

# When the Constable Blunders: A Comparison of the Law of Police Interrogation in Canada and the United States

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## I. INTRODUCTION

The Fifth Amendment to the United States Constitution ensures that no person "shall be compelled in any criminal case to be a witness against himself."<sup>1</sup> In 1966, the United States Supreme Court handed down its famous decision in *Miranda v. Arizona*,<sup>2</sup> which held that before custodial interrogation, suspects must be informed that (1) they have the right to remain silent, (2) anything they say can be used against them in a court of law, (3) they are entitled to have a lawyer present during the interrogation, and (4) they are entitled to have a court appointed lawyer present during the interrogation if they cannot afford one.<sup>3</sup> After the police have administered the warnings, they must obtain a valid waiver from suspects before beginning the interrogation.<sup>4</sup> The *Miranda* Court believed that these protections would preserve the suspect's right against self-incrimination, guaranteed by the Fifth Amendment.<sup>5</sup>

Prior to the enactment of the Canadian Charter of Rights and Freedoms in 1982,<sup>6</sup> the Supreme Court of Canada eschewed any relationship between self-incrimination and admissions made to the police by suspects before trial.<sup>7</sup> The privilege against self-incrimina-

1. U.S. CONST. amend. V.

2. 384 U.S. 436 (1966).

3. *Id.* at 444. In *Duckworth v. Eagan*, 492 U.S. 195 (1989), the Supreme Court of the United States held that the *Miranda* warnings need not be given in the exact form described in the opinion. "The inquiry," wrote Chief Justice Rehnquist, "is simply whether the warnings reasonably convey to [a suspect] his right as required by *Miranda*." *Id.* at 203. The *Miranda* warnings are not sufficient if the reference to a court appointed attorney is linked to a future time after the police finish the interrogation. *California v. Prysock*, 453 U.S. 355, 360 (1981).

4. *Miranda*, 384 U.S. at 444. The Court has held that the *Miranda* warnings are mere prophylactic rules designed to protect the privilege against self-incrimination. Nevertheless, the failure of the police to adhere to the *Miranda* rules raises a presumption of compulsion, and the subsequent confession is inadmissible during the prosecutor's case-in-chief. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

5. *Miranda*, 384 U.S. at 476.

6. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

7. *Marcoux & Soloman v. The Queen*, [1976] 1 S.C.R. 763, 768. Prior to the Charter, Professor Ratushny argued that self-incrimination had nothing to do with admissions made by accused persons outside of formal proceedings. ED RATUSHNY, SELF-INCRIMINATION IN CANADIAN CRIMINAL PROCESS 59-66 (1979). Professor Paciocco, of the University of Ottawa, argues persuasively that Ratushny's thesis was consistent with what was being said, but not with what was being done. Paciocco suggests, for example, that the Court's concerns about self-incrimination explain why involuntary statements were excluded only when made to persons in

tion, the Court held, meant only two things: (1) the witness was protected while testifying, and (2) the defendant did not need to testify at all.<sup>8</sup> Nevertheless, the Supreme Court of Canada historically excluded confessions that were obtained involuntarily by the police.<sup>9</sup> Statements were involuntary if they were obtained from suspects as a result of "fear of prejudice" or "hope of advantage" held out by a "person in authority" and were made without an operating mind.<sup>10</sup> Under this common law confession rule, police officers were not required to advise suspects of their right to remain silent, but failure to administer such a caution was a factor examined in determining whether the confession was obtained voluntarily.<sup>11</sup>

In April 1982, the government of Canada patriated the Canadian Constitution, which includes a constitutionally entrenched Charter of Rights and Freedoms.<sup>12</sup> The Charter owes some of its substance to the Bill of Rights in the United States Constitution.<sup>13</sup> Like the Bill of Rights, the Charter protects the rights of the accused from government action.<sup>14</sup> However, unlike the Bill of Rights, the Charter

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authority. David M. Paciocco, *Self-Incrimination: Removing the Coffin Nails*, 35 MCGILL L.J. 73, 82-83 (1989) [hereinafter Paciocco, *Coffin Nails*].

8. *Marcoux & Soloman*, [1976] 1 S.C.R. at 768.

9. It was never clear whether the Canadian Court excluded confessions because they were involuntary or because the involuntary nature of the confession made its admission untrustworthy. The Court, for example, was reluctant to exclude from trial confessions or portions of confessions that appeared trustworthy but were obtained involuntarily. As a result, if the Crown demonstrated by independent evidence that portions of an involuntary confession were trustworthy, those portions were admissible at trial against the defendant. See, e.g., *Regina v. Wray*, [1971] S.C.R. 272.

10. *Ibrahim v. The King*, [1914] A.C. 599, 602; see also *Ward v. The Queen* [1979] 2 S.C.R. 30, 39-40; *Horvath v. The Queen*, [1979] 2 S.C.R. 376, 389; Rosalind Conway, *No Man's Land: Confessions Not Induced by Fear of Prejudice or Hope of Advantage*, 42 U. TORONTO FAC. L. REV. 27 (1984).

11. GERALD A. BEAUDOIN & ED RATUSHNY, *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 456 (2d ed. 1989).

12. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). For a history of the patriation of the Constitution, see EDWARD MCWHINNEY, *CANADA AND THE CONSTITUTION 1979-1982: PATRIATION AND THE CHARTER OF RIGHTS AND FREEDOMS* (1982).

13. Perhaps more importantly, the Charter is modeled after the European Convention on Human Rights and the International Covenant of Civil and Political Rights. Peter W. Hogg, *Canada's New Charter of Rights*, 32 AM. J. COMP. L. 283, 284 (1984).

14. *Retail, Wholesale and Dep't Store Union Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573. Although some Canadian commentators argued that the Charter applied to private actions, the courts have been reluctant to agree. Dale Gibson, *The Charter of Rights and the Private Sector*, 12 MAN. L.J. 213 (1982).

explicitly states that it applies to provincial as well as federal governments.<sup>15</sup>

The provisions of the Charter relating to confessions and their exclusion from trial are relatively straight-forward. Section 10(b) of the Charter requires the police to inform a detained or arrested person of his right to retain and instruct counsel without delay.<sup>16</sup> Section 7 ensures that everyone has the right to life, liberty, security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.<sup>17</sup> Section 24(2) requires trial judges to exclude from trial evidence obtained by the police in a manner that violated a Charter right<sup>18</sup> if it is more probable than not

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15. Section 32 of the Charter provides:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 32(1). In contrast to the Canadian Charter, a particular right in the Bill of Rights is not applicable to state authorities unless explicitly found within the meaning of the Fourteenth Amendment.

16. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 10(b).

17. *Id.* pt. 1, § 7. American readers familiar with the Due Process Clause of the Fifth Amendment will notice two textual omissions. First, property is not protected by section 7. Second, the phrase "due process of law" does not appear. These omissions were intentional. During the debate over the Charter, the Maritime provinces, fearful of non-resident ownership of land, and the New Democratic Party, concerned that inclusion of property might prohibit the government of Canada and the provinces from nationalizing corporations, objected to enshrining property rights within the Charter. To gain the support of these groups, the federal government removed the term "property." The phrase "due process of law" was omitted because of concerns that the Supreme Court of Canada might interpret the expression to include a United States style substantive due process, opening up the possibility that social programs in Canada would be declared in violation of the Charter. Framers of the Charter believed that inclusion of the language "principles of fundamental justice" would limit interpretation of the section to procedural matters. However, in *Reference re § 94(2) of Motor Vehicle Act*, [1985] 2 S.C.R. 486, the Supreme Court of Canada held that section 7 can be used to examine the substance of legislation. The intentions of the framers are admissible to interpret Charter sections, but the weight given this evidence in *Reference re § 94(2) of Motor Vehicle Act* was slight. *Id.* at 488.

18. The phrase "obtained in a manner," according to some scholars, required the accused to show a causal connection between the Charter breach and the discovery of the evidence. The Supreme Court of Canada, in *Regina v. Strachan*, [1988] 2 S.C.R. 980, rejected this position and held that only a temporal relationship is needed between the Charter breach and the discovery of the evidence. *Id.* at 1005. Chief Justice Brian Dickson was careful to note that the presence of a temporal connection is not always determinative. *Id.* Situations will arise, he suggested, where evidence following the breach of a Charter right will be too remote from the violation to be "obtained in a manner" that infringes the Charter. *Id.* An example of such a lack of temporal relationship is found in *Regina v. Upston*, [1988] 1 S.C.R. 1083. In *Upston*, the suspect was detained in his home without being informed of his right to retain and instruct counsel as required

that admission of the evidence would bring the administration of justice into disrepute.<sup>19</sup> The Supreme Court of Canada has said that exclusion is mandatory once these conditions have been met, and that they will not review the judgment of the lower courts regarding application of section 24(2) to the facts of each case.<sup>20</sup> There is room, however, for judicial discretion at the trial level to exclude or admit evidence, and the Supreme Court will review the trial judge's decision when there is an apparent error in the application of the principles or when the judge's findings are unreasonable.<sup>21</sup>

The Court has found that the policy underlying sections 10(b) and 7 is to ensure, in part, that the accused is treated fairly during the investigatory process and given a choice whether to talk to the police.<sup>22</sup> Although section 11(c) of the Charter retains Canada's doctrine that the privilege against self-incrimination applies only at trial,<sup>23</sup> interpretation of sections 10(b) and 7 by the Supreme Court of Canada suggests that the purpose of the rights to silence and to retain and instruct counsel without delay before trial is to protect the

by section 10(b) of the Charter. *Id.* at 1083. After the arrest, officers read the section 10(b) warning and obtained incriminating statements. *Id.* The Supreme Court, in a short opinion, found no temporal relationship between the Charter breach and the second confession. *Id.* at 1083-84. For more on the link between the Charter breach and the discovery of self-incriminating evidence, see *infra* note 55.

19. Section 24(2) of the Charter states:

Where, in proceedings under subsection (1), 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 disrepute.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 24(2).

20. *Regina v. Kokesch*, [1990] 3 S.C.R. 3, 20.

21. *Regina v. Wise*, [1992] 1 S.C.R. 527, 540. The Court has not been clear in what it meant by mandatory exclusion on the one hand and judicial discretion to admit or exclude evidence from trial on the other. Nevertheless, it has not hesitated to overrule decisions of trial judges to exclude or admit evidence. What is clear is that, in applying section 24(2), judges have placed themselves in the unique position of defining what conduct of theirs will bring the administration of justice into disrepute. David M. Paciocco, *The Judicial Repeal of S. 24(2) and the Development of the Canadian Exclusionary Rule*, 32 CRIM. L.Q. 326, 333 (1990) [hereinafter Paciocco, *Judicial Repeal*].

22. *Regina v. Whitte*, [1994] 2 S.C.R. 9, 45, 914, 939.

23. Section 11(c) states:

Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(c).

Section 13 of the Charter also speaks to the right against self-incrimination:

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.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 13.

privilege.<sup>24</sup> Thus, sections 10(b) and 7 protect the fairness of the trial by ensuring that the accused is not subjected to compelled incrimination.<sup>25</sup>

Moreover, the Court has also found a fair trial policy underlying the exclusionary rule.<sup>26</sup> The admission of confessions obtained in violation of the Charter, according to the Court, would undermine "one of the fundamental tenets of a fair trial, the right against self incrimination."<sup>27</sup> The close affinity between the purposes underlying sections 10(b), 7, and 24(2) has led the Canadian Court to go beyond the Supreme Court of the United States in excluding confessions at trial.

This Article explores the Supreme Court of Canada's use of the Charter of Rights and Freedoms in limiting police interrogations and compares its case decisions with cases from the Supreme Court of the United States. Part II of this Article examines the purposes and policies underlying sections 10(b), 7, and 24(2) of the Charter. Part III then examines the application of sections 10(b) and 7 in situations where (1) suspects are interrogated by uniformed police officers or other persons known to be in authority, and (2) suspects are interrogated surreptitiously by persons not known to be in authority. In both situations, the Supreme Court of Canada has been more solicitous of the rights of the accused than has the Supreme Court of the United States.

## II. POLICY CONSIDERATIONS UNDERLYING SECTIONS 10(b), 7, AND 24(2)

The Supreme Court of Canada has given the Charter a purposive interpretation. The Charter, the Court stressed, must be capable of growth and development to meet new social, economic, and political changes that its framers did not foresee.<sup>28</sup> The definition of a right should be, according to former Chief Justice Brian Dickson, "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."<sup>29</sup> The interpretation of a Charter right, the Court emphasized, must not exceed the actual purpose of the right but

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24. *Regina v. Black*, [1989] 2 S.C.R. 138, 152-53.

25. *Id.*

26. *Regina v. Collins*, [1987] 1 S.C.R. 265, 278.

27. *Id.* at 284.

28. *Hunter v. Southam*, [1984] 2 S.C.R. 145, 167-68.

29. *Regina v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344.

must conform to its proper linguistic, philosophic, and historical context.<sup>30</sup>

The Court has examined the interests and policies underlying the Charter sections concerning self-incrimination. The values identified as protected by that Charter section play a dominant role in the Court's willingness to exclude evidence from trial, as will be discussed throughout this Article.

