

# Zigzags On Rights of Accused: Brittle Majorities Manipulate Weasel Words of Dialogue, Difference, and Chapter Values

Don Stuart

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

## Citation Information

Stuart, Don. "Zigzags On Rights of Accused: Brittle Majorities Manipulate Weasel Words of Dialogue, Difference, and Chapter Values." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 20. (2003).  
<http://digitalcommons.osgoode.yorku.ca/sclr/vol20/iss1/11>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

# ZIGZAGS ON RIGHTS OF ACCUSED: BRITTLE MAJORITIES MANIPULATE WEASEL WORDS OF DIALOGUE, DEFERENCE, AND CHARTER VALUES

Don Stuart\*

## I. OVERVIEW

Four of the most significant Charter<sup>1</sup> decisions from the Supreme Court respecting criminal justice over the past year were *Golden* (December 6, 2001: constitutional standards for strip searches), *Shearing* (July 6, 2002: defence right to cross-examine on a diary), *Hall* (October 10, 2002: denying bail to maintain public confidence constitutional) and *Sauvé* (October 31, 2002: federal prisoners' right to vote not to be restricted).

In each of these decisions the Supreme Court was deeply divided. This paper examines and then comments on the sharp divides in each case. It is also suggested that some of the reasoning places too much reliance on “weasel words” such as “dialogue,” “deference,” and “Charter values.” This stance may well be provocative as the Concise Oxford Dictionary<sup>2</sup> defines a “weasel word” as a “word that is intentionally ambiguous or misleading”! *Shearing* raises wider issues of how to balance competing rights; here the Charter rights of the accused to a fair trial with the privacy and equality rights of complainants in sexual assault cases. It will be suggested that the majority of the Court has importantly recalibrated its approach. Finally this paper concludes with some general observations about voting patterns and inconsistency on the Supreme Court and expresses concern that some members of the Supreme Court show little interest in the protection of fundamental rights of the accused.

---

\* Professor, Faculty of Law, Queen's University.

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>2</sup> 9th ed., 1995, at 1587.

## II. *R. v. GOLDEN*<sup>3</sup> (CHARTER STANDARDS FOR STRIP SEARCHES)

A detailed understanding of the sordid facts are key to an understanding of the ultimate 5-4 divide in the Supreme Court in this case.

In an effort to detect illegal drug activity in an area where trafficking was known to occur, police officers set up an observation post in an unoccupied building across from a sandwich shop. Using a telescope, an officer observed the accused giving a white substance to persons entering the shop. The officer believed that the accused was trafficking cocaine given the place and manner of the transactions. He instructed four “takedown” officers to make arrests. The accused and two others were arrested. During the arrests, the police found what they believed to be crack cocaine under the table where one of the suspects was arrested. The accused was observed to be crushing what appeared to be crack cocaine between his fingers.

Following the arrests, a police officer conducted a “pat-down” search of the accused. He did not find any weapons or narcotics. The officer then decided to conduct a visual inspection of the accused’s underwear and buttocks on the landing at the top of the stairwell leading to basement public washrooms. The officer undid the accused’s pants and pulled them back along with his long underwear. The officer saw a clear plastic wrap protruding from between the accused’s buttocks, as well as a white substance within the wrap. The officer testified that when he tried to retrieve the plastic wrap, the accused “hip-checked” and scratched him so that he nearly fell down the stairs. The officer then pushed the accused into the stairwell, face-first.

The accused was then escorted to a seating booth at the back of the shop. Patrons were asked to leave, but the other two accused, five officers, and a shop employee remained inside. The officers forced the accused to bend over a table. His pants were lowered to his knees and his underwear were pulled down. The officers tried to seize the package from his buttocks, but were unsuccessful as the accused continued to clench his muscles very tightly. Following these attempts, the accused accidentally defecated. The package did not dislodge. An officer then retrieved a pair of rubber dishwashing gloves used to clean the washrooms and toilets, and again tried to remove the package. The accused was facedown on the floor, with another officer holding down his feet. The officers told him to relax. Once he did the officers were able to remove a package which was found to contain 10.1 grams of crack cocaine with a street value of between \$500 and \$2000. The accused was placed under arrest for possession of a narcotic for the purpose of trafficking and for police assault. He was taken

---

<sup>3</sup> (2001), 47 C.R. (5th) 1 (S.C.C.).

to a police station, located about a two-minute drive away. There he was strip-searched again, fingerprinted, and detained pending a bail hearing.

Defence arguments that the strip searches on the steps and in the restaurant violated section 8 were rejected by the trial judge and summarily by the Ontario Court of Appeal in a brief endorsement judgment. The Supreme Court, however, granted leave to appeal. A 5-4 majority of the Court then found that section 8 had been violated.

**1. Majority** (*per* Iacobucci and Arbour, Major, Binnie and LeBel JJ. concurring)<sup>4</sup>

The majority considered it to be unquestionable that strip searches represent a significant invasion of privacy and are often a humiliating, degrading, and traumatic experience for individuals subject to them. The Court declared a number of new minimum standards for strip searches conducted incident to lawful arrest:

- Searches cannot be carried out simply as a matter of routine policy;
- Searches cannot be carried out abusively or for the purpose of humiliating or punishing the arrestee;
- The police must have reasonable and probable grounds to justify a strip search;
- Searches must be conducted in a reasonable manner;
- Searches should be conducted at the police station except where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers, or other individuals.

The majority nevertheless suggested<sup>5</sup> that legislative intervention could be an important addition to the guidance the Court was setting out. Clear legislative prescription as to when and how strip searches should be conducted would be of assistance to the police and to the courts.

While in this case the arrest was lawful on reasonable and probable grounds and the strip searches were related to the purpose of the arrest, the majority held that the Crown had failed to prove that the strip searches on the steps and in the restaurant had been necessary and urgent. The strip search in the restaurant was also held to have been carried out in an unreasonable manner. The following

---

<sup>4</sup> *Id.*, at paras. 23-120.

<sup>5</sup> *Id.*, at para. 103.

questions,<sup>6</sup> which drew upon the common law principles as well as the statutory requirements set out in English legislation, would provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the Charter:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

According to the majority in *Golden* the accused was not given the opportunity in the restaurant to remove his own clothing, the strip search was conducted without notice to, or authorization from, a senior officer, and the search was carried out in a manner that may have jeopardized the accused's health and safety. Where the circumstances of a search require the seizure of material located in or near a body cavity, the individual being searched should either be given the opportunity to remove the material himself or herself, or the advice and assistance of a trained medical professional should be sought to ensure that the material could be safely removed. There was no requirement that the ac-

---

<sup>6</sup> *Id.*, at para. 101.

cused cooperate in an exercise that constituted a violation of his or her Charter rights. In this case, the accused's refusal to relinquish the evidence did not justify or mitigate the fact that he was strip-searched in a public place, and in a manner that showed considerable disregard for his dignity and his physical integrity, in the absence of reasonable and probable grounds or exigent circumstances.

