CONTROVERSIES IN NEED OF RESOLUTION: SOME THRESHOLD QUESTIONS AFFECTING INDIVIDUAL RIGHTS AND POLICE POWERS UNDER THE CHARTER

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The *Charter* comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of Canada": s. 52, *Constitution Act 1982*. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The *Charter* is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act*). With the *Constitution Act 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the *Constitution*, remains to be interpreted and applied by the Court.[1]

I. INTRODUCTION

Those looking for dramatic change in this first short period of our Charter's[2] life are doubtless disappointed by its cautious beginnings. No one yet can claim to have a very clear picture of what the major thrusts of the Charter will be in the field of criminal justice or minority rights since the many Charter cases that have been litigated to date are throwing off conflicting and contradictory signals in almost every area of significance.

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[1] *Re* Skapinker (not yet reported, S.C.C., 3 May 1984) at 10-11, (Estey J.), *aff'g* 40 O.R. (2d) 481 (C.A. 1983).

[2] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

II. Evolving Judicial Attitudes and Public Perceptions

Some perhaps predictable judicial utterances have been made which reveal something about evolving judicial attitudes to the Charter jurisprudence.

As to whether the Charter revolutionizes Canadian law perhaps the most often quoted passage is this one by Mr. Justice Zuber in *R. v. Altseimer*: "[T]he Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter, which is a part of the supreme law of this country."[3]

Mr. Justice Scollin's prose in *Re Balderstone and The Queen*[4] ran a little purple but is no less arresting:

> The Charter did not repeal yesterday and did not abolish reality. . . . It is this wealth of legal tradition that sustains the real worth of the guarantees themselves and ensures that the Charter will not be translated into a warrant for rule by a judicial oligarchy. . . .[5]
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> . . . .
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> [There is no reason] for expanding a Charter of Rights into a malefactor's nirvana.[6]
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> . . . .
>
> [T]he procedure that leads to the deprivation of life, liberty or security of the person need not be a sophisticated protective cocoon spun by a civil libertarian zealot: all that is demanded is a fair and decent procedure, proportioned and fitting to the situation, that protects the person from caprice, oppression and indignity while maintaining the integrity, effectiveness and equilibrium of the process itself.[7]

On the importance or otherwise of American constitutional decisions, Mr. Justice Estey of the Supreme Court of Canada is of the view that we should be creating a distinctively Canadian jurisprudence, but this does not mean that the lessons of the American experience are to be ignored:

> The courts in the United States have had almost 200 years experience at this task [the interpretation and application of an entrenched Bill of Rights] and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.[8]

Brooke J.A. of the Ontario Court of Appeal expressed this point somewhat differently in a recent decision:

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[3] 29 C.R. (3d) 276, at 282, 17 M.V.R. 8, at 14-15 (Ont. C.A. 1982).

[4] [1983] 1 W.W.R. 72, 2 C.C.C. (3d) 37 (Man. Q.B.), *aff'd* (not yet reported, C.A., 12 Sep. 1983).

[5] *Id.* at 81-82, 2 C.C.C. (3d) at 46-47.

[6] *Id.* at 88, 2 C.C.C. (3d) at 53.

[7] *Id.* at 86, 2 C.C.C. (3d) at 51.

[8] *Re* Skapinker, *supra* note 1, at 11.

> [N]o doubt the decisions of courts of the United States of America may be persuasive references in some cases under our new Charter but it is important that we seek to develop our own model in response to present values on the facts of cases as they arise rather than adopting the law of another country forged in response to past events.[9]

Mr. Justice Tallis of the Saskatchewan Court of Appeal took essentially the same tack in *R. v. Therens*,[10] while Veit J. was at pains in *R. v. MacIntyre* to point out that "while the American experience can perhaps provide assistance, we should first look to our own Anglo-Canadian roots for an interpretation of the rights. . .".[11]

The cases seem to be unanimous in saying that the Charter should be given a liberal and expansive interpretation as this is the best means for ensuring that it will attain its objectives. Invariably, the words of Lord Wilberforce in *Minister of Home Affairs v. Fisher*[12] are invoked to the effect that the construction of the "supreme law of Canada" calls for a "generous interpretation", avoiding what has been called "the austerity of tabulated legalism".[13]

As to purpose and effect, these remarks capture the flavour of the Charter jurisprudence as well as any:

> The Charter as part of a constitutional document should be given a large and liberal construction. The spirit of this new "living tree" planted in friendly Canadian soil should not be stultified by narrow technical, literal interpretations without regard to its background and purpose. . . .
>
> . . . .
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> [T]he so-called "presumption of constitutionality" [does not assist when it is sought to determine whether a portion of a previously enacted statute is inconsistent with the provisions of the Constitution.] . . . [T]here can be no presumption that the legislators intended to act constitutionally in light of legislation that was not, at that time, a gleam in its progenitor's eye.[14]
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> [The Charter] is not a mere canon of construction for the interpretation of federal legislation.
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> . . . .
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> The implementation and application of the Charter should not be blunted or thwarted by technical or legalistic interpretations of ordinary words of the English language. . . . [If the rights guaranteed] are to survive and be available on a day to day basis . . . the temptation to opt in favour of a restrictive approach [must be resisted].[15]

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[9] R. v. Carter, 31 C.R. (3d) 76, at 79, 18 M.V.R. 9, at 12 (1982).

[10] 33 C.R. (3d) 204, 20 M.V.R. 8 (1983), *leave to appeal granted* (not yet reported, S.C.C., 6 Jun. 1983).

[11] 69 C.C.C. (2d) 162, at 167 (Alta. Q.B. 1982).

[12] [1980] A.C. 319, [1979] 3 All E.R. 21 (P.C. 1979) (Bermuda).

[13] *Id.* at 328, [1979] 3 All E.R. at 25. *See, e.g., Re* R. and Potma, 37 O.R. (2d) 189 (H.C. 1982); R. v. MacIntyre, *supra* note 11; Quebec Ass'n of Protestant School Bds. v. A.G. Que. (No. 2), 140 D.L.R. (3d) 33 (Que. C.S. 1982), *appeal dismissed* (not yet reported, C.A. 9 Jun. 1983), *leave to appeal granted* (not yet reported, S.C.C., 20 Sep. 1983); R. v. Currie, 4 C.C.C. (3d) 217, 19 M.V.R. 15 (N.S.C.A. 1983).

[14] *Re* Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113, at 123-25, 3 C.C.C. (3d) 515, at 524-27 (C.A. 1983).

[15] R. v. Therens, *supra* note 10, at 220-21, 20 M.V.R. at 22-23.

