



Lucier v. the Queen

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Commentary



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Abstract

In *Lucier v. The Queen*, the Supreme Court of Canada unanimously held that a declaration against penal interest is inadmissible when that declaration is inculpatory of the accused. Although correct, the decision cannot be supported on the basis of the Court's reasoning. The Court failed to discharge its duty to give good reasons for its decisions, a duty of particular importance for a court of final appeal. This comment explores the reasoning that the Supreme Court could have provided in *Lucier*, and uses the case to illustrate a more widespread shortcoming in the Court's approach to its appellate functions.

Case Comment

LUCIER v. THE QUEEN

BY MARC GOLD*

In *Lucier v. The Queen*,¹ the Supreme Court of Canada unanimously held that a declaration against penal interest is inadmissible when that declaration is inculpatory of the accused. Although correct, the decision cannot be supported on the basis of the Court's reasoning.² The Court failed to discharge its duty to give good reasons for its decisions, a duty of particular importance for a court of final appeal. This comment explores the reasoning that the Supreme Court could have provided in *Lucier*, and uses the case to illustrate a more widespread shortcoming in the Court's approach to its appellate functions.

I. THE INADEQUACY OF THE COURT'S REASONING

Lucier's house burned down, and he was charged with arson. Much of the evidence against him was circumstantial. He was in financial difficulty. The day after he had been refused a loan, he increased the fire insurance coverage on his house to twenty-seven thousand dollars from seven thousand dollars. A few days before the fire he had purchased a five-gallon gasoline container can.

The only direct evidence against him consisted of statements made by his friend Dumont, with whom he had been seen on the day before the fire. As Ritchie J. reports:

The circumstances immediately preceding this fire are recounted by the appellant's friend, one Dumont, who had himself been in the house at the time of the fire with the result that he was seriously burned and upon escaping to his sister's house nearby he was ultimately removed to a hospital in Winnipeg. There he was visited by a constable of the R.C.M.P. to whom he made a statement admitting that he had personally set the house afire and that he had been hired to do so for the purpose by the appellant who had undertaken to pay him \$500 for the task. Dumont later

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¹ [1982] 1 S.C.R. 28, 132 D.L.R. (3d) 244, 2 W.W.R. 289.

² By "correct" it is meant that the arguments for excluding the evidence were more compelling than were the arguments for admissibility, and not that there is a unique right answer to every legal question. See Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth, 1977) at 279-90; cf. Munzer, *Right Answers, Pre-Existing Rights and Fairness* (1977), 11 Ga. L. Rev. 1055.

made a further statement to another R.C.M.P. officer which was to the same effect in that he admitted responsibility for setting the fire and implicated the accused in the undertaking. Both these statements were made to persons in authority after Dumont had been duly cautioned and they were in my view contrary to his penal interest. A few days later Dumont died. . . .³

At trial the statements of Dumont were admitted as declarations against penal interest and Lucier was convicted. The conviction was affirmed by the Manitoba Court of Appeal, O'Sullivan J.A. dissenting,⁴ and an appeal was brought as of right to the Supreme Court of Canada.⁵

The reasons for judgment begin by noting that the police officers' testimony was hearsay evidence. The Court then offers the traditional rationales for the exclusion of such evidence.

It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.⁶

It is generally acknowledged that the most important of these rationales is the lack of opportunity to cross-examine the declarant.⁷

The Court proceeds to cite *The Sussex Peerage* case⁸ in which the House of Lords "recognized an exception to the hearsay rule in respect of a statement made by a deceased person against his pecuniary interest"⁹ but refused to apply the exception to statements against penal interest. The Court then cites its decision in *The Queen v. O'Brien*,¹⁰ in which Dickson J. had stated that "in a proper case, a declaration against penal interest is admissible according to the law of Canada; the rule as to absolute exclusion of declarations against penal interest, established in *The Sussex Peerage* case, should not be followed."¹¹

³ *Supra* note 1, at 30 (S.C.R.), 246 (D.L.R.), 291 (W.W.R.).

⁴ *R. v. Lucier* (1979), 1 Man. R. (2d) 182, 50 C.C.C. (2d) 535, [1980] 1 W.W.R. 415.

⁵ As per s. 618(1)(a) of the *Criminal Code*, S.C. 1953-54, c. 51.

⁶ *Supra* note 1, at 31 (S.C.R.), 246 (D.L.R.), 291 (W.W.R.), citing *Teper v. The Queen*, [1952] A.C. 480 at 486, 2 All E.R. 447 at 449, 2 T.L.R. 162 at 164. (per Lord Norman).

⁷ Wigmore, 5 *Evidence*, rev. Chadbourne (3d ed. Boston: Little Brown, 1974), 1362; McCormick, *Law of Evidence*, ed. Cleary (2d ed. St. Paul: West, 1972) at 245.

⁸ (1844), 11 Cl. & Fin. 85, 8 E.R. 1034, 3 L.T.O.S. 277 (H.L.).

⁹ *Supra* note 1, at 31 (S.C.R.), 246 (D.L.R.), 291-92 (W.W.R.). This statement is misleading. The exception had been recognized earlier than *The Sussex Peerage* case (*supra*, note 8), and encompassed statements against propriety interest as well. See Wigmore, *supra* note 7, at 1476; Morgan, *Declarations Against Interest* (1952), 5 Vand. L. Rev. 451.

¹⁰ [1978] 1 S.C.R. 591, 76 D.L.R. (3d) 513, 35 C.C.C. (2d) 209.

¹¹ *Id.* at 599 (S.C.R.), 518-19 (D.L.R.), 214 (C.C.C.). The statement at issue in *O'Brien* was not admitted, as the Court held it was not against penal interest when it was made. See Bushnell, *Declarations Against Penal Interest — R. v. O'Brien* (1980), 22 Crim. L.Q. 371.

