COMMENT

Schreiber v. *Canada* in the Supreme Court: Keeping the *Charter* at Home—But Not For Long

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I. INTRODUCTION

IN OUR FIRST ARTICLE,[1] we suggested that there were three possible solutions to the problem of s. 8 of the *Charter* and letters of request to foreign governments presented by the facts of *Schreiber* v. *Canada (A.G.)*.[2] First, the Supreme Court could accept the government's position and hold that s. 8 applies neither to letters of request nor to the gathering of evidence abroad. Second, the Court could agree with the Federal Court of Appeal and rule that letters of request are protected by the full canopy of s. 8 domestic search and seizure requirements, including prior judicial authorisation. Third, the Court could adopt the approach taken by courts in the United States and hold that, although the *Charter* does apply to letters of request, prior judicial authorisation is not necessary. As

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1 R. Harvie & H. Foster, "Unwarranted Behaviour: The Airbus Affair, United States Law, and Searching Foreign Bank Accounts" (1997–98) 25 Man. L.J. 421. Please note that in the sixth and seventh lines from the bottom of page 447, the word "not" was incorrectly inserted. The phrase, "The fifth (Lamer C.J.C.) was of the view that the *Charter* generally does not apply to a letter of request but ..." should instead read "The fifth (Lamer C.J.C.) was of the view that the *Charter* generally *does* apply to a letter of request but ..." [emphasis added].

2 As set out in *Schreiber* v. *Canada (A.G.)* (1996), 116 F.T.R. 151, *per* Wetston J. and *Schreiber* v. *Canada (A.G.)* (1997), 210 N.R. 9 (F.C.A.). After the ruling by Wetston J., the attorney general applied for an order suspending its effect pending determination of the appeal. Gibson J. granted a temporary suspension: see *Schreiber* v. *Canada (A.G.)* (1996), 111 F.T.R. 231. For a discussion of these facts, see Harvie & Foster, *supra* note 1 at 421–25.

it turns out, the Supreme Court reversed the courts below and adopted the government's position on the narrow issue of whether the *Charter* applies to letters of request, ruling four to three that it does not.[3]

Throughout the litigation the Crown argued that s. 8 was not applicable, and relied on *R.* v. *Terry* and *R.* v. *Harrer*.[4] Both of these cases involved Canadian citizens being interrogated by American police under circumstances that violated s. 10(b) of the *Charter*. And in both the Supreme Court of Canada held that, in the absence of special circumstances, s. 10(b) rights end at the Canadian border, at least when the interrogation is carried out by foreign law enforcement officers. In *Schreiber*, the government argued that Swiss authorities carried out the search and seizure in that case and that no special circumstances existed.[5]

Mr. Schreiber agreed that s. 8 does not apply to the Swiss; but he argued that Canadian government officials had to satisfy their own domestic standard for the issuance of a search warrant before the letter of request could be sent to Switzerland.[6] This, he contended, meant that there had to be prior judicial authorisation in Canada for the search.

II. THE MAJORITY

MADAM JUSTICE L'HEUREUX-DUBÉ, writing for a majority of four, rejected Schreiber's contention and ruled that letters of requests are not subject to s. 8 scrutiny. She began her judgment by pointing out that s. 32 limits the *Charter*'s application to matters within the authority of "Parliament and government of Canada" and "the legislatures and government of each province." The preparation and sending of the letter of request was the only activity engaged in by the government of Canada, so there was no question of the *Charter* applying to anything that took place in Switzerland. She then turned to Schreiber's contention that the letter of request was governed by s. 8.

Using a domestic search and seizure analogy, Madam Justice L'Heureux-Dubé ruled that s. 8 does not apply to letters of request. She pointed out that, if authorities in one province request the authorities in another province to conduct a search or seizure, it is not the request that is subject to s. 8 scrutiny, but

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3 *Schreiber* v. *Canada*, *supra* note 1. The four were L'Heureux-Dubé, McLachlin, Bastarache and Binnie JJ.A. However, in the result the decision was five to two because, although Lamer C.J.C. agreed with the dissenting justices Gonthier J. and Iacobucci J. that the *Charter* did apply, he held that, in the circumstances, Schreiber had no reasonable expectation of privacy.

4 *R.* v. *Terry*, [1996] 2 S.C.R. 207; *R.* v. *Harrer*, [1995] 3 S.C.R. 562.

5 For a discussion of the special circumstances see text accompanying notes 18–19, *infra*.

6 *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 154.

the search warrant and actions taken pursuant to the warrant. Arguing by analogy, she concluded that s. 8 does not apply to the letter of request in Canada. Responding to the dissent's assertion that the right of privacy is individual and, therefore, "it matters not where the search and seizure took place," Justice L'Heureux-Dubé argued that, although s. 8 does protect people, not places, it protects them only from actions by the government of Canada.[7] In *Schreiber* the search and seizure was carried out by Swiss authorities in Switzerland.

