

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

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PART II

The Myth of Procedural Rights

In Part I, it was argued that excessive reliance upon competent defence counsel to uncover and present Charter claims may not be a simple affirmation of the basic values of our cherished adversarial system, but rather may actually be a major shortcoming of the Charter. Regardless of whether this may or may not be true, there is something dangerous in leaving enforcement of rights entirely to defence counsel. There is a risk that leading precedents which appear to celebrate and protect procedural rights will contain the seeds of their own demise. Hidden within the rhetoric of celebrating rights, there exists an underlying premise which undercuts the practical value of the right. Building upon the theme in Part I of this article, it is my submission that some, if not many, of the leading cases can only provide mere symbolic protection of a right because the cases do not provide defence counsel with adequate tools to pursue the rights claim. It is simply assumed that counsel for the defence has some form of magical

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powers which will allow the lawyer to perfect his or her Charter claim within the limiting framework of an adversarial system of justice.

Some commentators contend that constitutional rights are mythical in that they merely provide an appearance of justice while in substance they are woefully deficient. These critical scholars see the entrenchment of rights as serving a legitimation function, *i.e.*, making the system appear more civilized while really doing nothing to combat and reduce repression. As David Rudovsky has commented:⁶⁹

The most significant social impact of the constitutional principles of due process and equal protection is not their effect on crime, which is minimal or nonexistent, or even the basic fairness they can and do provide in some circumstances. Rather, it is the appearance of fairness they lend the criminal justice system, as well as their legitimation of a class and race-biased judicial process. Indeed a critical view of each aspect of the criminal justice system, including the criminalization of conduct, police investigation, arrest, prosecution and incarceration, reveals the very significant degree to which these protections are unrealized promises.

Although these legitimation theories rely upon an overstated and false notion of conspiracy amongst judges, lawyers, police and politicians, there is a kernel of truth in their perspective. Procedural rights are often viewed as obstacles to achieving justice. They thwart the truth-seeking function of a criminal trial and clutter the process with ceremonial rituals having little to do with guilt or innocence. More often than not, courts will conceal their disdain for procedural rights (or more accurately, providing remedies for violations of procedural rights), but on occasion, the truth emerges. In 1987, the Alberta Court of Appeal dismissed a s. 9 arbitrary detention claim by an impaired driver who had been detained for hours longer than necessary.⁷⁰ After expressing concern that “trials will

⁶⁹ D. Rudovsky, “The Criminal Justice System and the Role of the Police”, in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982); See, also, S. Sheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (Yale University Press, 1974). For a Canadian perspective on the myth of rights, see, M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publications, 1994), in which the author discusses the “public relations” function of the Charter and its role in giving a false impression of concern for procedural rights.

⁷⁰ *R. v. Cuforth* (1988), 40 C.C.C. (3d) 253, 61 C.R. (3d) 187, [1988] 1 W.W.R. 274 (Alta. C.A.)

bloat” if Charter rights become the focal point of a criminal trial, the court indicated that the “answer is to discourage the redress of Charter infringements within the trial unless they are clearly relevant to the offence”.⁷¹ Accordingly, the court concluded that:⁷²

An adversarial criminal trial should retain its traditional function. Leaving aside clear and defined heads of exclusion such as involuntary confessions, unauthorized interceptions of private communications and the objects of s. 24(2) of the Charter, a criminal trial remains an inquiry, under all relevant evidence, to determine whether the accused, in truth, is guilty of a criminal offence.

Assuming that there is an unspoken judicial reluctance to provide concrete remedies for violations of procedural rights which have nothing to do with guilt or innocence, it would not be surprising to find courts imposing obstacles in the path of a successful invocation of s. 24(1) or (2) with respect to a violation of procedural rights. Sometimes these obstacles are hidden within the text of a judgment which appears to be responsive to due process considerations. In order to demonstrate this “one step forward, two steps back” approach, two important due process decisions will be deconstructed: the 1996 decision of the Ontario Court of Appeal in *R. v. Hosie*⁷³ and the 1991 Supreme Court of Canada decision in *R. v. Stinchcombe*.⁷⁴

(1) The Hosie Case — Evaluating Search Warrant Sufficiency

Due process advocates would view the Ontario Court of Appeal’s decision in *R. v. Hosie* as a victory. With exclusion of real evidence seized pursuant to a defective search warrant becoming a virtual impossibility, the *Hosie* case serves as a reminder to police that the issuance of a search warrant is not to be a perfunctory task in which the justice of the peace can be misled by “blind reliance upon ritualistic phrases

⁷¹ *Ibid.*, at p. 198 C.R.

⁷² *Ibid.*, at p. 197 C.R. Of course, other appellate courts have tried to distance themselves from this candid narrowing of the scope and operation of Charter rights, see, *R. v. Davidson* (1988), 46 C.C.C. (3d) 403, 67 C.R. (3d) 293, 88 N.S.R. (2d) 271 (C.A.)

⁷³ *R. v. Hosie* (1996) 107 C.C.C. (3d) 385, 49 C.R. (4th) 1, 91 O.A.C. 281 (C.A.)

⁷⁴ *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1, 9 C.R. (4th) 277, [1991] 3 S.C.R. 326.

without regard to the facts of a particular case”.⁷⁵ In a nutshell, the Ontario Court of Appeal found that Mr Hosie’s s. 8 rights were violated because the sworn information did not contain compelling details and it did not indicate the informer’s source of information. Exclusion of the seized evidence followed because of the seriousness of the violation in that the informant police officer misled the justice of the peace by resorting to a “ritualistic formula” in asserting that the informer was “believed reliable” when in fact the informer had never provided accurate information in the past.

Upon reviewing the informant’s testimony on the *voir dire* with respect to the explanation for the misleading disclosures, Mr Justice Rosenberg emphatically stated that he found “that explanation entirely unconvincing”.⁷⁶ Due process advocates might think they have cause for celebration in light of the fact that the court would not allow the police to explain away their careless and cavalier presentation of information to the justice of the peace. More often than not, drafting errors in the sworn information are disregarded and discounted on the basis that:⁷⁷

One cannot expect a police constable in a small town to have the drafting skills of a Chancery pleader or a solicitor who draws bond indentures. The *Criminal Code* obviously envisages that search warrants must be issued at all hours in most small centres in Canada. To require that legal drafting skills be employed if those warrants are to stand up in court, would bar the detection of crime in small towns and outside lawyers’ office hours.

However, a due process celebration would be premature and naive because this decision is not necessarily a harbinger of a future of strict judicial scrutiny, but rather merely represents a strong and critical decision in a single case.

The strength of s. 8 protection ebbs and flows from year to year. The early Supreme Court of Canada cases (*i.e.*, *Hunter v. Southam*,⁷⁸ *Collins*,⁷⁹ *Grefe*⁸⁰ and *Genest*⁸¹) all suggested

⁷⁵ *Supra*, footnote 73, at p. 399 C.C.C.

⁷⁶ *Supra*, footnote 73, at p. 396 C.C.C.

⁷⁷ *R. v. Carrier* (1996), 181 A.R. 284 at p. 305, 116 W.A.C. 284 (C.A.).

⁷⁸ *Hunter v. Southam* (1984), 14 C.C.C. (3d) 97, 41 C.R. (3d) 97 *sub nom. Director of Investigation and Research, Combines Investigation Branch v. Southam Inc.*, [1984] 2 S.C.R. 145.

⁷⁹ *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, [1987] 1 S.C.R. 265.

⁸⁰ *R. v. Grefe* (1990), 55 C.C.C. (3d) 161, 75 C.R. (3d) 257, [1990] 1 S.C.R. 755.

