The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable

David M Paciocco, BCL (Oxon)
Professor of Law, University of Ottawa

Introduction

The New Zealand Bill of Rights Act 1990[1] was crafted from a rib taken from the Canadian Charter of Rights and Freedoms.[2] Unlike the Charter, however, the Bill was not the product of major constitutional reform[3] Indeed, its entry onto the legal scene was so uneventful as to be almost surreptitious. And when it was discovered it was declared by most to have been still-born, a lifeless carcase testament to a non-elected Prime Minister. That body has been claimed by criminal lawyers, and they have breathed life into it.[4]

It was obvious to everyone that forces had been at work to disembowel the Bill. To some, its heart seemed to have been removed when it was deprived of constitutional status and its rights and freedoms made subject to ordinary legislation.[5] Its remedies clause was also excised,[6] raising the prospect that it was to be no more than another canon for interpreting legislation.[7] Moreover, the substantive rights it conferred were, in places, restated in an apparent attempt to avoid what were evidently perceived to be the more blatant excesses of Canadian jurisprudence.[8] Because of all of this it appeared to many that, like the Canadian Bill of Rights (1960),[9] the worth of the Bill would be measured only by the floridity of its prose – impressive sounding but empty words embossed on yellowing parchment, hanging on the walls of stately public buildings, rarely if ever to be uttered in court.

After less than two years it can be said with some confidence that those who counted on this being so were wrong. At the first available opportunity the Court of Appeal endorsed

1 Herein, the "Bill".

2 Part I of the Constitution Act 1982, as enacted by the Canada Act 1982 (UK), proclaimed 17 April 1982 (herein the "Charter").

3 See Rishworth, "A Canadian Bill of Rights for New Zealand" [1989] NZ Recent Law Review 83.

4 See Shaw & Butler, "The New Zealand Bill of Rights comes alive (I)" (1991) NZLJ 400.

5 Section 4 of the Bill deprives courts of the power to use it to render any enactment invalid or ineffective or to decline to apply any provision.

6 The 1985 draft Bill had contained a provision identical, *mutatis mutandis*, to s 24(1) of the Charter.

7 Section 6 is the only provision addressing the use that is to be made of the Bill by courts, and it specifies that the Bill is to be used in interpreting legislation.

8 Examples include:

(1) the decision to have a freedom from discrimination provision rather than a general equality provision like that in the Charter;

(2) the paring down of s 8, the "principles of fundamental justice" provision, (in Canada the equivalent provision, s 7 of the Charter, extends to deprivations of liberty and security of the person) and;

(3) the insertion of the curious phrase "under any enactment" to limit those situations of detention where subss 23(1) and (4) will apply.

9 The Canadian Bill of Rights (1960) is distinct from the Charter. It was passed as an ordinary statute and quickly fell into disuse after it became apparent that it would be narrowly construed, and would lead in almost all cases to no real remedy.

the Bill by approving the technique of the purposive interpretation and by accepting the importance of interpreting the Bill in a manner that will give the full measure of protection to the rights and freedoms it contains, even if this marks a departure from more familiar techniques of statutory construction.[10] It then swept aside any suggestion that the absence of a remedies clause would neuter the Bill, adopting first a prima facie exclusionary remedy for violations of the Bill[11] and then claiming a broad jurisdiction in courts to remedy violations.[12] It made great efforts to overcome the curious limitation that only persons who have been detained "under an enactment" or arrested will receive the benefit of subss 23(1) and (4), by interpreting "arrest" more broadly than its common law meaning would allow.[13] It then dashed the hopes of the nay-sayers in *Ministry of Transport v Noort*,[14] a bold decision with enormous practical consequences. Those who drink and drive, a class of persons increasingly viewed with contempt by the public, were accorded the right to consult a lawyer and the right to be advised of that right, prior to providing evidential breath or blood samples. The Bill is also enhancing protection against testimonial self-incrimination as confessional evidence obtained in violation of the Bill is being excluded more readily than before, and there is every indication that powers of search will be confined strictly under the Bill.[15]

Despite these impressive endorsements, it would be naive to believe that the Bill has been roundly embraced. Much of the Bill of Rights authority in this country is hesitant. Notwithstanding the presence of s 4, which would allow the passage of unreasonable legislation to remove the protection of the Bill in any case where Parliament saw fit, there is apparent concern on the part of at least some courts that the principles enshrined in the Bill have the potential to harm the primary mission of criminal law, the protection of the public. That concern is shared by at least some politicians and undoubtedly by members of the public. The fact that it has found a home in the criminal law has, politically, made the Bill a pariah; passed to affirm and promote human rights and fundamental freedoms and to express New Zealand's commitment to the International Covenant on Civil and Political Rights,[16] it has become, in the eyes of some, a rogues' charter. This appears to be having the effect of needlessly delaying the maturation of the Bill.[17]

10 *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439. For subsequent elaboration see *R v Butcher* [1992] 2 NZLR 257 and *Ministry of Transport v Noort* (1992) 8 CRNZ 114.

11 *R v Kirifi* [1992] 2 NZLR 8 and *Butcher*, ibid.

12 See *Noort*, note 10 above, per Cooke P (p 20):

> [T]he New Zealand Act contains no express provision about remedies or the exclusion of evidence. We have no counterpart of article 24(1) and (2) of the Canadian Charter, which deal expressly with those matters. This difference is probably not of much consequence. Subject to ss.4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection.

This is a bold statement, for there are a number of impediments that could have inhibited access to remedies. I discuss these in detail in "Remedies for Violations of the New Zealand Bill of Rights Act 1990", *Essays on The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Publication No 32, 1992) 40.

13 See the discussion below at Part III, **Purposive interpretation: "arrest" and "detention under any enactment"**.

14 Note 10 above.

15 See *R v Watt* (1992) 8 CRNZ 180 and see the discussion of search and seizure in *Adams Criminal Law*, "The New Zealand Bill of Rights Act 1990: Commentary".

16 See the preamble to the Bill.

17 The problem feeds on itself. The more that the political stature of the Bill is diminished because of its

It is an unfortunate reality that domestic charters tend to become the playthings of criminal lawyers. This almost universal experience is paradoxical; it is far more acceptable politically to recognize human rights in order to protect those who are victimized by society than it is to give rights to those who victimize society. At the same time, established concepts about government have made it easier and more natural for courts to be vigilant in protecting rogues than in policing those excesses of Parliament and its ministries that touch the lives of the weak, the disenfranchised, and the dispossessed.[18] The criminal law provisions of bills and charters tend, therefore, to be their most potent.[19]

In Canada these realities have caused the Canadian Charter of Rights and Freedoms to play its largest role in the context of the criminal law. The overwhelming majority of cases deal with matters of criminal procedure, and it is in this sphere that rights have been most effectively protected. As in New Zealand, this, of course, has caused public relations problems. The Charter, like the Bill, reduces the power of the state by protecting the rights of individuals and private groups. And it is, of course, the state that prosecutes crime. Those sections of the Charter that are relevant to the criminal law therefore reduce the power of the state to prosecute successfully, this at a time when the public is clamouring with good reason for more rather than less effective prosecutions.[20]

This tension has been played out in dramatic fashion in Canada in recent months. The Supreme Court of Canada struck down as unconstitutional the rape shield provisions of the Criminal Code, which prevented accused persons from asking some questions or leading some evidence about the sexual experiences of complainants. The Court reasoned that the prohibition was unduly broad, preventing accused persons from having access in some cases to evidence that could be critically important in determining what happened.[21] The death of the section[22] was met with a deafening outcry from feminist lobbyists and

---

criminal law orientation, the less likely it is that the non-criminal human rights and fundamental freedoms provisions will take hold.

18 There are two general reasons for this that will be explored in more depth in the body of this paper. The first is the commitment to parliamentary sovereignty so deeply entrenched in Westminster democratic theory. The second, to some degree a corollary of the first, is that courts are far more comfortable working in the familiar surrounding of criminal procedure than they are in matters more directly economic and political. They are better equipped to vindicate fundamental criminal law rights than they are to preserve democratic and civil rights, or minority rights.

19 The structure of the New Zealand Bill of Rights Act 1990 exacerbates this problem. The common law has done little to confer democratic, civil and minority rights. With the notable exception of the law of crimes prior to 1893, its preoccupation historically has been with private law and procedure. Legislation is the primary legal technique for touching democratic, civil, and minority rights. Yet the New Zealand Bill of Rights Act is, by Parliamentary decree, subject to legislation; it cannot be used to strike down, modify, or to refrain from applying legislation. Its contribution to matters of democratic, civil, and minority rights is therefore limited. It is a canon for interpreting legislation and for reviewing the discretionary actions of state agents. In non-legislated matters of criminal procedure, however, there is little in the Bill to prevent its effective application.

20 In Canada crime is on the increase for a variety of complex reasons. There is a law and order mentality that is widely expressed. There are frequent demands for more protection for woman and child victims (which is affecting profoundly the law of evidence in Canada), anti-drinking and driving campaigns receive considerable attention and support, and there is a general hostility to the regime for the prosecution of young offenders, fuelled by the growing number of youth gangs and the faithful reporting of any brutal crime committed by a young person.

21 *R v Seaboyer* (1992) 7 CR (4th) 117 (SCC).

22 It was replaced by a more flexible regime developed by the Court using its common law power.

victims' rights groups which prompted the government to respond quickly. It has since passed sweeping amendments to the sexual assault provisions of the Criminal Code in Bill C-49 designed to make the prosecution of sexual offences more effective.[23]

Judges, of course, are not to behave like politicians. They are to perform their function courageously, even when their decisions are unpopular. In the Canadian case of *Collins v R*[24] Lamer J was dealing with a provision that expressly requires judges to assess the impact of their decisions on the repute of the administration of justice. His Lordship spoke sceptically about the sensitivity of members of the public to the importance of protecting the kinds of rights and freedoms contained in the Charter, noting that "the public generally becomes conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system".[25] He noted that on such matters:[26]

> 'The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion.' The Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority.

This is not to suggest that courts must disregard the concerns of the public about law and order. Courts must respond, though, not because there is lobbying about society's law and order problems but rather because society does have law and order problems to lobby about. While courts must be principled they need not be absurd. So long as they do so in a restrained and principled way, they can apply fundamental principles in a sober fashion that will not cripple effective law enforcement; the Bill did not mandate civil libertarian zealotry. The task of courts is to use the Bill to preserve basic criminal law principles, while at the same time being pragmatic about it. Courts should give full measure to the rights and freedoms contained in the Bill, but only where those rights and freedoms are relevant, and where the effect of doing so is not disproportionately harmful to the public interest in the effective prosecution of crime.

This paper is divided into three parts. In part I, I will examine why domestic bills of rights tend to become "rogues' charters", and I will attempt to explain why this is not such a bad thing. I will suggest that the structure of the New Zealand Bill of Rights Act allows for the measured application of fundamental rights and freedoms, and I will claim that it is possible for courts to apply appropriate techniques to keep the use of fundamental principle relevant and proportional. In part II of the paper I will suggest particular

23 These amendments purport to define "relevance" for the purpose of proving past sexual conduct, and they establish a firm presumption against admissibility. They also go further and affect the substantive definitions of sexual offences by redefining "consent" in strict terms, and by harnessing the defence of belief in consent. The win in *Seaboyer* by those who opposed the rape shield protection of the Code had the effect therefore of inspiring a backlash that not only removed their victory, but also cut deeply into the principle of fault. Until then, that principle had been holding its own against lobbying designed to redefine sexual offences according to the perception of the complainant rather than the state of mind of the accused. Many of the provisions of Bill C-49 will be dragged again before the Supreme Court of Canada and, unless it backs down, the entire drama will be replayed.

