Unwarranted Behaviour: The Airbus Affair, United States Law, and Searching Foreign Bank Accounts

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I. THE BACKGROUND

IN THE FALL OF 1997, *Maclean's* magazine reported that German authorities had issued a warrant for the arrest of "German-Canadian businessman Karlheinz Schreiber." They wanted to question him about commissions he had allegedly received from the sale of armoured vehicles to Saudi Arabia and Airbus planes to Air Canada.[1] Although such a news item would ordinarily be of little interest to Canadians, Karlheinz Schreiber has for the past two years been one of the central figures in a political and legal controversy that is in some respects unprecedented in this country.

A. The Facts

In July 1988, Air Canada announced a $1.8 billion agreement to purchase thirty-four Airbus A-320 jet airplanes from Airbus Industrie, a European consortium. Soon afterwards, complaints from the Boeing Corporation about "irregularities" in the awarding of this contract prompted an R.C.M.P. investigation which, at the time, appeared to go nowhere. However, in March 1995 the C.B.C. news magazine show, *The Fifth Estate*, and the German magazine, *Der Spiegel*, suggested that secret commissions had been paid in the Airbus sale. These reports mentioned Swiss bank accounts opened by one Karlheinz Schrei-

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1 *Maclean's* (6 October 1997). The warrant required his attendance for investigation purposes, not arrest.

ber and by former Newfoundland premier Frank Moores. They also referred to the involvement of an "unnamed Canadian politician."[2] The R.C.M.P therefore re-opened their investigation.

On 29 September 1995 the federal Department of Justice sent a letter to authorities in Switzerland requesting that the Swiss provide Ottawa with "all banking information available at the Schweizerischer Bankverein Zurich (the Swiss Banking Corporation)" for Schreiber, Moores, and former Prime Minister Brian Mulroney.[3] There was at that time no mutual assistance treaty in force between Canada and Switzerland, and in this situation international law provides that "suspicion," as opposed to probable cause, is a sufficient basis for such a request.[4] Interestingly, less than two months after Canada sought Switzerland's help in this matter the current *Treaty between Canada and the Swiss Confederation on Mutual Legal Assistance in Criminal Matters*[5] came into force. Article 5 provides that requests "shall be executed in accordance with the law of the Requested State," and Article 22(2)(c) states that requests for assistance shall include:

> [I]n the case of a request for search and seizure, a declaration by a competent Authority of the Requesting State that such a measure would be permissible if the subject-matter of the request were located there ... .[6]

The *Mutual Legal Assistance in Criminal Matters Act*,[7] which has been in force since 1988, provides for the carrying out of international requests pursuant to treaty. It states, *inter alia*, that once the minister of justice has approved a foreign request for a search in Canada, Canadian law governing search and seizures applies.[8] Given that the search would be executed here, this is hardly surprising.

The Letter of Request which was sent to Switzerland in September of 1995 contained allegations of criminal behaviour on Mulroney's part, and on 18 November the *Financial Post* broke the story.[9] Upon receipt of the Letter of Re-

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2 *Maclean's* (20 January 1997).

3 *Schreiber* v. *Canada (Attorney General)* (1997), 210 N.R. 9 (F.C.A.) at 13, *per* Linden J.A [hereinafter *Schreiber*].

4 *Ibid.* at 16

5 Can. T.S. 1995 No. 24 (entered into force 17 Nov. 1995).

6 *Schreiber, supra* note 3 at 17 and *ibid.* at Art. 22(2)(c).

7 R.S.C. 1985, c. 30 (4th Supp.).

8 Sections 11(2) and 12: see Linden J.A., *supra* note 3 at 17–18.

9 As *Maclean's* put it, "[p]olitical circles had been buzzing for weeks about a major police investigation into the biggest ever civil aviation contract given by a Canadian government" when the allegations against Mulroney were published: *Maclean's* (27 November 1995). The story was reported all over the world, and in Canada the media coverage was intense.

quest the Swiss authorities, acting pursuant to applicable Swiss laws, issued an order for seizure of relevant documents and records. In May 1996 an application by Schreiber challenging the Swiss order was dismissed by the Swiss Federal Court.[10]

Two days after the story broke Brian Mulroney launched a $50 million libel suit against the R.C.M.P., the federal government, Kimberly Prost (the justice department lawyer who signed the letter), and Staff Sergeant Fraser Fiegenwald (the R.C.M.P. officer in charge of the investigation). Schreiber and Moores subsequently took similar legal action against the C.B.C., each claiming $35 million in damages. Although Ottawa pledged to defend the suit, a number of unfavourable rulings clearly weakened the defence. Especially damaging was the judge's decision that Mulroney did not have to answer questions about his finances, but his lawyers could conduct an unrestricted cross-examination of R.C.M.P. investigators. When it came out that Staff Sergeant Fiegenwald had probably told a reporter that the former prime minister was named in the Letter of Request, Ottawa apologised and settled the action by agreeing to pay all Mulroney's legal costs. Nonetheless, the settlement preserved the federal authorities' right to continue investigating the Airbus purchase.[11]

Eventually, an arbitrator ordered the R.C.M.P. to pay Brian Mulroney over $2 million dollars in costs, plus interest—an award that exceptionally included not only legal fees but what Mulroney had paid a public relations firm for presenting his case in the court of public opinion. In the end, and quite apart from the costs incurred by the Department of Justice and the R.C.M.P., the bill to the taxpayer, inclusive of interest charges and the fees of outside counsel retained by Ottawa, will probably swell to about $3.5 million.[12]

Of more legal interest than the libel suit, however, is an action commenced by Schreiber against the Attorney General of Canada in the Federal Court for a declaration that, in effect, Ottawa had acted unconstitutionally when it sent the Letter of Request to Switzerland.[13] Soon afterwards, the parties agreed to state a special case for adjudication, in which the answer to the following question of law would dispose of the action:

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[10] *Schreiber* v. *Canada (Attorney General)* (1996), 116 F.T.R. 151 at 153, *per* Wetston J. [hereinafter *Schreiber* Trial Judgment].

[11] *Maclean's* (20 January 1997).

[12] *The Globe and Mail* (8 October 1997). It should be noted that all of this money went to pay expenses; none of it was in the form of a damage award to Mulroney.

[13] *Supra* note 10. Apparently the action originally was for an injunction, which is not available against the Crown.

> Was the Canadian standard for the issuance of a search warrant required to be satisfied before the Minister of Justice and Attorney General of Canada submitted the letter of request asking Swiss authorities to search for and seize the plaintiff's banking documents and records?[14]

Now, the phrase "Canadian standard" could be read as meaning only that Ottawa must have reasonable and probable grounds to believe that evidence justifying a search or seizure in Switzerland exists before making the request for assistance. But in deciding that s. 8 of the *Canadian Charter of Rights and Freedoms*[15] applies to such requests, Wetston J. ruled in effect that the request must be accompanied by a warrant issued by a Canadian judge or justice who has concluded that the requirements of s. 8 have been met. In other words, he ruled that not only must the standard be met, but that whether it has been met must be ascertained in advance of the request by a person capable of acting judicially.

A few weeks after Wetston J.'s decision, the Attorney General applied for an order suspending the effect of the ruling "pending determination of the appeal in this matter ... ." Gibson J. found that the public interest in effective law enforcement justified a temporary suspension, provided that the appeal was heard expeditiously and that Ottawa requested the Swiss authorities not to take any further action on the Letter of Request until the appeal was determined.[16] In March of 1997 the Federal Court of Appeal dismissed the appeal (Stone J.A., dissenting) but made a suspension order on terms similar to those imposed by Gibson J.[17] The essence of the decisions of both courts is that: *(i)* s. 8 of the *Canadian Charter of Rights and Freedoms* applies to requests such as the one at issue, in the sense that Ottawa must persuade a justice by way of information on oath that there are reasonable and probable grounds for the foreign search; and *(ii)* this procedure does not involve extra-territorial application of the *Charter*.

The Globe and Mail, Canada's self-described "national newspaper," published an editorial lauding Wetston J.'s decision, and urging Ottawa not to appeal.[18] Another editorial appeared after the Federal Court of Appeal upheld the trial court's ruling, arguing that "[i]t would be unworthy of [then Justice Minister Allan Rock] to fight on" by seeking leave to appeal to the Supreme Court of Canada, and urging that Court to deny leave if he did.[19] The editors were to be disappointed: the day after the arbitrator's award in Mulroney's libel action was announced, a *Globe* editorial noted that Ottawa had, "shockingly, chosen

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[14] *Supra* note 10 at 2.

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

[16] *Schreiber* v. *Canada (Attorney General)* (1996), 118 F.T.R. 231 at 236, *per* Gibson J.