⁸¹ *R. v. Genest* (1989), 45 C.C.C. (3d) 385, 67 C.R. (3d) 224, [1989] 1 S.C.R. 59.

that the courts would give rigorous scrutiny to any investigative technique which unjustifiably intruded upon a reasonable expectation of privacy. The Supreme Court of Canada also rejected the restrictive American approach to defining a reasonable expectation of privacy by rejecting the U.S. Supreme Court's "assumption of risk" approach to privacy.⁸² The golden years of s. 8 protection culminated in 1992 with the Supreme Court of Canada's decision in *Mellenthin*⁸³ in which the court soundly criticized the police for converting a random vehicle stop into an "unfounded general inquisition".⁸⁴ More significantly, in that case the court excluded real evidence on the basis of the developing "discoverability" doctrine.

However, in recent years the tide has turned and we are witnessing the beginning of judicial misgivings with regard to the progressive application of s. 8 of the Charter. First, the Supreme Court of Canada trilogy in *Grant, Plant* and *Wiley*⁸⁵ has been construed by appellate courts as a relaxation of the level of scrutiny given to tips from anonymous informers.⁸⁶ Second, the Supreme Court of Canada has recently narrowed the operation of s. 8 by creating restrictive standing requirements⁸⁷ and by restricting the operation of the exclusionary rule to evidence directly obtained by the Charter violation.⁸⁸ Third, the Supreme Court of Canada has readily and frequently

⁸² In *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 74 C.R. (3d) 281 *sub nom. R. v. Sanelli*, [1990] 1 S.C.R. 30, and *R. v. Wong* (1990), 60 C.C.C. (3d) 460, 1 C.R. (4th) 1, [1990] 3 S.C.R. 36, the court clearly held that privacy is not lost because the accused may have knowingly assumed a risk of being detected or betrayed by confederates. The American approach, as represented in cases like *California v. Ciruolo*, 106 S.Ct. 1809 (1986), and *U.S. v. Knotts*, 103 S.Ct. 1081 (1983), has effectively prevented the reasonable expectation of privacy from being applied beyond the narrow confines of hiding in one's home.

⁸³ (1992), 76 C.C.C. (3d) 481, 16 C.R. (4th) 273, [1992] 3 S.C.R. 615.

⁸⁴ *Ibid.*, at p. 487 C.C.C.

⁸⁵ *R. v. Grant* (1993), 84 C.C.C. (3d) 173, 24 C.R. (4th) 1, [1993] 3 S.C.R. 223; *R. v. Plant* (1993), 84 C.C.C. (3d) 203, 24 C.R. (4th) 47, [1993] 3 S.C.R. 281; *R. v. Wiley* (1993), 3 C.C.C. (3d) 161, 24 C.R. (4th) 34, [1993] 3 S.C.R. 263.

⁸⁶ See, e.g., *R. v. Richter* (1994), 120 Sask. R. 257 at p. 263, [1994] 7 W.W.R. 753, 68 W.A.C. 257 (C.A.); *R. v. Pombert* (1994), 45 B.C.A.C. 70, 72 W.A.C. 70. In fact, in the *Hosie* case, *supra*, footnote 73, the trial judge concluded that the information was sufficient on the basis of the *Plant* decision, *ibid.*

⁸⁷ *R. v. Edwards* (1996), 104 C.C.C. (3d) 136, 45 C.R. (4th) 307, [1996] 1 S.C.R. 128.

⁸⁸ In *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481, 48 C.R. (4th) 297, 136 D.L.R. (4th) 502, the court would not allow for the exclusion of the evidence of Crown witnesses who were discovered during the course of an unreasonable search.

admitted real evidence on the basis of the good faith of the police.⁸⁹ Finally, the discoverability doctrine in *Mellenthin* has been narrowed so as to apply only to real evidence which is discovered through the coerced participation of the accused.⁹⁰ When the dust has settled from these recent developments, it will become clear that the exclusion of real evidence obtained in violation of s. 8 of the Charter remains at the level of wishful thinking for an accused person and not a settled expectation of a certain result.

The essence of search warrant sufficiency is the determination of whether the sworn information discloses reasonable and probable grounds. If s. 8 can be reduced to one operative concept it is the idea that the only justifiable threshold for allowing the state to intrude upon privacy is when "credibly-based probability replaces suspicion".⁹¹ The constitutional requirement of obtaining a warrant is secondary to this basic concept. The requirement of obtaining a warrant is there to ensure that a judicial officer will provide an objective and dispassionate assessment of whether the police have acquired reasonable and probable grounds. The idea that a warrantless search is presumptively unreasonable is a recent invention whereas the need to obtain reasonable and probable grounds has been a cornerstone of the common law for hundreds of years.⁹²

The intractable problem of defining reasonable and probable grounds has led the courts to declare that "probable cause is a fluid concept"⁹³ and that "the standard to be met is one

⁸⁹ *Wong*, *supra*, footnote 82; *R. v. Wise* (1992), 70 C.C.C. (3d) 193, 11 C.R. (4th) 253, [1992] 1 S.C.R. 527; *R. v. Silveira* (1995), 97 C.C.C. (3d) 450, 38 C.R. (4th) 330, [1995] 2 S.C.R. 297; *R. v. Evans* (1996), 104 C.C.C. (3d) 23, 45 C.R. (4th) 210, [1996] 1 S.C.R. 8.

⁹⁰ This narrowing of the discoverability doctrine was foreshadowed in *R. v. Burlingham* (1995), 97 C.C.C. (3d) 385, 38 C.R. (4th) 265, [1995] 2 S.C.R. 206, and in *R. v. S. (R.J.)* (1995), 96 C.C.C. (3d) 1, 36 C.R. (4th) 1, [1995] 1 S.C.R. 451. The Ontario Court of Appeal has recently adopted this narrow perspective in *R. v. Belnavis* (1996), 107 C.C.C. (3d) 195, 48 C.R. (4th) 320, 29 O.R. (3d) 321 (C.A.), even though this same court had previously given the most expansive construction of the discoverability doctrine, see, *R. v. Zammit* (1993), 81 C.C.C. (3d) 112, 21 C.R. (4th) 86, 13 O.R. (3d) 76 (C.A.), and *R. v. Acciavatti* (1993), 80 C.C.C. (3d) 109, 62 O.A.C. 137, 44 M.V.R. (2d) 66 (C.A.).

⁹¹ *Hunter v. Southam*, *supra*, footnote 78, at p. 167 S.C.R.

⁹² *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807 at pp. 817-18; *Money v. Leach* (1765), 3 Burr. 1742, 97 E.R. 1075 at pp. 1085-6, 1087-8; *R. v. Noble* (1984), 16 C.C.C. (3d) 146 at p. 155, 42 C.R. (3d) 209, 48 O.R. (2d) 643 (C.A.).

⁹³ *Illinois v. Gates*, 103A S.Ct. 2317 (1983) at p. 2329.

of reasonable probability”⁹⁴ without any further indication of how the officer can instantiate the “vagueness of the proposed test”.⁹⁵ Ultimately, the courts defer to the experience or expertise of the officer as “a trained officer draws inferences and makes deductions . . . inferences and deductions that might well elude an untrained person”.⁹⁶ Probable cause may be the threshold criterion for legitimate state intrusion, but is a standard that defies rational evaluation. Both the U.S. Supreme Court and the Supreme Court of Canada have prematurely abandoned the exercise of trying to construct bright-line standards for probable cause and they have settled on a “totality of circumstances”⁹⁷ test which is nothing more than a discretionary exercise in *post hoc* balancing.

Putting aside difficult issues relating to the proper judicial rule-making function in a parliamentary democracy, there is a simple reason why discretionary standards should be avoided unless absolutely necessary. Discretionary standards lead to inconsistent results which are based more upon the inclinations and ideology of the decision-maker than upon constitutional principles.⁹⁸ To illustrate this rather obvious point, let us compare the search warrant information in *Hosie* with a search warrant information reviewed by the same court (with an entirely different panel) one year earlier in the case of *R. v. Jalonikou*.⁹⁹ For ease of reference, the search warrant informations in both cases are reproduced in their entirety below:

R. v. Jalonikou

On Thursday the 28th of May 1992, I was contacted by a proven and reliable informant whom I have used in the past. At this time he provided me with the following information.