The judgment then lists five principles that the Court, in *The Queen v. Demeter*,¹² had considered to be a "valuable guide" in deciding whether or not to admit a declaration against penal interest. These principles focus on ensuring that the statement was against interest when made and was perceived to be so by the declarant¹³ and that there is a need to have the evidence admitted.¹⁴

The Court in *Lucier* concludes that declarations against penal interest may be admitted when tendered on behalf of the accused, but not when they are tendered by the Crown. The reasoning is contained in the following paragraphs:

Having regard to the judgment of this Court in the *Demeter* and *O'Brien* cases, it must now be recognized that in a proper case, statements tendered on behalf of the accused and made by an unavailable person may be admitted at trial if they can be shown to have been made against the penal interest of the person making them; but neither the two cases to which I have just referred nor any of the wealth of authorities cited in the Courts below apply such a rule to statements which have an inculpatory effect on the accused. On the contrary, wherever such statements have been admitted it will be found that they have an exculpatory effect. The difference is a very real one because a statement implicating the accused in the crime with which he is charged emanating from the lips of one who is no longer available to give evidence robs the accused of the invaluable weapon of cross-examination which has always been one of the mainstays of fairness in our Courts.

In the present case the statements made by Dumont which were tendered by the prosecutor are obviously inculpatory of the appellant and in my opinion this is not a "proper case" for admitting them¹⁵

In the result, a new trial was ordered.

¹²The Principles were articulated by the Ontario Court of Appeal in *Demeter v. The Queen* (1975), 10 O.R. (2d) 321, 25 C.C.C. (2d) 417, and approved by the Supreme Court of Canada in the same case on appeal, [1978] 1 S.C.R. 538 at 544, 75 D.L.R. (3d) 251 at 255, 34 C.C.C. (2d) 137 at 141. They are:

1. The declaration would have to be made to such a person and in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result. In *Sussex Peerage* the Lord Chancellor would not have admitted the declaration in any event of the rule because it was made to the declarant's son. In ordinary circumstances where a declaration is made for instance to an unestranged son, wife or mother, the psychological assurance of reliability is lacking because of [sic] risk of penal consequences is not real and the declarant may have motives such as a desire for self-aggrandizement or to shock which makes the declaration unreliable.
2. The vulnerability to penal consequences would have to be not remote.
3. ". . . the declaration sought to be given in evidence must be considered *in its totality*. If upon the whole tenor the weight is in favour of the declarant, it is not against his interest. . . ."
4. In a doubtful case a Court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused.
5. The declarant would have to be unavailable by reason of death, insanity, grave illness which prevents the giving of testimony even from a bed, or absence in a jurisdiction to which none of the processes of the Court extends. A declarant would not be unavailable in the circumstances that existed in *R. v. Agawa* [*infra* note 16].

¹³ Principles 1, 2, and 3.

¹⁴ Principle 5. The fourth principle appears to be a function of the court's concern that such evidence could be easily fabricated. See McCormick, *supra* note 7, at 674. See *infra*, notes 62 and 63.

¹⁵ *Supra* note 1, at 32-33 (S.C.R.), 248 (D.L.R.) 293-94 (W.W.R.).

The reasoning is incomplete. The Court noted that in none of the cases to which it was referred were statements inculpatory of the accused admitted as declarations against penal interest; whenever statements against penal interest were admitted, they were exculpatory in effect. These considerations may imply a reason for the conclusion in *Lucier*, but they do not constitute a reason. In only one Canadian case cited by the Court were the statements at issue held to be admissible,¹⁶ and although the cases concerned statements tendered by the accused, none of them relied upon a distinction between statements exculpatory and inculpatory in effect. Furthermore, to the extent that some of the cases reflected a concern with the issue of inculpatory statements, they do not speak with one voice.

In *R. v. Agawa and Mallet*,¹⁷ Martin J.A. appears to have assumed that if declarations against penal interest were to be recognized as an exception to the hearsay rule, they would be admissible against an accused:

Such an extension would make the declaration of A that B had assisted him to kill the deceased, evidence against B, after A's death, on a prosecution of B for the murder of the deceased.¹⁸

Indeed this was the assumption of the House of Lords in *The Sussex Peerage* case, where Lord Brougham said:

To say, if a man should confess a felony for which he would be liable to prosecution that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced.¹⁹

This assumption also influenced the Court of Criminal Appeal for South Australia in *Re Van Beelen*,²⁰ where an exculpatory statement was held inadmissible.

A rule in the form contended for would enable the prosecution to lead hearsay evidence against Y and Z of an extrajudicial confession made by X to the effect that X, Y and Z committed a crime as a joint enterprise, and, provided X was

¹⁶ The statements were held *not* admissible in *Demeter*, *supra* note 12, on the grounds that the statements were not really against penal interest when considered in context; the declarant was serving a term of life imprisonment at the time he made the statements and the Ontario Court of Appeal held that "there could be no penal consequences for the crime admitted to which he was vulnerable" at 344 (O.R.), 440 (C.C.C.). Similarly, in *O'Brien*, *supra* note 10, the circumstances under which the statements were made negated the fact that the declarant was exposing himself to penal consequences: the declarant made the statement to his lawyer who advised him to claim the protection of the *Canada Evidence Act*, R.S.C. 1970, c. 307, s. 5(2), which would preclude a court from using that statement against the declarant. In *R. v. Agawa and Mallet* (1975), 11 O.R. (2d) 176, 28 C.C.C. (2d) 379, 31 C.R.N.S. 293, the Ontario Court of Appeal would not admit the statement in issue because (1) it was not, when considered as a whole, against the interest of the declarant and (2) the declarant was not unavailable to testify. The only Canadian case in which the statements at issue were held to be admissible was *R. v. Pelletier* (1978), 38 C.C.C. (2d) 515 (Ont. C.A.).

¹⁷ *Supra* note 16.

¹⁸ *Id.* at 187-88 (O.R.), 390 (C.C.C.), 305 (C.R.N.S.).

¹⁹ *Supra* note 8, at 111 (Cl. & Fin.); 1045 (E.R.).

²⁰ (1974), 9 S.A.S.R. 163 [1974] A.C.L. — D.T. 212 (Court of Criminal Appeal, South Australia). The case was cited by O'Sullivan J.A. in the Manitoba Court of Appeal in *Lucier*, *supra* note 4, at 204-205 (Man. R.), 554 (C.C.C.), 436 (W.W.R.).

dead, or otherwise unavailable, such evidence would be admissible generally, and could lead to a conviction. *It is difficult to see how it could be excluded through the exercise of a judicial discretion.*²¹

On the other hand, the Ontario Court of Appeal in *Demeter* did allude to the possibility of excluding statements inculpatory in effect.

