American Cadillacs or Canadian Compacts: What is the Correct Criminal Procedure for s. 24 Applications under the Charter of Rights?

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PART II†

6. Preliminary Offers of Proof in Written Form and Summary Dismissal of the s. 24 Application Without a Hearing

As suggested earlier (in Part I of this article), the most radical proposal found in *R. v. Kutynec*[97] is the requirement that all s. 24 applications be accompanied by written proof in affidavit, documentary or transcript form. This preliminary offer of proof can then be attacked by the Crown as deficient in order to weed out frivolous applications before they even reach a hearing. The procedure is somewhat akin to the civil motion to strike out pleadings that disclose no reasonable cause of action. While this procedure is virtually unheard of in the Canadian criminal context, it is widely used in the United States.

The major practical objection to this new requirement has already been discussed above, that is, it cannot possibly work without access to some procedure for compulsory pre-trial discovery and production where the Charter violations will either be revealed or not revealed.

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† Part I is found in June, 1991 issue of the C.L.Q., at p. 298. Both parts of this article relate to research that the author is doing at the University of Toronto, Faculty of Law, with Professors M. Friedland and K. Roach, comparing the different ways in which the American and Canadian criminal justice systems have used their respective constitutions. The ultimate study will use New York State and the Province of Ontario as its primary models. The author would like to thank Professors Friedland and Roach for their invaluable assistance and guidance.

[97] (1990), 57 C.C.C. (3d) 507, 78 C.R. (3d) 181, 74 O.R. (2d) 205 (Dist. Ct.).

Leaving aside these practical concerns, Judge Borins' approach raises difficult theoretical questions as well.

The first and most obvious objection is that the test or standard set by *Kutynec* for a motion to strike is far too high. Judge Borins formulates the test in two ways:[97a] "a substantial preliminary showing that he or she was the subject of the infringement or denial of a Charter right" "demonstrate . . . a high likelihood that if a hearing were held the defendant would succeed on the merits." It appears the two formulations of the test are to be read as synonymous. Judge Borins clearly states that the purpose of this new procedure is to save court resources from "the time and cost of permitting . . . time-consuming hearings to identify non-meritorious claims".[98] Unfortunately, the test proposed achieves far more than its stated purpose. In a civil action, alleging a violation of constitutional rights and seeking a s. 24 or s. 52 remedy, the Supreme Court of Canada has unanimously held that the test for striking out the pleadings and denying a hearing to the plaintiff/applicant, is whether the action has "some chance of success" or whether it is "plain and obvious that the action cannot succeed".[99] This test, adopted in *Operation Dismantle*,[99a] is taken directly from ordinary civil cases, in non-constitutional settings, such as *Canada (Attorney General) v. Inuit Tapirisat of Canada*[100] and *Ross v. Scottish Union & National Ins. Co.*[101] In the latter case, referred to with approval in both *Operation Dismantle* and *Inuit Tapirisat*, the Ontario Court of Appeal (*per* Magee J.A.) stated: "To justify the use of Rule 124 . . . it is not sufficient that the plaintiff is not likely to succeed at the trial." *Kutynec* has therefore erected a standard which has been expressly rejected in the civil cases. It would be unfair in the extreme if civil litigants, in non-

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[97a] *Ibid.*, at p. 521 C.C.C.

[98] *Ibid.*

[99] *Operation Dismantle v. Canada* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287. The Supreme Court of Canada's most recent pronouncement on this issue, in a non-Charter case, is to the same effect: see *Carey Canada Inc. v. Hunt* (1990), 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, [1990] 6 W.W.R. 385.

[99a] *Ibid.*, at pp. 486-7 D.L.R.

[100] (1980), 115 D.L.R. (3d) 1 at p. 5, [1980] 2 S.C.R. 735, 33 N.R. 304.

[101] (1920), 53 D.L.R. 415 at pp. 421-3, 47 O.L.R. 308 (C.A.).

constitutional disputes, were granted access to scarce court resources on a more generous basis than criminal litigants involved in constitutional disputes. *Kutynec's* stated object of culling out "non-meritorious claims" could be achieved by applying a standard directed to that purpose and drawn from the civil cases, namely, whether the application has "no chance of succeeding".[102] The higher standard of showing "a high likelihood of success" will weed out both the "non-meritorious claims" as well as those claims which *may* succeed but are not *likely* to succeed. This higher standard is particularly inappropriate when dealing with a new constitutional instrument which must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers".[103] As Wilson J. noted in *Operation Dismantle*:[104] "nor will the novelty of the cause of action militate against the plaintiffs".

Similarly, in *Manicom v. Oxford (County)*,[105] Mr. Justice Saunders (Bowlby J. concurring) stated: "It is clear, however, and perhaps trite, that a claim should not be struck out because of novelty or complexity, or because it will involve a long and difficult trial."

Assuming an appropriate standard can be developed for the motion to strike out unmeritorious s. 24 applications, the more fundamental theoretical question is whether this civil procedural device should be imported into the criminal law. As already noted, many American jurisdictions have done so. The New York Criminal Procedure Law, for example, provides in s. 210.45(5) (dealing with s. 210.20 pre-trial motions to dismiss the indictment on various grounds such as facial insufficiency under s. 210.25; insufficiency of the evidence before the grand jury under s. 210.30; double jeopardy under s. 40.20; violation of the right to a speedy trial under s. 30.20, and abuse of process under s. 210.40) that "the court may deny the motion without

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[102] *McKay v. Essex Area Health Authority*, [1982] 2 All E.R. 771 (C.A.) at p. 778.

[103] *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 at p. 105, 41 C.R. (3d) 97, [1984] 2 S.C.R. 145.

[104] *Supra*, footnote 99, at p. 508 D.L.R.

[105] (1985), 21 D.L.R. (4th) 611, 52 O.R. (2d) 137, 20 O.R.R. 44 at pp. 48-9 (Div. Ct.). To the same effect is *Carey Canada Inc.*, *supra*, footnote 99.

conducting a hearing if . . . the motion is based upon the existence or occurrence of facts, and the moving papers do not contain sworn allegations supporting all the essential facts". Section 710.60(3) is to much the same effect (dealing with pre-trial motions to suppress evidence), although the section expressly exempts from its operation motions under s. 710.20(3) and (b) to suppress an involuntary statement or improper identification evidence. Thus, in New York State, virtually all species of constitutional motions (as well as other non-constitutional pre-trial motions) can be dismissed summarily without a hearing. This is achieved by New York's acceptance of the three procedural tools introduced in Canada by *Kutynec*: pleadings which allege facts; supporting evidence in written form, and motions to strike.

The first obvious point to note is that this kind of procedural tool has never been applied to criminal *prosecutions*. There is no device by which a criminal prosecution can be stopped, in advance of an actual hearing of the evidence, on the basis that it is "plain and obvious that the action cannot succeed". The Crown is never required to submit preliminary proof of its case in a sworn written form and be subjected to a motion to strike unmeritorious cases. The earliest point at which the prosecution can be stopped on such grounds is *after* the Crown has called all its evidence, either at a preliminary inquiry or at a trial held without benefit of a preliminary inquiry. The test is the same for committal at the end of the preliminary inquiry as on the directed verdict motion at the end of the Crown's case at trial.[106] (It is worth noting parenthetically that this test applied to the Crown — "there is admissible evidence which *could*, if it were believed, result in a conviction" — is a much lower standard than the *Kutynec* test of a "high likelihood" of success.[107]) Regardless of the test that is applied at this stage, the simple point to note is that there is no attempt

[106] *U.S.A. v. Sheppard* (1976), 30 C.C.C. (2d) 424 at p. 427, 34 C.R.N.S. 207, [1977] 2 S.C.R. 1067.

[107] Indeed, many prosecutions would fail at this stage if the "high likelihood" test was applied. In *R. v. Mezzo* (1986), 27 C.C.C. 97, 52 C.R. (3d) 113, [1986] 1 S.C.R. 802; and *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193, 59 C.R. (3d) 97, [1987] 2 S.C.R. 154, it was held that even "dubious" and "unsafe" cases must be allowed to proceed as the trial judge cannot "weigh" the evidence or assess its "quality" on such a motion. Thus we allow the prosecution to crowd already overloaded dockets with weak and unsafe cases

to vet the prosecution and cut off obviously unmeritorious cases until *after* all the evidence has been heard *viva voce* at a hearing.

The same applies to interlocutory proceedings. When the Crown seeks to tender a statement made to the police, which is obviously involuntary, there is no procedural mechanism to deny the Crown its right to tender the statement on a *voir dire*, call all relevant evidence, and seek a ruling as to the statement's admissibility (conversely, there is no right to deny the defence a hearing where the statement is obviously voluntary). We have never subjected the Crown to pleadings, preliminary offers of proof in written form, and motions to strike unmeritorious statement *voir dires* in advance of a hearing on the merits.

This historical reality leads to obvious questions as to whether there is something fundamental about the right to a hearing in the criminal context, both for the Crown and the defence. The long historical absence in Canada, of civil motions to summarily deny either party, in a criminal case, the right to call relevant *viva voce* evidence at a hearing may be due to unthinking or outdated tradition. On the other hand, it may be that there is some good reason why the judiciary are unwilling to prejudge a criminal matter as being obviously without merit, without the benefit of first hearing evidence.

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which should never lead to convictions. Since there is no procedural device to weed out these cases, either before or after the evidence has been heard, it seems unfair to subject only defence proceedings to this kind of vetting procedure in the name of preserving scarce court resources for only meritorious cases. This obvious double standard is particularly offensive when the defence proceedings being vetted involve allegations of constitutional violations. See, generally, R.J. Delisle, "Evidence — Tests for Sufficiency: Mezzo v. The Queen" (1987), 66 Can. Bar Rev. 389, and the Annotation to *R. v. Monteleone*, (1987), 59 C.R. (3d) 97. The only device in our procedural armoury for weeding out weak prosecutions occurs *after* the trial is completed when the Court of Appeal can assess the "reasonableness" of the verdict pursuant to s. 686(1)(*a*)(i). In Ontario alone there have been a startling number of successful appeals on this ground during 1990, particularly in identification cases: see: *R. v. Izzard* (1990), 54 C.C.C. (3d) 252, 75 C.R. (3d) 342, 38 O.A.C. 6 (C.A.); *R. v. D.(A.)* (1990), 37 O.A.C. 267 (C.A.); *R. v. Krack* (1990), 56 C.C.C. (3d) 555, 73 O.R. (2d) 480 *sub nom. R. v. K (F.)*, 39 O.A.C. 57 (C.A.); *R. v. B.(R.)* (1990), 11 W.C.B. (2d) 190 (Ont. C.A.); *R. v. Amaral* (1990), 11 W.C.B. (2d) 204 (Ont. C.A.); *R. v. Quercia* (1990), 60 C.C.C. (3d) 380, 1 C.R. (4th) 385, 75 O.R. (2d) 463 (Ont. C.A.). The evidence in most of these cases was shockingly weak and the verdicts obviously perverse and yet they all went through the full trial and appeal processes. If a procedure to dismiss weak criminal cases summarily, without a hearing, is desirable, then surely it should be applied equally to the prosecution.

This greater caution in criminal matters may simply be due to the fact that the opposing interests (liberty and the protection of the public) are sufficiently important to justify always hearing evidence so as to prevent judicial error.

