jurisdictional and substantive barriers to the prosecution, conviction and punishment of hijackers.

Even these legal deficiencies have not been completely cured; as long as States like France, Mexico and Spain choose not to take part in or accept the end product of the multilateral approach, preferring to enact their own, different national legislation, then the multilateral mechanism cannot be regarded as the only possible approach. Some have doubted, indeed, whether regulation in this field through the means of the international convention has even any minimal value or effectiveness.[26] This writer would not share this rather negative view. To be sure, the efforts in multilateral form have not, thus far, provided the ultimate solution, and it is highly unlikely that such efforts will, alone, do so in the future. Yet to abandon completely the multilateral approach would seem to invite disaster; it is suggested that only a rational blend of activity at all levels of agreement and jurisdiction can contribute to the eventual eradication or reduction to minimal proportions of the modern scourge of hijacking. Time alone will be judge of the value and effectiveness of these Canadian efforts.

*J. M. SHARP

BROWNRIDGE v. THE QUEEN:[1] ENIGMA OR ANATHEMA?

It is submitted that *Brownridge* v. *The Queen*[2] is a case the *ratio decidendi* of which, though it is difficult to sift one out of the confusion, will be seen to be very important, not in itself, but in the way it affects, affirms, and fills in the gaps of pre-existing case law. It is by no means a case which civil libertarians ought to herald without taking a long hard second look. Two main questions will be dealt with: first, what exactly was said in *Brownridge* and how does it sit with previous cases and second, what is its effect on the status of illegally obtained evidence?

On first sight, the Supreme Court's decision in *Brownridge* seems exceedingly unclear.[3] However, it is suggested that a *ratio* may be deduced from the case, though on a very pragmatic basis, viz. to ignore the judgments of Hall and Laskin, JJ. as well as the dissenting judgments. For reasons shortly to be explained, this course would seem to be the

26. For example, Thomas and Kirby, (1973) 22 International and Comparative Law Quarterly 163, at 172.

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1. (1972), 18 C.R.N.S. 308 (S.C.C.).
2. Ibid.
3. Infra, fn. 5.
For a brief discussion of whether this course of action is prevented by the fact that more judges disagreed with Ritchie J., than agreed, see Appendix 1.

most preferable, for it would eliminate that aspect of the case which is the most unpleasant.

Brownridge had been arrested for driving while impaired and was taken to the police station where a breathalyser demand was put to him. He replied that he first wanted the advice of counsel. When this was refused, he declined to take the test, and was charged with refusal. He later spoke to his lawyer and then requested to take the test. This being after the statutory two hour limit, the police declined his offer.

Mr. Justice Ritchie, whose decision won the most support, with three other judges concurring, seemed to view the matter as a simple one. He first acknowledges the right to counsel section of the Bill of Rights and then concludes that "the refusal of the police constable to permit the appellant to speak to his lawyer, in the circumstances of this case, deprived him of the right to retain and instruct counsel without delay, and constituted a reasonable excuse . . ."[4] It may be noted at this time that it is a trivial inference from Ritchie, J.'s judgment that the words "without reasonable excuse" in section 235(2) of the Criminal Code are themselves subject to the Bill of Rights, as well as the rest of s.235(2), a point with which Laskin J. does not agree. Ritchie J. then proceeded to deal with two English cases relied on in the Ontario Court of Appeal, and distinguished them both. With that done, he concluded that the appeal should be allowed.[5] He said nothing about his judgment in *R.* v. *O'Connor*,[6] which, it is respectfully submitted, leaves things in a very unsatisfactory state of affairs, as *O'Connor* was in several respects very similar to *Brownridge*. One can only speculate why Ritchie J. did not mention *O'Connor*, and more important, what *Brownridge* stands for in light of *O'Connor*. In order for such speculation to be fruitful, the latter case must first be examined.

