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**THE SUPREME COURT OF CANADA, PARLIAMENT AND THE *CHARTER*:
EXPLORING THE LIMITS OF THE JUDICIAL FUNCTION
IN CRIMINAL LAW**

by

Patricia A. Fricker

Submitted in partial fulfilment of the requirements
for the degree of Master of Laws

at

Dalhousie University
Halifax, Nova Scotia
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ABSTRACT

The Supreme Court of Canada is the court of final appellate jurisdiction in this country. Its decisions govern the day-to-day legal discourse in Canadian society. The judicial function has undergone a dramatic change since the advent of the *Canadian Charter of Rights and Freedoms*, and the inauguration of constitutional supremacy in a country where, prior to 1982, judicial deference to the concept of parliamentary supremacy was the norm. Yet, these two constitutional principles—constitutional supremacy and parliamentary supremacy—should not be treated as antagonistic. Rather, they are both integral to the type of criminal justice system evolving in Canada. The task for the Supreme Court of Canada since its elevation as constitutional arbiter has been to find the balance between these two constitutional doctrines. It must do so within the limits prescribed by the judicial function.

What are those limits in the context of criminal law? The definitional elements of the offence; the political and legal theory of classical liberalism; the *Charter's* constitutional, as opposed to statutory, character; the primacy of either crime control or due process values in judicial decision-making; the fluctuating balance in the criminal process between the influence of constitutional supremacy and parliamentary supremacy; the flexibility of the foundational principles of judicial independence and judicial impartiality; and, finally, prevailing societal norms. In this thesis it has been argued that there is a reciprocal normative relationship between the criminal process and society. Decision-making at the Supreme Court of Canada filters prevailing societal norms to conform to constitutional values—herein lies the process of readjustment between the criminal law and society at large.

To explore the limits of the judicial function at work, an analysis of case law emanating from the Supreme Court of Canada, particularly, but not exclusively, in the law of homicide had been undertaken. It is a premise of this work that the professional and academic dimensions of the criminal law cannot be understood in isolation of each other. Rather than approach the judicial function in an abstract manner, its limits have been revealed and explored through case law analysis. This gives the analysis immediacy to both academics and practitioners in their attempts to understand the Supreme Court of Canada's approach to constitutional adjudication in the field of criminal law.

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Chapter One: Introduction

The Supreme Court of Canada and the Adversarial System

Thirty years ago Professor Paul Weiler, writing about the process of judicial decision-making, observed: “The philosophy of the judicial process will soon be of great practical significance for the Canadian legal scene. The traditional, inarticulate, legal positivism of Canadian lawyers and judges is rapidly becoming outmoded ...”¹ How prophetic his words seem in post-*Charter*² criminal law where the judiciary and the judicial function, especially at the Supreme Court of Canada level, are the subject of unparalleled scrutiny and criticism. The adversarial system of criminal justice forms the background to the Supreme Court of Canada’s new role as Guardian of the Constitution and, like the Court itself, has been the subject of extensive academic comment. The focus of this thesis will be the changing nature of the judicial function in the context of criminal law, particularly at the Supreme Court of Canada level; however, such an analysis necessitates a basic understanding of the adversarial context in which that function has evolved.

In *R. v. Swain*³, Lamer C.J.C. found that the Supreme Court of Canada had, in past

¹Paul Weiler “Two Models of Judicial Decision-Making” (1968) 46 Can. Bar Rev. 406.

²*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

³[1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, 5 C.R. (4th) 253 [hereinafter *Swain* cited to C.R.]. See also *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1 [hereinafter *S.(R.D.)* cited to C.C.C.] at 364 where Justice Major in dissent—Chief Justice Lamer and Justice Sopinka concurring—writes: “The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown’s duty to

decisions, “recognized the constructs of the adversarial system as a fundamental part of our legal system.”⁴ He cited with approval Professor Weiler’s characterization of the adversarial process:

An adversary process is one which satisfies, more or less, this factual description: as a prelude to the dispute being solved, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments. This is by contrast with the public processes of decision by ‘legitimated power’ and ‘mediation-agreement’, where the guaranteed private modes of participation are voting and negotiation respectively. Adjudication is distinctive because it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved.⁵

[Footnotes omitted]

Effective preparation for an adversarial criminal contest also requires that the rules by which the Court will adjudicate the dispute are ascertainable beforehand by the parties concerned. Chief Justice Lamer concluded that “the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings ...”⁶ Its foundational principle is the presumption of innocence.

At common law, the presumption of innocence is referred to as the golden thread

present all the evidence fairly. The system depends on each side’s producing facts by way of evidence from which the court decides the issues. Our system ... does not permit a judge to become an independent investigator to seek out the facts.” For a detailed discussion of *R. (S.D.)* relative to the issue of judicial impartiality see *infra* at 60-71.

⁴*Swain, supra* note 3 at 280.

⁵*Weiler, supra* note 1 at 412 cited in *Swain, supra* note 3 at 281.

⁶*Swain, supra* note 3 at 281.

running throughout the English criminal law: *Woolmington v. Director of Public Prosecutions*.⁷ In Canada, the common law presumption of innocence has been entrenched under s. 11(d) of the *Charter*. A criminal trial ought not, therefore, to be perceived as an exercise in establishing the accused's innocence as he or she is presumed innocent from the outset. Rather, it is an adversarial contest in which the Crown seeks to prove the accused's guilt beyond a reasonable doubt. To speak of determining the guilt or innocence of the accused, therefore, is flawed when, in fact, the accused's innocence is the operating premise upon which the trial proceeds.

The conceptualization of the criminal trial as an adversarial contest between the State and the Individual emphasizes the liberal underpinnings of the Canadian criminal justice system.⁸ However, since the inception of the *Charter*, there has been growing discontent with a bipartite trial process.⁹ Third party interests vying for legitimacy in trial proceedings

⁷[1935] A.C. 462 (H.L.) at 481.

⁸See Peter H. Russell, *The Judiciary In Canada: The Third Branch Of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 25 where the author writes:

Insofar as the adversary system practised in most Canadian courts puts a premium on the rights and responsibilities of the litigants in the process of judicial decision-making, it reflects a strong commitment to individualism. Such a system tends to assume that the individuals (or their professional representatives) whose rights are at stake should be in the best position to ascertain the strongest arguments with which to support their respective claims. *At the philosophical core of such a system is the perception that a person is the bearer and prudent preserver of individual rights. An emphasis on the rights of the individual is evident in numerous other procedural features of our judicial system, notably the presumption of innocence and the requirement of proof beyond a reasonable doubt in criminal trials.*

[Emphasis added]

⁹ See Alan Young "Adversarial Justice and the Charter of Rights: Stunting the Growth of the 'Living Tree'" (1997) 39 C.L.Q. 362. And see Jamie Cameron "Tradition and

do so against a predominantly liberal philosophical background.¹⁰

It is not the purpose of this paper to resolve the tension between the concept of a criminal trial as a contest between the accused and the Crown, in pursuit of the truth,¹¹ and growing demands to make room for third parties, such as victims, in the adversarial context. This aside, a note of caution is warranted. The inclusion of third parties in adversarial proceedings where the accused's innocence is under attack ought to be approached with restraint.¹² It is not the third party whose liberty is at stake and who faces criminal sanction

Change Under the *Charter*: The Adversary System, Third Party Interests and The Legitimacy of Criminal Justice in Canada” in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) at 217.

¹⁰Third party or victim interests are not ignored in the current criminal process. Don Stuart, *Charter Justice In Canadian Criminal Law*, 2d ed. (Ontario: Carswell, 1996) [hereinafter *Charter Justice*] writes (at 35):

Legislative changes to better protect interests of victims have included rape shield laws, greater restitution provisions, fine surcharge programs to support victim services, provisions for bans on publicity of the identity of victims, written victim impact statements on sentencing and victim input into parole decisions.

¹¹See Law Reform Commission of Canada, *Our Criminal Procedure* [Report 32] (Ottawa: Supply and Services Canada, 1988) at 9-13. Speaking of the pursuit of truth in the trial process, and the impact of criminal procedure on that pursuit, the commissioners stated (at 10): “The truth is one thing; the law has regard for other values as well. A whole network of procedural and evidentiary rules exists to regulate and modulate the workings of the criminal justice system and thus secure the end of fundamental justice. *The manner in which Canadian criminal process pursues its purposes is therefore best described as a qualified search for truth.*” The commissioners maintain (at 9) that juxtaposed to the quest for truth are concerns for “human dignity (a notion which is broad enough to encompass the protection of society and the preservation of peace), and protection against the risk of convicting innocent persons.”

¹²See Don Stuart “*Charter Protection Against Law and Order, Victims' Rights and Equality Rhetoric*” in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell. 1996) at 327.

for wrongdoing. It is the accused.

Often what is overlooked in the debate over the extent of third party participation in the actual determination of guilt is the role of the Crown Attorney. He or she is responsible for the public interest in its many facets, and, in this capacity, for third party interests:

Crown Attorneys in Nova Scotia are responsible ... for the conduct of prosecutions. The conduct of a prosecution involves not only the conduct of the trial itself but a myriad of other activities essential to a fair prosecution. Crown Attorneys therefore conduct arraignments, show cause (bail) hearings, preliminary inquiries, sentencings, appeals ... disposition and review hearings before the *Criminal Code* Review Board, and fatality inquiries. In addition, they provide pre-charge advice to the police and provincial government enforcement officials, participate in the formulation of policy advice on the criminal law, participate in management activities aimed at improving the delivery of prosecutorial services to our community, prepare professional papers, and conduct and participate in public speaking engagements. In short, they discharge a number of responsibilities of fundamental importance to our community.

In discharging these responsibilities, a Crown Attorney must be guided by the law, codes of professional ethics, and the public interest. *The public interest involves many considerations. It encompasses the need to protect the overwhelming percentage of law-abiding citizens through the conviction of criminals and the deterrence of crime. ...*

The notion that all accused should receive fair and equal prosecutorial treatment by the Crown is an aspect of the rule of law. *Canada's judicial system operates on an adversarial trial model. It is left up to the parties to frame the issues before the court and lead the evidence relied on in support of their case. The role of defence counsel in this model is to do everything that can be ethically done to secure an acquittal for an accused who has chosen to plead not guilty. The role of the Crown Attorney excludes any notion of winning or losing.*¹³

[Emphasis added]

The Crown Attorney's role "excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal

¹³Public Prosecution Service, *Annual Report (September 1, 1993 to March 31, 1997)* (Halifax: Nova Scotia Government Printer, 1997) at 15.

responsibility.”¹⁴

The judiciary of the Supreme Court of Canada approaches its adjudicative task in the context of an adversarial tradition where liberalism’s emphasis on the individual is a primary influence.

As a third party deciding a dispute about legal rights, the judge should not render his decision without first allowing each of the parties to put forward its side of the case. If there is no opportunity for one or the other side to make its submissions and counter those of its adversary, or if the judge’s decision is based on considerations extraneous to the arguments of the parties, the adjudicative process will appear to be less a process for impartially and objectively settling disputes about legal rights than a device for imposing the will of the judge and the political forces with which he seems to be aligned.¹⁵

[Footnotes omitted]

Meeting the criteria of impartiality and objectivity in post-*Charter* Canada is particularly daunting given the stratified, heterogeneous and multi-cultural society in which we live. Yet the task is not impossible. Insofar as discretion—as distinct from unfettered subjectivity—informs subjective influences, the human dimension of the judicial function becomes an invaluable tool of individualized justice.¹⁶

¹⁴*Boucher v. Her Majesty The Queen*, [1955] S.C.R. 16 at 24. However, this understanding of the Crown role does not always correspond to that of actual practice. See for example the dissenting reasons of McLachlin and Major JJ. in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, 113 C.C.C. (3d) 481, 5 C.R. (5th) 291 at 299-329 [hereinafter *Westray* cited to C.R.]. At 326-327 the Justices wrote: “The present case is not simply about Crown non-disclosure. This case is about the appearance of justice. ... The entire proceedings were tainted by prosecutors who were playing to an enraged public, and playing to win. ... To win is not the role of the prosecutor, to win at all costs is an affront to the Canadian justice system.”

¹⁵Russell, *supra* note 8 at 25.

¹⁶See Kenneth Culp Davis, *Discretionary Justice* (Louisiana: Louisiana State University Press, 1969).

The tripartite relationship between the *Charter*, the criminal law, and the judicial function, as revealed through an analysis of case law issuing from the Supreme Court of Canada, shall be explored in later chapters. The primary focus shall be on the evolving nature of the judicial function, and the consequences of that evolution for the law of homicide. In short, the question to be addressed is as follows: What are the operational limits of the judicial function in post-*Charter* criminal law as revealed through an analysis of case law emanating from the Supreme Court of Canada, particularly, but not exclusively, in the area of homicide?

This question presupposes an examination of the adjudicative function against a broader theoretical background. Law is neither created, interpreted nor applied in a vacuum. “Legal change reflects an internal dynamic, which, nevertheless, is affected by external stimuli and, in turn, influences the external environment.”¹⁷ Likewise, the judicial function does not evolve in isolation from its broader theoretical context. In Chapter 2 that broader theoretical context will be explored including the implications for the judicial function of Canada’s political designation as a democracy; the predominantly liberal ideology informing our democratic institutions and constitutional documents; the predominance of either crime control or due process values in the criminal process; and the human dimension of judicial decision-making.

Both the law and the judicial adjudicative function are perceived as being influenced by the external environment, but in a self-adjusting rather than a simply reactive manner.¹⁸

¹⁷Gunther Teubner “Substantive And Reflexive Elements In Modern Law” (1983) 17 *Law & Society Rev.* 239 at 239.

¹⁸The ensuing discussion concerning the role of the Supreme Court of Canada in facilitating, through decision-making, a reciprocal adjustment between itself, the criminal

In turn, the social environment, itself, undergoes readjustment. Thus, one possible goal of the criminal justice system in a stratified, heterogenous and multi-cultural post-*Charter* Canada is to facilitate, perhaps even coordinate, the process of mutual readjustment between the criminal law and society. The common ground underpinning Herbert Packer's two models of the criminal process could be seen as providing the foci of adjustment for both society and the legal system.¹⁹ Limiting the criminal investigatory powers of the State, for instance, is an exercise in balancing the privacy interest of not only accused persons, but of society at large, as against the superior resources of the government. Compliance with the *Charter* and *Charter* values at the executive, legislative and judicial levels of government also facilitates the concept of the criminal justice system as an adjusting influence rather than a coercive

law and prevailing societal or community values derives from Teubner's, *supra* note 17, articulation of "reflexive law" as the outcome of evolutionary change in law and society. The author states (at 242):

From this juxtaposition of different but overlapping approaches [to law and society posited by German and American neo-evolutionary theories], I develop a new perspective on the process of legal and social change that permits me to point to a new "evolutionary" stage of law, which I call "reflexive law." This stage, in which law becomes a system for the coordination of action within and between semi-autonomous social subsystems, can be seen as an emerging but as yet unrealized possibility, and the process of transition to a truly "reflexive" law can be analyzed.

Teubner (at 270-273) sees the evolution of reflexive law in the context of "functionally differentiated societies" characterized by "specialized social subsystems".

Similarly, the need to perceive the Supreme Court of Canada from a different perspective is a consequence of the litigious multi-dimensional and multi-cultural society which Canada has become, particularly since the *Charter's* inception. Homogeneity no longer being the reality, the Supreme Court of Canada is compelled to re-assess its adjudicatory role insofar as it is involved in the constitutionalization of values.

¹⁹See *infra* at p. 47.

one.²⁰

The Supreme Court of Canada should not be seen as an isolated entity thrusting its vision of Canadian society on an unsuspecting public. Rather, it is the filterer of norms, but within the context of constitutional and criminal law principles. And herein lies the rub. The Supreme Court of Canada is not—and should not—be a result-oriented body where the facts of the case determine the outcome. Rather, the focus should be on the principles of criminal liability.²¹ Has the presumption of innocence been respected? Has the Crown proven guilt beyond a reasonable doubt? Has the accused’s right to a fair trial been respected? Has the substantive criminal law been interpreted and applied in a fair manner which respects the principle of the rule of law?²² While some may decry decisions of the Supreme Court of

²⁰See “Theory of the Charter”, *infra* note 64 and accompanying text. And see Peter Hogg and Allison Bushell “The *Charter* Dialogue Between Courts and Legislatures” ((1997) 35 Osgoode Hall L.J. 75.

²¹The issue of criminal liability is not novel. However, exploring the theoretical foundations of criminal liability is a resurgent trend in criminal law theory. See George Fletcher “The Rise and Fall of Criminal Law Theory” (1998) 1 Buffalo Crim. L. R. 275.

²²See *Our Criminal Procedure*, *supra* note 11 at 7-8 where the commissioners discuss the distinction between procedural and substantive law.

Substantive law reflects the legislature’s posture with regard to a particular social policy issue. It is substantive law which mirrors the decision to label certain activity as criminal. ... By contrast, procedural law provides the surrounding rules regulating the inquiry (whether at the police investigatory stage or a trial) into whether a violation of the substantive law has occurred.

While procedural law *simpliciter* is unable to control the content of substantive legislation, constitutional law is potentially able to do so. Where the Constitution contains express provisions, as ours does, protecting fundamental freedoms or legal rights, it may be wielded in such a manner as to prevent an invasion of the liberty of the individual by government or its agencies. This hold true regardless of whether the violation of the right or freedom has been accommodated by either the substantive or procedural law.

Canada, the grim reality is this: by conceding rights to the most despicable offenders accused of the most heinous crimes, only then will rights be secured for all. Undoubtedly, there is a tension between the confidence of the majority in the criminal justice system and the individual rights of the accused. But the balance must not be decided in the capricious court of public opinion. It must be decided through the ongoing assessment of basic criminal law principles and values necessitated by the *Charter's* mandate that the Constitution is the supreme law of the land. Respect for the rule of law, in turn, minimizes the risk of convicting the innocent and acquitting the guilty.

It is a working premise of this work that the theoretical framework introduced in Chapter 2 cannot be appreciated divorced from the actual practice of criminal law, hence the subject matter of Chapter 3—the law of homicide.²³ The language and practice of the trial and

[Footnotes omitted] [Emphasis added]

²³See Nicola Lacey “Philosophy, History and Criminal Law Theory” (1998) 1 Buffalo L. Rev. 275. The author (at 303-304) suggests an interpretive approach to criminal law theory:

An excellent illustration of the complex relationship between the normative and other aspects of legal theory may be drawn from Jules Coleman’s work of tort theory. Coleman introduces *Risks and Wrongs* by announcing that “[t]his book is a book about liberal political, moral and legal theory.” This immediately suggests that his enterprise is normative—part of liberal political philosophy. But over the next few pages it becomes clear that this is far from being the case:

We can distinguish among at least two ways of approaching this sort of explanatory inquiry. The first kind of explanatory approach adopts what I will call a “top-down” strategy. In top-down explanations, the theorist begins with what she takes to be the set of norms that would gain our reflective acceptance, at least among those practitioners who adopt the internal point of view. Then she looks at the body of law she seeks to understand and tries to reconstruct it plausibly as exemplifying those norms. In contrast to the top-down

appellate courtrooms is determined, in large measure, by the Supreme Court of Canada.. The governing political, moral and legal values and assumptions implicit in those judgments,²⁴ in turn, influence day-to-day legal discourse. As well, those values and assumptions fuel academic reaction to the Supreme Court of Canada's stewardship of the criminal justice

approach, one can work from the middle up. *In middle-level theory, the theorist immerses herself in the practice itself and asks if it can be usefully organized in ways that reflect a commitment to one or more plausible principles. This approach seeks to identify the principles that are candidates and those aspects of the practice that reflect them.*

For Coleman, then, the differentiation between normative and analytic projects is muddied because both middle-level theory and top-down theory are conceived as part of an essentially explanatory project. *What Coleman is expressing here is what I shall term an interpretive conception; the idea that explanatory projects around law are always going to be informed by the values which are immanent within a particular set of legal institutions and practices.* [Emphasis added] [Footnotes omitted]

Building on this interpretive conception, Professor Lacey states (at 309):

Moreover, I would argue that theorists of criminal law—whether lawyers or philosophers—who seek to develop theories which answer to the contours of actual practices of criminal law are, inevitably even if implicitly, engaged in the sort of interpretive enterprise which I have already suggested is the best way of understanding Coleman's concept of middle-level theory.

The idea of linking theory to practice—albeit not in a purely interpretive style—and developing a position on principles derived from the analysis is central to this paper.

²⁴See Fletcher, *supra* note 21 at 293-294 where the author underscores the importance of moral and political philosophy for an understanding of the principles of criminal liability: Skepticism both about the distinction between acts and omissions and about the distinction between attempts and completed crimes derives from the same root misconception. Both are premised on a dubious moral theory that makes bad intentions to be the core of immoral conduct. This view of morality would be influential only if theorists committed the additional mistake of failing to integrate political theory into their views of just punishment.

It should be clear, I think, that the future of criminal theory rests on an adequate appreciation of both moral and political philosophy. It is after all the state that seeks to inflict punishment. Without a view about the proper relationship of the state to its citizens, moral theories about crime and punishment can lead us astray.

system. For example, the Individual/State divide, central to traditional liberal ideology, is explored in *Hunter v. Southam Inc.*,²⁵ a non-homicide case which later influenced the 1997 decisions in *Feeney*²⁶ and *Stillman*,²⁷ two murder conviction appeals to the Supreme Court of Canada. These cases generated a wealth of academic response, sent a message to policing authorities that, as agents of the State, they will be bound by strict guidelines before infringing the accused's privacy interest, and prompted legislative reaction from Parliament, itself. Thus, by examining legal theory in the context of adversarial criminal practice, the various State and private players can appreciate better their respective positions vis-a-vis the criminal law. Disparate views at least would have in common an identifiable starting point—the bipartite adversarial criminal trial and the prevailing law as articulated by the Supreme Court of Canada.

Chapter 3 examines the judicial function in action in the law of homicide. The tension between constitutional supremacy and parliamentary supremacy, as operative principles in our liberal democracy, is the focal point of the analysis. The shift from judicial deference to legislative bodies in favour of judicial activism under the *Charter*, and the implications for the criminal justice system, will be explored in both Chapters 3 and 4.

This is not a treatise on the criminal law nor on the law of homicide. It is a focussed attempt to bring order to the chaos of academic and public criticism of the Supreme Court of

²⁵*Infra* at pp.127-130, 132-133.

²⁶*Infra* at pp.133-136.

²⁷*Infra* at pp.130-132.

Canada²⁸ by highlighting what may be perceived as the major forces governing their decision-making process. The *Charter* has thrust the Supreme Court of Canada into “un-Chartered” waters. In effect, not only must the *Charter* be introduced to the criminal law, but also the criminal law must be introduced to the *Charter*.

²⁸This is not to say that the Supreme Court of Canada was immune from criticism prior to 1982. See, for example, Paul Weiler, *In The Last Resort* (Toronto: Carswell, 1974) [hereinafter *Last Resort*]. At 235 he writes:

Underlying this litany of complaints is one basic theme: our Supreme Court is unduly oriented to the task of adjudicating the concrete dispute before it and, as a result, it exhibits much too narrow a conception of legal reasoning to do justice to the important legal policies it is setting for the Canadian polity. These are the fundamental attitudes which must be changed if we are to secure a better quality of judging from the Supreme Court of Canada.

Chapter 2

The Supreme Court of Canada: Exploring the Operational Limits of Judicial Activity

The Supreme Court of Canada operates within a liberal democracy. Of principal importance to the judicial function is the relationship between elected legislative bodies and the courts. The limits of the judicial function in criminal law must be understood in that context with its attendant ideological underpinnings.

The principle of parliamentary supremacy derives from the preamble to the *Constitution Act, 1867* and connotes a constitutional legal system in which Parliament, through its criminal law power, is subject to the Courts only insofar as it exceeds its jurisdiction under the federal division of powers.²⁹ Judicial deference to legislative pronouncements had been the norm in Canada prior to the advent of the *Charter* despite the operation of the *Canadian Bill of Rights*,³⁰ a piece of federal legislation enacted in 1960. Perhaps the most notable exception was the case of *R. v. Drybones*.³¹ In deciding that federal legislation making it an offence for an Indian to be intoxicated off a reserve violated the

²⁹See Douglas A. Schmeiser “The Case Against Entrenchment of a Canadian Bill of Rights” (1973) 1 Dal. L.J. 15 at 15-18.

³⁰S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter the *Bill of Rights*].

³¹(1969), [1970] S.C.R. 282, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355 [hereinafter *Drybones* cited to C.R.N.S.]. The accused, a First Nations man living in the Northwest Territories, was convicted of being intoxicated off a reserve, a crime specific to native peoples under then existing federal legislation.

equality provision of the *Bill of Rights*,³² Ritchie J. for a majority of the Supreme Court of Canada held that the *Bill of Rights* was more than a canon for the construction of federal statutes. It was, (and continues to be), “a statutory declaration of the fundamental human rights and freedoms which it recognizes ...”.³³ Substantive review of legislation became a recognized possibility, particularly with Chief Justice Laskin’s later characterization of the *Bill of Rights* as a quasi-constitutional document.³⁴ Referring to the *Drybones* case, one author noted:

Suddenly everything seemed changed when the Supreme Court decided *Drybones* in late 1969. Here the Court was directly confronted with the issue of the precise legal impact of a Bill of Rights ... The judges seized the opportunity to carve out a visible and full fledged judicial role as the protector of our civil liberties against Parliamentary intrusion.³⁵

³²Section 1 (b) states:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

...

(b) the right of the individual to equality before the law and the protection of the law;

³³*Drybones*, *supra* note 31 at 343.

³⁴See *R. v. Hogan* (1974), [1975] 2 S.C.R. 574, 18 C.C.C. (2d) 65, 26 C.R.N.S. 207 [hereinafter cited to S.C.R.] where Laskin, C.J.C., speaking in dissent, wrote (at 597): “The *Canadian Bill of Rights* is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument. It does not embody any sanctions for the enforcement of its terms, but it must be the function of the Courts to provide them in the light of the judicial review of the impact of that enactment. The *Drybones* case has established what the impact is, and I have no reason to depart from the position there taken.” The Supreme Court of Canada’s continuing conservatism in its adjudicative function under the *Bill of Rights* often left Laskin C.J. in dissent.

³⁵*Last Resort*, *supra* note 28 at 195.

Yet, this initial promise did not mature, and the Supreme Court of Canada retreated from its activist stance.³⁶

Constitutional developments in 1982 changed this perspective. Whereas the *Bill of Rights* had been a federal statute applicable only to federal legislation,³⁷ the *Charter* had constitutional status. Professor Hogg, writing of the shift from a statutory to a constitutional guarantee of fundamental rights and freedoms observes: “The restraint that led the Courts to defer to the legislative choices that were presented for judicial review under the Bill of Rights has not continued under the Charter. The Courts have assumed that the constitutional status of the Charter resolves their former uncertainty as to the legitimacy of judicial review.”³⁸ The source of that uncertainty derived, in part, from Canada’s political institutions and culture, and is equally as topical in current academic commentary on the Supreme Court of Canada’s application of the *Charter* in a stratified, multi-cultural liberal democracy. The old analysis still has some relevance, especially the ongoing tension between the principle of parliamentary supremacy and the role of an appointed court in Canadian democracy:

³⁶See *Charter Justice*, *supra* note 10 at 426 where Stuart, referring to *Drybones* as a “landmark decision” writes: “However, *Drybones* was subsequently distinguished by the Court in two controversial decisions. ... *Canada (A.G.) v. Lavell* (1974) ... [and] *Bliss v. Canada (A.G.)* (1979) ...”[Footnotes omitted]. See also Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Ontario: Carswell, 1997) (Loose-leaf) at 32-11 where the author observes: “In the 22 years that elapsed between the Bill’s enactment in 1960 and the Charter’s adoption in 1982, the *Drybones* case was the only one in which the Supreme Court of Canada held a statute to be inoperative for breach of the Bill.” [Footnotes omitted].

³⁷Although s. 2 of the *Bill of Rights* implies that it is applicable to “every law in Canada”, that phrase is qualified under s. 5(2) to refer to federal legislation, rules, orders, and regulations only.

³⁸Hogg, *supra* note 36 at 32-11.

Before considering Drybones we must examine the Canadian setting in which it appears. We know that provincial and federal legislative jurisdiction is delineated in ss. 91 and 92 of the British North America Act; that there is no Bill of Rights entrenched in our constitution, as in the United States, and if it were entrenched in our constitution, considering our many problems concerning amendment of our constitution, it is easy to foresee grave problems arising should we ever wish to amend it, as, for example, to conform to the needs of a changed and changing society; that our Government operates on the basis that the elected majority will rule, and the Government is representative and responsible; Parliament is supreme, hence any federal enactment, including the Canadian Bill of Rights, can be abrogated or amended (and we do not have a division of the legislative, executive, and judicial branches, nor do we have a system of checks-and balances [sic], as in the United States); and the Supreme Court of Canada is itself a creature of statute; and we live in a pluralistic federal community, in which Quebec does have its own unique problems.³⁹

[Emphasis added]

Despite the acknowledged difficulties of achieving, let alone amending, a constitutional bill of rights, that feat was accomplished in 1982. Thereafter, the Supreme Court of Canada found its judicial review role expanded by a legal rights document that enlarged upon its review function of both the positive and the common law.

The principle of constitutional supremacy, inaugurated under s.52 of the *Constitution Act, 1982*, has left the Supreme Court of Canada in an awkward position: it must now balance the competing principles of parliamentary supremacy and constitutional supremacy in the decision-making process. It will be argued that the co-existence of these two principles is a constitutional reality albeit not always an easy one.⁴⁰ The Court is trying to reconcile the two constitutional doctrines by articulating appropriate principles of constitutional

³⁹Hugh W. Silverman "Annotation: Dry bones: Are they alive?" (1970) 10 C.R.N.S. 356 at 357-358.

⁴⁰Exploration of the impact of parliamentary and constitutional supremacy in the law of homicide will be undertaken in Chapter 3.

adjudication that demarcate the Court's review function as distinct from Parliament's criminal law policy-making responsibility. The post-*Charter* ideological mix impacting on the judicial function to be explored in this chapter will form a background to the subsequent analysis of the law of homicide. That analysis will, in turn, pivot around judicial efforts to reconcile the Supreme Court of Canada's status in a legal system where a deep-rooted tradition of parliamentary democracy offers no quarter to the new-born principle of constitutional supremacy.

I. The Supreme Court of Canada

The Supreme Court of Canada exercises "exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive."⁴¹ Such was not always the case. Until 1949, the Supreme Court exercised an intermediate appellate jurisdiction only. It was overshadowed by the Judicial Committee of the Privy Council in England which continued to wield final appellate jurisdiction over the Dominion. Although the *British North America Act, 1867*⁴² provided, under s. 101, that a general court of appeal could be created in Canada, the ongoing British

⁴¹*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 52. Notice that the section number according the Supreme Court of Canada final and exclusive appellate jurisdiction in Canada also is the same numbering given to the constitutional supremacy clause under the *Charter*.

⁴²30 & 31 Vict., c. 3 (U.K.) renamed the *Constitution Act, 1867* by the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. For purposes of clarity, references to the *B.N.A. Act, 1867* prior to the year 1982 will not reflect the name change.

influence marginalized the Court's relevance and stature.⁴³ The Supreme Court's subservient position to British legal institutions paralleled the status of the Dominion vis-a-vis its colonial master.⁴⁴

The push for independence from British legal institutions initially was not unanimous.

The relationship between this continuing appeal procedure [to the Judicial Committee of the Privy Council] and the "general court of appeal for Canada" contemplated by s.101 of the 1867 constitution was a matter of controversy. Some wanted the new Canadian appeal court to be a tribunal of last resort; others sought that Privy Council appeals should be preserved, both as an alternative to any new court and as a tribunal for reviewing its decisions. An early intimation of this division of opinion came in 1870 when, in the House of Commons debate on a subsequently withdrawn Supreme Court bill, a member of parliament asked whether the new court would supplant the Privy Council, provoking a vigorously negative response from Sir John A. MacDonald.⁴⁵

[Footnotes omitted]

⁴³See Dale Gibson "Development of Federal Legal and Judicial Institutions in Canada" (1996) 23 Man. L. J. 450 at 486 where the author writes: "It was a forgone conclusion that the Court's prestige would be undermined by the possibility that cost-conscious litigants could leapfrog it entirely by the *per saltum* procedure for appeal directly from provincial courts to London's Privy Council. The Privy Council further eroded confidence in the Court by overruling it in numerous early decisions ..." See also Bora Laskin "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038 at 1038-1040. At 1040 Professor Laskin (as he then was) wrote: How far the intermediate position of the Court tended to its obscurity is difficult to estimate. I do not refer to any obscurity in a professional legal sense. The Court made itself felt whenever the opportunity offered. But it is clear that the Court has not hitherto been regarded by the public at large as a potent element in Canadian self-government. Perhaps this is a role which a national tribunal can essay only if it has ultimate judicial authority." See also Peter Russell "The Political Role Of The Supreme Court of Canada In Its First Century" (1975) 53 Can. Bar Rev. 576.

⁴⁴See Laskin, *supra* note 43 at 1038 where the author states: "It was a [constitutional] system under which Canadian judicial dependence on Imperial authority was of a piece with Canadian subservience in both legislative and executive areas of government."

⁴⁵Gibson, *supra* note 43 at 480.

Efforts to make the Supreme Court of Canada's decisions "final and conclusive" under its founding legislation proved unsuccessful and prerogative appeals to London continued.⁴⁶ However, in the field of criminal law—an exclusive federal jurisdiction under s. 91(27) of the *B.N.A. Act, 1867*—a movement was afoot to assert exclusive appellate jurisdiction for the fledgling national court.

In 1887 criminal appeals to the Judicial Committee of the Privy Council were abolished under Canadian legislation.⁴⁷ Apparently, the legislative initiative was prompted by Louis Riel's appeal of his treason conviction to the Privy Council.⁴⁸ Like Riel's appeal, the new initiative did not survive the scrutiny of the Privy Council, and this attempt to restrict British influence, at least in respect of criminal appeals, was crushed by the Privy Council's 1926 ruling in *Nadan v. The King*⁴⁹ The Privy Council held that the Dominion legislation was invalid because it purported to restrict prerogative appeals to the Crown and was, thereby,

⁴⁶*Ibid.* at 481-482 where Gibson writes: "There has always been some sentiment, strongest in Quebec, that Privy Council appeals should be abolished for all types of litigation. This had been the goal of the ineffectual restriction included in the 1875 statute establishing the Supreme Court of Canada, and sporadic agitation to replace it with a workable measure continued over the years." See also Barry L. Strayer, *The Canadian Constitution And The Courts*, 3d ed. (Toronto: Butterworths, 1988) at 26 where he writes: "[D]uring the 75 years after the creation of the Supreme Court, [Parliament] passed a number of measures with the purpose of making its judgments final."

