Peace and Public Order: International Mutual Legal Assistance
"The Canadian Way"

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One of the fastest-growing trends in the battle against transnational crime is the conclusion of mutual legal assistance treaties between states. These conventions provide a framework for inter-jurisdictional evidence gathering, allowing for formalized cooperation in criminal investigations through a system of requests for assistance between national authorities. Canadian practice in this area has remained largely unscrutinized, but presents an interesting duality: while the courts of the land have liberally interpreted the powers of the government to fulfill requests from other countries, the making of requests by Canadian authorities has been fraught with difficulty, particularly with regard to the rights of citizens under the Canadian Charter of Rights and Freedoms. The author surveys the legislative and judicial perspectives on mutual legal assistance, with particular emphasis on the Federal Court of Appeal’s recent decision in Schreiber v. Canada (Attorney General), and concludes that overzealous application of Charter principles threatens to undermine the state’s ability to combat transnational crime.

Une des orientations les plus florissantes dans la lutte contre le crime international s’avère être la conclusion de traités d’assistance mutuelle légale entre les États. Ces conventions présentent une structure pour la collecte de preuves entre les différentes juridictions, permettant une coopération formelle dans les enquêtes criminelles par l’entremise d’un système de demande d’assistance entre les autorités nationales. La pratique canadienne à ce niveau demeure peu analysée mais présente néanmoins une dualité intéressante: malgré le fait que les tribunaux du pays interprètent de façon libérale le pouvoir du gouvernement de s’acquitter des demandes d’assistance des autres États, ces mêmes tribunaux portent un jugement défavorable aux demandes d’assistance présentées par les autorités canadiennes, particulièrement en

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regard des droits accordés par la Charte canadienne des droits et libertés. L'auteur sonde la perspective législative et judiciaire quant à l'issue de l'assistance mutuelle légale, accordant une attention particulière à la récente décision de la Cour fédérale d'appel dans l'arrêt Schreiber c. Canada (Procureur Général). L'auteur conclut que l'application excessive des dispositions de la Charte sape l'habileté de l'État à combattre le crime international.

I. INTRODUCTION

1. Modern Trends in International Judicial Assistance

With the increasing globalization of world affairs, the opening of borders for economic purposes, and the advent of instantaneous communications technology has come a corresponding increase in both the amount and sophistication of transnational crime.1 As the global community becomes more tightly knit, governments and criminal authorities are becoming increasingly aware of the problems presented by the ability of the modern-day criminal to take advantage of dated notions of state sovereignty in confounding the enforcement of criminal law:

Each day, it becomes painfully clear to the police and the judiciary how great the energy, speed, mobility and sophistication of offenders are and, by contrast, how difficult it is to overcome the barriers created for the police and the judiciary out of differences in national legal systems and out-moded concepts of national sovereignty.2

Equally apparent has been the corresponding need for governments to overcome the barriers systemic to inter-state relations through cooperation in criminal matters. The difficulties

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1 As a trend, international crime has increased in amount during the last few decades to the extent that Interpol has a publication dedicated to tracking the increase; see Interpol Secretariat, International Crime Statistics (Paris: International Criminal Police Organization, 1993).

have been numerous, stemming primarily from the fact that
criminal jurisdiction remains one of the most closely guarded
aspects of sovereignty; such a narrow focus has allowed organized
crime in particular to prosper. While collaboration on this front has
its origins in more practically oriented and informal systems such as
that maintained by Interpol, both state governments and
international organizations have become active in fostering bilateral
and multilateral efforts at synchronizing legal mechanisms,
enhancing what has become known as “international judicial
assistance.” Most recently, the P8 Senior Experts Group on
Transnational Organized Crime called on states to review their
legislative schemes, as well as crime prevention and enforcement
systems, “to ensure that the special problems created by
Transnational Organized Crime are effectively addressed.”

On the domestic front, the Supreme Court of Canada has given
authoritative approval to Canada’s participation in this emerging
international legal regime:

The investigation, prosecution and suppression of crime
for the protection of the citizen and the maintenance of
peace and public order is an important goal of all
organized societies. The pursuit of that goal cannot
realistically be confined within national boundaries. That
has long been the case, but it is increasingly evident
today.6

3 “States have a tendency to think that anything connected with criminal law,
even quite minor procedural matters, affects national sovereignty.” R. Dussaix,
“Some Problems Arising from the Practical Application, from the Judicial Point of
View, of the European Convention on Mutual Assistance in Legal Matters”, in
European Committee on Crime Problems, Problems Arising from the Practical
Application of the European Convention on Mutual Assistance in Criminal Matters,
cited in W. Gilmore ed., Mutual Assistance in Criminal and Business Regulatory
Matters (New York: Cambridge University Press, 1995) at xiii.

4 See M. Anderson, Policing the World: Interpol and the Politics of International
Police Cooperation (Oxford: Clarendon Press, 1989); F. Bresler, Interpol (New

5 Senior Expert Group on Transnational Organized Crime, “P8 Senior Experts
Group Recommendations” (12 April 1996) at para. 1 [unpublished]. The P8 is
composed of the G7 countries and Russia.

The Canadian government has been active in this regard, having been an early participant in efforts to coordinate extradition, the first pillar of international judicial assistance. Indeed, in 1988 the federal Department of Justice set up a separate division among its ranks to handle legal cooperation with other states.

This essay will explore Canada's cooperative mechanisms with regard to the provision of mutual legal assistance, the lesser-known but increasingly important bedfellow of extradition in the fight against international crime, and a subject upon which there is a dearth of Canadian legal literature. A survey of the context in which Canada finds itself internationally will be followed by an examination of the Mutual Legal Assistance in Criminal Matters Act, which provides the legislative foundation for national efforts. This analysis will be accompanied by a look at jurisprudence on various sections of the Act, as well as cases dealing with procedural matters. Also, several corollary issues will be addressed, including the rights of the defence in such arrangements.

This examination will go towards demonstrating that, consistent with other Canadian international legal practice, the effectiveness of Canada's mutual legal assistance efforts has been limited by both legal and policy perspectives which are primarily inward-looking and focused on Canadian sovereignty. That this is at odds with Canada's traditionally internationalist outlook seems obvious. Victories which have been achieved in the battle against transnational crime appear to have been gained in spite of, rather than facilitated by, domestic court interpretation of the legislative scheme that provides the primary tools. Despite the Supreme Court's professed interest in "peace and public order" both domestically and internationally, Canada's commitment to

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8 The International Assistance Group (IAG) seems to have adopted LaForest's dictum from *Cotroni* as something of a "mission statement"; see e.g. Department of Justice, *International Assistance Group: Central Authority for Canada for Mutual Legal Assistance and Extradition* (Ottawa: Dept. of Supply and Services, 1995) at 3.
constitutionalism remains determinative; this fact is all the more important in a post-

Canada.

