THE CHARTER'S IMPACT ON THE CRIMINAL JUSTICE SYSTEM, Edited by B. Jamie Cameron, Toronto: Carswell, 1996. Pp. 448 ($75.00).

This is an excellent book. It is informative, provocative and important. It is the product of a unique initiative through which Professor Jamie Cameron, Director of the Centre for Public Law and Public Policy, brought many of the best criminal law judges, lawyers, policy analysts and academics together to examine "whether and to what extent the process of constitutionalization has altered the underlying assumptions and principles of criminal justice in Canada".[1] That question is of seminal importance. Criminal practitioners, including the judiciary, faithful to the common law method, have an understandable tendency to see the law as it is needed to resolve the specific issue that they are facing. The contribution that a book like this can make is to provide the larger picture. Without an appreciation of the more general trends, the law cannot develop rationally or productively. This book succeeds admirably in providing a thematic discussion of where we have been and where we appear to be going. The result of this collaboration is a collection of truly expert essays, commentaries and transcribed round table discussions that chronicle the sea change that is happening in Canadian criminal law.

As was no doubt expected, and indeed intended, the various participants view the criminal law quite differently. They have disparate notions about where the law should be headed, and they each focus on specific legal issues that are of particular interest to them. Despite this, and no doubt unwittingly, together the contributors succeed in pointing out the paradox of the *Canadian Charter of Rights and Freedoms.*[2] We constitutionalize fundamental principles and values so that they will endure, protected from the pressures of politics and expedience. Yet, the process of constitutionalizing basic criminal law principles has made them more vulnerable to attack.

Although there have been substantial gains for accused persons with respect to certain procedural protections, (such as the right to counsel, enhanced self-incrimination rights, trial within a reasonable time, disclosure rights and the exclusionary remedy) those accused of crimes have also experienced remarkable set-backs. Not only is the earnest commitment to these rights waning since the first five years of *Charter* enthusiasm, but also the entire conception of criminal law is being revisited in a way that threatens to increase the risk to the innocent. We are intent on giving everyone a 'voice' in the criminal law, despite the fact that the "*Charter* is intended to protect the accused from the majority",[3] and this is changing the face of the law.

Prior to the *Charter*, courts were relied upon to protect accused persons from the "shifting winds of public passion".[4] Though Lamer J. warned in the more robust *Charter* era of 1987 that "the *Charter* must not be left to [the] majority",[5] community

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[1] Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) at VII.

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

[3] *R.* v *Collins*, [1987] 1 S.C.R. 265, 33 C.C.C.(3d) 1 at 17 [hereinafter *Collins* cited to C.C.C.].

[4] D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 246.

[5] *Collins, supra* note 3 at 17.

views are exerting a significant influence on the development of the criminal law. As a result, we are coming to treat the criminal law as a process designed to vindicate the 'rights' of victims, despite our long-held belief that the function of a criminal trial is to test whether there is sufficient evidence of a condemnable wrong to provide society with the moral authority to collectively label, stigmatize, ostracize and punish one of its citizens. The casualties in all of this are those who are not morally guilty but who will be subjected to the indignity and calamity of conviction to appease unbridled public passion and the political demands of the day. Although causation is always among the most difficult of facts to establish, together the essays in this book provide a strong basis for attributing much of the blame for this result to the *Charter*. How did this happen? Although the themes are not tied systematically in the papers and dialogues contained in the book, together the discussions suggest that there are three related explanations.

First, the *Charter* has opened the proverbial 'can of worms' by inviting a public dialogue about what is fundamental in the criminal justice system. Second, the *Charter* has bestowed new rights that can be asserted in opposition to the rights traditionally conferred on accused persons. And third, there is the most base of reasons for reducing the ability of innocent persons to avoid conviction: politics.

Opening the Public Dialogue

By its very nature, *Charter* litigation forces courts to engage in a dialogue about fundamental rights and to consider the impact of recognizing them as constitutional principles. This has encouraged the courts to soften basic common law principles, to keep them from exerting disproportionate influence. When those principles were non-constitutional they could not be used to strike down legislation, and, while they provided strong guidance in resolving legal controversies, they could be overridden with informality where it was judged that they should not operate. Once anointed as fundamental and constitutionally required, it was feared that they would make the system rigid and unresponsive to competing needs, despite section 1 of the *Charter*.

The most notorious example of a basic principle being weakened to the state of complete anaemia is the principle of fault or *mens rea*, which characterized the substantive pre-*Charter* law. While we never succeeded entirely in avoiding objective criminal fault, we at least saw it as something to be avoided. The result of *Charter* challenges to substantive criminal law provisions has been to embrace objective liability openly. Fearful that recognizing a general principle of subjective fault would wreak havoc with many established criminal law offences like those dealing with criminal negligence and dangerous driving, or those providing aggravated forms of criminal liability for unintended consequences of unlawful behaviour, the Supreme Court of Canada has given its approval to criminal liability for negligent conduct. This process is described cleanly by Richard Litkowski in his essay "The *Charter* and Principles of Criminal Responsibility: A Long and Winding Road". As Stanley Cohen observes in his remarkable, troubling essay, "Law Reform, the *Charter* and the Future of the Criminal Law", this will no doubt inspire legislators to create more and more objective fault offences. And although it is impossible to demonstrate, the acceptance of criminal liability based upon what accused persons 'should have' foreseen and known has no doubt made it easier for courts to diminish the importance of *mens rea* principles, by employing aggressive conceptions of 'wilful blindness' and by resorting to

presumptions against the accused to resolve questions of fact about intention and knowledge. Although the *Charter* was used to strike down constructive murder and to marginalize absolute liability, the basic principle requiring *mens rea* may actually be one of its more noteworthy casualties.