The one Canadian precedent for such motions to strike in the criminal context, as noted earlier, is the so-called "*Wilson* hearing". Our experience with these hearings is helpful in determining whether the American-style motion to strike is likely to become a feature of Canadian constitutional procedure in criminal cases.

These applications had their genesis in the Supreme Court of Canada's decision in *R. v. Wilson*[108] where Mr. Justice McIntyre developed a procedural mechanism for reviewing "wire-tap" authorizations issued under what is now Part VI of the Criminal Code (previously Part IV.1). Since these authorizations were *ex parte* orders of District and Supreme Court Judges and since the Criminal Code provided no obvious statutory mechanism for reviewing the order in cases where it had issued on the basis of a false or misleading affidavit, Justice McIntyre crafted a common law procedure to provide a hearing and a remedy to the aggrieved party (*i.e.*, the person who had been "wire-tapped" under the suspect order). This new procedure (the so-called "*Wilson* hearing") was adopted directly from the civil procedure for rescinding *ex parte* court orders, such as injunctions, on the basis of deficiencies in the original *ex parte* affidavit. The civil procedure was to go back to the original judge who had made the *ex parte* order and conduct an *inter partes* hearing *de novo* with the right to call evidence and cross-examine the original affiant.[109] A line of cases emerged in Ontario setting out the proper procedure for these "*Wilson* hearings", which were previously unknown to criminal practitioners. The Ontario procedures for "*Wilson* hearings" were adopted entirely from American jurisprudence and they were virtually identical to the procedures now suggested in *Kutynec* for all s. 24 applications, namely: a pre-

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[108] (1983), 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, [1983] 2 S.C.R. 594.

[109] See *Dickie v. Woodworth* (1883), 8 S.C.R. 192; *Gulf Islands Navigation Ltd. v. S.I.U.* (1959), 18 D.L.R. (2d) 625, 28 W.W.R. 517 (B.C.C.A.); *Herman v. Klig*, [1938] 3 D.L.R. 755, [1938] O.W.N. 270 (S.C.).

trial notice of motion setting out particulars of the alleged deficiency in the "wire-tap" affidavit; supporting evidence in affidavit or documentary form appended to the notice; motions by the Crown to strike the proceedings and deny the applicant a full hearing (including denial of the right to cross-examine the original affiant) if the supporting evidence filed on the motion did not amount to "a substantial preliminary showing" or "*prima facie* proof" of the deficiency alleged.[110] The policy reasons advanced by the Ontario courts for introducing these stringent new requirements were also virtually identical to those advanced by Judge Borins in *Kutynec*, namely, to weed out unmeritorious claims in advance and to prevent the hearing itself from becoming a vehicle for discovery.[111] There is little authority outside Ontario adopting these procedures.

The American case on which the Ontario procedures were based is *Franks v. Delaware.*[112] In that case the United States Supreme Court adopted restrictive procedural rules limiting

[110] See *R. v. Parmar* (1987), 37 C.C.C. (3d) 300, 61 O.R. (2d) 132 (H.C.J.), affd 53 C.C.C. (3d) 489, 44 C.R.R. 278 (Ont. C.A.); *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113, 35 C.R.R. 207 (Ont. C.A.); *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193, 43 C.R.R. 252 revd 60 C.C.C. (3d) 161, 80 C.R. (3d) 317, [1990] 2 S.C.R. 1421 (Ont. C.A.); *R. v. Lachance* (1988), 27 O.A.C. 45 (C.A.), revd 60 C.C.C. (3d) 449, 80 C.R. (3d) 374, [1990] 2 S.C.R. 1490 *Re Corr and the Queen* (1987), 36 C.C.C. (3d) 116 (Ont.C.A.); *Re Church of Scientology and the Queen (No. 4)* (1985), 17 C.C.C. (3d) 499 (Ont. H.C.J.), affd 31 C.C.C. (3d) 449 (Ont.C.A.); *R. v. Collins* (1989), 48 C.C.C. (3d) 343, 69 C.R. (3d) 235, 41 C.R.R. 193 (Ont. C.A.).

[111] The best discussion of these policies is found in *Parmar, ibid.*, at pp. 339-40 C.C.C., *per* Watt J.

[112] 438 U.S. 154 (1978). It is a search-warrant case where the defence alleged that the police officers' sworn affidavit, which was used to obtain the warrant, was false. Counsel brought a pre-trial suppression motion and sought to call three witnesses (the affiant and two of his named sources) to establish that the affidavit was false. Counsel sought to argue that if the affidavit was in fact false then the warrant would fall and the fruits of the search could be suppressed on the basis that they were obtained in violation of the Fourth Amendment. The lower courts denied counsel the right to a suppression hearing. They held that the judge-made exclusionary rule for Fourth Amendment violations only extended to cases where the affidavit was insufficient *on its face* to establish probable cause. The Delaware Courts held that the exclusionary rule had not yet been extended by the U.S. Supreme Court to remedy affidavits that were *sub-facially untrue.* It was this issue which then came before the U.S. Supreme Court for the first time in 1977, that is, whether to further extend the judge-made exclusionary rule to cover a new form of Fourth Amendment violation that they had not previously recognized (the perjured affidavit as opposed to the facially insufficient affidavit). The court divided on the issue with the majority (*per* Blackmun J.) willing to extend the rule and the dissent (*per* Rehnquist J., as he then was) refusing to extend it. The majority, however, openly acknowledged how tentative they were about extending the exclusionary rule to cover a new basis for suppression of evidence probative of guilt. Blackmun J. described "the deep scepticism of Members of this Court as to the wisdom of extending the exclusionary rule to collateral

access to a "suppression hearing" in cases where one particular form of Fourth Amendment violation is alleged (namely, cases where a search-warrant affidavit is said to be false). These judge-made procedural rules are the same as those found in *Kutynec*, namely: notice, particulars, a "substantial preliminary showing" that the application has merit based on supporting affidavit evidence, and motions to strike before a suppression hearing would be granted.[113]

There are reasons to question whether *Franks* should ever have been followed in Canada. First, it must be noted that the *Franks* restrictive procedures are clearly the product of a period in U.S. judicial history where the United States Supreme Court was growing disillusioned with its own judicial creation, the exclusionary rule, and its procedural vehicle, the suppression hearing. As a result, the court was trying to rein in and limit the exclusionary rule on the basis of overtly stated policy reasons. In a context where the appellant Franks' counsel was seeking, successfully, to *extend* the rule, it is therefore not surprising that strict procedural limits were imposed. None of this is relevant to Canada where s. 24(2) is not a judge-made rule and the judiciary cannot reconsider its efficacy or wisdom. It was enacted by the almost unanimous vote of the legislatures and Parliament and it is they who must amend it if they have second thoughts as to its wisdom. Thus the whole overtly "political" debate in *Franks* over whether to extend the exclusionary rule, and whether to apply restrictions to the extension, could never take place in a Canadian court which can only *apply* s. 24(2). Second, as already noted

areas" and recognized the force of Delaware's six-point argument against extending the exclusionary rule any further ("None of these (six) considerations is trivial"). Amongst Delaware's six arguments were the following two: that the suppression hearing was a "judicially created remedy extended where its benefit as a deterrent promises to outweigh the societal cost of its use"; and that the "weight of criminal dockets, and the need to prevent diversion of attention from the main issue of guilt or innocence, militate against such an added burden on the trial courts . . . if such hearings were conducted routinely, it is said, they would be misused by defendants as a convenient source of discovery". Although the majority was willing to extend the exclusionary rule to include the sub-facial veracity of the affidavit, Blackmun J. expressly stated that Delaware's six points embody "competing values that lead us to impose limitations . . . both in regard to when exclusion of the seized evidence is mandated, *and when a hearing on allegations of misstatements must be accorded*". (Emphasis added.)

[113] *Ibid.*, at pp. 155-6 and 171-2.

above, the Canadian exclusionary rule in s. 24(2) does not resemble the American exclusionary rule propounded in *Weeks v. U.S.*[114] and extended to state prosecutions in *Mapp v. Ohio.*[115] The judicially created rule in these cases is one of automatic exclusion, once the violation of rights is established, on the theory that this will have a deterrent effect on the violators. It is this automatic exclusion and deterrence theory that is the source of much of the judicial soul-searching in the United States as to the wisdom of the rule.[116] The Canadian Charter specifically rejected the American approach and adopted a more balanced model where evidence is still presumptively admissible, in spite of the violation of rights, and where deterrence of state officials is not the correct focus.[117] Thus one of the major policy considerations which motivated the *Franks* court to impose procedural limits on suppression hearings, namely, the court's doubts about the deterrent effect of suppression of the evidence, is simply inapplicable in Canada. Third and finally, the peculiarly American concern, expressed in *Franks*, that expansion of the suppression hearing will be "misused by defendants as a convenient source of discovery" is understandable in the American context where mandatory procedures for pre-trial production and discovery already exist and should not be evaded (as discussed above). In Canada, where there have never been any such procedures enacted, we are accustomed to allowing hearings designed for other purposes, such as the trial and the preliminary inquiry, to become transformed into convenient vehicles for discovery.[118] Since there still are no mandatory pre-trial procedures for production and discovery in Canada, Canadian courts allow counsel to ask relevant questions of witnesses as the obvious and only means of obtaining discovery. There is no reason in principle why a s. 24 hearing in Canada should not be used for this purpose until some other mandatory procedure is

[114] 232 U.S. 383 (1914).
[115] 367 U.S. 643 (1961).
[116] See cases like *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 380 (1970), and *U.S. V. Leon*, 468 U.S. 897 (1984).
[117] See cases like *Collins*, *supra*, footnote 57, and *R. v. Duguay* (1985), 18 C.C.C. (3d) 289, 45 C.R. (3d) 140, 18 D.L.R. (4th) 32 (Ont. C.A.).
[118] See authorities and text referred to at footnotes 29, 33, 41, 43, 47, and 49.

developed to achieve the same purpose (unless it is suggested there should be no discovery at all of state witnesses on s. 24 Charter issues). Particularly in the context of Provincial Court trials (which constitute the great majority of criminal trials), where there has been no preliminary inquiry, the s. 24 hearing must be used to obtain discovery of relevant evidence from state officials, like police officers, as a matter of absolute necessity since there is no available alternative.

Given these three major distinctions between *Franks* and the Canadian context, it is hardly surprising that the Supreme Court of Canada expressly rejected the case when the first opportunity arose. In October, 1989, the court heard four "wire-tap" appeals together, all involving the issue of sub-facial attacks on the warrant affidavit (or "sealed packet"). Two of the cases, from British Columbia and Quebec, involved the preliminary issue of access to the "sealed packet". [119] In the two other cases, both from Ontario, access to the "sealed packet" had been granted but the restrictive *Franks* rule had been applied by the Ontario Court of Appeal to deny the applicants a full evidentiary hearing. The applicants had failed to make out the "substantial preliminary showing" required by *Franks* as a condition precedent to a hearing. In other words, the applications had been summarily struck out as unmeritorious, prior to the evidentiary hearing itself, on the basis of insufficient extrinsic evidence of the violation alleged.[120] The Supreme Court of Canada rejected *Franks* and reversed the Ontario Court of Appeal in both cases on the basis that the accused had been denied a s. 24 hearing.[121] In *R. v. Garofoli*[122] Sopinka J. (for the majority) stated:

> In my opinion, the pre-conditions in *Franks v. Delaware, supra*, are too restrictive. I believe that they are inconsistent with the approach which we have taken in Canada with respect to the right to cross-examine.