⁴⁷See *An Act to amend the law respecting Procedure in Criminal Cases*, S.C. 1886-87, c. 50, am. 1888-89, c. 43, s. 1.

⁴⁸See Strayer, *supra* note 46 at 26, n109. Gibson, *supra* note 43 at 480-481 concurs but adds: "It was just as probable, however, that the change was a personal project of minister of justice J.S. Thompson, who introduced the measures in parliament." [Footnotes omitted].

⁴⁹[1926] A.C. 482, [1926] 2 D.L.R. 177, 45 C.C.C. 221 (J.C.P.C.).

beyond the Dominion's jurisdiction to enact. Further, the legislation conflicted with two imperial statutes thereby violating the *Colonial Laws Validity Act, 1865*.⁵⁰ The result in *Nadan* was a key factor leading to the imperial conference of 1926 and the resulting Balfour Declaration "which acknowledged that the senior British colonies were independent in fact, if not in law, and that steps would soon be taken to make the law correspond to reality."⁵¹ After a five-year interval, the *Statute of Westminster, 1931*⁵² was enacted by the Imperial Parliament. Canada gained formal independence from Great Britain and the *Colonial Laws Validity Act, 1865* no longer was applicable to the Dominion.⁵³ Imperial statutes, once a tool of control and domination by the Imperial Parliament, now were applicable only at the Dominion's express request and consent.⁵⁴

Seizing upon this new era of independence, the 1888 initiative in respect of criminal appeals was resurrected, and, in 1933, a provision was added to the *Criminal Code*⁵⁵

⁵⁰28 & 29 Vict., c. 63 (U.K.). See Hogg, note 36 at 3-3 to 3-5.

⁵¹Gibson, *supra* note 43 at 481. See also Hogg, *supra* note 36 at 3-4 to 3-5.

⁵²22 Geo. V, c. 4 (Imp.), reprinted in R.S.C. 1985, Appendix II, No. 27.

⁵³See Laskin, *supra* note 43 at 1069. But see Brian Slattery "The Independence of Canada" (1983), 5 S.C.L.R. 369 at 391.

⁵⁴See Slattery, *supra* note 53 at 384 where the author discusses the impact of imperial statutes on colonies: "To understand the process by which a colony becomes independent, it is necessary to examine more closely a basic principle of British colonial law ... The rule states that the Imperial Parliament may legislate for British colonies overseas in any matters whatsoever; such legislation is not only binding in the colonies but possesses overriding force there, so as to nullify any existing or future local laws that conflict with it."

⁵⁵*An Act to amend the Criminal Code*, S.C. 1932-33, c. 53, s. 17.

abolishing criminal appeals from all courts to the Privy Council.⁵⁶ The legislative initiative was upheld by the Privy Council two years later in *British Coal Corporation v. The King*.⁵⁷ Ultimately, all civil and criminal appeals became the exclusive jurisdiction of the Supreme Court of Canada.⁵⁸

Thus, with the 1949 amendments to the *Supreme Court Act (1927)*⁵⁹ the Court entered adulthood, 18 years after Canada had gained formal independence from Great Britain under the *Statute of Westminster, 1931*. As the court of final appellate jurisdiction in this country, the Supreme Court of Canada has been striving, ever since, to carve a niche for itself in the Canadian political and legal landscape. Moreover, it is apparent from the foregoing brief historical description, that criminal law has been a significant arena for this struggle since the early days of Confederation.

I do not intend to delve further into the history of the Supreme Court of Canada.⁶⁰

⁵⁶See Strayer, *supra* note 46 at 27.

⁵⁷[1935] A.C. 500, [1935] 3 D.L.R. 401, 64 C.C.C. 145 (J.C.P.C.).

⁵⁸See *A.G. Ont. v. A.G. Can.*, [1947] A.C.127, [1947] 1 All E.R. 137, [1947] 1 D.L.R. 801.

⁵⁹*An Act to amend the Supreme Court Act*, S.C. 1949 (2d session), c. 37, s. 3. That section stated, in part:

3. Section fifty-four of the said Act is repealed and the following substituted therefor:

“54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Can and the judgment of the Court shall, in all cases be final and conclusive.

[Bold in original]

⁶⁰For a detailed history of the Supreme Court of Canada’s roots in English legal institutions and principles, see W. R. Lederman “The Independence of the Judiciary” (1956) 34 Can. Bar Rev. 769. And see Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1996). For a general

Sufficient for the purposes of this work is a rudimentary understanding of the Court's evolving status since its creation by federal statute in 1875.⁶¹ Such understanding facilitates, from this writer's perspective, an appreciation of the maelstrom surrounding the Court today, a consequence of its having gone from a position of relative obscurity to one of unprecedented visibility since the *Charter's* inception.⁶²

II. Constitutional Supremacy in a Parliamentary Democracy

The preamble to the *Constitution Act, 1867* provides that Canada is to have a

history see, Gibson, *supra* note 43; Laskin, *supra* note 43; Bora Laskin "The Supreme Court of Canada: The First One Hundred Years, A Capsule Institutional History" (1975) 53 Can. Bar Rev. 459; J.C. McRuer "The Supreme Court As A National Institution" (1980) 1 S.C.L.R. 467; and Hogg, *supra* note 36 at c. 8.

⁶¹*Supreme and Exchequer Courts Act, 1875*, S.C. 1875, c. 11.

⁶²See Brian Dickson "The Role and Function of Judges" (1980) 4 L. Soc. Gaz. 138 at 172-73 where Justice Dickson (as he then was) writes: "Throughout its first century in history the Supreme Court did not command public attention: its judges were not well-known public figures; media coverage was meagre and often inaccurate. But this has changed ..." See also Russell, *supra* note 8 at 335 where the author states:

The powerful role the Supreme Court is now assuming in Canadian government is one for which neither the Court nor the public have had much preparation. For most of its history the Supreme Court of Canada was a subordinate, secondary institution. ... The Court's long period of underdevelopment tells us something both about the slowness of Canada to mature as a nation and the slowness of the judiciary to acquire the status of a separate branch of government in Canada.

See also Claire Beckton and A. Wayne MacKay, Research Coordinators, *The Courts and the Charter* (Canada: University of Toronto Press, 1985) at 38 where they write: "Only in recent years has the practical impact and the policy-making role of the Supreme Court of Canada come to the attention of the Canadian public.... It is this document [the *Charter*] which greatly extends the policy function of the Supreme Court of Canada and accentuates the growing public presence of the Court." And see Peter McCormick and Ian Greene "The Supreme Court of Canada" in R.S. Blair and T.T. MacLeod eds., *The Canadian Political Tradition: Basic Readings*, 2d ed. (Ontario: Nelson Canada, 1993) at 506-507.

“Constitution similar in Principle to that of the United Kingdom.”⁶³ One such principle is that of parliamentary supremacy, a principle which stands in uneasy juxtaposition to that of constitutional supremacy heralded under s. 52 of the *Constitution Act, 1982*.⁶⁴ The heated

⁶³See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577, 118 C.C.C. (3d) 193 [hereinafter the *Provincial Court Judges Case* cited to C.C.C.] where Lamer C.J.C.(at 237-244) elaborates the importance of the preamble to the *Constitution Act, 1867* in giving legal effect to unwritten norms, such as the principle of judicial independence, which complement the written constitution itself.

⁶⁴See Christopher P. Manfredi, *Judicial Power And The Charter* (Toronto: McClelland & Stewart, 1993) at 14 where the author states: “As a whole, section 24 of the Charter and section 52(1) of the Constitution Act, 1982 push Canada further away from the tradition of parliamentary supremacy inherited from Britain toward a regime of constitutional supremacy enforced by judicial review.” He elaborates this statement further at 36-39 where the author discusses the paradox of liberal constitutionalism noting (at 37): “Counter majoritarianism and judicial finality are the very reasons why judicial review continues to be controversial in liberal democracies.” But see Brian Slattery “A Theory Of The Charter” (1987) 25 Osgoode Hall L.J. 701 [hereinafter “Theory of the Charter”]. This author argues that a “Coordinate Model” of the *Charter*—as opposed to a “Judicial Model” which assigns a central role to the courts—is the preferred approach. Slattery states (at 713):

The Coordinate Model holds that the duty to observe *Charter* standards affects every aspect of the process by which laws are enacted and implemented, including the formation of the initial policy, the drafting of the detailed provisions of a bill, the debates in the legislature and legislative committees, the voting of individual members of the legislature, the drafting of statutory orders and regulations, and the exercise of any powers conferred by the statute or its regulations. In principle, every person or body involved in this process has the responsibility to advert to *Charter* standards in making decisions that fall within that person’s competence. ... [T]here is more than one way to implement *Charter* standards; it would be wrong to assume that the judicial mode is the only one or the best.

And see *Provincial Court Judges Case*, *supra* note 63 at 236 where Chief Justice Lamer for the majority writes: “[T]he constitutional history of Canada can be understood, in part, as a process of evolution ‘which [has] culminated in the supremacy of a definitive written constitution’.” However, he stipulates (at 243) that “the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten and organizing principles found in the preamble to the *Constitution Act, 1867*. Even though s. 11(d) is found in the newer part of our Constitution, the *Charter*, it can be understood in this way, since the Constitution is to be read as a unified whole ...” And see Russell, *supra* note

debate surrounding judicial adjudication under the *Charter*, and the rise of the Court's star at the alleged expense of elected representatives, ignores or trivializes the legislative override provisions of the Constitution.⁶⁵ This despite the existence of a comparable precedent in the *Bill of Rights*.⁶⁶ Specifically, s. 33(1) of the *Charter* provides :

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

8 at 364 where the author asserts that “[a] more enduring and benign constraint on the Court is the ambivalence of Canadians about judicial power. ... Notions of parliamentary supremacy still dance in our heads.”

⁶⁵See “Theory of the Charter”, *supra* note 64 at 702 where the author writes:
The *Charter* is strikingly different from the American *Bill of Rights*. ... The most notable difference is that section 33 of the *Charter* allows legislatures to enact “notwithstanding clauses” that shield statutes from judicial scrutiny for conformity with many *Charter* provisions. One would have thought that this provision would figure prominently in any debate about the relative roles of legislatures and courts under the *Charter*. But curiously this has not been the case. Section 33 is usually ignored or treated as an embarrassment.

But see Russell, *supra* note 8 at 364 where the author asserts that s.33, “by relieving judges of the burden of finality, may encourage some to be bolder than they might otherwise have been. But in the long term, for citizens as for judges, it should serve as a reminder of the limited nature of the judicial mandate.” And see Patrick Healy “Another Round On Intoxication” (1995) 33 C.R. (4th) 269 at 274-275 where the author, writing in response to the *Daviault* decision, stated: “Until Parliament acts, the law is that stated in *Daviault*. ... The difficulty with any direct challenge to the correctness of the court’s conclusion is that it would have to be justifiable under s.1 or an exercise of parliamentary supremacy through reliance on s. 33 of the *Charter*.”

⁶⁶Section 2 of the *Bill of Rights* states: “Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment of infringement of any of the rights or freedoms herein recognized and declared ...” See *supra* note 37 for clarification of the phrase “every law of Canada”.

The “notwithstanding” legislation remains operable for five years and may be renewed every five years thereafter.

Clearly, s. 33 is a powerful affirmation of parliamentary primacy in this legal era of constitutional supremacy.⁶⁷ Professor Peter Hogg writes:

Section 33 of the Charter ... enables the Parliament or a Legislature to “override” most of the provisions of the Charter. This is accomplished by including in a statute an express declaration that the statute is to operate notwithstanding a provision included in s.2 or ss.7 to 15 of the Charter. Once this declaration is included, the statute will operate free of the invalidating effect of the Charter provisions specified in the declaration. In this way, the Parliament or a Legislature, provided it is willing to include the express declaration required by the override provision, is able to enact a law that abridges rights guaranteed by s. 2 or ss. 7 to 15 of the Charter. *The override provision thus preserves parliamentary supremacy over much of the Charter.*⁶⁸

[Emphasis added] [Footnotes omitted]

While Professor Hogg speaks of “parliamentary supremacy”, arguably the term “parliamentary primacy” reflects more accurately the political context in which the override provision

⁶⁷See *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 90 N.R. 84 [hereinafter *Ford* cited to S.C.R.] where the Supreme Court of Canada (at 740-741) held that s. 33 does not mandate substantive review of legislative policy in exercising the override; rather, it is restricted to matters of form. For a case commentary on *Ford* and the s. 33 override see A. Wayne Mackay and Diane Pothier “Developments In Constitutional Law: The 1988-89 Term” (1990) 1 S.C.L.R. (2d) 81 at 172. The authors note that “[w]hile we do not object to the result in this case, it is not clear why the Court felt compelled to give such a broad scope to legislative action under section 33 of the Charter. It does not appear to be consistent with the Court’s frequently declared liberal approach to enhance the rights and freedoms in the Charter.”[Footnotes omitted]. They conclude (at 173) that “the Court has made a significant value choice—one which asserts the importance of legislative supremacy even in the context of the Charter.” See also Brian Dickson “Keynote Address” in Frank E. McArdle, ed., *The Cambridge Lectures 1985* (Montreal: Les Editions Yvon Blais, 1987) [hereinafter “Keynote Address”] at 4 where then Chief Justice Dickson stated: “Thus, in Canada, legislative supremacy is subordinate to Constitutional supremacy, except to the limited extent that it is preserved by s.33 of the *Charter*, the so-called ‘non obstante’ or ‘opting out’ clause.”

⁶⁸Hogg, *supra* note 36 at 12-4 to 12-5.

operates: the political consequences of invoking s. 33, more so than constitutional theoretical principles, will determine that Section's efficacy in a given situation.⁶⁹

At this juncture of the discussion it is important to qualify the phrase "parliamentary supremacy". Former Chief Justice Brian Dickson aptly explains the limited scope of the concept of parliamentary supremacy in the Canadian context:

Parliamentary supremacy has never been absolute in Canada. The principle of unlimited parliamentary sovereignty is unique to the British Constitution, ultimately derived from the English common law which attaches only to the Parliament at Westminster, the "Mother of all Parliaments". Other legislative bodies established in what was once British territory derived their powers and authority, not from the common law, but rather from the English parliament and specific statutory grants made in the exercise of unlimited legislative competence. These derivative parliaments had no inherent powers of their own; such powers as they might validly exercise were always to be found within the four corners of the constitutive British legislation which gave them life.

In the case of Canada, the basic constitutive instrument is the *Constitution Act, 1867*.⁷⁰

The divisions of powers under ss. 91 and 92 of the *Constitution Act, 1867* limited the sovereignty of the federal and provincial levels of government by restricting each to their

⁶⁹See Michael Whittington and Richard Van Loon, *Canadian Government and Politics: Institutions and Processes* (Toronto: McGraw-Hill Ryerson, 1996) at 151 where the authors state:

The immunity from the Charter provisions that is given to a law by a 'notwithstanding' clause has a five-year 'sunset,' but may be renewed for further five-year periods. Its effect is to allow governments to override key sections of the Charter at will, but to force the politicians who wish to do so to 'own up' to what they are doing by having to publicly 'redo the dirty deed' every five years.

While accepting that the supremacy of Parliament has been limited by the *Charter* despite ss. 1 and 33, the authors write (at 152): "But Parliament and the legislatures are still the only institutions with the authority to define the changing values and norms of our society over time."

⁷⁰"Keynote Address", *supra* note 67 at 3-4.

respective fields of legislative competence.⁷¹ Additionally, since the advent of the *Charter*, these jurisdictional limitations on legislative sovereignty have been complemented by “substantive restrictions”.⁷²

The supremacy of constitutionally entrenched restrictions on legislative and government action, and the dictates of the principle of Rule of Law, explicitly recognized in the preamble to the *Constitution Act, 1982*, necessarily combine to limit the supremacy of Parliament and the provincial legislatures. Legislative or other governmental action not in conformity with this supreme law must be struck down, no matter how wise or how desirable it may be. Outside this realm of restricted activity, however, Parliament and the legislature remain supreme and any laws *not* inconsistent with the Constitution must be upheld by the judiciary no matter how unwise or ill-considered one might deem them to be.⁷³

[Emphasis in original]

Despite its limited nature, the concept of parliamentary supremacy remains strong in the Canadian psyche.

Perhaps the true bastion of parliamentary supremacy lies under *Charter* section 1—the “reasonable limits” provision.⁷⁴ If one accepts that all players in the process of making and

⁷¹*Ibid.* at 4.

⁷²*Ibid.*

⁷³*Ibid.*

⁷⁴See *Charter Justice*, *supra* note 10 at 3 where the author writes:

It is quite clear that none of these rights are absolute. Part of the political compromise that made possible the entrenchment of a Charter was the recognition that Parliament or a provincial legislature could expressly declare a law to operate notwithstanding the Charter. *Furthermore, and far more significant in the context of criminal law, where no legislature has resorted to the notwithstanding clause, is the so-called “Guarantee of Rights and Freedoms” in clause 1 of the Charter.* The heading of “guarantee” is a misnomer because the section is designed to allow courts to recognize limits on rights and freedoms.

[Emphasis added] [Footnotes omitted]

implementing laws—Parliament, the provincial legislatures, and the courts—have an equal responsibility to incorporate *Charter* values into their respective tasks, then a limitation on a given *Charter* right may be viewed as a considered decision by the enacting legislative body.⁷⁵ Sopinka J. in *R. v. Laba*⁷⁶ demonstrates this perspective in undertaking a s.1 analysis

See also “Theory of the Charter”, *supra* note 64 at 703.

⁷⁵See “Theory of the Charter”, *supra* note 64 at 715-716 where he maintains:

The same constitutional duties that bind a government in its legislative functions also affect its strictly executive activities, in the exercise of prerogative and statutory powers and generally in the administration of the law. The implication is that governmental officials and administrative boards generally are obligated to observe applicable *Charter* standards in carrying out their legal functions. [Footnotes omitted]

See also “Keynote Address”, *supra* note 67 at 8 where the author states:

The law-making component of the legal community, the legislators, have, of course, a critical role to play in *Charter* matters and in ensuring the evolution and attainment of social justice in our country. ...Effective efforts by legislators to bring their legislation into line with the *Charter* is certainly preferable to the process of challenging the constitutionality of legislation before the courts.

It must always be remembered that it is the responsibility of all organs of government to ensure that the guarantees of the *Charter* are made manifest in Canadian society. Protection of the principles of freedom, democracy and social justice which form the foundation of the *Charter* is not solely reposed in the judiciary, but is, rather, the duty of all facets of the Canadian Government. The courts and the legislatures are both concerned with upholding the constitution and shaping a better society for all Canadians. To adopt Professor Lederman’s words in a recent address to the Academy of Humanities and Social Sciences:

...independent courts and democratic legislatures have been, are, and will be partners and not rivals as primary decision-makers in a very complex total process, with heavy demands being made on both institutions.

⁷⁶[1994] 3 S.C.R. 965, 94 C.C.C. (3d) 385, 34 C.R. (4th) 360 [hereinafter *Laba* cited to C.R.]. Sopinka J.’s analysis of section 1 issues had the unanimous support of the Court, including Chief Justice Lamer.

of s. 394(1)(b) of the *Criminal Code*,⁷⁷ the provision in dispute. He begins with an overview of the test to be applied in the s. 1 analysis:

In the context of this background, I turn to the question whether s. 394(1)(b) can be upheld under s. 1 of the *Charter*. The test for determining whether this is the case was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39. Taking into account the modification suggested by the Chief Justice in his reasons in *Dagenais v. Canadian Broadcasting Corp.* ... released concurrently herewith ... the test can be stated as follows:

- (1) In order to be sufficiently important to warrant overriding a constitutionally protected right or freedom the impugned provision must relate to concerns which are pressing and substantial in a free and democratic society;
- (2) The means chosen to achieve the legislative objective must pass a three-part proportionality test which requires that they (a) be rationally connected to the objective, (b) impair the right or freedom in question as little as possible and (c) have deleterious effects which are proportional to both their salutary effects and the importance of the objective which has been identified as being of "sufficient importance".⁷⁸

Having articulated the s. 1 test, Justice Sopinka, in discussing the minimal impairment portion of the three-part proportionality test, put the necessity for deference to legislative efforts at realizing an objective in the context of constitutional principles which are the domain of the judiciary:

The legislature is entitled to some deference in choosing the means of attaining a given objective. As Lamer C.J.C. stated in R. v. Chaulk, [1990] 3

⁷⁷R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*]. Section 394(1)(b) states: Every one is guilty of an indictable offence and liable to imprisonment for a term exceeding five years who

...

(b) sells or purchases any rock, mineral or other substance that contains precious metals or unsmelted, untreated, unmanufactured or partly smelted, partly treated or partly manufactured precious metals, unless he establishes that he is the owner or agent of the owner or is acting under lawful authority;

⁷⁸*Laba*, supra, note 76 at 390.

S.C.R. 1303, at p. 1341, “Parliament is *not* required to search out and adopt the absolutely least intrusive means of attaining its objective” (emphasis in original). *However, it is also important to remember that this is not a case in which the legislature has attempted to strike a balance between the interests of competing individuals or groups. Rather it is a case in which the government (as opposed to other individuals or groups) can be characterized as the singular antagonist of an individual attempting to assert a legal right [the right to be presumed innocent] which is fundamental to our system of criminal justice. As the majority wrote in Irwin Toy Ltd. c. Quebec (Procureur general) ... in such circumstances the courts are in as good a position as the legislature to assess whether the least drastic means of achieving the governmental purpose have been chosen, especially given the inherently legal nature of the rights in question and the courts’ accumulated experience in dealing with such matters.*⁷⁹

[Emphasis added]

Parliament’s right to pursue its objectives, therefore, does not preclude “second order”⁸⁰ scrutiny of the means employed to realize those objectives. The means must be measured against constitutional, not political, standards. The goal of the Supreme Court in a s. 1 analysis is not to trump Parliament, but to give legislative initiatives—especially those compromising core legal principles of the criminal justice system such as the presumption of innocence—sober second thought⁸¹ in a non-partisan venue.⁸²

⁷⁹*Ibid.* at 392.

⁸⁰See “Theory of the Charter”, note 64 at 707 where Slattery uses the term “second order function” in describing the review function under the *Charter*: “The *Charter* also authorizes and binds certain bodies to review the acts of *others* for conformity with *Charter* rights where the latter are bound in a first order way to take account of the *Charter* in acting.” [Emphasis in original]. In reference to the “first order function”, the author writes (at 708): “The *Charter* imposes first-order duties on three sorts of governmental bodies: the executive, the legislature, and the courts. Each of these branches of government has the constitutional duty to comply with the *Charter*, regardless of whether any other body can enforce this obligation.”

⁸¹*Charter Justice*, *supra* note 10 at 345 observes:

One can only hope that the Supreme Court [in *Laba*] has at last settled on a tougher approach to section one justification in the context of criminal law.

This by-no-means-exhaustive discussion of ss. 1 and 33 of the *Charter* highlights that, as Canadians, we have inherited from Britain a political and legal tradition rooted in democratic and liberal principles, a tradition complemented by the 1982 constitutional initiatives.⁸³ Just as Canada cannot escape its British heritage, so too, the judiciary of the Supreme Court of Canada cannot escape the impact of the liberal democratic tradition upon their function. I cannot improve upon the words of then Justice Brian Dickson in this regard:

The Court's task brings with it the great responsibility of applying and developing the laws of Canada. *The role of the judiciary and the attitudes towards decision-making held by our judges have been shaped by the political philosophy and legal tradition unique to Canada. ...*

I refer to proximate legal traditions to emphasize the point that judicial attitude is shaped by the institutions and experience unique to each system of law, whether it be American, English or Canadian. *But in any legal order founded upon the common law, a fundamental philosophic issue surfaces to*

Hopefully, the court will in future be consistent in its *Laba* view that reverse onuses cannot be saved without consideration of the alternatives. If so the Court will have embarked on a new course much more protective of the presumption of innocence and for [sic] less receptive to arguments of law enforcement expediency.

As will be discussed later in this work, law enforcement or crime control values, and due process values, impact upon the decision-making process in the criminal law—particularly, for our purposes, the law of homicide.

⁸²The principles of judicial independence and judicial impartiality act to neutralize the partisan nature of legislative debates which inform the content of the law. For a discussion of these two vital principles see *infra* at 49-72.

⁸³See Lamer J. in *Reference Re M.V.A. (B.C.)*, *infra* note 107 at 305 where, after referring to ss. 1 and 33 as “internal checks and balances”, he stated:

The overriding and legitimate concern that courts ought not to question the wisdom of enactments, and the presumption that the legislator could not have intended same, have to some extent distorted the discussion surrounding the meaning of “principles of fundamental justice”: This has led to the spectre of a judicial “super-legislature” without a full consideration of the process of constitutional adjudication and the significance of ss. 1, 33 and 52 of the Constitution Act, 1982.

require our scrutiny and careful reflection. The dilemma—that of mapping the bounds of judicial activity—is worthy of the attention of judges, students-at-law, and the public alike.

The challenge is to learn the limits of the judicial task. In relating this theme to the Supreme Court of Canada, it is wise to recall that we speak of a young court. Through the Court’s history, British traditions served it well. We will continue to benefit from that influence, but henceforth Canada will chart its own course, cognizant of its manifold roles in the development of a distinctly Canadian jurisprudence.⁸⁴

[Emphasis added]

To appreciate the impact of liberal democratic principles on the evolving role of the Supreme Court of Canada judiciary, it is necessary to clarify what may be perceived to be the key principles involved.

III. Liberalism, Democracy and the Role of the Supreme Court of Canada

Sections 3 to 5 of the *Charter* are entitled “Democratic Rights”.⁸⁵ These provide that every citizen of Canada has the right to vote and to be qualified for membership in either the House of Commons or a legislative assembly; that, absent special circumstances such as real or apprehended war, invasion or insurrection, there must be an election, at a maximum, five years after the legislative body in question was elected to power; and that Parliament and each legislature must have an annual sitting. Canada, as a democracy, thus gives constitutional significance to the right to vote; and to the principle that the elected representatives of the

⁸⁴Dickson, *supra* note 62 at 176-177.

⁸⁵The *Charter* speaks of rights and freedoms. The difference between the two has been articulated by Whittington and Van Loon, *supra* note 69 at 172: “[R]ights, in the purest sense of the term, are created through the enactment of positive laws, while liberties [or freedoms] are the residual area of freedom left to the individual after the totality of the positive law is subtracted from it.” [Emphasis in original]. The authors, referring to Walter Tarnopolsky, acknowledge that fundamental freedoms may be augmented by the positive law.

people should be accountable to the citizenry through elections and annual legislative sittings.

For the purposes of this paper, “democracy” is viewed as follows:

Popular sovereignty Canadian political values are traditionally broadly described as democratic. Democracy may be viewed as a set of ultimate values, but we prefer to view it primarily as a set of operational procedures for realizing certain broad societal goals. Stated as a theoretical abstraction, the democratic aim or the ultimate democratic value is the common good or the common interest. Democracy, as a means of realizing the common good, is a system of government designed to reflect the will of the people as a whole rather than the will of any one individual, special interest, or elite. The limitations of democracy, as stated in such ethereal terms as these, follow from the fact that there is likely to be imperfect agreement as to what the common good is. In many cases the common good will conflict directly with the particular short-run demands put forward by individuals and groups within the society. *Therefore, democracy is perhaps best viewed as a form of government that attempts to maximize or optimize the common good by establishing operational rules that will satisfy the needs of as many people as possible.* This attempt is expressed in the principle of popular control or **popular sovereignty**.⁸⁶

[Boldface in original] [Emphasis added]

Thus, democracy is perceived as a structural means of legitimizing popular sovereignty through the vote, through widespread eligibility for political office, and through mandatory elections and legislative sittings.⁸⁷ The fundamental democratic freedoms enumerated under

⁸⁶Whittington and Van Loon, *supra* note 69 at 97-98. This is the same definition of democracy used by the authors in the last edition of their text entitled *The Canadian Political System: Environment, Structure and Process*, 4th ed. (Canada: McGraw-Hill Ryerson, 1987) at 110.

⁸⁷It is not my intention to elaborate the workings of Canadian federalism beyond noting that there are three branches of government: the executive, the legislative and the judicial. (Readers interested in the impact of federalism on judicial review should read W.R. Lederman “Unity And Diversity In Canadian Federalism: Ideals And Methods Of Moderation” (1975) 53 Can. Bar Rev. 597; and refer to Hogg, *supra* note 36). Prior to the enactment of the *Charter*, judicial review focused on the division of powers delineated in the *British North America Act, 1867*. H.S. Fairley “Developments In Constitutional Law: The 1983-84 Term” (1985) 7 S.C.L.R. 63 at 120, n318 argues that “[t]he essential difference between individual rights review necessitated by the Charter and division of powers review

s. 2 of the *Charter*—freedom of religion, freedom of expression, freedom of the press, freedom of conscience, and freedom of association—“are instrumental in realizing the basic democratic values of popular sovereignty and political equality ...”⁸⁸

Infusing this democratic form of government with additional values is the ideology of liberalism:

Classical liberalism includes a commitment to **individualism** and to individual liberties, a closely related commitment to the principles of individual private property and individual property rights, and a commitment to economic free enterprise and capitalism....*[T]he protection of rights of the individual from unreasonable interference by the government is still an important cornerstone of our constitutional practice.*⁸⁹

[Boldface in original][Emphasis added]

Not all academics accept liberalism’s predominance gracefully. According to one author:

The classical liberal state is constructed as fundamentally antagonistic

is that the former entails judicial nullification of majoritarian outcomes in an absolute sense whereas the latter merely zones the democratic process of decision to one level of government or another.” But see Manfredi, *supra* note 64 at 31 where he writes:

[J]udicial review became, for political as well as legal reasons, a principal mechanism for mediating federal-provincial disputes. ... Indeed, the division of powers has also served to provide judicial protection for individual liberties. ... In general, the impact of legislation on civil liberties was of only secondary importance in determining its constitutionality; enactment of restrictive legislation by the proper level of government was the threshold issue. ... Consequently, ... judicial review of the division of powers provided limited protection for liberties not expressly guaranteed by the Constitution Act, 1867. [Footnotes omitted]

Thus, while division of powers judicial review had a secondary impact on civil liberties, that impact was not inconsequential.

⁸⁸Whittington and Van Loon, *supra* note 69 at 173. The authors appear to treat ss. 2-5 of the *Charter* as democratic freedoms, derived from our common constitutional heritage with Britain, broken down into substantive democratic freedoms (s. 2 of the *Charter*) and political rights (ss. 3-5 of the *Charter*).

⁸⁹*Ibid.* at 99.

to individual interests. As representative of the all-powerful collectivity, the state always operates in potentially hostile opposition to individual interests. This coercive capacity of the state must be kept in check—one checking mechanism being judicial review. Moreover, since the state rather than private power is conceived as the major threat to individual liberty, state powers of economic regulation should be limited to establishing the preconditions of a competitive marketplace. State interference in the outcome of private market ordering is presumptively illegitimate. The antagonism between individual and state, representative of classical liberalism, is reinforced by other structural oppositions, such as those between freedom and restraint, and the public and private spheres.⁹⁰

⁹⁰Joel Bakan et al. “Developments In Constitutional Law: The 1993-94 Term” (1995) 6 S.C.L.R. (2d) 67 at 69. The authors criticize the tenets of classical liberalism as being incoherent, particularly (at 71) that tenet which presumes a public/private divide:

Judicial assertion of rights as a means of preventing state interference with individual choice is, from a classical liberal perspective, a positive event. However, when relied upon to re-order the private sphere, rights, as statements of public norms and values, threaten the very individual freedom mandating their constitutional protection in the first place, no less than government intrusion into the same sphere.

See also Hester Lessard et. al. “Developments in Constitutional Law: The 1994-95 Term” (1996) 7 S.C.L.R. (2d) 81 at 144. The authors note: “As the previous sections of this essay have emphasized, the cases this Term on the nature of equality and liberty rights and of the fundamental freedoms in the Charter, represent a remarkable and disturbing shift into the political vocabulary associated with classical liberalism.” And see also Allan C. Hutchinson and Andrew Petter “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 U.T.L.J. 278. Again, these authors (at 296-97), while recognizing the “platform of liberal legalism on which the Charter is built” are not enthusiastic about the future and recommend an abandonment of “liberal individualism” in favour of a “more open-ended form of social democracy”.

Manfredi, *supra* note 64 at 10 observes that Patrick Monahan, Andrew Petter, Allan Hutchinson and Michael Mandel are representative of one field of thought concerning the impact of judicial review on constitutional rights. He contends, that from the perspective of these writers, “the predominantly individualistic nature of liberal democratic ‘rights’ as well as the conservative character of judges, means that judicial enforcement of the Charter will inevitably constitute a serious impediment to progressive social change.” Basically, this perspective holds that an emphasis on individualism in judicial review thwarts the progress of social justice. At the other end of the continuum are those writers such as David Beatty and Dale Gibson whose perspective “celebrates rights-based judicial review and is profoundly sceptical about the capacity of popularly controlled institutions and decision-making processes to produce just and progressive policy outcomes.” In a nutshell, this perspective holds that judicial review of individual and group rights-based claims is the best

Liberalism, in this instance, is portrayed as a “face-off” between individual interests and the pursuit of State initiatives with the State assuming the negative persona of a Leviathan.

Stuart J. Whitley puts the case for liberalism vis-a-vis the criminal law in more positive terms.⁹¹ He traces the history of constitutional theory in Canada from the *Magna Carta* to the *Charter*,⁹² examines s. 7 of the *Charter* in light of Canada’s historical ties to British legal and political traditions⁹³, and concludes that the themes running through the criminal law “all may be gathered under the general rubric of ‘individual freedom’, [and] operate to prevent the state from oppression through the expedient of the criminal law.”⁹⁴ However, the writer cautions that “the purpose of the law is to serve the society from which it springs” and that “[i]t does that in the administration of criminal justice by the resolution of conflict between the state’s interest in crime suppression and the individual’s right to

vehicle for social progress. Manfredi concludes (at 10-11) that the perspective by authors such as Beatty and Gibson poses the greatest threat to liberal constitutional democracy. “[T]he attempt to correct policy errors of democratic institutions through litigation and adjudication risks undermining the capacity for self-government on which liberal democracy ultimately depends.”

