

Adversarial Justice and the Charter of Rights: Stunting the Growth of the "Living Tree"

Professor Alan N. Young*

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Introduction

In February, 1991, Bishop Hubert O'Connor was charged with various sexual offences arising out of incidents which took place while he was principal of a residential school in the 1960s. On June 4, 1992, defence counsel applied for, and obtained, a court order requiring disclosure of the complainants' medical, counselling and school records. Despite repeated warnings from various judges, the Crown failed to comply with this order, and on December 7, 1992, judicial patience ran out and a stay of proceedings was entered. After appeals to the British Columbia Court of Appeal and the Supreme Court of Canada, a new trial was ordered, and on

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Part II: The Myth of Procedural Rights

- (1) *The Hosie Case* — Evaluating Search Warrant Sufficiency
- (2) *The Stinchcombe Case* — Pre-trial Motions in the Charter Era

Conclusion

July 25, 1996, Bishop O'Connor was convicted and was sentenced to two and a half years' imprisonment.¹

Even if one assumes that justice has been served and an accused person has been justly punished for his crimes, one has to wonder how it is possible in the era of the *Canadian Charter of Rights and Freedoms* for a trial to drag on for five years and for a Crown Attorney to obstruct compliance with a court order with relative impunity. Although the Supreme Court of Canada characterized the actions of the Crown as "shoddy and inappropriate"² and as "extremely high-handed and thoroughly reprehensible",³ the court determined that this was not the "clearest of cases" to attract the remedy of a stay of proceedings for abuse of process or for violation of s. 7 of the Charter. The question remains how it is possible in an era of constitutional review for "shoddy" and "reprehensible" Crown conduct to attract censure but not to attract any meaningful remedy.

Similarly, on November 7, 1996, the Ontario Court of Appeal dismissed an appeal in which the accused claimed that his rights to a trial within a reasonable time had been violated because a trial that should have taken four days lasted nearly two years. Twenty hours of court time took place on 20 separate days over some 20 months; however, the court concluded that the accused's constitutional rights under s. 11(b) had not been violated because the accused suffered no demonstrable prejudice. Nevertheless, the court recognized that this piecemeal and scattered approach to a criminal trial was problematic and it stated:⁴

The manner in which the trial proceeded was most unsatisfactory. The twenty hours of court time required for evidence and argument leading to the conviction of the appellant took place on twenty days over some

¹ For a summary of the facts of this case, see, *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1, 44 C.R. (4th) 1 (S.C.C.). Apparently, Bishop O'Connor is intending to appeal this verdict, and on September 16, 1996, Madam Justice Proudfoot denied the accused bail pending appeal.

² *Ibid.*, at p. 47 C.R.

³ *Ibid.*, at p. 77.

⁴ *R. v. Leaver*, unreported (November 7, 1996, Ont. C.A.), at pp. 1-2 of the Judgment; see, also, Tracy Tyler, "Review Urged After Trial Dragged Out Over 2 Years", *The Toronto Star*, Wednesday November 13, 1996, for further details.

twenty months. In our view this is a most unsatisfactory manner for a criminal trial to proceed, particularly when the matter involves allegations of sexual assault involving a young child. We would hope that those responsible for scheduling in the provincial courts will review their procedures in order that similar situations may be avoided in the future.

Reasonable people might disagree with the response of the courts to the claims of constitutional impropriety raised in these cases; however, it is hard to gainsay the conclusion that these two trials do not serve as models of fair process. The very fact that these two trials could proceed in such a chaotic fashion raises the question of whether the enactment of the Charter of Rights has effected any positive change or improvement in our criminal process. Without doubt there have been monumental decisions and effective remedying of official misconduct in isolated cases, yet, after 15 years of Charter litigation, there has not been any documented and significant structural reform of our criminal process.

It may be unfair to condemn the Charter for failing to achieve a goal which was never intended. The courts have candidly stated on many occasions that the “*Charter* does not intend a transformation of our legal system”⁵ or that the “*Charter* was not intended to turn the Canadian legal system upside down”.⁶ None the less, Chief Justice Lamer has recognized that “we cannot shrink from our task of interpreting the Charter in a full and fair manner, even when, and perhaps especially when, we are confronted with the possibility of resulting *significant institutional reform*” (emphasis added).⁷ Although the Charter may not have been intended to reinvent the wheel, it is clear that some of the legal rights protected by the Charter cannot be comfortably accommodated within the existing structure of our criminal process. It should not be surprising that the criminal justice system, whose structure evolved over hundreds of years in the absence of constitu-

tionally entrenched rights, might have difficulty adapting to the demands of constitutional imperatives.

In this article, I will briefly examine how one fundamental component of our criminal process has stymied the full development and implementation of legal rights. In a nutshell, it is my contention that the logic of adversarial justice has skewed the implementation of legal rights. Although adversarial justice has many components, the defining characteristic of adversarial justice is the notion that control of the process should be left in the hands of the litigants. That is to say, primary responsibility for the collection and presentation of evidence is left in the hands of the Crown and defence, with the trier of fact occupying the role of passive umpire. This defining feature of adversarial justice can undercut the foundation for the implementation of constitutional rights because so much will depend upon the good faith exercise of discretion of Crown counsel and the competence of defence counsel.

