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Has Everything Been Decided?: Certainty, the Charter and Criminal Justice

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Has Everything Been Decided? Certainty, the Charter and Criminal Justice

James Stribopoulos*

I. INTRODUCTION

Closing in on the Silver Anniversary of the *Canadian Charter of Rights and Freedoms*,¹ it is hard not to be astounded by the changes that it has occasioned to almost every facet of our criminal justice system. Its impact has been nothing short of revolutionary,² moving our justice system sharply away from a crime control and toward a due process model.³

A quick review of the Supreme Court of Canada's constitutional decisions from the 2005 calendar year, however, might leave one with the impression that the revolution is finally coming to an end. Compared to only a decade ago,⁴ the Court's output in this important area seems to

* Assistant Professor, Osgoode Hall Law School. I would like to thank Alan Young, Renee Pomerance, Gary Trotter and Kent Roach for providing feedback on an earlier draft of this paper. Of course, any errors are mine alone.

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

² Kent Roach, "The Attorney General and the Charter Revisited" (2000) 50 U.T.L.J. 1, at 5. It is a revolution that Roach asserts "has fundamentally altered the law and discourse that governs the criminal process".

³ See generally Herbert L. Packer, "Two Models of the Criminal Process" (1964) 113 U. Pa. L. Rev. 1. See also Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968). Packer uses the metaphor of a conveyor belt to describe the crime control model and an obstacle course to describe the due process model. For a Canadian account of post-Charter developments in light of Packer's models, see Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

⁴ For example, in 1995 the Court decided approximately 25 cases that related to criminal law and the Charter. It should be remembered, however, that the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter "Code"] s. 691(2) was amended in 1997 to eliminate the automatic right to appeal to the Supreme Court that used to exist whenever an acquittal at trial was overturned by the court of appeal in the province.

have fallen off considerably.⁵ This might understandably cause some observers to believe that with the passage of time there is very little left to be decided. In other words, subject to the odd exception, the dust has finally settled. The Court has now spoken on almost every constitutional issue of any significance to criminal justice. Accordingly, in future we should expect to hear less and less from the Supreme Court on this subject. This is a view that would likely find some prominent backers, including Justice Moldaver of the Court of Appeal for Ontario.

Respected for his expertise in criminal law, Justice Moldaver recently issued a strongly worded admonition to Ontario's criminal defence lawyers when he spoke at their annual conference in the Fall of 2005. He told the assembled audience that: "Most of the *Charter* issues that you are likely to encounter on a day-to-day basis have been thoroughly litigated, all the way to the Supreme Court of Canada. By and large, the governing principles are now firmly established. And where that is so, the time for experimentation is over. It's finished. It's

⁵ In contrast, in 2005, there were a total of nine cases that fit the bill. None of these related to substantive criminal law. There were seven that related to matters of Criminal Procedure, see: *R. v. Gunning*, [2005] S.C.J. No. 25, [2005] 1 S.C.R. 627 (Charter s. 11(f), right to jury trial — trial judge precluded from directing verdict of guilt); *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 [hereinafter "*Orbanski & Elias*"] (Charter s. 10(b), right to counsel — whether right is implicitly overridden at the roadside for the purpose of questioning drivers about alcohol consumption and requesting their participation in sobriety tests); *Toronto Star Newspapers Ltd. v. Ontario*, [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188 (Charter s. 2(b), freedom of expression and the press, whether open court principle extends to pre-trial procedures like search warrant application materials); *R. v. Wiles*, [2005] S.C.J. No. 53, 2005 SCC 84 (Charter s. 12, cruel and unusual punishment, whether imposition of firearms prohibition contravenes right); *R. v. Pires*; *R. v. Lising*, [2005] S.C.J. No. 67, [2005] 3 S.C.R. 343 [hereinafter "*Pires & Lising*"] (Charter s. 8, right to be secure against unreasonable search or seizure, preconditions for cross-examining search warrant affiant on s. 8 application); *R. v. Decorte*, [2005] S.C.J. No. 77, [2005] 1 S.C.R. 133 (Charter s. 9, right not to be arbitrarily detained — whether First Nations Constables have legal authority to set up R.I.D.E. check-stops just outside reserves they are engaged primarily to serve); *R. v. Spence*, [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458 (trial judges are not obligated to explore the interracial nature of crime during challenge for cause procedure whenever victim and accused are of different races). And two Evidence cases with a Criminal Law and Charter component: see *R. v. Henry*, [2005] S.C.J. No. 76, 2005 SCC 76 [hereinafter "*Henry*"] (Charter s. 13, right against self-incrimination through prior testimony, whether right applies at retrial to preclude cross-examination of accused based on his testimony at first trial); *R. v. Turcotte*, [2005] S.C.J. No. 51, [2005] 2 S.C.R. 519 (Charter s. 7, right to silence, is right waived when a suspect answers some questions such that the failure to answer others may be the subject of evidence). This was roughly the same number of "criminal" Charter cases decided by the Court during the 2004 calendar year. See Eugene Meehan, *Supreme Court of Canada 2004 Year-In-Review* available online: <<http://www.eugenemeehan.com/english/sccReview2004.asp>>.

done.”⁶ The main point of his speech was as clear as it was strong: stop bringing spurious Charter applications. He forcefully argued that such motions are unduly prolonging criminal trials, choking the justice system and creating a backlog that is undermining public confidence in the system and threatening the administration of justice.⁷

Anyone close to the criminal courts knows that these concerns are justified. Criminal trials are indeed taking much longer to complete than they did a generation ago and Charter litigation is the major cause. Poor judgment by many criminal defence counsel on what Charter issues are worth litigating, as well as a plodding and prolix approach by some in advancing these claims, are undoubtedly a part of the problem, as Justice Moldaver suggests.⁸ And, as he also noted, intransigent prosecutors must shoulder some of the blame; so must trial judges who fail to bring a quick end to frivolous Charter applications.⁹ Of course, Justice Moldaver readily concedes that with the Charter some delays are simply unavoidable. The reality is that litigating the constitutionality of how the police acquired the evidence against an accused takes time. His concern is with those delays that could be prevented if counsel were more reasonable in assessing potential Charter claims.

My focus in this short paper will be on Justice Moldaver’s suggestion that when it comes to criminal justice and the Charter the governing principles are now firmly established and that the time for experimentation has mostly come to an end. I will respond to that claim by drawing on the Court’s Charter judgments from this past year. As noted, there were very few constitutional cases that touched on criminal law in 2005. At least superficially this would seem to support Justice Moldaver’s claim. As will become obvious, however, the numbers alone can be quite misleading. They tell only a very small part of the story.

⁶ Justice Moldaver delivered the Sopinka Lecture on Advocacy at the Criminal Lawyers Association Annual Fall Conference, in Toronto, on October 22, 2005. See Christie Blatchford, “Justice delayed, justice denied” *The Globe and Mail* (25 November 2003) A23, wherein large portions of the original speech are reproduced, including the passage quoted here. The entire lecture is reproduced in the Criminal Reports. See Hon. Justice Michael Moldaver, “Long Criminal Trials: Masters of a System They Are Meant to Serve” (2005) 32 C.R. (6th) 316 [hereinafter “Moldaver”]. In the published version Justice Moldaver has backed away from some of stronger language used in his original address. For example, the last sentence in the excerpt above was revised to read: “By and large, the governing principles are now firmly established. And where that is so — where the basic principles have been established — any further experimentation should generally be limited to fine-tuning.” *Id.*, at 322.

⁷ Moldaver, *id.*, at 320-23.

⁸ *Id.*

⁹ *Id.*, at 319-20.