⁹¹*Criminal Justice And The Constitution* (Canada: Carswell, 1989). See also Whittington and Van Loon, *supra* note 69 at 99-106. After canvassing (at 100-101) “The Pervasiveness of Liberal Values”, “The Persistence of Liberal Myths”, and the “Legitimation of Liberal Values”, the authors conclude (at 101): “[T]here *is* a set of political values that we call liberal, and those values are so deep-rooted in our political culture that they colour the thinking of even explicitly anti-liberal critics of our system. We are concluding, then, that ours is a basically a liberal society whose liberal values have been diluted (or polluted) ...” [emphasis in original].

⁹²Whitley, *supra* note 91 at 29-35.

⁹³*Ibid.* at 155-185.

⁹⁴*Ibid.* at 157.

procedural and substantive fairness.”⁹⁵ It is here where the principle of collectivism or community rights⁹⁶, manifested in State policies and actions aimed at crime suppression,

⁹⁵*Ibid.* at 357. See also Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at iii-iv where he states:

My points of view on particular questions are informed by certain basic attitudes about the Charter and its proper place in Canadian society. The most fundamental of these is my belief that the new opportunities the Charter has created for the protection of Canadians’ rights and liberties are generally beneficial, and should accordingly be maximized by generous rather than narrowly technical interpretation....

What is required for satisfactory implementation of Charter protections is a partnership between judges and politicians in which the latter act as initiators and leaders, and the judges normally remain in the background. Judges should be vigilant to ensure that basic constitutional rights are respected, but should not otherwise interfere with the democratic process.

See also The Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Information Canada, 1976) at 1 where the commissioners write: “Coping with crime is a two-sided problem for a just society. Crime uncoped with is unjust: to the victim, to potential victims and to all of us. Crime wrongly coped with is also unjust: criminal law—the state against the individual—is always on the cutting edge of the abuse of power. Between these two extremes justice must keep a balance.”

⁹⁶See Whittington and Van Loon, *supra* note 69 at 99 where the principle of collectivism is explored in greater detail. Basically, the communalist or collectivist aspect of Canadian liberalism, which recognizes the reality and validity of group rights, moderates our basic liberal values wherein the individual is the repository of legal rights and freedoms. The communalist or collectivist principle finds expression in the *Charter* which constitutionally recognizes the special status of the French and Aboriginal communities in Canada.

The equality provisions under s. 15 also facilitate the concept of communal interests as does the “reasonable limits” qualifier under s. 1 which necessitates a balancing of interests in order to determine if an impugned action, piece of legislation, or common law principle, although in violation of a *Charter* provision, is, nevertheless, a reasonable limit. Closely aligned to the idea of communalism is that of liberal pluralism. The authors state (at 99) “that the Canadian political culture can be broadly described as ‘liberal-pluralist’.” They explain (at 105) that “pluralism is rooted in liberal individualism. ... Individuals belong to as many groups as they choose, and multiple, overlapping memberships tend to be the rule rather than the exception. Individuals also have legitimate rights of their own, separate from their group identities.” Thus, individuals may confront the law on either an individual or a group basis.

collide with individual interests in liberty and autonomy. The justices of the Supreme Court of Canada are positioned as final arbiters of the proper balance between the two.⁹⁷ In the law of homicide, for example, the application of such liberal tenets as the autonomy of the individual and the individual's right to be free from unwarranted state intrusion have influenced the Supreme Court of Canada's adjudicative function to an unprecedented level. That influence, in turn, has sparked an ideological controversy encompassing the concepts of subjective and objective standards of fault, criminal responsibility, moral blameworthiness, stigma and penal consequences.⁹⁸

Informing this ideological dispute is, again, traditional liberal philosophy in which individual autonomy is prioritized as is the concomitant principle of freedom from state interference with the liberty and privacy of the person through the politics of a private/public divide.⁹⁹ Much of the judicial discord at the Supreme Court of Canada level on homicide-

⁹⁷See Russell, *supra* note 8 at 5 who maintains that it is "the coercive element in judicial decision-making—the judge's ties to the coercive powers of the state—that imbues adjudication with a political character ..." He reiterates this point at 6-7:

[C]ourts will determine whether the evidence adduced about a person's behaviour meets the legal standard of tortious negligence or criminal liability. These disputes go beyond the private to the public realm, for what is at issue is whether or how the law, as society's system of binding rules, is to be applied. Here again we see the inherently political dimension of adjudication—its connection to the law, its application of the norms of the political community which are backed by the coercive powers of the state.

⁹⁸ This controversy and its defining concepts is not peculiar to the law of homicide. The offence of sexual assault, for instance, also raises parallel concerns. See Douglas Alderson "R. v. O'Connor and Bill C-46: Two Wrongs Do Not Make a Right" (1997) 39 C.L.Q. 181. However, this thesis will focus primarily on the law of homicide.

⁹⁹See Fairley, *supra* note 87 at 119 who writes: "The two Charter cases falling within the 1983-84 Term indicate unreserved acceptance by the Supreme Court of its duty to vindicate constitutionally protected individual rights." The cases referred to were the first

related issues also can be linked to the *Charter* and the new era of constitutional supremacy.

As Chief Justice Lamer stated in *R. v. Vaillancourt*¹⁰⁰ concerning the offence of constructive murder:

Prior to the enactment of the Charter, Parliament had full legislative power with respect to the “The Criminal Law”(Constitution Act, 1867, s. 91(27)), including the determination of the essential elements of any given crime. It could prohibit any act and impose any penal consequences for infringing the prohibition, provided only that the prohibition served “a public purpose which can support it as being in relation to criminal law”: *Ref. re S. 5(a) of the Dairy Indust. Act* ... Once the legislation was found to have met this test, the courts had very little power to review the substance of the legislation. For example, in *R. v. Sault Ste. Marie (City)*, ... *Dickson J. (as he then was) held that, when an offence was criminal in the true sense, there was a presumption that the prosecution must prove the mens rea*. However, it was always open to Parliament expressly to relieve the prosecution of its obligation to prove any part of the mens rea, as it is said to have done in s. 213 of the Criminal Code with respect to the foreseeability of the death of the victim. *It is thus clear that, prior to the enactment of the Charter, the validity of s. 213 could not have been successfully challenged.*¹⁰¹

[Emphasis added]

Charter decisions handed down by the Supreme Court of Canada: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 9 D.L.R.(4th) 161, 11 C.C.C. (3d) 481 [hereinafter *Skapinker*]; and *A.Q. Quebec v. Quebec Ass'n of Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, 9 C.R.R. 133. But see Hutchinson and Petter, *supra* note 90 at 283-284. The authors acknowledge (at p. 283) that “[t]he Charter is at root a liberal document. Its enactment was a constitutional affirmation of liberal faith.” However, in their critique of a liberal interpretation of the *Charter*, they conclude at 295:

Liberalism is a failure; it cannot pass conceptual, social, legal, or political muster. A continued reliance on its intellectual assumptions and ideological prescriptions is indefensible. The challenge is to replace it with a substantive vision of social justice that is capable of responding to the vast inequalities of economic and political power that liberalism and its disciples permit ...and condone.

[Footnotes omitted]

¹⁰⁰[1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289 [hereinafter *Vaillancourt* cited to C.R.].

¹⁰¹*Ibid.* at 323-324.

Justice Lamer's comments comprehend the new role for the Supreme Court of Canada¹⁰² emerging as *Charter* litigation matures with a corresponding dilution of the doctrine of parliamentary supremacy. Whereas there had been a pre-*Charter* deference to the legislature in matters of statutory interpretation, as for example, in presuming, rather than requiring, that the Crown had to prove the mens rea of an offence beyond a reasonable doubt,¹⁰³ the Supreme Court of Canada in *Vaillancourt* elevated that very presumption to a constitutional imperative. The essential elements of all offences now included "not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the Charter."¹⁰⁴

¹⁰²In the pre-*Charter* case of *R. v. Farrant*, [1983] 1 S.C.R. 124, 4 C.C.C. (3d) 354, 32 C.R. (3d) 289 [hereinafter *Farrant* cited to C.R.] Dickson J., for the majority, described (at 291) the Court's position vis-a-vis the legislature: "It might be observed in passing that the constructive murder rule has been the subject of protracted criticism ... The rule may seem harsh but it is not the function of this court to consider the policy of legislation validly enacted. So long as the section continues in our Criminal Code it must be given effect in accordance with its terms." As to the Court's post-*Charter* status see Bruce P. Archibald "The Constitutionalization of the General Part of Criminal Law" (1988) 67 Can. Bar Rev. 403 at 419, n87 where he states: "While one might not wish to suggest that the Supreme Court of Canada respond to issues in a 'political' fashion, it is clear that the Charter has thrust the court into a new law making role and a new relationship with the legislature. ..." But see Fairley *supra* note 87 at 119-120 where the author predicts a grim future for the new era of judicial review. "[J]udicial review which challenges the merits of majoritarian outcomes with the potential to finally overrule them suggests a dimension to the role of the Court far different from that of neutral umpire in a federal state." [Footnotes omitted]

¹⁰³See *R. v Sault Ste. Marie*, [1978] 2 S.C.R.1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30 [hereinafter *Sault Ste. Marie* cited to C.R.].

¹⁰⁴*Vaillancourt*, *supra* note 100 at 326.

In *Hunter v. Southam Inc.*,¹⁰⁵ Justice Dickson writing for a unanimous court which included Lamer J., discussed the role of the court in the post-*Charter* era:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. *Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties.* Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. *The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.*¹⁰⁶

[Emphasis added]

Justice Lamer echoes this perspective in *Reference re Section 94(2) Motor Vehicle Act (B.C.)*¹⁰⁷ where he states that the principles of fundamental justice under s. 7 of the *Charter* “do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.”¹⁰⁸ He then goes on to quote with approval the words of Estey J. in *Skapinker* that “[w]ith the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.”¹⁰⁹ Whether or not the Supreme Court of Canada has used the *Charter*

¹⁰⁵[1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97 [hereinafter *Hunter v. Southam* cited to C.C.C.]. Chief Justice Laskin did not take part in this judgment.

¹⁰⁶*Ibid.* at 105.

¹⁰⁷[1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 23 C.C.C. (3d) 289 [hereinafter *Reference Re M.V.A. (B.C.)* cited to C.R.].

¹⁰⁸*Ibid.* at 309.

¹⁰⁹*Ibid.* at 315.

as a “yardstick of reconciliation” between the individual and society in the law of homicide is, as the ensuing case law analysis in Chapter 3 will reveal, open to debate.

It is within this burgeoning political and legal philosophical context that the Supreme Court of Canada must now operate.¹¹⁰ What does it mean to be the “guardian of the Constitution” in this new legal and political era of constitutional supremacy? Arguably, that the Supreme Court of Canada has a commitment to fundamental legal principles, including those basic to the criminal law. Such a commitment must not be blindly subverted to popular opinion. To develop this theme an analysis will be undertaken in Chapter 3 of the decision-making of Chief Justices Brian Dickson and Antonio Lamer bearing on the law of homicide

¹¹⁰Chief Justice Laskin laid the groundwork in his eloquent dissenting and concurring judgments wherein he expounded the impact of the *Bill of Rights* for, *inter alia*, Canadian criminal law. See, for example, *Miller and Cockriell v. The Queen* (1976), [1977] 2 S.C.R. 680, 38 C.R.N.S. 139, 31 C.C.C. (2d) 177 [hereinafter cited to C.R.N.S.] where Laskin C.J.C. gave a concurring judgment holding that the death penalty for accused persons convicted of killing a policeman or prison guard did not constitute cruel and unusual punishment contrary to the *Bill of Rights*. In so doing he stated (at 153): “[T]he legislation of Parliament falls to be tested as to its operative effect by what the Canadian Bill of Rights prescribes; otherwise, the Canadian Bill of Rights becomes merely an interpretation statute, yielding to a contrary intention in legislation measured against it.” He held (at 156) it to be the duty of the Court “not to whittle down the protections of the Canadian Bill of Rights by a narrow construction of what is a quasi-constitutional document.” The limited application of the death penalty to homicides involving policemen and prison guards was key to Laskin C.J.C.’s decision. Capital punishment had been abolished in Canada that same year—1976—by the *Criminal Law Amendments Act (No. 2)*, 1976, S.C. 1974-75-76, c. 105.

Laskin C.J.C.’s activist approach to the judicial function has not met with unqualified approval. See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989). He considered (at 20) Laskin’s assent to the Chief Justiceship as “a very important step in the legalization of politics.” Especially so in the post-*Charter* context. He contends (at 71) that the “Charter of Rights in its substitution of judicial for representative forums and of abstract/principle for concrete/policy forms of argument for the resolution of political controversy, represents a fundamental change in the structure of Canadian political life, a ‘legalization of politics’.”

under the *Charter*.¹¹¹ The controversy engulfing the law of homicide, today, can be traced to the respective interpretations of the scope of the adjudicative function¹¹² espoused, in part, by these Justices and the reaction to their interpretations both inside and outside the Court.

This discussion of democracy and liberalism in the Canadian judicial context is not intended to be exhaustive; rather, it is meant to give the reader a means to evaluate not only decisions emanating from the Supreme Court of Canada, but also the commentaries of academic authors writing in response to those decisions. Not all academic authors advocate deference to the office of the judiciary and decisions emanating therefrom. Professor Peter Russell writes of “radical realists” who perceive of the judiciary as a group of political actors

¹¹¹I am constructing my analysis around the decision-making of the Chief Justices because of their leadership role on the Bench. The Canadian Institute For The Administration of Justice, *Compendium of Information On The Status And Role Of The Chief Justice In Canada* (Montreal, 1987), writing of the office of the Chief Justice in general, stated (at 207-208):

The influence of a Chief Justice on the way cases are decided can be enormous. First of all, a Chief Justice will often be involved in very important cases or those involving a high degree of public interest. Secondly, because the Chief Justice is often more widely known, his decisions may receive more attention than those decided by ordinary judges. Thirdly, because of the respect for and the ability of the Chief Justices, their decisions will tend to be followed and relied upon by judges and lawyers as authorities in later cases.

The Chief Justice of Canada bears the additional distinction of being the highest judicial officer in Canada. As well, the Chief Justice chairs the Canadian Judicial Council which was established in 1971 to investigate complaints against the judiciary of the superior courts. For further discussion on, and statistical analysis of, the role of the Chief Justice, and his influence on the law and the Court, itself, see Peter McCormick “Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance” (1993) 4 S.C.L.R. (2d) 409; and see Friedland, *supra* note 60 at 225-231.

¹¹²Russell, *supra* note 8 at 40 contends that adjudication is the essence of the judicial function: “Adjudication is the function of settling disputes about legal rights and duties. It is a political activity insofar as it is authoritative and backed by the power of the state.”

perpetrating their subjective values and agendas on the larger unsuspecting community:

From this perspective the distinctive aspects of judicial institutions and the judicial process—the concern for the independence and impartiality of the judge, the procedural requirement of giving each side a fair hearing, and the provision of reasons explaining a decision in terms of legal rules and principles—are presumably nothing more than a cunning camouflage behind which judges are free to indulge their own political fancies.¹¹³

This thesis is not premised on such a radical realist approach. Rather, the centrality of the principles of judicial independence and impartiality to the judicial function will be argued.

IV. The Criminal Process and the Adjudicative Function

The individual encounters the intrusive power of the State when he or she comes into conflict with the criminal law.¹¹⁴ More so when the crime alleged is a culpable homicide. Liberalism champions the freedom of the individual but only to the point where his or her actions harm others.¹¹⁵ While the term “harm” is capable of and has been given wider

¹¹³*Ibid.* at 16-17. See also Richard Devlin “We Can’t Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*” (1995) Dal. L.J. 408 at 434-438 where the author discusses the formalist and realist view of the judicial role. The author, himself, is a realist who argues that the formalist conception of impartiality, and the formalist approach to race, are nonfunctional in Canada’s multi-cultural and diverse society.

¹¹⁴See *R. v. Paré*, [1987] 2 S.C.R. 618, 38 C.C.C. (3d) 97, 60 C.R. (3d) 346 at 368 [hereinafter *Paré* cited to C.R.] where Wilson J. for a unanimous court (including Dickson C.J.C.) writes: “Criminal law remains, however, the most dramatic and important incursion that the state makes into individual liberty.”

¹¹⁵See John Stuart Mill, *Utilitarianism, Liberty, Representative Government* (London: J.M. Dent & Sons, 1910). Mill writes (at 73): “[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”

meaning beyond physical harm,¹¹⁶ the harm to the victim consequent upon a homicide is the ultimate physical harm—death. The issue of criminal responsibility, absent proof of mental incapacity,¹¹⁷ involves an analysis of both the *mens rea* and *actus reus* of the offence in question.¹¹⁸ Pervading this inquiry are values particular to the criminal process. These values in turn encapsulate society’s normative perspective on different types of criminal behaviour,¹¹⁹ specifically, for the purposes of this project, behaviour adjudged to be culpable homicide.

Herbert Packer identifies two models of the criminal process: Crime Control and Due Process.¹²⁰ The former, he maintains, is characterized by the “presumption of guilt”

¹¹⁶See *R. v. Butler*, [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129, 11 C.R. (4th) 137 where the Supreme Court of Canada did a harm analysis under s. 1 of the *Charter* and concluded that social harm was a valid consideration in evaluating legislation. At issue in *Butler* was the obscenity definition under s. 163(8) of the *Code*.

¹¹⁷See s. 16 of the *Criminal Code* (Defence of Mental Disorder).

¹¹⁸That analysis, relative to the law of homicide, will be undertaken in Chapter 3.

¹¹⁹See *Our Criminal Law*, *supra* note 95 at 5 where it is stated: Criminal law, then has to do with values. Naturally, for crime itself, is nothing more nor less than conduct seriously contrary to our values. Crimes are acts not only punishable by law but also *meriting* punishment. As Fitzjames Stephen said, the ordinary citizen views crime as an act “forbidden by law and revolting to the moral sentiments of society”. Crimes are not just forbidden, they are also wrong. [Emphasis in original]

And further (at 16): “In truth, the criminal law is fundamentally a *moral* system. It may be crude, it may have faults ... but basically it is a system of applied morality and justice. It serves to underline those values necessary, or else important, to society. When acts occur that seriously transgress essential values ... society must speak out and reaffirm those values. This is the true role of criminal law.” [Emphasis in the original].

¹²⁰*The Limits of the Criminal Sanction* (California: Stanford University Press, 1968) at 149-173.

with a focus on the efficient suppression of crime, the latter by the “presumption of innocence” with a focus on the protection of the individual who finds himself in conflict with the state. The author recognizes that the criminal process has a direct impact on the substantive criminal law. What conduct will activate the intrusive power of the State? To what extent does the answer to this question reflect the type of criminal process in operation? To analyze these issues Packer constructed the two models under discussion. These models stand at either end of a continuum suggesting that no given society’s criminal process is either one or the other, but an amalgam of both.

That a given society’s criminal process may embody elements of both the Crime Control and Due Process Models is a result of the “common ground” or shared assumptions upon which those models rest.¹²¹ Packer identifies four such assumptions comprising the common ground. First, criminal conduct must be defined, it must be ascertainable to society; the degree of specificity in defining criminal law will reflect not only policy considerations but also the values held by decision-makers. Second, the legislature defines what is criminal conduct for the purposes of prosecution, and all players in the criminal process must, as an operating premise, defer to the legislature’s jurisdiction. Third, the State does not have unlimited authority to interfere with the privacy and security of the individual under the guise of law enforcement, particularly at the investigatory stage. Fourth, an accused is, if he so chooses, an active participant in the criminal adversarial process; he is entitled to challenge the charges levied against him at trial before an independent tribunal.

¹²¹ *Ibid.* at 154-158. While Packer is an American author, much of this “common ground” is found in constitutional form in sections 7 through 14 of the *Charter* in Canada.

Stuart Whitley, referring to Packer's two models of the criminal process, writes:

Packer proposed that the criminal justice system is a balance between two competing value systems or models. These are what he termed the "due process" and the "crime control" models. The latter is principally aimed at the detention [sic] and repression of crime, the implicit guilt of the arrested, a high conviction rate, and support for police action. The "due process" model accepts the concept of individual guilt as the foundation of criminal law, but demands that that conclusion be reached by explicit procedural safeguards. Implicit in this view is the notion that the protection of the individual is paramount to the interests of the community.

It is certain that the advent of the Charter has explicitly imported the "due process" model into the Canadian constitution.¹²²

[Footnotes omitted]

The impact of liberal values on the two models, therefore, is measured against the process for determining individual criminal responsibility.¹²³ The greater the emphasis on crime suppression and social control, the less sympathetic the judiciary will be to allegations of state contravention of individual rights and freedoms. Alternatively, a judge may emphasize one aspect of individualism—that of choice—to the accused's detriment, suggesting that in a society where criminal conduct is clearly defined and therefore knowable to the accused, the choice to indulge in that conduct cannot be trumped by liberalism's championship of individual liberty and autonomy.¹²⁴ Different emphases foster disparate results. Yet, it is the

¹²²*Supra*, note 91 at 30. See also Manfredi, *supra* note 64 at 104-105.

¹²³In *Laba*, *supra* note 76 at 369, Chief Justice Lamer, who was instrumental in overhauling the murder provisions of the *Criminal Code*, stated: "My analysis will be grounded in the following premise: when the constitutionality of a law is challenged in the context of criminal proceedings, there are effectively two proceedings—the proceedings directed at a determination of culpability and the proceedings directed at a determination of constitutionality. They will usually proceed together but may, on occasion, proceed separately."

¹²⁴See, for example, *R. v. Martineau*, [1990] 2 S.C.R. 633, 79 C.R. (3d) 129, 58 C.C.C. (3d) 353 [hereinafter *Martineau* cited to C.R.], a case concerning the constructive

dynamics of conflicting perspectives that determines ultimately the characterization of our criminal process as one favouring either crime control or due process values.

It is perhaps clear to the reader at this junction that the “common ground” bridging the gap between the two criminal process models, in fact, embodies key liberal principles. How far will the Court deviate from a narrow or broad legislative definition of criminal conduct? How much deference must be paid to legislative declarations that a particular action is criminal? What is the relationship between law enforcement activities vis-a-vis the security and privacy of the individual? What are the parameters of the adversarial struggle in which the accused is pitted against the State? These questions are rooted in the common assumptions, and the response of the Supreme Court of Canada to these questions in the criminal law context, influences both the substance and the impact of judicial activism in the law of homicide.

The responses generated by the Court to the cases argued before it are not expounded in a vacuum. Judging is a human endeavour and the law has developed principles, most notably those of judicial independence and judicial impartiality, to counterbalance the subjective dimension of the judicial process.

V. Subjectivity and the Judicial Process

Legal scholars have identified the tension that runs through the judicial adjudicatory

murder provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, s. 213. Both the majority reasons of Chief Justice Lamer and the dissenting judgment of Justice L’Heureux-Dubé reflect liberal influences, but the different emphases account for the disparate result. *Martineau* will be discussed in detail in Chapter 3.

function.¹²⁵ Wolfgang Friedman,¹²⁶ for instance, posits that whether one is talking of courts acting under the umbrella of a constitution, or acting within a legal system where a written constitution is not part of the legal landscape, the problems associated with the judicial impact on the development of the legal system are the same:

There always will be dynamic and static periods, periods in which the urge for social reform predominates over the desire for stability and certainty, and other periods when extraordinary legislative activity and the restlessness of society produce a judicial reaction, and added emphasis on legal stability. There will always be the conflicts of judicial temperaments as well as the inevitable divergences in applying any ideals and principles to a given fact situation. Such tensions are of the essence of law in a free society. ...¹²⁷

[Footnotes omitted]

¹²⁵See Benjamin N. Cardozo, *The Nature Of The Judicial Process* (New Haven: Yale University Press, 1921). He wrote (at 12-13):

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, ... which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

[Footnotes omitted]

Having acknowledged the quintessentially human dimension of judicial decision-making, Judge Cardozo makes no attempt at apology; rather, he proceeds to articulate his conception of the judicial process through reference to four methodologies: (i) philosophy or reasoning by analogy; (ii) evolution or reasoning by historical analysis; (iii) tradition or reasoning influenced by community customs; (iv) sociology or reasoning influenced by contemporary values of justice, morality and social welfare.

¹²⁶*Legal Theory*, 5th ed. (New York: Columbia University Press, 1967).

¹²⁷ *Ibid.* at 451.

Friedman's comments express clearly the reality that competing judicial emphases on either social justice,¹²⁸ stability and certainty, or individual rights colour the tenor and effect of judicial decision-making. Further, these competing emphases influence the values which permeate the judge's approach to a given fact situation. When trial and appellate judges tackle the question of balancing societal and individual interests in a period of either change or stability, the time-honoured principles of judicial independence and impartiality, recently accorded constitutional status,¹²⁹ deliver the exercise from disrepute.

Accepting the subjective aspect of judicial decision-making does not discredit the process. The comments of Professor W.R. Lederman, for instance, concerning the impact of judicial subjectivity on a division of powers review are equally applicable to individual rights review under the *Charter*:

[I]t is necessary that impartial superior courts should act as umpires of the essential guide-lines for the respective federal and provincial responsibilities given by the federal constitution. Of course the value assumptions of the judges will enter into their decisions. ... Inevitably widely prevailing beliefs in the country about these issues will be influential and presumably the judges should strive to implement such beliefs. Inevitably there will be some tendency for them to identify their own convictions as those which generally prevail or which at least are the right ones. ... *In the making of these very difficult decisions of relative values, policy decisions if one prefers that word, all that can rightly be demanded of judges is straight thinking, industry, good faith, and a capacity to discount their own prejudices with due humility. No doubt it is also fair to ask that they be men or women of high professional attainment, and that they be somewhat representative in their thinking of the*

¹²⁸Davis, *supra* note 16 at 6 describes social justice as "justice for segments of the population, as distinguished from justice for individual parties."

¹²⁹See *The Provincial Court Judges Case*, *supra* note 63.

*better standards of their times and their fellow citizens.*¹³⁰

[Emphasis added]

The goal is not to undermine the judicial process but to relativize the inescapable subjectivity of that process. Unharnessed subjectivity is to be eschewed.

Professor Peter Russell offers a similar perspective in discussing the adjudicative function and its relation to the principles of judicial independence and impartiality:

Adjudicators settling disputes as third parties are expected to decide disputes fairly and without partiality to either of the disputing parties. Thus they should be independent and not controlled by private parties or the

¹³⁰*Supra*, note 87 at 619-620. On the positive impact, upon fundamental civil liberties, of division of powers review during the 1950's see Dale Gibson, "—And One Step Backward: The Supreme Court And Constitutional Law In The Sixties" (1975) 53 Can. Bar Rev. 621 at 621-22.

Gibson did not like the approach of the Court during the next decade—the 1960's—because of its failure to give explanatory reasons for decision beyond the formally legal ones, an apparently deliberate attempt to defuse criticism of subjective bias in decision-making. He observed (at 639) that "if the court fails to disclose its true assessment, and instead offers empty exercises in formal logic, it becomes extremely difficult for those who differ with its views to engage in intelligent criticism." He added: "Without such frank and informed criticism, the ability of the Supreme Court to continue making wise decisions is dangerously weakened." The author then asserted the following (at 639-40):

[C]ounsel who appear before the court are at a great disadvantage if the outcome of their cases is in any way dependent upon policy factors which they are prevented from dealing with openly in argument because of the court's refusal to acknowledge their significance. It is one of the touchstones of democracy that satisfactory progress requires the uninhibited clash of competing ideas. This is as true in the judicial arena as in all others.

My research to date has revealed no dearth of academic comment and criticism on the operations of the Supreme Court of Canada and its decisions since the advent of the *Charter*. Whether this is a result of a better or poorer quality of decision-making is debatable: the activism of the post-*Charter* era on both the judicial and academic fronts awaits the judgment of posterity.

However, the articulation of philosophical considerations in judicial decisions, e.g., that crime suppression is paramount in an individual-rights constitutional analysis, is not to be confused with superfluous judicial pronouncements on the subject matter of the litigation. The latter are intolerable especially where they touch on matters, such as witness credibility, essential to a judicial determination of the issue in dispute.

government. But as social scientists we are sceptical of the possibility of complete or absolute independence and impartiality. This scepticism may be well founded, but it does not justify dismissing the ideals of independence and impartiality as irrelevant to a proper understanding of the judicial process. The challenge to political scientists is to ascertain the degree to which these ideals can and must be realized if a society's judicial system is to perform its essential adjudicative function.¹³¹

A comparable challenge faces the legal professional and academic communities. Independence and impartiality are Ideals to be sought, not goals to be ridiculed. As Martin Friedland states: "Independent and impartial adjudication is essential to a free and democratic society."¹³² He argues that "[t]he judiciary plays a major role in Canadian society in resolving disputes and, particularly, under the Charter, in developing the law. ... Society therefore has a legitimate interest in ensuring that the judiciary collectively and individually acts wisely, properly, and efficiently—as well as impartially."¹³³

A. Judicial Independence

The concept of judicial independence was explored in the *Provincial Court Judges Case*.¹³⁴ Chief Justice Lamer for the majority stated:

Valenté was the first decision in which this Court gave meaning to s.11(d)'s guarantee of judicial independence and impartiality. *In that judgment, this Court held that s.11(d) encompassed a guarantee, inter alia, of financial security for the courts and tribunals which come within the scope of that provision. ... It held that for individual judges to be independent, their salaries*

¹³¹*Supra* note 8 at 40.

¹³²*Supra* note 60 at 1.

¹³³*Ibid.* at 2.

¹³⁴*Supra*, note 63.

must be secured by law, and not be subject to arbitrary interference by the executive.¹³⁵

[Emphasis added]

Individual financial independence, the subject of the *Valenté* decision, was subsequently augmented by the Court's consideration of "the content of the *collective* or *institutional* dimension of financial security for judges of provincial courts."¹³⁶ However, relative to the guarantee of judicial independence under s.11(d) of the *Charter*, the Chief Justice clarified that the principle goes beyond financial independence to embrace "the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state."¹³⁷

Lamer C.J.C. discussed the *constitutional* basis for the principle of judicial independence, and linked that principle to the concept of judicial impartiality:

[T]he purpose of the constitutional guarantee of financial insecurity—*found in s.11(d) of the Charter, and also in the preamble to and s.100 of the Constitution Act, 1867*—is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. *Judicial independence is valued because it serves important societal goals—it is a means to secure those goals.*

One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in

¹³⁵*Ibid.* at 207.

¹³⁶*Ibid.* at 207. Emphasis in original.

¹³⁷*Ibid.* at 245.

a legal rule.¹³⁸

[Emphasis added]

Rooting the concept of judicial independence in both the *Charter* and the preamble to the *Constitution Act, 1867* enabled Chief Justice Lamer to circumvent the limitation set out in s.11(d) of the *Charter*—that it applies only to persons accused of offences.¹³⁹ “Judicial independence” he stated, “is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.”¹⁴⁰

Twelve years earlier, the Canadian Bar Association felt both compelled and uniquely positioned to explore the concept of judicial independence in Canadian law because “lawyers have a special relationship to the judges since both are vital elements in Canada’s justice system.”¹⁴¹ The Special Committee on the Independence of the Judiciary in Canada argued that judicial independence, as a component of legal dispute resolution, required “(a) the judge be not associated in any way, even in appearance, solely with either of the parties to the dispute;¹⁴² [and] (b) the judge not have any association or interest beyond the specific dispute before him which might cause him to be, or appear to be, biased in favour of one side or the

¹³⁸*Ibid.* at 209.

¹³⁹*Ibid.* at 232.

¹⁴⁰*Ibid.* at 244.

¹⁴¹Canadian Bar Association, *The Independence of the Judiciary in Canada* (Ontario: Canadian Bar Foundation, 1985) at 4.

¹⁴²This dimension of judicial independence identified by the Special Committee is akin to the idea of judicial impartiality to be discussed in the next section of this work.

other.”¹⁴³ Here, the symbolic importance of judicial independence was highlighted, for “[o]nly if these conditions are satisfied, if the judge is completely independent, *will the contestants have the reality and the semblance of a fair trial.*”¹⁴⁴

This is particularly true of the criminal trial given that s. 11(d) of the *Charter* guarantees persons charged with an offence “a fair and public hearing by an independent and impartial tribunal.” One cannot have a fair trial without at least the perception of judicial independence. Chief Justice Lamer in *Provincial Court Judges Case* observed that in addition to the objective aspects of judicial independence, “the court or tribunal [must] be *reasonably perceived* as independent”¹⁴⁵ for “the guarantee of judicial independence has the goal not only of ensuring justice is done in individual cases, but also of ensuring public confidence in the justice system.”¹⁴⁶ Absent that public confidence, the correlation between the criminal law, as a symbolic reflection of community values, and the prevailing social reality would be strained if non-existent.

B. Judicial Impartiality

Not all academic authors accept that the foundational principles of impartiality and judicial independence form the backbone of the judicial function. Professor Richard Devlin, for example, argues that judicial independence historically has been treated as the desired “end” to which other principles informing fair decision-making, such as impartiality, are

¹⁴³*Supra* note 141 at 7-8.

¹⁴⁴*Ibid.* at 8. Emphasis added.

¹⁴⁵*Supra* note 63 at 245. Emphasis in original.

¹⁴⁶*Ibid.*

subordinate.¹⁴⁷ Devlin argues that in effect, the weaknesses in these supporting principles are camouflaged by the sweeping importance accorded the principle of judicial independence. He posits that the concept of impartiality should be revamped, that the judiciary ought to “come clean” about their hitherto unspoken operating assumptions.¹⁴⁸ It is preferable, he argues, for a judge to articulate what he or she thinks rather than have the “unspoken” decide the issues before him or her and form the true basis of otherwise carefully scripted written decisions. While Professor Devlin’s three conceptions of impartiality are thought-provoking,¹⁴⁹ the difficulty is that instead of operating from one concept of impartiality—“Themis blindfolded”—practitioners and academics would be grappling with multiple variations on the theme. In effect, there would be no common point of reference

¹⁴⁷“Judging and Diversity: Justice or Just Us?” (1996) 20 *Prov. Judges J.* 4 at 6-7.