24 [1987] 1 SCR 265, 56 CR (3d) 193.

25 Ibid, SCR 282.

26 Ibid.

strategies for controlling fundamental principle. I will draw a fairly obvious distinction between the imposition of general limits on the reach of the rights and freedoms contained in the Bill, and the use of particular limits in individual cases. I will suggest that the techniques of purposive interpretation and purposive application of rights can be used to provide general limits on the rights and freedoms contained in the Bill, as can an appreciation of context. I will also suggest that the principled use of remedies is an appropriate technique for ensuring that the application of rights and freedoms is relevant and proportional. In part III of the paper I will examine briefly the law of arrest and detention in New Zealand. I will do so because it is an area of the law where, in my respectful opinion, the enjoyment of that right has been inappropriately curtailed by pragmatic considerations and by the failure to apply the purposive interpretation faithfully.

PART I
THE MAKING OF A ROGUES' CHARTER

The making of a "rogues' charter": parliamentary sovereignty, the courts, and criminal procedure

There are many who challenge the integrity of Bills of Rights, particularly when they have been constitutionalized, for where they have been made constitutional they allow courts to overturn the decisions of elected officials. To make matters worse, the text of a Bill is necessarily vague and malleable. Many deny the existence of established principles that will aid in construction. They urge, frequently with incontrovertible reason, that curial decisions reflect the politics and prejudices of the judge rather than the dictates of law. They argue that this constitutes illegitimate government.

Such concerns were no doubt central in influencing the design of the New Zealand Bill of Rights Act, most notably in s 4, which prevents courts from overriding legislation, even where it conflicts with the Bill. Yet as criticisms they have much less force in the area of criminal procedure than elsewhere. The contest of authority in matters of criminal procedure tends not to involve Parliament or its ministers. Most frequently, alleged violations of bills of rights in criminal cases are not challenges to legislation but rather relate to the actions of police, prosecutors, and courts themselves. While they are undoubtedly arms of the state, lay persons tend not to consider the police, prosecutors, and the courts to be "government". Even for the more politically astute, the function they perform, their non-elected status, and their independence from the rest of government, makes the judicial control of these institutions unobjectionable; parliamentary sovereignty and the integrity of the will of the people is sufficiently removed to be of little relevance. Section 4 has not, therefore, removed as much of the Bill's potential in criminal cases as it has in other areas of the law. Nor for the reasons stated do concerns about the desirability of activist courts have the same impact in the area of criminal procedure that they do in other areas. Moreover, criminal procedure emerged from judge-made law; courts have always been its progenitors and its guardians. Rules of criminal procedure are the product of, and the epitome of, the common law method. As one American commentator observed in the context of the American Bill of Rights, "[i]t took no violent

stretching of democratic theory to suppose an expectation on the part of the people that, in employing criminal sanction, the political branches would abide the judge's sense of what was mete and decent in the way of procedure".[27]

Fundamental criminal law rights do not suffer from the same problems of definition that plague most of the other rights and freedoms affirmed in the Bill. For this reason, as well, their growth and application is less likely to be inhibited by concerns about the desirability of judicial activism. More so than in any other area of the law, the accusatorial system employed in the prosecution of offences is structured and maintained through a network of familiar concepts available to guide the criminal lawyer. This has become evident in the text of the Bill itself. Its criminal procedure sections tend to be precisely tailored statutory provisions that differ in kind from the loose and aspirational wording employed for more elusive concepts such as fundamental freedoms, democratic rights, non-discrimination protections, or even the principles of natural justice. Even where the criminal law provisions are expressed in a vague fashion, they conjure up familiar images, seen before in the reasoning of common law judgments. Simply put, courts are more dexterous with familiar criminal law tools than they are with the newer implements of fundamental freedoms, democratic rights, and equality. They are therefore more apt to reach for those criminal law tools, and to work well with them.

This, of course, leads to the regrettable reality that the protection of bills of rights is infinitely more accessible in criminal than in non-criminal cases. Typically proclaimed in the name of oppressed minorities and the politically weak, it is therefore the invariable experience with domestic bills and charters that they come to serve primarily a less sympathetic clientele: the criminal accused, the overwhelming majority of whom, experience has shown, are guilty in fact. In the eyes of many, bills of rights are therefore undesirable because they become "rogues' charters"; the hands that clutch and wave bills of rights in the name of decency are often sullied with the blood of crime.

Defending the existence of a rogues' charter

Those of us who are criminal lawyers tend not to be overly distressed by this. The presumption of innocence is a legal concept that is reflexively incanted in answer to such criticism, but as hackneyed as that phrase is, it does express ample justification for the English tradition of conferring substantial rights on those accused of crime. There are persons who are wrongly charged. If freedom means anything, it is the right of the innocent not to be wrongly punished and not to be subjected without sound justification to arrest, search, or interrogation. Moreover, the very realization that most persons charged are indeed rogues speaks volumes about the need to develop safeguards for the decent treatment of such persons. If as a class they are held in contempt, their ill treatment is almost assured, and that ill treatment will engender little sympathy. The conundrum this places us in is that despite our immediate inclinations, our dispassionate values suggest that as persons they are to be treated with dignity and humanity. It is the function of a Bill to ensure this humane treatment out of respect for its basic values, for that humane treatment will not happen out of respect for accused persons themselves. It is done as a matter of principle.

27 Bickel, "The Supreme Court and the Idea of Progress" (1978) 32.

The cost of being principled

The kind of majestic dialogue that goes on about fundamental rights had the Crown in *Noort* cautioning "that the New Zealand Courts should not adopt what they called 'the rhetoric' of some Canadian Supreme Court judgments".[28] In fairness to those of us who poeticize when describing fundamental principles, notions about justice, fairness, and morality are the stuff of verse. They are the stuff of anthems, literature, and eulogy. They puff the chest and wet the eye. When society grants rights to persons who have flouted its most basic rules, it is done in a spirit of generosity. This engenders pride, perhaps even a feeling of self-righteousness. It expresses the dignity of turning the other cheek. It is the kindness of the good Samaritan. It is the embrace of the prodigal son. And therein lies the kernel of wisdom in the Crown's caution in *Noort*; it is possible for courts to get flush with the enterprise, and to lose sight of the costs engendered by the mission. The price of observing principle is the restriction on investigative techniques, the exclusion of evidence, and even, in some cases, the staying of proceedings. More bluntly put, the cost is the prevention of the successful prosecutions of some persons who are guilty. And if there is value in convicting the factually guilty, as there is generally believed to be, that price can be considerable.

To say that we pay that price as a matter of principle may be the noble affirmation that we are prepared to accept the costs associated with protecting our integrity. On the other hand, the phrase "it was done as a matter of principle" is sometimes used as the defiant justification provided by the actor whose conduct is self-destructive. There comes a point where, pragmatically, it is too expensive to adhere to principle. Where this is so it may be appropriate to compromise that principle. It has always been the nature of legal principles to allow for this, and it is a reality that is accommodated by the structure and nature of the New Zealand Bill of Rights Act.

What the Bill gives to "rogues": the juridical nature of its rights

Legal philosophers have toiled in their efforts to distinguish rights from freedoms and rules from principles. This is because the nature and function of various categories of legal concepts differ, and it is helpful in the orderly development of law to identify these differences. For example, the concept of a right normally suggests the existence of a correlative duty. The concept of a freedom, on the other hand, connotes the ability to act without interference but suggests no entitlement to positive assistance in the enjoyment of that freedom. The concepts of rules and principles also differ. Rules are generally conceived to be mandatory. Where a rule exists, it must be applied. As such, it is impossible for conflicting rules to exist within a legal system.[29] Principles, on the other hand, are not mandatory. They are notions of justice, morality, or fairness recognized as worthy of protection by a legal system. As mere values, they can conflict with one another. The function they serve is to assist in the generation and application of rules. Rules can therefore be developed to give effect to the values inherent in a principle. Moreover, principles can guide the exercise of discretion where a rule permits a range of choices to be made. In other words, principles are part of the raw material consulted in the selection

28 Above, note 10, at 122-123 of the decision of Cooke P.

29 Exceptions to rules are themselves rules. They do not conflict with the rules to which they are exceptions because they have an independent, exclusive sphere of operation.

and application of rules but they do not, themselves, have the force of law. Unlike rules, principles cannot be invoked directly by persons claiming legal rights.

Lawyers have always been lax in employing the language of rights, freedoms, rules, and principles. This is because the definitions for the concepts are not universally valid. They break down in some contexts. By their very nature, bills of rights tend to challenge the integrity of these definitions. They take freedoms and, in some respects, convert them into rights.[30] More importantly for present purposes, the rights and freedoms stipulated in bills of rights tend to be a hybrid between rules and principles. They are generally expressed as principles would be, in vague and aspirational terms conjuring up general notions about fairness, justice, or morality. Yet, unlike pure principles, they can by enforced directly by persons with standing. In simplistic terms, bills of rights take basic principles and give them the function of rules. Of course, they tend to lack the usual definitional precision of rules because of the diverse[31] and timeless[32] roles they are meant to play. Moreover, unlike simple rules, the rights and freedoms expressed in the Bill are not absolute. They are prima facie rights and freedoms, subject to limitations. Some of those limits will be internal, imposed as a matter of construction. Other limits will be external, engrafted through the operation of ss 4 and 5 of the Bill. The rights and freedoms affirmed in the Bill are therefore contingent rights, converted into rules only after they have run the gauntlet of parliamentary sovereignty and have been distilled in a restrained and careful manner through the lens of pragmatism.

All of this is quite unsatisfying for the legal positivist since it plays havoc with the primacy of certainty. If public policy is an unruly horse, pragmatism is a bronco with a burr under its saddle. The fact has to be faced, however, that the "general [international] recognition that some human rights are fundamental and anterior to any municipal law",[33] which helped carry the passage of the Bill of Rights Act, is itself a rejection of pure positivism and certainty.

By the same token, endorsement for the qualification of fundamental rights and freedoms in the name of pragmatism dissatisfies the civil libertarian or the ardent natural lawyer. They urge, with reason, that pragmatism is hardly an appropriate basis for sacrificing fundamental rights and freedoms. They point out that it will sustain the subjugation of those rights and freedoms in the hard cases, where they are most needed and can render those rights almost meaningless. As the structure of the Bill reveals, however, the day has been carried by the ethical pragmatist: rights and freedoms are recognized as fundamental and will be preserved, where it is not unreasonably costly to do so.

The central tension in criminal Bill of Rights jurisprudence, then, is to ensure that the

30 See *Adams Criminal Law*, "The New Zealand Bill of Rights Act 1990: Commentary", 10.1.05.

31 The rights and freedoms contained in the Bill perform several functions. They are canons of interpretation under s 6, principles to be consulted in the development of legislation (s 7), standards to be used to challenge common law rules, and rights that can sustain remedies where there has been non-compliance by state agents exercising discretionary or non-statutory powers.

32 Notions about justice, fairness, and morality adapt over time. If the Bill is to form the basis for the protection of principles of justice, fairness, and morality, its provisions must be left open to remain relevant. See the words of Dickson CJC in *Hunter v Southam Inc* [1984] 2 SCR 145, 155-56, 11 DLR (4th) 641, 14 CCC (3d) 97.