> [I]t is important to remember that [the Charter] is a constitutional document and although it is the law of Canada and of the provinces, it is not an enactment of either. There is, therefore, no reason to give deference to . . . [a] statute or to seek to uphold its validity.[16]

Charter activity has been intense. On any given day, one can usually find in the local newspapers one story, and often more, relating to Charter litigation. To the lay observer, it may appear that the Charter is radically transforming the society in which we live. Citizens reading their daily papers have been led to believe that:

> Writs of assistance are unconstitutional.[17]
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> Habitual criminals must be released from prisons because detaining them indefinitely is cruel and unusual treatment or punishment.[18]
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> Reverse onus provisions under the Narcotic Control Act[19] and under certain Criminal Code[20] sections (*e.g.*, those relating to bail or obliterated serial numbers) are invalid.[21]
>
> Excessive delay in bringing an accused person to trial (as in a four year delay in trying a simple charge of theft) contravenes the Charter's guarantees.[22]
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> Closed trials as mandated by the Juvenile Delinquents Act[23] unduly fetter freedom of the press and are impermissible.[24]
>
> Provincial statutes imposing absolute liability upon motorists who drive while prohibited or suspended contravene the principles of fundamental justice.[25]

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[16] *Re* Skapinker, *supra* note 1, (Ont. C.A.).

[17] *See, e.g.*, R. v. Carriere, 32 C.R. (3d) 117 (Ont. Prov. Ct. 1983); R. v. Cuff, 6 C.C.C. (3d) 311 (B.C. Cty. Ct. 1983); R. v. Pasztor (not yet reported, B.C. Cty. Ct., 4 Jul. 1983). *Contra* R. v. Noble, 6 C.C.C. (3d) 17 (Ont. Cty. Ct. 1983).

[18] *See Re* Mitchell and The Queen, 6 C.C.C. (3d) 193 (Ont. H.C. 1983).

[19] R.S.C. 1970, c. N-1.

[20] R.S.C. 1970, c. C-34.

[21] In reference to the Narcotic Control Act, *see* R. v. Oakes, 40 O.R. (2d) 660, 2 C.C.C. (3d) 339 (C.A. 1983); R. v. Carroll, 32 C.R. (3d) 235 (P.E.I.S.C. 1983); R. v. Cook, 4 C.C.C. (3d) 419 (N.S.C.A. 1983). As to bail litigation, *see* R. v. Pugsley, 55 N.S.R. (2d) 163, 31 C.R. (3d) 217 (C.A. 1982). *Contra* R. v. Bray, 2 C.C.C. (3d) 325 (Ont. C.A. 1983). On the presumption involving obliterated serial numbers and stolen vehicles, *see Re* Boyle and The Queen, 5 C.C.C. (3d) 193 (Ont. C.A. 1983).

[22] *See* R. v. Beason, 36 C.R. (3d) 73 (Ont. C.A. 1983). *See also* R. v. Antoine, 41 O.R. (2d) 606, 34 C.R. (3d) 136 (C.A. 1983); R. v. Heaslip, 36 C.R. (3d) 309 (Ont. C.A. 1983); R. v. H.W. Corkum Constr. Co., 5 C.C.C. (3d) 575 (N.S.C.A. 1983); R. v. Stapleton (not yet reported, N.S.C.A., 6 Dec. 1983).

[23] R.S.C. 1970, c. J-3 (*repealed by* Young Offenders Act, S.C. 1980-81-82-83, c. 110, s. 80).

[24] *Southam Inc., supra* note 14; *but see* Edmonton Journal v. A.G. Alta., 42 A.R. 383, 4 C.C.C. 59 (Q.B. 1983).

[25] *See* Reference *re* S. 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288, 42 B.C.L.R. 364, 33 C.R. (3d) 22 (C.A. 1983).

> Broad powers of search and seizure accorded under the Combines Investigation Act[26] violate Charter injunctions against unreasonable search and seizure.[27]

The reality in all of this, of course, is quite different. Often conflicting decisions on the same point are the order of the day. None of these matters can be regarded as truly settled until the Supreme Court of Canada speaks on the subject.

By far most of the activity in the Charter's short life has occurred in that area which the Charter characterizes as "Legal Rights". Profound change has not been the order of the day here. In fact, such changes as have occurred have been described as "marginal" in nature.[28]

The Charter by its very terms has wrought at least two[29] potentially significant alterations in our law. Two rights have been entrenched or constitutionalized which had never before been specifically so recognized even under the Canadian Bill of Rights:[30] these are the right to be free from unreasonable search and seizure (section 8) and the right, upon arrest or detention, not only to retain and instruct counsel, but also, and perhaps more importantly, to be *informed* of that right (section 10). Under the Bill of Rights there was no obligation to inform an accused of his rights.[31]

III. Emerging Critical Issues

At this juncture there are three pivotal questions to be resolved by the courts which, perhaps more than others, will determine the future

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[26] R.S.C. 1970, c. C-23.

[27] *See* Southam Inc. v. Director of Investigation & Research of the Combines Investigation Branch, [1983] 3 W.W.R. 385, 32 C.R. (3d) 141 (Alta. C.A.); Thompson Newspapers Ltd. v. Hunter, 73 C.P.R. (2d) 67 (F.C. Trial D. 1983).

[28] *See* Friedland, Legal Rights Under the Charter (unpublished paper delivered at the Annual Conference of the Canadian Institute for the Administration of Justice [hereafter cited as C.I.A.J.] in Winnipeg, Manitoba, 12-15 Oct. 1983).

[29] A third, perhaps less far-reaching change relates to the protection against self-incrimination conferred by s. 13 of the Charter which shields a witness from incriminating disclosures made in one proceeding being used in any other proceeding except one for perjury or the giving of contradictory evidence. Under the Charter the witness need not invoke the section in order to receive its protection. *See also* s. 11(c) of the Charter which entrenches the right of the accused not to be compelled to be a witness against himself. Both sections have been construed as "protection against testimonial compulsion and nothing else": R. v. Altseimer, *supra* note 3, at 281, 17 M.V.R. at 13.

[30] R.S.C. 1970, App. III.

[31] *See, e.g.*, Jumaga v. The Queen, [1977] 1 S.C.R. 486, 68 D.L.R. (3d) 639 (1976) and my discussion of this new right in *Criminal Procedure and the Canadian Charter of Rights and Freedoms*, in Criminal Procedure in Canada 1, at 19 (V. Del Buono ed. 1982).

effectiveness and significance of the Charter in matters relating to criminal justice and the rights of the individual. These are:

1. What is the meaning and scope of section 7 of the Charter, its so-called "due process" clause?
2. In what circumstances will the courts be prepared to grant meaningful remedies under the Charter?
3. What is the proper role to be played by section 1, the Charter's "reasonable limits" clause?

