
Self-Incrimination: Removing the Coffin Nails*

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The author articulates a principle against self-incrimination based on current notions found in doctrine as well as in the decisions of Canadian appellate courts. In doing so, he shows the inherent shortcomings of the prevailing view of self-incrimination. This holds the principle to be limited to two rules of evidence, expressed in sections 11(c) and 13 of the *Canadian Charter of Rights and Freedoms*, and arising solely in the setting of a formal trial: namely, the accused's non-compellability right and the protection of witnesses from having testimony given in one proceeding used in subsequent proceedings to incriminate them. The author instead posits a more vital principle against self-incrimination drawn from interpretation of other *Charter* provisions and from recent *Charter* authority. The scope of this principle is then discussed, and the argument is made that its appropriate application is limited to testimonial evidence. The article concludes with an analysis of the proper role of the redefined principle in the interpretation and application of particular *Charter* provisions.

L'auteur examine le privilège contre l'auto-incrimination et en démontre les lacunes. Ce privilège se limite aux deux règles de preuve, maintenant énoncées aux articles 11(c) et 13 de la *Charte canadienne des droits et libertés*, qui ne s'appliquent que dans le cadre d'un procès. Notamment, l'inculpé ne peut être contraint à témoigner contre lui-même et son témoignage ne peut servir contre lui dans un procès subséquent. L'auteur énonce ce privilège en tant que principe, qu'il voit reflété dans la *Charte* et dans son interprétation récente par les tribunaux. Il soumet que la portée de ce principe, bien que plus large que celle du privilège, se limite à la preuve testimoniale. En dernière partie, l'auteur examine le rôle que pourrait avoir ce nouveau principe dans l'interprétation et l'application de la *Charte*.

*In 1978, Ed Ratushny published an influential article entitled "Self-Incrimination: Nailing the Coffin Shut" (1977-78) 20 *Crim. L.Q.* 312. In this article I take the position that his report of the death of the principle of self-incrimination was greatly exaggerated.

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Introduction

The principle against self-incrimination¹ as it contributes to the definition of relevant rules of admissibility requires that:

no person should be required to respond (in the sense of providing information as opposed to real evidence) to an allegation made against them by the state until the Crown has established on evidence that there is a case to meet.

The prevailing view, so well described in the works of Ed Ratushny,² is that this principle applies solely in the context of formal proceedings. This view holds that the influence of the principle became spent with the development of two rules of evidence law pertaining to formal testimony, namely, the accused's non-compellability right, and the protection of witnesses from having the evidence that they give in one proceeding used in subsequent proceedings to incriminate them. Beyond this, it is said that the principle can have no influence on the development of the law. If this prevailing view is correct, the principle against self-incrimination can contribute nothing to the interpretation and application of the *Canadian Charter of Rights and Freedoms*³ apart from sections 11(c) and 13, which house the non-compellability and witness self-incrimination doctrines referred to.

In my opinion this prevailing view is incorrect. The claim that the principle against self-incrimination has not influenced the development of rules applicable to the admissibility of evidence obtained in the informal, pre-trial setting has never been accurate. Moreover, I take issue with the view that the principle against self-incrimination is beyond child-bearing. Indeed, the principle that I have defined has already been influential in the interpretation of a number of the *Charter's* provisions apart from sections 11(c) and 13, although the perpetuation of the prevailing view has served to retard the development of appropriate doctrine.

¹I have used the term "principle against self-incrimination" rather than the more familiar term "privilege against self-incrimination" advisedly. In the loose terminology we have come to employ, the "privileges against self-incrimination" are the non-compellability of the accused, and the right of a witness to be protected from the use of his or her self-incriminatory testimony in another proceeding. These "privileges" are rules of law. They exist as mandatory directions aimed at those who administer the conduct of criminal proceedings. In this article, I write primarily about the pertinent principle of law — that notion of justice, morality or fairness which influences or informs the development of rules of law having to do with the admission of self-incriminatory evidence. The distinction is important since the *Charter* preserves principles of law, and is not confined to the preservation of existing rules of law.

²*Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979); "Is There a Right Against Self-Incrimination in Canada?" (1973) 19 McGill L.J. 1; and "Self-Incrimination: Nailing the Coffin Shut" (1977-78) 20 Crim. L.Q. 312.

³Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

In this paper I will explore the influence that self-incrimination notions have had upon the development of the law of evidence. In this way I will support the articulation of the principle that I offer here. In the course of doing so I will suggest that the principle against self-incrimination has nothing to do with the obtainment of real evidence and that a sharp and clear line must be drawn between the treatment of testimonial and non-testimonial evidence. Having defined the principle against self-incrimination I will then examine the influence that self-incrimination notions have had to date in *Charter* interpretation. I will suggest that, on a number of occasions, resort to improper notions about what the principle against self-incrimination requires has led to inappropriate conclusions. I will also offer views on what the principle against self-incrimination should mean for the interpretation and application of particular provisions.⁴

There is no dispute that the principle against self-incrimination as I have articulated it here underlies both sections 11(c) and 13 of the *Charter*. It is my view that the interpretation of section 11(c) has been consistent with the principle against self-incrimination. In particular, decisions denying access to section 11(c) by those not subject to conviction at the proceedings with respect to which the section is being invoked are true to the principle. So, too, are those decisions which hold that nothing in section 11(c) prohibits the drawing of adverse inferences against an accused for having failed to testify. Section 13 authority, on the other hand, goes beyond the legitimate reach of the principle against self-incrimination. Nothing in this underlying principle would have required the exclusion of testimony voluntarily provided by accused persons at earlier proceedings, nor prevented the use of prior testimony during the cross-examination of an accused with a view to challenging his or her credibility as a witness.

Section 10(b), through its prohibition on efforts by the police to obtain statements from an accused who has yet to consult counsel and who has not waived the right to counsel, lends considerable indirect protection to the principle against self-incrimination as I have defined it. Its contribution to the principle suffers, however, from the line of authority which suggests that once a waiver has occurred, or counsel has been consulted, the protection of section 10(b) becomes spent. Whether this represents a gap in the extent to which the

⁴It should be made clear at the outset that in my view the principle against self-incrimination is exclusively an evidentiary one. Certainly this is the only role that it has served at common law. It is concerned with whether information which the accused has been compelled to provide to his or her accusers should be available in the prosecution. It is not concerned with the manner in which such evidence was obtained. It is not implicated, therefore, at the time when the information is secured from the accused. It is compromised only when that information is tendered in evidence. This is because prior to the adduction of the evidence by the Crown there has been no effort to "incriminate" the accused. The effect of this is that the principle against self-incrimination is seen as having no "normative" effect. Unlike other principles apt to do the job, the principle against self-incrimination does not exist to moderate police misconduct.

Charter entrenches the principle against self-incrimination depends on whether section 7 is ultimately interpreted to pick up the slack. The authority in this regard is uneven. Section 7 should, however, be interpreted to apply whenever an accused person is faced with the admission into evidence of a communication made by him or her at the behest of a state agent, as proof of the truth of its contents, without having made an informed and comprehending decision to provide the information.

Often, accused persons are asked or even required to participate in their own prosecutions through the provision of real evidence, such as breath or blood samples, or fingerprints. Traditionally, real evidence obtained from accused persons was left unprotected by the principle against self-incrimination, and it was much more likely to be admitted than compelled testimonial evidence. This dichotomy of protection was a principled one and should continue to be mirrored in the *Charter* jurisprudence. To a substantial degree this has occurred. Sections 11(c) and 13 are irrelevant to the obtainment of real evidence. Sections 10(b), 8 and 7 are, on the other hand, concerned with the obtainment of real evidence but the concern is with the *manner* by which such evidence is secured and not, as is the case with testimonial information, with what it is that is being obtained. In other words, these sections tolerate both the obtainment and the ultimate admission of real evidence, even when taken from the accused against his or her will, where their particular procedural requirements are observed. By contrast, the principle against self-incrimination relating to compelled testimonial information is concerned with the *nature* of the evidence being admitted. Curiously, the only relevant provision in which judicial authority equates involuntary participation in the production of real evidence with compelled testimonial self-incrimination is procedural, namely section 24(2), the *Charter's* exclusionary remedy: where evidence is obtained in the shadow of a *Charter* violation, it will be excluded almost automatically, as a matter of principle, whenever the evidence is the product of a pre-trial obligation imposed upon the accused by the state. In my view, this heightened propensity to exclude evidence should have been confined to proof which contravenes the principles against self-incrimination.

I. The Principle Against Self-Incrimination Defined

A. *The Ratushny Thesis*

The classic Canadian work on the law of self-incrimination prior to the *Charter* is Ed Ratushny's *Self-Incrimination in the Canadian Criminal Process*.⁵ In a nutshell, Ratushny denies that the principle relating to self-incrimination has anything to do with admissions made by accused persons out-

⁵*Supra*, note 2.

side of formal proceedings. He argues, however, that a broader principle exists which relates to both testimonial⁶ and non-testimonial⁷ evidence, and that it guards, at least to a degree, against compulsory disclosure of information outside of formal proceedings.

In his work, Ratushny traces the origins of the principle against self-incrimination,⁸ explaining how the seeds of current notions regarding self-incrimination germinated from a revulsion over the procedures of the notorious Court of Star Chamber. He draws the conclusion, however, that objection to the procedures of that court was not concerned as much with the spectacle of compelled testimony as with the fact that inquisitions were carried out in the absence of specific accusations. Yet, the legacy of distaste generated by the procedures of that court resulted in a case of over-kill which gave rise ultimately to the rule that persons could not be made to testify against themselves even where a proper accusation had been made.⁹ Historical research has suggested that "the expression *nemo tenetur prodere seipsum* ... did not grow out of a philosophy of law, but the converse was in fact the case....It became accepted as a rule of law in the minds of those who wished to believe it, and justifications both legal and moral began to appear."¹⁰

Ratushny goes beyond this historical explanation, however, to find a principled basis for some self-incrimination protections. In particular, he finds that basis in the concept of the rule of law. One of the aspects of the rule of law he identifies as the "principle of a case to meet", the notion that "a person should not be put in jeopardy merely on the basis of suspicion or speculation".¹¹ This principle, which Ratushny characterizes as a trial principle,¹² exists in recognition of the fact that an accused person has no obligation to rebut the accusation made against him. The dignity of persons and their liberty interest, coupled with the presumption of innocence,¹³ saves accused persons from having to answer

⁶By "testimonial" I refer to those cases where a person's communications are used as evidence of the truth of their contents, whether the statements are made in court or out of court, and whether they are oral, written, or in another form of symbolic communication.

⁷Such as hair and breath samples, fingernail scrapings, and other bodily samples, as well as the physical characteristics of an accused.

⁸Especially in Chapter 4 of *Self-Incrimination in the Canadian Criminal Process*, *supra*, note 2.

⁹*Ibid.* at 159-74.

¹⁰Tollefson, *The Privilege Against Self-Incrimination in England and Canada* (D. Phil. Dissertation, Oxford University, 1975) [unpublished] at 32, as cited with agreement by Ratushny, *ibid.* at 173-74.

¹¹*Self-Incrimination in the Canadian Criminal Process*, *supra*, note 2 at 178.

¹²*Ibid.* at 179.

¹³Ratushny sees the principle of a case to meet and the presumption of innocence as coterminous but not identical. See the discussion, *ibid.* at 180-81. He is no doubt correct, since the presumption of innocence is rebutted only by proof beyond a reasonable doubt while the principle of a case to meet is satisfied even where displaced by a lesser level of proof. Ratushny does not deny, however,

unsubstantiated allegations. Thus, the principle requires that "the Crown must prove its case before there can be any expectation that [the accused] will respond, whether it be by testifying himself or calling other evidence."¹⁴ The determination of whether the Crown will have presented a case to meet occurs at the close of the Crown's case and is assessed at a lower standard of proof than the ultimate determination of guilt.¹⁵ Thus, Ratushny maintains that the non-compellability of accused persons at their trial does not have independent value as a matter of principle, but is a mere corollary of the trial principle of a case to meet, and efforts to lionize it with rhetoric are misguided.¹⁶

Despite this, Ratushny recognizes that the principle against self-incrimination took on an apparent life of its own in the early development of the law¹⁷ and gave rise to two rules of criminal procedure which survived in pre-*Charter* Canada, each of which pertained only to formal proceedings. In other words, Ratushny sees the principle against self-incrimination as having nothing to do with compulsory disclosure in an informal context:

[T]he privilege against self-incrimination in Canada means only two things. It means

- (1) the protection given to any witness while testifying; and
- (2) the protection given to an accused not to testify at all.¹⁸

In his work he maintains that the influence of the principle became spent with the perpetuation of these two rules and that it has ceased to function in Canadian law as a guiding principle,¹⁹ that it can have no further influence in the development of Canadian law, and that continued reference to it can create only confusion.²⁰

All of this makes Ratushny sound extremely hostile to any suggestion that the principle demands an imposition of limits upon investigative techniques that would require accused persons to provide evidence against themselves. In fact, nothing could be further from the truth. As indicated above, he concludes that there is a principle independent of the principle of a case to meet,²¹ and inde-

the contribution that the presumption of innocence makes to the nature of the principle of a case to meet.

¹⁴*Ibid.* at 179.

¹⁵*Ibid.* at 181. In our system the inquiry is whether the Crown has adduced sufficient evidence which, if believed to be true, could form the basis of a conviction by a reasonable trier of fact. (*R. v. Mezzo, infra*, note 79) This lower standard is appropriate because the issue at this point is not whether the accused should be punished. Instead, it is whether the Crown has adduced sufficient evidence to justify calling upon the accused to answer the allegations.

¹⁶*Self-Incrimination in the Canadian Criminal Process, ibid.*, note 2 at 2-10.

¹⁷*Ibid.* at 53.

¹⁸*Ibid.* at 66.

¹⁹*Ibid.* at 53.

²⁰*Ibid.* at 66.

²¹Which applies only at the trial, *ibid.* at 186.

pendent of the principle against self-incrimination,²² which is intended to prevent the state from compelling accused persons to participate outside of formal proceedings in the investigation and prosecution of the offences against them. Ratushny sees this principle as applying whether the enforced participation involves the provision of information in the form of answers or statements, or by the compelled cooperation of the accused in investigative procedures such as the performance of physical tests,²³ the provision of blood samples,²⁴ or submission to psychiatric examinations.²⁵ He calls this principle, the "absence of pre-trial obligation".²⁶

In one respect, at least, this principle appears to be more vital than the principle against self-incrimination because, unlike the latter, it is not confined to testimonial evidence. On the other hand, the principle of the absence of pre-trial obligation seems remarkably weak. It appears from his discussion that Ratushny sees its effect as protecting accused persons who do not co-operate from having adverse inferences drawn against them for having failed to do so. He does not suggest that the principle could cause the exclusion of real evidence where such evidence is produced as a result of the authorities successfully compelling the accused to co-operate, nor does the case law support such a proposition.²⁷ In other words, it seems that the principle protects those who resist, but is of no use to those who are successfully made to participate in their own investigation.