New Rights Tenable in the Criminal Process

The second explanation made apparent in this book for why the *Charter* may be reducing the protection of accused persons is that it has bestowed new rights on persons other than the accused, which can be asserted in opposition to the rights that the accused can claim. Professor Stuart includes a poignant and important discussion of the dangers of using the *Charter* to protect victims' rights in his essay "*Charter* Protection Against Law and Order, Victims' Rights and Equality Rhetoric". It is a forceful piece, presented as a series of concise, even clipped, but powerful observations. Yet, our Supreme Court of Canada has chosen to go down the road of victims' rights and equality rhetoric, and it is not surprising. The *Charter* attempts to be all things to all people, and as Dianne Martin points out in her paper "Rising Expectations: Slippery Slope or New Horizon? The Constitutionalization of Criminal Trials in Canada", it has raised the expectations of everyone, and has created a dialogue about rights rather than about what is right. Complainants, invariably identified as victims, the media, and public interest groups are claiming a place at the table and it is changing the face of criminal law. There are thought-provoking discussions of this phenomenon by Jamie Cameron "Tradition and Change Under the *Charter*: The Adversary System, Third Party Interests and the Legitimacy of Criminal Justice in Canada", and Joan Gilmour, "Counselling Records: Disclosure in Sexual Assault Cases". The latter article does not present adequately both sides of that important debate, but it is an intelligent and worthy discussion of the nondisclosure position.

Unfortunately, one of the most interesting and integral questions is left unexplored in the book. When primary litigants seek to use equality rights or section 7 rights to sustain a claim, they are held to exacting, technical tests to see if they qualify for constitutional protection. Ironically, when asserting rights for the purpose of diminishing the constitutional protection of accused persons, complainants have not been held to the same standards. Their section 15 and section 7 rights are simply assumed without testing them against any of the technical components that those provisions have acquired in the case law. It is as though the oblique and startling practice that the Supreme Court of Canada has adopted of allowing *Charter* 'values', as opposed to strict *Charter* rights, to assist in the interpretation of the law, has somehow transformed the rights of complainants in sexual offence cases into firm constitutional entitlements that are not to be tested by *Charter* precedent, nor 'trumped' by long-standing principles intended to keep innocent persons from being convicted.

The Political Factor

A *Charter* "victory", like the remarkable *R.* v. *Askov*[6] decision, can attract considerable attention. In many cases, the Government has responded with immediate

[6] [1990] 2 S.C.R. 1199, 59 C.C.C.(3d) 449.

legislative intervention. As Kent Roach points out in "Institutional Choice, Co-operation, and Struggle in the Age of the *Charter*", the defence victory in *R.* v. *Seaboyer*; *R.* v. *Gayme*[7] was the impetus for extensive revision of the law of sexual assault, both procedurally and substantively. *R.* v. *Daviault*,[8] a decision discussed critically by Martha Shaffer in "Criminal Responsibility and the *Charter*: The Case of *R.* v. *Daviault*" brought about legislative change with break-neck speed, and since this book has been written and the *R.* v. *O'Connor*[9] decision released by the Supreme Court of Canada, the Government has responded to political pressure in order to prefer disparate privacy interests, *en masse*, to the ability of the individual accused person to explore avenues of defence. The legislation is telling about our commitment to the presumption of innocence. If we start from the assumption that persons accused of sexual assault are guilty, then it is a wonderful initiative. If we start where we should, from the presumption of innocence, it is alarming. It assumes that in every case the privacy interest that is being invaded is that of a victim. While most of course are, some are not, yet the legislation grants what is tantamount to blanket protection, save in the rarest of cases. This is interesting enough on its own, but the broader phenomenon is even more compelling. The paradigm of courts using a constitution to stand in watch for the excesses of legislators and state agents has been turned on its head; in Canada, Parliament stands watch over what are conceived in the political arena to be the "constitutional excesses" of our courts.

Pondering the Real Impact of the Charter

In the most intriguing and provocative piece in the book, "'Fundamental Justice', Repression and Social Power", Michael Mandel advances the thesis that the *Charter* is facilitating the oppression of the disadvantaged by the criminal justice system. It does so, he asserts, by supporting the illusion that justice is being preserved at a time in our history when we are incarcerating an unprecedented number of our poor and disenfranchised. Although the reader might be put off by the somewhat conspiratorial tone in which that thesis is presented, Professor Mandel assails the reader with a series of startling statistics that give great cause for concern. At the very least, notorious *Charter* decisions have doubtlessly contributed to a law and order mentality that supports increased and harsher use of criminal sanctions, despite the *Charter* not having had a measurable impact on the success of prosecutions. Interestingly, even *Askov*, as Professor Mandel no doubt enjoys pointing out, resulted in increased rates of incarceration as we pushed an unprecedented number of cases through the system in order to deal with the backlog which had developed.

