

2012

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Citation Information

Stuart, Don. "The Charter Balance against Unscrupulous Law and Order Politics." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 57. (2012).

DOI: <https://doi.org/10.60082/2563-8505.1230>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol57/iss1/2>

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The Charter Balance against Unscrupulous Law and Order Politics

Don Stuart*

I. UNSCRUPULOUS LAW AND ORDER POLITICS OF THE HARPER GOVERNMENT

Politicians have always been seduced by the expediency of law and order politics. There are few votes in being soft on crime. Former Liberal Governments twice passed anti-gang legislation in a day without committee consultation on the eve of federal elections. But the level of discourse and dogged resolve by the Harper Government to use its majority to toughen the criminal law, whatever the consequences and ignoring the advice from numerous experts, has reached new lows.

I first need to justify the deprecating use of the adjective “unscrupulous”.

On January 29, 2010, five new Senators were appointed. A Department of Justice press release of that date has Minister of Justice Nicholson saying:

The Prime Minister’s action has not only brought additional talent and expertise to the Senate; it has greatly strengthened our efforts to move forward on our tackling-crime agenda. The opposition has obstructed that agenda in the Senate, most notably by gutting Bill C-15 — a bill proposing mandatory jail time for serious drug offences, and a key part of the government’s efforts to fight organized crime.¹

* Professor, Faculty of Law, Queen’s University. Many of the views expressed in this paper first appeared in articles or annotations in the Criminal Reports, D. Stuart, *Canadian Criminal Law: A Treatise*, 6th ed. (Scarborough, ON: Thomson Carswell, 2011) or *Charter Justice in Canadian Criminal Law*, 5th ed. (Scarborough, ON: Thomson Carswell, 2010).

¹ Department of Justice, News Release, “Ministers Welcome New Senators to Help Support Law-and-Order Bills” (January 29, 2010), online: <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32473.html>.

In the same press release, Minister Paradis says: “These five new Senators support all our measures. And today, we ask the opposition parties to listen to the victims of crime and to support our measures, too.”²

On March 12, 2012, Bill C-10, the *Safe Streets and Communities Act*,³ was finally rammed through Parliament, with the government imposing unseemly time limits on debate of the Bill both in Parliament and at the committee stage. The government had packaged together a variety of crime-fighting measures. This omnibus bill pushed through nine previous bills introduced when the Harper Government did not have a majority and which had been the subject of opposition amendments. By and large, Bill C-10 was presented and passed without those opposition amendments. The legislation *inter alia*:

- introduces mandatory minimum imprisonment sentences for possession of illegal drugs for the purposes of trafficking and all sex offences against children;
- stiffens sentences for violent youth crimes;
- ends conditional sentences (allowing for house arrest) for a number of offences, including all sexual offenders;
- eliminates pardons (now called record suspensions) for a number of offences; and
- creates new civil remedies for victims of terrorism.

The government consistently defended its action by saying it was listening to victims and police and had the support of the majority of Canadians. Interestingly, when the government recently abolished the long-gun registry,⁴ it went off message, ignoring and attacking the views of victims’ groups and police associations. Whatever its pragmatic pitch, the present government now never mentions the presumption of innocence, the right to a fair trial and the need to use the blunt instrument of the criminal sanction with restraint.

In the committee processes, such as they were, academic experts from Canada and abroad were mocked and ignored. Evidence from

² *Id.*

³ Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess., 41st Parl., 2012 (assented to March 13, 2012), S.C. 2012, c. 1 [hereinafter “Bill C-10”].

⁴ Bill C-19, *An Act to amend the Criminal Code and the Firearms Act*, 1st Sess., 41st Parl., 2012 (assented to April 5, 2012), S.C. 2012, c. 6 [hereinafter “Bill C-19”].

criminologists that crime rates⁵ are declining and that there is no evidence that stiffer sentences deter had no impact. In response to a 2009 Statistics Canada report that 95 per cent of Canadians surveyed were satisfied with their personal safety from crime, Mr. Nicholson resorted to his now familiar and aloof mantra that “[w]e don’t govern on the basis of statistics.”⁶

The government did not respond to the Canadian Bar Association’s 100-page brief voicing concern about the rigidity and unfairness of mandatory minimums, the stress on incarceration, and the effect of these measures on disadvantaged groups, especially Aboriginal Canadians.⁷ They also were not moved by the testimony of Howard Sapers, the Correctional Investigator, that:

Some of the amendments will almost certainly have disproportionate impacts on Canada’s more marginalized populations, including aboriginal peoples, visible minorities, those struggling with addictions and substance abuse problems, and the mentally ill. Indeed, nearly all the growth in the correctional population over the past decade can be accounted for by these groups.⁸

Also ignored was a coalition of U.S. law enforcement officials, judges and prosecutors which called on the Senate committee to reconsider the mandatory minimum sentences. They concluded that, “[w]e cannot understand why Canada’s federal government and some provincial governments would embark down this road.”⁹

Former senior officials have now spoken out in an extraordinary show of unison and bravado. David Daubney, a long-time senior Department of Justice advisor, noted that: “[since] the mid-2000s, the Justice Department has asked for less and less research to be undertaken

⁵ Statistics Canada figures for 2011 show that crime rates have reached their lowest level since 1973.

⁶ Kim Mackrael, “Though Canadians feel safe, Conservatives move ahead on crime bill” *The Globe and Mail* (December 1, 2011), online: <<http://www.theglobeandmail.com/news/politics/though-canadians-feel-safe-conservatives-move-ahead-on-crime-bill/article4246898/>>.

⁷ *House of Commons Debates, Consideration of Senate Amendments*, 089 (March 5, 2012), at 1029 (as summarized by Jack Harris, M.P. (N.D.P.)).

⁸ *House of Commons Debates, Consideration of Senate Amendments*, 093 (March 9, 2012), at 1005 (quoted by Jack Harris, M.P. (N.D.P.)).

⁹ *House of Commons Debates, Consideration of Senate Amendments*, 084 (February 27, 2012) (quoted by Irwin Cotler, M.P.O. (Liberal)).

and typically ignores recommendations against policies such as mandatory minimum sentences or prison expansion.”¹⁰

John Edwards, former commissioner of Correctional Services Canada, Willie Gibbs, former chair of the Parole Board of Canada and Ed McIsaac, former executive director of the office of the Correctional Investigator, issued a joint press statement¹¹ against the Harper tough on crime agenda. They ask: “In a country that prides itself on fairness, compassion and pursuit of equality, why do we accept the idea that community safety will be enhanced through increased incarceration?”¹² Noting the existing reality of current double and treble bunking in federal and provincial jails, and the acceptance in the United States and the United Kingdom that minimum sentence regimes have been costly failures that have not made the public safer, they conclude that: “Criminal justice legislation that increases prison populations while draining resources from community programs in mental health, education, child poverty and social services makes absolutely no sense.”¹³

In its resolve to pass Bill C-10, the government steadfastly refused opposition requests for cost estimates for the much greater resort to imprisonment. A 95-page study¹⁴ by the office of Ken Page, Parliament’s independent budgetary officer, estimated the cost of drastically restricting conditional sentences (just one aspect of the Bill C-10) at \$137 million per year for provincial governments and \$8 million for the federal government. Both Ontario and Quebec have indicated they will not pay the costs of implementing Bill C-10.

So, the record shows that the government arrogantly rejected the advice of a broad cross-section of experts and government officials and simply persistently relied on its self-styled lie that the Bill will make Canadians safer.