O'Connor had been taken to a police station, but was not informed he was being charged. Two breathalyser readings were taken and then he was charged. He sought permission to phone his lawyer, but was allowed only one call, which was abortive as his lawyer was not in. The Magistrate had convicted, and Haines J. of the Ontario High Court, the first to hear the stated case, drew the inference, which the Magistrate had not, that O'Connor would have demanded counsel immediately upon arrest, had he been informed he was being charged. Haines J. said the police should have so informed O'Connor (indeed, this right to be so informed is itself guaranteed in the Bill of Rights). This is not to say

4. Op. cit. fn. 1.
5. It is interesting to note that O'Hearn, C.C.J., in R. v. Jones (1972), 20 C.R.N.S. 58 (N.S. Cty. Ct.) said that the only thing which clearly was decided by the Supreme Court was that the Ontario Court of Appeal should be reversed.
6. (1966), 57 D.L.R. 2d. 123 (S.C.C.).

that the police were under a duty to inform him that he had a right to counsel, but merely that he was under arrest. Now there is no doubt that, at law, Haines J. was without jurisdiction to draw an inference which the Magistrate had not, it being a stated case and the facts being assumed as complete. He went on to rely on the reasoning that counsel might have unearthed exculpatory evidence. In the Supreme Court, Ritchie J., it is submitted with greatest respect, lapsed into total confusion when dealing with these issues. He said that the "full answer and defence" provision of the Criminal Code, and the "right to a fair hearing" provision of the Bill of Rights were of no assistance, as they applied only to the course of the trial. In dealing with right to counsel, he acknowledged what Haines J. had done and quoted the passage in which Haines J. drew the above-mentioned inference. However, he did not merely discount that opinion as being outside the court's jurisdiction on a stated case, as perhaps he should have, but he further said there was no basis in fact for relying on such speculation as Haines J. did about the possibility of unearthing exculpatory evidence.[7] This itself was outside the court's jurisdiction on a stated case. He went on to say, though, that if Haines J. had excluded evidence merely because O'Connor had not been informed he was under arrest, then he was without jurisdiction to do so on a stated case. This, it is submitted, was the proper conclusion. However, Ritchie J. went on in *obiter* to say that the general law governing such evidence was covered by *A.G. for Quebec* v. *Begin*[8] a comment which it was strange indeed for him to have made, as he had just concluded that the court was without jurisdiction to deal with the issue. He also relied on *R.* v. *Steeves*[9] for the statement that there is no rule that a denial of counsel vitiates the charge.

It is most difficult to determine what *O'Connor* stands for, yet it is clear that an answer must be found in order to determine what happened in *Brownridge*. As Ritchie J. did not see fit to comment upon his judgment in *O'Connor* while deciding *Brownridge*, clearly, he saw no conflict between the two cases. This, it is submitted, is the key to finding the answer. If he saw no conflict due to the jurisdictional issue in *O'Connor*, then it will be open to defence counsel in future cases to argue that the Bill of Rights commands the holding as inadmissable evidence obtained pursuant to a violation of the Bill of Rights. If, on the other hand, he believed that the violation of the Bill of Rights was of no effect because of the *Steeves* and *Begin* cases, then the key found in the fact that Ritchie J. saw no conflict between the cases locks the door to the above

7. Quaere whether this pronouncement in O'Connor is an implied denouncement of R. v. Gray (1962), 132 C.C.C. 337 (B.C. Cty. Ct.) which is discussed at infra, p. 6.
8. (1955), 21 C.R. 217 (S.C.C.).
9. (1963), 42 C.R. 234 (N.S.C.Ct.).

argument. Very simply, the distinction would then be the difference in the statutory provisions under which the respective accused were charged. At the time O'Connor was charged, the breathalyser provision was not mandatory as it is now.[10] There was no offence of refusing. If the ruling in *O'Connor* were not that Haines J. had been outside his jurisdiction on a stated case (though it is submitted that he was and that that is what the Supreme Court decided), then the ruling must have been that the Bill of Rights was of no effect on those facts, due to the *Steeves* and *Begin* decisions. If this is the case, then the Bill of Rights is dead with respect to pre-trial tactics of the police[11] and further is of no use to an argument such as above.