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[119] *R. v. Dersch* (1990), 60 C.C.C. (3d) 132, 80 C.R. (3d) 299, [1990] 2 S.C.R. 1505, and *R. v. Zito* (1990), 60 C.C.C. (3d) 216, 80 C.R. (3d) 311, [1990] 2 S.C.R. 1520.

[120] *R. v. Garofoli, supra*, footnote 110, and *R. v. Lachance, ibid.*

[121] *Ibid.*

[122] *Ibid.*, at p. 197 C.C.C.

The reasoning which led Justice Sopinka to this conclusion focuses exclusively on the discovery issue (the last of the three bases for distinguishing *Franks* set out above). Sopinka J. analogized to the jurisprudence concerning access to the affidavit itself and held that unless counsel can ask questions at a hearing, they will not be able to prove a violation:[123]

> . . . the appellant cannot cross-examine unless he provides proof of deliberate falsehood or reckless disregard for the truth, and he cannot establish deliberate falsehood or reckless disregard for the truth unless he can cross-examine.

Sopinka J. stated that the court had "consistently demonstrated a policy to uphold the right to cross-examine".[124] He cited *Innisfil (Township)*[125] and *Potvin*,[126] as illustrative of the court's policy on this issue. In the latter case the court constitutionalized the right to cross-examine an "adverse witness". On the facts of *Potvin*, the "adverse witness" was someone testifying for the Crown on the ultimate issue of guilt or innocence. On the facts of *Garofoli*, the "adverse witness" was the police officer who had participated in gathering the "wiretap" evidence. The court drew no distinction between the right to question these two classes of witnesses, provided the questioning was necessary to the defence.

Dickson J., as he then was, had taken the same approach in the original *Wilson* decision itself, focusing on the discovery issue as the justification for asking questions:[127]

> These authorizations are made *ex parte* and *in camera*. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, *it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity*. It is

[123] *Ibid.*, at pp. 196-7 C.C.C.

[124] *Ibid.*, at p. 197 C.C.C.

[125] *Innisfil (Township) v. Vespra (Township)* (1981), 123 D.L.R. (3d) 530, [1981] 2 S.C.R. 145, 15 M.P.L.R. 250.

[126] *R. v. Potvin* (1989), 47 C.C.C. (3d) 289 at p. 302, 68 C.R. (3d) 193, [1989] 1 S.C.R. 525. where Wilson J. stated, on behalf of a unanimous court: "It is, as I have said, a principle of fundamental justice that the accused have had a full opportunity to cross-examine the adverse witness."

[127] *Supra*, footnote 108, at pp. 111-12 C.C.C. Although Dickson J.'s judgment in *Wilson* was a dissent (Chouinard J. concurring), his statement concerning the right to question the police officer/affiant does not differ from the apparent majority view on this issue, as Sopinka J. notes in *Garofoli, supra*, footnote 110, at p. 197 C.C.C.

> of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure. *The questioning can be such as to enable defence counsel to get some indication of whether the authorization was properly obtained,* without the disclosure of information which, in the opinion of the judge, ought to be kept confidential. Examples of such confidential information would be the identity of undercover agents and informers or specific information which would jeopardize a continuining police investigation. The interest in confidentiality expressed in s. 178.14 and defence counsel's interest in testing the validity of the authorization need not lead to conflict. [Emphasis added.]

Outside of Ontario, the discovery function of cross-examination had been acknowledged as the basis for permitting the police officer/affiant to be questioned in *R. v. Graves*[128] where Grant J. stated:

> The applicants seek the right to cross-examine the deponent of any affidavit which may be in the packets. In civil cases this is frequently done and in some types of procedure is the accepted practice. This, I feel, could probably accomplish two things. *It would assist the accused in getting information for its full answer and defence,* as sometimes a skilfully drafted document can accomplish its purpose without much disclosure. As well it may tend to be self-regulating if the deponent knows that he or she may subsequently be cross-examined on the document.
>
> I therefore grant the right to the applicants to cross-examine the deponent or deponents of any affidavit contained in the packets. [Emphasis added.]

This line of Canadian jurisprudence, emphasizing the need to ask questions in order to obtain discovery, also contains a parallel theme, namely, that it is an impossible task to expect a judge to predict accurately the result of a defence or Crown application without a hearing. Dickson J., as he then was, made the point succinctly in *R. v. Erven,*[129] concerning the necessity of hearing all the relevant evidence on a *voir dire* before deciding the "voluntariness" of statements:

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[128] (1987), 31 C.C.C. (3d) 552 (N.S.S.C.). The one Ontario case which had taken the same approach was Sutherland J.'s decision in *R. v. Martin* (1986), 32 C.C.C. (3d) 257 (Ont. H.C.J.).

[129] (1978), 44 C.C.C. (2d) 76 at p. 91, 6 C.R. (3d) 97, [1979] 1 S.C.R. 926.

> Unusual prescience would be required to determine that a statement is obviously voluntary before the accused has had a chance to call witnesses, testify, and present argument, and where all the persons involved have not been called as required by *Thiffault v. The King* (1933), 60 C.C.C. 97, [1933] 3 D.L.R. 591, [1933] S.C.R. 509.

This passage reflects the typical Canadian assumption that there have been no prior discovery proceedings, before the trial, where the accused and the Crown have already had an opportunity to question all the relevant witnesses. In the absence of such a pre-trial proceeding, Dickson J. is simply stating the obvious: how can you know what the witnesses are going to say on a given issue and predict the result until they have been questioned?

Garofoli and *Lachance* are simply post-Charter expressions of this Canadian tradition, found in pre-Charter cases like *Erven* and *Wilson*, to the effect that it is necessary to question witnesses on motions concerning the admissibility of evidence at trial, because this is the only procedural device we have in Canada to find out what the witness will say.[130]

The Supreme Court of Canada's rejection of *Franks v. Delaware* in *Garofoli* and *Lachance*, on the basis that there is a discovery function to questioning witnesses *viva voce* at a hearing, raises obvious questions as to the correctness of

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[130] As already noted, the preliminary inquiry cannot fill this role as the great majority of criminal trials in Canada are conducted without benefit of a preliminary inquiry and in those cases where a preliminary inquiry is held, it is highly unusual to call all witnesses relevant to a s. 24 issue. An interesting parallel line of jurisprudence, that is generally consistent with the approach taken in *Garofoli*, is the case-law dealing with challenge for cause under ss. 638 and 639 of the Criminal Code. The old English case-law, summarized in *R. v. Chandler* (1964), 48 Cr. App. R. 143 (C.C.A.), was to the effect that counsel could not question a prospective juror on the grounds of lack of indifference without first establishing a *prima facie* case of lack of indifference through extrinsic evidence. Some Canadian courts adopted this view and added further requirements that a particularized written notice had to be filed seeking the right to challenge for cause (see, for example, *R. v. Makow* (1974), 20 C.C.C. (2d) 513, 28 C.R.N.S. 87, [1975] 1 W.W.R. 299 (B.C.C.A.), and *R. v. MacFarlane* (1973), 17 C.C.C. (2d) 389, 25 C.R.N.S. 78, 3 O.R. (2d) 467 (H.C.J.)). These cases closely resemble the restrictive rules in *Franks*. The opposite view was stated by Haines J. in *R. v. Elliott* (1973), 12 C.C.C. (2d) 482, 22 C.R.N.S. 142, [1973] 3 O.R. 475 (H.C.J.)), where he rejected the English cases and held that prospective jurors could be questioned, provided there were strict controls placed on relevance and that no written particulars or *prima facie* evidence of lack of indifference need be filed in advance. Finally, in *R. v. Hubbert* (1977), 33 C.C.C. (2d) 207*n*, 38 C.R.N.S. 381, [1977] 2 S.C.R. 267, affg 29 C.C.C. (2d) 279, 31 C.R.N.S. 27, 11 O.R. (2d) 464 (C.A.), the Canadian courts arrived at a compromise: written particulars need not be

the *Kutynec* procedure of filing evidence in advance of a hearing and striking out s. 24 applications prior to any hearing. It may be that similar questions should be raised about the analogous American procedures.

Judge Borins never confronts this question of discovery of Charter violations because of his repeated insistence that any questioning directed to that end is inadmissible on grounds of relevance. He rigidly separates questions that go to issues of guilt and innocence (which are relevant) and questions which go to discovery of Charter violations (which are irrelevant).[131] It is unclear whether Judge Borins is stating that there is no right to question witnesses on issues relating to Charter violations *in any proceedings* or whether he is only saying there is no such right *at the trial proper.* He simply never addresses the issue of when and in what proceedings counsel should seek to ask these questions if one is forbidden from asking them at the trial. In *Kutynec's* case it made no difference anyway since the case involved a summary conviction matter where the trial was the only opportunity to ask the questions.

It is now clear from the Supreme Court of Canada's recent judgments in *Dersch* and *Garofoli* that the right to "full answer and defence", which is an incident of s. 7 of the Charter (as well as the common law and s. 650(3) of the Criminal Code), does not discriminate between questions which go to establish

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filed as the challenge can be launched orally in the general words of s. 638 (the "juror is not indifferent"); *prima facie* evidence of lack of indifference need not be called before being permitted to question; however, "counsel must have a reason, even a generalized one" before being allowed to question the particular prospective juror. Also see *R. v. Zundel* (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1, 35 D.L.R. (4th) 338, leave to appeal to S.C.C. refused 61 O.R. (2d) 588*n*, 80 N.R. 317*n* (Ont.C.A.), and *R. v. Sherratt* (1991), 63 C.C.C. (3d) 193 (S.C.C.). This is essentially the same position that *Garofoli* arrives at. It is interesting to note that the rules relating to the questioning of prospective jurors, in the United States, are extremely liberal and result in exhaustive and time-consuming *voir dires* prior to trial. No trace of the *Franks* restrictions on oral hearings are to be found in this area. See, for example, s. 270.15 of the New York Criminal Procedure Law which permits extensive questioning of all prospective jurors in all cases. It seems curious and contradictory that there are greater rights to question prospective jurors, as to alleged partiality, than there are to question police officers, as to alleged constitutional violations. There need be no basis for the former but there must be a substantial basis for the latter. These contrasting approaches to the right to ask questions at a hearing, in the United States, suggest that what has motivated the restrictions on constitutional hearings in that country is a political or policy-based desire to limit the use of the exclusionary rule.