2. Mutual Legal Assistance Defined

Mutual legal assistance is a practice that is well known to inter-state relations; however, it has traditionally been viewed as the responsibility of the diplomat, rather than the bureaucrat. Operating on a system of letters rogatory, diplomats and ranking state officials made requests of their international counterparts that domestic legal matters (almost exclusively of the civil variety) which involve the jurisdiction of another state be expedited by that state. For example, where certain evidence for a case in Country A was within the territory of Country B, the diplomats of the former would make a written request of those of the latter for the transmission of the evidence. The practice has, of late, shed its cumbersome diplomatic origins and been adapted by the administrators of justice into a means of relatively expedient cooperation. However, in the criminal context, despite its becoming "the fastest growing business in the criminal justice field,"...

"...mutual legal assistance...has no obvious place in the legal categories familiar to common lawyers. It lies rather forlornly in a no man's land between private international law on the one hand and criminal procedure on the other." 

For present purposes, it is suitable to adopt W. Gilmore's definition of mutual legal assistance in criminal matters: "the process whereby one state provides assistance to another in the investigation and prosecution of criminal offences." This definition includes what Gilmore describes as "such unglamorous but highly practical matters" as the provision of evidence,

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11. See Part III.1 below.


14. W. Gilmore, supra note 3 at xii.

15. Ibid.
documentary or *viva voce*, for use abroad; the search and seizure of evidence for use in foreign proceedings; the transfer of witnesses for interview; and the serving of documents originating in another jurisdiction. It is to be distinguished from extradition (which is subject to a customary and treaty law regime of its own), the enforcement of foreign criminal judgments generally, and such informal networks as exist between criminal justice authorities. The present focus will also exclude inter-state cooperation in the confiscation of the proceeds of crime which, while related in substance, has a separate body of international instruments and literature.\(^{16}\)

II. THE MULTILATERAL CONTEXT OF COOPERATION

One of the founding blocks of mutual legal assistance, as well as the first positive indication that states might be willing to compromise on the exclusivity of their criminal jurisdictions, was the 1959 *European Convention on Mutual Assistance in Criminal Matters*,\(^ {17}\) an agreement which set the basis for practice thereafter. Remarkable in its foresight and impact on subsequent developments, it is also noteworthy as an agreement which was sufficiently flexible to meet the needs of the various legal systems in Europe.\(^ {18}\) The *Convention* was able to sail into territory previously uncharted by the cooperative mechanisms which had developed around the practices of extradition, and to develop mechanisms for cooperation which required neither dual criminality\(^ {19}\) nor the existence of an extraditable offence. This ability was justified by the *Explanatory Report on the Convention* on the basis that in this area, unlike the extradition context, there was no concern about violation of the

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\(^{17}\) Eur. T. S. 30 [hereinafter *European Convention*].

\(^{18}\) Including the common law system of the U.K., which became a party in 1990.

\(^{19}\) The notion that any offence under investigation must constitute a penal offence in both (or all) involved jurisdictions—a key feature of extradition treaties. See Gilbert, *supra* note 7 and LaForest, *supra* note 7.
rights of the individual. While the Convention represented a positive start, its effectiveness was somewhat limited by state parties registering reservations to several provisions; moreover, it was supplanted for some states by networks of bilateral treaties concluded subsequently.

The Convention is of little relevance to the modern Canadian perspective, as it has been largely supplanted by mechanisms of greater scope and effectiveness in subsequent decades. It did, however, lay precedents for many techniques of mutual legal assistance currently in use, including the requirement that contact be made between “central authorities” of cooperating states (generally located in the departments of justice) as a means of providing speed and consistency. The modes of assistance discussed above are all accounted for as part of the main provisions, as well as the exchange of information on the criminal records of parties involved in a judicial matter. Also noteworthy are the bases for refusal of assistance, which include the grounds that the offence being prosecuted is a political offence, or that providing assistance would be “likely to prejudice the sovereignty, security, ordre public or other essential interests of its country.”

1. The Commonwealth Scheme

The second major multilateral effort at judicial assistance came during the mid-1980s when the Commonwealth countries took advantage of their traditional cultural and legal linkages to create the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, ratified in Vancouver in October, 1987. It was incumbent upon the framers of the device to take account of

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20 Cited in McClean, supra note 13 at 131: See also Gilmore, supra note 3 at xiii.
21 Gilmore, supra note 3 at xv.
22 European Convention, supra note 17, art. 15.
23 See the Gilmore definition, supra note 14 and accompanying text.
24 European Convention, supra note 17, art. 22.
25 Ibid, art. 2(a).
26 Ibid, art. 2(b).
27 For example, the Commonwealth Fraud Liaison Service.
the "sensitivity" of the criminal law context, given the members' "different judgments on the balance to be struck between the interests of the State and the civil liberties of individuals." As such, the Commonwealth Scheme is not a legally binding international agreement, but an agreed-upon set of principles which can shape the nature of criminal cooperation between member states.

The Scheme expands upon the European Convention in both form and content, providing for nine discrete heads of assistance to be furnished to requesting members. These include, in addition to the more "standard" techniques outlined earlier, identification and location of persons, effecting the temporary transfer of persons in custody to appear as witnesses, and the tracing, seizure, and forfeiting of the proceeds of criminal activities. A request may be made upon a criminal matter arising in the requesting country if: 1) proceedings have been instituted; or 2) the Central Authority can demonstrate "reasonable cause to believe that an offence...has been committed."

Also fleshed out are the grounds for refusal of assistance, which include an absence of dual criminality, a political offence exception, an ordre public ground similar to that in the European Convention, double jeopardy, and discretionary refusal "where compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions...." Further, paragraph 7(3) states that if the procedure requested is unavailable in that jurisdiction then there is no

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30 Ibid. para. 1 (3).

31 Ibid. para. 3(1). The commentary by Professor McClean, at 21, notes that the definition of "offence" in para. 3(2) as a transgression of "the laws of a country, or any part thereof" was "inserted to clarify the position in federal or composite countries, and was originally prompted by Canadian difficulties on this point."

32 McClean notes that emerging from the preparatory discussions for the Scheme was the idea that this requirement, in para. 7(1)(a), was in fact discretionary in character. This would both "ease the constitutional difficulties" of some countries and allow states not to be party to "harsher criminal regime[s]." See McClean, supra note 13 at 155-56.

33 Para. 7(1)–(2).
obligation on that state to grant the request by conforming to the norms of the requesting country.

Canada was an original party to the Commonwealth Scheme, and exerted its influence in several ways. First, a draft of Canada's bilateral mutual legal assistance treaty with the U.S.\textsuperscript{34} was used as a model by the Scheme's drafters.\textsuperscript{35} Second, rather oddly in the context of a non-binding agreement, Canada registered five "reservations and clarifications" requiring that requests for assistance, as well as the compelled attendance of an accused before a Commission examining witnesses per paragraph 16(3), be accompanied by letters rogatory.\textsuperscript{36} The Commentary to the Scheme, however, speaks approvingly of Canada's creativity in bending the international agreement to its federal-state agenda:

\begin{quote}
[T]he Canadian position favours fully negotiated bilateral mutual assistance treaties where such treaties are appropriate, e.g. where a neighbouring country is likely to make regular requests for assistance.... However, it also provides a machinery under which a request for assistance from a non-Treaty country, such as one under the Scheme, can be made the subject of an "administrative arrangement" with the legal effect of a temporary treaty.... It will be seen that this fully serves the purposes of the Commonwealth Scheme, while adopting procedures on the Canadian side which give a better 'fit' with existing Canadian legislation and practice.\textsuperscript{37}
\end{quote}

Thus, in a manner of speaking, Canada has reshaped the Commonwealth Scheme in its own image, as indicated by the integration of preferences peculiar to the Canadian perspective. Yet the requirement for letters rogatory to accompany any request made under the arrangement seems to maintain, at least in form, the kind of barrier to efficiency that the Scheme was designed to circumvent.