Canada is now one of the few Western countries that does not have an independent Law Reform Commission or a Sentencing Commission to keep track of sentencing realities and options. I have long seen the need for legislation to simplify and make more principled our substan-

¹⁰ Kirk Makin, “Crime bill threatens to undo decades of reform, former MP warns” *The Globe and Mail* (February 14, 2012), online: <<http://m.theglobeandmail.com/news/politics/crime-bill-threatens-to-undo-decades-of-reform-former-mp-warns/article545747/?service=mobile>>.

¹¹ J. Edwards, W. Gibbs & E. McIsaac, “Jails don’t keep people out of jail” *The Globe and Mail* (January 5, 2012), online: <<http://www.theglobeandmail.com/commentary/jails-dont-keep-people-out-of-jail/article1357501/>>.

¹² *Id.*

¹³ *Id.*

¹⁴ Released on February 8, 2012.

tive, procedural and evidentiary laws. In the case of sentencing, principles were inserted into the *Criminal Code* in 1995,¹⁵ but since then governments, and especially now the Harper Government, have ignored them in the rush to impose minimum penalties. There are now 40. A conference at the Faculty of Law at Queen's University in 1998¹⁶ sought unsuccessfully to revive previous efforts towards principled simplification by the Law Reform commission, a Canadian Bar Association Task Force and others. I have long favoured a General Part for substantive principles.

However, having seen the government in action these last several years, I am now resistant to any such efforts unless there is a commitment to delegate the task to a truly independent body where well-respected judges, lawyers and academics are well represented. I am not optimistic. Emeritus Professor Marty Friedland¹⁷ has recently called for comprehensive legislation to simplify the laws of evidence, but he too wants the effort controlled by judges, not politicians.

Pending that independent type of initiative, our entrenched *Canadian Charter of Rights and Freedoms*,¹⁸ interpreted by an independent judiciary, offers the best hope for a better balance. Hopefully, this check will not itself gradually dissolve with increasingly more conservative appointments being made to the Supreme Court. Justice Michael Moldaver was recently chosen for elevation from a group of distinguished criminal experts on the Ontario Court of Appeal, likely because he had stepped out of his neutral judicial role to speak out strongly against what he called frivolous assertions of Charter rights for accused, noting that Charter issues were now mostly settled.¹⁹

The Harper Government is no fan of the Charter, but has often rather piously pronounced its commitment to the rule of law in Canada and other countries such as Afghanistan and Libya. Our government should be proud of our judiciary and of our distinctive Charter. A good start would be a bill to remove sections of the *Criminal Code* that have long

¹⁵ S.C. 1995, c. 22, s. 6. See especially *Criminal Code*, R.S.C. 1985, c. C-46, ss. 718-719.

¹⁶ See D. Stuart, R.J. Delisle & A. Manson, *Towards a Clear and Just Criminal Law* (Toronto: Carswell, 1999).

¹⁷ Martin L. Friedland, "Developing the Law of Evidence: A Proposal" (2011) 16 Can. Crim. L. Rev. 37.

¹⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

¹⁹ In my view, the problems he identified were seriously exaggerated and hardly spoken of as a guardian of the constitution. See Don Stuart, "The Charter is a Vital Living Tree and Not a Weed to be Stunted — Justice Moldaver Has Overstated" (2006) 40 C.R. (6th) 280.

been declared unconstitutional. Parliament has not got round to deleting the unconstitutional objective “ought to have foreseen” element for murder under section 229(c) of the *Criminal Code*. On at least three occasions, which were embarrassing for the justice system, section 229(c) in its unconstitutional form was left with juries. This necessitated new trials in British Columbia, Ontario and New Brunswick. In *R. v. Townsend*,²⁰ Chiasson J., speaking for the British Columbia Court of Appeal said:

I cannot leave these reasons without wondering why steps have not been taken to amend the *Criminal Code* to conform to the now 20-year-old decision of the Supreme Court of Canada in *Martineau* determining that language in s. 229(c) is unconstitutional. The law that is recorded in the statute, on which every citizen is entitled to rely, is not the law of the land. An issue such as arose in this case should not occur. It creates the risk of a miscarriage of justice and the potential need to incur significant costs addressing an error in an appellate court with the possible costs of a new trial, assuming one is practical. In my view, failure to deal appropriately with such matters by updating the *Criminal Code* to remove provisions that have been found to offend the Constitution is not in the interests of justice.²¹

There are numerous provisions in the *Criminal Code*, such as abortion provisions, some reverse onuses and parts of the defence of duress, which have been declared unconstitutional and should be deleted. Persons within and without Canada should be accurately informed by our *Criminal Code* as to our operating justice system.

II. JUDICIARY ACHIEVES BETTER BALANCE THAN PARLIAMENT IN ASSERTING CHARTER STANDARDS

1. Principles of Fundamental Justice

In the last 30 years, the Supreme Court has used section 7 to establish a large number of Charter standards. Substantive standards now include:

²⁰ [2010] B.C.J. No. 1802, 261 C.C.C. (3d) 320 (B.C.C.A.).

²¹ *Id.*, at para. 43.

1. subjective *mens rea* for a few crimes such as murder, attempted murder and war crimes;²²
2. a marked departure standard for crimes based on objective fault;²³
3. due diligence with the onus reversed for regulatory offences which affect the liberty interest;²⁴
4. physical voluntariness for acts;²⁵
5. moral involuntariness for justifications and defences;²⁶
6. laws must not be too vague and must allow sufficient room for legal debate;²⁷
7. laws must not be overbroad in using means more than necessary to achieve their objectives;²⁸
8. laws must not be arbitrary;²⁹ and
9. laws must not be disproportionate.³⁰

Procedural standards established under section 7 include:

1. pre-trial right to silence arising on detention;³¹
2. principle against self-incrimination;³²
3. residual category of abuse of process;³³
4. right to full disclosure of Crown case;³⁴
5. right to have evidence preserved;³⁵

²² *R. v. Martineau*, [1990] S.C.J. No. 84, 79 C.R. (3d) 129 (S.C.C.); *R. v. Logan*, [1990] S.C.J. No. 89, 79 C.R. (3d) 169 (S.C.C.); *R. v. Finta*, [1994] S.C.J. No. 26, 28 C.R. (4th) 265 (S.C.C.).

²³ *R. v. Beatty*, [2008] S.C.J. No. 5, 54 C.R. (6th) 1 (S.C.C.). The ruling on the facts was, however, remarkably generous to the accused. He veered into the wrong lane, killing three persons, and offered no real explanation other than that he might have nodded off after a day working in the sun.

²⁴ *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, 48 C.R. (3d) 289 (S.C.C.); *R. v. Pontes*, [1995] S.C.J. No. 70, 41 C.R. (4th) 201 (S.C.C.).

²⁵ *R. v. Daviault*, [1994] S.C.J. No. 77, 33 C.R. (4th) 165 (S.C.C.); *R. v. Ruzic*, [2001] S.C.J. No. 25, 41 C.R. (5th) 1 (S.C.C.).

²⁶ *R. v. Ruzic*, *ibid.*

²⁷ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, 16 C.R. (6th) 203 (S.C.C.).

²⁸ *R. v. Heywood*, [1994] S.C.J. No. 101, 34 C.R. (4th) 133 (S.C.C.); *Canadian Foundation*, *ibid.*

²⁹ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 86 C.R. (6th) 223 (S.C.C.).

³⁰ *Ibid.*

³¹ *R. v. Hebert*, [1990] S.C.J. No. 64, 77 C.R. (3d) 145 (S.C.C.).

³² *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, 29 C.R. (4th) 209 (S.C.C.).

