhaps because the Court was faced with another apparent refusal of the B.C. Court of Appeal to follow precedent, the majority went through most of the *Collins* criteria before doing so, effectively and easily dispensing with the arguments that found favour below. And, like Justice McLachlin in *Evans*, Justice Iacobucci summarized this by saying only that "the exclusion of inculpatory statements obtained in violation of subsection 10(b) should be the rule rather than the exception."[77] Perhaps, but what

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[72] *Supra*, note 31 at 311.

[73] (1991), 67 C.C.C. (3d) 97, 7 C.R. (4th) 333 (S.C.C.) [hereinafter *Elshaw*].

[74] This argument had already been rejected in *Therens*, *supra*, note 26, where the Crown relied upon the same pre-*Charter* case, *Chromiak* v. *R.* (1979), 49 C.C.C. (2d) 257, 12 C.R. (3d) 300 (S.C.C.).

[75] *Supra*, note 73 at 121-23.

[76] As Iacobucci J. put it at 127, the Court of Appeal's approach was contrary to *Collins*: a rights violation that jeopardizes trial fairness cannot be "saved" by good faith.

[77] *Ibid.* at 129. The Court, at 130, found the Crown's reliance upon s. 686(1)(b)(iii) of the *Criminal Code* "somewhat disturbing in a case of this kind." If evidence should be excluded under s. 24(2) as bringing the administration of justice into disrepute, to admit it because there was "no substantial wrong or miscarriage of justice" seems awkward, if not actually contradictory.

are the exceptions? In *Evans* and *Elshaw* and every other case where statements were obtained in violation of subsection 10(b), they have been excluded. This may simply be an empirical fluke, but it looks more like an unstated *a priori* principle.

The only dissent in *Elshaw* was registered by Justice L'Heureux-Dubé, and it was based upon a refusal to accept the Crown's concession that subsection 10(b) had been violated.[78] She went on to urge the Court to "look south and learn" from the United States Supreme Court's decisions in *Terry* and *Adams* v. *Williams* in order to create a compromise between the interests of suspects and the requirements of law enforcement.[79] In *Terry*, the Court had ruled that police who were performing routine patrol functions and who became concerned for their safety could detain suspicious persons for a brief period of time in order to search them for weapons. In exigent circumstances, the Court reasoned, the Constitution did not require probable cause for this sort of "stop and frisk". *Adams* extended this doctrine to permit "*Terry* stops" where the officers' suspicions were based, not upon their own observations, but upon the information of others, and Justice L'Heureux-Dubé interpreted this as meaning that it is no longer necessary in the United States for police to entertain "reasonable fears for [their] safety" in order to come within *Terry*.[80] She then invoked another United States Supreme Court precedent, *Berkemer* v. *McCarty*, to argue that, in that country, persons who have been detained in order to determine whether the officers' suspicions are well-grounded are not necessarily "in custody" for the purposes of *Miranda* v. *Arizona* and, therefore, need not be advised of their right to counsel.[81] Applying this to Canada, Justice L'Heureux-

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[78] This also involved (*ibid.* at 104-05) a rather strained attempt to characterize holding Elshaw in the back of a police van (after his attempt to leave the scene had been intercepted) as a merely psychological detention rather than an actual deprivation of liberty. The reason for doing so was to support the argument that *Therens*, *supra*, note 26 ought to be overruled insofar as it required a s. 10(b) warning for such "detentions".

[79] *Ibid.* at 109, citing *Terry*, *supra*, note 64 and 407 U.S. 143 (1972) [hereinafter *Adams*].

[80] *Ibid.* at 110. This is not quite correct, however. The issue in *Terry* and *Adams* was the Fourth Amendment search, not a statement, and a concern for safety is still a requirement if the police intend to frisk the suspect. Thus, in *Ybarra*, *supra*, note 46, the majority and the dissent differed only on whether the police had reason to suspect that the defendant himself was armed, or simply that one or more of the other persons (in the bar being searched) were. *United States* v. *Serna-Barreto*, 842 F.2D 965 (7th Cir. 1988), a decision that L'Heureux-Dubé J. cites in support, also involved — as did *Terry* and *Adams* — concerns about whether the suspect was armed.

[81] 468 U.S. 420 (1984) [hereinafter *Berkemer*], holding that the roadside traffic stop of a suspected impaired driver was not the sort of "police-dominated" environment contemplated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966) [hereinafter *Miranda*]. We drew attention to *Berkemer* and *Terry* in the discussion of *Therens*, *supra*, note 26 in our earlier article: *supra*, note 2 at 751-55.

Dubé concluded that Elshaw was not detained within the meaning of subsection 10(b) and, therefore, his statement was admissible.[82]

The matter is perhaps not as straightforward as all this might suggest. A "stop and frisk" based on suspicion rather than probable cause pursuant to *Terry* and *Adams* is permissible only if there is a concern for safety, and although there appears to have been no "frisk" in *Elshaw*, nor was there the sort of potential danger necessary to bring the questioning within the "public safety" exception to *Miranda*.[83] Given that in American law there is no "bright line" that transforms an investigatory stop into an arrest, Justice L'Heureux-Dubé is on firmer ground if one focuses upon the nature of the detention. In the United States, the real issue in *Elshaw* would be whether the accused had been subjected to a custodial interrogation in a police-dominated environment. Because the officer remained outside the van when the accused was questioned, because the van was parked in a public place with the door open, and because the questioning was brief, it seems likely that the United States Supreme Court would have admitted the statement. In Canada, where the pre-trial right to counsel is not tied to custodial interrogation, only a retreat from the wide definition of "detention" in subsection 10(b) could accomplish this result.[84]

Neither the rigour of the exclusionary rule nor its extension, in a modified form, to "non-testimonial" evidence such as line-ups and breath tests, were anticipated by the framers of the *Charter*. Both are due to the Court's willingness to give its provisions a purposive interpretation.[85] This means that rights are interpreted in terms of protecting and advancing their underlying values, and, in the case of subsections 10(b) and 24(2), these values are quite similar. The exclusionary rule in subsection 24(2) maintains the reputation of the judicial system; subsection 10(b) aims "at fostering the principles of adjudicative fairness."[86]

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[82] In the alternative, Justice L'Heureux-Dubé held at 118-19 that if s. 10(b) had been violated she would rule the statements admissible because, "pursuant to the criteria set down in *R.* v. *Collins*", this would not bring the administration of justice into disrepute. As written in *Collins*, perhaps; but not as subsequently interpreted.

[83] *See New York* v. *Quarles*, 467 U.S. 649 (1984) [hereinafter *Quarles*]. Some states have enacted "stop and frisk" legislation. Montana, for example, distinguishes between stopping a vehicle to determine whether there is cause to arrest (which requires only a "particularized suspicion"), and actually "frisking" a person (which requires a reasonable suspicion that the person is "armed and presently dangerous"): *see* MONT. CODE ANN. 46-5-401, 402 & 403 (1991). *See also* American Law Institute, *A Model Code of Pre-Arraignment Procedure* at 279. If Parliament enacted similar legislation it would force the courts to examine this issue under s. 1 of the *Charter* instead of having to jump immediately to s. 24(2).

[84] So far, only circumstances of urgency or necessity justify departing from this requirement, and it must be necessary to question the suspect immediately, not simply necessary to detain the suspect: *Elshaw*, *supra*, note 73 at 126, citing *Clarkson* v. *R.*, [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207 [hereinafter *Clarkson*] and *R.* v. *Black*, [1989] 2 S.C.R. 138, 50 C.C.C. (3d) 1 [hereinafter *Black*].

[85] Paciocco, *supra*, note 68.

[86] *Clarkson*, *supra*, note 84 at 217.

From this perspective it would seem to be axiomatic that if, for any reason, police fail to observe subsection 10(b) and thereby conscript accused persons against themselves, the resulting evidence, whatever its nature, must be excluded, otherwise trial fairness is affected. This is borne out by the fact that, where evidence obtained in violation of subsection 10(b) has been admitted, there has been no reference to "good faith". Instead, the evidence has been excluded by finding a waiver or failure by the accused to exercise the right to counsel with diligence, as in *R.* v. *Smith*;[87] by categorizing the evidence as "non-emanating," as in *Strachan*;[88] or by creating, in *Tremblay*, an exception which the Court has thus far confined to that case.[89] As Justice Sopinka remarked in a passage relied upon by Iacobucci J. in *Elshaw*:

> I fail to see how the good faith or otherwise of the investigating officers can cure, so to speak, an unfair trial. This court's cases on s. 24(2) point clearly, in my opinion, to the conclusion that where impugned evidence falls afoul of the first set of factors set out by Lamer J. in *Collins* (trial fairness), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation). These two sets of factors are alternative grounds for the *exclusion* of evidence, and not alternative grounds for the *admission* of evidence. It seems odd indeed to assert that evidence the admission of which would render a trial unfair ought to be admitted because the police officer thought he was doing his job.[90]

So why look at the other *Collins* factors once it has been decided that admitting the evidence would be unfair? The answer would appear to be that some of the justices remain uncomfortable with the direction in which the Court's jurisprudence is inexorably leading them. Yet under the mounting pressure of accumulating jurisprudence, the discussion of these factors in such cases is becoming shorter and shorter.

For its part, the United States Supreme Court will also exclude confessions made where the right to counsel has been violated, because a failure to read a suspect his or her *Miranda*[91] rights raises a presump-

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[87] [1989] 2 S.C.R. 368, 50 C.C.C. (3d) 308. In this remarkable case, the Supreme Court narrowly decided (4:3) to admit a statement because the accused had not diligently exercised his right to counsel. Yet there were no circumstances of urgency or necessity and the police talked Smith out of waiting for his lawyer after he indicated he did not want to make a statement without consulting her. *See also R.* v. *Baig*, [1987] 2 S.C.R. 537, 37 C.C.C. (3d) 181, where the Court ruled that a person who failed to respond to the s. 10(b) warning could be presumed to have understood it. This looks like an implied waiver, but the Court insisted that there was no need to decide that issue.

[88] *Supra*, notes 22 & 66.

[89] *Supra*, note 66.

[90] *Hebert*, *supra*, note 4 at 20.

[91] *Miranda*, *supra*, note 81.

tion that a resulting confession is untrustworthy.[92] However, police are required to meet the standards established in *Miranda* only if the accused is in custody and is interrogated in a police dominated atmosphere. It is therefore difficult to avoid the conclusion that, notwithstanding the wording of subsection 24(2), there is now a more rigid exclusionary rule in Canada.[93] This is not only because the judicial definition of "detention" in subsection 10(b) means that the obligation to inform suspects of their right to counsel comes earlier in the process than in the United States,[94] but also because the waiver requirements are stricter,[95] and because there is only one judicial exception to the right to consult counsel "without delay".[96]

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[92] *Oregon* v. *Elstad*, 470 U.S. 298 (1985) [hereinafter *Elstad*]. This said, however, in *Elstad* and other decisions the Court has refined — many would say weakened — the *Miranda* standards in a number of ways. In *Quarles*, *supra*, note 83 the Court grafted a public safety exception onto *Miranda*; in *Duckworth* v. *Eagan*, 106 L.Ed. 2d 166 (1989) it loosened the warning requirements; and in *Colorado* v. *Connelly*, 479 U.S. 157 (1986) [hereinafter *Connelly*], *Colorado* v. *Spring*, 93 L.Ed. 2d 954 (1987) [hereinafter *Spring*] and *Moran* v. *Burbine*, 475 U.S. 412 (1986) [hereinafter *Moran*] it relaxed the waiver requirements.

[93] In addition to the cases cited in the preceding note, *see*, *e.g.*, *Oregon* v. *Mathiason*, 429 U.S. 711 (1977) and *Beckwith* v. *United States*, 425 U.S. 341 (1976) [hereinafter *Beckwith*], defining custody for *Miranda* purposes; and *Rhode Island* v. *Innis*, 446 U.S. 291 (1980) [hereinafter *Innis*] on the meaning of "interrogation".

[94] *See supra*, note 2 at 747-48 & 779.

[95] In the United States, the only consideration in assessing the validity of an otherwise apparently valid waiver is police coercion. Thus, in *Connelly*, *supra*, note 92, the mental illness of the suspect was regarded as irrelevant in the absence of such coercion. *But see Clarkson*, *supra*, note 84 and see the further discussion in Part III.A.1., *infra*.

[96] This exception was referred to in *Clarkson*, *supra*, note 84 and first applied in *Strachan*, *supra*, note 56 where the opportunity to exercise the right was suspended because police suspected the presence of weapons and needed to get a "potentially volatile situation" under control. It was then expanded somewhat in *Debot*, *supra*, note 56 where it was held that the exercise of the right had to be postponed until after a body search made incident to arrest. However, in both cases the Court held that the accused had to be read his s. 10(b) rights, and the only s. 24(2) issue was the admissibility of real evidence found as a result of the search.

Of course, s. 1 of the *Charter* can be used to limit s. 10(b), but there are relatively few statutes that can be construed as doing this, and even fewer have been so construed. Significantly, the exceptions have involved impaired driving: *see*, *e.g.*, *R.* v. *Bonin* (1989), 47 C.C.C. (3d) 230, 11 M.V.R. (2d) 31 (B.C.C.A.), *leave to appeal den'd* (50 C.C.C. (3d) vi) and *R.* v. *Grant* (1991), 67 C.C.C. (3d) 268, 7 C.R. (4th) 388 (S.C.C.) [hereinafter *Grant*], dealing with provincial highways legislation implicitly permitting physical co-ordination tests without counsel, and the *Criminal Code*, which implicitly permits roadside breathalyzer tests without counsel. In *Grant* the Supreme Court interpreted the latter provision quite narrowly, holding on the facts that it did not apply.

III. FUNDAMENTAL LEGAL RIGHTS

A. *The Right to Counsel and Self-Incrimination*

Now that police are well accustomed to reading suspects their subsection 10(b) rights, it is unlikely that we will see many more challenges based upon a failure to do so. Instead, problems will arise either because a purported waiver of these rights is ruled ineffective[97] or because an additional duty on police officers that the Supreme Court has read into the section was not satisfactorily discharged.[98]

1. *Waiver*

In our earlier article, we noted how in *Clarkson* the Supreme Court relied upon United States Sixth Amendment precedent on waiver in what was really a Fifth Amendment situation.[99] In that case, perhaps partly because of the way American law was misapplied, the Court asserted a waiver doctrine that at least one commentator has suggested may go "too far to be followed".[100] However that may be, in a recent case the Court served notice that, in deciding whether noncompliance with subsection 10(a) of the *Charter* may have tainted a putative subsection 10(b) waiver, they will consider all the circumstances, i.e., what the suspect knew as well as what the police actually told the suspect.

In *R.* v. *Smith* the accused had been drinking and was still suffering the effects of a severe beating at the hands of the deceased when arrested.[101] At the time, all he was told was that his arrest, which was carried out with a considerable show of force, related to the "shooting incident" of the previous day. He was not told that his victim was dead, nor that he was being charged with murder. Nonetheless, Justice McLachlin, writing for a unanimous Court, upheld the accused's waiver of his right to counsel because his knowledge of the charge was easily inferred from the circumstances. Implicitly distinguishing the earlier case of *Black* as one in which the death of the victim substantially affected the validity of any implied waiver, Justice McLachlin concluded:

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[97] *E.g.*, *Clarkson*, *supra*, note 84; *Evans*, *supra*, note 31.

[98] *E.g.*, *R.* v. *Manninen*, [1987] 1 S.C.R. 1233, 34 C.C.C. (3d) 385 [hereinafter *Manninen*].

[99] *Supra*, note 2 at 748-50.

[100] *Clarkson*, *supra*, note 84 at 219 and P.B. Michalyshyn, *Brydges: Should the Police Be Advising of the Right to Counsel?* (1990), 74 C.R. (3d) 151 at 159, who argues that a waiver made without legal advice is unlikely to be one made "with a true appreciation of the consequences" as required by *Clarkson*.

[101] (1991), 63 C.C.C. (2d) 313, 4 C.R. (4th) 125 (S.C.C.), not to be confused with *Smith* (1989), *supra*, note 87 (dealing with diligence and s. 10(b)) or *R.* v. *Smith* (Edward Dewey), [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97 (dealing with punishment under s. 12). In what follows, these three cases will be referred to in chronological order as *Smith (1987)*, *Smith (1989)* and *Smith (1991)*.

> The accused need not be aware of the precise charge faced. Nor need the accused be made aware of all the factual details of the case....The emphasis should be on the reality of the total situation as it impacts on the understanding of the accused, rather than on technical detail of what the accused may or may not have been told.[102]

The effect of ruling that awareness of the reason for the arrest can be inferred from the circumstances is that subsection 10(a) of the *Charter* reflects the existing common law.[103] Indeed, in *Evans*, handed down three weeks after *Smith (1991)*, Justice Sopinka explicitly noted the applicability of *Christie* v. *Leachinsky*, the leading English case on point, to waiver under the *Charter*.[104]

Justice McLachlin held in *Smith* that, insofar as waiving subsection 10(b) rights is concerned, "common sense" requires only that the accused be "possessed of sufficient information [to understand] the sort of jeopardy he faced when he or she made the decision to dispense with counsel."[105] Noting that "sometimes a lawyer is more important than at other times", she contended that it had never been suggested that:

> [F]ull information is required for a valid waiver. Indeed, if this were the case, waivers would seldom be valid, since the police typically do not know the whole story when the accused is arrested. Nor is the failure of the police to precisely identify the charge faced in the words of the *Criminal Code* necessarily fatal. In the initial stages of an investigation the police themselves may not know the precise offence with which the accused will be charged.[106]

This seems quite straightforward. It also points to what went wrong in *Clarkson*, and may signal a retreat, albeit a small one, from the test enunciated there. In that case Justice Wilson relied upon American Sixth Amendment precedent dealing not with waiving the right to counsel upon arrest or detention, but with appearing in court for trial and plea, a point much later in the process. That is why Sixth Amendment cases define the "awareness of consequences" test so widely: by then, the shape of the proceedings should have become clear, and it is not unreasonable to

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[102] *Ibid.* at 323-24. In *Black*, *supra*, note 84, the accused consulted counsel before she knew the victim had died, but was not given a reasonable opportunity to do so again in light of the new charge (murder). It was, therefore, held that she had not waived her rights by initiating a conversation on a different subject.

[103] Technically, Justice McLachlin's remarks relate to s. 10(b) rather than 10(a) because the Crown conceded — but the Court did not actually decide — that s. 10(a) had been violated.

[104] *Supra*, note 31 at 293, referring to *Christie* v. *Leachinsky*, [1947] A.C. 573. This was in a concurring judgment in which Justice Sopinka held that Evans's s. 10(a) rights as well as his 10(b) rights had been violated.

[105] *Smith (1991)*, *supra*, note 101 at 323. Yet in *Smith (1989)*, *supra*, note 87, the majority ruled that persuading the accused that it was in his interest to speak "off the record" did not affect their conclusion that he had not been diligent in seeking to consult counsel — notwithstanding that he expressed a desire to do so.

