

# CRIMINAL JUSTICE AND THE CHARTER

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## I. Introduction

One clear conclusion a year and a half after the passage of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> is the important role of the *Charter* in the development of the criminal law. It has certainly been extensively argued by counsel and cited by the judiciary. In the first 5 volumes of the 1983 *Canadian Criminal Cases*, for example, there were over a hundred cases in which the *Charter* was discussed in the reasons for judgment. This is over 25 percent of the reported cases in those volumes.

In the year and a half since the *Charter* was enacted there have been over 125 *Charter* cases reported in the *Canadian Criminal Cases*. In contrast, within a year and half after the *Bill of Rights* was enacted in 1960 there were only about a dozen cases on the *Bill of Rights* reported in that same report series. There has been, therefore, a ten-fold increase in reported decisions on the *Charter* in contrast with the *Bill of Rights*. If the number of cases citing the *Charter* starts dropping off in the next year and a half the *Charter* industry will be revived by the introduction of section 15 dealing with equality rights, which comes into effect on April 17, 1985.

Another clear conclusion is that the introduction of the *Charter* has brought us closer to American law. One can see this in the increasingly frequent citation of American authorities. When Chief Justice Laskin delivered the Hamlyn Lectures in 1969 he showed that the number of reported cases that cited American jurisprudence in the *Dominion Law Reports* in 1948, 1958 and 1968 was very low.<sup>2</sup> In the 6 volumes for the year 1968, for example, only 21 out of 575 reported cases cited U.S. authorities. Just prior to the introduction of the *Charter* the figure continued to be low — in fact, proportionately lower than in 1968. In the 13 volumes of the *Dominion Law Reports* published in 1981 only 36 out of 1,276 cases cited American authorities.

In contrast, in the first eight volumes of the *Dominion Law Reports* published so far in 1983 there have been 59 cases citing U.S. authorities out of 791 cases. The percentage has therefore increased from 2.8% to 7.5%. The increase in the *Canadian Criminal Cases* would no doubt be even higher because of the larger number of criminal cases reported. Even if one looks only at the non-*Charter* cases the number has increased significantly. So there is a major spillover effect of the *Charter*. This trend will, no doubt, continue in the light of the fact that the Supreme Court of Canada cited U.S. cases in 7 of its judgments reported so far in the 1983

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1. Set out in Part I of the *Constitution Act, 1982*, as enacted by the *Canada Act 1982* (U.K.), c. 11.  
2. B. Laskin, *The British Tradition in Canadian Law*, (1969), at 104.

*Dominion Law Reports*.<sup>3</sup> Moreover, Mr. Justice Dickson, in an extrajudicial statement, has stated that "the United States has a body of jurisprudence accumulated over some 200 years from which we can learn not only positive points but also of the errors which have been made".<sup>4</sup>

Although most courts have been willing to cite U.S. authorities, some have shown a reluctance to do so. In the Saskatchewan Court of Appeal case of *R. v. Therens*,<sup>5</sup> Tallis J.A. stated for the majority of the Court at the very end of his judgment:

I would also observe that counsel did not refer to any American authorities on the hearing of this appeal. While in some cases decisions of American courts may be persuasive references, I agree with learned counsel for the appellant that, in interpreting the *Charter*, we should strive to develop our own jurisprudence in response to cases that arise in our own country.<sup>6</sup>

It seems unlikely that such a restrictive view will be applied by the courts, although there may be considerable sympathy with that position in the area of search and seizure where there is an overwhelming abundance of U.S. case-law interpreting the comparable section of the American *Constitution* — a section with a different history however. So, it is likely that the increasing use of U.S. cases will continue. English cases will continue to become less important in the criminal law area. As England moves towards the Continent, economically and legally, Canada moves towards the United States.

Relatively few *Charter* cases in the past year and a half have cited the *United Nations International Covenant on Civil and Political Rights*<sup>7</sup> or the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>8</sup> This is surprising because many of the provisions in the *Charter* have been drawn directly from the *U.N. Covenant*, which came into force in 1966 and to which Canada became a signatory in 1976.<sup>9</sup> (Other provisions were drawn directly from the 1960 *Bill of Rights*,<sup>10</sup> which had itself drawn on the *United States Constitution* and the *United Nations Universal Declaration of Human Rights*.<sup>11</sup>) One of the reasons

3. See *Multiple Access Ltd. v. McCutcheon* (1982), 138 D.L.R. (3d) 1; *Atco Ltd. v. Calgary Power Ltd.* (1982), 140 D.L.R. (3d) 193; *Amato v. The Queen* (1982), 140 D.L.R. (3d) 405; *Regina v. Gardiner* (1982), 140 D.L.R. (3d) 612; *Basarabas v. The Queen* (1982), 144 D.L.R. (3d) 115; *Nowegijick v. The Queen* (1983), 144 D.L.R. (3d) 193; *Naken v. General Motors of Canada Ltd.* (1983), 144 D.L.R. (3d) 385. Dickson, J., delivered four of the judgments and Estey, J., the other three. A case has been included if the U.S. case is significant enough to have been noted in the list of cases following the head-note.

4. Address to the Canadian Association of Provincial Court Judges, Saskatoon, September, 1982, appended to *R. v. Hayden* (1983), 33 C.R. (3d) 363.

5. *Regina v. Therens* (1983), 33 C.R. (3d) 204.

6. *Ibid.*, at 227.

7. Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, at 52 (1966).

8. 213 U.N.T.S. 221, E.T.S. 5, signed at Rome, November 4, 1950, entered into force on September 3, 1953. References to the *International Covenant* and the *European Convention* can be found in D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms: Manual of Issues and Sources*, (1982).

9. Accession in force August 19, 1976: see Canada, Privy Council, Order in Council P.C. 1976-1156, May 18, 1976, and Fischer, "The Human Rights Covenants and Canadian Law", [1977] *Can. Yearbook Int'l Law* 42, which deals with the problems of implementing the *Covenant*.

10. The *Canadian Bill of Rights*, R.C.S. 1970, Appendix III. The *Act* has not been repealed. It applies only to federal law, whereas the *Charter* applies to federal and provincial law. There are some differences between it and the *Charter*. For example, the *Charter* does not deal with "property" in s. 7, whereas the *Bill of Rights* in s. 1(a) includes "the right of the individual to life, liberty, security of the person and enjoyment of property". Further, "Equality Rights" in the *Charter* do not come into operation for three years, but are in the meantime applicable under s. 1(b) of the *Bill of Rights*.

11. G.A. Res. 217, 3 GAOR, U.N. Doc. 1/777 (1948).

for enacting the *Charter* was to fulfil Canada's international obligations under the *Covenant*. Article 2.2 of the *Covenant* obligates each signatory state "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present *Covenant*." Perhaps in future cases the *Covenant* will be used to help interpret the *Charter* so that, if possible, Canadian law is in line with Canada's international obligations, just as the English courts have used the *European Convention* to interpret English legislation.<sup>12</sup>

The Supreme Court of Canada, in its current sitting that started in mid September, will hear many of the more than 20 *Charter* cases which, as of now, are on the Court's schedule.<sup>13</sup> Those decisions will, of course, indicate how the *Charter* will be used by the courts. Some tentative conclusions can, however, be drawn from the decisions of the Courts of Appeal.

The first is that there are very few surprises in the cases. Mr. Justice Zuber's statement in *Altseimer*<sup>14</sup> that "the *Charter* does not intend a transformation of our legal system or the paralysis of law enforcement" is certainly the view of all the provincial appellate courts. The changes that have been made by the courts have been of a marginal nature, changes that have taken some of the harshness out of some laws and further individualized the criminal justice system. In the long run, the *Charter* will block rather than promote change. It will prevent Parliament, provincial legislatures and municipalities from departing too far from the present criminal justice system. The *Charter* will help protect us from tyranny, but will not replace Parliament as the body which develops the criminal law. In my opinion, this is the proper use of the *Charter*. Unlike the United States, where the Supreme Court was forced to play an important role in imposing minimum standards on state institutions, in Canada this can be done directly because the criminal law is a federal responsibility. The *Charter* will have an important influence on legislatures. They will carefully scrutinize proposed legislation to make sure that it will not breach the *Charter* and we can expect future acts at both the provincial and federal levels amending existing laws to make them conform with the *Charter*.