³³ *R. v. O'Connor*, [1995] S.C.J. No. 98, 44 C.R. (4th) 1 (S.C.C.).

³⁴ *R. v. Stinchcombe*, [1995] S.C.J. No. 21, 38 C.R. (4th) 42 (S.C.C.); *R. v. McNeil*, [2009] S.C.J. No. 3, 62 C.R. (6th) 1 (S.C.C.).

³⁵ *R. v. La, Vu*, [1997] S.C.J. No. 30, 8 C.R. (5th) 155 (S.C.C.).

6. right to effective assistance of counsel;³⁶ and
7. duty to give reasons to allow for appellate review.³⁷

This list of section 7 standards is strikingly long. Some accuse the unelected judiciary of having been too activist and having exceeded its original Charter mandate. In my judgment, this long list of standards has provided salutary checks and balances against the current lure and expediency of law and order measures.

Canada should be particularly proud of its often quite distinctive and nuanced constitutional standards of fault. There is no evidence of rampant acquittals as a result. Fault standards are in place, however, to avoid injustice in borderline cases and to allow judges on occasion to use the criminal sanction with restraint. The policy foundation for these standards were laid by Dickson J. in the pre-Charter case of *R. v. Sault Ste. Marie (City)*.³⁸ Policy arguments in favour of some form of fault for even minor crimes³⁹ outweighed those favouring administrative and enforcement expediency.

Some see the ability of judges to strike down laws for arbitrariness, overbreadth, vagueness or gross disproportionality as alarming. The leading judgment is now the unanimous ruling of the full Supreme Court powerfully written and justified by McLachlin C.J.C. in *PHS Community Services*.⁴⁰ The prohibition of drug possession under the *Controlled Drugs and Substances Act*⁴¹ was held to engage the rights to life and security of the person of the clients and staff of Insite, Vancouver's supervised injection site. The Court held that the prohibition itself did not violate principles of fundamental justice as overbroad because the Minister's power under section 56 to grant an exemption meant that it could be limited to appropriate circumstances. However, the Supreme Court unanimously held that the Minister's refusal to grant such an exemption to the Vancouver safe injection site was not in accordance

³⁶ *R. v. B. (G.D.)*, [2000] S.C.J. No. 22, 32 C.R. (5th) 207 (S.C.C.).

³⁷ *R. v. Sheppard*, [2002] S.C.J. No. 30, 50 C.R. (5th) 68 (S.C.C.).

³⁸ [1978] S.C.J. No. 59, 3 C.R. (3d) 30 (S.C.C.), reasserted as a common law principle in *Lévis (City) v. Tétreault*, [2006] S.C.J. No. 12, [2006] 1 S.C.R. 420 (S.C.C.).

³⁹ Chief Justice Dickson would likely have resisted recent proposals to make parking and potentially minor provincial offences subject to monetary penalties (Administrative Monetary Penalty System (AMPS)) determined by administrative officials rather than judges: Law Commission of Ontario, *Modernization of the Provincial Offences Act: A New Framework and Other Reforms. Final Report* (August 2011), online: <<http://www.lco-cdo.org/POA-Final-Report.pdf>>.

⁴⁰ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 86 C.R. (6th) 223 (S.C.C.).

⁴¹ S.C. 1996, c. 19.

with principles of fundamental justice, as it was arbitrary and also grossly disproportionate in its effects. The remedy was to order the Minister to grant an exemption. Some media commentary has predicted that this ruling will lead to a more activist role for the courts in striking down legislation. One senior judge, who wished to remain anonymous, was quoted⁴² as saying that the Court had “opened a can of worms” and that many judges were “uncomfortable” in the role of assessing the effectiveness of governmental policy. It is true that the tests for finding breaches of fundamental justice under section 7 have been lowered and may seem unruly. The Court here identified three separate Charter challenges: arbitrariness, gross disproportionality and overbreadth. In *R. v. Malmo-Levine*,⁴³ the majority had called for considerable deference to legislative choices and had asserted a test of gross disproportionality for challenges based on vagueness or overbreadth. Not so here. The separate head of gross disproportionality is also confusing. Apart from its important role as a test for cruel and unusual punishment, the concept seems more appropriate as a consideration under a section 1 demonstrably justified reasonable limit analysis. However, a section 1 inquiry can only proceed where a Charter breach has been identified and established.

It does, however, seem doubtful, given past judicial history in the Supreme Court and Courts of Appeal, where such challenges have usually been quickly dismissed, that the judicial patterns will now radically change. The evidentiary record will rarely be as clear and uncontested as it was in the *Insite* case. It showed the effectiveness of *Insite* in reducing severe health and public safety risks in a particularly vulnerable population. Furthermore, Vancouver Health and police authorities, and the municipal and B.C. provincial governments, all read the evidence as favouring the maintenance of the *Insite* Clinic. It was only federal government law-and-order ideology that did not.

As for procedural standards, the duty to disclose established in *R. v. Stinchcombe*⁴⁴ is one of the best demonstrations of the power of an entrenched Charter to produce positive change. For years, prosecutors and Attorneys General had resisted disclosure rights and regimes, but we now know that full disclosure encourages guilty pleas and that non-

⁴² *The Globe and Mail*, October 11, 2011.

⁴³ [2003] S.C.J. No. 79, 16 C.R. (6th) 1 (S.C.C.). See also *R. v. Clay*, [2003] S.C.J. No. 80, 16 C.R. (6th) 117 (S.C.C.).

⁴⁴ [1995] S.C.J. No. 21, 38 C.R. (4th) 42 (S.C.C.).

disclosure has been a major factor in wrongful conviction cases.⁴⁵ There are strong arguments that disclosure requirements are costly and cumbersome in mega-trials. However, these can often be avoided or lessened by sound prosecutorial discretion to sever trials into smaller groups, and by forceful management strategies by experienced trial judges.

2. Power of Judicial Stay for Unreasonable Delay under Section 11(b)

One of the most important Charter checks is the enforcement of the section 11(b) right to be tried within a reasonable time. After the decision in *R. v. Askov*⁴⁶ on institutional delay, thousands of trials were stayed, particularly in Ontario. The Supreme Court got cold feet given the public outcry. In *R. v. Morin*,⁴⁷ the Court adjusted the tests to include consideration of: the factor of seriousness of the offence; no strict comparison of jurisdictions test; and putting the burden on the accused and deciding that prejudice to the accused was the controlling factor. Section 11(b) stays were quickly reduced to a trickle.

In the last five years or so, stays have been on the rise again across the country with an *Askov*-like crunch looming in British Columbia⁴⁸ and are already a reality in Montreal in a recent mega gang trial.⁴⁹ The reality of lengthy unconstitutional delays due to lack of resources in the form of too few judges, too few Crown attorneys and insufficient legal aid, is a powerful indicator that law and order rhetoric to toughen criminal laws is easy and effective politics but seldom accompanied by allocation of sufficient resources to the judicial or prison systems. Without the infusion of adequate resources, victims will undoubtedly suffer in not having a chance to see justice done. Section 11(b) stays bring this hypocrisy to a head, and a delay crisis, as in the aftermath of *Askov*, will force governments to find new resources for the justice system.

On June 4, 2009, the Supreme Court in *R. v. Godin*⁵⁰ handed down a unanimous judgment upholding the trial judge's stay of a sexual assault

⁴⁵ See, e.g., Nova Scotia, *The Marshall Inquiry: Royal Commission on the Donald Marshall, Jr., Prosecution*, (Halifax: Government of Nova Scotia, vol. 1, 1989), at 238-42.

