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10-1-1992

Recommended Citation
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The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison

ROBERT A. HARVIE*

I. INTRODUCTION

In 1984, in the case of United States v. Leon,1 the United States Supreme Court created the good faith exception to the Fourth Amendment exclusionary rule. The Court ruled admissible illegal drugs seized by the police pursuant to a warrant for which the police had failed to establish probable cause.2 In a companion case, Massa-

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1. 468 U.S. 897 (1984). The Court in Leon reaffirmed that the exclusionary rule is judicially created, and that the question of whether the Fourth Amendment is violated is different from the question of whether the evidence obtained as a result of that violation should be admitted at trial.

2. The Leon decision and its underlying rationale have been extensively criticized. See, e.g., Wayne R. LaFave, "The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications, 1984 U. ILL. L. REV. 895; William J. Mertens & Silas Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 GEO. L.J. 365 (1981); Craig M. Bradley, The "Good-Faith Exception" Cases: Reasonable Exercise in Futility, 60 IND. L.J. 287 (1984-85); Donald Dripps, Living with Leon, 95 YALE L.J. 906 (1986). Scholars argue that, given the common-sense criteria for determining probable cause developed in Gates v. Illinois, 462 U.S. 213 (1983), good faith will rarely be used. A major criticism of Leon is that, if the Court had used the Gates approach, it could have easily held that the application for the warrant contained sufficient information to establish probable cause. Some state courts have refused to imply a good faith doctrine in their constitutional equivalents to the Fourth Amendment. For example, in State v. Houston, 359 N.W.2d 336 (Minn. Ct. App. 1984), the Minnesota Court of Appeals refused to apply the good
chusetts v. Sheppard, the Court refused to suppress evidence found during the execution of a warrant that failed to name the items to be seized. Three years later, the Court allowed the admission of evidence that was seized by an officer while conducting a warrantless administrative search, pursuant to a statute that was later declared unconstitutional. In all three cases, the searches violated the Fourth Amendment. However, the evidence was in each case admitted because the officers acted in objective good faith.

Meanwhile, the Supreme Court of Canada decided R. v. Theresens, the first decision excluding evidence under section 24 of the

faith doctrine to warrantless searches; in State v. Novembrino, 519 A.2d 820 (N.J. 1987), the Supreme Court of New Jersey rejected the good faith doctrine; and in Stringer v. State, 491 So. 2d 837 (Miss. 1986), the Mississippi Supreme Court declined to adopt a good faith doctrine.


5. A distinction is made between good faith in determining the reasonableness of the search and good faith acts that would permit use of the evidence seized by a search that violated the Fourth Amendment. In the United States, good faith on the part of the officer may make the execution of the search reasonable. In Maryland v. Garrison, 480 U.S. 79 (1987), for example, police officers executed a warrant in the wrong third floor apartment, mistakenly believing that there was only one apartment located on that floor. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the United States Supreme Court held that an arrest and subsequent search were reasonable when officers acting in good faith and with sufficient probable cause arrested a suspect for violating an ordinance later declared unconstitutional. Cf. Illinois v. Rodriguez, 497 U.S. 177 (1990) (warrantless entry is valid when based upon the consent of a third party who the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact does not).

6. [1985] 1 S.C.R. 613 (Can.).

The Supreme Court of Canada does not originate in the Constitution of Canada, but section 101 gives Parliament the power to create Courts of Appeal for Canada. Parliament created two courts, the Supreme Court of Canada and the Federal Court of Canada. Provinces have the power to create their own courts. Nevertheless, the court system in Canada, unlike the dual court system in the United States, is unitary. Moreover, the Supreme Court of Canada has the power to review acts of Parliament and laws enacted by the provincial legislatures without the parties having to demonstrate a federal issue, as is the case in the United States. Furthermore, there is no case and controversy limitation on the Supreme Court of Canada. Although most appeals to the high court have the benefit of a trial and one review, the court is authorized to hear reference appeals. The federal government or a provincial government can refer pending legislation to the Supreme Court of Canada and ask for its opinion on whether the particular governmental unit, provincial or federal, has authority to enact the subject matter of the legislation. The government can also ask the Supreme Court for an opinion as to whether the legislation violates the Charter of Rights and Freedoms. CAN. CONST. (Constitution Act 1984) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Charter]; Supreme Court Act, R.S.C., ch. S-19, § 55 (1970) (Can.). For a history of the Supreme Court of Canada, see JAMES G. SNELL & FREDERICK VAUGHAN, THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION (1985).
Charter of Rights and Freedoms.7 Section 24 provides:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.8

In determining whether the infringement of a Charter right brought the administration of justice into disrepute, Justice Gerald Le Dain, dissenting in Therens, asserted that judges must consider whether the Charter violation "was committed in good faith or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant."9 Subsequent decisions accepted Justice Le Dain's position and signalled that good faith is an important, if not determinative, factor in deciding whether evidence obtained in violation of the Charter is admissible at trial.10

This Article compares the application of the good faith doctrine of the United States and Canada in decisions admitting into or excluding from criminal trials evidence seized in violation of the United States Constitution or the Canadian Charter of Rights and Freedoms. First, this Article examines some structural differences between the United States' Bill of Rights and Canada's Charter, and compares the policies underlying the applicable Charter sections with relevant amendments to the United States Constitution. Then, the Article ex-

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explores the history of Canada's section 24(2), the interpretation of its language, and the application of the rule in the context of good faith.

II. CANADIAN CHARTER OF RIGHTS AND FREEDOMS: STRUCTURAL AND POLICY CONSIDERATIONS

A. Structural Considerations

The Canadian Charter of Rights and Freedoms is much longer and contains more substantive rights than the United States' Bill of Rights. More important, the Charter contains its own limitation and remedy clauses. In particular, section 1 ensures that enumerated rights can only be limited to the extent that the limitation is "demonstrably justified in a free and democratic society." Determining whether a challenged statute is consistent with the Charter is a two-step process. First, a court must conclude that the challenged legislation violates a Charter right. The focus then shifts to an examination of whether the party, frequently the government, seeking a limitation of the right has demonstrably justified the restriction. If the party

11. The rights enumerated in the Charter are categorized into Fundamental Freedoms (freedoms of speech and association), Democratic Rights (right to vote), Mobility Rights (permitting movement from one province to another), Legal Rights (rights of the criminal defendant), Equality Rights (prohibiting discrimination and allowing affirmative action), and Official Languages of Canada (French and English given equal status in Canada and the province of New Brunswick). Charter, supra note 6, §§ 2-22. In the United States, some of these explicit rights have been given force through interpretation of the Bill of Rights. For an overview of the rights enumerated in the Canadian Charter, see GERALD A. BEAUDOIN & ED RATUSHNY, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (2d ed. 1989).

12. Charter, supra note 6, § 1.

13. Id. § 24; see supra note 7 and accompanying text.

14. Section 1 reads, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Charter, supra note 6, § 1.

15. Id. The limit will be prescribed by law within the meaning of section 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of common law. See Therens, [1985] 1 S.C.R. at 618.

16. R. v. Oakes [1986] 1 S.C.R. 103, 112 (Can.). In Oakes, the Court developed two central criteria that must be satisfied to establish a reasonable limit. First, the objective of the legislation must be sufficiently important to warrant overriding a constitutional protection. Second, the means chosen to achieve the objective must be reasonable and demonstrably justified. Id.

In finding reasonable limits, the courts have not always applied these stringent criteria in a manner that squares with the Oakes requirement. Section 24(2), however, has been applied rather broadly. This difference suggests that parties are in a better position using § 24(2) to suppress evidence than challenging the constitutionality of legislation. See Keith B. Jobson, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: SECTION 24(2), in WILLIAM H. CHARLES ET AL., EVIDENCE AND THE CHARTER OF RIGHTS AND FREEDOMS 199-200 (1989).
succeeds in justifying the limitation, the legislation is saved; but if the party fails to carry the burden, the statute is declared of no force or effect. The admissibility at trial of any evidence obtained pursuant to an unconstitutional statute hinges on an analysis of section 24(2).

The federal Parliament and provincial legislatures can insulate legislation from Charter attack by using the override power in section 33. This power allows legislatures to review and overrule judgments of the judiciary and, at the same time, maintain the ideology of parliamentary supremacy. This section has a direct relationship to section 24(2). A legislative body could enact a statute permitting, for example, the police to search for evidence without reasonable grounds if the legislation clearly indicated that the law was enacted notwithstanding the relevant Charter section. The result of invoking section

17. Section 52(1) of the Charter expressly provides that enactments inconsistent with the Charter are void: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Charter, *supra* note 6, § 52(1). Section 32 of the Charter applies the Charter to laws and acts of Parliament and the government of Canada, and the legislatures and the governments of each province. Id. § 32(1).

18. Section 33(1) states, "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." Charter, *supra* note 6, § 33(1).

This section applies only to selected Charter rights. Moreover, the override is limited to five years, but can be renewed for an additional five years. Id. § 33(3). Furthermore, provinces cannot opt out of federal law. Unlike the United States' system, Parliament or provincial legislatures can enact legislation violating the Charter and then insulate that legislation from Charter attack by invoking section 33.

19. In 1982, the Quebec National Assembly repealed all existing statutes and immediately reenacted them with a general override clause that read: "This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982." The Quebec Court of Appeal held that this general application of section 33 violated the intent and express language of the section. See *Alliance des Professeurs de Montreal v. A.G. Quebec*, 21 D.L.R.4th 354 (1985) (Can.); *Beaudoin & Ratushny, supra* note 11, at 105-06. Recently, the Quebec National Assembly used section 33 to enact a French language-only advertising law after the Supreme Court had already struck down similar legislation as violative of section 2 of the Charter, which guarantees the freedoms of conscience, religion, expression, assembly, and association. See *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712 (Can.); *Lorraine E. Weinrib, Learning to Live with the Override*, 35 McGill L.J. 541 (1990). The Saskatchewan legislature also used section 33 to override a decision of the Saskatchewan Court of Appeal that upheld the right to strike as part of the freedom of association found in section 2. The Supreme Court of Canada upheld the right to strike under section 2, but found that the legislation ordering the strikers back to work was a reasonable limit within the meaning of section 1. *Saskatchewan v. Retail, Wholesale & Dep't Store Union, Locals 544, 635, & 955, 38 D.L.R.4th 277 (1987)* (Can.).