\textsuperscript{34} Infra note 63.
\textsuperscript{35} Commonwealth Scheme, supra note 29 at 5.
\textsuperscript{36} Ibid. at 54.
\textsuperscript{37} Ibid. at 55.
2. Regional Cooperation: The Inter-American Convention

Canada is also a party to the Inter-American Convention on Mutual Assistance in Criminal Matters, adopted in Nassau on May 23, 1992. An effort at cooperation among the countries of the Western hemisphere, the Inter-American Convention represents an expansion on the form and substance of earlier arrangements. It contains fairly developed sets of procedures pertaining to service of documents and appearance of witnesses, transmittal of information and records, and the making of a request. The grounds for refusal, set out in article 9, appear to reflect an evolution in certain respects; the article does not contain a dual criminality requirement, but does allow a state to refuse assistance where "[t]he request has been issued at the request of a special or ad hoc tribunal." The various provisions are in fact detailed enough that the treaty may supplant the need for further bilateral arrangements, although time and state practice will be determinative. Such a multilateral instrument would normally be expected to replace any existing arrangements between state parties. However, as between certain countries there are often preferences as to which treaty is relied upon; Canada and the U.S., for example, are more likely to rely on their bilateral treaty for requests between them.

3. United Nations Mechanisms

Throughout its history the United Nations has been actively engaged in the formulation and implementation of criminal justice standards. Through the work of the Secretariat of the Crime Prevention and Criminal Justice Division, and its attendant expert advisory group, the Committee on Crime Prevention and Control, the United Nations has laboured to raise the visibility of crime-

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39 Chapter III.
40 Chapter IV.
41 Chapter V.
42 Now the rule rather than the exception; see Gilmore, supra note 3 at xii.
43 Article 9(c).
44 Infra note 65 and accompanying text.
related issues and enhance international cooperation in the area.\footnote{45} In addition to the formulation of resolutions and the drafting of international criminal law instruments, through the auspices of ECOSOC the Secretariat published the \textit{Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice}.\footnote{46} With the recent addition of the University of British Columbia Law School to the Secretariat's Crime Prevention and Criminal Justice Program Network of Institutes, the Canadian presence in this policy area is likely to be strengthened.\footnote{47}

The most widespread affirmation of the concept of mutual legal assistance, albeit in the context of a particular class of crime, appeared in 1988 with the signing of the \textit{United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances}.\footnote{48} The Convention contains a "stand-alone" provision on mutual legal assistance to be provided between state parties in narcotics matters, and is intended to complement (or at least not affect) existing state practice on such matters.\footnote{49} For states without established practice, paragraphs 8-19 of article 7 lay out a regime which is similar in form to the \textit{Commonwealth Scheme}. The grounds for refusal are more limited in this convention than in others, likely in an effort to compensate for what McClean describes as "the danger...that sufficient weight will not be given to the intention to make a real advance in the level of co-operation in the drugs field, and that pre-existing practices and attitudes will be relied upon unthinkingly."\footnote{50}

In 1990 the United Nations expanded its activities in the area of mutual legal assistance by publishing the \textit{Model Treaty on Mutual Assistance in Criminal Matters},\footnote{51} which would furnish

countries wishing to enter into a bilateral treaty with an example based on the Commonwealth Scheme.52 Standard in form, the Model Treaty contains provisions allowing for refusal where a state fears prejudice to sovereignty, security, ordre public or other essential public interests.53 It also contains an optional protocol on proceeds of crime.

III. THE BILATERAL CONTEXT OF COOPERATION

1. Letters Rogatory

As noted above,54 the system utilized by states for the provision of mutual legal assistance prior to the conclusion of treaties was the use of letters rogatory.55 Used primarily for the enforcement of civil judgments, the system involved an official request made through diplomatic channels for the provision of assistance by a foreign government, which would then be passed down to the relevant justice ministry for implementation. As a means of combating crime, the process was cumbersome, limited in scope, and potentially fraught with political problems, particularly within the closely guarded criminal jurisdictional setting.56

The basis for this mode of cooperation at international law is found in the principle of comity.57 Comity recognizes the mutual interest of states in their reciprocal cooperation on matters that fall within national jurisdiction. This was recognized by U.S. Chief Justice Marshall in The Schooner Exchange v. M'Faddon and Others58 when he explained that, despite the exclusive jurisdiction of a state within its own territory, reciprocal state assistance occurs as a matter of common interest. This principle was confirmed in Canada by the

53 Model Treaty, supra note 51, Art. 4(1)(a).
54 See Part I:2, above.
56 See Prost, supra note 12 at 18.
57 See generally 7 Encyclopedia of Public International Law (Amsterdam: North Holland, 1984) at 41–44.
Supreme Court in *Zingre v. The Queen et al.*,\(^5\) and in fact Canadian practice continues on this basis. Those countries with which Canada has no treaty or Commonwealth obligations will generally be fairly "low traffic" when it comes to requests for assistance. Accordingly, their requests will generally be expected in the form of letters rogatory. The process is faster than it has been historically, however, due to the Department of Justice's functioning as a Central Authority for these requests.\(^6\)

2. Bilateral Treaties

In 1973, during the period of years between the conclusions of the *European Convention* and the *Commonwealth Scheme*, the United States and Switzerland concluded the first bilateral treaty on mutual legal assistance.\(^6\) This instrument was extremely influential with respect to later efforts, including the *Commonwealth Scheme*, and may be noted as the first successful bridging of the gap between states of differing legal traditions.\(^6\)

Given the immense shared border and the multitude of common interests in law enforcement between Canada and the U.S., it is not surprising that both parties were moved to conclude the *Treaty on Mutual Legal Assistance in Criminal Matters*,\(^6\) in 1985. This treaty has been utilized by nearly every jurisdiction in Canada and has proven to be such an effective mechanism for inter-state cooperation in criminal matters that within five years of operation it

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had supplanted all but the most informal of police links as the preferred means of contact.  

The Canada–U.S. Treaty is comprehensive in scope and provides a greater degree of integration of systems than some other agreements of its kind, while maintaining certain national quirks. Article II(3) specifically eliminates the requirement of dual criminality, and article III(2) states that "in exceptional circumstances," assistance may be provided "in respect of illegal acts that do not constitute an offence within the definition of offence in article I." Interestingly, article II(4) notes that the Treaty "shall not give rise to a right on the part of a private party to obtain, suppress or exclude any evidence or to impede the execution of a request." The text of the Treaty itself thereby explicitly limits its use to government bodies, potentially precluding privately initiated anti-trust actions in the U.S. As C. Goldman and J. Kissack note, the disclosure requirements stemming from Stinchcombe v. R. "would probably require disclosure to an accused in Canada of information received from the United States."  