Not only should the *Charter* not replace Parliament in the development of the criminal law, it should not replace the normal role of the courts in developing the law. There is a danger of constitutionalizing the ordinary criminal law. The danger is, of course, that a constitutional decision is

12. See e.g., Lord Denning M.R. in *R. v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi*, [1976] 3 All E.R. 843 (C.A.); see also Lord Wilberforce in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319; Warbrick, "European Convention on Human Rights and English Law" (1980), 130 New L.J. 852; Bayefsky, "The Impact of the European Convention on Human Rights in the United Kingdom: Implications for Canada" (1981), 13 Ottawa L. Rev. 507; and Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 Can. B. Rev. 265. Note, however, that the Federal Court of Appeal held in *Re Attorney-General of Canada and Stuart* (1982), 137 D.L.R. (3d) 740 that a Convention which Canada had signed could not be used in interpreting domestic legislation. Contrast that case with the reliance on the *International Covenant* by the Ontario Court of Appeal in *Re Federal Republic of Germany and Rauca* (1983), 4 C.C.C. (3d) 385 at 402. And see the thorough canvas of the question in *Mitchell v. A.-G. Ont.*, Ont. H.C., unreported, July 7, 1983, per Linden J.

13. See the address by Dickson J. to the Canadian Bar Association, *Globe and Mail*, Aug. 31, 1983.

14. (1982), 1 C.C.C. (3d) 7.

difficult to change. Parliament cannot change a constitutional decision unless it exercises its power of override,<sup>15</sup> which for political reasons it will be reluctant to do, or unless there is a constitutional amendment,<sup>16</sup> which would be difficult to achieve. It would be preferable to continue to develop ordinary criminal law concepts, such as "abuse of process",<sup>17</sup> and to save the *Constitution* for cases where it is actually needed, such as to strike down legislation. If the courts do turn a matter into a constitutional doctrine they should be careful to avoid tying the hands of the legislature to such an extent that the legislature would be prevented from developing alternative techniques. The constitutional decision should be a guide to the legislature, which imposes, for example, minimum standards,<sup>18</sup> rather than a full detailed elaboration of an area of law.

## II. "Principles of Fundamental Justice"

The only surprising court of appeal case interpreting legal rights at date of writing was the British Columbia case *Reference Re s. 94(2) of the Motor Vehicle Act of B.C.*<sup>19</sup> In that case the Court struck down provincial legislation which made driving while prohibited or suspended an offence of absolute liability and provided a minimum seven day jail term. The Court stated that section 7 of the *Charter* is not restricted to procedural matters:

*The Constitution Act, 1982* in our opinion, has added a new dimension to the role of the courts; the courts have been given constitutional jurisdiction to look at not only the *vires* of the legislation and whether the procedural safeguards required by natural justice are present but to go further and consider the content of the legislation.<sup>20</sup>

Then referring specifically to section 7, which 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 Court said:

the meaning to be given to the phrase 'principles of fundamental justice' is that it is not restricted to matters of procedure but extends to substantive law and... the courts are therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of legislation.<sup>21</sup>

15. Section 33.

16. Section 38.

17. See *Connelly v. D.P.P.*, [1964] A.C. 1254 at 1280 (H.L.); See also *The Queen v. Osborn* (1970), 1 C.C.C. (2d) 482 (S.C.C.); *Rourke v. The Queen* (1977), 35 C.C.C. (2d) 129 (S.C.C.); *Amato v. The Queen* (1982), 69 C.C.C. (2d) 31 (S.C.C.).

18. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

19. (1983), 4 C.C.C. (3d) 243. See, to the same effect, *R. v. Hayden*, *supra*, n. 4 (Man. Prov. Ct.). The Manitoba Court of Appeal took a different view of s. 7 in *R. v. Hayden*, unreported, Oct. 5, 1983. Hall J.A. stated that "the phrase 'principles of fundamental justice' in the context of section 7 and the *Charter* as a whole does not go beyond the requirements of fair procedures and was not intended to cover substantive requirements as to the policy of the law in question". The Court distinguished the B.C.C.A. case stating that it dealt with "lack of guilty intent" and not with the policy of the law. The Manitoba Court of Appeal held in the accused's favour, however, holding that the section of the *Indian Act* making it an offence to be intoxicated on a reserve contravened "equality before the law" in s. 1(b) of the *Canadian Bill of Rights*. Whether the Court would have reached that conclusion before the enactment of the *Charter* is uncertain. With respect to remedies, *Regina v. Therens*, *supra*, n. 5 (Sask. C.A.) is a surprise.

20. *Ibid.*, at 246.

21. *Ibid.*, at 249.

A similar issue arose in the Ontario Court of Appeal case of *Stevens*<sup>22</sup> where the accused challenged his conviction for having sexual intercourse with a female under 14 on the basis that the provision making his belief as to her age irrelevant was contrary to "fundamental justice". The court stated:

Assuming, without in any way deciding the question, that s. 7 of the *Charter* permits judicial review of the substantive content of legislation, we are all of the view that, insofar as this case is concerned, s. 7 does not have the effect of invalidating s. 146(1) of the *Criminal Code* and preventing Parliament from creating the crime of having sexual intercourse with a girl under 14 years of age excluding mistake as to the age of the girl as a defence therefrom.<sup>23</sup>

The B.C. case as well as the Ontario *Stevens* case are going to be heard by the Supreme Court of Canada. They are important ones to watch because if the Supreme Court upholds the B.C. Court of Appeal it will have a potentially wide-ranging effect in other areas of the law, such as abortion.

Should fundamental justice be limited to procedural justice? No doubt some of the drafters of the *Charter* thought so,<sup>24</sup> but there are not specific words to this effect in the *Charter*. Section 7 is similar to the "due process" clause of the Fifth and Fourteenth Amendments to the *United States Constitution*.<sup>25</sup> "Due process" in the United States has been used to encompass so-called "substantive" as well as "procedural" due process,<sup>26</sup> although many disagree with this approach. The drafters may well have used the words "fundamental justice" to avoid the "substantive due process" issue. Another possible reason was to avoid the extremely narrow interpretation given to the phrase by some members of the Supreme Court of Canada. In *Curr v. The Queen*,<sup>27</sup> Ritchie J. had stated that the phrase "due process of law" as used in the *Bill of Rights* is to be construed as meaning "according to the legal processes recognized by Parliament and the courts in Canada." So the words "fundamental justice" were probably used to encourage the courts to give a broader meaning to the concept than they had given to "due process", yet to discourage the courts from encompassing "substantive justice". Whatever the Supreme Court does with the issue of "substantive justice", section 7 will continue to offer the greatest potential scope of all the sections for challenging legis-

22. (1983), 3 C.C.C. (3d) 198.

23. *Ibid.*, at 200.

24. See Tarnopolsky, "The New Canadian Charter of Rights and Freedoms as Compared and Contrasted with the American Bill of Rights" in (1983), 5 Human Rights Quarterly 227 at 235.

25. The Fourteenth Amendment, added in 1868 after the Civil War, includes the words "nor shall any State deprive any person of life, liberty, or property, without due process at law". In the 1960's the Warren Court, starting with the landmark case of *Mapp v. Ohio*, 367 U.S. 643 (1961) used the Fourteenth Amendment to impose on the States some of the criminal law standards found in the earlier amendments that had been applicable only to the federal government.

26. See e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

27. (1972), 7 C.C.C. (2d) 181 at 185. See also *Hogan v. The Queen* (1974), 18 C.C.C. (2d) 65 (S.C.C.).

lative and government action.<sup>28</sup> Thus far, however, the B.C. case is the only reported court of appeal decision applying s. 7 in the accused's favour, although it has been raised in a number of cases. The Ontario Court of Appeal in *Diotte*<sup>29</sup> held that "fundamental justice" did not require full disclosure at a preliminary hearing and the Manitoba Court of Appeal in *Stolar*<sup>30</sup> 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*<sup>31</sup> 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*<sup>32</sup> 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 *Caddedu*<sup>33</sup> 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,<sup>34</sup> but Caddedu 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*<sup>35</sup> has agreed to hear an appeal from another significant case in which Greenberg J. stayed a prosecution under s. 7 because of improper remarks by the Quebec Premier in the National Assembly which were given widespread publicity.<sup>36</sup> And, of course, the non-criminal Cruise missile case, in which s. 7 is relied on by those opposed to the testing of the missile, has ended up in the Supreme Court of Canada.

What is the relationship between s. 7 and ss. 8 to 14 inclusive? Certainly s. 7 is wider than the specific sections that follow it. But what if a matter is specifically dealt with under one of the specific sections; is it then excluded from s. 7? In *Curr v. The Queen*<sup>37</sup> Laskin J., as he then was, stated in a concurring opinion dealing with self-incrimination under the *Bill of Rights* that "due process" was not wider than the specific section dealing with self-incrimination. He wrote:

I am concerned with a submission that although self-crimination is expressly dealt with in one provision of the statute, this court should find another expression thereof in another provision of the same statute where it is not expressly mentioned.<sup>38</sup>

28. As to the application of s. 7 to "property" see *Elliott v. Director of Social Services* (1982), 17 Man. R. (2d) 350 (Matas, J.A.); *Re Fisherman's Wharf Ltd.* (1982), 44 N.B.R. (2d) 201 (N.B.C.A.); *Re Seaway Trust Co. et al. and The Queen* (1983), 41 O.R. (2d) 532 (Ont. C.A.).