There is some lower court authority related to this issue, and perhaps the most important case is *R.* v. *Steeves*.[12] Steeves had been arrested for leaving the scene of an accident and had been refused right to counsel until after questioning. During the questioning, Steeves divulged the name of E., upon whose evidence at trial he was convicted. Isley, C.J., for the majority, allowed the Crown appeal and sent the matter back to the Magistrate for adjudication on the merits. He said that the right to a fair hearing did not apply to pre-trial activities of the police, and further that there was no general rule that a person who has been detained or arrested and who has been denied counsel, can be acquitted for that reason. He said it was possible to interpret the Bill of Rights in such a way that a judge could dismiss the charge without prejudice to the Crown's right to institute fresh proceedings. However, he pointed out the absurdity of that interpretation where the crux of the matter was that evidence was obtained pursuant to a violation of the Bill of Rights. A new trial would be meaningless unless such evidence could be excluded, and the rule in *R.* v. *St. Lawrence*[13] eliminated this possibility. Thus an acquittal would be useless unless it were the normal type of acquittal, rendering further proceedings *res judicata*. The *St. Lawrence* case was taken to produce the result that the holding out of an improper inducement by the police was not such that evidence obtained thereby was rendered inadmissible. Haines J. in *O'Connor* had distinguished the *Steeves* case as dealing with the unearthing of real evidence as a result of illegal interrogation. The writer finds it difficult to term a witness as real evidence and consequently finds this distinction a weak one. How-

10. To be more accurate, the present provision is mandatory only in the sense that unreasonable refusal may be punished. A person is free to refuse and cannot be prevented from refusing even though a person can be prevented from committing other kinds of crime (for example, a person could be prevented from committing theft by a police officer). This is exactly what Pigeon J. has failed to understand in his dissenting judgment, it is respectfully submitted.
11. The writer finds support for this in Laskin J.'s judgment, which will be discussed infra.
12. **Op. cit.**, fn. 8; this case was adopted by the Supreme Court in O'Connor.
13. [1949] O.R. 215 (H.Ct.).

ever, it is submitted that the *St. Lawrence* case can be distinguished simply on the basis that it is a pre-Bill of Rights case.

The really interesting thing about the *Steeves* case is the way in which the court negated any possibility of a rule which would require dismissal of a charge where a violation of the Bill of Rights had occurred. Isley, C.J., said that if such a rule existed, even the murder provisions of the Criminal Code would be subject to it, and it could not be that a murderer could go free because the police had denied him counsel. The writer is, frankly astounded, at the lack of logic evident in this argument, but throws up his hands in despair when Ritchie J. in *O'Connor* expressly adopts this specific statement.[14] Why is murder exempt from the provisions of the Bill of Rights? What else is? What is the judicial basis of the rule? Does the Bill of Rights apply only to "less serious" offences, and what constitutes "less serious"? Of course, the court in *Steeves* would never admit that they had impliedly exempted murder from the protections under the Bill of Rights; they would say that the remedy was civil and not criminal. Notwithstanding that such a remedy is totally ineffective,[15] it is submitted that there is no judicial basis for saying that the remedy is civil only. The Bill of Rights is totally without value in the context of pre-trial violations unless a defence arises, or evidence can be excluded. If the courts persist in interpreting the matter as was done in *Steeves*, the enigma proceeds to become anathema.

It is quite clear that some courts have so insisted. In *Steeves*, Coffin J. paid lip service to *R.* v. *Gray*[16] and said that he had to ignore that case due to the *Begin* decision. Gray had been charged with impaired driving and had been denied counsel. The court ruled that illegally obtained evidence was nevertheless admissible if relevant. However, if not for the violation of the Bill of Rights, Gray's lawyer might have discovered exculpatory evidence, and an acquittal was ordered on the basis of this speculation. Note though, how thoroughly Ritchie J. squelched the speculative approach in *O'Connor*.