[17] *Schreiber*, *supra* note 3.

[18] *The Globe and Mail* (8 July 1996).

[19] *The Globe and Mail* (14 March 1997).

to appeal [the Federal Court of Appeal's decision in *Schreiber*] to the Supreme Court." Readers were presumably to infer that the Supreme Court's decision to grant leave was no less shocking.[20]

But was it? Or are the issues raised by the *Schreiber* case—as opposed to the Mulroney libel action, with which it has been so closely associated—somewhat more subtle than the *Globe* appreciated? Are the only options *(i)* subjecting all requests for mutual assistance to prior judicial approval, and *(ii)* applying no standards but the R.C.M.P.'s suspicions? Presumably the Supreme Court of Canada thought that the issues are more subtle: they granted leave. There was also that dissent in the Federal Court of Appeal, which left open the question whether, "by some modification of the current practice," higher standards could be applied to the request procedure without a judicial invocation of the *Charter*.[21] So, how, exactly, did the appellate Court reach its decision?

II. THE FEDERAL COURT OF APPEAL

THE MAJORITY JUDGMENT, written by Linden J.A., begins by asserting that the Canadian standard for the issuance of a search warrant,

> [A]s referred to in the question for adjudication, is based on "the right to be secure against unreasonable search or seizure [in s. 8 of the *Charter*]." The standard was set ... in *Hunter* v. *Southam Inc.* as "... reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search."[22]

The majority's approach was therefore to read the phrase "Canadian standard," as including not only the standard *per se* (*i.e.*, reasonable and probable grounds), but also the requirement that this standard be applied before the request is made by someone "capable of acting judicially" (*i.e.*, by impartially assessing information provided on oath to determine whether reasonable and probable grounds exist). In short, is prior authorisation required by judicial warrant.[23]

The majority then went on to say that whether this standard applies to the September Letter of Request depends upon the answers to two questions: *(i)* will applying the standard mean that the *Charter* will thereby be given "impermissible" extraterritorial effect? and *(ii)* do Letters of Request interfere with a person's right to be secure from unreasonable search and seizure? They added that neither the conduct of the Swiss authorities nor whether the proposed

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[20] *The Globe and Mail* (9 October 1997). The granting of leave was reported on 5 September 1997.

[21] *Schreiber*, *supra* note 3 at 89, *per* Stone J.A.

[22] *Ibid.* at 15, quoting from *Hunter* v. *Southam Inc.*,[1984] 2 S.C.R. 154 at 168; (1984), 14 C.C.C. (3d) 97 at 115 [hereinafter cited to C.C.C.].

[23] *Hunter* v. *Southam*, *ibid.* at 110.

search or seizure "would *in fact* satisfy the Canadian standard for the issuance of a search warrant" were at issue.[24]

A. Extraterritorial Effect

After engaging in a brief analysis of *Hunter* v. *Southam* and some of its progeny (the purpose of which was to stress prior authorisation as the best way to protect reasonable expectations of privacy), Justice Linden turned to the first of the two questions set out above: the territorial scope of s. 8 of the *Charter*. This involved consideration of two Supreme Court of Canada cases upon which the Attorney General of Canada strongly relied: *R.* v. *Terry*[25] and *R.* v. *Harrer*.[26]

In *Terry*, the accused was charged with murder in Canada, whereupon he fled to the United States. Canada requested extradition, and he was arrested in California pursuant to a U.S. warrant. The police in California notified the R.C.M.P., who asked them to interview Terry. Before doing so the police administered the *Miranda*[27] warning, after which Terry made a statement which was then used to obtain a search warrant. The issue before the Supreme Court of Canada was whether the failure of the police in California to advise Terry of his right to counsel under s. 10(b) of the *Charter* rendered his statement inadmissible at trial.[28] The facts and the issue in *Harrer* were similar.[29]

The Attorney General relied upon these decisions because in each the Supreme Court ruled that "a state is only competent to enforce its laws within its

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[24] *Schreiber*, *supra* note 3 at 15, *per* Linden J.A. [Emphasis in original.]

[25] *R.* v. *Terry*, [1996] 2 S.C.R. 207 [hereinafter *Terry*].

[26] *R.* v. *Harrer*, [1995] 3 S.C.R. 562 [hereinafter *Harrer*].

[27] *Miranda* v. *Arizona*, 384 U.S. 436 (1966) [hereinafter *Miranda*].

[28] The s. 10(b) right is triggered by arrest or detention, whether or not the police intend to interrogate. A *Miranda* warning, by contrast, is necessary only when *(i)* the accused is in police custody and *(ii)* the police intend to interrogate: see R. Harvie & H. Foster, "Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the *Charter*" (1990) 28 Osgoode Hall L.J. 729 at 744–48, and R. Harvie & H. Foster, "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the *Charter*" (1992) 24 Ottawa L. Rev. 39 at 65–66.

[29] In *Harrer*, the issue was the effect of the failure of U.S. law enforcement authorities to give the accused a second warning when the focus of the interrogation shifted from an immigration law violation to her involvement in a more serious criminal offence. The *Charter* (as interpreted by the Supreme Court of Canada) requires such a warning; the *Bill of Rights* (as interpreted by the Supreme Court of the United States) does not: see R. Harvie & H. Foster, "Different Drummers, Different Drums, supra note 28 at 62–64 and R. Harvie & H. Foster, "When the Constable Blunders: A Comparison of the Law of Police Interrogation in Canada and the United States" (1996) 19 Seattle U. L. Rev. 497 at 516–519.

own territorial boundaries" and dismissed the appeal.[30] In *Harrer*, the Court ruled that the most powerful argument for the Attorney General in that case was that, because the American authorities could "in no way be considered as acting on behalf of" Canada or a province, the alleged violation of s. 10(b), which occurred in the United States, could not be attributed to any government listed in s. 32(1) of the *Charter*. All nine justices agreed in the result, but McLachlin J. (for herself and Major J.) refused to consider whether the Americans were agents of the Canadian police because this was largely a question of fact.[31]

Terry is the more interesting of the two for present purposes because in it the agency argument had more force: the R.C.M.P. had requested help from the local police in California before a Canada-wide warrant for Terry's arrest had been issued, Canada had requested extradition and, after Terry's arrest, the R.C.M.P. asked the local police to interview him.

Nonetheless, McLachlin J. (for a unanimous Court) dismissed Terry's appeal, stating, *inter alia*, *(i)* that because the *Mutual Legal Assistance in Criminal Matters Act* provides that actions requested of the assisting state be carried out according to its own laws, the police in California would not have been bound by the *Charter* if they had been responding to a treaty request; *(ii)* that there was therefore even less reason to suppose that local police co-operating with Canadian police "on an informal basis" would be governed by the *Charter*; *(iii)* that the local police in California were bound only by the laws of California, "even if one could somehow classify them as 'agents' of the Canadian police"—so it was unnecessary, once again, to determine whether they were acting as agents;[32] and *(iv)* that "it is the decision of the suspect to go abroad that triggers the application of the foreign law." People therefore,

> [S]hould reasonably expect to be governed by the laws of the state in which they currently abide, not those of the state in which they formerly resided or continue to

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30 *Terry*, *supra* note 25 at 215, *per* McLachlin J. (for the Court). It is noteworthy that the Attorney General of Canada intervened in both *Harrer* and *Terry*, and that one of the two counsel who represented the Attorney General in these cases was Kimberly Prost. Ms. Prost was also the author of the letter of request in the *Schreiber* case and a defendant in Mulroney's libel action: see text accompany *supra* note 11.

31 *Harrer*, *supra* note 26 at 571–72, and 584. Section 32(1) provides that the *Charter* applies only to the laws and activities of the federal, provincial and territorial legislatures and governments.

32 United States law is noteworthy on this point. "The investigation of crime increasingly requires the cooperation of foreign and United States law enforcement officials, but there is no reason to think that Congress expected that such cooperation would constitute the foreign officials as agents of the United States." See *United States* v. *Maturo*, 982 F.2d 57 (1992), quoting *United States* v. *Paternina-Vergara*, 749 F.2d 993 (1984), as cited in W.R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 3rd ed. (St. Paul: West Publishing, 1996) at 285.

> maintain a principal residence. [Terry's] argument amounts to asserting that a Canadian traveller takes Canadian law with him or her, a proposition that is belied by the principle that, within its territory, a state is exclusively competent to exercise an enforcement jurisdiction.[33]

The Court noted that there were limited exceptions to the principle that a state's laws apply only within its boundaries, but none were relevant to Terry's situation.[34] More importantly, McLachlin J., also made clear that, if what happened abroad would affect the fairness of Terry's trial *in Canada* under *Charter* s. 11(d), or might violate the principles of fundamental justice under s. 7, different considerations applied. However, here too Terry failed. His arguments that it was unfair to treat evidence gathered abroad differently and that extraterritorial application of the *Charter* was good policy were rejected, primarily (but not exclusively) for reason *(iv)*, above.