[131] See text, *supra*, at footnote 20.

guilt or innocence and questions which merely go to establish Charter violations or the exclusion of evidence. The court was unanimous that both areas of inquiry are included in the concept "full answer and defence". In *R. v. Dersch*, Sopinka J., for the majority, stated:[132]

> It is fundamental to this view that denial of access [to the affidavit] constitutes a denial to make full answer and defence.
>
> Esson J.A. was of the opinion that it did not. He reasoned that the accused was simply deprived of an opportunity to exclude evidence on a technical ground. He put the position this way (at p. 440 C.C.C., p. 568 D.L.R.):
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> > "It follows, in my view, that refusal of the opportunity to demonstrate a defect in the proceedings leading to the authorization does not affect the right to make full answer and defence or the right to fair trial. It merely deprives the accused of an opportunity to have relevant evidence excluded on a technical ground. That opportunity is not a constitutionally protected right."
>
> The presumption of innocence requires the prosecution to prove that the accused is guilty beyond a reasonable doubt. This must be done by admissible evidence.
>
> . . . . . .
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> *Witholding information which enables the accused to assert the inadmissibility of evidence not only on statutory but constitutional grounds strikes me as going beyond depriving the accused of a technical ground. I prefer to characterize it in the language of Watt J. in R. v. Parmar* (1987), 34 C.C.C. (3d) 260 at p. 273, 1 W.C.B. (2d) 335:
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> > *It is said that a critical aspect of the right to make full answer and defence, an incident to s. 7 of the Charter, is the right to challenge the receivability of that portion of the prosecution's proof which is the primary evidence said to have been obtained by the interceptions. . . .*
>
> The right to full answer and defence does not imply that an accused can have, under the rubric of the Charter, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion, would be admissible if it tended to prove his or her innocence: See *R. v. Williams* (1985), 18 C.C.C. (3d) 356, 50 O.R. (2d) 321, 44 C.R. (3d) 351 (C.A.). *But it does provide, in my view, that the accused be given the opportunity to test the admissibility of a piece of evidence according to the ordinary rules that govern the*

[132] *Supra*, footnote 119, at pp. 140-1 C.C.C.

> *admissibility of the evidence.* I am therefore of the view that s. 178.14(*a*)(ii) ought to be interpreted so that an opportunity is provided to do so. [Emphasis added.]

In *Garofoli*,[133] Sopinka J. elaborated on the practical effect of this right to "full answer and defence" when challenging the admissibility of evidence on statutory or Charter grounds:

> In my opinion, when it is asserted by an accused that a wiretap infringes s. 8, an appropriate review is incompatible with the restrictions of *Wilson. The judge conducting the review must hear evidence and submissions as to whether the interception constitutes an unreasonable search or seizure.* Inasmuch as it is an issue as to the admissibility of evidence, it may be raised at trial. Under s. 24 of the Charter, the trial judge is a court of competent jurisdiction. [Emphasis added.]

Madam Justice McLachlin, who dissented on other points in both *Dersch* and *Garofoli*, made it clear that she concurred with Sopinka J. as to the meaning of "full answer and defence":[134]

> This raises the question of what is meant by "fair trial" and "full answer and defence". Prior to the Charter, evidence which was reliable and relevant was routinely admitted, notwithstanding that it might have been obtained improperly: see *R. v. Wray* (1986), 26 C.C.C. (3d) 481 at p. 564, 29 D.L.R. (4th) 161, [1971] S.C.R. 272. However, at least since the advent of the Charter, this court has emphasized that the right to make full answer and defence is "a cornerstone of the justice system" and cannot lightly be eroded: see *R. v. Mills* (1986), 26 C.C.C. (3d) 481 at p. 564, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863, *per* Wilson J. (dissenting on other grounds), at p. 969. The words "full answer and defence" entitle the accused to put forward all defences, regardless of whether they are based on a technicality or not. Indeed, the adjective "full" permits no other conclusion. The right to make full answer and defence cannot be diminished to the right to make non-technical answer and defence.

Three earlier judgments of the Ontario Court of Appeal,[135] all approved of in *Dersch* by the Supreme Court of Canada,

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[133] *Supra*, footnote 110, at p. 185 C.C.C.

[134] *Ibid.*, at p. 210 C.C.C.

[135] *R. v. Hunter* (1987), 34 C.C.C. (3d) 14 at pp. 24-7, 57 C.R. (3d) 1, 59 O.R. (2d) 364 (C.A.); *R. v. Playford* (1987), 40 C.C.C. (3d) 142 at pp. 173-87, 61 C.R. (3d) 101, 63 O.R. (2d) 289 (C.A.); *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at pp. 38-44, 63 C.R. (3d) 113, 35 C.R.R. 207 (Ont.C.A.). The best statement of the underlying principle is found in *Playford* where Goodman J.A. stated (at pp. 186-7 C.C.C.):

as well as judgments of the Quebec and Prince Edward Island Courts of Appeal,[136] had all accepted the proposition that the right to make "full answer and defence" includes the right to compelled disclosure of evidence relevant to a Charter violation, even if the accused did not know in advance what the disclosure was likely to show.

The judgment of Watt J. in *R v. Parmar*[137] was one of the earliest formulations of this line of reasoning, concerning a s. 7 right to access to information on which to base a s. 24 application. His reasoning was heavily relied on by the Ontario Court of Appeal in *Playford* and *Rowbotham*, and by the Supreme Court of Canada in *Dersch*. Watt J. summarized his views as follows:[137a]

> It may seem somewhat anomalous or incongruous that the mere assertion of a right to fundamental justice, without a scintilla of evidence to support an argument of its denial, should serve as a sufficient basis upon which to breach the statutory secrecy of the sealed packet. Indeed, it may appear to be all the more so when compared

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> The essence of a fair trial includes as a fundamental principle that only evidence properly admissible in law will be admitted in evidence at trial. If relevant and material evidence is admitted by a trial judge where it should be excluded by reason of an exclusionary rule of evidence or a statutory provision, it cannot be said that an accused has had a fair trial. An accused is entitled to be tried according to law. That is a principle of fundamental justice.
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> . . . . .
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> Every person is entitled to be free from unreasonable search or seizure under s. 8 of the Charter. *It follows logically that he is entitled to all information which can be made available without infringing upon some other person's right, in order to determine whether such a search or seizure is unreasonable.* A judge's refusal to give such information in the circumstances outlined above would amount to a failure to exercise his discretion judicially. It could not be supported on any logical or policy basis. If, indeed, the authorization had been obtained on the basis of some substantive defect which made the authorization invalid, then the private communication is unlawfully intercepted and is inadmissible as evidence and the interception constitutes an unreasonable search contrary to s. 8 of the Charter. If the evidence is material evidence which has nevertheless been admitted at trial and the accused is convicted, then the accused has not had a fair trial and has been deprived of the right not to be deprived of life, liberty and security of person except in accordance with the principles of fundamental justice, contrary to s. 7 of the Charter. *It is inconceivable that an accused should not be given the right to ascertain whether his private communications have been lawfully intercepted, when the necessary information is available and proper safeguards for protection of the rights of others can be taken.* [Emphasis added.]

[136] *R. v. Zito* (1988), 42 C.C.C. (3d) 565 (Que.C.A.), affd 60 C.C.C. (3d) 132, 80 C.R. (3d) 299, [1990] 2 S.C.R. 1505; *R. v. Martel* (1986), 27 C.C.C. (3d) 508, 51 C.R. (3d) 282, 58 Nfld. & P.E.I.R. 260 (P.E.I.C.A.).

[137] (1987), 34 C.C.C. (3d) 260 (Ont. H.C.J.).

[137a] *Ibid.*, at pp. 279-80 C.C.C.

> to that which is required in the event that fraud or material non-disclosure is asserted as the basis upon which the packet should be opened. *It must be recalled, however, that what is being here contested is the right to access to the packet in order to raise a potential challenge upon constitutional grounds that certain evidence ought not to be received. In practical terms, it may, to some extent, be a fishing expedition. It is, however, a fishing expedition in what are now constitutionally-protected waters.* The ultimate questions of whether the order should be set aside and whether evidence said to be gathered in accordance therewith ought to be received, are quite other matters. To permit access in the present circumstances is but to construe s. 178.14(1)(*a*)(ii) in a manner compatible with the constitutional guarantee of fundamental justice enshrined in s. 7. [Emphasis added.]

As noted earlier, Sopinka J. has now held in *Garofoli* that the reasoning from these cases, like *Parmar* and *Playford*, dealing with the right of access to the "sealed packet", is equally applicable to the right to question relevant witnesses *viva voce* at a hearing.[138]

It is difficult to conceive of *Kutynec* surviving in the face

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[138] It should be noted that two recent judgments of the Nova Scotia Court of Appeal and one from the British Columbia Court of Appeal appear to contradict this line of authority. In *R. v. Eagles* (1989), 47 C.C.C. (3d) 129, 68 C.R. (3d) 271, 88 N.S.R. (2d) 337 (C.A.), *R. v. Delaney* (1989), 48 C.C.C. (3d) 276, 89 N.S.R. (2d) 253, 45 C.R.R. 162 *sub nom. R. v. How* (C.A.), and *R. v. Hodgson* (1990), 57 C.C.C. (3d) 278, 78 C.R. (3d) 333, 24 M.V.R. 42 (B.C.C.A.), these courts held that the accused in an "over 80" prosecution did not have a constitutional right of access to the breathalyzer test ampoules, even if the ampoules were available, unless the accused first made out a case with extrinsic evidence that there was "some basis for the request . . . that . . . lends an air of reality to it — otherwise the request is really for nothing more than a 'fishing expedition'. Such expeditions are to be discouraged — not encouraged." This approach is the same one that was taken in the old "sealed packet" cases, now overruled by the Supreme Court of Canada in *Dersch, supra*, footnote 119, as outlined above. Indeed, in *Hodgson*, the British Columbia Court of Appeal referred with approval to its earlier decision in *Dersch*. The courts' rhetorical statements about "fishing expeditions" cannot survive careful analysis. If all that is meant by "fishing" is that counsel do not know in advance what the answer will be to their inquiry (and this appears to be the court's meaning), then there is nothing wrong with "fishing", as long as the inquiry is a relevant one. Counsel do this all the time in crossexamination. It is perfectly permissible to ask a question, without knowing the answer in advance and without being able to prove the assertion put, as long as the question is relevant. Counsel simply bear the risk of being stuck with the answer he or she gets (see *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017 (P.C.), and *R. v. Bencardino and DeCarlo* (1973), 15 C.C.C. (2d) 342, 24 C.R.N.S. 173, 2 O.R. (2d) 351 (C.A.)). It is clearly relevant to ask for the test ampoule, in order to see whether it is a proper one, and counsel has no way of knowing whether it is a proper one until it is produced. If it turns out to be proper, then no harm is done. If it is improper, then the unreliability of the Crown's testing will be exposed. As one member of the Supreme Court of Canada once put it in the course of an exchange with counsel during oral argument, "the only thing wrong with fishing is that sometimes you catch a fish". Cases

of this powerful line of authority. The procedure devised in *Kutynec* of summarily denying an applicant access to a s. 24 hearing, due to insufficient extrinsic evidence of a Charter violation, would appear to be a clear s. 7 violation for the same reasons as those expressed in *Parmar, Playford, Rowbotham, Hunter, Dersch, Garofoli,* and *Lachance.* Particularly in the context of a provincial court trial, where there is no other or earlier method available for questioning witnesses and discovering whether a proper basis exists for a s. 24 application, the conclusion seems inescapable that summarily cutting off any such inquiry results in a denial of "full answer and defence".

What *Dersch and Garofoli* require is an "opportunity" to establish the Charter violation by calling "evidence" at a hearing. *Kutynec* summarily denies this opportunity on a basis that *Garofoli* has expressly ruled out, namely, the accused's failure to obtain extrinsic evidence of the violation in advance of the hearing.[139]

The key characteristic of the "Canadian compact" model

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like *Eagles, How* and *Hodgson* confuse the issues of relevance and weight. In *Hodgson, supra,* at p. 292 C.C.C., MacFarlane J.A. stated:

> The appellant asserts that the alcohol standard was material evidence, and ought to have been produced. *But it would only be material evidence if there was a reason for saying that it might not be suitable.* [Emphasis added.]