[106] *Ibid.* Note, however, that the suggestion that lawyers are more important or less important, depending on the circumstances, sits rather uneasily with what was said in *Black*, *supra*, note 84 at 12, cited in *Elshaw*, *supra*, note 73 at 128.

require the accused to be "tuned in to the legal intricacies of the case" before a valid waiver can be made.[107] American Fifth Amendment law is narrower, requiring only that the suspect understand the right to stand mute and request a lawyer, and that the suspect be aware that statements made can be used against him or her. Ironically, at about the same time that Justice Wilson was using Sixth Amendment precedent to write the broad principle set forth in *Clarkson*, the United States Supreme Court — as Justice McLachlin acknowledges in *Smith (1991)* — was reducing even further the protection accorded suspects by that country's Fifth Amendment waiver doctrine.[108]

As a result, notwithstanding the modification of *Clarkson* in *Smith (1991)*, Canadian law continues to be more solicitous of individual rights than American law in this area as well. Smith's waiver was valid because the Court inferred that he knew the charge was murder; absent this inference, it seems that the failure of the police to tell him would have been fatal. In the United States, the issue is whether the suspect understands the right to silence, not whether the suspect understands the true import of the questioning and the true extent of his or her criminal liability.[109] In the absence of police "trickery" a failure to understand either of the latter is immaterial: there is no general obligation to explain. Perhaps this point of difference is best exemplified in *Evans*, where the Supreme Court held that it was necessary to reiterate the subsection 10(b) warning if "the nature of the investigation" changes. To do otherwise, wrote Justice McLachlin:

> leaves open the possibility of police manipulation, whereby the police — hoping to question a suspect in a serious crime without the suspect's lawyer present — bring in the suspect on a relatively minor offence, one for which a person may not consider it necessary to have a lawyer immediately present, in order to question him or her on the more serious crime.[110]

This possibility is, of course, precisely what the United States Supreme Court gave their stamp of approval to in cases such as *Spring*.[111]

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[107] *Clarkson*, *supra*, note 84 at 218-19.

[108] *Smith (1991)*, *supra*, note 101 at 322, citing *Moran*, *supra*, note 92. She might also have referred to *Spring*, *supra*, note 92, where the U.S. Supreme Court ruled that there was no obligation to tell a suspect that questioning related to a much more serious charge than when the suspect waived counsel. (The Court left open the question of whether affirmative deception — as opposed to "mere silence" — by the police will invalidate the waiver, but this seems likely.)

[109] This difference is because s. 10(a) requires the police to advise a detainee promptly of the reason for the detention, and because of the way the Supreme Court has interpreted ss. 10(a) and (b). As McLachlin J. put it, in Canada (i) a lack of information can "taint" the s. 10(b) warning (*Greffe*); (ii) the detainee is entitled to know "the extent of [his or her] jeopardy" (*Black*); and (iii) the test for a valid waiver entails "awareness of consequences" (*Clarkson*): *see Smith (1991)*, *supra*, note 101 at 322.

[110] *Supra*, note 69.

[111] *See supra*, note 108.

2. *The Supreme Court of Canada and* Miranda *v.* Arizona

In the landmark case of *Miranda*, the United States Supreme Court, over vigorous dissent, decided that the privilege against self-incrimination enshrined in the Fifth Amendment had to be made effective before as well as during trial.[112] To accomplish this, the Court held that, prior to interrogating a suspect who is in custody or a functional equivalent thereof, the police had to read the suspect a warning composed of four separate elements. These are (1) that the suspect has a right to remain silent; (2) that anything he says can be held against him in a court of law; (3) that he has the right to consult with an attorney and to have him present during interrogation; and (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning, if so desired. The language of subsection 10(b) includes very little of what is outlined in *Miranda*, but the Fifth Amendment itself lists none of the elements: the warnings and the remedy of exclusion are instead prophylactic rules created by the judicary to protect the values in that Amendment.[113] In two recent decisions the Supreme Court of Canada, just as its American counterpart did a quarter of a century earlier, tackled this apparent oversight and imposed significant new duties upon police.

(a) *Legal Aid and Duty Counsel*

Manninen was the first case in which the Supreme Court was asked to flesh out what was required of police under subsection 10(b). There the Court held that, in addition to reading a detainee the right to counsel, police have two further obligations to discharge: they must give a detainee a reasonable opportunity to exercise that right and, if the detainee elects to do so, they must make no attempt to elicit evidence from the detainee until the detainee has had such opportunity, provided he or she is duly diligent.[114] This, as we argued in our earlier article, is both more and less than *Miranda*.[115] It is more because in the United States the *Miranda* warnings are not required unless the suspect is both in custody and about to be interrogated; in Canada the subsection 10(b)

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[112] *Supra*, note 81. Justice Harlan, dissenting, wrote at 513-14 that the differences between judicial proceedings and police interrogation "are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present [case]." However, unlike Justice Wilson in *Clarkson*, *supra*, note 84, Chief Justice Warren was aware of this problem. He therefore departed from the Sixth Amendment approach the Court had flirted with in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and which they subsequently abandoned in *Kirby* v. *Illinois*, 406 U.S. 682 (1972).

[113] Furthermore, the warnings cast a wider net than the Fifth Amendment interests they are designed to protect, and a failure to give them creates a presumption of compulsion: *see Elstad*, *supra*, note 92; *Michigan* v. *Tucker*, 417 U.S. 433 (1974) [hereinafter *Tucker*].

[114] *Supra*, note 98. *See also Tremblay*, *supra*, note 66; *Smith (1989)*, *supra*, note 87.

[115] *Supra*, note 2 at 744-48.

warning must be given upon detention, whether or not it is custodial and whether or not interrogation is planned. It is less because, although Canadian police routinely supply suspects with the information in *Miranda* warnings (1) and (2), neither these warnings nor — subject to what is said below — warning (4) are constitutionally required. Only (3) is part of the subsection 10(b) warning, and then only partially.

This is why *Brydges*, decided in 1990, is such an important decision.[116] On the facts of that case the Court ruled a statement inadmissible on the ground that, although the accused had expressed a concern about not being able to afford a lawyer, the police had not adequately advised the accused of the availability of legal aid. Hence subsection 10(b) had been violated because questioning had not ceased when it became clear that Brydges might want to avail himself of his right to retain and instruct counsel. But the real significance of *Brydges* is that Justice Lamer went beyond these facts and drew a "bright line". He held that subsection 10(b) requires not only that upon arrest or detention suspects be informed of their right to retain and instruct counsel without delay, but that they must also be told of the availability of duty counsel or legal aid. In other words, detainees must be advised of this not only when they respond to the hitherto standard warning by indicating that they cannot afford a lawyer, but as a matter of course, i.e., as a part of the standard warning. This is, arguably, a version of the fourth element of *Miranda*. But it confers no substantive right to counsel paid for by the state; that is a statutory right only, limited by the legal aid laws of each province, and Justice Lamer declined to decide whether the *Charter* required state funded counsel for people without financial means.[117]

In the United States, the right to appointed (state funded) counsel at trial preceded the right to have such counsel present during interrogation by more than twenty-five years in federal criminal proceedings, and by three years in state ones.[118] Change was necessary, said Chief Justice Warren in *Miranda*, because denying counsel to the indigent is "no more supportable" in the police station than at trial.[119] Provincial legal aid schemes have, by statute, achieved substantially the same results in this country as constitutional interpretation has in the United States, but it seems likely that the thinking behind *Brydges* will stimulate pressure to read these entitlements into the *Charter*.[120] Especially, one

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[116] *Supra*, note 23.

[117] *See supra*, note 2 at 744.

[118] In *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) the Court ruled that the Sixth Amendment required state appointed counsel for indigent defendants in federal felony trials. In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) this right was extended to state felony trials, and in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) to misdemeanors where the defendant faces a potential jail sentence.

[119] *Miranda*, *supra*, note 81 at 472-73.

[120] By invoking ss. 7 and 15 (equal protection and benefit of the law) as well as s. 10(b). For American law on the right to counsel and equal protection *see*, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Ross* v. *Moffitt*, 417 U.S. 600 (1974).

might add, if the financial constraints under which government presently operates lead the provinces to enact restrictions on aid hitherto available.

(b) *The Right to Silence*

Neither the Canadian *Charter* nor the American *Bill of Rights* refers to a right to silence. In the United States, this right is derived from the Fifth Amendment privilege against self-incrimination at trial, even though, historically, this privilege applied only at trial. The pre-trial right to silence (e.g., the common law confessions rule) developed quite independently. The warnings required by *Miranda* protect the Fifth Amendment privilege by informing the suspect of his or her right to remain silent and of the consequences of speaking. In Canada the right to silence — but not the right to be told about it — has been read into section 7 of the *Charter*, which guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[121] But the Canadian Supreme Court has proved reluctant to equate any rights arising prior to trial with the privilege against self-incrimination. Instead, they have based both the privilege and the pre-trial common law confessions rule upon what they see as the wider notion of the right to remain silent.[122]

In *Hebert*, the accused was a robbery suspect who was arrested and informed of his right to retain and instruct counsel without delay. It is not clear whether he was arrested for the robbery or for other, unrelated charges, but there is no doubt that it was the robbery that interested the police most.[123] Hebert consulted a lawyer and was placed in a cell with an undercover officer who, according to the agreed but rather ambiguous statement of facts, "engaged the accused in conversation".[124] During the course of this conversation Hebert made incriminating statements about the robbery. Although he had invoked his right to counsel and consulted a lawyer, the Supreme Court of Canada declined to base its decision upon subsection 10(b). Justice McLachlin, writing for the majority, did

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[121] In *Hebert*, *supra*, note 4, and most recently, *R.* v. *Broyles* (1991), 131 N.R. 118, 68 C.C.C. (3d) 308 (S.C.C.) [hereinafter *Broyles*]. *See also R.* v. *Chambers*, [1990] 2 S.C.R. 1293, 59 C.C.C. (3d) 321.

[122] *See Marcoux* v. *R.* (1975), [1976] 1 S.C.R. 763, 24 C.C.C. (2d) 1; *Rothman* v. *R.*, [1981] 1 S.C.R. 640, 59 C.C.C. (2d) 30 [hereinafter *Rothman*]; and the debate between Wilson and Sopinka JJ. in *Thomson Newspapers*, *supra*, note 48.

[123] The preliminary inquiry transcript reveals that when the conversation in the cell took place, Hebert was to appear on two charges the next day, one of which was a narcotics offence on which he had been arrested that night. The other may have been the robbery, but the context suggests otherwise: *see Preliminary Inquiry in R. v. Hebert — How did the Officer Engage the Conversation?* (1991), 3 C.R. (4th) 61 at 64 & 69 [hereinafter *Preliminary*].

[124] *Hebert*, *supra*, note 4 at 22. The Court interpreted this as meaning that the undercover officer "elicited" the statement from Hebert. The agreed statement of facts indicates that he had previously been questioned about the robbery by a uniformed officer.

point to the close relationship between the right to counsel and the right to silence, but the Court analyzed the facts in terms of section 7 of the *Charter*, purporting to find a right to silence that attaches upon detention.[125] The Court omitted to determine whether there is any constitutional obligation on the police to tell a detainee this, so there is not.[126] The essence of the right to silence, according to the Court, is freedom of choice; if the conduct of the police effectively and unfairly deprives a detainee of his or her right to refuse to speak to the authorities, section 7 is violated. Employing this approach, the Court held that the trick used by the police had this effect and excluded the confession.[127]

In order to compare this result with American law, it is important to resolve whether Hebert was charged with the robbery prior to the conversation with the undercover officer. If so, in the United States he would have been protected by the Sixth Amendment right to counsel as well as any Fifth Amendment rights he might have had.[128] As we have seen, the decision is, unfortunately, not clear on this point. While it is unlikely that the police laid the robbery charge prior to the conversation — indeed, it is even possible that it was not the reason they gave Hebert for his arrest — there is evidence that he had been charged with something. Moreover, Justice Sopinka held that the "interchange" between Hebert and the police officer took place "after the appellant was charged", and he makes no mention of offences other than the robbery.[129] Thus, in the absence of any statement to the contrary by McLachlin and Wilson JJ., it seems reasonable to assume that, whatever the real facts may have been, the Court decided the case on the basis that Hebert had been charged with, or at least arrested for, the robbery.

(i) *The Sixth Amendment Right to Counsel and* Hebert

Assuming that Hebert was charged with robbery prior to his conversation with the undercover officer, in the United States the Sixth Amendment right to counsel would have applied and the police could not have actively sought to obtain incriminating statements about the robbery without giving him an opportunity to consult counsel. This is because the formal adversarial process begins with the charge, at which

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[125] All the justices concurred in the result, but Wilson and Sopinka JJ. would have interpreted the s. 7 right even more favourably to detainees by incorporating a waiver doctrine. Wilson J. even went so far as to suggest that the right might apply to suspects who were not detained.

[126] McLachlin J. said at 41 that counsel would "presumably" tell the accused of the right to remain silent, but parted company with *Miranda* by omitting to require police to do so.

[127] Insofar as *Rothman*, *supra*, note 122 permitted police to use undercover agents to elicit confessions from detainees who had invoked their right to counsel, it was overruled, or at least distinguished as a non-*Charter* case.

[128] *See infra*, note 130 and accompanying text.

[129] *Hebert*, *supra*, note 4 at 16. Sopinka J. refers to United States Sixth Amendment precedent at 14.

point the Sixth Amendment right to counsel attaches whether the defendant asks for a lawyer or not. This is so even if the defendant has been released from custody, and even if the defendant is questioned by an undercover agent.[130] As in civil litigation, the lawyer becomes a medium between the defendant and the plaintiff (state). Unless the defendant initiates a conversation with undercover police officers, they cannot question the defendant without first contacting his or her lawyer.[131] Consequently, if Hebert had been charged with robbery prior to the undercover conversation, the Supreme Court of Canada's decision to exclude the confession is consistent with American Sixth Amendment precedent.[132] It would not have been dealt with in the United States as a Fifth Amendment case.

(ii) *The Fifth Amendment Right to Counsel and* Hebert

Assuming, notwithstanding the reasons of Sopinka J., that Hebert was *not* charged with the robbery prior to his jail cell conversation, in the United States it is the Fifth Amendment protection against self-incrimination that would govern. The critical question in a Fifth Amendment analysis would be whether the police can send an undercover agent into a jail cell to elicit information from a suspect who has requested a lawyer, i.e., whether by speaking to the agent Hebert waived his right to counsel. Where the interrogation is conducted, not by undercover agents but by uniformed officers or detectives, this depends upon who initiated the conversation.

In *Edwards* v. *Arizona* the United States Supreme Court held that, once the defendant invokes the Fifth Amendment right to counsel, the defendant cannot be subjected to further interrogation by police until counsel has been made available. Thus, a waiver may not be inferred simply because the defendant responds to a police initiated custodial interrogation.[133] In *Arizona* v. *Roberson* and *Minnick* v. *Mississippi*, the

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[130] In Sixth Amendment jurisprudence, the right to counsel promotes a fair trial, preserves the adversary system, and assists the accused when confronted, post-indictment, with the formal power of the state: *see, e.g.*, *Massiah* v. *United States*, 377 U.S. 201 (1964) [hereinafter *Massiah*]; *United States* v. *Wade*, 388 U.S. 218 (1967); *Brewer* v. *Williams*, 430 U.S. 387 (1977); *United States* v. *Henry*, 447 U.S. 264 (1980) [hereinafter *Henry*]; *Maine* v. *Moulton*, 474 U.S. 159 (1985) [hereinafter *Moulton*]; *Michigan* v. *Jackson*, 475 U.S. 625 (1986) [hereinafter *Jackson*].

[131] *Moulton* and *Jackson*, *ibid.*

[132] Because that Amendment is violated when an undercover officer or agent deliberately elicits incriminating statements from a defendant whose lawyer is not present: *see Massiah* and *Henry*, *supra*, note 130. But if state agents act passively and the defendant makes incriminating statements, merely listening to such statements does not violate the Sixth Amendment: *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986) [hereinafter *Kuhlmann*], referred to by both Sopinka and McLachlin JJ. in *Hebert*, *supra*, note 4 at 14 & 42.

[133] 451 U.S. 477 (1981) [hereinafter *Edwards*].

Court went further.[134] There they held that the *Edwards* doctrine continues to apply *after* the suspect has consulted counsel, even where police want to question the suspect about a crime *other than* the one in respect of which counsel was originally requested. In each of these scenarios the suspect must initiate the conversation before questioning is permissible, or police must ensure that counsel is present if they wish to initiate it. Thus, because Hebert invoked his right to counsel and was held not to have initiated the conversation, in the United States *Edwards*, *Roberson* and *Minnick* would seem to require that evidence of questioning be supressed as having been obtained in violation of Fifth Amendment rights — that is, if the principles governing interrogations by uniformed officers also apply to undercover questioning.

It is, therefore, most interesting that three weeks before the judgment in *Hebert* the United States Supreme Court decided *Illinois* v. *Perkins*, a case that has received a certain amount of attention in Canada.[135] Perkins became the prime suspect in a murder investigation when a fellow inmate told police that Perkins had described the homicide in detail while they were in jail together. By this time, Perkins had been released and then re-incarcerated in a different jail, pending trial on an unrelated aggravated battery charge. The police placed the informant and an officer posing as an inmate in the cellblock, where they engaged Perkins in conversation about the murder without, of course, reading the *Miranda* warning. Perkins boasted about the killing and his statement was later admitted at trial. The narrow issue before the Court was whether the *Miranda* decision prohibits *all* undercover contact with incarcerated suspects that are reasonably likely to elicit an incriminating response. Prior to this, in cases such as *Hoffa* v. *United States*, the Court had decided only that questioning by undercover agents of suspects who are *not* incarcerated is insufficiently "custodial" to require *Miranda* warnings, even where the investigation had focused specifically upon them.[136]

Justice Kennedy, writing for the majority in *Perkins*, extended the *Hoffa* reasoning by arguing that in a jail context there was neither a police dominated atmosphere nor the sort of compulsion that the *Miranda* warnings were designed to guard against: Perkins did not know he was speaking to a police officer. Equating the facts in *Perkins* with using undercover agents to eavesdrop on suspects who are not in custody,

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[134] 486 U.S. 675 (1988) [hereinafter *Roberson*]; 112 L.Ed. 2d 489 (1990) [hereinafter *Minnick*]. The *Edwards* doctrine also applies in Sixth Amendment jurisprudence where an accused requests counsel at an arraignment or other hearing but has not had an opportunity to consult with counsel: *see Jackson*, *supra*, note 130.

[135] 110 L.Ed. 2d 243 (1990) [hereinafter *Perkins*]. The commentators include M. Brown & P. Healy, Hebert: *A Constitutional Right to Silence — Two Comments* (1990), 77 C.R. (3d) 194 [hereinafter *Two Comments*]; N. Lang, "Tales from Two Cells — *R.* v. *Hebert*" (1990), 4 KEEPING TABS: CRIMINAL JUSTICE BRANCH NEWSLETTER (B.C.) 3.

[136] 385 U.S. 293 (1966) [hereinafter *Hoffa*]. *See also Osborn* v. *United States*, 385 U.S. 323 (1966); *Beckwith*, *supra*, note 93.

he concluded that what *Miranda* forbids is coercion, "not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."[137] Because Sixth Amendment protection does not begin until the suspect is charged, agents may go beyond mere listening and actively elicit incriminating statements. Accordingly, there was no Fifth Amendment violation in *Perkins*.

Justice Kennedy's remarks, coupled with an assumption that the facts of the two cases are similar, have led some Canadian commentators to conclude that the *Perkins* approach is more sensible than that used in *Hebert*.[138] Indeed, in a very recent decision the Supreme Court of Canada has also equated the facts in the two cases.[139] To do this, however, glosses over a difference that makes comparing the decisions much more difficult than has been appreciated: Hebert had recently invoked his rights to counsel and silence, but there is no evidence that Perkins had done so. As Justice Brennan wrote in his concurring opinion in *Perkins*, this difference may be critical:

> As the case comes to us, it involves only the question whether Miranda applies to the questioning of an incarcerated suspect by an undercover agent. Nothing in the Court's opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence [as Hebert did], his statements would have been admissible. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived the particular right. See Edwards v. Arizona....Since respondent was in custody on an unrelated charge when he was questioned, he may be able to challenge the admission of these statements if he previously had invoked his Miranda rights with respect to that charge. See Arizona v. Roberson.[140]

The key, therefore, to understanding *Perkins* is not that he was questioned by someone he did not know was a police officer, although this is certainly important. Equally significant is that the United States Supreme Court did not consider whether Perkins had, at any earlier stage in the process, invoked his right to counsel. It is this fact in *Perkins*,

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[137] *Perkins*, *supra*, note 135 at 251, citing *Hoffa*, *ibid.* The concept of "misplaced trust" was also invoked in *United States* v. *White*, 401 U.S. 745 (1971) [hereinafter *White*], an electronic surveillance case that is discussed in more detail in Part IV.B., *infra*. The Court in *White* held that, whether "bugged or not," the informer may reveal what the suspect tells the informer, and there is no Fourth Amendment protection if the suspect does. In *Duarte*, *supra*, note 42, the Supreme Court of Canada rejected *White*, holding that s. 8 of the *Charter* requires the opposite result where electronic surveillance is concerned.