What matters much more in drawing out larger lessons from last year's cases and forecasting future trends is the substance of those decisions that the Court did hand down. Here, my focus will be on three of the Court's judgments: *Pires & Lising*,¹⁰ *Henry*¹¹ and *Orbanski & Elias*.¹² Together these three cases serve to illustrate that despite occasional claims to the contrary by observers like Justice Moldaver, the reality is that there continues to be much uncertainty surrounding a number of very basic Charter issues relating to the criminal justice system.

In the process of responding to Justice Moldaver's claim, the paper will also take up the question of legal uncertainty in criminal Charter litigation more generally. Ultimately, my claim is that, generally speaking, there are two forms of uncertainty in this context. In Part II, what I term "unavoidable" or even "necessary" uncertainty will be considered. Here, our focus will be on how some degree of uncertainty is inherent and even constructive when it comes to the interpretation of the Charter's open-ended and value-laden guarantees. In contrast, in Part III, we will explore the very different implications that arise when the law governing police powers is needlessly mired in uncertainty. Here, our focus will be on the rules that empower the police to interfere with individual liberty, as opposed to the Charter guarantees that are supposed to place minimum constitutional limits on police authority. The distinction is subtle but important. When it comes to the rules of police empowerment, beyond respecting minimum Charter requirements, our goals should equally be clarity and comprehensiveness. This is because uncertainty about the basic contours of police authority poses a serious, yet unnecessary, threat to the Charter rights of anyone who happens to come into conflict with police power.¹³

¹⁰ *Supra*, note 5.

¹¹ *Supra*, note 5.

¹² *Supra*, note 5.

¹³ I do not at all intend to suggest that certainty is the ultimate goal. Given how many actors (individuals, police, lawyers, judges) depend on clarity in the Court's judgments and the stakes for those involved, certainty is obviously a very important consideration. On the importance of clear and coherent rules within the criminal process see generally Alan N. Young, "The Charter, the Supreme Court of Canada and the Constitutionalization of the Investigative Process" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 1. Of course, substance also matters a great deal. Procedurally clear but substantively flawed laws can occasion much injustice. Accordingly, the Court's goal when operating in areas that implicate those individual interests protected by the Charter's legal rights guarantees must also be to safeguard individuals from abuses of state power during the criminal investigative and adjudicative processes. See generally James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1, at 5-17.

II. NECESSARY UNCERTAINTY: *PIRES & LISING* AND *HENRY*

Some uncertainty is of course inevitable in any constitutional system that gives common law courts the primary responsibility for interpreting a constitutional text on a case-by-case base. It is trite that in every case within such a system the resolution of some questions will need to be deferred until they are ripe for consideration in some future case. It would seem that Justice Moldaver's point is that when it comes to the criminal justice system and the Charter most of the basic questions have now been decided, they are settled; but are they? In this part of the paper I intend to demonstrate that they are not.

First, even questions that seem settled aren't always so. In part, the long-term viability of any common law constitutional system very much depends on the authority and willingness of its final court of appeal to revisit established doctrine when experience has demonstrated that one of its earlier judgments is either being misconstrued or was wrongly decided.¹⁴ This seems especially true in a system such as ours in Canada where the Constitution is considered to be a "living tree".¹⁵

Just as important, for reasons going to its institutional integrity, the Court must proceed with great caution before substantially revamping established precedent or taking the drastic step of overruling an earlier judgment. If the Court appears too eager to revisit established principles then the authority of its judgments will be undermined and its institutional integrity will needlessly suffer. In other words, the institutional integrity of the Court would seem to depend both on its willingness to reconsider its past decisions when the reasons for doing so are compelling and the resolve to refrain from doing so when they are not.

Contrary to claims that the time for Charter experimentation is over, cases like *Pires & Lising* and *Henry* demonstrate that the dust is far from settled, even when it comes to principles that may seem very well established. In each of these cases the Court revisited decisions that it

¹⁴ Although it is difficult, try to imagine a world in which *Plessy v. Ferguson*, 163 U.S. 537 (1896) (which upheld school segregation based on the so-called "separate but equal" doctrine) was never overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁵ The "living tree" metaphor began its ascent into Canadian constitutional law under the *British North America Act*. See *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 136 (P.C.), *per Viscount Sankey*. The Supreme Court has continued to embrace this metaphor in the Charter era. See *e.g.*, *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155-56 [hereinafter "*Hunter*"].

had handed down in the relative infancy of the Charter. In the former case, *Pires & Lising*, the Court reaffirmed its prior judgment in order to avoid any uncertainty that may have grown up around it because of some important and related developments. In *Henry*, the Court took the far more drastic step of actually overruling its earlier decision. As we go forward in this Part the important point to remember is that some uncertainty is inevitable and even necessary within our constitutional system.

1. The Judgment in *Pires & Lising*

Let us begin with *Pires & Lising*. The appellants were charged with several drug-related offences. By way of pre-trial Charter motion they challenged the admissibility of certain wiretap evidence that had been obtained pursuant to the authority of several judicial authorizations. On this motion they sought leave to cross-examine the police officer who had sworn the affidavit to obtain judicial approval for the wiretaps. The trial judge refused leave, concluding that the preconditions set down by the Supreme Court's earlier decision in *R. v. Garofoli*¹⁶ were not met. The appellants challenged that ruling unsuccessfully before the British Columbia Court of Appeal and then again before the Supreme Court.

The appellants' main argument was that the preconditions on the ability to cross-examine a warrant affiant set down in *Garofoli* — decided in 1990 — should be reconsidered. In *Garofoli*, in the course of some rather long reasons that dealt with a great many issues, Sopinka J. had indicated that before cross-examination would be permitted:

A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.¹⁷

It was the need for leave to cross-examine that the appellants challenged in *Pires & Lising*. (In the alternative, they argued that under the *Garofoli* test they should have been permitted to cross-examine in any event.)

The appellants pointed to a number of important developments since *Garofoli* in arguing in favour of a more relaxed approach. For example,

¹⁶ [1990] S.C.J. No. 115, [1990] 2 S.C.R. 1421 [hereinafter "*Garofoli*"].

¹⁷ *Id.*, at 1465.

there was the repeal of the automatic exclusionary rule that was in the former section 178.16 of the Code. It had imposed the burden on the Crown to establish the existence of a valid authorization. Failing that, the evidence obtained would be excluded. With the 1993 amendments the legal burden shifted squarely to the accused to show a Charter violation and to justify exclusion under section 24(2).¹⁸ The appellants argued that this shift in onus necessitated a relaxation of the initial threshold requirement that must be met before cross-examination is permitted. Absent that, the appellants argued that *Garofoli*, combined with the 1993 amendments, would undermine the ability of accused persons to challenge the sub-facial validity of wiretap authorizations.

In addition, there were three larger trends in the post-*Garofoli* jurisprudence that the Appellants emphasized in arguing for a relaxation of the requirements: first, clear and express recognition by the Court of the critical importance of cross-examination;¹⁹ second, developments with respect to the lower standard for the admissibility of defence evidence;²⁰ and, finally, the well established notion that rights require remedies and an argument that maintaining *Garofoli*'s requirements to cross-examine would impede access to the Charter's remedial scheme.

Before moving on to address how the Court responded to this claim, it is worthwhile to pause here and emphasize that the argument advanced by the Appellants was not without merit. A great deal has indeed changed since *Garofoli* was decided. The idea that the Supreme Court might be prepared to reconsider its judgment in that case a mere 15 years after it was decided was not at all far-fetched. For example, it was only 11 years between the Supreme Court's decision in *R. v. Landry*²¹ (decided in 1986) defining the common law requirements for entry into private premises to effect an arrest and the Court's decision in *R. v. Feeney*²² embracing the warrant requirement it had specifically rejected in *Landry*. In changing course in *Feeney* the Court had

¹⁸ This was because the normal rules governing Charter applications then applied. In other words, the applicant bears the burden on a balance of probabilities. See *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 [hereinafter "*Collins*"].