20. The example assumes that the legislature had authority under the Constitution Act, 1982 to enact the legislation. If not, the Supreme Court of Canada would strike down the
33 is to suspend the application of the Charter, including section 24(2).\(^{21}\)

In cases where law enforcement officers obtained evidence in a manner that violated a Charter right,\(^{22}\) section 24(2) requires judges to suppress such evidence if the party seeking exclusion establishes that it is more probable than not that the admission of the evidence at trial would bring the administration of justice into disrepute.\(^{23}\) Although the remedy afforded in section 24(2) applies to a breach of any Charter right, the section's practical impact is most evident when the legal rights enumerated in sections 8, 9, 10(b), and 7 are violated.\(^{24}\)

**B. Policy Considerations Underlying Sections 8, 9, 10(b), and 7.**

In *Hunter v. Southam Inc.*,\(^{25}\) the Supreme Court of Canada held that the Charter must be given a purposive interpretation.\(^{26}\) The Court not only applied a strict, textual analysis, but also examined the legislation on the ground that it was beyond the governmental body's power to enact legislation. See * supra* notes 6 and 7.


22. The phrase “obtained in the manner,” according to some scholars, required the accused to show a causal connection between the Charter breach and the discovery of the evidence. In *R. v. Strachan*, [1988] 2 S.C.R. 980 (Can.), the Supreme Court of Canada rejected this position and held that only a temporal relationship between the Charter breach and the discovery of evidence is needed. Chief Justice Dickson was careful to note that the presence of a temporal connection is not always determinative. *Id.* at 1005. Situations will arise, he suggested, where evidence following the breach of a Charter right will be too remote from the violation to be “obtained in a manner” that infringed the Charter. *Id.* at 1006.

An example of such a lack of temporal relationship is found in *R. v. Upston*, [1988] 1 S.C.R. 1083 (Can.). In *Upston*, the officers detained the accused without informing him of his right to retain and instruct counsel as required by section 10(b) of the Charter. After the arrest, the officers read the section 10(b) warning and obtained incriminating statements. The Supreme Court, in a short opinion, found no temporal relationship between the Charter breach and the second confession.


24. In contrast, in the United States the First, Fourth, Fifth, Sixth, and Fourteenth Amendments have different exclusionary rules that reflect and protect the different values underlying each amendment. In Canada, there is only one exclusionary rule, but this difference may not be as dramatic as it first seems. The Supreme Court of Canada's interpretation means that the decision about whether to exclude evidence depends on the underlying policy protected by the particular Charter section that was breached.

25. [1984] 2 S.C.R. 145 (Can.).

26. *Id.* at 156.
interests and policies underlying the Charter section in question. Thus, the Court's decision whether to exclude evidence from trial depends heavily on the values and policies that a particular section protects.

Section 8, which is similar to the Fourth Amendment, affords everyone the right to be secure against unreasonable searches or seizures. The section neither requires search warrants nor provides a standard to measure reasonableness. The Supreme Court of Canada, giving section 8 a purposive analysis, ruled that it protects people, not places, and, at a minimum, secures a reasonable expectation of privacy. The Court reasoned that the only effective protection for

27. Charter, supra note 6, § 8.
28. Id. Courts must first determine whether an unlawful search is unreasonable. If officers obtain evidence during an unlawful search, but the court does not deem it unreasonable within the meaning of section 8, the evidence is admissible at trial.

In Canada, there are numerous statutory provisions governing search warrants. Section 487 of the Criminal Code authorizes a justice of the peace to issue a search warrant for any offense violating the Criminal Code. Common law governs warrantless searches, unless authorized by the Criminal Code. Criminal Code, R.S.C., ch. 34, § 487 (1985) (Can.). There are a number of sections in the Criminal Code specifically allowing officers to search without warrants. Section 103(2), for example, permits officers to seize a firearm if there are reasonable grounds to believe that a person should not have a firearm in his or her custody for the person's own safety. Id. § 103(2). A similar provision allows warrantless searches of any bawdy or gaming house. Id. § 199(2).


A peace officer may, at any time, without a warrant, enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under section 12 or 13, enter and search any dwelling-house if the peace officer believes on reasonable grounds there is, in the place or dwelling-house, a narcotic by means of or in respect of which an offence under this Act has been committed. The warrant must be directed to a specific officer who must control the search process. Narcotics Control Act, R.S.C., ch. N-1, § 10 (1985) (Can.).

Until recently, police officers investigating violations of federal law had to adhere to the particular law's search and seizure requirements. The search provisions of the Narcotic Control Act, for example, govern searches for narcotics. Id. Similarly, the Criminal Code's search warrant provisions at one time governed searches for evidence that occurred in the course of investigating crimes enumerated in the Criminal Code. Recent amendments to the search warrant section of the Criminal Code provide that warrants can be issued for any offenses in the Code or "any other Act of Parliament." Criminal Amendment Act, R.S.C., ch. C-19, § 68 (1985) (Can.). The courts interpret this language to mean that officers can obtain search warrants under the authority of the Criminal Code while investigating crimes covered by other federal laws. See infra note 110.

29. The Supreme Court of Canada followed the United States Supreme Court's holding
this expectation was to prevent unjustified searches before they occurred. Thus, warrantless searches are *prima facie* "unreasonable," and prior authorization for the search is necessary whenever feasible. Nevertheless, warrantless searches are reasonable if they are authorized by law and if the law itself and the manner in which the search is executed are reasonable.\(^3\) A statute authorizing a warrantless search is reasonable if it includes a reasonable belief standard for the search.\(^3\)

When applying for search warrants, Canadian police officers must present magistrates with sufficient information to enable an independent determination as to whether reasonable grounds exist to conclude that an offense has been committed and that evidence will be found at the place to be searched.\(^3\) Thus, the Crown can interfere with privacy interests when its agents have reasonable grounds to believe evidence of the crime is located in the place to be searched.\(^3\)

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\(^3\) *Collins*, [1987] 1 S.C.R. at 278.

\(^3\) *R. v. Debot*, [1989] 2 S.C.R. 1140 (Can.). In some initial Charter cases, the Court adopted the notion that a violation of section 10(b) affected the reasonableness of the search. In *R. v. Simmons*, [1988] 2 S.C.R. 495 (Can.), and a companion case, *R. v. Jacoy*, [1988] 2 S.C.R. 548 (Can.), the manner of the search was unreasonable because officers detained Simmons without giving her the necessary section 10(b) warning, conducted a strip search, and seized narcotics. *Simmons*, [1988] 2 S.C.R. at 506-07. Nevertheless, the officers acted in good faith because they relied on an accepted customs agency procedure. *Id.* at 534-45. Similarly, in *Jacoy*, they relied on current Immigration Department policy. *Jacoy*, [1988] 2 S.C.R. at 560. The *Simmons* decision hinged on sections 143 and 144 of the Customs Act, R.S.C. ch. C-40 (1969). *Simmons*, [1988] 2 S.C.R. at 524-25. This act authorizes a customs officer to search any person if the officer has reasonable cause to believe that the person has goods subject to entry at customs or prohibited goods secreted about his or her person. Customs Act, R.S.C., ch. C-58, § 143 (1970) (Can.). The Customs Act also provides that before a person can be searched, he or she may ask to be taken before a magistrate, justice of the peace, or chief officer at the port. *Id.* § 144. Although these rights were posted on the wall in *Simmons*, no evidence suggested that Simmons read them. *Simmons*, [1988] 2 S.C.R. at 506-07. Under these circumstances, the court reasoned, the presence of counsel could have helped her understand her statutory options. This case is not very common in most search situations. *Id.* at 530-31. The *Debot* case more accurately represents the current retreat from the position that a violation of section 10(b) affects the reasonableness of a subsequent search.

\(^3\) The official giving prior authorization for search warrants need not be a judge, but at a minimum must be capable of acting judicially.

\(^3\) The United States Supreme Court has developed two standards under the Fourth Amendment. The first is a probable cause standard that is similar to the reasonable grounds test in Canada. The second is the reasonable suspicion standard. See *Terry v. Ohio*, 392 U.S. 1 (1968); United States v. Montoya de Hernandez, 473 U.S. 531 (1985). The Supreme Court of Canada has not adopted a reasonable suspicion standard similar to that of the United States.
The Supreme Court of Canada has developed a hierarchy of these privacy interests. In *Hunter*, the Court hinted that where the interest involved is the protection of bodily integrity, the Court applies a more stringent test than the typical reasonable grounds criteria. In a later decision, the Court held that "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home."

Protection of bodily integrity, therefore, seems to rest at the pinnacle of the hierarchy of privacy interests.

Section 9 of the Charter promotes a reasonable expectation of privacy by allowing Canadians freedom of movement without fear of arbitrary detention or imprisonment. Like section 8, section 9 does not include a standard to measure whether a person was arbitrarily detained or imprisoned. In *R. v. Storrey*, the Supreme Court of Canada corrected this omission and applied the reasonable grounds standard found in the Criminal Code to determine whether an arrest was arbitrary within the meaning of section 9.