[138] *See, e.g.*, *Two Comments*, *supra*, note 135 at 206, where Healy describes the facts in *Perkins* as "similar to Hebert" and where Brown, at 196, says the U.S. Supreme Court's approach "makes good sense".

[139] *See Broyles*, *supra*, note 121 at 320. Justice Iacobucci expressed the opinion that in *Perkins* the U.S. Supreme Court ruled that "Fifth Amendment rights do not prohibit surreptitious jailhouse conversations *of the kind which this Court found to violate s. 7 in Hebert*" (emphasis added).

[140] *Perkins*, *supra*, note 135 at 253n-254n. Note that in *Hebert*, *supra*, note 4 at 40, Justice McLachlin distinguished her analysis from one based upon waiver.

and not simply a more "sensible" attitude on the part of the Court, that contributed to the very different result in that case. As Justice Brennan suggests, if Perkins had invoked his Fifth Amendment right to counsel on the aggravated battery charge, his statements about the murder as well as the battery could be excluded: the protection conferred by the Fifth Amendment against questioning by uniformed officers is not offence specific.[141] Although Justice White's comments about compulsion suggest that, in a *Hebert* situation, the Court would attempt to distinguish the *Edwards* and *Roberson* line of cases, the issue was neither raised nor decided by the majority in *Perkins*.

(iii) Hebert *and* Perkins

As we have seen, if a suspect consults counsel and then tells the police that he or she does not wish to speak to them, American law merges the rights to counsel and silence under the rubric of the Fifth Amendment right against self-incrimination, which *Miranda* extended to pre-trial custodial interrogation. Only if Hebert had waived his right to counsel but refused to speak to the police about the crime would the United States Supreme Court have focused, as the Canadian Court did, on the right to silence.[142]

Hebert, of course, did not waive his right to counsel. On the contrary: because he was aware of police interest in his role in the robbery, he invoked the right and in fact consulted counsel. Why then did the Supreme Court of Canada decline to treat *Hebert* as a right to counsel case? Part of the explanation may be that the majority wanted to avoid having to apply the test set out in *Clarkson* for waiving subsection 10(b) rights.[143] The majority, therefore, moved the right to counsel into the background and interpreted section 7 as seeking to strike a balance between the individual's right to silence and the state's right to question.[144] Another consideration may have been that categorizing

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[141] *Ibid.* citing *Roberson*, *supra*, note 134. Anything *Perkins* said about the battery charge would be inadmissible because of the Sixth Amendment right to counsel.

[142] For such a case in Canada, *see R.* v. *Hansen* (1988), 46 C.C.C.(3d) 504 (B.C.C.A.).

[143] *Hebert*, *supra*, note 4 at 40.

[144] This dilution of s. 7 and other *Charter* sections (*e.g.*, 11(b)), is what Sopinka and Wilson JJ. objected to in their judgments in *Hebert*, *see supra*, note 124 and *R.* v. *Askov*, [1990] 2 S.C.R. 1199, 59 C.C.C. (3d) 449 [hereinafter *Askov*], where they were joined by Lamer C.J.C. *See also R.* v. *Swain* (1991), 63 C.C.C. (3d) 481, 5 C.R. (4th) 253 (S.C.C.) [hereinafter *Swain*]. The majority view that some sections incorporate societal interests quite apart from s. 1 was recently confirmed in *R.* v. *Seaboyer*; *R.* v. *Gayme* (1991), 66 C.C.C. (3d) 321, 7 C.R. (4th) 117 [hereinafter *Seaboyer*], and two extradition and death penalty cases: *Kindler* v. *Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1, 8 C.R. (4th) 1 (S.C.C.) and *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858, 67 C.C.C. (3d) 61 [hereinafter the *extradition cases*]. Even so, in most of these cases this approach either secured important new rights for suspected and accused persons (*Hebert*, *Askov*, *Swain*) or restored old ones (*Seaboyer*).

the issue as involving the right to silence neatly avoids the rule of virtually automatic exclusion that the Court has fashioned for cases where a confession is obtained from the accused after a breach of subsection 10(b). *Hebert* makes it clear that evidence emanating from the accused due to a breach of section 7 may not have to be excluded.[145]

It is therefore useful to note the four explicit limitations on the right to silence that are set out in *Hebert*.[146] The first is that nothing in the Court's ruling prevents uniformed officers or detectives from questioning the accused in the absence of counsel once counsel has been retained. Such "persuasion", according to Justice McLachlin, is constitutional so long as it falls "short of denying the suspect the right to choose or depriving him of an operating mind".[147] In the United States this is not the law. The evidence is admissible only if the defendant initiates the conversation; if he or she has invoked the right to counsel, police may not "persuade" a defendant to talk. Moreover, after indictment the Sixth Amendment applies, which insulates defendants from police initiated questioning whether they request counsel or not. The only possible exception would appear to be where a suspect, before being charged, chooses to stand on his or her right to silence rather than the right to counsel. If a suspect waives the latter right but refuses to speak, after a decent interval police may initiate further questioning so long as they scrupulously follow *Miranda*.[148]

The second limitation is that the right to silence applies only after detention, not to pre-detention investigations. Although one could make some fine distinctions here, especially since the Sixth Amendment protects defendants even after release on bail, this is sufficiently close to the American position to justify regarding it as substantially the same.[149]

The third limitation is that the right to silence is not implicated in voluntary statements made to cell mates that they afterwards decide to report. The right to silence is involved only if the informer is a state agent and, according to the subsequent case of *Broyles*, the informer is a state agent if his or her conversation with the accused would not "have taken place, in the form and manner in which it did take place, but for

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[145] *Hebert*, *supra*, note 4 at 44. However, because s. 10(b) is closely related to s. 7, it seems likely that, whatever the majority's intent, a rigorous rule of exclusion will develop here as well: *see Broyles*, *supra*, note 121.

[146] *Ibid.* at 41-43.

[147] *Ibid.* at 41. *See also Broyles*, *supra*, note 121 at 15.

[148] This, in any event, seems to be a reasonable interpretation of *Michigan* v. *Mosley*, 423 U.S. 96 (1975).

[149] *See Hoffa*, *supra*, note 136 which refused to apply Sixth Amendment precedent to a situation where, although the police had sufficient evidence to indict, they had not yet done so.

the intervention of the state or its agents."[150] The American position, to the extent that it has been articulated, does not appear to be significantly different. Had the original informant in *Perkins* been the only witness in that case, and had Perkins's original statement to him been the only evidence, that evidence would have been admitted without having to go into the question of whether his privilege against self-incrimination had been violated.[151]

The fourth limitation is to be found in the distinction between the elicitation of information and the merely passive reception of it by undercover agents. This is consistent with American Sixth Amendment precedent.[152] As we have seen, Fifth Amendment precedent involving questioning *by uniformed officers or detectives* also requires that the suspect initiate the conversation.[153] But the majority of the United States Supreme Court did not concern themselves with this distinction in *Perkins*: he had not been charged with murder (so he had no Sixth Amendment rights), and the questioning was non-custodial (so *Miranda* was not implicated). The Court, therefore, declined to consider whether he may have invoked his Fifth Amendment rights earlier in the proceedings and, if so, whether he should benefit from Fifth Amendment precedent — especially *Roberson* — on questioning by uniformed officers. As a result, the undercover agents in *Perkins* could go beyond passive listening, and could actively elicit information. In *Hebert*, on the other hand, the Supreme Court of Canada regarded the accused's invocation of his subsection 10(b) rights as a decision to stand upon the section 7 right to silence; hence anything that amounted to active interrogation would undermine that decision. Only their interpretation of the agreed statement of facts relieved them of the obligation to consider whether the undercover agent's conduct had really amounted to active elicition

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[150] *Supra*, note 121 at 319. It remains to be seen how easily this sits with Finlayson J.A.'s statement in *R.* v. *Johnston* (1991), 64 C.C.C. (3d) 233 at 243-44, 5 C.R. (4th) 85 (Ont. C.A.) *leave to appeal dis'd* 28 November 1991 [hereinafter *Johnston*] that the "undercover ploy by itself is not objectionable". In that case the accused had invoked the right to counsel, and the undercover agent conceded that he had tried to "get more information" from him; yet *Hebert* was distinguished and the evidence was admitted. Citing *Perkins* in support, Justice Finlayson stated that "strategic deception is permissible" under *Hebert* "even if it has the result of taking advantage of the accused's misplaced trust in one he supposes to be a fellow prisoner."

[151] The informant was a fellow inmate who was not a state agent at the time of Perkins's original statement to him, although he subsequently became one: *see* text following note 135 above.

[152] As Justice McLachlin herself points out: *see Hebert*, *supra*, note 4 at 42 referring to *Kuhlmann*, *supra*, note 132.

[153] *See supra*, text accompanying notes 145-46, and compare *Black*, *supra*, note 84 to *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983) on the meaning of "initiating" a conversation.

of Hebert's statement.[154] The Court simply assumed this was so, and excluded the evidence.[155]

As we suggest above, the key to understanding the difference between *Hebert* and *Perkins* is the much longer period of elapsed time in the latter between the initial arrest and the questioning. Whether Hebert had been arrested for robbery or for something else, he was aware that he was a robbery suspect and stood upon his rights. Perkins, on the other hand, had not been alerted to the fact that he was a murder suspect. In order to assess just where the two jurisdictions are in relation to each other, it is necessary to ask two questions. The first is, would the United States Supreme Court have excluded Hebert's statement on *Hebert* facts, or would they have regarded *Hebert* as simply another case of misplaced trust? And, secondly, would the Supreme Court of Canada have admitted Perkins's statement on *Perkins* facts, or would they have stuck to their guns as well, classifying the police behaviour there as equally destructive of the right to choose silence?

Justice Brennan may be correct in stating that, had Perkins invoked his right to counsel and consulted counsel as Hebert did, his confession might have been excluded. But the United States Supreme Court may well decide that there is no American scenario in which this could have happened. Sixth Amendment rights, unlike Fifth Amendment ones, are offence specific, so any such rights Perkins may have had regarding the battery charge would not apply to the undercover questioning about the murder.[156] And the decision in *Perkins* holds that one of the necessary conditions for the application of *Miranda* and the Fifth Amendment was absent in that case: there was no police dominated atmosphere sufficient

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[154] The preliminary inquiry transcript in *Hebert* can be read as supporting the view that, although the undercover officer initiated the conversation, it was Hebert who first brought up the robbery, immediately after talking to a detective who came into the cell for a brief period of time. However, once the subject had been raised, the officer elicited further information, and this is how the Court interpreted the clause in the agreed facts stating that the agent had "engaged" Hebert in conversation: *see Preliminary*, *supra*, note 123 at 66-69.

[155] As Finlayson J.A. put it in *Johnston*, *supra*, note 150 at 238, it is "unfortunate that the record in *Hebert* is so limited....[because] we have no detailed factual precedent for what amounts to actively eliciting information." Even as he spoke, however, the Supreme Court was considering the issue, and developed a definition in *Broyles*, *supra*, note 121 at 321, where police used a friend of the accused as their agent. The Court excluded the evidence, holding that, once it is determined that the informer is a state agent, two sets of factors are relevant to deciding whether he or she elicited the information. The first relates to the nature of the exchange: did the state agent conduct the conversation "as someone in the role the accused believed [him or her] to be playing would ordinarily have done", or was it "the functional equivalent of an interrogation?" The second concerns the relationship between the state agent and the accused: did the "agent exploit any special characteristics of the relationship to extract the statement?" Citing *Henry*, *supra*, note 130, Justice Iacobucci also ruled that instructing informers not to elicit information will not preclude inquiry into whether this instruction was scrupulously obeyed. Thus, although we are moving away from the factual desert of *Hebert*, it does not appear to be in the direction of anything resembling a "bright line".

[156] *McNeil* v. *Wisconsin*, 115 L.ED. 2d 158 (1991).

to qualify the questioning as "custodial" or as an "interrogation".[157] Only if Perkins had invoked his Fifth Amendment rights earlier in the process, e.g., when he was arrested for the battery, would the facts approach those of *Hebert*; but this was not an issue before the Court. If it had been, and if Perkins had requested counsel on the battery, defence counsel could rely upon the rule that the Fifth Amendment right to counsel is not offence specific and could also cite state court decisions in favour of exclusion.[158] To succeed, however, counsel would have to persuade the Court to apply the *Edwards* line of cases to undercover questioning.[159] If *Perkins* means that *Miranda* does not apply to surreptitious "interrogation", it may be difficult to convince a majority of the Court that *Edwards*, which is grounded in the *Miranda* rationale, does.

Similarily, if Hebert had been arrested on a narcotics charge and then, weeks or months later, information was received connecting him to a robbery, it may be that this new offence would be regarded as sufficiently removed in time from his invocation of the right to counsel to permit the sort of surreptitious questioning sanctioned in *Perkins*. Although the *Charter* requires that a subsection 10(b) warning be given upon detention, and it is, therefore, impossible for Hebert to have been detained without at least being alerted to his rights, there may well come a point at which, although once claimed, such protection wears off.[160] On the other hand, this may also be a subterfuge that the Supreme Court of Canada will not permit. The rule laid down in *Manninen*[161] requires that *all* questioning cease once the right to counsel is invoked, and *Hebert* makes it clear that, although police may question the accused in the absence of counsel once consultation has taken place, this is true only so long as they are not posing as undercover officers. The reason is that surreptitious questioning would undermine, not the right to counsel in subsection 10(b), but the right to silence in section 7. According to Justice McLachlin:

> When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice.[162]

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[157] Justice Marshall, dissenting in *Perkins*, was especially critical of this ruling, and Justice Brennan suggested that the interrogation may have violated the due process clause: *see supra*, note 135 at 254-55 & 257-59.

[158] *See, e.g.*, the pre-*Perkins* case of *State* v. *McMullan*, 713 S.W. 2d 881 (1986), where the Missouri Court of Appeals excluded a prison cell statement made to undercover agents after the defendant had been read his rights and requested counsel.

[159] *Edwards*, *supra*, notes 133-34, and accompanying text. For more on this aspect of *Miranda*, *see Innis*, *supra*, note 93; *Arizona* v. *Mauro*, 107 S.Ct. 1931 (1987) [hereinafter *Mauro*]; and compare such Sixth Amendment cases as *Massiah* and *Henry*, *supra*, note 130.

[160] Subsection 10(b), after all, speaks of "upon" detention.

[161] *See supra*, note 98.

[162] *Hebert*, *supra*, note 4 at 41.

Thus, the right to silence is not affected by regular police interrogation after consulting with counsel (so long as this does not amount to a denial of the suspect's "right to choose" or violate the common law confessions rule), but it is affected if done by undercover agents. On this view, even if the right to counsel is offence specific, the right to silence protects the accused from a *Perkins* tactic because the focus is on an informed choice to speak rather than on whether there was compulsion. As Justice Iaccobucci put it in *Broyles*, "the right to silence is triggered when the accused is subjected to the coercive powers of the state through his or her detention."[163] If detention, simpliciter, is sufficient, Canadian law appears to be the opposite of American law: there, uniformed police may not initiate questioning of a suspect who invokes the Fifth Amendment right to counsel, but — if the reasoning in *Perkins* is broadly construed — undercover agents may do so.

The reasoning in *Perkins* may be so construed, but it is too early to predict whether *Hebert* (especially as expanded and strengthened by the definitions of "state agent" and "elicit" in *Broyles*) protects suspects as much as first appears. This is partly due to its ambiguous facts. In *Hebert*, the Supreme Court of Canada seems to have assumed that Hebert had either been charged with, or at least arrested for, the robbery. Thus, when he invoked his right to counsel, he did so in relation to that offence. What if — quite apart from any significant time lapse — Hebert's incarceration related to one offence, but the surreptituous questioning related to another, more serious one?[164] Then would the questioning, acceptable in the United States, still be improper here? The answer is yes if Hebert had initially waived counsel on the first offence and then uniformed police questioned him about the second, otherwise police could subvert the purpose behind subsection 10(b).[165] But the Court has not addressed the question of whether this reasoning applies if the questioning about the unrelated offence is surreptitious. Put differently, are the rights in *Charter* sections 7 and 10(b) offence specific, like the right to counsel under the Sixth Amendment, or do they apply generally, like the rights protected by the Fifth? And if the latter, will they be

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[163] *Broyles*, *supra*, note 121 at 317. Contrast Kennedy J. in *Perkins*, *supra*, note 135 and accompanying text. He is quite explicit about how far his reasoning may go, implying at 252 that Fifth Amendment precedent on interrogation may not be relevant even where undercover agents ask about the very offence for which the suspect has been arrested. "[D]etention, whether or not for the crime in question, does not warrant a presumption that the use of an undercover agent to speak with an incarcerated suspect makes any confession thus obtained involuntary".

[164] As it may have done: *see Preliminary*, *supra*, note 123.

[165] *See Evans*, *supra*, note 31 at 306 and the text accompanying notes 108-11. In the United States, the waiver would — in the absence of police "trickery" — be valid because Fifth Amendment rights are not offence-specific: they are invoked or waived in respect of all possible offences.

applied to surreptitious, as opposed to routine, police questioning? The jurisprudence so far suggests they will be.[166]

It would seem, therefore, that both Supreme Courts will soon face important questions in this area. The American Court will have to decide whether, in a *Hebert* situation, they should apply *Perkins* instead of the *Edwards* doctrine.[167] For its part, the Canadian Court will have to decide whether *Hebert* and *Broyles* are as far-reaching as they appear to be, especially where surreptitious questioning relates to offences other than the ones on which the accused has been detained. Until then, it may be premature to imply, as some have done, that *Hebert* is an example of extremism in the defence of liberty on the part of the Canadian Court. It is a little bit more complicated than that, and the majority in *Hebert* does not appear to have intended such a contrast. Indeed, by focusing on the right to silence rather than the right to counsel, the majority tried to place significant limits on their decision by avoiding the most stringent requirements associated with subsection 10(b): the waiver doctrine, the virtually automatic exclusionary rule, and the need for a warning. Nonetheless, a constitutional ban on undercover agents actively eliciting information from a detainee who has invoked the right to counsel or silence may be the combined result of the wording of subsection 10(b), which requires all detainees to be warned, and the Supreme Court of Canada's interpretation of section 7, which is based upon informed choice rather than compulsion. If so, it must be conceded that this would, in yet another respect, make the Canadian Court a better protector of the interests of suspects than its American counterpart.

B. *Search, Seizure and the Right to Counsel*

In some early *Charter* cases the Supreme Court of Canada appeared to be sympathetic to the idea that a violation of subsection 10(b) could affect the reasonableness of a search. We noted this in our first article, pointing out that declaring a search unreasonable because a detainee had not been advised of right to counsel is an idea strange to American jurisprudence.[168] Since then, the Court has retraced its steps along this path, and moved somewhat closer to the American position.