Since the accused had already served his 14-month sentence in full, and because the courts below did not engage in a subsection 24(2) analysis, the majority declared<sup>7</sup> that it was neither necessary nor useful to determine whether the evidence deriving from the illegal strip search should have been excluded at trial. An acquittal was the proper result.

**2. Dissent** (*per* Bastarache J., McLachlin C.J. and Gonthier J. concurring<sup>8</sup> and L'Heureux-Dubé J., in a short concurring opinion)<sup>9</sup>

Justice Bastarache expressed profound disagreement with these new standards. In his view, the majority was wrong to require police to prove that they had reasonable and probable grounds to justify a strip search. The existing common law rule requiring that police demonstrate an objectively valid reason for the arrest rather than for the search is consistent with section 8 of the Charter provided that the strip search was for a valid objective and is not conducted in an abusive fashion. According to Bastarache J., the discovery of evidence should not be postponed to a time when the search can take place at a police station. The fear that evidence may be destroyed or lost before arriving at the police station was genuine. Police officers are not always close to a station; they operate in remote areas and are often alone. In the view of the minority the proposed rule that all strip searches proceed at a police station absent exigent circumstances should be left to Parliament. Furthermore, by stating that exigent circumstances will exist only where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten safety, the majority had abolished the right to search for evidence upon arrest. In doing so, they had drawn an unprecedented and unworkable distinction between the objective of discovering and preserving evidence and the objective of searching for weapons or other objects that could threaten safety.

According to Bastarache J. the majority was "excessive to adopt foreign legislation" (referring to the majority's reliance on English statute law).<sup>10</sup> Dis-

---

<sup>7</sup> *Id.*, at paras. 118-19.

<sup>8</sup> *Id.*, at paras. 1-21.

<sup>9</sup> *Id.*, at para. 22.

<sup>10</sup> *Id.*, at para. 8.

agreement was also expressed with the majority's views of the need for authorization by a senior officer, and emphasis on the unilateral decision of officers, the danger to health and safety, and the failure of the police to give the accused the opportunity to remove his own clothing.

The dissenters did, however, find a section 8 violation in the strip search at the restaurant but went on to hold that the evidence should not have been excluded under subsection 24(2).

### 3. Comment<sup>11</sup>

#### (a) *Standards or Deference?*

There is certainly room for debate on whether the majority went too far in setting out Charter standards for strip searches. Some of the Court's pronouncements such as the need for authorization by a superior officer, may be impractical in remote areas, as Bastarache J. suggests. However Bastarache J. shows little respect for the Court's role as "guardian of the Constitution"<sup>12</sup> in suggesting that standards for strip searches be left to Parliament. This position takes deference to a new level that does little to validate entrenched Charter rights. Strip searches are highly intrusive and had become very much part of the landscape of the Canadian criminal justice system. Parliament had chosen not to intervene despite recommendation from the Law Reform Commission as early as 1985.<sup>13</sup> This is typical of the ever-increasing law-and-order slant of politicians of all stripes who see the promise of few votes from being soft on crime and amending the law to favour the accused. It was high time for the Supreme Court to assert section 8 standards. Justice Bastarache also suggests that it was inappropriate for the majority to rely on standards laid out in legislation from the United Kingdom. It is not clear why it was improper for the majority to have developed its standards by looking to the law of other jurisdictions — regardless of whether this law was found in court decisions or in legislation.

---

<sup>11</sup> See further Eric V. Gottardi, "The *Golden Rules*: Raising the Bar Regarding Strip Searches Incident to Arrest" (2002), 47 C.R. (5th) 48.

<sup>12</sup> *Hunter v. Southam Inc. (sub nom. Canada (Director of Investigations & Research, Combines Investigation Branch) v. Southam)* (1984), 41 C.R. (3d) 97, at 110-11 (S.C.C.).

<sup>13</sup> Report no. 25, *Obtaining Forensic Evidence* (1985).

(b) *No Remedy of Exclusion of Evidence*

*Golden* is disappointing on the issue of remedy. The majority ducked the issue of whether the Charter breaches should lead to the exclusion of evidence; the Court was content to regard the issue as moot. Even though the minority found that the strip search in the restaurant breached section 8, Bastarache J. spoke against exclusion. He reasoned<sup>14</sup> that the evidence was not conscripted and otherwise discoverable. The search was quite intrusive but the actions of the accused led to a diminished expectation of privacy. Exclusion would have a more serious impact on the repute of the administration of justice than admission. Drug trafficking is recognized as a serious crime.

I have argued elsewhere in an article entitled “Eight Plus Twenty-Four Two Equals Zero”<sup>15</sup> that the trend of inclusion by the Supreme Court and Courts of Appeal in non-conscripted cases, and drug cases in particular, will sterilize section 8 protection against unreasonable search or seizure. A recent electronic survey of post-*Stillman*<sup>16</sup> subsection 24(2) cases at all levels of court has, however, found that the level of exclusion of non-conscripted evidence has risen to 50 per cent, even in drug cases. The message now is “Eight Plus Twenty-Four Two Equals Zero-Point Five!”<sup>17</sup> One hopes that this is an area in which the Supreme Court will follow the experience of trial judges who are finding it necessary to give section 8 teeth by excluding non-conscripted evidence where the violation is seen as serious.<sup>18</sup> Many commentators and judges see the Supreme Court’s *Stillman* approach of virtually automatic exclusion of conscripted evidence as bad policy and inimical to the discretion set out in subsection 24(2).<sup>19</sup> It is widely anticipated that the present differently composed Supreme Court is poised to return the subsection 24(2) jurisprudence to a discretionary exercise. Hopefully the focus will be on seriousness of the violation rather than seriousness of the offence. Unless there is a real risk that evidence may be excluded when obtained in violation of the Charter, Charter standards for law enforcement will have little effect or meaning. Too much reliance on

---

<sup>14</sup> *Golden*, *supra*, note 3, at paras. 17-20.

<sup>15</sup> (1998), 13 C.R. (5th) 50.

<sup>16</sup> *R. v. Stillman* (1997), 5 C.R. (5th) 1 (S.C.C.).

<sup>17</sup> Nathan J.S. Gorham, “Eight Plus Twenty-Four Two Equals Zero-Point Five” (2003), 6 C.R. (6th) 257.