Section 10(b) provides that everyone has the right upon arrest or detention to retain and instruct counsel without delay, and to be informed of that right. This section is the Canadian equivalent to the

34. [1984] 2 S.C.R. at 145.
36. Section 9 of the Charter reads: "Everyone has the right not to be arbitrarily detained or imprisoned." Charter, supra note 6, § 9.
37. [1990] 1 S.C.R. 241 (Can.).
38. Criminal Code § 495 differentiates between indictable and summary conviction offenses in terms of police arrest power. A police officer can arrest without a warrant any person whom the officer reasonably believes has committed an indictable offense. An officer may not make a warrantless arrest for a summary conviction offense in instances where the officer has a reasonable belief that the public interest may be satisfied without arresting the subject. Indictable offenses are comparable to felonies, and summary conviction offenses equate to misdemeanors.
39. *Storrey*, [1988] 1 S.C.R. at 256. The Supreme Court of Canada, in *R. v. Hufsky*, [1988] 1 S.C.R. 621 (Can.), and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 (Can.), held that section 198(a)(1) of the Highway Traffic Act, permits arbitrary stops of motorists, which violated section 9 of the Charter. The difference in the two cases lies in the fact that in *Hufsky*, the stop was made as part of a "spot check" program, but in *Ladouceur*, the stop was not part of any organized program. Nevertheless, both courts found the legislation demonstrably justified in a free and democratic society within the meaning of section 1. In their analyses of section 1, the Canadian justices expressly rejected the United States Supreme Court's majority opinion in *Delaware v. Prouse*, 440 U.S. 648 (1979), which held that stopping an automobile is a seizure under the Fourth Amendment and that detaining the driver to check his or her driver's license and automobile registration is unreasonable under the Fourth Amendment, unless the stopping officer has at least an articulable and reasonable suspicion that the motorist is unlicensed or the automobile is unregistered. In the United States, motorists have a diminished expectation of privacy. For example, a state is allowed to establish sobriety checkpoints. See Michigan Dep't of State Police v. *Sitz*, 496 U.S. 444 (1990).
United States' *Miranda*\(^{40}\) warnings. The subsection requires that detained suspects be informed of their right to counsel without delay, including a legal aid lawyer if so needed.\(^{41}\) The Supreme Court of Canada defines detention as a restraint of liberty other than an arrest, or control over the movement of a person by a demand that may have significant legal consequences and that prevents or impedes access to counsel, or a refusal to comply with a demand for which a citizen is criminally liable.\(^{42}\) This broad definition has led Canadian courts to require section 10(b) warnings much earlier in the process than those prescribed by *Miranda*.\(^{43}\)

In addition to administering the warnings, Canadian police officers must provide a reasonable opportunity for the detainee to obtain counsel and must cease questioning until the suspect has had an opportunity to contact a lawyer.\(^{44}\) Detainees, on the other hand, must make a reasonable effort to contact an attorney,\(^{45}\) but they may waive their right to retain and instruct counsel.\(^{46}\)

The values protected by section 10(b) are strikingly similar to

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\(^{41}\) In *R. v. Brydges*, [1990] 1 S.C.R. 190 (Can.), the Supreme Court of Canada held that a detainee who expresses concern about affording a lawyer must be informed of the existence of legal aid. *Id.* at 206. Justice Lamer, however, drew a "bright line," and suggested that the police must routinely advise detainees about the availability of legal aid as part of the section 10(b) caution. *Id.* As a result, detainees in Canada, but not in the United States, must be advised of the availability of legal aid. The Charter does not guarantee the right to counsel at trial. The right, if it exists, is determined by the legal aid statutes of each province. It seems likely, however, that if presented with the issue, the Supreme Court of Canada would find a right to counsel at trial in section 7.

\(^{42}\) Thomsen, [1988] 1 S.C.R. at 649.

\(^{43}\) See *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Miranda* warnings, designed to protect the Fifth Amendment privilege, are required when law enforcement officers conduct a custodial interrogation. *Id.* at 444. Section 10(b) can be examined more accurately in terms of the Sixth Amendment right to counsel. The right to counsel in Canada attaches on detention, whereas in the United States, the Sixth Amendment right to counsel attaches when the state decides to prosecute by filing formal charges. Some American scholars argue that the right should attach at the time of the arrest. See, e.g., James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1 (1988).


\(^{45}\) In *R. v. Smith*, [1989] 2 S.C.R. 368, 387 (Can.), the Court refused to find a section 10(b) violation when the detainee failed to make a reasonable effort to contact counsel.

those secured by the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment privilege against self-incrimination protects a central feature of the adversary system in that the accused cannot be compelled to contribute to his conviction.\textsuperscript{47} Moreover, the privilege prevents cruelty, ensures that suspects are treated with dignity, and promotes the search for truth by confirming that confessions are trustworthy.\textsuperscript{48} In Sixth Amendment jurisprudence, the right to counsel promotes a fair trial, preserves the adversary system, and provides legal assistance to the accused when confronted with the power of the state.\textsuperscript{49}

The Supreme Court of Canada likewise stated that the right to counsel promotes fair treatment of the accused in situations entailing a "significant legal consequence."\textsuperscript{50} Moreover, section 10(b) mandates a fair administration of the adversary system by allowing detainees to seek the assistance of counsel to safeguard their legal interests. Without this protection, detainees lose the presumption of innocence, and, moreover, must take the stand to counter the damaging statements.\textsuperscript{51} Justice Wilson summarized the Supreme Court of Canada’s view of the right’s importance, stating that "[t]he fairness of the trial would be adversely affected since the admission of the statement would infringe on the appellant’s right against self-incrimination, a right which could have been protected had the appellant had an op-

\textsuperscript{47} Neither the United States Supreme Court nor the Supreme Court of Canada has outlined precisely the values protected by the privilege against self-incrimination and the right to counsel. See generally Mark Berger, Taking the Fifth: The Supreme Court and the Privilege Against Self-Incrimination (1980); Peter B. Michalysyn, The Charter Right to Counsel: Beyond Miranda, 25 ALTA. L. REV. 190 (1986); Dale Gibson, Shocking the Public: Early Indications of the Meaning of "Disrepute" in Section 24(2) of the Charter, 13 MAN. L. REV. 495 (1983).

\textsuperscript{48} Other values have been identified as being protected by the privilege, but these values are beyond the scope of this Article. See generally George E. Dix, Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms, 67 TEX. L. REV. 231 (1988); Leonard W. Levy, The Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968); Berger, supra note 47. Recently, the United States Supreme Court applied the harmless error doctrine to coerced confessions. See Arizona v. Fulminante, 111 S. Ct. 1246 (1991).


\textsuperscript{50} Clarkson, [1986] 1 S.C.R. at 394; see also Michalysyn, supra note 47, at 194.

\textsuperscript{51} R. v. Hebert, [1990] 2 S.C.R. 151 (Can.). Justice Sopinka, in a concurring opinion, suggested that evidence obtained in violation of the right to counsel effectively strips the accused of the presumption of innocence "because he has damned himself in the eyes of the trier of fact." Id. at 207.
portunity to consult counsel.”

Section 7 resembles the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Section 7 ensures that “everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” In interpreting the section, the Supreme Court of Canada emphasized that each right—life, liberty, and security of the person—carries meaning in itself. In addition, the Court contended that the words “principles of fundamental justice” represent only qualifiers characterizing the rights to life, liberty, and security of the person, and not separate rights. Moreover, the rights protected by section 7 are broader than those guaranteed by the enumerated rights and originate, according to the Court, “in the basic tenets and principles of our legal system.”

The case of *R. v. Hebert* represents an example of the Supreme Court of Canada's method of analyzing the basic tenets of the legal system to determine the scope of the right to silence, which is not enumerated in the Charter. Hebert was arrested and given a section 10(b) warning. He consulted a lawyer, and afterwards declined to

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53. Section 7 differs from the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution in two respects. First, section 7 does not protect property. Second, section 7 does not guarantee Canadian citizens the right to “due process of law.” These omissions were intentional. During the debate over the Charter, the maritime provinces, fearful of non-resident ownership of land, objected to property protection under the Charter. The New Democratic Party was fearful that property protection might prohibit the governments of Canada and the provinces from nationalizing corporations. To gain these groups’ support, the federal government removed the term “property” from section 7.

The phrase “due process of law” was omitted for fear that the Canadian Supreme Court might interpret the expression to include the United States’ notion of substantive due process, thereby subjecting Canadian social programs to review in which they could be declared in violation. The Charter’s framers believed that the phrase “principles of fundamental justice” would limit interpretation of the section to procedural matters. However, the Supreme Court of Canada held that section 7 applies in examining the substance of legislation. In addition, the framers' intentions are admissible to interpret Charter sections. *In re Section 94(2) of the Motor Vehicle Act 1985*, [1985] 2 S.C.R. 486, 490 (Can.).


55. *In re Motor Vehicle Act*, [1985] 2 S.C.R. at 503. This case is an example of the Supreme Court of Canada’s reference jurisdiction. The Province of British Columbia asked the Court to determine the constitutionality of a statute that prohibited driving with an expired license without proof of mens rea and included jail as punishment. The Court held that the statute breached section 7 of the Charter.

56. [1990] 2 S.C.R. 151 (Can.).

57. The Crown found, and the defense agreed, that section 7 contained a right to silence. However, the defense disagreed with the Crown as to its scope. *Id.* at 161.
speak with police. The police placed Hebert in a jail cell, where an undercover officer later joined him and elicited incriminating statements. In analyzing the scope of Hebert’s rights, the Court explored the basic tenets of the legal system, including the Canadian confession rule, the right against self-incrimination, and the right to counsel. The Court subsequently concluded that the right to silence extended to this factual situation.

In conclusion, the Supreme Court of Canada developed rights beyond those enumerated in the Charter and provided additional safeguards to values already embraced by the enumerated Charter rights. These values become crucial in analyzing the exclusionary rule and the good faith doctrine in Canada. It is doubtful, however, that the Charter’s framers intended this result.

III. THE CANADIAN EXCLUSIONARY RULE: A HISTORY

The language currently found in section 24(2) first appeared in a pre-Charter case, *R. v. Wray*. The case questioned the admissibility of derivative evidence obtained as a result of an involuntary confession. In his statement, Wray revealed to investigators the location of the murder weapon and then later led them to the murder scene.

58. *Id.* at 164. The Charter’s right against self-incrimination only applies at trial. Section 11(c) states, “Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.” *Charter, supra* note 6, § 11(c). Section 13 of the Charter defines self-incrimination as follows: “A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.” *Id.* § 13.


60. *Id.* at 186. The police are not required to inform detainees of their right to silence as part of the section 10(b) caution. Nevertheless, police in Canada frequently warn detainees of this right. In *Hebert*, the Court assumed that counsel would advise their clients of the right. The Court also suggested that, although Hebert consulted an attorney, the police were not precluded from subsequently attempting to question the accused. *Id.* at 180. Of course, the police may not deny a detainee’s access to counsel.


61. 1971 S.C.R. 272 (Can.).

62. Canadian courts accept the common law rule that involuntary confessions cannot be used against the accused. This common law rule states that a confession is voluntary if it is (1) obtained without threats or promises; (2) accepted by an individual the suspect believes to be a person in authority; and (3) made with an operating mind.

63. Little Charter jurisprudence exists on the derivative evidence concept. In *Black*, the
The Ontario trial judge refused to allow the Crown to introduce evidence of the role the accused played in finding the weapon, and suppressed the rifle, claiming that he possessed the discretion to exclude improperly obtained evidence when that evidence would bring the administration of justice into disrepute. The Supreme Court of Canada disagreed. Justice Ronald Martland, writing for the majority, declared that, "under our law, the function of the court is to determine the issue before it, on the evidence admissible in law, and it does not extend to the exclusion of admissible evidence for any other reason." Vigorous debate stemming from this decision kept the concept of a discretionary exclusionary rule alive.