In assessing the impact of the Charter, most commentators explore the issue of whether constitutional rights serve to paralyze law enforcement or unduly burden prosecutors. This article will not explore this tiresome issue, but will examine the impact of the Charter from a different angle. It will be argued that the failure of the Charter to effect meaningful structural reform can be partially attributed to the adversarial logic of leaving the impetus for constitutional scrutiny in the hands of defence counsel. As “champion” of the interests of the accused, defence lawyers bear the burden of ensuring that their client’s constitutional rights have been respected by police, prosecutors and judges. Therefore, in the absence of some institutional mechanism for supervisory, quality control over the process, the implementation of constitutional rights is contingent upon the competency of counsel. We may operate upon an assumption that counsel for the defence is always competent and diligent; however, this is merely an idealized conception of the logic of adversarial justice. In the real world, there are good lawyers, bad lawyers, diligent lawyers and lazy lawyers, and it may be naive to believe that effective implementation of legal rights can be secured by leaving respon-

⁵ *R. v. Altseimer* (1982), 1 C.C.C. 37, 29 C.R. (3d) 276 at p. 282, 142 D.L.R. (3d) 246 (Ont. C.A.).

⁶ *R. v. Mills* (1986), 26 C.C.C. (3d) 481 at p. 492, 52 C.R. (3d) 1, [1986] 1 S.C.R. 863.

⁷ *Ibid.*, at p. 555.

sibility for the enforcement of these rights in the hands of the defence bar.

This article will be divided into two parts. In Part I, the article will outline instances in which constitutional doctrine is structured in a manner so as to leave primary responsibility for the enforcement of legal rights in the hands of defence counsel. In Part II, the article will explore two leading cases in which it will be demonstrated that even judicial decisions, with a strong due process perspective, can become unravelled and ineffective due to implicit reliance upon the competency of defence counsel. In the end, it is hoped that the reader will reach the position that clear, comprehensive and self-executing rules and procedures are the best safeguard for the implementation of constitutional rights, rather than leaving enforcement of the rights to the good faith discretion of the Crown and the tenacity of defence counsel. Although it undercuts the logic of adversarial justice, it is submitted that the only effective way of ensuring institutional respect for constitutional rights is to ensure that all the players (*e.g.*, police, Crown, defence counsel and judge) share equally the burden of being vigilant in preventing constitutional violations.

PART I

The Operation of the Charter of Rights within an Adversarial Framework

Adversarial criminal justice contemplates a stylized battle between an individual and a state representative. Accordingly, one of the purposes served by a system of rights is to correct the balance of advantages to ensure that the adversaries are similarly empowered.⁸ A fair fight requires that the parties are not grossly mismatched in terms of power and resources. On the one hand the enactment of the legal rights provisions

⁸ The allocation of rights and safeguards has sometimes been described as a rights offset theory "where the defendant is given a set of rights to offset the natural resource and public support advantages of the prosecutor", see, G. Goldpaster, "On the Theory of American Adversary Criminal Trial" (1987), *J. Crim. L. & Criminology* 118 at p. 126. See, also, A. Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure" (1960), 69 *Yale L.J.* 1149.

of the Charter serves to level the playing field between prosecutor and accused; on the other hand, the developing jurisprudence under the Charter has the potential to undercut the noble aspirations of correcting the balance of advantage.

An abstract set of legal rights is of little value unless the rights-holder has the resources to assert his/her rights in an effective manner. We mistakenly assume that counsel for the defence, as champion of the accused, always has the ability and resources to advance constitutional claims successfully on behalf of his/her client. If the jurisprudence under the Charter consistently places the burden of assertion and proof upon the accused and his/her counsel, we run the risk of leaving the protection of the Charter in the hands of lawyers of varying degrees of competence. It must be recognized that the legal process rights are not designed to benefit designated individuals. They are designed to structure and constrain governmental power, and in their ordering of state/citizen relations they inure to the benefit of all residents.⁹ Accordingly, one would expect that state officials would share the responsibility for ensuring that legal rights are given full effect. None the less, when one begins to chronicle the first 15 years of Charter jurisprudence, it becomes readily apparent that defence counsel, with their limited resources, bear the burden of ensuring that state officials act in accordance with the constitutional imperatives. A few selected examples, discussed below, will demonstrate the precarious foundation on which we have built our constitutional regime of legal rights.

(1) Abuse of Process and the Tainted Witness

In 1995, the Supreme Court of Canada established that the common law abuse of process doctrine and the principles of

⁹ Due to the brevity of this article, I cannot elaborate on this "regulatory" approach to legal rights; however, reference should be made to the jurisprudence under s. 24(2) for an illustration of this concept as the doctrine is clearly more concerned with the "long-term consequences" of constitutional violations than it is with providing a personal remedy for the accused rights-claimant. Further elaboration can be found in A. Young, "Not Waving But Drowning: A Look at Waiver and Collective Constitutional Rights in the Criminal Process" (1989), 53 *Sask. L.Rev.* 47.

fundamental justice under s. 7 are co-extensive.¹⁰ In doing so the court emphasized that “while the Charter is certainly concerned with the rights of the accused, it is also concerned with preserving the integrity of the judicial system”, and that, “one cannot separate the public interests in the integrity of the system from the private interests of the individual accused”.¹¹ Accordingly, there is clear jurisprudential support for the proposition that an abuse of process/fundamental justice claim is not only designed to protect an individual accused but it is also designed to ensure that the process operates fairly and in a manner which will not bring the administration of justice into disrepute. There should be little doubt that the latter concern is of equal importance to the Crown as to the defence.