Much of Ratushny's basic thesis has been unequivocally confirmed by judgments of the Supreme Court of Canada and its contribution to the law cannot be doubted.²⁸ In particular, the judgment of Lamer J. in *Dubois v. R.*²⁹ confirmed the essence of the thesis, namely, that there is an inextricable relationship between the principle of a case to meet and self-incrimination protections. Mr. Justice Lamer had occasion, for the majority of the Court, to discuss the constitutional right of an accused not to be compelled to be a witness as part of the

²²Which does not apply prior to the trial, *ibid.* at 183.

²³*R. v. Shaw* (1964), 48 W.W.R. 190, 43 C.R. 388, [1965] 1 C.C.C. 130 (B.C.C.A.) is cited, *ibid.* at 184.

²⁴*R. v. Burns*, [1965] 2 O.R. 563, 51 D.L.R. (2d) 393, [1965] 4 C.C.C. 298 (H.C.) is cited, *ibid.* at 184 and at 299-300.

²⁵*R. v. Sweeney (No. 2)* (1977), 35 C.C.C. (2d) 245 (Ont. C.A.) is cited, *ibid.* at 184.

²⁶*Ibid.* at 185.

²⁷Ratushny makes no suggestion that this principle would cause the exclusion of evidence where the accused is forced to participate and evidence is thereby obtained, *ibid.* at 183-87. This may be accounted for on the basis that illegally obtained evidence, apart from involuntary confessions, is admissible at common law.

²⁸At least half of Ratushny's thesis, that pertaining to the narrow compass of self-incrimination protections, is cited and relied upon by courts and commentators with incredible regularity.

²⁹[1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503, [1986] 1 W.W.R. 193 [hereinafter *Dubois* cited to S.C.R.].

Crown's case which is housed in section 11(c) of the *Charter*.³⁰ Quoting Ratushny he said:

[t]he important protection [offered by section 11(c)] is not that the accused need not testify, but that the Crown must prove its case before there can be any expectation that he will respond, whether by testifying himself, or by calling other evidence.³¹

His Lordship then went on to discuss the relationship of section 13 (the right of a witness not to have his or her testimony from one proceeding used to incriminate him or her in a subsequent proceeding)³² to the principle of a case to meet. Section 13, he concluded, was passed to prevent the state from *indirectly* conscripting persons as witnesses against themselves by using their previous testimony to prove the case against them.³³ It is incontestable, therefore, that Ratushny was correct in identifying the basic principle as relating to the concept of a case to meet.

An examination of my statement of the relevant principle at the beginning of this paper reveals that while it is based substantially on the connection that Ratushny has identified between self-incrimination and the concept of a case to meet, I disagree with Ratushny's thesis on two counts. First, I believe it was erroneous to have claimed even before the *Charter* that the self-incrimination principle had lost its vitality and contributed only to the development of the non-compellability and witness protection rules. Rather, the principle was clearly relevant to the admission of evidence obtained during the investigatory stage and helped bolster several other rules relating to testimonial self-incrimination. This is now coming to be borne out by *Charter* authority although this aspect of Ratushny's thesis has, in my opinion, served to slow the growth of what I would suggest are appropriate doctrines. Second, I see it as inaccurate to lump the co-operation of accused persons in acts of investigation which require physical participation with the protections that pre-*Charter* law gave to testimonial evidence. Again, *Charter* authority to date lends some support to this contention with one notable exception: in deciding whether section 24(2) of the *Charter* requires the exclusion of evidence obtained in a manner that violates the *Charter*, the Supreme Court appears to be largely driven by the principle of the absence of pre-trial obligation.

³⁰See the text of section 11(c) below at III.A.

³¹*Supra*, note 29 at 357, citing E. Ratushny, "The Role of the Accused in the Criminal Process" in W.S. Tarnopolsky & G.-A. Beaudouin, eds, *The Canadian Charter of Rights and Freedoms: Commentary*, 1st ed. (Toronto: Carswell, 1982) 335 at 358-59.

³²See the text of section 13 below at III.B.

³³*Ibid.*

B. A Vital Pre-Charter Principle Against Self-Incrimination

The principle against compelled self-incrimination played a vital role in the context of informal proceedings prior to the *Charter* and was influential in the development of the law of evidence. Despite this, Canadian courts denied for some time that the voluntariness rule emanating from the decision in *Ibrahim v. R.*³⁴ had anything to do with concepts of compelled self-incrimination. It was said that the rule, which required statements made to persons in authority to be voluntary before they could be proved, existed because of concern for the accuracy of the confession or admission, not because of any concerns related to self-incrimination.³⁵ Ratushny's thesis was unquestionably consistent with what was being said. It was not consistent with what was being done, however, and this must be the true test of the existence of a principle. The "reliability rationale" failed to account for several features of the voluntariness rule which had developed. In particular, it did nothing to explain why statements which the Crown conceded to be false had to be voluntary to be admitted.³⁶ Nor did it explain why statements would be excluded according to the voluntariness rule only when made to persons in authority.³⁷ These aspects of the rule were clearly influenced by the notion that it is inappropriate to compel persons accused of crimes to respond to allegations made against them by state agents. Other more recent aspects of the voluntariness rule are explicable only on the basis of this principle as well. The focus in case law relating to statements made by accused persons suffering oppression at the hands of state agents is on whether the accused's will to remain silent has been "sapped" such that the decision to speak is not a truly voluntary one; it is not on whether the oppression has deprived what the accused has said of its reliability.³⁸ The operating mind rule may require the exclusion of statements made where the accused is suffering from some condition which prevents him or her from appreciating the significance of speaking to persons in authority. If this is so, the focus is not on the trustworthiness of the informa-

³⁴[1914] A.C. 599, [1914-15] All E.R. 874 (P.C.) [hereinafter *Ibrahim* cited to A.C.].

³⁵See *Boudreau v. R.*, [1949] S.C.R. 262, [1949] 3 D.L.R. 81, 94 C.C.C. 1 [hereinafter *Boudreau* cited to S.C.R.]; *R. v. Fitton*, [1956] S.C.R. 958, 6 D.L.R. (2d) 529, 24 C.R. 371; *Piché v. R.* (1970), [1971] S.C.R. 23, 11 D.L.R. (3d) 700, 74 W.W.R. 674 [hereinafter *Piché* cited to S.C.R.]. More recently, see the opinion of the majority in *Rothman v. R.*, [1981] 1 S.C.R. 640 at 664, 121 D.L.R. (3d) 578, 59 C.C.C. (2d) 30 [hereinafter *Rothman* cited to S.C.R.].

³⁶*Piché*, *ibid.*

³⁷See *Ibrahim*, *supra*, note 34; and see, F. Kaufman, *The Admissibility of Confessions*, 3d ed. (Toronto: Carswell, 1979) at 80-103.

³⁸See *R. v. Priestley* (1965), 51 Cr. App. R. 1 and the explanation of the doctrine in Lord MacDermott, "The Interrogation of Suspects in Custody" (1968) 21 *Curr. Legal Probs* 1 at 10 where it is said that the actions of the police must affect "the mind of the subject so that his will crumbles and he speaks when otherwise he would have stayed silent." This doctrine has been unequivocally accepted in Canada. See *Horvath v. R.*, [1979] 2 S.C.R. 376, 93 D.L.R. (3d) 1, [1979] 3 W.W.R. 1; *Hobbins v. R.*, [1982] 1 S.C.R. 553, 135 D.L.R. (3d) 244, 41 N.R. 433.

tion provided but rather on the fact that the information will be used to incriminate the accused.³⁹

The influence of self-incrimination principles can also be seen in the context of authority dealing with whether the silence of accused persons can be used to ground inculpatory inferences. The silence of the accused can be circumstantially relevant in a variety of ways.⁴⁰ Two of the possible kinds of inferences which can be made from the failure of an accused person to speak threaten to compromise the principle against testimonial self-incrimination if allowed to be drawn under certain circumstances. The first is the inference of "adopted admission". If the accused remains silent in the face of an allegation against him or her where one might reasonably have expected an innocent person to have denied the allegation, it may be possible to conclude that the accused was acknowledging or admitting the truth of the statement.⁴¹ The second is the inference of consciousness of guilt. If the accused fails to respond to an allegation, it may reflect an awareness on the part of the accused that he or she has no answer to the allegation. Silence shows that the accused acted as a guilty person would have. In each of these cases, testimonial self-incrimination may be occurring because the silence of the accused is, in effect, treated as though it was a communication by the accused. In the former case the inference

³⁹See *Clarkson v. R.*, [1986] 1 S.C.R. 383, 26 D.L.R. (4th) 493, 50 C.R. (3d) 289 [hereinafter *Clarkson* cited to S.C.R.]. Here, at 399 McIntyre J. provides the most authoritative opinion to date on the test for determining whether the accused's mind was sufficiently operative to allow the admission of a statement. His Lordship indicated that the evidence should be excluded where *either* the accused was unable to appreciate what he or she was saying, or where the accused was unable to appreciate the consequences of speaking. In *R. v. Favell* (28 October 1986), (Ont. H.C.) [unreported], summarized in 17 W.C.B. 308 (Ont. H.C.), DuPont J. reinforced the connection between the doctrine and self-incrimination principles by holding that where the statement was made to a person in authority, the accused had to be able to appreciate the consequences of speaking before the statement would be admissible, but where the statement was made to persons not in authority, the statement would be admissible whether or not the accused appreciated the consequences of speaking, so long as the accused was capable of understanding what it was that was being said. In *R. v. Lapointe* (1983), (1984) 1 O.A.C. 1, 9 C.C.C. (3d) 366 (C.A.), Lacourciere J.A., for the Court, ruled specifically that the "appreciation of the consequences test" was inappropriate even where the statement was made to persons in authority, and had been rejected by earlier Supreme Court of Canada authorities. This decision has since been affirmed by the Supreme Court of Canada, [1987] 1 S.C.R. 1253, 76 N.R. 228, 35 C.C.C. (3d) 287 in a two line decision in which Dickson C.J.C. said, "We are substantially in agreement with the reasons of Lacourciere J.A. who delivered the judgment for the court." However, since there were many issues presented at the Court of Appeal, it is impossible to conclude that McIntyre J.'s views on the operating mind test have been authoritatively rejected by the Supreme Court.

⁴⁰For a more complete discussion of the issues presented by inferences from silence see D.M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987) at 552-70.

⁴¹*R. v. Christie*, [1914] A.C. 545, 83 L.J.K.B. 1097 (H.L.) is the leading case dealing with adopted admissions. There is some disagreement as to the precise formulation of the appropriate test for determining whether an allegation has been adopted as an admission. See S. Schiff, *Evidence in the Litigation Process*, 3d ed. (Toronto: Carswell, 1988) at 318-19.

is that the failure of the accused to deny the allegation is tantamount to an admission of the facts alleged. In the latter case, the inference stands as though it was a broad admission of culpability made by the accused. In each case, then, the inferences suggest that the accused has incriminated himself or herself.

There are restrictions, and perhaps even absolute prohibitions, upon the drawing of these inferences where the silence is maintained in the face of persons in authority. It is uncontested that where the accused remains silent after he or she has been cautioned, no inferences can be drawn from that silence.⁴² It is arguable that this is based solely on considerations of fairness and has nothing to do with a principle against testimonial self-incrimination.⁴³ On the other hand, the bulk of judicial authority holds that such inferences are absolutely prohibited even in the absence of a caution,⁴⁴ and to the extent that this is so, the prohibition can be explained only on the basis of the principle against testimonial self-incrimination.

The least that can be said with respect to this line of authority is that self-incrimination notions have played a substantial role in influencing the course of the law. There is no bar upon the use of such inferences where silence is maintained in the face of persons not in authority.⁴⁵ This confirms the contribution of self-incrimination notions since the concept of self-incrimination as known

⁴²For authority pertaining to adopted admission cases, see *R. v. Robertson* (1975), 21 C.C.C. (2d) 385, 29 C.R.N.S. 141 (Ont. C.A.); *R. v. Stevens* (1984), 2 O.A.C. 239, 11 C.C.C. (3d) 518 (C.A.), leave to appeal to S.C.C. refused; *R. v. Symonds* (1983), 1 O.A.C. 103, 38 C.R. (3d) 51, 9 C.C.C. (3d) 225 (C.A.) [hereinafter *Symonds* cited to O.A.C.]; *R. v. Spicer* (1984), 36 Sask. R. 235 (C.A.). With respect to inferences of consciousness of guilt see *R. v. Cripps*, [1968] 3 C.C.C. 323, 63 W.W.R. 532, 3 C.R.N.S. 367 (B.C.C.A.); *R. v. Leckey* (1943), [1944] K.B. 80, [1943] 2 All E.R. 665, 29 Cr. App. R. 128 (C.C.A.) [hereinafter *Lecky* cited to K.B.].

⁴³If silence could be used against the accused after he or she had been advised that they need not speak, the caution would become "a trap". *Leckey*, *ibid.* at 86, and see *R. v. Hawke* (1975), 7 O.R. (2d) 145 at 174, 22 C.C.C. (2d) 19 (C.A.) [hereinafter *Hawke* cited to O.R.].

⁴⁴As to adopted admissions, see *R. v. Hall* (1970), [1971] 1 All E.R. 322, 1 W.L.R. 298, 55 Cr. App. R. 108 (P.C.); *R. v. Eden*, [1970] 2 O.R. 161, [1970] 3 C.C.C. 280 (C.A.); *Taggart v. R.* (1980), 13 C.R. (3d) 179 (Ont. C.A.). In the latter case no absolute bar was enunciated but the reasoning of the court confirms that such a bar was applied. As to inferences about consciousness of guilt see *R. v. Itwaru* (1970), 1 N.S.R. (2d) 424, 10 C.R.N.S. 184, [1970] 4 C.C.C. 206 (N.S.C.A.) [hereinafter *Itwaru* cited to N.S.R.]. The decision in *R. v. Torbiak* (1974), 18 C.C.C. (2d) 229, 26 C.R.N.S. 108 (Ont. C.A.) supports this view. Ratushny argues that there is no absolute bar but that these decisions merely represent factual determinations that the requested inferences are not appropriate to be drawn. He also cites some contrary authorities. *Self-Incrimination in the Canadian Criminal Process*, *supra*, note 2 at 122ff. In my opinion the Canadian authorities which Ratushny cites as contradicting the existence of an absolute bar on the inference do not, in fact, do so. See D.M. Paciocco, *Charter Principles and Proof in Criminal Cases*, *supra*, note 38 at 561.