This proposition equates the relevance of the question with the weight or success of the answer. This view of relevance was rejected by the Supreme Court of Canada in *R. v. Morris* (1983), 7 C.C.C. (3d) 97, 36 C.R. (3d) 1, [1983] 2 S.C.R. 190.

[139] It is interesting to note that the one authority relied on by Judge Borins in *R. v. Kutynec* (1990), 57 C.C.C. (3d) 507, 78 C.R. (3d) 181, 74 O.R. (2d) 205 (Dist. Ct.), which appears to support a procedure of summarily denying the accused access to a s. 24 hearing, is *R. v. Hamill* (1984), 14 C.C.C. (3d) 338, 41 C.R. (3d) 123, 13 D.L.R. (4th) 275 (B.C.C.A.). In that case, Esson J.A. for the court stated at p. 367 C.C.C.:

> It follows that, if the statement of grounds does not disclose a basis upon which the court could make an order excluding the evidence, the application may be dismissed without hearing evidence.

This approach is consistent with Justice Esson's reasons for the British Columbia Court of Appeal in *R. v. Dersch* (1987), 36 C.C.C. (3d) 435, 59 C.R. (3d) 289, [1987] 6 W.W.R. 700, to the effect that the accused does not enjoy s. 7 rights to make full answer and defence on a s. 24 motion to exclude evidence. That view has now been rejected by the Supreme Court of Canada (60 C.C.C. (3d) 132, 80 C.R. (3d) 299, [1990] 2 S.C.R. 1505), as noted above. Esson J.A.'s approach to s. 8 of the Charter taken in *Hamill* was also rejected on further appeal: 33 C.C.C. (3d) 110, 56 C.R. (3d) 220, [1987] 1 S.C.R. 301. Finally, Esson J.A.'s statements in *Hamill* that there is no burden on the Crown to prove the reasonableness of a warrantless search (at p. 364 C.C.C.) and that the absence

of Charter litigation is that the first real "opportunity" to obtain a hearing concerning the Charter violation is at the trial itself, given our paucity of pre-trial procedures. Thus Canadian counsel have tended to collapse pre-trial discovery procedures and pre-trial s. 24 applications into the trial proper. In the United States these procedures are all kept rigidly separate.

It can be seen that the Canadian case-law, culminating in *Dersch* and *Garofoli*, has exhibited a commitment to making Charter remedies accessible by the simple device of reading into s. 24 the procedural content of s. 7. Thus the right to make "full answer and defence", which includes the right to question witnesses on relevant matters at a hearing, applies to s. 24 itself. This approach seems to rule out summary motions to strike s. 24 applications in advance of the hearing itself.[140] The American adoption of such motions, both by judicial creation in cases like *Franks* and by statutory enactment in provisions like ss. 210.45(5) and 710.60(3) of the New York Criminal Procedure Law, is partly justifiable because of the existence of compulsory pre-trial disclosure laws and pre-trial subpoena powers in the United States. However, these disclosure laws do not always provide full oral discovery with the right to question witnesses and to this extent the American authorities reveal a somewhat tentative commitment to any

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of reasonable grounds for the search is not a sufficient basis to justify any inquiry on a s. 24 application (at p. 366 C.C.C.) have both been rejected by the Supreme Court of Canada in *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, [1987] 1 S.C.R. 265. It is therefore doubtful whether the case is a useful precedent concerning s. 24 hearings.

[140] The only limits on the right to question the affiant that Sopinka J. recognizes in *Garofoli* is that counsel must demonstrate that "cross-examination is *necessary* to enable the accused to make full answer and defence" ((1990), 60 C.C.C. (3d) 161 at p. 198, 80 C.R. (3d) 317, 43 O.A.C. 1 (S.C.C.)). Given the ease with which this burden was met in the "sealed packet" cases (like *Parmar, supra*, footnote 137 at pp. 265-7), that is, by showing that extrinsic evidence of the alleged violation is not available, access to such a hearing should be granted except where the accused can already prove the violation *aliunde*. In *R. v. Bier*, unreported (November 1, 1990, Ont. Ct. Gen. Div.), Vannini J. expressed general agreement with the notice requirements for s. 24 applications announced in *Kutynec*. However, Vannini J. expressly disagreed with the proposal that affidavits be filed together with the notice and that the right to a hearing be subjected to a "threshold test". He stated at p. 5 of the Judgment:

> The Charter is the supreme law of Canada and a defendant should not be required to pass a threshold test showing that a breach may have been committed before entering upon a hearing on oral evidence and failing this, holding no hearing on the issue.

Also see Alan Gold's case comment "Wire-taps" (1991), 33 C.L.Q. 274 at pp. 278-9.

right to "full answer and defence" on the suppression hearing itself.[141]

Aside from the Canadian tendency to view the questioning of witnesses on relevant matters at a hearing as a fundamental s. 7 procedural right, there is one further theme that emerges from the Canadian jurisprudence which may tend to explain our reluctance to embrace the *Kutynec* and *Franks* models with their summary motion to strike out unmeritorious claims. The *Kutynec* motion to strike a s. 24 application, on the basis that defence counsel has produced insufficient extrinsic evidence of a Charter violation, requires the particular defence counsel to disclose his or her evidence and defence theory in written form prior to the actual hearing of any *viva voce* evidence. The judge then vets the quality of counsel's brief before letting counsel proceed. This is a highly interventionist judicial model,

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[141] For a good summary of the widely varying pre-trial disclosure practices and statutes, in the various American jurisdictions, see W.R. LaFave and J.H. Israel, *Criminal Procedure* (St. Paul, West Publishing Co., 1984), vol. 2, at pp. 474-510. Although there is American authority to the effect that the due process and confrontation clauses apply at pre-trial suppression hearings, as well as at the trial itself, these clauses have been given a more limited application at the suppression hearing because of the American judicial ambivalence about the exclusionary rule. Thus suppression hearings can be held *in camera* and the accused can be denied access to prosecution witness' prior inconsistent statements in some circumstances. These kinds of serious infringements of the due process and confrontation clauses would never be permitted at trial: see LaFave, *supra*, footnote 52, at pp. 245-9. *McCray v. Illinois*, 386 U.S. 300 (1967), is the case most often cited for the proposition that the accused enjoys lesser due-process rights at a suppression hearing than on the trial proper. In that case a badly divided Supreme Court held, by a 5-4 margin, that informer privilege would be more readily breached at trial than on a suppression motion where the informer's evidence was needed to assist the defence. The Ontario Court of Appeal in *Hunter, supra*, footnote 135, refused to follow *McCray* and the Supreme Court of Canada has recently adopted *Hunter* on this point: see *R. v. Scott* (1990), 61 C.C.C. (3d) 300 at p. 315 per Cory, J. *Dersch* and *Garofoli* also implicitly reject the approach taken in *McCray*, although no reference was made to the case. The American federal courts moved in 1983 to improve due-process rights on the suppression hearing by adding Rule 12(i) to the Federal Rules, which now requires disclosure at the suppression hearing of police officers' prior statements, including investigative reports, in the same manner as Rule 26.2 requires disclosure of such statements at trial. The Advisory Committee explained the reasoning behind this change as follows (see M.G. Hermann, Federal Rules of Criminal Procedure, 2nd ed., at p. 138.1):

> This change will enhance the accuracy of the factual determinations made in the context of pre-trial suppression hearings. As noted in *United States v. Sebastian, supra*, it can be argued most persuasively that the case for pre-trial disclosure is strongest in the framework of a suppression hearing. Since findings at such a hearing as to admissibility of challenged evidence will often determine the result at trial and, at least in the case of fourth amendment suppression motions, cannot be relitigated later before the trier of fact, pre-trial production of the statements of witnesses would aid defense counsel's impeachment efforts at perhaps the most crucial point in the case.

directly engaging the judge in the question of predicting whether counsel's chosen strategy will ultimately succeed. The traditional Canadian model of adjudication is far less interventionist. Judges never seek to obtain disclosure of counsel's brief, to evaluate its strengths and weaknesses and likelihood of success and to control the calling and questioning of witnesses. As long as the proferred witnesses and questions relate to relevant and admissible matters, counsel controls the conduct of the *lis* and the judge plays a more passive listening role. We regard this separation of roles as essential to judicial impartiality. It appears that American courts have accepted a much greater degree of judicial intervention and control over the litigation, perhaps due to the greater prevalence of trial by jury in that country and perhaps due to a greater preoccupation with the speed and efficiency of criminal litigation.[142] Judicial impartiality may be compromised by heavy use of "case flow management" techniques prevalent in the United States and by the *Franks* model of summary motions to strike. In the United States the trial judge becomes seized with the case from the moment the indictment is lodged in the trial court. In the course of setting or denying bail, managing the scheduling of the case, holding pre-trial conferences, and hearing all the pre-trial motions, the trial judge comes to know a great deal about the accused and about the case and has already shaped it through the various pre-trial proceedings. As long as the ultimate trial is conducted with a jury, any apprehension of bias can be substantially diminished. In Canada, where trials by judge alone are much more frequent, concerns about judicial neutrality would inevitably be raised by a close adherence to the American model.

In particular, the *Franks* and *Kutynec* model of pre-trial

[142] In *Court Reform on Trial* (New York, Basic Books, 1983), Malcolm Feeley notes this change in the American judicial model at p. 187:

> There has been a slow but marked evolution in how judges perceive their roles. Traditionally, judges have regarded themselves as passive referees, but increasingly they are adopting an active stance, scrutinizing reasons for continuances, limiting issues, controlling their calendars, and questioning jurors. All this is reinforced by a growing concern with judicial administration, leading to the appointment of fulltime administrators, the use of computerized information systems, and the adoption of other management devices.

determination as to whether a particular line of questioning or the calling of particular witnesses is likely to succeed in establishing a s. 24 violation, runs up against a strong line of Canadian authority favouring judicial non-intervention in these areas. Perhaps the clearest statement is that of Estey J., giving the unanimous judgment of the Supreme Court of Canada in *Innisfil (Township) v. Vespra (Township)*,[143] (a case that Sopinka J. referred to in *Garofoli*[144] on the right to cross-examine):

> It must be emphasized that if the appellant has here the right to cross-examine the representative of the Ministry, as I believe he does, it is not for the appellate court to withhold such right because in its judgment it is doubtful, or even impossible, in the view of the Court for the appellant to advance its case by such cross-examination. The decision to exercise the right is solely that of the holder of the right. He, of course, must exercise it at his peril as is the case in any other administrative or judicial proceeding where such a right arises.

This strict division of roles, between judge and counsel, appears to preclude any ruling in advance prohibiting relevant questions on the basis of their likelihood of success. The traditional Canadian judicial role has been to rule only on the relevance and admissibility of evidence, as each question is put. The best statement of this approach is the Ontario Court of Appeal's judgment in *R. v. Bradbury*,[145] *per* Kelly J.A.:

> We do not consider that it is allowable, in advance, to place any restriction on the length of time to be consumed by cross-examination. The rulings of the trial judge should be made when questions are put or about to be put and should be confined to the propriety of the question or questions in issue.