<sup>18</sup> The decision in *R. v. Law* (2002), 48 C.R. (5th) 199 (S.C.C.) was a step in that direction. See now the blockbuster unanimous ruling in *R. v. Buhay* (2003), 174 C.C.C. (3d) 97 (S.C.C.) to exclude non-conscripted evidence of marijuana.

<sup>19</sup> See Stuart, *Charter Justice in Canadian Criminal Law* (3d. ed., 2001), at 516-20 for further discussion and analysis of views of critics such as Ron Delisle and David Paciocco.

the factor of seriousness of the offence will also leave the irony that the Charter will have effect only in less important cases.<sup>20</sup>

### III. *R. v. SHEARING*<sup>21</sup> (RIGHT TO CROSS-EXAMINE ON COMPLAINANT'S DIARY)

The accused was charged with 20 counts of sexual offences alleged to have occurred between 1965 and 1989. The accused was the leader of a cult. He preached that sexual experience was a way to progress to higher levels of consciousness and that he, as cult leader, could be instrumental in enabling young girls to reach these higher levels. Two of the complainants were sisters who lived in a group home. One, KWG, kept a daily diary for eight months in 1970. The day-to-day entries covered part of the 10-year period when she alleged sexual abuse by the accused. When the complainant left the group home her mother put some of her belongings in a cardboard box in the storage area shared with other residents. About 18 months later, after the accused had been indicted, another resident of the house opened the cardboard box, found the complainant's diary, and gave it to the defence.

At trial, the defence sought to use the diary to contradict the complainant on the basis of entries arguably inconsistent with her evidence-in-chief, and to show the absence of any entry chronicling physical or sexual abuse. The complainant objected to the defence's use of the diary, and at the *voir dire* into its admissibility, she asserted a privacy interest. The trial judge permitted the accused to use the diary to cross-examine the complainant on entries that the defence considered probative but did not permit cross-examination on the issue surrounding the absence of any entries recording physical abuse by the complainant's mother or sexual abuse by the accused. The trial judge refused to allow cross-examination of the complainant's diary regarding the fact there was no mention of the alleged abuse. The trial judge applied the *O'Connor*<sup>22</sup> principles respecting production of therapeutic and other records of complainants. Justice Donald for the British Columbia Court of Appeal approved the trial judge's decision and approach with these words:

---

<sup>20</sup> The New Zealand Court of Appeal has recently abandoned its rule of *prima facie* exclusion and favoured a discretionary balancing exercise relying in proportionality: *R. v. Shaheed*, [2002] 2 N.Z.L.R. 377 (C.A.). In the United Kingdom, however, David Ormerod, "ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?" (2003) *Crim. L. Rev.* 67, is a strong advocate of *prima facie* exclusion for breaches of Art. 8 of the European Convention on Human Rights occurring in a criminal investigation.

<sup>21</sup> (2002), 2 C.R. (6th) 213 (S.C.C.).

<sup>22</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411.

*Mills*<sup>23</sup> has shifted the balance away from the primary emphasis on the rights of the accused. The decision requires a reconsideration of the position of the complainant, and in particular the equality rights of the complainant, so as to effectively guard against procedures which deny complainants equal access to and benefit of the law.<sup>24</sup>

When the matter reached the Supreme Court the Court divided 7-2 on this issue.<sup>25</sup> The majority held that the trial judge ought to have allowed the cross-examination and ordered a new trial on this count for which the accused had been convicted.

**1. Majority**<sup>26</sup> (*per* Binnie J., McLachlin C.J., Iacobucci, Major, Bastarache, Arbour and LeBel JJ. concurring)

According to Binnie J., the view in the British Columbia Court of Appeal that the balance had shifted from the rights of accused to the equality rights of complainants was wrong “even in terms of *production* of third party documents.”<sup>27</sup> The trial judge had also wrongly applied the *O'Connor* approach to this context of cross-examination on a diary in the hands of the accused. Counsel for the complainant at trial and Women’s Legal Education and Action Fund (LEAF) had argued that the machinery of sections 278.1 to 278.9 can be put into reverse; that is, it contemplates taking documents already in the hands of the defence and restoring these to the complainant thus requiring the defence to make a fresh application for the document just removed from its possession. According to Binnie J. this interpretation was unduly contrived and did violence to the statutory language. *O'Connor* was held to have no application to the issue of the admissibility at trial which was to be determined by principles laid down in *Seaboyer*<sup>28</sup> and *Osolin*.<sup>29</sup> A simple “balancing of interests” test as needed in *O'Connor* cannot be equated to “substantially outweighs” as described in *Seaboyer* and *Osolin*. According to Binnie J., under *O'Connor* the default position is that the third-party information is not produced to the defence. Under *Seaboyer* and *Osolin*, the default position is that the defence is allowed to proceed with its cross-examination. The issue was seen to be whether the potential probative value of a cross-examination on the diary “sub-

---

<sup>23</sup> *R. v. Mills*, [1999] 3 S.C.R. 668.

<sup>24</sup> *R. v. Shearing* (2000), 143 C.C.C. (3d) 233, at para. 93 (B.C.C.A.).

<sup>25</sup> The Court was unanimous that similar evidence had been properly admitted.

<sup>26</sup> *Shearing*, *supra*, note 21, at paras. 75-151.

<sup>27</sup> *Id.*, at para. 132.

<sup>28</sup> *R. v. Seaboyer* (1991), 7 C.R. (3d) 289 (S.C.C.).

<sup>29</sup> *R. v. Osolin* (1993), 26 C.R. (4th) 1 (S.C.C.); considered in *Shearing*, *supra*, note 21, at para. 133.

stantially outweighed” privacy and fairness considerations with respect to the third party and whether cross-examination on the absence of entries related to abuse relied on “her ‘rape myths’ or the equivalent.”<sup>30</sup>

If the trial judge had properly directed himself on the *Osolin* test he would have reached a different result. The conclusion was reached that, viewed from the *Osolin* perspective, the nature and scope of KWG’s diary did not raise privacy or other concerns of such importance as to “substantially outweigh” the appellant’s fair trial right to cross-examine on the diary (both the selected entries permitted by the trial judge and the absence of entries) to test the accuracy and completeness of KWG’s recollection of events 27 years previously.<sup>31</sup>

In the course of his judgment, Binnie J. saw cross-examination on the absence of reference to abuse as a high-risk tactic for the defence capable of generating “some devastating answers, to put it mildly.” However, the accused considered pursuit of that point to be crucial to his defence.<sup>32</sup>

## 2. Dissent<sup>33</sup> (*per* L’Heureux-Dubé J., Gonthier J. concurring)

The majority was wrong in deciding that the defence should have been permitted to question KWG on the absence of reference to abuse in her diary. First, the trial judge should have ordered the diary returned to KWG, its rightful owner, and then required the accused to seek its production through the appropriate statutory channels. Second, even if the accused had acquired the diary through the proper channels in the first place, the prejudicial effect of the proposed line of questions on the absence of entries substantially outweighed its probative value.