A rule that admitted declarations against penal interest in exculpation of an accused but excluded them where an accomplice named in such a declaration was an accused or co-accused would avoid most, if not all, of the policy considerations that are the true basis of *Sussex Peerage* and which underlie *Van Beelen*. Such a rule would not be a logical extension of the rule in civil cases but the law of evidence need not be logical and the principle that a confession is only evidence against the confessor might require that logic be deferred to policy, particularly in view of the almost total absence of judicial explanation of the civil rule that makes declarations against pecuniary or proprietary interest evidence of collateral statements in them not against interest as well as of the statement against interest itself.²²

Two aspects of this passage are significant. First, the Ontario Court of Appeal did not discuss what the policy is to which logic should be deferred. Second, the Supreme Court in *Demeter* made no mention of a distinction between the uses to which declarations against penal interest could be put.

The above passages have been set out in some detail in order to demonstrate that the Court's reference to the implications of these authorities does not suffice to justify its ultimate holding. Even when a prior case is "on all fours" with the case at bar, some organizing principle is required for that prior case to govern the subsequent case. The common law doctrine of precedent, resting on the principle that like cases should be treated alike, supplies an acceptable bridge between such cases.²³ When the cases are not alike, there is a more obvious need for some principled explanation of the legal significance of their differences. Unless the Court is prepared to deny that a principle from one case can be extended analogically to a case that differs from it, the mere reference to the difference is insufficient. This is especially so in a situation in which some of those prior cases seemed to assume the very point ultimately denied by the Supreme Court.

Nor is the rest of the reasoning satisfactory. The Court purports to justify its conclusion by reference to the accused's lack of opportunity to cross-examine the declarant, but is this not true of all evidence admitted as an exception to the hearsay rule? It is because statements made against interest are regarded as reliable that the law has sanctioned the traditional exception to the hearsay rule.²⁴ So too with the extension of the exception to statements against

²¹ *Id.* at 206 (Man. R.), 554 (C.C.C.), 436-37 (W.W.R.) [emphasis added].

²² *Supra* note 12, at 343 (O.R.), 439 (C.C.C.).

²³ Dworkin, *supra* note 2, at 112-13.

²⁴ "The basis of the exception is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned though oath and cross-examination are wanting." Wigmore, *supra* note 7, at 1457. I am inclined to agree with Hamilton L.J. in *Ward v. H.S. Pitt & Co.*; *Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K.B. 130, 108 L.T. 201, 29 T.L.R. 291 (reversed on other grounds, [1914] A.C. 733), where he states, with reference to this rationale: "As a reason this seems sordid and unconvincing. Men lie for so many reasons and some for no reason at all; and some tell

penal interest.²⁵ Given that the Court specifically held that the statements by Dumont were “contrary to his penal interest”,²⁶ it would seem that the rationale for the exception was satisfied. Standing alone, the Court’s reliance on the accused’s inability to cross-examine the declarant appears inconsistent with the law’s recognition of the exception in the first place.

The judgment is problematic for another reason. The law of evidence sanctions the admissibility of hearsay statements inculpatory of an accused every time a dying declaration is admitted, notwithstanding that no cross-examination of the declarant is possible.²⁷ The law of evidence may be more of a thicket than a seamless web, but it is incumbent upon the Court to attempt to relate one rule to the wider body of rules of which it is part.²⁸ The Court makes no attempt to explain why statements against penal interest should be treated differently from other exceptions to the hearsay rule.

II. TOWARDS A JUSTIFICATION FOR THE DECISION

Without entering the persistent jurisprudential debate about judicial decision-making, some modest guiding propositions may be offered.

First, an appellate court must explain its reasons for accepting or rejecting the arguments of counsel, and consider the reasons of the court below. Second, when the decision of the lower court turned upon the implications of the appellate court’s precedents, the appellate court should provide guidance in the interpretation of those precedents. Third, a court must indicate how the result in a particular case “fits in” with the rest of the law. Had these basic principles been observed, the Court would have produced a better reasoned decision in *Lucier*.

Consider the arguments submitted by counsel for *Lucier*, and the way in which they were analyzed by the Manitoba Court of Appeal. Counsel had invited the Court to exclude those portions of Dumont’s statement that im-

the truth without thinking or even in spite of thinking about their pockets, but it is too late to question this piece of eighteenth century philosophy” (at 138 (K.B.), 203 (L.T.), 293 (T.L.R.)). Nonetheless, this is the reason underlying the exception, and there is nothing in *Lucier* (*supra* note 1) to suggest that the Court is concerned with limiting the exception because the basic rationale is suspect.

²⁵ “There is little or no reason why declarations against penal interest and those against pecuniary or proprietary interest should not stand on the same footing. A person is as likely to speak the truth in a matter affecting his liberty as in a matter affecting his pocketbook.” *O’Brien*, *supra* note 10, at 599 (S.C.R.), 518 (D.L.R.), 214 (C.C.C.).

²⁶ *Supra* note 1, at 30 (S.C.R.), 246 (D.L.R.), 291 (W.W.R.).

²⁷ The exception for dying declarations is as old as the hearsay rule itself. *McCormick*, *supra* note 7, at 680-85.

²⁸ Professor Dworkin makes the point nicely:

Judges, like all political officials, are subject to the doctrine of political responsibility. The doctrine states, in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make. . . . It condemns that practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right. . . . The doctrine demands, we might say, articulate consistency.” Dworkin, *supra* note 2, at 87-88.

plicated *Lucier*, because they were not against Dumont's interest. Counsel also argued that on the basis of the precedents a distinction should be drawn between statements inculpatory and exculpatory in effect, only the latter being admissible.