¹⁴⁸*Ibid.* at 19. See also Martha Minnow “Stripped Down Like A Runner Or Enriched By Experience: Bias And Impartiality Of Judges And Jurors” (1991-92) 33 *William And Mary L.R.* 1201 at 1213 where the author writes: “The problem of bias for juries and for judges arises not only when they are too close to or too far from those they judge but also when they fail to identify an entrenched and biased assumption about whose perspective is the norm.” Further (at 1217) she states:

None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person’s own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.

Unlike Devlin, it may be that while Minnow encourages personal examination of the unspoken assumptions deriving from one’s life experiences, their elucidation in the trial process is not a pre-requisite for justice.

¹⁴⁹*Supra* note 147 at 8-20.

upon which to base critique and analysis. As it is, all litigants and their legal representatives theoretically have a level playing field. Nor should academics cry foul, for, in reality, issues such as race, colour, gender, previous criminal record, and frequency of the offence in the community, ought to be foremost in the mind of any defence or crown counsel in preparing his or her case and in anticipating the trial judge's "unspoken operating assumptions."¹⁵⁰ Supreme Court of Canada justices all have a practical legal background informing the subjective dimension of their adjudicative function.¹⁵¹ It is this legal practising background, complemented by academic contributions to the ongoing legal dialogue, that delivers judicial subjectivity from dishonour; that tempers the impact of discretionary justice; and that informs the concept of judicial impartiality.

Although advocating "judicial openness and candour",¹⁵² Professor Devlin, himself, reveals the tautological nature of academic arguments decrying subjectivity as the poison in the judicial process. The author articulates three questions¹⁵³ that a judge might ask himself

¹⁵⁰It is common practice to make informal inquiries of the local Bar if appearing before a judge whose adjudicative style is unknown to the litigator. Such inquiries are supplemented by an unofficial "grapevine" about the sitting judges and justices.

¹⁵¹See *R. v. S. (R. D.)*, *supra* note 3, where Cory J. observes (at 393): "It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear."

¹⁵²*Supra* note 147 at 19.

¹⁵³*Ibid.* at 18-19. The three questions are: (1) "How am I to judge an/other?"; (2) "Would I reach a different decision if the parties in question were white or people of colour?"; and (3) "If I were the person appearing before the judge, do I think that sufficient reasons have been given to satisfy me that I have been treated in a fair manner, even if I have not won my point?".

or herself in pursuit of the situationalist approach¹⁵⁴ to the concept of impartiality. He then concludes his discussion as follows:

Rather, they [the three questions] can be understood as regulative mechanisms through which we can monitor some of our own taken for granted assumptions. Moreover, a situationalist approach is not a panacea. *It does not mean that we will always be beyond reproach, but if we are mistaken then others can demonstrate to us our weaknesses and we can learn from our mistakes.* In short, the development of a pluralistically sensitive conception of impartiality cannot come prepackaged: it can only be achieved by trial and error.¹⁵⁵
[Emphasis added]

Who are these “others” who will demonstrate to the judiciary their weaknesses? Is this not merely substituting one form of subjectivity—that of the unidentified monitors—for the alleged subjectivity of the judiciary?¹⁵⁶ Professor Devlin’s analysis also fails to situate properly the

¹⁵⁴*Ibid.* at 14-20. This approach, favoured by the author, is described as follows at 16-17:

The act of judging, within this situationalist conception, is an inescapably social act. Situationalism emphasizes that everyone who is involved in the legal process—both those who judge and those who are judged—are deeply affected by their experiential contexts. Specifically, it suggests that cultural forces are always crucial variables and that judging can only aspire to impartiality if it is sensitive to social phenomena such as racialization.

¹⁵⁵*Ibid.* at 19-20.

¹⁵⁶The same observation applies to Jennifer Nedelsky’s article entitled “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L.J. 91. Relying on the work of neurologist Antonio Damasio who explores the impact of the affective upon effective reasoning, the author writes (at 105-106):

If reason and judgment are impaired without the the aid of somatic markers, how does one generate the appropriate affect? The problem, as Young notes, is that once affect is perceived as distinct from an interfering with reason, there is no room for reflecting on affect, for evaluating it, for educating it; feelings are simply the raw data of nature to be controlled by reason. There are, however, parts of the Western intellectual tradition that do not fall prey to that error. Aristotle, for example, discussed the need to educate affect in order to develop character. *In the Aristotelian approach, we*

concept of discretion as a controlled exercise of subjectivity relative to individualized justice.¹⁵⁷

The Supreme Court of Canada recently canvassed the issues of bias and judicial impartiality in *R. v. S. (R.D.)*.¹⁵⁸ The dissenting reasons of Major J. (C.J.C. Lamer and

should learn what things it is appropriate to be pleased by, and displeased by. And if we do not—if the good does not please us—no amount of duty can generate good moral character.

The idea that good judgment requires learning appropriate affective responses has interesting implications for the education of lawyers and judges. For example, it may be through great literature that jurists can best be exposed to individual characters who exemplify and thus teach the virtues necessary for the profession: integrity, decency, compassion and wisdom. Similarly, the project of educating lawyers and judges in issues of race and gender may be best understood not simply as a process of imparting information, but as an attempt to shift affective response.

[Emphasis added] [Footnotes omitted]

Who, in a diverse multi-cultural Canada, defines what is “good”? Who defines the “appropriate affective responses” that good judgment requires? For instance, does a feminist ideology define the parameters of goodness, and, if so, which branch of feminism? Alternatively, since the *Charter* is at root a liberal document, should liberal values be central to the inquiry?

¹⁵⁷See Davis, *supra* note 16 at 17 where he writes: “Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as in the administrative process.” A trial judge uses his discretion, for example, in determining the question of witness credibility, in ruling on legal arguments raised during the course of the trial, and in sentencing a convicted accused. In these instances, the facts of the particular case and the generally applicable law will be determinative of the discretionary decision but against the backdrop of general criminal law principles. Thus, in sentencing an accused, the trial judge will consider appellate direction on the appropriate range of sentence; in deciding a legal argument, he or she will apply the relevant law to the facts in issue. See also R.J. Deslisle, *Evidence: Principles and Problems* 4th ed. (Ontario: Carswell, 1996) at 18-22.

¹⁵⁸ *Supra* note 3. The case focussed on a summary conviction trial involving an accused black youth and the arresting police officer. During the course of her oral judgment, Judge Sparks made what could be considered improper and speculative remarks about white police officers in their encounters with “non-white” groups.

Sopinka J. concurring), and his articulation of the justiciable issue, are preferable to those of the majority:

This appeal should not be decided on questions of racism but instead on how courts should decide cases. *In spite of the submission of the appellant and interveners on his behalf, the case is primarily about the conduct of the trial. A fair trial is one that is based on the law, the outcome of which is determined by the evidence, free of bias, real or apprehended. Did the trial judge here reach her decision on the evidence presented at the trial or did she rely on something else? ...*

The trial judge stated that “police officers have been known to [mislead the court] in the past” and that “police officers do overreact, particularly when they’re dealing with non-white groups” and went on to say “[t]hat, to me, indicates a state of mind right there that is questionable.” She in effect was saying, “sometimes police lie and overreact in dealing with non-whites, therefore I have a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused.” This was stereotyping all police officers as liars and racists, and applied this stereotype to the police officer in the present case. *The trial judge might be perceived as assigning less weight to the police officer’s evidence because he is testifying in the prosecution of an accused who is of a different race.* Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that *this* [emphasis in original] particular police officer’s actions were motivated by racism. There was no evidence of this presented at trial.¹⁵⁹

[Emphasis added]

Framing the issue in reference to the presence or absence of supporting evidence is a

¹⁵⁹*Supra* note 3 at 361-362. Cory J. (at 402) also addressed the issue of whether there was evidence before the Court linking the police officers’s actions to racist motivations. He concluded that no such evidence existed. Contrarily, Justices L’Heureux-Dubé and McLachlin found (at 375) that there was evidence of a “ ‘racially motivated overreaction’ by the police officer in that he put both the accused and his hand-cuffed cousin in choke holds “purportedly to secure them.” R. J. Deslisle “Annotation” (1997) 10 C.R. (5th) 7 at 10 is somewhat dubious about the connection: “L’Heureux-Dubé J. finds that the fact that both boys were placed in choke-holds is evidence that his overreaction was racially motivated. The link in left unexplained. ... Of what relevance is the ‘overreaction’ to the issue of racism?”

necessary first step to further analysis.¹⁶⁰ Absent an evidentiary basis for her comments, a judge in the position of the trial judge in *S. (R.D.)* ought to exercise caution in voicing apparently gratuitous statements about a witness.¹⁶¹ To do otherwise sabotages the

¹⁶⁰See Wendy Baker “Women’s Diversity: Legal Practice And Legal Education—A View From The Bench” (1996) 45 U.N.B. L.J. 199 at 206 where the author states:

While I am an enthusiastic proponent of judicial education, particularly education which includes a focus on “social context”, I cannot emphasize too strongly that judicial sensitivity and training cannot compensate for a failure by counsel to properly analyze, plead and prove matters concerning gender or racial equality or cultural diversity arising in a lawsuit. Judges cannot substitute “judicial notice” for evidence or compensate, to any significant extent, for a failure by counsel to identify the issues and present the appropriate facts and law. [Emphasis added]

Madam Justice Baker concludes (at 208):

Judges must continue to educate themselves to increase their awareness of and sensitivity to women’s diversity and the context in which decision-making occurs in the society that is Canada today. *Law schools and continuing legal educators must prepare students and lawyers to identify, analyze, research, plead and prove the facts and law necessary to permit courts to reach fair and just decisions in the context of a diverse society.*

[Emphasis added]

I concur in this approach to the issues of diversity and equality and to the determination of related issues at trial based on the evidence adduced.

See also Beverly McLachlin “Judicial Neutrality and Equality” (Address to the Rendering Justice Conference, Hull, Quebec, November 17-19, 1995) at 24 where she writes:

My own view is that the fact that a judge or decision maker has expressed particular points of view on a subject should not in the normal case disqualify her. The reasonable onlooker would recognize, as Dickson C.J.C. did, that judges necessarily come to the bench or the case with views ... some of which may touch the case at hand. *The reasonable onlooker would also recognize that judges and adjudicators by their profession and oath assume the obligation of setting their personal views aside and rendering a verdict on the law and the evidence.*

[Emphasis added]

¹⁶¹When trial counsel engage in any type of speculative submissions to the Court, they are quickly put in their place by a vigilant trial judge! The issue of gratuitous judicial statements in the trial context was addressed by J.O. Wilson, *A Book for Judges* (Canada: Minister of Supply and Services, 1980) at 112. The author cites Chief Justice Culliton on this topic to the effect that “comments of a general nature which [are] related to the issue before him, [but] are not necessary to its determination” are best left unsaid, for “[s]uch

appearance of fairness in the trial process.

Justice Major determined that since there was no evidentiary foundation for the judge's remarks, their propriety was indefensible:

The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. *It is of no value, however, in reaching conclusions for which there is no evidence.* The fact that on some other occasions police officers have lied or overreacted is irrelevant. *Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.*

....

Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.¹⁶²

[Emphasis added]

Justice Major concluded that “we are concerned with both the fairness and the appearance of fairness of the trial, and the absence of evidence to support the judgment is an irreparable defect.”¹⁶³ Nor was the situation salvageable by speculating on what the judge might have

comments usually do no more than reflect the opinion of the judge.” See also David M. Paciocco “Judicial Notice in Criminal Cases: Potential and Pitfalls” (1998) 40 C.L.Q. 35 [hereinafter “Judicial Notice”] at 66 where the author, referring to the Nova Scotia Court of Appeal decision in *R. (D.S.)*, notes:

The problem is, how does one get from the general information that there is systemic racism in a police force to the conclusion that this particular officer on this particular day overreacted because of the race of the accused? Those observations, however correct, are unlinked by evidence to the facts and are therefore gratuitous. ... Without being arbitrary, there is simply no way to get from the general proposition that there are racist police officers, to the specific conclusion that this officer was a racist.

¹⁶²*Supra* note 3 at 364, 365.

¹⁶³*Ibid.* at 366.

meant.¹⁶⁴ Had there been an evidentiary basis for the comments and their relevancy in the first place, such a speculative exercise would not be necessary. Applying the test for finding a reasonable apprehension of bias as articulated in, *inter alia*, *Committee for Justice and Liberty v. National Energy Board*¹⁶⁵, Major J. concluded that the trial judge's comments gave rise to a reasonable apprehension of bias.

Fundamentally, what the dissenting justices did in *S. (R.D.)* was start with basic principles. Was there evidence, on the record, to support the disputed comments of the trial judge? That preliminary question ought to be the focus of any inquiry into gratuitous judicial comments that impact, or appear to impact, on the impartial adjudication of a case.¹⁶⁶ A trial is not about the race, gender, religion or other personal characteristics of the accused. It is about the proof (or lack thereof) of an allegation of wrong-doing by the accused, "a public demonstration to denounce the crime and re-affirm the values it [the crime] infringed."¹⁶⁷ If the accused's personal characteristics are pertinent to the question of guilt or innocence, then evidence on that point should be led through skilful cross-examination of Crown

¹⁶⁴*Ibid.* at 364.

¹⁶⁵*Infra* note 172 and accompanying text. And see *S. (R.D.)*, *supra* note 3 at 363.

¹⁶⁶For an excellent discussion of the importance of an evidentiary basis for judicial reasoning see "Judicial Notice", *supra* note 161. Paciocco discusses (at 65-67) the *S. (R.D.)* decisions at both the trial and Nova Scotia Court of Appeal levels, concluding at 67: "As this case demonstrates, taking judicial notice of matters not in evidence presents the risk of creating a perception of bias. ... The lesson in this for trial judges is clear. When facts that are not proved in evidence suggest themselves, they should not be relief [sic] on or even referred to unless they are necessary to the decision and are of unquestionable relevance." [Footnotes omitted].

¹⁶⁷*Our Criminal Law*, *supra* note 95 at 23.

witnesses, through defence evidence, or both. Divorcing the individual accused's cultural, ethnic, sexual and/or gender background from evidentiary constraints threatens the trial process as the issue of guilt or innocence for the alleged wrong-doing is subverted to issues of race, gender, sex and ethnicity where their relevancy to an issue before the Court has not been established.

The law governing reasonable apprehension of bias applied by Major J. in dissent was that articulated in the judgment of Justice Cory (Iacobucci J. concurring).¹⁶⁸ Major J. reached a different conclusion based on his application of the test to the facts in *S. (R.D.)*. According to Cory J., “bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.”¹⁶⁹ His Lordship notes that impartiality, on the other hand, goes beyond the fact that a decision-maker has certain beliefs, opinions or even biases.¹⁷⁰ “It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence ...”¹⁷¹ Having clarified the concepts of bias and impartiality, and the potentially negative impact of the former upon the latter, Cory J. elaborates the test for finding a reasonable apprehension of bias:

¹⁶⁸*Supra* note 3 at 366.

¹⁶⁹*Ibid.* at 388. See also *Provincial Court Judges Case*, *supra* note 63 at 245 where Lamer C.J.C. discusses the difference between independence and impartiality. “Impartiality was defined [by LeDain J. in *Valenté*] as ‘a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. ... (emphasis added). Independence, by contrast, focussed on the *status* of the court of tribunal.” [Emphasis in original].

¹⁷⁰*Supra* note 3 at 389.

¹⁷¹*Ibid.*

When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable of bias. ... It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. ...

It was in this context that Lord Hewart C.J. articulated the famous maxim: “[i]t is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” ...

The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394 ... :

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. ... Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including “the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold” ... To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.¹⁷²

[Emphasis in original]

The onus of proof is high—that of real likelihood or probability of bias as opposed to mere suspicion¹⁷³—for, a finding of real or perceived bias is one that “calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.”¹⁷⁴

¹⁷²*Ibid.* at 389-390.

¹⁷³*Ibid.* at 391.

¹⁷⁴*Ibid.*

Cory J. emphasizes that “whether a reasonable apprehension of bias arises will depend entirely on the facts of the case” and that “all judges are subject to the same fundamental duties to be and to appear to be impartial.”¹⁷⁵ In addition, “it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.”¹⁷⁶

In applying the test for reasonable apprehension of bias to the facts in the case, Cory J. concluded that no reasonable apprehension of bias occurred. He acknowledged, like Major J., that “there was no evidence before Judge Sparks that would suggest that anti-Black bias influenced *this particular police officer’s reactions*.”¹⁷⁷ However, he held that the judge was in fact responding to the Crown Attorney’s closing submission urging the Court to accept the evidence of the police officer over that of the young person, R.D.S.

While both Major J. and Cory J. expressly dissociate themselves from the reasons of Justices L’Heureux-Dubé and McLachlin,¹⁷⁸ they are, at least, in agreement as to the test for reasonable apprehension of bias.¹⁷⁹ This common ground aside, their Ladyships discuss the

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.* at 402. Emphasis in original.

¹⁷⁸ *Ibid.* at 366, 404.

¹⁷⁹ See Bruce Archibald “The Lessons of the Sphinx: Avoiding Apprehensions of Judicial Bias in a Multi-cultural Society” (1997) 10 C.R. (5th) 54 at 55-56 observes that all judges agreed that the test for reasonable apprehension of bias was that articulated by de Grandpré J. in *Committee for Justice and Liberty*; and that there exists a presumption of judicial integrity. Archibald goes on to state (at 56) that while the application of the test for bias appears contentious, “it is the ‘treatment of social context’ which became the most significant point of contention among the justices.” Deslisle, *supra* note 159, also

“fallacy of judicial neutrality”¹⁸⁰, the impossibility of objectivity¹⁸¹ but concede the desirability of impartiality.¹⁸² However, their view of impartiality necessitates a “conscious, contextual inquiry”.¹⁸³ This concept of impartiality compels the judge to put himself or herself in the shoes of the accused and attempt to see the situation which gave rise to the criminal charge from the accused’s perspective. The workability of that exercise is doubtful in that no one truly can get into the mind of another, particularly when the judge and the accused are meeting for the first time at trial.¹⁸⁴ Further, L’Heureux-Dubé’s deference to expert witnesses in establishing case context is problematic in that justice potentially

commented on the points of agreement in the three separate decisions. He writes (at 7): “It is true that the court, by a six-three majority, voted to restore the acquittals registered by the trial judge, but a five-four majority referred to her remarks as ‘unfortunate’, ‘troubling’, ‘worrisome’, and ‘unnecessary’ per Cory and Iacobucci JJ., and ‘stereotypical reasoning’, and ‘irrelevant’, per Major and Sopinka JJ. and Lamer C.J.C.”

¹⁸⁰*Supra* note 3 at 369.

¹⁸¹*Ibid.* But see McLachlin, *supra* note 160 at 34 where she states:

The end result of these practices—the putting aside of personal views, the preserving of an open mind, the mental act of placing oneself in the position of each of the parties, and finally, the use of reason to draw inferences from carefully considered facts instead of stereotypical assumptions—might be called the art of judging. .. It is much more than according a *pro forma* hearing, much more than arriving at a conclusion that makes us comfortable. It is a professional process which has been used by the most respected judicial and quasi-judicial decision-makers for centuries to attain the *degree of objectivity required for good judging*.

It appears as if Justice McLachlin concedes the possibility of objectivity in this article, contrary to her position in *S. (R.D.)*.

¹⁸²*Supra* note 3 at 369.

¹⁸³*Ibid.* at 371.

¹⁸⁴This presupposes that the accused has not appeared before the judge on previous charges.

becomes a battle of the experts rather than a reasoned consideration of the evidence by the trier of fact. An expert opinion is, in fact, just that—an opinion open to refutation by someone else in the field. Today’s social context built on the opinion of Expert X may be discarded tomorrow in favour of another model.¹⁸⁵

While all the justices in *S. (R.D.)* agreed that social context had some relevance, they were not unanimous as to the degree of relevance nor the manner in which social context would be brought to the court’s attention. This is problematic, especially for the effective exercise of judicial discretion relative to the admissibility of social context evidence. If, as Justices L’Heureux-Dubé and McLachlin argue, a judge can take his or her life experience into account in the course of rendering a decision, independent of evidence on the issue to which that life experience relates, to ensure trial fairness, that judge should hear only cases involving persons of a similar background to him- or herself. In effect, segregated justice would become mandatory in order to ensure that those of a similar race, gender, sexual orientation, and ethnic background benefited from the presiding judge’s empathy. Hopefully, the criminal justice system is not heading in that direction. “Themis-blindfolded” may not be a perfect model of impartiality as a response to the increasingly diverse nature of our society, but it at least ensures a common point of departure for the adversarial process. The

¹⁸⁵See, for example, Robert P. Mosteller “Syndromes And Politics In Criminal Trials And Evidence Law” (1996) 46 Duke L. J. 461. He states (at 461-462):

The perceived misuse of syndrome evidence is a major focus of criticism of American criminal trials. ‘Trash’ syndromes, such as the ‘Urban Survival Syndrome,’ ... attract national attention. Other syndromes, such as Battered Child Syndrome, Child Sexual Abuse Accommodation Syndrome, and Battered Woman Syndrome, are more widely accepted. Even for this latter group, however, the scientific validity and dimensions of their legitimate use remain unclear and controversial. [Footnotes omitted]

presumption of impartiality is not carved in stone; it can be rebutted through evidence, a process open to all who find themselves in a court of law.

This analysis of the *S. (R.D.)* case hopefully enlightens debate on the principle of judicial impartiality in the decision-making process. But perhaps the singular most important affirmation of judicial impartiality as a principle of pervasive influence upon the issue of subjectivity is the statement of Lord Hewart in *Rex v. Sussex Justices*: “[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹⁸⁶ The debate over subjectivity and the feasibility of impartiality in the decision-making process should not focus on whether it is established, as irrefutable fact, that judicial impartiality operates at the subjective level of each judge. Instead, energies would be better directed to an examination of whether justice has been seen to be done. Justice Major in *R. (S.D.)* captures the essence of such an examination when he states:

Canadian courts have, in recent years, criticized the stereotyping of people into what is said to be predictable behaviour patterns. ... Our jurisprudence prohibits tying credibility to something as irrelevant as gender, occupation or perceived group predisposition.

Similarly, we have eliminated the requirement for corroboration of the complainant’s evidence. ... The elimination of corroboration shows the present evolution away from stereotyping various classes of witnesses as inherently unreliable.

It can hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the history of the Canadian justice system that many thought had passed.

¹⁸⁶ [1924] 1 K.B. 256 at 259. Quoted in Wilson, *supra* note 161 at 3. The author, who compiled the text at the request of the Canadian Judicial Council, notes: “This pronouncement, so simply stated, so profound in its sagacity can never, how often repeated, become a cliché. ... Justice, of course, comes first but the appearance of justice is also of major importance.”

This reasoning, with respect to police officers, is no more legitimate than stereotyping of women, children or minorities.¹⁸⁷

Clearly, stereotypical reasoning violates the principle of impartiality and the appearance of justice suffers. Why should any witness walk away from a criminal courtroom labelled a racist or a liar in the absence of supporting evidence? The sad fact that such may have been done in the past as a result of a person's race, colour or gender is no justification for a recurrence in today's courtrooms. Common sense dictates that if impartiality, at a minimum, does not *appear* to have been exercised, then the further question of impartiality as a fact is pointless. In the final analysis, judicial impartiality and independence are unwritten constitutional norms. They are integral to the "common core" of the criminal process identified by Herbert Packer. "Themis-Blindfolded" stands at the gateposts of that process. Admissible evidence, that is what will inform the trier of fact of the social context of crime, not the unarticulated and unknowable background of the judge or the parties to the dispute.¹⁸⁸

The principle of judicial impartiality, like that of judicial independence, is critical to the constitutional guarantee of a fair trial under s. 11(d) of the *Charter*. The perception of impartiality is crucial to the integrity of the criminal trial. Thus, in *Westray*,¹⁸⁹ the majority found that the trial judge's actions in telephoning senior Crown personnel during the course

¹⁸⁷*Supra* note 3 at 364-365.

¹⁸⁸If, as in *S. (R.D.)*, a social context issue of significance to the disposition of the case arises independent of the evidence before the Court, the presiding judge ought to give counsel an opportunity to be heard, and to call evidence, on that issue.

¹⁸⁹*Supra* note 14.

of the trial “was sufficient in itself to raise the issue of apprehension of bias.”¹⁹⁰ The majority reasons did not delve further into the facts of the case in the interests of fairness:

It is important that a new trial be held, and as a result as little as possible should be said regarding the issues that may arise or the evidence. ... Particularly, the trial judge should not be inhibited either by our colleagues’ view of the evidence and issues or ours, which could well be different. At the new trial, both the Crown and the defence can take whatever steps and raise whatever issues they consider appropriate. *The trial of these accused like all who face criminal charges should be fair and be perceived to be fair. To achieve this goal the issues raised at the new trial and the facts upon which they rest must be determined by a judge who is not only impartial but is seen by all to be impartial. This is clearly in the best interests of the accused and the community.*¹⁹¹

[Emphasis added]

Thus, the legitimacy of the criminal justice system and of the Court’s adjudicative process depends upon an independent impartial judiciary capable of deciding cases on the basis of legal principles and admissible evidence. Anything less would seriously erode the criminal law’s legitimacy and be a disservice to the rule of law in society.

V. Parliament and The Supreme Court of Canada—Allies or Adversaries? Defining the Boundaries of Criminal Liability

Thus far, the major ideological influences operating on the justices of the Supreme Court of Canada as they fulfill their adjudicative role have been canvassed. The resulting ideological mix comprises the concepts of parliamentary and constitutional supremacy, democratic and liberal traditions and values, due process and crime control considerations, and challenges to the foundational principles of judicial independence and impartiality. This

¹⁹⁰ *Ibid.* at 295.

¹⁹¹ *Ibid.* at 297.

post-*Charter* ideological blend has transformed the law of homicide. The *Charter* and the *Constitution Act, 1982* are the catalysts in the mix: the Supreme Court of Canada's increasing activism under a system of constitutional supremacy¹⁹² is the primary source of the legal metamorphosis this area of the law has undergone.

The concept of constitutional supremacy under s. 52 of the *Constitution Act, 1982*, and the concomitant responsibility of the Supreme Court of Canada to measure criminal legislation against constitutional imperatives and standards, has facilitated the Court's activist leanings. Lamer J. in *Vaillancourt*¹⁹³ (Dickson C.J.C. concurring) identifies the operating tension between a constitution-wielding judiciary and an elected Parliament responsible for defining criminal behaviour. Concerning proof of the *mens rea* of an offence, he stated unequivocally:

As a result, while Parliament retains the power to define the elements of a crime, the courts now have the jurisdiction and, more important, the duty, when called upon to do so, to review that definition to ensure that it is in accordance with the principles of fundamental justice.¹⁹⁴

Substantive review, under a *Charter* analysis, will engage the Supreme Court in the delicate task of balancing its new constitutional directive¹⁹⁵ against the diminished, but still powerful,

¹⁹²See "Keynote Address", *supra* note 67 at 4. The then Chief Justice of the Supreme Court of Canada, speaking of the *Charter's* impact upon the principle of parliamentary supremacy, stated: "Thus, in Canada, legislative supremacy is subordinate to Constitutional supremacy, except to the limited extent that it is preserved by s. 33 of the *Charter* ..." For a discussion of the concept of legislative supremacy as that term is understood in the Canadian context see *supra* note 70 and accompanying text.

¹⁹³*Supra* note 100.

¹⁹⁴*Ibid.* at 324.

¹⁹⁵See Strayer, *supra* note 46 at 32 where he writes:
Now we need look no farther than s.52 of the *Constitution Act, 1982* for the

principle of parliamentary supremacy in the interests of criminal justice.

In the *Provincial Court Judges Case*, Lamer C.J.C., speaking specifically of the principle of judicial independence, articulates the link between our founding constitutional document, the *Constitution Act, 1867* and the *Charter*:

The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

....

As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble of the *Constitution Act, 1867*. Even though s. 11(d) is found in the newer part of our Constitution, the *Charter*, it can be understood in this way, since the Constitution is to be read as a unified whole.¹⁹⁶

Constitutional litigation rooted in the *Charter* is, therefore, not a legal exercise isolated from Canada's constitutional past; rather, it is an extension of that past into the ongoing evolution of our legal and political institutions. Canadians inherited a "Constitution similar in Principle to that of the United Kingdom".¹⁹⁷ Section 52 of the *Constitution Act, 1982*

principle of supremacy of the constitution, for a partial definition of the constitution covering the core statutes, and for the intended consequence of supremacy: that is, the invalidity of inconsistent laws. While the section does not specifically provide for judicial review to determine if there is inconsistency, its adoption after 115 years of such judicial review under the constitution implies that the courts are to continue to exercise such a role.

¹⁹⁶*Supra* note 63 at 242-243.

¹⁹⁷See Strayer, *supra* note 46 at 38-39 where the author states: "As noted above, Canada must in some way have inherited the concept of parliamentary supremacy since the preamble to the B.N.A. Act says we are to have a 'constitution similar in principle to that of the United Kingdom'. Yet judicial review of legislative action has thrived in Canada while in the United Kingdom its legitimacy is still very questionable." Strayer compares (at 42) the *grundnorm* of the British constitution—"that the laws of the United Kingdom Parliament are supreme and must be followed by the courts"—to that of the Canadian constitution, where, in addition "the laws of the *United Kingdom* Parliament are supreme" [emphasis in original]. He concludes (at 43):

In short, we have had a modification in our *grundnorm*. We still

maintains that the constitution is the supreme law of the land, and insofar as the principle of parliamentary supremacy enjoys constitutional status¹⁹⁸ through the preamble to the

recognize that the constitutional laws as enacted by Westminster for Canada, including the *Canada Act, 1982* and its schedule, the *Constitution Act, 1982*, are the supreme law of Canada, but we now also recognize that in the future the supreme law-making authority ... will belong to those Canadian legislative bodies prescribed in the new constitutional amending formula. ...

Thus while Parliament and Legislatures have legislative authority limited now by both the distribution of powers and the Charter guarantees of individual rights and freedoms, within the areas of authority left to each they enjoy parliamentary supremacy. This means that, like Westminster, they make laws which, if otherwise valid, the courts must respect.

See also Henri Brun in Beckton and MacKay, *supra* note 62 at 6, who writes:

The supremacy of Parliament has been weakened in the sense that the laws of Parliament may now be challenged in the courts by virtue of specific criteria set forth in the Charter. It remains unweakened, however, in the sense that the parliaments are still the bodies authorized to express the ultimate standards of the state in accordance with the Constitution. And dynamic law, the body of law that a society gradually creates for itself as its needs evolve, continues to flow, at the very highest level, from parliamentary legislation. ...

The Charter of Rights has in no sense deprived the legislative bodies of their responsibility to act as the primary agents in the continuous evolution and reform of the law.

¹⁹⁸In the *Provincial Court Judges Case*, *supra* note 63, Chief Justice Lamer (at 237) wrote: "In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act, 1867*." He added: "It [the preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. ... It [the preamble] is the means by which the underlying logic of the Act can be given the force of law." The Chief Justice found (at 238) that the preamble's "reference to 'a Constitution similar in Principle to that of the United Kingdom', ... indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged." Lamer C.J.C. found (at 240-241) that the preamble, in recognizing and affirming Parliamentary democracy "speaks to the kind of constitutional democracy that our Constitution comprehends." See also *Southam Inc. v. Canada (Attorney General)*, *infra* note 202 and accompanying text. Chief Justice Iacobucci's (as he then was) discussion of the significance of the reference to "a Constitution similar in Principle to that of the United Kingdom" in the preamble to the *Constitution Act, 1867* was cited with approval by Lamer C.J.C. in *Provincial Court Judges Case* at 241. See also "Keynote

Constitution Act, 1867, it remains a powerful influence on the “nature of the legal order that envelops and sustains Canadian society.”¹⁹⁹

How ought the Court to approach its task of recognizing constitutional supremacy in the context of a Parliamentary democracy where, until 1982, the principle of parliamentary supremacy was the primary restraint on judicial activity? In keeping with Chief Justice Lamer’s comments in the *Provincial Court Judges Case*, the Coordinate Model of the *Charter* expounded by Brian Slattery offers an alternative to the portrayal of constitutional and parliamentary supremacy as opposing rather than complementary principles:

Generally the Coordinate Model holds that the *Charter* allows for a continuing dialogue between the courts and legislatures as to the true nature of *Charter* rights and the reasonableness of limits on them. But this dialogue can occur only if it is accepted that the roles of the executive, legislative and judicial branches under the *Charter* are reciprocal and not confrontational and that their attitudes to one another should be flexible and founded on mutual respect.²⁰⁰

[Footnotes omitted]

Viewed thusly the *Charter* may be perceived “as the development and extension of the best

Address”, *supra* note 67 at 2 where he states:

The preamble of the *Constitution Act, 1867*, formerly known as the *British North America Act, 1867*, speaks of Canada functioning under “a Constitution similar in principle to that of the United Kingdom”. The British Constitution involves the interplay of three unwritten principles, namely: (1) the sovereignty of the Crown; (2) the Rule of Law protected by an independent judiciary; and (3) *the supremacy of Parliament*.

[Emphasis

added]

And see Law Reform Commission of Canada, *Criminal Procedure: Control of the Process*, Working Paper 15 (Ottawa: Information Canada, 1975) at 23 where the commissioners write: “Our written constitution, the British North America Acts, and, to a lesser extent, the Bill of Rights, place restrictions on the powers of our legislative bodies. Subject to these limitations, parliamentary sovereignty remains a fundamental constitutional doctrine.”

¹⁹⁹*Provincial Court Judges Case*, *supra* note 63 at 239.

²⁰⁰“Theory of the Charter”, *supra* note 64 at 710.

of Canadian constitutional traditions.”²⁰¹ This cannot be accomplished without growing pains. Striking the balance between old constitutional traditions and new constitutional mandates is a challenge, not a recipe for deconstructing the legal system, especially if the detractors have no viable substitutes.²⁰² This is particularly the case in the area of criminal law where the values embodied in the criminal justice system, and reflected in sections of the *Charter*, do and must continue to underlie the decisions which result from litigation arising from the criminal justice process.

²⁰¹*Ibid.* at 704.