It is therefore easy to see why the Attorney General relied upon *Terry* and *Harrer*. The statements in *Terry* about agency and the degree to which the authorities in the requesting state are implicated in the actions of the police in the requested state (which in United States law may be important in cases involving the application of the Fourth Amendment to non-citizens abroad), left Schreiber with little room to manoeuvre.[35] So did the statements about the effect of a decision to go abroad. The Attorney General therefore argued that, by banking in Switzerland, Schreiber "gave up the protection of the *Charter*."[36]

Schreiber's response, which the trial judge and the majority in the Court of Appeal found persuasive, conceded that the *Charter* did not apply to what happened in Switzerland. He was, he said, simply asking that the *Charter* be applied to what happened in Canada. Schreiber was *not*, his counsel argued, seeking to have the *Charter* applied extra-territorially to the conduct of the Swiss authorities. He was seeking only to apply it to the conduct of the Canadian government in Canada, *i.e., to the making of the request itself.*[37] Schreiber's was therefore

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[33] *Terry*, *supra* note 25 at 217, 218, 219, and 220.

[34] The examples McLachlin J. gives (at 215) include offences committed on aircraft, war crimes, and special cases where a state might formally consent to giving another state jurisdiction within its boundaries. One such case that comes to mind is United States jurisdiction in Canada during the building of the Alaska Highway: see K.S. Coates & W.R. Morrison, "Controlling the Army of Occupation: Law Enforcement and the Northwest Defense Projects, 1942–1946" in J. McLaren, H. Foster & C. Orloff, eds., *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: Canadian Plains, 1992) at 194–211.

[35] See, for example, *Brulay* v. *U.S.*, 383 F.2d 345 (1967), discussed in the text accompanying *infra* note 61.

[36] *Schreiber*, *supra* note 3 at 28, *per* Linden J.A.

[37] *Ibid.* at 84. As Stone J.A. put it although in *Terry* the statement "was taken by the foreign police at the behest of the R.C.M.P. in Canada, that fact does not appear to have formed

not a *Harrer* or *Terry* situation. There, the complaint was about the actions of American officials on American soil; here it was about the action of Canadian officials—"the preparation and signing of the Letter of Request"—on Canadian soil.[38]

The Court ruled that a further distinction was that the s. 10(b) rights at issue in *Harrer* and *Terry* apply only when a person is arrested or detained; s. 8 applies to the right of "[e]*veryone* ... to be *secure* against unreasonable search or seizure [emphasis added]." Thus the class of persons protected by s. 8 is wider than that protected by s. 10(b), and it is arguable that it does not matter that a request is really neither a search nor a seizure.[39] As Linden J.A., put it,

> The question to be asked ... is not whether a Letter of Request is a "search." To answer that question positively would require us to employ a very broad meaning of the word. Rather, the question ... is whether the Letter of Request jeopardizes the respondent's reasonable expectation of privacy, his *security* against unreasonable search and seizure. Such an approach allows the Court to identify the Letter of request ... as a source of jeopardy to the respondent's privacy interest without having to characterize it as a "search."[40]

Stone J.A., dissenting, took a different view:

> The governmental action that is constrained by virtue of section 8 is "unreasonable search and seizure." In my view, the sending of the request did no more than ask that a search and seizure of the respondent's bank records be conducted in Switzerland by the Swiss authorities in accordance with the laws of that country. This is the only conduct that is challenged in this case. ... . To conclude that section 8 is engaged because Canadian authorities sent the request to Switzerland even though they did not and could not conduct any search and seizure there would be to contort the language of this important provision and give to it application where no governmental action of the kind envisioned by the section is involved. It would be wrong, in my view, to emphasize the word "secure" at the expense of the remaining language of section 8, when that section guarantees the right to be secure against "unreasonable search and seizure" by Canadian state actors.[41]

Interestingly, the only explicit policy issues considered by the majority were *(i)* whether the alleged lack of a procedure for submitting a request to a justice jus-

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the basis of any argument that the *Charter* was thereby engaged. In my view, therefore, neither *Terry* ... nor *Harrer* ... is conclusive" on the issue raised by Schreiber.

38 *Schreiber*, *supra* note 3 at 30, *per* Linden J.A.

39 It is interesting to note that, in like fashion, the United States Supreme Court has contrasted the phrase, "the people," in the Fourth Amendment (relating to searches) to "person" and "accused" in the Fifth and Six Amendments (relating to self-incrimination and the right to counsel). However, that Court has done so, not to expand the class of persons protected by the Fourth Amendment, but to shrink it: see *U.S. v. Verdugo-Urquidez*, 108 L. Ed. 2d 222 [hereinafter *Verdugo-Urquidez*], and text accompanying *infra* notes 57–59.

40 *Schreiber*, *supra* note 3 at 38, *per* Linden J.A.

41 *Schreiber*, *supra* note 3 at 88–89, *per* Stone J.A.

tified what happened in this case, and *(ii)* the effect upon law enforcement of a ruling that such a procedure was constitutionally required.[42] The wider issue raised by the Attorney General was not addressed: whether, as a matter of policy, persons who transfer their assets outside of the country or who acquire assets beyond Canada's borders (possibly enjoying certain tax and other benefits as a result) should qualify for *Charter* protection—especially if granting such protection is possible only by going beyond existing case law to interpret s. 8 as applying to government actions that fall short of an actual search or seizure? The majority apparently thought that this important issue does not arise if only the request in Canada is being challenged.

Nonetheless, the point of law raised by Schreiber is a novel one, and depends upon the assumption that persons with foreign bank accounts have a constitutionally protected privacy interest in those accounts that is identical to any privacy interest they may have in domestic accounts.[43] In our view, the implications of extending *Charter* protection by interpreting s. 8 so broadly are significant.

B. The Right to be Secure Against Unreasonable Searches

As stated above, the majority of the Court of Appeal took the view that a person's security interest under s. 8 of the *Charter* can be threatened by government action falling short of an actual search or seizure in Canada. Accordingly, Linden J.A. ruled that the Letter of Request was such an action, and that it could be identified as a "source of jeopardy to [Schreiber's] privacy interest without having to characterise it as a 'search.'"[44]

How did the Court manage to interpret a request to a foreign government, over which Ottawa has by definition no authority, in this way? First, by holding that Schreiber had a reasonable expectation of privacy in the information sought and, secondly, by rejecting the Attorney General's argument that, because a Letter of Request is only a request, it is like an application for a search warrant and cannot, on its own, interfere with anyone's reasonable expectation of privacy. The majority ruled that a Letter of Request is really more like the

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[42] *Supra* note 41 at 52–56, *per* Linden J.A. Both issues were determined in Schreiber's favour, mainly on the ground that convenience is not a good argument in favour of relaxing *Charter* standards domestically, and nothing changes "simply because [the investigation] involves the collection of evidence abroad."

[43] See *Collelo* v. *United States Securities and Exchange Commission*, 908 F.Supp. 738 (1995) [hereinafter *Collelo*], discussed in the text accompanying notes 81–84. There the government argued (at 753) that "by placing their assets abroad, plaintiffs (U.S. citizens) are not entitled to the full panoply of Constitutional rights." Although the United States District Court described this argument as one that had been "rejected long ago," the authorities cited in support do not appear to address the situation in *Schreiber*. The leading case, for example, is *Reid* v. *Covert*, 354 U.S. 1 (1957), as to which see *infra* note 54.

[44] *Schreiber*, *supra* note 3 at 38, *per* Linden J.A.

search warrant itself, because there was "a reasonable expectation of its acceptance, and a likelihood of it being acted upon."[45] Domestically, of course, the likelihood that a police request for a search warrant will be granted is hardly enough to transform the request into a warrant, or at least into a government action that can jeopardise someone's privacy interest; but in *Schreiber* the Court held that a request to a foreign government should be viewed in this fashion.