29. Unreported, May 4, 1983.

30. (1983), 4 C.C.C. (3d) 333.

31. (1982), 2 C.C.C. (3d) 301.

32. (1983), 2 C.C.C. (3d) 383.

33. (1983), 4 C.C.C. (3d) 112.

34. (1982), 4 C.C.C. (3d) 97. See also *Re Conroy and The Queen* (1983), 42 O.R. (2d) 342 (*per* Craig J.). Note *Soenen v. Thomas, Alta. Q.B.* unreported, August 1983, in which McDonald J. stated: "The principles of natural justice, and those of fundamental justice, do not impose procedural standards upon a director of an institution, in which pretrial or post conviction prisoners are held, when, pursuant to his statutory authority, he decides what the rules governing the institution shall be".

35. (1982), 3 C.C.C. (3d) 36.

36. (1982), 1 C.C.C. (3d) 477. See also *Randall and Weir v. The Queen*, N.S.S.C. App. Div., unreported, June 29, 1983, where the accused unsuccessfully argued that it was contrary to the "principles of fundamental justice" to "apply the same minimum seven-year sentence to both 'hard drugs' such as heroin and 'soft drugs' such as marijuana".

37. *Supra*, n. 27.

38. *Ibid.*, at 202-3.

In my opinion, a similar approach will not be taken by the Supreme Court to the *Charter*. In the *Bill of Rights* the specific provisions were introduced by the words "in particular", showing, therefore, that they were meant to be applications of the general. But the scheme of the *Charter* is different and the specific sections are not so related to s. 7. So, for example, it would not be at all surprising for the courts to use s. 7 in cases of delay before the accused is charged, assuming that delay in s. 11(b) is limited to delay after the charge.

"Fundamental justice" has not been restricted to the trial itself. This had been done under the *Bill of Rights*<sup>39</sup> where the words "fundamental justice" were directly linked to the hearing. Under the *Charter*, courts of appeal have not, for example, objected to the potential application of s. 7 to the preliminary hearing.<sup>40</sup>

### III. "Reasonable Limits Prescribed by Law"

Not only will it be important to watch what the Supreme Court of Canada does with section 7, it will be equally important to see what the Court does with section 1, which states that the rights and freedoms set out in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 1 was raised in about one third of the court of appeal cases I examined, although rejected in over half of the cases in which it was raised.<sup>41</sup>

My personal impression is that there has been perhaps too much reliance on section 1. Courts have taken the rather lawyer-like route of finding that there has been a *prima facie* breach of a named provision and then testing whether the legislation or action can be upheld under s. 1. Judges seem to like making their decisions within the comfortable confines of s. 1. This gives s. 1 greater prominence than I believe it should have. Would it not be better to concentrate on interpreting the named provision as the courts would have been forced to do if there was no section 1? There is no comparable section in the American *Bill of Rights* and the so-called "limitation" clauses in the *U.N. Covenant* and in the *European Convention* are limited to emergency situations.<sup>42</sup>

Let me now turn to some of the specific provisions. I will not, however, deal with s. 8, the search and seizure section, which is the subject of a separate paper presented at this Conference.

39. *Duke v. The Queen* (1972), 7 C.C.C. (2d) 474 at p. 479. Note that s. 2(e) of the *Bill of Rights* refers to "a fair hearing in accordance with the principles of fundamental justice".

40. See *R. v. Diotte*, Ont. C.A., unreported, May 4, 1983. See also *Stolar v. R.* (1983), 32 C.R. (3d) 342 (Man. C.A.); *R. v. Hislop et al.*, Ont. C.A., unreported, Sept. 14, 1983.

41. Section 1 was relied on by the courts in *Regina v. Altseimer*, *supra*, n. 14 (Ont. C.A.); *Re Skapinker and Law Society of Upper Canada* (1983), 3 C.C.C. (3d) 213 (Ont. C.A.); *Regina v. Carroll* (1983), 4 C.C.C. (3d) 131 (P.E.I.C.A.); *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225 (Ont. C.A.); *Reference Re Section 94(2) of the Motor Vehicle Act of B.C.*, *supra*, n. 19 (B.C.C.A.); *Regina v. Holmes* (1983), 4 C.C.C. (3d) 440 (Ont. C.A.); *Regina v. Carson* (1983), 4 C.C.C. (3d) 476 (Ont. C.A.).

42. See Article 21 of the *International Covenant* and Article 15 of the *European Convention*.

#### IV. "Arbitrarily Detained"

Section 9 provides: "Everyone has the right not to be arbitrarily detained or imprisoned." No court of appeal case has yet given a detailed exposition of the section. There is a similar provision in the *Bill of Rights*: "no law of Canada shall be construed or applied so as to... authorize or effect the arbitrary detention, imprisonment or exile of any person".<sup>43</sup> No doubt a court interpreting the *Charter* would adopt the meaning that Arnup J.A. gave to the word "arbitrary" when dealing with the validity or writs of assistance under the *Bill of Rights*: "To be 'arbitrary' in this context means to be unreasonable or capricious".<sup>44</sup>

The question of what constitutes a "detention" has been the subject of a number of court of appeal cases. Section 10(b) of the *Charter* provides: "Everyone has the right on arrest or detention... to retain and instruct counsel without delay and to be informed of that right". Must a person suspected of impaired driving who has been stopped for a roadside-screening test or who accompanies a police officer to a police station for a breathalyzer test be informed that he has the right to counsel? In the Supreme Court of Canada case of *Chromiak*<sup>45</sup> under the *Bill of Rights* the court said that a person stopped for a roadside test was not detained. That decision was followed by the Ontario Court of Appeal in *Altseimer*.<sup>46</sup>

The more difficult question is whether *Chromiak* should apply to a person who voluntarily accompanies an officer to a police station for a breathalyzer test. There are observations in *Chromiak* which would cover the breathalyzer situation and a number of courts of appeal have so applied *Chromiak* in *Charter* cases.<sup>47</sup> The Nova Scotia Court of Appeal took the position that "had the British Parliament intended to create a more substantial right by s. 10 of the Charter than that guaranteed by s. 2(c) of the Canadian Bill of Rights, it would have used different terminology".<sup>48</sup> This may be the high-water mark of imputed parliamentary intention, considering that if the British Parliament intended anything it was to get rid of the whole question as quickly as reasonably possible. In contrast, the majority of the Saskatchewan Court of Appeal held in *Therens*<sup>49</sup> that accompanying an officer to a station was a detention. *Chromiak* was of interpretative assistance but did not bind a court under what was described as a "living" Charter. The court recognized that different considerations may apply to a roadside screening. My guess is that the Supreme Court of Canada will say that both the *Altseimer* and *Therens* decisions are correct, that an accused need not be told before a roadside screening test that he has the right to counsel, but must be told this before a breathalyzer test.<sup>50</sup>

43. *Canadian Bill of Rights*, *supra*, n. 4, s. 2(a).

44. *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182 at 189.

45. *Chromiak v. The Queen* (1979), 49 C.C.C. (2d) 257 at 262.

46. *Supra*, n. 14.

47. *See R. v. Currie* (1983), 33 C.R. (3d) 227 (N.S.C.A.); *The Queen v. Trask*, Nfld C.A., unreported, Jan. 12, 1983.

48. *Currie*, *ibid.*, at 234.

49. *Supra*, n. 5.

50. *Therens* and *Trask* are to be heard by the Supreme Court of Canada.



## V. Right to Counsel

The requirement that the accused must be told that he has the right to counsel differs from the previous law. It is one of the few major express changes in the legal rights from the existing law. The prior law was expressed as follows by MacKay J.A. in *R. v. DeClercq*:<sup>51</sup>

I am not aware that there is any legal duty imposed on police officers, unless they are asked, to tell people they question when investigating complaints or before they take statements, that they are entitled to counsel.<sup>52</sup>

An accused now has to be informed of his right to counsel on arrest, as in the United States under the *Miranda* ruling,<sup>53</sup> and failure to do so will mean, in most cases, that a statement obtained will be excluded under s. 24. Whether the courts will require the police to say that the accused does not have to make a statement, as in *Miranda*, remains to be seen.