III. THE CONCURRING CHIEF JUSTICE AND THE DISSENT

DISSENTING JUSTICE IACOBUCCI'S judgment fits our second possible solution (full application of s. 8 to letters of request), but it is more difficult to place Chief Justice Lamer's concurring opinion into our framework. On the one hand, the chief justice did not adopt the position that courts have taken in the United States, *i.e.*, that the constitution applies but there is no need for prior judicial authorisation. (None of the justices really discuss U.S. law.) On the other hand, unlike dissenting Justice Iacobucci, he did not agree with the conclusion reached in the courts below, *i.e.*, that the search was unreasonable because there was no prior authorisation. Nevertheless, these two judgements focus on what we consider to be the critical issue, left largely unexplored in the lower courts: whether someone who removes bank assets from Canada to another country has a reasonable expectation of privacy in those assets.[8]

Chief Justice Lamer and dissenting Justice Iacobucci agreed that letters of request prepared and transmitted by Canadian governmental officials are subject to the *Charter*. They also agreed upon the general principles governing s. 8. First, the purpose of s. 8 is to protect the individual's reasonable expectation of privacy. Second, an expectation of privacy varies with the context that brings the individual into contact with the state. In this regard, both justices quoted from *R* v. *Plant*[9] in which Sopinka J. established guidelines for determining whether an individual has a reasonable expectation of privacy.

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained, and the seriousness of the crime being investigated allow for a balancing of the societal interests in protecting individual dignity, integrity, and autonomy with effective law enforcement.[10]

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7 *Supra* note 2 at para. 32.

8 Harvie & Foster, *supra* note 1 at 431, 444–45.

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

10 *Supra* note 9 at 293. Lamer C.J.C. quoted the language at para. 21, Iacobucci J. at para. 52.

They also agreed that bank records are the sort of information that individuals expect to remain confidential, because they form part of the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state."[11] Accordingly, there is little doubt that if Schreiber had banking records in Canada subject to a criminal investigation he would have a reasonable expectation of privacy, and that prior judicial authorisation is required before such records can be searched.

But the two parted company when it came to the significance of the fact that Schreiber's bank account was in Switzerland, not Canada. According to the Chief Justice, Schreiber's reasonable expectation of privacy is no greater than the privacy afforded by the law of the state in which the bank records are located. Quoting McLachlin J.'s statement in *R* v. *Terry* that "[p]eople should reasonably expect to be governed by the laws of the state in which they currently abide,"[12] he reasoned that individuals who move bank accounts from Canada to foreign countries are presumed to know the banking laws of the foreign state and to take these laws into account when they decide to move their assets. As a result, such individuals cannot reasonably expect a higher degree of privacy than is provided by those laws. In short, "if you want s. 8 of the *Charter* to apply to requests to search your bank accounts, bank in Canada."[13]

Iacobucci J. disagreed. According to him, Schreiber had a reasonable expectation of privacy in his Swiss bank records because such records, regardless of location, reveal intimate details of a person's financial life. There is also a confidential relationship between the client and the bank: in order for Canadian authorities to obtain Schreiber's banking information, they needed the assistance of a third party—the Swiss authorities. Moreover, the search and seizure, although carried out by Swiss authorities, was initiated by authorities in Canada and, according to Iacobucci J., Schreiber had a reasonable expectation that Canadian officials would not request a search of his bank records in Switzerland without some form of prior judicial authorisation. In sum, the issuing of the letter of request by the Attorney General placed Schreiber's privacy interests in jeopardy.[14] And the dissenters' remedy is not only to exceed the international law standard of mere suspicion by requiring reasonable grounds; it is to require prior judicial authorisation.[15]

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[11] *Ibid.*, Lamer C.J.C. at para. 22, quoting Sopinka J. in *Plant*.

[12] *Terry*, *supra* note 4 at para. 24.

[13] Harvie & Foster, *supra* note 1 at 444.

[14] *Schreiber*, *supra* note 1 at paras. 55–56.

[15] See Harvie & Foster, *supra* note 1 at 422.

Although the majority and concurring judgements leave the international law standard of suspicion intact, in the United States there is precedent holding that, although there is no need for prior judicial authorisation, letters of request must meet the probable cause (reasonable grounds) requirement of the Fourth Amendment. [16] As we indicated in our first article, the apparently ill-conceived wording of the letter of request, the absence of process prior to sending the letter,[17] and the lack of confidentiality that led to the Mulroney lawsuit all suggest that something more is needed in Canada, as well. And, in fact, Ottawa has indicated that it will take measures to improve confidentiality, to make the wording of letters of requests more precise, and to ensure that senior officials review sensitive requests.[18]

We applaud this, and the majority decision in *Schreiber*, as a better solution than that proposed by the dissent and in the courts below. Having Parliament establish standards and procedures for issuing letters of request—including a requirement that requests be based upon reasonable grounds—still seems to us a better approach than requiring prior judicial authorisation.

Although courts may eventually have to face the question of what standard should apply when evidence from a search overseas conducted pursuant to a letter of request is challenged as adversely affecting the fairness of the trial under ss. 7 or 11(d), this is a different matter. And in developing these standards and procedures, policy makers—and courts—might learn from the U.S. experience here, as well.