Article V sets out a fairly limited set of grounds for refusal, which can occur only when the request is not made in conformity with the Treaty provisions, where execution of the request would be contrary to "public interest," or if execution would interfere with an ongoing investigation or prosecution in the requested state. Notably absent are both a double jeopardy exception and any provision similar to the Commonwealth Scheme's discretionary

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64 Author’s interview with Mr. Rodney T. Stamler, Executive Division Director (retired), Royal Canadian Mounted Police, 29 March 1992.  
65 Article I defines "offence" as:  
a) for Canada... a law of Parliament that may be prosecuted upon indictment, or an offence created by the Legislature of a Province...  
b) for the United States, an offence for which the statutory penalty is a term of imprisonment of one year or more....  
68 Art. V(1)(a).  
69 Art. V(1)(b).  
70 Art. V(2).
"human rights exception," most likely attributable to the similarity of legal systems between the two parties, as well as historically friendly relations. The absence of even a discretionary dual criminality requirement, however, significantly cuts down the bases upon which Canada could refuse to render assistance. This raises the interesting possibility that Canada could provide evidence for use in a U.S. prosecution that would result in the death penalty upon conviction.

The provisions of the Treaty dealing with the often-controversial area of costs have also made an impact upon treaties concluded by other jurisdictions. Article VII states that the requested state shall assume all costs for activities conducted within its boundaries, with the exceptions of expert fees, translation/transcription expenses, and travel and incidental expenses of persons travelling to the requested state to attend the execution of a request (such as a witness). Also notable is the Treaty's Annex, which contains an explicit extension of cooperation to the quasi-criminal context, in such areas of provincial jurisdiction as securities, wildlife protection, environmental protection, and consumer protection. This allows the provinces to make requests for assistance in pursuit of statutory offences, though as will be explained below, all such requests must be routed through the federal Department of Justice.

The Canada-U.S. Treaty demonstrated a certain amount of success in efforts to secure mutual legal assistance, and Canada has actively pursued similar arrangements on both the bilateral and multilateral levels. Canada now has its own model treaty for use in bilateral negotiations, and is currently party to eight international conventions (including the Commonwealth Scheme), as well as ten bilateral treaties. Moreover, efforts to form further relationships in compelling areas are ongoing; for instance, federal officials are

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71 See McClean, supra note 13 at 162.
72 Art. VII(1)(a)–(c).
74 Author’s interview with M. Jacques Lemeer, International Assistance Group (IAG), Department of Justice, Ottawa, 5 October 1997.
currently negotiating a mutual legal assistance treaty with Russia, presumably in an effort to deal with the spread of Russian organized crime networks into Canada.

IV. CANADIAN DOMESTIC IMPLEMENTATION AND APPLICATION

Having described the nature and scope of Canada's international obligations respecting mutual legal assistance, an inquiry must be made into how smoothly the system functions. Of particular relevance in the criminal setting is the degree to which the courts of the land will permit such obligations to interfere with the rights and privileges of Canadians. Such an examination is illuminating, as it reveals an intriguing duality in the perspective of the courts. First, as the following discussion will illustrate, the judiciary has facilitated the government's ability to respond to requests for mutual legal assistance from other states, essentially through a liberal interpretation of the powers given to police and prosecutors under the enabling legislation. Conversely, as will be shown in Part V, below, requests for assistance initiated by Canada are met with judicial reluctance to allow Canadian authorities to proceed with anything less than extreme caution. That this reluctance largely stems from the Charter is perhaps not surprising.

1. Mutual Legal Assistance in Criminal Matters Act

It is characteristic of Canadian law that for international legal obligations entered into by treaty to have effect in domestic law, they must be incorporated into the legislative scheme through the enactment of a statute. This approach to implementation of international law has been labelled "transformationist," a view "clearly springing from following the British legal tradition that treaties must be enacted into law by Parliament before they will

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75 Alan Cassell, United Nations Treaty Law and Criminal Division (JLA), Dept. of Foreign Affairs, (Remarks to the Canadian Council on International Law Annual Conference, Ottawa, 16 October, 1997).

76 See generally S. Handelman, Comrade Criminal: Russia's New Mafiya (New Haven: Yale University Press, 1995).
Canada's legal obligations regarding mutual legal assistance have been implemented via the *Mutual Legal Assistance in Criminal Matters Act*, which received royal assent on July 28th, 1988. The Act provides the legislative basis upon which the Department of Justice (Canada's "Central Authority") is to organize its activities to meet requests for assistance under the various instruments to which Canada is a party. It is designed simply to create an ability to provide assistance where it is requested by other states, since the response to requests for assistance by Canada will be the preserve of the requested states.

Consistent with Canada's preference for bilateral treaty relationships, the Act allows "administrative arrangements" to be entered into with countries that are not in treaty relationships with Canada, enabling the provision of assistance with respect to specific investigations. These arrangements are implemented by the Minister of Foreign Affairs in the same manner as treaties, and last for up to six months. The rationale for such "mini-treaties" is slightly mysterious, though one might speculate that they function to keep inter-state mutual legal assistance firmly in the federal sphere. Another interpretation would be that these administrative arrangements legitimate interference with citizens by the state where no crime has been committed on Canadian soil, illustrating for the courts the necessity and appropriateness of such action. This also serves to lend a strong domestic character to the entire transaction, insofar as Canadian policy preferences dictate both how

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79 Section 3(2) of the Act, however, notes that these relationships will not "abrogate or derogate from an agreement, arrangement or practice" on an informal basis. This preserves the functioning of Interpol, as well as ad hoc links which police or prosecutors may form.
80 But see the discussion of Schreiber, infra note 123 and accompanying text, with regard to the process followed for those requests.
81 See McClean, *supra* note 29.
82 Section 6(1).
83 Section 6(3).
84 Section 6(4).
i. Search and Seizure/Taking of Evidence

Sections 10–16 of the *Act* provide the circumstances under which Canadian authorities will execute a search warrant and seize evidence for a foreign proceeding. When a request for assistance is approved by the Minister of Justice, relevant documentation is provided to the "competent authority"85 of the jurisdiction in which the search and seizure is to take place,86 who will then apply *ex parte* for a search warrant to a judge of the province "in which the competent authority believes that evidence of the commission of the offence may be found."87 The judge may issue the warrant where he or she is satisfied that "an offence has been committed with respect to which the foreign state has jurisdiction,"88 and must fix the time and place for a hearing subsequent to the execution of the warrant.89 In the hearing, the judge may order the return of any material seized if he or she is not satisfied that the warrant was properly executed,90 or may order that the record or thing seized be turned over to the foreign state with such conditions attached as the judge sees fit for the preservation of the item or the protection of third parties.91