Because the provision is new the courts have understandably held that the *Charter* is not retroactive before April 17, 1982. The Saskatchewan Court of Appeal so held in *Regina v. Lee*<sup>54</sup> and this was followed by the Ontario Court of Appeal in *Regina v. Longtin*.<sup>55</sup> In the earlier Ontario Court of Appeal case of *Potma*<sup>56</sup> the Ontario Court of Appeal avoided the issue on other grounds stating that "It is better left for determination in a case where, unlike this one, the *Charter* has the effect of changing existing law and the issue is thus of practical consequence".<sup>57</sup>

No doubt, the Supreme Court of Canada will follow *Lee* and *Longtin*. It is possible that the Supreme Court, assuming such a case is tested in the Supreme Court, will apply s. 24, the remedies section, to conduct which was illegal before the *Charter* came into effect, but which was tested after the *Charter* came into operation,<sup>58</sup> and they will surely not ignore conduct occurring before the *Charter*, such as delay and "cruel and unusual" punishment, which continued past the date of the implementation of the *Charter*. The Ontario Court of Appeal held in *Regina v. Antoine*<sup>59</sup> that pre-trial delay could be taken into account, although Martin J.A. stated for the Court that "delay antecedent to the *Charter* does not have the same weight as delay subsequent to the *Charter*".<sup>60</sup>

51. [1966] 2 C.C.C. 190.

52. *Ibid.*, at 192.

53. *Miranda v. Arizona*, 384 U.S. 436 (1966).

54. (1982), 142 D.L.R. (3d) 574.

55. (1983), 41 O.R. (2d) 545.

56. *Re Potma and The Queen* (1983), 2 C.C.C. (3d) 383.

57. *Ibid.*, at 393.

58. See also *Regina v. Antoine* (1983), 41 O.R. (2d) 607 (Ont. C.A.) holding that s. 24 can, of course, apply to trials commenced before the *Charter* came into operation if there is a breach of a right secured by the *Charter* which occurred after the *Charter* came into effect.

59. *Ibid.*, at 613. See also *Regina v. Beason*, Ont. C.A. unreported, Sept. 1, 1983.

60. The issue of retroactivity was raised in the unreported Ontario Court of Appeal decision of *Diotte*, May 4, 1983, from which leave to appeal to the Supreme Court of Canada was refused, Oct. 13, 1983, See, *supra*, n. 40.

One question not specifically dealt with in the *Charter* is whether the state has an obligation, as in the United States,<sup>61</sup> to supply legal aid to an arrested person who cannot afford counsel. Nor is any mention made in the *Charter* of an obligation to provide legal assistance at trial. This question had been raised under the *Bill of Rights* in the *Ewing* case,<sup>62</sup> where two members of the British Columbia Court of Appeal held that there was no obligation to supply counsel to an indigent person charged with possession of narcotics; two other members of the court said that fairness demanded that counsel be supplied; and the fifth member of the court said that in any event this was not a case where it was unfair not to provide counsel. Although the right to counsel at trial is not mentioned in the *Charter*, and there are as yet no appeal court decisions on the question, it is safe to assume that it will come under the concept of a "fair ... hearing" in s. 11. In certain cases legal assistance for the indigent will be considered essential to a "fair hearing". Article 14(3)(d) of the *U.N. Covenant*, which provides that a person "to be tried" has the right "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any... case if he does not have sufficient means to pay for it," might be used to flesh out some of the bare bones of the concept of a "fair hearing". The courts will probably also look to the American cases to determine when "the interests of justice" require counsel. In *Argersinger v. Hamlin*<sup>63</sup> the United States Supreme Court limited *Gideon v. Wainwright*<sup>64</sup> to cases where the accused receives a jail sentence. In other words, if he does not have counsel because he is indigent he cannot be sentenced to jail.

## VI. "Person Charged with an Offence"

Section 11 provides that "any person charged with an offence" has certain specified rights. The definition of these opening words are important because they determine to whom the rights apply. Is a corporation a person?

The British Columbia Court of Appeal held in *Re PPG Industries*<sup>65</sup> that a corporation was not a person to which the right to a jury trial applied and so a corporation was not entitled to trial by jury under the *Combines Investigation Act*.<sup>66</sup> The Supreme Court of Canada has granted leave to appeal in this case and so we may get guidance on the issue and the related question whether a corporation is covered by the search and seizure sections, as a number of trial judges have held.<sup>67</sup>

61. *Miranda*, *supra*, n. 53.

62. *Re Ewing and Kearney and the Queen* (1974), 18 C.C.C. (2d) 356.

63. 407 U.S. 25 (1972).

64. 372 U.S. 335 (1963).

65. *Re PPG Industries Canada Ltd. and Attorney-General of Canada* (1983), 3 C.C.C. (3d) 97, leave to appeal to the Supreme Court of Canada granted March 21, 1983.

66. R.C.S. 1970, c. C-23.

67. *Souham Inc. v. Hunter* (1982), 68 C.C.C. (2d) 356 (Alberta Q.B.) *per* Cavanagh J.; *Re Balderstone et al. and The Queen* (1982), 2 C.C.C. (3d) 37 (Man. Q.B.) (*per* Scollin J.).

I have not seen a court of appeal judgment on the words "charged with," but trial judges have used those words to prevent the right to a jury trial applying to a summary application for contempt of court<sup>68</sup> and to a declaration as a dangerous offender.<sup>69</sup> Nor have I seen any court of appeal cases on the word "offence". A number of trial courts have, however, dealt with the question. A trial judge in British Columbia has held that a professional disciplinary proceeding is not dealing with an "offence" such that a person subject to discipline cannot be compelled to be a witness under s. 11(c),<sup>70</sup> and another British Columbia judge has held that an internal prison disciplinary proceeding is not an offence which will bar a subsequent criminal charge under s. 11(h) of the *Charter*.<sup>71</sup> In the Ontario Court of Appeal case of *Carson*<sup>72</sup> the court assumed that the simplified procedure under the *Provincial Offences Act*<sup>73</sup> came within section 11, but upheld the legislation under s. 1 of the *Charter*; and an Ontario trial judge has held that municipal parking infractions are "offences" within s. 11 of the *Charter*.<sup>74</sup> One wonders whether the word "offence" should be given such a broad meaning. Note that the marginal designation, which has on occasion been looked to by courts in the past,<sup>75</sup> says "Proceedings in criminal and penal matters", which may be used to limit the application of the provision.

## VII. "Tried Within a Reasonable Time"

There have been a reasonably large number of trial judgments in which s. 11(b), "to be tried within a reasonable time" has been argued. There are now several court of appeal cases. A Manitoba Court of Appeal case has held that a delay of 8 months from an order transferring a juvenile to an ordinary court was not unreasonable<sup>76</sup> and the same court held that 6 months was not unreasonable.<sup>77</sup> In contrast, the Nova Scotia Court of Appeal in *Corkum Construction*,<sup>78</sup> a case on which leave to appeal was recently refused by the Supreme Court of Canada, held that the magistrate did not err in ruling that a 3½ month delay between the serving of a summons and the trial was unreasonable in the light of a number of factors such as the nature of the charge, the length of the limitation period, the delay in serving the information and the possibility of prejudice to the accused. The Ontario Court of Appeal in *Antoine*<sup>79</sup> held that a 26 month delay did not breach the *Charter*, but some of that period was delay before

68. *Attorney-General of Quebec v. Laurendeau* (1982), 3 C.C.C. (3d) 250 (Quebec S.C.) (per Rothman J.). A further motion to the Quebec Court of Appeal was dismissed: *Laurendeau v. Attorney-General of Quebec* (1983), 33 C.R. (3d) 350.

69. *Regina v. Simon* (No. 2) (1982), 141 D.L.R. (3d) 374 (N.W.Terr.S.C.) (per De Weerd J.).

70. *Re James and Law Society of British Columbia* (1982), 143 D.L.R. (3d) 379 (B.C.S.C.) (per Murray J.).

71. *Regina v. Mingo* (1982), 2 C.C.C. (3d) 23 (B.C.S.C.) (per Toy J.).

72. *Supra*, n. 41.

73. R.S.O. 1980, c. 400.

74. *Re McCutcheon and City of Toronto et al.* (1983), 41 O.R. (2d) 652 (per Linden J.).

75. See *Wright, McDermott and Feeley v. The Queen*, [1964] 2 C.C.C. 201 (S.C.C.).

76. *Regina v. Belton* (1982), 3 C.C.C. (3d) 427.

77. *The Queen v. Burrows*, unreported, April 25, 1983.

78. *The Queen v. H. W. Corkum Construction Co. Ltd.*, (1983), 150 D.L.R. (3d) 555 (N.S.S.C.-App. Div.).

79. *Supra*, n. 58.

the *Charter* came into effect and, as we have already seen, the Court took the view that delay prior to the *Charter* is not entitled to the same weight as delay occurring after the *Charter* came into force.