In *R. v. Dikah*,¹² the Ontario Court of Appeal was faced with the issue of whether reliance upon a paid informant at trial amounted to an abuse of process. It was argued that structuring a payment schedule for the informant whereby the informant would be paid if the assistance provided led to a “successful investigation” would serve as a testimonial inducement. As such, it was argued that providing this incentive to lie amounted to an abuse of process. In overturning the stay of proceedings awarded at trial, the court noted:¹³

Where the defence has a full opportunity to explore factors relevant to reliability and credibility before the trier of fact, I see no constitutional or supervisory authority for a trial judge pre-empting the trier of fact’s assessment by entering a stay of proceedings.

Although lawyers assert that cross-examination “is beyond any doubt the greatest legal engine ever invented for the discovery of truth”,¹⁴ there are two problems in believing that cross-examination is the best solution for evidence which may have been tainted by state action. First, the Wigmorean characterization of the greatest legal engine is surely an overstatement and, second, not all lawyers have equal forensic

¹⁰ *O’Connor, supra*, footnote 1.

¹¹ *Ibid.*, at pp. 36-7 C.R.

¹² (1994), 89 C.C.C. (3d) 321, 31 C.R. (4th) 105, 18 O.R. (3d) 302 (C.A.).

¹³ *Ibid.*, at p. 333 C.C.C.

¹⁴ 5 Wigmore, *Evidence* (Chadbourn Rev. 1979), § 1367, p. 32.

skills. None the less, the conclusion reached in *Dikah* may be defensible because paying an informant for investigative assistance is a necessary evil and, although regrettable, it is a fact of life which should not be characterized as an abuse of process.¹⁵ However, in 1995, the Ontario Court of Appeal revisited this issue, and, once again, found that a stay of proceedings should not be ordered when the evidence of a Crown witness has been tainted by state action.

In *R. v. Buric*,¹⁶ a major Crown witness had been shown copies of witness statements, police notes of interviews and notes containing editorial comments in an attempt to convince this witness to testify. In effect, this Crown witness was given an advance preview of the Crown’s case before he even provided his first statement to the police. This, of course, raised the possibility that this witness would not be testifying truthfully from his own recollection, but would, in fact, be parroting the disclosure material he had been shown. The trial judge found that this witness was trying to tailor his evidence to conform to the disclosure material, and that the failure of the police to obtain a recorded account of the witness’ evidence prior to being exposed to the disclosure material made it impossible to evaluate the extent of the tainting.

Following the spirit of *Dikah*, the Court of Appeal overturned the trial judge’s order excluding the evidence of this tainted witness. The court concluded:¹⁷

Ordinarily, the trial process also provides several safeguards against the jury’s potential misuse of unreliable evidence. Labrosse J.A. refers to these safeguards in his judgment in *Dikah* . . . They include the Crown’s duty to provide full and timely disclosure, the defence’s right to explore credibility and reliability through cross-examination and the trial judge’s obligation to warn the jury of a witness’s suspect credibility. Because of these safeguards in the trial process, most evidence — including evidence that is apparently unreliable — goes

¹⁵ This should be contrasted with the facts of the *Xenos* case, *R. v. Xenos* (1991), 70 C.C.C. (3d) 362, 43 Q.A.C. 212 (Que. C.A.), in which the court concluded that payment from an insurance company to a Crown witness if the prosecution for arson was successful did constitute an abuse of process. This is clearly far more serious and abusive than paying an informant for investigative assistance.

¹⁶ (1996), 106 C.C.C. (3d) 97, 48 C.R. (4th) 149, 28 O.R. (3d) 737 (C.A.).

¹⁷ *Ibid.*, at p. 126 C.C.C.

to the jury. We have confidence that juries will be able to sort through the evidence, assess its reliability, and, if appropriate, reject it.

Unlike the situation in *Dikah*, in this case state officials have acted in an improper manner. Clearly, it is a dangerous practice to provide an unsavoury Crown witness with the tools needed to tailor his testimony in a manner favourable to the Crown. This improper practice could be a contributing factor to a wrongful conviction, and there is no reason to place the enormous burden of avoiding a wrongful conviction solely on the shoulders of defence counsel. Defence counsel may or may not be able to shatter the credibility of this witness through cross-examination; however, if the Charter is designed to preserve the integrity of the process, then surely Crown counsel has an obligation not to allow a tainted witness to potentially cast doubt on the integrity of the process. Instead of leaving enforcement of the principles of fundamental justice in the hands of defence counsel with varying forensic skills, greater respect for the Charter would be achieved by a prophylactic rule preventing the Crown from employing a witness who has been tainted by exposure to the disclosure material. The decision in *Buric* cannot prevent this regrettable practice from recurring, and, sometime in the future, an innocent person will be convicted on the basis of tainted and tailored evidence if defence counsel is incapable of exposing the impact of the taint though cross-examination.

Beyond the tainting issue, the jurisprudential development of the abuse of process doctrine reveals that the courts are reluctant to impose obligations upon the Crown to ensure that the integrity of the process is preserved. The Supreme Court of Canada has clearly held that it is unnecessary to prove *mala fides* or bad motive on behalf of the Crown in order to raise successfully the abuse of process doctrine.¹⁸ Presumably prosecutorial bad faith is not a precondition to awarding a stay of proceedings because the primary consideration is not a personal assessment of the intent of state officials but, rather, the impact that improper state action has had on the accused's

¹⁸ *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, [1988] 1 S.C.R. 657 at 659; *O'Connor, supra*, footnote 1 at p. 43 C.R.

fair trial interests and the societal interest in preserving the integrity of the process. None the less, the courts appear reluctant to employ the abuse of process doctrine, or the corresponding Charter right, when the improper conduct emanates from a private party.