The test for admissibility of defence evidence was indeed whether the prejudicial effect of that evidence substantially outweighed its probative value. In weighing prejudicial and probative value, the trial judge had, however, to consider not only the accused’s right to full answer and defence, but also the importance of the complainant’s and other witnesses’ privacy and equality rights. In this case, the cross-examination would have introduced such a high potential of prejudice that it substantially outweighed the minimal probative value of questions concerning the absence of entries in the complainant’s diary. It could hardly be doubted, said L’Heureux-Dubé J., that a teenager’s personal diary is high on the spectrum of records in which one has a privacy interest.

---

<sup>30</sup> *Shearing, id.*, at para. 109.

<sup>31</sup> *Id.*, at para. 150.

<sup>32</sup> *Id.*, at para. 114.

<sup>33</sup> *Id.*, at paras. 164-85.

Proper consideration of the complainant's equality rights also required an appreciation of myths and stereotypes in the context of sexual violence. Allowing questioning on the absence of the mention of sexual assault in the diary would be to endorse the same discriminatory beliefs that underlined the "recent complaint" myth. The recent complaint myth suggests that the presence of certain emotional reactions and the immediate reporting of the assault, despite all of the barriers that might discourage such reports, lend credibility to the assault report, whereas the opposite reactions lead to the conclusion that the complainant must be fabricating the event.

The defence was required to demonstrate a valid reason for its proposed line of questioning. The majority position was that the absence of any entries relating to physical or sexual abuse was potentially of probative value, depending on the complainant's responses. Accordingly, the complainant should have been called on to give these responses before the jury. This determination should take place in a *voir dire* rather than in front of the jury.

In the case at bar, the prejudicial effect was very high, while the probative value was, at best, minimal. The diary is an intimate record of the complainant's life during the period of time at issue, and the proposed line of cross-examination would necessarily open up much of the diary's contents to scrutiny.

Besides constituting a wide-ranging violation of the complainant's privacy rights, the proposed cross-examination also had potential equality implications, as victims would naturally be loath to report sexual assaults if they feared that their entire private lives would be intensely scrutinized at trial.

### 3. Comment

#### (a) *Balancing Rights of Accused Against Complainants' Interests*

The *Shearing* ruling that cross-examination should have been permitted regarding the lack of reference to abuse in the diary of a complainant in a sexual assault trial appears to recalibrate the balance between the rights of accused and those of complainants in sexual assault cases. The new tilt is in the direction of full answer and defence for accused.

It is important to recall the major rulings in *O'Connor*<sup>34</sup> and *Mills*.<sup>35</sup> In the context of access by accused to therapeutic and other records of complainants in sexual assault cases, all justices of the Supreme Court in *O'Connor* recognized that complainants had enforceable privacy rights under sections 7 and 8.

---

<sup>34</sup> *Supra*, note 22.

<sup>35</sup> *Supra*, note 23.

A 5-4 majority did not speak of equality rights under section 15 and therefore implicitly rejected them. In *Mills* the Court unanimously recognized, as did Parliament in its new statutory regime to control access to records of complainants, the need to balance against rights of accused the privacy and equality rights of complainants.

The recognition of equality rights in *Mills* was accomplished by reliance on a passing reference to equality rights for complainants in *Osolin* and without reference to the new multiple part section 15 test the Court had recently adopted for equality rights in *Law v. Canada (Minister of Employment and Immigration)*.<sup>36</sup> The Court in *Mills* emphasized that there was no hierarchy of rights, relying once again on Lamer C.J.'s pronouncement to this effect in *Dagenais v. Canadian Broadcasting Corporation*.<sup>37</sup>

(b) *Equality Values Rather Than Equality Rights*

In the majority judgment in *Shearing* there is no mention of the principle that there is no hierarchy of rights and the language of privacy and equality rights for complainants seems to be deliberately softened to that of "interests"<sup>38</sup> and "values."<sup>39</sup>

*Shearing* appears to decide that, where rights of accused and privacy and equality concerns clash in the context of a trial, it is the rights of accused that must be given priority. In the trial context we appear to be squarely back to the controversial balancing of values expressed by the majority in *Seaboyer*. Justice McLachlin (as she then was) in that case indicated that although complainants had privacy and equality concerns, the line had to be drawn short of the point that resulted in an unfair trial and the possible conviction of an innocent person.

That there is a difference in approach is very clear on a comparison of the dissenting opinion of L'Heureux-Dubé J. in *Shearing*. Privacy and equality rights of complainants are strongly asserted with a very different result. Justice L'Heureux-Dubé indeed appears to go as far as resisting any form of cross-examination on the diary.

The general approach of the majority in *Shearing* is to be applauded. In the context of a criminal trial that focuses on just punishment of the person charged rather than compensation of complainants, it is the rights of accused that must be given priority. Inconsistent rights cannot be "balanced." Like Donald J. of the British Columbia Court of Appeal, I read *Mills* to hold very clearly that the

---

<sup>36</sup> [1999] 1 S.C.R. 497.

<sup>37</sup> [1994] 3 S.C.R. 835.

<sup>38</sup> *Supra*, note 21, at para. 98.

<sup>39</sup> *Supra*, note 21, at para. 107.

rights of the accused had to be weighed equally against the privacy and equality rights of complainants. Under that view, the accused in a sexual assault case would have diminished rights.<sup>40</sup> The majority in *Shearing* goes out of its way to backtrack and reinforce the view that even those charged with the heinous offence of sexual assault must have a fair trial. The Court here implicitly abandons the view that there is no hierarchy of rights. Some rights are more important than others. That is also the position of the South African Constitutional Court in interpreting its Bill of Rights.<sup>41</sup>

I have suggested elsewhere<sup>42</sup> that it was unprincipled and polemic for the Court in *Mills* to assert equality rights for complainants without addressing the *Law* tests, which require careful analysis of comparator groups and the existence of discrimination on enumerated or analogous grounds before a section 15 claim is established. The result was constitutional rights for one type of victim with uncertain practical consequences, which could have lead, for example, to an argument for a right for complainants to be represented throughout a sexual assault trial.