The informant stated that he was on the premise located at 879 Kennedy Road, #102. While on the premises he spoke with the occupant he knows as Moe.

⁹⁴ *R. v. Debot* (1986), 30 C.C.C. (3d) 207 at p. 219, 54 C.R. (3d) 120, 25 C.R.R. 275 (Ont. C.A.), affd 52 C.C.C. (3d) 193, 73 C.R. (3d) 129, [1989] 2 S.C.R. 1140.

⁹⁵ *R. v. Landry* (1986), 25 C.C.C. (3d) 1, 50 C.R. (3d) 155, [1986] 1 S.C.R. 145.

⁹⁶ *U.S. v. Cortez*, 449 U.S. 411 (1981) at p. 418.

⁹⁷ *Illinois v. Gates*, *supra*, footnote 93; *Debot*, *supra*, footnote 94; *R. v. Greffe*, *supra*, footnote 80.

⁹⁸ See, e.g., A.W. Alschuler, “Bright Line Fever and the Fourth Amendment” (1984), U. Pitt. L. Rev. 227; W.R. LaFave, “Case-by-Case Adjudication Versus Standardized Procedures” (1974), Sup. Ct. Rev. 127.

⁹⁹ (1995), 28 W.C.B. (2d) 172 (Ont. C.A.)

At this time the informant was offered a quantity of Cocaine for sale and he saw a large quantity of Cocaine.

Due to the informants [*sic*] lifestyle he is very familiar with the sale and distribution of Cocaine.

I request that the informants [*sic*] identity remain a secret for his personal safety.

I am therefore requesting that a Narcotic Control Act search warrant be granted for the above premise.

* * *

R. v. George Hosie

[1.] On September 8, 1993 Cst. A. Doucette received information from Cpl. GIBERON [*sic*] of the Royal Canadian Mounted Police which I investigated and found to be accurate and reliable.

[2.] The information supplied by Cpl. Giberson is as follows: G. HOSIE who resides at 1498 Everts St. in Windsor, Ontario is cultivating marihuana in a hydroponic laboratory located in his residence.

[3.] A check with Windsor Utilities Commission on September 8, 1993 confirms that George HOSIE resides at 1498 Everts St. and that he along with Mary SMITH have been paying the hydro bills since March 1993. HOSIE'S hydro bills appear to be significantly larger than normal.

[4.] HOSIE has a criminal record dating back to 1971 for various offences, including a charge for possession of a narcotic in January 1985.

[5.] I received information for Cpl. Campbell that a source believed reliable has advised that George HOSIE recently moved to Everts Ave, Windsor, Ontario and has established a very high-tech hydroponic Marihuana growing operation. Cpl. Campbell further advised that information supplied by the source, while it has not lead to previous arrests, has been confirmed through other sources and otherwise investigated and found to be reliable.

[6.] Based upon the above information the writer believes that George HOSIE is cultivating marihuana from a hydroponic laboratory in his residence.

[7.] It is requested that a search warrant be granted as execution of warrant will afford evidence to support the charge of cultivation of cannabis marihuana contrary to Section 6 Subsection 1 of the Narcotic Control Act.

In *Jalonikou*, the record, as amplified upon review, demonstrated that the police had never received information in the past about this location and this suspect. The informant had provided information on one previous occasion which had resulted in an arrest but had not yet resulted in a conviction. The informant provided this information in the hope of negotiating a favourable deal on outstanding charges. Upon receiving the tip the police conducted a search pursuant to a warrant without ever having surveilled the location and without even determining whether the targetted location actually existed and whether the suspect had some connection with this location as either occupant or resident.

In *Hosie*, the record, as amplified upon review, demonstrated that the police surveilled the location and sought hydro records to determine if an increase in hydro consumption had occurred. Although some investigative work had been completed, the officer's conclusion about increased hydro consumption was not necessarily supported by the information she had obtained from the Utilities Commission. More significantly, the officer had indicated in the sworn information that the informer could be believed as he/she had proven reliable even though this informer had never been used previously.

In *Jalonikou*, the court concluded:¹⁰⁰

The trial judge found that the search warrant was invalid because the information in support of it did not supply sufficient detail to justify its issuance by the Justice of the Peace. We have some reservations about the correctness of that finding because the information contained far more than bald allegations and, in fact, contained considerable detail. Nevertheless, it is clear from all of the evidence that the police did indeed have reasonable and probable grounds to believe, and did believe, that the offence was taking place in the subject premises on the date when they received very specific information from their informant.

Even though the information in *Hosie* was more detailed and was subject to a small degree of investigative corroboration, the court concluded that "the information supplied is far from detailed and could not be described as compelling". It would be a herculean task to try to reconcile these two results,

and perhaps, the easiest explanation is that the court was simply in error in the *Jalonikou* case. However, in my submission these divergent results are a product of the fact that the standard employed for evaluating sufficiency is so open-ended as to allow for inconsistent application. Accordingly, with a governing standard that is discretionary in nature, success in obtaining a s. 24(2) remedy for a s. 8 violation appears to be dependent upon discovering that the police lied or showed reckless disregard for the truth. How often will defence counsel, whether competent or not, be able to uncover police falsehood?

The *Hosie* and *Jalonikou* cases can be reconciled by asserting that a Charter remedy was awarded in *Hosie* because the police intentionally misled the issuing justice of the peace; whereas, in *Jalonikou* the police were forthright in presenting the small bit of information they obtained from the informer. Admittedly, reckless disregard of the truth is a cardinal sin and should attract a Charter remedy; however, due process advocates should not celebrate developments in the law which turn upon an assessment of the honesty and integrity of a police officer.

The Supreme Court of Canada has outlined the proper approach upon a *voir dire* to determine the sufficiency of a search warrant information or an affidavit filed in support of a wire-tap authorization. In *R. v. Garofoli*, the court stated:¹⁰¹

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

According to this approach, the reviewing court is entitled to examine the record, as amplified upon the review, to resolve the Charter claim. Although it has been argued that the amplified record cannot be used to "bolster or rescue" a

¹⁰⁰ *Supra*, footnote 99, at p. 2.

¹⁰¹ *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 at p. 188, 80 C.R. (3d) 317, [1990] 2 S.C.R. 1421.

deficient warrant,¹⁰² it is invariably the case that, when the accused wishes to cross-examine the informant upon discrepancies and falsehoods in the sworn information, the amplified record serves to undercut the accused's Charter claim. Police officers are professional witnesses and when given the opportunity to explain their actions it is common for the court to conclude that the officer was "forthright and truthful" and that any mistakes in the sworn information were a product of a mere "error in judgment".¹⁰³

Once the Supreme Court of Canada lifted the restriction upon cross-examining an informant or affiant,¹⁰⁴ it has been increasingly common for the defence to embark upon a lengthy *voir dire* to try to bolster its claims of misleading disclosure and material non-disclosure by the informant. Beyond any issues relating to the efficacy and value of this process, there is a danger that the courts are unduly focusing on the amplified record without paying careful attention to the four corners of the sworn information. Even though cogent proof of falsehood or fraud will greatly assist the defence,¹⁰⁵ it is of greater

¹⁰² In *Carrier, supra*, footnote 77, the dissenting judge concluded that the amplified record can only "serve to destroy any basis" for the warrant and cannot bolster a deficient warrant. This conclusion is at odds with the conclusion of the B.C. Court of Appeal in *R. v. Madrid* (1994), 48 B.C.A.C. 271 at pp. 285-7, 78 W.A.C. 271. Before the Charter the law was clear in that extrinsic information could not serve to support a deficient warrant and the reviewing judge was restricted to examining the four corners of the sworn information (see, *Worrall (Re)*, [1965] 2 C.C.C. 1, 44 C.R. 151, 48 D.L.R. (2d) 673 (Ont. C.A.); *La Société Radio-Canada v. Lessard* (1989), 50 C.C.C. (3d) 428 at pp. 443-4, 72 C.R. (3d) 291 (Que. C.A.)), and, in my submission, this still remains the law. However, the amplified record can be used by the Crown to support its claim for admission of evidence under s. 24(2). For example, the sworn information may not disclose reasonable and probable grounds; however, the amplified record shows that the police had the grounds but failed to set the grounds out adequately in the warrant — this evidence can, and should be used, to discount the seriousness of the violation and assist in making the case for admission of the impugned evidence, see, e.g., *R. v. Harris* (1987), 35 C.C.C. (3d) 1, 57 C.R. (3d) 356, 20 O.A.C. 26 (C.A.).