In two recent appellate decisions, no remedy was granted for the intentional destruction (shredding) of counselling records which were the subject of a production request.¹⁹ In refusing to grant relief, the Ontario Court of Appeal in *Carosella*, noted:²⁰

. . . it is clear that there is no basis upon which to make a finding of abuse of process. Neither the Crown nor the police had anything to do with, or even knowledge of, the destruction of the social worker's notes taken at the March 16, 1992 interview.

In a similar vein, the Newfoundland Court of Appeal recently dismissed an abuse of process application which was premised on the fact that theft charges were brought to further a civil end.²¹ Notwithstanding that there is abundant case-law, dating back to the turn of the century, in which laying a criminal charge to secure a civil end has always amounted to an abuse of process, the court concluded that:²²

It is difficult to see why the state's power to respond to the public's concerns for protection and maintenance of order by prosecuting criminal acts should be impaired by actions of the individual complainant, even censurable acts, where the Crown has neither been involved nor has acquiesced in the complainant's conduct.

Once again, there appears to be no obligation on the Crown to ensure that the integrity of the criminal process is not impaired by improper conduct. Based upon the underlying rationale of the exclusionary rule (*i.e.*, to prevent "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies"²³) can it not be argued that remedies should have been granted in these cases to avoid the taint of

¹⁹ *R. v. Carosella* (1995), 102 C.C.C. (3d) 28, 44 C.R. (4th) 266, 26 O.R. (3d) 209 (C.A.); *R. v. L. (P.S.)*, [1996] B.C.W.L.D. 027 (B.C.C.A.).

²⁰ *Ibid.*, at p. 33 C.C.C.

²¹ *R. v. Finn* (1996), 106 C.C.C. (3d) 43, 139 Nfld. & P.E.I.R. 97 (Nfld. C.A.).

²² *Ibid.*, at p. 54 C.C.C.

²³ *R. v. Collins* (1987), 33 C.C.C. (3d) 1 at p. 16, 56 C.R. (3d) 193, [1987] 1 S.C.R. 265.

partnership between the Crown and the private players who have acted improperly? Taking a clear, firm and condemnatory stance with this type of conduct will serve to prevent its recurrence. Under the current approach, in order to secure a remedy it is incumbent upon defence counsel to prove that the intentional destruction of documents (or the laying of a charge to secure a civil end) compromised the accused's right to make full answer and defence. Needless to say, we have, once again, saddled defence counsel with the primary obligation of ensuring respect for legal rights. In this instance the weak link in the chain is not the variable of competence of counsel, but, rather, the weak link is the burden upon the defence to prove the impossible. How can defence adequately demonstrate the probable impact of missing evidence on the fairness of the trial when defence has no idea what may be contained in the destroyed materials?

(2) Waiving Rights under S. 11(b)

The short history of the jurisprudential development of s. 11(b) of the Charter has not been pretty. The Supreme Court of Canada appeared hopelessly divided,²⁴ and the test for determining the unreasonableness of delay went through many formulations. However, in 1990 the infamous *Askov* case²⁵ appeared to settle the debate, and a multi-faceted balancing test was articulated requiring the court to assess:

- (1) the length of the delay;
- (2) waiver of time periods;
- (3) the reasons for the delay, including
 - (a) inherent time requirement of the case;
 - (b) actions of the accused;
 - (c) actions of the Crown;
 - (d) limits on institutional resources, and
 - (e) other reasons for the delay

- (4) prejudice to the accused.

²⁴ *R. v. Mills*, *supra*, footnote 6; *R. v. Rahey* (1987), 33 C.C.C. (3d) 289, 57 C.R. (3d) 289, [1987] 1 S.C.R. 588.

²⁵ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at p. 481, 79 C.R. (3d) 273, [1990] 2 S.C.R. 1199.

From the perspective of the position being advanced in this article, *Askov* avoided the dilemma of placing the entire burden on defence counsel to preserve the constitutional rights of the accused. The court stated:

The accused should not be required to assert the explicitly protected individual right to trial within a reasonable time . . . The failure of the accused to assert the right does not give the Crown licence to proceed with an unfair trial.

The unhappy saga of the *Askov* case need not be recounted here, but suffice it to say, that after 50,000 cases in Ontario were stayed as a result of the application of the *Askov* guidelines, the Supreme Court of Canada felt obligated to perform some damage control. In 1992, the Supreme Court of Canada in the *Morin* case²⁶ made a few subtle adjustments to the guidelines which have effectively curbed the flurry of s. 11(b) stays. Beyond stipulating that any numerical estimation of acceptable delay (six to eight months from committal to trial was the *Askov* stipulation) could only be considered an administrative guideline and not an inflexible limitation period, the court fine-tuned the waiver and assertion requirements. It is not surprising that the waiver and assertion requirements would be the factors employed for damage control because:²⁷

waiver is an effective device for reaffirming the existence of procedural rights in the abstract while finding them inapplicable in particular cases [and courts have therefore] pressed them into service with increasing frequency.

The court could not dismantle the waiver requirement (*i.e.*, clear and unequivocal and with full knowledge of the right one is waiving) as this would have created inconsistencies with the formulation of waiver in the context of other Charter rights. Therefore, the court modified the principle that one need not assert a right in order to gain the benefit of its protection. The court stated:²⁸

²⁶ *R. v. Morin* (1992), 71 C.C.C. (3d) 1, 12 C.R. (4th) 1, [1992] 1 S.C.R. 771.