One of the rationales that is often expressed in the Canadian case-law on this subject of judicial non-intervention in counsel's conduct of the case, is that the judge is not privy to what is in counsel's brief and counsel is not permitted to disclose it. For example, in *R. v. Doiron*,[146] the Nova Scotia Court of Appeal dealt with the power of a trial judge to order production

[143] (1981), 123 D.L.R. (3d) 530 at p. 549, [1981] 2 S.C.R. 145 at p. 171, 15 M.P.L.R. 250.
[144] *Supra*, footnote 140, at p. 197.
[145] (1973), 14 C.C.C. (2d) 139, 23 C.R.N.S. 293 at p. 294-5 (Ont. C.A.).
[146] (1985), 19 C.C.C. (3d) 350, 67 N.S.R. (2d) 130 (N.S.C.A.).

of a witness' prior statement so that counsel could cross-examine on the statement. Jones J.A. stated that:

> . . . the exercise of that right must be left in the hands of counsel for an accused . . . It is not appropriate that the decision should be left solely to the trial judge to determine whether the statement is contradictory or of any use to the defence. *He is not privy to information available to the defence.* [Emphasis added.]

Brooke J.A., on behalf of the Ontario Court of Appeal, went further in *R. v. Zehr*,[147] stressing that counsel is not permitted to explain his or her decisions relating to the calling of witnesses:

> There are many reasons why counsel may choose not to call a witness, and our Courts will rarely questions the decision of counsel, for *the system proceeds on the basis that counsel conducts the case.* Often a witness is not called, and if the reason was known it would not justify an instruction that an adverse inference might be drawn from the witness not being called. *Of importance under our system, counsel is not called upon, or indeed permitted, to explain his conduct of a case.* [Emphasis added.]

Justice Brooke was obviously concerned about the breakdown in the proper administration of justice that has occurred in famous cases like *Colpitts*[148] and *Tuckiar*[149] where counsel have breached solicitor-and-client privilege by openly revealing to the court their views and strategies concerning their conduct of the defence. These strategies are almost always based on the client's account and the client's instructions which counsel must not reveal to the court. The Supreme Court of Canada, in a recent unanimous judgment, has emphasized the same point concerning judicial ignorance of the contents of counsel's brief as one of the reasons for non-interference in the questioning of witnesses. The court, speaking through Lamer J., as he then was, in *R. v. Brouillard*,[150] adopted the famous remarks of Lord Greene M.R. on this subject in *Yuill v. Yuill*:[151]

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[147] (1980), 54 C.C.C. (2d) 65 (Ont. C.A.) at pp. 68-9.

[148] *R. v. Colpitts*, [1966] 1 C.C.C. 146, [1965] S.C.R. 739, 47 C.R. 175, revg C.R. *loc. cit.*, at p. 146 (N.B.C.A.). In particular, on this point, see pp. 176-7 C.R., *per* Bridges C.J.N.B., and p. 178 C.R. *per* Ritchie J.A.

[149] *Tuckiar v. The King* (1934), 52 C.L.R. 335 (H.C. Aust.).

[150] (1985), 17 C.C.C. (3d) 193, 44 C.R. (3d) 124, [1985] 1 S.C.R. 39.

[151] [1945] 1 All E.R. 183 (C.A.) at p. 185. Also see *Delaney & Co. Ltd. v. Berry* (1964), 49 D.L.R. (2d) 171, 50 W.W.R. 493 (Man. C.A.).

> *It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination.* In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the questions himself. [Emphasis added.]

This body of jurisprudence raises serious questions concerning the adoption of the *Franks* and *Kutynec* model of pre-trial motions to strike in Canada. The adversarial model of litigation lets counsel decide what witnesses to call and what questions to ask. These tactical decisions are motivated by the client's instructions and the account the client ultimately can or cannot give in evidence and by the investigations counsel has conducted. All of this is protected by solicitor-and-client privilege and cannot be discussed by counsel in court or out of court. The pre-trial motion to strike a s. 24 application, on grounds of insufficient merit, compels disclosure and discussion of these privileged matters.[152]

Furthermore, the presumption of innocence and the non-compellability of the accused, enshrined in s. 11(*c*) and (*d*) of the Charter, mean that the accused does not have to decide whether to testify and reveal the defence until faced with "a case to meet" at the close of the Crown's case.[153] The accused's defence to the case and any evidence he can give relevant to a Charter violation may be closely intertwined (for example,

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[152] The earlier discussion of the common law and post-Charter authorities (see footnotes 80-91 and accompanying text), which require a judge to intervene and come to the assistance of the accused when counsel fails to object to an obvious breach of the rules of evidence or of the Charter, appears at first blush to contradict the traditions of judicial non-intervention discussed herein. However, it must be remembered that the former line of authority is an exceptional power and hardly represents the norm. Furthermore, it is a power that is only exercised *after the fact*, once an obvious violation of the law has been revealed on the record and counsel appears ignorant of it. This is very different from the judicial intervention *before the fact*, contemplated by *Kutynec*, where counsel are given no opportunity to put their case on the record at a hearing prior to being scrutinized by the judge. It is precisely because of the timing of the intervention that other values are offended, such as judicial neutrality, solicitor-and-client privilege, and the right to a hearing.

[153] *R. v. Dubois* (1985), 22 C.C.C. (3d) 513, 48 C.R. (3d) 193, [1985] 2 S.C.R. 350.

where pre-charge delay has resulted in loss of a crucial defence witness, or where a search and seizure of drugs occurs at premises the accused shared with another person, or where the accused leads police to the murder weapon after a denial of the right to counsel). If the accused must offer evidence in affidavit form prior to the s. 24 hearing or be cross-examined at the pre-trial stage on a s. 24 hearing, the Crown may well discover the defence and then develop further evidence and strategies of its own to meet the now disclosed defence.[154] This kind of indirect violation of the right to remain silent and the privilege against self-incrimination (a form of derivative use) is avoided in the "Canadian compact" model of s. 24 application where defence evidence on the application need not be called until the Crown has closed its case. A further related difficulty is whether the accused's affidavit, offered in advance of trial in support of a s. 24 application pursuant to the *Kutynec* rules, would be protected by s. 13 of the Charter against its subsequent use by the Crown at trial.[155]

The American approach, adopted in *Kutynec*, requires that

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[154] See the dissent in *U.S. v. Salvucci*, 448 U.S. 83 (1980). In *R. v. Bennett*, unreported (November 15, 1990, Ont.Ct.Gen.Div.), summarized 11 W.C.B. (2d) 461, Mr. Justice Stortini commented on *Kutynec* and its requirement that affidavits be filed in advance of the s. 24 hearing, at p. 132, "I would think having to file an affidavit probably offends the self-incrimination protection given by the Charter." Also see the common law cases like *Dietrich* and *Sproule, supra*, footnote 10, which held that subjecting relevant defence evidence to a *voir dire* gave "an unfair preview of the evidence . . . to the opposite party."

[155] This is a question of some considerable difficulty. In *R. v. Erven* (1978), 44 C.C.C. (2d) 76 at p. 88, 6 C.R. (3d) 97, [1979] 1 S.C.R. 926, Dickson J., as he then was, stated unequivocally in relation to a "voluntariness" *voir dire*:

> The accused may testify on the *voir dire* while remaining silent during the trial. *Evidence on the voir dire cannot be used in the trial itself.* [Emphasis added.]

Also see p. 92 C.C.C., and *R. v. Magdish* (1978), 41 C.C.C. (2d) 449, 3 C.R. (3d) 377 (Ont. H.C.J.), where the accused was questioned on the *voir dire* as to the truthfulness of his confessions to the police, and Grange J., as he then was, prevented the Crown from tendering the *voir dire* testimony at the trial proper. The Judgments of Branca and Carrothers JJ.A. in *R. v. Van Dongen* (1975), 26 C.C.C. (3d) 22, 31 C.R.N.S. 346, [1975] 4 W.W.R. 246 (B.C.C.A.) are to the same effect as is the Privy Council's seminal decision in *Wong Kam-ming v. The Queen*, [1979] 2 W.L.R. 81, and the House of Lords' decision in *R. v. Brophy* (1981), 73 Cr.App.R. 287. However, the latter two cases held that where the confession is admitted in evidence and the accused then testifies at trial, his prior testimony on the *voir dire* can be used in cross-examination to demonstrate inconsistencies. This position has been adopted in Ontario in *R. v. Tarrant* (1981), 63 C.C.C. (2d) 385, 25 C.R. (3d) 157 (Ont. C.A.) and *R. v. Coughlin and Nicholson* (1982), 3 C.C.C. (3d) 259 (Ont. C.A.). All these Canadian pre-Charter cases and English cases are *not* based on any statutory protection against self-incrimination such as that found in s. 5 of the Canada Evidence Act. None of the accused had invoked that provision. Rather, these

counsel and the accused profer evidence of the constitutional violation in advance of the trial and persuade the judge of the likely success of a *viva voce* hearing, where particular witnesses could be called and questioned, presumably by revealing to the judge what counsel anticipates may emerge. This kind of procedure represents a serious assault on solicitor-and-client privilege, on the presumption of innocence and the privilege against self-incrimination, and on the Canadian tradition of judicial non-intervention in the calling and questioning of witnesses on relevant matters. Unfortunately, none of these considerations are discussed in *Kutynec.*

In *R. v. Roach*,[156] McClung J.A. (McDermid and Stevenson JJ.A. concurring) held that the onus is on the defence to bring out evidence of any Charter violation and that there is no burden on the Crown to prove compliance with the Charter during its case in-chief. However, the court was sensitive to the potential difficulties this burden creates for the presumption of innocence and the non-compellability of the accused. The

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cases simply express a judge-made policy that the accused's absolute right to remain silent at his trial should not be compromised by his need to testify on the *voir dire.* These decisions expressly articulate a policy of encouraging the accused to testify on *voir dires.* Given this pre-Charter common law jurisprudence, it is doubtful whether counsel need to seek any additional protection from s. 13 of the Charter. That section raises the thorny problem of whether the trial can be regarded as "any *other* proceedings", in relation to the *voir dire*, or whether they are all part of one proceeding. The jurisprudence is far from clear on this point but it is submitted that s. 13 of the Charter leads to much the same result as the common law, namely, the accused's testimony on the *voir dire* cannot be used at the subsequent trial except to cross-examine in relation to credibility (note that at common law the testimony on the *voir dire* cannot be used for any purpose if the impugned evidence is excluded at the end of the *voir dire*): see generally *R. v. Jewitt* (1982), 3 C.C.C. (3d) 191 (B.C.Co.Ct.); *R. v. Tarafa* (1989), 53 C.C.C. (3d) 472, [1990] R.J.Q. 427 (Que.S.C.); *R. v. Kuldip* (1990), 61 C.C.C. (3d) 385, 1 C.R. (3d) 285, 43 O.A.C. 340; *R. v. Protz* (1984), 13 C.C.C. (3d) 107, [1985] 5 W.W.R. 263, 34 Sask. R. 190 (C.A.); *R. v. Buxbaum* (1989), 70 C.R. (3d) 20, 33 O.A.C. 1 (C.A.); *R. v. Yakeleya* (1985), 20 C.C.C. (3d) 193, 46 C.R. (3d) 282 14 C.R.R. 381 (Ont.C.A.); *R. v. Paonessa and Paquette* (1982), 66 C.C.C. (2d) 300, 27 C.R. (3d) 179, 135 D.L.R. (3d) 277 *per* Zuber J.A. (Ont. C.A.), affd 3 C.C.C. (3d) 384 (S.C.C.). Also see the prescient article of Alan W. Mewett, Q.C., "The Risks of the Accused Testifying on the *Voir Dire*" (1983-84), 26 C.L.Q. 444. The American jurisprudence is to much the same effect. It is clear that the prosecution cannot use the accused's testimony on the pre-trial suppression hearing to directly prove guilt as part of its case in-chief. The further issue of whether that testimony can be used when the accused testifies at trial, to impeach credibility, has not been finally resolved but most authorities appear to permit such use: see *Simmons v. U.S.*, 390 U.S. 377 (1968); *People v. Sturgis*, 317 N.E. 2d 545 (1974); *People v. Douglas*, 136 Cal. Rptr. 358 (1977); LaFave, *supra*, footnote 52, at pp. 240-3.