¹⁰³ See, e.g., *R. v. Church of Scientology* (1987), 31 C.C.C. (3d) 449 at p. 526, 18 O.A.C. 321, 30 C.R.R. 238 (C.A.); *R. v. Madrid, ibid.*, at p. 290; *R. v. Moore* (1995), 137 N.S.R. (2d) 231 (C.A.).

¹⁰⁴ Prior to *Garofoli, supra*, footnote 101, the defence had to show a *prima facie* case of fraud or reckless disregard for the truth before being allowed to cross-examine the deponent or affiant. Now the defence simply needs to seek leave of the court to cross-examine on issues which are relevant to the determination of the Charter claim.

¹⁰⁵ Beyond the result in the *Hosie* case, *supra*, footnote 73, reference should be made to *R. v. Dellapenna* (1995), 62 B.C.A.C. 32, 103 W.A.C. 32, for another example of exclusion which was primarily based upon reckless disregard for the truth. Even though the Supreme Court of Canada in *R. v. Bisson* (1994), 94 C.C.C. (3d) 94, [1994] 3 S.C.R. 1097, 65 Q.A.C. 241, held that falsehoods should merely be excised from the sworn information

importance to address the primary issue of whether the sworn information discloses sufficient evidence to provide reasonable and probable grounds. As stated earlier, the fundamental consideration in a s. 8 claim must be the absence of presence of probable cause as this is the threshold standard for justifying state intrusion. It is so fundamental that the Supreme Court of Canada has recently reversed the onus of proof on a s. 24(2) claim when the claim is based upon an absence of reasonable and probable grounds. The court stated:¹⁰⁶

For example, in cases involving a breach of s. 8 of the Charter where evidence has been obtained as a result of an unreasonable search and seizure, it is clear that, unless the Crown can show that the police had reasonable and probable grounds to act as they did, such as a well-founded belief at the time that an accused was in possession of drugs or that there were compelling and urgent circumstances, there is a presumption that the violation is a serious one under s. 24(2) which must be rebutted by the Crown.

Although the motives and intentions of law enforcement officials are clearly relevant with respect to the issue of remedy under s. 24(2), it is essential that this exercise of reviewing the amplified record not overshadow the primary issue of whether the sworn information discloses probable cause. If the *Hosie* and *Jalonikou* cases can only be reconciled on the basis that in the former, reckless disregard was proved; whereas, in the latter, the police acted honestly upon the sparse information they had acquired, then we have moved into an era in which s. 8 claims will stand or fall on the ability of the officer to explain his/her shortcomings in the drafting of the sworn information and on the ability of competent defence counsel to ferret out falsehood and lies. If the success of a Charter claim is contingent upon the *post hoc* explanation of the police, and the forensic and investigative skills of counsel, then the right has been effectively denuded and has been replaced by an oath-swearing contest between amateur witnesses (*i.e.*, most accused persons) and professional witnesses

leaving the reviewing judge to determine sufficiency upon the remaining material in the information, cases such as *Hosie* and *Dellapenna* show that significant falsehoods will usually lead to exclusion (notwithstanding the remaining material) as fraud, plain and simple, is an abuse of the court's process.

¹⁰⁶ *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 at pp. 314-15, 33 C.R. (4th) 1, [1994] 3 S.C.R. 173.

(i.e., most police officers). As the Massachusetts Supreme Court has aptly noted: “lies about the existence of an undisclosed informant and his reliability are easy to tell yet most difficult to uncover”.¹⁰⁷

Despite the hundreds, if not thousands, of s. 8 claims brought in the past 15 years, there is a strong possibility that very little has changed since the Law Reform Commission of Canada reported in 1981 that 58.9% of the search warrants were invalidly issued (as based upon a national average).¹⁰⁸ The commission concluded that there were consistent failures by the police to comply with existing statutory requirements and that “there is a lack of effective mechanisms to enforce the legal rules”.¹⁰⁹ In 1995, Mr Justice Casey Hill of the Ontario Court (General Division) conducted an informal survey, and upon his review of 100 search warrants and search warrant informations, he concluded that 39% of the warrants were invalidly issued.¹¹⁰ Clearly there has been some reduction in the incidence of invalidly issued warrants; however, one must wonder whether a compliance rate of 61% is acceptable in the Charter era.

The continuing lack of adherence to statutory and constitutional preconditions for the issuance of a warrant may be attributed to the fact that, as in *Hosie*, the courts appear to have predicated the granting of a Charter remedy upon proof of intentional wrongdoing by the police. Instead of predicating constitutional review upon a rigorous assessment of whether a warrant and supporting information discloses reasonable and probable grounds, as evaluated on the basis of clearly articulated bright-line standards, the courts search in vain for proof of an attempt by the police to deliberately mislead the court. Mr Justice Hill commented that “fact-finding at this level of fault is not difficult, as a “flagrant abuse of power” or a “gross

¹⁰⁷ *Lewin v. State*, 542 N.E. 2d 275 (1989) at p. 286. In this case the police had employed a fictitious informant to obtain 31 search warrants over a 10-month period.

¹⁰⁸ Law Reform Commission of Canada, *Police Powers — Search and Seizure in Criminal Law Enforcement*, Working Paper No. 30 (1983).

¹⁰⁹ *Ibid.*, at p. 86.

¹¹⁰ Mr Justice C. Hill, “The Role of Fault in Section 24(2) of the Charter”, in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Agincourt, Ontario: Carswell, 1996).

invasion of privacy” is readily identifiable”;¹¹¹ however, this would only be true if there exist meaningful and effective procedures in place to allow defence counsel to discover evidence of deliberate wrongdoing. As the next section of the article discusses, it is questionable whether there is such an effective discovery mechanism with defence counsel having to rely upon luck and police candour in order to lay the groundwork for a successful claim for exclusion under s. 24(2).

(2) The *Stinchcombe* case — Pre-trial Motions in the Charter Era

The 1991 *Stinchcombe* case¹¹² “marked the dawn of a new era in disclosure to defence, by transforming a professional courtesy into a formal obligation”.¹¹³ The court stated in no uncertain terms that full and frank disclosure was a primary component of the right to make full answer and defence and that the “right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted”.¹¹⁴ *Stinchcombe* did not create a new right with respect to disclosure as the common law has always considered full disclosure to be an integral part of the process.¹¹⁵ The innovation of *Stinchcombe* is in the creation of an avenue of judicial review in which the Crown will have to justify non-disclosure on the basis that the material sought is clearly irrelevant or privileged. Prior to this decision, the common law approach to non-disclosure was basically a “hands-off” policy of deference to prosecutorial discretion in the absence of proof of an oblique motive.

Building on the impetus generated by the *Stinchcombe* case, the courts have extended the scope of the Crown’s obligation to disclose. Although the Crown does not have to act as an investigator for the defence, in terms of collecting evidence which is not currently in its possession, numerous appellate courts have held that, for the purposes of disclosure, the police

¹¹¹ *Ibid.*, at pp. 58-9.

¹¹² (1991), 68 C.C.C. (3d) 1, 9 C.R. (4th) 277, [1991] 3 S.C.R. 326.

¹¹³ *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1, 44 C.R. (4th) 1, [1995] 4 S.C.R. 411.

¹¹⁴ *Stinchcombe*, *supra*, footnote 112, at p. 9 C.C.C.