In the United States the comparable "speedy trial" provision has been interpreted to mean a reasonable time from the charge; the pre-indictment period does not matter, although it can be argued that undue delay before a charge is a denial of "due process".<sup>80</sup> In *Corkum*, however, the Nova Scotia Court of Appeal ruled that it was proper to take into account the period of time prior to the laying of an information. The Ontario Court of Appeal in *Antoine*<sup>81</sup> implicitly accepted that s. 11(b) related to delay between the initial information and the trial, but the possibility of a wider interpretation was not argued. It will be interesting to see what the Supreme Court of Canada says on this question and whether the Court attempts to spell out a test for "unreasonable delay". The Court has granted leave to appeal from the Ontario Court of Appeal decision of *Re Mills and the Queen*,<sup>82</sup> which, unlike some of the other Ontario Court of Appeal decisions, dealt in a cursory manner with the issue of delay. The test used by the U.S. Supreme Court in *Barker v. Wingo*<sup>83</sup> is, in the words of the Court, "a balancing test, in which the conduct of both the prosecution and the defendant are weighed".<sup>84</sup> In the U.S. crowded dockets do not constitute an excuse for delay, although deliberate delay will count for more than delay because of crowded dockets. Mr. Justice Martin, in *Antoine*,<sup>85</sup> described *Barker v. Wingo* as an "illuminating judgment" and found it "both persuasive and helpful in determining the similar question whether an accused's right to be tried within a reasonable time... has been contravened".<sup>86</sup> Mr. Justice Martin's judgment is itself illuminating. His approach requires a careful investigation of the reasons for delay. He states:

Although the failure of the accused to object to delay is a factor to which considerable weight must be given... there might be some delays by the prosecution that, in the circumstances, are so shocking that a court would be warranted in holding that an accused's right under s. 11(b) to be tried within a reasonable time had been infringed, despite his apparent acquiescence in those delays.<sup>87</sup>

Martin J.A., for the Ontario Court of Appeal, found "shocking" delay in the later case of *Beason*<sup>88</sup> where there was a delay of more than four years in bringing the accused to trial on a "simple charge of theft". The Court held that objections by the accused and a finding of prejudice were not

80. *United States v. Lovasco*, 431 U.S. 783 (1977).

81. *Supra*, n. 58.

82. Leave to appeal granted Sept. 20, 1983 from the decision of the Ontario Court of Appeal's eleven line judgment June 27, 1983, dismissing an appeal from Osborne J.'s judgment in (1983), 2 C.C.C. (3d) 444.

83. 407 U.S. 514 (1972).

84. *Ibid.*, at 530.

85. *Supra*, n. 58.

86. *Ibid.*, at 621.

87. *Ibid.*, at 621.

88. *The Queen v. Beason*, unreported, Sept. 1, 1983. See also *Kott v. Le Juge Lassonde*, Quebec Court of Appeal, unreported, August 2, 1983; leave to appeal to S.C.C. refused October 17, 1983.

necessary conditions for a breach of the *Charter* provision and concluded that in these circumstances "the only appropriate remedy is the dismissal of the charge".

A number of courts of appeal have dealt with the issue of whether an appeal lies from a refusal to hold that the delay was reasonable. They have held that no direct appeal lies<sup>89</sup> and that a prerogative writ should not be used to divide the proceedings.<sup>90</sup> If there is one issue that appeal courts seem to be agreed on it is that trials should not be fragmented by prerogative proceedings and appeals during the course of the trial.<sup>91</sup> Of course, if the trial judge stays a proceeding based on unreasonable delay, one would expect an appeal court to hear an appeal and in the Manitoba Court of Appeal case of *Belton*<sup>92</sup> the Court held that a stay under such circumstances was tantamount to a verdict of acquittal.

### VIII. "Presumed Innocent"

The paragraph which wins the prize for the most number of appeal cases is 11(d): "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Indeed, the first part of the paragraph dealing with the presumption of innocence simply in relation to s. 8 of the *Narcotic Control Act* could carry off the prize by itself.

The appeal courts have so far been unanimous in declaring that the reverse onus section found in s. 8 of the *Narcotic Control Act*<sup>93</sup> violates s. 11(d) of the *Charter*. As is well known, s. 8 provides that if an accused is proved to be in possession of a narcotic he must establish that the possession was not for the purpose of trafficking. The first appeal court judgment to decide the issue was a 5-member Ontario Court of Appeal in *R. v. Oakes*.<sup>94</sup> Once again, Mr. Justice Martin delivered a thorough and penetrating judgment for the Court, and once again carefully canvassed the American authorities. The Court held that s. 8 did reverse the onus and then quickly shifted attention to s. 1, holding that the reverse onus could not be "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*. Earlier Supreme Court of Canada cases had dealt with the comparable section in the *Bill of Rights*. In the *Shelley* case,<sup>95</sup> Chief Justice Laskin stated that a challenged statutory reverse onus provision does not violate the presumption of innocence if it goes no farther than to require an accused to prove an essential fact upon a balance of probabilities and if the essential fact is "one which is rationally open to the accused to

89. *Regina v. Cameron* (1982), 3 C.C.C. (3d) 496 (Alberta C.A.).

90. *Re Krakowski and The Queen* (1983), 4 C.C.C. (3d) 188 (Ont. C.A.).

91. See also *Re Kendall and The Queen* (1982), 2 C.C.C. (3d) 224 (Alberta C.A.); *Re Anson and The Queen* (1983), 4 C.C.C. (3d) 119 (B.C.C.A.); *Laurendeau v. Attorney-General of Quebec* (1983), 33 C.R. (3d) 350 (Quebec C.A.); *Re Seaway Trust Co. et al. and The Queen*, *supra*, n. 28.

92. *Supra*, n. 76, leave to appeal to the Supreme Court of Canada refused Feb. 7, 1983. See also *Regina v. Holmes* (1983), 41 O.R. (2d) 250 (Ont. C.A.).

93. R.S.C. 1970, c. N-1.

94. (1983), 2 C.C.C. (3d) 339.

95. *R. v. Shelley* (1981), 59 C.C.C. (2d) 292.

prove or disprove".<sup>96</sup> Martin J.A., held that these were not the exclusive considerations and added a further test: "a reverse onus clause which is unreasonable or arbitrary because there is no rational connection between the proved fact and the presumed fact offends against the fundamental principle that an accused has the right to be presumed innocent"<sup>97</sup> under the *Bill of Rights* and, it would follow, under the *Charter*. Martin J.A. seemed somewhat nervous about this extension of *Shelley* and quickly shifted to s. 1, applying the same test to that section:

a reverse onus provision... cannot be justified as a reasonable limitation of the right to be presumed innocent under s. 1 of the Charter in the absence of a rational connection between the proved fact and the presumed fact. In the absence of such a connection the presumption created is purely arbitrary.<sup>98</sup>

The Court more or less invited Parliament to redraft the section by suggesting that:

Parliament, if it had wished to do so, might have decided that possession of a specified quantity of a certain drug was more consistent with trafficking than possession for personal use, and could have made the possession of the specified quantity presumptive evidence that the drug was possessed for the purpose of trafficking.<sup>99</sup>

Other appeal courts have reached the same result with respect to s. 8: Prince Edward Island,<sup>100</sup> British Columbia,<sup>101</sup> Nova Scotia,<sup>102</sup> New Brunswick,<sup>103</sup> Alberta<sup>104</sup> and Quebec.<sup>105</sup> Every court was unanimous on this issue, with the exception of Alberta, where Mr. Justice McInglung delivered a strong dissent stating that "there is a rational, fair and manageable onus within s. 8". "The Canadian Charter of Rights and Freedoms grants us no mandate", he stated, "to strike down valid parliamentary expressions on the ground that their rational underpinning might be assailed in notional cases."<sup>106</sup> McInglung J.A., even referred to *Hansard*<sup>107</sup> to show that the Minister of Justice at the time of the introduction of s. 8 was of the view that the section did not conflict with the *Bill of Rights*.

The *Oakes* case is to be heard by the Supreme Court of Canada and it will be interesting to see what their approach will be. Most observers predict that they will strike down s. 8. I agree, but I predict that they will build Martin J.A.'s "rational connection" test into s. 11(d) and not force reliance on s. 1.

96. *Ibid.*, at 295.

97. *Supra*, n. 94, at 351.

98. *Ibid.*, at 362-63.

99. *Ibid.*, at 364.

100. *Regina v. Carroll*, *supra*, n. 41.

101. *Re Anson and The Queen* (1983), 4 C.C.C. (3d) 119.

102. *Cook v. The Queen*, unreported, March 16, 1983.

103. *Regina v. O'Day* (1983), 5 C.C.C. (3d) 227.

104. *R. v. Stanger*, [1983] 5 W.W.R. 331.

105. *Landry v. The Queen*, Quebec Court of Appeal, unreported, August 4, 1983. L'Heureux-Dubé J. dissented on the basis that the facts warranted a finding of trafficking. The conviction was before the *Charter* came into operation, but the Court applied *Oakes* to the comparable section of the *Bill of Rights*, s. 2(f) — another illustration of the *Charter* giving new life to the *Bill of Rights*.