²⁷ G. Dix, "Waiver in Criminal Procedure; A Brief for More Careful Analysis" (1977), 55 *Texas L.Rev.* 193 at p. 195.

²⁸ *Morin*, *supra*, footnote 26, at p. 24 C.C.C.

Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider . . . None the less, in taking into account inaction by the accused, the court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of the delay.

In concluding that Morin could not invoke the protection of s. 11(b), the court noted that “while the accused was not *required* to do anything to expedite her trial, her inaction can be taken into account in assessing prejudice”.²⁹ Therefore, “inaction”, which can be recast as a failure to assert one’s right, can lead to an inference of an absence of prejudice and an absence of prejudice, in turn, leads to raising the administrative, numerical guideline for acceptable delay. The net result of this subtle modification of the *Askov* criteria is to place the burden upon the defence to ensure protection of the right. This is rather ironic in light of the fact that the court in *Morin* also noted that s. 11(b) protects individual rights and a “societal interest”. The societal interest is defined as follows:³⁰

Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public.

It would stand to reason that inaction, or lack of assertion, by the accused would have little to do with protecting this societal interest.

The right to trial within a reasonable time stands on a precarious foundation when one combines the impact of inaction with the notion that an informed waiver is usually demonstrated by counsel agreeing to a particular adjournment.³¹ Courts have always assumed that admissions and concessions made by counsel are done with the knowledge

²⁹ *Morin*, *ibid.*, at p. 28 C.C.C.

³⁰ *Ibid.*, at p. 12 C.C.C.

³¹ *R. v. Smith* (1989), 52 C.C.C. (3d) 97, 73 C.R. (3d) 1, [1989] 2 S.C.R. 1120 at p. 1136; *R. v. Heikel* (1992), 72 C.C.C. (3d) 481 at p. 511, 125 A.R. 298, 10 C.R.R. (2d) 72 (C.A.).

and understanding of the accused³² despite sociological studies indicating that counsel often act without properly and fully explaining their actions to their clients.³³ Anytime counsel agrees to a date there is a danger that the agreement reflects the convenience of counsel’s schedule and not the desires and understanding of the client. In an interesting and informative article on pre-trial motions under the Charter, Michael Code suggests that, unlike American practice, in Canada “the failings of counsel are not to be visited on the client by treating counsel’s failure to object as a waiver”.³⁴ If Mr. Code is correct in his assessment then there is little danger in allowing counsel to waive this right, or in requiring counsel to assert the right because courts would provide relief to an accused who claims that his/her lawyer acted without proper instruction as part of their practice of not visiting counsel’s failures upon the client. Needless to say, there are reasons to doubt that courts are that vigilant in ensuring that the actions of counsel are consistent with desires and understanding of the accused. More often than not, courts assume an identity of interest between counsel and client. It may be that the logic of adversarial justice still supports the pre-Charter judicial sentiment that “an accused must surely assume responsibility for the actions of his own solicitor. To put it another way. I think that the mistake of the solicitor must be regarded as the mistake of the client”.³⁵

(3) Proving a S. 10(b) Right-to-Counsel Violation

Through a combination of ss. 7, 9, 10, 11(c) and 13 of the Charter, the court has developed a clear and comprehensive set of guidelines to protect against the coercion and manipulation of the accused into becoming a testimonial source. However, hidden within the body of this clear and self-

³² See, e.g., *R. v. Adgey* (1973), 13 C.C.C. (2d) 177, 23 C.R.N.S. 298, [1973] 2 S.C.R. 426.

³³ See, e.g., Ericson and Baranek, “The Ordering of Justice: A Study of the Accused Person as Criminal Dependant in the Criminal Process” (Toronto: University of Toronto Press, 1982).

³⁴ M. Code, “American Cadillacs or Canadian Compacts: What is the Correct Criminal Procedure for s. 24(2) Applications under the Charter of Rights?” (1990-91), 33 C.L.Q. 298 at p. 341.

³⁵ *R. v. Behr*, [1967] 3 C.C.C. 1, [1967] 1 O.R. 639 (Dist. Ct.).

executing set of rules, there is a weak link in the chain of protection. Before turning to this weak link, it would be helpful to outline the basic rules and principles governing interrogation in the Charter era.

Beginning with *R. v. Manninen*³⁶ and ending with *R. v. Bartle*,³⁷ the court has created a relatively straightforward and clear approach to preventing the conscription of the accused as a testimonial source. Whenever an accused is detained or arrested, the police must advise the suspect of his/her right to counsel. Although the police need not take constructive steps to facilitate the obtaining of legal advice, the court has expanded the informational component of the right so that the suspect is made aware of the availability of duty counsel and the phone number by which to reach duty counsel.³⁸

Upon being advised of the right to counsel, an accused may waive the right or assert it. If the right is asserted the police must cease questioning until a reasonable opportunity to consult counsel has been provided.³⁹ This "holding-off" period (*i.e.*, the duration of the no-questioning ban) will vary based upon whether the accused is being reasonably diligent in pursuing contact with counsel.⁴⁰ If a given jurisdiction provides free legal advice through duty counsel then the holding off period will be shortened,⁴¹ however, absent an emergency, the holding-off period cannot be shortened because of administrative expediency or convenience to the state.⁴²

This basic framework applies not only to the interrogation process but also to any investigative technique that requires the participation of the accused (*i.e.*, line-up; breathalyzer). As the court clearly stated in *Leclair and Ross*:⁴³

In my view, the right to counsel also means that, once an accused

³⁶ (1987), 34 C.C.C. (3d) 385, 58 C.R. (3d) 97, [1987] 1 S.C.R. 1233.