In *R.* v. *Martel*,[17] the accused, on an impaired driving charge, was twice in two days refused the opportunity to communicate with the outside world. He pleaded guilty on the advice of the Magistrate (whom the appeal court took pains to exonerate.) On appeal, he was allowed

14. Laskin J. in Brownridge impliedly adopts it as well. This will be discussed infra.
15. Just envisage the following: the judge asks the plaintiff, 'what damage did you suffer?' and the plaintiff replies 'I was convicted!' With respect, it is submitted that this is no basis for a civil action. Indeed, as Haines J. said in O'Connor (and this was not over-ruled by the Supreme Court) the suggestion that the remedial aspect of the Bill of Rights could be civil in nature must surely be erroneous, for Parliament has no jurisdiction to confer a civil remedy: **Transport Oil Ltd. v. Imperial Oil Ltd.** [1935] 2 D.L.R. 500 (Ont. C.A.) and **Gordon v. Imperial Tobacco Sales Co.** [1939] 2 D.L.R. 27 (Ont. S. Ct.).
16. **Op. cit.**, fn. 7.
17. (1968), 64 W.W.R. 152 (Alta. Dist. Ct.).

to change his plea,[18] but it was pointed out that denial of counsel neither provides a defence nor renders evidence inadmissible.

In *R.* v. *Jones*,[19] it is respectfully submitted that the writer's second interpretation of the effect of Ritchie J.'s judgment in *Brownridge* was borne out. Jones had been found in his car and appeared to be inebriated. Upon being taken to the police station a breathalyser demand was put to him and Jones replied that he wanted the advice of a lawyer. The police refused and Jones capitulated; readings of 0.15 and 0.16 were taken. Jones was charged with driving while his blood-alcohol count was greater than 0.08. O'Hearn, C.C.J., interpreted Ritchie J.'s judgment in *Brownridge* as being tied to the reasonable excuse provision and hence inapplicable to these facts. He relied on the *Begin* and *O'Connor* cases to hold that the evidence could not be excluded, and on *Steeves* to hold that the denial of counsel did not itself give rise to a defence. He interpreted Laskin J.'s judgment in *Brownridge* as being that the conduct of the police vitiated the charge in that case, but said that the charge against Jones was not vitiated for the reasons that Laskin J. gave.

Though the judgment of the court in *Brownridge* appeared to O'Hearn, C.C.J. to look like a bridge hand in which the trumps had vanished, the judgment of Laskin J. appeared to the writer to be a virtual maze. However, when the fog lifted, it is submitted with great respect that Laskin J. was more confused than his judgment. In the early part of his judgment, he makes one thing clear: it is not the case that a violation of the Bill of Rights can have only the result, if any, of a federal enactment being declared inoperative. He went on to say: ". . . I regard the phrase "without reasonable excuse" as adding a defence or a bar to a successful prosecution which would not be available without those words, but not as encompassing defences or bars that would exist without them."[20] As the Bill of Rights applies, notwithstanding that phrase, it must therefore contemplate something other than considerations of the Bill of Rights. The argument is conceded some force, but it is respectfully submitted that it fails to comprehend the nature of the Bill of Rights. The effect of that statute can indeed be to declare inoperative a federal enactment, as in *R.* v. *Drybones*,[21] and not merely act as a canon of construction. For example, if it is alleged that a federal statute is susceptible of two interpretations, and the first is consistent with the Bill of Rights whereas the second is not, the Bill of Rights would operate as a canon of construction and command the taking of the first interpretation. Indeed, this approach can be seen as underlying Ritchie J.'s judgment in

18. This is one remedy, though restricted in scope, which flows from the Bill of Rights. See also R. v. Ballegeer (1968), 66 W.W.R. 570 (Man. C.A.).
19. (1972), 20 C.R.N.S. 58 (N.S. Cty. Ct.).
20. Op. cit., fn. 1 at p. 326.
21. [1970] S.C.R. 282.