Complementary to the search and seizure provisions are sections 17–23 which govern the taking of evidence for use abroad by less coercive means than a search warrant. Apprised of the potential existence of evidence through a process similar to that followed in a

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85 Defined in s. 2 as "the Attorney General of Canada, the attorney general of a province or any person or authority with responsibility in Canada for the investigation or prosecution of offences."
86 Section 11(1).
87 Section 11(2).
88 Section 12(1)(a).
89 Section 12(3). Interestingly, s. 13 provides that the peace officer executing the warrant may also seize anything he or she finds that "will afford evidence of, has been obtained by or used in or is intended to be used in the commission of an offence."
90 Section 15(1)(a).
91 Section 15(1)(b), 15(2).
search and seizure, a judge may order the examination of any person, or order any person to produce documentary evidence, “in order to give effect to the request.” The person may refuse to answer any questions or to produce documents on the following bases: if the refusal is based on Canadian law (e.g., the privilege against self-incrimination); if requiring the person to answer questions or produce evidence would be a breach of privilege under the law of the requesting state (an interesting concession to that state’s jurisdiction); or, if the actual answering of questions or production of evidence would be an offence in the requesting state. However, such refusal must be justified by the party before a judge, who may determine that the refusal under Canadian law is not well-founded and order the person to answer the questions or provide the evidence requested.

These provisions of the Act have been the subjects of recent litigation, and the results have been noteworthy primarily due to their confirmation of the powers of the Crown under treaty and within the scheme of the Act. In Canada (Attorney General) v. Ross the British Columbia Court of Appeal held that, for a court to grant an order of transmission, Canadian authorities taking evidence under the Act (whether through seizure under sections 10–16 or obtained under section 18) need not show that the evidence will be admissible at trial in the requesting state. In R. v. Rutherford Ltd., the police had been engaged in negotiations with the manager of the company under investigation, who had been offering to turn over evidence in exchange for prosecutorial immunity. When search warrants were issued pursuant to the Act to allow a search of the company premises, the company and manager applied to quash the warrants, claiming that the Crown had not disclosed the aforementioned negotiations to the Court in their application. They submitted that provision of this evidence would

92 Section 17, 18(1).
93 Section 18(2).
94 Section 18(7)(a)–(c). Section 43 of the Act provides that where a similar refusal is made by a party in a foreign state, “a judge may determine the validity of the refusal on application...by a Canadian competent authority.”
95 Section 19(3).
96 (1994), 44 B.C.A.C. 228, 71 W.A.C. 228 (B.C.C.A.).
have shown that examination under section 18 was more appropriate. The Court held that the withheld evidence only strengthened the case for a search warrant, as the manager's plea for immunity showed that he was likely to have withheld evidence under a section 18 inquiry, and dismissed the application to quash.

In *United Kingdom v. James & Boyden*,98 the Canadian police were acting under a section 18 order in an investigation of R., a U.K. citizen with Canadian business dealings. Section 18(5) of the *Act* permits "third parties" to apply to have the order set aside if they can assert a proprietary interest in the evidence, among other grounds. Upon R.’s application under this section, the Court found that the words "third parties" were not to be interpreted to include the party under investigation, who had neither a constitutional right to privacy nor common law standing to challenge the investigation process.

Cases involving the constitutional rights of the party under investigation have also been won by the Crown. In *United Kingdom v. Hrynyk*99 the respondent was alleged to have had business dealings with a party being investigated for bankruptcy fraud in the U.K. Hrynyk was ordered to attend a section 18 examination and to furnish documents relating to transactions with the foreign accused. Under section 18(6) he applied for and received use and derivative use immunity for his evidence, but continued to refuse to answer questions on the basis that the order and the *Act* violated the right to remain silent under section 7 of the *Charter*. The Court, noting that section 18(5) of the *Act* allows a judge to impose conditions upon evidence to protect the interests of compelled witnesses, found that the immunity granted to Hrynyk provided the proper balance of the interests of the individual and the state. The compelled testimony in this case would not have put the party in personal jeopardy, and therefore did not infringe his section 7 rights.100

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100 A similar ruling had been made earlier by the Quebec Supreme Court in *Etats-Unis d'Amérique c. Ross*, [1995] R.J.Q. 1680.
ii. Appeals

Section 35 of the *Act* allows an appeal on a question of law alone "from any order or decision of a judge or a court in Canada made under this Act," provided leave of the Court of Appeal is granted. This provision has been narrowed in at least one instance, where the Court held that the question of whether section 18 evidence gathering should be ordered instead of a search warrant is at best a mixed question of law and fact. In a different case, the Nova Scotia Court of Appeal recently outlined the test to be applied as to whether leave to appeal should be granted:

Is the question raised not settled by authority? Is it of importance generally and, if not of importance generally, is it nonetheless of great importance to a person with serious interests, such as his liberty, at stake? Does the proposition of law put forward have any merit? Are there any discretionary conditions, such as prejudice to either the applicant or the requesting state, which are required to be taken into account?

The language of "serious interests, such as... liberty" suggests the importance of the *Charter* rights as "questions of law" when deciding whether or not to allow an appeal. The latter part of the test, however, denotes a willingness on the part of the Court to accommodate the interests of the requesting state even on a question of law. Such flexibility indicates that courts may be disposed towards facilitating Canada's compliance with its "requested-state" obligations.

2. Collateral Issues

i. Expanding Information-Gathering: The Role of the Defence

As demonstrated above, mutual legal assistance is an inter-governmental cooperative mechanism which has been given the authority of international law. By making the provision of information a matter of international comity or obligation, it allows

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states to overcome the problems inherent in the strictly domestic scope of criminal jurisdiction, hindering the ability of malfeasants to hide behind such structural obstacles. On the domestic scene, however, the relative power imbalance between the state and the accused must be addressed by both the courts and the legislative criminal justice scheme. As such, the question arises as to whether the state's exclusive access to such means of procuring evidence is desirable from a policy standpoint.

In Canada, the defence has available to it a great majority of the evidence collected by the Crown due to the *Stinchcombe* disclosure requirements, and the accused is generally protected by the *Charter* from that which is obtained unconstitutionally. Therefore, evidence received by the Crown through a mutual legal assistance request must be disclosed to the defence. However, mutual legal assistance mechanisms give the Crown absolute discretion with respect to which evidence is to be gathered in the foreign jurisdiction. Thus, it is not unrealistic to contemplate an unfair trial as a result of evidence beneficial to the defence being unretrievable, perhaps even unknown to the defence, on this basis. The government of Australia recently introduced an amendment "which formalizes the role of the Attorney-General in seeking foreign evidence at the request of the defence." Should a Canadian case ever be heard where foreign evidence is left unsecured by the Crown in detriment to the defence, the courts may implement a similar policy underpinned by section 7 of the *Charter*. This raises the question: does the accused have the right under section 7 to the same modes of access to evidence located in foreign jurisdictions as the Crown? Must the search for such evidence be *facilitated* by the Crown? The intuitive answer is no, due to the fact that at international law, treaties give rise to rights only as between the parties to them, which necessarily excludes individuals. Moreover, the goal of the *Charter* in the criminal context is to balance the disparity of resources between the

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103 Supra note 66.
104 D. Stafford, "The Role of the International Association of Prosecutors in Encouraging International Cooperation" (Paper presented to the International Association of Prosecutors Annual Conference, 2 September 1997, Ottawa [unpublished].
individual and the state. An expression of legislative preference on this matter, however, is desirable.

\[ ii. \text{Form of Evidence: Comparative Legal Divergence} \]

As the *Schreiber* case, discussed below, indicates, the manner in which evidence is gathered by the requested state and the form in which it arrives in the requesting state can engage issues of both domestic and international law. From the Canadian perspective, the question is twofold: first, what kind of evidence is it acceptable to receive from requested states? A related question would be whether states which provide unusable evidence have violated their treaty obligations. The second issue: where requests are made of Canadian authorities, is it possible that our legal and constitutional restrictions will bring us into breach of our duties at international law?