After the Wray decision, and before the passage of the Charter, two Canadian commissions recommended a discretionary exclusionary rule, albeit for different reasons. The Law Reform Commission of Canada's Report of Evidence advocated a discretionary exclusionary rule for Canada's evidence code. The Commission was careful to

Supreme Court of Canada allowed into evidence a knife that was obtained after police elicited a confession in violation of § 10(b). The Court suggested that the knife inevitably would have been discovered. Black, [1989] 2 S.C.R. at 165.


65. Wray, 1971 S.C.R. at 288. The Court held that those parts of an involuntary statement substantiated by the police were admissible as evidence. Id. at 296 (citing The King v. St. Lawrence, 1949 O.R. 215 (Can.)).

66. M.S. Weinberg, The Judicial Discretion to Exclude Relevant Evidence, 21 MCGILL L.J. 1 (1975); Roger C. Gibson, Illegally Obtained Evidence, 3 U. TORONTO FAC. L. REV. 23 (1973). Regardless of the criticisms leveled at the Wray decision, the Court reinforced its holding when it ruled that evidence seized in violation of the 1960 Canadian Bill of Rights would not be excluded. Hogan v. The Queen, [1975] 2 S.C.R. 574, 585 (Can.). The Canadian Bill of Rights was enacted by Parliament in 1960 amid controversy between those who favored relying upon the common law to protect personal rights and those who believed that a bill of rights was more effective. Civil libertarians hoped that the Supreme Court of Canada would give the new legislation a purposive interpretation, much like that now given by the Court in Charter litigation. However, they were disappointed. The Court was reluctant to use the Canadian Bill of Rights to strike down legislation or administrative actions. WALTER TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 14 (2d ed. 1975). The Court's cautious approach gave added momentum to those who favored an entrenched Charter of Rights. See id. The Canadian Bill of Rights is still in effect and is occasionally presented as an alternate argument to the Charter.

67. LAW REFORM COMMISSION OF CANADA, REPORT ON EVIDENCE (1975) [hereinafter LAW REFORM]. The proposed legislation provided that "evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute." Id. at 22. THE ONTARIO LAW REFORM COMMISSION, REPORT ON EVIDENCE (1976) adopted similar recommendations. This proposal stated
point out that although exclusion was unlikely to be effective in controlling or deterring improper police activity, courts must nonetheless attempt to protect the integrity of the judicial process.\textsuperscript{68}

The McDonald Commission, established to investigate abuses committed by the Royal Canadian Mounted Police ("R.C.M.P."), argued that a discretionary exclusionary rule would deter police misconduct.\textsuperscript{69} The Commission discovered R.C.M.P. files purporting to show that without judicial condemnation of unlawful police practices, police officers believed that those practices were implicitly approved by the judiciary.\textsuperscript{70} An exclusionary rule, the McDonald Commission argued, coupled with effective training, supervision, discipline, and policy review, would deter police abuses and ensure that the judiciary was not contributing to an improper police attitude.\textsuperscript{71}

\textit{R. v. Rothman}\textsuperscript{72} was the only pre-Charter case that explored the meaning of the language subsequently adopted in section 24(2). Rothman was arrested and given the standard warning that his statements could be used against him.\textsuperscript{73} He informed the officers that he did not want to talk to them. He was then placed in a jail cell, and was later joined by an undercover officer who extracted damaging admissions. The trial court excluded Rothman's confession, arguing that to admit it would bring the administration of justice into disrepute. The majority of the Supreme Court rejected the trial judge's decision.\textsuperscript{74} In a lengthy concurrence, Justice Antonio Lamer urged

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\textsuperscript{68.} The Law Reform Commission emphasized that it was not recommending the United States' model of exclusion as a deterrent. \textit{Law Reform, supra} note \textsuperscript{67}, at 62. Rather, it desired to restore what some thought was the common law discretionary rule. \textit{Id.} This proposed legislation was never enacted.


\textsuperscript{70.} \textit{Id.} at 1039-40.

\textsuperscript{71.} \textit{Id.} at 1046. In 1972, Parliament enacted an exclusionary rule as part of a statute permitting wiretapping under certain conditions. The law gave trial judges discretion to exclude evidence as a result of an illegal wiretap when its "admission would bring the administration of justice into disrepute." Criminal Code, R.S.C., ch. C-46, § 189(2) (1985) (Can.).

\textsuperscript{72.} [1981] 1 S.C.R. 640 (Can.). The case was overruled by \textit{Hebert, [1990] 2 S.C.R.} at 151.

\textsuperscript{73.} Prior to the Charter, officers notified suspects that they were not obliged to make any statement, but that anything they said could be used against them. This caution was not mandatory but was considered as part of the totality of circumstances in determining whether a confession was voluntary. \textit{See Rothman, [1981] 1 S.C.R.} at 643.

\textsuperscript{74.} The statement was made voluntarily because Rothman did not know he was speaking to a person in authority. \textit{Id.} at 644. The United States Supreme Court employed similar rea-
the Court to adopt a "shock the community conscience" test\textsuperscript{75} to determine whether police activities brought the system of justice into disrepute.\textsuperscript{76}

Although pre-Charter efforts failed to establish a limited exclusionary rule, these endeavors indicate that some Canadians were sympathetic to such a rule. Others were satisfied with the Wray concept and strongly opposed any form of exclusionary rule in the Charter.

The first version of the Charter had a tone of civil libertarianism.\textsuperscript{77} The enforcement section left the remedy for Charter violations to the judges' discretion as they deemed appropriate, and limited application to the circumstances of the case before them.\textsuperscript{78} Provincial leaders feared this broad language would lead to a rule similar to that of the United States, and, in response, they proposed language prohibiting an exclusionary rule.\textsuperscript{79} Civil rights groups, the Canadian Bar Association, and others objected vigorously to this prohibition. After further debate, the government agreed to a provision directing courts to exclude evidence when it would bring the administration of justice into disrepute. This language reflected a compromise between those

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\item[75.] The test is similar to the "shock the conscience of the court" test used by the United States Supreme Court in Rochin v. California, 342 U.S. 165, 172 (1952). See Gibson, \textit{supra} note 66, at 74.
\item[76.] Justice Lamer believed the trick used by the police probably did not shock the conscience of the community. \textit{Rothman,} [1981] 1 S.C.R. at 697. Two dissenting justices, Chief Justice Laskin and Justice Estey, took the opposite view. They argued that ethical principles are vital if a system of justice is to command the respect and support of the community. According to the dissenters, placing an undercover agent into Rothman's jail cell, after he explicitly refused to talk to the officers, prejudiced the public trust in the integrity of the judicial process. \textit{Id.} at 677-98. In July 1990, Justice Lamer was appointed Chief Justice of Canada.
\item[77.] Anne McLellan & Bruce P. Elman, \textit{The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24,} 21 ALTA. L. REV. 205 (1983); \textit{JOBSON,} \textit{supra} note 16.
\item[78.] The proposed section stated that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." This language is now contained in § 24(1) of the Charter.
\item[79.] The proposed section stated that "[n]o provision of this Charter, other than section 13, affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto." This proposal, if adopted, would have cemented the Wray concept into the Canadian Constitution. McLellan & Elman, \textit{supra} note 77, at 207.
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Section 13 provided that "[a] witness has the right when compelled to testify not to have any incriminating evidence so given used to incriminate him or her in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." This section in modified form remained § 13 of the Charter. Charter, \textit{supra} note 6, § 13.
who favored retaining the *Wray* doctrine and those who favored adopting a doctrine similar to the United States' exclusionary rule.\(^{80}\)

During the debate on the Canadian Constitution before the Special Joint Committee of the Senate and House of Commons,\(^{81}\) proponents of section 24(2) believed it would be used sparingly and only in the most repugnant and objectionable cases of police abuse.\(^{82}\) The "shock the community conscious" test, as developed in *Rothman*, was thought to be the proper standard to measure whether admission of illegally obtained evidence at trial would bring the system into disrepute.\(^{83}\) The framers did not foresee the Court's purposive interpretation of section 24(2), with its resulting broader application of the exclusionary rule.\(^{84}\)

### IV. THE SUPREME COURT OF CANADA'S INTERPRETATION OF SECTION 24(2) OF THE CHARTER

#### A. Purpose of the Canadian Exclusionary Rule

The purpose of Canada's exclusionary rule is to protect the reputation of the justice system. The Supreme Court of Canada has adamantly claimed that the intention of section 24(2) is not to deter the police. "The main reason for this," according to Justice Claire L'Heureux Dube, "is that the price of exclusion is not paid by the police, and that consequently, from the police point of view, exclusion generally would amount to no punishment at all."\(^{85}\) At most, the

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\(^{81}\) MINUTES OF PROCEEDINGS AND EVIDENCE OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND OF THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA (1980) [hereinafter JOINT COMMITTEE]. The Committee was established to take testimony from various interest groups concerning the proposed Charter.

\(^{82}\) Paciocco, *supra* note 80 (arguing that the section was intended to be used sparingly and only in narrow circumstances).

\(^{83}\) Rothman v. R., 59 C.C.C.2d 30 (Can.). One witness before the Special Joint Committee testified that the standard for determining whether evidence brought the administration of justice into disrepute was whether "the admission of this evidence would make me vomit, [because] it was obtained in such a reprehensible manner." JOINT COMMITTEE, *supra* note 81, at 179 (testimony of Mr. Ewaskchuk).

\(^{84}\) There is disagreement in Canada about the scope of the exclusionary rule. Professor Paciocco contends that the Court has gone too far in its interpretation of the rule. Paciocco, *supra* note 80, at 326. Professor Elman argues that the impact of the Court's interpretation has not extended much beyond *Wray*, and that confessions are excluded from trial, but real evidence is not. See Bruce P. Elman, *Returning to Wray: Some Recent Cases on Section 24 of the Charter*, 26 ALTA. L. REV. 604 (1988).

\(^{85}\) R. v. Duguay, [1989] 1 S.C.R. 93, 123 (Can.). In excluding the evidence in *Duguay*, the Ontario Court of Appeal had used "blind eye" reasoning, which posits that if courts turn a
Court hopes that its decisions will foster a positive attitude on the part of the police toward Charter rights.