¹⁹ See e.g., *R. v. Lyttle*, [2004] S.C.J. No. 8, [2004] 1 S.C.R. 193, at para. 41.

²⁰ See e.g., *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at para. 43.

²¹ [1986] S.C.J. No. 10, [1986] 1 S.C.R. 45.

²² [1997] S.C.J. No. 49, [1997] 2 S.C.R. 13 [hereinafter "*Feeney*"].

emphasized subsequent developments under section 8 of the Charter relating to the protection of privacy.²³

In *Pires & Lising* the Supreme Court ultimately rejected the appellants' claim that developments over the intervening years warranted a change in approach. Although the legal burden had shifted the evidentiary burden had remained firmly on the Crown. Once a search is challenged, it is the Crown that must show the existence of a facially valid authorization. Failing that, the search or seizure will be presumed to be unreasonable and the applicant will have discharged its legal burden.²⁴ In other words, as a practical matter those challenging the validity of a search warrant are not worse off than they were before the amendments. This is especially true because of developments over the intervening years that actually work to the advantage of accused persons when it comes to making a preliminary showing that cross-examination is necessary. Today, unlike when *Garofoli* was decided, accused persons can quite easily gain access to the affidavit sworn to obtain a warrant,²⁵ as well as other investigatory materials that will shed considerable light on whether or not cross-examination of the affiant might prove useful in mounting a challenge to the warrant.²⁶ As the Court points out, "the defence does not arrive empty-handed at the evidentiary hearing".²⁷

The Court concluded that the appellant's reliance on cases that emphasize the importance of cross-examination and the ability of the defence to introduce evidence *at trial* was misplaced. The basis for a sub-facial challenge to a warrant is actually quite narrow. The reviewing judge does not conduct a *de novo* hearing. Rather, she is limited to a consideration of whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions were satisfied.²⁸ For the Court these differences in context were important. Given the limited basis for conducting a sub-facial

²³ *Id.*, at paras. 42-51.

²⁴ A warrantless search or seizure is presumptively unreasonable under s. 8 of the Charter, which as a practical matter means that the burden shifts to the Crown. See *Collins*, *supra*, note 18.

²⁵ See *R. v. Dersch*, [1990] S.C.J. No. 113, [1990] 2 S.C.R. 1505 (holding that once the admission of the evidence is challenged an accused is entitled to access to the authorization packet submitted by police in order to permit full answer and defence).

²⁶ See *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (holding that the defence is entitled to all material in the possession or control of the Crown that is potentially relevant to the case whether favourable to the accused or not).

²⁷ *Pires & Lising*, *supra*, note 5, at para. 27.

²⁸ See generally *Garofoli*, *supra*, note 16, at 1451-52. See also *R. v. Araujo*, [2000] S.C.J. No. 65, [2000] 2 S.C.R. 992.

attack on a search pursuant to warrant, the need for some preliminary showing by an accused that cross-examination might be fruitful remains important. As Charron J. noted for the Court in *Pires & Lising*, “[t]here is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence”.²⁹ *Garofoli* set down a leave requirement in order to avoid valuable court time being wasted by the exploration of what is ultimately irrelevant evidence. In other words, the “*Garofoli* threshold test is all about relevancy. If the proposed cross-examination is not relevant to a material issue, within the narrow scope of the review of admissibility, there is no reason to permit it”.³⁰ Any other course would ignore concerns about the prolixity of proceedings and, in many cases, the need to protect informants. For the Court these concerns were as important today as they were in 1990. As a result, it left *Garofoli*’s leave requirement intact.

Nevertheless, the Court sensibly seized the opportunity to provide some guidance on what sort of showing is required by the leave requirement set down in *Garofoli*. As noted, the Court in that case had dealt with a host of different section 8 Charter issues. In the result, it had concluded that *Garofoli* had wrongly been denied the opportunity to cross-examine the affiant in his case.³¹ Possibly due to the brevity of the Court’s reasons in *Garofoli* on this discrete issue, over the intervening years trial courts had been rather inconsistent in applying the leave requirement.³² This practical reality would have no doubt informed the decision of counsel for *Pires* and *Lising* to challenge *Garofoli*. For similar reasons, the time was also right for the Court to revisit the issue and provide some needed guidance — which is exactly what it did:

... in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focused on the question to be determined on a *Garofoli* review — whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed

²⁹ *Pires & Lising*, *supra*, note 5, at para. 31.

³⁰ *Id.*

³¹ *Garofoli*, *supra*, note 16, at 1466.

³² See Michal Fairburn, “Litigating the Warranted Search: A Practical Overview” (Paper presented to the Fourth Symposium on Issues in Search and Seizure Law in Canada, November 2005) (Toronto: Osgoode Hall Law School, Professional Development Program, 2005), at 10-12.

cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. Such a strict standard was rejected in *Garofoli*. A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown.³³

Quite sensibly, this passage is followed by a number of specific examples from the case law regarding the sort of circumstances in which cross-examination should be permitted.³⁴ The Court closes off by carefully reviewing the facts in this case in order to explain why the appellants had failed to meet the standard, providing another concrete example of the standard in application.³⁵

Returning briefly to my larger point, the Court's decision in *Pires & Lising* provides a useful example for our purposes here. The Supreme Court had set down the threshold test in *Garofoli* only 15 years earlier. Nevertheless, experience over the intervening years revealed much confusion regarding how onerous the Supreme Court intended the threshold requirement to be. In addition, the constitutional landscape had changed considerably in the interim. Given these circumstances it is understandable why counsel for Pires and Lising thought the time might be right to try and convince the Court to reconsider its earlier decision. Similarly, the Court was also justified in deciding to revisit its earlier judgment and provide some needed clarification.

Pires & Lising effectively illustrates that even well established constitutional principles benefit from periodic review and renewal. Subjecting long-standing doctrine to continued debate in light of contemporary circumstances ensures the Charter's vitality and is in keeping with the "living tree" theory of our Constitution. Of course, this sort of review will occasionally lead the Court to conclude that a prior judgment was wrongly decided and needs to be overturned. This is exactly what happened in *Henry*.

³³ *Pires & Lising*, *supra*, note 5, at para. 40.

³⁴ *Id.*, at paras. 42 through 44. See also *id.*, at para. 69.

³⁵ *Id.*, at paras. 49-68. Here, the appellants emphasized a single statement in the affidavit which did serve to create a false impression on a point that the trial judge, the British Columbia Court of Appeal and the Supreme Court all concluded was rather inconsequential to the issuance of the authorization. There was an innocent explanation for the misstatement and therefore no real basis to suggest that it was deliberate. Where there is some basis to think that a false statement was included with the intention to mislead the Court indicated that leave to cross-examine should be granted. That was not this case. Accordingly, the appeal was dismissed.

2. The Judgment in *Henry*

The Supreme Court has considered section 13 of the Charter on a number of prior occasions.³⁶ In *Henry* that guarantee was again front and centre. It reads:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Unfortunately, the Court's past decisions interpreting section 13 drew two difficult distinctions that have sometimes proven elusive in application.