33 *Ministry of Transport v Noort*, above, note 10, p 24, per Cooke P.

search for principle is not conducted in a self-destructive manner while at the same time ensuring that the allure of convicting the factually guilty does not devalue fundamental principles unduly. As Canadians have discovered, this is an impossible task to perform perfectly. It is even a difficult task to perform well. It is a task that can be aided, however, by the development and application of appropriate legal technique.

PART II
GUIDES FOR RECONCILING PRINCIPLE AND PRAGMATISM

Relevance and proportionality

Two objectives, more than any other, define the pragmatic application of principle. The first is the desire to keep the application of principle relevant. Society gains nothing where rights and freedoms are applied in cases where the principles they affirm are not advanced through their application. In criminal cases, where the application of those rights and freedoms prevents the trial of charges on their merits or on all available, probative evidence, society loses a great deal. The first pragmatic objective in the application of fundamental principle should therefore be the pursuit of relevance. The second objective is that of proportionality. Ideally, the vindication of fundamental rights and freedoms should not produce costs that are greater than the benefits to be gained. Pragmatic limitations on rights and freedoms contained in the Bill should therefore be directed at ensuring the relevant and proportional application of fundamental rights.

General and specific limitations on the application of principle

Relevance and proportionality can be enhanced through the development of appropriate limitations on the operation of fundamental principle. In some cases general limitations can be imposed on the reach of rights and freedoms. This can be done through the use of ss 4 and 5 of the Bill, or alternatively through the definition of rights and freedoms themselves. The application of rights or freedoms can also be kept proportional and relevant in particular cases, under appropriate circumstances. This can be done through the principled application of remedies.

General limitations upon rights and freedoms

1 *External limitations: the non-contribution of s 4 and the relative non-contribution of s 5*

The most potent technique for limiting the application of fundamental rights and freedoms is the external limitation that exists in s 4 of the Bill. This section has nothing to do, however, with ensuring that the rights and freedoms contained in the Bill are applied pragmatically, with relevance and proportion. It is too unwieldy to perform that function; it is more cleaver than scalpel. Any enactment, no matter how unreasonable, draconian, or excessive, will predominate where it is inconsistent with the rights and freedoms contained in the Bill, not because this represents sound policy in a particular case but rather because the commitment to the values contained in the Bill is, in the end, less than the general commitment to parliamentary sovereignty. The extent to which it ultimately contributes to keeping the operation of fundamental principles relevant and proportional

is dependent not on legal technique but rather on the choices made by politicians. For this reason it will not be analysed further in this paper. Suffice it to say that the existence of s 4 should be enough to embolden courts in the interpretation and application of principle. Their decisions can be unceremoniously overturned by legislative amendment if those courts are perceived to overshoot the mark.

Section 5, on the other hand, if read in isolation, appears to be a tool for keeping the operation of principle appropriate, relevant and proportional. Like s 1 of the Charter, it purports to make fundamental rights and freedoms subject to limitations that are demonstrably justifiable in a free and democratic society. In Canada s 1 has resulted in the development of criteria for judging when a limitation on the application of a right or freedom will be appropriate, relevant and proportional.[34] The promise of s 5 of the Bill has been largely dashed, however, by the passage of s 4. Although the relationship between the two sections is yet to be finally settled, some Court of Appeal judges have taken the view that s 5 is of relevance only in cases where the limitation on a right or freedom is prescribed by common law;[35] where statutory limitations are offered to justify the non-application of fundamental rights, only s 4 need be considered since any statutory limit, reasonable or not, will predominate.[36] Other judges of the Court of Appeal have taken the preferable view that s 5 should be used to analyse alleged statutory limitations before s 4 is considered.[37] If the statutory limitation is reasonable and only qualifies but does not completely contradict the right or freedom, then that right or freedom can exist in its qualified form and there is no need to examine s 4.[38] Moreover, where an implicit statutory limit is presented to justify a contravention of a prima facie right or freedom, it has been urged that s 5 should be used to confine such implied limitations to those that are reasonable and demonstrably justifiable.[39] Under either view, s 5 will rarely be

34 The *Oakes* test, developed in the case of *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200, 50 CR (3d) 1, is applied in deciding whether a limitation satisfies s 1. I describe the test in "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent Law Review 353. It purports on its face to be a rigid, legalistic test with specific criteria, although some judges treat it as a test that can vary depending on the circumstances: see *R v Edwards Books* (1986) 55 CR (3d) 193 (SCC); *R v Wholesale Travel Group Inc*(1992) 8 CR (4th) 145, 84 DLR (4th) 161, [1991] SCR 154; *R v Butler* (unreported, 27 February 1992) (SCC) and *R v Downey* (unreported, May 1992) (SCC). The Supreme Court of Canada has been criticized for applying the test inconsistently, most recently and trenchantly in Stuart, *Charter Justice In Canadian Criminal Law* (1991) 8-20. The part of the test most likely to break down is its "minimal impairment" criteria. At times the Court seems to insist that to be justifiable, a legislated limitation must interfere with the right as little as possible: see, eg, *R v Seaboyer* (1992) 7 CR (4th) 117 (SCC). More frequently, the Court acknowledges that the legislature can choose a statutory scheme that most effectively accomplishes the objective of the statute, even though there might be more minimal but less effective techniques available: see, eg, *R v Chaulk* (1991) 2 CR (4th) 1 (SCC). The Court has become more cognizant over time of the fact that "the business of government is a practical one": per La Forest J in *Edwards Books* (p 259).

35 It is worth noting that the Supreme Court of Canada has indicated that s 1 of the Charter will be applied strictly and rigorously when the limitation prescribed by law is based in common law rather than statute. *R v Swain* (1991) 63 CCC (3d) 481, 514 (SCC).

36 This is the view taken by Gault J, and provisionally by Cooke P, in *Ministry of Transport v Noort*, above, note 10.

37 Richardson J, McKay J concurring in *Noort*, ibid. Hardie Boys J felt that ss 4 and 5 could be considered together.

38 In *Noort*, note 10 above, the Transport Act limited the right contained in subs 23(1)(b) only to the extent that it was reasonable to confine detainees to telephone, rather than personal, consultation.

39 *Adams Criminal Law*, "The New Zealand Bill of Rights Act: Commentary", ch 10.4C.04.

definitive where legislation is being considered.[40] The contribution that it can make to keeping the application of principle reasonable and proportional where it is allowed to operate has already been well documented.[41] It will not therefore be analysed further in this paper.

2 *Using interpretation of prima facie rights to keep the application of principle effective and relevant*

There is obvious danger in using the process of interpretation of the prima facie rights and freedoms contained in the Bill to prevent it from producing an unattractive result in a particular case. The dynamics of stare decisis can mean that, in the long run, the interpretation given to legislated words will prove to be of more significance than the words themselves. Expedient and clever interpretation to respond to unattractive applications of the Bill may well render the Bill incapable in future cases of fulfilling its function, even though in such cases its protection is not only proportional and relevant, but also necessary to preserving fundamental principle.

Fortunately, the legitimacy of interpreting the provisions of the Bill in a narrow fashion in order to confine their application has already been denied. The first thing settled about the Bill is that its provisions are to be interpreted to give full effect to the interests that the Bill is meant to protect. Narrow, technical interpretations are to be avoided.[42] This does not mean, however, that the process of interpretation cannot contribute to the pragmatic application of fundamental principle. Indeed, properly applied, a purposive interpretation can enhance the prospect that the rights and freedoms affirmed in the Bill will be applied solely where there is sound reason for it. It can enhance the objective of relevance, even by narrowing appropriately the reach of the provisions of the Bill.

(a) The limiting effect of the purposive interpretation

The technique of purposive interpretation is to attempt to identify the underlying purpose for the relevant right and freedom and then to use it to assist in defining the content of that right or freedom. In the language of the Supreme Court of Canada, "[t]he meaning of a right or freedom ... [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect".[43] The purposive interpretation is justified for several reasons,[44] although the

40 It is difficult to imagine that the competing views as to the role of s 5 will make a difference in many cases. This is because s 5 can salvage rights and freedoms by confining statutory limitations to those that are reasonable solely where the statutory limit can be given such a meaning under s 6. Where it cannot, s 4 applies and even unreasonable limits will be given effect to.

41 See the *Oakes* cases referred to above, *Adams Criminal Law*, "The New Zealand Bill of Rights Act 1990: Commentary", ch 10, as well as the numerous Canadian articles on the topic, including Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986) 24 Osgoode Hall LJ 867; Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall LJ 123; Elliot, "The Supreme Court of Canada and Section 1 - The Erosion of the Common Front" (1987) 12 Queen's LJ 277; Kerans, "The Future of Section 1 of the Charter" (1989) 23 UBC L Rev 567; Siebrasse, "The *Oakes* Test in the Supreme Court: An Old Ghost Impeding Bold New Initiatives" (1991) 23 Ottawa L Rev.

42 *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439; *R v Butcher* [1992] 2 NZLR 257; *Ministry of Transport v Noort*, note 10 above.

43 *R v Big M Drug Mart* [1985] 1 SCR 295, 344; *Mills v R* [1986] 1 SCR 863, 917.

44 Including the fact that the general language employed in a bill or charter will typically yield no precise answer if interpreted as statutes normally are.

most frequently stated one is the need to keep ordinary techniques of interpretation from narrowing the principles of a bill or charter, thereby denying persons "the full measure of the fundamental rights and freedoms referred to".[45] Not surprisingly, this has created a tendency to think of purposive interpretations as being expansive. While this is generally so, it is not invariably the case. There is a distinction to be drawn between a "generous" interpretation and a "purposive" one, since a purposive interpretation need not be the most generous interpretation.[46] The primary function of the purposive interpretation is to ensure that the interpreted section applies in those cases where the mischief it was created to ameliorate actually exists. In this sense, it helps focus provisions, reducing the prospect that they will be applied gratuitously where the mischief they are directed at has not occurred. For example, like the New Zealand Bill of Rights, the Charter provides protection against "unreasonable search or seizure".[47] A generous interpretation of "search" might include any case where a state agent looks for incriminating information or material. A purposive interpretation, on the other hand, reflects the fact that the section exists to protect claims of privacy that are reasonably held by the claimant. It therefore results in the prima facie right being violated only where the person subject to the search has a reasonable expectation of privacy in the place or thing searched.[48] There is therefore no unreasonable search where a state agent finds incriminating material that was kept in plain view by the subject[49] or where the subject does not have a privacy interest in the place of search.[50]

A purposive interpretation can even produce a right that is narrower than ordinary rules of interpretation would produce. Section 13 of the Charter provides an apt illustration. In Canada, the right of witnesses other than the accused to refuse to testify on the grounds that their answers might incriminate them has been abolished statutorily and replaced with a use immunity.[51] Witnesses must answer self-incriminatory questions, but the answers provided cannot be used to incriminate them in subsequent proceedings. Section 13 constitutionalizes this regime. It provides two express exceptions, however. Prior testimony can be used to incriminate the witness "in a prosecution for perjury" or in a prosecution "for the giving of contradictory evidence".[52] Classic interpretation would ensure that these were the sole exceptions to the protection of s 13 since they are the exclusive expressed exceptions. Canadian authority, however, has judged that the purpose behind s 13 does not extend to protecting persons from prosecution for giving

45 *Minister of Home Affairs v Fisher* [1980] AC 319, 328-329, quoted with approval in *Flickinger*, note 42 above and *Noort*, note 10 above.