What follows is an attempt to briefly canvass some of the major developments to date relating to each of these questions. This in turn will be followed by a consideration of selected issues involving the intersection or overlap of police powers and legal rights.

A. *Section 7 — The Principles of Fundamental Justice*

This section provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The wording thus differs from both the Canadian Bill of Rights[32] and the American Bill of Rights[33] insofar as it conspicuously declines to employ the familiar "except by due process of law" phraseology. Government commentators have asserted that the choice of terminology reflects a desire to deny substantive reach to the provision and thus restrict its ambit to procedural matters only.[34] Others have seen in the wording an attempt to avoid the unhappy history of section 1(a) of the Canadian Bill of Rights and thus invest the section with substantive scope.[35] Not surprisingly, this controversy is now reflected in the divided jurisprudence on the meaning of the section. The dominant reading of the section favours the government view; and indeed, the testimony of Mr. Strayer, now Strayer J. of the Federal Court Trial Division, has been judicially recognized in at least two decisions.[36]

The British Columbia Court of Appeal, however, has found a substantive dimension to be present in section 7. In *Reference re S. 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288*,[37] the Court struck down

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[32] R.S.C. 1970, App. III, sub. 1(a).

[33] *U.S. Const.* amend. V and XIV.

[34] *See* B. Strayer's testimony in MINUTES OF PROCEEDINGS AND EVIDENCE OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA (32nd Parl., 1st sess. 46:32, 1980-81).

[35] *See* M. MANNING, RIGHTS, FREEDOMS AND THE COURTS: A PRACTICAL ANALYSIS OF THE CONSTITUTION ACT, 1982, at 231 (1982); Whyte, Legal Rights: The Scope and Application of Section 7 of the Charter, at 7-14 (unpublished paper delivered at the Annual Conference of the C.I.A.J. in Winnipeg, Manitoba, 12-15 Oct. 1983).

[36] R. v. Holman, 28 C.R. (3d) 378, 16 M.V.R. 225 (B.C. Prov. Ct. 1982); *Re* Mason, 35 C.R. (3d) 393 (Ont. H.C. 1983).

[37] *Supra* note 25.

provincial legislation which created an absolute liability offence of driving while prohibited or suspended and which visited a mandatory minimum seven day jail term upon those convicted. The Court proclaimed that "the phrase 'principles of fundamental justice' . . . is not restricted to matters of procedure" and "the courts are therefore called upon, in construing the provisions of [section] 7 of the Charter, to have regard to the content of the legislation".[38] A few lower courts have reached the same conclusion.[39]

The weight of authority to date seems to favour restricting section 7 to matters of procedure only: the Manitoba Court of Appeal in a curious decision unequivocally declared that section 7 does not guarantee substantive due process, and then having thus disarmed itself, was forced to resort to section 2(e) of the Canadian Bill of Rights in order to invalidate a section of the Indian Act[40] making it an offence for a native to be intoxicated on a reserve.[41]

Numerous other decisions have sought to restrict section 7 to procedural matters.[42] Although its decisions have been interpreted otherwise, the Ontario Court of Appeal has been careful to reserve its position on this matter until an appropriate case comes before the Court.[43]

Perhaps the strongest reason for acknowledging a substantive dimension to section 7 is to be found in the writing of an American academic, Paul Bender, who, in a recent article, offers an illuminating comparison of the Charter and the United States Bill of Rights.[44] Professor Bender writes:

> One possibility, and perhaps the most natural reading, is that the first clause of section 7 means to impose *substantive* limits on governmental deprivations of life, liberty and personal security, just as the second clause imposes *procedural* limitations. That is, if a statute were to authorize conviction and imprisonment for a criminal offense without a fair trial, that would presumably violate the second clause of section 7, whereas if the law were procedurally fair in operation but substantively unreasonable — if it, for example, criminalized private behavior without an adequate justification for

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[38] *Id.* at 30.

[39] *See, e.g.*, R. v. Campagna, 141 D.L.R. (3d) 485 (B.C. Prov. Ct. 1982); R. v. Carriere, *supra* note 17; R. v. Hayden, 33 C.R. (3d) 363 (Man. Prov. Ct. 1983), *aff'd* 36 C.R. (3d) 187 (C.A. 1983), but overruled on this point. *Leave to appeal denied* (not yet reported, S.C.C., 19 Dec. 1983).

[40] R.S.C. 1970, C. I-6, sub. 97(b).

[41] R. v. Hayden, *supra* note 39.

[42] R. v. Holman, *supra* note 36; *Re* Mason, *supra* note 36; R. v. MacIntyre, *supra* note 11; R. v. Cadeddu, 32 C.R. (3d) 355, 4 C.C.C. (3d) 112 (Ont. H.C. 1982); *Re* Jamieson and The Queen, 70 C.C.C. (2d) 430 (Que. C.S. 1982).

[43] *See Re* Potma and The Queen, 2 C.C.C. (3d) 383, 18 M.V.R. 133 (1983); R. v. Stevens, 3 C.C.C. (3d) 198 (1983); R. v. Diotte, 42 O.R. (2d) 159 (1983); and see the discussion by Whyte of the Court's decision in *Potma*, *supra* note 35.

[44] *See* Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28 McGILL L.J. 811 (1983).

> doing so in light of legitimate governmental concerns — that might violate the first clause of section 7. Read this way, the first clause of section 7 would constitute a "substantive" due process provision similar in nature to that employed from time to time by United States courts under the Fourteenth Amendment. It would still, however, be a right that is essentially negative in character.[45]

While section 7, however it may be interpreted, possesses significant potential to control police, prosecutorial and other governmental action, thus far, it has only rarely been successfully invoked by accused persons. In *R. v. Carriere*,[46] it was invoked along with section 8 of the Charter in a successful attack upon the validity of writs of assistance. As mentioned, the British Columbia Court of Appeal employed the section to invalidate a section of the province's Motor Vehicle Act[47] and in Manitoba, the Provincial Court relied upon the section in order to strike down section 97(b) of the Indian Act, but the Court of Appeal disagreed with this use of the section.[48]

Friedland summarizes some of the unsuccessful Charter challenges launched to date involving reliance upon section 7:

> The Ontario Court of Appeal in *Diotte* held that "fundamental justice" did not require full disclosure at a preliminary hearing and the Manitoba Court of Appeal in *Stolar* held that there was no necessity to provide an opportunity for an accused to make submissions to the Attorney-General before a direct indictment was preferred. The Ontario Court of Appeal in *Carter* refused to exclude evidence of blood samples taken by hospital personnel and later seized by the police with a search warrant; and the same court held in *Potma* that it was not a breach of section 7 for the police to fail to produce the ampoules used in a breathalyzer test. The Ontario Court of Appeal in *Cadeddu* was about to deal with a significant case on appeal from a judgment of Potts J. who held that a person whose parole was revoked was entitled to an in-person hearing, but the accused died the day after the hearing of the appeal and before judgment, and the Court of Appeal refused to deal with a moot issue. The Quebec Court of Appeal in *Vermette* has agreed to hear an appeal from another significant case in which Greenberg J. stayed a prosecution under section 7 because of improper remarks by the Quebec Premier in the National Assembly which were given widespread publicity.[49]

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[45] *Id.* at 825.