²⁰²See *Southam Inc. v. Canada (Attorney-General)*, [1990] 3 F.C. 465, 73 D.L.R. (4th) 289, 114 N.R. 255 (C.A.) at 305-306 where Iacobucci C.J. (as he then was), delivering the judgment of the Court, stated:

Strayer J. was of the opinion that courts had such a jurisdiction [to apply constitutional restraints to the exercise of privileges by the Senate or one of its committees] and found, in particular, that the adoption of the Charter fundamentally altered the nature of the Canadian Constitution such that it is no longer “similar in principle to that of the United Kingdom” as is stated in the preamble to the *Constitution Act, 1867*. *Accepting as we must that the adoption of the Charter transformed to a considerable extent our former system of parliamentary supremacy into our current one of constitutional supremacy, as former Chief Justice Dickson described it, the sweep Strayer J.’s comment that our Constitution is no longer similar in principle to that of the United Kingdom is rather wide.* Granted, much has changed in the new constitutional world of the Charter. But just as purists of federalism have learned to live with the federalist Constitution that Canada adopted in 1867 based on principles of parliamentary government in a unitary state such that the United Kingdom was and continues to be, so it seems to me that *the British system of constitutional government will continue to co-exist alongside the Charter if not entirely, which it never did, but certainly in many important respects. The nature and scope of this co-existence will depend naturally on the jurisprudence that results from the questions brought before the courts.*

[Emphasis added] [Footnotes omitted]

This passage was cited with approval by Chief Justice Lamer writing on behalf of the majority in the *Provincial Court Judges Case*, *supra* note 63 at 241.

Questions arising during constitutional adjudication do not always involve judicial review of impugned legislation. Statutory provisions otherwise within Parliament's legislative competence often are subjected to interpretive techniques which impact upon the operational effect of the provision. The *Criminal Code* is obviously a key statute in that its provisions are subjected to this process on a daily basis. As well, common law rules—judicial creations—may be reformulated subject only to the discretion of the Court and such doctrines as *stare decisis*. Reformulating common law rules in the post-*Charter* context underscores the impact of *Charter* values upon the law's evolution. This, too, is very important in the criminal law context where s. 8(3)²⁰³ of the *Criminal Code* ensures the continuing relevance and importance of the common law to the criminal process. The impact is more subtle, yet equally as forceful, when the Court engages in statutory or common law interpretation where the challenged section or rule otherwise meets constitutional requirements. The case law analyses undertaken in Chapter 3 will illuminate the subtleties of statutory interpretation and reformulation of the common law. Again, the issue of criminal liability is central to the resolution of these cases.

VI. Summary

The Supreme Court of Canada is at the apex of the Canadian legal system, its justices

²⁰³Section 8(3) states:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

rendering decisions that have repercussions for the very fabric of Canadian society. The Court has gone from a position of relative obscurity to one of much-scrutinized visibility. Originally created by federal statute in 1875, the Court has been thrust from its largely supervisory role under the auspices of parliamentary or legislative supremacy, into a more active one under the *Charter*, a document rooted in the principle of constitutional supremacy. The challenge ahead for the Court is to strike an acceptable balance between its historical roots in a tradition of parliamentary supremacy and its new role as constitutional arbiter under the *Charter*. The impact of these respective doctrines on judicial decision-making at the Supreme Court of Canada level will be assessed in the law of homicide analysis which follows. Suffice it to say at this point that there is considerable tension between the historical tradition of deference to legislative pronouncements and the fledgling concept of constitutional primacy.

But other influences are at work. The tenets of liberalism, with their roots in the protection of individual rights from unreasonable or unwarranted interference by the State, have been diluted in the Canadian context by a communalist or collectivist principle which accepts the legitimacy of group interests and rights. The Court must grapple with these realities in fashioning a truly Canadian legal jurisprudence in our post-*Charter* liberal democratic society. Superimposed on these philosophical underpinnings are the values inherent in our criminal process, values vacillating between concerns about crime control and respect for due process. The Court has the unenviable task, in its role as adjudicator, to strike a workable balance.

It is in its adjudicatory role that the Supreme Court of Canada faces the wrath of the

academic community's radical wing as that august body patrols the policy-making implications of the Court's new mandate under the 1982 constitutional initiatives. Subjectivity is portrayed as a destructive weakness permeating the judicial function. Time-honoured principles of judicial independence and impartiality are under attack as being no more than convenient shields for the political agenda of the individual justices. However, as decisions like *S. (R.D.)* illustrate, basic theoretical concepts, such as the presumption of judicial integrity, the principle of judicial impartiality, and the overarching principle of judicial independence, are the mainstays of fairness in the criminal process. The content of those principles may be contested, but reliance on the intangibility of subjectivity as justification for their irrelevance is unconvincing. If the approach of the radical realists is taken to its extreme, the contention that subjectivity—that inescapable dimension of any human activity—cannot be harnessed, itself, is a subjective opinion to be accorded no more weight than an opinion to the contrary. Legal dialogue becomes peripheral and circular, a screen behind which the real questions, such as the extent and scope of discretionary justice as a legitimate exercise of subjectivity, are never addressed.

The principles of judicial impartiality and independence mould subjective influences in the adjudicatory process. In the interests of fairness and justice, these principles are open to refutation, a recognition that the human aspect of the judicial function, if not channelled appropriately, threatens the truth- and fact-finding process. The rules of evidence have become increasingly responsive to the multi-cultural and diverse nature of our society, to the need to get at the truth through evidence that meets the tests of reliability and trustworthiness. Evidence duly adduced and admitted into the record—this is the guarantee

of diversified impartiality, this is the means of informing the Bench of the cultural, racial and gender dimensions of crime. All of these institutional and normative concerns are brought to bear in the criminal context, a detailed examination of which is the subject of the next chapter of this thesis.

Chapter 3

From *Sault Ste. Marie* to *Feeney*: Following the Ebb and Flow of Legal Liberalism in the Law of Homicide

I. Criminal Liability and its Pre-*Charter* Constitutional Context

Parliament's definition of criminal activity and the Supreme Court's review of the adequacy and content of that definition in determining criminal responsibility is at the forefront of the Court's struggle to synchronize its tradition of deference to Parliament with its new mandate to measure legislation against *Charter* values. Over and above this potentially confrontational aspect of judicial review of legislation, the Court's adjudication of the constitutional validity of *Criminal Code* provisions, and its reformulation of common law principles in the light of the *Charter*, have had an appreciable impact on the issue of criminal liability.

The determination of criminal responsibility is of fundamental concern to any person who is or may be in conflict with the criminal law. More so for persons charged with homicide offences where the penal consequences upon conviction almost invariably involve a period of incarceration.²⁰⁴ The Supreme Court of Canada, buttressed by the *Charter*'s overwhelmingly liberal character as an individual rights document, has undertaken a reconsideration of the requisite mental elements of the homicide offences,²⁰⁵ most notably

²⁰⁴See Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (Ontario: Carswell, 1994) at 4-7 where they write: "The distinction between the three offences [murder, manslaughter and infanticide] is very important because they are subject to vastly different penalties."

²⁰⁵*Ibid.* at 4-1 where the authors write:

Section 222(4) provides that all culpable homicides are murder,

murder and manslaughter. Chief Justice Lamer's comments in the 1987 *Vaillancourt* decision, concerning the offence of constructive murder, bear repeating:

Prior to the enactment of the Charter, Parliament had full legislative power with respect to the "The Criminal Law" (Constitution Act, 1867, s. 91(27)), including the determination of the essential elements of any given crime. It could prohibit any act and impose any penal consequences for infringing the prohibition, provided only that the prohibition served "a public purpose which can support it as being in relation to criminal law": Ref. re S. 5(a) of the Dairy Indust. Act ... Once the legislation was found to have met this test, the courts had very little power to review the substance of the legislation. For example, in R. v. Sault Ste. Marie (City), ... Dickson J. (as he then was) held that, when an offence was criminal in the true sense, there was a presumption that the prosecution must prove the mens rea. However, it was always open to Parliament expressly to relieve the prosecution of its obligation to prove any part of the mens rea, as it is said to have done in s. 213 of the Criminal Code with respect to the foreseeability of the death of the victim. It is thus clear that, prior to the enactment of the Charter, the validity of s. 213 could not have been successfully challenged.²⁰⁶

[Emphasis added]

The Chief Justice qualified his comments by stating: "However, federal and provincial legislatures have chosen to restrict through the Charter this power with respect to criminal

manslaughter, or infanticide. ... The structure adopted in the *Code* presents difficulties. The foundation *actus reus* elements for all three homicide offences can be found in the underlying requirement that a death be caused, as well as in the list of ways of committing culpable homicide in subsection (5). *The distinction among the crimes is primarily based on the mental or fault elements required for each, rather than on the actus reus.* Thus, the distinguishing fault elements for murder can be found in s.229, and the distinctive aspects of infanticide can be found in s.233. Manslaughter alone is left without any special section setting out its distinctive fault features. They have to be found in the judicial interpretations of s.222(5) and through a process of eliminating those culpable homicides which are murder or infanticide (s.234).

[Emphasis added][Footnotes omitted]

²⁰⁶*Supra* note 100 at 324.

law.”²⁰⁷

These passages encapsulate the *Charter's* impact on the judicial consideration of criminal intent. Previously, the concept of parliamentary supremacy fostered a deferential attitude towards duly enacted legislation, even where an impugned provision, such as then s.213 of the *Criminal Code*,²⁰⁸ relieved the Crown of proving the mental element of the crime. Parliament was supreme within its jurisdiction as demarcated by the *Constitution Act, 1867* and decisions rendered thereunder. Federalism was the primary limitation on what Parliament could and could not do.²⁰⁹ The *Charter* changed this, for the essential elements of all offences now included “not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the Charter.”²¹⁰ Additionally, the Court became more activist in overhauling common law principles impacting on the fault analysis and in interpreting duly enacted criminal legislation such that both the common law and the statutory provisions as interpreted were consistent with *Charter* values.

²⁰⁷ *Ibid.*

²⁰⁸ R.S.C. 1970, c. C-34.

²⁰⁹ See *Provincial Court Judges Case*, *supra* note 63 at 250 where Lamer C.J.C., in referring to *Beauregard* and recounting the sources of the judiciary’s independence, stated: *The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government.* Institutional independence also adheres in adjudication under the *Charter*, because the rights protected by that document are rights against the state. As well, ... the preamble and the judicature provisions of the *Constitution Act, 1867*, [are] additional sources of judicial independence.

[Emphasis added]

²¹⁰ *Vaillancourt*, *supra* note 100 at 326.

It is significant to note that the majority in *Vaillancourt* did not prioritize the dual impact of criminal legislation and the *Charter* on its deliberations. Indeed, it may be argued that the wording of the statutory provision and the relevant constitutional principle will assume different weight depending on the context of the case. In the articulation of the requisite mental element for murder, for instance, the *Charter* was ascendant;²¹¹ however, in upholding the murder classification provision of the *Code*, Parliament's exclusive jurisdiction in matters of criminal policy was the determinative factor.²¹² But there were significant legal precedents pre-dating *Vaillancourt* bearing on the criminal fault analysis that warrant discussion, particularly the pre-*Charter* case of *R. v. Sault Ste. Marie*.²¹³

The 1978 judgment in *Sault Ste. Marie* set the stage for post-*Charter* developments in the law of murder. Dickson J. writing for a unanimous Court, including Chief Justice Laskin, canvassed the issue of *mens rea* relative to criminal and absolute liability offences²¹⁴ preparatory to introducing into Canadian law a third category of offences—strict liability offences—to which the defence of due diligence would apply. Justice Dickson (as he then was) stated:

The doctrine of the guilty mind expressed in terms of intention or

²¹¹See *Vaillancourt*, *supra* note 100; *Martineau*, *supra* note 124; and *Sit*, *infra* note 298.

²¹²See *Paré*, *supra* note 114; *Luxton*, *supra* note 302; and *Arkell*, *supra* note 302.

²¹³*Supra*, note 103. In this case the city of Sault Ste. Marie had been charged with an absolute liability offence under Ontario pollution-control legislation.

²¹⁴“[A]bsolute liability’ entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence.”: *Supra* note 103 at 40.

recklessness, but not negligence, is at the foundation of the law of crimes. *In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without mens rea ...*²¹⁵
 [Emphasis added]

The mental element for a true criminal offence, therefore, consisted not in negligence, but in the intentional or reckless commission of the impugned act coupled with knowledge of or wilful blindness towards the facts constituting the offence.²¹⁶ The *Sault Ste. Marie* decision reflected the Court's abhorrence in convicting an accused who, although causally responsible for the offending conduct, might be "morally innocent in every sense" given that his mental state had been immaterial to the issue of legal guilt.²¹⁷ This decision was one of the highwater marks of the subjectivist approach to the issue of *mens rea* in Canadian criminal law.²¹⁸ Criminal guilt in the absence of moral turpitude was an abhorrent prospect given the punitive consequences following a conviction for murder. Proportionality between legal guilt and moral blameworthiness was deemed mandatory albeit in this pre-*Charter* context the principle of subjective fault was not accorded constitutional status. David Paciocco, in exploring the subjectivist tenor of the *Sault Ste. Marie* decision, explains the relationship between the requisite mental element of an offence and moral fault:

The paradigm criminal intends the consequences of his acts and knows the circumstances in which he is acting. "Recklessness" and "wilful blindness" demand less, but they are still subjective states. A "reckless" actor does not

²¹⁵*Supra* note 103 at 34.

²¹⁶*Ibid.* at 40.

²¹⁷*Ibid.*

²¹⁸See David M. Paciocco "Subjective and Objective Standards of Fault for Offences and Defences" (1995) 59 Sask. L. R. 271 at 274.

intend the prohibited consequence but sees the risk that it will occur and unjustifiably goes ahead despite that risk. The subjective fault emerges from the deliberate and knowing decision to take that risk. An accused will be “wilfully blind” when that person “deliberately choose[s] not to know something when given reason to believe inquiry is necessary”. Not wanting to know the truth, the accused chooses to remain in ignorance. Moral fault emerges from the conscious decision not to confirm the existence of a fact that the accused knows is almost certain to exist, so that ignorance can be plead.²¹⁹

[Footnotes omitted]

It appeared that absent a subjective mental state, be it “intent”, “wilful blindness”, or “recklessness”, presumptively, criminal liability could not be established. Of necessity, the parameters of subjective and objective fault for criminal offences “lies at the very heart of the debate about what we want criminal law to be.”²²⁰ In turn, the demarcation of those parameters involves the interplay between Parliament, through its criminal legislation, and the Supreme Court of Canada through its decision-making in its constitutional, interpretative and common law capacities.

The Supreme Court of Canada, in deciding *Sault Ste. Marie*, was not operating under the auspices of the *Charter* when it introduced the defence of due diligence in respect of public welfare offences. It was not measuring statutory content against constitutional values. Instead, the Court premised its decision on the basic principle that liability should not be divorced from the issue of fault.²²¹ The Court felt free to pursue its articulation of the strict liability category of offences because “a jural category of public welfare offences [was] the

²¹⁹*Ibid.*

²²⁰*Ibid.* at 272.

²²¹*Supra* note 103 at 54.

product of the judiciary and not of the legislature.”²²² Deference to Parliament, therefore, was not an impediment to judicial activism in the area of judge-made law.²²³

Nine years later when the Supreme Court of Canada heard the *Vaillancourt* case, the legal landscape had changed immeasurably with the advent of constitutional supremacy as a working premise for judicial decision-making. Distinctions between statutory and judge-made law no longer were a prerequisite to judicial consideration of the substantive nature of the disputed legislative provision. The Court reformulated common law rules deemed outdated in the post-*Charter* context, and interpreted valid criminal legislation in keeping with the values and norms of a post-*Charter* Canada. During and after that nine-year interval, the Court continued to build upon its legal guilt-moral fault criteria for determining the requisite mental elements of the homicide offences.²²⁴ An analysis of the case law decided between *Sault Ste. Marie* and *Feeney*²²⁵ will reveal the impact of both constitutional supremacy and Parliamentary supremacy, as foundational constitutional principles, upon the

²²²*Ibid.* at 53.

²²³In the post-*Charter* context see *Swain*, *supra* note 3 at 286 where Lamer C.J.C., speaking of the common law rule permitting the Crown to raise evidence of the accused’s insanity despite the accused’s wishes to the contrary, stated: “If a new common law rule could be enunciated ... I can see no conceptual problem with the Court’s simply enunciating such a rule to take the place of the old rule ... Given that the common law rule was fashioned by judges and not by Parliament or a Legislature, judicial deference to elected bodies is not an issue.”

²²⁴See Alan Mewitt and Morris Manning, *Mewitt And Manning On Criminal Law*, 3d ed. (Ontario: Butterworths, 1994) at 58 where they write: “The principle of fundamental justice propounded in the *B.C. Motor Vehicle Act Reference* was that of the requirement of *mens rea*, of the need that criminal offences contain some mental element that ensures that the ‘morally innocent’ are not brought within its ambit.” [Footnotes omitted].

²²⁵*Infra* note 373.

Supreme Court of Canada's restructuring of the homicide provisions and the determination of criminal liability thereunder. Undercurrents of liberalism and of due process and crime control values have greatly influenced the restructuring process.

II. *Ancio, Logan and Hibbert:* Attempted Murder—Principal and Party Liability

In the 1984 case of *R. v. Ancio*,²²⁶ the Supreme Court of Canada considered the requisite mental element for attempted murder. The specific intent to kill was held by the Court to be the requisite mental element, proof of which could found a conviction. The following passage from McIntyre J.'s majority decision²²⁷ foreshadowed subsequent developments in the law governing the offence of murder:²²⁸

It was argued, and *it has been suggested in some of the cases and academic writings* on the question, that it is illogical to insist upon a higher degree of mens rea for attempted murder, while accepting a lower degree amounting to recklessness for murder. I see no merit in this argument. The intent to kill is the highest intent in murder and there is no reason in logic why an attempt to murder, aimed at the completion of the full crime of murder, should have any lesser intent. *If there is any illogic in this matter,*

²²⁶[1984] 1 S.C.R. 225, 10 C.C.C. (3d) 385, 39 C.R. (3d) 1 [hereinafter *Ancio* cited to C.R.]. The accused had been convicted of attempted murder through the combination of s. 24(1)—the “Attempts” section—and s. 213(d) [subsequently s. 230 (d), repealed, S.C. 1991, c. 4, s. 1] of the *Code*, the constructive murder provision.

²²⁷Laskin, C.J.C. took no part in this judgment. Both Justices Lamer and Dickson concurred in the majority decision.

²²⁸See Don Stuart “Annotation” (1984) 39 C.R. (3d) 2 at 3 where, in reference to Justice McIntyre’s remark concerning the illogic of characterizing an unintentional killing as murder, the author alludes to “[t]his hint of an attack on the legitimacy of forms of murder short of intentional killing ...”

*it is in the statutory characterization of unintentional killing as murder.*²²⁹

[Emphasis added]

Responding to the illogical statutory characterization, itself a product of Parliament, the *Ancio* case compelled the seven-member majority to overturn its previous decision in *Lajoie v. R.*²³⁰ where the phrase “intent to commit an offence” under s. 24(1) of the *Criminal Code*²³¹ was held to mean, in relation to the offence of murder, an intention to commit that offence in any of the ways provided in the *Code*.²³² The *Charter* was still in its infancy, but the Court was flexing its muscle in the post-*Charter* criminal law context albeit as an exercise in statutory interpretation. A subjectivist ideology compatible with liberalism’s emphasis on the autonomy and liberty of the individual began to emerge, facilitated, in part,

²²⁹*Supra* note 226 at 25. But see the pre-*Charter* case of *Farrant*, *supra* note 102 where Dickson J. for the majority (which included McIntyre J.) held (at 291) that the court could not consider the policy of legislation validly enacted. In *Farrant* the Court upheld the accused’s second degree murder conviction under the constructive murder provisions of the *Criminal Code*.

²³⁰(1973), [1974] S.C.R. 399, 20 C.R.N.S. 360, 10 C.C.C. (2d) 313.

²³¹R.S.C. 1970, c. C-34. This section retains the same numbering and content under the current *Code*, R.S.C. 1985, c. C-46. Section 24(1) states:

Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

²³²See Grant, Chunn and Boyle, *supra* note 204 at 4-34:

Before the Supreme Court of Canada began to tinker with the *Criminal Code*’s murder provisions in 1987, s. 229 and s. 230 included a gradation of definitions of murder based largely on the level of *mens rea* involved from intentional, reckless, and negligent murder in s. 229 to constructive murder in s. 230, where there was no mental element required with respect to causing death. All of these definitions constituted murder and were subject to the same penalty.

by the Court's increasing detachment from a tradition of parliamentary deference in its adjudicative function.

Six years later in *R. v. Logan*, the Court constitutionalized the *Ancio* ruling requiring a specific intent to kill as the requisite *mens rea* for attempted murder.²³³ At issue was the constitutionality of s. 21(2) of the *Criminal Code*. That section states:

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.²³⁴

Lamer C.J.C. subjected s. 21(2) to a s.7 analysis under the *Charter*: "If an offence is one of the few for which s.7 requires a minimum degree of mens rea, *Vaillancourt* does preclude *Parliament* from providing for the conviction of a party to that offence on the basis of a degree of mens rea below the constitutionally-required minimum."²³⁵ He concluded: "Given that a minimum degree of mens rea (subjective foresight) is constitutionally required to convict a principal of the offence of attempted murder, the restriction of s.7 in this case is in

²³³[1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169 at 177 [hereinafter *Logan* cited to C.R.]. The accused had been convicted of attempted murder through the operation of s. 21(2) of the *Criminal Code*. Lamer C.J.C. on behalf of the majority which included retiring Chief Justice Dickson stated (at 177): "*Ancio*, supra, established that a specific intent to kill is the mens rea required for a principal on the charge of attempted murder. However, as the constitutional question was not raised or argued in that case, it did not decide whether that requisite mens rea was a *constitutional* requirement. The case simply interpreted the offence as currently legislated." [Emphasis in original]. In *Logan*, the *Ancio* ruling, which was restricted to principals, was extended to include non-principals.

²³⁴R.S.C. 1970, c. C-34, s. 21. The section maintains the same content and numbering under R.S.C. 1985, c. C-46.

²³⁵*Supra* note 233 at 177.

convicting, through the operation of s. 21(2), a non-principal who does not have that same degree of *mens rea*.”²³⁶ In the subsequent s.1 analysis, the Court struck a balance between the legitimate legislative objective underlying s.21(2), and the constitutional requirement for a minimum degree of *mens rea* before finding a non-principal charged with attempted murder guilty of the offence through the operation of s.21(2):

This differential treatment of parties and principals charged with *attempted murder* is the restriction which must undergo the s.1 test.

In this case, the objective of such a differentiation is to deter joint criminal enterprises and to encourage persons who do participate to ensure that their accomplices do not commit offences beyond the planned unlawful purpose. This is a legislative objective of sufficient importance to justify overriding the rights of an accused under s.7 of the Charter.²³⁷

[Emphasis in original]

Although the Court ultimately determined that the legislative objective could not justify the objective portion of s.21(2) contained in the phrase “or ought to have known”,²³⁸ it restricted its ruling to that small class of offences where “it is a constitutional requirement for a conviction that foresight of consequences be subjective”,²³⁹ such as murder, attempted murder, and theft. “Because of the importance of the legislative purpose, the objective

²³⁶*Ibid.* at 180.

²³⁷*Ibid.*

²³⁸See Isabel Grant “Developments In Criminal Law: The 1993-94 Term” (1995) 6 S.C.L.R. (2d) 209 at 212 where the author, commenting on *Logan* stated: “In the Supreme Court of Canada, the high point in terms of a culpability analysis came in 1990 with *R. v. Logan*, where the Court equated the stigma of attempted murder with that of murder, characterizing an attempted murderer as a ‘lucky murderer.’” [Footnotes omitted]. The author explained (at 212) that a culpability analysis “focuses on the mental state of the accused and on the blameworthiness we attach to that mental state”.

²³⁹*Supra* note 233 at 181.

component of s.21(2) can be justified with respect to most [other] offences.”²⁴⁰ The Supreme Court used the language of constitutional adjudication—not statutory interpretation—in rendering the objective portion of the impugned provision inoperative vis-a-vis those offences requiring subjective foresight of consequences. *Logan* is an illustration of the Court balancing, quite effectively, the foundational principle of parliamentary primacy with that of constitutional supremacy.

Section 21(2) again came before the Supreme Court of Canada in *R. v. Hibbert*.²⁴¹ In interpreting the meaning of the phrase “intention in common”, Chief Justice Lamer for a unanimous Court stated: “[W]hen Parliament drafts a statute in language that, on its face, supports more than one meaning, it is appropriate for a court to consider which of the alternative interpretations that are available best accords with Parliament’s intention ...”²⁴² One of the guide’s used by Lamer C.J.C. in determining Parliament’s intention was the common law governing party liability.²⁴³ After reviewing the relevant common law

²⁴⁰*Ibid.*

²⁴¹[1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193, 40 C.R. (4th) 141 [hereinafter *Hibbert* cited to C.R.]. The accused had been charged with attempted murder through the operation of s. 21(2) of the *Code*. The Crown alleged that he had been a party to the shooting of the victim, Cohen. At trial the accused was acquitted of the main charge, but convicted of the included offence of aggravated assault. The Ontario Court of Appeal dismissed the accused’s appeal from conviction. On further appeal to the Supreme Court of Canada, the conviction was set aside and a new trial ordered.

²⁴²*Ibid.* at 159.

²⁴³*Ibid.* at 160. Lamer C.J.C. stated: “Although s. 21 of the Code was intended to simplify the law governing parties by eliminating the old distinctions drawn at common law between principals in the first and second degree, accessories before and after the fact, etc., there is no indication, in the section or elsewhere, of any intention by Parliament to radically alter the basic principles of party liability, including its mental element.”

authorities, he concluded : “These English cases reveal that the mens rea for party liability at common law is not of the sort that is capable of being ‘negated’ by duress. Put another way, it is not a precondition for party liability at common law that an accused actively *desire* that the underlying criminal offence be successfully completed.”²⁴⁴ Chief Justice Lamer applied this reasoning in determining the meaning of both s. 21(1)(b) and s. 21(2).²⁴⁵

Speaking specifically of s. 21(2) he concluded: “Interpreting the expression ‘intention in common’ as connoting a mutuality of motives and desires between the party and the principal would restrict the scope of this section in a manner that is difficult to justify on

²⁴⁴*Ibid.* at 161. Emphasis in original.

²⁴⁵*Ibid.* at 164-167. See also Kenneth Campbell “Party Liability In Homicide Cases” in Frank Armstrong, ed., *Crown’s Newsletter*, vol. 3, 50th Anniversary Issue (Ontario: Ontario Crown Attorneys’ Association, 1996) 31 at 31-32. The author writes:

In *R. v. Hibbert*, the Supreme Court of Canada, in the context of considering whether the defence of duress negated the mental element for “party” liability, considered the general *mens rea* requirements of s. 21 of the *Code*. In the course of his analysis of the provisions of s. 21, Lamer C.J.C., on behalf of a unanimous Court, enunciated the following two important legal propositions:

(1) The mental element for “aiding”, reflected in the phrase in s. 21(1)(b) of the *Code*, which bases criminal liability of an alleged “aider” on whether or not the act or omission was done “for the *purpose* of aiding” another person to commit the offence, means only that the alleged “aider” must have “*intended*” the act. It does *not* relate to the “desire” or “ultimate object” of the accused in performing the act.

(2) Similarly, the mental element in s. 21(2) of the *Code*, which requires that a number of persons form an “intention in common” to carry out some unlawful purpose and to assist each other therein, means no more than that the two or more persons “must have *in mind* the same unlawful purpose.” It does *not* require that the individuals share the same motives or subjective views with respect to the desirability of the “unlawful purpose”.

[Bold-face italics in original] [Footnotes omitted]

the basis of Parliamentary intention.”²⁴⁶ In reaching this conclusion, the comments of Martland J. in previous case law to the contrary were held not to reflect the law in Canada on the relation between duress and mens rea under s. 21(2) of the *Code*.²⁴⁷ Of significance to this paper, were the Supreme Court of Canada’s efforts in *Hibbert* to conduct its exercise in statutory interpretation with due regard to Parliament’s decision to broaden the reach of criminal culpability under the party-liability provisions of the *Code*.²⁴⁸ Parenthetically, the Court qualified its deference to Parliament by noting that Parliament’s ability to do so is limited by the restrictions imposed by the *Charter*.²⁴⁹ *Logan* was cited as a case in point.²⁵⁰

III. B.C. Motor Vehicle Act Reference, Vaillancourt, Paré, Martineau and Cooper: The Requisite Mental Element for Murder

The pre-*Charter Sault Ste. Marie* decision was revisited by the Supreme Court of Canada in the 1984 case of *Reference Re M.V.A. (B.C.)*.²⁵¹ At issue was the constitutionality of the absolute liability offence of driving while prohibited contrary to provincial motor vehicle legislation. Speaking for the majority, which included Chief Justice Dickson, Lamer J. stated:

²⁴⁶*Supra* note 241 at 166.

²⁴⁷*Ibid.* at 166-167.

²⁴⁸*Ibid.* at 165-166.

²⁴⁹*Ibid.* at 165.

²⁵⁰*Ibid.* at 165-166.

²⁵¹*Supra* note 107.

Indeed, as I said, in penal law, *absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence*; it offends s.7 of the Charter if, as a result, anyone is deprived of their life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s.1.²⁵²

[Emphasis added]

The impugned provision was found to be inconsistent with the *Charter*. Professor Stuart noted that the case established that “a due diligence defence was the minimum standard of fault required by the Charter for any type of offence threatening the liberty interest ...”²⁵³ Permeating the entire decision was the legal guilt/moral fault dilemma evidenced by Lamer J’s comment that “[i]t has from time immemorial been part of our system of laws that the innocent not be punished.”²⁵⁴ Challenges to the sufficiency of the fault standards for *Criminal Code* offences were imminent.²⁵⁵

According to the majority in *Reference Re M.V.A. (B.C.)*, the administration of the justice system is “founded upon a belief in ‘the dignity and worth of the human person’ (preamble to the Canadian Bill of Rights, R.S.C.. 1970, App. III) and on ‘the rule of

²⁵²*Ibid.* at 321.

²⁵³*Charter Justice, supra* note 10 at 67. And see Rosemary Cairns Way “The Charter, The Supreme Court And The Invisible Politics of Fault” (1992) 12 Windsor Y.B. Access Just. 128 at 134.

²⁵⁴*Supra* note 107 at 318.

²⁵⁵See Don Stuart, *Canadian Criminal Law*, 3d ed. (Toronto: Carswell, 1995) [hereinafter *Canadian Criminal Law*] at 182 where he writes:

Once the Supreme Court decided in *Motor Vehicle Act Reference* that a due diligence defence was a minimum standard of fault required by the Charter for any type of offence threatening the liberty interest, it was only a matter of time before the Supreme Court would have to decide whether that standard was sufficient for Criminal Code offences.

law' (preamble to the Canadian Charter of Rights and Freedoms)."²⁵⁶ The phrase "principles of fundamental justice" was subjected to a purposive analysis²⁵⁷ and was held to be "a qualifier of the right not to be deprived of the right to life, liberty and security of the person."²⁵⁸

As a qualifier, the phrase serves to establish the parameters of the interest but it cannot be interpreted so narrowly as to frustrate or stultify them. *For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which 'has the most severe consequences upon an individual' ...*²⁵⁹

[Emphasis added]

The individual—the darling of liberal ideology—had become the focus of s. 7 rights, and "the task of the court [was] ... to secure for persons 'the full benefit of the Charter's protection' ..."²⁶⁰ In fulfilling its task, the Court refused to limit the scope of review under

²⁵⁶*Supra* note 107 at 309. See also *Swain, supra* note 3 at 280 where Lamer C.J.C., refers to, *inter alia*, *Reference Re M.V.A. (B.C.)* as illustrative of the fact that the Supreme Court of Canada has "on numerous occasions, acknowledged that the basic principles underlying our legal system are built on respect for the autonomy and intrinsic value of all individuals."

²⁵⁷For a discussion of the purposive approach to *Charter* interpretation see *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385 and *Hunter v. Southam, supra* note 105.

²⁵⁸*Supra* note 107 at 308.

²⁵⁹*Ibid.*

²⁶⁰*Ibid.* at 306. See also Eric Colvin, *Principles of Criminal Law*, 2d ed. (Canada: Carswell, 1991) at 18-19. The author states (at18):

"In *Reference re S. 94(2) of the Motor Vehicle Act*, the Supreme Court was faced with an issue about the relationship between punishment and culpability.

s. 7 to alleged procedural breaches, but widened that scope to include substantive matters as well. Lamer J. found that substantive review of the content of legislation was not new to Canadian law;²⁶¹ rather, the scope of constitutional adjudication, itself, had merely expanded beyond the historical distribution-of-powers analysis to encompass individual rights. However, Lamer J. took great pains to demarcate judicial encroachment on Parliament's criminal law power under its expanded review jurisdiction: "In neither case, be it before or after the Charter, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments."²⁶²

They [Reference re 94(2) of the Motor Vehicle Act, Vaillancourt, and Martineau] have, however, put into question much existing law on the scope and level of culpability for criminal offences. Legislative prescriptions respecting culpability are no longer of paramount authority. They are subject to judicial review in light of the constitutional requirement that the principles of fundamental justice be observed. [Emphasis added]

²⁶¹*Supra* note 107 at 303-304.

²⁶² *Ibid.* at 304. And see Patrick Monahan and Andrew Petter "Developments In Constitutional Law: The 1985-86 Term" (1987) 9 S.C.L.R. 69 at 74-75. The authors write: "[T]he Supreme Court itself has repeatedly acknowledged that its role under the Charter is a limited one. The Court believes that it is confined to applying the text of the Constitution objectively and is not permitted to assess the wisdom of legislation." After a discussion (at 75) of the underlying liberal tenet that "the state's power is not absolute; individuals retain for themselves some residual elements of their original liberty", the authors conclude: "This is why Mr. Justice Lamer in the *Motor Vehicle Reference* was so quick to dismiss the argument that the courts have been asked to review the 'wisdom' of enactments. According to Lamer J., the Charter issue is not whether the legislative policy is desirable but rather whether the state possesses the power to interfere with individual liberty, a different matter entirely."