46 See Hogg, "Interpreting the Charter of Rights: Generality and Justification" (1990) 28 Osgoode Hall LJ 817, and *Adams Criminal Law*, "The New Zealand Bill of Rights Act 1990: Commentary" ch 10.2.03.

47 The Charter in s 8, the Bill in s 21.

48 *Hunter v Southam Inc* [1984] 2 SCR 145; (1984) 11 DLR (4th) 641, 14 CCC (3d) 97.

49 *R v Longtin* (1983) 8 CRR 136 (Ont CA).

50 *R v Pugliese* (unreported, 11 March 1992) (Ont CA).

51 Section 5 of the Canada Evidence Act, RSC 1985, c. C-5.

52 Section 13 provides:

> A witness who testifies in any proceedings has the right not to have incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
>
> Perjury is an offence under s 120 of the Criminal Code, while the giving of contradictory evidence is an offence under s 124.

false evidence or attempting to mislead a court. Despite the limited reach of the expressed exceptions, s 13 is therefore construed as not applying in any case where the testimony of a witness is the actus reus of an offence.[53] The purposive interpretation therefore assists in providing only relevant relief.

In this sense, a purposive interpretation is a pragmatic interpretation. It is not as bound by the imprecision of language as more common techniques of interpretation are. It focuses on the problem to be addressed, and ensures the application of the provision in cases where it is truly needed.

(b) Harkening to the purpose in the application and refinement of doctrine

The failure to harken back to the purpose of a particular provision of the Bill when applying previous authority dealing with that provision, or when refining doctrine associated with a section, can cause the protection of a right or freedom to be misplaced. This can result in the application of those rights in circumstances where the mischief to be addressed by the right in question does not exist. Two examples from Canadian jurisprudence illustrate how the failure to harken back to the purpose behind a provision can give a right or freedom inappropriate breadth.

(i) *R v Brydges*

Experience in Canada in the early years of the Charter proved that some detainees chose not to call a lawyer because they could not afford one and were unaware of the availability of legal aid. In *R v Brydges*[54] the Supreme Court of Canada, applying an enlightened and thoroughly defensible purposive interpretation, held that police officers would have to provide detainees with information as to the availability of legal aid. In this way, the right to counsel would not be forgone because of poverty and ignorance.

After *Brydges* was decided, each police force had their Charter warning cards reprinted to add advice as to the availability of legal aid. The Attorney General's office in Ontario chose wording that is admittedly technical, and which may not be understood by some lay persons. Although the matter is yet to be settled, an increasing number of trial courts in Ontario have held that the wording is inadequate and they have therefore found that the Charter is violated where the cards are used. At least dozens of people have been acquitted of alcohol driving offences as a result, typically without any inquiry into whether the detainee in the case had any difficulty understanding the warning, or any financial impediment to contacting counsel. The net effect is that *Brydges*, a case intended to ensure that the poorer members of society do not lose the opportunity to consult counsel because of their poverty, has become a decision relied upon by persons who can afford the best lawyers, in order to avoid accountability.

The reason this is wrong is that the purpose of the decision in *Brydges* was not to require the police to add a series of words to the incantation they perform after detaining persons. Its purpose was to ensure meaningful access to counsel. Where the incantation is irrelevant to the enjoyment of that right for a particular complainant, the failure to perform

53 See *R v Staranchuk* (1983) 36 CR (3d) 285 (Sask CA), affirmed [1985] 1 SCR 439; *R v Stegmaier* (unreported, 19 September 1985) (BC Co Ct) per Selbie Co Ct J.

54 (1990) 53 CCC (3d) 330 (SCC).

it in no way attracts the mischief of subs 10(b), the right to counsel provision. If courts interpreting *Brydges* had regard to the purpose behind the right to counsel it would have been made clear to them that subs 10(b) is violated only when persons who cannot afford counsel choose not to do so out of ignorance as to the availability of legal aid. To find an automatic breach where others do not hear words that are irrelevant to them, is to apply principle in a thoroughly unpragmatic, self-destructive fashion.[55]

(ii) Pretrial delay and waiver

The determination in Canada of whether there has been a violation of the right to be tried within a reasonable time is a complex exercise. Delay happens for all kinds of reasons, including delay that is caused, contributed to, or consented to by the accused. The purpose behind subs 11(b) is in no way advanced by allowing an accused who is responsible for delay to rely upon it as a basis for a claim that the trial has not been held within a reasonable time. Yet Canadian authority allows some such delay to be considered in quantifying the pretrial period to be tested against the standard of "unreasonableness". This curiosity is the unfortunate result of the non-purposive application of the strict concept of "waiver" culled from other Charter provisions.

Waiver is an important concept in right to counsel cases, for no-one can be made to consult a lawyer if they choose not to. No Charter violation occurs, therefore, where a detainee waives the right to counsel. To ensure that waivers of the right to counsel have integrity Canadian courts have come to apply a stringent standard. The Crown must establish a valid waiver, and in doing so it must prove that the detainee understood the existence of the right, the nature of the right, and voluntarily chose to forgo that right.[56] These are sage requirements in right to counsel cases, and perhaps even in search and seizure cases,[57] but have little relevance in deciding whether the state has violated the right of a person charged to be tried within a reasonable time. The sole inquiry in quantifying the period of delay to be tested against subs 11(b) should simply be, who is responsible for the delay? If it is the Crown or the state, the accused can rely upon it. If the accused caused, contributed to, or consented to the delay, he or she cannot. Despite this, the Supreme Court of Canada in the unreasonable delay case of *R v Askov* applied right to counsel waiver authority, concluding that before a period of delay can be removed from consideration:

> [T]here must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused understood that he or she had [the relevant] guarantee, understood its nature and has waived the right provided by the guarantee.[58]

Unfortunately, the requirements of that formula bear no precise reference to the purpose underlying subs 11(b), which is the amelioration of prejudice caused by state-engendered delay.

55 The consequences of a *Brydges* breach will typically be exclusion because of the fair trial dichotomy. See the discussion below at part II, **Limitations on rights and freedoms ...** 2(b) The fair trial dichotomy.

56 See *Clarkson v R* (1986) 26 DLR (4th) 493, 25 CCC (3d) 207 (SCC); *R v Manninen* (1987) 41 DLR (4th) 301 (SCC); *R v Ross* [1989] 1 SCR 3; *R v Black* (1989) 50 CCC (3d) 1 (SCC); *R v Evans* (1991) 63 CCC (3d) 289 (SCC).

57 *R v Wills* (unreported, 20 February 1992) (Ont CA).

58 (1990) 74 DLR (4th) 355, [1990] 2 SCR 1199, 79 CR (3d) 273.

When the problem was ultimately discovered by the Supreme Court of Canada, the Court did not correct it by rejecting the waiver test. Instead it held that actions by the accused or counsel for the defence falling short of waiver but which cause or contribute to delay will not remove any periods of delay from consideration on behalf of the accused, but may be relevant in assessing whether a remedy should be granted.[59] With respect, brief reflection on the purpose of subs 11(b) would have revealed how needlessly complex and undirected this approach is. It has the potential to provide relief in cases where the principles underlying the right are simply not relevant.

(c) Contextual interpretations

Canadian courts defining the application of procedural protections under the Charter have come to the realization that fundamental criminal law principles are contextual. In one setting they can require precise fidelity, while in another context they can be readily compromised. In this way they seek to ensure proportionality. As La Forest J said in *R v Lyons*, "the requirements of fundamental justice are not immutable: rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another."[60]

Where fundamental principles are constrained in one area while being given full measure in another area, it is ultimately for pragmatic reasons having to do with proportion and relevance. Typically this occurs where it is apparent that to apply the principle in an unqualified fashion would have the disproportionate effect of threatening the efficacy of investigative techniques, or the enforcement of law, while at the same time providing relief that is not necessary to the protection of fundamental principle.

(i) Using the context of a right within a charter or bill as a limiting principle

The Supreme Court of Canada decision in *R v Hebert*[61] illustrates that the focus and nature of related rights can assist in justifying the pragmatic limitation of particular principles. In that case the Court used such considerations to limit the effective operation of the fundamental right to pre-trial silence to situations of detention.

The Charter does not provide expressly for a right to pre-trial silence. Its express self-incrimination content is limited to the non-compellability of accused persons as witnesses at their trial[62] and the protection of witnesses against having their testimony used to incriminate them in subsequent proceedings.[63] The right to silence is not otherwise provided obvious protection.[64] On the other hand, subs 10(b) of the Charter, the right to counsel provision, is recognized as being concerned in large measure with ensuring that detained persons know that they are free to refuse to answer questions.[65] Indeed, the

59 *Sharma v R* (unreported, 26 March 92) (SCC).
60 (1987) 37 CCC (3d) 1, 45, 44 DLR (4th) 193, [1987] 2 SCR 309.
61 (1990) 57 CCC (3d) 1.
62 Subsection 11(c).
63 Section 13.
64 Under the Bill the additional protection of subss 23(4) (the right of certain detained persons to refrain from making statements and to be advised of that right) and 25(d) (the right not to be compelled to confess) are available.
65 See Shaw & Butler, "The New Zealand Bill of Rights comes alive (I)", [1991] NZLJ 400, 406-407 for a complete discussion of the various purposes behind subs 10(b).

entitlement to know about the freedom not to incriminate oneself is considered to be so important that state agents are to suspend the questioning of detained suspects until a reasonable opportunity to consult counsel has been provided.[66] Once a detainee has had the opportunity to consult counsel, however, there is nothing in the Charter to prevent questioning. The reality, of course, is that detainees who have consulted counsel will be told not to speak to persons in authority, and they will often take such advice. In Canada it therefore became common for the police to seek to obtain admissions through the subterfuge of posing as fellow prisoners and provoking conversation about the offence under investigation. To many this seemed wrong. It allowed persons who sought to enjoy their right not to speak to persons in authority to be deprived unwittingly of that right.[67]

In *Hebert* the Court held that there is a pre-trial right to remain silent contained in s 7 of the Charter, as a principle of fundamental justice. It is violated by state agents who hide their identity as state agents and then cause suspects to make incriminating statements. The Court drew a pragmatic line, however. The principle was held to be confined to those accused persons who are detained or in custody. There is therefore nothing in s 7 or elsewhere in the Charter to prevent undercover investigations of non-detained suspects, or to prevent the police from using such techniques to secure self-incriminating admissions.[68]

The Supreme Court of Canada was open about the fact that it was involved in a line-drawing exercise based upon concerns for the efficiency of criminal investigation. McLachlin J, for the majority, spoke of the importance of "the state's legitimate interest in law enforcement [which cannot] be frustrated without proper justification".[69] She felt it was appropriate to confine the application of the principle against pre-trial self-incrimination to cases of detention because the Charter gives special consideration to situations of detention.[70] Moreover, detention is relevant to the enjoyment of the protection against pre-trial self-incrimination. Persons who are detained are in a distressing, inherently coercive atmosphere. Their associations are subject to the control of state authorities, and they are deprived of the freedom to have immediate access to the support of others, including ongoing contact with counsel. While some of the Court's reasoning can be criticized,[71] the essence of the decision is that the principle of fundamental justice

66 *R v Manninen* [1987] 1 SCR 1233. There is good reason to believe that similar protection is developing in New Zealand. In *R v Butcher* [1992] 2 NZLR 257, 266 (CA) Cooke P noted that once one of the detainees had "showed that he wished to wait for legal advice by his remarks in the police car[,] [h]e should not have been interrogated thereafter". See the discussion in *Adams Criminal Law*, "The New Zealand Bill of Rights Act 1990: Commentary".