(c) *Myths and Stereotypes*

The Court in *Shearing* now speaks more softly of the need in sexual assault trials to avoid arguments based on myths and innuendo. That attitude is demanded by policy concerns for complainants but is of a quite different order to an enforceable section 15 right.

On the issue before the Court there is room to argue that the majority may not have sufficiently validated privacy issues in a matter as personal as a diary or indeed properly refuted the dissenting opinion that the discriminatory doctrine of recent complaint was really behind what the defence was trying to do. Perhaps the analogy of the recent complaint myth is strained given that this diary had been maintained for eight months.

Justice L'Heureux-Dubé is certainly persuasive in suggesting that whether the defence counsel could cross-examine on the absence of reference to abuse in the diary was properly a matter for the judge not the jury.

Despite such misgivings, the larger import of *Shearing* is that a 7-2 majority has been bold enough, in the emotive context of sexual assault, to reassert the pre-eminence of a right to full answer and defence.

---

<sup>40</sup> The majority view in *Shearing* appears to support the interpretation of Stephen Coughlan, "Complainants Records After Mills: Same As It Ever Was" (2000), 33 C.R. (5th) 300, that the Court in *Mills* had allowed for considerable discretion to favour the rights of accused.

<sup>41</sup> *S. v. Makwanyane* 1995 (6) BCLR 8665 (CC) at para. 104, in which the 11 justices were unanimous in striking down the death penalty.

<sup>42</sup> *Charter Justice*, *supra*, note 19, at 37-40.

#### IV. *R. v. HALL*<sup>43</sup> (DENYING BAIL TO MAINTAIN PUBLIC CONFIDENCE)

The Charter issue in *Hall* was the constitutionality of the separate ground in subsection 515(10)(c) of the *Criminal Code*<sup>44</sup> for denying bail that Parliament had enacted in 1997. That section authorized detention on:

any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission, and the potential for a lengthy term of imprisonment.

This ground had replaced the ground for denial of bail "in the public interest," which the majority of the Supreme Court had declared unconstitutional in *Morales*.<sup>45</sup>

In *Hall* the Supreme Court was unanimous in ruling that the opening phrases "on any other just cause being shown and, without limiting the generality of the foregoing" were too general to survive Charter challenge and had to be struck down. The division in the Court came with the further 5-4 ruling that the remainder of the provision allowing for detention to "maintain confidence in the administration of justice" could survive Charter challenge.

The context of *Hall* was a horrifying murder. In 1999, a woman's body was found with 37 slash wounds to her hands, forearms, shoulder, neck and face. It appeared her assailant had attempted to decapitate her. The murder received much media attention and caused significant public concern and a general fear that a killer was at large. Based on compelling physical and other evidence linking the accused to the crime, he was charged with first degree murder. He applied for bail.

The bail judge held that pre-trial detention was not necessary "to ensure attendance in court" under subsection 515(10)(a) of the *Criminal Code* nor for the "safety of the public" under subsection 515(10)(b). He held, however, that detention was necessary to "maintain confidence in the administration of justice" under subsection 515(10)(c) in view of the highly charged aftermath of the murder, the strong evidence implicating the accused, and the other factors referred to in subsection (c). The 5-4 majority upheld this decision.

---

<sup>43</sup> (2002), 4 C.R. (6th) 197 (S.C.C.).

<sup>44</sup> R.S.C. 1985, c. C-46.

<sup>45</sup> *R. v. Morales*, [1992] 3 S.C.R. 711.

**1. Majority**<sup>46</sup> (*per* McLachlin C.J., L'Heureux-Dubé, Gonthier, Bastarache and Binnie JJ. concurring)

According to the Chief Justice any bail provision that confers open-ended judicial discretion to refuse bail is unconstitutional. It was a fundamental principle of justice that an individual cannot be detained by virtue of a vague legal provision. However, according to the majority, the portion of subsection 515(10)(c), which permits denial of bail where necessary to maintain confidence in the administration of justice, having regard to four specified factors, was neither unduly vague nor overbroad.

As to vagueness it gave sufficient guidance for legal debate. The ground was much narrower and more precise than the old public interest ground that was struck down as vague in 1992. It relied on concepts held to be justiciable and offered considerable precision.

As for overbreadth, the means chosen did not go further than necessary to achieve Parliament's purpose of maintaining public confidence in the bail system and the justice system as whole, and Parliament had hedged the provision with important safeguards.

The Chief Justice saw the provision as representing a separate and distinct basis for bail denial not covered by the other two categories of flight risk and public safety in subsections (a) and (c). It was neither superfluous nor unjustified. It served a very real need to permit a bail judge to detain an accused pending trial for the purpose of maintaining the public's confidence if the circumstances of the case so warranted. Without public confidence, the bail system and the justice system generally stood compromised. Denial of bail "to maintain confidence in the administration of justice" having regard to the factors set out in subsections 515(10)(c) complied with Charter section 11(e)'s requirement that there be no denial of bail without just cause.

According to McLachlin C.J., this was an "excellent example"<sup>47</sup> of the courts' constitutional dialogue with Parliament.

**2. Dissent**<sup>48</sup> (*per* Iacobucci, Major, Arbour and LeBel JJ. concurring)

For Iacobucci J., liberty is at the heart of a free and democratic society and our justice system must minimize unwarranted denials of that liberty. In the criminal law context, this freedom is embodied generally in the right to be presumed innocent until proven guilty and specifically in the right under section 11(e) of the Charter not to be denied reasonable bail without just cause. It

---

<sup>46</sup> *Hall, supra*, note 43, at paras. 13-46.

<sup>47</sup> *Id.*, at para. 43.

<sup>48</sup> *Id.*, at paras. 59-129.

was impossible to justify the sweeping discretion to abrogate liberty that subsection 515(10)(c) affords and it should be struck down in its entirety.

In *Morales*<sup>49</sup> the Supreme Court held that a restriction on the section 11(e) right to bail will be valid if it meets the following two conditions:

- (1) bail is denied only in a narrow set of circumstances; and
- (2) the denial of bail is necessary to promote the proper functioning of the bail system, and is not undertaken for any purpose extraneous to the bail system.<sup>50</sup>

Subsection 515(10)(c) did not, in the view of the dissent, meet these constitutional requirements. Fear that a bail judge would be unable to protect the public without the subsection 515(10)(c) ground was without reasonable foundation. There was no evidence that the bail system was lacking in any way before the introduction of the provision in 1997, five years after the “public interest” ground for denying bail had been struck down as unconstitutionally vague. The Crown could not even raise a convincing hypothetical scenario that would require pre-trial detention for reasons not contemplated by subsection 515(10)(a) or (b). Whether the phrase “maintain confidence in the administration of justice” had been given a workable standard by courts and/or Parliament in other contexts, in the context of subsection 515(10)(c) it was impermissibly vague<sup>51</sup> because of the failure to establish a plausible and valid ground for denying bail that would serve the proper administration of the bail system and that was not already covered under the more specific grounds in subsections 515(10)(a) and (b). Subsection 515(10)(c) was ripe for misuse and could allow irrational public fears to override an accused’s Charter rights. In this case, the bail judge erred in considering the subjective fears of the public after determining that there was no risk of flight nor threat to the public. The reaction of the public may assist in determining the threat posed by the accused’s release under the public safety ground, but that is not what was decided in this case.