The Supreme Court of Canada favoured a liberal approach to the *Charter*, with—as we shall see—consequences for the law of homicide.²⁶³ As well, the Court continued to espouse its guardianship role while verbally acknowledging the supremacy of Parliament in matters of criminal policy.²⁶⁴ However, the impending overhaul of homicide law under the auspices of s. 7 of the *Charter* catapulted the Court into a confrontational role with Parliament whatever its pronouncements or protestations to the contrary.²⁶⁵

²⁶³See John D. White “Annotation” (1986) 48 C.R. (3d) 291 at 292 who writes: “[T]he line between the administration of legal norms and general political supervision by the courts has grown dimmer by this decision.”

²⁶⁴*Supra* note 107 at 304–305 where Justice Lamer responded to the argument that expanding the scope of review under s. 7 would “inexorably lead the courts to ‘question the wisdom of enactments’, to adjudicate upon the merits of public policy”, by reminding detractors “that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada.” He added (at 305): “It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.”

²⁶⁵See, for example, *R. v. Jobidon* [1991] 2 S.C.R. 714, 7 C.R. (4th) 233, 66 C.C.C. (3d) 454 [hereinafter *Jobidon* cited to C.R.] where, one year after the decision in *Reference Re M.V.A. (B.C.)*, the common law defence of consent, under the umbrella of unlawful act manslaughter, came before the Supreme Court of Canada. The accused and the deceased were involved in a fight in the parking lot of a hotel. The deceased suffered severe trauma to the head and died as a result. The accused had been acquitted of the manslaughter charge at trial when the judge found that the defence of consent negated the underlying unlawful act of assault. The trial judge was overturned on appeal and a guilty verdict on the charge of manslaughter entered. The Ontario Court of Appeal was upheld by the Supreme Court of Canada following its conclusion that the unlawful act of assault, on the facts in *Jobidon*, was not subject to the defence of consent.

Gonthier J. for the majority [Lamer C.J.C. did not take part in this decision] identified (at 242) the main question to be decided as follows: “The principal issue is whether absence of consent is a material element which must be proved by the Crown in all cases of assault, or whether there are common law limitations which restrict or negate the legal effectiveness of consent in certain types of cases.” He held that the defence of consent to a charge of assault under s. 265 of the *Criminal Code* was subject to common law limits despite the unqualified statutory wording to the contrary. Section 265 (1)(a) states: “A person commits

In the 1987 *Vaillancourt* decision, the Supreme Court of Canada considered the constitutionality of s. 213(d)²⁶⁶ of the *Criminal Code*.²⁶⁷ The accused was convicted at trial of second degree murder. The culpable homicide had occurred during the armed robbery of a pool hall. To begin his analysis, Justice Lamer, writing for the majority, explicated the mental state to be proven under s. 213 (d), as well as its nature and scope, by analyzing that provision in the context of the other murder sections.²⁶⁸ The requisite mental element for

an assault when *without the consent of another person*, he applies force intentionally to that other person, directly or indirectly.” [Emphasis added]. In effect, a person cannot consent to bodily harm.

Canadian Criminal Law, *supra* note 255 at 18 notes: “[T]he effect of the majority interpretation was to create a new crime ... and to read the words ‘without the consent of another person’ out of the assault definition in section 265 of the Criminal Code.” And see S.J.Usprich “Annotation” (1992) 7 C.R. (4th) 235 at 236: “Surely a construction that jettisons ‘the plain words of s. 265’ goes beyond interpretation.” And see also Clayton C. Ruby and Suzanne Jarvie “Developments In Criminal Law And Procedure: From Seaboyer to Stinchcombe: A Review of the Major Decisions of the 1991-92 Term” (1993) 4 S.C.L.R. (2d) 379 at 396.

²⁶⁶Section 213(d), repealed by S.C. 1991, c. 4, s. 1, stated:

Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

...

(d) he uses a weapon or has it upon his person

(i) during or at the time he commits or attempts to commit the offence; or

(ii) during or at the time of his flight after committing or attempting to commit a

offence,

and death ensues as a consequence.

²⁶⁷ R.S.C. 1970, c. C-34.

²⁶⁸*Supra* note 100 at 318-320.

murder under the *Criminal Code* provisions ranged from subjective foresight of death on the part of the perpetrator to objective foreseeability or negligence.²⁶⁹ Lamer J. then turned to the *Charter* and isolated two principles of fundamental justice under s. 7 pertinent to his analysis. First, in keeping with the findings in *Sault Ste. Marie* and *Reference Re M.V.A. (B.C.)*, he found *mens rea* to be an essential element of any offence where the penalty, following conviction, constituted a restriction on the accused's liberty.²⁷⁰ “[*Reference Re M.V.A. (B.C.)*] thus elevated *mens rea* from a presumed element in *Sault Ste. Marie*, supra, to a constitutionality-required element.”²⁷¹ However, those two cases left undecided the further question concerning what “level of *mens rea* was constitutionally required for each type of offence”.²⁷² *Vaillancourt* was the first opportunity the Court had to consider the secondary question of the level of *mens rea* constitutionally required for the offence of murder. Thus begins the controversy over whether an offence calls for a constitutionally-mandated subjective or objective level of mental intent.

To assist him in the determination of the requisite level of *mens rea* for murder, Justice Lamer introduced the concept of stigma into the legal guilt/moral fault equation.

²⁶⁹But see *Sault Ste. Marie*, supra note 103 at 40 where Dickson J. says that negligence has no place in the criminal law. The issue of negligence and an objective standard of intent came before the court in the *Creighton* quartet, infra note 391.

²⁷⁰Supra note 100 at 324.

²⁷¹Ibid. at 324-325.

²⁷²Ibid. at 325.

But, whatever the minimum mens rea for the act or the result may be, there are, though few in number, certain crimes where, because of the special nature of the *stigma* attached to a conviction therefor or the available penalties, the principles of fundamental justice require a mens rea reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence. The punishment for murder is the most severe in our society, and the stigma that attaches to a conviction for murder is similarly extreme. In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. *That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.*²⁷³

[Emphasis added]

He concluded by finding that “it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.”²⁷⁴

Stigma, as an analytical construct in defining the constitutionally-required fault element for criminal offences, was linked by Justice Lamer to both social opprobrium and penal consequences.²⁷⁵ In effect, the moral fault of the accused should justify both the penalty and the stigma consequent upon conviction.²⁷⁶ Stigma as social opprobrium is a

²⁷³*Ibid.* at 325-326.

²⁷⁴*Ibid.* at 326.

²⁷⁵See Alan Brudner “Proportionality, Stigma and Discretion” (1996) 38 C.L.Q. 302 at 303-304. See also *Our Criminal Law*, *supra* note 95 at 22 where the commissioners, under the caption “The Meaning of Guilt” stated: “Real crimes consist of seriously wrongful acts, and anyone sent to prison or otherwise punished for a real crime is being *stigmatized* [emphasis added] for wrongdoing. Justice, therefore, demands that he should have *meant* to do the act forbidden ...” [Emphasis in the original].

²⁷⁶*Ibid.* at 303-304.

problematic concept given that there is no criminal fault-public opprobrium scale matching the two in a principled way for the purposes of sentencing where differences in moral fault potentially could be compensated.²⁷⁷ Further, in the absence of this criminal fault-social opprobrium scale, it would be left to the appellate courts, in the interests of justice and fairness, to fetter judicial sentencing discretion by setting up a hierarchy of offences prioritized according to their level of fault. In effect, the courts would be “usurping the constitutional function of Parliament to enact criminal laws.”²⁷⁸ Again, the Supreme Court of Canada appears to be walking a fine line between its own jurisdiction and that of Parliament, a line that must be respected if the two branches of government are to co-exist effectively.²⁷⁹

²⁷⁷*Ibid.* at 306-308. See also Don Stuart “Continuing Inconsistency But Also Now Insensitivity That Won’t Work” (1993) 23 C.R. (4th) 240 at 245 where the author, referring to the *Creighton* decision, writes:

The court seems to require that the difference between deliberate and negligent conduct be addressed in sentencing. This suggests, for example, that Parliament’s new scheme for sexual assault, which penalizes in the same prohibition but subject to a flexible penalty, one who is deliberately aware of a risk of non-consent and one who did not take reasonable steps to ascertain whether there was consent, will survive *Charter* scrutiny. However, if the Supreme Court is consistent, it will insist that upon conviction a deliberate accused must receive a higher sentence than one who acted without taking reasonable steps. *Even if this is the outcome of Charter challenges to the substantive sexual assault reforms, there will still be much to be said, on the basis of fair labelling and justice and also for ease of administration, for separate offences with separate penalties.* This is now the case with murder and manslaughter, and intentional and negligent arson.

[Emphasis added] [Footnotes omitted]

²⁷⁸Brudner, *supra* note 275 at 303.

²⁷⁹In *Logan*, *supra* note 233 at 178-179, Lamer C.J.C. again considered the stigma criterion. He stated (at 178):

It should be noted that, as a basis for a constitutionally-required minimum

Stigma as a reflection of blame, on the other hand, would “require that the accused exhibit the level of blameworthiness that defines the criminal category under which he is subsumed ...”²⁸⁰ Differences in relative levels of fault would be reflected linguistically in such terms as murderer, manslayer, thief, rapist, and so forth.²⁸¹ The “stigma-as-blame version of the proportionality principle in relation to stigma”²⁸² offers, through the principle of imputability, a more just interpretation of the stigma criterion:

The blameworthiness that incurs stigma in the notional sense is not simply a characteristic of an act, outcome, or mental disposition that public opinion happens to blame. Rather, it is determined independently of empirical opinion both by the importance to human well-being of the interest harmed by the wrongdoer and by the degree to which the harm is imputable to his agency as distinct from chance. Whatever public opinion might be, the negligent actor is less blameworthy for an unlawful outcome than someone who produces the same outcome intentionally, for the outcome belongs less to the former’s agency than it does to the latter’s. ... In assessing someone’s blameworthiness for a deed or outcome, the criminal law focuses narrowly on the degree to which the deed and its consequences are imputable to his moral agency so as to render *him* legally answerable for them. An outcome negligently caused, however, is connected to agency more loosely than one intentionally produced, for in that outcome we see not only a reflection of the

degree of mens rea, the social stigma associated with a conviction is the most important consideration, not the sentence. ... The sentencing range available to the judge is not conclusive of the level of mens rea constitutionally required. Instead, the crucial consideration is whether there is a continuing serious social stigma which will be imposed on the accused upon conviction.

This passage does not clarify the use of the term “stigma”, for continuing social stigma can be ascribed both to the moral blameworthiness of the offender as well as societal repugnance for the act. However, based on the majority reasons of Lamer C.J.C. in *Martineau*, social stigma as a determinative factor in the criminal fault analysis, attaches more to moral blameworthiness than to social opprobrium.

²⁸⁰Brudner, *supra* note 275 at 305.

²⁸¹*Ibid.*

²⁸²*Ibid.* at 308.

agent's purposes but also the effect of independent causes, whereas in the outcome intentionally produced we see only the agent.²⁸³

[Emphasis in original]

Crimes undifferentiated as to fault, therefore, offend the principle enunciated in *Sault Ste. Marie* that "[i]n the case of true criminal crimes ... a person should not be held liable for the wrongfulness of his act if that act is without mens rea ..."²⁸⁴

The reasons for decision of Justice Lamer (as he then was) in *Vaillancourt* support the argument that proportionality between stigma and moral blame is the determinative element informing the content of the mental element of a crime. His analysis of the murder provisions of the *Criminal Code*,²⁸⁵ beginning with s. 212(a)(i)²⁸⁶ [now s. 229(a)(i)], focussed on the relative degrees of moral fault distinguishing each provision. He observed that then s. 212(a)(i) defined culpable homicide as murder where the accused both caused, and meant to cause, the other person's death. "This is the most morally blameworthy state of mind in our system."²⁸⁷ Under s. 212(a)(ii)²⁸⁸ [now s. 229(a)(ii)] there was a "slight

²⁸³ *Ibid.* at 309-310.

²⁸⁴ *Supra* note 103 at 34.

²⁸⁵ R.S.C. 1970, c. C-34.

²⁸⁶ Section 212 (a)(i) stated:
Culpable homicide is murder
(a) where the person who causes the death of a human being
(i) means to cause his death ...

²⁸⁷ *Supra* note 100 at 319.

²⁸⁸ Section 212 (a)(i) stated:
Culpable homicide is murder
(a) Where the person who causes the death of a human being
...

relaxation” of the subjective foresight of death mandated as the requisite mental element for murder in the previous section.²⁸⁹ To be guilty of murder under then s. 212(a)(ii) the accused need only intend to cause bodily harm to the other person albeit he must subjectively have foreseen the likelihood of death arising from his actions. Subjective foreseeability, however, proven on the standard of recklessness.²⁹⁰ Section 212(c)²⁹¹ [now s. 229(c)] imported both a subjective and an objective element. Culpable homicide under this section was deemed to be murder where, from a subjective perspective, the accused, for an unlawful object, “does *anything ... he knows ... is likely to cause death*”²⁹², or, from an objective perspective, “does *anything that he ... ought to know is likely to cause death*”,²⁹³ and thereby causes death to a human being. The accused’s desire to carry out the unlawful object without causing death or bodily harm to the victim was irrelevant to the inquiry.²⁹⁴ The objective component of s. 212(c) “eliminate[d] the requirement of actual subjective foresight and replace[d] it with

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not; ...

²⁸⁹*Supra* note 100 at 319.

²⁹⁰*Ibid.*

²⁹¹Section 212(c) stated:
Culpable homicide is murder

...

(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires his object without causing death or bodily harm to any human being.

²⁹²*Supra* note 100 at 319. *Emphasis in original.*

²⁹³*Ibid.* *Emphasis in original.*

²⁹⁴*Ibid.*

objective foreseeability or negligence.”²⁹⁵ The final section analyzed was s. 213²⁹⁶ [now s. 230], the felony murder or constructive murder provision of the *Code*.

Under this provision, it is murder if the accused causes the victim’s death while committing or attempting to commit one of the enumerated offences if he performs one of the acts in subss. (a) to (d). *Proof that the accused performed one of the acts in subss. (a) to (d) is substituted for proof of any subjective foresight, or even objective foreseeability, of the likelihood of death.*²⁹⁷

[Emphasis added]

²⁹⁵*Ibid.*

²⁹⁶The content of s. 213 was as follows:

Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

(a) he means to cause bodily harm for the purpose of

(i) facilitating the commission of the offence; or

(ii) facilitating his flight after committing or attempting to commit the offence, and death ensues from the bodily harm;

(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and death ensues therefrom;

(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and death ensues therefrom; or

(d) he uses a weapon or has it upon his person

(i) during or at the time he commits or attempts to commit the offence; or

(ii) during or at the time of his flight after committing or attempting to commit a offence,

and death ensues as a consequence.

²⁹⁷*Supra* note 100 at 320.

Justice Lamer further noted that s. 21(2) of the *Code*, which provided for criminal liability on a party basis, was “a further relaxation of the mental state” for murder.²⁹⁸ On the question of proving an essential element of an offence, such as *mens rea*, by proof of a substituted element, Lamer J. held that Parliament’s constitutional authority to do so was restricted: “If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(d).”²⁹⁹ Since the constructive murder provision could not pass the “substitution” standard, it was struck down.

The majority in *Vaillancourt*, through Justice Lamer, made a masterful attempt at articulating its position on the offence of constructive murder without offending notions of legislative supremacy on matters relating to public policy. However, it was not unanimous. Justice McIntyre’s dissent sounded a warning peal for the increasingly activist Court:

It must be recognized at the outset that Parliament has decided that the possession and use of weapons, particularly firearms, in the course of the commission of offences is a gravely aggravating factor. Experience has shown that the presence of firearms leads to personal injury and loss of life. Parliament has chosen to term a killing arising in the circumstances described here as “murder”. ...

....
As has been noted, the appellant’s conviction is based on a combination of s. 21(2) and s. 213(d) of the Criminal Code. There was in this case evidence of active participation in the commission of the robbery, the underlying offence, and the terms of s. 21(2) were fully met. It must be accepted that the section gives expression to a principle of joint criminal liability long accepted and applied in the criminal law. I am unable to say

²⁹⁸*Ibid.* The issue of party liability was considered by the Court in *Logan*, *supra* note 233 and *R. v. Sit*, [1991] 3 S.C.R. 124, 66 C.C.C. (3d) 449.

²⁹⁹*Supra* note 100 at 327.

*upon what basis one could exempt conduct which attracts criminal liability, under s. 213 of the Criminal Code, from the application of that principle.*³⁰⁰

[Emphasis added]

McIntyre J. concluded: “In my view, Martin J.A. [in *R. v. Munroe*] has stated the policy considerations which have motivated Parliament in this connection, and I would not interfere with the Parliamentary decision.”³⁰¹ The majority and dissenting decisions highlight the potential ambiguity in distinguishing judicial decisions impacting on matters of legislative policy and those articulated within the boundaries of the Court’s constitutional adjudicatory function.

The *Vaillancourt* decision appears to have favoured a subjectivist approach to the homicide-related provisions. Yet, two weeks prior to that case, the Supreme Court of Canada in the *Paré*³⁰² case saw no incongruity in validating the murder classification provision³⁰³ which mirrored the soon to be struck-down constructive murder section of the *Criminal Code*. For purposes of classifying the substantive offence of murder, no fault element was

³⁰⁰*Ibid.* at 315-316.

³⁰¹*Ibid.* at 316.

³⁰²*Supra* note 114. The constitutionality of the murder classification provision of the *Criminal Code* was upheld in the post-*Charter* cases of *R. v. Luxton*, [1990] 2 S.C.R. 711, 58 C.C.C. (3d) 449, 79 C.R. (3d) 193 and *R. v. Arkell*, [1990] 2 S.C.R. 695, 59 C.C.C. (3d) 65, 79 C.R. (3d) 207 (S.C.C.). In *Canadian Criminal Law*, *supra* note 255 at 186, Stuart expressed dissatisfaction with the *Paré* decision and the subsequent survival of the impugned section under *Charter* scrutiny. Concerning Justice Wilson’s contention in *Paré* that the organizing principle of then s. 214(5) was the unlawful domination of the victim, he wrote: “How can it possibly be said that the list of murders under section 231 [previously s. 214(5)] includes all murders involving unlawful domination over the person? Doesn’t any murder involve such domination? ... The classification was and is irrational and should have been declared unconstitutional.” [Footnotes omitted].

³⁰³See R.S.C. 1970, c. C-34, s. 214(5).

required.³⁰⁴ Murder committed in the commission of one of the enumerated offences under then s. 214(5)—in the *Paré* case, indecent assault—was classified as first degree murder. Wilson J., for a unanimous Bench which included Chief Justice Dickson, observed that the enumerated offences involved “the unlawful domination of people by other people.”³⁰⁵ Here, a harm analysis focussing on the consequences of crime trumped the doctrine of strict construction of penal statutes which required an interpretation most favourable to the accused. The most favourable interpretation, from an accused’s perspective, of the phrase “while committing” in s. 214(5) [now s. 231(5)] would require contemporaneity between the murder and the enumerated underlying offence. Wilson J. rejected this argument in favour of a “continuing transaction” approach.

This approach, it seems to me, best expresses the policy considerations that underlie the provision. Section 214, as we have seen, classifies murder as either first or second degree murder. All murders are serious crimes. Some murders, however, are so threatening to the public that Parliament has chosen to impose exceptional penalties on the perpetrators. One such class of murders is that found in s. 214(5), murders done while committing a hijacking, a kidnapping and forcible confinement, a rape, or an indecent assault.³⁰⁶

After rejecting the Law Reform Commission of Canada’s criticism of a lack of organizing

³⁰⁴ See Don Stuart “Annotation” (1987) 60 C.R. (3d) 346 at 347 where he states: “It is curious that a Supreme Court which has, both before and after the enactment of the Canadian Charter of Rights and Freedoms, striven to assert subjective mens rea as the fault requirement for serious offences, ... has chosen to ignore it in deciding whether a particular murder falls within the most serious penalty category of first degree murder.”

³⁰⁵ *Supra* note 114 at 370.

³⁰⁶ *Ibid.*

principle to s. 214(5), she stated:

The offences listed in s. 214(5) are all offences involving the unlawful domination of people by other people. Thus an organizing principle for s. 214(5) can be found. This principle is that, where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime. *Parliament has chosen to treat these murders as murders in the first degree.*

Refining, then, the concept of the “single transaction” referred to by Martin J.A. in *Stevens*, supra, it is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder. The murder represents an exploitation of the position of power created by the underlying crime and makes the entire course of conduct a “single transaction”. *This approach, in my view, best gives effect to the philosophy underlying s. 214(5).*³⁰⁷

[Emphasis added]

Both Chief Justice Dickson and Justice Lamer sat on the *Paré* bench. Their approach to the issue of classifying murder for the purposes of sentencing is intelligible from a criminal liability perspective: the substantive offence of murder already would have been proven in keeping with subjectivist principles.³⁰⁸ Sentencing follows conviction—legal guilt commensurate with moral fault already has been established thereby preserving a proportionality between stigma and blame. The policy considerations expressed by Parliament, relative to the constructive murder sections, are deferred to the sentencing stage after legal guilt has been established.³⁰⁹

³⁰⁷*Ibid.* at 370-371.

³⁰⁸See *Canadian Criminal Law*, supra note 255 at 186 where Stuart writes: “According to the Court [in *Paré*], the relationship between the sentence classification and the moral blameworthiness of the offender clearly existed. The section only came into play where murder had been proven beyond a reasonable doubt.”

³⁰⁹See also *R. v. Harbottle*, [1993] 3 S.C.R. 306, 84 C.C.C. (3d) 1, 24 C.R. (4th) 137 where the phrase “when death is caused by that person” in s. 214(5) [now s. 231(5)] was interpreted by the Supreme Court of Canada. Cory J. for a unanimous Court which included

The murder classification provisions under s. 214 [now s. 231] simply retain the constructive murder principle deemed unconstitutional in *Vaillancourt* under a fault analysis. The decision also reflects a crime control perspective in that murderers who commit the crime while committing one of the enumerated offences, will be stigmatized as first-degree murderers. Nor is there anything to prevent Parliament from broadening the list in now s. 231(5) given that the section's judicial interpretation reflects not only victim interests, but also a reliance on Parliamentary policy to treat murderers who abuse their power over others as first degree murderers. One might speculate that the Supreme Court of Canada, anticipating its decision in *Vaillancourt*, delivered a judgment suitably deferential to Parliament's exclusive criminal policy jurisdiction.

Chief Justice Lamer observed (at 148) that the issue before the Court was one of causation. In determining (at 149) that the test for causation under the section must be a strict one, he linked his analysis to the issue of moral blameworthiness:

At the outset, it is important to remember that when s. 214(5) comes into play it is in essence a sentencing provision. First degree murder is an aggravated form of murder and not a distinctive substantive offence. ... It is only to be considered *after* the jury has concluded that the accused is guilty of murder by causing the death of the victim. An accused found guilty of second degree murder will receive a mandatory life sentence. What the jury must then determine is whether such aggravating circumstances exist that they justify ineligibility for parole for a quarter of a century. It is at this point that the requirement of causation set out in s. 214(5) comes into play. The gravity of the crime and the severity of the sentence both indicate that a *substantial and high* degree of blameworthiness, above and beyond that for murder, must be established in order to convict an accused of first degree murder.”

[Emphasis in original]

See also Allan Manson “Rethinking Causation: The Implications of *Harbottle*” (1994) 24 C.R. (4th) 153 at 155.

The substantive content of s. 213 [now s. 230], the constructive murder provision of the *Criminal Code*,³¹⁰ was re-visited in *Martineau*.³¹¹ Between the time of hearing and the time of judgment, Justice Lamer had succeeded Justice Dickson as Chief Justice of the Supreme Court of Canada although Dickson J. participated in the decision. A harm analysis focussing on the consequences of the criminal act was not central to the majority decision delivered by Lamer C.J.C. who began his reasons for judgment as follows: “The facts of this case are not central to the disposition of this appeal, and therefore, may be briefly summarized as follows.”³¹² In truth, the facts were quite brutal as explicitly related in L’Heureux-Dubé J.’s dissenting reasons where victim interests figured prominently in the requisite-fault for murder analysis. Specifically, she situated her dissenting reasons in the context of homicide statistics,³¹³ the corresponding duty of Parliament to respond to “a matter of critical public concern”³¹⁴ and the Court’s ill-advised usurping of Parliament’s role in protecting the citizenry through the manipulation of legislation.³¹⁵ “The criminal law must

³¹⁰R.S.C. 1970, c. C-34.

³¹¹*Supra* note 124. The accused in this case, along with another person, broke into a trailer, tied up the two occupants, robbed them and their home, and then the accused’s friend shot the two homeowners. The accused was convicted of second degree murder. The Crown’s appeal from a decision of the Alberta Court of Appeal ordering a new trial was dismissed by the Supreme Court of Canada.

³¹²*Ibid.* at 135.

³¹³*Ibid.* at 158-159.

³¹⁴*Ibid.* at 159.

³¹⁵*Ibid.* at 165.

reconcile two ‘competing claims’ as well. Social protection must be measured against justice to the individual accused.”³¹⁶

Striking down the legislation simply because some other scheme may be preferable would be an unwarranted intrusion into Parliament’s prerogative, and would undermine the means it has chosen to protect its citizenry. *The Charter is not designed to allow this court to substitute preferable provisions for those already in place in the absence of a clear constitutional violation.* Such a task should be reserved for the Law Reform Commission or other advisory bodies. This court’s province is to pronounce upon the constitutionality of those provisions properly before it. *The Charter does not infuse the courts with the power to declare legislation to be of no force or effect on the basis that they believe the statute to be undesirable as a matter of criminal law policy.* For the aforementioned reasons, I do not believe that s. 213(a) offends the Canadian Charter of Rights and Freedoms.³¹⁷

[Emphasis added]

Justice L’Heureux-Dubé thus relied on “significant policy consideration in favour of upholding the existing legislation”³¹⁸ even though in *Reference Re M.V.A. (B.C.)* the Court held that policy considerations were best left to arguments of justification under s. 1.³¹⁹

³¹⁶*Ibid.* at 160.

³¹⁷*Ibid.* at 165.

³¹⁸*Ibid.* at 143.

³¹⁹*Supra* note 107 at 321. Chief Justice Lamer, discussing the idea of the “public interest”, stated:

[I]f the public interest is there referred to ... as a possible justification under s. 1 of a limitation to the rights protected at s. 7, then I do agree.

Indeed, as I said, in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the Charter if, as a result, anyone is deprived of their life, liberty or security of the person, irrespective of the requirement of public interest. *In such cases it might only be salvaged for reasons of public interest under s. 1.*

Chief Justice Lamer, for the majority, undertook an abstract legal analysis returning again to the concept of stigma, and the proportionality between stigma, punishment and moral blameworthiness, as a means of constitutionality-mandating a subjective standard of fault for murder, namely: subjective foreseeability of death.

The effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in *Punishment and Responsibility* (1968), at p. 162, the fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally. ... *In my view, in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death. The essential role of requiring subjective foresight of death in the context of murder is to maintain the proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. Murder has long been recognized as the "worst" and most heinous of peace time crimes. It is, therefore, essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death*³²⁰

[Emphasis added]

The liberal emphasis on individual autonomy and liberty as against the State was the context for Lamer C.J.C.'s analysis; the repercussions associated with the exercise of free will had been secondary to maintaining the proportionality between stigma, punishment and moral blameworthiness.³²¹ L'Heureux-Dubé J. rejected the paramountcy of stigma as an analytical

³²⁰*Supra* note 124 at 138-139.

³²¹See also *Sit, supra* note 298. Lamer C.J.C., again delivering the judgment of the Court, confirmed (at 452) the ratio in *Martineau* "that proof of subjective foresight of death is necessary in order to sustain a conviction for murder ..." He also confirmed (at 452) the ratio in *Logan* requiring the same minimum degree of mens rea for a conviction under the party section of the *Criminal Code* if that minimum degree is required before the principal

tool³²², choosing instead to focus on the question of choice and the concomitant responsibility that follows upon the accused's exercise of his or her free will:

Section 213(a) deals with one who has already proven to be a "hijacker", a "kidnapper", a "rapist", or an "arsonist". Furthermore, this person has already proven willing to cause bodily harm to commit the offence or to enable himself to escape after having committed the offence. *In these circumstances, it is certainly appropriate for Parliament to put this person on notice, that if these purposeful acts result in death, you will be charged as a "murderer" as well.*³²³

[Emphasis added]

Both approaches reflect liberal influences, but the differing emphases account for the disparate result. Thus the controversy between Chief Justice Lamer and L'Heureux-Dube in *Martineau* typifies subsequent decisions in the law of homicide.

Section 212(a)(ii)³²⁴ [now s. 229 (a)(ii)] of the *Criminal Code* was subjected to statutory analysis in *R. v. Cooper*.³²⁵ The requisite intent necessary to found a murder

can be convicted of the main offence.

And see Grant, *supra* note 238 at 212 where the author, reviewing the 1993-1994 term, states: "In the Supreme Court of Canada, the high point in terms of a culpability analysis came in 1990 with *R. v. Logan*, where the Court equated the stigma of attempted murder with that of murder, characterizing an attempted murderer as a 'lucky murderer'. ... This term's decisions [including the *Creighton* quartet] reflect a greater emphasis on the need to punish the causing of harmful consequences and show a move away from principles of subjective fault. ... [T]here is a clear move away from subjective culpability." [Footnotes omitted].

³²²*Supra* note 124 at 163.

³²³*Ibid.* at 164.

³²⁴*Supra* note

³²⁵[1993] 1 S.C.R. 146, 18 C.R. (4th) 1, 78 C.C.C. (3d) 289 [hereinafter *Cooper* cited to C.R.]. The accused in *Cooper* was charged with the first-degree murder of a former girlfriend by strangulation. He maintained that he blacked-out after grabbing the girl by the neck, then awoke to find her dead beside him in the back seat. The accused then pushed the

conviction under the impugned section was at issue. Cory J. delivered the majority decision and held, as a matter of statutory interpretation, that there were two dimensions to the intent component of s. 212(a)(ii):

The intent that must be demonstrated in order to convict under s. 212(a)(ii) has two aspects. There must be (a) subjective intent to cause bodily harm; (b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. It is only when those two elements of intent are established that a conviction can properly follow.³²⁶

Lamer C.J.C., sitting in lone dissent, agreed. The majority and dissenting opinions diverge on the question of when the subjective intent to cause bodily harm coincides with the subjective knowledge that the bodily harm is likely to cause death.³²⁷ Lamer C.J.C. stated:

Cooper intended to choke the deceased and cause her bodily harm. Under s. 212(a)(i), it was open to the jury to infer from his conduct and on all of the evidence that in doing so he intended to kill her. To be found guilty under s. 212(a)(ii), however, he must have been aware of the fact that he persisted in choking her long enough for it to become likely that death would ensue.³²⁸

deceased's body out of the vehicle and drove away.

³²⁶*Ibid.* at 8.

³²⁷This is referred to as the simultaneous principle. In *Canadian Criminal Law*, *supra* note 255 at 327, Stuart introduces the principle and writes: "It is well established that the act and *mens rea* must occur at the same time (be concurrent, be contemporaneous). ... The essence of the justification for the simultaneous principle is one of the need to use the criminal law sanction fairly and with restraint." However, Stuart observes (at 329) that the general principle is not inflexible: "Courts have recognized techniques or exceptions to avoid the full rigour of the principle." One such technique, as illustrated by the *Cooper* decision, is superposing intent on an act. "In *Cooper* ... Cory J. for the Supreme Court adopted the *Fagan* approach and further held that it was not always necessary for the requisite *mens rea* to continue throughout the commission of the wrongful act. ... It was sufficient that the intent and act of strangulation coincided at some point, and it was not necessary that the intent continue throughout the entire two minutes."

³²⁸*Supra* note 325 at 16.

It appears as if the accused could have been convicted of an intentional killing under s. 212(a)(i) but that, absent awareness of the continuing act of choking, he may have had no more than subjective foresight of bodily harm under s. 212(a)(ii)! Since awareness of the ongoing conduct leading to foresight of bodily harm is a pre-requisite to the foresight of the likelihood of death, Lamer C.J.C. held that the jury also ought to have been instructed to consider the impact of evidence of drunkenness upon the accused's awareness in the circumstances of the *Cooper* case.³²⁹ Lamer C.J.C.'s dissenting reasons in *Cooper* highlight his ongoing commitment to a culpability analysis of the law of homicide be it in the context of statutory interpretation or constitutional analysis.

IV. *Hill* and *Lavallee*: Criminal Defences and The Objective Standard

The liberal subjective approach influencing the determination of criminal fault also impacted upon the Supreme Court of Canada's statutory interpretation of the reasonable person standard in the defence of provocation. In *R. v. Hill*³³⁰ the Court considered the ordinary person test in s. 215 [now s. 232] of the *Criminal Code*.³³¹ That test injects an objective standard into the three-part test for provocation,³³² a standard "clearly envisaged

³²⁹*Ibid.*

³³⁰[1986] 1 S.C.R. 313, 25 C.C.C. (3d) 322, 51 C.R. (3d) 97 [hereinafter *Hill* cited to C.R.].

³³¹R.S.C. 1970, c. C-34.

³³²*Supra* note 330 at 108. The objective test is the threshold test directed to the question of whether or not an ordinary person would be deprived of the power of self-control because of the provoking act or insult. Then, the trier of fact must consider if the accused

by the Criminal Code as a harsh first hurdle,³³³ a standard deemed necessary by Parliament in the exercise of its responsibility for the criminal law. Dickson C.J.C., delivering the majority judgment, stated: "It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned, among other things, with fixing standards of human behaviour."³³⁴ From this perspective, he articulated the content of the ordinary person standard for the purposes of the provocation defence:

I think it is clear that there is widespread agreement that the ordinary or reasonable person has a normal temperament and level of self-control. It follows that the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness.³³⁵

In addition to not being exceptionally excitable, pugnacious or drunk, the ordinary person may possess other traits that are neither "peculiar" nor "idiosyncratic" to the accused.³³⁶ With these pre-conditions in mind, the determination of the content of the ordinary person standard, in a given case, would depend on the "relevance of the particular feature to the provocation in question."³³⁷ Race, for instance, might be relevant where the alleged

actually had been provoked. A subjective test is applicable at this stage. Finally, the trier of fact must determine if the accused acted on the sudden before his passions cooled.