¹¹⁵ See, e.g., *R. v. Savion* (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259 (Ont. C.A.)

and the Crown are indivisible and that the Crown has an obligation to obtain from the police all material which should be properly disclosed to the defence.¹¹⁶ Similarly, there is some authority for the proposition that the Crown has an obligation to seek out material which may be in the hands of other government agencies which have had some involvement with the accused and the case.¹¹⁷ Although the pre-*Stinchcombe* ruling¹¹⁸ that the defence does not have automatic access to the complete police file has not been specifically overtaken, there is little doubt that the right to full and frank disclosure has been given strong support, at least at the level of theory.

In more practical terms, defence counsel bear a heavy burden to ensure that full disclosure has been obtained. First, the obligation to disclose must be triggered by a request by or on behalf of the accused.¹¹⁹ Second, it is incumbent upon the defence to bring to the attention of a judicial officer at the earliest opportunity any failure of the Crown to comply with its disclosure obligations, as the failure to seek prompt judicial review can result in the denial of any judicial remedy for non-disclosure.¹²⁰ Third, in order to obtain a stay of proceedings, or a new trial upon appeal, for non-disclosure, defence will have to prove prejudice by demonstrating that the non-disclosed material could have affected the verdict. As the Ontario Court of Appeal has stated:¹²¹

¹¹⁶ See, e.g., *R. v. V. (W.J.)* (1992), 72 C.C.C. (3d) 97, 14 C.R. (4th) 311, 102 Nfld. & P.E.I.R. 275 (Nfld. C.A.); *R. v. T. (L.A.)* (1993), 84 C.C.C. (3d) 90, 14 O.R. (3d) 378, 18 C.R.R. 235 (C.A.); *R. v. O'Grady* (1995), 66 B.C.A.C. 178 (B.C.C.A.).

¹¹⁷ *R. v. Arsenaull* (1994), 93 C.C.C. (3d) 111 at p. 117, 153 N.B.R. (2d) 81 (C.A.); *R. v. Lenny* (1994), 155 A.R. 225 at pp. 229-30, 73 W.A.C. 225 (C.A.).

¹¹⁸ *R. v. Wood* (1989), 51 C.C.C. (3d) 201, 33 O.A.C. 260, leave to appeal to S.C.C. refused 56 C.C.C. (3d) vi, 40 O.A.C. 240n.

¹¹⁹ *Stinchcombe*, *supra*, footnote 112, at pp. 13-14 C.C.C.

¹²⁰ *Stinchcombe*, *ibid.*, at pp. 12-13 C.C.C.; *R. v. H. (J.S.)* (1993), 83 C.C.C. (3d) 572 at p. 575, 141 A.R. 344, 46 W.A.C. 344 (C.A.); *R. v. McAnespie*, [1993] 4 S.C.R. 501, 86 C.C.C. (3d) 191n, 68 O.A.C. 185.

¹²¹ *R. v. Peterson* (1996), 106 C.C.C. (3d) 64 at p. 83, 47 C.R. (4th) 161, 89 O.A.C. 60 (C.A.), leave to appeal to S.C.C. refused 109 C.C.C. (3d) vi; see, also, *R. v. Hamilton* (1994), 94 C.C.C. (3d) 12, [1995] 1 W.W.R. 711, 125 Sask. R. 8 (C.A.); *O'Grady*, *supra*, footnote 116. Since this article was written the Supreme Court of Canada released its decision in *R. v. Carosella* (1997), 112 C.C.C. (3d) 289, 142 D.L.R. (4th) 595, in which the court entered a stay of proceedings for the destruction of rape crisis centre files. The decision in this case may be a signal of a more relaxed standard for awarding a stay of proceedings for non-disclosure or the case may be narrowly restricted to its facts (*i.e.*, deliberate shredding of documents to avoid court production).

Thus, to show prejudice as a consequence of the non-disclosure, the appellant must satisfy the court that there is a reasonable probability that, had there been proper disclosure, the result might have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Therefore, the right to full answer and defence is dependent upon the competence of defence counsel to initially request disclosure, to make timely application if he or she believes that full disclosure is lacking, and upon failure to perform the first two tasks properly, to be able to persuade a court that the non-disclosed material would have significantly affected the fairness and accuracy of the trial.

If disclosure is considered to be a fundamental component of the right to make full answer and defence, it is curious that the burden is placed solely on the shoulders of defence counsel to ensure that the fairness of the trial is not tainted by incomplete disclosure. To fulfil the great promise of the *Stinchcombe* case, one would expect some modification of pre-trial procedure so that trials do not proceed in the absence of full disclosure; however, *Stinchcombe* requirements are being enforced without the creation of any new pre-trial mechanism to give practical effect to its sweeping theoretical principles.

As early as 1986, the Supreme Court of Canada concluded that it would not fashion new procedural mechanisms for the enforcement of Charter claims. The court stated:¹²²

The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

Although the Charter is not a revolutionary departure from the common law and statutory approach to Canadian criminal procedure, one would expect that some of the innovative substantive changes under the Charter would have been accompanied by equally innovative procedural reforms. One would expect that some form of institutional safeguards would

¹²² *R. v. Mills* (1986), 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, [1986] 1 S.C.R. 863.

be constructed which would not depend upon the competence and tenacity of counsel. Instead we have new wine in old bottles, and an uncomfortable fit between the demands of the Charter and the ability of contemporary process to give effect to these demands. As Mr Justice Moldaver has commented:¹²³

... even though the *Charter* has now been in existence for over ten years, Parliament has failed to create a code of procedure designed to deal with such basic issues as how, when, why and to whom and by whom *Charter* applications are to be brought. Instead, Parliament has seemingly been content to leave it up to the courts to develop a procedural scheme on a piecemeal basis. With respect, I question the wisdom of this approach, particularly when one considers that the courts are limited in their ability to make broad procedural changes and they have no ability to initiate comprehensive, policy-driven reforms.

It may be preferable for Parliament to attend to wide-ranging procedural reform; however, in the face of legislative inertia, the courts should undertake this task to ensure that the existing procedural mechanisms do not undercut the constitutional rights guaranteed by the Charter. The pre-trial motion, as currently conceived, is an ineffective mechanism for protecting rights and the manner in which the courts have structured pre-trial motions under the Charter creates a risk that form will triumph over substance and that violations of legal rights will go without remedy.

Judicial review of alleged non-disclosure must take place at the earliest opportunity to avoid the inference that the defence is not altogether that concerned about the missing disclosure. However, the current procedural regime does not accommodate timely and early requests for review. First, while the case makes its way through the provincial court system, the accused can only bring the application for disclosure review to the trial judge¹²⁴ even though the accused may have made numerous appearances before numerous provincial court judges prior to appearing before a trial judge. Second, if the accused elects to be tried in a higher court, he or she will

¹²³ Mr Justice M. Moldaver, "The Impact of the Charter on the Criminal Trial Process — A Trial Judge's Perspective", in Cameron, *supra*, footnote 110, at p. 147.

¹²⁴ See, e.g., *R. v. Delaney* (1989), 48 C.C.C. (3d) 276, 89 N.S.R. (2d) 253, 45 C.R.R. 162 *sub nom. R. v. How* (C.A.).

have to wait even longer for a proper forum to entertain a Charter claim, as the general consensus is that preliminary hearing judges do not have jurisdiction to order disclosure or production of materials.¹²⁵ Once committed to stand trial, the accused may still have to wait because a trial judge is usually not assigned to a case until shortly before it is to commence. Most jurisdictions allow application to the Chief Justice to designate a trial judge in advance; however, in practice, this is the exceptional procedure and not the rule.

The ineffectiveness of this procedural regime is demonstrated by the insistence of the Supreme Court of Canada in *O'Connor*¹²⁶ that applications for production of sensitive third party records be made to the trial judge. Without having a trial judge designated in advance, a pre-trial motion for production on the eve of trial will only serve to further delay the proceedings. Often, the records are voluminous and will require time to conduct a meaningful and proper review. Furthermore, the custodian of the records and the complainant have the right to appeal an adverse ruling of production directly to the Supreme Court of Canada and, of course, further delay will once again be occasioned.