Brownridge in which the phrase "without reasonable excuse" was viewed in conjunction with the Bill of Rights. This is as it should be. The effect of Laskin J.'s reasoning is to exclude the phrase from the section altogether, when viewing it to see if the section as applied to the facts before the court is in conflict with the Bill of Rights. Thus, in determining such a question, Laskin J. looks to the offence of refusal, whereas the offence stipulated in section 235(2) is refusal without reasonable excuse. Of course, Laskin J. would presumably reply by saying that the phrase contemplates something other than a potential conflict with the Bill of Rights, but this is precisely what is sought to be determined, i.e. what the phrase means, so that it would be circular to reply in that manner. The point is that if one interpretation of that section involves a contemplation of the Bill of Rights, and another does not, then the former must be taken in a situation where the Bill of Rights applies, and consistency with that Bill is required. The point is simply that the Bill of Rights can operate as a canon of construction to choose from an enactment an intention consistent with itself, although clearly it cannot invent an intention in order to do this.[22]

Laskin J. proceeded to say that the conduct of the police in that case vitiated the charge before the court on the basis of the Bill of Rights.[23] However, from this point on, total confusion sets in. Probably aware that this ruling presents some conflict with the *Steeves* case, which he refers to a few lines later, he declares that this ruling is not applicable in every criminal case, but only in a case such as the one before him because there the violation of the Bill of Rights was the very basis on which the accused was charged. Amazingly, when this ruling is put in simpler terms, a very peculiar thing occurs. Laskin J. is really saying that a defence arose there because the denial of counsel was illegal and therefore a lawful demand had not been put to the accused; ergo it was not unlawful for the accused to refuse the demand, i.e. he had a reasonable excuse in refusing. This reformation of Laskin J.'s reasoning is of course the writer's, but it is submitted to be warranted; all he has accomplished at first sight is to reword Ritchie J.'s reasoning with the logical result, clearly unintended, of finding no reasonable excuse anyway. The second sight is enlightening though. By saying the charge is not vitiated in every criminal case, he is impliedly adopting the *Steeves*

22. The writer apologizes for this digression, but feels it is necessary to clear up Laskin J.'s comments and indicate why he was, it is respectfully submitted, in error. The adoption by another court of his comments in this regard would lead to an unnecessary and unwarranted restriction in the scope of what constitutes reasonable excuse. See for example, R. v. Chomokowski (1973) 2 W.W.R. 75 in which the Magistrate applied Laskin J.'s **dicta** to hold that reasonable excuse could not be viewed in conjunction with freedom of religion (appeal dismissed by the Man. C.A. on other grounds).

23. This use of the Bill of Rights as other than a canon of construction or a tool to render inoperative federal statutes will become important **infra** when dealing with the Bill of Rights **vis a vis** illegally obtained evidence.

case. As far as Laskin J. is concerned, the Bill of Rights is of no effect unless it forms the basis of the charge (e.g. refusing to comply with a demand when the effect of the demand is to violate the Bill of Rights.) He makes it abundantly clear when he says "I am not dealing here with a situation where an offence has been allegedly committed prior to the denial of right to counsel, or where the denial of the right to counsel, if it occurs first, is unrelated to an offence allegedly committed subsequently".[24] He then proceeded to distinguish the *Steeves*, *O'Connor*, and *Ballegeer*[25] cases as being of those types. The statement quoted above, plus the reference to *O'Connor*, make it clear to the writer that Laskin J. was taking Ritchie J. in *O'Connor* as having precluded the possibility of ruling evidence obtained pursuant to a violation of the Bill of Rights inadmissible. Since he adopted *Steeves*, Laskin J. thought that the Bill of Rights would be of no effect where the denial of counsel was unrelated to the offence if committed subsequently, and more important, of no effect where the offence was committed prior to the denial of counsel as in *O'Connor*. He did not distinguish that case because of the jurisdictional issue involved there, but merely because the offence was committed prior to the denial of counsel. Thus if the offence occurs first, nothing follows as a consequence of the denial of counsel. His reasoning deals with the time of the offence relative to the time of the denial of counsel. Thus if the offence occurs first, then the denial of counsel occurs, and then evidence is obtained, the Bill of Rights, according to Laskin J., is of no effect despite the fact that the evidence is obtained pursuant to a violation of the Bill of Rights.