⁴⁵See J.H. Buzzard, R.D. Amlot and S. Mitchell, *Phipson on Evidence*, 11th ed. (London: Sweet & Maxwell, 1970) at 371; *Hawke*, *supra*, note 43; *Parkes v. R.*, [1976] 3 All E.R. 380 (P.C.), Sir R. Cross and C. Tapper, *Cross on Evidence*, 6th ed. (London: Butterworths, 1985) at 529-30. But see *Itwaru*, *ibid.*

in law applies between the individual and the state. Where silence maintained in the face of state agents is sought to be used as evidence the decisions are replete with references to the so-called "right to silence" as the explanation for the disallowance of the inferences. Moreover, there appears to be no bar to using the silence of the accused where the inference sought to be drawn does not involve using that silence as positive evidence of guilt.⁴⁶

These lines of authority demonstrate that the principle against self-incrimination has, in fact, played a vital role with respect to the ultimate proof of information obtained in informal settings. This was to be expected since the operation of the principle as it applies to information obtained outside of formal settings is, in my view, an inevitable corollary of the principle of a case to meet. This application of the principle against self-incrimination is required in order to keep the principle of a case to meet from becoming illusory. After all, if accused persons could be made to respond to allegations made against them prior to the commencement of formal proceedings and to have their responses used as evidence of their guilt, then adherence to the principle of a case to meet at the trial would become pointless.⁴⁷

C. *Testimonial Versus Non-Testimonial Self-Incrimination*

The common law carved a sharp and clear line between cases where accused persons were compelled to answer allegations made against them and cases where they were forced to participate in the provision of physical evidence. The prevailing view is that the voluntariness rule applied solely to efforts to adduce testimonial evidence.⁴⁸ Pre-*Charter* Supreme Court judgments denied

⁴⁶In such cases the evidence about silence is being used to undermine the evidence of the accused, and not to contribute affirmative information to assist the Crown in the establishment of a case to meet. See *R. v. Parker*, [1933] 1 K.B. 850, [1932] All E.R. 718, 24 Cr. App. R. 2 (C.C.A.); *R. v. Littleboy*, [1934] 2 K.B. 408, [1934] All E.R. 434, 24 Cr. App. R. 192 (C.C.A.); and *R. v. Hoare*, [1966] 2 All E.R. 846, [1966] 1 W.L.R. 762, 50 Cr. App. R. 166 (C.C.A.), which are alibi cases. A failure to offer a timely explanation can also be relevant outside of the alibi context. See *R. v. Fillekes* (1974), 27 C.R.N.S. 399 (Ont. C.A.).

⁴⁷This point was not, of course, lost upon Ratushny. He notes that a legal obligation to co-operate in a police investigation would denude the principle of a case to meet, as well as other trial principles, of their significance. *Self-Incrimination in the Canadian Criminal Process*, *supra*, note 2 at 187. His answer is to place reliance on the principle of the absence of a pre-trial obligation, which, for the reasons I present below, does not, to my mind, provide satisfactory support for the principle of a case to meet.

⁴⁸See P.K. McWilliams, *Canadian Criminal Evidence*, 3rd ed. (Aurora, Ontario: Canada Law Book, 1988) at 15-3; *R. v. Angelucci*, [1947] 1 W.W.R. 82, 4 C.R. 220, 88 C.C.C. 111 (B.C.C.A.) where the accused produced stolen goods from his pocket as a result of a demand by the police, and it was held that the confession rule had no bearing on the admission of the items; and see the discussion of *R. v. Voisin*, [1918] 1 K.B. 531, [1918-19] All E.R. 491, 13 Cr. App. R. 89 (C.C.A.) [hereinafter *Voisin* cited to K.B.] by the Criminal Law Revision Committee in its Eleventh Report (Cmd. 4991, para 69). In *Voisin* the accused was asked to write words to see if his penmanship

consistently that the concept of self-incrimination had anything to do with the obtainment of real evidence from accused persons, even where the obtainment of the evidence required a degree of forced co-operation such as where the accused was compelled to participate in a line-up,⁴⁹ or to provide breath or blood samples.⁵⁰ Moreover, non-testimonial evidence discovered as a result of improper investigative techniques that would compel the exclusion of testimonial evidence was held admissible.⁵¹

This is not to say that the law granted no protection against the compulsory pre-trial non-testimonial participation of accused persons. No doubt Ratushny is correct and that, as a matter of principle, it has always been considered unsettling to require persons who are presumed to be innocent to co-operate in the furnishing of real evidence against themselves. Yet, subject perhaps to an exclusionary discretion,⁵² the relevant principle has no impact where the accused person capitulates and co-operates in furnishing self-incriminatory real evidence. As Ratushny indicates, all the relevant principle serves to do is to protect, in some cases, those who have successfully resisted the pressure to co-operate by invalidating the inference that the accused must have had something to hide.⁵³ By contrast, the confession rule illustrates that the principle against self-incrimination has contributed to the exclusion of evidence actually obtained.

Why would the law draw such a substantial distinction between the compelled disclosure of testimonial information and the compelled disclosure of real evidence? The reasons are rarely articulated in the caselaw because the issue simply does not emerge as one for comparison. Yet there are clear and compelling reasons for the difference in treatment between the two kinds of evidence which emerge, as a matter of inference, from the authorities. They relate primarily to the reliability of the information provided and to the inevitable existence of a causal connection in the case of compelled testimonial information.

and spelling matched words scribbled at the crime scene. The writing was held admissible, not to prove the truth of its contents, but to help identify the accused. The court mooted the application of the confession rule but the Criminal Law Revision Committee considered this to have been unnecessary. See *R. May, Criminal Evidence* (London: Sweet & Maxwell, 1986) at 8-94 as to section 76(4)(b) of the *Police and Criminal Evidence Act, 1984*, U.K., c. 60.

⁴⁹*Marcoux v. R.*, [1976] 1 S.C.R. 763, 60 D.L.R. (3d) 119, 24 C.C.C. (2d) 1 [hereinafter *Marcoux* cited to S.C.R.].

⁵⁰*Hogan v. R.* (1974), [1975] 2 S.C.R. 574, 48 D.L.R. (3d) 427, 18 C.C.C. (2d) 65 [hereinafter *Hogan* cited to S.C.R.].

⁵¹*R. v. St. Lawrence*, [1949] O.R. 215, 93 C.C.C. 376, 7 C.R. 464 (H.C.) [hereinafter *St. Lawrence* cited to O.R.]; *R. v. Wray*, [1974] S.C.R. 565, 33 D.L.R. (3d) 750, 10 C.C.C. (2d) 215.

⁵²See the judgment of Dickson C.J.C. in *Marcoux*, *supra*, note 49.

⁵³See *Self-Incrimination in the Canadian Criminal Process*, *supra*, note 2 at 184, citing *R. v. Burns*, [1965] 2 O.R. 563, 51 D.L.R. (2d) 393, 4 C.C.C. 298 (H.C.); *R. v. Shaw* (1964), [1965] 1 C.C.C. 130, 48 W.W.R. 190, 43 C.R. 388 (B.C.C.A.) and *R. v. Sweeney* (1977), 35 C.C.C. (2d) 245 (Ont. C.A.). For a recent application of the discretion to exclude the evidence of a refusal to cooperate in the provision of real evidence see *R. v. Fyfe* (1984), 7 C.C.C. (3d) 284 (N.W.T.C.A.).

1. The Reliability of the Information

While the “reliability rationale” cannot adequately account for all of the aspects of the voluntariness rules, there is no question that the dependability of evidence is an extremely important consideration in the development of rules about proof. After all, the primary function of evidence is to produce correct determinations of fact. There is no question that testimonial evidence is more likely to be misleading than real evidence. The trier of fact is itself a witness to real evidence in the sense that the evidence can be seen and characterized; in terms of knowing what the thing is and whether to believe in its existence the trier of fact can rely on its own senses.⁵⁴ Testimonial evidence is useful, on the other hand, only where the trier of fact is prepared to assume that the witness is accurate in what he or she has observed and is truthful in relating that to the court. Moreover, as a matter of human experience there are grave dangers associated with assigning credibility to enforced disclosures. It is not surprising, then, to find absolute rules of exclusion related to compelled testimonial evidence, but not to rules about the proof of real evidence.⁵⁵

2. The Causal Connection

The case for excluding evidence is more compelling where it can be said that, “but for” the improper act or inducement, the evidence would not have been found.⁵⁶ Where the evidence is testimonial in nature, it does not exist prior to the relevant communication. If that communication never occurs, the evidence never appears. It follows that where a person communicates only because of pressure, inducement, or the exploitation by another of that person’s ignorance, there is a “but for” connection between the wrongful act and the particular admission. The wrongful act, in a very real sense, creates the information. The authorities would not have had the precise admission relied upon “but for” that act. Where the evidence is real evidence, on the other hand, it is more difficult to discern such an ineluctable “but for” connection. The real evidence, whether it be the blood of an accused, a weapon wielded by an assailant, or a

⁵⁴Authentication still depends, however, on the accuracy of evidence provided by witnesses.

⁵⁵This notion was of obvious significance in the development of the pre-*Charter* rule in *St. Lawrence, supra*, note 51. Calling the relative unreliability of communications into aid in this context is not, in my opinion, inconsistent with my earlier rejection of the reliability rationale as the sole basis for the voluntariness rule. Its influence in that context cannot be denied. The point is that factors other than reliability affected the development of the voluntariness rule but that reliability does stand as a significant consideration in the decision to accept evidence, whether it be real or testimonial.

⁵⁶I do not believe that the largely discredited “but-for” test is an appropriate minimum threshold for issues of causation as it is decidedly too narrow. It is precisely because it is so narrow, however, that it adds considerable weight to the case in favour of giving compelled communications heightened protection.

document, has independent existence. It is there to be discovered, and it may well be that the evidence would have come to the attention of the authorities in some legitimate fashion had they not acted as they did. Exclusion may therefore accomplish more than perfect *restitutio in integrum* between the parties; by causing the state to lose the evidence completely, it may well be put in a position that is worse than if the constitutional violation had never occurred.⁵⁷

3. Personal Autonomy and Privacy of the Mind

I am convinced that in addition to these pragmatic considerations, there is something in the nature of the seizure of the information stored in the memory of an accused person which makes it more reprehensible than the taking of real or physical evidence from his or her person. By its very nature that which is in the mind of the accused person is more private than that which is physically possessed. It is certainly less accessible. What exists can usually be observed by a third party without a willed act of participation by the accused. Physical characteristics used to identify an accused and the possession of objects by the accused can be observed without his or her participation. Even bodily specimens can be forcibly taken from an accused who continues to resist. Information stored in the recesses of the mind can become available for use against the accused, however, only through an act of the accused. He or she must be a full participant in its creation by making a conscious decision to speak. In this sense, the seizure of involuntary statements involves an overbearing of the will of the individual to resist and conscripts the accused in a way that the seizure of physical evidence does not. It is an act of the self which ultimately leads to the evidence. The privacy of the mind, the last refuge of the individual, is invaded with the enforced complicity of the accused.

Certainly, it is difficult to find clear statements in the authorities that such notions have grounded the disparate treatment that information and physical evidence have received at common law. These sentiments no doubt explain, however, the frequent, if somewhat confusing, references to freedom of speech⁵⁸

⁵⁷The influence of these notions is manifest in the recent *Charter* case of *Black v. R.* (10 August 1989), (S.C.C.), [hereinafter *Black*] [not yet reported] in which Wilson J., for a unanimous court, calls each of these points into aid in determining whether to exclude unconstitutionally obtained evidence. It was ultimately decided to exclude a statement but to admit real evidence because, unlike the statement, the real evidence would have inevitably been discovered and, unlike the statement, had not been brought into existence as a result of the constitutional violation.

⁵⁸For this reason it is common, although potentially confusing, for American commentators supporting the principle against self-incrimination to call into aid the constitutional right to freedom of speech or to emphasize the privacy of the human mind. See, for example, *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956), rev'd, 353 U.S. 391 (1957); E. Griswold, *The Fifth Amendment Today* (Cambridge, MA: Harvard University Press, 1955) at 9; Ratner, "Consequences of Exercising the Privilege Against Self-Incrimination" (1957) 24 U. Chi. L. Rev. 472 at 488-89.

that can be found in American writings dealing with self-incrimination. Moreover, they give added significance to the phrase *self-incrimination*. The lack of clear expression of concepts of personal autonomy and privacy of the mind may be explained, in part, on the basis that they are inherent in the revulsion which elevated the principle against self-incrimination into a vital legal concept. As Field J. said in *Brown v. Walker*:

The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought.

A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement.⁵⁹

It is no doubt why Wigmore spoke in this context of the individual being sovereign when he sought to explain the principle.⁶⁰

In brief, then, violations of the privacy of the mind invade the last sanctuary of the individual and create evidence which might not otherwise exist, the reliability of which is suspect. On the other hand, the seizure of real evidence does none of these things. This accounts for the dichotomy of protection at common law in which testimonial evidence receives a higher level of respect, and it is this dichotomy which causes problems for Ratushny's thesis that both testimonial and non-testimonial evidence discovered in informal proceedings can shelter under the same principle of the absence of a pre-trial obligation. It also casts doubt on the wisdom of equating testimonial and non-testimonial self-incrimination for the purposes of defining *Charter* protection.

II. The *Charter* and Testimonial Self-Incrimination

Based on the foregoing I would suggest that the principle against self-incrimination which pre-existed the *Charter* provided that:

no person should be required to respond (in the sense of providing information) to an allegation made against them by the state until the Crown has established on evidence that there is a case to meet.

To what extent has this principle been entrenched in the *Charter*, and to what extent are the decisions dealing with the relevant *Charter* provisions true to the requirements of the principle?

⁵⁹161 U.S. 591, 637 (1896).

⁶⁰J.T. McNaughton, ed., *Wigmore on Evidence* (Boston: Little, Brown and Co., 1961), para. 2251.

A. Section 11(c)

This section specifies that:

11. Any person charged with an offence has the right
 - (c) not to be compelled to be a witness in proceedings against that person in respect of the offence.

Its function is to entrench the non-compellability right of accused persons relating to their own trials.⁶¹ To date, the authority dealing with the section has been true to the underlying common law principle. There have essentially been two major issues relating to its scope. The first is whether the section allows a witness to refuse to provide information at a proceeding where he or she is not an accused. The second relates to whether an accused person who avails himself or herself of the right not to be a witness is protected by the section from the drawing of adverse inferences for having failed to testify.