³⁷ (1994), 92 C.C.C. (3d) 289, 33 C.R. (4th) 1, [1994] 3 S.C.R. 173.

³⁸ *Ibid.*

³⁹ *Manninen*, *supra*, footnote 36; *R. v. LeClair and Ross* (1989), 46 C.C.C. (3d) 129, 67 C.R. (3d) 209, [1989] 1 S.C.R. 3; *R. v. Smith*, *supra*, footnote 31.

⁴⁰ *Smith*, *ibid.*

⁴¹ *R. v. Brydges* (1990), 53 C.C.C. (3d) 330, 74 C.R. (3d) 129, [1990] 1 S.C.R. 190; *R. v. Prosper* (1994), 92 C.C.C. (3d) 353, 33 C.R. (4th) 85, [1994] 3 S.C.R. 236.

⁴² *Prosper*, *ibid.*

⁴³ *Supra*, footnote 39, at pp. 12-13 S.C.R.

or detained person has asserted that right, the police cannot, in any way, compel the detainee or accused person to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right. In the case at bar, it cannot be said that the appellants had a real opportunity to retain and instruct counsel before the line-up was held. Nor can it be said that there was any urgency or other compelling reason which justified proceeding with the line-up so precipitously.

This framework can be by-passed if the accused is not being reasonably diligent or if the accused has waived his/her right. Waiver is subject to an exacting standard. The waiver must be voluntary and informed — the accused must be aware of the consequences of waiving the right.⁴⁴ Incapacitation⁴⁵ or deception by the police⁴⁶ can vitiate what may appear to be a knowing waiver.⁴⁷

In addition to the right to counsel protection, the court has added a supplemental protection under s. 7 of the Charter.⁴⁸ The right to remain silent is considered to be a principle of fundamental justice under s. 7, and if an accused is detained and asserts his/her right to remain silent, the police must not do anything to subvert this right.⁴⁹ This supplemental protection is not as clear and self-executing as the s. 10(b) protection, and it represents an interesting departure from the American approach. In the United States, the assertion of the right to silence carries with it a temporary no-questioning ban;⁵⁰ however, the U.S. Supreme Court does not recognize the same

⁴⁴ *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207, 50 C.R. (3d) 289, [1986] 1 S.C.R. 383.

⁴⁵ *Ibid.*

⁴⁶ *R. v. Evans* (1991), 63 C.C.C. (3d) 289, 4 C.R. (4th) 144, [1991] 1 S.C.R. 869.

⁴⁷ Reference should also be made to *R. v. Whittle* (1994), 92 C.C.C. (3d) 11, 32 C.R. (4th) 1, [1994] 2 S.C.R. 914, in which the court has appeared to lower the exacting standard for waiver in that an accused will be deemed to be aware of the consequences of waiving his/her s. 10(b) right if the accused has a "limited cognitive capacity" to understand the nature of the right. It is not necessary for the accused to possess an analytical ability to judge what would be in his/her best interests.

⁴⁸ In addition further protection for the right against self-incrimination is found in s. 7 as the court has commenced to construct protection against the use of derivative evidence which is found as a result of compelled testimony: *R. v. S. (R.J.)* (1995), 96 C.C.C. (3d) 1, 36 C.R. (4th) 1, [1995] 1 S.C.R. 451.

⁴⁹ *R. v. Hebert* (1990), 57 C.C.C. (3d) 1, 77 C.R. (3d) 145, [1990] 2 S.C.R. 151.

⁵⁰ See, *Michigan v. Mosely*, 423 U.S. 96 (1975); *Edwards v. Arizona*, 451 U.S. 477 (1981).

prohibition on “dirty tricks” with respect to police efforts to subvert the assertion of the right.⁵¹

To support this clear expression of protection against the use of the accused as a testimonial source, the court has construed the exclusionary rule in a manner such that it appears to have automatic application with respect to a violation that results in the accused being conscripted to assist the state in constructing its “case-to-meet”. *Collins*⁵² established the distinction between conscripted and real evidence with the former being subject to virtually automatic exclusion on the basis that this type of evidence impairs the fairness of the trial. Therefore, we find the exclusionary rule being applied in circumstances in which the violation may appear trivial or inadvertent,⁵³ and even in cases in which the right to counsel may have had little practical application. For example, in breathalyzer cases (cases in which the advice counsel can provide is significantly limited), the court has rejected the notion that the accused must demonstrate that he/she would have sought counsel if the right was provided.⁵⁴ In addition, the court has warned against speculating upon whether or not counsel could actually have been of some assistance in the circumstances.⁵⁵

This summary of the jurisprudential approach to constitutionalizing the interrogation process should show that the Supreme Court has performed well in creating rules which are clear and self-executing. It imposes upon the police the burden of ensuring that confessions are obtained in a manner which shows that any incriminating statements are given as a matter of free and voluntary choice. However, even within this protective regime there are problems which can only be avoided if the accused has access to competent counsel. First, the integrity of the protective regime requires the accused to believe that consultation with counsel is necessary and desirable before speaking with the authorities. The naive or arrogant

⁵¹ *Illinois v. Perkins*, 110 S.Ct. 2394 (1990).

⁵² *Supra*, footnote 23.

⁵³ *R. v. Elshaw* (1991), 67 C.C.C. (3d) 97, 7 C.R. (4th) 333, [1991] 3 S.C.R. 24.

⁵⁴ *R. v. Barile*, *supra*, footnote 37.