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[166] In *Broyles* (1987), 82 A.R. 238 the Alberta Court of Appeal ruled that, although police failed to re-advise the accused of his rights when the focus of the investigation changed, surreptitious questioning did not violate s. 10(b) because Broyles knew his rights and understood the changed circumstances. *Smith (1991)*, *supra*, note 101, does not mention this decision, but it is noteworthy that McLachlin J. refused to follow it in *Evans*, *supra*, note 31. Unfortunately, the appellant in *Broyles* abandoned his s. 10(b) argument when the case reached the Supreme Court of Canada, so that Court did not address it: *see*, *supra*, note 121 at 9.

[167] *Supra*, note 133 and especially *Roberson*, *supra*, note 134.

[168] *Supra*, note 2 at 764-66 & 779. Unfortunately, a last-minute word-processing error crept into note 116 of that article on page 764. The passage in square brackets should have read: "Since this was written, a majority of the Court appears to have relented somewhat: *see R.* v. *Debot*...."

In *Debot* the appellant was subjected to a warrantless "frisk" search prior to being advised of his right to retain and instruct counsel. In a ruling that does not refer to American law,[169] the Court came to the somewhat odd conclusion that Debot was entitled to be told about his right to counsel, but not to exercise it.[170] More importantly, Justice Lamer pointedly took issue with Justice Wilson's view "that a denial of the right to counsel should be a factor when determining the reasonableness of a search", a view that she had previously expressed in *Simmons*,[171] *Jacoy*,[172] and *Strachan*.[173] On behalf of the majority, he ruled instead that this would occur only in "exceptional circumstances", suggesting that there were but two:

> Such would be the case when the lawfulness of the search is dependent upon the consent of the person detained. If a detained person's consent to a search of his house, which, under the circumstances of the case and the applicable law, requires a warrant, was given while that person's s. 10(b) rights were being violated (either because he has not been informed of his right to counsel or because the police have obtained his consent to search his house before he has been given a reasonable opportunity to exercise his right to counsel), then the search is unlawful and, as such, unreasonable. Apart from a situation such as this or other situations analogous to those dealt with in *R.* v. *Simmons*....where the s. 10(b) violation goes to the very lawfulness of the search, I have not been able to imagine situations where the right to counsel will be relevant to a determination of the reasonableness of a search.[174]

Although this approach is closer to the dissenting views put forward by Justice L'Heureux-Dubé in *Simmons* than it is to Justice Wilson's, it differs from both and represents the opinion, thus far, of only three justices. More importantly, it continues to protect the interests of the accused more effectively than corresponding doctrine in the United States. There the reasonableness of the search hinges upon the language of the Fourth Amendment and the behaviour of the police, not upon the implied right to counsel in the Fifth Amendment, nor the explicit right in the Sixth.[175] If American police do not intend to engage in custodial interrogation (and of course if the suspect has not yet been charged), there is no right to counsel to complicate matters. Even if police routinely

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[169] Except for a brief and tangential reference by Wilson J. to *Spinelli* v. *United States*, 393 U.S. 410 (1969). In *Cloutier* v. *Langlois*, [1990] 1 S.C.R. 158, 53 C.C.C. (3d) 257, Justice L'Heureux-Dubé referred to American cases such as *United States* v. *Robinson*, 414 U.S. 218 (1973) in holding that when police conduct a frisk search as an incident of a lawful arrest they do not need reasonable grounds.

[170] *Debot*, *supra*, note 56. Sopinka J. concurred in the result but, finding the majority position anomalous, he held that there was no obligation to advise Debot of his right to counsel prior to "frisking" him.

[171] *Supra*, note 56.

[172] *Supra*, note 22.

[173] *Supra*, note 56.

[174] *Debot*, *supra*, note 56 at 199. In *Simmons*, *supra*, note 56, statute permitted suspects to request a review by a magistrate or justice prior to being searched.

[175] *See supra*, note 2 at 766.

read *Miranda* in such situations, the fact remains that it is not constitutionally required.[176] This contrast is especially clear where a reasonable search is contemporaneous with a subsection 10(b) violation. Although Justice Lamer is of the view that real evidence obtained in such circumstances will normally be admitted, he "hastens to add" that this will not always be so, once again revealing that some of the general propositions enunciated in *Collins* may be general indeed.[177]

C. *Self-Incrimination and the Prior Testimony of the Accused*

In our first article we noted that the Supreme Court of Canada had gone to extraordinary lengths to protect an accused from having his or her testimony at trial used at a second or subsequent trial for the same offence.[178] At issue was the proper interpretation of *Charter* section 13, which recognized the right to prevent "incriminating evidence" given by a witness in any proceeding from being used "to incriminate that witness in any other proceedings." In one of their earliest departures from pre-*Charter* law and practice the Court ruled in *Dubois* that a retrial for the same offence was an "other" proceeding and that the accused's testimony in front of the first jury could not be placed before the second.[179] To do otherwise, held the Court, would be to permit accused persons to be conscripted against themselves in order to help the Crown discharge its burden of establishing a case to meet.[180] The result is that an accused who makes a statement in a police station after being read his or her rights, and who testifies at trial, can prevent the prosecution from using the testimony against him or her at a retrial but not the unsworn statement made to the police.[181]

A year later, the Court took the next step in *R.* v. *Mannion*. There the accused was charged with rape and the Crown had cross-examined him on an inconsistency between his testimony at the first trial (when he said he had been telephoned by police who told him they were investigating a rape) and his examination-in-chief at the retrial (when he said that he had been called by the police but that they gave no specific

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[176] *See Innis* and *Mauro*, *supra*, note 159.

[177] To repeat: in the United States there is no right to counsel unless the police, in addition to searching, engage in custodial interrogation. Hence the exceptions to the general rule envisioned by Justice Lamer ought not to arise in that country.

[178] *Supra*, note 2 at 767-69. The authors thank Professor Don Casswell whose comments on this section of the paper were most helpful.

[179] *Dubois*, *supra*, note 5, McIntyre J. dissenting.

[180] *Ibid.* at 537-38. *Dubois* is the origin of the conscription notion, which is criticized by H. Foster in *Historical Pre-Conditions for Judicial Review: Some Criminal (and other) Thoughts about Courts, Legislators and the Charter* (1989) 47 THE ADVOCATE 695 at 700-02.

[181] Notwithstanding that in the pre-*Charter* case of *Boulet* v. *R.*, [1978] 1 S.C.R. 332, 34 C.C.C. (2d) 397, the Court held that previous testimony by the accused, even if given as an ordinary compellable witness, need not be proved voluntary at a subsequent trial.

reason for wanting to see him). Because Mannion had left town soon after this telephone conversation, the Crown cross-examined him on the earlier testimony to show consciousness of guilt, i.e., that his departure had been prompted by his knowledge of the rape investigation. Relying upon the reasoning in *Dubois*, Justice McIntyre held that section 13 required, not only barring the accused's prior testimony from being used in the Crown's case-in-chief, but also from being used to cross-examine him during the defence case.[182] This Draconian result appeared clear enough, but an ambiguity soon emerged. In *R.* v. *Kuldip*, the Ontario Court of Appeal not unreasonably regarded *Mannion* as forbidding all cross-examination of the accused on prior testimony, whether it related to facts in issue (positive evidence of guilt) or solely to credibility.[183] In either case, that Court reasoned, the accused's prior testimony was being used against him by the Crown to secure a conviction, and the precise ruling in *Mannion* was unqualified: a unanimous Supreme Court of Canada had concluded that cross-examining the accused at a new trial "on testimony given at a previous trial on the same charge" infringes section 13.[184] Other Courts of Appeal disagreed with this interpretation, relying upon the distinction between material facts and credibility.[185]

When *Kuldip* reached the Supreme Court of Canada, the justices got their chance to resolve this difference of opinion, and in doing so they appear to have virtually overruled *Mannion*.[186] The accused was charged with leaving the scene of an accident, and testified not only that he had gone to the police station immediately afterwards, but that three weeks later he returned and talked to an officer who had been there when he originally reported the accident. Shortly before his retrial he learned that this officer had not been on duty the day of the accident, so he had to change his testimony to reflect this somewhat awkward development. The Crown cross-examined Kuldip at his retrial about this, suggesting that he had either lied or made a serious and surprising error at his first trial.[187] After examining the relationship between subsection 5(2) of the

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[182] *R.* v. *Mannion*, [1986] 2 S.C.R. 272, 28 C.C.C. (3d) 544 [hereinafter *Mannion*]. The Court's unanimous decision was written by Justice McIntyre, the sole dissenter in *Dubois*, *supra*, note 5.

[183] (1988), 40 C.C.C. (3d) 11, 62 C.R. (3d) 336 (Ont. C.A.).

[184] *Mannion*, *supra*, note 182 at 552-53. On the meaning of "incriminating", *see Dubois*, *supra*, note 5 & *Piché* v. *R.*, [1971] S.C.R. 23, 11 D.L.R. (3d) 700.

[185] *See, e.g., Johnstone* v. *Law Society of British Columbia* (1987), 40 D.L.R. (4th) 550, 15 B.C.L.R. (2d) 1 (C.A.); *R.* v. *B.(W.D.)* (1987), 45 D.L.R. (4th) 429, 38 C.C.C. (3d) 12 (Sask. C.A.).

[186] (1990), 61 C.C.C. (3d) 385, 1 C.R. (4th) 285 (S.C.C.) [hereinafter *Kuldip*].

[187] *Ibid.* at 388-89.

Canada Evidence Act and section 13 of the *Charter*, the Ontario Court of Appeal ruled that this cross-examination had been improper.[188]

Chief Justice Lamer's reasons in the Supreme Court of Canada overturning this decision require a separate case commment, but we nonetheless attempt a brief critical summary. He disagreed with the Ontario Court of Appeal's interpretation of subsection 5(2) and the origins of section 13, arguing that earlier decisons — including one of his own — suggesting that the former conferred protection against the use of all prior testimony were either incomplete or incorrect.[189] However, even if the *Canada Evidence Act* did protect the accused more than section 13, this was not a problem. The *Charter* aims only to guarantee that "individuals benefit from a minimum standard of fundamental rights", and Parliament is always free to go beyond this if it chooses.[190]

Pointing out that in *Mannion* the Court had viewed the inconsistency between the accused's testimony at the two trials as tending to show a guilty conscience, the Chief Justice maintained that this left open the question of whether section 13 protected against using it "for some other purpose, namely, for the purpose of challenging the credibility of the witness."[191] He also cited and relied upon provincial appellate decisions that expressed doubts about whether the framers of the *Charter* intended to restrict cross-examination directed solely to credibility.[192] Contending that such cross-examination does not incriminate, he con-

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[188] The Court gave two reasons for this conclusion. The first was also given by McIntyre J. in *Mannion*, *supra*, note 182 at 551: it is that s. 5(2) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 had been interpreted as not making any distinction between evidence-in-chief and cross-examination. Because a witness had to specifically invoke s. 5(2) at the first proceeding, and because there was no obligation on the trial judge to tell witnesses about it, it tended to protect only those who were sufficiently well advised (or forensically experienced) to know their rights. Section 13 of the *Charter*, which conferred automatic protection, had been enacted to redress this imbalance. Therefore, if a distinction were made between cross-examination designed to incriminate and cross-examination relating solely to credibility, then s. 5(2) would cover the latter but s. 13 would not. Once again, only savvy or well advised witnesses would be able to avail themselves of it. Secondly, the distinction would be difficult to apply in practice: it is notoriously vague and liable to produce complex jury instructions.

[189] *Kuldip*, *supra*, note 186 at 403. In *R.* v. *Coté* (1979), 50 C.C.C. (2d) 564, 8 C.R. (3d) 171 (Que. C.A.) at 571-72, Lamer J.A. held that to cross-examine an accused on previous testimony before the coroner was to use it against the accused in a manner prohibited by s. 5(2).

[190] *Ibid.* at 400. However, in *Dubois*, *supra*, note 5 and *Thomson Newspapers*, *supra*, note 48, Chief Justice Lamer raised the possibility that both s. 5(1) and s. 5(2) of the *Canada Evidence Act* may not give sufficient protection, especially against so-called "derivative" evidence, and may therefore infringe the privilege against self-incrimination contained in ss. 7, 11(c) and 13 of the *Charter*.

[191] *Ibid.* at 395.

[192] *Ibid.* at 395-97. (Contrast Chief Justice Lamer's comments in *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 at 306-07 [hereinafter *Motor Vehicle Reference*], where he states that the Supreme Court would be in no way bound or influenced by contemporaneous declarations of intent by the framers.)

cluded that it was admissible so long as juries are told that the prior testimony is not admissible as proof of the truth of its contents. Such instructions, he argued, should be no more troublesome than those "which are routinely given with respect to the use to which an accused's criminal record may be put."[193] The Chief Justice then added that:

> A trial necessarily involves evidentiary questions which are sometimes complex in nature. While simplicity in these matters is generally preferable to complexity, the policy reasons underlying *the need for a jury to have before it all the relevant information related to the charge*....clearly outweigh the benefits of simplicity in these circumstances.[194] [Emphasis added]

This is a somewhat surprising statement, because the law as it existed before the Supreme Court of Canada began re-making it in *Dubois* did not have to sacrifice simplicity to relevance. The accused's prior testimony could be used in the Crown's case-in-chief as well as in cross-examination, and pre-*Charter* juries regularly heard a great deal of "relevant information related to the charge" that *Dubois* and *Mannion* exclude and *Kuldip* continues to restrict.

Kuldip is, therefore, a case about prior inconsistent statements in more ways than one. With respect, it appears to us to reveal a Court struggling to avoid the implications of the abrupt change in the law made in *Dubois*, and ending up with a four to three decision that is every bit as ambiguous as *Mannion*.[195] We say this because the limitations imposed by section 13 remain unclear. Does the ability to cross-examine depend upon whether the subject matter of the prior testimony is confined to collateral issues, or is all cross-examination now permitted so long as the trier of fact understands that the prior testimony, no matter how incriminating, is evidence of nothing but the contradiction between it and what the accused has now said in direct examination? One commentator appears to adopt the latter interpretation:

> Since the purpose of the legislation is pursuit of truth, it would be very odd to allow [it] to inhibit that search by permitting a witness to tell one story at trial, and a different story at another trial, and yet be shielded from confrontation with the earlier statement. It is one thing to protect the witness against directly incriminating herself by her own words, using her own words as indicative of guilt, and quite another to protect

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[193] *Ibid.* at 398. Thus, the ruling in *Kuldip* means that another category of prior statement will be subject to an instruction that Estey J. in *McInroy* v. *R.* (1978), [1979] 1 S.C.R. 588, 42 C.C.C. (2d) 481 described as virtually impossible for a jury to understand or apply. Nor, with respect, is it comforting to know that such instructions will be no more troublesome than those regarding an accused's criminal record: *see, e.g.*, the various judgments in *R.* v. *Corbett*, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385 [hereinafter *Corbett*].

[194] *Ibid.*

[195] Wilson, La Forest and L'Heureux-Dubé JJ. dissented, stating at 404 that they agreed with "the reasons of Martin J.A. writing for a unanimous Court of Appeal and [had] nothing to add to them."

> against the use of an earlier statement to expose defects in her credibility.[196]

This view, considered in isolation, is a reasonable one, and it finds strong support in a detailed example given by Chief Justice Lamer in *Kuldip*.[197] Both suggest that, no matter how incriminating prior testimony may be, the accused can be cross-examined upon it so long as the trier of fact is warned that the statement in question is evidence of nothing but the bare fact of contradiction. Thus, if there is no additional evidence that proves the facts asserted in the statement beyond a reasonable doubt, the prosecution fails.[198]

The problem, however, is that the Court did not actually overrule *Mannion*, and the facts of that case are troubling.[199] If it remains good law, there may still be a category of prior testimony, analogous to Mannion's, that touches so closely upon the issues in the case that even a warning restricting its use to credibility is legally insufficient to justify cross-examination upon it. Yet can Mannion's prior testimony really be characterized in this way? Kuldip's apparent attempt — if indeed that is what it was — to manufacture evidence that he reported the accident goes right to the heart of the offence charged and seems just as incriminating as Mannion's: both, in other words, suggest consciousness of guilt. So if it is permissible to cross-examine Kuldip on his prior testimony, why not Mannion? We suspect that one can do both, and that *Mannion*, if not actually overruled, has been distinguished to the vanishing point.[200]

In the unlikely event that *Mannion* does remain good law, and admissibility depends upon whether or not the cross-examination can somehow be said to relate to such things as consciousness of guilt, then the closer the prior testimony is to the real issues in the case, the less likely it is that the jury will learn that the accused told an earlier jury something quite different. Of course, if the accused does not testify at the retrial, the issue of the prior testimony will never arise at all. This is the effect of the interpretation of section 13 handed down by the Court in *Dubois*, and it provides an interesting contrast to American law.

It is hardly surprising that the Supreme Court of Canada makes no reference to United States Supreme Court precedent in *Dubois*, *Mannion* and *Kuldip*. As we pointed out in our earlier article, American defendants

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[196] R.J. Delisle, *Annotation* (1991), 1 C.R. (4th) 286 at 287.

[197] The example is too lengthy to reproduce here, but it may be found in *Kuldip*, *supra*, note 186 at 397-98.

[198] Subjecting the accused's prior testimony to the same limitation as that of an ordinary witness abrogates the common law principle that anything said voluntarily by an accused is an exception to the hearsay rule and is admissible for its truth. As such, it is an ingenious attempt to avoid the evidentiary buffalo jump created by the blanket rule of exclusion in *Mannion*. Moreover, the Supreme Court seems to have already considered and rejected this option in *Mannion*: *see*, *supra*, note 182 at 549-50.

[199] The CANADIAN CRIMINAL CASES headnote says that *Kuldip* "considered" *Mannion*; the CRIMINAL REPORTS headnote says "distinguished".

[200] Delisle, *supra*, note 196, does not explicitly address this aspect of *Kuldip*.

waive the lion's share of their privilege against self-incrimination by testifying.[201] Prior testimony may, therefore, be used at a retrial in the United States, even as part of the prosecution's case-in-chief. There is only one exception: where it is established that the defendant felt compelled to testify at the first trial in order to respond to evidence, such as a coerced confession, that was improperly admitted. But in the 1968 decision that established this exception, the Warren Court emphasized that they were not questioning:

> the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.[202]

This is no longer the law in Canada because, according to Justice Lamer's reasons in *Dubois*, it "would, in effect, allow the Crown to do indirectly what it is estopped from doing directly by s. 11(*c*), *i.e.*, to compel the accused to testify."[203] In describing the decision of an accused to testify in such circumstances as compulsory self-incrimination, the Supreme Court of Canada goes well beyond its American counterpart.[204] *Kuldip* is not an overruling of this unusual position; it is simply a complicated retreat from one of its less palatable implications.

D. *The Presumption of Innocence*

The presumption of innocence, expressed in functional terms as the burden on the prosecution to prove guilt beyond a reasonable doubt, is closely related to the question of offence definition discussed under Part III.F., below. This is because legislators can ease the onus of proof upon the prosecution, and thereby weaken the presumption of innocence, in one of two ways: either by explicitly reversing it, or by deleting (or omitting) what has been (or in some sense ought to be) an essential element of the offence charged. Thus, subsection 8(2) of the *Narcotic Control Act* provides that, once the Crown has proved that the accused was in possession of a quantity of narcotics, they have also proved that the possession was for the purposes of trafficking — unless the accused

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[201] *See supra*, note 2 at 768; *McGautha* v. *California*, 402 U.S. 183 (1971).

[202] *Harrison* v. *United States*, 392 U.S. 219 (1968) at 222 [hereinafter *Harrison*]. Note that the U.S. Supreme Court has ruled that a defendant may also be cross-examined on statements obtained in violation of *Miranda*: *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975).

[203] *Supra*, note 5 at 537.