The majority in the Court of Appeal admitted the statements because the Supreme Court in *O'Brien* had decided that the restrictive rule expressed in *Sussex Peerage* "is no longer to be applied in Canada."²⁹ Monnin J.A. interpreted *O'Brien* as holding that "the *Sussex Peerage Case* . . . is no longer an authority"³⁰ in Canada. According to Matas J.A.:

On principle, the same considerations which led the Supreme Court to reject the rule in *Sussex Peerage* for exonerating statements should apply as well to incriminating statements, subject to the overriding principle that a proper case must be made out.³¹

For the majority, the criteria for "a proper case" appear to be the guidelines for admissibility approved by the Supreme Court in *Demeter*.³²

O'Sullivan J.A. took issue with the majority's approach to the *O'Brien* case. The thrust of his argument is that it was wrong to treat *O'Brien* as if it were a statute, giving it a "fundamentalist interpretation".³³ After citing the passage in *O'Brien* in which Dickson J. said that "the rule as to absolute exclusion of declarations against penal interest, established in *The Sussex Peerage* case, should not be followed",³⁴ O'Sullivan J.A. observed:

The effect of the decision is to hold that the rule as to absolute exclusion of declarations against penal interest should no longer be followed. *But to abolish a rule of absolute exclusion is not to introduce a rule of absolute inclusion.* In my opinion, *The Sussex Peerage Case*, *supra*, is still an authority, save to the extent that it has been (or will be) modified by the Supreme Court of Canada.³⁵

O'Sullivan J.A. is essentially correct. The force of a precedent is of two kinds. First, it has what one might call its enactment force, that is, it is authority for the case that it decides and for all those cases materially identical to it.³⁶ Second, it has a gravitational force, that is, the ability to serve as a springboard for analogies to different cases.³⁷ Although one must acknowledge the potential gravitational force of *O'Brien* as applied to the facts of *Lucier*, it requires the invocation of some intermediate principles to justify its extension. Conversely, the Court should have explained in a principled way why it refused to extend *O'Brien* to *Lucier*.

²⁹ *Supra* note 4, at 196 (Man. R.), 547 (C.C.C.), 428 (W.W.R.) (per Matas J.A.).

³⁰ *Id.* at 186 (Man. R.), 539 (C.C.C.), 419 (W.W.R.).

³¹ *Id.* at 196 (Man. R.), 547 (C.C.C.), 428 (W.W.R.).

³² *Id.* at 198 (Man. R.), 548 (C.C.C.), 430 (W.W.R.).

³³ *Id.* at 199 (Man. R.), 550 (C.C.C.), 431 (W.W.R.).

³⁴ *Supra* note 10, at 599 (S.C.R.), 518-19 (D.L.R.), 214 (C.C.C.).

³⁵ *Supra* note 4, at 200 (Man. R.), 550 (C.C.C.), 432 (W.W.R.). [emphasis added].

³⁶ Dworkin, *supra* note 2, at 111.

³⁷ *Id.* at 110-15.

1. *The hearsay rule and its exceptions*

Why is hearsay excluded as a rule? What principles explain the exceptions to the rule? What principles govern the creation of new exceptions, or the expansion or extension of established ones?³⁸

To the first question, the answer is well known. The weaknesses inherent in human testimony are notorious; one cannot assess accurately what weight to attach to a statement in the absence of some knowledge about the declarant's perception, memory, narrative ability, and sincerity.³⁹ When testimony is given in court, one can get such knowledge. When the declarant is not in court, one does without. The court process can be seen to be a set of "conditioning devices" designed to enhance the reliability of otherwise suspect testimony.⁴⁰ In the context of the law of hearsay, the conventional wisdom is that the core value served by the law is that of ensuring that evidence be as reliable as possible.⁴¹

Are there any general principles that underlie the established exceptions to the rule excluding hearsay? According to Wigmore, all exceptions can be rationalized on the basis that there is a necessity for the evidence, and that the circumstances surrounding the making of the statement impart some measure of reliability to it.⁴² Others have disagreed. For Morgan and Maguire:

There is in truth no one theory which will account for the decisions. Sometimes an historical accident is the explanation; in some instances sheer need for the evidence overrides the court's distrust for the jury; in others only the adversary notion of litigation can account for the reception; and in still others either the absence of a motive to falsify, or a positive urge to tell the truth as the declarant believes it to be, can be found to justify admissibility. Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception itself is built. In short, a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.⁴³

If Morgan and Maguire are correct (and I believe they are), it may not be possible to explain any particular exception in terms of its consistency in principle with the rest of the law. That a new rule appears to contradict some of the settled law cannot be *per se* a reason for rejecting the rule, or for criticizing the Court. The Court can be faulted, however, when it makes no attempt to explain how the rule does or does not fit with the settled law.

³⁸ This is leaving aside the historical question of whether the hearsay rule is best viewed as the product of the adversary system or as a consequence of the use of juries. See Wigmore, *supra* note 7, at 1364; Thayer, *Preliminary Treatise on Evidence* (New York: Augustus M. Kelly, 1969) at 47; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept* (1948), 62 Harv. L. Rev. 177.

³⁹ Morgan, *id.*; McCormick, *supra* note 7, at 581-84. For a psychologist's description of what can go wrong with human testimony, see Loftus, *Eyewitness Testimony* (Cambridge: Harvard University Press, 1979).

⁴⁰ The phrase is from Strahorn, *A Reconsideration of the Hearsay Rule and Admissions* (1937), 85 Univ. of Pa. L. Rev. 484.

⁴¹ Morgan, *supra* note 38, at 179-85.

⁴² Wigmore, *supra* note 7, at 1420.

⁴³ Morgan and Maguire, *Looking Backward and Forward at Evidence* (1937), 50 Harv. L. Rev. 909 at 921.

Although Wigmore's rationalization fails to explain adequately the entire law of hearsay, it is a valuable guide to new exceptions, or to the extension of established ones. The "circumstantial probability of trustworthiness"⁴⁴ underlies the dissenting opinion of Lord Pearce in *Myers v. Director of Public Prosecutions*,⁴⁵ approved by the Supreme Court in *Ares v. Venner*.⁴⁶ Where a court wishes to create a new exception to the rule, or to extend an existing one, it should identify some special quality of reliability that the evidence has. Conversely, when it refuses to expand or create an exception to the rule, it should refer to the absence of any special reason for regarding the evidence as reliable. Such an inquiry was not pursued in *Lucier*, notwithstanding that it was at the heart of one of counsel's submissions.⁴⁷

2. *The issue of reliability*

This section will examine two questions: whether the evidence has that quality of reliability that would justify a new exception to the hearsay rule, and the extent to which that analysis should be modified or supplemented in the light of the settled law respecting declarations against interest.