First, what exactly constitutes "any other proceedings"? Some cases are easy. For example, protection of an accused person from use of his evidence at the preliminary inquiry or trial of a third party is obvious. More difficult is the situation of an accused who testifies at his own trial which then either results in a mistrial or culminates in a successful appeal. Does the guarantee protect that accused from use of his prior testimony at any subsequent retrial? In *Dubois*³⁷ the Supreme Court held that a retrial for the same offence falls within the meaning of the words "any other proceedings". But what about the accused person who testifies on a *voir dire*, can that evidence then be used by the Crown at the trial proper or is the *voir dire* a separate proceeding? Although that issue has never directly come before the Court, it has signalled in rather strong *obiter* that the *voir dire* and trial proper should be considered separate proceedings for section 13 Charter purposes.³⁸

Second, once the guarantee in section 13 of the Charter is engaged, what does it actually protect against? On its face, the provision speaks of not having evidence "used to incriminate ... except for a prosecution for perjury or for the giving of contradictory evidence". Over the last 20 years the Court has experienced considerable difficulty giving this

³⁶ See *R. v. Dubois*, [1985] S.C.J. No. 69, [1985] 2 S.C.R. 350 [hereinafter "*Dubois*"]; *R. v. Mannion*, [1986] S.C.J. No. 53, [1986] 2 S.C.R. 272 [hereinafter "*Mannion*"]; *R. v. Kuldip*, [1990] S.C.J. No. 126, [1990] 3 S.C.R. 618; *R. v. Noël*, [2002] S.C.J. No. 68, [2002] 3 S.C.R. 433 [hereinafter "*Noël*"]; *R. v. Allen*, [2003] S.C.J. No. 16, [2003] 1 S.C.R. 223 [hereinafter "*Allen*"].

³⁷ *Id.*

³⁸ See *R. v. Darrach*, [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443, at para. 66. As a practical matter the issue has not arisen because there is established case law that predates the Charter which holds that an accused's testimony on a *voir dire* is not admissible on the trial proper. See *Erven v. The Queen*, [1978] S.C.J. No. 114, [1979] 1 S.C.R. 926, at 932.

language consistent and coherent meaning. Here is a brief summary of the Court's prior rulings that take up this issue:

- In *Dubois* the accused was being retried following a successful appeal. The Court held that section 13 precluded the Crown from introducing as part of its own case a transcript of the accused's evidence from his first trial.
- In *Mannion* the Crown cross-examined the accused on inconsistencies between his testimony at his first trial and the answers he gave when testifying at his retrial. The Court held that section 13 precluded the Crown from engaging in this sort of questioning.
- In *Kuldip* the Crown had again cross-examined the accused on inconsistencies between his testimony at his first trial and the answers he gave when testifying at his retrial. This time the Court drew a distinction between use of prior testimony for the purpose of "incriminating" an accused, which the Court said is to establish guilt and runs afoul of section 13, and use for "impeachment" purposes, which the Court said is elicited merely to contradict and undermine credibility.
- In *Noël* the Crown had cross-examined an accused about testimony he had given at an accomplice's trial. Here, the Court acknowledged the difficulty created by its earlier decision in *Kuldip* and the distinction drawn between incrimination and impeachment. In *Noël* the Court held that section 13 provides that, when an accused testifies at trial, he or she cannot be cross-examined on prior testimony to impeach credibility unless the trial judge is satisfied that there is no realistic danger that the prior testimony could be used to incriminate the accused.³⁹

The interpretive challenge with section 13 of the Charter that seemed to finally come to a head in *Noël* was the difficult distinction that the Court had attempted to draw between incrimination and impeachment. A difference that was better understood in theory than it was in practice. The reality is that whenever the Crown is attempting to

³⁹ It should be noted that *Allen*, *supra*, note 36, involves a straightforward application of the principle from *Noël*.

use an accused's prior testimony it is doing so in order to advance its case against him with the ultimate objective of proving his guilt.⁴⁰ For this reason the distinction between incrimination and impeachment has at times seemed rather artificial.

In *Henry* it was the impossibility of drawing such a distinction that the appellants hoped to make the focus of their appeal. Both men had been convicted of murder at their first trial. They successfully appealed against those convictions. At their retrial, which pre-dated the Supreme Court's decision in *Noël*, both men testified in their own defence and each gave a substantially different account than they had at their first trial. The Crown cross-examined them on the differences in their respective stories from the first trial to the second and both men were again convicted. The discrete issue before the Supreme Court of Canada was whether the cross-examination at their subsequent trial ran afoul of section 13 of the Charter.

The Court began its judgment by reiterating the purpose behind section 13 of the Charter, as articulated in *Dubois*: "to protect individuals from being indirectly compelled to incriminate themselves, to ensure that the Crown will not be able to do indirectly that which s. 11(c) prohibits".⁴¹ It contrasted that purpose with what it characterized as the position being advanced by the appellants, which it described as follows: "that an accused can volunteer one story at his or her first trial, have it rejected by the jury, then after obtaining a retrial on an unrelated ground of appeal volunteer a different and contradictory story to a jury differently constituted in the hope of a better result because the second jury is kept in the dark about the inconsistencies."⁴² Through this description of the appellants' position the Court made clear at the outset that this case was *not* going to turn on the impossible distinction between incrimination and impeachment.

⁴⁰ See Hamish Stewart & Erica Bussey, "The Privilege Against Self-Incrimination: Too Strong, Too Weak, or Both?" (2005) 9 Can. Crim. L. Rev. 369, at 377-78; M. Naeem Rauf, "Section 13 of the Charter and the Use of an Accused's Prior Testimony: A Reply to David Doherty and Ronald Delisle" (1991) 4 C.R. (4th) 42, at 48; Don Stuart, *Charter Justice and Canadian Criminal Law*, 4th ed. (Scarborough, Ont.: Carswell, 2005), at 467-68. See also *R. v. Kuldip*, [1988] O.J. No. 40, 40 C.C.C. (3d) 11, at 23 C.C.C. (C.A.) where Martin J. acknowledged this reality when the case was before the Court of Appeal.

⁴¹ This passage can be found in *Dubois*, *supra*, note 36, at 358. See also *Kuldip*, *supra*, note 36, at 629. It is reproduced in *Henry* in a couple of places. See *Henry*, *supra*, note 5, at paras. 2 and 22.

⁴² *Henry*, *supra*, note 5, at para. 2.

Rather, the Court in *Henry* seized the opportunity to acknowledge that its earlier judgments dealing with section 13 had been less than consistent. The Court attributed this confusion to a failure on its part to keep the purpose of the guarantee at the forefront in its analysis and to instead focus on the particular purpose for which the evidence was being used (*i.e.*, incrimination versus impeachment). With this change of emphasis the Court proceeded to draw out yet another distinction, the difference between the accused who was merely a witness in a prior proceeding and who was therefore truly *compelled* to testify and the accused who chose to take the stand at an earlier trial and thereby *voluntarily* gave up the absolute right not to be compelled to testify which is guaranteed by section 11(c) of the Charter. For the *Henry* Court the sensible solution to all of the confusion that had grown up around section 13 was to return to first principles, the underlying purpose of the guarantee — affording protection against *compelled* self-incrimination. With that purpose in mind, the Court proceeded to survey its past judgments.

In the end, the Court concluded that for the most part its earlier decisions could be reconciled with the underlying purpose of section 13 of the Charter. There were some exceptions, however, that needed to be reconsidered. The Court acknowledged that it should not depart from its own precedents unless there are compelling reasons for doing so,⁴³ noting that it should be “particularly careful before reversing a precedent where the effect is to diminish *Charter* protection”.⁴⁴ Nevertheless, the Court concluded that with respect to developments relating to section 13 of the Charter there were very good reasons for doing just that.