[204] It may be, for example, that the Crown sometimes should be able to do indirectly what it may not do directly, because it is only the direct method that offends the constitutional value that is at stake. *See also* Justice White's dissent in *Harrison*, *supra*, note 202 at 229-30, protesting the exception to the general rule of admissibility created there.

establishes otherwise. On the other hand, subsection 94(2) of the British Columbia *Motor Vehicle Act* used to state that driving while suspended or prohibited was an absolute liability offence (i.e., not knowing that your licence had been suspended was not an excuse), punishable by a minimum of seven days imprisonment. Both these provisions have been declared inoperative by the Supreme Court of Canada. In *Oakes*, the Court ruled that subsection 8(2) ran afoul of the presumption of innocence contained in subsection 11(d) of the *Charter* because it placed a persuasive burden on the accused, and it could not be saved as a reasonable limit under section 1 because the presumed fact (an intent to traffic) and the proved fact (possession) were not sufficiently rationally connected.[205] In the *Motor Vehicle Reference*, the Court held that the liberty of accused persons guaranteed by section 7 was impaired by subsection 94(2), and that the principles of fundamental justice were violated where a legislature completely deleted the *mens rea* requirement in an offence carrying the penalty of imprisonment.[206] In Parts E and F, below, we will discuss the combined effect of these two *Charter* provisions; in this section, we wish to focus upon the evolution of subsection 11(d) taken in isolation.

Both before and after *Oakes* was decided, the courts were faced with a number of issues concerning the proper interpretation of subsection 11(d). Some held that the critical question in determining whether the section had been violated was whether it shifted the legal, as opposed to merely the evidential, burden. While *Oakes* seemed to confirm that a shifting of the legal burden — the true "reverse onus" clause — violated subsection 11(d) and could survive *Charter* scrutiny only if it were preserved by section 1, the Court did not say whether there were also circumstances in which a shifted evidential burden might also offend.[207] On the other hand, they soon muddied the waters further by implying in *R.* v. *Vaillancourt* and *R.* v. *Whyte* that the "rational connection" test might not be confined to the section 1 analysis but might be relevant to defining the accused's rights, as well.[208] They were also very murky in *Whyte*, *R.* v. *Holmes* and *R.* v. *Schwartz* about whether, for the purposes of subsection 11(d) analysis, a distinction should be made between essential and "other" elements of an offence. *Whyte* said no, *Schwartz* seemed to say yes, and in *Holmes* different justices said different things.[209]

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[205] *Supra*, note 3. The Ontario Court of Appeal had come to the same result, but by incorporating the "rational connection" test into s. 11(d): *see R.* v. *Oakes* (1983), 2 C.C.C. (3d) 339, 32 C.R. (3d) 193 (Ont. C.A.). The Supreme Court insisted that questions of reasonableness be left to s. 1.

[206] *Supra*, note 192.

[207] The Ontario Court of Appeal has invalidated a section of the *Criminal Code* on this ground: see *R.* v. *Boyle* (1983), 5 C.C.C. (3d) 193, 35 C.R. (3d) 34.

[208] [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118 [hereinafter *Vaillancourt*]; [1988] 2 S.C.R. 3, 42 C.C.C. (3d) 97 [hereinafter *Whyte*]. For a detailed discussion *see* W.H. Charles, T.A. Cromwell & K.B. Jobson, EVIDENCE AND THE CHARTER OF RIGHTS AND FREEDOMS (Toronto: Butterworths, 1989) at 156-69 [hereinafter EVIDENCE].

[209] *See* [1988] 1 S.C.R. 914, 41 C.C.C. (3d) 497 [hereinafter *Holmes*]; [1988] 2 S.C.R. 443, 45 C.C.C. (3d) 97 [hereinafter *Schwartz*]; and EVIDENCE, *ibid.* at 176-77.

As it happens, the Court got its chance to clear up the latter question in the course of a series of cases dealing with the insanity defence, and one concerning the offence of promoting hatred.[210] In two of these, *Keegstra* and *Chaulk*, the Court addressed the presumption of innocence, but only *Chaulk* will be discussed here.

Chaulk and his co-accused were juveniles who had been convicted of first degree murder for entering a home, committing robbery and then stabbing and bludgeoning its sole occupant to death. Their only defence was insanity, and the expert evidence was that they were paranoid psychotics who thought they had the right to kill "losers".[211] Subsection 16(4) of the *Criminal Code* provides that everyone shall "until the contrary is proved" be presumed sane, and the accused argued that this violated subsection 11(d) by reversing the burden of proof. The Crown's position was that the presumption applies only to essential elements of the offence and to "true" defences; because insanity is neither of these, but is instead a claim for an *exemption* from criminal liability based on incapacity, the burden that subsection 16(4) places on the accused does not offend subsection 11(d).[212] Three of the justices agreed with this analysis, or at least a version of it, but the majority did not. On their behalf Chief Justice Lamer relied upon *Whyte* in concluding that the presumption of innocence had been violated:

> If an accused is found to have been insane at the time of the offence, he will *not* be found guilty; thus the "fact" of insanity precludes a verdict of guilty. Whether the claim of insanity is characterized as a denial of *mens rea*, an excusing defence or, more generally, as an exemption based on criminal incapacity, the fact remains that sanity is essential for guilt. Section 16(4) allows [this] to be *presumed*....[and] requires an accused to disprove [it] on a balance of probabilities; it therefore violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt....as to the guilt of the accused.[213]

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[210] The latter is *R.* v. *Keegstra* (1990), 61 C.C.C. (3d) 1, 1 C.R. (4th) 129 (S.C.C.) [hereinafter *Keestra*]. The former is comprised of *R.* v. *Chaulk* (1990), 62 C.C.C. (3d) 193, 2 C.R. (4th) 1 (S.C.C.) [hereinafter *Chaulk*]; *R.* v. *Romeo* (1991), 62 C.C.C. (3d) 1, 2 C.R. (4th) 307 (S.C.C.); *R.* v. *Ratti* (1991), 62 C.C.C. (3d) 105, 2 C.R. (4th) 293 (S.C.C.); *R.* v. *Landry* (1991), 62 C.C.C. (3d) 117, 2 C.R. (4th) 268 (S.C.C.). *See also Swain, supra*, note 144, where the Court held that the common law rule allowing the Crown to lead evidence of insanity notwithstanding the accused's objections violates s. 7, and that the statutory procedures providing for the detention of persons found not guilty by reason of insanity violate both ss. 7 and 9.

[211] *Chaulk, ibid.* at 200.

[212] *Ibid.* at 212, paraphrasing Lamer C.J.C. (emphasis in original).

[213] *Ibid.* at 213, and *see also Keegstra, supra*, note 210 at 68-69. Whether the Court has adequately resolved what one commentator has described as the "distressing inconsistency" between *Holmes* and *Schwartz* may be debated (*see* EVIDENCE, *supra*, note 208 at 177). What is clear, however, is that, except where the facts fall "within the narrow ratio of *Schwartz*" (*ibid.* at 214), it can no longer be argued that there is a distinction between essential and "other" elements of an offence for the purposes of s. 11(d) analysis.

Although the Court in *Chaulk* and *Keegstra* abandoned the distinction between essential and other elements of offences, they nonetheless found subsection 16(4) to be a reasonable limit upon the presumption of innocence. Then — without citing the *Charter* in aid — they went on to overrule one of their own pre-*Charter* decisions that had restricted the scope of the insanity defence, and ordered a new trial.[214]

There is no equivalent of subsection 11(d) of the *Charter* in the American *Bill of Rights*. As Chief Justice Dickson pointed out in *Oakes*, the courts in that country have had to deal with the issue under the rubric of alleged due process violations under the Fifth and Fourteenth Amendments.[215] The former Chief Justice cited this approach with approval, noting that in the United States the proven fact must not only be rationally connected to the presumed fact, but it must also be sufficient to support the inference of guilt beyond a reasonable doubt. Nonetheless, the United States Supreme Court has been less willing than the Canadian to look behind the distinction between essential and "other" elements of the offence. Put somewhat differently, although American law has been rigorous about explicit reverse onus clauses,[216] it has been less concerned about legislatures adopting the second of the two tactics described above, i.e., imposing strict liability by omitting part of the *mens rea* requirement (as in felony murder) or by transforming an element of the offence into an affirmative defence. Although in *Patterson* v. *New York* the Court stated that there were obviously constitutional limits upon legislators' powers to do this, they seem disinclined to impose them.[217] As a number of commentators — and the dissenters in *Patterson* — have pointed out, this puts a premium on formalism. A good case can be made that there is no substantive difference between the elements of an offence and affirmative defences, and between affirmative defences and presumptions.[218] As we shall see in Part III.F., below, the Supreme Court of Canada has used subsection 11(d) of the *Charter*, especially when combined with section 7, to transcend such formalism and intervene

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[214] This was another, earlier *Schwartz* v. *R.*, [1977] 1 S.C.R. 673, 29 C.C.C. (2d) 1, which held that the second branch of the insanity definition in s. 16(2) could not be met if the accused knew that his (or her) act was legally wrong. Chaulk and his co-accused were re-tried in October of 1991 on the basis that their knowledge of the law did not matter if they did not know their acts were morally wrong. This time, they were found not guilty by reason of insanity: *National*, 9 November 1991 at 3.

[215] *Supra*, note 3 at 341-42, wherein he cites *Tot* v. *United States*, 319 U.S. 463 (1943) [hereinafter *Tot*]; *Leary* v. *United States*, 395 U.S. 6 (1969); *New York* v. *Allen*, 442 U.S. 140 (County Court of Ulster County 1979); *In Re Winship*, 397 U.S. 358 (1970).

[216] Except for regulatory offences: *see, e.g., United States* v. *Dotterweich*, 320 U.S. 277 (1943); *Morissette* v. *United States*, 342 U.S. 246 (1952).

[217] 432 U.S. 197 (1977) [hereinafter *Patterson*].

[218] *See* EVIDENCE, *supra*, note 208 at 175.

much more directly in the policy-making involved in offence — and defence — definition.[219]

On the actual point of law decided in the *Chaulk* case, American constitutional jurisprudence once again provides an interesting contrast. Although in some United States jurisdictions the prosecution may have had to prove sanity beyond a reasonable doubt, this is not a constitutional requirement.[220] Thus, in *Leland* v. *Oregon*, to which only Wilson J. referred in *Chaulk*, all the members of the United States Supreme Court agreed that the presumption of sanity does not violate due process under the Fourteenth Amendment.[221] This may seem not very different from the Supreme Court of Canada's decision to uphold subsection 16(4) under section 1 of the *Charter*. In practical terms, it is not. But what is different is that seven of the nine justices in *Leland* upheld the Oregon statute notwithstanding that it required the defendant to prove his insanity, not simply on a balance of probabilities, but *beyond a reasonable doubt*.[222] The Court noted that no other state had done this; however Justice Clark saw no:

> difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof....In Davis v. United States....we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But "[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts [291 U.S. 97 (1934)][223]

Tot, the 1943 case on reverse onus clauses that was referred to by Chief Justice Dickson in *Oakes*, was distinguished.[224]

Given that even placing the civil burden of proof on the accused was held in *Chaulk* to violate subsection 11(d), it seems clear that imposing the reasonable doubt standard would not survive section 1 scrutiny in Canada.[225] Perhaps this standard is in jeopardy in the United States as well, and in the right circumstances *Leland* will be overruled. However, the tenor of the times suggests otherwise, and recent legislative and judicial developments indicate that a rather different issue has

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[219] Although the Court recently ruled (5:4) that strict liability offences requiring the accused to show due diligence on a balance of probabilities either do not violate s. 11(d) (two justices) or are saved under s. 1 (three justices), they also held, unanimously, that certain other restrictions on the defence did violate s. 7. *See R.* v. *Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193, 8 C.R. (4th) 145 (S.C.C.) [hereinafter *Wholesale Travel*], where the Court continues to struggle with the distinction between regulatory and criminal law that has plagued them since *Hunter*, *supra*, note 3, and *Thomson Newspapers*, *supra*, note 48.

[220] *See, e.g., Davis* v. *United States*, 160 U.S. 469 (1895) [hereinafter *Davis*] and note 226, *infra*, re the rule for federal prosecutions.

[221] 343 U.S. 790 (1952) [hereinafter *Leland*].

[222] And had done so since 1864.

[223] *Leland*, *supra*, note 221 at 798-99. *See* Lamer C.J.C. in *Kuldip*, *supra*, note 186 and text accompanying note 190.

[224] *Ibid.* referring to *Tot*, *supra*, note 215.

come to the fore.[226] Moreover, the insanity defence involves federalism issues. The United States Constitution, unlike the Canadian, does not explicitly confer the power of judicial review, and tinkering with the burden of proof comes perilously close to using the federal *Bill of Rights* to affect substantive criminal law, which is a matter for the states. As Justice Felix Frankfurter, one of the two dissenters in *Leland*, put it:

> Like every other State, Oregon presupposes that an insane person cannot be made to pay with his life for a homicide....Unlike every other State, however, Oregon says that the accused person must satisfy a jury beyond a reasonable doubt that, being incapable of committing murder, he has not committed murder....
>
> To repeat the extreme reluctance with which I find a constitutional barrier to any legislation is not to mouth a threadbare phrase. Especially is deference due to the policy of a State when it deals with local crime....There is a gulf, however narrow, between deference to local legislation and complete disregard of the duty of judicial review which has fallen to this Court by virtue of the limits placed by the Fourteenth Amendment upon State action. This duty is not to be escaped, whatever I may think of investing judges with the power which the enforcement of that Amendment involves.[227]

Frankfurter, obviously, was not a strict constructionist: he believed that the Fourteenth Amendment had substantive content.[228] However, as we shall see in Part III.F., below, his concerns about the proper limits to judicial intervention are not given as much weight by those justices on the Canadian Supreme Court who have embraced substantive review under section 7 of Canada's *Charter*.

E. *The Right to a Fair Trial*

Subsection 11(d) of the *Charter* also guarantees accused persons the right to a fair hearing by an independent and impartial tribunal. Both

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[225] Chief Justice Lamer as much as says so in his s. 1 analysis in *Chaulk*, *supra*, note 210 at 223.

[226] The burden of proof on defendants in Oregon has since been reduced to the civil standard. However, three states (Montana, Idaho and Utah) have eliminated the insanity defence altogether, and in *State* v. *Searcy*, 798 P.2D 914 (1990) the Supreme Court of Idaho upheld this move against both state and federal constitutional challenge. Moreover, after the attempted assassination of former President Reagan, Congress removed the obligation on the government to prove sanity beyond a reasonable doubt (*see Davis*, *supra*, note 220) and substituted a burden on the defendant to prove insanity by clear and convincing evidence: *Comprehensive Crime Control Act*, 18 U.S.C. c. 1, s. 17 (1988); *Insanity Defense Reform Act of 1984*, 18 U.S.C. ss. 4242 (1984).

[227] *Leland*, *supra*, note 221 at 805 & 807.

[228] *See* P. Brest, *The Intentions of the Adopters Are in the Eyes of the Beholder* in E.W. Hickok, Jr., ed., THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (Charlottesville: University Press of Virginia, 1991) 17 at 18.

aspects of this right have been considered by the Supreme Court, but only the requirement of a fair hearing need briefly detain us here.[229]

In 1988 the Court refused to strike down section 12 of the *Canada Evidence Act*, holding that cross-examining an accused person on his or her prior criminal record does not, in and of itself, violate the right to a fair trial under subsection 11(d) or fundamental justice under section 7. Nonetheless, they recognized that the prejudicial effect of cross-examination of this sort might outweigh its probative value, and declared that trial judges have a discretion to suspend the operation of section 12 in such a case.[230] It is therefore all the more noteworthy that three years later, in *Seaboyer*, the Court rejected what they referred to as the American doctrine of "constitutional exemption" when they were asked to consider the validity of sections 276 and 277 of the *Criminal Code*, Canada's "rape shield" law.[231] These sections, which were enacted in the same year as the *Charter*, prohibited the defence from introducing evidence of the complainant's sexual reputation for the purpose of challenging credibility (section 277), and restricted cross-examination of the complainant on previous sexual activity with anyone other than the accused (section 276). The latter was done by confining such cross-examination to three defined exceptions (the so-called Michigan Model) and by requiring the accused to satisfy the court (at an *in camera* hearing at which the complainant was not a compellable witness) that the case fell within one of the exceptions.

The Court upheld section 277, but ruled seven to two that section 276 potentially excluded relevant and probative evidence as well as that which is irrelevant and prejudicial; that by doing so it violated the rights of accused persons to fundamental justice and a fair trial; and that Parliament's solution to the problem of protecting complainants in sexual assault cases did not impair these rights as little as possible. Hence, it could not be saved under section 1. To adopt the American solution and permit judges to suspend the operation of the rape shield law whenever they felt it was necessary would be to re-introduce the old common law notions of relevancy, said the Court, and this was the very discretion that Parliament had sought to exclude in the first place. Instead, Justice McLachlin developed new common law principles for the trial of sexual offences which permit the cross-examination of the complainant on past sexual conduct where the purpose of such cross-

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[229] The Court has considered judicial independence and impartiality in such cases as *Valente* v. *R.*, [1985] 2 S.C.R. 673, 23 C.C.C.(3d) 193, *R.* v. *Lavigne*, [1989] 1 S.C.R. 1591, 99 N.R. 66; *R.* v. *Lippé* (1990), 61 C.C.C. (3d) 127, *see also* note at 81 C.R. (3d) 1 (S.C.C.).

[230] *Corbett*, *supra*, note 193. On the facts, however, the majority ruled that the accused, who was charged with murder, was properly cross-examined on a previous murder conviction.

[231] *Supra*, note 144 at 403-05, distinguishing *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385 [hereinafter *Big M Drug Mart*] and *R.* v. *Edwards Books and Art Ltd*, [1986] 2 S.C.R. 713, 30 C.C.C. (3d) 385 [hereinafter *Edwards Books*].

examination is a proper one and the probative value of the evidence outweighs its prejudicial effect.[232]

It may be debated whether the Supreme Court of Canada's decision in *Seaboyer* is any more favourable to the accused than a rule such as 412(b)(1) of the *Federal Rules of Evidence* (FRE) in the United States, which simply provides that, notwithstanding the federal rape shield law in FRE 412, evidence of the complaint's past sexual behaviour is allowed whenever it is "constitutionally required to be admitted."[233] If the United States Supreme Court is willing to suspend the operation of the rape shield law in those situations that commentators have described as violating due process (the Fifth and Fourteenth Amendments) and the confrontation clause (the Sixth Amendment), this approach seems to be subject to just as much discretionary abuse as Justice McLachlin's, and possibly more.[234] Indeed, although a standard American text argues that where the circumstances of a rape suggest a very low probability of consent "the Constitution should not be read so as to require the admission of sexual history evidence for whatever bearing it might have on that issue", the example the authors proceed to give of such a case implies a very low threshhold of admissibility.[235] Still, the fact remains that the Supreme Court of Canada struck the law down. In the United States, presumably because of the exemption doctrine, no part of FRE 412 has been ruled unconstitutional.[236]

F. *Some Substantive Examples*

It seems beyond debate that the most striking result of the Supreme Court of Canada's *Charter* jurisprudence has been its willingness to create a constitutional doctrine of *mens rea*. This intention was announced early on when the Court declared in the *Motor Vehicle Reference* that the combination of absolute liability with the possibility of imprisonment violated section 7 of the *Charter*, and in *Oakes* that reverse onus clauses

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[232] *Ibid.* at 406-10. Recently the government has introduced new legislation: *see* Bill C-49, *An Act to amend the Criminal Code (sexual assault)*.

[233] 28 FED R. EVID. 412(b)(1).

[234] The confrontation clause guarantees criminal defendants the right to "be confronted with the witnesses against" them.

[235] R.O. Lempert & S.A. Saltzburg, A MODERN APPROACH TO EVIDENCE, 2nd ed. (1983) at 639.