#### A. Section 10(b)

Section 10(b) guarantees the right of the accused, upon arrest or detention, to "retain and instruct counsel without delay and to be informed of that right."<sup>31</sup> The right to retain and instruct counsel in Canada protects the dignity of defendants, ensures that statements made by defendants are properly transcribed, expedites the preparation of the defense, reduces the possibility of coercion by the police,<sup>32</sup> and

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30. *Id.* Part of the reason for the purposive approach to Charter jurisprudence was the cautious approach taken by the Supreme Court of Canada in its interpretation of the Canadian Bill of Rights. Enacted by Parliament in 1960, the Bill of Rights was not a constitutional document but an ordinary statute applicable to matters only within federal jurisdiction. The legislation is not applicable to matters within provincial authority. Although in theory the Court could use the Bill of Rights to strike down laws of Parliament (as opposed to laws of provincial legislatures) that were in contravention of the Bill of Rights, it did so only in one case. See *Regina v. Drybones*, [1969] 3 S.C.R. 282. Moreover, the preamble to the Bill caused the Court concern. The preamble reads: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist. . . ." Canadian Bill of Rights, S.C. 1960, preamble. Some justices expressed concern that the language applied only to legislation enacted prior to the Bill. To the extent that this interpretation was followed, it meant that the Bill of Rights was frozen in time and could not grow and develop to meet changes in society. *Regina v. Burnshine*, [1974] 44 D.L.R.3d 584, 586; *Regina v. Miller & Cockriell*, [1976] 70 D.L.R.3d 324, 324; see also WALTER TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS* 128 (1975). The Bill of Rights is still in effect. Canadian Bill of Rights, S.C. 1960.

31. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 10(b).

32. MARIE FINKELSTEIN, *THE RIGHT TO COUNSEL* 1-1 to 1-6 (1988). These first four purposes are similar to those protected by the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment privilege against self-incrimination protects a central feature of the adversary system—that the defendant may not be compelled to contribute to his or her conviction, for example. Moreover, the privilege prevents cruelty, ensures that defendants are treated with dignity, and promotes the search for truth by confirming that confessions are trustworthy. MARK BERGER, *TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF INCRIMINATION* 25-44 (1988); see also George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 245 (1988); LEONARD LEVY, *THE ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF INCRIMINATION* 345-55, 430-31 (1968). In Sixth Amendment jurisprudence, the right to counsel promotes a fair trial, preserves the adversary system, and gives legal assistance to the defendant when confronted with the power of the state. See *Maine v. Moulton*, 474 U.S. 159, 169 (1985); *Brewer v. Williams*, 430 U.S. 387, 409 (1977) (Powell, J., concurring); *United States v. Wade*, 388 U.S. 218, 220 (1967); *Massiah v. United States*, 377 U.S. 201, 206 (1964);

promotes fair treatment of defendants in situations that may give rise to a "significant legal consequence."<sup>33</sup> Perhaps more importantly, the right to counsel protects the due administration of the adversary system by giving detainees the option of seeking the assistance of counsel to protect their legal interests. Without such an option, the right against self-incrimination might be compromised and suspects placed in a position of having to take the witness stand to counter the damaging effects of statements they may have made. Madame Justice Bertha Wilson summarized the Supreme Court of Canada's philosophy regarding the right to counsel when she opined that "[t]he fairness of the trial would be adversely affected since the admission of the statement would infringe on the appellant's right against self-incrimination, a right which could have been protected had the appellant had an opportunity to consult counsel."<sup>34</sup>

### B. Section 7

Section 7 provides that 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.<sup>35</sup> The rights protected by section 7 are broader than those safeguarded by the enumerated rights in the Charter. Life, liberty, and security of the person are given individual meaning, and the "principles of fundamental justice" are not to be seen as separate rights but as qualifiers of the right to life, liberty, and security of the person.<sup>36</sup> They are found, according to the Court, "in the basic tenets and principles of our legal system."<sup>37</sup> Recently, the Supreme Court examined the basic tenets of the Canadian legal system and found a right to silence in section 7 that attached upon detention.<sup>38</sup>

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see also James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 52 (1988).

33. *Regina v. Therens*, [1985] 1 S.C.R. 613, 616; see also Peter B. Michalyszyn, *Charter Right to Counsel: Beyond Miranda*, 25 ALTA. L. REV. 190, 194-99 (1986).

34. *Regina v. Black*, [1989] 2 S.C.R. 138, 160.

35. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

36. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 201-02.

37. Reference re § 94(2) of Motor Vehicle Act, [1985] 2 S.C.R. 486, 503. This case is an example of the Supreme Court of Canada's reference jurisdiction. The Province of British Columbia asked the Court to determine the constitutionality of a statute that prohibited driving with an expired license but did not require proof of mens rea and included jail as punishment. The Court held that the statute breached section 7 of the Charter. *Id.*

38. *Regina v. Hebert*, [1990] 2 S.C.R. 151, 175. The Court did not require the police to warn suspects of their right to silence. *Id.* The majority assumed that lawyers would advise their clients of this right. *Id.*; see *infra* part III. In the United States, the right to silence has been



The essence of the pre-trial right to silence, according to the Court, is freedom of choice.<sup>39</sup> 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.<sup>40</sup> The purpose of section 7, the Court emphasized, is to seek a balance between the interests of the detained individual and those of the state.<sup>41</sup> On one hand, section 7 provides persons with protection against the unfair use of the superior resources of the state.<sup>42</sup> On the other hand, it permits the state to deprive a person of life, liberty, and security so long as the state respects the fundamental principles of justice.<sup>43</sup> Applying these concepts to the right to silence, the Court has concluded that section 7 protects a detainee's right to choose whether or not he will make a statement to the police.<sup>44</sup> If a suspect chooses not to make a statement, the state cannot use its superior power to override his will and compel him to contribute to his own conviction.<sup>45</sup>

### C. Section 24(2)

The purpose of Canada's exclusionary rule is to protect the reputation of the justice system. The deterrent theory adopted by the United States Supreme Court to justify the exclusionary rule has been explicitly rejected by the Supreme Court of Canada.<sup>46</sup> "The main reason for this," according to Madame Justice Claire L'Heureux Dube, "is that the price of exclusion is not paid by the police, and that consequently, from the police's point of view, exclusion generally would amount to no punishment at all."<sup>47</sup> Certainly, police miscon-

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associated with the privilege against self-incrimination.

39. *Hebert*, [1990] 2 S.C.R. at 181.

40. *Id.* at 181-82.

41. *Id.* at 182-83.

42. *Id.*

43. *Id.*

44. *Id.* at 181.

45. *Id.*

46. Detering unconstitutional police behavior is the purpose of the Fourth Amendment's exclusionary rule. *United States v. Calandra*, 414 U.S. 338, 347 (1974). In *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court hinted that there may be a deterrent rationale for the Fifth Amendment's exclusionary rule. *Id.* at 442. In *Oregon v. Elstad*, 470 U.S. 298 (1985), another Fifth Amendment case, Justice O'Connor mentioned the twin rationales of trustworthiness and deterrence. *Id.* at 300.

47. *Regina v. Duguay, Murphy & Sevigny*, [1989] 1 S.C.R. 93, 123 (L'Heureux Dube, J., dissenting on other grounds). At most, the Supreme Court of Canada hopes that its decisions will foster a positive attitude on the part of the police toward Charter rights. Nevertheless, the deterrent theory seems to play a role in the Court's decision to exclude evidence. In excluding the evidence in *Duguay, Murphy & Sevigny*, the Ontario Court of Appeal used "blind eye" reasoning, namely, if courts turn a blind eye to police misconduct, the police may assume that

duct may bring the administration of justice into disrepute, but the purpose of section 24(2) is "to prevent having the administration of justice brought into *further disrepute* by the admission of the evidence in the proceeding."<sup>48</sup> According to Chief Justice Lamer, the relevant question for judges is "whether the evidence could bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case."<sup>49</sup> The answer to the question is not determined by taking opinion polls or conferring with the public. The Charter was designed to protect the defendant from the majority, and its enforcement, Chief Justice Lamer argued, cannot be left to the majority.<sup>50</sup> The enforcement is in the hands of judges who, taking into consideration all the factors, can best determine whether, in the eyes of a reasonable dispassionate person, the admission of the evidence would bring the system of justice into disrepute.<sup>51</sup> The focus of the rule, therefore, is aimed at protecting the reputation of the judicial system by safeguarding the fairness of the trial.

There are two requirements for exclusion of evidence under section 24(2).<sup>52</sup> First, there must be a Charter violation in the course of obtaining evidence.<sup>53</sup> Under this threshold requirement, evidence must be presented to establish a connection between the infringement of the Charter right and the obtaining of evidence which is sought to be excluded.<sup>54</sup> This link is not a strict one, however. So long as the evidence sought to be excluded is remotely connected with the Charter breach, it falls within the scope of section 24(2).<sup>55</sup>

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they have the courts' tacit approval to continue the activity. *Regina v. Duguay, Murphy & Sevigny*, [1988] 18 D.L.R. 4th 32. The majority of the Supreme Court of Canada seemed to agree with this reasoning when it stated: "The Court of Appeal did not enunciate any principle with which we disagree." *Duguay, Murphy & Sevigny*, [1989] 1 S.C.R. at 98. Although Canadian courts have eschewed the deterrent rationale for the exclusionary rule, their use of blind eye reasoning is aimed at deterring police misconduct. *Id.*

48. *Regina v. Collins*, [1987] 1 S.C.R. 265, 281-82 (emphasis added).

49. *Collins*, [1987] 1 S.C.R. at 282. This test was first recommended by Professor Morissette. Yves-Marie Morissette, *The Exclusion Under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do*, 29 MCGILL L.J. 521, 538 (1984).

50. *Collins*, [1987] 1 S.C.R. at 281-82.

51. *Id.*

52. *Regina v. Strachan*, [1988] 2 S.C.R. 980, 999.

53. *Id.* at 1000.

54. *Id.*

55. *Id.* at 1006-07. The accused bears the ultimate burden of persuasion under section 24(2). Nevertheless, the onus on any particular issue will shift back and forth between the Crown and the accused. One issue that arises in section 10(b) cases is whether the accused would have acted any differently had there been no violation of his or her right to counsel. This issue goes to the strength of the link between the Charter breach and the evidence obtained. In *Regina v.*

Second, the accused must establish that admission of the evidence at trial would bring the administration of justice into disrepute.<sup>56</sup> In *Regina v. Collins*,<sup>57</sup> the seminal case interpreting section 24(2), the Supreme Court of Canada established three sets of factors to determine whether the admission of the evidence would bring the administration of justice into disrepute.<sup>58</sup> The first set of factors concerns the

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Pozniak, [1994] 3 S.C.R. 310 and *Regina v. Harper*, [1994] 3 S.C.R. 343, the Court stated that the onus was on the Crown to demonstrate that the accused would not have acted differently had he or she been informed properly of his or her right to counsel. In *Pozniak*, the suspect was arrested for impaired driving at 4:00 a.m. He was partially informed of his section 10(b) rights. *Pozniak*, [1994] 3 S.C.R. at 311. (For what constitutes being fully informed under section 10(b), see *infra* section III.A.4.). At the police station he told officers that he wanted to talk with his lawyer. He picked up the telephone but did not dial the number. *Pozniak*, [1994] 3 S.C.R. at 311. Moreover, he told the breathalyzer technician that he was confused as to whether he should call a lawyer and that his lawyer was probably on holiday. *Id.* *Pozniak* testified that he would probably have talked with a lawyer had he been fully informed of his section 10(b) rights. *Id.* Under these circumstances, the Court held that the Crown had not met its burden of demonstrating that, on the balance of probabilities, *Pozniak* would not have acted differently. *Id.* at 315. In *Harper*, however, the accused, upon being approached by the police, made a spontaneous incriminating statement while still at the scene of the incident. [1994] 3 S.C.R. at 343. After having been partially advised of his section 10(b) rights, the accused made another incriminating statement. *Id.* The Court held that the Crown had met its burden of demonstrating that the accused would not have acted differently if he had been properly warned. *Id.* at 353. The Court found that the accused had an "almost irresistible desire to confess." *Id.* at 354. The accused neither testified nor provided any evidence that he would have demanded counsel had he been fully aware of his rights. *Id.*

56. *Strachan*, [1988] 2 S.C.R. at 1007; see also Dale Gibson, *Shocking the Public: Early Indications of the Meaning of 'Disrepute' in Section 24(2) of the Charter*, 13 MAN. L. REV. 495, 498-501 (1983).

57. [1987] 1 S.C.R. 265.