Certainly, police misconduct may bring the administration of justice into disrepute. But the purpose of section 24(2) is to prevent the administration of justice from being brought into further disrepute by the admission of the evidence at trial. Therefore, the rule is aimed at protecting the reputation of the judicial system by safeguarding the fairness of the trial. 86

B. Factors in Determining Whether to Apply the Exclusionary Rule

Justice Lamer, writing for the majority in R. v. Collins, 87 the seminal case interpreting section 24(2), rejected the "shock the community conscience" test. Justice Lamer developed a lower threshold to determine whether admitting evidence could bring the administration of justice into disrepute. 88 According to Justice Lamer, the relevant question for judges is: "Would the admission of evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?" 89 This question is not answered by polling community members or consulting the public. 90 The Charter was designed to protect

blind eye to police misconduct, the police may assume that they have the courts' tacit approval to continue the activity. R. v. Duguay, 18 C.C.C.3d 289 (Can.). Upon review, the majority of the Supreme Court of Canada seemed to agree with this reasoning when, in a short opinion, they stated, "The Court of Appeal did not enunciate any principle with which we disagree." Duguay, [1989] 1 S.C.R. at 89. Blind eye reasoning was also used by the McDonald Commission. See supra note 69.

87. Id.
88. Id. Justice Lamer gave two reasons for rejecting the test he developed in Rothman. First, Justice Lamer stated that breaches of the Charter are violations of the most important law in the land. Second, he adopted the French version of § 24(2), which is less onerous than the English text. The English text uses the phrase "would bring the administration of justice into disrepute," while the French reading, "es susceptible de discrediter l'administration de la justice," translates as "could bring the administration of justice into disrepute."
89. Id. This test was first recommended by Professor Yves-Marie Morissette, The Exclusion Under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do, 29 MCGILL L.J. 521 (1984).
the accused from the majority; its enforcement, Justice Lamer argued, cannot be left to the majority. Its enforcement is in the hands of judges who, taking into consideration all factors, can best determine whether, in the eyes of a reasonable, dispassionate person, the admission of the evidence would bring the justice system into disrepute.

Justice Lamer divided these factors into three categories: fairness of the trial, seriousness of the Charter breach, and the long-term effects on the administration of justice by excluding the evidence in a particular case. In theory, these categories are weighed and balanced with no particular factor being determinative.

1. Fairness of the Trial

According to Justice Lamer, the fairness of the trial is dictated by the type of evidence obtained as a result of a Charter breach. Real evidence that exists independent of the Charter violation will rarely bring the administration of justice into disrepute. However, confessions and other evidence emanating from the accused will render the trial unfair, since that evidence did not exist prior to the violation of the Charter. More important, its admission at trial would strike at “one of the fundamental traits of a fair trial, the right against self-incrimination.” Justice Lamer recognized that a violation of section 10(b) would most likely result in obtaining the type of evidence that would render the trial unfair.

2. Seriousness of the Charter Breach

The seriousness of the Charter breach focuses on the conduct of the authorities. On the one hand, if the police behaved in a deliberate, willful, or flagrant manner, the evidence, regardless of its nature, will

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92. Id. at 284.
93. Id.
94. Id. In Canada, the concept of evidence emanating from the accused goes beyond the traditional notion of testimonial self-incrimination and includes line-up identification and the results of blood tests. See, e.g., R. v. Ross, [1989] 1 S.C.R. 3 (Can.) (line-up identification); R. v. Dyment, [1988] 2 S.C.R. 417 (Can.) (blood samples). In contrast, in the United States, line-up identification is not self-incrimination within the meaning of the Fifth Amendment. Therefore, counsel is not required at a line-up conducted prior to indictment. See Kirby v. Illinois, 406 U.S. 682 (1972). After indictment, the Sixth Amendment requires counsel at line-ups. See United States v. Wade, 388 U.S. 218 (1967). Moreover, blood samples are not testimonial in nature and may be seized within the meaning of the Fourth Amendment. See Schmerber v. California, 384 U.S. 757 (1966); Winston v. Lee, 470 U.S. 753 (1984). For a detailed comparison of these points, see Harvie & Foster, supra note 46.
be excluded. On the other hand, if the police acted in good faith, or the Charter violation was trivial or technical in nature, the evidence will be admitted.95

3. Long-Term Effect of Exclusion on the Administration of Justice

In this category, the seriousness of the offense and the long-term effect of regularly admitting evidence is weighed against the severity of the Charter violation. Justice Lamer suggested that evidence will likely be admitted when the Charter violation is trivial and the offense is serious.96 However, he pointed out that if the admission of evidence would result in an unfair trial, because the evidence emanated from the accused in violation of section 10(b), the seriousness of the offense would not render the evidence admissible. This position minimizes the importance of the third category when courts examine whether they should exclude evidence emanating from an accused at criminal trials.

V. THE RIGHT TO COUNSEL, SELF-INCRIMINATION, AND THE GOOD FAITH DOCTRINE

A. The American Position

The good faith exception in the United States is rooted in the deterrent rationale. The exception assumes that officers acting under a reasonable belief that their behavior is lawful cannot be deterred by the threat of exclusion.97 Where other values, such as fairness of the trial and maintaining the integrity of the adversary system, are protected by the rule, the United States Supreme Court has not applied
the good faith doctrine.\textsuperscript{98}

Applying Fifth Amendment jurisprudence, the United States Supreme Court refused to adopt a good faith exception to the \textit{Miranda} warnings.\textsuperscript{99} A confession obtained without the required \textit{Miranda} warning is presumed untrustworthy. It cannot be made trustworthy by a good faith failure to administer the proper warning.\textsuperscript{100} The fair trial policy underlying the Sixth Amendment's exclusionary rule provides a further constitutional basis, thereby leading the Court to explicitly reject a good faith exception.\textsuperscript{101}

\textbf{B. The Canadian Position}

The Supreme Court of Canada has given section 24(2) a purposive interpretation, similar to enumerated legal rights. The logic of this approach had led the Court to adopt an automatic rule of exclusion whenever a violation of the right to retain and instruct counsel results in evidence emanating from the accused. The values underlying sections 10(b) and 24(2) are remarkably similar. The exclusionary rule maintains the reputation of the system by ensuring a fair trial.

\textsuperscript{98} In Michigan v. Tucker, 417 U.S. 433 (1974), the United States Supreme Court used a good faith argument in a Fifth Amendment case. The police interrogation occurred prior to the \textit{Miranda} decision, but the trial was conducted after the \textit{Miranda} opinion was delivered. Accordingly, the \textit{Miranda} doctrine applied. Johnson v. New Jersey, 384 U.S. 719 (1966). The Court held that the statement was admissible because the officers had acted in good faith by giving a limited warning. The majority hinted in dicta that in the proper case there might be a deterrent rationale for excluding evidence in a Fifth Amendment context.


\textsuperscript{100} There is a deterrent rationale behind the \textit{Miranda} warnings. In Oregon v. Elstad, 470 U.S. 298 (1985), Justice O'Connor mentioned the twin rationales of "trustworthiness and deterrent," but stated in dicta that "[w]e do not imply that good faith excuses a failure to administer \textit{Miranda} warnings." \textit{Id.} at 317.

\textsuperscript{101} \textit{Moulton}, 474 U.S. at 159. In \textit{Moulton}, the government argued that the police behaved in good faith by encouraging Moulton's codefendant to seek information from Moulton about plans to kill a prosecution witness. The police did not intentionally seek information from Moulton concerning the theft for which he was indicted, and took affirmative measures to prevent the codefendant from inducing Moulton to make incriminating statements about the theft. The majority of the Court argued that acceptance of a good faith exception in these circumstances would invite the risk of fabricated investigations. Furthermore, police officers' motives are difficult to determine when the police have more than one reason to investigate an individual charged with a crime. More important, deliberately eliciting disclosures harms constitutional interests in adversarial fair play. \textit{Id.}
Section 10(b) aims "at fostering the principles of adjudicative fairness." 102 Under this theory, it is axiomatic that if police officers fail to observe the section 10(b) requirements and thereby conscript the accused against himself, the resulting evidence is excluded from trial.

The Court arrived at this conclusion by eschewing its own dispassionate person standard and by instead focusing on the reputation of the system from the standpoint of a reasonable jurist. 103 It seems unlikely that a dispassionate Canadian, or American for that matter, would hold the system of justice in disrepute simply because police officers failed to warn a detainee of the right to retain and instruct counsel, resulting in self-incriminating statements by the detainee. Nevertheless, in the eyes of many jurists, this behavior is what brings the system of justice into disrepute and assails the integrity of the judicial process. 104

Neither the good faith conduct of the police, nor the seriousness of the offense, can effectively weigh against the unfairness of admitting evidence. Yet, the Court continues to examine the behavior of police officers, labeling their failure to abide by section 10(b), regardless of the circumstances, as flagrant, willful, deliberate, or serious. Even officers who relied in good faith on pre-Charter precedent have had their behavior in violating section 10(b) described as "flagrant." 105

The Court may have foreclosed reliance on pre-Charter precedent as an argument for good faith in right to silence cases and, by implication, in section 10(b) cases. Justice Beverley McLachlin, writing for the majority in Hebert, 106 examined the good faith issue in section 24(2), stating: "It is said that the police acted in good faith,

103. Paciocco, supra note 80, at 329.
104. Id. Professor Paciocco concludes that in applying § 24(2), judges have placed themselves in the unique position of defining what conduct will bring the administration of justice into disrepute. Id. at 327.
105. A good illustration of this point is found in R. v. Therens, [1985] 1 S.C.R. 613. The events took place in late April 1982, two weeks after the patriation of the Constitution, when the accused lost control of his motor vehicle and struck a tree. A police officer demanded a breath test of the suspect. During the course of these events, the accused was not informed that he had a right to retain and instruct counsel. The Crown relied on the pre-Charter case of R. v. Chromiak, [1980] 1 S.C.R. 471 (Can.), wherein the Supreme Court of Canada held that a demand for a breath test was not a detention within the meaning of the 1960 Bill of Rights. Nevertheless, a majority of the Court reasoned that the failure of the officer to inform the suspect of his right guaranteed by § 10(b) was a flagrant breach of the Charter and excluded from evidence the results of the breath test.
106. [1990] 2 S.C.R. 151 (Can.).
relying on Rothman as authority to proceed as they did. However, ignorance of the effect of the Charter does not preclude application of 24(2) of the Charter, nor does it cure an unfair trial."