[236] There is a disparate array of rape shield laws in the United States, only some of which are similar to FRE Rule 412: *see* Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation* (1987) 78 J. CRIM. L. & CRIMINOLOGY 644 and *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence* 1985 WIS. L. REV. 1219. Few state courts have ruled these laws unconstitutional on their face, but they might apply the exemption doctrine in particular cases. When the Oregon Court of Appeals struck down that state's rape shield law [in *State* v. *Jalo*, 557 P.2D 1359 (1976)], Oregon responded by amending it to widen the availablity of cross-examination: *see* J.G. McGuinness, *Montana's Rape Shield Statute: No Time to Waste* 52 MONT. L. REV. 125.

violated subsection 11(d).[237] These two principles were then combined in the 1987 case of *Vaillancourt* to invalidate Canada's long standing felony murder statute, which imposed liability for murder irrespective of intent to kill.[238] The Court held that, although the law did not actually reverse the onus of proof, as in *Oakes*, it removed a constitutionally required element of the offence (the *mens rea* of murder), which had the same effect. In doing so, subsection 230(d) [formerly 213(d), since repealed] violated both section 7 and subsection 11(d), because it would be possible to convict under subsection 230(d) despite the existence of a reasonable doubt with respect to that element.[239] At the very least, they said, the *Charter* requires that, in a murder prosecution, the Crown prove that death was an objectively foreseeable consequence of the accused's actions. As Justice Lamer put it:

> [W]hatever the minimum mens rea for the act or the result may be, there are....certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of crime....The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme....It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.[240]

As worded, subsection 230(d) of the *Criminal Code* was interpreted as failing to meet the "minimal" standard of objective foreseeability, and was accordingly struck down.[241]

More importantly, Justice Lamer thought that, in the next case, the Court should go even further and hold that the Constitution required *subjective* foresight for a murder conviction. This placed a number of

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[237] *Supra*, note 192 and *Oakes*, *supra*, note 3.

[238] *Supra*, note 208.

[239] *Ibid.* at 135.

[240] *Ibid.* at 134.

[241] Justice McIntyre, the sole dissenter in *Dubois*, *supra*, note 5, was also on his own in *Vaillancourt*. He did not agree that s. 230(d) permitted convictions for murder without proof of objective foreseeabilty of death, but he had a more fundamental objection to the majority judgment. Murder is a legal concept, he noted, and need not be defined in terms of intentional killing if Parliament has decided that certain other forms of homicide deserve equally serious punishment. *Mens rea*, in other words, denotes blameworthiness, and should not be confined by the *Charter* to a narrow range of psychological states. "The principal complaint in this case," he argued at 124:

> is not that the accused should not have been convicted of a serious crime deserving of severe punishment, but simply that Parliament should not have chosen to call that crime "murder". No objection could be taken if Parliament classified the offence as manslaughter or a killing during the commission of an offence, or in some other manner.

Parliament had classified a killing that takes place in the course of a serious offence involving weapons as murder; if the legislation was too harsh it was up to Parliament, not the courts, to change it.

other *Criminal Code* provisions in jeopardy, and since *Vaillancourt* a series of cases dealing with attempted murder and constructive murder has been decided. In these, the Court firmly embraced the subjective foresight standard, striking down subsections 230(a) and 230(c) of the *Code* and declaring the phrase "knew or ought to have known" in subsection 21(2) inoperative where the issue is whether the accused is a party to attempted murder.[242] The Court has also considered subsection 229(c), which provides that anyone who, for an unlawful object, does anything he knows "or ought to know" is likely to cause death is guilty of murder, notwithstanding that he desires to achieve his object without causing death or bodily harm. It, too, is probably inoperative.[243]

This is not the place to engage in a critical analysis of the particular version of the doctrine of *mens rea* that the Supreme Court has constitutionalized in these cases. Two points, however, seem worth making — or, more accurately, remaking in the light of new information.[244] The first is that the Court continues to maintain that the interpretation placed upon section 7 of the *Charter* in the *Motor Vehicle Reference* is the only reasonable one. As Chief Justice Lamer put in in *Martineau*, echoing his words in the earlier case:

> Parliament....decides what a crime is to be, and has the power to define the elements of a crime. With the advent of the Charter in 1982, Parliament also has, however, directed the courts to review those definitions to ensure that they are in accordance with the principles of fundamental justice. We, as a court, would be remiss not to heed this command of Parliament. This is an unassailable proposition....[245]

Americans are of course familiar with this sort of argument, and Shakespeare's Queen of Denmark would have known what to say about it.[246] The fact is that Parliament did *not* direct the courts to review the definitions of crimes. The only reason that the Chief Justice's proposition is "unassailable" is because the Court says so, having chosen to discount the testimony of the framers of section 7, some of whom stated that judicial review should be confined to procedural questions.[247] We do not, however, wish to be seen as taking sides in the debate between

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[242] *See R.* v. *Martineau* (1990), 58 C.C.C. (3d) 353, 79 C.R. (3d) 129 (S.C.C.) [hereinafter *Martineau*]; *R.* v. *Logan* (1990), 58 C.C.C. (3d) 391, 79 C.R. (3d) 169 (S.C.C.) [hereinafter *Logan*]; *R.* v. *Rodney* (1990), 58 C.C.C. (3d) 408, 79 C.R. (3d) 187 (S.C.C.) [hereinafter *Rodney*]; *R.* v. *Luxton* (1990), 58 C.C.C. (3d) 449, 79 C.R. (3d) 193 (S.C.C.) [hereinafter *Luxton*]; *R.* v. *J.(J.T.)* (1990), 59 C.C.C. (3d) 1, 79 C.R. (3d) 219 (S.C.C.); *R.* v. *Arkell* (1990), 59 C.C.C. (3d) 65, 79 C.R. (3d) 207 (S.C.C.); *R.* v. *Sit* (1991), 66 C.C.C. (3d) 449, 9 C.R. (4th) 126 (S.C.C.).

[243] *Martineau, ibid.* at 362-63.

[244] *See supra*, note 2 at 734, 772-74 & 781.

[245] *Martineau, supra*, note 242 at 358.

[246] *Hamlet*, act 3, scene 2.

[247] *See* material cited in the *Motor Vehicle Reference, supra*, note 192. *See also Wholesale Travel, supra*, note 219 at 214, wherein the Chief Justice re-iterates his view that the Court is not "adjudicating upon the merits or wisdom of enactments" when reviewing legislation because it is not the Court's role to "second guess" the policy decisions of elected officials.

interpretive and non-interpretive views of constitutional adjudication, or between strict and purposive construction.[248] These difficult issues need not be resolved in a comparative essay, nor do our own views on them neatly coincide. We make the point only because the United States Supreme Court — unlike its Canadian counterpart — has proved extremely reluctant to review the substance of criminal legislation, and it seems important to emphasize that the Supreme Court of Canada's decision to do so was exactly that: a decision. Indeed, to describe it as faithful obedience to a parliamentary command must seem somewhat ironic to both the framers of the *Charter* and the legislators who have seen so many of their other parliamentary "commands" struck down.

In fact, American law in this area provides yet another most interesting contrast to Canadian. In the United States, appellate courts confronted with some of the unsavoury consequences of the felony murder rule have avoided them without resorting to constitutional principles. Instead, they have employed either the common law or canons of statutory interpretation to blunt the rule.[249] For its part, the United States Supreme Court has yet to confront the issue directly. Not only is it much more difficult to fit substantive criminal law issues within recognized parameters of federal judicial review, but in the past even the "liberal" wing of the Court has expressed strong reservations about opening that particular can of worms.[250] Such review as is possible, i.e., through the Fifth, Eighth and Fourteenth Amendments, falls short of what the Canadian Court has done under sections 7 and 11(d), and is confined to questions involving the burden of proof and proportionate punishment.[251] Although that Court has somewhat cryptically declared that "there are obviously constitutional limits beyond which the States may not go", legislatures in the United States enjoy more freedom to ease the prosecution's burden by deleting elements of offences that in Canada would be regarded as constitutionally required.[252]

It is, therefore, worth noting that Justice L'Heureux-Dubé referred to American law in her dissent in *Martineau*.[253] But in doing so she makes a claim that overstates the argument we have made. It also underscores the difficulties involved when Canadians consult American law and, for that matter, when Americans consult Canadian law —

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[248] *See* P. Brest, in Hickok, ed., *supra*, note 228 at 17-18.

[249] *See supra*, note 2 at 772-73.

[250] *Ibid.* at 773-74, citing the remarks of Justice Marshall in *Powell* v. *Texas*, 392 U.S. 514 (1968). For criticism, *see* J.J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea* (1973) 10 HOUSTON L. REV. 1039.

[251] In the United States the outer limit of these doctrines was reached in cases such as *Lambert* v. *California*, 355 U.S. 225 (1957) [hereinafter *Lambert*]; and *Robinson* v. *California*, 370 U.S. 660 (1962) [hereinafter *Robinson*], dealing with the much more fundamental problem of imposing criminal liability in the absence of an act (*Robinson*) and, where liability is base upon an omission, in the absence of notice (*Lambert*) that one is under a duty.

[252] *Patterson*, *supra*, note 217 at 210 and accompanying text.

[253] *Supra*, note 242. Justice L'Heureux-Dubé did, however, join the majority in *Logan*, *supra*, note 242, because of the high degree of *mens rea* required in attempts.

should they ever feel so moved.[254] Referring to *Tison* v. *Arizona*[255] and *Gregg* v. *Georgia*,[256] Justice L'Heureux-Dubé states "[a]part from certain limits *when combined with the death penalty*, the United States Supreme Court has consistently upheld the constitutional validity of the felony-murder rule".[257] The emphasis, however, should not be where she has placed it; it is the latter portion of the quoted passage, not the former, that is startling. The United States Supreme Court has *not* upheld the constitutional validity of the felony murder rule. It has, in fact, never been asked to strike it down and, apart from considerations involving the death penalty, it would be difficult — although not impossible — to ask it to.[258] Cases such as *Tison* and *Gregg* are challenges, not to the felony murder rule, but to *executing* people who have been convicted of murder under statutes that dispense with the need to prove an intent to kill — just as *Leland* was a case about executing people who cannot prove their insanity.[259] In other words, these are not cases involving a challenge to the legislature's right to define the elements of an offence; they are simply cases where that right is assumed but the punishment is challenged as cruel and unusual under the Eighth Amendment.

The American jurisprudence raises the question of why, in felony murder cases, the Supreme Court of Canada has opted to review offence definition under section 7 of the *Charter* rather than punishment under section 12.[260] This trend began in the *Motor Vehicle Reference*, although it would have been a simple matter in that case to strike down subsection 94(2) of the *Motor Vehicle Act* as violating section 12.[261] As we saw above, this section imposed a minimum term of seven days imprisonment for a person convicted of driving while prohibited or suspended, "whether or not the defendant knew of the prohibition or suspension."[262] This,

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[254] Which they very rarely do. The U.S. Supreme Court has referred to their Canadian counterpart only eleven times since 1886, and then only briefly. None of these references appear to involve criminal law issues. State courts have been equally shy: communication to the authors dated 25 September 1991 from Dr. T. Simmons, environmental litigation services consultant, Reno, Nevada.

[255] 481 U.S. 137 (1987) [hereinafter *Tison*].

[256] 428 U.S. 153 (1976) [hereinafter *Gregg*].

[257] *Martineau*, *supra*, note 242 at 379 (emphasis in original).

[258] *See supra*, notes 250-52 and accompanying text.

[259] *Supra*, note 221.

[260] The Court has reviewed punishment under s. 12 in cases such as *Smith (1987)*, *supra*, note 101, where no *mens rea* problem was involved, striking down the mandatory minimum prison term provided for in s. 5(2) of the *Narcotic Control Act*. In that case, as in others, the Court held that the test was whether any application of the law might result in a *Charter* violation, not whether it did in the case before them. However, in *R.* v. *Goltz* (1991), 67 C.C.C. (3d) 481, 8 C.R. (4th) 82 (S.C.C.) [hereinafter *Goltz*], the majority (6:3) seems to have backed away from this philosophy, preferring a case-by-case approach.

[261] *Supra*, note 192.

[262] *Ibid.* paraphrasing s. 94(2). In *Goltz*, *supra*, note 260, the Court considered a different part of the Act, which gives the Superintendent of Motor Vehicles discretion to prohibit from driving anyone he considers to have an unsatisfactory driving record, and make it an offence to drive "knowing" of the prohibition. The penalty is a mandatory seven days imprisonment for a first offence, and this was held constitutional in *Goltz*.

surely, would be cruel and unusual treatment or punishment, and analysing the problem in this way would have avoided most of the dangers involved in substantive review.[263] The facts in the felony murder cases, however, may have militated against such an approach.

Take, for example, *Martineau*, *Rodney* and *Luxton*.[264] Martineau was convicted of second degree murder arising out of a breaking and entering, during which he and his companion tied up their 70-year-old victim and his wife. Martineau's companion then shot and killed them both. Rodney was also convicted of second degree murder. He had been involved in a plan to kidnap the wife of a supermarket manager and hold her for ransom. In the course of this kidnapping, one of Rodney's accomplices shot and killed her. Luxton was convicted of first degree murder. He had confined a taxi driver at knife point and forced her to drive to a field where he repeatedly stabbed her in the neck and head. The punishment for first degree murder in Canada is life imprisonment without eligibility for parole for twenty-five years. The punishment for second degree murder is also imprisonment for life, without eligibility for parole for ten years.[265] Given such facts and such penalties, it seems reasonable to suppose that, if one is concerned about the possibility of injustice to an accused, it might be better to focus upon *mens rea* than upon punishment. After all, arguing about the death penalty for felony murder is one thing; arguing about life imprisonment with parole in ten to twenty-five years is quite another. Indeed, when one looks at the facts of *Tison* it is not difficult to imagine what the United States Supreme Court would have to say about whether Canada's penalty is cruel and unusual.[266]

However that may be, the potential consequences of the *Motor Vehicle Reference*/*Oakes*/*Vaillancourt* doctrine go well beyond murder and attempted murder. The notions of "moral innocence" and "stigma",

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[263] *See supra*, note 2 at 158n and accompanying text.

[264] *See supra*, note 242 for citations. The Justices in the majority tend to spend less time on the facts than Justice L'Heureux-Dubé, dissenting. In *Martineau*, for example, she points out that the accused either said or thought, "Lady, say your prayers," whereas Chief Justice Lamer says that the facts "are not central to the disposition of this appeal."

[265] Or such greater number of years, not being more than 25, as the judge in a second degree murder case may deem appropriate, and any recommendation by the jury may be taken into account: *see Criminal Code* ss. 235 & 743-44.

[266] The Tisons were brothers who, along with a third brother and other family members, helped their father and another inmate escape from a prison where he was serving a life sentence for killing a guard. They entered the prison armed, and later helped in abducting and robbing a family whose car they needed. After watching their father and his companion repeatedly shoot all four of these people with shotguns, including two children aged 2 and 15, they continued their escape. They were captured in a shoot-out in which their other brother was killed. The father fled into the desert, where he died of exposure. The Supreme Court held (5:4) that the Eighth Amendment does not prohibit the death penalty for felony murder where it can be shown that the defendant was recklessly indifferent to human life, and remanded the case for a determination of that issue. The nature of the dissent, which held that foreseeability of harm is not equivalent to intent where the death penalty is concerned, suggests that American defence counsel really ought to be looking north.

plus the severe penalties attaching to some offences, were important elements in the Court's reasoning, and in *Vaillancourt* Chief Justice Lamer gave theft as another example of a crime that requires a minimum *mens rea*.[267] Then, in *R.* v. *Nguyen*; *R.* v. *Hess*, the Court ruled that one of the so-called statutory rape provisions of the *Criminal Code* violated section 7 of the *Charter* because it deleted the need for the Crown to prove that the accused knew that the female complainant was underage.[268] The Court declared that portion of the law inoperative and ordered a new trial on the section as amended, thus re-writing the statute in a way that, a few years ago, the justices were reluctant to do. Similar examples of the new trend towards "reading in, out or down" to avoid completely sterilizing legislation may be found in *Seaboyer*, *Swain*, *Wholesale Travel* and other cases, some of which have been discussed above.[269]

Another area of possible concern is criminal negligence, where the Supreme Court's continuing confusion over whether the Crown must prove subjective foresight of consequences has, so far, escaped *Charter* scrutiny.[270] Extreme intoxication, however, has not. Although in *R.* v. *Bernard*[271] the Court appeared to hold that denying the intoxication defence to general intent offences does not violate the *Charter*, several of the justices could conceive of cases where intoxication might be so severe that withholding the defence would offend subsection 11(d).[272] Even more recently, the Court had to defend a proposition that, to most people, would seem unassailable: in *R.* v. *Penno* they affirmed that denying the defence of drunkenness to drunk drivers offends neither section 7 nor section 11(d) of the *Charter*.[273] Arguing that proof of the existence of an essential element of an offence is also a defence to that offence will surely prove to be the zenith (or nadir) of lawyerly ingenuity in *Charter* cases, but it does illustrate just how far the logic can be taken.

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[267] *Supra*, note 208 at 134. This led the accused in *Wholesale Travel*, *supra*, note 219 to argue that false or misleading advertising was analogous to theft and involved the requisite stigma. Chief Justice Lamer agreed in *Wholesale Travel*, at 212, that it carried "some" stigma, but not enough to be struck down on that ground alone. Justice McLachlin, at 264, on the other hand, obviously believed that the less said about "stigma" as a constitutional concept, the better.

[268] (1990), 59 C.C.C. (3d) 161, 79 C.R. (3d) 332 (S.C.C.). McLachlin and Gonthier JJ. dissented, holding that the law was a reasonable limit under s. 1.

[269] *Supra*, notes 144 & 219; and *see* J. Atrens, "National Appellate Court Seminar Outline: 1990-91 Decisions of the Supreme Court of Canada on *Charter* Legal Rights in Criminal Cases" (unpublished) at 2. As Atrens points out, the position put in *Hunter*, *supra*, note 3 has largely gone by the wayside. Dickson C.J.C. said in *Hunter* at 115 that it should "not fall to the courts to fill in the details that will render legislative lacunae constitutional."

[270] *See R.* v. *Tutton* (1989), 48 C.C.C. (3d) 129, 69 C.R. (3d) 289 (S.C.C.); *R.* v. *Waite* (1989), 48 C.C.C. (3d) 1, 69 C.R. (3d) 323 (S.C.C.); and *R.* v. *Anderson* (1990), 53 C.C.C. (3d) 481, 75 C.R. (3d) 50 (S.C.C.).

[271] (1988), 45 C.C.C. (3d) 1, 67 C.R. (3d) 113 (S.C.C.) [hereinafter *Bernard*].

[272] *See* especially the dissent and the judgments of Wilson and La Forest JJ.

[273] (1990), 59 C.C.C. (3d) 334, 80 C.R. (3d) 97 (S.C.C.) [hereinafter *Penno*]. The judgments are almost as diverse in *Penno* as in *Bernard*, *supra*, note 271, but only Chief Justice Lamer felt obliged to resort to s. 1.

IV. The Explicit Rejection of United States Supreme Court Precedent

We noted in our first article that the Supreme Court of Canada has not always gone farther to protect the interests of the accused than the United States Supreme Court, but that they had explicitly rejected American precedent favouring the accused in only one case, involving random traffic stops.[274] This is no longer the only area among those we have surveyed in which the Court has explicitly rejected American precedent, and they have recently gone even further in defending random stops as a reasonable limit on the section 9 right to be protected against arbitrary detention.[275] On the other hand, the Court's rejection of American precedent on electronic surveillance has had the opposite effect, protecting the interests of the accused in a way that the United States Supreme Court will not.