1. Other Proceedings

At common law, the non-compellability of an accused person applied only at his or her own trial and at preliminary proceedings constituting part of the primary process of prosecuting the accused.⁶² The Supreme Court of Canada has denied that accused persons had the right to refuse to testify or provide information at proceedings which could not end ultimately in their conviction.⁶³ This line of authority has been confirmed in most cases in the context of section 11(c).⁶⁴ In my view this is a result consonant with the relevant principle. The real issue is whether the accused has been made to furnish testimonial information which is being used as evidence to assist the prosecutor in presenting its case to meet. At the proceeding where the information is being adduced the prosecutor is not being called upon to make a case against the accused therefore there is no risk of the immediate violation of the principle. So long as the testimony cannot be used against the accused in a subsequent proceeding to help

⁶¹It has been held not to apply to corporations. See *R. v. Amway Corp.*, [1989] 1 S.C.R. 21 [hereinafter *Amway*].

⁶²*Batary v. A.G. Sask.*, [1965] S.C.R. 465 at 474-75, 52 D.L.R. (2d) 125, 46 C.R. 34.

⁶³*Faber v. R.* (1975), [1976] 2 S.C.R. 9, 65 D.L.R. (3d) 423, 27 C.C.C. (2d) 171; *Dilorio v. Montreal Jail Warden* (1976), [1978] 1 S.C.R. 152, 73 D.L.R. (3d) 491 B.N.R. 361.

⁶⁴See *R. v. Crooks* (1982), 39 O.R. (2d) 193, 2 C.R.R. 124, 2 C.C.C. (3d) 57 (H.C.), affirmed 39 O.R. (2d) 193n (C.A.); *Rueben v. R.* (1983), 24 Man. R. (2d) 100 (Q.B.); *Porco v. R.*; *Morelli v. Stalker* (1983), 33 C.R. (3d) 398, 6 C.C.C. (3d) 93 (Que. S.C.); *Michaud v. Min. of Justice N.B.* (1982), 145 D.L.R. (3d) 588, 4 C.R.R. 159, 3 C.C.C. (3d) 325 (N.B.Q.B.) [hereinafter *Michaud* cited to D.L.R.]; *R. v. Daigle* (1982), 32 C.R. (3d) 388, 4 C.R.R. 153 (Que. S.C.); *Re Robinson and R.* (1986), 3 B.C.L.R. (2d) 17, [1986] 4 W.W.R. 729, 28 C.C.C. (3d) 489 (S.C.), aff'd on other grounds [1987] 3 W.W.R. 362 (B.C.C.A.), aff'd, [1988] 1 W.W.R. 216 (S.C.C.).

establish its case to meet, then the principle against self-incrimination is respected. Section 13 of the *Charter* assures that this cannot happen.⁶⁵

2. Adverse Inferences

Prior to the *Charter* it was the case that nothing prevented the drawing of adverse inferences against an accused for having failed to testify in his or her own defence.⁶⁶ Section 11(c) has not changed this,⁶⁷ although there are authorities to the contrary.⁶⁸ The leading cases are the recent Ontario Court of Appeal decision in *R. v. Boss*⁶⁹ and the decision of the Manitoba Court of Appeal in *R. v. B.(J.N.)*⁷⁰ In *R. v. Boss* the accused challenged the constitutionality of section 4(5) of the *Canada Evidence Act*⁷¹ on the footing that it prevented the judge from directing the jury not to draw an adverse inference from the failure of the accused to testify. It was argued that section 11(c) required such a direction since it invalidates any such inferences. The court held that nothing in section 11(c) should be taken to require any jury directions, and went further to hold that section 11(c) does not prevent the drawing of adverse inferences. That section protects accused persons from being "compelled" to testify, and that term is simply not apt to prohibit the tactical compulsion which exists where an accused person realizes that the case against him or her is so strong that the only remaining chance for acquittal is to take the stand. In *R. v. B.(J.N.)* it was held that nothing in the *Charter* prevented an appeal court from considering the failure of the accused to have testified in determining whether a verdict of guilty is unreasonable or cannot be supported by the evidence.

Although neither the Court in *Boss* nor *B.(J.N.)* made it a central part of their reasoning,⁷² an examination of the principled bases for section 11(c) supports the decisions. The underlying principle against self-incrimination, which emanates from the principle of a case to meet, is respected even where infer-

⁶⁵Concern has been expressed by some that self-incriminatory testimony can lead to "clue-facts", sources of information or real evidence that can subsequently be used in presenting the case against the accused. This problem is discussed below in note 143.

⁶⁶*Corbett v. R.* (1973), [1975] 2 S.C.R. 275, 42 D.L.R. (3d) 142, 25 C.R.N.S. 296; *Vezeau v. R.* (1975), [1977] 2 S.C.R. 277, 66 D.L.R. (3d) 418, 34 C.R.N.S. 309.

⁶⁷*Ioannadis v. M.E.I.*, [1983] 1 F.C. 369 at 371 (Fed. C.A.); *R. v. Thomas* (14 June 1985), (Ont. D.C.) [unreported], summarized (1985), 15 W.C.B. 47; *R. v. Chapman* (28 May 1982), (B.C. Prov. Ct.) [unreported]; *R. v. Kuyan* (14 June 1985), (Ont. H.C.) [unreported], per Saunders J.; *R. v. Boss*, (1988), 68 C.R. (3d) 123 (Ont. C.A.) [hereinafter *Boss*], *R. v. B.(J.N.)* (1988), 68 C.R. (3d) 145 (Man. C.A.).

⁶⁸See *R. v. Pelley* (1983), 34 C.R. (3d) 385 (Ont. Co. Ct.), now overruled by *Boss*, *ibid.*; *R. v. Olsen* (6 Feb. 1985), (B.C. Co. Ct.) [unreported], summarized (1985), 13 W.C.B. 493.

⁶⁹*Supra*, note 67.

⁷⁰*Supra*, note 67.

⁷¹R.S.C. 1985, c. C-5.

⁷²There is reference in each judgment to the principle of a case to meet as constituting the underlying basis for section 11(c) but no analysis is made of the significance of this.

ences adverse to the accused are drawn from his failure to testify. This is because by the time the accused has to elect whether to testify the Crown will have already established that there is a case to meet. If it had not, the accused could have moved successfully for a directed verdict of acquittal. Thus, the principle has already been completely satisfied and there is no longer any prospect of its violation.

B. Section 13

Section 13 provides that:

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

A number of issues have arisen with respect to the scope and application of section 13. The primary issues which have implications for the principle against testimonial self-incrimination include, whether the section would apply to voluntary self-incrimination, how broadly the phrase "in any proceedings" was to be interpreted, and what the phrase "incriminate" would come to mean. Each of these issues is all but settled. In general, the principle against self-incrimination has become over-extended in the context of section 13 authority and, as a result, section 13 has come to provide protections that are much broader than a principled approach would have required.

1. Voluntary Self-Incrimination

According to the principle, no-one should be compelled or made to provide testimonial information in order to assist the Crown in establishing its case to meet. As Wigmore said in explaining the principle against self-incrimination in the American context, "[t]he privilege contributes to a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him...."⁷³ Where the accused has chosen to provide information in another proceeding without any compulsion, the individual has, *ex hypothesi*, been left undisturbed. The fact that the government seeks to utilize information which that person has already provided against himself, at the subsequent proceeding, does not change this, for the accused is not being called upon to do anything to facilitate the government's use of that evidence. It would seem to follow, as it does with the confession rule, that the voluntariness of the initial provision of information removes concern for the violation of the principle against self-incrimination and that the information should be available for

⁷³Wigmore on Evidence, *supra*, note 60, vol. 8 at 317.

use by the Crown. Despite this, it is settled that section 13 provides protection even where the accused voluntarily testifies at an earlier proceeding.⁷⁴

The decision to grant the protection of section 13 without the need for any inquiry into the voluntariness of the decision of the ultimate accused to provide testimony at the earlier proceeding makes sense, and is consistent with the principle against self-incrimination, only where the person giving the information was a compellable witness at those earlier proceedings. This is because compellable witnesses have no real choice but to testify and therefore the inquiry into voluntariness would not be a truly meaningful one. Where at the earlier proceeding the individual is testifying in his or her own defence, however, the situation is different. Because the accused is not compellable, his or her decision to testify will have been voluntary,⁷⁵ and a meaningful waiver of the principle against self-incrimination can fairly be assumed, at least where the accused is represented by counsel. Section 13 has been interpreted more broadly in this context than it had to be in order for it to vindicate its underlying principle.

2. "In Any Proceedings"

It appears that the protection granted by section 13 is available only where the information in question is provided during a more or less standardized mode of procedure for the resolution of some legal issue, which procedure has a discrete beginning, whether that be the issuance of a claim or the provision of notice of a hearing, and a distinct end, typically a finding by a tribunal, usually accompanied by the ordering of, or the refusal of, a remedy.⁷⁶ As such, the section is not concerned with statements made to public officials in informal settings, even where those statements are compelled by law.⁷⁷ Thus, section 13 is

⁷⁴*Dubois, supra*, note 29 at 360. It is interesting that on this issue Lamer J. relied primarily upon the legislative history of section 13 rather than upon the purposive analysis which colours the rest of his judgment.

⁷⁵As *Boss (supra*, note 67) indicates, the practical compulsion that an accused might feel to testify is not relevant in deciding whether the decision to take the stand was voluntary.

⁷⁶While there is no comprehensive definition in the cases as to what a "proceeding" is, cases providing definitions in other contexts illustrate the need for a modicum of form along the lines that this tentative definition suggests. See, for example, *Dupont v. Comm. du Dist. D'Urbanisme de Belledune* (1984), 151 A.P.R. 125, 58 N.B.R. (2d) 125 (Q.B.) (as used in rules of court); *Jorgensen v. Jorgensen* (1968), 66 W.W.R. 17 (B.C. Co. Ct) (as used in matrimonial legislation); *O.N.A. Staff Union v. O.N.A.* (1982), 83 C.L.L.C. 16,002 (O.L.R.B.) (as used in labour legislation); *A.G. Can. v. Royal American Shows Inc.* [1980] 1 W.W.R. 187 (Alta. Q.B.) (as used in the criminal law context). Cases dealing with the term in the context of section 13 of the *Charter* consistently employ this form of definition. See, for example, *Donald v. Law Society of B.C.*, (1984), 48 B.C.L.R. 210, 2 D.L.R. (4th) 385, [1984] 2 W.W.R. 46 (C.A.), additional reasons [1985] 2 W.W.R. 671, leave to appeal to S.C.C. denied (1984), 7 C.R.R. 305, 55 N.R. 237n. (S.C.C.); *R. v. Carlson* (1984), 47 C.R. (3d) 46, 14 C.R.R. 4 (B.C.S.C.).

⁷⁷See, for example, *R. v. Metcalfe* (3 February 1983), (Alta. Prov. Ct.) [unreported], dealing with statements which a driver was compelled to make at an accident scene; see also, *R. v. Campbell*

inadequate to accomplish entirely its mission of preserving the underlying principle against testimonial self-incrimination; that principle is offended whenever individuals are compelled by state agents or by law to provide testimonial information which can subsequently be used to help establish a case to meet. Yet, section 13 is not presented as the exclusive protector of that underlying principle, and by its terms it is incapable of extending its protection to what is being said by accused persons outside of the context of what can legitimately be described as "proceedings". The question, then, is whether other *Charter* provisions fill in the gap left by the text of section 13.⁷⁸

3. "Incriminate"

The principle against self-incrimination, as an emanation of the principle of a case to meet, is offended only where the state somehow forces the accused to provide information that the Crown can use to establish or prove that there is a case to answer. Thus, where the Crown is using information that the accused provides in order to contradict the case for the defence the principle is not offended. This is because the information is not being added to the bank of positive data that will establish that there is a case for the accused to meet. Moreover, if the accused is presenting its defence, then *ex hypothesi* the Crown has established a case to meet and the principle has done its service. There is no need, therefore, to continue to exclude evidence in the name of the principle. It is also worth pointing out that the concept of a case to meet has nothing to do with the credibility of evidence. In deciding whether the Crown has established a case to meet, the judge will pay no regard to the reliability of the evidence adduced but will assume that the evidence is true.⁷⁹ It would seem to follow that if all the Crown wishes to use the admission of the accused for is to address credibility issues then the principle of a case to meet, and therefore the principle against self-incrimination, remains undisturbed by the admission of the evidence.

All of this means that a principled interpretation of section 13 would allow the Crown to adduce admissions made at earlier proceedings by an accused where those admissions are being used solely to challenge the credibility of defence evidence. This result would have been accommodated comfortably by the language of the section. The prohibition in section 13 is on using the earlier testimony to "incriminate th[e] witness in any other proceedings." The term

(5 September 1985), (Ont. Prov. Ct.) [unreported] per Megginson P.C.J. In *R. v. Vandervoet* (1986), 26 C.R.R. 173 (Ont. Prov. Ct.), a challenge to provisions in the *Environmental Protection Act*, R.S.O. 1980, c. 141, as am. was refused despite that the provisions require disclosure of information outside of the context of a formal process.

⁷⁸See *infra*, III.D.

⁷⁹*R. v. Mezzo* [1986] 1 S.C.R. 802, 4 W.W.R. 577 [hereinafter *Mezzo* cited to S.C.R.].

“incriminate”, means to “tend to prove the guilt of”.⁸⁰ This suggests that to be incriminating, evidence must constitute positive information that the accused committed the criminal act alleged. Evidence is not incriminating, therefore, where its sole function is to neutralize information which the accused presents as exculpatory.⁸¹ Despite this, there are unequivocal indications in the Supreme Court of Canada case of *R. v. Mannion*,⁸² that section 13 disallows the use of evidence given in earlier proceedings even where it is being used solely to contradict the evidence of the accused.

There are differences of opinion among the appellate courts who have considered this issue as to what exactly *Mannion* decided. In *Re Johnstone and Law Society of British Columbia*⁸³ the British Columbia Court of Appeal interpreted *Mannion* narrowly, holding that its ratio was confined to cases where the Crown attempted to use the prior testimony of the accused during cross-examination as an opportunity to get positive evidence of guilt, and not just to discredit the accused. The Saskatchewan Court of Appeal agreed in *R. v. W.D.B.*⁸⁴ Each court held that the earlier evidence could be used during the cross-examination of the accused so long as it was used solely to test the credibility of the accused's answers. On the other hand, the Ontario Court of Appeal in *R. v. Kuldip*⁸⁵ expressed its disagreement with *Re Johnstone* as to the import of *Mannion*, ultimately ruling that section 13 precludes any cross-examination of accused persons on the basis of prior testimony given by the accused.⁸⁶

Quite clearly the ratio of the *Mannion* case is, as *Re Johnstone* suggests, confined to cases where the Crown seeks to use the cross-examination to obtain

⁸⁰J.B. Sykes, ed., *The Concise Oxford Dictionary*, 7th ed. (Oxford: Clarendon Press, 1982) at 507.