⁴⁶ [1990] S.C.J. No. 106, 79 C.R. (3d) 273 (S.C.C.) [hereinafter "*Askov*"].

⁴⁷ [1992] S.C.J. No. 25, 12 C.R. (4th) 1 (S.C.C.) [hereinafter "*Morin*"].

⁴⁸ In *R. v. Blattler*, [2012] B.C.J. No. 300, 25 C.R.R. (2d) 290 (B.C. Prov. Ct.), Steinberg J. stayed an Internet luring charge for unreasonable delay and lamented the shortage of judges.

⁴⁹ Gangsterism charges were stayed against 31 of 155 alleged Hell's Angels members in *Auclair v. R.*, [2011] Q.J. No. 6103, 86 C.R. (6th) 155 (Que. S.C.).

⁵⁰ [2009] S.C.J. No. 26, 67 C.R. (6th) 95 (S.C.C.).

charge because of a 30-month delay between the date the accused was charged with sexual assault and the date set for trial. Writing for the Court of seven justices, Cromwell J. noted that this was a straightforward case, that virtually all the delays were attributable to the Crown and were unexplained, and that the length of delay risked prejudice to the right to make full answer and defence. This decision has the potential to further revitalize the section 11(b) right in several respects. The Court is far more accepting of the realities facing defence counsel seeking an early trial where court and Crown resources are lacking, placing a strong burden of justification of delay back on the Crown (in marked contrast to the approach in *Morin*) and not requiring evidence of actual prejudice (again in contrast to the ruling in *Morin* on the facts). The decision deserves to be carefully examined and applied.⁵¹

3. Carefully Balanced Standards for Policing

There is now a significant record of case law since the enactment of the Charter to suggest that our courts do a better job than Parliament in their non-political forum in balancing civil liberties of the accused against the need for effective police powers. The *Hunter v. Southam Inc.*⁵² presumption that warrantless searches are contrary to section 8, detailed Charter standards for strip searches⁵³ and the new pronouncement in *R. v. Grant*⁵⁴ that detention or imprisonment that is unlawful is necessarily arbitrary and contrary to section 9, are each highly indicative of the power of the Charter to force change which limits the powers of the police. The case law is often complex and sometimes inconsistent. The other reality is that *Criminal Code* amendments have tended to be *ad hoc* and often too complex and unclear.

In *Hunter*, Dickson, C.J.C. saw the judiciary as the guardians of the Constitution and that the Charter was in place to constrain rather than authorize governmental power. There is no doubt now that, in resorting to the ancillary powers doctrine over the years, the Supreme Court has actually authorized a number of new police powers. This occurred, for

⁵¹ There are signs that Ontario Courts are not applying the rigour of *Godin*, as pointed out by Steve Coughlan in his forthcoming C.R. annotation to *R. v. Lahiry*, [2011] O.J. No. 5071, 2011 ONSC 6780 (Ont. S.C.J.) (cited with approval in *R. v. Tran*, [2012] O.J. No. 83, 2012 ONCA 18 (Ont. C.A.)). See also *R. v. Khan*, [2011] O.J. No. 937, 2011 ONCA 173 (Ont. C.A.), leave to appeal refused [2011] S.C.C.A. No. 195 (S.C.C.).

⁵² [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.) [hereinafter "*Hunter*"].

⁵³ *R. v. Golden*, [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679 (S.C.C.).

⁵⁴ [2009] S.C.J. No. 32, 66 C.R. (6th) 1 (S.C.C.).

example, in the case of the limited power of investigative detention,⁵⁵ the roadblock stop power,⁵⁶ emergency entries⁵⁷ and the use of sniffer dogs.⁵⁸

Some argue⁵⁹ that the problem with the ancillary powers doctrine is that it is a fact-specific *ex post facto* inquiry which is vague and speculative, and that it should be left to Parliament to allow for full democratic processes. Both citizens and police officers need to know which powers the state possesses in advance. But what of Parliament's record of almost always favouring arguments of law and order expediency and listening only to police and prosecutor lobby groups?

Consider the issue of police use of sniffer dogs. The Binnie test of individualized reasonable suspicion in *R. v. Kang-Brown*⁶⁰ to limit the use of police sniffer dogs in routine criminal investigations is a well-justified and pragmatically sound solution to making such a police power Charter compliant. Parliament has not bothered to attempt any regulation before (or since). Justice Binnie is also persuasive in holding that it seems far too late for four justices on the Court in that case to now reject the use of the ancillary powers doctrine. The horse is well out of the barn. The choice of a reasonable suspicion standard is indeed a reduction in the *Hunter* standard of reasonable and probable grounds. But the important and key aspect of the focus of all but one of the justices on an individualized standard is that police cannot just rely on police hunches and "Spidey sense".⁶¹ These may mask arbitrariness and discriminatory behaviour, as long ago pointed out by Doherty J.A. in *R. v. Simpson*.⁶² There are still concerns, expressed most forcefully in the writings of Professor David Tanovich,⁶³ that our courts should do more to address the well-documented and corrosive aspect of racism in our justice system.

⁵⁵ *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.).

⁵⁶ *R. v. Clayton*, [2007] S.C.J. No. 32, 47 C.R. (6th) 219 (S.C.C.).

⁵⁷ *R. v. Godoy*, [1998] S.C.J. No. 85, 21 C.R. (5th) 205 (S.C.C.).

⁵⁸ *R. v. Kang-Brown*, [2008] S.C.J. No. 18, 55 C.R. (6th) 240 (S.C.C.).

⁵⁹ See, for example, Steve Coughlan, *Criminal Procedure*, 2d ed. (Toronto: Irwin Law, 2012), at 17-20 and James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1.

⁶⁰ *Supra*, note 58.

⁶¹ This explanation for a police stop was rejected by LaForme J. (as he then was) in *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65 (Ont. S.C.J.) as lacking an objective basis for reasonable suspicion. See similarly recently *R. v. Brown*, [2012] O.J. No. 1569, 289 O.A.C. 327 (Ont. C.A.).

⁶² [1993] O.J. No. 308, 20 C.R. (4th) 1 (Ont. C.A.).

⁶³ See, for example, D.M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).

4. Robust Discretionary Remedy of Exclusion of Evidence under Section 24(2)

Of course, there are ongoing concerns as to whether the standards for policing are in fact being applied by police and implemented by courts, and that is why the *Grant* decision on section 24(2) is so important and encouraging.

The approach to section 24(2) changed with the bellwether rulings of the Canadian Supreme Court in *R. v. Grant*,⁶⁴ and *R. v. Harrison*.⁶⁵ In *Grant*, a 6-1 majority rejected the *Collins/Stillman* conscripted/non-conscripted dichotomy as too rigid for a discretionary power, hard to apply and yielding inconsistent results. It asserted a discretionary approach with revised criteria and emphasis. The Court arrived at a revised discretionary approach to section 24(2), free of rigid rules but placing special emphasis on the factor of seriousness of the breach rather than the seriousness of the offence or the reliability of the evidence. The same criteria are to be applied to all cases of Charter breach. Furthermore, the Court emphasized that where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.

In a joint judgment McLachlin C.J.C. and Charron J. (Binnie, LeBel, Fish and Abella JJ. concurring) settled on the following revised template:

When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

- (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
- (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and
- (3) society's interest in the adjudication of the case on its merits.

⁶⁴ [2009] S.C.J. No. 32, 66 C.R. (6th) 1 (S.C.C.) [hereinafter "*Grant*"]. The Court built on the earlier analysis of Arbour J. in *R. v. Buhay*, [2003] S.C.J. No. 30, 10 C.R. (6th) 205 (S.C.C.) respecting the exclusion of non-conscripted evidence.