Laskin J.'s reference to *Ballegeer* is most confusing, as the affinity which he finds in that case to *Brownridge* totally escapes the writer. Ballegeer had been charged with theft and had been denied counsel. He signed a confession and was convinced to plead guilty. On appeal he was allowed to change his plea. With respect, it is submitted that similarity of those facts to *Brownridge* is lacking. However, by that reference, two judges of the Supreme Court have now said that a violation of the Bill of Rights will be a highly relevant factor in an application to change a plea. There is another, though less obvious, consequence of the reference to *Ballegeer*. The *Steeves* case pointed out the waste in having a new trial unless evidence was excluded. Possibly Laskin J. was thinking that a confession that was obtained pursuant to a denial of counsel could be ruled involuntary and thus inadmissible. This idea was dealt with parenthetically, though no conclusion was reached, in *R.* v. *Deleo* & *Commisso*.[26] In this case, the police knew that Deleo had

24. Op. cit., fn. 1, at p. 330.
25. Op. cit., fn. 20.
26. (1972), 8 C.C.C. 2d 264 (Ont. Cty. Ct.).

obtained counsel and asked him if he wanted the lawyer's presence at the line-up, but this was declined. When the police started to question Deleo, they did not inform him that he could have his lawyer present. It was held that there was no duty to inform Deleo of his rights and that no violation of the Bill of Rights had occurred. However, it was suggested, *obiter*, that such a violation could possibly go to the question of voluntariness, notwithstanding that the law on voluntariness clearly contemplated other factors. It was also suggested that such evidence might be excluded under the minimal discretion to exclude admissible evidence as per *R.* v. *Wray*.[27]

It remains to deal with illegally obtained evidence *per se*. The *Begin* case decided that such evidence was admissible if relevant. As a general statement this cannot be disputed. However it must be pointed out that *Begin* was decided before the Bill of Rights was passed. What is sought to be determined now is the admissibility of evidence obtained pursuant to a violation of the Bill of Rights. Clearly, if a case were to come up now wherein evidence was obtained illegally but not contrary to the Bill of Rights, *Begin* would cover the issue. Equally clearly, if evidence is obtained contrary to provincial privacy legislation, it is inadmissible as there is no conflicting paramount federal legislation. A bill is presently before Parliament respecting privacy which would declare such evidence inadmissible, though not evidence indirectly obtained (i.e. the fruit of the poisoned tree).

Just as American courts have seen the wisdom of making mandatory the practice of informing an accused of his rights,[28] they have also seen the wisdom of declaring inadmissible illegally obtained evidence. This followed from the decision of the American Supreme Court in *Mapp* v. *Ohio*,[29] in which evidence obtained by unlawful searches and seizures was ruled inadmissible. The court reasoned he did not go free merely because the police blundered, but because the law set him free. There was no judicial basis for saying that the police or the government were above the law and to say otherwise was to breed contempt for the law and the law's integrity. This, of course, is the counter-argument to the *Steeves* case. The basis of the ruling is a proposition which is held also in Canada: a wrongdoer cannot be allowed to keep his ill-gotten gains.