According to the dissent, subsection 515(10)(c) could not be saved under section 1 of the Charter. The Crown did not identify a pressing and substantial objective furthered by the provision and the provision, which did not exist in comparable legal systems, also failed the proportionality test.

---

<sup>49</sup> *Supra*, note 45.

<sup>50</sup> *Hall, supra*, note 43, at para. 69.

<sup>51</sup> The minority relied heavily on the analysis of my colleague Gary Trotter in his oft-quoted book, *The Law of Bail in Canada*, 2d ed. (1999). The majority ignored it.

According to Iacobucci J., the majority had transformed dialogue with Parliament into “abdication.”<sup>52</sup>

### 3. Comment<sup>53</sup>

#### (a) *Vagueness and Overbreadth*

The 5-4 majority decided that subsection 515(10(c)) is constitutional to the extent that it allows bail to be denied not because the accused is a flight or safety risk but to “maintain confidence in the administration of justice.” For reasons powerfully expressed by Iacobucci J. in dissent, this is a deeply disappointing ruling. *Hall* effectively overrules the *Morales* rulings that detention in the public interest is too vague and that section 11(e) requires grounds of detention to be limited to assessment of flight risk and public safety. The surprise is that the majority judgment was written by McLachlin C.J. who had joined the majority in *Morales* and dissented in *Pearson*<sup>54</sup> on the basis that the reverse onus for narcotic traffickers was too broad.

The doctrines of void for vagueness and void for overbreadth, already toothless, have even less vitality after *Hall*.

#### (b) *Dialogue with Parliament*

On the issue of the much vaunted need for “dialogue with Parliament,” the majority sees its decision as an “excellent example” whereas the minority speak of an “abdication” of the role of the Court to guard the rights of accused. For the minority, Iacobucci J. speaks powerfully:

The mere fact that Parliament has responded to a constitutional decision of [the Supreme] Court is no reason to defer to that response where it does not demonstrate a proper recognition of the constitutional requirements imposed by that decision.

[The] ... role of [the Supreme] Court, and indeed of every court in our country, to staunchly uphold constitutional standards is of particular importance when the public mood is one which encourages increased punishment of those accused of criminal acts and where mounting pressure is placed on the liberty interest of these individuals. Courts must be bulwarks against the tides of public opinion that threaten to invade these cherished values. Although this may well cost courts popu-

---

<sup>52</sup> *Hall*, *supra*, note 43, at para. 127.

<sup>53</sup> See also the strong criticisms of H. Archibald Kaiser, “R. v. Hall: Erosion of Basic Principles in Bail and Beyond” (2002), 4 C.R. (6th) 341.

<sup>54</sup> *R. v. Pearson*, [1992] 3 S.C.R. 665.

larity in some quarters, that can hardly justify a failure to uphold fundamental freedoms and liberty.<sup>55</sup>

In my books the minority has it exactly right. *Hall* shows that the dialogue metaphor is strained and likely to be used to erode rights of accused.<sup>56</sup> How could the majority not explore the reality that the government snuck in an amendment to restore a wide public interest ground into a massive criminal law omnibus bill and that there was no Parliamentary debate on the floor or at the committee stage. Some dialogue.

Rhetoric about “dialogue with Parliament” is a far cry from the clear vision of Dickson C.J. in *Hunter v. Southam Inc.*<sup>57</sup> that under the Charter the judiciary is the guardians of the constitution for the unremitting protection of individual rights and freedoms and that the Charter is to constrain, not authorize, governmental action.

The “dialogue with Parliament” discourse, with attendant corollaries such as a presumption of constitutionality and a posture of respect for Parliament,<sup>58</sup> chooses to de-emphasize the very nature of the entrenchment of a *Charter of Rights* and the existence of section 52 of the *Constitution Act* that makes the *Constitution* the supreme law of the land. The entrenched compromise was to allow for demonstrably justified reasonable limits on Charter rights in section 1 and an override provision in section 33 that permits legislatures to opt out on a five-year renewable basis. Once the highest Court has declared minimum Charter standards, absent a section 33 override, the only dialogue in the courts should be whether responsive legislation meets those standards. The devastating impact of *Mills* and *Hall* is that these decisions will continue to encourage quick “in your face” legislation whenever a legislature does not like a Charter ruling and that legislation is likely to survive any new Charter challenge. Why should politicians now bother with thinking about a section 33 override? Given the law-and-order mood of the community, and the expediency of politicians and now the Court, the likely effect will be far less protection for accused.

Professor Kent Roach has advanced a similar criticism of *Mills*:

The court in *Mills* gave Parliament much more respect than *O'Connor* received from the elected branch of government.... Faced with a direct repudiation of its earlier decision, the court not only blinked, but looked away.... Respect for the rule of

---

<sup>55</sup> *Hall, supra*, note 43, at paras. 127-128.

<sup>56</sup> See my earlier detailed criticism of *Mills: Charter Justice, supra*, note 19, at 7-10. It is extraordinary that the Court used the need to dialogue with Parliament language to uphold the constitutionality of legislation that enacted word for word the tests preferred by L'Heureux-Dubé J. in her dissenting opinion in *O'Connor*.

<sup>57</sup> *Supra*, note 12.

<sup>58</sup> *Mills, supra*, note 23.

law required more. The court should either have admitted that it had been wrong and overruled *O'Connor* or required Parliament to use its s. 33 override.... Stealth overrides by Parliament and stealth overruling of controversial decisions by courts do little to promote careful deliberation about complex and difficult questions of competing rights.<sup>59</sup>

(c) *Possible Limits on Hall*

As a result of *Hall* it will be difficult for defence counsel to resist a detention order when a justice decides that the offence is serious and that the evidence is overwhelming (a determination which is in practice often made without evidence being properly lead or tested).