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[16] Like *Schreiber*, United States case law does not require authorities to obtain prior judicial approval before sending this sort of letter of request to a foreign government. Nevertheless, this does not mean that courts will accept mere suspicion as the standard for letters of request or searches overseas. In *Collelo* v. *United States Securities and Exchange Commission*, 908 F. Supp. 738 (1995), a United States Federal trial judge ruled that a letter of request sent pursuant to a treaty that demanded only reasonable suspicion violated the probable cause requirement of the Fourth Amendment. The trial judge ruled that a treaty cannot abridge the constitutional rights of United States citizens: see Harvie & Foster, *supra* note 1 at 439–441. In *United States* v. *Juda*, 46 F.3d 961 (1995), the court of appeals for the Ninth Circuit ruled that the Fourth Amendment reasonableness standard applies to United States officials conducting searches of United States citizens in foreign countries. The same court in *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987), held unreasonable an electronic surveillance of a United States citizen overseas conducted in violation of Philippine law. The court permitted the use of the evidence by applying the good faith doctrine announced in *United States* v. *Leon*, 468 U.S.897 (1984), see generally Harvie & Foster, *supra* note 1 at 435.

[17] In *Terry* and *Harrer*, *supra* note 4, arrest warrants had been issued. And in the United States many of the relevant cases involved the issuance of arrest warrants or the returning of grand jury indictments prior to the request. It must be emphasised, however, that there is no requirement that legal action be initiated before making the request.

[18] G. Thomson (Deputy Minister of Justice, Canada), Letter to the Editor, *The Globe & Mail* (23 October 1997) A22, quoted in Harvie & Foster, *supra* note 1 at 443.

IV. CONCLUSION

UNTIL VERY RECENTLY, *Schreiber* v. *Canada (A.G.)* was the last in a series of cases to hold, or in which the parties stipulate, that the *Charter* stops (so to speak) at the water's edge. As we said, to us this seems the right decision, and a welcome repudiation of the broad extension of the *Charter* contemplated in the courts below and in the dissent in the Supreme Court of Canada. In *Terry*, however, the Court pointed out that there are special circumstances in which s. 10(b) might apply beyond Canada's borders.[19] These circumstances include offences committed on aircraft, war crimes, and special cases where a state might formally consent to giving another state jurisdiction within its boundaries.[20] In *Harrer*, La Forest J. went further when he mused,

> [H]ad the interrogation about a Canadian offence been made by Canadian peace officers in the United States in circumstances that would constitute a violation of the *Charter* had the interrogation taken place in Canada, an entirely different issue would arise.[21]

Although La Forest J. did not identify, precisely, what that issue is, soon afterwards the Supreme Court Canada was faced in *R.* v. *Cook* with the fact scenario he had described, albeit involving a U.S. rather than a Canadian suspect.[22] And on those facts the Court ruled seven to two that a U.S. citizen who commits a crime in Canada and flees to the United States *is* protected by s. 10(b) if interrogated by Canadian peace officers.

Needless to say, this decision must be put beside *Schreiber*, which states that the *Charter* does not apply to letters of request and that Canadian citizens who move their assets outside of Canada are not protected by s. 8. It also begs comparison with *Terry* and *Harrer*, which state that Canadian citizens who commit crimes in Canada and flee to the U.S. are not protected by s. 10(b) when interrogated by U.S. law enforcement officials, even at the request of Canadian authorities. Why then should Cook, a U.S. citizen charged with murder in Canada and interrogated in the U.S. by Canadian police, have the benefit of s. 10(b), if Terry and Harrer, both of whom were apparently Canadian citizens charged with Canadian crimes and questioned in the U.S. by Americans, do not? The answer seems to lie in the Supreme Court of Canada's starting point. The Court focussed exclusively upon government agency, and upon which law enforcement officials should fall within s. 32(1) of the *Charter*, to the exclusion of the equally important question of who should be a rights holder under ss. 8

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19 *Terry*, *supra* note 4 at 215.

20 See Harvie & Foster, *supra* note 1 at 428.

21 *Harrer*, *supra* note 4 at 571.

22 *R.* v. *Cook* (1998), 230 N.R. 83 (SCC).

and 10(b). Also relevant is the Court's relatively sudden preference for extra-territorial application of s. 10(b), as opposed to standing by the "water's edge" approach and applying ss. 7 and 11(d) of the *Charter* to any subsequent trial in Canada if what happened abroad might affect the fairness of that trial.[23]

But these issues, fascinating as they are, would take us well beyond the Supreme Court's decision in *Schreiber*. They must perforce await another day, and another forum.

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[23] See *Harrer*, *supra* note 4 and Harvie & Foster, *supra* note 1 at 428, 443. In fairness, the Court asserts applying the *Charter* in this fashion does not violate "the principle of state sovereignty by imposing Canadian criminal law standards on foreign officials and procedures," and that the case is based on "very particular facts." But Iacobucci J. concedes that it "marks an exception to the general rule in public international law that a state cannot enforce its laws beyond its territory." *Cook*, *supra* note 22 at 115–116.