58. *Id.* at 267. Some scholars argue that section 24(2) was intended to be used sparingly and only in narrow circumstances. Paciocco, *Judicial Repeal*, *supra* note 21, at 333. Early supporters of the Charter's exclusionary rule argued that a "community shock" test was the appropriate standard. Many lower courts initially accepted the community shock test as controlling. M. Proulx, *Redefining the Balance of Criminal Trial: The Effect of the Exclusionary Rule in Section 24(2) of the Canadian Charter of Rights and Freedoms*, Lecture at Cambridge University (1985) (transcript available in the University of Victoria Law Library). Testimony before Parliament suggests that framers of the Charter believed that section 24(2) would be applied only in the most repugnant cases of police abuse. MINUTES OF PROCEEDINGS AND EVIDENCE OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND OF THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA, 1980, vol. 6 48:124 (available in the University of Victoria Undergraduate Library). Justice Lamer, the author of the *Collins* opinion, gave two reasons for rejecting the community shock test. First, breaches of the Charter are violations of the most important law in the land. *Collins*, [1987] 1 S.C.R. at 266. Second, Canada is officially bilingual and the French version of section 24(2) is less onerous than the English text. *Id.* The English text uses the language "would" bring the administration of justice into disrepute, while the French reading, "est susceptible de déconsidérer l'administration de la justice," translates as "could" bring the administration of justice into disrepute. For a brief history of the Canadian exclusionary rule, see Robert A. Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOY. L.A. INT'L & COMP. L.J. 779, 791 (1992).

fairness of the trial,<sup>59</sup> the second centers on the seriousness of the Charter violation,<sup>60</sup> and the third is directed toward the effect of exclusion on the repute of the administration of justice.<sup>61</sup>

### 1. Fairness of the Trial

According to Justice Lamer in *Collins*, if the evidence tends to affect the fairness of the trial, it should be excluded.<sup>62</sup> Real or physical evidence obtained in a manner that violated the Charter would rarely render the trial unfair because such evidence exists irrespective of the Charter violation. In contrast, confessions and other evidence emanating from the accused that was obtained in violation of the Charter, particularly the right to counsel, will render the trial unfair because it strikes at a fundamental tenet of the fair trial, the right against self-incrimination.

Although some justices have expressed reservations about the wisdom of the distinction between evidence that affects the fairness of the trial and that which does not, the distinction has nevertheless taken root. The Court, however, reserves the former characterization for statements and other evidence that does not exist independently of the accused.<sup>63</sup>

Justice La Forest argues that the distinction should not be between confessions and real evidence, but between evidence that the defendant was forced to *create* and evidence that the defendant was forced to *locate or identify*.<sup>64</sup> According to Justice La Forest, if the defendant is forced to create evidence as a result of a Charter breach, he or she effectively provides the Crown with evidence it would not otherwise have had.<sup>65</sup> This is the kind of prejudice that the right against self-incrimination, as well as the right to counsel, is designed to prevent. If the effect of the breach, however, is to force the defendant to locate or identify the evidence, the use of the evidence

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59. *Collins*, [1987] 1 S.C.R. at 267.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 269. 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 under the circumstances existing at that time—if they had obeyed the law. See R. J. Delisle, *Collins*, *An Unjustified Distinction*, [1987] 56 CRIM. REP. (3d) 216.

64. *Collins*, [1987] 1 S.C.R. at 269.

65. *Id.*

does not affect the fairness of the trial because it would have been discovered anyway.<sup>66</sup>

## 2. Seriousness of the Charter Violation

The seriousness of the Charter violation centers on the conduct of the authorities. On one hand, if the police's violation of the Charter was deliberate, willful, or flagrant, the trial judge would exclude evidence obtained as a result of the violation from trial.<sup>67</sup> On the other hand, if the police acted in good faith, or the Charter violation was trivial or technical in nature, the judge would likely admit the evidence.<sup>68</sup>

## 3. Long-Term Effect of Exclusion on the Administration of Justice

In this category, the seriousness of the Charter breach is weighed against the gravity of the crime charged. According to Justice Lamer, evidence will likely be admitted when the Charter violation is trivial and the offense is serious. Evidence is more likely to be excluded if the offense is less serious. However, if admitting the evidence is likely to affect the fairness of the trial, the seriousness of the offense will not be considered so as to render the evidence admissible.<sup>69</sup>

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66. *Thomson Newspapers Ltd. v. Canada* (Dir. of Investigation and Research, Restrictive Trade Practices Comm'n), [1990] 1 S.C.R. 425, 488; see also *Regina v. Wise*, [1992] 1 S.C.R. 527, 529; *Regina v. Mellenthin*, [1992] 3 S.C.R. 615, 627-28 (stressing the difference between independently existing real evidence that *could* have been found without the compelled testimony and independently existing real evidence that *would* have been found without compelled testimony); Charles B. Davidson, *Connecting Real Evidence and Trial Fairness: The Doctrine of "Discoverability"*, 35 CRIM. L.Q. 493, 505-06 (1993). In *Nix v. Williams*, 467 U.S. 431 (1984), the United States Supreme Court developed the inevitable discovery exception to the Fourth Amendment's exclusionary rule. *Id.* at 448.

67. The Supreme Court of Canada has defined the term "flagrant" rather broadly. In *Regina v. Therens*, [1985] 1 S.C.R. 613, for example, the Court labeled "flagrant" the failure of a police officer to inform a suspect of his right to retain and instruct counsel even though the facts occurred shortly after the enactment of the Charter and the officer followed proper pre-Charter procedures ascribed by the Supreme Court of Canada. *Id.* at 620. In *Regina v. Greffe*, [1990] 1 S.C.R. 755, a case involving the seizure of real evidence, the Supreme Court of Canada found the officer's behavior a flagrant violation of the Charter even though the facts occurred before its enactment. *Id.* at 759. In *Regina v. Kokesch*, [1990] 3 S.C.R. 3, the Supreme Court of Canada admitted the possibility that good faith reliance on previous case precedent may be sufficient to admit evidence that does not affect the fairness of the trial. *Id.* at 19-20. See Harvie, *supra* note 58, at 791.

68. *Collins*, [1987] 1 S.C.R. at 285-86; see also *Therens*, [1985] 1 S.C.R. at 132-33.

69. *Collins*, [1987] 1 S.C.R. at 283-86. The third set of factors seems doomed to irrelevance. Once it is decided that evidence tends to affect the fairness of the trial, even the seriousness of the offense does not count against exclusion. If the evidence does *not* affect the fairness of the trial but the violation of the Charter is serious, this also means that the evidence

#### 4. Affinity Between Right to Counsel and the Exclusionary Rule

A close affinity has developed in the jurisprudence between sections 10(b) and 24(2). Section 10(b), according to Madam Justice Wilson, "is clearly unconcerned with the probative value of any evidence obtained by the police but rather . . . [is concerned with the] fair treatment of an accused person."<sup>70</sup> The exclusionary rule found in section 24(2) maintains the reputation of the system by ensuring a fair trial. Confessions and evidence emanating from the accused,<sup>71</sup> obtained in violation of section 10(b), render the trial unfair since that evidence did not exist prior to the violation of the Charter and, more importantly, its admission at trial would strike at "one of the fundamental tenets of a fair trial, the right against self-incrimination."<sup>72</sup> Under this theory, it is axiomatic that if police fail to observe the section 10(b) requirements and conscript the defendant against himself or herself, the resulting confession or evidence emanating from the accused is automatically excluded from trial. Neither the good faith conduct of the police nor the seriousness of the offense can effectively weigh against the unfairness of admitting the confession.

The close relationship between sections 10(b) and 24(2) is further demonstrated by the Court's willingness to admit confessions where the statements were obtained in violation of a Charter section other

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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 these conclusions are reached, the evidence can be admitted without further analysis.

70. *Regina v. Clarkson*, [1986] 1 S.C.R. 383, 394.

71. The concept of evidence emanating from the accused goes beyond the traditional notion of testimonial self-incrimination and includes line-up identification and the results of blood tests. See *Regina v. Ross*, [1989] 1 S.C.R. 3 (line-up identification); *Regina v. Dymont*, [1988] 2 S.C.R. 417 (blood samples). For a discussion of evidence emanating from the accused, see *infra* section III.A.3. All a lawyer can do is advise his clients that refusal to participate will lead to adverse inference at trial. In the United States, line-up identification is not self-incrimination within the meaning of the Fifth Amendment and counsel, therefore, is not required at a line-up conducted prior to indictment. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). After indictment, the Sixth Amendment requires counsel at line-ups. *United States v. Wade*, 388 U.S. 218, 219 (1967). Moreover, blood samples are not testimonial in nature and may be seized within the meaning of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 758 (1966); accord *Winston v. Lee*, 470 U.S. 753, 763 (1985). For a detailed comparison of these points, see Robert Harvie & Hamar Foster, *Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the Charter*, 28 OSGOODE HALL L.J. 729 (1990) [hereinafter Harvie & Foster, *Ties That Bind*]. According to David Paciocco, the exclusion from trial of evidence emanating from the accused is not based on the concept of self-incrimination, but rather on the common law principle of an absence of a pre-trial obligation. Paciocco, *Coffin Nails*, *supra* note 7, at 78.

72. *Collins*, [1987] 1 S.C.R. at 284.

than section 10(b). The Court, for example, has permitted the use of statements at trial obtained in violation of section 8 of the Charter.<sup>73</sup> Section 8 protects citizens in Canada by prohibiting unreasonable searches and seizures. The section's purpose is to protect a reasonable expectation of privacy.<sup>74</sup> The Supreme Court of Canada has held that warrants are necessary before the police can surreptitiously tape record face-to-face conversations with suspects who are neither detained nor in custody.<sup>75</sup> Failure to obtain a warrant, however, does not automatically result in the exclusion of a confession, in part, because the underlying policy governing section 8 concerns privacy of the individual and has little to do with a fair trial.<sup>76</sup>

The policies underlying the right to silence in section 7 are similar to the policies underlying the right to counsel. A violation of the defendant's right to silence, like a violation of the right to counsel, adversely affects the privilege against self-incrimination and renders the trial unfair because "[t]he accused would be . . . placed in the position of having to take the stand if he wished to counter the damaging effect of the confession."<sup>77</sup> Nevertheless, in right to silence cases, the majority of the Court has not ruled out "the possibility that there may be circumstances in which a statement might be received where the suspect has not been accorded a full choice in the sense of having decided, after full observance of all rights, to make a statement voluntarily."<sup>78</sup> To date, however, the Supreme Court of Canada has excluded from trial all confessions obtained in violation of either the defendant's right to counsel or his right to silence.<sup>79</sup>

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73. *Regina v. Duarte*, [1990] 1 S.C.R. 30; *Regina v. Wiggins*, [1990] 1 S.C.R. 62. Both of these cases were decided under section 8 of the Charter. See *infra* section III.B.2 for analysis of these decisions. The confession will be excluded if the police acted in bad faith. *Harvie*, *supra* note 58, at 793.

74. *Hunter v. Southam, Inc.*, [1984] 2 S.C.R. 145, 156-57.

75. *Id.* at 157.

76. *Id.*

77. *Regina v. Hebert*, [1990] 2 S.C.R. 151, 189.

78. *Id.* at 188.

79. *Paciocco, Judicial Repeal*, *supra* note 21, at 358.

## III. APPLICATION OF SECTIONS 10(b) AND 7

A. *Questioning of Suspects by Uniformed Officers or a Person Known to be in Authority*

Section 10(b) has been interpreted to require uniformed officers, or other persons known by detainees to be in authority, to inform detainees of their right to instruct and retain counsel without delay.<sup>80</sup> In addition, officers are required to provide a reasonable opportunity for suspects to obtain counsel and to make no attempt to elicit evidence from suspects until they have an opportunity to consult counsel.<sup>81</sup> For their part, detainees must make a reasonable effort to contact an attorney<sup>82</sup> and can waive their right to retain and instruct counsel.<sup>83</sup>

In Canada, the warnings in section 10(b) offer more protection than *Miranda* in a number of ways: (1) the warnings must be administered upon detention,<sup>84</sup> (2) a more stringent waiver requirement is imposed,<sup>85</sup> (3) non-testimonial as well as testimonial evidence from the accused is excluded,<sup>86</sup> (4) the right to government appointed counsel is enhanced,<sup>87</sup> and (5) counsel is provided before a search.<sup>88</sup>

However, the requirements of section 10(b) offer less protection than the *Miranda* warnings because police officers in Canada are not required to warn detainees of their right to silence.<sup>89</sup>

## 1. Detention

The Supreme Court of Canada has defined "detention," as it is used in section 10(b), broadly. Detention, according to the Court, occurs when there is a restraint of liberty, other than an arrest, in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel.<sup>90</sup> In addition to physical restraint, detention occurs when

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80. *Regina v. Therens*, [1985] 1 S.C.R. 613, 620.

81. *Regina v. Manninen*, [1987] 1 S.C.R. 1233, 1234.

82. *Regina v. Smith*, [1989] 2 S.C.R. 368, 370 (refusing to find a section 10(b) violation when the detainee failed to make a reasonable effort to contact counsel).

83. *Regina v. Clarkson*, [1986] 1 S.C.R. 383, 385.

84. See *infra* notes 90-93 and accompanying text.

85. See *infra* notes 141-145 and accompanying text.

86. See *infra* notes 146-148 and accompanying text.

87. See *infra* notes 216-219 and accompanying text.

88. See *infra* notes 227-230 and accompanying text.

89. *Hebert*, [1990] 2 S.C.R. at 184. Nevertheless, police officers in Canada regularly warn suspects of their right to silence. The standard caution incorporates this right.