Dumont's admission that he set fire to the house appears clearly to be against his interest, and the law of hearsay assumes such statements to be reliable on the theory that a person would not say something false when it was against his interest. Nevertheless, the statement was of no use to the Crown since it wished to use that part of Dumont's statement that implicated the accused.

On its face, there is no reason to assume that this part of the statement was reliable because it was not against the interest of Dumont to point the finger at the accused. Indeed, considering the circumstances under which the statement was made, there is good reason to doubt whether the entire statement really was against interest.⁴⁸ Many such statements are likely to be made to the police.⁴⁹ When a suspect is being questioned by the police, there are strong pressures on him to implicate others in the crime. A suspect who admits involvement in a crime but who can identify the "bigger fish" might be granted immunity from prosecution, or at least gain some favour at the hands

⁴⁴ Wigmore, *supra* note 7, at 1420.

⁴⁵ [1965] A.C. 1001, [1964] 2 All E.R. 881, 48 Cr. App. Rep. 348.

⁴⁶ [1970] S.C.R. 608, 14 D.L.R. (3d) 4.

⁴⁷ As discussed below, the issue of reliability underlies the argument that the Court should have excluded those parts of Dumont's statements not directly against his interest. The failure of the Supreme Court to address this issue directly reveals the interaction of the principles articulated above. Attention to the arguments of counsel, and to the reasoning of the court below, would have forced Ritchie J. to confront basic issues of principle concerning the law of hearsay.

⁴⁸ *Supra* note 12, Principle 3.

⁴⁹ Regarding those statements made to persons other than the police, even those parts *prima facie* against interest might not be admissible, given that the law requires that the declarant "apprehended a vulnerability to penal consequences" (*Demeter*, *supra* note 12, Principle 1). Nevertheless, some statements not made to the police might qualify as being against interest. The argument against their admissibility would depend on the considerations discussed in Section 3, *infra*, respecting the value of liberty.

of the law enforcement officials. Even if the police do not offer the suspect any such deal, he may volunteer the information in the belief that things will go easier for him. In both cases one must question whether the statement really is against his penal interest, since it is the subjective state of mind of the declarant that is supposed to impart reliability to the statement.⁵⁰

Is it an answer to say that the police officers who took the statement can be questioned and cross-examined on the issue of whether any deal was struck? With respect to the declarant who *volunteers* information in the circumstances considered above, it is not. Where a deal was made, evidence of the deal *could* emerge from examination in court, but it might not. Police officers, experienced in testifying and desirous of securing a conviction, might be tempted (and able) to keep such information from the court.

If these considerations seem to point towards the exclusion of the evidence, so do analogies with other areas of the law relating to hearsay. Dumont's statements would not have been admissible against Lucier under the rules relating to statements made by persons acting in concert.⁵¹ Nor would they have been admissible had Dumont been charged along with Lucier; out-of-court statements by co-accused are not admissible against each other.⁵² Dumont's statements were not made in the presence of Lucier, so they could not be admitted as an adoptive admission.⁵³ While it is true that the law requires only that hearsay fall within one of the recognized exceptions in order to be admitted,⁵⁴ the issue here is the creation (or at least the extension) of an exception. Analogies from the law that point against admissibility are therefore persuasive.⁵⁵

What, then, can be said to justify admissibility? It is here that a peculiarity of the law respecting declarations against interest becomes relevant.

It will be recalled that counsel for Lucier had invited the court to exclude those portions of Dumont's statements implicating the accused on the grounds

⁵⁰ American courts have been sensitive to this issue. See, e.g., *United States v. Turner*, 475 F. Supp. 194 (1978); *United States v. Bailey*, 581 F. (2d) 341 (1978).

⁵¹ The rule distinguishes between those statements made in furtherance of the common purpose, admissible on the fiction of agency, and statements that are "mere narrative" of acts already done, which are not admissible. See Cross, *Evidence* (5th ed. London: Butterworths, 1979) 527-28; McCormick, *supra* note 7, at 645-46. For a good analysis of this area of law, see Levie, *Hearsay and Conspiracy: a Reexamination of the Co-conspirators' Exception to the Hearsay Rule* (1954), 54 Mich. L. Rev. 1159. It is clear that the statements of Dumont would be deemed "narrative" and thus not admissible.

⁵² Cross, *id.* at 523.

⁵³ *The King v. Christie*, [1914] A.C. 545, 10 Cr. App. Rep. 141, 24 Cox. C.C. 249; cf. *R. v. Eden*, [1970] 2 O.R. 161 (Ont. C.A.).

⁵⁴ In *Ares v. Venner*, *supra* note 46, the Supreme Court of Canada sanctioned the admissibility of hearsay evidence that did not fall within a recognized exception. The focus was on the ostensible reliability of the nurses' notes. The statement of Dumont ought not to be deemed so reliable as to justify its admissibility.

⁵⁵ Nor does this argument contradict the established that "[i]f evidence is admissible for one purpose, it cannot be rejected on the ground that it is inadmissible for some other purpose" (Cross, *supra* note 51, at 20). The purposes are the same: to implicate the accused in the crime with which he is charged.

that they were not against the interest of the declarant. This argument represents a challenge to well-established principles concerning this exception to the hearsay rule. When a declaration against interest is admitted, all collateral matters contained in the statement are admitted along with those parts actually against interest.⁵⁶ In the Manitoba Court of Appeal, the majority affirmed this traditional principle without referring to its controversial nature.⁵⁷

It is said that the admissibility of collateral matters is justified by the psychological assumptions underlying the exception for declarations against interest. As noted above, the assumption is that a person would not say something false when it was against his interest.

Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy, it is obvious that the situation indicates the correctness of whatever he may say while under that influence.⁵⁸

The focal point clearly is the ostensible reliability of the statement.