[156] (1985), 23 C.C.C. (3d) 262, at p. 265, 49 C.R. (3d) 237, 66 A.R. 73 (C.A.).

court therefore held that the accused could elicit evidence of the Charter violation at trial through cross-examination of Crown witnesses: "The accused is not driven to call defence evidence to put the complaint into issue; *this may be achieved by cross-examination of prosecution witnesses* or by way of admission of fact." (Emphasis added.) More recently, Stevenson J. gave the unanimous judgment of the Supreme Court of Canada in *R. v. L. (W.K.)* and held, to the same effect, that it will be open to counsel seeking a s. 24 remedy "to continue to trial and argue the motion at the close of the Crown's case" depending on "the nature of the facts which the parties seek to establish" and whether they have been able to agree on all the supporting facts at the pre-trial stage.[157] This attempt to balance competing interests — placing the burden on the defence to prove the Charter violation but allowing the proof to emerge in the ordinary way at trial — is typical of the "Canadian compact" model of Charter litigation where discovery of the violation and bringing of the s. 24 application can both be collapsed into the trial itself. Thus where counsel have been unable to develop all the necessary factual material prior to trial, due to lack of access to state witnesses, and where counsel do not wish to expose defence witnesses at the pre-trial stage, before the Crown has established "a case to meet", the s. 24 application can be brought at the close of the Crown's case. This approach of McClung J.A. and Stevenson J., of course, would be prohibited by *Kutynec* and by the American rules discussed above.

A further practical difficulty is that both Canadian and American jurisprudence place the burden of proof on the prosecution in some s. 24 (suppression) hearings. The obvious example, common to both countries, is the warrantless search. It is clearly untenable to place a burden on the defence to make a preliminary offer of proof in these cases since the sole burden rests on the prosecution to justify the search. If *Kutynec* is adopted, a separate set of rules would have to be developed for these cases where the burden is on the Crown.[158] Will the

[157] May 16, 1991 (S.C.C.), judgment reserved; affg (1989), 51 C.C.C. (3d) 297 (B.C.C.A.).
[158] See *R. v. Collins, supra*, footnote 139; *R v. DeBot* (1986), 30 C.C.C. (3d) 207, 54 C.R.

Crown have to file particularized written pleadings accompanied by preliminary offers of proof that are then subject to a defence motion to strike?

The American authorities appear to have shown little sensitivity to the potential clash between placing a burden on the defence to make a "substantial preliminary showing" and the presumption of innocence which protects against pre-trial disclosure of the defence. Indeed, many American pre-trial disclosure statutes require reciprocal disclosure to the Crown by the defence.[159] However, some American Courts have refused to follow *Franks* in an inflexible fashion and have modified its rules to provide for lesser burdens in some circumstances.[160]

In conclusion, it can be seen that pre-trial motions to strike out s. 24 applications on the basis of insufficient merit, as suggested in *Kutynec* and as practiced in the United States, run up against enormous theoretical hurdles when one tries to transplant them into Canadian soil. The great weight of existing authority seems to preclude such a procedure in Canada and, indeed, it is likely that such a procedure itself would violate s. 7 of the Charter as it denies the right to a

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(3d) 120, 26 C.R.R. 275, affd 53 C.C.C. (3d) 193, 73 C.R. (3d) 129, [1989] 2 S.C.R. 1140; *R. v. Greffe* (1990), 55 C.C.C. (3d) 161, 75 C.R. (3d) 257, [1990] 1 S.C.R. 755; and LaFave, *supra*, footnote 52, at pp. 217-233. The Crown now bears the burden in Canada in relation to some of the s. 11(*b*) Charter motions (see *R. v. Askov*, *supra*, footnote 92). To be consistent, the Crown should have to plead these elements with supporting particulars and offers of proof.

[159] See LaFave and Israel, *supra*, footnote 141. The New York Criminal Procedure Law, for example, provides for such reciprocal defence disclosure in s. 240.30 and s. 240.45(2).

[160] *People v. Pointdexter*, 282 N.W. 2d 411 (1979); *State v. Casal*, 699 P.2d 1234 (1985); *Commonwealth v. Douzanis*, 425 N.E. 2d 326 (1981); *People v. Nunez*, 658 P.2d 879 (1983); *People v. Lucente*, 506 N.E. 2d 1269 (1987); *People v. Luttenberger*, 784 P.2d 633 (1990); *Commonwealth v. Signorine*, 535 N.E. 2d 601 (1989); *Commonwealth v. Hall*, 302 A.2d 342 (1973); *Theodor v. Superior Court*, 501 P.2d 234 (1972); *State v. Malkin*, 722 P.2d 943 (1986). These cases, which are discussed in LaFave, *Search and Seizure*, 2nd ed. (1987), vol. 2, at pp. 200-6, all revolve around the problem of the accused's practical inability to prove that a police affidavit is false without the benefit of a hearing at which the police officer or his informant can be compelled. The procedural device these cases often resort to, to escape this dilemma, is to compel production of the informant at an *ex parte in camera* hearing where the informant can be questioned by the judge. Such a proceeding, in the absence of the accused, would probably not be permissible in Canada: see *R. v. Barrow* (1987), 38 C.C.C. (3d) 193, 61 C.R. (3d) 305, [1987] 2 S.C.R. 694. However, for a novel attempt to introduce *ex parte* and *in camera* proceedings into Canada in an analogous situation (cross-examination of a police officer as to the reliability of his informant): see *R. v. Love*, unreported (March 27, 1991, Alta. Q.B.).

hearing ("full answer and defence"), it also compromises judicial neutrality and it may threaten solicitor-and-client privilege, the presumption of innocence and non-compellability of the accused, and the privilege against self-incrimination ("derivative use immunity").

7. Courts Administration

One of the most striking features of American pre-trial procedure on constitutional motions is that it has been fitted into an accommodating system of courts administration. The cornerstone of this system is the assignment of a trial judge to the case from the moment the indictment or information is filed in the court. For example, in New York State, the Uniform Rules for Courts Exercising Criminal Jurisdiction provide as follows in s. 200.11:

> (c) *Assignment of actions to individual assignment judges.* Except as provided in subdivision (b) of this section, upon commencement of a criminal action in the superior court, the action shall be assigned to a judge by the clerk of the court in which it is pending pursuant to a method of random selection authorized by the Chief Administrator. The judge thereby assigned shall be known as the "assigned judge" with respect to such action and, except as otherwise provided in subdivision (d) of this section, shall conduct all further proceedings therein.

Thus, subsec. (c) provides that an "assigned judge" is seized with the case long before the actual trial commences. Section 200.12 then specifies what the "assigned judge" must do:

> As soon as practicable after the assignment of an action to an individual assignment judge, the assigned judge shall conduct a preliminary conference. The matters to be considered at such conference shall include establishment of a timetable for completion of discovery and filing and hearing of motions, fixing a date for commencement of trial, and consideration of any other matters that the court may deem relevant. At the conclusion of the conference, the directions by the court to the parties and any stipulations by counsel shall be placed on the record or incorporated in a written court order. In the discretion of the court, failure of a party to comply with these directions shall result in the imposition of such sanctions as are authorized by law. The court may direct the holding of additional preliminary conferences as may be needed.

It can be seen that this New York system of courts administration has two practical consequences: first, there is a "trial judge" available from the commencement of the action who can order pre-trial discovery and can receive and hear the various constitutional motions in advance of the trial date; second, this "assigned judge" will inevitably develop a sense of responsibility for the case assigned to him or her and will be inclined to take control over its scheduling and successful resolution within a reasonable time. Thus the court structure in New York facilitates pre-trial resolution of constitutional motions. This does not cause delays because the New York Criminal Procedure Law prohibits interlocutory appeals from an unsuccessful pre-trial motion. For example, s. 710.70(2) provides:[161]

> An order finally denying a motion to suppress evidence may be reviewed upon an appeal *from an ensuing judgment of conviction* . . .". [Emphasis added.]

There are no provisions in the Canadian Criminal Code and there are no rules of court in Ontario that bear any resemblance to the New York rules. Each Chief Judge in each jurisdiction administers his or her court according to practices developed locally. The normal practice in most jurisdictions is something like the following: the accused's first appearance is in an "Assignment Court" where the presiding judge sets a trial date once the accused has retained counsel or elected to proceed without counsel; the judge presiding in "Assignment Court" is not the trial judge as no judge is assigned to the case at this early stage; accordingly, there is no judge who has the status to hear constitutional motions relating to the trial, such as motions to exclude evidence;[162] similarly, there is no judge

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[161] See *People v. Boyd*, 458 N.Y.S. 2d 643 (2d Dept., 1983); *People v. Adler*, 416 N.Y.S. 2d 79 (2d Dept., 1979); *People v. Pergament*, 397 N.Y.S. 2d 359 (1977). Also see ss. 450.20(8) and 450.50 which permit the prosecution to appeal an order suppressing evidence provided the prosecutor certifies that the remaining evidence is insufficient to justify a trial. These provisions, denying interlocutory appeals by the defence and permitting them in some circumstances by the prosecution, are now the norm in most U.S. jurisdictions. See LaFave, *supra*, footnote 52, at pp. 505-19.

[162] *R. v. Mills* (1986), 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, [1986] 1 S.C.R. 863, clearly gives this power to the "trial judge" (*per* McIntyre J., at pp. 493-5 C.C.C., and *per* La Forest J., at pp. 555-6 C.C.C.) save in exceptional circumstances where an immediate remedy

who has the status to order pre-trial disclosure as Canadian law leaves this matter to the discretion of the Crown Attorney and it is only "at the trial" that "the trial judge" can order disclosure;[163] a pre-trial conference must be held in cases where the election is for trial by jury, under s. 625.1(2), and such a conference is often held in non-jury cases as well, however, the judge presiding at the conference is not the "trial judge" (unlike in New York) and, accordingly, has no powers to grant s. 24 remedies or any other remedies; and finally, the "trial judge" will be assigned to the case either on the very morning of the trial or shortly before and s. 24 motions can then commence on the first day of trial.