⁶⁵ [2009] S.C.J. No. 34, 66 C.R. (6th) 105 (S.C.C.) [hereinafter "*Harrison*"].

The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.⁶⁶

According to the Chief Justice and Charron J., the words of section 24(2) capture its purpose: to maintain the good repute of the administration of justice. Viewed broadly, the term "administration of justice" embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole. The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Deterring police misconduct is not the aim although it could be a happy windfall.⁶⁷

In *R. v. Côté*,⁶⁸ an 8-1 majority of the Supreme Court strongly reasserts the approach to section 24(2) it declared in *Grant* and *Harrison*. Faced with an exclusion decision for multiple Charter violations in an investigation of a domestic murder case, the Quebec Court of Appeal arrived at a compromise along the lines of the now rejected *Collins/Stillman* dichotomy: the conscripted evidence of statements should be excluded, but the non-conscripted reliable evidence (here forensic evidence found in a warrantless search contrary to section 8) was to be admitted as the murder offence was serious. According to Cromwell J. for the Supreme Court majority, the Quebec Court of Appeal had first erred in intervening on the basis that the police had not deliberately acted in an abusive manner. The Court had exceeded its role by its recharacterization of the evidence, which departed from express findings by the trial judge of deliberate and systemic police misconduct not tainted by any clear and determinative error. The Court of Appeal had also erred in interfering with the trial judge's section 24(2) determination by assigning greater importance to the seriousness of the offence. Justice Cromwell powerfully reasserts that, once there has been a determination on the first and second *Grant* factors that the Charter violation or violations were

⁶⁶ *Grant*, *supra*, note 64, at para. 71.

⁶⁷ *Id.*, at para. 73. Compare the pro-state view of the majority of the U.S. Supreme Court that the exclusionary remedy in that jurisdiction requires evidence that exclusion will deter this type of police conduct in the future (*Herring v. U.S.*, 129 S. Ct. (U.S. 2009)).

⁶⁸ [2011] S.C.J. No. 46, 87 C.R. (6th) 1 (S.C.C.) [hereinafter "*Côté*"].

serious, the factors of the seriousness of the offence, the reliability of the evidence and the importance of the evidence to the Crown's case, are not determinative and should not lead to admission.

Most Canadian academics have welcomed the abandonment of the dichotomy between conscripted and non-conscripted evidence.⁶⁹ The abandonment of the *Collins/Stillman* trial fairness yardstick has admittedly set up an inconsistency with the separate discretion to exclude under section 11(d) to ensure a fair trial which the Court recognized in *R. v. Harrer*.⁷⁰ This rarely exercised discretion is mostly applied in trials in Canada where the Charter breach occurred outside our borders. The *Harrer* jurisprudence needs to be reconsidered and made consistent with *Grant*.

There can be no doubt now that *Grant* has put in place a robust discretionary exclusion remedy for section 24(2). Surveys now indicate that, across the country, trial judges are likely to exclude for Charter violations in roughly two out of every three cases for all types of Charter breaches and whatever the type of evidence.⁷¹ Appeal courts are less likely to exclude. Of course, the discrepancy between trial and appeal courts may be explained by the reality that courts of appeal are more likely to be confronted by selective Crown appeals against exclusion decisions by trial judges based on unreasonable errors. And *Côté* sends an unmistakable message that, absent errors, appeal courts should defer to rulings by trial judges.

The importance of this reality should not be exaggerated. In the vast majority of criminal trials across the country, Charter issues are not even raised, and often, where they are, Charter violations are not found. But it is the reality that, in hundreds of rulings each year where Charter violations are found, the section 24(2) remedy of exclusion is now

⁶⁹ See D. Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed. (Scarborough, ON: Thomson Carswell, 2010), at 595-97 and authors there cited. See also S. Penney, V. Rondinelli & J. Stribopoulos, *Criminal Procedure in Canada* (Markham, ON: LexisNexis Canada, 2011), at 557-73. David Paciocco, "Section 24(2): Lottery or Law — The Appreciable Limits of Purposive Reasoning" (2011) 58 Crim. L.Q. 1 [hereinafter "Paciocco"] is, however, less enthusiastic about the new regime and expresses concerns *inter alia* about too much discretion for trial judges and the discounting of the factor of seriousness of the offence.

⁷⁰ [1995] S.C.J. No. 81, 42 C.R. (4th) 269 (S.C.C.). See further Paciocco, *id.*, at 22-23, 39-43 [hereinafter "*Harrer*"].

⁷¹ See Mike Madden, "Empirical Data on Section 24(2) under *Grant*" (2010) 78 C.R. (6th) 278 (and see also "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of *R. v. Grant*" (2011) 14 Can. Crim. L. Rev. 229). For a similar Quebec survey, see Thierry Nadon, "Le paragraphe 24(2) de la Charte au Québec depuis *Grant* : si la tendance se maintient!" (2011) 86 C.R. (6th) 33.

regularly invoked. The success rate is similar to that for applications for section 11(b) stays for breaches of the right to be tried within a reasonable time. In section 24(2) cases, it is clear that trial judges are to be concerned not only about truth concerning guilt or innocence, but also about the truth that police officers are often proved to be deliberately flouting, careless or ignorant about Charter standards. If there is a concern about exclusion of highly probative evidence, the question should be directed against the apparently lax and ineffective training of police officers respecting Charter standards, even where they are clearly established. If the police learned to apply Charter standards, then there would be no possibility of exclusion. The police disregard for the Charter in *Côté*, a serious but routine domestic assault investigation, is shocking and an affront to the rule of law, as found by the trial judge, Cournoyer J.

In *Hudson v. U.S.*,⁷² Scalia J., writing for a 5-4 majority, refused to apply the exclusionary rule to a violation of the Fourth Amendment “knock-and-announce” rule. He suggested that the exclusion remedy may no longer be necessary because of the increasing professionalism of police forces, with wide-ranging reforms in education, training and supervision, better internal discipline and various forms of citizen review.

Policing and review standards have improved in Canada as well. However, those preferring alternative remedies, such as civil suits and police complaints procedures, now bear a heavy burden of demonstrating their comparative efficacy. In Canada, they have thus far generally proved to be a poor and low-visibility response to systemic problems of police abuse or ignorance of their powers under an entrenched Charter. Police are rarely, if ever, disciplined for Charter breaches. Civil litigation is expensive, uncertain in outcome and, if successful, likely to be subject to confidentiality agreements. Civil litigation is also highly unlikely where the plaintiff is in prison. In *Vancouver (City) v. Ward*⁷³ the Supreme Court recently recognized a new right to sue civilly for compensation for a Charter breach but pragmatically restricted the remedy to superior courts.⁷⁴

Thankfully, our Supreme Court in *Grant* and *Harrison* saw the need for a vigorous remedy of exclusion for serious Charter breaches, however serious the crime. In this area as in others, our Supreme Court,

⁷² 547 U.S. 586 (2006).

⁷³ [2010] S.C.J. No. 27, 76 C.R. (6th) 207 (S.C.C.).