Both Canadian and American law, which will be considered in Part III, below, was cited on these points. The Canadian law referred to included *Hunter* v. *Southam*, which states that s. 8 protects "people, not places." Applying this to Schreiber's situation, the Court stated that,

> [A]n approach to protection against unreasonable search and seizure which focuses on the impact of the search or seizure on the individual cannot be reconciled with the position that a person may have a privacy interest in banking information in Canada but not in Switzerland. The impact of the Government action on the privacy interests of individuals, the "people," is the same in each case, though the places may be different.[46]

Which of course is true; but it begs the very important question whether Canadians who remove their assets from "*Charter* territory" by banking in a foreign country ought to have the same claim on our notions of due process as those who keep their money in Canada, subject to Canadian law. Even in *Hunter* v. *Southam*, the Supreme Court of Canada acknowledged that there might be situations in which the "relevant standard" might not conform to the paradigm of prior authorisation, and emphasised the need for a "contextual" approach to determining reasonableness under s. 8 of the *Charter*.[47]

So, does a person have a privacy interest in banking information, even in Canada? To answer this question the Court referred to *R.* v. *Plant*, in which the Supreme Court of Canada sought to confine s. 8 protection of information to a "biographical core" which, in that case, excluded computerised electronic records.[48] Applying the criteria listed in *Plant*, Linden J.A., concluded that banking records qualify for s. 8 protection. Unlike electronic records, such records "reveal important and personal details about an individual" and, in Schreiber's

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[45] *Schreiber*, *supra* note 3 at 49 (quoting Wetston J.).

[46] *Ibid.* at 40.

[47] *Hunter* v. *Southam*, *supra* note 22 at 115. One example given by the Supreme Court of a situation where the standard might be lowered is when state security is involved. Subsequently, in *R.* v. *Simmons* (1988), 45 C.C.C. (3d) 296 (S.C.C.) at 319–20, the Supreme Court ruled that, because persons seeking to enter a country have a lower expectation of privacy, a different standard was appropriate for border searches. Dickson, C.J.C., relied upon United States law to reach this result. The Court has also laid down a lower standard for regulatory searches: see, *e.g.*, *McKinley Transport Ltd.* v. *The Queen* (1990), 55 C.C.C. (3d) 530 (S.C.C.).

[48] *R.* v. *Plant*, [1993] 3 S.C.R. 281.

case, they could not be obtained "without the assistance of Swiss authorities," a third party.[49] Of course, the assistance of the Swiss authorities would not have been necessary if the records were in a domestic bank; and the involvement of third parties is in fact one of the features of banking records that have led courts in the United States to a rather different conclusion.

III. UNITED STATES LAW

THE FOURTH AMENDMENT to the Constitution of the United States, like s. 8 of the *Canadian Charter of Rights and Freedoms*, focuses upon the reasonableness of searches and seizures. It provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[50]

The Supreme Court of the United States has yet to decide whether the Fourth Amendment applies to a search respecting a U.S. citizen that is executed in a foreign country; but, when the occasion arises, it is likely to say that it does.[51] This is partly because, although the Court once used a traditional "territorial" approach to the application of the American Bill of Rights, it has, at least since *Reid* v. *Covert*[52] in 1957, moved towards what might be called a "social compact" theory.[53] Some of the language in *Reid* is quite sweeping, probably much too sweeping, given the facts of the case. As Justice Black put it,

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[49] *Schreiber*, *supra* note 3 at 42–44, *per* Linden J.A., citing, *inter alia*, *R.* v. *Eddy* (1994), 119 Nfld. & P.E.I.R. 91 (Nfld. S.C. T.D.), *R.* v. *Lillico* (1994), 92 C.C.C.(3d) 90 (Ont. Ct. Gen. Div.), and A.C. Hutchison *et al.*, *Search and Seizure Law in Canada* (Toronto: Carswell, 1993).

[50] U.S. Constitution, amend. IV.

[51] See, for example, LaFave, *supra* note 32 at 279–80, who states that, "assuming a sufficient American nexus or involvement with a foreign search ... an American citizen in another country can invoke the Fourth Amendment with respect to search activity occurring there."

[52] *Reid* v. *Covert*, *supra* note 43

[53] *Ibid.* "Social compact" theory, rather than examining the geographic area in which the law applies, focuses on which persons—citizens, resident aliens, illegal aliens—have subscribed to the "compact." On the different theories about the extraterritorial application of the United States Constitution see, *inter alia*, LaFave, *supra* note 32; Student Note, "The Application of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries" (1977) 16 Col. J. Trans. L. 495; P.B. Stephan, "Constitutional Limits in International Rendition of Criminal Suspects" (1980) 20 Va. J. Int'l L. 77; S.A. Saltzburg, "The Reach of the Bill of Rights Beyond the Terra Firma of the United States" (1980) 20 Va. J. Int'l L. 741; J.A. Ragosta, "Aliens Abroad: Principles for the Ap-

> When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the constitution provide to protect his life and liberty should not be stripped away just because he happened to be in another land.[54]

More recent cases have focused upon the extent to which non-citizens may invoke this shield. The leading decision is now *United States* v. *Verdugo-Urquidez*,[55] in which Chief Justice Rehnquist, for a plurality of the Court, adopted a "membership" approach to the social compact theory, emphasising the limited class of persons who originally ratified the Constitution. The chief justice then interpreted "the people," as that language appears in the Fourth Amendment, as excluding Verdugo-Urquidez, a Mexican citizen whose residence in Mexico was searched by Mexican police and U.S. Drug Enforcement agents while he was incarcerated in the United States.[56] Verdugo-Urquidez was not, according to the chief justice, a member of the "national community," nor did he have a "sufficient connection with [the United States] to be considered part of that community."[57] Thus, he was not one of "the people" for the purposes of the Fourth Amendment.[58]

As we have seen, the Supreme Court of Canada has stayed with the traditional territorial or "water's edge" approach to any question of the extraterrito-

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plication of Constitutional Limitations to Federal Actions" (1985) 17 N.Y.U. J. Int'l L. & Pol. 287; and G.L. Neuman, "Whose Constitution?" (1991) 100 Yale L.J. 909.

54 *Supra* note 43 at 6. The issue was whether the Sixth Amendment applies to wives of U.S. military personnel living overseas, *i.e.*, persons who are overseas usually because their government has ordered them to be there. The Court ruled that a military dependent cannot be tried by a military tribunal for a capital offence, but must be afforded his or her Sixth Amendment right to trial by jury. This seems a far cry from the facts of cases such as *Schreiber*.

55 *Verdugo-Urquidez*, *supra* note 39.

56 Although the majority found against *Verdugo-Urquidez*, only a plurality (which distinguished *Reid* v. *Covert* as not applicable to the Fourth Amendment) did so on this basis. Justice Kennedy wrote a separate, concurring opinion based upon what has been called the "due process" approach, as did Justice Stevens, whose opinion is more difficult to classify. Justices Brennan and Marshall dissented, adopting the "municipal" approach, and Justice Blackmun also dissented. For a discussion of these different versions of the social compact theory, especially as they relate to this case, see Neuman, *supra* note 53; E. Bentley, "Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad after *Verdugo-Urquidez*" (1994) 27 Vand. J. Trans. L. 329; and E. Fisher, "The Road Not Taken: The Extraterritorial Application of the Fourth Amendment Reconsidered" (1996) 34 Col. J. Trans. L. 705.

57 *Verdugo-Urquidez*, *supra* note 39 at 233.

58 By implication, the Court in *Verdugo-Urquidez* suggests that a citizen of the United States would be protected, while living or travelling abroad, from unreasonable searches and seizures conducted by United States officials. However, whether U.S authorities need prior judicial authorization to conduct a search of a citizen's property located abroad is a separate question: see text accompanying *infra* notes 63–72 and 81–90.

rial application of the *Charter*: that is why the Federal Court of Appeal focused upon the Letter of Request rather than upon what happened in Switzerland.[59] However, in concluding that the Canadian standard for the issuance of a search warrant had to be satisfied before the Letter of Request could be issued, the majority in *Schreiber* does refer to United States law, and to this we now turn in more detail.

A. General

Justice Linden begins his discussion by remarking that "American jurisprudence on the application of the U.S. Constitution's Fourth Amendment is similar to ours," and cites a leading American text for the proposition that,

> [I]f the police of a foreign country, acting to enforce their own law and without instigation by American officials, conduct a search which would not meet the requirements of the Fourth Amendment if conducted in this country, *and the fruits are later offered into evidence here*, the evidence is not subject to suppression on constitutional grounds.[60]

He then refers to the case of *Brulay* v. *United States*, in which Mexican police arrested the defendant without warrant after United States authorities had advised them of the defendant's activities. But the United States Court of Appeals for the Ninth Circuit refused to exclude evidence of large quantities of amphetamine tablets seized in Mexico. The exclusionary rule, according to *Brulay*, is a "court-created prophylaxis designed to deter federal officials from violating the Fourth Amendment," not Mexican officials.[61] Describing the American position as calling for exclusion only when this will deter unconstitutional conduct by American authorities, the majority in *Schreiber* "recasts" the argument along the following lines.