³³³Don Stuart "Annotation" (1985) 51 C.R. (3d) 99. The author traces the movement of the Court away from previous decisions in which no subjective factors could inform the reasonable person test.

³³⁴*Supra* note 330 at 108-109.

³³⁵*Ibid.* at 114.

³³⁶*Ibid.*

³³⁷*Ibid.*

provoking insult was a racial slur; but irrelevant where the alleged provoking insult concerned the accused's physical disability.³³⁸ While rejecting personal or subjective considerations peculiar to the accused,³³⁹ such as drunkenness, the objective standard test nevertheless is partially contextualized to reflect the facts of the case and the circumstances of the accused.³⁴⁰ So, in *Hill*, the ordinary person was found to be someone of the same age and sex of the accused.³⁴¹

This partial contextualization of the ordinary person standard, through the process of statutory interpretation, served the Court's liberal leanings in favour of individual autonomy and, indirectly, the aims of due process over crime control. It also furthered the Court's subjective approach to criminal liability by personalizing the reasonable person standard, albeit minimally, when analyzing criminal fault. But the personalization of the reasonable

³³⁸*Ibid.*

³³⁹To do otherwise would be to defeat the purpose of the objective standard which is to effect minimum standards of conduct. Dickson C.J.C. stated (*ibid.* at 108):

We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility. In doing this, the law quite logically employs the objective standard of the reasonable person.

See also Mewitt and Manning, *supra* note 224 at 739-741.

³⁴⁰See Mewitt and Manning, *supra* note 224 at 741 where the authors write:

The test is, therefore, that of the *ordinary* person with these characteristics of the accused that do not prevent him being, himself, a person of ordinary temperament—his sex, his age, his colour, his education, his physical condition and so on, but not those characteristics which make his temperament, at the time, extraordinary. Fundamentally, this must refer to his mental ability and his intoxication ...” [Emphasis in original].

³⁴¹*Supra* note 330 at 117.

person standard was constrained by Parliament's determination that the objective aspect of the provocation defence would be a "harsh first hurdle".

Progress in *Hill* made on the secondary fronts—expanded liberalism through the incorporation of the accused's characteristics into the reasonable person standard and the implicit preference for due process values—was offset by Justice Dickson's finding that a trial judge is not required, in each and every case, to tell the jury the specific attributes informing the ordinary person standard for the purposes of their deliberations. He stated:

The trial judge did not err in failing to specify that the ordinary person, for the purposes of the objective test of provocation, is to be deemed to be of the same age and sex as the accused. *Although this type of instruction may be helpful in clarifying the application of the ordinary person standard, I do not think it wise or necessary to make this a mandatory component of all jury charges on provocation.*³⁴²

[Emphasis added]

It seems illogical to leave an accused person's fate to the common sense of a jury which, most inconveniently, is not subject to judicial review on appeal. Such judicial pronouncements attenuate the s. 7 right to life, liberty and security of the person given that the trial judge's direction on the objective standard is discretionary, not mandatory. Does it matter if the age, sex, race or religion of the accused might be pertinent to the ordinary person test, and therefore to the issue of criminal liability, if not articulated in a clear fashion to the trier of fact?³⁴³

³⁴²*Ibid.* at 115-116.

³⁴³See also Stuart, *supra* note 333. He contends (at 100) that the Supreme Court of Canada could have adopted the full ruling in *R. v. Camplin*, [1978] A.C. 705 (H.L.) requiring a mandatory direction on the reasonable person standard. See also Mewett and Manning, *supra* note 224 at 741-742. But see Grant, Chunn & Boyle, *supra* note 204 at 6-14 to 6-17 where the authors observe (at 6-16) that the "*Hill/Camplin* approach appears to expect the

Lamer J.'s agreement in dissent that the trial judge was not required to give an instruction on the content of the ordinary person standard blurred the issue further still:

But I should like to add that there will, in my view, be cases where failure to do so, given the particular circumstances of the case, would be unfair and constitute reversible error; but not because of a special rule applicable to charges on provocation, but rather under the general rule that the judge's charge to the jury must always be fair.³⁴⁴

Who defines fairness? This perspective may be an extension of the *Sault Ste. Marie* reasoning that judicial creations, such as the category of public welfare offences and the "reasonable person", will be creatures of judicial discretion.

jury to adopt a praiseworthy attitude of racial and religious tolerance, to try to see what happened from the perspective of a person sharing the relevant characteristics of the accused." They go on to caution, however, "that *Camplin* might require, and *Hill* assume, that jurors would 'suspend commitments to fundamental liberal values such as racial and religious tolerance and endorse moral agnosticism or cultural relativism.'" [Footnotes omitted].

³⁴⁴*Supra* note 330 at 119. See also the majority reasons for decision of Lamer C.J.C. in *R. v. Jacquard*, [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1, 4 C.R. (5th) 280 [hereinafter *Jacquard* cited to C.C.C.]. Chief Justice Lamer took a functional approach to jury instructions holding that a judge was not compelled to give specific jury directions linking the mental disorder evidence to the question of intent provided his overall charge made it clear, at least to the appellate court, that it did so apply. The accused in *Jacquard* had been convicted of first degree murder in the shooting death of his stepfather; and of the attempted murder of his stepmother. In dismissing the accused's appeal from conviction, Lamer C.J.C. stated (at 10-11):

In many cases, a trial judge need only review relevant evidence once and has no duty to review the evidence in a case in relation to every essential issue. ... As long as an appellate court, when looking at the trial judge's charge to the jury as a whole, concludes that the jury was left with a sufficient understanding of the facts as they relate to the relevant issues, the charge is proper.

He concluded (at 27): "[A]ppellate courts must adopt a functional approach to reviewing jury charges. The purpose of such review is to ensure that juries are properly—not perfectly—instructed."

The subjectivist impact on criminal defences arose again in the 1990 judgment of *R. v. Lavallee*³⁴⁵, a decision of Wilson J. in which Dickson C.J.C. and Lamer J. concurred. At issue was the evidentiary foundation for a female accused's plea of self-defence to a murder charge in the context of domestic violence. The accused built her defence around s. 34(2) of the *Criminal Code*. That section states:

34. ...

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

"The feature common to both s. 34(2)(a) and s. 34(2)(b) is the imposition of an objective standard of reasonableness on the apprehension of death and the need to repel the assault with deadly force."³⁴⁶ As in the case of the reasonable person test under the provocation provision of the *Criminal Code*,³⁴⁷ the *Lavallee* decision focussed on the content of the reasonable person standard. Specifically, could it be informed by expert testimony, and, if

³⁴⁵[1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97, 76 C.R. (3d) 329 [hereinafter *Lavallee* cited to C.R.]. The female accused shot her common law husband in the back of the head as he was leaving her room. He subsequently died. She was acquitted at trial. The Manitoba Court of Appeal reversed the accused's acquittal and ordered a new trial. The Supreme Court of Canada subsequently restored the acquittal.

³⁴⁶*Ibid.* at 346.

³⁴⁷See analysis of *Hill* decision *supra* at pp. 117-121.

so, what ought to be the factual basis of that testimony and the appropriate jury direction if the factual basis, either in whole or in part, comprises hearsay?³⁴⁸

In *Lavallee* the accused's deceased common law husband threatened to kill her "when everyone else had gone."³⁴⁹ In assessing whether the accused had a reasonable apprehension of death, Wilson J. considered expert testimony on the battered woman syndrome to be invaluable to a consideration of the reasonable person standard:

Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing only the final incident may have been unlikely to recognize the batter's [sic] threat as potentially lethal. Using the case at bar as an example, the "reasonable man" might have thought, as the majority of the Court of Appeal seemed to, that it was unlikely that Rust would make good on his threat to kill the appellant that night because they had guests staying overnight.

*The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.*³⁵⁰

[Emphasis added]

Justice Wilson, in keeping with the subjectification of the reasonable person standard stated:

³⁴⁸For a discussion of the evidentiary basis of expert evidence and the impact of *Lavallee*, see R.J. Delisle "Lavallee: Expert Opinion Based On 'Some Admissible Evidence'—Abbey Revisited" (1990) 76 C.R. (3d) 366.

³⁴⁹*Supra* note 345 at 347.

³⁵⁰*Ibid.* at 352.

If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the “reasonable person” would do in such a situation. The situation of the battered woman as described by Dr. Shane strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill her captor or must she wait until he makes the attempt on the third day? *I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable. To the extent that expert evidence can assist the jury in making that determination, I would find such testimony to be both relevant and necessary.*³⁵¹

[Emphasis added]

As the above quote indicates, Wilson J. discounted the temporal connection which traditionally had linked the reasonable apprehension of death or reasonable bodily harm held by the accused to the defensive act.³⁵² In effect, Justice Wilson contextualized the concept of “imminence” through the use of expert testimony on the battered woman syndrome such that what might not be perceived as imminent to the reasonable man may be imminent to the battered woman “given her situation and her experience”.³⁵³

³⁵¹*Ibid.* at 357.

³⁵²*Ibid.* at 347, 348-349.

³⁵³*Ibid.* at 352. See David Watt “The Battered Woman Syndrome: Should She Or Shouldn’t She” (Paper presented to the National Criminal Law Program, Victoria, British Columbia, July 13-17 1998) at Section 2.8. Justice Watt (at 1-2) states emphatically: “The battered woman syndrome is *not* a defence, justification or excuse for what would otherwise be criminal conduct. It is *not* recognized as a defence, justification or excuse by statute, or the common law. It is, rather, a condition that provides a context for a statutory defence which, if successful, warrants a complete acquittal, even in cases where the batterer has been killed. In the result, battered woman syndrome is superimposed upon, or forced into, the technical requirements of existing law, rather than being accorded a separate and discrete place as a justification.” [Emphasis in original][Footnotes omitted].

Wilson J.'s analysis in *Lavallee* potentially opens the door for accused female persons with a syndrome to have their s.34(2) defence contextualized: "The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man.'"³⁵⁴ Jury instructions concerning the cogency of expert evidence would be particularly important given its significance to the defence of self-defence, and to the deliberations of the jury on the battering relationship which, Wilson J. held, was beyond the jury's ken.³⁵⁵ Whether Justice Wilson's decision can properly be said to reflect a victim analysis focussing on the harmful consequences of crime is doubtful. The case conveniently sidesteps the unpalatable reality that the deceased common law husband was no less a victim, at least in the end result, than his surviving abused spouse.

³⁵⁴*Supra* note 345 at 346. See also L'Heureux-Dubé's separate but concurring judgment in *R. v. Malott*, [1998] 1 S.C.R. 123, 21 C.C.C. (3d) 456, 12 C.R. (5th) 207 where (at 470) she states: "The expert evidence is admissible, and necessary, in order to understand the reasonableness of a battered woman's perceptions ... Accordingly, the utility of such evidence in criminal cases is not limited to instances where a battered woman is pleading self-defence, but is potentially relevant to other situations where the reasonableness of a battered woman's actions or perceptions is at issue (e.g. provocation, duress or necessity)." Justice L'Heureux-Dubé posits (at 473) that whether battered men should be accorded the same approach cannot be determined "without the benefit of research and expert opinion evidence which has informed the courts of the existence and details of 'battered woman syndrome' ..."

But see *R. v. McConnell*, [1996] 1 S.C.R. 1075, 48 C.R. (4th) 199, 42 Alta. L.R. (3d) 225 where the pre-emptive strike reasoning underlying the battered woman syndrome was deemed relevant to legitimizing the "prison environment syndrome" raised by the accused male offender in the self-defence context.

³⁵⁵*Supra* note 345 at 345.

**V. *Hunter, Stillman and Feeney*:
Characterization of the State in the Adversarial Context**

The subjectivist approach to judicial consideration of the mental element of offences such as attempted murder and of criminal defences such as provocation is a reflection not only of liberalism's focus on the individual as a repository of rights, entitled to liberty and autonomy, but of the Court's characterization of the "State"—the Government—as an oppositional entity. The predominantly legal liberal influences acting upon the Supreme Court of Canada necessitates an appreciation of the State/Individual relationship as defined by our court of final appeal, the Supreme Court of Canada.

In the 1984 case of *Hunter v. Southam*,³⁵⁶ the Court, speaking of a constitution, stated: "Its function is to provide *a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties*" [Emphasis added].³⁵⁷ Justice Dickson thus viewed "the legitimate exercise of governmental power" and "the unremitting protection of individual rights and liberties" as the major influences guiding the Court in its adjudicative function.³⁵⁸ In *Hunter v. Southam* the constitutional document was the *Charter*:

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain

³⁵⁶ *Supra* note 105. Chief Justice Laskin did not take part in this judgment. In this case the issue was whether the *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 10 violated s. 8 of the *Charter*. Lamer and Dickson J J. were members of the unanimous bench.

³⁵⁷ *Supra* at 105.

³⁵⁸ *Ibid.*

*governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.*³⁵⁹

[Emphasis added]

Liberalism's influence can be seen in the *Charter's* description as a constraint on government action in respect of the rights and freedoms guaranteed therein; as a limitation on the existing powers of federal and provincial governments to engage in search and seizure activities; and as focussing primarily on the consequences of government action for the individual effected rather than upon the effect of the impugned action in furthering legitimate government goals.³⁶⁰ The Supreme Court of Canada presented itself as a buffer between a Goliath and his unsuspecting prey albeit in deciding the constitutionality of a provision under the *Combines Investigation Act*, not the law of homicide. Nevertheless, the decision had subsequent repercussions for the question of criminal liability in the homicide context.

The majority decision in *Hunter v. Southam* establishes that the purpose of s. 8³⁶¹ of the *Charter* is "to protect individuals from unjustified State intrusions upon their privacy."³⁶²

³⁵⁹*Ibid.* at 106.

³⁶⁰See also Monahan and Petter, *supra* note 262 where the authors criticized the Supreme Court's increasing liberal activism. They stated (at 70): "The popular and elite rhetoric surrounding the Charter has emphasized that the document should receive a 'large and liberal' interpretation. The Supreme Court in particular has embraced this rhetoric ..." After referring to the *Hunter v. Southam* case as illustrative of this "rhetoric", the authors stated (at 77): "Assuming that the function of Charter review is to control state intervention, the Court has equated a large and liberal interpretation of the Charter with an expansion of rights and freedoms."

³⁶¹Section 8 of the *Charter* states: "Everyone has the right to be secure against unreasonable search or seizure."

³⁶²*Supra* note 105 at 109.

Justice Dickson concluded that this purpose could not be served unless unwarranted searches were prevented before they occurred: “This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation.”³⁶³ Dickson J. explained:

Such a requirement puts the onus on the State to demonstrate the superiority of its interests to that of the individual. As such it accords with the apparent intention of the Charter *to prefer, where feasible, the right of the individual to be free from State interference to the interests of the State in advancing its purposes through such interference.* ... [W]here it is feasible to obtain prior authorization, I would hold that such authorization is a pre-condition for a valid search and seizure.³⁶⁴

[Emphasis added]

Individual interests will rule the day unless the State can persuade the Court that its interests outweigh those of the individual.³⁶⁵ The Court’s approval of the qualifying phrase “where feasible” in discussing its championship of individual rights reflects, in part, a crime control perspective of the search and seizure powers of the State. Specifically, at the arrest or detention stage, the State *may not* be similarly constrained. Justice Cory for the majority in

³⁶³ *Ibid.* (Emphasis in original).

³⁶⁴ *Ibid.*

³⁶⁵ See *ibid.* at 108 where Dickson J.(as he then was) wrote:

The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s.8, whether it is expressed negatively as freedom from “unreasonable” search and seizure, or positively as an entitlement to a “reasonable” expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.

[Emphasis in original]

the 1997 case of *R. v. Stillman*³⁶⁶ observed: “ In [*Hunter*] v. *Southam Inc.*, ... it was held that a search conducted without prior authorization is presumptively unreasonable. However, the long-standing power of search incident to arrest is an exception to this general rule ...”³⁶⁷

The majority judgment in *Stillman* limited the scope of that exception by perpetuating the perception of the State as a negative force with which to be reckoned.

In the case at bar to proceed in the face of a specific refusal to compel the accused to submit to the lengthy and intrusive dental process, to force the accused to provide the pubic hairs and to forcibly take the scalp hairs and buccal swabs was, to say the least, unacceptable behaviour that contravened both s.7 and s.8 of the *Charter*. *It was a significant invasion of bodily*

³⁶⁶*R. v. Stillman*, [1997] 1 S.C.R. 607, 5 C.R. (5th) 1, 113 C.C.C. (3d) 321 [hereinafter *Stillman* cited to C.R.]. The accused was charged with the murder of a 14-year old girl. She had died from blows to the head. Her body had been recovered from a river. Semen was found in her vagina and a human bite mark was located on her abdomen. At issue in *Stillman* was the admissibility of evidence taken from the accused during his detention at the police station. The evidence comprised samples of hair, dental impressions, buccal swabs and a tissue containing mucous. The latter was obtained when the accused went to the washroom, blew his nose, and discarded the tissue in a wastebasket. In the final result, all evidence was excluded but the tissue containing the mucous. A powerful piece of evidence which put the accused at the scene. Although the accused’s s. 8 *Charter* right had been violated, the majority, which included Chief Justice Lamer, held that the administration of justice was not brought into disrepute by admitting the tissue into evidence. The Court found that the tissue’s seizure did not interfere with the accused’s bodily integrity, even though the Court held that the arrest was illegal and that the police had (at 29) “obtained surreptitiously that which the appellant had refused to provide them voluntarily: namely a sample from which his DNA profile could be obtained.”

The *Stillman* decision provides a synthesis of the law governing the exclusion of evidence under s. 24 of the *Charter*. Although it is not being cited in this paper for the s. 24 analysis, readers may consult the following sources on that point: Paul L. Moreau “Exclusion of evidence—Section 24(2) of the Charter” (1998) 40 C.L.Q. 148; Hogg, *supra* note 36 at 38-15 to 38-17, 45-8, 45-22 to 45-23; Tom Goddard “*Stillman*: The Majority Could Not Have Intended to Exclude Alternative *Conscriptive* Means from Consideration under the “Discoverability” Principle” (1997) 5 C.R. (5th) 110; Don Stuart “*Stillman*: Limiting Search Incident to Arrest, Consent Searches and Refining the Section 24(2) Test” (1997) 5 C.R. (5th) 99.

³⁶⁷*Stillman*, *supra* note 366 at 23.

*integrity. It was an example of the use of mental and physical action by agents of the state to overcome the refusal to consent to the procedures. It serves as a powerful reminder of the powers of the police and how frighteningly broad they would be in a police state. If there is not respect for the dignity of the individual and integrity of the body then it is but a very short step to justifying the exercise of any physical force by police if it is undertaken with the aim of solving crimes. No doubt the rack and other stock in trade of the torturer operated to quickly and efficiently obtain evidence for a conviction. Yet repugnance for such acts and a sense of a need for fairness in criminal proceedings did away with those evil practices. There must always be a reasonable control over police actions if a civilized and democratic society is to be maintained.*³⁶⁸

[Emphasis added]

Not surprisingly, the pubic hairs, scalp hairs and buccal swabs were deemed inadmissible for the purposes of the new trial ordered by the Court. The common law power of search incidental to arrest was deemed not to extend to the unlawful seizure of bodily substances. “[S]tate interference with a person’s bodily integrity is a breach of a person’s privacy and an affront to human dignity. The invasive nature of body searches demands higher standards of justification.”³⁶⁹

To buttress its conclusion the majority in *Stillman* relied on Parliament’s enactment of legislation authorizing the seizure of certain bodily substances for the purposes of D.N.A. analysis:

It is certainly significant that Parliament has recently amended the *Criminal Code* ... so as to create a warrant procedure for the seizure of certain bodily substances for the purposes of DNA testing. This suggests that Parliament has recognized the intrusive nature of seizing bodily samples. The section requires that the police have reasonable and probable grounds, as well

³⁶⁸*Ibid.* at 39-40.

³⁶⁹*Ibid.* at 26. In the subsequent 1997 *Feeney* decision, *infra* note 373, the Court extended the “higher standards of justification” to the warrantless search of a dwelling house.

as authorization from a judicial officer, before they can make such seizures. If this type of invasive search and seizure to arrest came within the common law power of search incident to arrest, it would not have been necessary for the government to create a parallel procedure for the police to follow. In my view, it would be contrary to authority to say that this is no more than a codification of the common law.³⁷⁰

[Emphasis added]

Further, “[t]he common law power of search incidental to arrest cannot be so broad as to encompass the seizure without valid statutory authority of bodily samples in the face of a refusal to provide them. *If it is, then the common law rule itself is unreasonable, since it is too broad and fails to properly balance the competing rights involved.*”³⁷¹ The Court’s decision was an amalgam of common law and statutory considerations aimed at preserving the autonomy and dignity of the individual from the investigatory arm of the State. The Court grounded its conclusion as to the inadmissibility of the evidence in Parliament’s statutory restriction on the right of law enforcement personnel to invade the bodily integrity of accused persons for investigatory purposes.

The Supreme Court of Canada in *Hunter v. Southam* had applied an objective standard in balancing the interests of the individual and those of the state. This, again, reflects the influence not only of liberal philosophy but of a Court operating on the principle of constitutional supremacy:

The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the State cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established. ...

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.* at 28.

Here again it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the State in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence *may* be uncovered by the search, would be to define the proper standard at the *possibility* of finding evidence. ... It would tip the balance strongly in favour of the State and limit the right of the individual to resist to only the most egregious intrusions.³⁷²
 [Emphasis in original]

The objective standard for evaluating prior authorization of search and seizures under the *Combines Investigation Act* was seen by the Court as a means of limiting state intrusion into the individual's privacy. As well, it was perceived as a tool for the Court to use in guarding the fluctuating boundary between the State and the individual.

The *Hunter v. Southam* analysis of the individual/state relationship had even further impact on the Supreme Court of Canada in the 1997 case of *R. v. Feeney*³⁷³. At issue was the common law rule concerning warrantless arrests following forcible entry into a dwelling-

³⁷²*Supra* note 105 at 114.

³⁷³[1997] 2 S.C.R. 13, 115 C.C.C. (3d) 129, 7 C.R. (5th) 101 [hereinafter *Feeney* to C.C.C.]. The accused appealed his second degree murder conviction claiming violations of his ss. 8 and 10(b) *Charter* rights. While investigating the vicious beating death of an 85 year old man, the police, acting upon a local resident's suggestion that they speak to the accused, proceeded to his home. They knocked on the door, announced themselves, and, receiving no answer, went inside the accused's trailer. The accused, who was in bed, was told to get up and step into the light. Observing blood stains on his clothes, the officer had his partner read the accused his rights. The accused's blood-stained shirt was seized. Later, after eight hours of interviews, the police obtained a warrant to seize the accused's shoes, Sportman cigarettes, and money hidden under his mattress. The accused did not see a lawyer until two days later between fingerprinting sessions. Sopinka J. delivered the majority opinion. Chief Justice Lamer dissented stating (at 138): "My reasons and conclusion are not to be taken as disagreeing in any way with the principles of *R. v. Stillman* ...as expressed in the reasons of Sopinka J. I agree with those principles as stated therein. My disagreement is with their application on the facts of this case."

house. The majority reformulated the previous judicial exposition of the test, for, the pre-*Charter* context in which earlier cases had been decided, placed insufficient emphasis on the primacy of the individual's privacy interest:

The analysis in *Landry* was based on a balance between the individual's privacy interest in the dwelling-house and society's interest in effective police protection. *This Court held that the latter interest prevailed and warrantless arrests in dwelling-houses were permissible in certain circumstances.* While such a conclusion was debatable at the time, in my view, *the increased protection of the privacy of the home in the era of the Charter changes the analysis in favour of the former interest: in general, the privacy interest outweighs the interest of the police and warrantless arrests in dwelling-houses are prohibited.*³⁷⁴

[Emphasis added]

The Court concluded that, in addition to the *Landry* formulation of the common law rule governing warrantless arrests in private dwellings, the law enforcement authorities also must have prior judicial authorization to enter the dwelling:

To summarize, in general, the following requirements must be met before an arrest for an indictable offence in a private dwelling is legal: a warrant must be obtained on the basis of reasonable and probable grounds to arrest and to believe the person sought is within the premises in question.; and proper announcement must be made before entering.³⁷⁵

Chief Justice Lamer did not agree with the reasoning of either Sopinka J. or L'Heureux-Dubé J. although he agreed with the result reached, in dissent, by Justice L'Heureux-Dubé. He preferred the reasoning of Lambert J.A. of the British Columbia Court of Appeal who favoured a crime control analysis, characterizing the situation faced by the police in *Feeney* as one of exigent circumstances.

³⁷⁴*Ibid.* at 154.

³⁷⁵*Ibid.* at 158.

The fundamental point in relation to the police conduct in this case was that there had been a savage attack on an elderly man in a small community which suggested a killer out of control in the community and that the police had a duty to protect the community. They also had a duty to try to locate and neutralize the killer and if possible to gather evidence that would satisfy them then and there that the killer had been apprehended, and that would later tend to establish that the correct person had been apprehended and made to stand trial.

In those circumstances it is my opinion that the police were facing a situation which could be classified as an emergency, or as exigent circumstances which would require immediate action, and that in addition they were facing circumstances where the possibility of the destruction of evidence, particularly evidence in relation to bloodstains, was a real one and had to be addressed.³⁷⁶

Contrarily, the majority in *Feeney* did not agree with Lambert J.A.'s characterization of the situation and added that "even if they [exigent circumstances] existed, safety concerns could not justify the warrantless entry into the trailer in the present case."³⁷⁷ Sopinka J. explained that "[t]o define these as exigent circumstances is to invite such a characterization of every period after a serious crime."³⁷⁸ Is this, in reality, not the case? The *Feeney* decision is a classic example of the confluence of disparate ideological influences on judicial decision-making: liberalism in the portrayal of the state, and crime control and due process values in dividing the Court on the correct application of legal principles to the facts of the case.³⁷⁹

³⁷⁶*R. v. Feeney* (1995) 54 B.C.A.C. 228, 88 W.A.C. 228 [hereinafter *Feeney* (B.C.C.A.) cited to B.C.A.C.] at 234.

³⁷⁷*Ibid.* at 159.

³⁷⁸*Ibid.*

³⁷⁹See Don Stuart "Feeney: New Charter Standards for Arrest and Undesirable Uncertainty" (1997) 7 C.R. (5th) 175. The author notes (at 177):

Sopinka J. makes a compelling case for the majority that, since prior judicial authorization is the fundamental *Charter* requirement for searches under *Canada* (*Director of Investigation & Research, Combines Investigation*

Responding to the Supreme Court of Canada's reformulation of the common law rule governing arrest in a dwelling house, Parliament enacted ss. 529 to 529.5³⁸⁰ of the *Criminal Code*. The new provisions aim "to ensure that peace officers are able to effectively discharge powers of arrest, and secure protection of the public, while, at the same time, respecting privacy interests in residential dwellings. The net effect of the ... is to legislate and clarify the procedures which must be followed in the post-Feeney era."³⁸¹

VI. *Creighton*: Manslaughter, Penal Negligence and Criminal Liability

The common law definition of unlawful act manslaughter was the subject of judicial scrutiny in *R. v. Creighton*.³⁸² McLachlin J., on behalf of a slim majority, confirmed the historical common law test for determining the requisite *mens rea* of unlawful act

Branch) v. *Southam Inc.*, so too should there be a general constitutional requirement of warrant before entry into a dwelling house to arrest.

The problem with the majority judgment lies in its refusal to recognize a general exigent circumstances exception.

Stuart contends (at 178) that the Court's failure to recognize such an exception has negative repercussions for law enforcement:

In the absence of the recognition of a general exigent circumstances exception, the police have been placed in an unenviable position. Even in the presence of clear exigent circumstances of danger or destruction of evidence, they might well be reluctant to move lest the case be jeopardized. The Supreme Court has been insufficiently attentive to the practical consequences of their judgment.

³⁸⁰S.C. 1997, c. 39, s. 2.

³⁸¹Renee M. Pomerance "Entry And Arrest In Dwelling Houses" (Paper presented to the National Criminal Law Program, University of Victoria, Victoria, British Columbia, July, 1998) at Section 5.2, p. 4. [Underlining in original] [Unpublished].

³⁸²[1993] 3 S.C.R. 3, 23 C.R. (4th) 189, 83 C.C.C. (3d) 346 [hereinafter *Creighton* cited to C.R.]

manslaughter—objective foreseeability of bodily harm.³⁸³ The *Creighton* decision introduces into the fault analysis vocabulary of the law of homicide the concept of penal negligence. It will be recalled that in *Sault Ste. Marie* Dickson J. (as he then was) noted that “[w]ithin the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent would make, or who fails to know facts he should have known, is innocent in the eyes of the law.”³⁸⁴ Penal negligence is not tantamount to simple negligence. It connotes a marked departure from the standard of a reasonable person.³⁸⁵ Lamer J., for a substantial minority, agreed on the objective standard but would have changed it to provide for objective foreseeability of death, not simply bodily harm. Further, he would have injected the objective standard for fault—the reasonable person—with “any human frailties which might have rendered the accused incapable of having foreseen what the reasonable person would have foreseen.”³⁸⁶ Under Lamer C.J.C.’s objective test “the accused’s

³⁸³*Ibid.* at 208. The 5:4 majority rested on LaForest J., who in separate reasons, expressed difficulty in agreeing with either the Chief Justice or McLachlin J. He stated (at 237): “This case caused me difficulty because both sets of reasons take a view of the law that I have in the past resisted.” But see Grant, *supra* note 238 at 218 where she writes:

By a narrow 5:4 split, the Court held that, as a matter of statutory interpretation, only bodily harm need be foreseeable and that this standard is constitutionally adequate. Although McLachlin J.’s judgment attracted a majority, it was written largely as a response to the minority judgment of Lamer C.J. One can only assume that Lamer C.J. thought he was writing for a majority of the Court and that some members defected at the last moment ...” [Footnotes omitted]

³⁸⁴*Supra* note 103 at 40.

³⁸⁵See also *R. v. Hundal*, [1993] 1 S.C.R. 867, 19 C.R. (4th) 169, 79 C.C.C. (3d) 97.

³⁸⁶*Supra* note 382 at 229.

behaviour is still measured against the standard of the reasonable person, but the reasonable person is constructed to account for the accused's particular capacities and resulting inability to perceive and address certain risks."³⁸⁷

McLachlin J. rejected the minority position outright. In so doing, she did a victim analysis of the required symmetry between fault and consequences through the application of the "thin skull" rule which "requires aggressors, once embarked on their dangerous course of conduct which may foreseeability injure others, to take responsibility for all the consequences that ensue, even to death."³⁸⁸ As well, she applied a victim analysis to the ordinary person test concluding:

In summary, I can find no support in criminal theory for the conclusion that protection of the morally innocent requires a general consideration of individual excusing conditions. The principle comes into play only at the point where the person is shown to lack the capacity to appreciate the nature and quality or the consequences of his or her acts. Apart from this, we are all, rich and poor, wise and naive, held to the minimum standards of conduct prescribed by the criminal law.³⁸⁹

³⁸⁷*Ibid.* at 231. The Chief Justice relied on the liberal writings of H.L.A. Hart and Don Stuart (at 229) in justifying his position.

³⁸⁸*Ibid.* at 204-205. Grant, *supra* note 238 argues at 209 that the *Creighton* decision represents a movement away from liberalism in substantive criminal law: "In general we are witnessing a move away from a focus on individual fault towards more concern with the harmful consequences of crime. This may be a function of a broader trend within the Court witnessed over the past decade in constitutional law and only recently in criminal law: a shift away from a liberal conception of the state." See also Patrick Healy "The Creighton Quartet: Enigma Variations In A Lower Key" (1993) 23 C.R. (4th) 265: "As for the first point, these cases mark a high point in the courts trend toward restriction of substantive review of the criminal law."

³⁸⁹*Supra* note 382 at 211-212. This position was criticized by Don Stuart in "Continuing Inconsistency But Also Now Insensitivity That Won't Work" (1993) 23 C.R. (4th) 240.

Despite their differences, both the majority and minority decisions agree that manslaughter is not a crime of stigma necessitating a subjective standard of fault.³⁹⁰

The *Creighton* quartet³⁹¹ established that the objective standard of fault is alive and well.³⁹² Arguably, this represents a retreat from the judicial activism seen in such cases as *Vaillancourt*, *Martineau*, and *Logan* where a subjective analysis of fault governed the outcome. One author notes that this retreat is reflective of a new policy being pursued by the Court:

³⁹⁰*Ibid.* at 200-202 (reasons of McLachlin J.); at 224-225 (reasons of Lamer C.J.C.). However, the Chief Justice (at 227) found that the stigma attached to the offence of manslaughter requires, at a minimum, objective foreseeability of the risk of death in order to satisfy s. 7 of the *Charter*.

³⁹¹*Creighton*, *supra* note 382 (unlawful act manslaughter); *R. v. Naglik*, [1993] 3 S.C.R. 122 (failure to provide necessities of life); *R. v. Finlay*, [1993] 3 S.C.R. 103 (careless storage of a firearm); and *R. v. Gosset*, [1993] 3 S.C.R. 76 (unlawful act manslaughter). Of significance to this thesis is the fact that the Court, applying the stigma benchmark, held that none of these crimes merited a subjective standard of fault.

³⁹²See Bruce P. Archibald "Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (with Ruminations on Restorative Justice) (1998) 40 C.L.Q. 263 at 278 where he writes:

The Supreme Court of Canada has been concerned, particularly in the light of the concept of "principles of fundamental justice" in Charter s.7, not to countenance the imposition of criminal liability on the "morally innocent". However, the court no longer equates the moral imposition of criminal sanctions with subjective fault in all circumstances. Those who fail to comply with the behavioural standards of the reasonable person, at least in so far as they depart from such standards to the extent of a marked and substantial degree, are now thought worthy of criminal punishment. It is now deemed moral to punish the grossly negligent. ... Subjective fault is constitutionally required for murder, attempt murder, theft and other unspecified offences of high penalty and stigma. But Parliament may constitutionally adopt mixed fault and objective fault standards in other areas, within the outer limits of the prohibited combination of absolute liability and imprisonment.