Wigmore's reliance on the idea of a "trustworthy condition of mind"⁵⁹ has not gone unchallenged. One writer has insisted that whatever reliability attaches to a statement against interest is a function of those parts of the statement actually against interest.⁶⁰ Matters not against interest should not be admitted. The critics of Wigmore appear to have the better of the argument, and it would be open to a court to so decide.

To the above analysis the following objection could be raised. If collateral matters are not reliable, then they should be excluded regardless of whether they inculpate or exculpate an accused. It is no answer to say that, in most cases, statements exculpatory of an accused will tend to have been directly against the declarant's interest; to exclude collateral matters could result in the exclusion of evidence helpful to an accused. For example, assume that A and B are both charged with possession of narcotics. A makes a statement that the drugs were his, and that B had nothing to do with it. The latter part of the statement, although exculpatory of B, is not directly against A's interest.⁶¹

⁵⁶ *Higham v. Ridgway* (1808), 10 East 109, 103 E.R. 717.

⁵⁷ Matas J.A. cites *Higham v. Ridgway, id.*, and refers to the Crown's argument that "there is no basis for editing out those portions which incriminate the appellant" (*supra* note 4, at 190 (Man. R.), 542 (C.C.C.), 423 (W.W.R.)). Monnin J.A. makes no direct reference to the collateral matters principle but notes:

Both statements must be looked at in their totality. If they meet the requirements, they are admissible, they are so in totality. At any time it is a bad policy to edit or expurgate statements or confessions. To do so under these particular circumstances would be worse. The statements either are admissible or not. The trier of the facts can then canvass the entire situation.

188 (Man. R.), 540 (C.C.C.), 421 (W.W.R.). O'Sullivan J.A., dissenting, does not allude to this aspect of the rule admitting declarations against interest.

⁵⁸ Wigmore, *supra* note 7, at 1465.

⁵⁹ *Id.*

⁶⁰ Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule* (1944), 58 Harv. L. Rev. 1, at 57-63. See also Maguire, *Evidence: Common Sense and Common Law* (Chicago: The Foundation Press, Inc. 1947) at 145-46; McCormick, *supra* note 7, at 677. In *Demeter*, the Ontario Court of Appeal noted how seldom discussed is this rationale for the rule (*supra* note 12, at 343 (O.R.), 439 (C.C.C.)).

⁶¹ *United States v. Marquez*, 462 F. (2d) 893 (1978) (U.S.C.A., 2d Circ.).

One way around this objection is to relax the criticism of Wigmore noted above. Where the collateral statement is neutral respecting the reliability of the statement as a whole, one could accept Wigmore's theory and admit the entire statement. Where the collateral statement casts doubt on the reliability of the statement as a whole, no part of it should be admitted. For example, where A admits he is guilty of a crime, this is clearly against his interest. If A admits guilt and exonerates B, little has changed with respect to the ostensible reliability of the entire statement; the collateral part is neutral. Where A implicates B, we have reason to doubt the reliability of the entire statement, for the reasons considered above.

A further objection to this analysis leads us to the second (and more difficult) way in which we could deal with this problem. When A confesses to a crime and exonerates B, there is always the possibility that B got A to confess falsely to the crime. If so, the reliability of the statement, apparently directly against interest, is suspect. There are various answers to this problem. First, it is plausible that A would agree to confess falsely only if he were assured of escaping prosecution. In such circumstances, he may not have apprehended a vulnerability to penal consequences, and the statement would be deemed not to be against interest. Second, there are a variety of doctrinal devices with which this problem could be tackled. For example, Rule 804(b)(3) of the Federal Rules of Evidence⁶² provides that an exculpatory statement "is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Alternatively, the Uniform Law Conference of Canada would have such statements excluded where "there is evidence tending to establish collusion between an accused and the declarant in the making of the statement."⁶³ Finally, the boldest way around this problem is to fashion different rules for the Crown and the accused. Evidence of suspect reliability could be admissible when exculpatory, but inadmissible when inculpatory. As will be discussed below, there is a serious doctrinal obstacle to this form of analysis, but it is an obstacle that can and should be surmounted.

It should be appreciated that these problems exist only if the court is searching for a general rule governing the admissibility of statements collateral to those directly against interest. If the court adopts a case-by-case approach, focusing on the question of the reliability of the statement as a whole, the problem identified above disappears. To some extent, such a case-by-case approach is implicit in the principles governing statements against interest approved by the Supreme Court in *Demeter*, and is consistent with much American law on the subject.⁶⁴ On the other hand, the judgment in *Lucier* makes it fairly clear that it was the inculpatory nature of the statement that determined its inadmissibility.⁶⁵ For the Court to justify such a rule on the

⁶² Federal Rules of Evidence, H.R. 5463, P.L. 93-595.

⁶³ *Uniform Evidence Act*, s. 58(2).

⁶⁴ For a critical examination of American law on the subject of declarations against penal interest, see Bergeisen, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest* (1978), 66 Calif. L. Rev. 1189.

⁶⁵ First, Ritchie J. was clear that he considered the statements to have been against Dumont's penal interest. Second, the only factor Ritchie J. considered before he concluded that this was not a "proper case" for admitting the statements was the fact that the statement was inculpatory of the accused.

basis of a distinction between statements inculpatory and exculpatory in effect, it would have had to confront additional arguments of principle. The Court did not do so, despite the arguments of counsel and the reasoning of the court below.

3. *Doctrinal symmetry and the value of liberty*

Counsel for the accused invited the Court to distinguish between statements inculpatory and exculpatory in effect. The invitation was declined by the majority in the Court of Appeal because it could find no authority for such a distinction: "Admissibility is never decided by the use which is to be made of the evidence."⁶⁶ The principle that admissibility is not a function of whether the evidence helps or hurts an accused appears well established in the law.⁶⁷ Must it prevail, or are more important values implicated that could justify the distinction?

It was noted earlier that as a rule hearsay evidence is excluded because, absent the opportunity for cross-examination (or some effective substitute), the reliability of the evidence cannot be tested. When we ask why the law should concern itself with the reliability of evidence, the values of individual liberty and autonomy emerge.

By insisting that evidence be as reliable as possible, the law protects the liberty of an accused. An individual will be deprived of his liberty only when the evidence has been tested in court (or is otherwise considered reliable) and the legal burden resting on the Crown has been discharged. In this sense, there is an instrumental relationship between cross-examination and liberty, mediated through the concept of reliability.