[46] *Supra* note 17. Similar results were achieved in R. v. Cuff and R. v. Pasztor, *supra* note 17; R. v. Sieben (not yet reported, B.C. Prov. Ct., 11 May 1983). *Contra* R. v. Noble, *supra* note 17.

[47] *See* Reference *re* S. 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288, *supra* note 25.

[48] *See* R. v. Hayden, *supra* note 39.

[49] *Supra* note 28, at 9-10. *See* R. v. Diotte, *supra* note 43; R. v. Stolar, 20 Man. R. (2d) 132, 32 C.R. (3d) 342 (C.A. 1983); R. v. Carter, *supra* note 9; R. v. Potma, *supra* note 13; R. v. Cadeddu, *supra* note 42; R. v. Vermette (No. 5), [1983] C.A. 1, 3 C.C.C. (3d) 36 (Qué. C.A. 1982).

B. *Section 24 — Charter Remedies*

Section 24 of the Charter is a two-pronged remedy section to which resort may be had when a violation of a Charter right is manifest. The section was created to overcome the unsatisfactory Bill of Rights jurisprudence which prevailed after the Supreme Court of Canada decision in *Hogan v. The Queen*.[50] It will be recalled that in *Hogan*, the Supreme Court of Canada declared itself incapable of fashioning a remedy in the face of an apparent breach of a fundamental right. (Hogan, prior to taking a breathalyzer test had been denied his right to consult with counsel in contravention of section 2(c)(ii) of the Bill.) Section 24(1) now provides that anyone whose rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction in order to obtain an appropriate and just remedy having regard to all the circumstances. Where the remedy contemplated is the exclusion of evidence, as contrasted with some other response such as a stay of proceedings, costs, or damages, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute, in accordance with section 24(2).

As one can imagine, many controversies have arisen concerning the proper interpretation of this section. The ensuing discussion focuses on just two of these:

1. The relationship between sections 24(1) and 24(2).
2. The basis upon which evidence should be excluded under section 24(2).

1. *The Relationship Between Sections 24(1) and 24(2)*

The conventional wisdom in this area is that section 24(2) has no independent existence apart from section 24(1) but rather, it is a particular form of section 24(1) application.[51] Courts in Canada have largely treated as self-evident the proposition that the sanction of excluding evidence is limited to that which is specified in section 24(2).[52] However, Tallis J.A., in a majority judgment of the Saskatchewan Court of Appeal, has taken a different view of the operation and interrelationship of the two subsections. In *R. v. Therens*,[53] he held that the very broad powers conferred on a court under section 24(1) to grant a remedy that is appropriate and just are not limited by section 24(2). Instead, section 24(2) strengthens the enforcement mechanism by providing that,

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[50] [1975] 2 S.C.R. 574, 9 N.S.R. (2d) 145 (1974).

[51] *See* R. v. Simmons (not yet reported, Ont. C.A., 11 Apr. 1984); R. v. Gibson, 37 C.R. (3d) 175 (Ont. H.C. 1983); *Re* R. and Siegel, 29 C.R. (3d) 81 (Ont. H.C. 1982).

[52] Stuart, *Annot.*, 33 C.R. (3d) 205 (1983).

[53] *Supra* note 10.

in the particular circumstances set forth in section 24(2), the court *shall* exclude the evidence if it considers that to do so would be consistent with criteria set forth in that subsection and would be appropriate and just in the circumstances. Hence there are

> two different powers to exclude unconstitutionally obtained evidence granted by the Charter: the *mandatory* exclusion under section 24(2) where the administration of justice would be brought into disrepute by the admission of the evidence, and a *discretionary* power, as part of the general discretionary remedial authority granted by section 24(1). By this view, evidence may be excluded, on a discretionary basis, even if its admission would not bring the administration of justice into disrepute.[54]

As mentioned, this is a controversial approach that is decidedly out of the mainstream of reported judicial thinking on this subject. It is, however, an attractive argument, powerfully put, which will have to be squarely confronted by the Supreme Court of Canada in the days ahead.

2. *The Basis Upon Which Evidence Merits Exclusion Under Section 24(2)*

Although the standard found in section 24(2) may in one sense be described as a mandatory power (thus arguably not entailing the exercise of a discretion), it is more correct to describe it as a discretion that is to be exercised in accordance with the stipulated criteria that are set forth in the provision itself. All true discretions are exercised in this way.[55] How then, is this "discretion" to be exercised? The case law to date on the interpretation of the subsection is deeply divided and impossible to reconcile. To use Packer's terminology, both a "crime control" approach and a "due process" interpretation are vying for dominance in this crucial area.[56] The "crime control" school sees section 24(2) as having a restricted ambit. It is best expressed by Seaton J.A. in *R. v. Collins*[57] and is well summarized in the following extract taken from the headnote:

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[54] Gibson, Shocking the Public: Early Indications of the Meaning of "Disrepute" in Section 24(2) of the Canadian Charter of Rights and Freedoms, at 14-15 (unpublished paper delivered at the Annual Conference of the C.I.A.J. in Winnipeg, Manitoba, 12-15 Oct. 1983).

[55] R. v. Manninen, 43 O.R. (2d) 731, 37 C.R. (3d) 162 (C.A. 1983) states that there is no discretion left to the court by s. 24(2). *See* my discussion of judicial discretion in DUE PROCESS OF LAW 197 *passim* (1977). *See also* Delisle, *Annot.*, 37 C.R. (3d) 163 (1983) where the Court of Appeal's conception of discretion is disputed; *see* note 58 *infra*.

[56] *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-74 (1968).

[57] 33 C.R. (3d) 130 (B.C.C.A. 1983); *see also* R. v. Gibson, *supra* note 51; R. v. Chapin, 43 O.R. (2d) 458 (C.A. 1983), as to the proposition that evidence improperly obtained is *prima facie* admissible.