90. *Therens*, [1985] 1 S.C.R. at 641.



police officers assume control over the movement of a person by a demand or direction that may have significant legal consequences.<sup>91</sup> Compulsion or coercion arises in these cases, according to the Court, from criminal liability resulting from a refusal to comply with a demand or direction of a police officer, or from the reasonable belief that one does not have a choice as to whether or not to comply.<sup>92</sup> This broad definition of detention means that suspects in Canada must be informed of their right to retain and instruct counsel without delay well in advance of their American counterparts, who need not be advised of the right to counsel until they are in custody and interrogation is about to begin.<sup>93</sup>

The Canadian case of *Regina v. Elshaw*<sup>94</sup> provides an illustration of the differences between the American and Canadian laws. The case shows how the Supreme Court of Canada may require officers to advise suspects of their section 10(b) rights where the United States Supreme Court might not require *Miranda* warnings. In *Elshaw*, two adult witnesses observed Mr. Elshaw behave suspiciously with two little boys in a public park, and they telephoned the police.<sup>95</sup> When confronted by one of the witnesses, Elshaw attempted to leave the park by jumping a fence, but he was stopped by two police officers and placed in the back of a police van.<sup>96</sup> Five minutes later, after briefly investigating the situation and questioning the boys and adult witnesses, one officer returned to the van, opened the door, and asked Elshaw what would have happened if they had not intervened.<sup>97</sup> In response, Elshaw made incriminating statements.<sup>98</sup> Only then did the police advise him of his right to counsel.<sup>99</sup>

The Crown admitted that Elshaw had been detained and his right to counsel abridged, but argued that under section 24(2) the confession

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91. *Id.* at 642.

92. *Regina v. Thomsen*, [1988] 1 S.C.R. 640, 649 (citing *Regina v. Therens*, [1985] 1 S.C.R. 613, 626 (LeDain, J., dissenting)).

93. The *Miranda* warnings, designed to protect the Fifth Amendment privilege at the police station, are required when the police wish to conduct a custodial interrogation. Perhaps section 10(b) can be examined more accurately in light of the Sixth Amendment right to counsel. The right to counsel in Canada attaches on detention, whereas in the American system, the Sixth Amendment right to counsel attaches when the state decides to prosecute by filing formal charges. Some American scholars argue that the right should attach at the time of the arrest. Tomkovicz, *supra* note 32, at 438.

94. [1991] 3 S.C.R. 24.

95. *Id.* at 31.

96. *Id.* at 32.

97. *Id.*

98. *Id.*

99. *Id.*

should be admitted.<sup>100</sup> The majority of the Court disagreed that the confession should be admitted and excluded the statement.<sup>101</sup>

In the United States, the issue in *Elshaw* would be whether he was subjected to a custodial interrogation. Like their counterparts in Canada, police officers in the United States could detain Elshaw in order to conduct a brief investigation as articulated in *Terry v. Ohio*<sup>102</sup> and its progeny.<sup>103</sup> Unlike police officers in Canada, officers in the United States would not have to warn the suspect of his rights to counsel and to remain silent unless the court determined that Elshaw was in custody.<sup>104</sup> Suspects, although seized for the purpose of the Fourth Amendment, are not in custody for the purpose of *Miranda* until they are formally arrested or are in a situation that amounts to the functional equivalent of formal arrest.<sup>105</sup> In the

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100. *Id.* at 34.

101. *Id.* at 31.

102. 392 U.S. 1 (1968).

103. Descendants of *Terry* include: *United States v. Sokolow*, 490 U.S. 1 (1989) ("drug profile" can be part of the totality of circumstances leading officers to believe criminal activity is afoot); *United States v. Sharpe*, 470 U.S. 675 (1985) (duration of detention must be determined by whether the police diligently pursued a means of investigation likely to confirm or dispel their suspicions quickly); *United States v. Hensley*, 469 U.S. 221 (1985) (*Terry* not limited to on-going criminal activity); *Michigan v. Long*, 463 U.S. 1032 (1983) (the self-protection search principle in *Terry* extended to searches of vehicles); *United States v. Place*, 462 U.S. 696 (1983) (trained dog detecting narcotics is legally sufficient to establish reasonable suspicion); *Adams v. Williams*, 407 U.S. 143 (1972) (police officers need not observe the suspicious behavior).

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Supreme Court of the United States held that the appropriate test to determine whether an individual is seized within the meaning of the Fourth Amendment is whether a reasonable person, in this case a reasonable bus passenger, would be free to decline the officer's request or otherwise terminate the encounter. *Id.* at 436. An objective test was also adopted to determine whether suspects were under arrest within the meaning of the Fourth Amendment. *Id.*; accord *Scott v. United States*, 436 U.S. 128, 135-38 (1978). The Supreme Court of Canada has adopted both an objective test and a subjective test to determine whether suspects are under arrest. *Regina v. Stonney*, [1990] 1 S.C.R. 241. The objective test is whether a "reasonable person standing in the shoes of the police officer would have believed that reasonable and probable grounds existed to make an arrest." *Id.* at 250. The subjective test examines the motives of the arresting officer. *Id.* Evidence that the arresting officer demonstrated bias toward persons of different race, nationality, or color, or that there was enmity between the officer and person arrested, "might have the effect rendering invalid an otherwise lawful arrest." *Id.* at 251.

104. *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984).

105. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*Miranda* is not required simply because the defendant was interrogated by a uniformed officer in the police station. Voluntarily accompanying the police to the station house and then answering questions about the crime is not "custody" for the purpose of *Miranda*.); see also *California v. Behler*, 463 U.S. 1121 (1983). There may be cases where the *Miranda* warnings are required even though the suspect has been neither formally arrested nor in a situation that amounts to a functional equivalent. Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and Miranda's Concept of Custody*, 1993 U. ILL. L. REV. 379, 385. In *Regina v. Hawkins*, [1993] 2 S.C.R. 157, the Supreme Court of Canada agreed with the Newfoundland Court of Appeals that the accused

United States, officers who make investigatory stops are not required to read the *Miranda* warnings before asking suspects questions. In *Berkemer v. McCarty*,<sup>106</sup> for example, the United States Supreme Court held that questioning a traffic violator at the scene of the violation was not "custody" for the purpose of administering the *Miranda* warnings prior to questioning.<sup>107</sup>

The distinction between investigatory stops and custodial arrest was not lost on dissenting Justice Madam L'Heureux-Dube. She did not accept the Crown's admission that Elshaw was detained within the meaning of section 10(b), and she urged the Court to look south and learn from the United States Supreme Court's decisions in *Terry v. Ohio*,<sup>108</sup> *Adams v. Williams*,<sup>109</sup> and *Berkemer v. McCarty*.<sup>110</sup> She correctly pointed out that, in the United States, a suspicious person stopped by the police, or a person detained in a public place for the purpose of determining whether or not the officer's suspicions are well grounded, is not "in custody" for the purposes of *Miranda*.<sup>111</sup> Applying this rule to Canada, Justice L'Heureux-Dube concluded that Elshaw was not detained within the meaning of section 10(b) of the Charter; therefore, in her view, the statement was admissible.<sup>112</sup>

In summary, the pre-trial right to counsel in Canada is not tied to custodial interrogation; the issue is whether the suspect was detained. Once the suspect is detained, a confession obtained when the police fail to observe the requirements of section 10(b) results automatically in suppression at trial, although the Supreme Court of Canada has not stated this legal conclusion so boldly.

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was not in detention within the meaning section 10(b) because he agreed to be questioned at the police station rather than at his home or place of business. *Id.* at 158. The police telephoned the suspect, requesting the interview and giving him the choice of location.

106. 468 U.S. 420 (1984).

107. *Id.* at 441-42.

108. 392 U.S. 1 (1967).

109. 407 U.S. 143 (1972).

110. 468 U.S. 420 (1984).

111. *Elshaw*, [1991] 3 S.C.R. at 60.

112. *Id.* at 70. Of course, in the United States, placing Elshaw in a police van while a short investigation was conducted might be the functional equivalent of an arrest, in which case *Miranda* would be required before interrogation. Apparently, Madam Justice L'Heureux-Dube recognized this possibility and argued that, even if Elshaw had been detained, the statement should not be excluded because, under the *Collins* criteria, its admission would not bring the administration of justice into disrepute. *Id.*

## 2. Waiver

The Supreme Court of the United States has stated that to waive their Fifth Amendment right, defendants must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."<sup>113</sup> *Miranda* serves this waiver requirement by informing defendants of the nature of their rights and the consequences if they waive those rights.<sup>114</sup> The waiver requirement in Canada is more rigorous, as illustrated by *Regina v. Clarkson*.<sup>115</sup>

*Clarkson* concerned the admissibility of a confession obtained from an intoxicated and emotionally distraught suspect. Ms. Clarkson was arrested for the shooting death of her husband and was told, on at least two occasions, of her section 10(b) rights.<sup>116</sup> Nonetheless, she steadfastly maintained, against the advice of a relative present during the interrogation, that she did not need a lawyer.<sup>117</sup> The police accepted her word and obtained an incriminating statement.<sup>118</sup>

Citing *Von Moltke v. Gillies*<sup>119</sup> and *Adams v. United States*,<sup>120</sup> two Sixth Amendment cases from the United States, the Supreme

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113. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

114. *Id.* The Court has not clarified the consequences of which the defendant must be made aware. *Dix*, *supra* note 32, at 246. Nevertheless, defendants need not be aware that an attorney is attempting to contact them. *Moran*, 475 U.S. at 421. Nor must they be told about the nature of the crime under investigation. *Colorado v. Spring*, 479 U.S. 564, 573-75 (1987).

115. [1986] 1 S.C.R. 383. For a comparison of the waiver requirements between the United States and Canada, see Harvie & Foster, *Ties That Bind*, *supra* note 71, at 783-85, and Robert Harvie & Hamar Foster, *Different Drummers, Different Drums*, *The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter*, 24 OTTAWA L. REV. 39, 62-65 (1992) [hereinafter Harvie & Foster, *Different Drummers, Different Drums*].

116. *Clarkson*, [1986] 1 S.C.R. at 383.

117. *Id.*

118. *Id.*

119. 332 U.S. 708 (1948). This case involved a defendant who had purportedly waived his Sixth Amendment right to counsel at trial and then pleaded guilty.

120. 317 U.S. 269 (1942). This case dealt with the issue of whether a layman could waive the right to counsel at trial and the right to trial by jury. The Court rejected the position that a layman could never waive these two rights and held the waiver valid so long as the defendant knew what he was doing so that "his choice is made with eyes open." *Id.* at 279. In *Johnson v. Zenbst*, 304 U.S. 458 (1938), the Court stated that a waiver is valid when it reflects "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464. *Johnson* and *Von Moltke* dealt with courtroom waiver, a situation in which a defense attorney and a judge are generally present to advise the accused and to ensure that the accused understands the full impact of the waiver. In Fifth Amendment waiver cases, neither defense attorneys nor judges are normally in police interrogation rooms. William T. Pizzi, *Waiver of Rights in the Interrogation Room: The Court's Dilemma*, 23 CONN. L. REV. 229, 240 (1991).

Court of Canada adopted an awareness of consequences test.<sup>121</sup> Writing for the *Clarkson* majority, Madam Justice Wilson quoted with favor the waiver language from the *Von Moltke* decision:

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offense included within them, the range of allowable punishments thereunder, possible defenses to the charge and the circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.<sup>122</sup>

Although Madam Justice Wilson hesitated to require defendants to be aware of the legal intricacies of the case, she did point out that "any voluntary waiver in order to be valid and effective must be premised on a true appreciation of the consequences of giving up the right."<sup>123</sup>

The Canadian Court reaffirmed this approach in *Regina v. Evans*<sup>124</sup> by requiring that suspects have a true appreciation of the circumstances in which they find themselves. Mr. Evans was arrested on a marijuana charge in the hope that he would provide evidence that his brother had committed murders.<sup>125</sup> During the course of the first interview, officers began to suspect Evans of the killings.<sup>126</sup> During the second interview, the officers falsely told Evans that his fingerprints had been found at the scene.<sup>127</sup> This strategy eventually produced a confession to the murder.<sup>128</sup>

Although Evans was advised of his section 10(b) right to retain and instruct counsel without delay, the Court found a number of

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121. *Clarkson*, [1986] 1 S.C.R. at 386. Madam Justice Wilson's reliance on these two Sixth Amendment cases is an excellent illustration of the Supreme Court of Canada's initial misunderstanding of the difference between the Fifth and Sixth Amendments to the United States Constitution. Recently, the Court has become more sophisticated in its use of United States Supreme Court precedent. Harvie & Foster, *Different Drummers, Different Drums*, *supra* note 115, at 110.

122. *Clarkson*, [1986] 1 S.C.R. at 395 (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948)).

123. *Id.* at 396. In order to waive the *Miranda* rights in the United States, defendants do not have to possess full knowledge of the ramifications of their decision. They need only understand that they have the right to remain silent and the right to counsel. *Moran*, 475 U.S. at 421-23; see also DAVID M. NISSMAN & ED HAGEN, *LAW OF CONFESSIONS* 6-12 (2d ed. 1994). In Canada, the burden of establishing an unequivocal waiver is on the prosecution and the standard of proof is very high. *Regina v. Bartle*, [1994] 3 S.C.R. 173, 174. In the United States, the burden of establishing a waiver of the *Miranda* rights is on the prosecution and the burden of proof is preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986).

124. [1991] 1 S.C.R. 869.