By affording an accused the opportunity to confront adverse witnesses and his accusers, cross-examination serves the value of autonomy in a more direct way.⁶⁸ The accused is afforded the dignity of participating fully in the process by which the decisions affecting his liberty are made.⁶⁹

⁶⁶ *Supra* note 4, at 189 (Man. R.), 541 (C.C.C.), 421 (W.W.R.).

⁶⁷ *Sparks v. The Queen*, [1964] A.C. 964 at 980, [1964] 1 All E.R. 727 at 734, 108 Sol. Jo. 154 (P.C.).

⁶⁸ The Sixth Amendment to the Constitution of the United States provides "that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Central to the concept of confrontation is the right of cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074.

The relationship between the right of confrontation and the rationale of the hearsay rule is obvious and, although the American courts have consistently denied that there is a complete overlap between the hearsay rule and the Confrontation Clause, rare is the case in which evidence admitted under a traditional exception to the hearsay rule is held to violate the Sixth Amendment. See McCormick, *supra* note 7, at 604-607.

In his dissenting opinion of *Lucier*, O'Sullivan J.A. focused not on the question of reliability, but on that of confrontation: "My understanding is that our law makes hearsay evidence inadmissible as a general rule because the law of our country does not regard it as desirable that persons should have judgments rendered against them on the basis of the evidence of witnesses who are not subject to cross-examination and confrontation" (*supra* note 4, at 201 (Man. R.), 551 (C.C.C.), 432 (W.W.R.)).

⁶⁹ An analogy can be drawn with the values served by adherence to procedural due process in the enforcement of the law. See Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978) at 501-506.

If this analysis is correct, the Court could (and should) have invoked the concept of liberty to overcome the argument that the law knows no distinction between the uses to which admissible hearsay evidence can be put. It was upon this concept that O'Sullivan J.A. relied when he refused to extend *O'Brien* to the facts of *Lucier*.⁷⁰ The protection of liberty must have been the policy to which the Ontario Court of Appeal was referring in *Demeter*.⁷¹ Without some reliance on the value of liberty, the decision in *Lucier* cannot be justified.

The objection to this line of reasoning is that it is not enough to invoke the concept of liberty, with its considerable rhetorical force. One must demonstrate that the value of liberty is "built in" to the law itself in a way that legitimates a court's reliance upon it. Even if one accepts the analysis of the hearsay rule suggested above, can it truly be said that the law of evidence manifests such a pervasive concern for individual liberty? For while the law serves the value of liberty by imposing a burden on the Crown of proving guilt beyond all reasonable doubt, it serves some other mistress when it allows an accused who takes the stand to be questioned about his past convictions ostensibly in order to test credibility.⁷² Similarly, although the non-compellability of an accused can be seen to serve the value of liberty,⁷³ this is not true of the rules permitting adverse comments by the judge on the credibility of an accused who does take the stand.⁷⁴

Notwithstanding these counter-examples, the law can still be seen to reflect concern for the value of individual liberty. The key is to distinguish the goal of a given rule from the empirical assumptions underlying the actual content of that rule. For example, the rule that allows witnesses (including the ac-

⁷⁰ "If there is more than one view that can be taken of the extent to which the Supreme Court intends to reform the law of evidence, I think this Court should adopt that view which favours the liberty of the citizen and not that which favours the power of the state" (*supra* note 4, at 199 (Man. R.), 550 (C.C.C.), 431 (W.W.R.)).

⁷¹ *Supra* note 12, at 343 (O.R.), 439 (C.C.C.).

⁷² *Canada Evidence Act*, *supra* note 16, s. 12.

⁷³ This has become a constitutional right by virtue of s. 11(c) of the *Charter of Rights and Freedoms, Constitution Act*, 1982. The values it serves appear identical to those served by the privilege against self-incrimination in the United States. Of the latter it has been said:

[W]e do not make even the most hardened criminal sign his own death warrant, or dig his grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being. (Griswold, *The Fifth Admendment Today* (1955), cited in McCormick, *supra* note 7, at 252, note 61).

Even Wigmore, by and large critical of the ostensible rationales for the privilege, nonetheless found some merit in the idea that the law is to "comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than a good reason and not be conscripted by his opponent to defeat himself." Wigmore, 8 *Evidence*, rev. Chadbourn (3d ed. Boston: Little, Brown, 1974) at §2251.

⁷⁴ "It is well established that a Judge is entitled to express his own views of the facts or on the credibility of witnesses, and to express his opinion in strong terms provided that he does not use such language as leads the jury to think that they must find the facts in the way in which he indicates. . . ." (*R. v. Ruddick* (1980), 57 C.C.C. 421 at 435 (Ont. C.A.), leave to appeal denied April 6, 1981.

cused) to be questioned about prior convictions is designed to enhance the ability of the trier of fact to evaluate the testimony of a witness. The trier of fact is then better able to assess the weight (reliability) of that testimony. In principle, the rule is neutral with respect to liberty when applied to the accused's testimony; an accused has no right to complain if a trier of fact, *for good reasons*, devalues his testimony in light of his impugned credibility.

The rub is that the rule, as applied in Canada, is misconceived in its psychological assumptions about human veracity and is unfair in operation, given what we now know about how people evaluate information. The nexus between having a criminal record and telling the truth on the witness stand is tenuous at best; in truth, it is so elusive as to be virtually non-existent.⁷⁵ With respect to the use that the trier of fact makes of information of prior convictions to evaluate the testimony of an accused, empirical evidence suggests that in fact an accused is significantly prejudiced when that information is before the court. The knowledge of his record infects the trier of fact's appreciation not only of his testimony but of his entire defence.⁷⁶ In *operation*, the rule does not serve liberty, although in its goal, the rule does not contradict the thesis here advanced.