67 It may be that subs 23(4) will apply in New Zealand to prevent this from happening.

68 Section 7 does, however, apply in cases of "entrapment" where such techniques go beyond acceptable limits. See *R v Mack* (1988) 44 CCC (3d) 513 (SCC).

69 Note 61 above, p 38.

70 Sections 9 and 10 rights are premised upon the fact of detention. Inexplicably, her Ladyship went further, indicating that ss 7-14 exist to preserve the rights of detained individuals. This is a curious overstatement since ss 8, 11, 12, 13, and 14 are not associated with detention. The included observation that the legal rights provisions give special status to detention cannot be denied, however.

71 Some would argue that the Court should not have developed internal limitations on the pre-trial right to silence; it would have been more appropriate to require limits to be imposed, if at all, under s 1. The fact is, however, that there is no legislation dealing with the problem and it would be unrealistic to expect legislation. More importantly, a blanket limitation seemed appropriate as a matter of principle, in the definition of the right.

protecting pre-trial self-incrimination requires more complete protection for detained than non-detained persons. Moreover, the Charter itself identifies detention as a discrete event that can, as a matter of principle, define the onset of fundamental rights. The context of the right to pre-trial silence within the Charter therefore provides a principled basis for confining the protection of that right to cases where it was perceived to be truly necessary, and where it will not interfere unduly with important investigative techniques.

(ii) Using the declining consequences to the accused as a limiting principle

It has long been recognized that criminal law principles apply with less rigour where the consequences of conviction to a person charged decline in significance. The paradigm example is with the classification of offences, as illustrated by the leading Canadian case, *R v City of Sault Ste Marie*.[72] That case established that for mere regulatory offences, the common law countenances material compromise on the principle of fault and on the presumption of innocence, in the interest of effective enforcement.

A similar principle is being used in Canada to confine the application of fundamental rights, where to allow those rights unbridled application would be too costly. Where the consequences of conviction are significant enough, the principles must be allowed to operate. Where those consequences are sufficiently reduced, the principles can be confined as their protection is of reduced relevance to the accused.

(1) Minimum mens rea

The Charter has been used to create certain minimum mens rea requirements. Unless the prescribed level of moral culpability accompanies the actus reus, a particular offence will be unconstitutional.[73] The leading case is *R v Vaillancourt*.[74] The Supreme Court of Canada held that the principles of fundamental justice can be offended by the conviction and punishment of persons for an offence that does not require objective foresight of the consequence prohibited by that offence.[75] The Court stopped short of holding, however, that this principle was of general application. The Court was cognizant that if objective foreseeability of consequences was to be recognized as a generally imposed mens rea

---

Of more concern is that McLachlin J stated that one of the purposes of ss 7-14 was "to maintain the repute and integrity of our system of justice", which would allow law and order considerations to influence the definition of rights. With respect, it is difficult to accept that provisions designed to guarantee rights to individuals could be fairly characterized as having as one of their purposes the assurance of effective investigation. The undoubted interest that the public has in such matters is more appropriately a basis for qualifying rights, rather than one of the rationales for those rights.

72 (1978) 85 DLR (3d) 161 (SCC). For true crimes there is to be a presumption of mens rea. Regulatory offences are presumed to be strict liability offences, wherein guilt is presumed upon proof by the Crown of the actus reus, subject to rebuttal by the defendant through the establishment of due diligence. Alternatively, regulatory offences are absolute liability offences, subject to no defence of due diligence.

73 In the first such case, *Reference re s 94(2) of Motor Vehicle Act* (1985) 23 CCC (3d) 289, 24 DLR (4th) 536, [1985] SCR 486, it was held that absolute liability offences are prima facie unconstitutional where the liberty of the accused is in peril, as it will be where the accused can be imprisoned if found guilty. At a minimum, s 7 of the Charter requires that defendants be able to avoid conviction by establishing due diligence.

74 (1987), 39 CCC (3d) 118, 133-134, 47 DLR (4th) 399, [1987] 2 SCR 636.

75 In *R v Martineau* (1990), 79 CR (3d) 129 (SCC) this principle was made more rigid. It now requires that subjective foresight of death is required for murder convictions; mere objective foresight will not be enough.

requirement it would tear a path through the Criminal Code and other statutory offences. A line was therefore drawn, albeit an obscure one. The Court held that the principle would be honoured solely where the offence was of such a character that conviction would carry with it a "special stigma". Murder convictions are, of course, seriously stigmatizing, as are convictions for theft, since they involve proof of dishonesty.[76] The corollary of this, of course, is that, absent special stigma arising from conviction, the fundamental principle that guilt should not rest on anything less than objective foresight will not operate. In qualifying the reach of the principle, the Court therefore signalled that it was legitimate to limit fundamental principles, depending upon the seriousness of the consequences of their non-observance to the accused, and depending upon the practical consequences that their application would have on the effectiveness of prosecutions.

The concept of "stigma" has become central under the Charter. Section 7 protects the "security of persons", which has been interpreted to protect persons against the stigmatization associated with criminal prosecution.[77] Moreover, s 7 has been recognized as the basic legal rights provision, colouring the interpretation and application of the balance of the criminal procedure sections. Stigma has therefore played an important role in defining the purpose underlying subs 11(b), the right to be tried within a reasonable time.[78] It is not surprising, then, that increased stigmatization has been used as a principled basis for delimiting the operation of fundamental principle under the Charter. The unsatisfying challenge for Canadian courts in applying the constitutionalized principle of fault, however, lies in identifying which offences are stigmatizing and which offences are not.[79]

(2) Search and seizure

In *Thomson Newspapers v Canada* the Supreme Court of Canada confirmed that "the application of a less strenuous and more flexible standard in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s 8".[80] The Court then upheld a regulatory seizure regime that contravened each of the requirements for a reasonable search and seizure adopted in the leading case of *Hunter v Southam Inc.*[81] In justifying this departure from the strict requirements of

76 Note 74 above, p 134. Manslaughter convictions, on the other hand, do not have a special stigma because of the absence of intention.

77 Unlike its analogue, s 8 of the Bill, which protects only the right to life.

78 See below at part II, **Limitations on rights and freedoms ...**, 2(a) "The right to trial within a reasonable time and the stay of proceedings".

79 In *R v Wholesale Travel Group Inc* (1992) 8 CR (4th) 145 (SCC) the defendant urged that the offence of false advertizing had the same special stigma as theft because it also involved dishonesty. The Court denied this was so because the offence of false advertizing could be committed inadvertently, allowing for the conviction of honest persons. See *R v Peters* (1991) 11 CR (4th) 49 (BCCA), where arson was held not to be a seriously stigmatizing offence.

80 [1990] 1 SCR 425, (1990) 54 CCC (3d) 417, 67 DLR (4th) 161, 219-20.

81 [1984] 2 SCR 145, (1984) 11 DLR (4th) 641, 14 CCC (3d) 97. Under the section challenged in *Thomson*, the Director of the Combined Investigation Branch could require the production of documentation for inspection without reasonable and probable cause to believe that an offence had been committed and that the production would produce evidence. Production could be required by an investigator without the prior approval of a neutral third party, and without any indication that the materials sought to be produced would be strictly relevant to the offence under investigation. Each of these short-comings violate the minumum standards for reasonable searches and seizures developed in *Hunter*.

Hunter, La Forest J adopted an analysis much like that used in *Vaillancourt* to limit the reach of the fundamental principle recognized in that case. His Lordship said:

> [T]he relevance of the regulatory character of the offences defined in the Act is that conviction for their violation does not really entail ... the kind of moral reprimand and stigma that undoubtedly accompanies conviction for the traditional "real" or "true" crimes. It follows that investigation for purposes of the Act does not cause the kind of suspicion that can affect one's standing in the community and that ... entitles the citizen to a relatively high degree of respect for his or her privacy on the part of investigating authorities.[82]

The lessened expectation of privacy is also supported by pragmatic considerations. With respect to the regulation of fair competition policies, His Lordship observed that:

> ... because of the nature of the conduct regulated ... there will in many cases be no way of determining whether proscribed conduct has been engaged in, short of studying the process by which a suspected corporation or business has made and implemented its decisions .... To limit [the] use [of the power to order the production of documents] to situations in which the Director or a Commission member can show reasonable and probable grounds to believe that a specific offence has been committed would frustrate the process of investigation at its very inception."[83]

La Forest J therefore concluded for the majority that:

> [the impugned provision] does not, having regard to the low expectation of privacy which those subject to its operation can be said to have in regard to the documents that fall within its scope and the important and difficult task of law enforcement in which it assists, countenance the making of unreasonable seizures within the meaning of s 8 of the Charter.[84]

In *R v McKinlay Transport Ltd* this approach was affirmed when Wilson J articulated "a distinction between seizures in the criminal or *quasi*-criminal context within which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review".[85]

(3) Reverse onus provisions

The presumption of innocence is recognized in Canada as requiring the Crown to prove the guilt of the accused beyond a reasonable doubt. Reverse onus provisions frequently challenge this most basic principle. By reversing the burden of proof on a matter in issue, these provisions can cause the conviction of accused persons who fail to discharge that onus, even though there may be reasonable doubt as to their guilt. Where this occurs, the presumption of innocence is contravened.[86] It is becoming increasingly clear, however, that even the presumption of innocence will have reduced operation in cases where the consequences of conviction are seen to be more modest for the accused, and where the

82 Note 80 above, 227 (DLR (4th)).
83 Ibid, p 234.
84 Ibid, p 242.
85 (1990) 68 DLR (4th) 568, 582.
86 See *R v Oakes*, note 34 above.

efficacy of a prosecutorial regime would be reduced by the unbridled application of that principle.

R v Wholesale Travel Group Inc[87] is the leading case. It involved a challenge to the false or misleading advertizing sections of the Competition Act RSC 1970 c.C-23. Those provisions were challenged, in part, because they reversed the onus of proof on the question of mens rea for the offence; persons charged with the offence are required to establish on the balance of probabilities that they have acted with due diligence if they hope to exculpate themselves.

It is clear that placing this onus on accused persons allows for the successful prosecution of persons who may well have used due diligence, but who cannot prove positively that they have done so. Despite this, a divided Supreme Court of Canada upheld the section. Two justices found that the reversal of a persuasive burden on the issue of due diligence did not violate the presumption of innocence while the balance of the majority held that a reversal of the persuasive burden could be justified under s 1 of the Charter as a reasonable limitation on the presumption of innocence. The important feature is that all five of those judges justified their position through reasoning identical to that applied in the search and seizure cases.

Mr Justice Cory, for himself and L'Heureux-Dube J, held that the reverse onus provision did not contravene the presumption of innocence. His decision was based squarely on the distinction between regulatory and criminal offences. In particular, His Lordship justified the lower concern for principle in the regulatory context on what he termed the "licensing justification" and "the vulnerability justification". The "licensing justification" is a kind of social contract. In return for carrying on a regulated activity, those engaging in that activity must recognize that they have placed themselves in a position of responsibility to the public. The "vulnerability justification" rests on the pragmatic consideration that effective "regulatory legislation is essential to the operation of a complex industrial society [and] plays a legitimate and vital role in protecting those who are most vulnerable and least able to protect themselves".[88] Together these considerations enable the presumption of innocence to have a different content in the regulatory sphere than in the case of criminal prosecutions. Insistence on proof by the defendant of due diligence, to a balance of probabilities, satisfies the presumption of innocence as it operates in the context of regulatory offences.[89]

87 (1992) 8 CR (4th) 145, (1991) 84 DLR (4th) 161, [1991] SCR 154.