[Footnotes omitted]

In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)* and *R. v. Vaillancourt*, fuelled by a purposive approach to interpretation of the *Charter*, a majority held that s. 7 implied a broad jurisdiction for reform of the criminal law. Since then the court has unanimously resiled from this view. *A new majority has asserted an even narrower view of its jurisdiction under s. 7, based in part on a desire to show greater deference to the legislature and settled jurisprudence*, and in part on a belief that the purposes of the *Charter* have to be interpreted flexibly by the court with regard to the specific legal context and questions of policy put in issue before it. ... In short, the path from *Vaillancourt* to the current position is a path in retreat.³⁹³
 [Emphasis added] [Footnotes omitted]

Whereas the *Creighton* majority position on the constitutionality of the *mens rea* for unlawful act manslaughter appears to be based on the historical longevity of the offence as defined,³⁹⁴ a similar argument was not persuasive when the Court found the constructive murder provisions of the *Criminal Code* to be unconstitutional.³⁹⁵ The tide was turning in

³⁹³Healy, *supra* note 388 at 266.

³⁹⁴*Supra* note 382 at 200. Justice McLachlin writes: “We are here concerned with a common law offence virtually as old as our system of criminal law.”

³⁹⁵See *Vaillancourt*, *supra* note 100 at 320 where Lamer J. observed: “Although the concept of felony murder has a long history at common law, a brief review of the historical development of s. 213 indicates that its legitimacy is questionable.” The majority, led by Lamer J., struck down that portion of the constructive murder *Criminal Code* provisions which attributed criminal responsibility to an accused who caused the victim’s death while committing or attempting to commit one of the enumerated offences and used a weapon or carried a weapon on his person. See also Alan Gold “Constructive Manslaughter Should Not Have Survived” (1993) 23 C.R. (4th) 262. The author maintained (at 262);

The judgment of McLachlin J. ... is based almost entirely upon a *historical* argument, revisited in various forms but all the same argument at bottom, that “the offence of unlawful act manslaughter, as defined by our courts and those in other jurisdictions for many centuries, is entirely consistent with the principles of fundamental justice.” What is troubling about this judgment is that almost every word of it could have been written about the felony-murder rule and used to justify the continuation of that doctrine of constructive liability.”
 [Emphasis in the original]

favour of stability in the legal system and against ongoing social reform through judicial decision-making.³⁹⁶

The *Charter* had been in effect approximately 11 years when *Creighton* was decided. Over the course of those 11 years the Supreme Court of Canada initially had articulated a burgeoning subjective approach to legal guilt reflected in its statutory and constitutional analysis of the requisite mental element for murder and attempted murder, in its partial subjectification of the reasonable person test in the provocation defence to murder, and in its characterization of the state as a negative entity at least in the area of criminal law. By imbuing the State with a negative persona, the Court constructed a justificatory premise for its subjective approach to matters affecting the determination of criminal liability in an adversarial “State v. Individual” scenario. In so doing, the Court continued to shed its pre-*Charter* attitude of legislative deference in favour of a more activist approach to its adjudicative function. The *Creighton* decision marked a shift in the balance with repercussions for the subjectivist approach to criminal liability. In *Sault Ste. Marie* the Court had rejected negligence as a basis for criminal liability; in *Creighton* the marked-departure-from-the-norm standard underpinning penal negligence “partly reconcile[d] the recently

³⁹⁶A similar approach favouring stability in the law was articulated in *Hibbert*, *supra* note 241 at 156 where Lamer C.J.C. for the majority stated:

Since the sole aspect of s. 21 left with the jury in the appellant’s trial was s. 21(1)(b), the analysis could strictly speaking, be restricted to that subsection. ... *In my view, in order to avoid creating undue confusion and uncertainty in the law, it is appropriate that we address the issue on the continued validity of Paquette’s statements on the relation between duress and mens rea under s. 21(2) head on. I will thus extend my analysis beyond what is strictly necessary for the resolution of the present appeal by, considering s. 21(2) in addition to s. 21(1)(b).* [Emphasis added]

neglected dicta in *Sault Ste. Marie* ... that a negligent person is innocent in the eyes of the criminal law ...³⁹⁷

The *Creighton* decision represents the other side of liberal thought—the individual, provided he or she is not mentally incapacitated—is responsible for the harm he or she does to another person. It is not a matter of the Court protecting one set of interests or values at the expense of another, but of finding the balance between the two in the context of the particular crime. “The criminal law must reflect not only the concerns of the accused, but the concerns of the victim and, where the victim is killed, the concerns of society for the victim’s fate. Both go into the equation.”³⁹⁸

VII. *R. v. Daviault*: The Charter and the Adjudicative Function at Common Law

Reformulating common law rules in the post-*Charter* context underscores the impact of *Charter* values upon the law’s evolution. For example, in the sexual assault case of *R. v. Daviault*,³⁹⁹ the common law principle limiting the defence of intoxication to crimes of specific intent was re-examined under the auspices of the *Charter* and the Court’s reasoning in *Vaillancourt*.

³⁹⁷*Charter Justice*, *supra* note 10 at 80.

³⁹⁸*Supra* note 382 at 207-208.

³⁹⁹[1994] 3 S.C.R. 63, 93 C.C.C. (3d) 21, 33 C.R. (4th) 165 [hereinafter *Daviault* cited to C.R.]. Although he would have taken the majority position in *Daviault* even further, Chief Justice Lamer (at 176) agreed with Cory J.’s position on the law and supported the creation of an exception to the *Leary* rule that self-induced intoxication can not be used as a defence to a general intent offence. He further agreed that the accused’s appeal from conviction should be allowed and a new trial ordered.

Cory J. for the majority adopted the approach to common law principles that offend the *Charter* articulated by Lamer C.J.C. in *Swain*:

In *R. v. Swain*, [1991] 1 S.C.R. 933, Lamer C.J.C. ... wrote on this issue. At p. 978 he stated:

Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s.1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

This then is the approach that should be adopted when a common law principle is found to infringe the *Charter*.⁴⁰⁰

⁴⁰⁰*Ibid.* at 192.

At issue was the common law principle established in *R. v. Leary*⁴⁰¹ that self-induced intoxication could not form the basis of an acquittal for a general intent offence, even in the case of extreme intoxication where a reasonable doubt exists as to the accused's capacity to form the requisite intent for the crime alleged. "In such a situation, self-induced intoxication is substituted for the mental element of the crime."⁴⁰² The Court had grappled with the issue of a substituted mental element in *Vaillancourt* and applied the same reasoning in *Daviault*:

[T]he substituted mens rea rule has the effect of eliminating the minimal mental element required for sexual assault. Furthermore, mens rea for a crime is so well recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice. See *R. v. Vaillancourt*, [1987] 2 S.C.R. 636.

In that same case it was found that s. 11(d) would be infringed in those situations where an accused could be convicted despite the existence of reasonable doubt pertaining to one of the essential elements of the offence; see *Vaillancourt*, supra, at pp. 654-56. *That would be the result if the Leary rule was to be strictly applied.*⁴⁰³ [Emphasis added]

In carving out an exception to the *Leary* principle, Cory J. was troubled by the rule's indiscriminate application in light of other fundamental principles of criminal liability:

In my view, the strict application of the *Leary* rule offends both ss. 7 and 11(d) of the *Charter* for a number of reasons. The mental aspect of an offence, or mens rea, has long been recognized as an integral part of crime. The concept is fundamental to our criminal law. That element may be minimal in general intent offences; nonetheless, it exists.⁴⁰⁴

⁴⁰¹[1978] 1 S.C.R. 29, 74 D.L.R. (3d) 103, 37 C.R.N.S. 60 [hereinafter *Leary* cited to C.R.N.S.].

⁴⁰²*Supra* note 399 at 187.

⁴⁰³*Ibid.* at 190.

⁴⁰⁴*Ibid.* at 189.

However, giving credence to self-induced intoxication as a defence to “general intent” crimes such as sexual assault was problematic. It appeared as if the accused was to be rewarded both for his or her irresponsible drinking and for any criminal acts which occurred while under the influence of alcohol. Not a value choice widely endorsed in society.

The majority Bench in *Daviault* was not blind to the downside of its decision however true to criminal principle it may have been. Justice Cory was quick to observe that “it is only those who can demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal element required for a general intent offence.”⁴⁰⁵ He added that “it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to succeed.”⁴⁰⁶ Almost as if in anticipation of public outrage at the decision, Cory J. rounded out his comments by observing “that it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk.”⁴⁰⁷ Which is exactly what Parliament did shortly thereafter.

Section 33.1⁴⁰⁸ of the *Code*, captioned “Self-induced Intoxication”, was Parliament’s response to the *Daviault* decision. That section states:

⁴⁰⁵*Ibid.* at 196-197.

⁴⁰⁶*Ibid.* at 197.

⁴⁰⁷*Ibid.*

⁴⁰⁸Enacted by *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, s. 1.

(1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as required in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

Parliament exercised its criminal law power in the interest of the Canadian polity. This legislative response sends the message that the bodily integrity of the individual trumps even fundamental notions of criminal liability where a person, voluntarily consuming alcohol, “departs markedly from the standard of reasonable care generally recognized in Canadian society”. Given the post-*Creighton* timing of the *Daviault* decision and Parliament’s response thereto, a “marked departure from the norm” would appear to be a plausible objective standard by which to measure the accused’s level of intoxication.

Richard Wolson captures the social and legal ramifications of the pre- and post-*Daviault* response, both judicial and legislative, to the defence of intoxication:

In the final analysis, it appears that the law of plea of intoxication has come full circle: the common law developed, over the course of 70 years, a judicial response to a perceived social problem, namely, punishing those who voluntarily become impaired and commit acts of violence against fellow citizens. To maintain the common law, Courts needed to create the legal fiction of the specific/general intent dichotomy. Intellectual honesty, in the end, prevails, largely due to the expanding role of the *Charter* analysis. The logic of the common law is then reconciled. However, the reconciliation is

done at the expense of the perceived social policy. One of the underpinnings of the change in judicial opinion was the social science evidence that there is no correlation between alcohol and violence. The public hue and cry, informed, no doubt, by particular lobby groups, compelled Parliament to enact legislation to take us back, more or less, to the *status quo ante*. *Quaere* whether anything has changed?⁴⁰⁹

A constitutional challenge has been launched against s. 33.1 in *R. v. Vickberg*⁴¹⁰ It will be interesting to see the Supreme Court of Canada's response to this challenge given its invitation to Parliament in *Daviault* to develop a legislative response to its judgment.

Like *Feeney*, the *Daviault* decision is illustrative of the interplay between Parliament and the Supreme Court of Canada in fashioning our criminal justice system by determining the underlying principles or values governing the criminal process. Similarly, in *R. v. Seaboyer*,⁴¹¹ the Supreme Court of Canada struck down the then existing "rape-shield" provisions of the *Criminal Code* because of over breadth. Acknowledging that the *Code* provisions aimed to balance the interests of complainants, McLachlin J., on behalf of the majority which included Chief Justice Lamer, maintained that "the Courts must seek a middle way that offers the maximum protection to the complainant compatible with the maintenance of the accused's fundamental right to a fair trial."⁴¹² The blanket application

⁴⁰⁹Richard J. Wolson "Quelling The Spirits: The Evolution Of The Plea of Intoxication" (Paper presented to the National Criminal Law Program, University of Victoria, Victoria, British Columbia, July 1998) at Section 2.3, p. 8. [Unpublished].

⁴¹⁰[1998] B.C.J. 1034.

⁴¹¹ [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 7 C.R. (4th) 117 [hereinafter *Seaboyer* cited to C.R.].

⁴¹²*Ibid.* at 128.

of the provisions in question served to exclude both irrelevant and relevant evidence thereby increasing the possibility of a conviction of an innocent accused.

To summarize, s. 276 has the potential to exclude otherwise admissible evidence which may in certain cases be relevant to the defence. Such evidence is excluded absolutely, without any means of evaluating whether in the circumstances of the case the integrity of the trial process would be better served by receiving it than by excluding it. Accepting that the rejection of relevant evidence may sometimes be justified for policy reasons, the fact remains that s. 276 may operate to exclude evidence where the very policy which imbues the section—finding the truth and arriving at the correct verdict—suggests the evidence should be received. *Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed in the absence of an assurance that the curtailment is clearly justified by even stronger contrary considerations. What is required is a law which protects the fundamental right to a fair trial while avoiding the illegitimate inferences from other sexual conduct that the complainant is more likely to have consented to the act or less likely to be telling the truth.*⁴¹³

[Emphasis added]

Even though the majority in *Seaboyer* struck down then s. 276 of the *Code*, it was not oblivious to the legitimate goal of Parliament in enacting the legislation in the first place.

Nor were the old common law rules governing the admissibility of evidence of the complainant's sexual conduct revived to fill the gap created by the unconstitutionality of the impugned provision. "Like other common law rules of evidence, they must be adapted to conform to current reality.... [T]he reality in 1991 is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent."⁴¹⁴ Justice McLachlin held "that the old rules which permitted evidence of sexual conduct and condoned invalid inferences from it solely for these purposes

⁴¹³*Ibid.* at 147.

⁴¹⁴*Ibid.* at 154-155.

have no place in our law.”⁴¹⁵ Although guidelines were proposed for the introduction and use of sexual conduct evidence in the absence of both statutory and applicable common law principles, the Court noted that “[s]uch guidelines should be seen for what they are—an attempt to describe the consequences of the application of the general rules of evidence governing relevance and the reception of evidence—and not as judicial legislation cast in stone.”⁴¹⁶ Parliament responded to *Seaboyer* by reenacting s. 276⁴¹⁷ of the *Criminal Code*. The constitutionality of the new provisions recently has been challenged, unsuccessfully, in *R. v. Darrach*.⁴¹⁸

VIII. Summary

This brief tour of the law of homicide, exclusive of the infanticide offence,⁴¹⁹ is meant to highlight the tensions that operate on the justices at the Supreme Court of Canada in the exercise of their adjudicative function. Specifically considered was the approach pursued by the Court in deciding issues of criminal liability in the law of homicide. Questions arising during constitutional adjudication do not always involve judicial review of impugned legislation. Statutory provisions otherwise within Parliament’s legislative

⁴¹⁵*Ibid.* at 155.

⁴¹⁶*Ibid.* at 157.

⁴¹⁷S.C. 1992, c. 38, s. 2.

⁴¹⁸(1998), 38 O.R. (3d) 1, 122 C.C.C. (3d) 225, 13 C.R. (5th) 283 (Ont.C.A.) leave to appeal to the Supreme Court of Canada granted June 4, 1998 at [1998] S.C.C.A. No. 184.

⁴¹⁹This offence is defined under s. 233 of the *Criminal Code*. For a detailed review of the offence see Grant, Chunn & Boyle, *supra* note 204 at 4-81 to 4-103.

competence often are subjected to interpretive techniques which effect the operational impact of the provision. Such was the case in the *Hill* and *Hibbert* decisions. As well, common law rules—judicial creations—may be reformulated subject only to the discretion of the Court and such doctrines as *stare decisis*.⁴²⁰

⁴²⁰The Court's adherence to its previous decisions—*stare decisis*—was addressed in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 62 C.C.C. (3d) 193, 2 C.R. (4th) 1 [hereinafter *Chaulk* cited to C.R.]. There the Court considered, *inter alia*, the meaning of the word “wrong” in then s. 16(2) of the *Criminal Code*. The Court already had determined the meaning of that word in the 1977 case of *R. v. Schwartz*, [1977] 1 S.C.R. 673. In *Schwartz*, a majority of the Court held that the word “wrong” meant contrary to law. Dickson J.'s dissenting opinion in *Schwartz*—Laskin C.J.C. concurring—was revisited in *Chaulk*. Lamer C.J.C., in overturning the *Schwartz* ruling to find that the word wrong meant morally wrong, stated (at 41-42):

With respect for contrary views, it is my opinion that *Schwartz* was wrongly decided by this Court and that the dissenting opinion of Dickson J. (concurrent in by Laskin C.J.C., Spence and Beetz, JJ.) is to be preferred. The majority judgment fails, in my respectful view, to appreciate the manner in which insanity renders our normal principles of criminal responsibility inapplicable to an individual as well as the particular objectives of s. 16 of the Code.

I do not dispute the principle that this Court should not easily overrule its prior judgments. In this regard, I refer to the words of Dickson C.J.C., in which I concurred, in R. v. Bernard ...:

“Let me say immediately that, even if a case were wrongly decided, certainty in the law remains an important consideration. There must be compelling circumstances to justify departure from a prior decision. On the other hand, it is clear that this Court may overrule its own decisions and indeed, it has exercised that discretion on a number of occasions.”

In my opinion, it is appropriate in this case to overrule the majority decision in Schwartz with respect to the meaning of the word “wrong” in s. 16(2). ... In my view, Schwartz had the effect of expanding the scope of criminal responsibility unacceptably to include persons who, by reason of disease of the mind, were incapable of knowing that an act was wrong according to the normal and reasonable standards of society even though they were aware that the act was formally a crime. It is now necessary for this Court to reconsider its decision in Schwartz in order to redefine the scope of criminal liability in a manner that will bring it into accordance with the basic principles of our criminal law. [Emphasis added]

The case law analysis undertaken in Chapter 3 illuminates the subtleties of both statutory interpretation and of reformulating the common law. More importantly, the case law review reveals that the Supreme Court of Canada is more than a final arbiter of legal disputes; it is also an arbiter of values, particularly when not in a confrontational position vis-a-vis Parliament through its criminal legislation.

Daviault, Seaboyer and *Feeney* are just three examples of the reciprocal impact of developments in the common law and in statutory law. The Supreme Court of Canada has been striving to synchronize these developments through the articulation and application of *Charter* values. The extent to which this is accomplished will determine not only the type of criminal process in Canada, but also the stability of that process and the certainty of the law therein. Values change; it is the fluidity of values in our heterogenous society which may present the greatest challenge to the Supreme Court of Canada in facilitating coherency in both the written and the common law governing the criminal law process.

Coordination of the scope of criminal liability with basic principles of criminal law was used to justify non-adherence to a pervious decision.

Chapter 4

Conclusion: Making Sense of the Changing Role of the Supreme Court of Canada in Post-Charter Criminal Law

In Chapter One the following question was posed: What are the operational limits of the judicial function in post-Charter criminal law as revealed through an analysis of case law emanating from the Supreme Court of Canada, particularly, but not exclusively, in the law of homicide? Chief Justice Dickson posed a similar question in *Harrison v. Carswell*,⁴²¹ a pre-Charter case in which the Supreme Court of Canada had to decide whether the respondent picketer committed a trespass on the appellant's shopping centre property:

The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic beliefs. *It raises also fundamental questions as to the role of this Court under the Canadian constitution. The duty of this Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the Court to act creatively—it has done so on countless occasions; but manifestly one must ask—what are the limits of the judicial function?*⁴²²

[Emphasis added]

Speaking for a majority of the Court, Dickson C.J.C. adopted a deferential position to the impugned legislation creating the picketing offence. "If there is to be any change in this statute law, if A is to be given the right to enter and remain on the land of B against the will of B, it would seem to me that such a change must be made by the enacting institution, the

⁴²¹[1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68, 25 C.C.C. (2d) 186 [hereinafter cited to S.C.R.].

⁴²²*Ibid.* at 218.

Legislature, *which is representative of the people and designed to manifest the political will, and not by the Court.*⁴²³ This deferential attitude to legislative bodies was typical of pre-*Charter* law in Canada. More specifically, in the criminal context, Dickson J. adopted the same reasoning in the 1983 *Farrant* decision, a pre-*Charter* constructive murder case:

Section 213 embodies the concept that when a weapon is used in the course of certain specified criminal acts and death results, the accused is treated as if the mens rea for murder existed and the homicide is murder. ...

It might be observed that the constructive murder rule has been the subject of protracted criticism ... A killing in the course of the specified offences may be murder even though the offender never intended that result. All that is required is the mens rea for the lesser offence ... In England the Homicide Act, 1957 .. did away with the rule. *The rule may seem harsh but it is not the function of this court to consider the policy of legislation validly enacted. So long as the section continues in our Criminal Code it must be given effect in accordance with its terms.*⁴²⁴

[Emphasis added]

The review of post-*Charter* developments in the law of homicide explored in Chapter 3 underscores the extent to which such an approach to the judicial function no longer is sufficient. Again, the question must be asked: What are the operational limits of the judicial function in Canadian criminal law in the latter 20th century? An important question, for the criminal law reflects, in large measure, prevailing community values. The extent of the congruity says something about the confidence of society in both the criminal justice system and the judiciary who stand as guardians thereto.

Consistent with interpretive or middle-level theory, the actual practice of criminal law has been the starting point of analysis. The adversarial nature of the Canadian legal system

⁴²³ *Ibid.* at 219.

⁴²⁴ *Supra* note 102 at 290-291.

has been acknowledged as have the challenges to the bipartite nature of the criminal trial. However, whatever the criticisms about the “underinclusiveness” of the adversarial system, the fact is that a trial proceeds as an adversarial contest between the accused and the State. This is the practical reality. Legal practitioners and academics ought not to lose sight of the trial as a forum in which the State tests the accused’s innocence. At common law, under the *Bill of Rights*, and under the *Charter*, the presumption of innocence is paramount. A trial, therefore, is not about the accused proving his innocence—it is about the Crown proving the allegation of wrongdoing according to law.⁴²⁵ The law of homicide has been the primary, albeit not the sole, focus of my analysis because death is the ultimate consequence of crime. How the Supreme Court of Canada decides criminal liability in the hardest of cases, is largely determinative of its overall approach to liability in the criminal justice system.

Given the influence of the Supreme Court of Canada, through its decision-making, upon the criminal law, an attempt has been made herein to highlight what may be considered the major forces impacting upon the judicial function at the Supreme Court of Canada level. The wealth of criticism directed against our highest court, the apparent fluidity of the law, and my concern as a criminal practitioner for the apparent instability in the legal system prompted this modest investigation of the judicial function. Yet, the Court is an integral part of Canadian political, social and legal life. The inevitability of social change in a multi-

⁴²⁵Reverse onus provisions under the *Code* are an instance where the accused is called upon to prove his innocence. However, as in *Laba*, these provisions in the post-*Charter* era are subject to strict judicial scrutiny to ensure that they impair minimally the presumption of innocence.

cultural, stratified Canada, and the legal response thereto is not, as Gunter Teubner points out, of the “stimulus-response” variety:

For the neo-evolutionists, legal autonomy means that law changes in reaction only to its own impulses, for the legal order—norms, doctrines, institutions, organizations—reproduces itself. But in so doing, the legal system is not insulated from its environment. The key idea, central to the neo-evolutionary theories, is the “self-reference of legal structures.” *Legal structures so conceived reinterpret themselves, but in the light of external needs and demands. This means that external changes are neither ignored nor directly reflected according to a “stimulus-response scheme.” Rather, they are selectively filtered into legal structures and adapted in accordance with a logic of normative development.* Even the strongest social pressures influence legal development only insofar as they first shape “legal constructions of social reality.” Thus, broader social developments serve to “modulate” legal change as it obeys its own developmental logic.⁴²⁶

[Emphasis added] [Footnotes omitted]

Coordinating the mutual readjustment between society and the criminal law has been the task for the Supreme Court of Canada in this unprecedented era of legal rights litigation. The *Lavallee* case, for example, reveals the Court’s attempt to anchor social reality in basic criminal law principles. The question of criminal liability in the circumstances of that case was tempered by social justice concerns.

Liberal theory has played a dominant role in the adversarial legal tradition, but a constrained role in pre-*Charter* Canadian criminal law where democratic values informing the concept of parliamentary supremacy were ascendant. However, in the post-*Charter* era, the emphasis on individual rights often has been at the expense of State initiatives. The

⁴²⁶*Supra* note 17 at 248-249.

Supreme Court of Canada's portrayal of the State as a negative entity is a theme running throughout the *Charter* case law on homicide. The *Stillman* and *Feeney* decisions are illustrative of this fact. As a result, there is a fluctuating reliance on either crime control or due process values. In the case law analysed in this thesis, due process values appear to have the upper hand.

Liberalism's championship of individual rights as against the State also has generated a redefinition of basic principles of criminal liability in constitutional adjudication. Most significantly, the constructive murder provisions of the *Code* fell under the *Charter's* hammer as a subjective analysis of the fault requirement for murder trumped legislative prescriptions to the contrary. The unparalleled activism of the Supreme Court of Canada in this area of homicide law occurred in the first decade following the *Charter's* entrenchment. The Court's record in civil liberties under the *Bill of Rights* had been unimpressive. The same would not be said of the Court under the *Charter* where the advent of constitutional supremacy liberated the Supreme Court of Canada from its historical obscurity.

Section 52 of the *Constitution Act, 1982* has had a profound impact upon the judicial function. Before 1982, the Supreme Court of Canada operated in a political and legal regime where Parliamentary supremacy set the tone for judicial decision-making. Deference to legislative bodies was the norm; flashes of judicial activism, as in the *Drybones* case, few. Writing in the 1982 Special Edition of the Supreme Court Law Review, Alan Gold explored the potential impact of the Court's conservative past on the *Charter's* future:

Unfortunately, the judicial utilization of the Charter's provisions, so optimistically contemplated by the Attorney General, has little historical support. It is fair to say that "[h]istorically in Canada, to the extent that we

have relied on the judiciary as the instrument of definition and protection of our civil liberties we have not ... been well served," and this is true both before and after the statutory enactment of the *Canadian Bill of Rights*. ... Even the famous decision in *R. v. Drybones*, whose initial light dimmed so swiftly, can still evoke some pride in the decision itself, and regret and disappointment only as to its judicial aftermath.

....
 The importance of the fact of entrenchment for ultimate judicial utilization cannot be overstated. The lack of entrenched character to the *Canadian Bill of Rights* has had a pervading influence on judicial interpretation throughout the Bill's case law. There was some slight movement, at least in the eyes of Chief Justice Laskin, whose description of the *Canadian Bill of Rights* evolved from one of a mere "statutory jurisdiction" to that of "quasi-constitutional" instrument. But essentially, the cases under the *Canadian Bill of Rights* reflect an incessant genuflection to parliamentary supremacy, producing what has been called a "widespread sense of illegitimacy" and an "explicit unwillingness" towards applying the *Canadian Bill of Rights*.⁴²⁷

[Footnotes omitted]

Expectations for the Supreme Court's performance were guarded. The Court's past deference to Parliament had to be shed in the new dawn of the *Charter* where the Court's review function took on constitutional proportions.

The juxtaposed principles of constitutional and parliamentary supremacy have provided the focal point for the restructuring of the judicial role. The co-existence of these principles also has compelled the Court to grapple with its relationship with society at large. Previously, the Court's impact on the Canadian polity was latent: for the most part, division-of-powers cases did not have the immediate impact typical of *Charter* litigation. This coupled with the Supreme Court of Canada's restrained application of the *Bill of Rights* meant that its consciousness of social phenomenon was undeveloped. This would not do today.

⁴²⁷ Alan D. Gold "Legal Rights" (1982) 4 S.C.L.R. 107 at 107-108.

In Chapter One I suggested that Gunther Teubner's idea of reflexive law might suggest a possible approach to the question of how the judiciary could perceive itself in reference to social phenomenon. Seen as a self-adjusting institution, whose decisions reflect a consciousness of the prevailing social values, the Court maintains its independence from extra-legal influences. The question of the requisite *mens rea* for murder, for instance, saw the triumph of a subjective approach to the question of criminal liability. A person should not be committed of an offence he did not intend to commit. Moral blameworthiness demanded subjective culpability. Yet, the apparent retreat in *Creighton* from the subjective approach should be seen not as a retreat, but as a Court re-balancing the competing interests of complainants and accused persons against the background of prevailing societal norms.

Chief Justice Dickson's endorsement in *Hill* of the objective standard in applying the reasonable person test to the defence of provocation underscored the need for judicial sensitivity to prevailing social attitudes: "It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned, among other things, with fixing standards of human behaviour."⁴²⁸ McLachlin J. in *Creighton* used the same reasoning, citing Dickson C.J.C. in *Hill*, to justify the historical objective test for determining the requisite *mens rea* for unlawful act manslaughter—objective foreseeability of non-trivial bodily harm.⁴²⁹ Chief Justice Lamer, speaking in dissent in *Creighton*, conceded the objective standard although he would have modified the common law test to objective foreseeability of death. In the final analysis,

⁴²⁸*Supra* note 330 at 108-109.

⁴²⁹*Supra* note 382 at 212-213.

Lamer C.J.C.'s tenacious advocacy for the subjective standard of fault, had to concede to the broader social and legal context.

Like any undertaking, time will perfect the judicial process inaugurated by *Charter* litigation. The Court is not immune from criticism. However, criticism can be either instructive or destructive. Much of what I have read in preparing this thesis has been of the latter variety. Why is this so? During the Court's first 100 years, legal literature attacking its essence was sparse. Today, the principles of judicial impartiality and judicial independence are subjected to much scrutiny, particularly in academic circles. Yet, these are constitutional principles; they are part of the common core of values that inform both the expectations of society and the judicial function. As such, they should be respected. Any readjustment in their content will, as Gunther Teubner says of reflexive law, come about through an evolutionary, not a revolutionary, process.

This thesis attempts to meld the academic and the practical by examining the impact of legal theory and principle upon the judicial function as revealed in the actual practice and development of the criminal law. To do otherwise would yield an incomplete picture of the dynamics of the adjudicatory function. The Supreme Court of Canada is not only expounding law, it is expounding values. Through its decision-making process, the Court shapes the criminal process with repercussions for all involved. A rudimentary appreciation of the Supreme Court of Canada's role in pre- and post-*Charter* Canada hopefully will enlighten critique of the Court's role in the criminal justice system.

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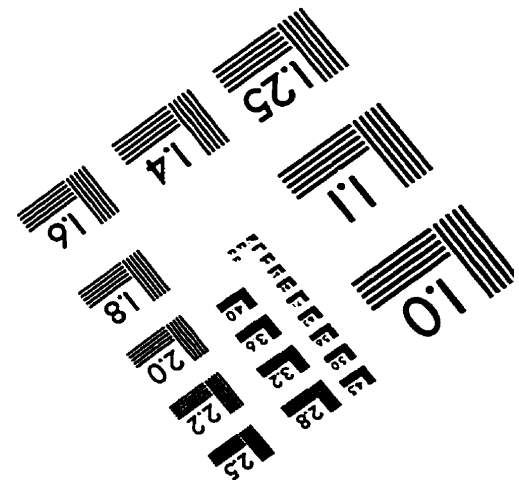
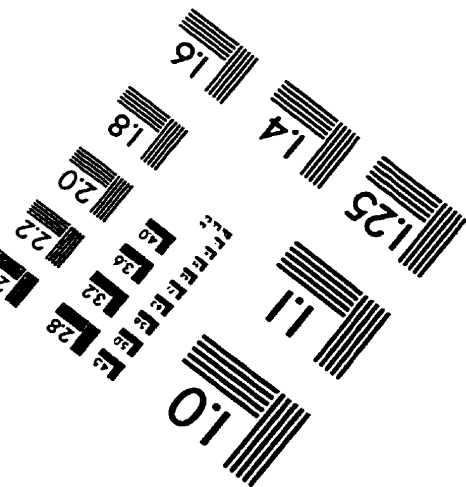
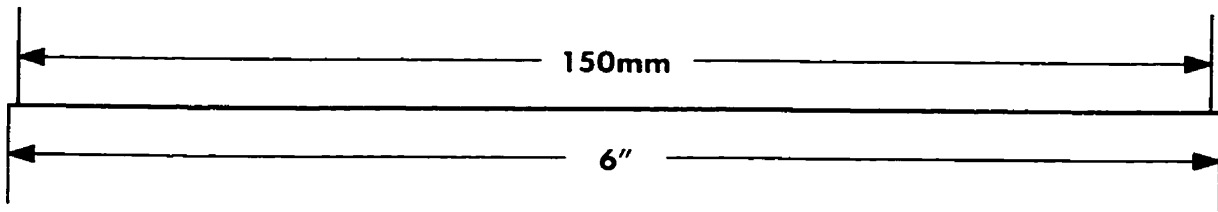
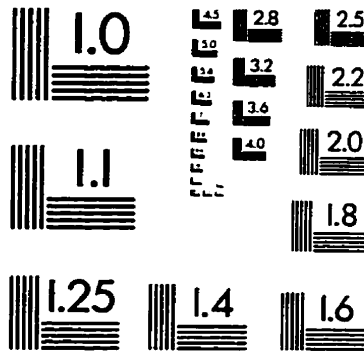
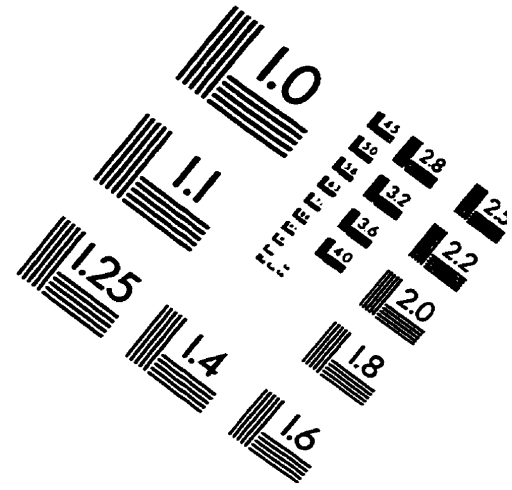
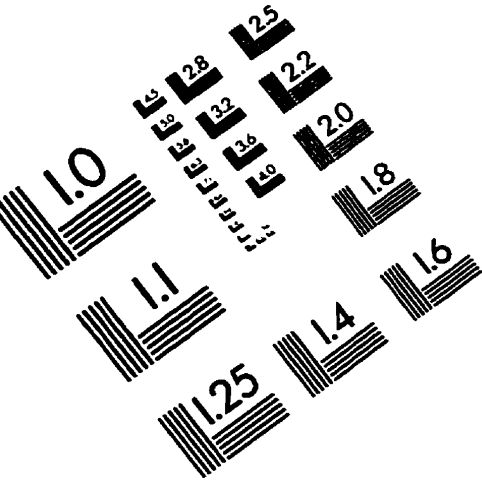
Criminal Law Amendments Act (No. 2), 1976, S.C. 1974-75-76, c. 105.

Statute of Westminster, 1931, 22 Geo. V, c. 4 (Imp.), reprinted in R.S.C. 1985, Appendix II, No. 27.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 52.

Supreme and Exchequer Courts Act, 1875, S.C. 1875, c. 11.

IMAGE EVALUATION TEST TARGET (QA-3)




APPLIED IMAGE, Inc
 1653 East Main Street
 Rochester, NY 14609 USA
 Phone: 716/482-0300
 Fax: 716/288-5989

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