The same analysis can be applied to the ability of the judge to comment on the evidence of an accused. This power has been defended on the basis that it aids the jury in evaluating the evidence and that it will result in a better appreciation of its weight.⁷⁷ In principle, the power is neutral with respect to the value of liberty, but in operation a different picture emerges. There is evidence to suggest that a judge's adverse comments on the evidence greatly influence the jury's evaluation of that evidence. More significantly, when a judge concludes his comments with the disclaimer that it is for the jury to find the facts, the influence of the judge may thereby be increased, not diminished.⁷⁸ In its operation, the rule does not achieve its desired goal, but the thesis that the law is *intended* to serve liberty remains unimpaired.

Of course, a point may be reached where the weight of counter-examples could force a reconsideration of the thesis. After all, judges must know the impact on the jury of evidence of prior convictions and adverse judicial comments. Could they not be seen to desire such results and, if so, is not the thesis undermined?

Perhaps this explains, in part, the reluctance of the Supreme Court to address the issue directly. It would render the Court vulnerable to the criticisms that it was being wilfully blind to the contradictions inherent in the law of

⁷⁵ Lawson, *Credibility and Character: A Different Look at an Interminable Problem* (1975), 50 *Notre Dame Lawyer* 758 at 783-89.

⁷⁶ Hans and Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries* (1976), 18 *Crim. L.Q.* 235.

⁷⁷ "The judge has great experience in weighing evidence. If this experience is shared with the jury, whose unique fact-finding ability lies in the fact that they represent a cross-section of the community, the best results are likely to be achieved." (Notes to "Proposed Evidence Code", s. 10, in *Report on Evidence*, Law Reform Commission of Canada, Ottawa 1975 at 56).

⁷⁸ See an as yet unpublished paper on this topic, by Gold and Jull.

evidence and that it was simply imposing the ideologically pregnant concept of liberty upon a body of law that is informed by less lofty ideals.

Nevertheless, the fact remains that the Court is seized with an issue it must decide. Furthermore, it is an issue that does not drop from the skies with no structure or limits to it. The nature of the legal arguments presented here reveals the joiinder of issues on one point: is there any reason to qualify the adage that "what is sauce for the goose is sauce for the gander"?⁷⁹ In a case where the Court is concerned with the limits of a recently-articulated exception to the rule excluding hearsay, the Court is entitled to invoke the concept of liberty in support of its decision, even though it may be difficult to characterize the law as being concerned exclusively with liberty. To have invoked the idea that the law of evidence functions to prejudice the accused person as a *justification* for a rule admitting the evidence at issue would be to affirm the adage that two wrongs make a right. Can it be argued seriously that such a route would be preferable to the one pursued here?

III. CONCLUSION

In the preceding section an attempt was made to demonstrate how the Supreme Court could have arrived at the result in *Lucier* in a principled manner. It was suggested that the evidence of Dumont was no more reliable than hearsay evidence in general, and the Court could have decided the case simply on the grounds that the evidence, taken as a whole, was not against the penal interest of the declarant. In terms of the distinction drawn by the Court between inculpatory and exculpatory statements, it was demonstrated that the Court had to invoke the value of liberty to justify the rule that emerges from *Lucier*.

If the arguments presented here are correct, it is clear that the Court fell short of the ideal to which a court, especially the Supreme Court, should aspire. The judgment was largely a cut-and-paste job; it failed to consider the range of authorities discussed in the court below; it did not consider adequately either the arguments of counsel or the reasoning of the court below; it was silent on the question of how lower courts are to approach the application of Supreme Court precedents; and the reasoning was, at best, incomplete. Whatever one may think of the result reached in the case, *Lucier v. The Queen* is a sad comment on the quality of legal craftsmanship in the Supreme Court of Canada. Even though the Court may find its caseload excessive⁸⁰ and decide to concentrate its efforts on the more important cases,⁸¹ how much longer would it have taken the Court to produce a well-reasoned judgment? In the

⁷⁹ O'Sullivan J.A., *supra* note 4, at 200 (Man. R.), 550 (C.C.C.), 432 (W.W.R.).

⁸⁰ In recent years, the Court has been deciding approximately 120 cases per year: Bushnell, *Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance* (1982), 3 Supreme Court L.R. 479. Not all cases heard are chosen by the Court. *Lucier*, for example, arose on an appeal as of right. The connection between caseload and craftsmanship was suggested by Reiter and Swan, *Developments in Contract Law: the 1980-81 Term* (1982), 3 Supreme Court L.R. 115 at 132-45.

⁸¹ For example, *Lucier* was heard in the same term as was *Reference re Amendment of the Constitution of Canada* Nos. 1, 2 & 3, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1, [1981] 6 W.W.R. 1.

long run, the public is more adequately served if the Court takes the time to do its job well, even if it means that judgment is somewhat delayed.

Counsel has a role to play here. If arguments are well presented, the Court is less likely to avoid dealing with them in its reasons for decision. Nevertheless, the judges should assume a sense of collective responsibility for the Court's output. Critics have suggested that there is insufficient "quality control" within the institution; that individual judges concur in judgments if the result is agreeable to them, regardless of the adequacy of the reasons for judgment. In some areas, it is alleged, the Court continues to give inadequate weight to its "political" function and takes an unduly narrow, adjudicative approach to its role.⁸² However, the Court's judgment in *Lucier* would indicate that even in performing its adjudicative function as the court of last resort, the Supreme Court of Canada is falling short in its duty to give principled reasons in support of its decisions. Despite the obvious attraction of decisions that articulate a clear rule, cases should not be decided simply by a bare assertion of the rule that determines the case. In fact, the Court purports to offer reasons in support of its decisions, and properly so, but these reasons are open to scrutiny. Nothing less than the legitimacy of the judicial function hangs in the balance.

⁸² Weiler, *In the Last Resort* (Toronto: Carswell, 1974) at 6. In certain areas the Court appears to have embraced a wide conception of its role. See, e.g., *Crevier v. Attorney-General of Quebec*, [1981] 2 S.C.R. 220, 38 N.R. 541, 127 D.L.R. (3d) 1; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 574, 130 D.L.R. (3d) 588, 1 W.W.R. 1, varying [1980] 5 W.W.R. 283; *Reference re Amendment of the Constitution of Canada*, *supra* note 81. In other areas, the Court appears to behave as if it were just another court seized with the duty of deciding a particular case one way or the other (Reiter and Swan, *supra* note 80 at 138 ff.).