⁵⁵ *R. v. Strachan* (1988), 46 C.C.C. (3d) 479, 67 C.R. (3d) 87, [1988] 2 S.C.R. 980; *R. v. Elshaw*, *supra*, footnote 53; *Barile*, *ibid.*

accused may believe that he/she can speak freely with the police without seeking the assistance of counsel. To respect the importance of counsel truly at this investigatory stage, it would clearly be better to have a regime in which all accused must consult with counsel, without having to request this right, before any statement can be taken. Although some people may think this would be unworkable in practice, it should be noted that in Italy no statement or admission is admissible in court unless the statement was taken in the presence of a lawyer.⁵⁶

Second, our rules and principles fall short of requiring the *presence* of counsel at the interrogation even if requested by the accused. Although the issue is largely underdeveloped, the Ontario Court of Appeal concluded that there was nothing unconstitutional in the failure of the police to inform a suspect that his lawyer had called the station earlier in the day.⁵⁷ The court noted that “the police are not the guardians of the solicitor-client relationship” and that requiring the police to notify the accused that a lawyer had called “confuses the role of the police, which is essentially investigative, with that of defence counsel, which is protective and essentially adversarial in nature”.⁵⁸

Third, and most significantly, the logic of adversarial justice places this entire regime of sensible procedural protection on a precarious foundation because of the refusal of the courts to constitutionally require that all station-house investigative procedures be videotaped. Therefore, the issue is not whether the police complied with their constitutional obligations, but rather, whether defence counsel can reconstruct history so as to prove a violation at a *voir dire* conducted at trial. Once again, the burden is placed solely on the shoulders of defence counsel to uncover evidence of constitutional impropriety instead of

⁵⁶ W. Pakter, “The Exclusionary Rules in France, Italy and Germany” (1985), 9 *Hastings Int’l and Comparative L.Rev.* 1 at p. 24; L. Fassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe* (1991), 29 *Col. J. Transnational Law* 245 at p. 256.

⁵⁷ *R. v. Bain* (1989), 47 C.C.C. (3d) 250, 68 C.R. (3d) 50, 31 O.A.C. 357 (C.A.), *revd on other grounds* 69 C.C.C. (3d) 481, 10 C.R. (4th) 257, [1992] 1 S.C.R. 91. The conclusion reached by the Ontario Court of Appeal is consistent with the approach of the American Supreme Court with respect to misleading a suspect about inquiries made by counsel at the station: see, *Moran v. Burbine*, 106 S.Ct. 1135 (1986).

⁵⁸ *Ibid.*, at p. 55 C.R.

demanding that a permanent, frozen record be created in which the investigative activities of the police can be adequately reviewed and assessed.

Presumably, the right to counsel is designed to offset the pressures created by the coercive environment of the police station, yet the *Manninen* and *Miranda* conception of the right has never been expanded to altogether bar the taking of statements in this coercive environment. In failing to prohibit station-house interrogation or any interrogation not taken before a judicial official, many criminal trials are needlessly lengthened by the need to reconstruct the historical facts surrounding the taking of any statement at the police station.

In *R. v. Barrett*, the Ontario Court of Appeal⁵⁹ was confronted with the typical scenario of an accused asserting that a whole host of interrogation abuses had taken place, and the police asserting that a standard and proper interview had occurred. In allowing the accused's appeal the Court of Appeal found two deficiencies in the trial. First, the trial judge had failed to give proper reasons for accepting the version of the police, and second, that the failure of the hold-up squad to videotape the confession was a cause of concern for reconstructing the events. Carthy J.A. stated:⁶⁰

Universal use of videotapes would obviously be of assistance to judges in weighing evidence and reaching a just conclusion, but beyond that, there is the potential to benefit the entire administration of justice.

Given the modest cost of videotape equipment, such critical evidence should not, in fairness, be restricted to sworn recollection of two contesting individuals as to what occurred in stressful conditions months or years ago. The evidence is admissible under our present rules, but everyone involved in the criminal justice system should make reasonable efforts to better serve its ultimate ends.

Surprisingly, the Supreme Court did not appear concerned with making "reasonable efforts to better serve" the administration of justice. The court entirely avoided the issue of videotaping and it restored the conviction on the basis that

⁵⁹ (1993), 82 C.C.C. (3d) 266, 13 O.R. (3d) 587 (C.A.), rev'd 96 C.C.C. (3d) 319, 38 C.R. (4th) 1, [1995] 1 S.C.R. 752.

⁶⁰ *Ibid.*, at p. 608 O.R.

it had recently decided that there was no legal or constitutional obligation on a trial judge to provide meaningful reasons.⁶¹ Although the court has done a great deal to bolster the right to counsel, it appears that it is unwilling to impose other obligations that would increase the accuracy and integrity of the pre-trial process. This is regrettable especially in light of the fact that other jurisdictions, which have not constitutionalized their process, have taken steps to impose a videotaping obligation on the police.⁶²

The court cannot construct a proper and comprehensive regime of constitutional protection in a vacuum. Its decisions must have an impact upon the standard practices of the police and the court should not recoil from the fact that its decisions may require some restructuring of the process. If the court is not confident that the police will attend to this restructuring then the court should take it upon itself to perform this function. For example, in *LeClair and Ross*, the court ruled that the police must suspend the holding of a line-up until the accused has had a reasonable opportunity to consult counsel. Lamer C.J.C. stated:⁶³

In the case at bar, had the appellants been allowed access to their lawyers, they could have been advised that they were under no statutory obligation to participate . . . unless they were given a photograph of the line-up, or not to participate if the others in the line-up were obviously older than themselves. In short, they could have been told how a well-run line-up is conducted, even though there is no statutory framework governing the line-up process.