Conceding that there may be no point in applying the *Charter* to the Swiss, Linden J.A., states that "requiring Canadian authorities to comply with the Canadian standard for the issuance of a search warrant when sending a letter of request to foreign authorities would prevent unjustified invasions of privacy by Canadian authorities in the future."[62] Certainly the rationale is the same: deterring or preventing unconstitutional conduct. But the prophylaxis is different. *Brulay* contemplates excluding evidence obtained by a search or seizure *after the*

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[59] See *Terry*, *supra* note 25 and *Harrer*, *supra* note 26. In other words, although s. 8 applies to "a broader class of persons than citizens and permanent residents" (*per* Wilson J. in *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 202), the reach of the *Charter* generally does not extend beyond Canada's borders.

[60] *Schreiber*, *supra* note 3 at 32–33, *per* Linden J.A., citing W.R. LaFave & J.H. Israel, *Criminal Procedure*, 2nd. ed., (St. Paul: West Publishing, 1992) at 119. [Emphasis added.]

[61] *Supra* note 35 at 348.

[62] *Schreiber*, *supra* note 3 at 33, *per* Linden J.A. See also *Barr* v. *U.S. Dept. of Justice*, 819 F.2d 25 (2nd Cir.1987).

fact, at a pre-trial suppression hearing; *Schreiber* requires screening by a justice before the request for assistance with the search is even sent.

Resorting to United States jurisprudence on the exclusionary rule is therefore somewhat problematic: the question whether United States agents must obtain prior authorisation to conduct a search or seizure in relation to a citizen overseas has not been decided.[63] American jurisprudence has focused instead upon the exclusionary rule and the reasonableness requirement. Thus in *United States* v. *Peterson*, the Court of Appeals for the Ninth Circuit held that where U.S. drug agents worked jointly with Philippine authorities to conduct electronic surveillance of a U.S. citizen, their failure to comply with Philippine law was unreasonable under the Fourth Amendment.[64] Nevertheless, the Court permitted use of the evidence by applying the good faith doctrine announced in *United States* v. *Leon*[65] a few years earlier.

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[63] An interesting illustration of this is 18 U.S.C., s. 3292, which provides that, prior to a grand jury returning an indictment, the United States may apply to a court to suspend the running of the statute of limitations. To secure such an order the United States must "indicate" that evidence of an offense is in a foreign country, and the court must find, by a preponderance of evidence, that an official request for the evidence has been made and that it "reasonably appears" that the evidence is in the foreign country—not that there is probable cause for a search or seizure. The term "official request" is defined as including "any ... request for evidence made by ... an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country." But even this procedure is tied to situations where there may be a limitations problem, and it contemplates requests being made to foreign governments *prior* to the return of an indictment and *prior* to any application to court.

[64] *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987). It may be worth noting that U.S. courts have been slow to apply the so-called "silver platter" doctrine to foreign searches. Prior to *Mapp* v. *Ohio*, 367 U.S. 463 (1961), in which the Supreme Court ruled that the Fourth Amendment applied to the states, federal officers requested state officers to conduct searches which "the federal authorities would doubtless conduct themselves but for the exclusionary rule." The judicial solution was to hold that "federal officers could not accomplish by indirection, through request of or participation with state officials, that which they could not constitutionally do themselves": LaFave, *supra* note 32 at 286, 287. However, there is a significant difference where foreign searches are concerned. Federal officials ordinarily do not have authority to conduct foreign searches on their own initiative: they require the cooperation of the foreign jurisdiction. LaFave, a leading commentator in the United States, has therefore contended that this reality means that a "black-or-white" approach to whether the Fourth Amendment applies is not appropriate. He concedes that where American authorities have requested a search in a foreign country, "there is no reason to forego the requirement that the request must be based upon probable cause." But he argues that it may not be appropriate to exclude the evidence where the applicable foreign law permits wider latitude to the searchers, and notes the even wider principle advanced in *United States* v. *Juda*, 46 F.3d 961 (1995), that "a foreign search is reasonable if it conforms to the requirements of foreign law": LaFave, *supra* note 32 at 287–88.

[65] *United States* v. *Leon*, 468 U.S.897 (1984). The Court stated that the American agents had acted reasonably when they relied upon assertions made by the Philippine authorities that all proper authorizations had been obtained.

In *United States* v. *Juda*,[66] the same court relied upon *Peterson* to rule that the Fourth Amendment reasonableness standard applies to United States officials conducting searches of United States citizens in foreign countries. In that case, U.S. Drug Enforcement agents working with Australian authorities placed a beeper aboard a vessel owned and operated by a U.S. citizen.[67] The agents had been told that this was not a violation of Australian law, and the Court ruled that the consequent search was reasonable so long as it conformed to Australian law. It is not clear in *Juda* whether the Court's decision was based on the reasonableness clause of the Fourth Amendment or on the exclusionary rule. But in neither *Juda* nor *Peterson* was there talk of a search warrant from a judge in the United States, only of ensuring that either the Fourth Amendment reasonableness standard had been met or that the officers had acted in good faith. And in these cases United States officials were actually involved in the foreign search.

United States v. *Verdugo-Urquidez* is to much the same effect. It involved an unsuccessful motion to suppress evidence at trial and, in the course of their concurring opinions, Justices Kennedy and Stevens concluded that the warrant clause of the Fourth Amendment did not apply to foreign searches of non-citizens (which is what Verdugo-Urquidez was), because "American magistrates have no power to authorise such searches."[68] Justice Kennedy cited other considerations, but one commentator has described his position as recognising that "the unique demands of international law enforcement require...an approach which protects fundamental rights *while not unduly interfering with the executive's conduct of foreign affairs*."[69] Even Justice Blackmun, who dissented from the ma-

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66 *Supra* note 39, citing *Verdugo-Urquidez* in support.

67 In the United States, whether a search warrant is needed before placing a beeper depends upon the facts. The Court ruled in *United States* v. *Knotts*, 460 U.S. 276 (1983), that the use of a beeper without a search warrant to track a container of chloroform in an automobile did not violate the Fourth Amendment. However, in *United States* v. *Karo*, 468 U.S. 705 (1984), the Court held that a warrant is required to install a beeper where the police lost visual contact with the car carrying the can of ether they were tracking, and the can was moved to four different locations. But for the beeper the police would not have discovered any of these transfers, except the last one (when they used the beeper, as well as visual surveillance, to trace the ether to a house). Nonetheless, the Court permitted the use of the evidence on the ground that the police had established probable cause once they reached the house. In Canada the installation of a beeper violates s. 8: see *R.* v. *Wise* (1992), 70 C.C.C. (3d) 193 (S.C.C.), although in this case, too, the Court admitted the evidence.

68 *Verdugo-Urquidez*, *supra* note 39 at 242, *per* Stevens J. The warrant clause is the latter part of the Fourth Amendment, quoted in the text accompanying note 50 *supra*. Thus warrants require probable cause, and where there is no warrant the search must not be unreasonable.

69 Fisher, *supra* note 56 at 725 [emphasis added]. The "due process" approach advocated by Justice Kennedy is rooted in Justice Harlan's concurring opinion in *Reid* v. *Covert*, *supra* note 43 at 75. Its essence is that, when considering the application of the Constitution when the United States acts abroad, the "question of which specific safeguards ... are ap-

jority's decision that the Fourth Amendment did not protect the defendant, agreed that the fact that U.S. magistrates had no power to authorise searches abroad rendered "the Warrant Clause inapplicable ... ." More importantly for present purposes, he went on to conclude,

> The Fourth Amendment nevertheless requires that the search be "reasonable." And when the purpose of a search is the procurement of evidence for a criminal prosecution, we have consistently held that the search, to be reasonable, must be based on probable cause.[70]

Indeed, it was on this point that Justices Brennan and Marshall, who also dissented, took issue with Justices Stevens and Blackmun. Like the Federal Court of Appeal in Canada, they saw no need to distinguish between domestic and foreign searches, and argued that the need to "protect those suspected of criminal activity from the unbridled discretion of investigating officers is no less important abroad than at home." But they also conceded that in most cases this would not interfere

> [W]ith the Executive's traditional prerogative in foreign affairs because a court will have occasion to decide the constitutionality of such a search *only if the Executive decides to bring a criminal prosecution* and introduce evidence seized abroad. When the Executive decides to conduct a search as part of an ongoing criminal investigation, fails to get a warrant, and then seeks to introduce the fruits of that search at trial, however, the courts must enforce the Constitution.[71]

From this it can be seen that only two of the seven justices in *United States* v. *Verdugo-Urquidez* supported the notion of applying the warrant clause of the Fourth Amendment to foreign searches (at least where non-citizens were involved), and even they appear to have stopped well short of the Federal Court of Appeal's decision in *Schreiber*. That is to say, the United States Supreme Court, unlike the Federal Court of Appeal in *Schreiber*, is content to wait until the government attempts to introduce the fruits of the foreign search at a criminal trial in the United States; it has not contemplated accepting an invitation to intervene at the investigation stage because the government has not secured prior judicial authorisation for a foreign search.[72] However, even if prior

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propriately to be applied in a particular context ... can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case": *per* Harlan J. in *Reid*.