There are some exceptions to the above model. Chief Judges in some jurisdictions have adopted American "case management" techniques and have designed systems where the judge sitting in "Assignment Court" takes carriage of all the cases taken into that court in a given period of time and sets them down for trial in his or her own court to be completed within a three- or four-month "cycle" before again returning to "Assignment Court" to take on a fresh batch of cases. However, these jurisdictions are exceptional in Ontario. Similarly, in very lengthy or complex cases the Chief Judge may assign a particular trial judge to the case well in advance of the trial so as to schedule pre-trial motions. Again, this is the exception and not the rule.

The typical Canadian model of court administration, outlined above, is obviously not designed with a view to facilitating disposition of s. 24 applications at the pre-trial stage. Since no "trial judge" is assigned before trial, there can be no pre-

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is required (*per* Lamer J., as he then was, at pp. 516-520 C.C.C., and *per* La Forest J., at pp. 565-7 C.C.C.).

[163] See authorities cited, *supra*, at footnote 3. The obvious inefficiencies caused by this rule, prohibiting pre-trial s. 24 applications for disclosure, are illustrated by a case like *R. v. Delaney* (1989), 48 C.C.C. (3d) 276, 89 N.S.R. (2d) 253, 45 C.R.R. 162 *sub nom. R. v. How* (C.A.) where defence counsel brought such an application in the trial court two weeks before the trial. The order was granted, the disclosure was obtained and the trial could have proceeded on schedule. In spite of this apparently desirable procedure, the Nova Scotia Court of Appeal held that there was no jurisdiction to make the order at the pre-trial stage (at p. 168 C.R.R.): "Such an application could only be made to the trial judge at the trial." The court gave no consideration to the fact that the trial would likely have to be adjourned if the trial judge granted the requested disclosure on the first day of trial. American pre-trial disclosure motions obviously avoid these difficulties.

trial motions. However, this typical form of courts administration in Canada does fit the "compact model" of Charter litigation. The usual Canadian practice that has arisen, of collapsing the s. 24 application into the trial proper, may simply have been adopted by the bench and bar for pragmatic reasons and not out of any carefully considered rational choice. That is, the bench and bar may simply have felt that Charter motions could not be brought in advance of trial, since no "trial judge" is assigned at that stage, and that serious reforms of our traditional form of courts administration would have to take place before the American model could be adopted (if it was deemed desirable).[164]

Justice Zuber addressed these issues in his *Report of the Ontario Courts Inquiry*[165] and rejected the American "case management" model:

> This involvement in a case from beginning to end is case management, and proceeds from the premise that the public interest (and perhaps the parties' interest) requires supervision of each individual case as it proceeds through every step. This Inquiry is not convinced that such intensive involvement in the processing of cases is required in Ontario.
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> . . . . . .
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> This Inquiry considers that case management on the American model is not necessary in Ontario, and to a great extent it is not practical because it supposes the ready availability at all times of a particular Judge to deal with motions. There are also some undesirable aspects of case management by a single Judge, particularly in cases where there may be a number of interim measures sought, as a Judge can become too familiar with a case, a party or a solicitor over the course of time.

Judge Borins does not address these issues in *Kutynec.*

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[164] Justice O'Driscoll's judgment in *R. v. Siegel* (1982), 1 C.C.C. (3d) 253 (Ont. H.C.J.), is illustrative of this practical predicament. Defence counsel attempted to bring on a pre-trial "suppression hearing" in the American style but there was no trial judge assigned to the case. O'Driscoll J. then had to decide whether he could hear the s. 24 application when he was not the trial judge. He concluded (at p. 263):

> Has Parliament by enacting the *Canadian Charter of Rights and Freedoms* introduced a whole new procedure into the criminal law whereby the admissibility of evidence is decided in the abstract, in a vacuum, at an anticipatory hearing by a judicial officer who is neither the judge at the preliminary inquiry nor the trial judge? Does s. 24 of the Charter provide for such a new and novel approach to the question of the admissibility of evidence? I can find no such provision in the Charter.

[165] (Queen's Printer for Ontario, 1987), pp. 186-8.

Therefore, when the *Kutynec* rules are applied in the Canadian setting, without "case management", it simply means that the s. 24 application is heard on the morning of the first day of trial. Thus two of Judge Borins' main objectives are simply not achieved. These two objectives were expressed as follows by His Honour:[166]

> The pre-trial motion facilitates prosecution and defence preparation for trial by giving them advance knowledge of the evidentiary status of the evidence which the defendant is attempting to exclude. In general, the requirement of the pre-trial motion places a premium on effective pre-trial preparation by forcing a defence lawyer to consider Charter issues well in advance of the trial date.

This laudable pursuit of "advance knowledge" and "pre-trial preparation" will simply not materialize when the s. 24 motion is brought no earlier than the first day of trial. It should be noted that resolution of s. 24 issues well in advance of the trial date would also facilitate rational planning and use of court resources. The result of a s. 24 application will inevitably have an impact on the willingness of the Crown to withdraw a charge or accept a plea to a lesser charge and, conversely, will have an impact on the willingness of the defence to consider a guilty plea. A preliminary examination of court records at the County Court in Lockport, New York, appears to indicate that plea bargaining or withdrawal of charges often followed the resolution of pre-trial motions. When these kinds of discussions take place after the first day of trial, court room facilities end up being under-utilized as the case collapses and the judge has no work for the remainder of time that had been allotted for the trial. When the same discussions take place well in advance of trial, there is no waste of court facilities and judicial resources as the time required for trial is never set aside in the court's calendar in the first place.[167]

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[166] *Supra*, footnote 97, at p. 518 C.C.C.

[167] The A.L.I. Model Code, *supra*, footnote 78, at p. 557, adopted the *pre-trial* suppression hearing because of its perceived benefits in achieving early disposition of cases without the necessity of a trial:

> Disposition of the motion prior to trial seems highly desirable as a general proposition. In many cases, a grant may result in abandonment of the prosecution, and a denial in a guilty plea.

8. Conclusion

The most obvious conclusion to be drawn from the above study of American and Canadian procedural models for constitutional motions in the course of criminal litigation, is that whatever model is adopted, it must be harmonized with existing law relating to pre-trial discovery and to courts' administration. If the chosen model cannot work in the context of the existing discovery law and existing courts administration practice, then there must be simultaneous reforms in those two areas so that all parts of the criminal justice system work coherently. In this regard, the adoption of the American model of pre-trial s. 24 application in *Kutynec* simply cannot work in Canada as the American model assumes mandatory pre-trial discovery mechanisms and pre-trial assignment of trial judges, neither of which exist in Canada.

On a more fundamental level, the adoption of American pleadings, preliminary offers of proof, and motions to strike, raise serious normative questions about the right to an evidentiary hearing, the role of the judge and the role of counsel in an adversarial model of litigation, and the presumption of innocence and the privilege against self-incrimination. American traditions appear to accept a far more active role for the Judge in controlling and limiting the calling of evidence and the bringing of constitutional applications. American authorities are also much more willing to limit the right to a hearing, to punish the client for counsel's mistakes, and to compel pre-trial disclosure of defence evidence. In Canada, very different traditions have emerged: the judge is much less involved in controlling the litigation and great trust is placed in counsel's judgment; the right to an evidentiary hearing in criminal matters, including constitutional motions, is itself constitutionally protected; when counsel does make a mistake, it is the

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Ontario courts adopted "over-booking" as their remedy for the problem of cases collapsing on the first day of trial. The Zuber Report, *supra*, footnote 165, at pp. 190-3, having rejected "case management", expressly embraced "over-booking principles to ensure that judges and courtrooms are kept busy". However, the disastrous consequences of "over-booking" in Ontario were swiftly illustrated when *R. v. Askov* (1990), 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, [1990] 2 S.C.R. 1199, was decided by the Supreme Court of Canada.

court's duty to intervene and protect the accused; and the defence is allowed to meet its burden of proving a Charter violation through cross-examination of Crown witnesses at trial rather than through pre-trial production of defence witnesses. In short, Canadian courts have been much more protective and assiduous than their American counterparts in nurturing the constitutional motion and in making it compatible with other traditional values such as judicial neutrality, the right to an oral hearing, and the presumption of innocence and the privilege against self-incrimination. A student of comparative law cannot help but notice startling differences between American and Canadian procedures in enforcing constitutional rights in criminal cases. These differing procedures are the result of equally startling differences in our respective policy perceptions, for example, the American perception is that pre-trial motions reduce delay whereas the Canadian perception is that they cause delay. Empirical research should be undertaken to help resolve this policy dispute.

The apparent harshness of some of the American law in this area seems to be predicated, in part, on a deliberate policy decision by the courts to control and limit access to constitutional remedies so that only the most meritorious motions are allowed to proceed to a hearing. A similar approach is seen in Canada in the *Kutynec* case. This policy reflects American judicial and political doubts about the wisdom of constitutional remedies in the criminal law. The obvious critique that can be made of this approach is that it proceeds by indirection: if the courts and politicians doubt the appropriateness or efficacy of constitutional remedies in criminal cases, then they should address the problem directly by reforming the substantive law of the Constitution and the chosen remedies; to leave the substantive law and the law of remedies untouched, and merely cut off the right to a hearing, is to kill the messenger. The right to a hearing is simply the vehicle that delivers the apparently unwanted message. These restrictive procedural rules may achieve nothing more than the saving of some court time and the covering up of some constitutional violations that would have been uncovered at

a full hearing. Dickson J., as he then was, commented on whether such an exercise is acceptable in the criminal law context in *Erven*:[168]

> Accepting, *arguendo*, that a *voir dire* entails delay in the judicial process, it does not necessarily follow that efficient administration of justice should be sought at the expense of the legitimate rights of an accused.
>
> . . . . .
>
> In my opinion, it is always necessary to hold a *voir dire* to determine the voluntariness of a statement made by an accused out of Court to a person in authority. Only in this way can fairness to the accused be assured.

It appears that Canadian courts, unlike their American colleagues, have been more determined to preserve judicial neutrality, counsel's control over the litigation, and the right to full s. 24 hearings. The extent to which these choices come into conflict with the s. 11(*b*) guarantee of a trial within a reasonable time will be the subject of another article and, as mentioned above, needs to be the subject of empirical research.

To the extent that these difficult policy choices become embodied in a set of procedural rules governing s. 24 applications, it is to be hoped that the choices will be made only after a thorough public airing of the competing values. If the judiciary severely restricts access to s. 24 hearings and remedies, then the Charter of Rights will be frustrated just as surely as a narrow technical reading of its substantive and remedial provisions would frustrate it. This was not what the framers of the Charter intended when they expressly included s. 24 in the Charter in order to ensure that violations of rights would be remedied.[169] It is to be hoped that Judge Borins' efforts in *Kutynec* will be treated as the beginning of a debate on this subject in Canada and not as the end of the debate.

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[168] *Supra*, footnote 155, at pp. 94 and 97 C.C.C. As to the extent to which "administrative expediency" can ever justify a s. 7 violation, see *Singh v. Canada (Minister of Employment & Immigration)* (1985), 17 D.L.R. (4th) 422, [1985] 1 S.C.R. 177, 14 C.R.R. 13 at p. 57, and *Ref. re s. 94(2) of Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at p. 313, 48 C.R. (3d) 289, [1985] 2 S.C.R. 486.

[169] The history of how s. 24 came to be included in the Charter can be found in McLellan & Elman, *supra*, footnote 16, at pp. 206-8, and in the article by Professor Roach, *supra*, footnote 57, at pp. 224-6.