106. *Supra*, n. 104, at 342.

107. See also the reference to *Hansard* in *Re Federal Republic of Germany and Rauca* (1983), 4 C.C.C. (3d) 385 at pp. 404-5.

There have been other challenges to legislation based on the “presumption of innocence”. In *Holmes*<sup>108</sup> the Ontario Court of Appeal held, and this was subsequently followed by the Manitoba Court of Appeal in *R. v. Kowalczyk*,<sup>109</sup> that section 309 of the *Criminal Code*, placing the onus on the accused to prove a lawful excuse for possession of instruments suitable for housebreaking when found in possession under circumstances giving rise to a reasonable inference that the instrument was intended to be used for housebreaking, did not shift the onus of proof. Even if it did, the court said, it was not unreasonable under s. 1, following *Oakes*, “by reason of the rational connection between the presumption and the facts required to be proved.” Further, in *Russell v. The Queen*<sup>110</sup> the Nova Scotia Court of Appeal held that the doctrine of recent possession created only an evidential burden on the accused and not a persuasive burden and so did not contravene s. 11(d). The Ontario Court of Appeal in *Boyle*<sup>111</sup> applied the reasoning in *Oakes* to s. 312(2) of the *Criminal Code* and held that the presumption that a motor vehicle which had its identification number obliterated had been obtained by crime is reasonable and therefore constitutionally valid, but the presumption that the accused had guilty knowledge of this fact was not. It should be noted that the Court applied s. 11(d) to a statute which placed an onus on the accused to adduce evidence of a reasonable doubt.

One issue that has not come before the Courts is whether the onus placed on the accused by the Supreme Court of Canada in the *Sault Ste. Marie* case<sup>112</sup> to prove that he exercised due diligence in strict liability cases meets the *Charter*. One can be sure that the Supreme Court of Canada will find that it is valid. To strike it down might ultimately detract from the rights of the accused, by encouraging the legislature to create more absolute liability offences. A question that I have not adequately sorted out in my own mind is how the *Charter* can permit the Ontario Court of Appeal in *Oakes* to strike down a reverse onus clause and yet permit the same Court, two days earlier in *Stevens*,<sup>113</sup> to hold that Parliament can completely eliminate an otherwise essential element — in that case knowledge of a girl’s age. Maybe, the B.C. Court of Appeal is on the right track.

### IX. “Reasonable Bail”

Two days after the *Oakes* case was released the Ontario Court of Appeal released the *R. v. Bray* decision,<sup>114</sup> again a unanimous judgment delivered by Martin J.A. The issue was the validity of s. 457.7(2)(f) of

108. *Supra*, n. 41. The Supreme Court of Canada has granted leave to appeal from a similar decision of the Ontario Court of Appeal, *R. v. Pearce*, March 15, 1983.

109. [1983] 3 W.W.R. 694.

110. (1983), 32 C.R. (3d) 307.

111. *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713.

112. *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353.

113. (1983), 3 C.C.C. (3d) 198.

114. (1983), 2 C.C.C. (3d) 325.

the *Code*, which places the onus on an accused charged with murder to show cause why he should be released from custody pending trial. No mention was made in the judgment of the presumption of innocence or the *Oakes* case; rather, it was s. 11(e) which was analyzed: "not to be denied reasonable bail without just cause." The Court held that s. 11(e) was not breached, and even if it was breached, the provision was a "reasonable limitation" under s. 1. The Court also, in an *obiter* statement, took the view that detention to prevent the commission of offences would "clearly constitute 'just cause'", an issue which is a contentious one in the United States.

The Ontario Court in *Bray* disagreed with the Nova Scotia Court of Appeal case of *Regina v. Pugsley*<sup>115</sup> which struck down the reverse onus bail section, again without reliance on the presumption of innocence subsection. "Under the Charter", the Court stated, "it seems clear... that a person who is charged with an offence is entitled to reasonable bail unless the Crown can show just cause for a continuance of his detention."<sup>116</sup>

### X. "Fair and Public Hearing by an Independent and Impartial Tribunal"

Returning again to s. 11(d), there is room for discussion and division on the words "fair", "public hearing", and "independent and impartial tribunal." The word "fair" has been the subject of only one court of appeal decision. In *R. v. Sophonow*<sup>117</sup> an accused who was appealing his conviction asked the Manitoba Court of Appeal for a ban on extra-judicial comment respecting his guilt or innocence until after his appeal was concluded, on the ground that his rights under s. 11(d) of the *Charter* were infringed. The Court denied his application, not wanting to act as a censor, and keeping in mind the "freedom of the press" provision in s. 2. In the Quebec case of *R. v. Vermette* (No. 4)<sup>118</sup> the trial judge stayed a charge because the Premier of Quebec made certain improper comments about the accused that were given widespread publicity. The Quebec Court of Appeal has ruled that an appeal can be taken from the stayed proceedings,<sup>119</sup> but as yet I have seen nothing to indicate that a decision has been reached by the Appeal Court. The section may in the long run prove to be a very important one because of the elasticity of the word "fair". Perhaps Article 14 of the *U.N. Covenant* will be used to put flesh on the word. It provides some concrete cases of fairness not otherwise dealt with in the *Charter*. For example, Article 14(3) states, in part, that an accused is entitled "to have adequate time and facilities for the preparation of his defence"; "to be tried in his presence"; and "to examine or have examined, the witnesses against him and to obtain the attendance and exami-

115. (1982), 2 C.C.C. (3d) 266.

116. *Ibid.*, at 270.

117. (1983), 21 Man. R. (2d) 110 (C.A.).

118. (1982), 1 C.C.C. (3d) 477 (Quebec S.C.).

119. *R. v. Vermette* (1982), 3 C.C.C. (3d) 36 (Que. C.A.)



nation of witnesses on his behalf under the same conditions as witnesses against him”.

Section 11(d) of the *Charter* refers to a “public hearing by an independent and impartial tribunal”. The Ontario Court of Appeal in *Re Southam Inc. and The Queen* (No. 1)<sup>120</sup> held that the provision in the present *Juvenile Delinquents Act* that trials should be *in camera* was inconsistent with the *Charter*. Note, however, that it was s. 2(b) relating to “freedom of the press” that was relied on by the court, not s. 11(d), because the application for an open hearing was not made by the accused but by a newspaper. As in the *Oakes* case the Court invited Parliament to introduce a section individualizing the decision respecting barring the public:

An amendment giving jurisdiction to the court to exclude the public from juvenile court proceedings where it concludes, under the circumstances, that it is in the best interests of the child or others concerned or in the best interests of the administration of justice to do so would meet any residual concern arising from the striking down of the section.<sup>121</sup>

As in *Oakes*, the court was not willing to “rewrite the statute”, but was willing to give guidance to the legislative draftsman. The net result will be, assuming new legislation is enacted, that the decision will be individualized on a case-by-case basis — the traditional judicial method of trying to achieve justice.

The words “independent tribunal” were analyzed in *R. v. Valente* (No. 2)<sup>122</sup> where the Ontario Court of Appeal held that the Ontario Provincial Court Judges were “independent” within the meaning of the *Charter*. The case is to be heard by the Supreme Court of Canada. The test set out by Howland C.J.O. for a 5-member court is “whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a provincial court judge... was a tribunal which could make an independent and impartial adjudication”.<sup>123</sup> The Court held that there was not a “reasonable apprehension” that the judge was not able “to make an independent and impartial adjudication”. Other cases will, no doubt, arise in the future. The Supreme Court of Canada held in the *MacKay* case,<sup>124</sup> under a comparable provision in the *Bill of Rights*, that court martial proceedings were valid. This may be tested under the *Charter*, but undoubtedly the same result will be reached. Assuming that a professional disciplinary hearing comes within s. 11, it would seem, therefore, that the tribunal would be considered “independent and impartial”, even if composed of members of the same professional organization.

120. (1983), 3 C.C.C. (3d) 515 (Ont. C.A.).

121. *Ibid.*, at 536.

122. (1983), 2 C.C.C. (3d) 417 (Ont. C.A.).

123. *Ibid.*, at 440.

124. *McKay v. The Queen* (1980), 54 C.C.C. (2d) 129 (S.C.C.).