⁸¹The foregoing arguments were considered to be persuasive in a number of appellate court decisions. One of the most thoroughly reasoned, in my opinion, is the decision in *R. v. Langille* (1986), 73 N.S.R. (2d) 262, 176 A.P.R. 262, 60 C.B.R. (N.S.) 55 (C.A.). See also, *R. v. Sophonow No. 2* (1984), 29 Man. R. (2d) 48, 34 C.R. (3d) 287, 12 C.C.C. (3d) 372 (C.A.) and *R. v. Yakelya* (1985), 9 O.A.C. 284, 46 C.R. (3d) 282, 20 C.C.C. (3d) 193. These cases were ultimately overruled, in my opinion, by the Supreme Court of Canada decision in *R. v. Mannion* [1986] 2 S.C.R. 272, 31 D.L.R. (4th) 621, [1986] 6 W.W.R. 525 [hereinafter *Mannion* cited to S.C.R.].

⁸²*Ibid.*

⁸³(1987), 15 B.C.L.R. (2d) 1, 40 D.L.R. (4th) 550, [1987] 5 W.W.R. 637 (C.A.).

⁸⁴(1987), 38 C.C.C. (3d) 12 (Sask. C.A.).

⁸⁵(1988), 24 O.A.C. 393, 40 C.C.C. (3d) 11 [hereinafter *Kuldip* cited to O.A.C.].

⁸⁶The Court in *Kuldip*, *ibid.*, analyzed the issue as though there was no binding authority in coming to its conclusion, emphasizing that whether the Crown invites the inference, a trier of fact who is shown that the accused is lying will infer that there is a consciousness of guilt. The Court also concluded that s. 5(2) of the *Canada Evidence Act*, *supra*, note 71, prohibited the use of earlier testimony for all cross-examination purposes but that its failing was that its protection had to be expressly invoked. Reasoning that section 13 was drafted so as to remove the need for an invocation of the protection against self-incrimination, the Court concluded that to construe section 13 more narrowly than section 5(2) would perpetuate a regime in which those who are knowledgeable about their legal rights will receive greater protection than those who are not.

positive evidence of guilt. In that case the Crown sought to convince the trier of fact that Mannion's effort to tell a different story at his second trial from what he had told at his first demonstrated a consciousness of guilt, which stood as circumstantial evidence of culpability. On the other hand, the reasoning in the case is unequivocal, and extends to circumstances where the Crown attempts to use the evidence solely to undermine the credibility of the present testimony of the accused. As the Court in *Kuldip* pointed out, McIntyre J., for the Court, analyzed the case in extremely broad terms, concluding:

I would answer the questions as follows:

1. Whether the cross-examination of an accused at a new trial on testimony given at a previous trial on the same charge infringes or denies the right guaranteed in s. 13 of the *Canadian Charter of Rights and Freedoms*?

A: Yes.

This conclusion is both unfortunate⁸⁷ and unnecessary to a purposive interpretation of the provision, but I cannot help but agree with the Ontario Court of Appeal as to the significance of the *Mannion* decision. Section 13, contrary to the requirements of its underlying principle, prohibits the use of the prior testimony of accused persons in cross-examining them at their subsequent trials.

C. Section 10(b)

Section 10(b) states:

Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right.

Although not on its face a self-incrimination provision, section 10(b) has been interpreted as requiring that where an accused person has not validly waived the right to retain and instruct counsel without delay, no questions should be asked of the accused until he or she has been provided with a meaningful opportunity to retain and instruct counsel.⁸⁸

The right to retain and instruct counsel without delay is not an end in itself. It is the process whereby an arrested or detained person can become advised of his or her rights and entitlements so that informed decisions can be made about whether to participate in the investigation. It also ensures that the person is able to insist on his or her legal rights relating to release from detention. Thus, the

⁸⁷Subject to the remote possibility of the accused being charged with perjury, or giving contradictory evidence, the accused is free, as a result of this interpretation, to recraft his or her evidence without fear of the trier of fact learning of this.

⁸⁸*R. v. Manninen* [1987] 1 S.C.R. 1233 at 1242, 41 D.L.R. (4th) 301, 34 C.C.C. (3d) 385 [hereinafter *Manninen* cited to S.C.R.]. See D.M. Paciocco, "The Development of *Miranda* — Like Doctrines Under the *Charter*" (1987) 19 *Ottawa L. Rev.* 49 at 66.

right to consult counsel without delay is a procedure provided so as to vindicate underlying rights and privileges belonging to detainees, one of these being the entitlement to remain silent; the detainee, upon discussing the matter with counsel, will know that he or she need not provide self-incriminatory information. If the accused's section 10(b) rights are violated and the evidence produced is testimonial in nature, it will almost certainly be excluded.⁸⁹ Section 10(b) therefore plays a predominant role in protecting the principle against self-incrimination as it applies in informal settings. This section is limited in the service it can provide, however, to cases of "arrest" or "detention".

Despite some decisions to the contrary,⁹⁰ the prevailing view is that once an accused person has had the opportunity to consult counsel, section 10(b) has been fully complied with⁹¹ unless circumstances change materially during a continued detention thereby necessitating further legal advice.⁹² In *R. v. Logan*,⁹³ for example, the Ontario Court of Appeal ruled that there had been no violation of section 10(b) where accused persons, having been provided with counsel, made statements to undercover police officers in the absence of their lawyers

⁸⁹See *R. v. Collins*, [1987] 1 S.C.R. 265, [1987] 3 W.W.R. 699, 33 C.C.C. (3d) 1 [hereinafter *Collins*, cited to S.C.R.], and see D.M. Paciocco, "More on *Miranda* — Recent Developments Under Subsection 10(b) of the *Charter*" (1987) 19 Ottawa L. Rev. 573; D.M. Paciocco, "The Judicial Repeal of Section 24(2) and the Development of the Canadian Exclusionary Rule", publication pending; and see *R. v. Woolley* (1988), 25 O.A.C. 390, 40 C.C.C. (3d) 531 (C.A.) [hereinafter *Woolley* cited to O.A.C.].

⁹⁰*R. v. Grieg* (1987), 33 C.C.C. (3d) 40, 56 C.R. (3d) 229, 26 C.R.R. 136 (Ont. H.C.) [hereinafter *Grieg* cited to C.C.C.], where it was held that, save in emergency situations, once an accused has retained counsel no further questioning should take place without reasonable notice to counsel. See also *R. v. Ashford* (9 April 1985), (Ont. H.C.) [unreported] (sub nom. *R. v. A & E*).

⁹¹See the dicta of the court in *R. v. Playford* (1987), 63 O.R. (2d) 289, 24 O.A.C. 161, 40 C.C.C. (3d) 142 at 168 (C.A.); *R. v. Ferguson* (1985), 10 O.A.C. 5, 20 C.C.C. (3d) 256, 16 C.R.R. 21 (C.A.); *R. v. Emile*, [1988] N.W.T.R. 196, 42 C.C.C. (3d) 408 at 430 (C.A.); *R. v. Stone* (10 May 1984), (B.C.S.C.) [unreported], per Lysyk J., overturned on another point (1986), 25 C.C.C. (3d) 548 (B.C.C.A.); *R. v. Martell* (1984), 13 W.C.B. 151 (B.C.S.C.). Where the accused has been provided with a reasonable opportunity to consult counsel and chooses not to do so, the accused can of course be questioned, even where the accused indicates a desire not to answer questions, so long as no improper pressure is applied. See *R. v. White* (1986), 24 C.C.C. (3d) 1 (B.C.C.A.); *R. v. Williams* (1986), 48 Alta. L.R. (2d) 68, 73 A.R. 388, 54 C.R. (3d) 336 (C.A.). Even where an accused has had the opportunity to consult counsel without delay, it is possible that section 10(b), through using the word "retain", provides an ongoing right for accused persons held in custody to see their lawyer from time to time. There is dicta that can be interpreted to support this in the case of *R. v. Logan* (1988), 67 O.R. (2d) 87 at 113, 57 D.L.R. (4th) 58 (C.A.) [hereinafter *Logan* cited to O.R.]. In my view, because section 10(b) provides its protection "on arrest or detention" and is to be provided "without delay", it does not comfortably accommodate such a right, although section 7 surely would.

⁹²*Black, supra*, note 57. At the time the accused spoke to counsel, the charge was attempted murder. She sought to recontact counsel when advised that the charge was being changed to first degree murder. The failure of the police to delay questioning until this was possible constituted a *Charter* violation in light of the change in circumstances.

⁹³*Supra*, note 91.

while in custody awaiting trial. In *R. v. J.T.J. (No. 2)* the Manitoba Court of Appeal held that "once counsel has been retained and instructed, and the accused has received advice as to how to exercise his rights under the law, the further investigation by the police is entirely proper."⁹⁴ In each case the appellate courts held that it was implicit in *R. v. Manninen*⁹⁵ that the Supreme Court of Canada would adopt this position. In that case Lamer J. described the no questioning bar in these terms:

[Section] 10(b) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee *until* he has had a reasonable opportunity to retain and instruct counsel. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under law but, equally if not more important, to obtain advice on how to exercise those rights.⁹⁶

The Court in *Logan* said:

The clear implication in the judgment of Lamer J. in *Manninen* is that s. 10(b) confers the right, upon arrest or detention, to retain, instruct and be instructed by counsel *before* any statements of the accused are elicited. The words "*upon* arrest or detention" indicate a point in time, not a continuum.⁹⁷

This approach is indeed consistent with the purposive interpretation of section 10(b) described by Lamer J.⁹⁸ The detainee, having spoken to counsel, is in a position to exercise informed judgment about which legal rights to insist upon. Thus, subject to any improper inducements or pressure, a decision to speak to persons known to be in authority is a fully informed one and thereby represents a valid waiver of the right to remain silent. Where there has been a valid waiver of that right, the underlying principle against self-incrimination is not violated by the subsequent use of the statement provided.

In the United States, once counsel has been retained the accused cannot be interviewed again in the absence of his or her attorney.⁹⁹ This line of authority is premised on the view that custodial interrogation is inherently coercive and

⁹⁴(1988), 50 Man. R. (2d) 300 at 306, 40 C.C.C. (3d) 97 (C.A.) [hereinafter *J.T.J. (No 2)* cited to Man. R.], Huband J. O'Sullivan J. dissented on this point. The confession was ultimately excluded because of non-compliance with the procedural protections of the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, s. 56(2), as. am. 1986, c. 32, s. 38. Huband J.'s opinion on the issue was expressed earlier by His Lordship in the case of *R. v. F.J.C.* (1987), 46 Man. R. (2d) 92 (C.A.), additional reasons at (1987), 46 Man. R. (2d) 92 at 95 (C.A.) [hereinafter *R. v. C.*], where he criticizes the judgment of Dupont J. in *Grieg, supra*, note 85.

⁹⁵*Supra*, note 88.

⁹⁶*Ibid.* at 1242-43.

⁹⁷*Supra*, note 81 at 113.

⁹⁸But see S.A. Cohen, "Indirect Interrogation: Jailhouse Informers and the Right to Counsel" (1989), 68 C.R. (3d) 58.

⁹⁹See *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964).

that the true voluntariness of any statement made by an accused in such an environment cannot be assured without the added protection of the presence of counsel.¹⁰⁰ In response it can be said that, at least since the seminal decision in *Ibrahim v. R.*,¹⁰¹ we have not accepted that custodial questioning is so inherently intimidating that we must conclusively presume involuntariness.¹⁰² Our courts have felt able to determine on the facts of each case whether the accused succumbed to pressure or promise. So long as there is no illegitimate inducement or oppressive conduct, the accused's mind is "operating", and the accused has either consulted counsel or validly waived the entitlement to do so, the decision to speak to those known to be in authority would appear to be sufficiently voluntary to allow the answers given to be admitted against the accused without compromising the principle against self-incrimination.

The major deficiency with section 10(b) in terms of the extent of its protection of the principle against self-incrimination relates to its failure to protect accused persons from tricks designed to secure inculpatory admissions where the accused has previously indicated a desire not to make any statements. My objection to the use of such investigative techniques is basic. Without appreciation that he or she is providing information directly to the state, the accused is not, in any meaningful sense, waiving his or her entitlement not to incriminate himself or herself. Where an accused person expresses a desire not to speak, the authorities cannot insist on the provision of information. It seems inconsistent with the values inherent in the principle against self-incrimination to then allow the use of subversive means to accomplish indirectly what cannot be done directly.

The issue was central in the pre-*Charter* case of *Rothman v. R.*¹⁰³ There a police officer posed as an arrested truck driver, and was lodged in the cell with the accused, Rothman. Rothman had previously told the police that he wished to exercise his right to remain silent. Despite this, the undercover officer managed to elicit admissions by Rothman, which were subsequently held admissible

¹⁰⁰See *Miranda v. Arizona*, 384 U.S. 436, 469-70 (1966).

¹⁰¹[1914] A.C. 599 (P.C.), where the submission that answers produced during custodial interrogation had to be excluded automatically was rejected. This put to rest the suggestion to this effect made in cases like *R. v. Mick* (1863), 17 E.R. 376 and *R. v. Gavin* (1885), 15 Cox C.C. 656.

¹⁰²See David M. Paciocco, "The Development of *Miranda*-Like Doctrines Under the *Charter*", *supra*, note 88 at 63-64.

¹⁰³*Supra*, note 35.

at his trial.¹⁰⁴ In defending the use of such tricks in a solo concurring judgment, Lamer J. concluded that:

The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the [confession] rule be hampered in their work.¹⁰⁵

His Lordship went on to add that the only reliable confessions that should be suppressed are those produced by conduct which shocks the community.¹⁰⁶

Mr. Justice Estey dissented. His Lordship offered that one of the primary concerns of the confession rule is the protection of the public interest in the integrity of the judicial process¹⁰⁷ and he indicated clearly in his judgment that the integrity of that process is tied largely to the extent to which the principle against self-incrimination is respected. Obtaining and relying upon an involuntary confession would fail to maintain that respect, even where the confession is involuntary only in the sense that the accused did not wish to provide the information to the police:

To be voluntary a statement must be volunteered by the speaker in the sense that the statement must be the product of a conscious *volens* on the part of the speaker. The *volens* must relate not only to the mechanics of speaking, that is the articulation of the ideas of the speaker. Where the speaker has, as here, already refused to give a statement to the authorities, the test of voluntariness must include an appreciation of the circumstances in which the statement is made, including an awareness that his statement is being "volunteered" to a person in authority. To apply the rule otherwise in circumstances we have here would not merely permit but would encourage the deliberate circumvention by the authority of the accused's announced exercise of his right not to give a statement to the authorities.¹⁰⁸

Lamer J. did not deny that the means used by the police undermined the true voluntariness of Rothman's confession. His Lordship rejected Mr. Justice Estey's position because he accepted the Ratushny thesis that self-incrimination protections are not relevant to the admission of evidence gathered during informal proceedings. His Lordship concluded, that "inere lack of voluntariness cannot be ... a reason for excluding a statement as there is no general right to

¹⁰⁴The majority judgment turned on the narrow reach of the established confession rule in which the accused must appreciate that he is speaking to a person in authority before the voluntariness rule applies. Since Rothman felt that he was speaking to a fellow detainee and not a police officer, there was no need to assess the voluntariness of the statement and it was admissible. This rule is itself questionable as it is based on the view that the only operative purpose behind the confession rule is to ensure trustworthiness of the confession. It also relies upon the questionable assumption that pressure exerted by persons who are not, to the knowledge of a suspect, persons in authority is unlikely to be substantial enough to induce a false confession.