To remedy the obvious procedural gaps, the Supreme Court of Canada has ruled that a superior court of record has concurrent jurisdiction with a trial court to award remedies for violations of the Charter;¹²⁷ however, resort to superior court review is extraordinary and discretionary. Furthermore, a superior court of record may not be in a position to assess whether requested material is relevant and, as such, should be disclosed, because the court will lack the requisite familiarity with the evidence to allow it to make this determination of relevancy. Finally, regardless of the problem of finding the proper forum for review, the pre-trial motion for further

¹²⁵ See, e.g., *Flesch v. British Columbia (Attorney General)* (1992), 17 W.C.B. (2d) 553 (B.C.S.C.). This issue has not been finally resolved as the Ontario Court of Appeal in *R. v. R. (L.)* (1995), 100 C.C.C. (3d) 329, 39 C.R. (4th) 390, 127 D.L.R. (4th) 170, has ruled that a preliminary hearing judge has jurisdiction to order production of third party therapeutic records. The question is whether this ruling survives the *obiter* comments of the Supreme Court of Canada in *O'Connor*, *supra*, footnote 113, which suggests the opposite.

¹²⁶ *Ibid.*

¹²⁷ *R. v. Rahey* (1987), 33 C.C.C. (3d) 289, 57 C.R. (3d) 289, [1987] 1 S.C.R. 588.

disclosure is a mere paper review and it does not come close to the discovery mechanisms available in the civil process. Fearing innovation, appellate courts have ruled that a reviewing judge, or a trial judge, does not have the authority to order a pre-trial hearing in which proposed Crown witnesses will be compelled to testify as a form of pre-trial discovery.¹²⁸

The failure to fashion responsive and unique procedures for review of incomplete disclosure underscores a larger problem relating to the utilization of current pre-trial motion procedures for raising Charter claims in the struggle to fit Charter claims into the existing procedural regime one major shortcoming has been identified which dovetails with the problems identified above with respect to judicial review of incomplete disclosure. The majority of appellate courts have required counsel for the defence to make a "preliminary offer of proof" before being entitled to enter into a *voir dire* to determine if constitutional rights have been violated.¹²⁹ In order to make this preliminary showing, defence will not be permitted to cross-examine in a *voir dire* the public officials, who may have been responsible for the violation, in order to demonstrate that there is an air of reality to the Charter claim.¹³⁰ Therefore, defence counsel will be required to ferret out the facts which support the claim through review of the disclosure materials, cross-examination at the preliminary hearing, or independent investigation.

In terms of discovering Charter violations hidden in disclosure material, there is little chance that this will be a productive exercise. As Michael Code has commented:¹³¹

It appears that Judge Borins [who ruled that there must be a

¹²⁸ *R. v. Arviv* (1985), 19 C.C.C. (3d) 395, 45 C.R. (3d) 354, 20 D.L.R. (4th) 422 (Ont. C.A.), leave to appeal to S.C.C. refused D.L.R., C.C.C., *loc. cit.*, [1985] 1 S.C.R. v.; *R. v. Sterling* (1993), 84 C.C.C. (3d) 65, [1993] 8 W.W.R. 623, 113 Sask. R. 81 (C.A.); see also *R. v. Jackman* (1994), 114 Nfld. & P.E.I.R. 284 (Nfld. Prov. Ct.).

¹²⁹ *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289, 12 C.R. (4th) 152, 7 O.R. (3d) 277 (C.A.); *R. v. McKarris* (1995), 131 Nfld. & P.E.I.R. 181 (P.E.I.C.A.), *affd* 143 Nfld. & P.E.I.R. 178, 198 N.R. 391; *R. v. Dwernychuk* (1992), 77 C.C.C. (3d) 385, 135 A.R. 31, 12 C.R.R. (2d) 175 (C.A.), leave to appeal to S.C.C. refused 79 C.C.C. (3d) vi, 141 A.R. 17n, 151 N.R. 400n; *R. v. Daigle* (1994), 49 B.C.A.C. 257, 80 W.A.C. 257 (B.C.C.A.).

¹³⁰ *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193, 118 W.A.C. 113 (B.C.C.A.).

¹³¹ 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. 314.

preliminary offer of proof before entering into a *voir dire*] has assumed that the police and the Crown will record all evidence relevant to a Charter violation in some written form and will then voluntarily disclose that written record to the defence. Alternatively, he has assumed that knowledge of and the ability to prove all Charter violations is already held by the accused and his witnesses. All these assumptions are untenable. As to voluntary disclosure of state wrongdoing, it would surely be unsafe to build a system of criminal and constitutional procedure on this assumption. While the highly principled police officer or Crown Attorney would voluntarily disclose their own wrongdoing, it is generally not the highly principled person who engages in wrongdoing in the first place.

As to the notion that the foundation for a Charter claim can be established at the preliminary hearing, this is also ineffective as it does not address discovery of Charter violations in cases of summary conviction offences and it does not reflect the reality that the vast majority of preliminary hearings are bypassed by waiver under s. 549 of the *Criminal Code*. In the few cases in which preliminary hearings are held, the courts do allow for cross-examination with respect to prospective Charter claims even though the claim cannot be made at the preliminary hearing stage.¹³² However, this right appears to be more of an indulgence than a firm and fixed manner of discovering constitutional violations. So long as the preliminary hearing judge does not disallow cross-examination in its entirety, there will not be any judicial review of the decision of a preliminary hearing judge to curtail the scope of cross-examination or to disallow the asking of a specific question.¹³³ The fact is that the preliminary hearing was designed to determine sufficiency of evidence and its discovery function is incidental to this primary design. It does not appear to be meaningful and effective to leave discovery of violations of the supreme law of the land to a forum not designed for this specific purpose.

Failing to recognize properly the inherent shortcomings of the process of disclosure, the courts end up punishing the accused who fails to discover and present this "preliminary offer of proof" prior to trial. Unless the evidence of the Charter violation arises *ex improviso*, defence will be precluded from

¹³² See, e.g., *R. v. Cover* (1988), 44 C.C.C. (3d) 34, 40 C.R.R. 381 (Ont. H.C.J.).

¹³³ *R. v. George* (1991), 69 C.C.C. (3d) 148, 5 O.R. (3d) 144, 8 C.R.R. (2d) 346 (C.A.).

raising the violation unless notice is given of its intent to do so, with supporting particulars, in a timely fashion.¹³⁴ Once again, the sins of the lawyer are visited upon the client and accused persons lose the right to raise procedural defences based upon the Charter as a result of their counsel's lack of diligence. Preclusion of the Charter claim may be consistent with the logic of adversarial justice; however, it is not an appropriate way of responding to potential violations of the supreme law of the land.

Even if counsel can discover evidence of the violation, and then applies for relief in a timely fashion, the pre-trial motion still remains an ineffective mechanism for advancing Charter claims. Due to the fact that the accused bears the persuasive burden of proving a violation on a balance of probabilities, some courts have concluded that defence counsel has the evidentiary burden of calling the relevant witnesses on the *voir dire*. As a result, counsel for the defence loses the right to cross-examine these witnesses and is thus put in the untenable position of having to prove its claim through the examination in-chief of witnesses who have adverse interests. In relation to a *voir dire* to determine if the procedural defence of entrapment was applicable, the Ontario Court of Appeal noted that it "sees no reason why the normal rules respecting hostile and adverse witnesses should not apply to an entrapment proceedings".¹³⁵ Similarly, the British Columbia Court of Appeal held that on a s. 8 claim, defence counsel, and not the Crown, must call the police informant who obtained the contested search warrant. The court concluded that there was no reason to require the Crown to introduce the warrant into evidence to demonstrate that the accused's rights had been respected. Defence bears the burden of ensuring respect for the Charter, but as a small concession and indulgence the court stated that:¹³⁶

... it may be that a trial judge conducting a *voir dire* into an alleged

¹³⁴ *Kutynek*, *supra*, footnote 129; *R. v. Drew* (1991), 104 N.S.R. (2d) 115, 32 M.V.R. (2d) 292 (C.A.); *R. v. Luksicek* (1993), 23 B.C.A.C. 265, 39 W.A.C. 265 (B.C.C.A.); *R. v. Chamberlain* (1994), 30 C.R. (4th) 275, 4 M.V.R. (3d) 54 (Ont. C.A.).