88 Ibid, 217 (CR (4th)).

89 Iacobucci J (Gonthier and Stevenson JJ concurring) disagreed with this analysis, holding that the imposition of a reverse onus in which the defendant had to prove due diligence was prima facie unconstitutional because it did, in fact, violate the presumption of innocence. His Lordship upheld the section as a reasonable limitation on the presumption of innocence, however, noting that "what is ultimately involved in th[e] appeal is the ability of the federal and provincial governments to pursue social ends through the enactment and enforcement of public welfare legislation." (p 234) Unlike Lamer CJC, who felt that the regulatory scheme could be sufficiently effective with an evidentiary burden, Iacobucci J considered that, as a practical matter, a full reversal of the persuasive burden was the necessary compromise on the presumption of innocence. In *R v Ellis-Don Ltd* (1992) 61 CCC (3d) 423 (SCC) the Court signalled in effect that, absent exceptional circumstances, all regulatory offences containing reverse persuasive onus provisions would be saved under s.1

The decision of Cory J has been harshly criticized.[90] The primary basis for that criticism is that it reduces access to fundamental principle based upon the suspect technique of classification involved in distinguishing regulatory offences from true crimes. As Stuart points out, "[m]any commentators [including] the Law Reform Commission of Ontario have pointed to the difficulty of making a valid distinction based on the intrinsic nature of the acts prohibited as crimes, and those punished as regulatory offences".[91]

The general criticism that there is imprecision in drawing lines applies with equal force to the determination that search and seizure guarantees are lessened for regulatory offences, and to the concept of stigma as a basis for delimiting principles. Classification, though, is the enterprise of lawyers; it is what we do. That we cannot do it with perfection is regrettable, and we should always strive to improve. Whereever the lines are to be drawn, however, it seems inevitable and appropriate that we should reduce the vigilance with which we guard fundamental principle where the availability of those principles is of reduced importance to the person charged, and the practical consequences of insisting on their full application is disproportionate.[92]

Limitations on rights and freedoms in particular cases: the use of remedies to keep the application of principle relevant and proportional

1 *Basic remedial principles*

It has frequently been pointed out that without a remedy, there is no effective right. The simplest way to prevent the application of fundamental rights and freedoms is simply to deny a remedy. In relative terms it is a safe technique because, by using the remedy to adjust the impact of the right, the definition of the right remains unaffected.

The fact that this technique indirectly deprives the right of its substance in a given case does not violate established principles. There is ample precedent for it. Equity has always insisted that its complainants come forward with clean hands, and the availability of its remedies is a matter of discretion. Courts in New Zealand have claimed a common law discretion to decide whether to exclude illegally or unfairly obtained evidence.[93] The decision to stay proceedings for abuse of process at common law is discretionary, as is the application under s 347.[94] Even under the Charter, where the requirements of subs 24(2) are not satisfied, complainants whose rights have been violated are routinely left without remedy.[95] So it must be with the Bill. In some cases the breach will not warrant a remedy because it is trifling,[96] because the complainant contributed to the violation,[97]

90 Don Stuart, "*Wholesale Travel*: Presuming Guilt for Regulatory Offences is Constitutional but Wrong" (1992) 8 CR (4th) 225.

91 Ibid, p 232.

92 Another example would be the routine traffic stop for minor driving violations. It would be absurd to insist on the full panoply of rights to counsel.

93 *R v Convery* [1968] NZLR 426 (CA).

94 *R v Hartley* [1978] 2 NZLR 199 (CA).

95 See *R v Wise* (unreported, 27 February 1992) (SCC).

96 This has already been recognized in New Zealand. See *R v Butcher* [1992] 2 NZLR 257, 266 (CA); *R v Waddel* (HC Auckland, T 119/91. 25 October 1991, Thomas J).

97 See, eg, the Canadian cases of *R v Tremblay* (1987) 37 CCC (3d) 514 (SCC); *R v Smith* (1989) 71 CR (3d) 129 (SCC).

or because it would be disproportionate in the public interest to grant a remedy.[98] None of this is new and none of it offensive.

The legitimacy of denying a remedy despite the existence of a violation of the Bill has already been recognized as acceptable practice by the Court of Appeal in *R v Grant*.[99] Grant was arrested and interviewed. He admitted to two burglaries during the course of his interrogation, prior to being advised of his right to a lawyer. He was subsequently informed of that right, declined it and continued to confess to other burglaries. The Court of Appeal held that it was appropriate to admit even the first confessions into evidence because it was apparent that, even if he had been advised of his right to a lawyer in a timely manner, it would not have made a difference.

Often, the question will not be whether to provide a remedy, but rather which remedy should be provided. The decision as to how to remedy a given violation need not involve the unprincipled selection of a response from the remedial menu. Rational and useful guidelines readily suggest themselves. In particular, a remedy should relate to the wrong done, the effective remedy that is least disruptive of the public interest in trying the case on its merits should be selected, and the remedy should be proportional to the violation.

The importance of these principles was driven home in the Canadian case of *R v D'Amico*.[100] D'Amico was charged with robbery. The issue at the trial was to have been identification. The Crown had available a photograph of the robber taken during the robbery by a security camera. The photograph showed the robber to be wearing sunglasses as well as a distinctive cap sold only during a two week summer fair. He had a bandage on his nose and an obvious mark on his running shoe. The Crown had available an expert who had removed the sunglasses from the photograph using a computer, and who had drawn eyes onto the photograph using the facial bone structure to assist in determining their appropriate shape. Evidence was available to prove that at the time of the robbery the accused had an injury on his nose where the bandage appeared on the robber. Moreover, he owned a cap identical to that worn by the robber, and shoes were found on his possession which contained a paint splatter precisely where the security photo showed a mark on the shoe of the robber. The simulated eyes prepared by the computer artist were all but identical to D'Amico's eyes even though the artist had never seen a photograph of him or met him in person.

During the course of the investigation, an over-zealous officer showed potential witnesses a photo line-up. For those who could identify the accused, he confirmed that they had picked out the right man. For those who could not, he showed a more recent photograph of the accused that was not part of the photo line-up, which they then identified. Defence counsel brought a motion to stay the proceeding on the basis that the identification procedures of the officer prejudiced his client's right to a fair trial, contrary to subs 11(d) of the Charter. The judge agreed and the charges were stayed.

98 See, eg, *R v Wise*, note 95 above. In cases where the proposed remedy is the termination of the prosecution, an assessment is made as to whether the public interest is better served by allowing the case to proceed than by dealing with the breach. I discuss this fully in "The Stay of Proceedings in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 Crim LJ 315.

99 (CA 443/91, 19 March 1992).

100 (Ont Ct of J (Gen Div), 15 June 1992, Flanagan J).

With respect, a stay was not the appropriate remedy. Granted, the fairness of the trial was threatened by the prejudicial use of the photo line-up. That prejudice could have been removed, however, thereby restoring the prospect of a fair trial by simply excluding the tainted evidence. A stay was not the least intrusive remedy available and did not address the mischief caused to D'Amico as precisely as exclusion would have. The remedy was disproportionate given the public interest in having the case tried on its merits.

2 *The Supreme Court of Canada and remedial principles*

As the *D'Amico* case illustrates, appropriate remedial principles are easy to lose sight of. This has been true in the Supreme Court of Canada where even the paramount importance of remedial discretion has been forgotten. In two separate but important areas the Supreme Court of Canada has tied the hands of lower courts, who have found themselves granting inappropriate relief as a result.

(a) The right to trial within a reasonable time and the stay of proceedings

In Canada, a stay of proceedings is the mandatory remedy for violations of "the right to be tried within a reasonable time".[101] The Supreme Court of Canada allowed this to happen because of its needless fidelity to the particular language employed by the drafters of subs 11(b). The Court reasoned that, ex hypothesi, where subs 11(b) has been violated, there has not been "a trial within a reasonable time". Any trial after a subs 11(b) breach would therefore be outside of the constitutionally mandated reasonable time, and any court conducting such a trial would therefore be violating the Charter. A stay is the only available remedy that can prevent a continuing Charter violation.[102]

The reasoning of the Court has an undeniable logic. That reasoning derives, however, from a literal rather than a purposive interpretation of the section. As a result, the remedy is not gauged to accomplishing the purpose behind the provision and is far more than is required to provide effective restitution in many cases. This is because subs 11(b) serves two different objectives. The first is to ensure that delay does not prejudice the prospects that an accused person will receive a fair trial.[103] The section also protects against over-long exposure to the stresses and loss of liberty associated with pending criminal charges.[104] Where prejudice is of the first kind such that a fair trial can no longer be held because of delay, a stay is unquestionably a relevant and proportionate remedy. Where prejudice is in the form of stress, or the loss of some liberty pending trial as the result of bail conditions, a stay may be totally unnecessary to accomplish the purpose of ameliorating that prejudice. An order expediting trial, monetary relief, or even the amelioration of sentence if found guilty may, in the circumstances, be far more relevant and proportional to the damage suffered.

The inappropriateness of the rigid remedial regime for subs 11(b) violations was driven

101 *Rahey v R* (1987) 57 CR (3d) 289, 39 DLR (4th) 481; [1987] 1 SCR 588.

102 *Rahey*, ibid, 306 CR (3d). The wording of subs 25(b) should save courts in New Zealand from imposing this rigid regime in this country. It protects against "undue delay". It seems that "undue delay" can arise before the stage is reached where it is no longer reasonable to conduct a trial. If so, it should be possible to tailor the remedy to the mischief that is present.

103 *R v Conway* (1989) 70 CR (3d) 209 (SCC).

104 *R v Rahey*, note 101 above, pp 299-300.

home dramatically with the decision in *Askov v R.*[105] There the Supreme Court of Canada held that systemic delay caused by inadequate resources would violate subs 11(b), and that appropriate periods of systemic delay could be identified by finding comparable Canadian jurisdictions and selecting as the constitutional standard the best record among those jurisdictions for getting trials on. In the helter skelter of Canadian federalism and demographics the results were catastrophic. Over 60,000 criminal charges were halted without trial on their merits in Ontario alone, thousands because the cases had taken only a few days or a few weeks longer than the ideal period to get before the courts. The cost was grossly disproportionate to the violations and caused untold damage to the repute of the administration of justice.

Askov has since been effectively reversed by the Supreme Court of Canada, but they have clung to the theory of the mandatory stay.[106] The current result of this excessive rigidity, coupled with the backlash from *Askov*, is that the prediction of those who opposed the mandatory stay when it was first proposed is being realized. Section 11(b) violations are rarely found now, in no small measure because of fear for the costs of doing so. As a result, litigants are left entirely without remedy where sufficient time has passed for less draconian forms of relief to be relevant and proportional.

(b) The fair trial dichotomy

Equally regrettable is the position taken by the Supreme Court of Canada on the operation of subs 24(2), the exclusionary remedy section of the Charter. The Court has held that the most important factor in deciding whether to exclude the evidence has nothing to do with the degree or kind of misconduct by the officer. Rather, it has to do with the character of the evidence that has been obtained. The Court has therefore created two categories of evidence. Evidence falling into the first category, known as the "unfair trial" category, is all but automatically excluded. The fate of evidence not falling into that category (therefore falling into the other of the two categories) is to be determined on the basis of a complex weighing of competing factors.[107] In practice, this form of evidence is generally admitted, despite the fact that it is unconstitutionally obtained.