The answer to both questions will be a matter of practicality in cooperation. As K. Prost notes, "[f]or mutual assistance to succeed, the operative principle must be that requests will be executed in accordance with the law of the requested state and, to the extent not prohibited by that law, will be provided in the manner sought by the requesting state." 105 This statement is in fact enshrined in the Canada-u.s. Treaty, being a verbatim recitation of article VII(2). 106 It has obvious practical implications; for example, where Canada makes a request of a civil law state for the results of a witness examination, Canada will require a verbatim record of the witness statements. However, civil law practice generally provides a *proces verbal* or summary, which would be insufficient for Canadian purposes. 107 A more effective means of facilitating cooperation would be for the requesting states to reduce their expectations as to the form which the evidence will take; this would, however, require a massive international convergence on criminal procedure standards, which would require an unlikely convergence of political will. In the interests of practicality, it is hoped that the foreign jurisdiction will be able to provide the evidence in a form usable in Canada so long as it does not violate its own laws in the process, and building such a good working relationship with the jurisdiction

105 Prost, *supra* note 12 at 22.
106 *Canada-U.S. Treaty, supra* note 63.
107 Prost, *supra* note 12 at 23.
must be a matter of practical concern for the prosecution services of cooperating states.

Yet the true issue is not the nature of the relationship with the foreign jurisdiction, but the compatibility of legal traditions. Mutual legal assistance between jurisdictions which have similar legal traditions, such as those under the Commonwealth Scheme, will be fairly trouble-free almost as a rule; likewise with nations of a similar socio-economic standing. However, an issue for Canadian criminal justice will be the pursuit of evidence within the jurisdiction of states with less compatible legal traditions, particularly with respect to the rights of the individual. When evidence is taken by authorities in these states, its arrival in Canada may be met with Charter challenges to its admissibility. Where a mutual legal assistance arrangement is in effect, can these states be said to have violated their international legal obligations? The short answer must be no; the treaties in their present form provide that states shall pursue evidence in accordance with their own laws. And yet this may be precisely the factor that brings the ongoing foundation of legal assistance networks to a halt. Making requests of states with comparable or “tougher” standards of conduct for the authorities will create no insurmountable problems; on the other hand, working arrangements with jurisdictions which acquire evidence by practices unacceptable by Canadian standards may prove more difficult. The only alternative—the breaking down of the Canadian legal regime surrounding evidence which has evolved over a century’s practice—seems unlikely, particularly in the face of Charter requirements.

The corollary scenario, where Canada’s legal regime does not allow us to acquire evidence which is sufficient for the requesting state’s purposes, hardly seems to present a similar problem. Where a request is made of Canada by a state with a “looser” approach to the rights of individuals at criminal law, Canada’s standards are unlikely to cause problems for the foreign authorities. A state with a tougher set of standards will likely have a means, similar to Canada’s Charter, to exclude evidence which, while consistent with practice in Canada, must be excluded under its regime.

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108 Such as Switzerland. See Part V:3 below.
V. CANADIAN REQUESTS: JURISPRUDENCE AND
THE CHARTER

The foregoing indicates that, while the Act has a few areas wherein contention might arise, it has for the most part occupied a fairly quiet, practical and uncontested corner of Canadian criminal procedure. This can be attributed to the procedure to be followed being consistent with Canadian law and practice despite that the requests are made by foreign authorities. Such a policy is consistent with the principle mentioned above: that the provision of assistance insofar as it requires activity in domestic jurisdiction shall be carried out according to the laws of that jurisdiction. Typical is the Canada-U.S. Treaty, which states that a request "shall be executed in accordance with the law of the Requested State and, to the extent not prohibited by the law of the Requested State, in accordance with the directions stated in the request."\(^{109}\) This notion accords with the close guarding of the criminal jurisdiction and is predominantly uncontroversial.

In Canada, more profound questions have been dealt with by the courts when Canada has made requests for assistance of other countries, for use in investigations in Canada. The individual freedom issues are obvious; since evidence will be gathered by the police and prosecutors of foreign jurisdictions, it will be done in accordance with foreign law. As such, persons attracting Charter protection\(^{110}\) who are under investigation are afforded none of their domestic rights in the foreign jurisdiction. From a defence point of view, this process could be characterized as an "end-run" around the Charter. As will be demonstrated, while the process is on solid ground at international law, it becomes more problematic where international practice and the Charter meet.

1. R. v. Filonov\(^{111}\)

This case involved an RCMP investigation into drug-smuggling, where a request was made of the American authorities pursuant to the Canada-U.S. Treaty. The U.S. Drug Enforcement Agency

\(^{109}\) Canada-U.S. Treaty, supra note 63, art. VII(2).

\(^{110}\) That is, any person who falls into Canadian criminal jurisdiction.

\(^{111}\) (1993), 82 C.C.C. (3d) 516 (Ont. Gen. Div.).
executed two search warrants and seized documentary evidence, which was handed over to the RCMP. The accused applied to have the searches by the American authorities subjected to Charter scrutiny, and to have the documents excluded based on section 24(2) of the Charter because certain procedural requirements under Canadian law were not met. The Court, noting that the Charter is to govern the relationship between the Canadian authorities and residents, noted that the search had to be carried out according to American procedural requirements, and:

by authorities who were in no way controlled by or answerable to any Canadian authorities. The fact that the process was initiated by the latter did nothing to make their [u.s.] counterparts agents of the Canadian government. Even if they could be so considered, their conduct would not be governed by the Charter unless the Charter expressly said as much.\footnote{Ibid. at 522-23.}

The Court thus refused to extend the Charter's provisions to foreign police cooperating with a Canadian investigation, where they were operating within their own jurisdiction, and accordingly quashed motions to have both the evidence and the warrants set aside. It noted that a Charter remedy might have been available in the face of evidence that the documents were obtained in such a manner that the accused's rights were violated, but that this had little to do with the issue of admissibility.\footnote{Ibid. at 521.}