⁴³ *Henry*, *supra*, note 5, at 44. The Court cited a number of its prior decisions in support of this proposition. See *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654; *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 [hereinafter “*Chaulk*”]; *R. v. B. (K.G.)*, [1993] S.C.J. No. 22, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] S.C.J. No. 32, [1996] 1 S.C.R. 683; *Clark v. Canadian National Railway*, [1988] S.C.J. No. 90, [1988] 2 S.C.R. 680. It then proceeded to list a number of examples where the Court in fact took this significant step. See *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] S.C.J. No. 80, [1990] 2 S.C.R. 489; *Brooks v. Canadian Safeway Ltd.*, [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219.

⁴⁴ *Henry*, *supra*, note 5, at para. 44. See also *R. v. Bernard*, [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833, at 860-61 (Dickson C.J., dissenting) indicating that the principle of certainty and the institutional limits imposed on the law-making functions of the courts should similarly constrain the Court from overruling a past decision where the effect would be to expand criminal liability. Chief Justice Dickson’s comments in *Bernard* were later adopted by a majority of the Court. See *Chaulk*, *id.*, at 1353.

Beginning with *Mannion*, the Court concluded that it must be overturned for a number of reasons. It will be remembered that *Mannion* was the case in which the accused was cross-examined at a retrial using evidence he had given at his first trial. In that decision the Court drew no distinction between incrimination and impeachment. Rather, it simply held that the cross-examination of Mr. Mannion on inconsistencies between his evidence in both proceedings served to incriminate him and ran afoul of section 13 of the Charter.⁴⁵

In *Henry*, the Court noted that the decision in *Mannion* failed to take into account the purpose underlying section 13 of the Charter, protecting against compelled self-incrimination. Second, to maintain *Mannion* would allow individuals who were not in any sense “compelled” to testify at their former trial, like the two appellants in *Henry*, to take advantage of the Court’s holding in *Noël* in a manner that would require a cumbersome and unworkable application of the incrimination/impeachment distinction. The third and, according to the Court, most important reason for overruling *Mannion* was to be better able to protect the position of those who are truly compelled. The Court reasoned that treating accused persons who are required to testify as witnesses in an earlier proceeding the same as accused persons who choose to testify at successive trials lessens the protection for the former. *Noël*’s “no possibility” test may seem sensible when applied to those who were compelled to testify but results in absurd outcomes when applied in cases like *Henry*. Such a result is not consistent with the underlying purpose of section 13 of the Charter. For all these reasons the Court in *Henry* decided to take the unusual step of expressly overruling *Mannion*.

Next the Court turned its attention to *Kuldip*. It too involved the cross-examination of an accused at his second trial based on evidence he had given at his first trial. It will be remembered that this is the case in which the Court first introduced the impeachment versus incrimination distinction. This is a distinction that the *Henry* Court quite sensibly concluded was no longer tenable. The Court noted that to the extent that *Kuldip* allowed for the cross-examination of an accused on his inconsistent testimony volunteered at his first trial, it should be affirmed. In contrast, to the extent it had shielded such an accused from

⁴⁵ See *Mannion*, *supra*, note 36, at 280.

cross-examination that was said to “incriminate” the decision was overruled.

Finally, the Court briefly revisited its recent decision in *Noël*. In that case the accused was cross-examined by the Crown at his own trial based on testimony he was compelled to give at the earlier trial of his accomplice. For the Court, this represented a classic example of the sort of compulsion that section 13 of the Charter is principally aimed at protecting against. As a result, the decision was easily reconciled with the *Henry* Court’s renewed emphasis on compulsion as the linchpin of section 13. Nevertheless, *Noël* had struggled to maintain the awkward distinction between incrimination and impeachment that had found its genesis in *Kuldip*. For the *Henry* Court it made little sense to try and maintain that distinction any longer. Although the Court acknowledged that the plain language in section 13 provided support for maintaining it, it understandably conceded that, “experience has demonstrated the difficulty in practice of working with that distinction”.⁴⁶ The Court therefore concluded that “prior *compelled* evidence should, under s. 13 as under s. 5(2) [of the *Canada Evidence Act*], be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to a ‘prosecution for perjury or for the giving of contradictory evidence’”.⁴⁷

In the result, given that both appellants in *Henry* had been cross-examined on the testimony that they had *volunteered* at their first trial the necessary element of compulsion was lacking. In other words, section 13 of the Charter no longer applies to accused persons who testify at successive trials. An accused who chooses to forego their right to silence at an earlier trial is not compelled in that proceeding. As a result, should that accused again choose to testify at a retrial there is nothing about permitting them to then be cross-examined on any inconsistencies between their evidence at both trials that is contrary to the goal behind section 13 of the Charter.

Returning momentarily to our larger enterprise, *Henry* provides an excellent example of how even established principles can gradually be eroded by the lessons of experience. Less than 20 years had elapsed between *Mannion* and *Henry*. Nevertheless, within that comparatively

⁴⁶ *Henry*, *supra*, note 5, at para. 50.

⁴⁷ *Id.*, at para. 50.

short period an idea that had managed to gain the support of a unanimous seven-member panel of the Supreme Court had fallen into disfavour. *Henry* is an example that aptly demonstrates that within a common law constitutional system such as ours even well-established principles are continually open to being challenged and, if proven wanting, overruled. Of course, even with this most recent development one is hard-pressed to now claim that the debate surrounding the meaning of section 13 has finally ended and that the time for experimentation is forever over.

There is much to be thankful for about the Court's decision in *Henry*. First, the decision provides a useful reminder of the underlying purpose behind section 13 of the Charter and makes a good effort to rationalize the established case law in light of that larger objective. Second, the case sensibly eliminates the artificial and practically unworkable incrimination versus impeachment distinction. Unfortunately, in the process of redressing some of the confusion created by its past decisions the Court does manage to create some uncertainty of its own.

Most significantly, the Court expressly reaffirms its prior decision in *Dubois*.⁴⁸ This is the case involving a retrial at which the Crown tendered as part of its own case a transcript of the accused's evidence at his first trial. The accused chose not to testify at the retrial. In rejecting the notion that *Dubois* also had to be overruled, the Court shifted its focus from the absence of any compulsion at the earlier proceeding to the circumstances of the new trial. It reasoned that:

The rationale underlying *Dubois* for extending s. 13 protection to an accused in a retrial, however, was because when a "new" trial is ordered the accused is entitled not to testify at all. Thus, to allow the Crown simply to file the testimony of the accused given at the prior trial (now overturned) would permit the Crown indirectly to compel the accused to testify at the retrial where s. 11(c) of the *Charter* would not permit such compelled self-incrimination directly. The Crown must prove its case without recruiting the accused to self-incriminate.⁴⁹

⁴⁸ *Henry*, *supra*, note 5, at paras. 39-40.

⁴⁹ *Id.*, at para. 39.

As Professor Hamish Stewart has argued, this effort to distinguish *Dubois* seems less than persuasive.⁵⁰ If “compulsion” is the key, then section 13 of the Charter should serve as no barrier to the admission of testimony by an accused that was *volunteered* at an earlier trial or, by analogy, at an unrelated trial or on a *voir dire*. If the reason that admitting prior testimony in subsequent proceedings is offensive is because there is something inherently unfair about allowing the Crown to gain an advantage from some flaw in the earlier trial (that led to a mistrial or a successful appeal) then compulsion would *not* seem to be the animating concern after all. But, if this is true, then why do these concerns about unfairness not persist when the accused then makes the choice to take the stand at the second trial? How does that subsequent choice serve to vitiate the unfairness of giving the Crown a tactical advantage that it would not otherwise have had but for the legally flawed first trial?⁵¹ These are important questions that the *Henry* Court does not answer. Accordingly, there would seem to be much room for future development in this important area of Charter law.