⁷⁴ The justifications the Court gave for this new civil remedy such as the need for deterrence and stress on a functional approach are inconsistent with the rationales the Court relied on for s. 24(2) exclusion in *Grant*. See, further, David Paciocco, *supra*, note 69, at 20-27.

mindful of its role as guardian of our Constitution, has given our criminal justice system a welcome balance against law and order expediency. In considering exclusion remedies, courts must be especially concerned with the long-term integrity of the justice system if Charter standards for the accused are ignored and/or operate unequally against vulnerable groups, such as persons of colour and those who are young.⁷⁵

III. SUGGESTIONS FOR IMPROVEMENT OF CHARTER STANDARDS

Chief Justice Dickson, in a visit to the Faculty of Law at Queen's University, once suggested that academics are most impressive in criticizing but less so in offering constructive changes. In that spirit, I offer five suggestions for change to better respect the rights of the accused.

1. The Test for Exclusion under Section 24(2) Should Be Clarified Respecting the Issues of Discoverability and Good Faith

Justice Cromwell in *Côté* holds that discoverability is a factor relevant to the first two *Grant* factors but not determinative. In that case, the fact that the police could have acted in compliance with the Charter made the violation and invasion of privacy more serious. Justice Cromwell repeats a line in *Grant* that trial judges should not speculate about discoverability. Whether the police would have discovered the evidence is necessarily speculative. Surely it would be better for the Court to abandon this unprincipled and confusing inquiry? The focus should be on what the police did, not on what they might have done. Discoverability should always, as in *Côté*, amount to a “catch 22” for the Crown: if the police did not have to break the Charter standard, their breach is more serious.

There is also room for greater clarity on the issue of police “good faith”. According to the Court in *Grant*, “good faith” on the part of the police will mitigate the seriousness of the violation, but “ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith”.⁷⁶ It would also have

⁷⁵ In developing standards for strip searches, the majority of the Court in *R. v. Golden*, [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679, at para. 83 (S.C.C.), took into account Commission findings of overrepresentation of African Canadians and Aboriginals in the Canadian criminal justice system and likely disproportionality in arrests and searches.

⁷⁶ *Grant, supra*, note 64, at para. 75.

been preferable had the Court in *Grant* expressly disavowed the utility of the politically and emotionally charged labels of good or bad faith, which have produced uncertainty and inconsistency.⁷⁷ Judges are very familiar with deciding whether conduct was intentional or negligent. A Charter breach should be considered especially serious where the police have intentionally breached a Charter standard and serious where the breach was negligent. Police misperception or ignorance of Charter standards should only mitigate a Charter breach where the Crown has shown due diligence by the police in their attempt to comply with Charter standards.

2. There Should Be a Better Balance of the Rights of Accused and Complainants in Sexual Assault Cases

Although there are now calls to recognize new legal and constitutional rights for victims and complainants that the accused have too many rights, there is room for considerable caution and concern. Thus far, the Supreme Court has avoided recognizing general Charter rights for victims. This is as it should be. A criminal trial is about determining guilt and the just punishment of accused, not about personal redress for victims. What, for example, if the input of victims were to be determinative on the issue of sentence? It surely would be unjust to have the length of a prison sentence determined by whether the victim wants revenge or compassion. It seems clear that a general right of representation of victims at trial, even on the determination of guilt, would hopelessly burden and confuse an already overtaxed and under-resourced criminal justice system.

Thus far, the enforceable Charter rights for victims are those of privacy and equality for complainants, but only in sexual assault cases. The recognition of enforceable section 15 equality rights came by mere assertion in the context of access to medical records in *R. v. Mills*,⁷⁸ without any consideration of the 10-part test the Court had earlier established in *Law v. Canada (Minister of Employment and Immigration)*⁷⁹ to assess section 15 claims. In *R. v. Shearing*,⁸⁰ however, a 7-2

⁷⁷ Justice Doherty of the Ontario Court of Appeal has pointed to the dangers of labels such as good or bad faith in *R. v. Kitaitchik*, [2002] O.J. No. 2476, 4 C.R. (6th) 38, at para. 41 (Ont. C.A.), relying on C. Hill, "The Role of Fault in Section 24(2) of the *Charter*" in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996), at 57.

⁷⁸ [1999] S.C.J. No. 68, 28 C.R. (5th) 207 (S.C.C.).

⁷⁹ [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

⁸⁰ [2002] S.C.J. No. 59, 2 C.R. (6th) 213 (S.C.C.) [hereinafter "*Shearing*"].

majority of the Supreme Court ruled that defence counsel ought to have been allowed to cross-examine a complainant in a sexual assault trial as to a lack of reference to abuse in her diary, of which the accused had gained possession. According to Binnie J. for the majority, the view of the British Columbia Court of Appeal in the court below 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 records”.⁸¹ In *Shearing* there is no mention in the majority judgment of the unruly and unworkable 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” and “values”. The general approach in *Shearing*⁸² is a welcome recalibration of the balance of the rights of the accused and those of complainants in favour of the right to a fair trial. The Court ought to return to serious analysis of this section 15 issue in the sexual assault context, now that it has in *R. v. Kapp*⁸³ unanimously backed off the 15-part *Law* test in favour of a simpler test of whether the distinction based on enumerated or analogous grounds creates a disadvantage by perpetuating prejudice or stereotyping.

The implications of an enforceable section 15 right for complainants in sexual assault cases has been left unexplored. The policy issues are far wider than establishing rights for protection of therapeutic and other records of complainants. Can complainants now seek status to be represented throughout a sexual assault trial? Why is representation allowed in the case of access to records but not rape shield hearings? What of such rights for principal witnesses in other gendered crimes such as domestic assault?

In the context of criminal law the enshrinement of section 15 equality rights has had a far greater and welcome impact when there is no attempt to claim an enforceable right, but a reliance instead on “equality-lite” arguments of the need to be respectful of equality values. This has, for example, allowed the Supreme Court in *R. v. Tran*,⁸⁴ respecting the partial defence to murder, to rule *obiter* that the individualized approach to the ordinary person test must be respectful of Charter values against discrimination so that homophobia and honour killings cannot ground provocation defences.

⁸¹ *Id.*, at para. 132 (emphasis in original).

⁸² The majority ruling on the facts is questionable in its apparent lack of concern for myths and stereotypes in the now abrogated doctrine of recent complaint.

⁸³ [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.).

⁸⁴ [2011] S.C.J. No. 58, 80 C.R. (6th) 1 (S.C.C.).

The balance needs to be addressed in the context of our rape shield laws. Unlike any country in the Western world, Canada's rape shield protection applies, ever since a further assertion by McLachlin J. in *R. v. Seaboyer*⁸⁵ and now according to the *Criminal Code*, equally to prior sexual history with the accused. The Supreme Court in *R. v. Darrach*⁸⁶ upheld the statutory regime as constitutional, but it left ambiguities such that the law is not clear. The Court found that the rules in section 276(1) are not blanket exclusions and may lead to admission under the criteria of section 276(2). Can that lead to admission on the issue of consent? Consent is often the central issue in sexual assault trials, especially since the Supreme Court in *R. v. Ewanchuk*⁸⁷ so drastically narrowed the defence of mistaken belief in consent. The problem is that *Darrach* is self-contradictory, indicating at one point that such evidence would never be admissible on the issue of consent as it is not relevant and, at another, that such evidence is rarely admissible to show consent.

There is a consistent line of authority, especially in the Ontario Superior Court (reviewed in *R. v. Strickland*⁸⁸ and see earlier *R. v. Temertzoglou*⁸⁹), to admit prior evidence of sexual conduct with the accused to show "context". Admitting that evidence is "part of the context" seems very like the "part of the narrative" ruse often resorted to, to bypass unwelcome evidentiary rules.⁹⁰ The real problem is that the twin myth hypotheses are too rigid. David Paciocco⁹¹ suggested judges read them down to forbid only general stereotypical inferences and to allow inferences specific to the case. This was the approach taken by Fuerst J. in *Temertzoglou*. This solution is rather like that adopted by the Supreme Court in *R. v. Handy*⁹² for similar fact evidence: pattern evidence of the accused can exceptionally be admitted as evidence of specific rather than general propensity. The Paciocco analysis found favour in lower courts but was not squarely addressed by the Supreme Court in *Darrach*.