The Supreme Court of Canada in Terry expanded on themes regarding Charter application which had been touched upon by Justice Dilks in Filonov.\footnote{Which case the Court referred to, \textit{ibid.} at 217.} Terry had fled to the u.s. after killing a man in British Columbia, and was apprehended by American authorities in California acting under an extradition warrant. At issue was the Charter admissibility of evidence taken during the questioning of Terry by the American authorities which was then

\begin{footnotes}
\item[112] Ibid. at 522-23.
\item[113] Ibid. at 521.
\item[114] [1996] 2 S.C.R. 207.
\item[115] Which case the Court referred to, \textit{ibid.} at 217.
\end{footnotes}
transmitted to Canadian police, though not, it appears, by way of a treaty request. Nonetheless, the judgment of McLachlin J. examined the treaty relationship in an interesting *obiter dictum*. After stating clearly that a state's criminal law cannot apply outside its boundaries,\(^\text{116}\) the Court began to draw lines with regard to the application of the *Charter*:

> The practice of cooperation between police of different countries does not make the law of one country applicable in the other country. Bilateral mutual legal assistance treaties negotiated under the authority of the *Mutual Legal Assistance in Criminal Matters Act*... stipulate that the actions requested of the assisting state shall be undertaken in accordance with its own laws... Thus, if the Santa Rosa police in this case had been responding to a treaty request, they would not have been governed by the *Charter*.\(^\text{117}\)

Justice McLachlin further noted that a person arrested out of jurisdiction is not left without a *Charter* remedy, as evidence could be excluded on the basis of the section 11(d) right to a fair trial, or the accused's rights to fundamental justice under section 7.\(^\text{118}\)

A further *dictum*, however, indicated possible disagreement among the members of the Court. Justice McLachlin noted that, “even if one could somehow classify [the U.S. police] as 'agents' of the Canadian police, so long as they operated in California they would be governed by California law.”\(^\text{119}\) The Court felt it unnecessary to decide on this factual issue. The statement is somewhat at odds with a *dictum* by LaForest J. in *R. v. Harrer*, where under similar circumstances it was stated that, “a different issue would also arise if the United States policemen...had been acting as agents of the Canadian police ....”\(^\text{120}\) In neither case did the Court make any mention of what might constitute an “agency”

\(^{116}\)Citing at 216, LaForest J. in *R. v. Harrer*, [1995] 3 S.C.R. 562 at para. 15: “Canada cannot impose its procedural requirements in proceedings undertaken by other states in their own territories.” Terry had, in fact, been an intervenor in Harrer's hearing before the Supreme Court.

\(^{117}\)Ibid. at 216–17.

\(^{118}\)Ibid. at 219.

\(^{119}\)Ibid. at 220.

\(^{120}\)Supra note 116 at para. 11.
relationship between police of different jurisdictions that would trigger an application of the *Charter* to the police in the requested state. LaForest's line of reasoning seems consistent with the opinion that he expressed in *Harrer* that the *Charter* may apply extraterritorially in some circumstances. Yet under what conditions can the police of one jurisdiction, acting within their jurisdiction, be considered the agents of another? McLachlin's *dictum* seems to indicate that a Treaty request will not actuate this relationship, and the Court's findings in both *Harrer* and *Terry* indicate that informal police cooperation as well will not serve this purpose. Yet a lack of further pronouncement on the issue, coupled with the uncertainty of the Court's direction on the *Charter's* scope, may give us pause. The Court's tiptoeing up to the line of extraterritorial application of the *Charter*, however, will undoubtedly have implications for the provision of mutual legal assistance in the future.

3. *Schreiber v. Canada (Attorney General)*

The latest judgment on mutual legal assistance came from a Federal Court of Appeal hearing on a spinoff issue of the *Airbus* scandal. Karlheinz Schreiber was the subject of a criminal investigation on kickbacks allegedly received by him and other parties (including former Prime Minister Brian Mulroney) for the awarding of Canadian contracts to certain companies. During the investigation, a letter of request was sent by the Attorney General of Canada to the Swiss authorities requesting records of bank accounts held by Schreiber in that country, and the records were seized in accordance with the request. The Attorney General did...
not obtain a search warrant or other judicial authorization prior to the request. Schreiber contended that his right to security against unreasonable search and seizure in section 8 of the Charter had been infringed, as the process set out by the Court in Hunter and Dyment was not followed. The Attorney General submitted that the privacy right was not subject to Charter protection outside Canada, because section 8 could not have extraterritorial effect. The question put to the Federal Court Trial Division was:

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?  

The Trial Division had answered the question in the affirmative.

The disposition of the case found a two-thirds majority of the Court of Appeal siding with Schreiber J.A., but subject to a strongly-worded dissent by Stone J.A. The disagreement turned on competing interpretations of the words contained in section 8. The majority, relying on Hunter, used an expansive characterization of the section and focused on the expectation of privacy that the accused is to be afforded under the section, rather than the nature of the alleged violation:

The question to be asked, therefore, 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 to be asked is whether the letter of request jeopardizes the respondent’s reasonable expectation of privacy, his security against unreasonable search and seizure.

The Court thus extended the section 8 protection to the entire process surrounding a search and seizure, rather than just the

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127 R. v. Dyment, [1988] 2 S.C.R. 417. This case and Hunter establish that, for a search and seizure to be initiated, judicial approval on “reasonable and probable grounds” must be obtained. See Hunter, ibid. at 160.
128 Supra note 123 at 185.
129 Supra note 123 at 228, Linden J.A.
physical act. Schreiber's *Charter* rights were judged to have been engaged when the letter of request was sent, as this initiating action was taken by a government body, and is therefore subject to the *Charter*. While the facts of the case took place within the context of a letters rogatory request, the practical effect will extend to a request under treaty: "Canada will be required to obtain prior judicial approval before a request can be sent to foreign authorities."\(^{130}\)

The majority specifically rejected the submission of the Attorney General that to extend *Charter* protection to the accused in such an instance was to apply the *Charter* right extraterritorially. While it acknowledged that a state cannot fetter the activities of another state's authorities in the criminal context due to sovereignty concerns, the Court drew a clear line between any activities by the foreign authorities and the process being initiated on Canadian soil. Insofar as a request is made for a search and seizure by Canadian authorities with respect to an investigation into an offence under Canadian law, the request itself must conform with the *Charter* requirements.\(^{131}\)

In his dissent, Stone J.A. took issue with the majority's interpretation of the section 8 protection, stating that they had incorrectly emphasized the word "secure" at the expense of the words "search" and "seizure." He concluded that the *Charter* right could not apply to Schreiber because the documents were seized by the Swiss police, operating under their own laws: "there was simply no 'search' or 'seizure' in Canada to which section 8...could attach."\(^{132}\) Furthermore he found:

> To conclude that [section 8] is engaged because the Canadian authorities sent the request to Switzerland even though they could not and did not conduct any search and seizure there would be to contort the language of

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\(^{130}\) *Ibid.* at 192, Stone J.A.

\(^{131}\) The Court appeared to find influential the fact that with the sending of the request, the government had a “reasonable expectation of its acceptance, and a likelihood of it being acted upon.” It found that this was “sufficient to engage section 8 of the *Charter*, particularly when the thrust of its protection... is to institute a means of preventing unjustified searches before they happen” *supra* note 123 at 236. The same would clearly be true of a treaty request.