Possible limits on the *Hall* ruling could and should be developed from the following considerations:

- (1) McLachlin C.J. remarks that “the circumstances in which recourse to this ground for bail denial may not arise frequently.”<sup>60</sup>
- (2) McLachlin C.J. accepts that the reasonable person making the assessment of the need to maintain public confidence must be properly informed about the philosophy of the legislative provisions, Charter values, and the actual circumstances of the case.<sup>61</sup> Such a test had previously been adopted by Justice Baudoin for the Quebec Court of Appeal in *Lamothe*.<sup>62</sup> “Charter values” are certainly weasel words here in that the majority of the Supreme Court is showing so little respect for its previous standards.
- (3) This was an especially brutal offence with evidence that the community was fearful about this particular case.

(d) *Ignoring Context*

A surprising and disappointing feature of the majority judgment in *Hall* is the failure of the majority to consider the issue of context. Often the Supreme Court has an expansive view of context and is guided by a variety of secondary sources; here the majority puts on blinkers.

In *Golden*, for example, the majority of the Court considered it important to develop standards for strip searches by taking into account Commission Re-

---

<sup>59</sup> K. Roach, “Mills” Case Comment (2000), 43 Crim. L.Q. 145.

<sup>60</sup> *Supra*, note 43, at para. 31.

<sup>61</sup> *Id.*, at para. 41.

<sup>62</sup> *R. v. Lamothe* (1990), 77 C.R. (3d) 236 (Que. C.A.).

ports that African Canadians and Aboriginal people are over-represented in the criminal justice system and are therefore likely to be disproportionately arrested and subjected to personal searches, including strip searches.<sup>63</sup> One of the Reports listed was the *Report of the Commission on Systemic Racism in the Ontario Justice System*.<sup>64</sup> According to that Report, black persons charged with drug trafficking and importing offences are 27 times more likely to be denied bail than those who are white. Why wasn't that worrisome statistic relevant to the majority's consideration of whether a ground for detention, based on the justice's perception of public confidence, is unacceptably broad? The issues before the Court went to the core issue of whether our bail system is just.

### V. SAUVÉ<sup>65</sup> (PENITENTIARY INMATES' RIGHT TO VOTE)

In *Sauvé* a 5-4 majority upheld a constitutional challenge by penitentiary inmates to section 51(e) of the *Canada Elections Act*<sup>66</sup> that denied the right to vote to "every person who is imprisoned in a correctional institution serving a sentence of two years or more." The appellants challenged the Act on the grounds that section 51(e) violated the right to vote guaranteed in section 3 of the Charter and violated the equality rights guarantee in section 15 of the Charter. A 5-4 majority upheld the challenge on the first ground.

#### 1. Majority<sup>67</sup> (per McLachlin C.J., Iacobucci, Binnie, Arbour and LeBel JJ. concurring)

According to the Chief Justice, section 3 of the Charter guarantees every Canadian citizen the right to vote. Section 51(e) of the *Canada Elections Act* violates that right and that violation could not be demonstrably justified under section 1. Deference to Parliament can be appropriate in cases of competing social and political philosophies. Here, the issue was not a question of competing social and political philosophies, but a conflict between a guaranteed fundamental right and Parliament's denial of that right. The fact that the legislation follows judicial rejection of a previous more comprehensive denial does not require the court to defer to Parliament as part of a dialogue: Parliament's laws must conform to the Constitution at every stage.

---

<sup>63</sup> *R. v. Golden*, *supra*, note 3, at para. 83.

<sup>64</sup> (Toronto: Queen's Printer for Ontario, 1995).

<sup>65</sup> *Sauvé v. Canada (Chief Electoral Officer)* (2002), 168 C.C.C. (3d) 449 (S.C.C.).

<sup>66</sup> S.C. 2000, c. 9.

<sup>67</sup> *Sauvé*, *supra*, note 65, at paras. 6-64.

Chief Justice McLachlin emphasized that there must be a constitutionally valid reason for infringing a right: a simple majoritarian political preference for abolishing a right would not be constitutionally valid. Here, section 51(e) was not directed at a specific problem or concern. The asserted objectives were to enhance civic responsibility and respect for the rule of law and to enhance the general purposes of the criminal sanction. These are vague and symbolic objectives. It is difficult to say that they are not important, but if Parliament can limit rights simply by offering symbolic or abstract reasons, judicial review becomes vacuously constrained. People should not be left guessing why their Charter rights have been infringed. Here, the government failed to identify particular problems requiring a denial of the right to vote, making it hard to say that the denial is aimed at a pressing and substantial purpose. The government had also not demonstrated that the restriction to federal inmates was rationally connected to its objective or minimally impaired the right to vote.

**2. Dissent**<sup>68</sup> (*per* Gonthier, L'Heureux-Dubé, Major and Bastarache JJ. concurring)

The minority reasoned that where limitations on Charter rights are based on philosophical, political and social considerations not capable of scientific proof, the court ought to look to the text of section 1 of the Charter, the basic principles of that section, and its relationship with the rights and freedoms in the Charter. Where the social or political philosophy advanced by Parliament reasonably justifies a limitation of a right, it ought to be upheld as constitutional. Here, the temporary disenfranchising of some inmates was reasonably seen by Parliament as strengthening the rule of law, democracy, and the right to vote, and should be upheld.

Where as part of the dialogue between Parliament and the court Parliament has chosen to draw a particular line regarding which offences are serious enough to warrant losing the vote the court ought, said the minority, to show some deference.

Justice Gonthier also dismissed the alternative argument that the voting restriction violated section 15 equality rights primarily on the basis that being a prisoner was not an enumerated or analogous ground and that the fact of being a prisoner did not arise from stereotypical application of presumed group characteristics, but by the past commission of serious criminal acts by that individual.

---

<sup>68</sup> *Id.*, at paras. 65-208.

### 3. Comment

#### (a) *Division on Deference*

Chief Justice McLachlin's strong pronouncements against deference stands in stunning contrast to her reliance on the need for dialogue in *Hall* and her joining in the dissent in *Golden*. Three of the dissenting justices, L'Heureux-Dubé, Gonthier and Bastarache JJ., return to the justification of the need for deference employed in *Golden*. Here the need for deference is weakly<sup>69</sup> justified on the basis that the case raised philosophical, political and social considerations. It is hard to think of a criminal case that doesn't!

Justice L'Heureux-Dubé, the great champion of equality rights and of a broad test of discrimination focusing on whether a law diminishes the dignity of a group, here joins Gonthier J. in rejecting the section 15 claim for penitentiary inmates denied the right to vote.