> Section 24(2) has chosen a middle ground between admitting all evidence, however obtained, and excluding all improperly obtained evidence. The middle ground is not that of discretion. Evidence improperly obtained is prima facie admissible. The onus is on the person who wishes the evidence excluded to establish that its admission would bring the administration of justice into disrepute. If this is established, "the evidence shall be excluded". There is no other test and no discretion. Whether the administration of justice is brought into disrepute should be viewed through the eyes of the community at large, including the policeman, the law teacher and the judge. There will thus probably be a gradual trend away from the admission of improperly obtained evidence. However, the major lesson to be learned from the Canadian past and from the experience of others is that the administration of justice will not be held in high regard if evidence is regularly excluded. Cases in which the evidence should be excluded will be rare.[58]

These views rest on an assumption that the appropriate test for determining what brings the administration of justice into disrepute is whether the evidence was obtained by police conduct that would "shock the community" — a standard favouring the interest in law enforcement — or "crime control" deriving from *dicta* found in the minority judgment of Lamer J. in *Rothman v. The Queen*.[59] *Rothman* is not a Charter case. Rather it is a case dealing with the admissibility of confessions obtained by trickery and deception. Equally compelling *dicta* are to be found in the dissenting "due process" oriented judgment of Estey J. in the same case. Estey J. was of the view that conduct "prejudicing the public interest in the integrity of the judicial process" was the appropriate standard.[60]

The "due process" school is now well represented in Charter jurisprudence by the views expressed (in dissent) by Anderson J.A. in *R. v. Cohen*,[61] a companion case to *R. v. Collins*. After an exhaustive analysis of cases including the judgment of Estey J. in *Rothman*, he distilled the following principles and guidelines:

1. The words "administration of justice" include not only the trial process but the investigatory process. In other words, the "integrity of the judicial process" depends not only on the conduct of strictly judicial matters but also on the conduct of the police in their dealings with suspected offenders.
2. The administration of justice will be brought into disrepute if the conduct of the police tends to "prejudice the public interest in the integrity of the judicial process".
3. The "integrity of the judicial process" may be prejudiced by the conduct of the police in several ways, some of which are as follows:
   (a) failure to observe a humane and honourable standard of conduct in the treatment of persons suspected or accused;

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[58] R. v. Collins, *id.* at 131. As is evident, Seaton J.A. subscribes to the "no discretion" view on s. 24(2).

[59] [1981] 1 S.C.R. 640, 121 D.L.R. (3d) 578.

[60] These matters are taken up at greater length in two annotations: *see* Stuart, *Annot.*, 29 C.R. (3d) 216 (1982); Stuart, *Annot.*, 33 C.R. (3d) 131 (1983).

[61] 33 C.R. (3d) 151 (B.C.C.A. 1983).

(b) flagrant abuse of police powers; or
(c) failure of the police to abide by the law in carrying out their duties.

4. A balance must be struck between the need for firm and effective law enforcement and the right of the citizen to be free as far as reasonably possible from illegal and unreasonable conduct on the part of the police.
5. The courts will not be concerned with technical or insubstantial breaches of the law by the police.
6. In determining whether the violation is "prejudicial to the integrity of the judicial process", the court will review all the circumstances in the light of, at least, the following factors:
   (a) the seriousness of the offence in the light of the facts relating to the charge;
   (b) the seriousness of the violation and, in particular,
      (i) the extent to which the constitutional rights of the accused were breached in obtaining the evidence;
      (ii) whether any harm was inflicted on the accused; and
      (iii) the seriousness of the violation as compared to the seriousness of the offence.
   (c) whether the violation was deliberate or inadvertent. . . .[62]

The Supreme Court of Canada, when called upon, may not settle on either of these conceptions,[63] but clearly will have to resolve the dispute which they embody. One suspects that the Court will take great pains to ensure that the judiciary is adequately equipped to discharge its two important responsibilities: "*the protection of the innocent* against

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[62] *Id.* at 187-88. A not entirely dissimilar approach was discussed by Martin J.A. in R. v. Chapin, *supra* note 57, at 482. In that case, Martin J.A. found it unnecessary to decide whether there was:

> in all the circumstances, a flagrant abuse of power on the part of the police or a gross invasion of privacy. . . . It is proper for the judge in deciding whether the admission of the evidence improperly obtained would bring the administration of justice into disrepute to consider such matters as the nature and extent of the illegality, the unreasonableness of the conduct involved, and whether the officer was acting in good faith, as distinct from knowingly infringing the accused's right.

Howland C.J.O. in R. v. Simmons, *supra* note 51, at 45, also rejected the "community shock" test stating that every case should be considered "on its merits as to whether it satisfies the requirements of s. 24(2)" and one should "not . . . substitute a 'community shock' or any other test for the plain words of the statute". These are clearly different standards than the "community shock" test deriving from *Rothman*, *supra* note 59, which forms the basis of Seaton J.A.'s opinion in *Collins*, *supra* note 57, and that of Ewaschuk J. in *Gibson*, *supra* note 51. The two standards are not completely interchangeable. Thus, it cannot now be confidently asserted that there is "general acceptance" of the "community shock" test although such is the thrust of the judgment in *Gibson*. *But see* Doherty, *Stevens: Section 24(2) of the Charter on Appeal*, 35 C.R. (3d) 30, at 32 (1983); and R. v. Stevens, 35 C.R. (3d) 1 (N.S.C.A. 1983). Stuart, *supra* note 60, criticizes the *Rothman* standard as "too restrictive". For general discussion, see McLelland and Elman, *The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of S. 24*, 21 ALTA. L. REV. 205, at 228-37 (1983).

[63] *See* the alternative approach discussed in *Simmons*, *supra* note 51, and note the discussion of applicable criteria in both the majority and dissenting opinions.

conviction; and *the protection of the system* itself by ensuring . . . the repression of crime through the conviction of the guilty . . .".[64]

C. *Section 1 — Reasonable Limits*

Section 1 has been the focus of intense discussion and debate since it was first advanced in modified form in 1980.[65] The section "guarantees the rights and freedoms set out . . . subject only to such reasonable limits prescribed by law as can be demonstrably justified[66] in a free and democratic society". In part, the fears engendered by the existence in the Charter of a reasonable limitations clause have been misplaced.

The courts will give a reasonable limitation interpretation to some of the rights and freedoms which might otherwise seem to be unlimited whether a reasonable limits clause is inserted in a Bill of Rights or not.[67] The substantial question — one which remains unanswered to this day — is "whether specific inclusion of a limitations clause gives the courts broader or narrower powers of judicial supervision than might be the case in the absence of such specification".[68]

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[64] Rothman v. The Queen, *supra* note 59, at 689, 121 D.L.R. (3d) at 616 (Lamer J.).