70 *Verdugo-Urquidez*, *supra* note 39 at 253–54.

71 *Ibid.* at 250–51 [emphasis in original].

72 Technically, the courts in *Schreiber* did not actually order that any further action or reliance on the Letter of Request be stayed. Instead, Gibson J. granted the Attorney General's request for an order suspending the effect of Wetston J.'s ruling on the condition that Ottawa request the Swiss to suspend their investigation. See text accompanying *supra* notes 16–17.

authorisation were required under United States law, the privacy rationale developed in *Schreiber* would not be applied to banking records.

B. Banking Records in United States Law

In finding that Schreiber had a reasonable expectation of privacy in his banking records in Switzerland, the majority referred, *inter alia*, to the U.S. Supreme Court's decision in *Katz* v. *United States* and to the Supreme Court of Canada's invocation of that decision in *Hunter* v. *Southam*.[73] In particular, Justice Linden relied upon the oft-cited statement of Stewart J., in *Katz*, and adopted in *Hunter*, that the Constitution's guarantee against unreasonable search and seizure "protects people, not places."[74] As we have seen, this led to the conclusion that, if Schreiber had a privacy interest in banking records in Canada (which the Attorney General conceded), he had one in Switzerland as well. The impact of government action on his privacy interest "is the same in each place, although the places may be different."[75]

The difficulty with this is that the United States Supreme Court ruled twenty years ago that the *Katz* principle, properly understood, should not be extended to banking records. In *United States* v. *Miller*, the Court noted that *Katz* was authority for more than the "people, not places" approach; it was also authority for the proposition that "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." Accordingly, the defendant in that case had no reasonable expectation of privacy with respect to checks, deposit slips and financial statements held by his bank. These documents, wrote Justice Powell, contained information voluntarily given to the bank and exposed to its employees "in the ordinary course of business." Indeed, in enacting the *Bank Secrecy Act* relied upon by the defendant, Congress assumed the lack of any legitimate expectation of privacy concerning such records because the "express purpose" of the Act was to require records to be kept because of their importance in "criminal, tax and regulatory investigations and proceedings."[76] In effect, therefore, the depositor

> [T]akes the risk, in revealing his affairs to another, that information will be conveyed by that other person to the government ... .This Court has held *repeatedly* that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, *even if the information is revealed*

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[73] *Schreiber*, *supra* note 3 at 39–40, *per* Linden J.A., referring to *Hunter* v. *Southam*, *supra* note 22. *Katz* is reported at 389 U.S. 347 (1967) [hereinafter *Katz*].

[74] *Ibid.* citing *Katz* at 351.

[75] *Ibid.* See also the text accompanying *supra* notes 48–49.

[76] *United States* v. *Miller*, 48 L.Ed. 2d 71 (1976) at 79, *per* Powell J.

> *on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.*[77] [Emphasis added.]

In 1991, the United States Court of Appeals, Sixth Circuit, applied *Miller* to a United States government request for assistance in obtaining bank records in Switzerland. The Court was unmoved by the defendant's argument that Switzerland's strict banking secrecy laws meant that he had a reasonable expectation of privacy protected by the Fourth Amendment.[78]

Justice Linden acknowledges these cases, but only in a footnote; and he notes that the "U.S. Courts' position does not turn on ... whether Government officials should be required to satisfy domestic procedural standards before soliciting foreign assistance."[79] This is true; as we argue above, United States courts have not gone that far. But it is also true that, if there is no privacy interest in banking records, the case for requiring the federal government to go before a justice before requesting the assistance of a foreign government to search such records collapses.[80] Even if there is a reasonable expectation of privacy in bank records in Canada, by focusing upon the person and not the place, Justice Linden virtually excludes consideration of the question whether such an expectation should extend to records that have been placed outside Canada, and therefore effectively beyond the reach of Canadian law.

C. Warrantless Searches

The real issue is therefore: what does it mean to say that s. 8 of the *Charter* protects citizens or others who have assets abroad and who are the subject of criminal investigation by Canadian authorities?

Probably the most important United States precedent relied upon by Justice Linden in this respect is a decision of the California District Court, *Collelo* v. *United States Securities and Exchange Commission*.[81] In that case the Court found that a request by the S.E.C. that was made pursuant to a mutual assistance

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[77] *United States* v. *Miller*, *supra* note 76. Although the Supreme Court of Canada rejected this sort of "risk" analysis in *R.* v. *Duarte* (1990), 53 C.C.C. (3d) 1 (S.C.C.), it may take a different view where the unique dangers of unauthorised electronic surveillance are not involved. On the other hand, in *Regina* v. *Donaldson* (1990), 58 C.C.C. (3d) 295 (B.C.C.A.), the B.C. Court of Appeal ruled that clients of stock brokers have a reasonable expectation of privacy in the records held by their brokers.

[78] *United States* v. *Sturman*, 951 F.2d 1466 (1991). The privacy of Swiss banking laws was also a significant factor in the Mulroney and Schreiber litigation.

[79] *Schreiber*, *supra* note 3 at 96.

[80] In light of United States law, it is at least debatable whether the Attorney General should have conceded that Schreiber had the sort of privacy interest in his banking records that was at issue here. Given the trend of Canadian law on this point, however, it is understandable: see *Schreiber*, *supra* note 3 at 42–45, *per* Linden J.A., and cases cited therein.

[81] *Collelo*, *supra* note 43.

treaty, and that resulted in a Swiss asset freeze, violated the Fourth Amendment. Relying upon the "colourful" statement by Justice Black in *Reid* v. *Covert* that has already been cited, District Judge Paez ruled that the government cannot limit a citizen's constitutional rights by treaty.[82] Consequently, the fact that the S.E.C. had complied with the "reasonable suspicion" standard in the treaty could not validate an otherwise unconstitutional search or seizure, *i.e.*, one that had to be based upon the Fourth Amendment's requirement of "probable cause."

In *Schreiber*, Justice Linden concedes that *Collelo* is a treaty case, but maintains that it is nonetheless persuasive authority for "the broader point" that a government "cannot use the need for international assistance as an excuse to justify its own constitutionally impermissible conduct."[83] Again, this point is true. But the fact remains that there was no question in *Collelo* of prior authorisation for the request. District Judge Paez put the point this way:

> To obtain a warrant, of course, the government must have probable cause. *When proceeding without a warrant, as here, the government's "conduct is governed by the other half of the Fourth Amendment*, which declares the right of the people to be secure 'against unreasonable searches and seizures.' But it is clear that such an arrest or search is unreasonable if not based upon probable cause ... ."[84] [Emphasis added.]

Judge Paez quoted from *Arizona* v. *Hicks*, to the effect that "[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, *i.e.*, the standard of probable cause."[85] The constitutionally impermissible conduct in *Collelo*, therefore, was not that the United States government proceeded without having a justice apply the standard for the issuance of a warrant; it was that, relying on the text of the mutual assistance treaty, it had acted on the wrong standard: reasonable suspicion rather than probable cause.[86]

To sum up: American jurisprudence on the application of the Fourth Amendment may, as the majority in *Schreiber* contends, be similar to ours; but there are also significant differences between that jurisprudence and the law as expounded in *Schreiber*. In the first place, the U.S. Supreme Court has ruled that banking records do not come within the privacy principle enunciated in the *Katz* case; the majority in *Schreiber*, however, cites *Katz* to the opposite ef-

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82 "Colourful" is how Linden J.A. describes Justice Black's statement.

83 *Schreiber*, *supra* note 3 at 34–35, *per* Linden J.A.

84 *Collelo*, *supra* note 43 at 753, quoting LaFave & Israel, *supra* note 60.

85 *Ibid.* quoting *Arizona* v. *Hicks*, 480 U.S. 321 (1987) at 327.