¹³⁵ *R. v. Virgo* (1993), 67 O.A.C. 275 (Ont. C.A.) pp. 278-9.

¹³⁶ *R. v. Feldman* (1994), 91 C.C.C. (3d) 256 at p. 265 (B.C.C.A.), *affd* [1994] 3 S.C.R. 832, 93 C.C.C. (3d) 567n, 178 N.R. 140.

breach of the Charter would grant the defence more leeway than might otherwise be permitted if fairness and the right to make full answer and defence appear to require a relaxation of the normal rules with respect to permitting cross-examination of one's own witness.

Although there are rare cases in which a court, or a prosecutor, takes the initiative in identifying and raising a potential Charter violation on behalf of the accused,¹³⁷ the logic of the adversarial system demands that counsel for the defence act as the sole guardian of the legal rights contained in the Charter. We do not have any notion of quality control in which both private lawyers and public officials work together to ensure compliance with the constitutional imperatives. When one examines the rhetoric of rights espoused by the courts one might expect a more pro-active stance being adopted with respect to the procedural mechanisms needed to uncover rights violations. For example, the Supreme Court of Canada has stated:¹³⁸

The words "full answer and defence" entitle the accused to put forward all defences, regardless of whether they are based upon a technicality or not. Indeed, the adjective "full" permits no other conclusion. The right to make full answer and defence cannot be diminished to the right to make non-technical answer and defence.

In a similar vein, the Ontario Court of Appeal has noted that:¹³⁹

The essence of a fair trial includes as a fundamental principle that only evidence properly admissible in law will be admitted in evidence at trial. If relevant and material evidence is admitted by a trial judge where it should be excluded by reason of an evidentiary rule of evidence or a statutory provision, it cannot be said to be a fair trial. An accused is entitled to be tried according to law. That is a principle of fundamental justice.

If procedural defences should not be relegated to the category of mere technicalities, then one would expect that all participants to the process would have the duty to ensure that convictions are not entered in the face of unclaimed

¹³⁷ See, e.g., *R. v. Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.).

¹³⁸ *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 at p. 210, 80 C.R. (3d) 317, [1990] 2 S.C.R. 1421.

¹³⁹ *R. v. Playford* (1988), 40 C.C.C. (3d) 142, 61 C.R. (3d) 101 at p. 145, 63 O.R. (2d) 289 (C.A.).

Charter violations. Perhaps it may be asking too much to require prosecutors to raise claims on behalf of the accused; however, one would, at least, expect that the procedural mechanisms for enforcing claims would allow defence to embark upon fishing expeditions for discovery of the basis for the claim as this would be “a fishing expedition in what are now constitutionally-protected waters”.¹⁴⁰ Disappointingly, the courts are more inclined to agree with Borins Dist. Ct. J. in his articulation of the policy objectives underlying the restrictive approach to pre-trial motions under the Charter. Judge Borins justified the requirement of providing a “preliminary offer of proof” on the basis that the procedure should:¹⁴¹

... prevent the trial from being used as a means of discovering evidence of possible Charter violations by way of extensive cross-examination.

... it follows that cross-examination of Crown witnesses in an attempt to locate evidence which might support a violation of the defendant's Charter rights is not permissible on the ground of relevance.

When the dust finally settles on this debate concerning pre-trial motions, I suspect we will discover that the courts are magnanimous in the articulation of principle and theory, but rather stingy in the construction of practical and effective avenues to review violations of the rights and principles so greatly cherished in the abstract.

Conclusion

The *Canadian Charter of Rights and Freedoms* is not self-executing and it cannot guarantee the development of a legal process which preserves and protects the rights and freedoms of every individual without some degree of institutional adjustment. The beneficiary of the enumerated legal rights (*i.e.*, the accused) depends upon the good faith diligence of legal professionals to act in a manner consistent with the constitutional demands of the Charter. The adversarial system of

justice is ill-suited to this goal because the notion of litigants as adversarial opponents locked in battle over competing interests relegates the Charter to yet another topic for debate and argument at trial instead of a goal worthy of mutual respect from both sides.

Presumably, the excesses of adversarial justice are somewhat muted in the criminal process because both adversaries are committed to avoiding miscarriages of justice. Prosecutors cannot be conceived of as true adversaries as their interests align with defence counsel with respect to ensuring that the innocent are not convicted. Accordingly, as a public official engaged in the administration of justice, prosecutors must follow the oft-quoted admonition of the Supreme Court of Canada:¹⁴²

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it also must be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and justness of judicial proceedings.

Despite the noble aspiration of transcending the adversarial fetish of winning or losing, there is little doubt that the logic of adversarial justice serves to minimize the contribution of public officials to the goal of protecting legal rights. Prior to the enactment of the Charter it was recognized that the prosecutor's public duty did not require he or she to assist counsel for the defence in preparing and presenting a defence. In 1951, the Supreme Court of Canada ruled that counsel for the defence could not obtain a court order requiring that the Crown call certain witnesses as part of its case.¹⁴³ In a subsequent case, the court justified this non-interference with the exercise of prosecutorial discretion by stating: “It is within the framework of the adversary system under which our

¹⁴⁰ *R. v. Parmar* (1987), 34 C.C.C. (3d) 260 (Ont. H.C.J.) at p. 280.

¹⁴¹ *R. v. Kutynec* (1990), 57 C.C.C. (3d) 507 at pp. 518 and 519-20, 78 C.R. (3d) 181, 74 O.R. (2d) 205 (Dist. Ct.), aff'd 70 C.C.C. (3d) 289, 12 C.R. (4th) 152, 7 O.R. (3d) 277 (C.A.).

¹⁴² *R. v. Boucher* (1954), 110 C.C.C. 263, [1955] S.C.R. 16 at pp. 23-4.

¹⁴³ *R. v. Lemay* (1951), 102 C.C.C. 1, 14 C.R. 89, [1952] 1 S.C.R. 232.

criminal law is administered, that the accused must be guaranteed a fair trial.”¹⁴⁴ The notion that a fair trial must be moulded within the framework of the adversary system still persists in the Charter era. The 1951 ruling in *Lemay* is still good law¹⁴⁵ and, as this article has, hopefully, demonstrated, much of the jurisprudence under the Charter imposes a burden of investigation and presentation upon counsel for the defence with respect to a violation of legal rights. Somehow the public duty of the prosecutor was not strong enough for the courts to impose a similar obligation on the Crown. Of course, we assume that the Crown will always act in a manner consistent with the Charter, just as we assume that counsel for the defence will always be competent. Unfortunately, assumptions are often just an excuse for failing to confront the truth.

Perhaps, allowing the logic of adversarial justice to shape the contours of Charter jurisprudence would not be troublesome if there existed a truly meaningful mechanism for testing our assumptions regarding the competence of counsel. Leaving the supreme law of the land in the hands of counsel would not be a problem if effective review of counsel’s performance was allowed. However, “the traditional Canadian and English approach has been to eschew attacks on the competence of counsel”,¹⁴⁶ and it appears that the traditional approach has changed little in the Charter era.

In the past five years, the Ontario Court of Appeal has been confronted with an increasing number of cases in which the competence of counsel is being questioned. To facilitate these claims, the court has relaxed the requirements for the admission of fresh evidence needed to review the conduct of trial counsel, but, as would be expected, the claims are invariably dismissed.¹⁴⁷ The standard of review adopted for scrutinizing

¹⁴⁴ *R. v. Caccamo* (1975), 21 C.C.C. (2d) 257 at p. 276, 29 C.R.N.S. 78, [1976] 1 S.C.R. 786.