A. *Random Traffic Stops*

In *Hufsky* the Supreme Court of Canada ruled that random stop-checks that were part of an organized program constituted a reasonable limit on the right against arbitrary detention contained in section 9 of the *Charter*.[276] Two years later, in *Ladouceur*, they had to consider an incident that was more difficult to justify.[277] There the police officer stopped a driver to determine whether he had a valid driver's licence, registration and insurance, but the stop was not part of an organized program. According to Sopinka J., it was purely a "roving random stop" that was compatible with permitting individual officers "to stop any vehicle, at any time, at any place....on any whim."[278] Nonetheless, the Court once again rejected (five to four) the American condemnation of such stops contained in *Delaware* v. *Prouse*,[279] and held that, although Ladouceur's admission that his licence had been suspended was obtained by way of a violation of section 9 of the *Charter*, the provincial highways legislation authorizing arbitrary detention was justified under section 1. Four of the justices felt that the Court had reached the "outer limits of s. 1" in *Hufsky* and that extending the exemption beyond stop-check programs stretched the concept of reasonable limits to the breaking-point. Accordingly, they recommended that the highways legislation be

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[274] *Supra*, note 2 at 776*ff*.

[275] *See R.* v. *Ladouceur*, [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22 [hereinafter *Ladouceur*], discussed *infra*. The Court has also rejected American law favourable to the accused in *Keegstra*, *supra*, note 210 and in other cases they have referred to American precedent in ways that are difficult to classify. *See, e.g.*, *Seaboyer*, *supra*, note 144 and the cases discussed in the portion of our earlier article referred to in the preceding note.

[276] *Hufsky*, *supra*, note 4.

[277] *Ladouceur*, *supra*, note 275. *See also R.* v. *Wilson* (1990), 56 C.C.C. 142, 77 C.R. (3d) 137 (S.C.C.) [hereinafter *Wilson*].

[278] *Ibid.* at 29.

[279] 440 U.S. 648 (1979) [hereinafter *Prouse*].

"read down" and confined to such programs or to "road-blocks where all vehicles are required to halt".[280]

This, in part, is what has happened in the United States. The real issue in both jurisdictions is of course the same, i.e., whether the Constitution permits police to find drunk drivers by random selection. The usual procedure is that, under the guise of checking for valid documentation, officers signal motorists to pull over and then observe their behaviour. In *Michigan Department of State Police* v. *Sitz*,[281] the police had established such a program: under the guidelines, a sobriety check-point could be set up along a state highway and vehicles passing the established point were to be stopped in order to examine the drivers for signs of intoxication. If such signs were discovered, the driver in question was to be directed off the road for a further test. All others resumed travel.

Shortly before the operation was put into effect, a group of licenced drivers in Michigan brought suit to enjoin it. The majority of the Court, however, ruled that the Michigan program did not violate the Fourth Amendment, giving two reasons for distinguishing *Prouse*. In *Sitz*, evidence was led to show that stop-check initiatives resulted in approximately 1.5% of the drivers stopped being arrested for intoxication — hardly a large number. Nonetheless, in *Prouse* no empirical evidence had been presented to indicate that random stops promoted highway safety.[282] In addition, the Michigan program did not, according to the Court, involve truly "random" stops: picking up on a suggestion in *Prouse*, the program required that *all* vehicles passing the check-point were to be stopped.

It now seems that the difference between the two jurisdictions is that the United States Supreme Court is willing to tolerate arbitrary interference with the "liberty" of motorists in order to deter drunk drivers, so long as everyone is inconvenienced equally. It is therefore the random nature of the stop, rather than the stop itself, that offends.[283] In Canada, however, motorists can operate their vehicles with the knowledge that, if luck is with them, the officer will choose the car in front of or behind them. The Canadian Court seems less concerned about the discretionary authority *Ladouceur* confirms police as having, so there is no need to stop everyone in order to keep matters constitutional.

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[280] *Per* Sopinka J., *supra*, note 275 at 30, quoting Tarnopolsky J.A. in the Ontario Court of Appeal. The minority would have admitted the statement under s. 24(2), however.

[281] 110 L.Ed. 2d 412 (1990) [hereinafter *Sitz*].

[282] This of course had been done in *Hufsky*, *supra*, note 4 and other Canadian cases. Evidence was led in *Sitz* that the experience in other states was that sobriety check-points resulted in drunk driving arrests in about 1% of all motorists stopped.

[283] Stopping all vehicles ensures, for example, that racial minorities are not being subjected to a disproportionate number of checks. So, probably, would stopping every other vehicle.

B. *Electronic Surveillance*

By way of contrast, in three major cases dealing with electronic surveillance the Supreme Court of Canada has recently interpreted section 8 of the *Charter* much more favourably to suspects than the Fourth Amendment in similar situations.[284] Only two require discussion here. In *Duarte*, the police conducted electronic surveillance of certain conversations without seeking a judicial authorization. In doing so, they relied upon paragraph 178.11(2)(a) of the *Criminal Code*, which provided that the consent of one of the participants was sufficient. The Ontario Court of Appeal held that there had been no violation of section 8, adopting the "risk" analysis used in *White*.[285] This approach proceeds on the basis that "the consent to the interception by the recipient may be looked upon as no more than the extension of the powers of recollection of the recipient of the communication." In other words, the Fourth Amendment does not protect a suspect's misplaced trust in someone he speaks to in confidence any better than the Fifth Amendment did in *Perkins*.[286]

In the Supreme Court of Canada, La Forest J. conducted an extensive and informative analysis of the American position and rejected it. Speaking for everyone but Justice Lamer, Justice La Forest stated that the real question in the case was whether section 8 imposes on the police the obligation to seek prior judicial approval before engaging in so-called participant surveillance, or whether they have unlimited discretion where the originator or recipient consents.[287] In concluding that section 8 does impose such an obligation, the Court also rejected the Crown's argument that there is a distinction between participant surveillance and other forms of electronic surveillance.

The purpose of the warrant requirement, said Justice La Forest, is not to protect people from the risk of disclosing information, but to protect them from the "much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit [their] words." Invoking the spirit of *Hunter* and *Dyment*, he wrote that "one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance".[288] Obviously our expectation of

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[284] *Duarte*, *supra*, note 42; *Wiggins*, *supra*, note 43; and *Thompson*, *supra*, note 44.

[285] *Supra*, note 137. Justice La Forest correctly points out in *Duarte* that only a plurality in *White* adopted the "risk" analysis. The majority reversed on other grounds, but *White* did move the law away from the "reasonable expectation of privacy" test in *Katz* v. *United States*, 389 U.S. 347 (1967) [hereinafter *Katz*].

[286] *Supra*, note 135.

[287] Lamer C.J.C. agreed with the Ontario Court of Appeal that there was no s. 8 violation, but because the majority admitted the evidence notwithstanding the violation, the Court was unanimous in the result.

[288] *Duarte*, *supra*, note 42 at 10-11, referring to *Hunter*, *supra*, note 3 and *Dyment*, *supra*, note 5. *Duarte* confirms our earlier assessment that, although the two Courts adopted similar approaches to privacy in *Hunter* and *Katz*, *supra*, note 285, they have since diverged: *see supra*, note 2 at 779.

privacy must be balanced against the ability of law enforcement organizations to conduct criminal investigations, and Parliament did so with respect to non-participant surveillance by requiring police to obtain a judicial authorization based upon reasonable and probable grounds. If this protection does not apply to participant surveillance, citizens cannot know whether the person to whom they are speaking has agreed to a violation of their privacy. Hence, we must all run the risk that, whenever we speak, the state, without any prior judicial authorization, may be secretly recording and transmitting what we say. In this sense, concluded the Supreme Court, the "risk" analysis in *White* destroys all expectations of privacy. Accordingly, the Court held that intercepting private communications by an instrumentality of the state but without prior judicial authorization infringes section 8, even when one party to the communication has consented.[289] The evidence was admitted, however, because the police had reasonable grounds for the surveillance and had relied in good faith upon paragraph 178.11(2)(a).[290]

A related issue arises in cases where officers obtain judicial authorization to intercept private communications and need to effect a surreptitious entry in order to plant a listening device. Where both the statute and the authorization are silent on this point, is the entry a violation of section 8? In *Dalia* v. *United States*[291] the appellant argued that the authorization must specifically approve surreptitious entry, notwithstanding that Title III of the *Crime Control Act* of 1968 makes no mention of it. The Supreme Court of the United States disagreed, holding that if the warrant satisfies Fourth Amendment standards its execution is best left to the discretion of the police.[292] Here, too, Canadian law has struck out on its own.

In *Thompson* the Supreme Court of Canada declined to countenance covert entry into residential premises without prior judicial authorization, rejecting *Dalia* and departing from their own, pre-*Charter* jurisprudence.[293] Although there were a number of issues in *Thompson*, it is this one that is of interest for comparative purposes. The Court ruled that, at a minimum, the authorization must refer to each residence in which listening devices are to be installed and designate the type of device. The information necessary for these clauses enables the judge to determine whether entry is required or whether some less intrusive means should be employed. Because the authorization in *Thompson* failed to meet this standard it did not comply with section 8: eight of

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[289] But the Court did not actually strike down s. 178.11(2)(a): *see Duarte* at 6 & 23.

[290] This aspect of the case was discussed in Part II.A.1., *supra*.

[291] 441 U.S. 238 (1979) [hereinafter *Dalia*].

[292] The Court reviewed Title III and also held that (1) the Fourth Amendment does not prohibit *per se* covert entries to plant a listening device, and (2) that Congress did not intend a distinction between surveillance requiring, and not requiring, surreptitious entry.

[293] *Supra*, note 44, reviewing *Lyons* v. *R.*, [1984] 2 S.C.R. 633, 15 C.C.C. (3d) 417 and *Reference re Application for an Authorization*, [1984] 2 S.C.R. 697, 15 C.C.C. (3d) 466.

the eleven residences entered were not listed in the authorization and the issuing judge had not considered whether entry into the three that were listed was necessary.[294]

In our view, the Supreme Court may have been wise to divorce themselves from United States Supreme Court precedent respecting participant surveillance and surreptitious entry. But our point for present purposes is a less contentious one. It is that in this area, as in a number of others, the Court has protected the interests of suspects more effectively than its American counterpart. Moreover, its jurisprudence has been shaped against a background of statutory regimes that are strikingly similar.[295] Although the evidence in these cases was admitted, the Court has interpreted the *Charter* as requiring judges, not police officers, to decide whom the state may eavesdrop upon and "trespass" against. In so doing, they not only rejected United States Supreme Court precedent that unequivocally favours the prosecution, but for the first time did so explicitly.[296]

V. CONCLUSION

We conclude this survey in two ways. First, we consider how the structure of the *Charter* may have contributed to differences between post-1982 Canadian criminal law and its American counterpart, summarizing what has been set out above and indicating in passing some cases and issues that space has prevented us from discussing in more detail. Second, we hazard some remarks about the general tenor of the Court's decisions and its use of American precedent.

A. *The Structure of the* Charter

The primary structural differences between the Canadian *Charter* and the American *Bill of Rights* are four: the former has (i) an explicit exclusionary rule in subsection 24(2); (ii) an explicit provision for judicial review in section 52; (iii) an explicit reasonable limits clause in section 1; and (iv) a time limited provision for the statutory override of the rights that are most important to accused persons in section 33. For present purposes, we need consider only the first three, together with a few of the most important differences in the wording of the rights themselves.

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294 Again, because the evidence had been obtained in good faith reliance upon what the police reasonably believed to be the law, it was admitted.

295 Part IV.1 [now Part VI] of the *Criminal Code* was modeled on Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, Pub. L. No. 90-351, 82 STAT. 197 at 211 (1968).

296 In a way, they did it again in *Broyles*, *supra*, note 121. However, as we pointed out in Part III.A.2.(b), *supra*, it remains to be seen whether the Court really meant to equate the surreptitious jailhouse conversation in *Hebert*, *supra*, note 4, with the one in *Perkins*, *supra*, note 135.

1. *Exclusion Under Subsection 24(2) and Otherwise*

Subsection 24(2) provides for the exclusion of evidence obtained in a manner that infringes or denies a *Charter* right, but only if to admit it would, "having regard to all the circumstances....bring the administration of justice into disrepute." The Supreme Court of Canada has held that exclusion is mandatory once these conditions have been met, and that they will not substitute their opinion for that of the courts below "as regards the application of section 24(2)" to the facts of each case.[297] However, except for cases where a subsection 10(b) violation results in evidence emanating from the accused, there is clearly considerable room for discretion in deciding whether to exclude or admit, and the Court has not experienced any difficulty in reviewing such decisions.[298] By way of contrast, in the United States exclusion has traditionally been automatic once a constitutional violation is established, although during the past decade the Supreme Court has created some significant exceptions to this practice.[299] The current Court has also declared that, at least with respect to the Fourth Amendment, the American exclusionary rule is merely a judicially created device for deterring violations; it is not "a personal constitutional right".[300]

Notwithstanding these differences, both the wording of certain *Charter* rights and the interpretation that the Supreme Court of Canada has imposed upon them and upon subsection 24(2) have made the Canadian rule function in some respects remarkably like the American — notwithstanding the intentions of the framers.[301] Not only has the Court taken a wide view of the subsection 10(b) requirement of advising a suspect of his right to counsel "upon detention", but the importance they have attached to this right has led to a practice of automatic exclusion when a breach results in incriminating statements and virtually automatic exclusion for other "emanating" evidence.[302] And although *Collins* states that real evidence will rarely be excluded because it is more difficult to classify as affecting the fairness of trials, the concepts

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[297] *Kokesch*, *supra*, note 22 at 220, citing *Duguay*, *supra*, note 57.

[298] Except, perhaps, in *Duguay* itself, where the Court implied that, but for this principle, they might have reversed. Its main importance therefore lies in the lengthy — and solitary — dissent by Justice L'Heureux-Dubé.

[299] *See* the discussion in notes 92-96, *supra*, and accompanying text.

[300] *Leon*, *supra*, note 19 at 906, citing *United States* v. *Calandra*, 414 U.S. 338 at 348 (1974).

[301] *See generally* Paciocco, *supra*, note 68 and the Special Joint Committee on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 1980. One witness before the Committee testified that the standard for determining whether evidence brought the administration of justice into disrepute was "that the admission of this evidence would make me vomit, it was obtained in such a reprehensible manner": Testimony of E. Ewaschuk (now Ewaschuk J.), Vol. 6, 48:124. Although many lower courts initially accepted the "community shock" test enunciated by Lamer J. in *Rothman*, *supra*, note 122 as controlling, he later rejected it for s. 24(2) purposes in *Collins*, *supra*, note 20 at 21-22.

[302] For the exceptions, *see* the discussion in notes 66-68, *supra* and accompanying text.

of "emanation" and "conscription" advanced in *Dubois* and *Collins* have led to the exclusion of non-testimonial evidence where subsection 10(b) rights were violated.[303] It is also noteworthy that in search cases where no emanating evidence or subsection 10(b) rights are involved, if the section 8 violation relates to bodily integrity, the evidence will be excluded.[304] Indeed, if the search is unreasonable under section 8 because the police lacked reasonable grounds, this alone can amount to a sufficiently serious violation to justify exclusion even if it did not involve bodily integrity.[305] In these circumstances, holding a search unreasonable under section 8 yet "reasonable" for the purposes of subsection 24(2) seems just as difficult as the dissenters in *Leon* said it ought to be in the United States.[306] It is this sort of development that has led members of the Court such as former Chief Justice Dickson to claim that the Court has interpreted subsection 24(2) wrongly and is repeating American excesses.[307]

As we have seen, however, when one compares particular issues in the two jurisdictions, it may not be entirely accurate to portray the American Court as the one that protects the interests of accused persons most effectively. That portrayal is especially suspect where the right to counsel is concerned. Detained as well as arrested persons must be advised of their right to counsel in Canada, whereas in the United States this is required only where there is both arrest and custodial interrogation in a "police dominated atmosphere". When combined with the Supreme Court's decision to (i) expand the concept of self-incrimination to include any evidence that emanates from the accused; and (ii) inextricably link trial fairness and subsection 10(b), this results in a more potent exclusionary rule than the American one. Not only does it reach non-testimonial evidence such as breath samples and line-ups, it even raises the possibility of invalidating otherwise reasonable searches on subsection 10(b) grounds. Although to date the Court has not excluded evidence for this reason and seems unlikely to do so, *Debot* leaves this possibility

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[303] *See, e.g., Ross, supra,* note 5; *Therens, supra,* note 26.

[304] *See supra,* note 59 and accompanying text.

[305] *See Kokesch, supra,* note 22 at 231, where Justice Sopinka purported to distinguish cases such as *Duarte, supra,* note 42 as ones where police relied in good faith upon statutes wrongly presumed to authorize constitutional behaviour. Where, on the other hand, "police powers are already constrained by statute or judicial decisions, it is not open to a police officer to test the limits by ignoring the constraint and claiming later to have been 'in the execution of my duties'." Chief Justice Lamer made a similar point in *Greffe, supra,* note 9 at 194 where he said there was no evidence of "good faith reliance by the police on a previously unchallenged procedure." If this is the test, the Court's decisions to exclude in *Therens, supra,* note 26 and *Elshaw, supra,* note 73 seem dubious; but then, they were s. 10(b) cases.

[306] *Supra,* text accompanying note 49. Since this was written, however, the Court has distinguished *Kokesch* (4:3) on facts described by one of the dissenting justices as "so similar" that distinguishing it was "difficult, if not impossible": *see R.* v. *Wise,* [1992] 1 S.C.R. 527, 70 C.C.C. (3d) 193 at 216.

[307] *E.g.,* in *Greffe, supra,* note 9 and accompanying text. He has also expressed reservations about applying U.S. precedent to s. 1 of the *Charter,* especially to strike down Canada's hate laws: *see Keegstra, supra,* note 210 at 30-35.

open.[308] The Court has yet to exclude evidence solely on the basis of a breach of subsection 10(a), either; but a failure to give detainees the reason for their detention may tip the balance against admissibility where other violations are involved.[309]

Another consequence of the importance the Court attaches to the right to counsel has been a more stringent waiver doctrine, but it seems too early to tell whether this will result in more exclusions than in the United States.[310] The Court's description of the doctrine in *Smith (1991)* and their reluctance to extend waiver doctrine to section 7 in *Hebert* suggests that it does have this potential; but the interpretation given to the right to silence in the latter case may be even more significant if it means that using undercover agents to elicit information from detainees is never permitted in Canada. Certainly Justice Iacobucci's equation of the facts of *Hebert* and *Perkins* makes this a real possibility.[311]

The rights to counsel and silence are not the only areas where the Court has vigorously protected the interests of suspects and accused persons, nor is subsection 24(2) the only avenue of exclusion. In the United States prosecutors can not only cross-examine an accused on his or her prior testimony but can — subject to one exception — use it as part of their case-in-chief as well.[312] This is not so in Canada. Section 13 of the *Charter* has been interpreted as imposing an absolute bar on doing the latter, and although *Kuldip* says that section 13 permits the former to be done, the extent of this permission remains somewhat unclear.[313] Moreover, the current Chief Justice has hinted in both *Dubois* and *Thomson Newspapers* that subsection 5(1) of the *Canada Evidence Act* may be unconstitutional.[314] It seems unlikely that a majority of the Court will go this far, but if his forecasts in this area prove as reliable as his similar statements in *Vaillancourt* about objective liability for murder, we may see in Canada a revival, via sections 7, 11(c), 11(d) and 13, of the common law right to refuse to answer incriminating questions that the Fifth Amendment protects in the United States.[315] Combined

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[308] *See* Part III.B., *supra*.

[309] *See, e.g., Greffe, supra*, note 9; *Smith (1991), supra*, note 101; and the reasons of Sopinka J. in *Evans, supra*, note 31.

[310] *See* Part III.A.1., *supra*.

[311] *See supra*, notes 139 & 296 and Part III.A.2.(b), generally.