## XI. "Trial by Jury"

Section 11(f) gives the right to a jury trial in any case "where the maximum punishment for the offence is imprisonment for five years". We have already seen that lower courts have found ways to hold that contempt proceedings and dangerous offender declarations do not require jury trials. Similarly, in *Regina v. S.B.*<sup>125</sup> the B.C. Court of Appeal held that a juvenile committed to an industrial school for more than 5 years did not have the right to a jury trial because the *Juvenile Delinquents Act* "does not contemplate punishment". Further, the Alberta Court of Appeal held in *Crate*<sup>126</sup> that a deemed reelection to be tried by a judge without a jury under s. 526.1 of the *Code* is valid. Section 11(f) excepts from its operation "an offence under military law tried before a military tribunal". There are two relevant and interesting decisions of the Court Martial Appeal Court of Canada under the *Charter*. In *MacDonald v. The Queen*<sup>127</sup> the Court held that the off-duty sale of marijuana by a serviceman had what is described as "a real military *nexus*" to the service because of the clear "connection between drug use and the user's performance of his or her military duties". Therefore, the accused was properly subject to military discipline and was not entitled to a jury trial. In a later case, *Rutherford v. The Queen*,<sup>128</sup> the Court held that similar off-duty conduct by a serviceman who had subsequently left the service was not subject to military discipline under the *National Defence Act* and so could not be tried without a jury. According to the Court, he would be denied his rights under s. 15 of the *Charter* of "equality before the law enjoyed by other civilians", a rather interesting analysis considering that s. 15 does not come into operation until 1985.<sup>129</sup> Section 1 was not applicable because it could not be demonstrated, stated the Court, "that his escape from punishment, total or partial, will adversely affect 'the general standard of discipline and efficiency of the Service'".

Some further issues may arise in the future. Will six-person juries, as now exist in the Yukon and Northwest Territories,<sup>130</sup> be permitted to continue? The Supreme Court of the United States in *Williams v. Florida*<sup>131</sup> upheld six-member state juries, as, no doubt, would our courts. What about non-unanimous majority verdicts, which now exist in England<sup>132</sup> and in some American states? It does not appear likely that majority verdicts will be proposed in Canada in the near future, in view of the Law Reform Commission of Canada's position<sup>133</sup> arguing against the practice. But assume that legislation were introduced. The United States Supreme

125. (1983), 3 C.C.C. (3d) 390 (B.C.C.A.).

126. *Crate v. The Queen*, unreported, July 26, 1983.

127. Unreported, June 1, 1983.

128. Unreported, June 24, 1983.

129. The Court could have relied on — and perhaps intended to rely on — s. 1(b) of the *Bill of Rights*, "equality before the law".

130. *Criminal Code*, R.S.C. 1970, c. C-34, s. 561.

131. 399 U.S. 78 (1970).

132. *Criminal Justice Act, 1967*, (U.K.), c. 80, s. 13.

133. *Working Paper No. 27: The Jury in Criminal Trials*, (1980), p. 19; *Report No. 16: The Jury*, (1982), at 77.

Court held in *Apodaca v. Oregon*<sup>134</sup> in 1972 that legislation providing for 10 out of 12 jurors was constitutional and in *Johnson v. Louisiana*<sup>135</sup> in the same year that 9 out of 12 was permissible. One should not conclude, however, that majority verdicts are therefore constitutional in the United States in all cases. These were state prosecutions which were subject to the “due process” clause of the Fourteenth Amendment. They do not necessarily determine the issue for federal law which is governed by the right to an “impartial jury” in the Sixth Amendment. Indeed, a majority of the Supreme Court in the two cases mentioned above held that majority verdicts were not permitted in federal prosecutions. So, when looking at American cases one must be careful to distinguish Fourteenth Amendment cases from constitutional cases involving the amendments applicable to the federal government. To complete the picture on this issue in the United States, the Supreme Court has held that the right to a jury trial is breached if the jury consists of fewer than six jurors<sup>136</sup> and in another case<sup>137</sup> did not permit majority verdicts in the case of six-person juries.

## XII. “Self-crimination”

Self-incrimination — or as it is described in a marginal note, “self-crimination” — is discussed in two provisions of the *Charter*. Section 11(c) states that a person charged has the right “not to be compelled to be a witness in proceedings against that person in respect of that offence”, and s. 13 states that “a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings except in a prosecution for perjury or for the giving of contradictory evidence”. In *Altseimer*<sup>138</sup> the Ontario Court of Appeal held that the breathalyzer provisions did not breach the *Charter*, stating that “it is plain that the protection continues to be protection against testimonial compulsion and nothing else”.

Section 13 goes beyond the existing law, however, in that now a witness does not have to object to answer a question to prevent its use in a subsequent proceeding. Under s. 5(1) of the *Canada Evidence Act*<sup>139</sup> an objection was necessary.<sup>140</sup> A minor change is that the *Charter* allows a later prosecution for giving contradictory evidence<sup>141</sup> as well as for perjury; the change was necessary because the *Canada Evidence Act* had been interpreted as not encompassing a contradictory evidence charge within the word “perjury”.<sup>142</sup>

134. 406 U.S. 404 (1972).

135. 406 U.S. 356 (1972).

136. *Ballew v. Georgia*, 435 U.S. 223 (1978).

137. *Burch v. Louisiana*, 441 U.S. 130 (1979).

138. *Supra*, n. 14.

139. R.S.C. 1970, c. E-10.

140. *Supra*, n. 14, at 12.

141. *Criminal Code*, R.S.C. 1970, c. C-34, s. 124.

142. See *R. v. Chaperon* (1979), 52 C.C.C. (2d) 85 (Ont. C.A.).

In *Re Crooks and The Queen*<sup>143</sup> the Ontario Court of Appeal approved of a judgment by O'Driscoll J. holding that a separately charged accused could be compelled to give evidence at the trial of another person charged with the same offence. This case, for which leave to appeal has been granted by the Supreme Court of Canada, was followed by the British Columbia Court of Appeal.<sup>144</sup> Other questions will come up in the future. Will the courts allow an accused who has not yet been charged to be called before a coroner's inquest, as apparently happens in Quebec?<sup>145</sup> Would it violate the *Charter* if the *Evidence Act* was changed to allow the judge to comment on the accused's failure to testify, as in England,<sup>146</sup> and as in the Law Reform Commission of Canada's proposed Evidence Code?<sup>147</sup> Does the section prevent a judge or jury or appeal court taking into account the fact that the accused did not testify as a trial judge in Ontario recently held?<sup>148</sup>

### XIII. Double Jeopardy

The double jeopardy provision in s. 11(h) is a very narrow one: "if finally acquitted of the offence, not to be tried or punished for it again and, if finally found guilty and punished for the offence, not to be tried for it again". The language of the provision will not, without stretching the natural meaning of the words, cover the rule against multiple convictions,<sup>149</sup> the rule against unreasonably splitting a case,<sup>150</sup> issue estoppel,<sup>151</sup> termination before a final verdict, or even prosecutions for similar, although not identical, offences. It does not even cover all of the ambit of the traditional special pleas of *autrefois acquit* or *convict* which in addition prohibit subsequent prosecutions in certain cases for more serious offences.<sup>152</sup> I say the above with some hesitation, however, because Dickson J., in an extrajudicial statement, indicated that s. 11(h) would have a wider impact. "The *Kienapple* principle", he said, "now has constitutional status under s. 11(h) of the *Charter*".<sup>153</sup> One of the two appeal court decisions that I have seen dealing with double jeopardy is the Manitoba Court of Appeal decision of *Burrows*<sup>154</sup> in which the court held that a stay of proceedings was not a final acquittal within the meaning of the section. The second is an Ontario Court of Appeal decision, *R. v. Krug*,<sup>155</sup> which

143. (1982), 2 C.C.C. (3d) 57 (Ont. H.C.).

144. *Regina v. Walters* (1982), 2 C.C.C. (3d) 512 (B.C.C.A.).

145. See E. Ratushny, "The Role of the Accused in the Criminal Process" in W. S. Tarnopolsky and G. A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary*, (1982) 335.

146. See A.R.N. Cross, *Evidence*, 5th ed., (1979), at 413.

147. *Report on Evidence*, (1975), s. 56.

148. Killen J. in *R. v. Pelley*, *Globe and Mail*, September 24, 1983, at 14, col. 1.

149. See *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524 (S.C.C.).

150. See cases listed, *supra*, n. 17.

151. See *Gushue v. The Queen* (1979), 50 C.C.C. (2d) 417 (S.C.C.).

152. Section 538 of the *Criminal Code*. See generally, M.L. Friedland, *Double Jeopardy*, (1969). These other aspects of double jeopardy could, however, come within s. 7 or 11(d).

153. Address to the Canadian Association of Provincial Judges, Saskatoon, September, 1982, appended to *R. v. Hayden* (1983), 33 C.R. (3d) 363 (Man. Prov. J.Ct.).

154. Unreported, April 25, 1983.

155. Unreported, April 11, 1983, leave to appeal to the Supreme Court of Canada granted June 6, 1983.

simply adopted the trial judge's view that multiple convictions are permissible for theft and for an offence under s. 83, using a firearm in the commission of an offence. This case is to be heard by the Supreme Court of Canada and so Dickson J. will, in fact, have a final say on the application of the *Kienapple* principle. I predict that the clause will continue to be narrowly construed. The word "finally" in the Charter provision makes it clear that new trials can be ordered following an appeal from a conviction and reasonably clear that, unlike in England or the United States, appeals from an acquittal are permitted in certain cases.