It seems anomalous that the burden of ensuring that a line-up is conducted fairly falls upon counsel. Counsel may not be available or counsel may not provide the best advice and there is no reason for the integrity of the line-up process to be contingent upon the availability and competence of counsel. In the absence of legislative action, it is incumbent upon the court to create the necessary guidelines for ensuring a fair

⁶¹ The court had already decided that there existed no constitutional obligation to give reasons: see, *R. v. Burns* (1994), 89 C.C.C. (3d) 193, 29 C.R. (4th) 113, [1994] 1 S.C.R. 656.

⁶² See, e.g., *McKinney v. The Queen* (1991), 65 A.L.J.R. 625 (Aust. H.C.), in which the court put pressure on the police to adopt a tape-recording requirement.

⁶³ *Supra*, footnote 39, at p. 14 S.C.R.

pre-trial process. As much as the court may not wish to assume this role, there is little sense in imposing constitutional obligations on the police with respect to the right to counsel if these obligations can only secure the reliability and integrity of the pre-trial process through *ex post facto* dissection of the process by defence counsel during a trial which will be held months, if not years, after the pre-trial interrogation.

4. Losing the Right to Confront Witnesses at Trial

The sixth amendment of the American Constitution guarantees an accused the right to be confronted with the witnesses who are giving evidence against him/her at trial. Our Charter does not explicitly recognize this right; however, it is an implicit component of the right to fair trial guaranteed by s. 11(d) of the Charter.⁶⁴ The right to a face-to-face confrontation may be an indispensable component of a fair trial and the right to make full answer and defence; however, it is not an absolute right. The Supreme Court of Canada has already given the stamp of approval to the various statutory provisions which permit a child in cases of sexual offences to give evidence in a non-traditional manner which by-passes the conventional confrontation of accused and accuser.⁶⁵

In light of the inherent difficulties in prosecuting sexual offences against children, it is not surprising that the court would abandon the conventional confrontation of accused and accuser in order to facilitate full and frank disclosure of a child's evidence. However, a less-compelling scenario for by-passing the right of confrontation is the need to read in preliminary hearing evidence of a witness who is unavailable at trial due to death, illness or absence from Canada⁶⁶ (s. 715 of the *Criminal Code*). Although prosecutorial necessity is a

⁶⁴ *R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327, 25 C.R. (4th) 325, [1993] 4 S.C.R. 475.

⁶⁵ *R. v. L. (D.O.)* (1993), 85 C.C.C. (3d) 289, 25 C.R. (4th) 285, [1993] 4 S.C.R. 419; *Levogiannis*, *ibid.*

⁶⁶ In *R. v. Rogers and Thurber* (1987), 35 C.C.C. (3d) 50, 55 Sask. R. 198 (C.A.), the witness was unavailable because she was in Palm Springs (presumably on vacation) and no attempt had been made by the Crown to bring her back for trial. The court found that her preliminary evidence could be read in at trial and this did not present any constitutional problems. Apparently, there is a fairly low threshold to trigger the application of this section.

legitimate reason for departing from the right of confrontation, it surely does not stand on as firm a foundation as the objective of lessening the plight of sexually abused children. Nevertheless, the Supreme Court of Canada upheld the constitutionality of this provision in a manner which suggests that the burden lies upon defence counsel to protect against incursions into the right of confrontation.

In *R. v. Potvin*,⁶⁷ the Supreme Court of Canada held that s. 715 does not violate the Charter because evidence given at a preliminary hearing must be given in the presence of the accused and that the accused must have had a "full opportunity" to cross-examine the witness at the preliminary hearing. Having had the opportunity to cross-examine ensures that the evidence to be read-in at trial has the indicia of reliability. Unfortunately, it is quite common of defence counsel not to pursue a vigorous cross-examination of a witness at the preliminary hearing because attacks on a witness' credibility are irrelevant in determining whether the accused should be committed to stand trial. In addition, defence may fear disclosing their position and strategy through their cross-examination.

The Supreme Court of Canada was not concerned with the fact that cross-examination at a preliminary hearing may be more apparent than real, and it concluded that:⁶⁸

As for the detriment an accused might suffer from the tactical decision of his or her counsel not to press certain issues at the preliminary hearing with a witness who may subsequently become unavailable at the trial, I am in complete agreement with the observations of Martin J.A. [who stated]:

"In my view, an accused is not deprived of 'full opportunity' to cross-examine a witness at the preliminary hearing merely because his counsel, for tactical reasons, has conducted the cross-examination of a witness differently than he would have conducted the cross-examination at the trial, provided there has been no improper restriction of the cross-examination by the provincial judge holding the preliminary hearing."

The upshot is that defence counsel bears the burden of ensuring

⁶⁷ (1989), 47 C.C.C. (3d) 289, 68 C.R. (3d) 193, [1989] 1 S.C.R. 525.

⁶⁸ *Ibid.*, at p. 232 C.R.

that the accused does not lose the benefit of confronting adverse witnesses at some point in the proceeding. Defence counsel is then placed in a catch-22 situation in that if he/she vigorously cross-examines at the preliminary hearing the accused may lose a tactical edge by revealing his/her strategy, yet, if counsel refrains from a probing cross-examination at the preliminary hearing the accused may lose the only opportunity to test the accuracy and veracity of this evidence.

(To be continued.)