The Supreme Court of Canada drove itself to this position by equating the participation of the accused in the pre-trial investigation of offences, with the calling of the accused as a witness at trial. A trial in which an accused is forced to testify against himself would, of course, be unfair. By analogy, reasoned the Supreme Court, a trial in which the unconstitutionally obtained pre-trial statements of the accused were admitted would also be unfair, for the accused is equally, albeit less formally, providing testimonial information against himself. Over the next few cases the doctrine spread to encompass ultimately any unconstitutionally obtained evidence, whether testimonial or not, that emanated physically from the accused,[108] or that became available because of the participation of

105 (1990) 74 DLR (4th) 355, 2 SCR 1199, 79 CR (3d) 273.

106 *Morin v R* (1992) 71 CCC (3d) 1 (SCC).

107 The "fair trial dichotomy" was developed in the case of *Collins v R* [1987] 1 SCR 265, 56 CR (3d) 193, 38 DLR (4th) 508 (SCC).

108 *R v Therens* (1985), 18 CCC (3d) 481, 45 CR (3d) 97 (SCC) (breath sample, explained in *Collins* on the basis of the fair trial dichotomy); *R v Pohoretsky* (1987) 33 CCC (3d) 398, 58 CR (3d) 113 (blood sample); *R v Dyment* (1988) 45 CCC (3d) 244, 66 CR (3d) 348 (SCC) (blood sample).

the accused in the investigation against him.[109] In each such case the Court held that to admit the evidence would render the trial unfair. This was so not because of the nature of breach, but because of the nature of the evidence. Indeed, the Court has said that the seriousness of the breach[110] or the good faith of the police[111] cannot support the admission of evidence falling into the fair trial category.

The fair trial dichotomy is far too rigid to serve sensibly the rational application of Charter relief. There is, to be sure, stronger reason for excluding a good deal of the evidence caught by the Supreme Court's fair trial concept than evidence which falls outside the fair trial category. Statements obtained unconstitutionally will frequently represent the creation of a source of information that would not have existed but for the Charter breach, unlike real evidence which is already in existence. Statements are also more prone to inaccuracy than real evidence.[112] Moreover, the obtainment of physical samples from the accused will normally represent more intrusive state conduct than the search of one's home or car. The broad range of circumstances encountered, however, make the "unfair trial" characterization ring hollow in many cases, and remove the effective flexibility courts require to produce proportional and relevant remedies. To take an extreme example, there have been cases where evidence of breath samples has been excluded where the subjects have been lawyers, simply because they have not been advised of their right to counsel.[113]

Equally regrettable is that the bold line this doctrine has drawn based upon the kind of evidence obtained has led to the development in some courts of an informal, unarticulated presumption that evidence not falling into the fair trial category is prima facie admissible. The question of remedy is largely prejudged against the accused.

3 *Providing remedies to promote compliance*

Not all of the remedial principles relevant to the Bill relate specifically to the case before the court. The decision to stay proceedings or to exclude evidence may be prompted less by restitutionary concerns relevant to the complainant, and more by systemic considerations. In particular, courts may grant remedies in the interests of encouraging compliance by the authorities in future cases or to preserve the integrity of the administration of justice. Each of these concerns was central in the celebrated passage from Richardson J's judgment in *Moevao v Department of Labour*:[114]

> There are two related aspects of the public interest .... The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by the State and citizen alike. And the due

109 *R v Ross* (1989) 46 CCC (3d) 129, 67 CR (3d) 219 (SCC), (participation in a physical line-up).
110 *Collins*, note 107 above, 286 (SCR).
111 *R v Elshaw* (1991) 7 CR (4th) 333 (SCC).
112 This is because for statements, triers of fact must resolve the issues of existence and inference, whereas with real evidence, only authenticity and inference are in issue.
113 In New Zealand the robust view that a failure to advise of the right to counsel will not lead to a remedy where there is reason to believe that the person arrested is already aware of that right would tend to prevent a similar result in this country. See, eg, *R v Chase* (HC Hamilton, T 48/91, 26 September 1992, Jamieson J); *R v Thompson* (HC Hamilton, T 72/91, 13 December 1991, Jamieson J), and see *R v Y D* (HC Auckland, T 146/91, 16 October 1991, Temm J).
114 [1989] 1 NZLR 464, 481 (CA).

> administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice.

These are important considerations and it is surely proper and in some cases necessary for courts to have regard to the larger picture. On the other hand, it must be appreciated that where the motivation for the remedy is general rather than specific to the accused, the accused receives a windfall, and the public is deprived of a trial on its merits or on all available evidence. It is suggested, therefore, that pragmatically, if not as a matter of principle, remedies should be granted for systemic reasons solely where those systemic interests cannot otherwise be protected. The most significant example in practical terms pertains to alcohol driving offences. Restitutionary analysis would lead to the admission of breath or blood samples in all but the most extreme cases where the complaint has to do with a failure to advise a detainee of the right to a lawyer; typically counsel can do nothing other than advise the client that they must provide a sample. It is clear, therefore, that if the sole remedial focus was restitutionary, it would "afford a precedent for breach in each case".[115] General considerations therefore predominate. Contrast this, however, with the case of the suspect who happens to be a lawyer and is fully aware of his or her rights. Is it really necessary to exclude the results of those tests in order to reinforce the message that the police must comply with the requirements of the Bill? Courts have ample opportunity to address those systemic interests in cases where the mischief intended to be addressed by the section has actually befallen the complainant.

In sum, the determination of remedy is an appropriate time to be pragmatic with fundamental principle. It leaves the construction of the right undisturbed, and enables courts to focus on whether the violation warrants a remedy in all of the circumstances. Moreover, it calls for an assessment of the mischief of the section in assessing what remedy is needed to address the breach, thereby keeping the ultimate disposition relevant and proportional to the violation. In those cases where systemic interests cannot otherwise be protected adequately, it may well be appropriate to grant remedies that are disproportionate to the mischief that has befallen a complainant as the result of a breach of the Bill.

PART II

ARREST AND DETENTION: PRAGMATISM OVER PRINCIPLE?

Purposive interpretation: "arrest" and "detention under any enactment"

The rights contained in subss 23(1) and (4) are available only to persons who have been "arrested" or "detained under any enactment". The effect of the phrase "under any enactment" suggests that those who are detained without legislative authority, but who are not arrested, are not entitled under the Bill to the comfort of the right to a lawyer. Those persons do not appear to be entitled to be informed of the reason for their detention, or to be informed of the right to refrain from making a statement. What makes this important

115 Hardie Boys J, *Ministry of Transport v Noort*, above, note 10, p 132.

is that the police in New Zealand appear commonly to detain suspects where there are insufficient grounds for arrest, in order to question them as part of the investigation. There is no lawful authority for such detentions,[116] and therefore they are not "detentions under any enactment". It is nonetheless a simple matter to observe that persons detained in such circumstances require access to legal advice, as much, if not more so, than those who are detained with legislative authority.[117] Any purposive interpretation of the Bill would strive to extend the protection of subss 23(1) and (4) to such persons.[118] Equally, it would strive to include persons who are not subject to actual detention but who have reason to believe that they are not free to leave, persons who in Canada would be said to be subject to "psychological detention".[119]

The Court of Appeal has been cognizant of the problem. The majority of the Court has done an admirable job in its efforts to overcome it. It has cast off the narrow definition of arrest extant at common law in order to make up for the qualified definition of "detention" in subs 23(1). While common law arrest will suffice,[120] the Court of Appeal has extended the definition of "arrest" in s 23 to include "de facto arrest". In particular, it has held that:

> De facto detention in police custody with intention or contemplation that the subject will be formally charged is arrest within the meaning of the New Zealand Bill of Rights Act.[121]

There therefore appear to be two requirements to this form of arrest, "de facto detention"[122] and "intention or contemplation [by the authorities] that the subject will be formally charged". This last criterion is problematic.

116 *Blundell v Attorney-General* [1968] NZLR 341; *R v Fatu* [1981] 3 NZLR 419; (1989) 4 CRNZ 638; *R v Ardmore* [1989] 2 NZLR 210, (1988) 3 CRNZ 550.

117 As Cooke P noted in *R v Butcher* [1992] 2 NZLR 257, 264 (CA), "[t]o be informed of a right to consult a lawyer without delay is, if anything, more valuable in the case of an unlawful arrest than in the case of a lawful one".

118 In fairness to courts in New Zealand, the insertion of the words "under any enactment" in those subsections of the Bill presents a serious impediment. What I am suggesting courts do is to use the purpose behind those subsections to avoid giving any meaning to that unfortunate phrase. Even though there is precedent for doing this in Canada, it may be asking too much. For that precedent, see *R v Dubois* [1985] 2 SCR 350, 364, where the term "incriminating evidence" was read out of s 13 of the Charter so that it would not impose a requirement that testimony would have to be incriminating when given, before a witness could be protected against its use by the prosecutor in a subsequent proceeding. It is noteworthy that, like the phrase "under any enactment", this term was added to the section late in the day, suggesting it was to have some significance. Exigencies of the purposive interpretation overrode this, however.

119 *R v Therens* (1985) 18 DLR (4th) 655, 680 (SCC):

> Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

120 The common law definition expressed by Hillyer J in *R v Edwards* [1991] 3 NZLR 463 at 466 was cited with approval by the Court of Appeal in *R v Kirifi* [1992] 2 NZLR 8 and in *R v Edwards* (1991) 7 CRNZ 528:

> [A]n arrest can occur only where there has been physical touching of the person with a view to his detention (a mere touch will suffice, but presumably the intent must be made clear to the arrestee by words or otherwise) or the utterance of words of arrest, coupled with acquiescence or submission on the part of the arrestee.

121 *R v Butcher* [1992] 2 NZLR 257, 264.

122 In *R v Butcher*, ibid, Cooke P said (p 264) that "[b]y de facto detention I mean ... a situation in which the subject is not free to go ...".

The requirement of an "intention or contemplation of formal charge" does nothing to service the purpose behind the rights contained in subss 23(1) and (4). Indeed, it appears to interfere with the attainment of that purpose. As Gallen J pointed out in *R v Cowie*,[123] the Bill must be directed at the effect of detention on the person who is subject to it and the need for safeguards in such circumstances. Given that, how can the subjective intention of those carrying out the detention matter?[124] Persons ignorant of their legal entitlements who are subject to de facto detention need to have access to legal advice whether or not a decision to charge them has crystallized in the mind of their captor to the point where it qualifies as the "contemplation of a charge". It seems evident that the requirement of a contemplation of a charge is a hangover from the traditional concept of arrest, which required a manifestation of the intention of the arrestor to detain the subject; it does not arise at all from a purposive interpretation of the term as applied in s 23.[125]

Because it is not a purposively developed criterion, it is not surprising that the "contemplation of a charge"[126] requirement actually prevents the fulfilment of the purpose behind the right to counsel and the right to be advised of the entitlement not to speak. There may well be no crystallized contemplation of charges against those who are subject to de facto detention without lawful authority, leaving such persons without access to the protection of the Bill. To make matters worse, this is more likely to be so where there is little evidence against the detainee at the time of the detention, creating the curiosity that the more arbitrary a detention is, the less likely rights to counsel will arise. The "contemplation of charge" requirement also frustrates the application of subss 23(1) and (4) to cases of psychological detention. Where there is a contemplation of charge, there is more likely to be full arrest. The concept of psychological detention tends to do most of its work in Canada in cases where there is no crystallized contemplation of a charge.