\(^{132}\) *Supra* note 123 at 204.
this important protection and to give it application where no governmental action of the kind envisaged by the section is involved.\textsuperscript{133}

Finding that the Canadian authorities could not carry out the search and seizure themselves, he judged the request to be simply standard intergovernmental cooperation not attracting Charter scrutiny.

The majority decision in \textit{Schreiber} is well-reasoned and appealing from an individual rights point of view, and appears to be consistent with the Supreme Court's objectives in \textit{Hunter}. Moreover, it seems to strike a proper balance between policy and the protection of the individual: "A government cannot use the need for international assistance as an excuse to justify its own constitutionally impermissible conduct."\textsuperscript{134} Yet the words of Stone J.A. leave a few nagging doubts as to the proper ambit of the Charter. The majority seems to dismiss out of hand the Attorney General's "effective" submission that, "by banking in Switzerland, the respondent gave up the protection of the Charter."\textsuperscript{135} It also rejected a proposed parallel with \textit{Harrer}, where McLachlin J. noted in the context of the section 10(b) right to counsel that the right "appertains to the time of arrest or detention," and thus could not apply to a foreign authority carrying out the interrogation.\textsuperscript{136} But is the parallel such an unreasonable one? Could the right to protection against search and seizure not be said to more properly "appertain" at the time of its physical violation? The protection afforded by section 8 is to apply to "unreasonable search and seizure"; while neither side of the judgment in \textit{Schreiber} chose to focus on this, the inclusion of the word "unreasonable" would seem to indicate a focus on the activity itself—more in line with the interpretation of Stone J.A. The accused still has open to him or her an application to exclude the evidence if it violates sections 11(b) or 7, i.e. if the evidence-gathering conduct has been grievous.

From a policy perspective, too, the judgment of the Court in \textit{Schreiber} may be seen to have negative implications. The need for

\begin{footnotes}
\item[133] Ibid. at 207.
\item[134] Ibid. at 225.
\item[135] Supra note 123 at 221.
\item[136] Ibid. at 223.
\end{footnotes}
the level of section 8 protection prescribed by the Court will necessitate judicial approval of virtually every request made of a foreign state for evidence, which cannot but compromise the efficiency for which current techniques of mutual legal assistance are designed. Furthermore, this would seem to put the Charter's objectives at odds with the leeway needed in the fight against international crime, a fight approved of by the Supreme Court in Cotroni. The Court in Schreiber has perhaps indirectly acknowledged this problem, where it stated that, "[t]he spectre of the need for legislative action cannot inhibit the Court from declaring unconstitutional conduct to be [so]." Yet such pronouncements can further tie the hands of the state in its pursuit and prosecution of a brand of crime which is by nature intransigent and difficult to halt, and turn the Charter's domestic focus on individual rights loose in an area where its restrictions may, in the larger scope, undermine its peace and public order objectives by compromising the ability of the state to combat international criminals.

The Court's invocation of "the spectre of the need for legislative action" seems to suggest that its judges envision a political response, a use of legislation to unbind the powers of the prosecution. Yet such an expectation is ingenuous at best, given that any new legal structure will be viewed through the same Charter lens as the present legislation, a lens which has clearly affirmed the rights of the individual being investigated by the state. It is submitted that the level of protection already afforded by the Charter is sufficient in this instance, particularly given the need for efficiency and speed in the investigation of international crimes. A society in which the power to combat such an insidious and slippery brand of crime is limited is one wherein the rights of all citizens are curtailed, one wherein the wheels of justice are deadlocked—one wherein crime does pay. While such a limitation of the right to privacy may constitute a violation of the language of section 8, it would certainly constitute a limitation that is reasonable and just in the overall interests of our democratic society, and could thus be shielded under section 1. Allowing unfettered international cooperation in

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137 Supra note 6.
138 Schreiber, supra note 123 at 241.
evidence-gathering, while providing under sections 7 and 11(b) for exclusion of such evidence as is deemed impermissible at trial, surely will not lower the Charter bar unacceptably. As the Schreiber decision is under appeal to the Supreme Court, this question will continue to be of significance.

VII. CONCLUSION

Canada’s famed “internationalism” has always in fact featured a juxtaposition of conflicting trends, lending a certain bipolar quality to national will on the subject. While an initiator and enthusiastic participant in efforts to formulate and advance the goals of international law, Canada’s implementation thereof has been hindered by the reluctance of national courts to incorporate customary international legal duties into judicial decision making when they appear to conflict with a statute. As well, our troublesome federal system has made our status as parties to international treaty the subject of both internal division and international criticism. In the area of mutual legal assistance, it seems clear that the mechanisms which allow us greater facility in fighting international crime will be held back by a determination not to let pressing external need interfere with the courts’ Charter-based deconstruction of the “peace and public order” mandate; witness the Supreme Court’s slow but sure extension of the Charter to matters beyond our borders. Yet such a stance has the potential to be self-defeating, as unfettered jurisdiction-hopping lawbreakers rob legal systems of their prosecutorial legitimacy.

In some ways, Canada’s domestic law orientation stance on mutual legal assistance would seem entirely consistent with international practice. Characteristic of virtually all inter-state relationships in this area are reservations relating to the interests of state sovereignty and jurisdiction, allowing parties to refuse cooperation if it is seen to be contrary to ill-defined “national

interests”, or limiting its operation to practice permitted under domestic law. And this, too, is consistent with the close guarding of criminal jurisdiction.

However, such trends only underline the profound barriers which continue to restrain the effectiveness of the battle against international crime. It is difficult to envision police and prosecutorial authorities conducting their activities according to anything but their own laws and procedures; yet this is precisely the weakness upon which the perpetrators of transnational crime prey. Without some integration of criminal systems, without a jurisdictional “dropping of borders” commensurate with the emerging degree of economic interdependence, the battle will continue to be a losing one. Mutual legal assistance treaties such as we know them, even combined with the network of treaties in areas such as extradition, represent but a first step.

Efforts are being made in this regard, particularly in the European forum142 where co-mingling of jurisdictions does not meet with the fierce opposition it does elsewhere. As Williams and Castel wrote in 1981, “[a] reasonable solution for preventing criminals escaping trial for their activities, by involving several states, lies in the universal acceptance of elastic jurisdictional principles which can be molded to fit the realities of modern-day crime.”143 Nearly two decades later the means towards the implementation of such a “universal acceptance” are slowly evolving as the tools of the trade of police forces and prosecuting authorities, in the form of extradition arrangements, mutual legal assistance mechanisms, and coordination in the pursuit of the proceeds of crime, among others. Yet Canada continues to maintain itself in the highly insular, sovereign camp, bound by jurisdictional entanglement. To make a meaningful contribution to the battle against international crime, not to mention meeting the needs of its own populace, Canada must be willing to adopt a more internationalist approach to constitutionalism and due process so that the lofty and worthwhile goal of “peace and public order” may have some chance of being realized.

142 For example, the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime reprinted in Gilmore, supra note 3 at 78.

143 Williams and Castel, supra note 55 at vii.