VI. THE SEIZURE OF EVIDENCE AND THE GOOD FAITH DOCTRINE

The previous analysis does not extend to evidence seized in violation of section 8 of the Charter. A violation of an individual’s reasonable expectation of privacy adversely affects neither the adversarial nature of the system nor the fairness of the trial. Good faith, therefore, becomes the determinative factor as to whether the evidence will be admitted at trial.

In Leon and Krull, the United States Supreme Court limited the use of the good faith doctrine to situations where officers acted with objective and reasonable reliance on a subsequently invalid search warrant or on a statute later declared unconstitutional. Likewise, Canadian jurists have used the good faith doctrine to justify admitting evidence where the law authorizing the search was found unreasonable, or where the police did not provide sufficient information to establish reasonable grounds, but where the magistrate issued the search warrant nonetheless.

A. Reliance on an Unconstitutional Statute

In five decisions, the Supreme Court of Canada used the good faith rationale to admit evidence at trial when officers relied on statutes later declared null and void or chose the wrong statutory authority. In two decisions, Hamill and Sieben, R.C.M.P. officers used writs of assistance authorized by section 10(3) of the Narcotic Control Act. Although the government admitted that the use of writs of assistance was unreasonable, the Crown successfully argued that the

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107. Id. at 189.
114. The section, which the legislature subsequently repealed, provided that "[a] judge of the Federal Court of Canada shall, upon application by the Minister, issue a writ of assistance authorizing and empowering the person named therein, aided and assisted by such person as
officers acted in good faith because they relied on a statute that they did not know violated the Charter.

In *R. v. Duarte* and *R. v. Wiggins*, police officers recorded conversations relying on a statute permitting the interception of private communication without judicial authorization. The statute also required the consent of the originator or intended recipient for the interception to be proper. The Supreme Court of Canada declared that the statute violated section 8 of the Charter insofar as it allowed state agents to monitor conversations without prior judicial authorization. In both cases, the Court admitted the conversations under section 24(2), reasoning that the officers acted within the scope of a statute that they believed was valid.

In *R. v. Lamb*, a police officer, intending to search for narcotics, obtained a search warrant from a magistrate under the authority of section 443 of the Criminal Code, notwithstanding that he was investigating an alleged violation of the Narcotic Control Act. The officer testified that he sought the warrant under the authority of the Criminal Code because he learned during a training course that the provisions in the Narcotic Control Act providing for warrantless searches were of dubious constitutional validity, and that recent amendments to the Criminal Code validated search warrants for nar-

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115. [1990] 1 S.C.R. 30 (Can.).
118. *Duarte*, [1990] 1 S.C.R. at 59-60; *Wiggins*, [1990] 1 S.C.R. at 68. The Court did not characterize the conversations as emanating from the accused, but this is the type of evidence that has been excluded when a violation of § 10(b) has occurred. Professor Paciocco suggests that these decisions may represent a retreat from the absolute rule of exclusion when evidence emanates from the accused. Paciocco, *supra* note 80, at 360. In a narrow sense, this suggestion is correct, but the decisions are consistent with the Court's enforcement of its fair trial policy. Significantly, neither *Duarte* nor *Wiggins* was detained nor entitled to counsel. As such, the underlying values protected by § 10(b), fairness of the trial and protection of the adversary system, were not compromised.
119. [1989] 1 S.C.R. 1036 (Can.).
120. Now § 487.
121. The officer intended to search the suspect's home and outbuilding. The Narcotic Control Act permits a warrantless search in premises other than the suspect's residence. See *supra* note 23. The opinion is unclear as to what kind of training course the officer attended. The Alberta Court of Appeal neither addressed the sufficiency of the training nor developed a standard for training.
cotic offenses. Although the Alberta Court of Appeal held the search unreasonable, the justices admitted the evidence under section 24(2) because the officer relied in good faith on his training. The Supreme Court of Canada, in a short opinion, simply stated that the appellate court committed no error in admitting the evidence.

In four of the five cases—Sieben, Duarte, Wiggins, and Lamb—a finding of good faith was supported by the fact that the officers had reasonable grounds for the search but relied on statutory procedures that the Court later declared unconstitutional or inappropriate. In Hamill, the Court remanded the case to the trial court for a determination of whether the officer had reasonable grounds to conduct the search. These decisions differ sharply from the facts in Krull where the officer lacked probable cause, but the evidence was nonetheless admitted because he acted in good faith reliance on the statute.

B. Search Warrants Obtained Without Reasonable Grounds

The Supreme Court of Canada has not addressed the issue of whether officers can, in good faith, rely on a magistrate's conclusion that reasonable grounds existed for issuing a search warrant that is later determined to be based on insufficient information. Provincial courts examining the problem have reached different conclusions. The Ontario Court of Appeal accepted the rationale articulated by the majority of the United States Supreme Court in Leon, holding that

122. As it turned out, the officer's training was sound. The Supreme Court of Canada in R. v. Multiform Manufacturing Co., 58 C.C.C.3d 257 (1990), held that amendments to the search warrant provisions of the Criminal Code were applicable to any federal statute regardless of whether the statute contained its own search and seizure provisions. See supra note 28.

128. In DeFillippo, the United States Supreme Court distinguished the unconstitutional statutes that do not directly authorize an arrest and unconstitutional laws that, on their face, do not satisfy the warrant or probable cause standard of the Fourth Amendment. De Fillippo, 443 U.S. at 39. Under the second type of statute, good faith of the officer would not make a search reasonable under the Fourth Amendment. See Ybarra v. Illinois, 444 U.S. 85 (1979); WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2, at 609 (1986). According to the decision in Krull, evidence is admissible regardless of whether the statute is described as "substantive" or "procedural" if the officer was acting in objective good faith. Krull, 480 U.S. at 346, 353. Today, it is inconceivable that a reasonably well-trained officer in the United States would not think that a "procedural" statute permitting searches without probable cause or a warrant is unconstitutional.
officers could rely on the magistrate's determination that reasonable grounds existed. Unlike the United States Supreme Court in *Leon*, the Ontario court stressed that officers were in possession of facts that, if presented to the magistrate, would have been sufficient to establish reasonable grounds for the search.

The Saskatchewan Court of Appeal took a different position. In *R. v. Pastro*, a search was declared unreasonable because the information in the warrant application did not establish reasonable grounds. The justices commented that if evidence establishing reasonable grounds existed, the officer should have provided it to the magistrate, and if the evidence did not exist, the officer failed to follow well-established procedures in applying for the warrant. In either event, the court reasoned, good faith is relevant only when examining the manner in which the search is carried out and not in the failure of the police to provide the magistrate with sufficient information to establish probable cause.

Errors on the face of a search warrant may also render a search unreasonable, but if the defects are a result of an oversight, the evidence will be admitted. In *R. v. Parent*, evidence was admitted although the address was inadvertently omitted from the search warrant when the officers' application for the warrant contained the address. The Yukon Territory Court of Appeal declared the search unreasonable, but concluded that the officers acted in good faith. The court reasoned that the oversight was a mere administrative error that, in eyes of a reasonable dispassionate person, would not bring the administration of justice into disrepute.

129. *Harris & Lighthouse Video Centres*, 35 C.C.C.3d at 23.
131. Officers prepared the warrant application using information from a confidential informant, but failed to establish the basis of the informant's information or substantiate his credibility. This approach is similar to the two-pronged test developed in *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964). *Gates* overruled these decisions replacing the two-pronged test with a totality of the circumstances test to establish probable cause. See *Gates*, 462 U.S. at 238.
132. In *Turcotte*, the Saskatchewan Court of Appeal again held that the good faith doctrine applies only to the manner in which the search is carried out. *Turcotte*, 39 C.C.C.3d at 210-11. This does not mean that the court would use the good faith doctrine to admit evidence obtained from a search conducted in an unreasonable manner, but it may use good faith to admit evidence seized by authority of a search warrant containing a technical defect.
133. 47 C.C.C.3d 385 (Y.T.C.A. 1989). *Parent* is factually similar to *Sheppard*. See supra note 3 and accompanying text.
Exclusionary Rule and Good Faith Exception

C. Exceptions to the Good Faith Doctrine

Justice Byron White, writing for the United States Supreme Court majority in *Leon*, stated that evidence would be suppressed in situations where the search warrant was so facially defective that a reasonable officer would not presume it to be valid, where the magistrate was misled by false information, and where the magistrate abandoned his neutral role. Canadian courts have also refused to apply the good faith doctrine in similar situations. Furthermore, a finding of good faith seems unlikely where the manner of the search—the physical way in which it was carried out—was unreasonable.

1. Defective Search Warrants

The Supreme Court of Canada has ruled that police officers are expected to know the essential components of a valid search warrant. In *R. v. Genest*, a warrant was issued under section 10 of the Narcotic Control Act. The form warrant did not name the officer in charge of the search, nor the hours it could be executed, nor the objects to be seized. The Crown admitted that the search was unreasonable, but justified admission of the evidence under section 24(2) on the theory that the officers acted in good faith. The Supreme Court rejected this argument on the ground that the warrant was so facially inadequate that the officers should have been alert to its deficiencies.