125. *Id.* at 878.

126. *Id.*

127. *Id.* at 881.

128. *Id.*

problems with his waiver. First, the police made no attempt to explain the rights after Evans indicated he did not understand them.<sup>129</sup> Second, and most importantly, the police read his section 10(b) rights after Evans had been arrested for the marijuana charge but not before they began interviewing him about the murder.<sup>130</sup> The Court reasoned that it was necessary to reiterate the section 10(b) warning if "the nature of the investigation" changes.<sup>131</sup> To do otherwise, wrote Madam 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.<sup>132</sup>

The United States Supreme Court gave its stamp of approval to such police tactics in *Colorado v. Spring*.<sup>133</sup>

The Supreme Court of Canada, in *Regina v. Smith*,<sup>134</sup> clarified the position it had initially taken in *Clarkson and Evans*.<sup>135</sup> In *Smith*, the defendant had been drinking and had received a severe beating when he was arrested.<sup>136</sup> At the time of the arrest, he was told that his arrest was related to the "shooting incident" of the previous day and was advised of his right to retain and instruct counsel immediately, which he waived.<sup>137</sup> He was told neither that the victim was dead nor that he was being charged with murder.<sup>138</sup> The Supreme Court of Canada upheld the defendant's waiver because his knowledge of the charge was easily inferred from the circumstances.<sup>139</sup> Retreating from *Clarkson*, Madam Justice McLachlin noted that it had never been suggested that

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129. *Id.* at 879.

130. *Id.* Section 10(a) reads: "Everyone has the right on arrest or detention (a) to be informed without unreasonable delay of the specific offence." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 10(a).

131. *Evans*, [1991] 1 S.C.R. at 871.

132. *Id.* at 892.

133. 479 U.S. 564 (1987).

134. [1991] 1 S.C.R. 714.

135. Some Canadian commentators argue that the waiver rule established by the Supreme Court (prior to *Smith*) goes too far and is likely to be modified in fact if not in law. *Should the Police Be Advising of the Right to Counsel?*, [1990] 74 CRIM. REP. (3d) 151.

136. *Smith*, [1991] 1 S.C.R. at 714.

137. *Id.* at 718-19.

138. *Id.*

139. *Id.* at 724-25.

full 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.<sup>140</sup>

Even with this slight retreat, or clarification, Canadian waiver law continues to be more solicitous of individual rights than American law. Smith's waiver was valid because the Court inferred that he knew the charge was murder. Absent such inference, the failure of the police to inform him would have been fatal. In Canada, the issue is whether suspects understand the true import of the questioning and the true extent of their criminal liability.<sup>141</sup> This is because, in Canada, (1) a lack of information on the part of the suspect can "taint" the section 10(b) warning,<sup>142</sup> (2) the detainee is entitled to know "the extent of [his or her] jeopardy,"<sup>143</sup> and (3) the test for a valid waiver entails "awareness of the consequences."<sup>144</sup> In the United States, the issue is whether the defendant understands the right to remain silent and the right to counsel.<sup>145</sup>

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140. *Id.* at 728. Nevertheless, Madam Justice McLachlin was aware that Canada had taken a different approach than the United States to the issue of waiver. "In Canada," she wrote, we have adopted a different approach [than in the United States]. We take the view that the accused's understanding of his situation is relevant to whether he has made a valid and informed waiver. This approach is mandated by § 10(a) of the Charter, which gives the detainee the right to be promptly advised of the reasons for his or her detention. It is exemplified by three related concepts: (1) the "tainting" of a warning as to the right to counsel by lack of information, (2) the idea that one is entitled to know the "extent of one's jeopardy," and (3) the concept of "awareness of consequences" developed in the context of waiver.

*Id.* at 726-27.

141. *Id.* at 726-27.

142. *Regina v. Greffe*, [1990] 1 S.C.R. 755, 759.

143. *Regina v. Black*, [1989] 2 S.C.R. 138, 139.

144. *Regina v. Clarkson*, [1986] 1 S.C.R. 383, 385-86. However, quaere whether the Court's recent decision in *Regina v. Whittle*, [1994] 116 D.L.R.4th 416, also signals a retreat. In *Whittle*, the Court not only departed from *Clarkson* in holding that "awareness of consequences" was not a part of the common law confession rule, but also in holding that waiver of section 10(b) required only that a suspect possess the "limited cognitive capacity required for fitness to stand trial." *Id.* at 417. *Whittle* was suffering from mental illness at the time he confessed. *Id.* The United States Supreme Court held, in *Colorado v. Connelly*, 479 U.S. 157 (1986), that a statement from a mentally ill accused was not involuntary for the purpose of due process absent some form of state coercion. *Id.* at 166-67 (1986). The same rule applies to the waiver requirement in *Miranda*. *Id.* at 169-70.

145. *Patterson v. Illinois*, 487 U.S. 285, 296 (1988). In *Patterson*, the defendant was interrogated after his indictment was returned but before counsel was appointed. *Id.* at 288-89.

### 3. Evidence Emanating from the Accused

In Canada, the concept of evidence emanating from the accused goes beyond the traditional self-incrimination notion of testimonial evidence and includes line-up identification and blood samples.<sup>146</sup> The Supreme Court of Canada has excluded line-up identification and blood samples from trial when the police failed to advise suspects of their section 10(b) right, failed to obtain a valid waiver, or did not provide a reasonable opportunity to obtain counsel.<sup>147</sup> Identification at a line-up and blood samples are the types of evidence that do not exist independently of the Charter violation and create an unfair trial when admitted in evidence.<sup>148</sup>

In *Regina v. Ross*,<sup>149</sup> three teenagers were arrested in the early morning hours for breaking and entering.<sup>150</sup> They were advised of their right to instruct and retain counsel, but because of the lateness of the hour they were unable to contact their lawyers.<sup>151</sup> The police then told them to participate in a line-up, and they did.<sup>152</sup> The Supreme Court of Canada unanimously ruled that the defendants were denied a reasonable opportunity to consult counsel, and the majority excluded the identification made at the line-up.<sup>153</sup>

Justice Lamer reasoned that although there was no legal obligation on the part of the accused to participate in the line-up, legal consequences might have flowed from a refusal.<sup>154</sup> A lawyer can describe to the accused the proper methods of conducting a line-up and the

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He was given a *Miranda* warning, which he waived, but he argued that the indictment entitled him to something more than the mere *Miranda* warnings. *Id.* at 290. The Court disagreed and held that "[a]s a general matter . . . an accused who is admonished with the warnings . . . in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment right [as well]." *Id.* at 296.

146. In the United States, neither line-ups nor blood samples are the types of evidence protected by the Fifth Amendment. *United States v. Wade*, 388 U.S. 218, 220 (1967); *Schmerber v. California*, 384 U.S. 757, 760 (1966).

147. See, e.g., *Regina v. Ross*, [1989] 1 S.C.R. 3; *Regina v. Therens*, [1985] 1 S.C.R. 613.

148. Prior to the Charter, the Supreme Court of Canada held that line-up evidence was not covered by the self-incrimination doctrine, which in Canada is restricted to trial. *Regina v. Marcoux & Soloman*, [1976] 1 S.C.R. 763. Similarly, in *Regina v. Hogan*, [1975] 2 S.C.R. 574, another pre-Charter case, the court held that breathalyzer evidence obtained in violation of the right to counsel was nonetheless admissible. *Id.* at 585.

149. [1989] 1 S.C.R. 3.

150. *Id.* at 3.

151. *Id.* at 7.

152. *Id.* at 8.

153. *Id.* at 5.

154. *Id.* at 14.



legal consequences of participating or not participating.<sup>155</sup> Although the identity of the accused certainly pre-exists a Charter violation, an identification obtained by a line-up is not, according to the Court, preexisting evidence.<sup>156</sup> The purpose of the line-up is to reinforce the credibility of identification evidence.<sup>157</sup> An accused who participates in a line-up is participating in the collection of inculpatory evidence.<sup>158</sup> Thus, an accused who is told to participate in a line-up without a reasonable opportunity to communicate with counsel is conscripted against himself to create evidence for the trial.<sup>159</sup>

The Supreme Court of Canada, in *Regina v. Therens*,<sup>160</sup> excluded the result of a blood-alcohol test because the police failed to advise the accused of his right to retain and instruct counsel.<sup>161</sup> Therens was involved in an automobile accident.<sup>162</sup> The investigating officer, pursuant to what was then section 235(1) of the Canadian Criminal Code, demanded that Therens accompany him to the police station to provide a breath sample for a blood-alcohol test.<sup>163</sup> Therens complied and was convicted of impaired driving on the basis of the breathalyzer readings.<sup>164</sup> He was not advised that he had the right to retain and instruct counsel without delay.<sup>165</sup>

The majority of the Supreme Court of Canada held that Therens was detained for purposes of section 10(b).<sup>166</sup> They went on to hold that the failure to advise the defendant of his right to counsel was a "flagrant" violation of the Charter, and that admitting the evidence would bring the administration of justice into disrepute because the detainee was required by law to provide evidence that was incriminat-

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155. *Id.*

156. *Id.* at 16.

157. *Id.*

158. *Id.*

159. *Id.* at 17. The accused, for example, might be shown to witnesses individually without benefit of a line-up. Pre-Charter jurisprudence permitted the Crown to place into evidence the fact that the accused failed to participate in a line-up. See, e.g., *Marcoux & Soloman*, [1976] 1 S.C.R. at 775. American readers may have difficulty understanding how line-up identification can be evidence emanating from the accused. Madam Justice L'Heureaux-Dube had the same difficulty. Her dissent in *Ross* argued that the identity of the accused pre-existed the line-up as did the perceptions of witnesses. *Ross*, [1989] 1 S.C.R. at 18. The identification evidence, she reasoned, came into existence at the time the accused was seen committing the crime. *Id.*

160. [1985] 1 S.C.R. 613.

161. *Id.* at 620.

162. *Id.* at 613.

163. *Id.*

164. *Id.*

165. *Id.* at 620.

166. *Id.* at 619.

ing—the breath sample.<sup>167</sup> In the United States, the Fifth Amendment protects the accused only from being compelled to provide the state with evidence of a testimonial or communicative nature.<sup>168</sup> The right does not protect suspects from appearing in line-ups, or providing breath or blood samples.<sup>169</sup> The right to counsel, therefore, is not available at a line-up conducted before the defendant has been formally charged or indicted,<sup>170</sup> or at breath tests.<sup>171</sup>

#### 4. Right to Government Appointed Counsel

The *Miranda* decision made clear that a defendant is entitled to court appointed counsel before interrogation can begin. The explicit language of section 10(b) does not require the police to warn detainees of a right to provincial legal aid, but the Supreme Court of Canada has interpreted section 10(b) to require such a warning.<sup>172</sup>

In *Regina v. Brydges*,<sup>173</sup> the Court ruled a statement inadmissible on the ground that the police had not advised the defendant of the availability of legal aid after he expressed concern about not being able to afford a lawyer.<sup>174</sup> Brydges, a resident of Alberta, was arrested in Manitoba and charged with second degree murder.<sup>175</sup> He was informed of his right to retain and instruct counsel without delay,<sup>176</sup> and upon arrival at the police station, Brydges asked the investigator whether the province of Manitoba had legal aid because he could not afford a lawyer.<sup>177</sup> The investigator, also from Alberta, answered that he imagined that such a system existed in the province but asked the defendant whether there was a need for him to talk with a

167. See *id.* In the United States, the police need not read the *Miranda* warnings to an accused prior to administering a breath test, but they must be read to the accused if the police intend to obtain incriminating statements. *Pennsylvania v. Muniz*, 496 U.S. 582, 604-05 (1990).

168. *United States v. Wade*, 388 U.S. 218 (1967).

169. *Schmerber v. California*, 384 U.S. 757 (1966) (blood tests); *United States v. Wade*, 388 U.S. 218 (1967) (line-ups).

170. The Sixth Amendment requires that the accused be advised of his or her right to counsel before appearing in a line-up and after he or she has been formally charged or indicted. *Wade*, 388 U.S. at 220-21.

171. *Kirby v. Illinois*, 406 U.S. 682, 690 (1972); *Schmerber*, 384 U.S. at 760.

172. Although the Charter does not explicitly provide for counsel at trial, all the Provinces provide legal aid in criminal cases to those suspects who are indigent and are charged with an offense where there is a reasonable chance they will go to jail or lose their livelihood. CURT T. GRIFFITHS AND SIMON N. VERDUN-JONES, *CANADIAN CRIMINAL JUSTICE* 286 (1994).

173. [1990] 1 S.C.R. 190.

174. *Id.* at 210.

175. *Id.* at 194.