The Supreme Court’s decisions in both *Pires & Lising* and *Henry* serve to remind us of an important point about law in a common law constitutional system such as ours. That is, even principles that may seem well established are always open to being reconsidered in light of experience. This is because, as Holmes observed, the “life of the law has not been logic: it has been experience”.⁵² The notion that we will reach a point in any area of law where all questions are settled, especially an area as contested and challenging as the interpretation of broadly worded and value laden constitutional guarantees, is simply not realistic. In other words, some level of uncertainty is not only inevitable but also essential to the vitality of our constitutional order. As Dickson J. noted on behalf of a unanimous Supreme Court in *Hunter v. Southam*,⁵³ our Constitution must “be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers”.⁵⁴ In short, the dust will never settle. The document will always remain a work in progress.

⁵⁰ See Hamish Stewart, “*Henry* in the Supreme Court of Canada: Reorienting the s. 13 Right against Self-incrimination” (2006) 34 C.R. (6th) 112.

⁵¹ *Id.*, at 116-18.

⁵² Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown, 1923), at ch. 1.

⁵³ [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145.

⁵⁴ *Id.*, at 155.

III. AVOIDABLE UNCERTAINTY: *ORBANSKI & ELIAS*

To this point, our focus has been on what I term “unavoidable” or even “necessary” uncertainty. In this section we shift gears and focus on an area that although related is actually quite different than the subject of constitutional interpretation more generally. This is the law relating to police powers. Obviously, the meaning of many of the Charter’s Legal Rights guarantees will bear on police investigative powers by imposing constitutional limits on police authority. That is, however, a very different question than the source and scope of police power. Here, it is essential to remember another important passage from *Hunter v. Southam* that in recent years has too often been forgotten. Before identifying the larger purpose behind section 8 of the Charter, or elaborating on its requirements, Dickson J. indicated:

I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means . . . that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of “reasonable” search and seizure, on these governments.⁵⁵

Although this point seems obvious, it is important. The Charter and the Supreme Court’s judgments under it were never intended to serve as a source of new and previously unimagined police powers.

This is not to say that the Charter was not expected to have some impact on the criminal investigative process. From the beginning, it was apparent to everyone that its effects would undoubtedly be great. A number of its provisions speak directly to the regulation of police authority. What was not apparent at the outset was the pressure that it would place on the courts to create new police powers. The Charter — largely because of its exclusionary remedy — served to reveal serious deficiencies in the scattered collection of statutory and common law

⁵⁵ *Id.*, at 156-57.

rules which make up the law of police powers in Canada. Although, at times, the Supreme Court has been sceptical about acting to correct these shortcomings,⁵⁶ in recent years it has taken a much more proactive approach in filling gaps in police authority.

The Court has employed a variety of law-making devices over the last 20 years to essentially make up for shortcomings in police powers.⁵⁷ For example, it has used what has come to be known interchangeably as the “*Waterfield* test”⁵⁸ or the “ancillary powers doctrine” to recognize new police investigative powers at “common-law”.⁵⁹ Similarly, it has essentially abandoned the rule of strict construction for statutory enactments that authorize state intrusions on individual liberty that had long dominated in the era before the Charter.⁶⁰ Instead, the Court has routinely read language into legislation to make up for deficiencies in

⁵⁶ See *id.* See also *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36, at 56-57.

⁵⁷ See generally James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the Charter” (2005) 31 Queen’s L.J.1, at 17-48 [Stribopoulos, “In Search of Dialogue”].

⁵⁸ See *R. v. Waterfield*, [1963] 3 All E.R. 659 (Ct. Crim. App.) [hereinafter “*Waterfield*”]. That case developed a test for assessing whether a police officer was acting in the “execution of his duty” in order to determine the potential culpability of an accused charged with the offence of obstructing a police officer in the execution of his duty. That test was transformed into a means of recognizing new police investigative powers by the Supreme Court of Canada in its controversial judgment in *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 [hereinafter “*Dedman*”] where the Court recognized at “common-law” a police power to conduct sobriety check-stops of motorists. It has since used the test on two other occasions. In *R. v. Godoy*, [1998] S.C.J. No. 85, [1999] 1 S.C.R. 311 to create a police power to enter private residences in response to disconnected 911 calls. Then again in *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 to recognize a police power to detain suspects for criminal investigative purposes.

⁵⁹ For a more detailed description and critique of these developments see James Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41 Alta. L. Rev. 335, at 349-55. [Stribopoulos, “A Failed Experiment?”]. See also Tim Quigley, “Brief Investigatory Detentions: A Critique of *R. v. Simpson*” (2004) 41 Alta. L. Rev. 935.

⁶⁰ Before the Charter, the Supreme Court had recognized that when dealing with such a statute, “that if real ambiguities are found, or doubts of substance arise . . . then the statute should be applied in such a manner as to favour the person against whom it is sought to be enforced”. *Marcotte v. Canada (Deputy Attorney General)*, [1974] S.C.J. No. 142, [1976] 1 S.C.R. 108, at 115. This principle had been applied equally to circumstances where the law encroached on individual liberty (see *R. v. Noble*, [1977] S.C.J. No. 68, [1978] 1 S.C.R. 632, at 638; *Beatty v. Kozak*, [1958] S.C.J. No. 9, [1958] S.C.R. 177, at 190, affg (1957), 7 D.L.R. (2d) 88 (Sask. C.A.); *Shim v. R.*, [1938] S.C.R. 378, at 380-81) or property interests (see *Laidlaw v. Metropolitan Toronto* [1978] S.C.J. No. 32, [1978] 2 S.C.R. 736, at 748; *Prince George (City) v. Payne*, [1977] S.C.J. No. 53, [1978] 1 S.C.R. 458, at 463; *Wells v. Newfoundland*, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199, at 218; *R. v. Colet*, [1981] S.C.J. No. 2, [1981] 1 S.C.R. 2, at 11).

formal police powers.⁶¹ In *Orbanski & Elias* we find the Court blending both of these law-making devices together in order to confer upon police a power that is not expressly granted by statute. Amazingly, this implied power is then used by the Court to effect an override of what is an express Charter right!

At issue in *Orbanski & Elias* (separate cases heard and decided together) was the scope of police authority when conducting a roadside sobriety check-stop. In particular, whether the police are authorized to ask a driver about her prior alcohol consumption or request that he or she participate in roadside sobriety tests without first appraising the driver of his or her right to counsel guaranteed by section 10(b) of the Charter. Given established case law, the Crown readily conceded that there had been a “detention” in each of these cases for section 10 Charter purposes.⁶² Similarly, there was no doubt that in neither case did the police properly comply with their informational obligations under section 10(b). The only issue then was whether these section 10(b) violations were justified under section 1 of the Charter. Of course, in order for this to be the case the override must be “prescribed by law”.⁶³ As a result, the legal authority to question detained motorists and request that they participate in roadside sobriety tests was the focus of this appeal.

Both cases originated in Manitoba. At the time,⁶⁴ although legislation in the province conferred express authority on police officers to stop motorists it did not expressly mention any power to question

⁶¹ See generally Stribopoulos, “In Search of Dialogue”, *supra*, note 57, at 30-41. For example, the Court read a police power to break into private premises to install and maintain listening devices into the Criminal Code scheme governing wiretaps. See *R. v. Lyons*, [1984] S.C.J. No. 63, [1984] 2 S.C.R. 633 and *Reference re: Judicature Act (Alberta)*, s. 27(1), [1984] S.C.J. No. 64, [1984] 2 S.C.R. 697. It also read a power on the part of teachers and school administrators to search into a provincial Education Act that was entirely silent as to the existence of such a power. See *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393. It also read a power to detain suspected alimentary canal smugglers at ports of entry for extended periods (until they provide a urine sample or defecate under state supervision) into a provision in the *Customs Act* which simply refers to a power to “search”. See *R. v. Monney*, [1999] S.C.J. No. 18, [1999] 1 S.C.R. 652.