Just a week after its decision in Miranda,[30] the American Supreme Court decided *Schmerber* v. *California*.[31] There, blood was taken from the accused pursuant to a charge of impaired driving; the accused had

27. [1971] S.C.R. 272.
28. Miranda v. Arizona 86 S.Ct. 1602 (1966).
29. 367 U.S. 643 (1960).
30. Op. cit., fn. 28.
31. 384 U.S. 757 (1966).

objected all along. The court ruled the evidence admissible, taking a line of reasoning identical to that in *Begin*. The court distinguished *Mapp* v. *Ohio* on the basis that the test was a reasonable one and further the accused was not one who could object on religious grounds or on fear of trauma or pain. The evidence being real and not verbal, self-incrimination was not in issue. Mr. Justice Black dissented in an extremely cogent judgment. He said that "to reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat."[32] Black J. said this feat was accomplished by viewing the evidence as real and not testimonial or communicative (as was done in *Begin*) where in truth it was both. The blood sample itself would be real evidence, but it would normally not be put in evidence; the evidence was testimonial in that it was calculated to produce testimony by some person as to the alcohol content in the blood. It was communicative in that its purpose was to communicate the blood-alcohol count. However, notwithstanding that this argument was not raised in *Begin* (nor in *R.* v. *Curr*,[33]) the writer concedes that it is unlikely to succeed.

It is clear that *Begin* cannot be disturbed, However, the writer is convinced that that decision is limited to cases in which the Bill of Rights is not in issue. The question is, are there any cases which convincingly disprove that? The major case to deal with is *O'Connor*. The writer has posed two possible interpretations of Ritchie J.'s judgment. It is clear to the writer that Laskin J. chose the second. This is precisely the reason why it was suggested earlier that it would be preferable to find a *ratio* in *Brownridge* by ignoring his judgment. It is certainly arguable that Ritchie J. merely said in O'Connor that the denial of counsel occurred subsequent to the obtaining of the evidence and hence it was not illegally obtained. In any event, Ritchie J. at no place in his judgment expressly declared that evidence obtained pursuant to a denial of counsel was nevertheless admissible. In view of this, it is especially interesting to note Spence J.'s comments in his separate judgment in *O'Connor*: "there may well be cases where the same failure to warn the accused that he is under arrest and to state the charge against him results in the obtaining of evidence which could not otherwise have been obtained. It is not my view that we are in any way bound in the consideration of such cases by the result in the present appeal."[34] If this question had been conclusively determined by the *Begin* case, it would not have been necessary for Spence J. to have said this. Indeed, it is submitted that he is merely acknowledging that the issue is still open to question.

32. **Ibid.**, p. 773.
33. (1972), 18 C.R.N.S. 281 (S.C.C.).
34. Op. cit., fn. 6.

Spence J.'s comments are especially interesting in light of Haines J.'s ruling in the court below, that evidence could be admissible on the basis of the Bill of Rights. He had said: "If I am right in my conclusion, then it follows that it was reasonably to be supported that Parliament intended the direct and immediate remedy of nullifying the proceedings[35] which evidenced abuse of our system of criminal justice. Any other interpretation can only result in removing the teeth of civil liberties' legislation and succeed in making such legislation the object of derision and not of respect amongst the entire citizenry of which our police constables and law enforcement officials are members."[36] These comments were not overruled by the Supreme Court; they said merely, it is submitted, that Haines J. was without jurisdiction to make them.

The *Steeves* case clearly decided that evidence was admissible if relevant. Though it was adopted by the Supreme Court, it was adopted for another and altogether different point. Thus its authority on the evidenciary issue is not great, and it relied in this regard on a pre-Bill of Rights case (*St. Lawrence*). The *Jones* case similarly relied on a pre-Bill of Rights case (*Begin*), but it was said in that case that *O'Connor* was to the same effect. This is respectfully submitted to be a misunderstanding of that decision. Also, *Jones* was decided by a lower court, which is true also of the *Martel* case, in which the same misunderstanding is present. Indeed, no higher court has dealt with the issue of whether the Bill of Rights can render evidence inadmissible, so long as *O'Connor* can be interpreted, as the writer suggests, as not precluding such an argument.