176. *Id.*

177. *Id.* at 195.

lawyer.<sup>178</sup> Brydges answered, "Not right now, no."<sup>179</sup> During the subsequent interrogation, he made a number of incriminating statements.<sup>180</sup>

Chief Justice Lamer, writing for the majority of the Court, found a violation of section 10(b).<sup>181</sup> The Court held that the defendant's inability to afford counsel was an impediment to his right to retain and instruct counsel.<sup>182</sup> Although the investigator was from outside the province, the Court felt that he could have easily discovered the availability of legal aid.<sup>183</sup>

The holding of *Brydges* is narrow, but the significance of the case lies in the "bright line" drawn by Chief Justice Lamer. He held that section 10(b) requires not only that detainees and arrestees be warned of their right to retain and instruct counsel without delay, but that as a matter of course, they must also be told of the availability of legal aid.<sup>184</sup>

In *Regina v. Bartle*,<sup>185</sup> the Court drew another bright line, holding that detainees in a province that had established a twenty-four-hour duty counsel system must be advised, as part of the section 10(b) warning, that duty counsel is available, and they must be told how to avail themselves of this service.<sup>186</sup> In *Bartle*, the defendant was arrested for impaired driving and was cautioned at the roadside that he had a right to retain and instruct counsel without delay and that he could apply to the Ontario Legal Aid Plan for legal assistance.<sup>187</sup>

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178. *Id.*

179. *Id.*

180. *Id.* at 196.

181. *Id.* at 210.

182. *Id.* at 209.

183. *Id.*

184. *Id.* at 209, 211-12. The Court distinguished between the role of duty counsel and the role of legal aid counsel. While duty counsel provides temporary legal advice, legal aid counsel provides arrestees with long-term legal advice regarding bail, pleas, and trial. As a result of this rule, some provinces established a twenty-four-hour duty-counsel system to give immediate but temporary legal advice to detainees regardless of whether they could afford counsel. *Id.* at 212-14. See also Kathryn Moore, *Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study*, 30 OSGOODE HALL L.J. 547, 563-65 (1992).

185. [1994] 3 S.C.R. 173.

186. *Id.* at 176. *Bartle* was one of a group of five contemporaneously adjudicated decisions dealing with the issue of access to duty counsel. The other four decisions were *Regina v. Matheson*, [1994] 3 S.C.R. 328; *Regina v. Prosper*, [1994] 3 S.C.R. 236; *Regina v. Pozniak*, [1994] 3 S.C.R. 310; and *Regina v. Harper*, [1994] 3 S.C.R. 343. *Harper* and *Pozniak* reaffirmed that suspects must be told about duty counsel and how to access the service, but they differed on whether the Crown had met its burden that the accused in these cases would have acted differently if they had known about duty counsel and how to access legal assistance.

187. *Bartle*, [1994] 3 S.C.R. at 176.

The officer then read the breathalyzer demand, and the accused made a number of incriminating statements.<sup>188</sup> At the police station, the officer told the suspect that he could telephone a lawyer.<sup>189</sup> The accused refused and took the breathalyzer test.<sup>190</sup> At no time was the suspect told that the province had established a twenty-four-hour duty counsel accessible through a toll-free telephone number.<sup>191</sup> Chief Justice Lamer, writing for the majority, held that the failure of the officer to inform the suspect at the roadside detention of the availability of duty counsel and the toll-free telephone number violated section 10(b).<sup>192</sup> The fact that no telephone was immediately available was of little concern to the Court. Chief Justice Lamer suggested that the police should explain to detainees that, as soon as they reach the police station, they may telephone duty counsel.<sup>193</sup> The Court excluded the incriminating statements as well as the results from the breathalyzer test under section 24(2).<sup>194</sup>

Some provinces have elected not to establish twenty-four-hour duty counsel systems. This election was held not to violate the Charter in *Regina v. Matheson*,<sup>195</sup> where the Supreme Court of Canada concluded that section 10(b) does not require provinces to provide duty counsel to render immediate legal advice to detainees.<sup>196</sup> Moreover, in those provinces that have not established a system to provide temporary legal advice, the police are under no obligation to inform a detainee about duty counsel.<sup>197</sup> So long as the detainee is read the section 10(b) warning, accompanied by the *Brydges* require-

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188. *Id.* Section 254(3) of the Criminal Code allows police officers in Canada to demand that a driver of a vehicle take a breathalyzer test when they have reasonable and probable cause to believe the individual is driving under the influence of alcohol. Section 254(5) of the Code makes it a criminal offense to refuse to take a breathalyzer test. Criminal Code, R.S.C., ch. C-46, §§ 254(3) & (5) (1985).

189. *Bartle*, [1994] 3 S.C.R. at 174.

190. *Id.*

191. *Id.*

192. *Id.* Madam Justice L'Heureux-Dube argued in dissent that the holding in *Bartle* was a "clear invitation to provinces to refrain from going beyond what is strictly constitutionally required on the one hand, and on the other, to discontinue practices which exceed constitutional minimum standards." *Id.* at 224.

193. *Id.* at 186.

194. *Id.*

195. [1994] 3 S.C.R. 328.

196. *Id.* at 335.

197. *Id.* In *Matheson*, the accused was advised of his right to consult and instruct counsel, including his right to apply for legal aid. The province of Prince Edward Island had not established a twenty-four-hour duty-counsel system and the suspect was not advised about duty counsel. The suspect, however, waived his section 10(b) rights and made no demand to consult counsel. *Id.* at 329.

ment about the right to apply for legal aid, the informational component of section 10(b) has been met.<sup>198</sup>

Nevertheless, those provinces that have not established a twenty-four-hour duty counsel system often pay a heavy penalty. In *Regina v. Prosper*,<sup>199</sup> a Nova Scotia detainee demanded to consult and instruct counsel.<sup>200</sup> No such system existed in the province at the time.<sup>201</sup> The accused was stopped by a police officer early Saturday afternoon in Halifax and charged with impaired driving.<sup>202</sup> The officer advised the accused of his section 10(b) rights, including the right to apply for legal aid.<sup>203</sup> The officer demanded that the suspect take a breathalyzer test.<sup>204</sup> The suspect indicated that he would take the test but first wanted to talk with a lawyer.<sup>205</sup> At the police station, the suspect was provided with a list of Legal Aid attorneys and their home telephone numbers.<sup>206</sup> The accused made fifteen telephone calls but was unable to contact a lawyer.<sup>207</sup> Unknown to the officer, the Legal Aid lawyers in Halifax had advised the provincial Attorney General a few days earlier that they would take no more telephone calls outside of regular working hours, thus ending the twenty-four-hour duty counsel system in the area.<sup>208</sup> Unable to contact duty counsel and unable to afford a private lawyer, the accused took the breath test.<sup>209</sup>

Chief Justice Lamer reasoned that the implementation of section 10(b) requires that once the detainee has indicated a desire to talk with counsel, the state must provide the detainee with a reasonable opportunity to do so.<sup>210</sup> According to the Chief Justice, "reasonable

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198. *Id.* at 336.

199. [1994] 3 S.C.R. 236.

200. *Id.* at 236-37.

201. *Id.*

202. *Id.* at 237.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 238.

208. *Id.*

209. *Id.*

210. *Id.* at 245. Chief Justice Lamer re-emphasized that section 10(b) does not impose a constitutional duty on provinces to ensure that *Brydges* duty counsel is available to detainees. *Id.* In a not-too-subtle effort to persuade reluctant provinces to establish twenty-four-hour duty counsels, he took pains to describe the various duty counsel schemes throughout Canada and suggested such systems are not costly to establish and maintain. *Id.* Madam Justice L'Heureux-Dube agreed that section 10(b) did not require provinces to provide twenty-four-hour duty counsel, but argued that the suspect in *Prosper* was provided ample opportunity to consult and instruct counsel. *Id.* at 280.

opportunity' will depend on all the surrounding circumstances. These circumstances include the availability of duty counsel services in the jurisdiction where the detention takes place."<sup>211</sup> The lack of duty counsel services extends the time in which the detainee will have the ability to exercise his right to counsel.<sup>212</sup> As a result, officers must "hold-off" from attempting to elicit incriminating evidence from the detainee until he or she has had a reasonable opportunity to contact counsel.<sup>213</sup> The hold-off period may require officers to wait until Legal Aid lawyers are available during regular office hours, or until the accused is taken before a magistrate.<sup>214</sup> Because the police in *Prosper* failed to hold-off until the suspect could consult counsel, the results of the breath test were inadmissible under Section 24(2).<sup>215</sup>

In sum, whether the police can obtain self-incriminating evidence quickly depends, in part, on the existence or nonexistence of twenty-four-hour duty counsel. Police in those provinces without twenty-four-hour duty counsel risk the loss or inadmissibility of self-incriminating evidence if it is obtained when duty counsel is not available.<sup>216</sup>

At first impression, *Brydges* and its progeny seem to correspond to the *Miranda* warning about court appointed counsel. However,

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211. *Id.* at 269. Detainees must be reasonably diligent in pursuing their right to counsel. The existence or nonexistence of twenty-four-hour duty counsel may impact what constitutes reasonable diligence. Detainees may not have to be as diligent in seeking advice during times when the duty counsel does not exist, as opposed to times when duty counsel is available. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 270.

215. *Id.* at 274.

216. The Chief Justice recognized this possibility and suggested that the potential loss of evidence can be taken into account in determining reasonable opportunity. In *Prosper*, the Court dismissed the issue of whether the long delay meant the loss of the breathalyzer evidence because it did not arise on the facts of the case. *Id.* Furthermore, the Court suggested that there may be cases in which urgent circumstances require that the police obtain the evidence immediately. The Court had previously indicated such a possibility in *Elshaw*, [1991] 3 S.C.R. at 30. The Chief Justice suggested, however, that whether breath samples can be used as evidence in impaired driving cases under the urgent circumstance doctrine may require an examination of the constitutionality of section 254(5) of the Criminal Code. *Prosper*, [1994] 3 S.C.R. at 274. This section makes it a criminal offense to refuse to provide a breath sample. Moreover, Chief Justice Lamer was unwilling to find that the two-hour evidentiary presumption available to the Crown in impaired driving cases was sufficient itself to be an urgent circumstance. *Id.* Section 258(1) of the Code allows the Crown a presumption that the breathalyzer reading taken within two hours after the incident was the concentration of alcohol in the blood at the time of the alleged offense. *Id.* at 281.

Madam Justice L'Heureux-Dube argued in dissent that the hold-off penalizes provinces without twenty-four-hour duty counsels and warned that the requirement may signal the end of the breathalyzer as a means of testing blood-alcohol levels of impaired drivers in those provinces. *Id.* This result, she suggested, is an aberration in light of the holding that twenty-four-hour duty counsels are not constitutionally mandated. *Id.*

deeper analysis suggests that this is not the case. The *Miranda* Court required a warning about appointed counsel at the police station, in part, because "[d]enial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable . . . than the similar situation at trial."<sup>217</sup> The Canadian Charter, unlike the United States Constitution, does not contain an explicit right to counsel at trial, and the Supreme Court of Canada has been adamant in its refusal to read formally into section 10(b) a requirement for twenty-four-hour duty counsel.<sup>218</sup> These rights, if they exist, are presently statutory rights only, limited by the legal aid laws of each province. Nevertheless, the practical implication of the decisions in *Brydges*, *Bartle*, and *Prosper* is that provinces must provide twenty-four-hour duty counsel accessible to detainees and advise detainees of its availability, or risk the loss at trial of self-incriminating evidence under section 24(2). Finally, it seems likely that the thinking behind these decisions will stimulate pressure to read the right to legal aid at trial into section 7 of the Charter.<sup>219</sup>

### 5. Search and Seizure and the Right to Counsel

The Supreme Court of Canada, in its initial Charter decisions, suggested that failure of the police to advise suspects of their right to retain and instruct counsel without delay could make an otherwise reasonable search unreasonable. In *Regina v. Simmons*,<sup>220</sup> customs officers stopped Ms. Simmons at the border and conducted a strip search.<sup>221</sup> They did not read Ms. Simmons her section 10(b) rights

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217. 384 U.S. 436, 472-73 (1966).

218. Section 10(b) is not sufficiently explicit about whether defendants are entitled to counsel at trial. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 10(b).

219. In *Brydges*, Chief Justice Lamer declined to decide whether section 7 of the Charter required state-funded counsel in criminal cases for people without financial means. [1990] 1 S.C.R. at 217. However, in *Regina v. Rowbotham*, [1988] 25 O.A.C. 321, the Ontario Court of Appeal held that, in cases not covered by provincial legal aid plans, the combined effect of sections 7 and 11(d) of the Charter is that funded counsel must be provided if a defendant wants a lawyer, cannot pay for one, and cannot have a fair trial without one. *Id.* at 325.

Section 11(d) of the Charter states that "[a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(d).

In *Prosper*, Madam Justice L'Heureux-Dube hinted in her dissent that there may be a minimum level of legal aid imposed by section 7. [1994] 3 S.C.R. at 288.

220. [1988] 2 S.C.R. 495.