[65] *See* P. HOGG, CANADA ACT 1982 ANNOTATED 13 (1982). The original version as submitted on 6 Oct. 1980 read: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."

[66] "Demonstrable justification" implies that the proponents of limiting legislation must discharge a significant burden in order for impugned legislation to withstand constitutional challenge: Federal Republic of Germany v. Rauca, 38 O.R. (2d) 705 (H.C. 1982), *aff'd* 41 O.R. (2d) 225 (C.A. 1983). Those seeking to uphold the limit must satisfy the court by evidence, by the terms and purpose of the limiting law, its economic, social and political background, and if helpful, by reference to comparable legislation of other free and democratic societies that the limit is reasonable and demonstrably justified: *Southam Inc.*, *supra* note 14; R. v. Big M Drug Mart Ltd. (not yet reported, Alta. C.A., 2 Nov. 1983). In assessing the question of demonstrable justification, the courts will be interested in whether Parliament ever actually addressed the question. Courts thus will, in all likelihood, examine the Parliamentary record and such empirical data as exists on the subject: *see* R. v. Oakes, *supra* note 21.

[67] *See* Tarnopolsky, *The New Canadian Charter of Rights and Freedoms as Compared and Contrasted with the American Bill of Rights*, 5 HUMAN RIGHTS Q. 227, at 266 (1983). Ewaschuk J. in R. v. Moore (not yet reported, Ont. H.C., 10 Jan. 1984), at 12, expressed the view that "where the particular Charter provision contains its own modifier, e.g., unreasonable, arbitrary or cruel and unusual, the provision is self-defined as to what constitutes a reasonable limitation". Accordingly, no reference need be made to s. 1 when dealing with constitutional challenges involving violations of these provisions. *See also* Reich v. College of Physicians & Surgeons of Alta. (not yet reported, Alta. Q.B., 6 Apr. 1984) to the same effect.

[68] Tarnopolsky, *id.* Ewaschuk J. does not particularly clarify this point in *Moore*, *id.* He states "for that reason, [the fact that the section is self-contained, defining by its own terms what constitutes a reasonable limitation] the onus is on the applicant to establish the infringement, although the Crown may in the particular case *tactically* have

It is evident that there is substantial confusion afoot as to the proper role and function of section 1. Particularly in need of clarification is the matter of the relationship of section 1 limits to those limits found in the sections of the Charter which define rights and freedoms. It is clear, for example, that many of the legal rights are qualified by phrases such as "unreasonable", "arbitrarily", "according to law", "except in accordance with the principles of fundamental justice" and so on.[69] More particularly, does a court, once having measured legislation or misconduct against the specific, qualified Charter standard and finding it wanting, nevertheless always have to pass on and consider the same phenomenon in the light of the general standard found in section 1? Does it make any sense to have a court conclude that a search was unreasonable and that the procedures involved did not accord with the principles of fundamental justice and yet still be required to ask whether the matter can be sustained as a reasonable limit under section 1?

Belanger J. concluded in *Carriere*,[70] that the Crown had not demonstrably justified that the writ of assistance was a reasonable limit prescribed by law upon the rights contained in section 7. In *Reference re S. 94(2) of Motor Vehicle Act, British Columbia*,[71] the British Columbia Court of Appeal concluded that the provisions of section 94(2) go beyond the reasonable limits envisaged by section 1 of the Charter. *R. v. Cadeddu*,[72] another Ontario case, is to the same effect. Perhaps these cases are evidence of an *ipso facto* result; once derogations from the principles of fundamental justice are found to exist the limit imposed by the law is *prima facie* unjustifiable.

In any event, one would suspect that once an infringement is manifest, in order to displace the presumption of unconstitutionality which naturally arises, a heavy burden would fall upon those seeking to uphold the validity of the limit. Evans C.J.H.C. did not view the nature of the burden imposed by section 1 in this way. In *Federal Republic of Germany v. Rauca*, he stated:

> In my view, the "limits" to be applied require the court to adopt an objective standard in assessing the restrictions "prescribed by law" and that the demonstrable justification which modifies the reasonable limits be interpreted in a manner that *leans slightly in favour of the individual* when the competing rights of the individual and of society are being balanced in the courts. The addition of the words "in a free and democratic society" sets out the parameters within which these competing rights must be resolved.[73]

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to justify the limitation" (emphasis added). *Query*: Does this imply that the legal burden does not fall on the Crown? This would be a decidedly curious and arguably unacceptable result since, in those instances where section 1 does apply, the burden falls upon the party seeking the benefit of the limitation.

[69] *See* M. MANNING, *supra* note 35, at 141.

[70] *Supra* note 17.

[71] *Supra* note 25.

[72] *Supra* note 42.

[73] *Supra* note 66, at 715 (emphasis added).

At a different point in this judgment, the Chief Justice concluded that the extent of the burden was to be the usual civil onus based on the balance of probabilities. In the subsequent case of *Southam Inc.*[74] the Crown argued that the onus was on the *applicant* to establish not only that a particular right or freedom had been denied but also, on the balance of probabilities, the negative, namely that such infringement or limit is unreasonable and cannot be demonstrably justified in a free and democratic society. This proposition was strongly repudiated by the Ontario Court of Appeal.[75]

Although there seems to be little doubt that the complete burden of proving an exception under section 1 of the Charter rests on the party claiming the benefit of the exception or limitation,[76] the difficult questions concerning the relationship of section 1 to other Charter provisions remain to be resolved.

D. *Police Powers and Legal Rights*

1. *Sections 9 and 10 — Arbitrary Detention and the Right to Counsel*

Section 10(b) of the Charter, as previously noted, guarantees the right to counsel and the right to be informed of that right. Section 9 provides that everyone has the right not to be arbitrarily detained or imprisoned. Common to both rights thus is the aspect of detention. Detention is clearly a matter of central concern as well as the right to "security of the person" which appears in section 7.

"Arbitrary detention", in the context of Bill of Rights litigation has been interpreted as "capricious"[77] or "unreasonable" detention.[78] Charter interpretations are to the same effect.[79] Some of the decisions to date leave the impression that so long as the detention is one that is specifically authorized by existing law and according to procedures enacted by Parliament, the prescription in section 9 does not apply.[80]

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[74] *Supra* note 14.