Mr. Justice Casey Hill, for his part, reported that he had attempted to find out whether the *Charter* jurisprudence was having a discernible effect on police practices in obtaining search warrants. He found that despite Supreme Court of Canada decisions, of 100 warrants reviewed by him in 1994, 39% were constitutionally invalid.[10] Is it that the message is not getting through, or that the message is not clear enough to be

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7 [1991] 2 S.C.R. 577, 66 C.C.C.(3d) 321.

8 [1994] 3 S.C.R. 63, 93 C.C.C.(3d) 21.

9 [1995] 4 S.C.R. 411, 44 C.R.(4th) 1.

10 *Supra* note 1 at IX.

understood? Or is it that the exclusionary remedy is not being used with sufficient consistency to have an impact? As he did in his fine book,[11] Professor Kent Roach in "Institutional Choice, Co-operation, and Struggle in The Age of The *Charter*", calls for the use of more institutional remedies at the court level to assist in improving compliance.

The Nature and Range of Scholarship

The scholarship in this book is impressive. As is inevitable with eighteen different authors, the quality of the articles varies. So too does the incisiveness and importance of the comments made during the round table discussions. Yet the comments are well worth reading, and surprisingly, not one of the articles is weak. Indeed, each would be publishable in a refereed journal.

As expected, there is a great variety in approach. There are sweeping, thematic and scholarly surveys like Professor Alan Young's chapter on "The *Charter*, the Supreme Court of Canada and the Constitutionalization of the Investigative Process"; there are more conversational pieces like the Hon. Michael Moldaver's worthwhile discussion of "A Trial Judge's Perspective on the *Charter*"; and there are articles that rest content to chronicle important developments, like the fine contribution by D.D. Graham Reynolds, "The Effect of the *Charter* on Drug Investigations and Drug Law Enforcement".

There are also invaluable discussions of the jurisprudence on discrete topics. "The Role of Fault in s. 24(2) of the *Charter*" by the Hon. Casey Hill provides a useful discussion of the concept of "good faith" as a mitigating consideration under subsection 24(2). The Hon. Marc Rosenberg in "The *Charter*'s Impact on the Law of Evidence in Criminal Cases", among other things, gives a concise and clear account of what is happening to the trial fairness concept under subsection 24(2). There is a valuable discussion of the jurisprudence dealing with the fragile right to receive reasons for judgment by the Hon. Ian McDonnell, in "Reasons for Judgment and Fundamental Justice".

Some of the articles fail to carry forward the broader theme of the book, but where this happens it is because of the state of the jurisprudence. Instead of analysing broad, profound questions about the impact of the *Charter*, they report developments in a discrete area of the criminal law where the *Charter* has had little impact. Michelle Fuerst's piece, entitled "When Societal Rights Outweigh a Right to Confrontation: *Charter* Protection for Child Witnesses", for example, barely mentions the *Charter* because the Supreme Court of Canada made short work of it in *R.* v. *L.(D.O.)*[12] and *R.* v. *Levogiannis*,[13] but that does not diminish its utility. It is a concise, clear and worthwhile discussion of the jurisprudence relating to section 715.1[14] (videotaped child evidence) and section 486(2.1)[15] (testimony outside of the courtroom). So too with

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[11] K. Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1994).

[12] [1993] 4 S.C.R. 419, 85 C.C.C.(3d) 289 rev'g (1991), 65 C.C.C.(3d) 465 (Man.C.A.).

[13] [1993] 4 S.C.R. 475, 85 C.C.C.(3d) 327.

[14] *Criminal Code*, R.S.C. 1985, c. C-46.

[15] *Ibid.*

"Extradition from Canada Since the *Charter* of Rights" by Professor Sharon A. Williams. It tags along as the last chapter in the book, collated mysteriously with three provocative and unsettling articles engaging profound and general concerns about *Charter* jurisprudence and law reform. Yet it is well worth reading.

Conclusion

This book should be read by anyone interested in the development and application of the criminal law. All of us who work in the 'system' play an important part in shaping the law, and hence in adjusting the relative rights of those who live in and visit this country. We need to appreciate not just the technical questions required to resolve the cases we are arguing or adjudicating. We need to know what waves are pushing us along, and whether they are casting us towards the shores of disaster or into more placid harbours. This book will not answer that question because of the diverse views presented, but it will at least enable us to recognize what is happening. As Professor Cameron notes in her introduction "not to confront th[e] question [of where we are headed] is to risk losing control of the pace and direction of change under the *Charter*".[16] Professor Cameron and those who participated in this project are to be congratulated for doing their part to assist in the orderly development of the law. Their contribution will be realized when judges and lawyers take the time to read this book.

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[16] *Supra* note 1 at VIII.

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