In *R. v. A. (No. 2)*,⁹³ the House of Lords somehow read *Darrach* as not applying rape shield principles equally to prior sexual history with

⁸⁵ [1991] S.C.J. No. 62, 7 C.R. (4th) 117 (S.C.C.).

⁸⁶ [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443 (S.C.C.) [hereinafter "*Darrach*"].

⁸⁷ [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 (S.C.C.).

⁸⁸ [2007] O.J. No. 517, 45 C.R. (6th) 183 (Ont. S.C.J.).

⁸⁹ [2002] O.J. No. 4951, 11 C.R. (6th) 179 (Ont. S.C.J.).

⁹⁰ See Christopher Nowlin, "A Wolf in Sheep's Clothing" (2006) 51 Crim. L.Q. 238, 271.

⁹¹ D. Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive Charter Challenge" (1993) 21 C.R. (4th) 223.

⁹² [2002] S.C.J. No. 57, [2002] 2 S.C.R. 908 (S.C.C.).

⁹³ [2001] 2 W.L.R. 1546 (H.L.).

the accused. The Law Lords unanimously declared that new United Kingdom rape shield laws offended fair trial rights in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁹⁴ in applying with equal force to prior sexual history with the accused.

Following the Kobe Bryant rape trial acquittal in the United States, Dean Michelle Anderson has called for restrictions on evidence of prior sexual history with the accused in U.S. jurisdictions.⁹⁵ But she accepts it as a given that:

prior negotiations between the complainant and the defendant regarding the specific acts at issue or customs and practices about those acts should be admissible. Those negotiations, customs, and practices between the parties reveal their legitimate expectations on the incident in question.⁹⁶

My sympathy is with trial judges attempting to ensure in appropriate cases that sexual assault trials are fair to both the accused and the accuser.

3. Charter Rights for Accused Should Not Depend on Their Being Asserted

One of the key Charter rights is the right to counsel under arrest or detention under section 10(b). One of the early compromises the Supreme Court made was to decide that,⁹⁷ while the informational right to be advised of the right to counsel is automatic, implementation duties, such as the requirement for police to stop questioning before a reasonable opportunity to consult counsel has been provided, only arise where the right to counsel is asserted. The right may also be lost if the detainee does not continue to assert it with reasonable diligence. This means that assertive and criminal law savvy suspects get a full panoply of rights while the most vulnerable — those who are ignorant of their rights, naïve or just plain scared — get nothing. The *Stinchcombe* right to full disclo-

⁹⁴ 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 (entered into force 3 September 1953).

⁹⁵ Dean Michelle Anderson, “Time to Reform Rape Shields Laws. Kobe Bryant Case Highlights Holes in the Armour” (2004) Criminal Justice 14.

⁹⁶ *Id.*, at 19.

⁹⁷ See the summary of jurisprudence by Lamer C.J.C. in *R. v. Bartle*, [1994] S.C.J. No. 74, 33 C.R. (4th) 1 (S.C.C.).

sure⁹⁸ is also triggered by a request. How this works out for an unrepresented accused is uncertain.

4. The Court Needs to Reconsider Its Decidedly Pro-State Balance in Its Much-Criticized Interrogation Trilogy of *Oickle*,⁹⁹ *Singh*¹⁰⁰ and *Sinclair*¹⁰¹

The vehemence of the protests of the dissenters in *Singh* and *Sinclair* is palpable and, in my view, justified. In *Sinclair*, Binnie J. fires the most direct salvo:

What now appears to be licenced as a result of the ‘interrogation trilogy’ [Oickle, Singh and now Sinclair] is that an individual (presumed innocent) may be detained and isolated for questioning by the police for at least five or six hours without reasonable recourse to a lawyer, during which time the officers can brush aside assertions of the right to silence or demands to be returned to his or her cell, in an endurance contest in which the police interrogators, taking turns with one another, hold all the important legal cards.¹⁰²

[W]hen the decisions are read together the resulting latitude allowed to the police to deal with a detainee, who is to be presumed innocent, disproportionately favours the interests of the state in the investigation of crime over the rights of the individual in a free society ...¹⁰³

According to LeBel and Fish JJ. (with Abella J. concurring), the suggestion of the majority

[t]hat our residual concerns can be *meaningfully* addressed by way of the confessions rule thus ignores what we have learned about the dynamics of custodial interrogations and renders pathetically anaemic the entrenched constitutional rights to counsel and to silence.¹⁰⁴

When the pre-trial right to silence was first recognized by McLachlin J. in *R. v. Hebert*¹⁰⁵ under section 7, the Court used strong language. There was a need in the Charter era to move beyond the old common

⁹⁸ *Supra*, note 44.

⁹⁹ *R. v. Oickle*, [2000] S.C.J. No. 38, 36 C.R. (5th) 129 (S.C.C.) [hereinafter “*Oickle*”].

¹⁰⁰ *R. v. Singh*, [2007] S.C.J. No. 48, 51 C.R. (6th) 199 (S.C.C.) [hereinafter “*Singh*”].

¹⁰¹ *R. v. Sinclair*, [2010] S.C.J. No. 35, 77 C.R. (6th) 203 (S.C.C.) [hereinafter “*Sinclair*”].

¹⁰² *Id.*, at para. 98.

¹⁰³ *Id.*, at para. 77.

¹⁰⁴ *Id.*, at para. 184 (emphasis in original).

¹⁰⁵ [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) [hereinafter “*Hebert*”].

law's focus on reliability to allow judicial control of police interrogation, abuses and tricks. The detainee had a fundamental right to choose whether to speak to police. The Court held that the police trick of sending an undercover officer into a cell to overcome the assertion of the right to silence violated section 7 and should result in exclusion. There was no consideration of involuntariness. The Court was pragmatic in limiting the right in that context to arise only on detention and to preclude only active eliciting "functionally equivalent to interrogation" as later characterized in *R. v. Broyles*.¹⁰⁶ The majority in *Hebert* refused to require that the detainee be advised of the right to silence. In the context of undercover officers, this decision seems wise; otherwise, all types of undercover work would have been effectively outlawed.

It has long been accepted that advising the accused of a right to remain silent is not a requirement of the voluntary confession rule, but a lack of warning may be taken into account in determining voluntariness (*R. v. Boudreau*¹⁰⁷). At common law, the right to silence operates, held Abella J. for a unanimous Supreme Court in *R. v. Turcotte*,¹⁰⁸ to allow no adverse inferences to be drawn from pre-trial silence lest it be a "snare and delusion" to advise the accused of the right to remain silent and then to use it against someone who exercises it.

Although there is still strong rhetoric in the majority opinion in *Sinclair* about the apparently fundamental section 7 right to choose not to speak to known police interrogators, there is no Charter requirement that the accused be advised of that right and no remedy contemplated irrespective of voluntariness if that right is breached. As pointed out by the dissenters in *Sinclair*, a major disappointment is that, as in *Singh*, the detainee repeatedly asserting the right to silence and/or right to consult counsel will not in itself lead to a Charter remedy under section 7 or section 10(b). That is apparently not a "snare and delusion". A right without a remedy is meaningless. The *Hebert* section 7 right to silence against proactive questioning by undercover agents in cells is therefore now the anomaly.