2. Misleading Information

In *R. v. Donaldson*, the British Columbia Court of Appeal considered the admissibility of evidence obtained as a result of a search warrant issued on the basis of misleading information. A R.C.M.P. officer, in an application for a search warrant, used the phrase “relia-

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134. *Leon*, 468 U.S. at 293.
135. *Sheppard*, 468 U.S. at 981; see *Bradley*, supra note 2 (discussing the distinction between good faith before obtaining the warrant versus good faith after issuance).
136. [1989] 1 S.C.R. 59 (Can.).
137. *Id.* at 73. The warrant in this case violated the version of § 10(2) of the Narcotic Control Act that was in force at the time of the case. The section read, in part: “A justice who is satisfied by information upon oath that there is a narcotic . . . in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling house and search for narcotics.” [1989] 1 S.C.R. at 65. The warrant also contained a number of blank spaces. *Id.* at 73.
138. *Id.* at 87. The Court also held that the deficiencies in the warrant, coupled with the unreasonable manner in conducting the search, demonstrated a lack of good faith. *Id.* at 91.
ble confidential sources" instead of disclosing that his knowledge was obtained from the questionable interception of private communications.\textsuperscript{140} The trial judge found that the failure to inform the magistrate of the meaning of the phrase was deceptive because the magistrate believed that the phrase referred to a typical police informant.\textsuperscript{141} On appeal, the Crown admitted the section 8 violation but argued that the evidence should not be excluded.\textsuperscript{142} The appellate court disagreed and emphasized that because warrant applications are made \textit{ex parte}, it is essential that magistrates are not deliberately deceived by the police.\textsuperscript{143} The justices emphasized that quashing warrants and excluding evidence is not done to punish the police, but "to avoid the corruption of the judicial process which would result if deliberate efforts to mislead judicial officers in the discharge of their judicial functions could nonetheless lead to valid judicial orders."\textsuperscript{144}

3. Magistrates Abandon Their Proper Role

Sometimes officers will present a warrant application to a specific magistrate because he will "rubber stamp" it without applying the requisite scrutiny. The Saskatchewan Court of Appeal held a search unreasonable because the warrant was issued by a justice of the peace who was not a neutral and impartial magistrate as required by section 10(2) of the Narcotic Control Act.\textsuperscript{145} The justice of the peace was a member of the Corps of Commissionaires with specific duties of traffic enforcement at the Regina airport. The R.C.M.P. constable in charge of the airport detachment supervised and disciplined members of the corp assigned to traffic enforcement.\textsuperscript{146} Under these circumstances, the court refused to apply the good faith doctrine and asked whether "good faith [can] be said to exist where the course of conduct points to an obvious selection process of obtaining search warrants."\textsuperscript{147}

\textsuperscript{140} \textit{Id.} at 301. Crown officials were concerned that if they divulged their source of information, it would substantially affect their ability to carry on the investigation. \textit{Id.}
\textsuperscript{141} \textit{Id.} at 310.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 311.
\textsuperscript{144} Donaldson, 58 C.C.C.3d at 311 (quoting R. v. Sismey, 55 C.C.C.3d 281, 285 (B.C.C.A. 1990)).
\textsuperscript{145} Pastro, 42 C.C.C.3d at 490.
\textsuperscript{146} In Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), the magistrate abandoned his neutral and detached role when he went with the police and made an item-by-item determination of what evidence could be seized.
\textsuperscript{147} Pastro, 42 C.C.C.3d at 546.
4. Unreasonable Manner in Executing Searches

Where the manner of the search is physically abusive or violates bodily integrity, the good faith rationale is insufficient to admit the evidence. In *Hamill*, the police applied a chokehold to the suspect, and the Supreme Court of Canada sent the case back to the trial court to determine whether the police officer, in addition to having reasonable grounds to conduct the search, had sufficient reason for applying the hold.\(^{148}\) The Court cautioned that if there was no justification for the manner of the search, the chokehold would be unreasonable and the evidence inadmissible, notwithstanding the officer's good faith reliance on a law later declared unconstitutional.\(^{149}\)

In *R. v. Genest*,\(^{150}\) a small army of officers used a battering ram to enter a home pursuant to a defective search warrant only five weeks after the officers conducted a similar search of the home.\(^{151}\) According to the Court, the method of entry, the previous search, and the officers' reliance on a defective warrant suggested the officers' ulterior motives and a continuing abuse of police power.\(^{152}\)

The Supreme Court of Canada has avoided applying the good faith rationale in cases where the manner of the search violated a suspect's bodily integrity. In *R. v. Greffe*,\(^{153}\) the Court declined to find a good faith belief of the officers where a rectal search was conducted after an arrest for traffic offenses.\(^{154}\) Similarly, the Court has refused to apply the good faith doctrine in situations where the violation of bodily integrity was less intrusive. In *Pohoretsky*, the defendant was convicted of impaired driving, under section 236 of the Criminal Code.\(^{155}\) A physician, at the request of a police officer, obtained a blood sample from the incoherent driver. The issue before the Court was whether this act of taking a driver's blood sample was authorized. According to the Manitoba Blood Test Act, the physician's act was


\(^{149}\) *Id.* The Court did not determine whether the manner of the search was reasonable because it was not a ground upon which exclusion was argued. *Id.* The Court suggested that if Hamill was a violent person who had assaulted police officers in the past, then applying the chokehold was reasonable. *Id.* In *R. v. Rao*, 12 C.C.C.3d 97, 102 (Ont. C.A. 1984), officers physically assaulted the accused in the course of searching his home. This action made the search unreasonable, and good faith was not an issue. *Id.* at 127.

\(^{150}\) [1989] 1 S.C.R. 59 (Can.).

\(^{151}\) *Id.* at 66-67.

\(^{152}\) *Id.* at 88.

\(^{153}\) [1990] 1 S.C.R. 755 (Can.).

\(^{154}\) *Id.* at 758.

proper, but section 237 of the Criminal Code prohibited the taking of blood for chemical analysis without consent. In resolving this conflict, the Court concluded that the search was unreasonable and excluded evidence of the blood test on that basis. The Court reasoned that the officer did not act in good faith because he should have known that the Manitoba Blood Test Act was contrary to the Criminal Code and, therefore, was of no force or effect.

In addition, an officer’s good faith was insufficient to allow evidence of blood test results obtained by a doctor who, for medical purposes, held a vial under a free flowing wound to collect a blood sample. After the suspect disclosed to the doctor that he had consumed a beer and some antihistamine tablets, the doctor turned over the blood sample to a police officer. The officer had neither requested the sample nor was aware that blood had been taken. Nevertheless, the Court concluded that the seizure, in the absence of some compelling reason or statutory authority, violated the defendant’s personal autonomy.

These rulings indicate that the courts rarely allow the good faith doctrine as a justification for admitting evidence seized when officers were aware of substantive defects in the search warrant, when they provided the magistrate with misleading information, when they forum shopped to obtain the search warrant, and when they conducted the search in an unreasonable manner. Furthermore, the Greffe, 156 Id. at 947. Manitoba’s Blood Test Act permits the taking of blood without consent if the doctor has reasonable grounds to believe that the individual has been driving a car during the preceding two hours. Id.

157. Id. at 949-50. The Crown conceded before the Supreme Court that taking the blood sample was unreasonable for two reasons. Id. at 948. First, the police officer did not establish the necessary legal grounds pursuant to Manitoba’s Blood Test Act. Id. Second, the Act was irrelevant in criminal prosecutions because the defendant was charged under the Criminal Code, and provinces have no jurisdiction to legislate with respect to criminal matters. Id; see supra note 7.

158. Hamill, Sieben, Duarte, Wiggins, and Lamb differ from Pohoretsky because the officers acted within the authority of the Criminal Code and would not have known that the law violated the Charter. See MacCrimmon, supra note 23, at 252.


160. Id.

161. Id.

162. Id. at 431-32. There are now detailed provisions in the Canadian Criminal Code for taking blood samples. Criminal Law Amendment Act, R.S.C., ch. C-46, §§ 252-61 (1985) (Can.).

163. An exception, for example, is the notorious case of R. v. Legere, 43 C.C.C.3d 502 (N.B.C.A. 1988). The New Brunswick Court of Appeal admitted into evidence hair samples that were taken by force from the accused in violation of § 8. The court felt that the officers
Exclusionary Rule and Good Faith Exception

Pohoretsky, and Dyment decisions signal the Supreme Court of Canada's willingness to protect bodily integrity, the most significant value protected by section 8, as evidenced by the Court's strict enforcement of the exclusionary rule for violation of bodily integrity without prior judicial or statutory authority.

D. Unreasonable Searches or Seizures Without Warrants

The most vexing problem surrounding the good faith doctrine occurs in warrantless searches. Such situations arise when officers conduct a warrantless search, believing they have reasonable grounds, but it is later determined that they did not. American commentators, focusing on the deterrent rationale, argue that extending the good faith exception to warrantless searches dilutes the standard of probable cause and makes the warrant process less attractive to the police. In contrast, it is unclear whether the Supreme Court of Canada will apply the good faith doctrine in warrantless searches, but, in two cases examining this issue, they did not apply the doctrine.

In Greffe, the R.C.M.P., acting on an informant’s tip and a follow-up investigation, alerted customs authorities at the Calgary airport that the accused was transporting heroin into the country. Customs officials detained Greffe, and without informing him of his right to counsel, conducted a body search. No drugs were discovered, and Greffe was turned over to the R.C.M.P. Constables then advised Greffe that he was under arrest for unpaid traffic tickets. He was informed of his right to retain and instruct counsel and that

acted in good faith because, before extracting the samples, they had consulted with Crown counsel, who apparently informed them that taking hair samples did not violate the Charter.  

164. Dripps, supra note 2, at 907.  
165. In R. v. MacDonald, 44 C.C.C.3d 134 (P.E.I.C.A. 1990), the Court of Appeal for Prince Edward Island held that an officer's behavior in stopping, searching, and seizing narcotics from a suspect without a warrant and without reasonable grounds was high-handed, illegal, and unwarranted.  
167. Id.  
168. Id. at 773. One of the Charter violations in Greffe was the failure of the officers to accurately advise Greffe why he was being arrested. Section 10(a) of the Charter requires that persons detained or arrested be informed promptly of the reasons for their detainment. The officer had written in his notebook that the arrest was for a traffic offense. Id. One constable testified that he had an independent recollection that he told Greffe that he was being arrested for a narcotics violation. The trial court, however, found that the traffic arrest was the stated reason for the detention. Id.
he would be subjected to a body search by a doctor.\(^\text{170}\) At the hospital, a physician gave Greffe a rectal examination and discovered a quantity of narcotics.\(^\text{171}\) The R.C.M.P. constables testified that the informant's tip and their subsequent investigation revealed a description of Greffe, the flight he was on, the clothes he was wearing, and that he had narcotics in his possession.\(^\text{172}\)

The Crown admitted that the officers' information was insufficient to establish reasonable grounds as required by section 8 of the Charter, but argued that the evidence should be admitted under section 24(2).\(^\text{173}\) In his section 24(2) analysis, Justice Lamer, writing for the majority, found that the officers did not have reasonable grounds to conduct the search.\(^\text{174}\) Although the events occurred in 1984, prior to decisions in Charter cases, Justice Lamer reasoned that the cumulative effect of the two Charter violations of sections 8 and 10, in addition to the use of the traffic arrest as a vehicle to conduct the rectal examination, gave rise to an inference of bad faith, and thus the evidence was suppressed.\(^\text{175}\)

\(^\text{170}\) Id. at 772-73.
\(^\text{172}\) Id. at 766-67. The Crown declined the trial judge's invitation to elicit more testimony about what led the constables to believe that Greffe was carrying narcotics. There was no evidence, for example, about the informant's reliability or how the officers knew that the suspect swallowed a balloon. Id. at 792.
\(^\text{173}\) Id. at 786-87. The Crown frequently admits Charter violations. But in Greffe, the Crown may have made a tactical error. The dissent argued that officers had reasonable grounds to conduct the search for narcotics, notwithstanding the fact that they arrested Greffe on a traffic warrant. A cursory reading of provincial appellate court opinions reveals a disturbing trend. Courts frequently assume the Charter violation and quickly focus on § 24(2). To the extent that this is true, the development of jurisprudence for substantive Charter sections is weakened.
\(^\text{174}\) In Greffe, the Court signaled that it might move away from the proportionality test outlined in Collins. [1990] 1 S.C.R. at 793. The decision elevated the "seriousness of the Charter breach" to a determinative role in exclusion decisions. The Court suggested that the facts of each case will determine which of the three Collins factors it will emphasize. P. Michael Bolton, Q.C., & Chris Tollefson, The Exclusion of Real Evidence Under §§ 24(2) of the Charter, 48 THE ADVOCATE 343 (1990).
\(^\text{175}\) Greffe, [1990] 1 S.C.R. at 758 ("No urgency or immediacy to prevent loss of evidence.").