⁶² See *Orbanski & Elias*, *supra*, note 5, at para. 2. See *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 641-44; *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 647-50 [hereinafter “*Thomsen*”]; *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621, at 631-32; *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257.

⁶³ Charter, *supra*, note 1, s. 1.

⁶⁴ Since the time of *Orbanski & Elias*’ respective stops, Manitoba amended its provincial *Highway Traffic Act* to expressly override the right to counsel at the roadside. See *Highway Traffic Act*, S.M. 1985-86, c. 3, s. 76.(6).

drivers or request that they participate in roadside sobriety tests.⁶⁵ Nevertheless, for the majority, Charron J. emphasized the “operating requirements”⁶⁶ of the “interlocking scheme of federal and provincial legislation”⁶⁷ that governs all aspects of motor vehicle travel. Given the authority provided by that scheme for police to stop motorists and check on their sobriety, she reasoned that the power to ask drivers questions about their alcohol consumption and request that they perform sobriety tests arose by necessary implication.⁶⁸

With respect to the scope of these implied police powers, Charron J. invoked the common law as a guide on their potential limits.⁶⁹ She quoted with approval from a decision of the Ontario Court of Appeal that had dealt with the scope of police power to check the sobriety of drivers at the roadside: “a procedure cannot be reasonable ... unless it can be performed at the site of the detention, with dispatch, with no danger to the safety of the detainee and with minimal inconvenience to the detainee.”⁷⁰ She then turned to the actual facts of the two appeals before the Court, emphasizing throughout that the limits on police authority in this context necessarily require a “case-specific inquiry”.⁷¹ In other words, the exact contours of police authority will vary from case to case. According to the majority, this is unavoidable because it “is both impossible to predict all the aspects of such encounters and impractical to legislate exhaustive details as to how they must be conducted”.⁷²

Next, the majority turned to whether these implied powers could be reconciled with both the informational and implementation requirements of section 10(b). In other words, did these powers necessarily override the right to counsel? In *Thomsen* the Court had held that section 254(2) of the *Criminal Code*, the provision authorizing police officers to make

⁶⁵ See *Highway Traffic Act*, S.M. 1985-86, c. 3, s. 76.(1).

⁶⁶ *Orbanski & Elias*, *supra*, note 5, at paras. 37, 39.

⁶⁷ *Id.*, at para. 27.

⁶⁸ *Id.*, at para. 43.

⁶⁹ See *id.*, at para. 45. In particular, she quoted from *Dedman*, *supra*, note 58, where the Court in assessing whether the roadblock stop at issue in that case was justified under the second prong of the *Waterfield* test had probed whether that power was “necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference”. *Id.*, at 35.

⁷⁰ *R. v. Ratelle*, [1996] O.J. No. 372, 105 C.C.C. (3d) 58, at 73 (C.A.).

⁷¹ *Orbanski & Elias*, *supra*, note 5, at paras. 47, 49-50.

⁷² *Id.*, at para. 45.

an ALERT breath demand at the roadside where they suspect a driver has alcohol in his body, by necessary implication limited the right to counsel.⁷³ Reasoning by analogy, the majority easily concluded that the screening procedures that are designed to furnish the grounds for such a demand must also do the same.⁷⁴ The majority failed to acknowledge that from a technological standpoint much had changed since *Thomsen* was decided in 1988. The justification for finding an implied override of the right to counsel in that case was the impracticality of implementing that right at the roadside. Since then cellular phones have become commonplace, making the suggestion that *Thomsen* was controlling on the practical need for an override far from compelling.

Nevertheless, with the required power in place and the need for an override of the right to counsel established, the majority next turned to its section 1 analysis. It very quickly concluded that the limitation on the right to counsel in this context constituted a reasonable limit under section 1 of the Charter.⁷⁵

In a strongly worded dissent LeBel J., joined by Fish J., took exception to the means by which the majority had found that there was a “limit prescribed by law” on the right to counsel in these two cases. The dissent criticized the majority’s “inventive use” of its “law-making powers” in this case,⁷⁶ an approach it characterized as “utilitarian” and “based on expediency rather than legal principles”.⁷⁷ The dissent described the majority’s analysis as essentially reducing down to little more than this: “Drunk driving is evil. Drunk driving is dangerous. Drunk drivers must be swiftly taken off the road. If there is something missing in the statute, let us read in the necessary powers. Failing that, let us go to the common law and find or create something there.”⁷⁸

⁷³ See *Thomsen*, *supra*, note 62.

⁷⁴ *Orbanski & Elias*, *supra*, note 5, at para. 52.

⁷⁵ The compelling state interest was supplied by the carnage caused by impaired drivers. The rational connection was provided by the impracticality of implementing the right at the roadside. Finally, when it came to the proportionality analysis the majority adopted the reasoning from *R. v. Milne*, [1996] O.J. No. 1728, 107 C.C.C. (3d) 118, at 128-31 (C.A.), leave refused, [1996] 3 S.C.R. xiii (note) which held that although the right to counsel does not apply during such roadside encounters the results of questioning and sobriety testing may only be used as an investigative tool to furnish grounds for a breath demand or arrest. A driver’s answers to police questions or his or her performance on sobriety tests are not admissible on the trial proper. See *Orbanski & Elias*, *supra*, note 5, at paras. 54–58.

⁷⁶ *Orbanski & Elias*, *supra*, note 5, at para. 70.

⁷⁷ *Id.*, at para. 69.

⁷⁸ *Id.*

The dissent in *Orbanski & Elias* also takes up the larger institutional implications of the majority's approach. It complains that the majority conflates the process of creating a police power that encroaches on Charter rights with the process of justifying it under section 1. The dissent expresses alarm at the long-term implications of the majority's approach:

The doctrine would now be encapsulated in the principle that what the police need, the police get, by judicial fiat if all else fails or if the legislature finds the adoption of legislation to be unnecessary or unwarranted. The courts would limit *Charter* rights to the full extent necessary to achieve the purpose of meeting the needs of police. The creation of and justification for the limit would arise out of an initiative of the courts.⁷⁹

The dissent in *Orbanski & Elias* represents the first sign of division on the Court regarding the use of law-making devices since the enterprise began 20 years ago in *Dedman*. In that case, Dickson C.J. had expressed similar concerns in his dissenting judgment, reminding the majority that it is "the function of the legislature, not the courts, to authorize . . . police action that would otherwise be unlawful as a violation of rights traditionally protected at common law."⁸⁰ The dissent in *Orbanski & Elias* makes the very same observation before candidly acknowledging a point that seems to escape the majority, that "legislatures are better equipped to investigate and assess the need for enhanced police powers and to integrate required changes into the relevant statutory scheme as a whole".⁸¹

Unfortunately, what ultimately emerges from the majority judgment in *Orbanski & Elias* is an open-ended power on the part of the police to do those things that are "reasonable" in the circumstances when carrying out sobriety check-steps. Clear guidance and concrete limits on the types of procedures permitted do not emerge from the judgment. Instead, we are told that ascertaining whether or not the police had legal authority to do what they did requires that every case be considered on

⁷⁹ *Id.*, at para. 81.

⁸⁰ *Dedman*, *supra*, note 58, at 15 (Dickson C.J.C., dissenting).