Fortunately, the Court of Appeal has yet to commit itself on whether the "contemplation of charge" requirement will endure. Cooke P in *Butcher* left the matter open.[127] He predicted that the definition of de facto arrest would ultimately extend to cases of psychological detention, an extension that would be largely moot if the contemplation of charge requirement persists. More importantly, after providing the provisional definition of de facto arrest he said:

> There would appear to be no room for doubt that if the true position in fact is that

123 (HC Wanganui, T 7/91, 21 November 1991).

124 The same is true of the view expressed in *R v Rose* (HC Auckland, T 142/91, 16 September 1991, Henry J) that there must be some positive action taken before an arrest can be said to have resulted.

125 Alternatively, it is a concession to Parliament, who inserted the phrase "under any enactment". To read arrest as imposing only the "de facto" detention requirement would render the term "under any enactment" meaningless, since all detentions would be arrests.

126 It is not yet clear how crystallized the contemplation of a charge must be to satisfy the requirement. There are decisions which imply that more than a mere hope that the investigation will produce sufficient evidence to charge a suspect is required. In these cases courts have held that there was no contemplation of charge because the police had little or no evidence to sustain a charge at the outset of the interview. See *R v Cowie* (HC Wanganui, T 7/91, 25 November 1991, Gallen J); *R v Goodwin* (HC Hamilton, T 56/91, 29 November 1991, Jamieson J), and see the discussion below in which I suggest these decisions are unduly restrictive.

127 Note 117, above, p 415.

> the suspect is not being treated as free to go, that constitutes arrest for the purposes of this Act.[128]

It may prove significant that there is no reference here to the "contemplation of a charge" requirement.

Purpose and pragmatism in the application of the right to counsel

Nowhere is the tension between pragmatism and principle more fully played out in this country than in the law relating to the right to counsel. I am mindful that I am judging the authority from a Canadian perspective, where detention is interpreted differently, and I am no doubt influenced by the fact that in some New Zealand cases where no arrest or detention has been found, arguments against arrest or detention that have prevailed would have been rejected in Canada as unarguable. Even putting the competing definitions of arrest and detention aside, however, much of the case-law in New Zealand strikes me as unwelcoming to the fundamental right to retain and instruct a lawyer. Indeed, there are a number of cases where this is evident in the overt comments of judges, including some of those of the Court of Appeal.

In *R v Edwards*, in the course of discussing the concept of detention, Casey J made a point that is incontestable. He cautioned:

> In situations of this kind,[129] it is important not to lose sight of the fact that the police have a duty to investigate and prosecute crime. The fact that they are interviewing a suspect at a police station does not mean that he or she must inevitably be regarded as being detained.[130]

A similar point was made by Thomas J in *R v Waddel*. In rejecting the suggestion that a detention had occurred before the formal charge he said:

> I decline to proceed on the basis that the interview of a person who may be suspected of an offence is not a legitimate part of Police investigation. More often than not, studies and research have shown, Police interrogation of suspects is the dominant method of solving crime. Provided, therefore, that the rights of the person being interviewed are protected and the interview is conducted fairly, it is unnecessary and undesirable to bring forward the point of time when a person properly can be said to be under arrest.[131]

No-one can argue with the legitimacy or importance of questioning suspects. These comments, however, do not bode well for the fundamental right to counsel, or for the right to silence affirmed in the Bill. They reveal a concern that access to those rights may inappropriately interfere with the pressing business of police investigation. Those rights, however, have been recognized as fundamental. It is important to bear in mind that they do not illegitimize interrogation after detention. Their function is simply to ensure that those who are effectively being denied their freedom are aware of their rights so that they can insist on them if they so choose. Certainly persons provided with the right to counsel

128 Ibid.
129 The suspect was picked up in the early morning hours, brought to the station, and interviewed during the night for two hours.
130 (CA 83/91, 27 September 1991).
131 (HC Auckland, T 119/91, 25 November 1991).

will be less inclined to speak. It is incontrovertible, therefore, that confessions will be lost. But consider whose confessions those are. They are the confessions of those who required access to legal advice to appreciate fully their fundamental rights so that those rights are not squandered out of ignorance, fear, or resignation after marathon interrogation that the law would have allowed them to refuse to engage in, had they known better. Cautioning about the need to bear in mind the requirements of effective investigation while defining the triggering event for the right to counsel stands as an indictment of the right to silence. Such comments contain indirectly the same message provided by Holland J in *R v Butcher* when he noted that "there is urgent need for consideration to be given to whether the right to silence should not be qualified [and] whether there should not be a limited power to detain for inquiries".[132]

It is somewhat difficult to urge in the face of this that the provisions of the Bill should not only be interpreted purposively but also applied purposively. After all, these and similar comments are directed at an application that is consistent not with the purpose behind the fundamental right, but rather with the needs of law enforcement. It would seem as a matter of principle, however, that a purposive interpretation of rights should be accompanied by a purposive application. After all, there is no point in interpreting a provision in a fashion meant to secure the effective protection of the right if the tests produced by that process are applied in a narrow, legalistic fashion. In other words, in deciding whether a particular set of facts fits within a test or standard stipulated by the Bill, it would seem appropriate to ask whether or not the purpose behind the provision in question would be advanced by its application to those facts. Some of the case-law dealing with the right to counsel fails to do so, denying the application of the right to counsel in cases where it would appear to be required. This is occurring, in my opinion, on a number of fronts, including in the determination of whether there is a contemplation of a charge, one of the prerequisites to the extended definition of "arrest".

The language in *R v Butcher* does not ask whether there is a fixed intention to charge the subject; it inquires whether there is an "intention or contemplation that the suspect will or *may* be formally charged".[133] Despite this, the case-law seems to insist upon a more or less crystallized intention to charge.[134] In *R v Goodwin*,[135] for example, the Court concluded that there was no contemplation that the accused would be charged at the time he admitted to having violently shaken his daughter. At the point where that admission was made, an autopsy had already revealed that his seven week old daughter had died of a cerebral hemmhorage caused by "trauma", the wife of the accused had advised the police that he had previously threatened to throw the child out of a window, and he had been cautioned and told that he could not leave after a six and a half hour interview.

I have to concede the obvious point that the police did not have enough evidence actually to charge him prior to this admission. On the other hand, they clearly regarded him as a potential suspect and no doubt hoped that if he was the offender he would incriminate

132 [1992] 2 NZLR 257, 274.
133 Ibid, p 415 (CA).
134 See *R v Cowie* (HC Wanganui, T 7/91, 25 November 1991, Gallen J).
135 (HC Hamilton, T 56/91, 29 November 1991, Jamieson J)

himself. It would have been an appropriate factual characterization for the court to have held that the prospect that Goodwin might be charged, depending on the results of the interview, was foremost in the minds of the investigators. Looking at the question purposively, it is obvious that Goodwin needed legal advice; he asked on several occasions when he could leave and it is evident he did not wish to be there. It is apparent, at least in reading the report of the case, that he did not know he could leave and felt obliged to stay and answer questions. The decision shows little sensitivity to the purpose behind the right to counsel.

In *R v Waddel*[136] the requirements of "de facto detention" were applied in rigorous fashion, thereby avoiding a finding of detention. The Court conceded that at the time he entered the police vehicle, Waddel may have felt that he would be taken to the station whether he liked it or not, but ruled that his subjective belief that he was being detained was not enough to make his decision to accompany the police involuntary. There had been no actual compulsion, and the matter had to be viewed objectively. Justice Thomas then acknowledged that if Waddel had tried to leave, he would have probably been restrained. Because Waddel did not attempt to leave, however, the resolve of the officer to detain him was never put to the test. No actual detention occurred, therefore. With the greatest of respect, the concept of detention suffers if a person's subjective belief in his detention saves the police from actually detaining him, thereby sustaining the conclusion that he is not under de facto detention at all.[137] The law should not arrive at the conclusion that a person's rights increase if he has the temerity to assert himself against the police by attempting to leave.

The decisions in *Goodwin* and *Waddel* do not stand alone. There appears, in general, to be a high level of tolerance for the practice of interviewing suspects at the police station, often for long periods of time, without formal arrest, under circumstances that hover close to the line of de facto detention.[138] It is worth noting that, save in those cases where the detention is considered arbitrary, a purposive interpretation of the Bill would not prevent the practice. What it seeks to do is to ensure that this pragmatic exercise is carried on under circumstances where detainees are apprised of their fundamental rights. Even where there have been violations, control over remedy for those violations that are occurring is available to ensure that the goals of relevance and proportionality are respected.

136 (HC Auckland, T 119/91, 25 October 1991, Thomas J). The decision can be supported on grounds other than those criticized here. Waddel proved to be an unsatisfactory witness, and the Court found that he was aware of his entitlement to speak to counsel, was presented with the opportunity to do so, and declined.

137 This was effectively the position under the Canadian Bill of Rights (1960) on the concept of detention: *Chromiak v R* [1980] 1 SCR 417. This decision is rejected by the Supreme Court of Canada in *R v Therens* (1985) 18 CCC (3d) 481 and has become the stock example of a narrow, technical interpretation unfitting to an instrument designed to secure fundamental rights.

138 *R v Cowie* (HC Wanganui, T 7/91, 25 November 1991, Gallen J); *R v Rose* (HC Auckland, T 142/91, 16 September 1991, Henry J); *R v Manley & Roberts* (HC Wanganui, T 4/92, 2 April 1992, Neazor J, re Roberts) see also *R v Edwards; R v Biddle* (CA 432/91, 18 February 1992) and *R v Chase* (HC Rotorua, T 72/92, 26 September 1991, Jamieson J, re accused Dornauf). Cases where arrest has been found to exist include *R v Thompson* (HC Rotorua, T 72/91, 13 December 1991, Jamieson J); *R v Parkinson* (HC Palmerston North, T 16/91, 11 November 1991, Grieg J) and *R v Watt* (1992) 8 CRNZ 180.

Conclusion

The New Zealand Bill of Rights Act 1990 is of primary use to those accused of crime. In this sense, it is a "rogues' charter". To a degree, at least, it is bound to hinder the enforcement of law. Its impact on the public interest in the prosecution of offenders is not unrestrained, however. The fundamental rights and freedoms it recognizes are subject to limitations. The most potent limitations are in the hands of legislators. Courts nonetheless play a pivotal role in ensuring that the Bill does not take on exaggerated importance. They can maintain a sense of pragmatism by invoking the techniques of purposive and contextual interpretation, as well as purposive application, to assist in keeping the operation of fundamental principles proportional and relevant. Moreover, they can use their remedial power in a principled fashion to assist in imposing appropriate limitations on the reach of the rights and freedoms affirmed in the Bill. Where pragmatic considerations related to effective law enforcement are allowed to qualify the operation of rights and freedoms through rigid factual characterization or by replacing purposive interpretation, however, fundamental principles suffers. They are rendered incapable of operating effectively in those areas where their contribution is not only proportional and relevant, but also demonstrably required. Keeping a rogues' charter respectable requires respecting the rights of rogues, even when we do not respect the rogues themselves.