221. *Id.* at 496. The *Simmons* decision hinged on sections 143 and 144 of the Customs Act, R.S.C. ch. C-40 (1970). This act authorized a customs officer to search any person if the officer

or point out that, under the Customs Act, persons may ask to be taken before a magistrate, justice of the peace, or chief officer at the port of entry before being searched.<sup>222</sup> The majority of the Supreme Court ruled that persons subjected to a search at the border are detained pursuant to section 10(b) and must be told of their right to retain and instruct counsel.<sup>223</sup> On the facts in *Simmons*, the Court reasoned that the presence of counsel could have helped the detainee to understand the options available to her under the statutes, and the officers' failure to warn her of that right made their search unreasonable.<sup>224</sup>

The Court retreated from this doctrine in *Regina v. Debot*.<sup>225</sup> The defendant in *Debot* was detained and subjected to a warrantless frisk before he was advised of his right to retain and instruct counsel.<sup>226</sup> In that case, the majority of the Court took issue with the argument that the failure to advise the defendant of his section 10(b) right affects the reasonableness of the search.<sup>227</sup> Nevertheless, the majority reasoned that the failure to read section 10(b) would affect the reasonableness of the search in two exceptional circumstances.<sup>228</sup> The first exists when the police seek to obtain consent of the person detained to conduct the search.<sup>229</sup> The second exists in those rare cases like *Simmons* where the section 10(b) violation goes to the very lawfulness of the search.<sup>230</sup> Even by narrowing the situations in which the failure to advise a detainee of his right to counsel affects the reasonableness of the search, the Supreme Court of Canada goes beyond the United States Supreme Court in protecting the rights of the accused.

In situations where the accused knows that the interrogator is a police officer or a person in authority, the Supreme Court of Canada

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had reasonable cause to believe that the person had goods subject to entry at customs or prohibited goods secreted about his or her person.

222. *Simmons*, [1988] 2 S.C.R. at 498. These rights were posted on the wall but there was no evidence that Ms. Simmons read them. *Id.* at 507.

223. *Id.* at 521.

224. *Id.* at 522.

225. [1989] 2 S.C.R. 1140.

226. *Id.* at 1152. The Court came to the rather odd conclusion that *Debot* was entitled to be told about the right to counsel but not to exercise it. *Id.* at 1165, 1175.

227. *Id.* at 1172-75.

228. *Id.* at 1173.

229. *Id.* at 1173-74. In the United States, the Fourth Amendment does not require the prosecution to demonstrate that suspects knew of their right to refuse in order to prove voluntary consent to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

230. *Simmons*, [1988] 2 S.C.R. at 498. Whether the real evidence will be admitted under section 24(2) will depend on whether the independently existing real evidence could or would have been found without the compelled testimony. *Regina v. Thomson*, [1988] 1 S.C.R. 640, 650.



is more willing to find that the constable blundered than is the United States Supreme Court. The Court's broad definition of detention, its stringent waiver requirement, its extension of the concept of testimonial evidence to evidence emanating from the accused, its holding that the police must hold-off interrogations until duty counsel is available for the accused even in light of no constitutional requirement for provinces to provide duty counsel, and the limited right to counsel during searches has led the Supreme Court of Canada to declare confessions unconstitutional and exclude the confession from trial in situations in which the United States Supreme Court would not.

*B. Questioning of Suspects by Undercover Agents or Persons Not Known by Suspects to be Persons in Authority*

Questioning of suspects may occur surreptitiously by police officers or agents of the police while suspects are in jail or still free. This section explores decisions from the Supreme Court of Canada focusing on surreptitious interrogations and compares them to similar decisions from the United States Supreme Court.

*1. Questioning by Undercover Agents of Detainees*

Section 10(b) does not apply to surreptitious questioning of a suspect when the suspect is unaware that the questioner is an officer. The Supreme Court of Canada has, however, applied the right to silence found in section 7 in such a situation. For example, where the suspect was detained, consulted an attorney, and then was engaged in conversation by an undercover agent of the police, the Court has held that the right of silence applies. In *Regina v. Hebert*,<sup>231</sup> the defendant was a robbery suspect who was informed of his right to retain and instruct counsel.<sup>232</sup> Hebert did consult with a lawyer.<sup>233</sup> He was then placed in a cell with an undercover police agent who engaged him in conversation.<sup>234</sup> During the course of the conversation, Hebert made incriminating statements about the robbery.<sup>235</sup> Although Hebert had been administered the section 10(b) warning and consulted counsel, the Court declined to base its decisions on a right to counsel

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231. [1990] 2 S.C.R. 151.

232. *Id.* at 153.

233. *Id.* According to the agreed statement of facts, Hebert was arrested for a narcotic offense but was the prime suspect in a robbery. *Preliminary Inquiry in Regina v. Hebert—How Did the Officer Engage the Conversation?*, [1991] 3 CRIM. REP. (4th) 61.

234. *Hebert*, [1990] 2 S.C.R. at 153.

235. *Id.*

analysis.<sup>236</sup> The majority recognized the close relationship between the right to counsel and the right to silence, but chose to analyze the case in terms of section 7 of the Charter, where they found a right to silence that attached upon detention.<sup>237</sup> The majority of the Court neither required the police to inform suspects of their right to silence nor required the police to obtain a waiver.<sup>238</sup> Nevertheless, the Court held that if the conduct of the police effectively deprives detainees of their right to refuse to speak to the authorities, section 7 is violated.<sup>239</sup> Employing this approach, the Court held that the trick used by the police had the effect of denying Hebert his freedom of choice and, consequently, the Court excluded his confession.<sup>240</sup>

The Court in *Hebert* set out four explicit limitations on the right to silence. First, uniformed officers or those known by the defendant to be in authority may question an accused in the absence of counsel once counsel has been retained.<sup>241</sup> Second, the right to silence attaches only after detention.<sup>242</sup> Third, the right to silence is not

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236. *Id.*

237. *Id.* at 164.

238. *Id.* Two concurring Justices, Wilson and Sopinka, would have incorporated a waiver into the right to silence doctrine. *Id.* at 180. Madam Justice Wilson suggested that a right to silence may exist prior to detention. *Id.* at 185.

239. *Id.* at 166. The Crown and the defense agreed that section 7 contained a right to silence but disagreed that it applied in this fact situation. *Id.* at 154.

240. *Id.* at 164. The pre-Charter case of *Regina v. Rothman*, [1981] 1 S.C.C. 640, permitted police to use undercover agents to elicit confessions from suspects who had invoked their right to counsel. *Id.* at 664. The Court reasoned that the statement was voluntary because Rothman did not know he was speaking to a person in authority. *Id.* In so far as *Rothman* permitted the use of undercover agents to elicit confessions from jailed suspects who had invoked their right to counsel, it was overruled by *Hebert*. *Hebert*, [1990] 2 S.C.R. at 173.

241. *Hebert*, [1990] 2 S.C.R. at 164. The rule in the United States is different. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the United States Supreme Court held that once the defendant clearly expresses his desire to deal with the police only through counsel, the defendant cannot be further interrogated until counsel has been made available or until the suspect initiates the conversation. *Id.* at 484-85. In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court extended the *Edwards* doctrine to situations where defendants had consulted counsel. *Id.* at 153. The *Edwards* doctrine also applies when the police want to interrogate about a subject matter unrelated to earlier questioning. *Arizona v. Roberson*, 486 U.S. 675, 683 (1985). The Sixth Amendment is offense specific and, as a result, the commencement of the Sixth Amendment in one offense does not trigger the *Edwards* rule relative to a separate offense. *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

242. *Hebert*, [1990] 2 S.C.R. at 164. In the United States, if a defendant demands the right to silence without demanding counsel, the Supreme Court has permitted the police to reinterrogate so long as *Miranda* is scrupulously followed. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). The Sixth Amendment prohibits the use of undercover police agents to elicit incriminating statements once adversary proceedings have commenced whether or not the individual is in custody. In *Massiah v. United States*, 377 U.S. 201 (1964), the defendant was not in custody. *Id.* at 201. In *United States v. Henry*, 447 U.S. 264 (1980), the defendant was in custody and an undercover cellmate was told by the F.B.I. not to engage Henry in conversation about the crime for which

implicated in voluntary statements made to cellmates that are not police agents.<sup>243</sup> Finally, the right to silence is violated when the state's agent actively elicits the confession and not when he or she passively listens to the incriminating statement.<sup>244</sup>

In summary, the *Hebert* decision makes clear that the active solicitation of an incriminating statement from a suspect by the state's undercover agent, after the suspect has been detained, undermines the right to silence in section 7. The right is not affected by interrogation conducted by uniformed police or a person known to be in authority after the defendant has consulted with counsel, so long as the interrogation does not amount to a denial of the suspect's right to choose. Moreover, the Court was explicit in its holding that the police are under no obligation to warn a defendant of his right to silence. The Court assumed that a defendant's lawyer will advise him of the right.

Shortly after *Hebert* was announced, the Supreme Court of Canada had the opportunity to address two issues the case left unresolved: (1) the definition of a state agent, and (2) what it means to "elicit" a statement. In *Regina v. Broyles*,<sup>245</sup> the defendant was arrested for forgery and was also a suspect in his grandmother's death.<sup>246</sup> After receiving his section 10(b) warning, he consulted with counsel, who told him not to talk to the police.<sup>247</sup> The police arranged for a friend of Broyles to visit him in jail. They provided the friend with a body-pack recording device, but did not explicitly tell the friend to elicit a statement from Broyles.<sup>248</sup> During the conversation, the friend successfully encouraged Broyles to ignore the advice of his counsel that he remain silent. The friend then asked Broyles questions about his grandmother's death.<sup>249</sup> Broyles made several incriminating statements.<sup>250</sup>

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he was charged. *Id.* at 266. The Court found that the agent had engaged Henry in some conversation and that the statements were a product of those conversations. *Id.* at 272-74.

243. *Hebert*, [1990] 2 S.C.R. at 166. This rule is also found in the United States. The Fifth Amendment prohibition against compelled incrimination applies only to state action. *Colorado v. Connelly*, 479 U.S. 157, 166 (1986). Confessions obtained by private individuals not connected to state action are not governed by the Fifth Amendment prohibition and, thus, are not excluded from evidence. *Id.*

244. *Hebert*, [1990] 2 S.C.R. at 165. The rule is similar in the United States. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (right violated when police and their informant took some action beyond merely listening that was deliberately designed to elicit incriminating remarks).

245. [1991] 3 S.C.R. 595.

246. *Id.* at 600.

247. *Id.* at 601.

248. *Id.* at 602.

249. *Id.*

250. *Id.* The Court did not deal with the issue of whether the officer should have reread section 10(b) after the focus of the interrogation changed.

The Court asked the following question to determine whether or not an informer was a state agent: Would the exchange between the accused and the informer have taken place in the form and manner in which it did but for the intervention of the state or its agents? If the answer to this question is negative, it is then necessary to explore whether the incriminating statements were elicited by the agent.<sup>251</sup>

The Court developed two sets of factors to determine whether there was a connection between the conduct of the state agent and the defendant's statements. The first set concerns the nature of the exchange between the defendant and the state agent.<sup>252</sup> If the state agent interrogates the suspect or engages in conversation that is the "functional equivalent" of an interrogation, then he or she is deemed to have elicited the statement.<sup>253</sup>

The second set of factors focuses on the relationship between the defendant and the state agent.<sup>254</sup> Did the state agent, for example, exploit any special relationship to extract the statement?<sup>255</sup> Applying the state agent test and the two sets of factors to the case, the Court found that the defendant's friend was an agent of the state and had elicited the statement in violation of Broyles' right to silence.<sup>256</sup> The confession was therefore excluded from trial.<sup>257</sup>

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251. *Id.* at 606. The test in the United States is whether, in light of all the circumstances, the private party acted as an agent of the state. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Circumstances may include the state's knowledge of or acquiescence in the activity of the private party and the intent of the party performing the activity. *United States v. Walther*, 652 F.2d 788, 790 (9th Cir. 1981).

252. *Broyles*, [1991] 3 S.C.R. at 607-08.

253. *Id.* at 608. There was a conversation about the crime between the friend and Broyles and, therefore, the court did not define functional equivalent. *Id.* at 608-09. In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the United States Supreme Court established a test to determine whether police words or actions are the functional equivalent of an interrogation. The test is whether the police officers should have known that their words or actions were reasonably likely to elicit an incriminating response. *Id.* at 301. In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the Court held admissible at trial incriminating statements made in response to the officers' carefully worded instructions on how to take the sobriety test. *Id.* at 603. The Court reasoned that the description of the test was not likely to be perceived as requiring a response by the suspect. *Id.* at 603-04.

254. *Broyles*, [1991] 3 S.C.R. at 611.

255. *Id.*

256. *Id.* at 614-15.

257. *Id.* at 616. Justice Iacobucci, writing for the Court, suggested that instructing informers not to elicit information will not preclude inquiry into whether this instruction was scrupulously followed. *Id.* at 616-17. In Sixth Amendment jurisprudence, instructions to an undercover agent by the police not to question a defendant regarding the crime charged is irrelevant, even if the informer followed the instructions and did not intentionally seek information about the crime charged. *Mainre v. Moulton*, 474 U.S. 159, 173-74 (1985). The reason for this is that accepting the incriminating statement invites the risk of fabricated investigations, and police officers' motives are difficult to determine when the police have more than one reason to

The judgments in *Hebert* and *Broyles* were criticized in Canada due to their stark contrast with the United States Supreme Court's decision in *Illinois v. Perkins*.<sup>258</sup> Decided three weeks before *Hebert*, the *Perkins* Court held that the police are not obligated to read *Miranda* warnings to a defendant who is incarcerated with an undercover agent whose purpose is to engage the defendant in an incriminating conversation.<sup>259</sup> Justice Kennedy, writing for the majority, argued that a jail setting is not a police-dominated atmosphere and does not present the sort of compulsion that the *Miranda* warnings were designed to guard against.<sup>260</sup> Equating the facts in *Perkins* with using undercover agents to eavesdrop on suspects who are not in custody, 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."<sup>261</sup> Justice Kennedy's remarks, coupled with the similarity in the facts of *Perkins* and *Hebert*, led some Canadian commentators to compare the reasoning of the two decisions and conclude that the *Perkins* approach is more sensible than that used in *Hebert*.<sup>262</sup>

These Canadian commentators failed to recognize what may be a significant factual difference in the two cases. In *Hebert*, the suspect had not waived his right to counsel and had consulted with counsel prior to being placed in the jail cell. In *Perkins*, there was no evidence that the defendant had previously invoked his right to counsel or his right to silence. If *Perkins* had invoked his Fifth Amendment privilege, he might well have had to initiate the conversation before questioning would be permissible. As Justice Brennan pointed out in a footnote to his concurring opinion, "[n]othing in the court's opinion suggests that, had respondent previously invoked his Fifth Amendment

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investigate an individual charged with a crime. *Id.* at 179-80.