[312] *See Harrison, supra*, note 202 and accompanying text.

[313] *Supra*, note 186 and Part III.C., generally.

[314] *Supra*, note 190.

[315] All of the Justices in *Thomson Newspapers* agreed that the privilege or right against self-incrimination protected by the *Charter* is not exhausted by the specific enumerations in ss. 11(c) and 13, especially where derivative evidence is concerned. In other words, these provisions "do not prevent residual content being given to s. 7": *per* Lamer C.J.C. at 428. However, the Chief Justice found that the wrong section was challenged in *Thomson Newspapers* (so the notice given to the Attorneys General was insufficient to open up the broader s. 5 issue), and Sopinka J. distinguished between compelling a witness to be examined by a court (which is not prohibited by s. 7) and by an investigative body (which is). Therefore, only two of the five Justices held that it is a principle of fundamental justice under s. 7 that a witness may refuse to give an incriminating answer in both circumstances. *See also Stelco Inc.* v. *Canada (A.G.)*, [1990] 1 S.C.R. 617, 55 C.C.C. (3d) 227 (S.C.C.).

with the *Dubois/Mannion* rule concerning the prior testimony of the accused, this would be effective protection indeed.

2. *Section 52*

Nor are *Charter*-based protections for accused persons in Canadian law confined to excluding evidence. For example, in 1991 the way was opened for evidence favouring the defence when, invoking fundamental justice and the right to a fair trial, the Court struck down the barely nine-year-old rape shield law in *Seaboyer*, revealing an increasing willingness to write new rules rather than leave this to Parliament.[316] In the United States such laws have been preserved by the doctrine of constitutional exemption.[317] Another example comes from the *Duarte* line of cases, where the Court admitted the challenged electronic surveillance evidence but refused to concede to Canadian police involved in participant surveillance and surreptitious entry the wide discretionary powers American law allows them.[318] And although both jurisdictions have approved of placing a persuasive burden on the accused with respect to insanity, only the United States Supreme Court is willing to countenance a statute elevating this to proof beyond a reasonable doubt.[319]

Finally, the Court's potent combination of the presumption of innocence in subsection 11(d) and fundamental justice in section 7 has proved to be an exceptionally broad sword. Cutting a swath through the *Criminal Code*'s homicide provisions and more, the Court has vigorously asserted the position that the *Charter* mandates (what in the United States would be called) substantive review.[320]

3. *Section 1*

In addition to the discretion not to exclude evidence that subsection 24(2) appeared to confer, section 1 of the *Charter* was and is an important qualifier of enumerated rights. The Court has invoked it to save Canada's rather dubious prostitution law, its hate laws, the presumption of sanity, random traffic stops, roadside breathalyzer tests, etc.[321] However, where a *Charter* provision such as section 7 or section 8

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[316] *See supra*, note 269 and accompanying text.

[317] *See supra*, note 236 and accompanying text.

[318] *See supra*, Part IV.B.

[319] *Leland*, *supra*, note 221.

[320] *See* Part III.F., *supra*.

[321] On the prostitution law *see R.* v. *Skinner*, [1990] 1 S.C.R. 1235, 56 C.C.C. (3d) 1; *R.* v. *Stagnitta*, [1990] 1 S.C.R. 1226, 56 C.C.C. (3d) 17; and *Reference re ss. 193 and 195.1(1)(c) of Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 [hereinafter the *prostitution cases*] Wilson and L'Heureux-Dubé dissenting in each case. On the hate laws *see Keegstra*, *supra*, note 210; *R.* v. *Andrews* (1990), 61 C.C.C. (3d) 490, 1 C.R. (4th) 266 (S.C.C.). On the presumption of sanity *see Chaulk*, *supra*, note 210. On random stops *see Hufsky*, *supra*, note 4, *Ladouceur*, *supra*, note 275 and *Wilson*, *supra*, note 277. For roadside testing, *see R.* v. *Thomsen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411 [hereinafter *Thomsen*], limiting the right to counsel.

is invoked, it is both semantically and conceptually difficult to find a law to be fundamentally unjust or unreasonable, and then conclude that it is nonetheless a reasonable limit that is demonstrably justifiable in a free and democratic society. Hence, perhaps, the temptation to read societal interests into "fundamental justice" in section 7, and to either uphold the impugned provision without invoking section 1 or strike it down as unsaveable.[322] But even where section 1 is called in aid, there are clear signs that the weak role assigned to it in the early cases has been abandoned, in fact if not in rhetoric. As Peter Hogg has pointed out, the broad and purposive interpretation of rights first advanced in *Big M Drug Mart* is very difficult to reconcile with the stringent *Oakes* standard of justification,[323] and there is a growing body of case law in which the Court has cited the *Oakes* test as governing, but then has gone on to apply it in a most unconvincing way.[324]

The brake upon individual rights in section 1 is, therefore, significant. As we pointed out in our first article, the importance of blood sample decisions such as *Pohoretsky* and *Dyment* is less now that sampling is authorized by statute and can be justified under that section.[325] It also seems clear that the Court's decision to find in provincial highway laws reasonable limits on subsection 10(b) (the right to counsel) and section 9 (the right not to be arbitrarily detained) has greatly weakened the practical importance of *Therens* as an impaired driving precedent.[326] More generally, some justices continue to resort to section 1 very readily, and in cases such as *Whyte* (another impaired driving case), *Chaulk*, and a number of others it has been used with obvious effect.[327] Nonetheless, if one excepts impaired driving, the main impact of section 1 has been upon civil law or, in the criminal context, on section 2 freedoms and section 15 equality rights that have applications well beyond the criminal process.[328] Section 1 has not set the tone in

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[322] In the *extradition cases* and *Seaboyer*, the majority held that the statutory provisions in the former did not violate s. 7, but that those in the latter did, and could not be saved: *see supra*, note 144. On the other hand, where a right is involved that does not contain such imprecise terms as "justice" or "reasonable" in its definition, resort to s. 1 is somewhat less strained. For example, in *Keegstra*, *supra*, note 210 and *Wholesale Travel*, *supra*, note 219, either a majority (*Keegstra*) or a plurality (*Wholesale Travel*) found the s. 11(d) violations in those cases to be justified under s. 1. The *prostitution cases*, *ibid.*, combined both gambits: the majority found that s. 195.1(1)(c) did not violate s. 7 of the *Charter* and, although it did violate s. 2(b), this was a reasonable limit under s. 1.

[323] *Interpreting the* Charter *of Rights: Generosity and Justification* (1990) 28 OSGOODE HALL L.J. 817.

[324] Most recently and notably, in *Ladouceur*, *supra*, note 275 and the *prostitution cases*, *supra*, note 321.

[325] *Supra*, note 2 at 782n.

[326] *See Thomsen*, *supra*, note 321; *Hufsky*, *supra*, note 4; and *Ladouceur*, *supra*, note 275.

[327] *Whyte*, *supra*, note 208; *Chaulk*, *supra*, note 210.

[328] *E.g.*, freedom of religion in *Edwards Books*, *supra*, note 231; *R.* v. *Jones*, [1986] 2 S.C.R. 284, 28 C.C.C. (3d) 513; and freedom of expression in *Keegstra*, *supra*, note 210; the *prostitution cases*, *supra*, note 321; *Canadian Newspapers Co.* v. *Canada (A.G.)*, [1988] 2 S.C.R. 122, 43 C.C.C. (3d) 24.

the core areas of *Charter* criminal law, such as the right to counsel, the privilege against self-incrimination, offence definition, search and seizure, individual privacy, etc. Nor do we think that it has, on the whole, adversely affected the interests of persons accused of serious crime. This may be largely because there are fewer laws to qualify as reasonable limits where many of these crimes are concerned, and therefore, the *Charter* attack is upon police action rather than a statute. But whatever the explanation, when we compare the results in these areas with United States precedent, we are not inclined to describe them as more "conservative" of state power than American law.

B. *Looking South*

In a recent article, David Beatty compares the Canadian Court's record in *Charter* cases to what he sees as the *Charter*'s potential, rather than to the reality of a neighbouring jurisdiction. On this basis he concludes that the Supreme Court of Canada has adopted "a very conservative approach to the Charter, and to the protection of human rights".[329] This opinion, he adds, is one that he "would expect most students of the *Charter* to share."[330] Perhaps, but however justified this may be as a general assessment of the Court's record, insofar as the criminal law issues canvassed in this essay are concerned it is over-inclusive and, we think, quite wrong. As we said in our first article, in many respects the Supreme Court of Canada has jumped into rights review "head first", and has ended up protecting the interests of accused persons at least as much as, and often more than, the Rhenquist, Burger and, what is more surprising, the Warren Court.

Of course, Canadian judges need not cite American law, and many cases continue to be decided without any obvious sign that United States decisions or commentaries were advanced in argument — even if they were. Perhaps as counsel become increasingly aware of the "wealth of experience" to be found down south, courts are learning to become correspondingly wary of it.[331] In criminal law, however, it can be a fertile source of argument and analogy for those seeking to apply the brakes. Thus, although Justice L'Heureux-Dubé begins her dissenting analysis

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[329] D. Beatty, *A Conservative's Court: The Politicization of Law* (1991) 41 U.T.L.J. 147 at 150-51. He explains:

> [L]egally, we find ourselves ruled by a Court controlled by people who have favoured a set of doctrines and modes of analysis that are in conflict with the most basic principles and values underlying the Charter, and that provide much less protection for our rights and freedoms than the Charter is able to guarantee.

[330] *Ibid.* and at 148 & 166. Beatty concedes that his further contention that such conservatism itself violates the *Charter* — a position we find not unlike the charges levelled by American conservatives against the Warren Court — does require some defending. We agree.

[331] Chief Justice Dickson sounded this warning note in *Simmons*, *supra*, note 56 quite early on (*compare* his later comments in *Keegstra*, *supra*, note 307). *See also* La Forest J. in *R.* v. *Rahey*, [1987] 1 S.C.R. 588 at 638-39, 33 C.C.C. (3d) 289 at 325.

of American law in *Elshaw* with the usual qualifications about being well aware of the perils of resorting to United States precedent, she goes on to recommend that we "look south and learn".[332] A similar point was made in *Wholesale Travel*, a false advertising case that is, significantly, somewhat farther from the centre of what has been traditionally regarded as serious crime. "Decisions of the highest American courts should not and must not be slavishly followed in Canada", wrote Justice Cory, but "we can often benefit from the American experience and learning." He then went on to conclude that this experience supported his view that strict liability with a reverse onus does not violate sections 7 and 11(d) of the *Charter* where the accused chooses to participate in a regulated industry.[333] Unfortunately, it remains too often the case that some of the justices will cite United States law and others will simply ignore it, so the two sides never debate the important issues that the differences between the jurisdictions reveal. However, the members of the Court appear less inclined than in the past to imply that American law is more solicitous to the accused than Canadian law. Chief Justice Dickson's comment in *Greffe* must now be set alongside such examples as Justice La Forest's explicit rejection of United States precedent in *Duarte*, Justice McLachlin's acknowledgment in *Smith (1991)* that Canadian waiver doctrine protects suspects more than American law does, and Justice Iacobucci's description of *Perkins* in *Broyles*.[334]

Some commentators have argued that it is usually the so-called "conservative" justices, notably La Forest and L'Heureux-Dubé JJ., who preach judicial restraint or deference. But this says too much. "Conservative" and "liberal" are tricky terms, and judges have different reasons, stated and unstated, for deciding as they do. They may also be quite wrong about the effects of decisions made by judicial colleagues with whom they disagree. For example, the dissenters in *Miranda* and other opponents of the exclusionary rule seem to have been mistaken about some of its implications for law enforcement. It now seems tolerably clear that, as the majority in that case claimed, the *Miranda* rules have not handcuffed the police but "liberated" them, enabling interrogators to "sanitize the....process and....continue questioning [their] isolated suspect."[335] Indeed, the empirical evidence is that clearance and confession rates have been "essentially unaffected" by the decision.[336] Another example comes from a recent study of the Chicago police department,

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[332] *Elshaw*, *supra*, note 73 at 108-09.

[333] *Wholesale Travel*, *supra*, note 219 at 261, referring, *inter alia*, to the test enunciated in *Lambert*, *supra*, note 251.

[334] *Duarte*, *supra*, note 42; *Smith (1991)*, *supra*, note 101 at 322; and *Broyles*, *supra*, note 139.

[335] S.J. Schulhofer, *Reconsidering Miranda and the Fifth Amendment*, in Hickok, ed., *supra*, note 228 at 288 & 297. The point of *Miranda* was to lay down clear rules. As Rehnquist J. put it in *Tucker*, *supra*, note 113 at 443, this would "help police officers conduct interrogations without facing a continued risk that valuable evidence would be [excluded]" because of a failure to comply with the old voluntariness test. In *Edwards*, *supra*, note 133 clear rules became "bright lines".

[336] *Ibid.* at 298.

which revealed that *none* of the officers surveyed were in favour of abolishing the Fourth Amendment's exclusionary rule.[337] Canadians may, over time, come to similar conclusions.

Equally important, if "conservatives" can be wrong about the effects of prophylactic rules, "liberals" sometimes forget that judicial activism, like public policy, is an unruly horse, and can lead to unintended consequences. Moreover, judicial restraint can produce "progressive" as well as "conservative" results.[338] This also depends upon political definitions, as the Supreme Court of Canada's fractured decision in *Thomson Newspapers* amply demonstrates.[339] A few years earlier, in *Hunter*, the Court ruled that the search powers in the *Combines Investigation Act* were unconstitutional,[340] so the Restrictive Trade Practices Commission, frustrated in its investigations, resorted instead to its power to order persons to appear and produce documents. In *Thomson Newspapers* this was challenged in turn as violating sections 7, 8, 11(c) and 13 of the *Charter*, on the grounds that it authorized unreasonable search and seizure and compelled self-incrimination. A fragile coalition of "conservatives" and, just barely, one "liberal" saved the legislation, but only by implicitly retreating from much of what the Court had said about the same statute in *Hunter* during an early burst of "liberal" activism.[341] Whether one approves of the result of the case probably depends upon whether one sees it as a failure to protect individual rights against self-incrimination and unreasonable seizure, or as a refusal to undermine completely the Commission's ability to investigate the concentrations of wealth and power that have been gradually built up by corporate

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[337] Although they did favour modifying it with a reasonable good faith exception: *see* A.W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in Hickok, ed., *supra*, note 228 at 197 & 202.

[338] For example, has the liberal (conservative, social democratic) politician who pushes through medicare legislation changed political stripes because, when appointed to the bench, he or she declines to strike it down because it restricts doctors' freedom of contract?

[339] *Supra*, note 190.

[340] *Supra*, note 3.

[341] Deciding what is "true" crime (*mala in se*) and what is not (*mala prohibita*) has always been a constitutional problem in this area of Canadian law, and flows from ambivalence about the changing nature of crime in a highly regulated society: *see supra*, note 219. Thus, in *Beaver* v. *R.*, [1957] S.C.R. 531, 118 C.C.C. 129 [hereinafter *Beaver*], the Supreme Court of Canada ruled that, because the *Narcotic Control Act* [then the *Opium and Narcotic Drug Act*] related to serious crime, the common law presumption of *mens rea* applied. Then in *R.* v. *Hauser*, [1979] 1 S.C.R. 984, 46 C.C.C. (2d) 481 and *R.* v. *Wetmore*, [1983] 2 S.C.R. 284, 7 C.C.C. (3d) 507 the Court decided that, for the purposes of assigning prosecutorial authority, the Act was not criminal law. As we imply in notes 241 and 267, *supra*, the notion of "stigma" adds little. Its first appearance in a *Charter* case was in *Vaillancourt*, *supra*, note 208, but it appeared in different guises in *Beaver* and other cases, where it was equally unhelpful.

multinationals.[342] Perhaps the legislation does go too far — although somehow one doubts that many individuals who are not connected to Exxon, Noranda or the like will be affected, or have the resources to fight the sort of legal battles launched by the Southam and Thomson newspaper chains — but *Thomson* and cases like it are not the whole story. In most of the decisions we have discussed above, the "Mulroney" Court cannot be fairly characterized as having betrayed the "liberal promise" of the *Charter*.

In our beginning, therefore, we find our end: the *Charter* is a different drum, however unsteady the beat, and Holmes was probably right about generalizations not being worth a damn.[343] Although much remains the same, what has changed since our first study is that the Supreme Court is referring to United States precedent with increasing sophistication, and Canadian judges are becoming less inclined to treat American law as a grab bag of handy one-liners to be quoted without reference to context. Justice Sopinka's cautious and judicious use of such precedent in *Hebert*, for example, is a hopeful sign that the Court is developing an appreciation for the subtleties of American constitutional law, and the difficulties involved in applying it to Canada.[344] So is Justice La Forest's rejection of it in *Duarte*, whatever one might think of the philosophy or the result of either case.[345] Needless to add, American jurists have yet to show a similar — one is tempted to say, any — interest in Canadian criminal jurisprudence.[346] But elephants, notwithstanding popular folklore, rarely pay much attention to mice; especially ones that appear to be heading in a different direction.

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[342] For our part, we applaud Chief Justice Lamer's statement in *Wholesale Travel*, *supra*, note 219 at 210-11:

> [W]hen the criminal law is applied to a corporation, it loses much of its "criminal" nature and becomes....a "vigorous" form of administrative law....Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is in their benefit to do so, should not be allowed to deny this distinction....where [it] is not to their benefit.

[343] *See supra*, text acompanying note 16 and T.S. Eliot, *Four Quartets*, in THE COMPLETE POEMS AND PLAYS, 1909-1950 (New York: Harcourt, Brace & Company, 1952) at 123 (with apologies to Thoreau).

[344] *Supra*, note 4 at 14-15.

[345] *Supra*, note 5 at 6-9, 15-19. *See also* the different views of United States precedent taken in *Thomson Newspaper*, *supra*, note 48.

[346] *See supra*, note 254. This was strikingly illustrated as the present article was going to press. The U.S. Supreme Court handed down two landmark decisions dealing with hate laws and abortion, yet no mention was made of *Keegstra*, *supra*, note 210 in the former and *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449 appears only in a dissenting — and somewhat misleading — footnote in the latter: *see R.A.V.* v. *St. Paul, Minn.*, No. 90-7675, 60 L.W. 4667 and *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, Nos. 91-744 & 91-902, 60 L.W. 4795.

APPENDIX I

LEGAL RIGHTS IN THE *CANADIAN CHARTER* AND THE *UNITED STATES CONSTITUTION*

Canadian Charter	*United States Constitution*
Section 1	No counterpart.
The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	
Section 7	Fifth and Fourteenth Amendments
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	No person shall....be deprived of life, liberty, or property, without due process of law.
Section 8	Fourth Amendment
Everyone has the right to be secure against unreasonable search or seizure.	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 person or things to be seized.
Section 9	
Everyone has the right not to be arbitrarily detained or imprisoned.	
Section 10	
Everyone has the right on arrest or detention	
(a) to be informed promptly of the reasons therefor;	No counterpart.
(b) to retain and instruct counsel without delay and to be informed of that right.	Sixth Amendment
	In all criminal prosecutions, the accused shall enjoy the right....to have the Assistance of Counsel for his defence. [Also see below Fifth Amendment.]

Section 11	Fifth Amendment
Any person charged with an offence has the right	
....	
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;	No person....shall be compelled in any criminal case to be a witness against himself....
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.	No counterpart.
....	
Section 12	Eighth Amendment
Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	....nor cruel and unusual punishments inflicted.
Section 13	No counterpart.
A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.	
Subsection 24(2)	No counterpart.
Where....a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into dispute.	

Section 33	No counterpart.
[Legislative override allows Parliament or legislature to enact legislation notwithstanding that it may violate sections 2 or sections 7 to 15 of the *Charter*.]	
Subsection 52(1)	No counterpart.
The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	