There is a danger that the constitutional provision will stultify the development of non-constitutional criminal law rules by appearing to codify the double jeopardy principles. Of course the *Charter* does no such thing: s. 26 makes clear that the *Charter* should not be "construed as denying the existence of any other rights or freedoms that exist in Canada".

Section 11(i) provides: "if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment". This is a relatively unimportant provision to be in a Constitution. The *Interpretation Act*<sup>156</sup> already makes this a rule of interpretation. Not surprisingly, there are as yet no court of appeal cases on the section. No doubt this provision was introduced into the *Charter* because of Article 15 of the *U.N. Covenant* which states: "Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby". Note, however, that not all of the *U.N. Covenant* Articles are duplicated in the *Charter*. For example, the *Covenant* specifies a "right to his conviction and sentence being reviewed by a higher tribunal according to law",<sup>157</sup> and for "compensation" in certain cases when there has been a miscarriage of justice,<sup>158</sup> but these are not contained in the *Charter*. One of the provisions in the *U.N. Covenant*, understandably not reproduced in the *Charter*, is a section which clearly dates the *Covenant* to a period before the decline of the "rehabilitative ideal" which started in about the mid-60s. The *Covenant*, which was adopted by the U.N. General Assembly in 1966 states in Article 10(3): "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". One rarely hears talk about rehabilitation in a prison setting today.

156. R.S.C. 1970, c. I-23, s. 36(e).

157. Section 14(5).

158. Section 14(6).

#### XIV. "Cruel and Unusual Treatment or Punishment"

The final provision I will deal with is s. 12, "cruel and unusual treatment or punishment": "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." A similar provision is found in the *Bill of Rights*, where the words have been given effect in only one case. In the *McCann* case<sup>159</sup> the section was used to declare that the form of solitary confinement used in a British Columbia penitentiary was cruel and unusual.

Thus far I have found only one court of appeal case which has discussed the section under the *Charter*. In *Randall and Weir v. The Queen*<sup>160</sup> the accused argued that her 7 year minimum sentence for importing marijuana into Canada breached s. 12. The case was argued without the assistance of counsel and the Court rejected the argument saying simply that "The sentence cannot be considered 'cruel and unusual treatment or punishment' ". The Ontario Court of Appeal in *Regina v. Shand*<sup>161</sup> had reached the same result in a pre-*Charter Bill of Rights* case. Will it maintain that position under the *Charter*? The words "cruel and unusual" were the subject of analysis in the 1976 case of *Regina v. Miller and Cockriell*<sup>162</sup> where the Supreme Court of Canada unanimously held that the imposition of capital punishment was not cruel and unusual punishment. It seems likely that under the *Charter* Laskin C.J.C.'s opinion that the words "cruel and unusual" are "interacting expressions colouring each other, so to speak, and hence, to be considered together as a compendious expression of a norm" will be preferred over the majority's view that the conduct must be both cruel and unusual.<sup>163</sup>

Several trial judges have dealt with the section in relation to prison conditions, both before and after conviction. Although the courts show a reluctance to interfere with prison administration, there are indications that they would be prepared to interfere in a proper case. A Federal Court judge, Dubé, J., in *Collin v. Kaplan*,<sup>164</sup> held that on the facts presented "double-celling" of convicted persons did not breach the section, noting that the situation was to be temporary. A Saskatchewan judge, Sirois, J., examined pretrial incarceration in Saskatchewan<sup>165</sup> and held that the various concerns complained of were reasonable restrictions under s. 1, stating:

159. *McCann v. The Queen* (1975), 29 C.C.C. (2d) 337 (F.C.T.D.); See also *R. v. Bruce, Wilson and Lucas* (1977), 36 C.C.C. (2d) 158 (B.C.S.C.). See Michael Jackson, *Prisons of Isolation: An Analysis of Solitary Confinement in the Canadian Penitentiary*, (1983).

160. N.S.S.C.-App. Div. unreported, June 29, 1983.

161. (1976), 30 C.C.C. (2d) 23 (Ont. C.A.).

162. (1976), 31 C.C.C. (2d) 177 (S.C.C.).

163. *Ibid.*, per Laskin, C.J.C., concurring Mr. Chief Justice Laskin's approach was adopted by Linden J. in *Mitchell v. A.-G. Ont.*, Ont. H.C., unreported, July 7, 1983 and by Mahoney J. in *Re Gittens and The Queen* (1982), 68 C.C.C. (2d) 438 (F.C.T.D.).

164. (1982), 1 C.C.C. (3d) 309 (F.C.T.D.).

165. *Re Malby et al. and Attorney-General of Saskatchewan* (1982), 2 C.C.C. (3d) 153 (Sask. Q.B.).

The institution may and certainly must place restrictions and limitations on the rights of the applicants so that sufficient security will ensure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff.<sup>166</sup>

So, for example, the court did not condemn the practice of transporting the prisoners "with their hands handcuffed behind their back and their legs in shackles". The Court warned, however, that "if there were no valid reasons for using handcuffs and shackles on a particular case, and these were in fact used then that would or could constitute cruel and unusual treatment or punishment"<sup>167</sup>. The Court also upheld the prison rules respecting visitation as well as strip searches after visits. Indeed, all of the standard prison procedures were upheld, with the exception of the denial of the right to vote which the court held violated s. 3 of the *Charter*. Mr. Justice McDonald in Alberta arrived at a similar result,<sup>168</sup> agreeing with the Saskatchewan judge that "Courts do not sit to superintend the administration of the jail and penitentiary systems". McDonald, J., upheld a directive limiting contact visits to monthly visits as well as such other practices as visual strip searches, even "in the absence of reasonable and probable cause to believe that the prisoner being searched has concealed an object in his body-cavity", and the use of pesticides.

## XV. Conclusion

The courts have clearly interpreted the requirements of the *Charter* more liberally than the similar provisions in the *Bill of Rights*. There is no ambiguity in the *Charter* as to the power to strike down legislation or to grant an appropriate remedy for breach of the *Charter* as there is in the *Bill of Rights*. Many courts have pointed out that the *Charter* is now part of the Constitution and not just a statute, or even a "quasi-constitutional" document, as Laskin C.J.C. called the *Bill of Rights* in *Hogan*<sup>169</sup> and *Miller and Cockriell*.<sup>170</sup>

Parliamentarians, the legal profession, and the public expect the courts to be more involved in policy issues than in the past — and, to a considerable extent, the courts have attempted to meet these expectations. The courts seem prepared to travel beyond the "frozen concepts" doctrine which has characterized the interpretation of the *Bill of Rights*<sup>171</sup> and onto the more fertile plain of Lord Sankey's "living tree"<sup>172</sup> concept, in which the Canadian Constitution is "capable of growth and expansion within its natural limits." As stated earlier, the changes that have been made by the courts have been of a marginal nature; still, the changes have been impor-

166. *Ibid.*, at 159.

167. *Ibid.*, at 163.

168. *Soenen v. Thomas*, *supra*, n. 34. McDonald J. points out that the comparable American provision speaks of "cruel and unusual punishments" whereas ours speaks of "treatment or punishment" and "treatment" is a more general word than "punishment". He warns of the danger, therefore, of relying too heavily on American cases.

169. *Hogan v. The Queen* (1974), 18 C.C.C. (2d) 65, at 81 (S.C.C.).

170. *Supra*, n. 162, at 184.

171. See generally, W.S. Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981), 44 *Law and Contemporary Problems* 169.

172. *Edwards v. A.-G. Can.*, [1930] A.C. 124, at 136 (P.C.).

tant, taking some of the harshness out of some laws and further individualizing the criminal justice system. In the pre-*Charter* case of *Blaikie*,<sup>173</sup> dealing with language rights under the *Constitution Act, 1867* the Supreme Court, in a unanimous judgment, stated that the court should avoid "overly technical" interpretations of constitutional guarantees. Instead it should give them "a broad interpretation attuned to changing circumstances". A broad, but careful, approach has been given to the *Canadian Charter of Rights and Freedoms* by the appeal courts so far, and undoubtedly a similar approach will be taken by the Supreme Court.

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173. *A.-G. of Quebec v. Blaikie*; *A.-G. Quebec v. Laurier* (1979), 49 C.C.C. (2d) 359, at 368 (S.C.C.). See also *Minister of Home Affairs v. Fisher*, [1980] A.C. 319, at 328 (P.C.), in which Lord Wilberforce stated for the Privy Council that the Bermuda Constitution should be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'".