86 The defendants in *Collelo* also argued that their Fifth Amendment right to due process had been violated, in that they had been deprived of their property without a hearing. The Court agreed that there had been a Fifth Amendment violation, but ruled that the defendants were entitled only to a *post*-deprivation hearing.

fect, and extends it even to banking records kept outside the country—an extension that has been specifically rejected in the United States.[87] Secondly, although the Fourth Amendment may apply to a foreign search or seizure, the focus in American jurisprudence has been upon suppressing evidence or making a declaration of invalidity *after* the event, not upon requiring prior judicial authorisation.[88] The third difference is related to the second: United States courts have not held that a request for a foreign government to conduct a search, "prior to the search ... taking place," constitutes government action attracting Fourth Amendment protection.[89] To be sure, the majority in *Schreiber* stops short of describing the request as a search; instead, they characterise it as jeopardising Schreiber's "security" against unreasonable search and seizure, citing in support the reasonable expectation that the Swiss would act upon it. Hence the conclusion is that, in addition to reasonable grounds for the request, the grounds must be certified on oath to a justice. But this is an argument that moves rather quickly—at any rate, too quickly for us.[90]

IV. OPTIONS

BROADLY SPEAKING, there appear to be three possible solutions to the problem of foreign searches as posed by the *Schreiber* case. The first is the *status quo ante*, or a tightened up version of it: that is, a request procedure restrained only by international law and executive convention. The *Charter* would therefore apply neither to the gathering of evidence abroad nor to the request process at home. The second is the solution reached by the majority in the Federal Court of Appeal: subjecting all such requests not only to the reasonableness standard, but to prior authorisation by a justice based upon information provided on oath. The *Charter* on this approach would continue to be inapplicable to the evidence gathering process abroad, but would apply to the request process. The third possibility is to adopt an approach not unlike that in the United States: the *Charter*

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87 See *United States* v. *Sturman*, *supra* note 78.

88 Although the reasoning is not entirely clear, even the two dissenting justices in the leading case of *United States* v. *Verdugo-Urquidez* do not appear to have approved of fettering executive authority in foreign affairs by adjudicating on searches in advance of a criminal prosecution: see *supra* notes 71–72 and accompanying text.

89 The quoted passage is from *Schreiber* Trial Judgement *supra* note 10 at 156, *per* Wetston J.: "the question to be addressed in the case at bar is whether the standard required by section 8 of the *Charter* should apply to the letter of request procedure in Canada, prior to the search or seizure taking place."

90 *Cf.* the dissenting reasons of Stone J.A., who states at 85 that this reasoning "begs the question of whether the request itself represented a 'search' or 'seizure.' The fact that the Swiss authorities could be expected to act on the request is surely not the same as saying that the request constituted a 'search' or a 'seizure' in Canada."

will either be confined to the request process or (with appropriate theoretical adjustments) be conceded a degree of extra-territorial application, but without prior judicial assessment of whether the reasonableness standard for a search and seizure has been met.[91] An assessment of these options follows.

A. Option One

It seems difficult to dispute that the Federal Court and *The Globe and Mail* are justified in taking the view that the first option, at least as it existed in the autumn of 1995, served no one very well in the Mulroney and Schreiber cases. Indeed, the more that one learns about the process involved in deciding to send the notorious Letter of Request—and, more importantly, the more one is prevented from learning about it—the more inadequate that process appears. For example: columnist Jeffrey Simpson recently wrote that the R.C.M.P. code of conduct hearing against Staff Sergeant Fiegenwald should be open to the public, something Fiegenwald was also believed to want. Under the *R.C.M.P. Act*,[92] the hearing must be held *in camera*, so the *Ottawa Citizen* went to court to argue that this was inconsistent with s. 2 of the *Charter* (freedom of the press). Simpson described an open hearing as "Canadians' best and perhaps only chance to know what happened during the Airbus affair ... ."[93]

It may well have been. Two weeks later, the R.C.M.P. announced that Fiegenwald was leaving the force and that the proposed code of conduct hearing was unnecessary because the charges had been dropped. In a written statement Fiegenwald said he had received a job offer he "couldn't refuse" and that sometimes "something good arises from a bad situation."[94] A bad situation, indeed! Former Conservative cabinet minister John Crosbie was Minister of Transport in 1988, when the Airbus deal was made. In his recently published memoirs he maintains,

> There were no kickbacks ... . The "scandal" was concocted by Boeing, a sore loser, which spread baseless rumours about its rival's sales tactics. It was seized on by certain "investigative" journalists who were not prepared to let the truth interfere with their single-minded pursuit of Mulroney ... . The air of scandal was fertilized by the [R.C.M.P.], which conducted an incompetent and superficial investigation ... by the top officials in Justice, who neglected to vet the letter before it was sent to the Swiss

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91 Theoretical adjustment is required because the prevailing Canadian theory is territorial: see the discussion of the different approaches to applying constitutional rights to foreign searches in the text accompanying *supra* note 53.

92 R.S.C. 1985, c. R-10.

93 *The Globe and Mail* (14 October 1997).

94 *The Globe and Mail* (30 October 1997).

> [and by] Justice Minister Allan Rock, dreams of 24 Sussex Drive dancing in his head, [who] became part of the lynch mob.[95]

One does not have to subscribe to Mr. Crosbie's well-known and self-admitted penchant for rhetorical excess to agree that the evidence, to date, makes it appear that the wording of the Letter of Request was ill-conceived. If there were grounds sufficient to meet the international law standard of suspicion (and apparently the Swiss thought or were prepared to assume, that there were), they appear in retrospect to have fallen far short of any higher standard.[96]

Moreover, although the issue in the United States cases discussed above was not prior judicial authorisation for a foreign search or seizure, none of the decisions that are analogous to *Schreiber* involved anything as unsupported as Kimberly Prost's letter to the Swiss apparently was. For example, in *Verdugo-Urquidez* there was an arrest warrant;[97] in *Collelo* there was an S.E.C. lawsuit, albeit filed the day *after* the S.E.C. requested the Swiss to freeze Collelo's bank accounts;[98] and in *Miller* there were grand jury subpoenas.[99] Even in *Terry*, the leading Canadian case, there was a Canada-wide warrant and an extradition request in addition to the informal requests made by the R.C.M.P.[100]

So something more is needed. According to the Deputy Minister of Justice, changes to Ottawa's procedures for making requests abroad have already been made. These include measures to "improve" confidentiality, to make the wording of requests "more precise," and to "ensure that all sensitive requests are reviewed at a senior level."[101] A respectable case can be made that, given the realities of international investigations, this or (better yet) an even more carefully monitored process is sufficient protection for assets located abroad. It would not involve s. 8 protection; but, as contemplated in *Harrer* and *Terry*, an accused could still argue that the search compromised the fairness of his trial in Canada under *Charter* s. 11(d), or the principles of fundamental justice under s. 7.[102] Moreover, it is always open to parliament, as a matter of policy, to enact greater protections.

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[95] J. Crosbie, *No Holds Barred: My Life in Politics* (Toronto: McClelland & Stewart, 1997) at 422–423.

[96] See text accompanying *supra* note 4.

[97] *Verdugo-Urquidez*, *supra* note 39.

[98] *Collelo*, *supra* note 43.

[99] *United States* v. *Miller*, *supra* note 76.

[100] *Terry*, *supra* note 25.

[101] *Globe and Mail* (23 October 1997), letter to the editor by Deputy Minister of Justice George Thomson.

[102] See *Terry*, *supra* note 25 and text accompanying *supra* note 34. Trial fairness and exclusion of evidence is considered *infra* notes 108–109 and accompanying text.

B. Option Two

The second option is that of the Federal Court of Appeal, *i.e.*, subjecting the request in Canada to full s. 8 protection. However, it is surely arguable that this solution prescribes surgery in a situation where diet and exercise will do the job just as well. At the very least, it seems to have side-lined discussion of the extent to which people should have a reasonable expectation of privacy in their banking records and, more importantly, the extent to which assets and records they have moved beyond the territorial reach of Canada's laws should nonetheless enjoy the same sort of protection that is accorded assets and records in Canada. By invoking the "people, not places" maxim in *Katz* v. *United States*, and by holding that a mere request for a search is sufficient government action to attract s. 8 protection, the majority in *Schreiber* avoided discussion of why people who prefer Switzerland's banking laws to Canada's should not also be content with Swiss laws respecting search and seizure. As McLachlin J. said in *Terry*, "it is the decision of the suspect to go abroad that triggers the application of the foreign law."[103] Why is it not equally the decision of an individual to bank abroad that triggers the application of foreign law? In short, if you want s. 8 of the *Charter* to apply to requests to search your bank accounts, bank in Canada.