258. 496 U.S. 292 (1990).

259. *Id.* at 300.

260. *Id.* at 296-97.

261. *Id.* at 297.

262. See Michael Brown & Patrick Healy, *Hebert: A Constitutional Right to Silence - Two Comments*, [1990] 77 CRIM. REP. (3d) 194; Nick Lang, *Tales from Two Cells - Regina v. Hebert*, (1990) 4 KEEPING TABS: CRIMINAL JUSTICE BRANCH NEWSLETTER (B.C.) 3. Canadian Supreme Court Justice Iacobucci also expressed the opinion that in *Perkins*, the United States Supreme Court ruled that "Fifth Amendment rights do not prohibit surreptitious jailhouse conversations of the kind which this court found to violate § 7 in *Hebert*." *Broyles*, [1991] 3 S.C.R. at 610.

right to counsel or right of silence [as Hebert did], his statements would be admissible."<sup>263</sup>

Nevertheless, the reasoning of the majority in *Perkins* suggests that Perkins trusted the undercover agent at his peril and it was irrelevant whether he had previously invoked his Fifth Amendment right to counsel. To the extent that this is a correct interpretation of *Perkins*, the Canadian Court has gone beyond the Supreme Court of the United States in protecting the rights of suspects in situations where the police obtain confessions through undercover agents.

## 2. Questioning by Undercover Agents of Suspects Who are Neither Detained Nor in Custody

In *Regina v. Duarte*<sup>264</sup> and *Regina v. Wiggins*,<sup>265</sup> the Supreme Court of Canada permitted incriminating statements at trial when the confessions were obtained in violation of section 8 of the Charter. Section 8 protects privacy by ensuring that individuals are free from unreasonable searches and seizures.<sup>266</sup> In both cases, police officers surreptitiously recorded the suspects' conversations, relying on a statute permitting the interception of private communication without judicial authorization when the interception was made with the consent of the originator or intended recipient.<sup>267</sup> Neither Duarte nor Wiggins were in custody or detained when the conversations were recorded, so section 10(b) did not apply. The United States Supreme Court took a different position in *United States v. White*.<sup>268</sup> In *White*, the Court reasoned that the Fourth Amendment does not protect a wrongdoer's misplaced trust in an accomplice or a police agent.<sup>269</sup> Wrongdoers take the risk that anyone in whom they confide may report the conversation to the police.<sup>270</sup> It is mere speculation, the Court reasoned, to suggest that wrongdoers who suspect that their confidant was reporting to the police would change the nature of their utterances because they also suspected that the accomplice was recording the

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263. *Perkins*, 496 U.S. at 300 n.\* (Brennan, J., concurring).

264. [1990] 1 S.C.R. 30.

265. [1990] 1 S.C.R. 62.

266. Section 8 states: "Everyone has the right to be secure against unreasonable search or seizure." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 8.

267. Criminal Code, R.S.C., ch. C-46, § 178(11)(1) (1995). In *Duarte*, the monitoring took place in a hotel room, [1990] 1 S.C.R. at 31, and in *Wiggins*, the officer wore a "body pack." [1990] 1 S.C.R. at 65.

268. 401 U.S. 745 (1971).

269. *Id.* at 752.

270. *Id.*

conversation.<sup>271</sup> The Supreme Court of Canada explicitly rejected this risk analysis and held that the statute permitting the police to monitor conversations without prior judicial authorization violated section 8.<sup>272</sup> Nevertheless, the Court permitted the use of the taped conversations at trial on the ground that the officers acted in good faith, thinking the statutes were valid.<sup>273</sup>

The Justices did not characterize the conversations as emanating from the accused, but it is the type of evidence that has been automatically excluded when obtained in violation of sections 10(b) or 7.<sup>274</sup> Admitting the statements in *Duarte* and *Wiggins*, however, is consistent with the Court's fair trial policy. Because neither Duarte nor Wiggins was detained, they were not entitled to retain and instruct counsel, and they had no right to silence. Therefore, the values underlying sections 10(b) and 7—fairness of the trial and protection of the adversary system—were not harmed.<sup>275</sup>

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271. *Id.*

272. *Duarte*, [1990] S.C.R. at 49-54. The Crown attempted to save the statute under section 1 of the Charter. Section 1 provides that "[t]he 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." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. The limit is prescribed by law within the meaning of section 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. *Regina v. Therens*, [1985] 1 S.C.R. 613, 621; see also *Regina v. Oakes*, [1986] 1 S.C.R. 103, 104. The Court has invoked section 1 to save laws that otherwise violated the Charter. See, e.g., *Regina v. Skinner*, [1990] 1 S.C.R. 1235 (prostitution); *Regina v. Keegstra*, [1990] 3 S.C.R. 697 (hate laws); *Regina v. Hufsky*, [1988] 1 S.C.R. 621 (random traffic stop laws). In *Regina v. Thomsen*, [1988] 1 S.C.R. 640, the Court found a reasonable limit on the right to retain and instruct counsel without delay. A police officer made a formal demand on Thomsen to provide a breath sample for a roadside screening device. *Id.* at 641. The officer held Thomsen about fifteen minutes and at no time informed him of his right to retain and instruct counsel. *Id.* Thomsen was charged under section 234.1 (now section 238) of the Criminal Code, which makes it a criminal offense to refuse a demand by a peace officer to provide a sample of breath suitable for a roadside screening device. *Id.* The Court reasoned that because Thomsen was detained for the purposes of section 10(b), the statute's failure to provide for the right to counsel contravened the Charter. *Id.* at 648. The Court saved the statute under section 1, reasoning that roadside testing increased the likelihood of detecting impaired drivers and increased the perceived risk of detection that is essential to effective deterrence. *Id.*

273. *Duarte*, [1990] S.C.R. at 56-57. For a comparison of the good faith doctrines in Canada and the United States, see Harvie, *supra* note 58, at 791. For an analysis of the good faith doctrine in Canada, see Marilyn T. MacCrimmon, *Developments in the Law of Evidence: The 1986-87 Term*, 10 SUP. CT. L. REV. 225, 251-59 (1988); see also Paciocco, *Judicial Repeal*, *supra* note 21, at 333; P. Michael Bolton & Chris Tollefson, *The Exclusion of Real Evidence Under § 24(2) of the Charter*, 48 ADVOC. 343, 350-51 (1990).

274. Paciocco, *Judicial Repeal*, *supra* note 21, at 361; see also Harvie & Foster, *Different Drummers, Different Drums*, *supra* note 115, at 55.

275. Privacy is the underlying value protected by section 8. A violation of an individual's privacy will rarely affect the fairness of the trial because the Canadian Court has developed a

## IV. CONCLUSION

In Canada, although the courts continue formally to confine the self-incrimination principle to trial, it is now clear that the purpose of the warnings prescribed in section 10(b) and the right to silence in section 7 of the Charter is to protect a defendant's right against self-incrimination. The failure of the police to advise suspects of their right to retain and instruct counsel without delay or their failure to respect suspects' right to silence "generates an identical sort of evidence: self-incriminatory statements that would not have been made but for the violation."<sup>276</sup> Protecting the right against self-incrimination, in turn, fosters "the principles of adjudicative fairness."<sup>277</sup>

This fairness policy is similar to the fair trial policy found by the Court in section 24(2).<sup>278</sup> It is unfair to permit the use of the statement because "the accused is placed in the invidious position of having to take the stand, contrary to the privilege against self-incrimination, in order to disclaim the confession."<sup>279</sup> The coupling of the policies underlying sections 10(b) and 7 with section 24(2) ensures that confessions obtained in violation of the right to counsel and the right to silence are automatically excluded from trial. The impact of the fair trial policy is further highlighted by the willingness of the Court to allow into evidence confessions or statements obtained in violation of section 8. The underlying privacy value protected by

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hierarchy of privacy interests. In *Hunter v. Southam*, [1984] 2 S.C.R. 145, the Court suggested that where the interest involved was the protection of bodily integrity, the standard governing the search may be higher than reasonable grounds. *Id.* at 168. In a later decision, the Court suggested that "a violation of the sanctity of a person's body is much more serious than that of his office or even his home." *Regina v. Pohoretsky*, [1987] 1 S.C.R. 945, 949. In *Regina v. Dymnt*, [1988] 2 S.C.R. 417, a physician held a vial under Mr. Dymnt's free-flowing wound in order to collect a blood sample for medical purposes. *Id.* at 417-18. The police neither requested a sample nor knew one had been taken. *Id.* at 418. When the doctor spoke to the investigating officer, he handed over the sample. *Id.* Nevertheless, the Court held that the police officers had violated section 8 when they obtained the sample and that admitting the evidence at trial would bring the administration of justice into disrepute because the seizure of the blood sample violated the personal autonomy of Mr. Dymnt. *Id.* at 422. In *Regina v. Dersch*, [1993] 3 S.C.R. 768, the Court held that a blood sample taken by a physician without the accused's consent and without knowledge of the police, but later obtained by the police without a search warrant, violated section 8. *Id.* at 778. The Court excluded the evidence from trial because of the seriousness of the police violation and the importance of guarding against a free exchange of information between health care professionals and police. *Id.* at 779. These cases suggest that the protection of bodily integrity rests at the pinnacle of the hierarchy of privacy interests.

276. *Regina v. Hebert*, [1990] 2 S.C.R. 151, 207.

277. *Regina v. Clarkson*, [1986] 1 S.C.R. 383, 394.

278. See *supra* text accompanying notes 70-72.

279. *Hebert*, [1990] 2 S.C.R. at 207.



section 8 neither impugns the privilege against self-incrimination nor impacts upon the fairness of the trial.<sup>280</sup>

Prior to 1982, the Supreme Court of Canada eschewed any relationship between the doctrine of self-incrimination and pre-trial confessions and excluded only those confessions that were obtained involuntarily.<sup>281</sup> The enactment of the Charter, together with a few years of jurisprudence, has altered the relative positions of the Supreme Court of Canada and the United States Supreme Court on issues surrounding confessions. While the American Court has continued its uneven assault on the *Miranda* doctrine, the Supreme Court of Canada has embarked on a different course in its interpretation of sections 10(b) and 7. The Canadian Court has steadfastly maintained that the purpose of sections 10(b) and 7 is to ensure that defendants are treated fairly. To this end, it has defined the term "detention" in section 10 broadly, has not grafted exceptions onto sections 10(b) and 7 once the right to counsel and silence have attached,<sup>282</sup> and has not loosened the waiver requirements of section 10(b) substantially.<sup>283</sup> The result of the Court's rigid adherence to the requirements and purposes of sections 10(b) and 7 and their close relationship to the policies underlying section 24(2), is that when constables blunder in obtaining confessions, the Supreme Court of Canada is likely to exclude those confessions from trial in situations where the United States Supreme Court would not.

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280. There may, of course, be situations where the behavior of the police in violating section 8 was so outrageous that the confession or statement will be excluded.

281. There are a few pre-Charter references to a connection between the confession rule and the privilege against self-incrimination. See, e.g., *Regina v. Wray*, [1971] 1 S.C.R. 272, 279 (Spence, J. & Cartwright, C.J.); *Piche v. The Queen*, [1971] S.C.R. 23, 36 (Cartwright, C.J.); *DeClercq v. The Queen*, [1968] S.C.R. 902, 905-06 (Hall & Pigeon, J.J.). But as Ratushny points out, these references are mostly in dissenting judgments and are "tenuous in nature." RATUSHNY, *supra* note 7, at 62.

282. In *New York v. Quarles*, 467 U.S. 649 (1984), the Supreme Court of the United States adopted a public safety exception to the *Miranda* doctrine. *Id.* at 652. The Supreme Court of Canada has hinted that urgency or necessity in questioning a detainee may be used to admit the confession under section 24(2) even though the statement was obtained in violation of section 10(b). *Regina v. Elshaw*, [1991] 3 S.C.R. 24, 41; *Regina v. Clarkson*, [1986] 1 S.C.R. 383, 390. And, of course, defendants must be "duly diligent" in acting upon their rights. *Regina v. Smith*, [1991] 1 S.C.R. 714, 723.

283. *Contra Regina v. Whittle*, [1994] 2 S.C.R. 914, 942 (adding additional awareness of consequences test).