¹⁰⁵*Supra*, note 35 at 697.

¹⁰⁶*Ibid.* at 697.

¹⁰⁷*Ibid.* at 646.

¹⁰⁸*Ibid.* at 651.

no self-crimination.”¹⁰⁹ Therefore, not all involuntary confessions need be excluded. Involuntariness is only symptomatic of unreliability, and where it does not affect reliability, or where reliability is not in issue, a lack of voluntariness should cause exclusion only where it is necessary to refuse the evidence in order to preserve the “integrity of the criminal justice system” and this can be tested by asking whether the method by which the evidence was obtained shocks the conscience.¹¹⁰ His Lordship stated:

If lack of voluntariness ... were to result automatically in the exclusion of all unwilling statements this would then be, in my opinion, an overextension of the right of an accused to stand mute, and would amount to introducing indirectly into our system a facet of the general privilege of no self-incrimination we do not have in this country.¹¹¹

In *Collins v. R.*,¹¹² His Lordship took the opportunity to express, in *obiter*, his opinion that nothing in the *Charter* changed his views on the use of tricks to elicit statements:

I still am of the view, that the resort to tricks that are not in the least unlawful let alone in violation of the *Charter* to obtain a statement should not result in the exclusion of a free and voluntary statement unless the trick resorted to is a dirty trick, one that shocks the community.¹¹³

Decisions to date where the issue has actually emerged have adopted the same view and have held that nothing in the *Charter* has changed the result of the *Rothman* decision.¹¹⁴ In a number of these decisions there is no discussion of the matter, just a pronouncement that section 10(b) has nothing to say about the issue. Where courts do analyze the problem more fully, the reasoning tends, in my view, to be unsatisfactory. For example, the analysis of the issue in *R. v. Hebert*¹¹⁵ as to why section 10(b) is not applicable to jail cell subterfuge is curious. The Court found significance in the fact that the “there was no continuity or connection between what took place in the interrogation room and the statement made by the accused to the undercover officer.”¹¹⁶ While the Court conceded for the sake of argument that a “continued interrogation of an accused

¹⁰⁹*Ibid.* at 692.

¹¹⁰*Ibid.* at 696-97.

¹¹¹*Ibid.* at 693.

¹¹²*Supra*, note 89.

¹¹³*Ibid.* at 286-87.

¹¹⁴*Logan*, *supra*, note 91; *R. v. Forsyth* (2 December 1986), (B.C.C.A.) [unreported] summarized in 1 W.C.B. (2d) 156; *R. v. Hebert* (1988), 43 C.C.C. (3d) 56 (Y.T.C.A.) [hereinafter *Hebert* cited to C.C.C.]; *Sophonow*, *supra*, note 81; *Emile*, *supra*, note 91; *R. v. Morin* (9 January 1986), (Ont. H.C.) [unreported] per Craig J. (overturned on other grounds, (1987), 36 C.C.C. (3d) 50 (Ont. C.A.), approved (1988), 44 C.C.C. (3d) 193 (S.C.C.)). The judgment of Craig J. was approved in *Logan*, at 110-11. But see *R. v. Perrault* (1984), 11 C.R.R. 331 (Ont. Dist. Ct.) and *R. v. Smith* (5 November 1987), (Ont. H.C.) [unreported].

¹¹⁵*Ibid.*

¹¹⁶*Ibid.* at 60.

person after he has retained counsel and indicated his desire not to speak may constitute a breach of section 10(b)", it would not logically follow that there would be a *Charter* violation in the absence of coercion or pressure where the accused was merely engaged in a conversation "at a time and place completely isolated from the interrogation process".¹¹⁷ Thus, while the open efforts of the police to persuade the accused to waive his *Charter* rights by continued interrogation are seen as potentially unconstitutional, the surreptitious efforts to con the accused out of a fundamental right are not. As I say, I find the reasoning curious. Moreover, the reference to coercion suggests that the Court in *Hebert* did not focus on the basic objection. The essence of the decision of the Supreme Court of Canada in *Clarkson v. R.*¹¹⁸ is that statements made by accused persons need not be the product of improper inducements to be excluded; a court must be satisfied before admitting the evidence that the waiver of the right to counsel is an informed and comprehending one. Surely where an accused is intentionally fooled into thinking that he or she is not faced with a person in authority, his or her comments cannot be taken as the product of an informed and comprehending waiver.¹¹⁹ It seems odd that we would go to so much trouble to ensure absolute voluntariness when it comes to waiving the procedural protection of the right to counsel, but that we would be so cavalier when it comes to the waiver of those substantive rights which section 10(b) was developed to protect.

The decisions in *R. v. Logan*,¹²⁰ and *R. v. Emile*¹²¹ on the other hand, place what may indeed be a real impediment to relying on section 10(b) to challenge the practice of using undercover police officers to obtain admissions from accused persons. These decisions reject section 10(b) challenges in this context on the basis previously discussed,¹²² namely that this section becomes spent once the accused has had an opportunity to retain and consult counsel, or has waived the right to counsel.¹²³ Thus, the subsequent subterfuge of the police can have nothing to do with this section of the *Charter*. Even if this point is correct,

¹¹⁷*Ibid.* at 61.

¹¹⁸*Supra*, note 35.

¹¹⁹There are, of course, arguments to the contrary. The accused has, *ex hypothesi*, spoken to counsel and would have been advised not to speak to anyone. The decision to do so therefore arguably amounts to a valid waiver. An accused person who provides information about his or her complicity must appreciate that he or she is creating evidence that might come back to haunt them. Despite such arguments, I, for one, have difficulty accepting that knowledge of the identity of who is being spoken to is not an essential element of a valid waiver.

¹²⁰*Supra*, note 91.

¹²¹*Ibid.*

¹²²See text accompanying note 114.

¹²³Where the right to counsel is waived, the accused can reactivate the "no questioning" bar by suggesting that he or she now wants to speak to a lawyer. See *R. v. Anderson* (1984), 45 O.R. (2d) 225, 7 D.L.R. (4th) 306, 10 C.C.C. (3d) 417 (C.A.).

(as I believe it to be), all it serves to do is to transfer the basic question of whether this practice is constitutionally objectionable to section 7.

D. Section 7

Section 7 provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The principle against self-incrimination will receive protection under section 7 in situations where the life, liberty or security of the person of the accused is in peril only if it is considered to be an established principle of our system of justice that is fundamental to justice, given the rule of law and the inherent dignity of individuals.¹²⁴ I would suggest that it is beyond controversy that the principle against self-incrimination meets this criteria. It is an indispensable corollary of the principle of a case to meet which helps to define the accusatorial system which, in turn, exists in order to vindicate the rule of law. The principle, under its more common appellation, "the right to silence", has been expressed to be a fundamental principle on numerous occasions.¹²⁵ The only thing which serves to challenge this conclusion is the broad support which exists for the Ratushny thesis. A number of courts have held that sections 11(c) and 13 accommodate the entire principle, given that it has no significance in the informal setting.¹²⁶

¹²⁴This is essentially the formula which the Supreme Court of Canada developed for the identification of principles of fundamental justice in the case of *Ref. re S. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 23 C.C.C. (3d) 289. See D.M. Paciocco, *Charter Principles and Proof in Criminal Cases*, *supra*, note 40 at 107-16.

¹²⁵See, for example, *R. v. Collins*, *supra*, note 89; *R. v. Clarke* (1979), 33 N.S.R. (2d) 636 at 652, 57 A.P.R. 636, 48 C.C.C. (3d) 440 (C.A.) per Macdonald J.; *R. v. Symonds*, *supra*, note 42; *R. v. Esposito* (1985), 53 O.R. (2d) 356 at 362, 12 O.A.C. 350, 24 C.C.C. (3d) 88 (C.A.). In a recent case note "Woolley: Finding Keys in the Distinction Between Statements and Real Evidence" (1988), 63 C.R. (3d) 347, R.J. Delisle suggests a distinction, which is not explained, between the privilege against self-incrimination and the right to remain silent. Presumably he is confining the language of the privilege against self-incrimination to the protections found in section 11(c) and 13, and considers the right to silence as applying outside of formal proceedings. I have no problem with the terminology, but Delisle sees the linkage between the two in *Woolley*, *supra*, note 89, as "odd". In my view, the linkage is inevitable as both the privilege, as defined, and the right to silence are emanations of the same underlying principle. See the discussion of *Woolley*, *infra* at n. 129ff.

¹²⁶See, for example, *R. v. Altseimer* (1982), 38 O.R. (2d) 783, 142 D.L.R. (3d) 246, 1 C.C.C. (3d) 7 (C.A.) [hereinafter *Altseimer* cited to O.R.]; *Thomson Newspapers Ltd. v. Director of Investigation & Research* (1986), 54 O.R. (2d) 143, 26 D.L.R. (4th) 507, 25 C.C.C. (3d) 233 (H.C.), affirmed on this point (1986), 57 O.R. (2d) 257 (C.A.), currently on appeal to S.C.C. [hereinafter *Thomson* cited to O.R.]; *R. v. Sydholm* (1983), 22 M.V.R. 37 (B.C. Co. Ct.), affirmed (9 May 1983), (B.C.C.A.) [unreported] summarized in (1983), 10 W.C.B. 71 [hereinafter *Sydholm* cited to W.C.B.]; *Transpacific Tours Ltd. (C.P. Holidays) v. Director of Investigation & Research* (1985), 68 B.C.L.R. 32, 25 D.L.R. (4th) 202, 24 C.C.C. (3d) 103 (S.C.) [hereinafter *Transpacific*

To return to the last issue discussed in the context of section 10(b), the Ontario Court of Appeal in *R. v. Logan* held that section 7 could not assist in any claim that the *Charter* invalidates the use of trickery to obtain admissions for that very reason:

It is now clearly established that, in Canada, the privilege against self-incrimination is not functionally operative at the pre-trial stage in the sense that it cannot operate to produce a result in a particular case.¹²⁷

The reasoning mirrors that employed by Lamer J. in the pre-*Charter* case of *Rothman v. R.*¹²⁸

There is some confusion caused by the *Logan* case. The Ontario Court of Appeal had previously decided a case called *R. v. Woolley*.¹²⁹ In *Woolley* the Court held that the police violated a principle of fundamental justice when they induced a confession from the accused by threatening him.¹³⁰ The matter could not be resolved using the common law confession rule because the issue related to the admissibility of certain real evidence found as a result of the involuntary confession and, at common law, the real evidence would be admissible.¹³¹ The Court held that it could examine the admissibility of the evidence using section 24(2) of the *Charter*¹³² because the act of improperly inducing the accused to produce the evidence violated his "right to remain silent". The Court held:

It has always been a tenet of our legal system that a suspect or accused has a right to remain silent at the investigative stage of the criminal process and at the trial stage. At the very least, it is clear that an accused person is under no legal obligation to speak to police authorities and there is no legal power in the police to compel an accused to speak...

The right to remain silent is a well-settled principle that has for generations been part of the basic tenets of our law. It follows that the protection given by this principle must come within the purview of s. 7 of the *Charter*.¹³³

In *R. v. Logan*, the *Woolley* decision was distinguished on the footing that it was the coercive conduct of the police in that case which caused the violation of the accused's right to remain silent.¹³⁴ This is true enough, and certainly the

Tours cited to B.C.L.R.]; *Belhumeur v. Comité de discipline du Barreau du Québec* (1988), 35 C.R.R. 193 (Que. C.A.), applying similar although not identical reasoning.

¹²⁷*Supra*, note 91 at 114, citing Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process*, *supra*, note 2 at 65-66.

¹²⁸*Supra*, note 35.

¹²⁹*Supra*, note 89.

¹³⁰The police threatened to hold *Woolley* in custody until they found the keys to the *Corvette* that he was arrested for taking. He then confessed and showed them the keys.

¹³¹See the discussion above accompanying note 47.

¹³²The exclusionary remedy. See below section IV.E.

¹³³*Supra*, note 89 at 396.

¹³⁴*Supra*, note 114 at 115.

relevant principle is violated where coercion is employed since the Crown has not, at that point, established a case to meet against the accused. Yet, the issue should not have been whether the facts of *Woolley* were distinguishable. It should have been whether the pertinent principle which *Woolley* recognized as one of fundamental justice was respected in *Logan*. Logan's "right to remain silent", which vested in him the entitlement to choose whether to provide incriminating information, was in fact contravened since he was deprived, by the trick that was employed, of the benefit of his decision to insist upon the enjoyment of that right.

The *Woolley* case is important for it recognizes that section 7 of the *Charter* does indeed add to the constitutional protections given to the principle against self-incrimination, and as the foregoing discussions indicate, there are gaps in the extent to which sections 11(c), 13 and 10(b) provide *Charter* protection for this fundamental principle. The decision, of course, does not settle the matter. It stands in contrast to a great wave of authority, including other appellate court case law.¹³⁵ Moreover, read in conjunction with the earlier Ontario Court of Appeal decision in *Thomson Newspapers Ltd. v. Director of Investigation & Research*¹³⁶, it would have to be confined to its context in which there was a standard police investigation. In *Thomson*, after adopting the Ratushny thesis and stating that sections 11(c) and 13 exhaustively cover the *Charter*'s self-incrimination protections, Grange J.A. responded to persistent references to the so called "right to silence", by stating that the "right must be restricted to police inquiries and the like and the trial proceedings themselves."¹³⁷ This "right to silence" could not, therefore, affect the outcome of a *Charter* challenge brought against a section under the *Combines Investigation Act*¹³⁸ which requires persons to appear before Anti-combines officers to answer questions.

The *Thomson* case typifies the context in which this issue has been debated. Section 7 and self-incrimination claims are called into aid to quash

¹³⁵See, for example, *Haywood Securities Inc. v. Inter-Tech Resources Group Inc.* (1985), 68 B.C.L.R. 145, 24 D.L.R. (4th) 724, [1986] 2 W.W.R. 289 [hereinafter *Haywood* cited to B.C.L.R.] Leave to appeal to S.C.C. granted (C.A.), although it was suggested that "if the sole aim and purpose of the proceeding was to obtain evidence to ... assist the criminal prosecution" then it might be arguable that section 7 would be violated (at 153); *Transpacific Tours, supra*, note 126; *Re Ziegler and Hunter* (1983), 8 D.L.R. (4th) 648, 39 C.P.C. 234, 51 N.R. 1 (Fed. C.A.) [hereinafter *Ziegler* cited to D.L.R.], leave to appeal to S.C.C. denied, [1984] 1 S.C.R. xiv; *Sydholm, supra*, note 126 and see the other decisions discussed below; but see *R.L. Crain Inc. v. Couture* (1983), 30 Sask. R. 191, 6 D.L.R. (4th) 478, 10 C.C.C. (3d) 119 (Q.B.) [hereinafter *Crain* cited to Sask. R.].