[75] For the Crown perspective on this issue, see R. MCLEOD, J. TAKACH, H. MORTON, M. SEGAL, THE CANADIAN CHARTER OF RIGHTS: PROSECUTION AND DEFENCE OF CRIMINAL AND OTHER STATUTORY OFFENCES 4-43 (1983).

[76] *See* Quebec Ass'n of Protestant School Bds. v. A.G. Que. (No. 2), *supra* note 13; *Re* Skapinker, *supra* note 1, (Ont. C.A.). Also, the Supreme Court of Canada has strongly indicated in *Re* Skapinker, *supra* note 1, that in order to rely upon s. 1 something more than a "minimal" or "slim" record will be required.

[77] R. v. Roestad, [1972] 1 O.R. 814, at 817, 5 C.C.C. (2d) 564, at 567 (Cty. Ct. 1971).

[78] Levitz v. Ryan, [1972] 3 O.R. 783, at 790, 29 D.L.R. (3d) 519, at 526 (C.A.).

[79] *See, e.g., Re* Mitchell and The Queen, *supra* note 18; *Re* Jamieson and The Queen, *supra* note 42.

[80] *See, e.g.*, R. v. Frankforth, 70 C.C.C. (2d) 448 (B.C. Cty. Ct. 1982); R. v. Newall (No. 4), 70 C.C.C. (2d) 10 (B.C.S.C. 1982); R. v. McGregor, 3 C.C.C. (3d) 200 (Ont. H.C. 1983). *See also* R. v. Currie, *supra* note 13.

Linden J. disagreed with this interpretation in *Re Mitchell and The Queen*:

> These decisions must be interpreted with some caution. In my opinion, they should not be construed to mean that simply because a statute sets out a specific procedure for detaining a person, that statutory procedure is automatically free from arbitrariness. It may be that certain sentencing or detention procedures authorized by statute are *prima facie* capricious or unreasonable. The right to attack such a procedure under section 9 should not be foreclosed by the fact that the procedure is set out in a statute, and followed by a judge, for to do so would be to ignore section 52 of the Charter. The procedure itself must be scrutinized in order to determine whether it is arbitrary in the sense of being capricious, unreasonable, or unjustifiable.[81]

It was inevitable that the question of what constitutes a "detention" would become contentious in view of the controversy engendered by the Supreme Court of Canada decision in *Chromiak v. The Queen*[82] and the Ontario Court of Appeal judgment in *R. v. Dedman*.[83] Both cases involved denials of the right to counsel in the context of compulsory breath tests conducted by means of a roadside screening device. In both cases, the Court refused to extend fundamental protection (at this time under the Bill of Rights) to the accused because a stopped motorist is not legally "detained" and the fundamental right is only applicable once the fact of "detention" is demonstrable. This aspect of "detention", which surfaced in *Chromiak*, has been re-argued under the Charter and the same result was reached by several appeal courts.[84]

The Saskatchewan Court of Appeal declined to follow *Chromiak* in *Therens*.[85] In *Chromiak*, the Supreme Court of Canada had held (in *obiter*, as the issue there involved *roadside* screening) that even if the suspect accompanies the officer to the station there is no detention. In *Therens*, Tallis J.A. declined to apply *Chromiak* to the interpretation of the Charter. In his view, the word "detention" in section 10(b) should be given its ordinary meaning, and this includes the temporary restraint on the liberty of the accused inherent in the procedure authorizing a breath test irrespective of whether there was a formal arrest. On the facts of the

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[81] *Supra* note 18, at 209-10.

[82] 49 C.C.C. (2d) 257, 102 D.L.R. (3d) 368 (1979).

[83] 32 O.R. (2d) 641, 122 D.L.R. (3d) 655 (1981), *leave to appeal granted* (unreported, S.C.C., 19 Oct. 1981). (I discuss *Chromiak* and *Dedman* at some length in *The Investigation of Offences and Police Powers* in CRIMINAL JUSTICE: PAPERS OF THE ANNUAL CONFERENCE OF THE CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE 1, at 9-14 (S. Oxner ed. 1981)).

[84] *See* R. v. Altseimer, *supra* note 3; R. v. Currie, *supra* note 13; R. v. Trask, 21 M.V.R. 49 (Nfld. C.A. 1983); R. v. Engen (not yet reported, Alta. C.A., 10 Jan. 1984); R. v. Campbell (not yet reported, Alta. C.A., 10 Jan. 1984); R. v. Rahn (not yet reported, Alta. C.A., 9 Jan. 1984). *See also* R. v. Simmons, *supra* note 51.

[85] *Supra* note 10.

case, it would be a fiction to hold that the accused was free to depart as he pleased.[86]

2. *Police Misconduct*

Sections 7 through 11 of the Charter address the most prevalent forms of citizen-police encounters. These sections ensure, in general terms, the security of the person and afford as well more specific protection against such matters as unreasonable search, arbitrary detention, unreasonable bail, and the denial of the right to counsel.

Falling in this area are two issues which can be expected to attract a substantial amount of Charter litigation: police interrogation (confessions) and entrapment.

(a) *Confessions*

In *R. v. Nelson*[87] the police found the accused intoxicated at the scene of a shooting. Upon being asked what happened, the accused spontaneously volunteered a confession ("I shot the guy."). The officer then charged Nelson with attempted murder and advised him that he could contact a lawyer once they reached a telephone. This did not occur. Instead, some three hours later at the detachment, Nelson was again cautioned and advised of his right to counsel, although not in the precise terms of the Constitution. While the accused was in custody at the station, the police learned that the victim had died, but this information was not conveyed to the accused although a more serious charge was virtually certain. A further three hours elapsed before the accused was informed and again advised of his right to counsel.

Scollin J. ruled all statements obtained after the initial encounter at the crime scene to be inadmissible. As to the initial utterances and the failure by the investigator to warn the accused of his Charter rights, he said: "It would be unrealistic to expect an investigator to immediately run around the scene of violence trumpeting 'Charter' warnings to the wind and to everybody who happened to be there."[88] More important are these observations as to what constitutes proper notification of Charter rights:

> Real opportunity is what is meant by the provision of the Charter, not the incantation of a potted version of the right followed immediately by a conduct which presumed a waiver. Understanding and real opportunity are best evidenced by a considered and recorded election. The elegant and measured

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[86] Note that *Therens*, *id.*, involved a charge under s. 236 of the Criminal Code while *Chromiak*, *supra* note 82, involved s. 234.1. A strong contrast to *Therens* is to be found in R. v. Simmons, *supra* note 51. *But see also* the strong dissent by Tarnopolsky J.A. and note the artful manner in which *Chromiak* is distinguished by him.