It now remains to find the argument. In *Brownridge,* Laskin J. acknowledged that the Bill of Rights does not have the sole effect of declaring inoperative a federal enactment. This, it is submitted, is both fundamentally true and fundamentally important. It is evident that the Bill of Rights can do the following things: it can render inoperative a statute, either generally because of the statute itself, or on the facts before it; it can vitiate a charge; it can create a reasonable excuse where the lack of such is required for an offence; it can require a new trial; it can operate as a canon of construction. Indeed there is no statutory limit in the number of ways it can take effect. This follows merely from the wording of section two of the Bill, viz. "Every law of Canada shall . . . be *so construed* and *applied* as not to abrogate, abridge, or infringe or to *authorize* the abrogation . . ." In other words, it states in mandatory terms that federal laws must be construed or applied in such a way as to guarantee certain rights. This is not restricted to only those statutes which legislate in respect of the rights and freedoms listed, but rather

35. By "proceedings", he was referring to the illegal obtaining of evidence.
36. [1965] 1 C.C.C. 20 (Ont. H. Ct.) at p. 30.

it applies to any law, notwithstanding that a particular law might on its face have nothing to do with the listed freedoms and rights, to ensure that that law will be applied or construed in such a way as to protect those freedoms and rights. Thus the prohibition against theft, or rape, or murder, is subject to the right to counsel, or freedom of religion, or equality before the law, notwithstanding that the substance of those laws has nothing to do with right to counsel, or religion, or equality, nor does it attempt to deny those rights and freedoms. All this might seem trivial and obvious, but it is necessary to show that the Bill of Rights can compel the application of a law in such a way as to deal with something foreign to the substance of that law. For example, a new trial is nowhere mentioned in the Bill of Rights, but in *Ballegeer,* it was granted as a remedy to a violation of the Bill. This is merely an application of the words "be so construed and applied as not to . . . etc." Thus it is submitted that these same words can, in certain circumstances, render evidence inadmissible. Since the Supreme Court has adopted the *Steeves* case for the rule that a defence does not necessarily arise where the Bill of Rights had been violated, the only major remedy left is the exclusion of any evidence obtained pursuant to such violations. This would in effect nullify the violation. Where there is no excuse provision, and where a new trial would be useless without the exclusion of illegally obtained evidence, it is submitted that the Bill of Rights compels that exclusion.

If the Supreme Court were to reject this argument, or view it as precluded by *O'Connor* as impliedly affirmed in *Brownridge,* then indeed the police have a free hand with respect to pre-trial tactics and indeed they will be above the law. The writer realizes of course that the arguments herein leave untouched evidence obtained illegally but where no violation of the Bill of Rights has occurred. It would however be a lot better if the arguments did find support in the courts rather than their ignoring and finally putting to rest the Bill of Rights.

APPENDIX 1:

The issue is, does the theory of *ratio decidendi* prevent the use of Ritchie J.'s judgment in *Brownridge* as the *ratio*? Hall and Laskin JJ. agreed that reasonable excuse was not the proper conclusion. The writer submits that the dissenting judges, Pigeon, Abbott and Judson JJ. rested entirely on their belief that the accused was neither arrested nor detained and therefore not entitled to counsel. Notwithstanding the huge differences in the two decisions of these five judges, it is a common premise that there was no reasonable excuse. Hence more judges found that there was no reasonable excuse than there were that did find one.

However, by dissenting, the dissenting judges have elected themselves out of the *ratio*. Their judgment is totally irreconcilable with that of Hall and Laskin JJ. It bears absolutely no similarity to it other than the above-mentioned common premise. Accordingly, it is only to the majority decisions that one can look for the *ratio*, and Ritchie J.'s judgment won the most support.

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