¹³⁶*Supra*, note 126.

¹³⁷*Ibid.* at 262. See also *Ontario Securities Commission v. Biscotti* (21 July 1988), (Ont. H.C.) [unreported], summarized at 11 A.C.W.S. (3d) 2.

¹³⁸R.S.C. 1970, c. C-23, as am. S.C. 1986, c. 26, s. 19 (renamed *Competition Act*).

subpoenas or to challenge statutory provisions requiring discovery procedures,¹³⁹ or in an effort to avoid the production of pre-existing documents¹⁴⁰ or other real evidence.¹⁴¹ In my view decisions rejecting such claims are correct but not for the reasons provided by Grange J.A. in *Thomson*. Consider what the relevant principle requires:

[N]o person should be required to respond (in the sense of providing information) to an allegation made against them by the state until the Crown has established on evidence that there is a case to meet.

When exactly is this principle contravened? It is not contravened when pre-existing documents are ordered to be produced, for the production of pre-existing documents does not constitute an answer to the allegation. Nor is it offended when an accused person is made to provide real evidence. Nor is it even offended when answers to questions are compelled. The principle is violated only if the testimonial information obtained from the accused is subsequently admitted into evidence as part of the Crown's case to meet. Until it is relied upon at the trial of the accused, there has been no incrimination. Thus, if there is a statutory mechanism in place which guards accused persons from the admissibility of their answers at their criminal trials, then the principle is being respected.¹⁴² It is not the investigation that is offensive to the principle. It is the use to which the information is put that is troublesome.¹⁴³

*R. v. Woolley*¹⁴⁴ is not the only decision holding that section 7 houses constitutional support for the principle against self-incrimination. In *R. v. Grieg*,¹⁴⁵

¹³⁹*Crain, supra*, note 135; *Haywood, supra*, note 135; *R. v. Wooten* (1983), 5 D.L.R. (4th) 371, 9 C.C.C. (3d) 513 (B.C.S.C.); *Michaud, supra*, note 64; *Sydhholm, supra*, note 126; *Re Bookman* (1984), 49 C.B.R. (N.S.) 267, 41 C.P.C. 248 (Ont. S.C.); *Ziegler, supra*, note 135.

¹⁴⁰See, for example, *Bassett v. College of Physicians and Surgeons* (1987), 63 Sask. R. 45 (Q.B.), aff'd (1988) 70 Sask. R. 283 (C.A.) [hereinafter *Bassett* cited to Sask. R.] and *R. v. Amway Corp.* (1986), 72 N.R. 221 at 225 (Fed. C.A.), reversed on other grounds by S.C.C. *supra*, note 61.

¹⁴¹See, for example, *R. v. Brake* (1985), 52 Nfld & P.E.I.R. 178, 153 A.P.R. 178 (Nfld. S.C.) [hereinafter *Brake* cited to Nfld & P.E.I.R.] (handwriting sample); *Altseimer, supra*, note 126 (breathalyzer sample); *R. v. Gaff* (1984), 35 Sask. R. 136 (Q.B.), aff'd (1984), 36 Sask. R. 1 (C.A.). Leave to appeal to S.C.C. refused, [1984] 2 S.C.R. vii (breathalyzer sample).

¹⁴²See *Stelco Inc. v. A.G. Can.* (1987), 13 F.T.R. 128 (T.D.), aff'd, (1987), 83 N.R. 193 (Fed. C.A.). For this reason I am not persuaded by the reasoning of Scheibel J. in *Crain, supra*, note 135, since ss 17(2) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as am. S.C. 1986, c. 26, s. 24 (renamed the *Competition Act*) provided that the answers given could not be admitted at subsequent proceedings. Section 13 of the *Charter* will provide this protection whenever the information is obtained in the context of formal proceedings.

¹⁴³In *Haywood, supra*, note 135, Lambert J.A. argued that section 7 would be offended even where evidence discovered as a result of compelled disclosure was admitted. For the reasons why I take issue with this submission see D.M. Paciocco, *Charter Principles and Proof in Criminal Cases, supra*, note 40 at 596-97.

¹⁴⁴*Supra*, note 89.

¹⁴⁵*Supra*, note 90.

a decision with an admittedly checkered history,¹⁴⁶ Dupont J. held that section 7 was violated where an accused person clearly manifested his right to silence but where the police persisted in interrogating him, as though he had no such right at all. More recently, in *R. v. Hansen*¹⁴⁷ the British Columbia Court of Appeal accepted that section 7 of the *Charter* is contravened in at least some cases where the silence of an accused is sought to be used against him. The accused made a statement to the police but then, when pressed for an explanation, invoked his right to remain silent. The Court held that, at least where the accused has been cautioned, the use of his silence to draw adverse inferences against him contravenes the principles of fundamental justice.

A related issue is whether there is a constitutional right to be advised of the right to remain silent. Recently in *R. v. Campbell*¹⁴⁸ the P.E.I. Supreme Court held that section 7 houses the right to remain silent as a principle of fundamental justice, and that it also requires that any suspects be advised of this right. This decision is contradicted to a degree on this latter point by the judgment in *R. v. Cipriani*.¹⁴⁹ In that case a government tax auditor failed to caution the subject of the audit that his answers could be used against him in a subsequent proceeding and, on this basis, the trial judge excluded the statements. The Ontario Court of Appeal overturned that decision in a brief judgment stating that once it was determined that the answers provided were voluntary, that should have ended the matter.

Traditionally, the provision of a caution was not required before a self-incriminatory statement would be found admissible. The existence of a caution only provided relevant evidence with respect to the issue of voluntariness.¹⁵⁰ In my view, so long as a court is satisfied that the decision to speak was not compelled, there would seem to be no need for the provision of such a caution in order to satisfy the dictates of the principle against self-incrimination. I argued in an earlier article that a constitutionally required warning of the right to silence should not be gleaned from the existence of a principle of fundamental justice related to testimonial self-incrimination.¹⁵¹ That argument was based in part on the broad notion of waiver which Madame Justice Wilson spoke of in the case of *Clarkson v. R.*¹⁵² The *Clarkson* decision appears to hold that a valid

¹⁴⁶The decision was soundly criticized in *R. v. C.*, *supra*, note 90 and in *J.T.J. (No. 2)*, *supra*, note 94, by Monnin C.J.M. and Huband J.A. The decision in *J.T.J. (No. 2)* was cited with approval by the Ontario Court of Appeal in *Logan*, *supra*, note 91 at 112. On the other hand, O'Sullivan J.A. agreed with the decision in *J.T.J. (No. 2)*, while it is cited with approval by the British Columbia Court of Appeal in *R. v. Hansen* (21 December 1988), [unreported].

¹⁴⁷*Ibid.*

¹⁴⁸See J. Middlemiss, *The Lawyers Weekly*, (Vol. 9, No. 4) (Friday May 26, 1989) 1.

¹⁴⁹(1988), 34 C.R.R. 382 (Ont. C.A.).

¹⁵⁰*Supra*, note 35.

¹⁵¹Paciocco, *supra*, note 88 at 62-66.

¹⁵²*Supra*, note 39.

waiver of section 10(b) can be made only if the accused person is aware at the time of the waiver that he or she need not provide information to the police. That being so, any constitutionally entrenched warning of the right to silence would be redundant to the protection that section 10(b) already provides.¹⁵³ Despite the broad language used in the *Clarkson* decision,¹⁵⁴ however, doubt has now been cast upon whether a detainee must appreciate the existence of the right to silence before a waiver of the right to counsel will prove valid. In *R. v. Weber*¹⁵⁵ it was held that for a section 10(b) waiver to be valid, all that the accused must realize is that by not consulting counsel, he or she might ultimately make a decision different from that which would have been made if he or she had received legal advice. The waiver requirement does not necessitate that the detainee be aware of what his or her legal rights are or of what the legal consequences would be if he or she pursued a certain course of action. As much as I like the results of the decision in *Weber*, I have difficulty in reconciling it with *Clarkson*. The waiver requirement may well not be as fragile as the *Weber* decision indicates. If it is not, there would appear to be no need to add to the procedural protections already provided by section 10(b).

What then should section 7 be held to contribute to the principle against self-incrimination? It is to be hoped that the Supreme Court of Canada will ultimately determine that section 7 provides protection in circumstances like *Woolley*¹⁵⁶ where a person ultimately being tried for an offence is faced with the adduction of testimonial evidence as part of the Crown's case, which he or she produced at the behest of a state agent in the absence of an informed and comprehending decision to make that information available.

III. The *Charter* and Non-Testimonial Self-Incrimination

As indicated above, it was well-settled at common law that the concept of self-incrimination had nothing to do with the obtainment of real as opposed to testimonial evidence. Moreover, decidedly less protection was granted with respect to the obtainment and the proof of real evidence. I suggested earlier that the distinction between the two kinds of proof is a principled one, and that this principle should be reflected in the interpretation of the *Charter*. By contrast,

¹⁵³See the discussion in Paciocco, *supra*, note 88 at 52-61. Madame Justice Wilson made it clear that, whatever the precise contents of a valid waiver might be, the accused must have some awareness of the consequences of not exercising the constitutional right. On the facts of the case *Her Ladyship* ultimately held that *Clarkson* did not validly waive her right to counsel because she was not aware of the consequences of speaking. By seizing on an awareness of the consequences of not exercising one of the underlying rights that the right to consult counsel is meant to protect rather than on the right to counsel itself, the message seems to be that a valid waiver requires some appreciation of the relevant underlying legal rights and entitlements.

¹⁵⁴The language is repeated in *Black v. R.*, *supra*, note 57.

¹⁵⁵(1987), 52 Alta. L.R. (2d) 274, 79 A.R. 251, 49 M.V.R. 128 (Q.B.).

¹⁵⁶*Supra*, note 89.

Ratushny argued in his work that the single principle of the absence of pre-trial obligation provided the accused with pre-trial protection against the compelled provision of testimonial and non-testimonial evidence. To a significant degree, *Charter* authority has maintained a distinction between the level of protection offered to testimonial as opposed to non-testimonial evidence. On the other hand, Ratushny's unitary notion of the absence of a pre-trial obligation has been influential in the application of the *Charter's* exclusionary remedy.

A. *Section 10(b)*

Protections relating to the adduction of non-testimonial evidence appear to shelter under section 10(b)'s right to counsel. The obligation on state agents to desist in efforts to have accused persons produce evidence against themselves until they have consulted counsel¹⁵⁷ extends beyond testimonial information to include real evidence that can only be obtained with the co-operation of the accused. As a result, in *R. v. Therens*¹⁵⁸ the police were held to have violated section 10(b) by obtaining breath samples from an accused without giving him an opportunity to consult with his lawyer. In *LeClair and Ross. v. R.*¹⁵⁹ the Supreme Court of Canada found that section 10(b) had been violated where the accused were made to participate in a police line-up without having had a meaningful opportunity to consult counsel.

In each of these cases it can be said, at least indirectly, that the absence of pre-trial obligation, or a concept of non-testimonial self-incrimination, received support. This observation should, however, be put into perspective. All that section 10(b) seeks to ensure is that an accused person appreciates the network of legal rights and obligations that pertain in situations of custodial investigation. Where the law compels non-testimonial self-incrimination, section 10(b) does nothing to prevent it. An accused person arrested for an alcohol driving offence, for example, must, after consulting with counsel or waiving the right, provide a self-incriminating breath sample or risk conviction for refusing to blow. An accused asked to participate in a line-up will learn from his or her lawyer that a refusal to do so could conceivably lead to an adverse inference being drawn against him, and nothing in section 10(b) will prevent the inference from ultimately being drawn. Since section 10(b) is meant to make available to detainees those legal rights which already exist, it contributes little to the principle of the absence of pre-trial obligation.

¹⁵⁷See text accompanying note 91.

¹⁵⁸[1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655, 18 C.C.C. (3d) 481 [hereinafter *Therens* cited to S.C.R.].

¹⁵⁹[1989] 1 S.C.R. 3 [hereinafter *Leclair and Ross*].

B. Sections 11(c) and 13

Neither section 11(c) nor section 13 pertain to non-testimonial self-incrimination. This is primarily because of the restrictive language which the provisions employ. Each section provides protections relating to the accused's role as a "witness", and a witness is commonly understood to be one who provides testimonial information.¹⁶⁰ Thus, section 11(c) is inapplicable, apart altogether from its other contextual limitations, to the compulsion of breath samples¹⁶¹ or to the obtainment of other species of real evidence such as footprint casts¹⁶² or blood samples.¹⁶³ It is also inapplicable where an accused person is asked to provide a handwriting sample, or to perform an act in court.¹⁶⁴ Both sections 11(c)¹⁶⁵ and 13 are inapplicable to the enforced production of pre-existing documents.¹⁶⁶ In short, these sections confine their protection to testimonial self-incrimination.

C. Section 8

Section 8 of the *Charter* provides:

Everyone has the right to be secure against unreasonable search or seizure.

It is now settled that the obtainment of physical specimens from the person of an accused can constitute a seizure within the meaning of section 8 of the *Charter*. In *R. v. Pohoretsky* it was held that the taking of a blood sample from an unconscious suspect without consent, and without prior judicial authorization, constituted either an unreasonable search or seizure.¹⁶⁷ In *R. v. Dymont*¹⁶⁸ the Court concluded that section 8 was violated by way of an unreasonable seizure where blood samples were obtained without reasonable grounds by a medical doctor and then handed over to the police. It is important to note that, as

¹⁶⁰The witness may be authenticating real evidence, but the real evidence, once verified, stands independently of the testimony which establishes its relevance.

¹⁶¹*Supra*, note 126.

¹⁶²*R. v. Nielsen* (1984), 30 Man. R. (2d) 81, 16 C.C.C. (3d) 39, 17 C.R.R. 90 (C.A.). Leave to appeal to S.C.C. refused, (1985), 31 Man. R. (2d) 240 (S.C.C.).

¹⁶³*R. v. Racette* (1988), 61 Sask. R. 248 at 283-84, 48 D.L.R. (4th) 412, 39 C.C.C. (3d) 289 (C.A.) [hereinafter *Racette* cited to Sask. R.].

¹⁶⁴In *Brake*, *supra*, note 141. It was assumed, without deciding the matter, that section 11(c) might apply to cases where accused persons are asked to provide things in court like hand writing samples. For a discussion of why I consider this assumption to have been incorrect see D.M. Paciocco, *Charter Principles and Proof in Criminal Cases*, *supra*, note 44 at 462.