For controls on normal police interrogation in custody, the majority places its trust on what the majority in *Sinclair* call the "broad" voluntary confession rule set out in *Oickle*. The problem is that the Supreme Court confirmation of rulings on voluntariness on the facts of *Oickle* and *Singh*

¹⁰⁶ [1991] S.C.J. No. 95, [1991] 3 S.C.R. 595 (S.C.C.).

¹⁰⁷ [1949] S.C.J. No. 10, [1949] S.C.R. 262 (S.C.C.), affirmed, by Charron J. in *Singh*.

¹⁰⁸ [2005] S.C.J. No. 51, 31 C.R. (6th) 197 (S.C.C.).

gives no comfort for those seeking such judicial control on aggressive interrogation determined to get the detainee to confess at all costs. Bright and committed detectives have been given a huge authority to use tricks, inducements, lies, polygraphs and psychological techniques largely free of scrutiny by lawyers and even in the face of multiple assertions of the so-called right to silence.

The newly reconstituted Supreme Court should reconsider especially their rulings that one brief consultation with duty counsel satisfies section 10(b),¹⁰⁹ in order to give better meaning to the right to silence. However, the trilogy is of course binding, and even narrow majorities often are hard to get reconsidered or changed.¹¹⁰ The hope for a better balance may well lie with trial judges presiding over voluntary confession *voir dire*s. Under *Oickle*, it should be recalled, and this was not emphasized in *Sinclair*, a confession must be excluded if oppressive conditions resulted in involuntariness *or*, irrespective of involuntariness, if the police tricks were “shocking”. The latter is a high hurdle, but it does give judges a direct remedy of exclusion for egregious interrogations. Prior to *Oickle*, Ketchum J. in *R. v. S. (M.J.)*¹¹¹ excluded a confession in part because the videotape revealed Calgary police were using the oppressive atmosphere and psychological brainwashing Reid method pioneered in the United States, which should not, he held, be accepted in Canada. That method is currently in widespread use and emphasized in police training. It should result in judicial controls in egregious cases. Some judges¹¹² have recently linked their decision to exclude a confession to a consideration of an inadequate discharge of the section 10(a) obligation to advise of the reason for arrest or detention. Some judges might wish to resort to the little-known automatic exclusion rule for evidence obtained by mental or physical torture to be found in section 269.1(4) of the *Criminal Code*.

¹⁰⁹ See, especially, the companion rulings to *Sinclair* in *R. v. McCrimmon*, [2010] S.C.J. No. 36, 77 C.R. (6th) 266 (S.C.C.) and *R. v. Willier*, [2010] S.C.J. No. 37, 77 C.R. (6th) 283 (S.C.C.).

¹¹⁰ The 5-4 ruling in *R. v. Hall*, [2002] S.C.J. No. 65, 4 C.R. (6th) 197 (S.C.C.), upholding the revised public interest ground to deny bail, is another strong candidate for review.

¹¹¹ [2000] A.J. No. 391, 32 C.R. (5th) 378 (Alta. Prov. Ct.).

¹¹² Justice Baldwin in *R. v. Koivisto*, [2011] O.J. No. 2794, 87 C.R. (6th) 336 (Ont. C.J.).

5. The Protection against Cruel and Unusual Punishment under Section 12 Needs to Be Revitalized and Used to Strike Down Disproportionate Minimum Penalties

In *R. v. Ferguson*,¹¹³ McLachlin C.J.C., on behalf of a unanimous Supreme Court, decided that constitutional exemptions were not available as a remedy for mandatory minimum sentence. Paul Calarco¹¹⁴ sees a silver lining for defence counsel. He suggests that without judges being able to fall back on the solution of a constitutional exemption to a mandatory minimum sentence in the individual case, it will be easier to have the penalty struck down as grossly disproportionate. Hopefully¹¹⁵ this will breathe new life into section 12 challenges.

The judicial record since the Supreme Court in *R. v. Smith*¹¹⁶ struck down the seven-year minimum sentence for importing a narcotic has indeed thus far been one of retreat and timidity.¹¹⁷ There will be clear challenges to the courts to dust off section 12 to put constitutional brakes on Parliament's new appetite for enacting minimum punishments at a time when the United States courts and policy-makers have become acutely aware of the danger, injustice and costs of such sentencing rigidity. A strong candidate is the simplistic and ridiculous grid scheme for sentencing for possession of marijuana for trafficking: mandatory 6 months for 6-200 plants, 1 year for 201-500 plants and 2 years for 501 or more plants found at the time of the police raid. In *R. v. Smickle*,¹¹⁸ Molloy J. of the Ontario Superior Court recently used section 12 to strike down a three-year minimum sentence where police entered a home looking for another person and found the accused taking a picture of himself holding a loaded handgun. That intrepid decision is under appeal.

The cat would be among the pigeons — or in this case among the hawks — were our Court to follow the recent U.S. Supreme Court

¹¹³ [2008] S.C.J. No. 6, 54 C.R. (6th) 197 (S.C.C.).

¹¹⁴ Paul Calarco, "R. v. Ferguson: An Opportunity for the Defence" (2008) 54 C.R. (6th) 223.

¹¹⁵ Professor Kent Roach, Editorial (2008) 54 Crim. L.Q. 1 suggests that the more likely scenario is that *Ferguson* will encourage the trend to greater use by Parliament of mandatory sentences and greater acceptance of such sentences despite the injustice that mandatory sentences will cause in exceptional cases.

¹¹⁶ [1987] S.C.J. No. 36, 58 C.R. (3d) 193 (S.C.C.).

¹¹⁷ In *R. v. Goltz*, [1991] S.C.J. No. 90, 8 C.R. (4th) 82 (S.C.C.) and *R. v. Morrissey*, [2000] S.C.J. No. 39, 36 C.R. (5th) 85 (S.C.C.), Gonthier J. paid lip service to the gross disproportionality test of *Smith* but substantially narrowed it.

¹¹⁸ [2012] O.J. No. 612, 91 C.R. (6th) 132 (Ont. S.C.J.).

remedy¹¹⁹ of ordering the release of 3,700 prisoners to deal with overcrowding in California.

The Harper Government has consistently said it will not reintroduce the death penalty. Yet, a recent poll¹²⁰ finds that 49 per cent of Canadians support the death penalty “for dangerous offenders”. In its impressive judgment in *United States of America v. Burns*,¹²¹ the Court was unanimous in deciding that the Minister of Justice should not have agreed to the extradition of Canadian citizens on aggravated first degree murder charges in the state of Washington without obtaining assurances that the death penalty would not be imposed. The issue was decided under section 7. However, the Court added the following comment:

We are not called upon in this appeal to determine whether capital punishment would, if authorized by the Canadian Parliament, violate s. 12 of the *Charter* (“cruel and unusual treatment or punishment”), and if so in what circumstances. It is, however, incontestable that capital punishment, whether or not it violates s. 12 of the *Charter*, and whether or not it could be upheld under s. 1, engages the underlying values of the prohibition against cruel and unusual punishment. It is final. It is irreversible. Its imposition has been described as arbitrary. Its deterrent value has been doubted. Its implementation necessarily causes psychological and physical suffering.¹²²

It is salutary and another sign of the power of the Charter that the Supreme Court is on record that it would likely find that the death penalty would violate section 12.

¹¹⁹ *Coleman v. Schwarzenegger*, 2011 U.S. Lexis 4012 (U.S.S.C.).

¹²⁰ *Leger Sun Media Poll*, March 13, 2012.

¹²¹ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.).

¹²² *Id.*, at para. 78.