The dissent vigorously argued that the officers had sufficiently reasonable grounds to conduct the search within the meaning of § 8 and, moreover, the officers acted in good faith because the search occurred before the Supreme Court announced any Charter decisions analyzing searches at the border. Id. at 767-68. In the United States, customs officials can detain individuals at the border when they have reasonable suspicion, as opposed to probable cause. United States v. Sokolow, 490 U.S. 1, 7 (1989); Hernandez, 473 U.S. at 531. The United States Supreme Court has yet to address the issue of what burden is required when conducting a
In *R. v. Kokesch*, police officers, acting without reasonable grounds, conducted a perimeter search of the accused’s home. They observed a piece of plywood nailed to the wall of the residence covering a metal vent, and, from the side of the plywood, they detected the odor of marijuana, as well as heat, coming from the area. Based on these observations, the officers obtained a search warrant for the home and seized a number of marijuana plants.

The Supreme Court of Canada held that conducting the search prior to obtaining the search warrant was unreasonable, and excluded the evidence from trial. Distinguishing the cases of *Duarte, Wiggins, Hamill*, and *Sieben*, Justice John Sopinka emphasized that the police improperly trespassed on the accused’s private property without statutory authority. Even though no express law prohibited the search, Justice Sopinka stated that the police officers were aware, or should have been aware, that common law and case precedent prohibited this police activity. Therefore, under these circumstances, the police did not act in good faith.

**VII. STANDARD OF GOOD FAITH**

The Supreme Court of Canada has indicated that the concept of rectal examination at the border. Given the intrusive nature of such a search, more justification than mere suspicion may be necessary. *Lafave, supra* note 128, § 10.5, at 286-88.

177. *Id.* at 9.
178. *Id.*
179. *Id.* at 10.
180. *Id.* at 18.
181. *Kokesch*, [1990] 3 S.C.R. at 33-34. The Narcotic Control Act, under which the investigation was authorized, permits warrantless searches other than in a suspect’s home. The Act, however, requires that the police have reasonable grounds before conducting a warrantless search. See *supra* note 23.
182. *Kokesch*, [1990] 3 S.C.R. at 33. According to the Court, two pre-Charter cases precluded the argument that the police had common law authority to trespass on the private property of the suspect to conduct a search, and the police knew about or should have been aware of these two cases. *Id.* at 33-34 (citing Eccles v. Bourque, [1975] 2 S.C.R. 739 (Can.); Colet v. The Queen, [1981] 1 S.C.R. 2 (Can.)).

In *Kokesch*, the Supreme Court of Canada admitted the possibility that good faith reliance on previous case precedent may be sufficient to admit evidence that does not affect the fairness of the trial. *Id.* at 22. It seems logical that if officers should have been aware of cases prohibiting trespass, they may rely in good faith on pre-Charter cases permitting conduct that otherwise might violate § 8. Justice Sopinka seems to have suggested this outcome when he reasoned that “[t]he question of the length of time after a judgment that ought to be permitted to pass before knowledge of its content is attributed to the police for the purposes of assessing good faith is an interesting one, but it does not arise on these facts.” *Id.* at 33.
good faith requires an assessment of reasonableness. But, there are two tests of reasonableness that determine the standard of good faith, an objective reasonableness test and a subjective test that takes into consideration the reasonableness of the officer's beliefs.

The objective reasonableness standard was adopted by the United States Supreme Court in *Leon*. The Court required that the activities of the police be measured by a hypothetical well-trained police officer. Though the Supreme Court of Canada has yet to follow this standard expressly, its decisions are consistent with the test applied in the United States. Under this objective test, a reasonable officer would not know that writs of assistance were unconstitutional, but the officer should, nonetheless, realize that a provincial law has no effect if it contradicts the Criminal Code. Moreover, a reasonable officer should know the facial requirements of a valid search warrant and could rely on the officer's training, previous case precedents, and departmental policies, as well as Crown counsel, to guide his or her activities.

Good faith, as a subjective notion, requires an examination of the beliefs and motives of the officers and a judgment about the reasonableness of those beliefs. The Ontario Court of Appeal defined good faith in this way in *R. v. Harris & Lighthouse Video Centres, Ltd.* In that case, the officer's preparation of the warrant fell below a reasonably competent standard, but the officer honestly and reasonably believed that she had presented the magistrate with reasonable grounds for a search. In permitting the evidence at trial, the court

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184. MacCrimmon, *supra* note 23, at 255-56. It is unlikely that the court will accept a standard that examines the beliefs and motives of officers without regard to the reasonableness of those beliefs. Such a standard would enthrone the private judgments of every police officer. *Id.* at 257-58.
185. Dripps argues that a well-trained officer would not seek a warrant from a magistrate until he or she had conducted a significant independent investigation and secured an internal screening of the warrant application from a departmental superior or lawyer. See Dripps, *supra* note 2, at 930-31.
186. Some scholars argue that the *Leon* decision concerns a mistake of law rather than good faith. See Bradley, *supra* note 3. Bradley argues that *Leon* will have a major impact on negligent mistake of law cases, but not on good faith cases. See *id.* at 295-96. Similarly, Misner argues that the good faith exception was analogous to the mistake of law defense. Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 509 (1986).
188. *Id.* at 28. The Ontario Court of Appeal emphasized that the officer was in possession of facts that, had she presented them to the magistrate, would have resulted in the issuance of a valid search warrant. *Id.*
rejected the objective reasonableness test, but cautioned that it would not reward ignorance. Ignorance of proper procedure might be so glaring, the court stated, that it would bring the administration of justice into disrepute.

Although the Supreme Court of Canada's decisions are consistent with the objective reasonableness test developed in Leon, the Court's willingness to make judgments about the motives and beliefs of officers suggests that it will accept the Ontario Court of Appeal's standard of good faith. Of course, the reasonableness of those beliefs will become central to the Court's finding of good faith.

VIII. CONCLUSION

Canadian judges examined section 24(2) and discovered that its purpose mirrored their judicial values regarding fairness of the trial and maintenance of the adversary system. The reputation of the system, they believe, depends upon the exclusion of evidence when its admission contravenes those values. Had they looked into their communities, they would have discovered that the reasonable and dispassionate person does not hold the system in disrepute in every case in which those values are impugned. Nevertheless, having started down the road of enforcing judicial norms, perhaps Canadian courts should embrace Justice Sopinka's dictum that the fairness of the trial and seriousness of the violation "are alternative grounds for the exclusion

189. Id. at 27. The Ontario court also rejected the objectively reasonable test. See R. v. Moran, 36 C.C.C.3d 225 (Ont. C.A. 1987); R. v. Woolley, 40 C.C.C.3d 531 (Ont. C.A. 1988).
190. Harris & Lighthouse Video Centres, 35 C.C.C.3d at 27. Appellate courts place weight on an officer's experience and position within the organization. See Pastro, 42 C.C.C.3d at 522. In R. v. Rhodenbush, 21 C.C.C.3d 423, 427 (B.C.C.A. 1985), the British Columbia Court of Appeal suggested that superior officers are deemed to have more knowledge about the Charter than their subordinates.
191. Perhaps the best example of the Court's use of the subjective state of mind in non-exclusion cases is found in Storrey. In determining the standard to be applied in assessing whether an arrest violates § 9, the Court adopted an objective and subjective test. Storrey, [1990] 1 S.C.R. at 251-52. The objective test is whether a "reasonable person standing in the shoes of the police officer would have believed that reasonable and probable grounds existed to make an arrest." Id. at 250. The subjective test examines the motives of the arresting officer. In this case, there was no indication that the police officer demonstrated bias toward persons of different race, nationality, or color, or that there was enmity between the officer and the person arrested. Id. at 251-52. "These factors, if established," the Court cautioned, "might have the effect of rendering invalid an otherwise lawful arrest." Id. at 252. The rule in the United States is different. LAFAVE, supra note 128, § 1.4, at 80. In Scott v. United States, 436 U.S. 128, 138-39 (1978), the United States Supreme Court held that the Fourth Amendment requires only an objective assessment of the officer's actions in light of the facts and circumstances known to him or her.
of evidence, and not alternative grounds for the *admission* of evidence. It seems odd indeed to assert that the admission of evidence which would render a trial unfair ought to be admitted because the police officer thought he was doing his job."

In addition, another automatic rule of exclusion lurks on the horizon in cases in which the physical manner of the search was unreasonable. Under such circumstances, reasonable acts of good faith by the police can rarely overcome the disrepute of the system if the evidence is admitted.

So, what is left for the application of the good faith doctrine? First, the good faith rationale will continue to have its impact when the only issue is the admissibility of real evidence or evidence that does not impugn the fairness of the trial. Second, the Supreme Court of Canada may find that officers act in good faith in conducting a warrantless search when they believe they have reasonable grounds, but in fact do not. Third, the Supreme Court of Canada will continue to use the good faith doctrine to determine the admissibility of evidence in a narrow range of cases, similar to those decided by the United States Supreme Court, where there is either insufficient information in the application to provide the magistrate with reasonable grounds, but the magistrate nevertheless issues the search warrant, or where officers conducted a search relying on a statute later declared unconstitutional. In either event, the Supreme Court of Canada, unlike the Supreme Court of the United States, will apply the good faith exception only if it is established that officers had facts in their possession that gave them reasonable grounds to conduct the search or to obtain the warrant.

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