### 4. General Observations

#### (a) *Voting Patterns*

Four cases do not make a trend. Nevertheless the following patterns (S denoting pro state and D denoting pro accused) will come as no surprise to those following the Court's many rulings on criminal justice matters:

	<i>Golden</i>	<i>Shearing</i>	<i>Hall</i>	<i>Sauvé</i>
McLachlin C.J.	S	D	S	D
L'Heureux-Dubé J.	S	S	S	S
Gonthier J.	S	S	S	S
Iacobucci J.	D	D	D	D
Major J.	D	D	D	S
Bastarache J.	S	D	S	S
Binnie J.	D	D	S	D
Arbour J.	D	D	D	D
LeBel J.	D	D	D	D

There was considerable speculation in the media that the retirement of Lamer C.J. would result in the Court being less divided and less pro-accused.

---

<sup>69</sup> See further Stephen Coughlan, "Annotation" (2003), 5 C.R. (6th) 208.

Two years later there are no clear signs on either front. Certainly McLachlin C.J. has had no better success in keeping her troops in order in important criminal cases. As to being pro-accused, a full evaluation of Lamer C.J.'s lengthy judicial record<sup>70</sup> revealed that he was by no means unremittingly pro-accused. As to present members of the Court, Iacobucci and Arbour JJ. tend to favour the accused but, like Lamer, not always. Very little attention has been paid in the media to the reality that L'Heureux-Dubé and Gonthier JJ. have over many years on the Court been almost unremittingly against enhancing rights of accused whatever the issue. So too Bastarache J. now often, but less unremittingly, takes the state side. It may be healthy that there are now several swing votes in the form of McLachlin C.J. (perhaps the most unpredictable), Binnie and LeBel JJ.<sup>71</sup> With the recent retirement of L'Heureux-Dubé J. and the pending departure of Gonthier J., the balance might change once again. Where Deschamp J. will fit on this spectrum remains to be seen. The judicial record of the newest appointment, Fish J., tends towards the protection of rights of the accused.

(b) *Brittle Protection of Rights of Accused*

An entrenched *Charter of Rights and Freedoms* with powerful remedies for exclusion of evidence and striking down legislation is an important check against the ever-increasing trend to law-and-order politics. Recent blunderbuss and politically expedient measures against organized crime<sup>72</sup> and suspected terrorists,<sup>73</sup> for example, need to be reviewed by justices who should be above law-and-order politics and should take their mandate to guard minority rights under the Constitution, which expressly include those of accused. We have seen that this was very powerfully expressed by Justice Iacobucci in *Hall*. The problem is that this was a minority position of four justices. Hopefully *Hall* will not

---

<sup>70</sup> Stuart, "Chief Justice Antonio Lamer: An Extraordinary Judicial Record of Reform of the Canadian Criminal Justice System" (2000) 5 Can. Crim. L. Rev. 51.

<sup>71</sup> Gary Trotter, "Developments in Criminal Law and Procedure: The 2001-2002 Term" (2002) 18 Sup. Ct. L. Rev. 204, at 204 found that in that term (which included *Golden*) there were five major criminal decisions in which the Court split 5-4. In each case McLachlin C.J.C., L'Heureux-Dubé, Gonthier and Bastarache JJ. favoured the state, and Iacobucci, Major, Binnie and Arbour JJ. sided with the accused. In each case the newest member of the Court, LeBel J., was the swing vote and not consistently on one side or the other.

<sup>72</sup> Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2001) Man. L.J. 89.

<sup>73</sup> Stuart, "The Anti-Terrorism Bill (Bill C-36): An Unnecessary Law and Order Fix that Permanently Stains the Canadian Criminal Justice System," published in (2002) 2 N.J.C.L. 153 and in D. Daubney et al., eds. *Terrorism, Law and Democracy: How is Canada Changing Following September 11?* (2002, Les Editions Themis).

be “epochal.”<sup>74</sup> Perhaps the dissenting vision in that case will come to the fore with a changing composition of the Court and there will be another zigzag.

For the reasons evident in my commentary on each of the four cases digested in this paper, I find it disappointing and surprising that the Court ever divided. Wasn't it obvious that demanding standards were needed for strip searches, that the bail provision was a political end run around standards the Court had imposed for bail, and that penitentiary inmates had a strong claim to rely on the unrestricted right to vote guaranteed by section 3? Although *Shearing* may be seen by some as unconscionable backtracking on rights of complainants in sexual assault cases, in my judgment it should serve to remove some of the exaggerated rhetoric from the difficult responsibility of ensuring a fair trial for those charged with sexual assault. Perhaps, for example, our rape shield protection,<sup>75</sup> now the toughest in the western world especially in that it extends equally to the admissibility of prior sexual history with the accused,<sup>76</sup> could be adjusted when the proper case reaches the Court. This does not mean, of course, that sexual assault laws should not guard against demonstrated myths and stereotypes and protect complainants' privacy and other interests.

Hopefully too the Court will face up to justifying future differences of view in difficult cases without hiding behind the language of dialogue, deference and/or Charter values. In each case the analysis tends to be vague and perhaps disingenuous.

---

<sup>74</sup> See Kaiser, *supra*, note 53, at 254.

<sup>75</sup> As upheld in *R. v. Darrach*, [2002] 2 S.C.R. 443.

<sup>76</sup> The House of Lords in *Regina v. A*, [2001] H.L.J. No. 25, May 17, 2001 referred to *Darrach* but refused to apply such principles to evidence of prior sexual history with the accused.

<i>Buhay</i> .....	274
<i>Dagenais v. Canadian Broadcasting Corporation</i> .....	279
<i>Golden</i> .....	267, 268, 271, 273, 288, 290, 291, 292
<i>Hall</i> .....	267, 281, 282, 284, 285, 286, 287, 288, 290, 291, 292
<i>Hunter v. Southam</i> .....	286
<i>Hunter v. Southam (sub nom. Canada (Director of Investigations &amp; Research, Combines Investigation Branch) v. Southam)</i> .....	273
<i>Law</i> .....	274
<i>Law v. Canada (Minister of Employment &amp; Immigration)</i> .....	279
<i>Morales</i> .....	282, 284, 285
<i>O'Connor</i> .....	275, 276, 279, 286
<i>Osolin</i> .....	276, 277, 279
<i>R. v. Darrach</i> .....	293
<i>R. v. Lamothe</i> .....	287
<i>R. v. Mills</i> .....	276, 279, 280, 286, 287
<i>R. v. Morales</i> .....	282
<i>R. v. Pearson</i> .....	285
<i>R. v. Shaheed</i> .....	274
<i>S. v. Makwanyane</i> .....	280
<i>Sauvé</i> .....	267, 288, 289, 291
<i>Seaboyer</i> .....	276, 280
<i>Shearing</i> .....	267, 275, 276, 277, 279, 280, 281, 291, 293
<i>Stillman</i> .....	274