¹⁴⁵ See, e.g., *Cunliffe v. Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560, 40 C.R. (3d) 67, [1984] 4 W.W.R. 451 (B.C.C.A.).

¹⁴⁶ M. Code, *supra*, footnote 131, at p. 337.

¹⁴⁷ *R. v. Silvini* (1991), 68 C.C.C. (3d) 251, 9 C.R. (4th) 233, 5 O.R. (3d) 545 (C.A.); *R. v. W. (W.)* (1995), 100 C.C.C. (3d) 225, 43 C.R. (4th) 26, 25 O.R. (3d) 161 (C.A.); *R. v. McKellar* (1994), 34 C.R. (4th) 28, 19 O.R. (3d) 796, 72 O.A.C. 398; *R. v. B. (L.C.)* (1995), 104 C.C.C. (3d) 353, 46 C.R. (4th) 368, 27 O.R. (3d) 686 (Ont. C.A.);

the conduct of trial counsel is loose and deferential. The Ontario Court of Appeal has adopted the following American standard of review:¹⁴⁸

“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the 6th Amendment. Second, the defendant must show that the deficient performance prejudiced the defence. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

“Thus, in order to show that the defence was prejudiced by the deficient performance, it must be shown “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

In fairness to the appellate courts, it is very difficult to second-guess and scrutinize the conduct, strategy and effectiveness of trial counsel after the fact in an appellate forum. However, placing the burden of enforcing the demands of the Charter on counsel for the defence will invariably trigger a corresponding demand to review the effectiveness of counsel. An irreconcilable tension exists between the need for effective review and the limits of appellate scrutiny. Mr Justice Doherty’s judgment in *Joanisse* provides some insight into the nature of this irreconcilable conflict. Initially, he outlines the importance of effective counsel within an adversarial system as follows:¹⁴⁹

An accused who is represented by counsel at trial is entitled to receive

R. v. Joanisse (1995), 102 C.C.C. (3d) 35, 44 C.R. (4th) 364, 85 O.A.C. 186 (C.A.); leave to appeal to S.C.C. refused 111 C.C.C. (3d) vi; *R. v. Bilméz* (1995), 101 C.C.C. (3d) 123 (Ont. C.A.). The only successful claim of ineffective assistance of counsel was the *McKellar* case in which the incompetence was obvious because counsel had failed to even interview potential alibi witnesses. In *Bilméz*, the appellant was successful in obtaining a new trial because the trial judge did not hold any type of inquiry to determine whether or not trial counsel had a conflict of interest in the joint representation of two accused. Accordingly, this latter case shows that trial courts, and not just appellate courts, may be unresponsive to allegations of ineffective assistance of counsel.

¹⁴⁸ *Strickland v. Washington*, 104 S.Ct. 2574 (1986) at p. 2064, as quoted in *B. (L.C.)*, *ibid.*, at p. 701 O.R.

¹⁴⁹ *Joanisse*, *supra*, footnote 147, at pp. 56-7 C.C.C.

effective legal assistance . . . That entitlement finds expression in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. Any appellant may challenge a conviction on the basis that the ineffective assistance of counsel occasioned a miscarriage of justice. Claims of ineffective representation at trial are becoming more common. Many of these claims, like the one made here, allege that trial counsel's performance was so deficient as to amount to incompetence resulting in ineffective assistance.

The importance of effective assistance of counsel at trial is obvious. We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by "partisan advocacy on both sides of the case": *U.S. v. Cronin*, 104 S. Ct. 2039 (1984), *per* Stevens J. at p. 2045. Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution as well as marshal and advance the case on behalf of the defence. We further rely on a variety of procedural safeguards to maintain the requisite level of adjudicative fairness in that adversarial process. Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused.

After outlining the importance of effective counsel, Mr Justice Doherty then goes on to discuss the difficulties in employing appellate review as the mechanism for securing this fundamental right to effective assistance of counsel. He states:¹⁵⁰

This court, following the lead of the Supreme Court of the United States, has taken a cautious approach to claims based on the alleged incompetence of trial counsel . . . Such claims can be easily made. It would be a rare case where, after conviction, some aspect of defence counsel's performance could not be subjected to legitimate criticism. Convictions would be rendered all too ephemeral if they could be set aside upon the discovery of some deficiency in counsel's defence of an accused. Appeals are not intended to be forensic autopsies of counsel's performance at trial.

There are also practical difficulties involved in an appellate court's attempt to assess the quality of the service provided by a trial counsel.

¹⁵⁰ *Ibid.*, at pp. 58 and 59 C.C.C.

In many situations, and this case provides an excellent example, the facts underlying the claim of incompetence are contested. The appellate forum is ill-suited to resolving these factual disputes. Claims based on the alleged incompetence of trial counsel also tend to disrupt the normal adversarial balance on appeal. Trial counsel, the true "target" of the appellant's allegations, has no standing in the appeal. Instead, the Crown is placed in the position of justifying or explaining conduct over which it had no control and with respect to which it usually had no knowledge prior to the receipt of the fresh evidence.

It is little solace to an accused person to be required to rely upon the assistance of counsel for the protection of his or her legal right and then be informed that there is little he or she can do to undo the wrong committed by ineffective or incompetent counsel. A young offender, *B. (L.C.)*, was incarcerated for sexual assault and his lawyer did not conduct a full interview with him until the morning of the trial itself. The lawyer would not go to the jail prior to trial to interview his client because he had a "high volume", "resolution-oriented" legal aid practice and the legal aid block fee for the case made it economically undesirable for this lawyer to perform his job properly. The Court of Appeal dismissed the appeal stating:¹⁵¹

I accept Mr. Campbell's submission that defence counsel should have seen the appellant before the morning of the trial, block-fee or no block-fee. Nonetheless, even assuming that his failure to visit his client while he was in custody, in its broadest aspects would satisfy the performance prong of the effective assistance of counsel issue, I am unable to conclude that there is a reasonable probability that the result would have been different had defence counsel acted as the appellant submits he should have acted . . . There can be no fixed rules as to the circumstances in which counsel should interview an accused client. The purpose of counsel meeting a client must be assessed in some sort of context. Looking at generally, the clear purpose is to enable counsel to know his client's version of what happened. That information will enable counsel to undertake any investigation that may be required. In many cases there will be no investigation required. For example, in this case, I am not persuaded that any further investigation would have been fruitful. Further, this is not a case where counsel's inadequate preparation led to a failure to call witnesses who would have assisted the defence.

Surely, public confidence in the administration of justice

¹⁵¹ *B. (L.C.)*, *supra*, footnote 147, at p. 703.

cannot be fostered by a process in which counsel can undertake representation with such indifference so as to perceive interviewing his client in jail as an economic liability. Confidence would be further undermined by an appellate process which expresses regret over the indifference of the champion of the accused, but ultimately concludes that the trial was fair and the result would have been the same even if the lawyer acted as a true advocate. In the eyes of the accused, he or she would conclude that the legal profession is only serving its own interests and is not altogether that concerned with substantive justice or procedural fairness.

If appellate courts are institutionally ill-suited for conducting review of the conduct of trial counsel, then the time has arrived to reconsider the current approach of leaving counsel for the defence with the primary obligation of safeguarding constitutional rights. Although Lamer C.J.C. speaks of necessary "institutional adjustment" to accommodate the demands of the Charter, the reality is that very little has changed in a structural sense. The adversarial system survived the arrival of the Charter notwithstanding the fact that the logic of adversarial justice and the demands of constitutional rights cannot comfortably co-exist with respect to many issues.

It is time to examine a key question which, to date, has not even been asked: can a procedural form (adversarial justice), created at a time in which the notion of legal rights was not known and not desired, support and sustain a modern system in which legal rights claims have become a focal point? Without examining this fundamental question, we may find that the Charter, as "living tree capable of growth"¹⁵² is being stunted in its development by the underlying assumptions and ideology of adversarial justice.

¹⁵² *Hunter v. Southam*, *supra*, footnote 78, at p. 156 S.C.R.