⁸¹ *Orbanski & Elias*, *supra*, note 5, at para. 82 (LeBel J., dissenting). On the institutional shortcomings of courts as rule-making bodies and the comparative advantages of leaving the creation of police powers to Parliament see generally Stribopoulos, "In Search of Dialogue", *supra*, note 57, at 55-61.

its own facts.⁸² This obviously gives police officers on the street wide latitude in deciding how these potentially intrusive encounters will unfold. In every case it will ultimately be up to a reviewing court to determine *ex post facto* whether the police behaved appropriately or unconstitutionally. Of course, if no one is charged the possibility that police abuses will escape detection is great. Due to its own institutional limitations, this is something the Court rarely acknowledges — largely because these are cases that for the very same reason it almost never sees.⁸³

The net result of all this is considerable uncertainty. It is far from clear what screening procedures police are entitled to carry out at the roadside when conducting a sobriety check-stop. The majority's claim that police-motorist encounters are far too rich in their diversity to lend themselves to clear, comprehensive and prospective legislative guidance is not at all persuasive.⁸⁴ Although no legislative scheme could ever address every potential eventuality, statutory guidance could go a considerable distance toward structuring and confining police discretion in a manner that at least reduces the potential for abuse.⁸⁵

Unfortunately, the majority's judgment in *Orbanski & Elias* continues a disturbing trend that has emerged in the post-Charter era.⁸⁶ The Court has moved away from its traditional function of standing between the individual and the state alert to see that any intrusion on liberty is justified by law,⁸⁷ in favour of a role that increasingly sees it playing a law-making function that is better left for legislatures. Not only does this breed uncertainty, it also contributes to an environment that makes it far less likely that Parliament will ever have any incentive to take the sort of comprehensive legislative action that is needed most

⁸² See notes 69 through 72 and accompanying text.

⁸³ On the low visibility of police abuses, see generally Stribopoulos, "In Search of Dialogue", *supra*, note 57, at 57-58. See also Stribopoulos, "A Failed Experiment?", *supra*, note 59 at 344.

⁸⁴ *Supra*, note 72 and accompanying text.

⁸⁵ See Kenneth C. Davis, *Police Discretion* (St. Paul: West Publishing Co., 1975) [Davis, *Police Discretion*] who long ago recognized the dangers of too little and too much discretion, arguing: "Unnecessary discretion must be eliminated. But discretion often is necessary and often must be preserved. Necessary discretion must be properly confined, structured and checked." *Id.*, at 170. See more generally Stribopoulos, "In Search of Dialogue", *supra*, note 57.

⁸⁶ See generally Stribopoulos, "In Search of Dialogue", *supra*, note 57.

⁸⁷ This characterization of the role of the courts within the Anglo-Canadian constitutional system finds its genesis in Lord Atkin's now celebrated dissenting judgment in *Liversidge v. Anderson*, [1942] A.C. 206, at 244 (H.L.).

in order to achieve greater clarity as to the scope and limits on police power.

Legal uncertainty always comes at a price. When it comes to police powers, however, the cost is especially high. This is because, as Skolnick warns:

Whenever rules of constraint are ambiguous, they strengthen the very conduct they are intended to restrain. Thus, the police officer already committed to a conception of law as an instrument of order rather than as an end in itself is likely to utilize the ambiguity of the rules of restraint as a justification for testing or even violating them.⁸⁸

In this context uncertainty actually cuts against the very purpose underlying the Charter's legal rights guarantees, that is, protecting individuals from abuses of state power during the criminal investigative process.⁸⁹ Although when it comes to ascribing meaning to the Charter's guarantees, a certain amount of uncertainty is unavoidable and even necessary, when it comes to the scope and limits on police power the opposite is true.⁹⁰ In this context everyone benefits from certainty: police officers who must make snap decisions about the appropriateness of a particular course of action in response to fast-moving events in the field; individuals, who must decide whether or not to acquiesce to police power or risk prosecution; prosecutors, who must predict the likelihood of a successful prosecution; defence lawyers, who must advise their clients whether they have a meritorious Charter claim; and trial judges, who have the unenviable task of sorting through the mess and adjudicating on the merits of Charter claims that are brought.⁹¹

⁸⁸ Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: MacMillan, 1994), at 12.

⁸⁹ See generally Stribopoulos, "In Search of Dialogue", *supra*, note 57, at 13-17.

⁹⁰ See generally Stribopoulos, "In Search of Dialogue", *supra*, note 57.

⁹¹ For a recent example of a trial judge openly acknowledging how difficult this task can be, see *R. v. Binning*, [2006] B.C.J. No. 820 (S.C.). The trial judge noted that what has emerged is a:

... minefield through which the police must navigate, bearing in mind numerous trial and appellate decisions which offer a variety of sometimes conflicting paths for the investigating officers to follow as they carry out their enforcement activities. Given the intricacy of the law, it is little wonder that in this case, as in other cases, particularly those involving the drug trade, the energies expended by Crown, defence counsel, and the court are directed not to what might innocently be thought of as the crucial issue, that being whether the Crown has established beyond a reasonable doubt that the accused committed the alleged offence or offences, but with the painstakingly difficult task of ensuring that there has been no breach of the accused's Charter rights by the police during their investigation.

Id., at para. 11.

Finally, contrary to any suggestion that everything has been decided, *Orbanski & Elias* aptly illustrates that when it comes to the scope and limits on police power, far more remains to be decided than has been settled. Of course, every unanswered question in this important area has profound Charter implications. For example, knowing what the limits are on police authority to detain motorists is inextricably interwoven with the parameters of the constitutional right not to be arbitrarily detained that is guaranteed by section 9 of the Charter. By embracing case-by-case review as the means for assessing the breadth of police power, the Court has left the constitutional right vulnerable to indirect and gradual erosion as courts justify police actions from one decision to the next. Under this system far from becoming “firmly established” the governing principles seem to be growing increasingly elusive.

IV. CONCLUSION

Our modest goal was to evaluate the claim that we have finally reached a point in the Charter’s development with respect to questions regarding criminal justice where the governing principles have become firmly established and the time for experimentation has ended. Based simply on how few Charter cases with a criminal justice component were decided by the Supreme Court in 2005 one might be deceived into believing that this is in fact the case. Closer scrutiny of those judgments, however, reveals that there continues to be much uncertainty surrounding a number of very basic Charter issues.

As our review of *Pires & Lising* and *Henry* in Part II illustrates, even questions that may sometimes seem settled are open for reconsideration under our common law constitutional system. In fact, some level of uncertainty is not only inevitable but also necessary. In a very real sense the long-term health of our Constitution and the integrity of our Supreme Court both depend on the Court’s willingness to reconsider its past constitutional decisions when the reasons for doing so are compelling and the resolve to refrain from doing so when they are not. In this sense, a view that “established principles” are better left alone could actually threaten the long-term stability of our constitutional system.

At the same time, our critical review of *Orbanski & Elias* in Part III serves to illustrate that too much uncertainty can carry its own unique

dangers. When it comes to the source, scope and limits on police powers, clarity and comprehensiveness should be our goals. Unfortunately, the sort of uncertainty that is fuelled by a judgment like *Orbanski & Elias* brings its own pitfalls. Far from being well established, the very notion of implied police powers embraced by the Court in that case ensures that there will be much uncertainty into the future surrounding a number of basic issues that have profound constitutional implications.

In summary, the idea that everything has been decided and that there is little room for constitutional experimentation when it comes to the Charter and criminal justice is not borne out by the Supreme Court's judgments from 2005. There continues to be much uncertainty surrounding a number of very basic but important constitutional issues relating to the criminal justice system. Rather than having ended, the time for experimentation seems to have just begun.