¹⁶⁵*Re Bassett and R.* (1987), 53 Sask. R. 81, 35 D.L.R. (3d) 537 (C.A.).

¹⁶⁶See the *obiter* comments of Hugesson J. in *Ziegler*, *supra*, note 139 at 673-74. See also, *Bassett v. College of Physicians and Surgeons* (1987), 63 Sask. R. 45 (Q.B.).

¹⁶⁷[1987] 1 S.C.R. 945 at 948, 75 N.R. 1, [1987] 4 W.W.R. 590 [hereinafter *Pohoretsky* cited to S.C.R.]. The Court declined to decide which had occurred, a search or a seizure.

¹⁶⁸[1988] 2 S.C.R. 417.

with section 10(b), the concern in this line of authority is not with the fact of non-testimonial self-incrimination. The Supreme Court did not focus in these cases on what was being obtained but concerned itself rather with the method by which the real evidence was being obtained. Indeed, in *Pohoretsky* the Court cited in its reasoning the newly proclaimed section 238(3)(b) of the *Criminal Code of Canada*,¹⁶⁹ which allows for the obtainment of blood samples by warrant, leaving the impression that had the samples been obtained in accordance with constitutional search and seizure procedures, there would have been no constitutional violation.¹⁷⁰ For this reason, section 8 cannot be understood as protecting against non-testimonial self-incrimination.

D. Section 7

At issue here is whether the principle of the absence of a pre-trial obligation is one of fundamental justice, thereby protected by section 7 of the *Charter*.¹⁷¹ In the face of the Supreme Court of Canada decision in *R. v. Beare*; *R. v. Higgins*,¹⁷² one would be hard pressed to argue that it is. *Beare* involved a constitutional challenge to the *Identification of Criminals Act*,¹⁷³ which requires persons arrested of certain offences to attend, if required, to be fingerprinted. Much of the argument centred on section 7 of the *Charter*. It was alleged that the procedure infringed upon the liberty and security of the person of those forced to subject themselves to fingerprinting, and that it did so in a manner that was inconsistent with the principles of fundamental justice. The Supreme Court accepted that there was an infringement of the liberty of such persons¹⁷⁴ but held that the infringement was in accord with the dictates of the principles of fundamental justice.

What makes the decision important in the present context is that the Court supported the use of the procedure, in part, on the basis that fingerprinting was of great use in linking accused persons to crimes,¹⁷⁵ and in providing evidence that could be used by the prosecution to prove a prior record for the purpose of

¹⁶⁹R.S.C. 1970 c. C-34 (now R.S.C. 1985 c. C-46, s. 254(3)(b)).

¹⁷⁰*Supra*, note 167. See *R. v. Racette*, [1988] 2 W.W.R. 318, 39 C.C.C. (3d) 289 (Sask. C.A.) for a similar analysis with respect to s. 8 and the obtainment of blood samples.

¹⁷¹In *R. v. Nielsen*, *supra*, note 162, the Court assumed for the sake of argument that section 7 may have been violated where the accused was required to provide a footprint cast to the police but then admitted the evidence on the basis that its admission would not bring the administration of justice into disrepute.

¹⁷²[1988] 2 S.C.R. 387, 55 D.L.R. (4th) 481, 45 C.C.C. (3d) 57 [hereinafter *Beare* cited to S.C.R.].

¹⁷³R.S.C. 1970, c. I-1, s. 2, (now R.S.C. 1985, c. I-1, s. 2).

¹⁷⁴Although it did so on the narrow basis that the statute requires persons to appear at a specific place and time to go through the process on pain of imprisonment for failure to comply. See, *supra*, note 172 at 402.

¹⁷⁵*Ibid.* at 399-400.

seeking a heavier sentence in the event of a conviction.¹⁷⁶ In other words, the fact that the process conscripts accused persons in the investigation against themselves through the provision of real evidence supported the constitutionality of the provision rather than detracted from it. Moreover, the court emphasized that persons who are arrested on reasonable and probable grounds must expect a significant loss of privacy:

He must expect that incidental to his being taken into custody he will be subjected to observation, to physical measurement and the like. Fingerprinting is of that nature. While some may find it distasteful, it is insubstantial, of very short duration, and leaves no lasting impression. There is no penetration into the body and no substance is removed from it.¹⁷⁷

Thus, while there is doubtlessly a principle of fundamental justice relating to invasive procedures,¹⁷⁸ the mere fact that the accused is forced to co-operate in the adduction of real evidence is not, in and of itself, contrary to principles of fundamental justice. By contrast, it would be recognized as absolute heresy were someone to make a parallel remark about persons in custody having to expect to be made to answer questions.

In rendering its decision, the Supreme Court of Canada had occasion to look at the primary sources that one would turn to in attempting to discover the principles of fundamental justice. The Court took an incomplete but sufficient look at the extent to which common law and statute allowed the enforced participation of accused persons in the obtainment of real evidence. Finding widespread statutory support for the practice of fingerprinting in democratic countries¹⁷⁹ and broad common law support for this and analogous investigative practices,¹⁸⁰ the Court concluded that no principle of fundamental justice was contravened. I would venture to suggest the same is true of other compelled, non-invasive investigative procedures.

¹⁷⁶*Ibid.* at 400.

¹⁷⁷*Ibid.* at 413. The Court even cited at 405, with apparent approval, the decision in *Brown v. Baugh and Williams* (1982), 38 B.C.L.R. 1, [1982] 5 W.W.R. 644, 70 C.C.C. (2d) 71 (C.A.), aff'd [1984] 1 S.C.R. 192, 7 D.L.R. (4th) 193, [1984] 3 W.W.R. 577 to the effect that the common law would permit the use of reasonable force in securing the fingerprints.

¹⁷⁸The Supreme Court of Canada elected not to consider the issue in *Dyment, supra*, note 168 where blood samples were taken from an accused person, because the issue could be resolved using the *Charter's* search and seizure provision, section 8.

¹⁷⁹*Supra*, note 172 at 406-07.

¹⁸⁰The court at 403-04, referred to bodily searches incident upon arrest for real evidence, and the observation of height, weight and natural or artificial marks on the body to be used for identification purposes. To this list could have been added statutory provisions authorizing the taking of breath samples, the production of licences and permits and the like, and enactments requiring the production of documents upon subpoena.

In *R. v. Racette*,¹⁸¹ the Saskatchewan Court of Appeal had occasion to consider whether a statutory provision¹⁸² permitting the obtainment of blood samples from suspected impaired drivers contravened section 7 of the *Charter*. Although it is a case that could have been resolved on the basis of section 8 of the *Charter*, or according to the section 7 principle of fundamental justice against the conduct of invasive procedures,¹⁸³ the reasoning of Vancise J.A. for the majority engages in a broader analysis which has some semblance of the principle of the absence of pre-trial obligation. His Lordship concluded that the accused's right to security of the person included "the public interest in being left alone, as manifested by the individual interest in being secure against a requirement to provide a sample of bodily substance for the purpose of analysis..."¹⁸⁴ He then concluded that section 7 was contravened by the impugned statute since it deprived persons of their security of the person in a manner that was not in accord with the principles of fundamental justice; the procedural safeguards associated with the section failed to provide for prior judicial authorization.

Notwithstanding the language used in the decision, the *Racette* case cannot be counted as an endorsement of the principle of the absence of pre-trial obligation. This is because Vancise J.A., through the mode of analysis he employed, left the principle without any substantive protection. He did this by concluding that the "interest in being left alone" was part of the right to "the security of the person". This being so, there would be a *Charter* violation only if that "interest in being left alone" (the absence of pre-trial obligation) was denied in a way that was inconsistent with the principles of fundamental justice. Naturally, what His Lordship then focussed upon were procedural questions relating to the way in which the interest in being left alone was compromised. It follows that had the procedures employed by the statute been acceptable, there would have been no problem with compromising the interest in being left alone. By treating the absence of pre-trial obligation as an aspect of security of the person and not as constituting one of the principles of fundamental justice, the judgment left the principle of the absence of pre-trial obligation without substantive protection.¹⁸⁵

¹⁸¹*Supra*, note 163.

¹⁸²Provided for in the *Vehicles Act, 1983*, S.S. 1983, c. V-3.1, s. 168(6), as am., S.S. 1983-4, c. 20.

¹⁸³His Honour laid the groundwork for this analysis at 278 by citing *Re Laporte and R.* (1972), 29 D.L.R. (3d) 651, 18 C.R.N.S. 357, 8 C.C.C. (2d) 343 (Sask. C.A.), and the common law right of persons to refuse to provide blood samples.

¹⁸⁴*Supra*, note 163 at 282.

¹⁸⁵A similar approach appears to have been taken in the case of *R. v. Legere* (1988), 43 C.C.C. (3d) 503 at 513 (N.B.C.A.) where it was held that the forcible taking of hair samples from the head of an accused "in the absence of legislation authorizing such acts, is an infringement of the right to security of the person" and contravenes section 7 of the *Charter*. If the approach in these cases proves correct it will effectively render useless any substantive principles relating to protection against invasive procedures.

E. Section 24(2)

It is in the context of section 24(2) that a mutant principle has developed, obscuring the important distinction between testimonial self-incrimination, on the one hand, and the obtainment of real evidence through the enforced participation of the accused person, on the other. In the case of *R. v. Collins*¹⁸⁶ Lamer J., for the Court, created a distinction between evidence, the admission of which would affect the fairness of the trial, and evidence, the admission of which would not. According to this distinction, where the admission of the evidence would undermine the fairness of the trial it ought almost automatically to be excluded. In defining when the admission of evidence obtained in the shadow of a constitutional violation would render the trial unfair,¹⁸⁷ the Court began by keying in on, and indeed articulating, the principle against self-incrimination. Speaking of how it was the nature of the evidence and not so much its manner of obtainment that determined whether its admission would cause the trial to become unfair Lamer J. said:

Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.¹⁸⁸

For the most part, then, the distinction that His Lordship drew appears to be the principled one that I have argued for in this paper, and, for the reasons given above I am thoroughly persuaded by the view that self-incriminatory statements ought to be excluded much more readily than real evidence. Yet, even this passage in *Collins* presaged that the distinction of principle that would ultimately be drawn would not rest completely on the principle against self-incrimination. Lamer J. employed the phrase, "or other evidence emanating from him", and to illustrate it, cited the *Therens*¹⁸⁹ case which involved the compelled provision by the accused of a species of real evidence, a breath sample. In subsequent cases in developing the "unfair trial" distinction the Court moved away from discussions about self-incrimination and focussed on the broader question of whether the accused was "conscripted against himself"; in other words, the question

¹⁸⁶*Supra*, note 89.

¹⁸⁷In light of the decision in *R. v. Strachan*, [1988] 2 S.C.R. 980, [1989] 1 W.W.R. 385 it is no longer accurate to speak of constitutionally obtained evidence when referring to section 24(2)'s exclusionary reach. The Court in that case held that the unconstitutional act need not cause the discovery of the evidence for it to be subject to section 24(2) exclusion.

¹⁸⁸*Supra*, note 89 at 284.

¹⁸⁹*Ibid.* at 275ff. commenting on *Therens*, *supra*, note 158.

became whether the principle of the absence of a pre-trial obligation had been infringed.

In *R. v. Pohoretsky*¹⁹⁰ this criterion was employed to buttress a decision to exclude the results of a blood sample where the blood was taken from the accused. The Court emphasized that the effect of the extraction and analysis of the accused's blood "was to conscript the appellant against himself".¹⁹¹ Subsequently, in the case of *Leclair and Ross v. R.*,¹⁹² the category of evidence whose admission would render the trial unfair was extended even beyond "other evidence emanating" from an accused. In *Ross* the accused were made to participate in a police line-up despite the fact they had not yet successfully contacted counsel. In deciding to exclude the evidence of the line-up identification, Lamer J. said, for the Court:

In *Collins* we used the expression "emanating from him" since we were concerned with a statement. But we did not limit the kind of evidence susceptible of rendering the trial process unfair to this kind of evidence. I am of the opinion that the use of any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would render the trial process unfair.¹⁹³

Despite the language employed in the earlier decision of *Collins*,¹⁹⁴ this new articulation represents a clear rejection of the principle against self-incrimination as the basis for distinction in determining whether the admission of evidence will effect the fairness of the proceedings.¹⁹⁵ Moreover, this new articulation represents a clear embrace of Ratushny's principle of the absence of a pre-trial obligation as one of the primary indicia in exclusionary decisions. It gives that principle a life it never had, for it will be recalled that at common law, unlike the principle against testimonial self-incrimination, the principle of the absence of pre-trial obligation did not have the vitality necessary to cause the exclusion of evidence; at most it disallowed the drawing of adverse inferences in some cases.

I have said enough to make the point that the "fairness of the trial" distinction employed by the Supreme Court of Canada has lost the thread. It is also worth noting, however, that the Court's approach to section 24(2) produces a curious result. Section 24(2) jurisprudence, dealing with a remedial provision of the *Charter*, takes much of its content from the principle of the absence of a pre-trial obligation, while the substantive provisions of the *Charter* leave it with

¹⁹⁰*Supra*, note 167.

¹⁹¹*Ibid.* at 949.

¹⁹²*Supra*, note 161.

¹⁹³*Ibid.* at 16.

¹⁹⁴*Supra*, note 89.

¹⁹⁵After all, in *Marcoux*, *supra*, note 49 at 773-74, the Court rejected the view that self-incrimination considerations were relevant to the conduct of a line-up.

precious little protection. In the result, courts will be able to vindicate the principle only where there is some other coincidental *Charter* violation upon which to base the section 24(2) jurisdiction.

Conclusion

The question of whether the *Charter* adequately protects the principle against self-incrimination turns upon the interpretation of section 7. Because of textual limitations, even together sections 11(c), 13 and 10(b) cannot do the job. The thing which has prevented section 7 from qualifying already as the clear refuge for this essential principle is the contention that the principle against self-incrimination does not affect the admissibility of evidence obtained in informal settings, a view which, despite its frequent repetition, does not reflect accurately the state of the law. In contrast, the principle of pre-trial obligation has received more than its due in the context of section 24(2) authority. This latter development is troublesome, not only because it provides what I would argue is an overly aggressive exclusionary rule, but also because it threatens the recognition of the principle against self-incrimination as a principle of fundamental justice. Unless a clear line is drawn between compelled admissions and the enforced participation in the production of real evidence, the costs of recognizing a principle against self-incrimination might appear too great to tolerate. A unitary principle like the principle of the absence of pre-trial obligation would threaten the conduct of line-ups, and the compelled provision of breath and blood samples. If the scope of the relevant principle is confined, on the other hand, to testimonial evidence, it will appear far less threatening, for it will be a familiar doctrine, one that we have lived with, despite representations to the contrary, for a number of years.