[87] 3 C.C. C. (3d) 147, 32 C.R. (3d) 256 (Man. Q.B. 1982).

[88] *Id.* at 149, 32 C.R. (3d) at 257.

> exchange of the drawing-room is unlikely to prevail in the investigation of violent crime but the form of words in the Charter is not complicated and should be followed unless the exigencies of the situation render that course impractical; if another form of words is used to convey the substance of the right it is all the more vital that there be a responsive reply to demonstrate that the essence of the right is understood.
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> . . . .
>
> The purpose of making the accused aware of his right is so that he may decide; and that means he should have a fair opportunity to consider whether he wishes to resort to his right. To make the right effective, particularly in the case of an unsophisticated and uneducated accused, he should obviously be asked whether he does wish to retain and instruct counsel. If the answer is that he does not, that answer will normally amount to a waiver. If the answer is that he does wish to retain and instruct counsel, a reasonable opportunity must then, without delay, be given to him to do so.[89]

The mere reading by police of Charter rights to an arrested or detained person is not of itself sufficient to satisfy constitutional requirements. If the accused expresses the desire to remain silent and to see his lawyer, assuming there is no urgency or emergency, the police should offer him the use of an available telephone so that he might exercise his right to retain counsel without delay. Failure to do so may render the reading of constitutional rights a mere ritual without significance or meaning.[90]

(b) *Entrapment*

One method of controlling police misconduct is through development and maturation of the now recognized common law defence of entrapment.[91] The seminal judgment of Estey J. in *Amato v. The Queen*

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[89] *Id.* at 152-53, 32 C.R. (3d) at 261-62. Where the police have not acted maliciously in failing to inform the accused of his right to counsel, at least one court has held that the admission in evidence of statements made by the accused subsequent to his arrest do not bring the administration of justice into disrepute: R. v. Tontarelli (unreported, Ont. Cty. Ct., 4 May 1982).

[90] R. v. Manninen, *supra* note 55. *Query*: If these sentiments have significance, can the assertions in R. v. Solonas (unreported, B.C. Prov. Ct., 24 Sep. 1982) and Fallowfield v. The Queen (not yet reported, B.C. Cty. Ct., 2 Sep. 1983) that the police, after dispensing the "requisite information" to the accused, are entitled to rely upon his subsequent silence or inaction be correct? (Such was the case in relation to the Canadian Bill of Rights in Jumaga v. The Queen, *supra* note 31. There the accused, while requesting counsel, did not assert a right to private consultation and thus could not complain of an infringement of his fundamental rights.) The Ontario Court of Appeal in R. v. Anderson (not yet reported, 7 Mar. 1984), seems to indicate agreement with the view that beyond the initial advice stage responsibility for securing ancillary aspects of the right to counsel (such as privacy or the attendance of counsel) rests with the accused who must specifically request additional assistance from the police. Scollin J. observed in *Nelson*, *supra* note 87, at 153, 32 C.R. (3d) at 261, that it is "vital that there be a responsive reply to demonstrate that the essence of the right is understood". Similar although more expansive views than those of Scollin J. are found in R. v. Shields, 10 W.C.B. 120 (Ont. Cty. Ct. 1983), but these have been contradicted in R. v. Anderson.

[91] *See* Amato v. The Queen, 29 C.R. (3d) 1 (S.C.C. 1982). *See also* Kirzner v. The Queen, [1978] 2 S.C.R. 487, 1 C.R. (3d) 138 (1977).

indicates that the defence is based on the inherent power of the court to enter a stay of proceedings where the conduct of the police amounts to an abuse of process. Abuse of process is itself a controversial doctrine which may not prove sufficient to sustain the defence.[92] Section 7 of the Charter may now provide (along with section 24) a more substantial foundation upon which to anchor the defence.

In *R. v. Jewitt*,[93] the accused, after substantial encouragement from an undercover police agent, sold one pound of marijuana to other operatives. The trial judge placed the issue before the jury instructing them that the onus was on the Crown to negative entrapment beyond a reasonable doubt. The jury found entrapment and the trial judge then directed that the proceedings be stayed. The Crown appealed. Two judges of the Court of Appeal held that there was no jurisdiction in the Court of Appeal to entertain an appeal from such an order, thus confirming the decision reached at trial. Anderson J.A. concluded that a right of appeal did exist and proceeded to consider the defence of entrapment. He expressed the view in *obiter* that in future cases the entrapment defence would be raised pursuant to section 7 of the Charter, it being argued that allowing the police to secure convictions by means of entrapment would deprive the accused of his liberty through means not consonant with principles of fundamental justice. In his view, only in rare cases would the conduct of the police be held to be "so outrageous as to offend the principles of fundamental justice and thus bring the administration of justice into disrepute".[94]

If this view prevails, the implications for policing are substantial indeed. Section 7 is clearly much broader in scope than simply entrapment (if entrapment does indeed fall within its purview).[95] Conceivably, any form of serious police misconduct could be dealt with in a similar fashion.

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[92] *See* Rourke v. The Queen, [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193 (1977), and my discussion of the doctrine in *Observations on the Re-emergence of the Doctrine of Abuse of Process*, 19 C.R. (3d) 310 (1981).

[93] [1983] 4 W.W.R. 481, 34 C.R. (3d) 193 (B.C.C.A.).

[94] *Id.* at 504, 34 C.R. (3d) at 217.

[95] *See* France, *Jewitt: The Entrapment Defence Succeeds*, 34 C.R. (3d) 224 (1983). France correctly identifies the controversial aspect of this judgment, namely, Anderson J.A.'s assertion that s. 7 of the Charter has substantive reach and effect. This controversy is explored *supra* under the heading *Section 7 — The Principles of Fundamental Justice*. However, also note the support expressed for the view that the judge does have jurisdiction to exclude evidence by virtue of s. 24 of the Charter, if that evidence was obtained in violation of the accused's right as guaranteed by s. 7 thereof in *Re* Uba and The Queen, 42 O.R. (2d) 454, 5 C.C.C. (3d) 529 (H.C. 1983).

IV. Conclusion

The one conclusion that is safe to draw in light of this exegesis is that it is much too soon to draw conclusions. As mentioned, controversy and disagreement are the order of the day in the courts throughout the land. The Supreme Court of Canada has only spoken thus far on one matter of Charter significance. Only its pronouncements can begin to quiet the judicial cacophony, but once it speaks, one can expect that a new round of controversy will begin. Constitutional decisions affecting fundamental rights are, after all, the closest thing we have to formal expressions of national values — and in this area, as with other issues Canadian, one should expect the sounds of a sometimes discordant dialectic rather than the harmony of consensus.