A search or seizure of a Canadian citizen's property overseas by a foreign government pursuant to a request by Canada is not the same as a domestic search. First, the search is conducted by the foreign government, not by Canada, and the better view is that the search—not the request made in Canada—is what interferes with any privacy interest that may exist. Second, the lack of prior judicial authorisation does not necessarily exclude the courts: under options one and three they have their say when the case is brought to trial, although that say is greater under option three. Third, *Schreiber* is a very unusual case on its facts: a former prime minister was implicated, and his name became public. Mulroney's legal recourse was to sue for libel, and he did. Schreiber and Moores have also launched libel actions. Had the object of this investigation been a suspected drug dealer, and had his name become public, he too could sue for libel. Can these people really say that their privacy has been violated, not by the search carried out by the Swiss authorities, but by a request letter written in Canada? Certainly their reputation may be injured by a request that becomes public, but that is an injury that can be remedied by a civil action.

Obviously, reasonable people may differ over this sort of issue. That is why it deserves more discussion and analysis than it has received, both in the press and in the courts. That it did not is all the more remarkable when one considers *(i)* that all the justices seem to have agreed that there was no obviously binding precedent, *Terry* included, and *(ii)* that requiring the sort of prior authorisation inherent in the paradigm set forth in *Hunter* v. *Southam* (notwithstanding that even *Hunter* seems to contemplate a relaxing of the paradigm at the nation's

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[103] See text accompanying *supra* note 33.

borders) will involve "judicialising" Canada's relations with other nations in a way that may inordinately fetter executive authority. There is also surely a question as to whether Canada's overburdened justice system really ought to have justices of the peace—the officials who usually hear applications for search warrants—vetting requests for overseas assistance in criminal investigations.[104]

C. Option Three

The third possibility lies in the fact that *Hunter* v. *Southam* itself contemplates a spectrum of privacy rights or, more accurately, of reasonable expectations of privacy. These range from the high degree of protection accorded bodily orifice searches, to the lower degree accorded regulatory searches or searches where state security is involved, and ultimately to situations where really no reasonable expectation of privacy exists. Surely it is open to Canadian courts, if they are unwilling to affirm the first option and find that foreign bank accounts are not protected by s.8, to rule that they are also not at the end of the privacy spectrum that demands prior authorisation. For this reason, the existing *Treaty between Canada and the Swiss Confederation on Mutual Legal Assistance in Criminal Matters* may be instructive.

As stated above, where Canada wants the Swiss to conduct a search, the treaty requires Ottawa to include with its request "a declaration by a competent Authority ... that such a measure would be permissible if the subject-matter of the request were located [in Canada]."[105] Assuming that "competent authority" includes a senior official of the Department of Justice, two interpretations of this article seem possible. The first is that the official in question need declare only that, if the Swiss were making such a request of Canada, a procedure exists here for processing it, likewise when the request is made of Switzerland by Canada. This is simply an expression of mutuality: in neither case is the requested country guaranteeing or making a significant prediction about the outcome of their procedure. The second interpretation is that the official must declare that, were such a request presented on oath before a justice in Canada, a search warrant would in all likelihood issue; in other words, that there are reasonable and probable grounds for the request. This also is not a guarantee, but it does involve a declaration of opinion that may subsequently be subjected to strict judicial scrutiny.

If the second interpretation is adopted, s. 8 need function only in the way that the Fourth Amendment does in the American cases discussed above. In

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[104] In *Schreiber*, *supra* note 3 at 52–54, Linden J.A. suggests that, in the absence of a set procedure, the R.C.M.P. could have applied to a provincial court judge under s. 487.01(c) of the *Criminal Code* (enacted to fill any potential "gap" in the law) for a search warrant authorizing the Department of Justice to use "any investigative technique or procedure" to carry out a search.

[105] See text accompanying *supra* note 6.

other words, the "warrant clause" (prior authorisation in the *Hunter* v. *Southam* paradigm) would not apply, but the requirement that the search be based upon something more than mere suspicion (in the United States, "probable cause") would; and the questions of the constitutional validity of the search or seizure, and whether the evidence thereby obtained should be excluded, would be left for trial. Domestically, the Supreme Court of Canada has held that where there has been no prior judicial authorisation, a search or seizure will be unreasonable "unless it is authorized by law, the law itself is reasonable and the manner in which the search was carried out is reasonable."[106] For foreign searches conducted at the request of Canada this might depend—as suggested in *United States* v. *Juda*[107]—solely upon Swiss law; or, if the procedure is to require a declaration along the lines suggested above, the test would have to be expanded to include a finding that there were indeed reasonable grounds to make the request.

If upon trial in Canada it were shown that reasonable grounds for the search or seizure did not exist, it would be open to the accused to argue that the evidence obtained should be excluded pursuant to s. 24(2) of the *Charter*, as interpreted by the Supreme Court of Canada in *Regina* v. *Collins*[108] and subsequent cases. The fact that exclusion of such evidence on these authorities is likely only if the *Charter* breach is sufficiently serious to overcome the disrepute that would be caused to the administration of justice by its exclusion, seems reasonable, and reflects the situation for domestic searches that do not involve "conscriptive" evidence.[109] To the extent that it may not parallel domestic searches,

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106 *Regina* v. *Borden*, [1994] 3 S.C.R. 145 at 165.

107 *Supra* note 64.

108 *Regina* v. *Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.), stating that three sets of factors are relevant to deciding whether unconstitutionally obtained evidence should be excluded pursuant to s. 24(2). These are the seriousness of the *Charter* breach, the effect of the exclusion upon the fairness of the trial, and whether exclusion would bring the administration of justice into disrepute.

109 See *Regina* v. *Stillman*, [1997] 1 S.C.R. 607 at 668–671 and *Regina* v. *Feeney*, [1997] 2 S.C.R. 13 at 58–60, where the Court distinguishes between conscriptive and non-conscriptive evidence. The admission of the former, if obtained in violation of the *Charter*, affects the fairness of the trial. Evidence is conscriptive if obtaining it involved "the accused being compelled to incriminate himself either by a statement or the use as evidence of the body or bodily substances." It will be excluded as compromising the fairness of the trial unless the Crown shows, on a balance of probabilities, that the evidence would have been discovered by non-conscriptive means. On the other hand, "if the accused was not compelled to participate in the creation or discovery of the evidence (*i.e.*, the evidence existed independently of the *Charter* breach in a form useable by the state), the evidence will be classified as non-conscriptive." Bank records on this definition would appear to be non-conscriptive evidence, and therefore admitting them will not affect the fairness of the trial. They will be excluded only if the *Charter* breach is sufficiently serious to outweigh the dis-

we think—for the reasons already given—that rights "do not always look the same when they travel abroad."[110]

In short, what happened to the former Prime Minister was not only without warrant, it may also have been unwarranted in the broader sense of that term. The flaws in the process as it existed in the autumn of 1995 make the latter determination a difficult one to make, but the solution for Mr. Mulroney was a libel action. Is the solution for the justice system the wholesale application of s. 8 of the *Charter* to requests for foreign searches? Might it not be better to adopt a version of the approach contained in the United States jurisprudence, or even to reform the process but leave the *Charter* out of it entirely? The answer, at least in the case under consideration, depends upon a further question, one that has received scant consideration thus far and one which we hope will be squarely addressed in the Supreme Court of Canada. To what extent should the law regard foreign bank accounts—and by extension any assets situated abroad—worthy of the sort of s. 8 protection requested and granted in *Schreiber?*

V. POST-SCRIPT

As this article was going to press, the Supreme Court of Canada brought down its decision in *Schreiber* v. *Canada.*[111] The Court held 5:2 (Gonthier and Iacobucci, JJ., dissenting) that the appeal from the decision of the Federal Court of Appeal should be allowed.

Four of the majority justices (L'Heureux-Dube, McLachlin, Bastarache, and Binnie, JJ.) stated that the sending of a letter of request does not, by itself, engage s. 8 of the *Charter.* The fifth (Lamer, C.J.) was of the view that the *Charter* generally does not apply to a letter of request but that, in the circumstances of this case, Schreiber had no reasonable expectation of privacy.

The Court also stated that, upon trial in Canada, s. 7 may require the exclusion of evidence obtained abroad by foreign officials, if this is necessary in order to preserve the fairness of the trial.

We intend to write a short analysis of the Supreme Court's decision, which will appear in the forthcoming issue of the *Manitoba Law Journal.*

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repute that would be caused to the administration of justice by their exclusion: see D. Paciocco & L. Stuesser, *The Law of Evidence* (Concord: Irwin Law, 1996) at 175.

[110] Fisher, *supra* note 56 at 706. See also McLachlin J., in *Terry*, *supra* note 25, who states at 218 (admittedly without addressing the precise issue here) that "it is not in fact unfair to treat evidence gathered abroad differently from evidence gathered on Canadian soil."

[111] *Schreiber* v. *Canada* (1998) 158 D.L.R. (4th) 577.