# The Application of Charter Rights To The Interrogation Process

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*This article addresses the problem of determining when detention exists in the interrogation process in light of the recent Supreme Court of Canada decision in* R. *v.* Therens. *Special attention is paid to the importance of the right to counsel. An actual case is utilized to illustrate the problems which arise when detention is found to exist short of arrest, given the finding in* Therens *with respect to sections 1 and 24 of the* Charter.

*L'auteur de l'article s'attache à déterminer quand il y a détention en cas d'interpellation d'un individu par la police à la lumière du recent arrêt de la Cour suprême du Canada,* La Reine *c.* Therens. *Il étudie plus particulièrement l'importance du droit à l'avocat et se sert d'une situation réelle pour illustrer les difficultés que pose la constatation d'une situation de détention non-constitutive d'une arrestation compte tenu des conclusions de la Cour suprême sur les articles 1 et 24 de la* Charte *dans l'arrêt* Therens.

In Canada the process of questioning individuals[1] for the purpose of solving crimes has evolved, unencumbered by legislation[2] and sanctioned by the courts[3], into a relatively effective investigative technique frequently utilized by

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[1]For the purpose of this paper the following terminology is utilized: interrogation is limited to the questioning of suspects, potential accused and accused individuals; interview is any questioning situation excluding interrogation; and questioning includes both interview and interrogation situations.

[2]In the *Criminal Code* the sole legislative enactment is section 470 concerning the use at a preliminary inquiry by a prosecutor of any admission, confession or statement made at anytime by the accused. This section deals with the results of the process rather than procedure to be followed on interrogation. However, in the *Young Offenders Act*, section 11 (concerning right to counsel) and section 9 (concerning notice to parents or other adults on arrest of the offender) have significant application to the process, given the inability of a young offender to either retain counsel or waive the right to counsel due to the age factor. The combined effect of these provisions is illustrated in a recent case in the Manitoba Court of Appeal, *R.* v. *R.J.N.H.* (1985), 22 C.C.C. (3d) 114, where a confession taken after arrest but without involvement of an adult was ruled inadmissible under the ordinary rules of voluntariness. See also *R.* v. *W.W.W.* (1985), 20 C.C.C. (3d) 214 (Man. C.A.).

[3]The questioning process is sanctioned to the extent that the conduct of law enforcement officials does not exceed the limits of the common law respecting admissibility of confessions. That is not to say that all conduct of officers involved in interrogation where the confession is subsequently admitted in evidence is necessarily acceptable, as admissibility is decided on the issue of voluntariness rather than on the behaviour of enforcement officials. For example, as noted by F. Kaufman, *Admissibility of Confessions*, 3rd ed. (Toronto: The Carswell Company Ltd., 1979) 235: "[T]he use of tricks or artifice, even if reprehensible, will therefore not by itself suffice to exclude a confession, provided the circumstances do not cast doubt on the truth of the contents." In the final analysis, it is difficult to disabuse enforcement officials of the notion that once a confession is admitted in court the method employed in obtaining it is by inference sanctioned.

law enforcement agencies. However, two recent developments which raise the possibility that current practices and procedures will be subject to substantial changes have caused concern within the enforcement community.

First, the Law Reform Commission of Canada in Working Paper 32 and Report 23, both entitled *Questioning Suspects*, has recommended that legislation dealing with investigative powers be included as a new Part[4] in the *Criminal Code*. The call for legislation by the Commission is based on two premises — that current law on the questioning of suspects is inadequate and that the *Canadian Charter of Rights and Freedoms*[5] does not provide direct procedural regulation in this area by either guaranteeing the right of a suspect to remain silent or by imposing an obligation on the state to provide a complete interrogation record.[6] Excepting the matter of the right to remain silent, it is not within the scope of this paper to analyse the soundness of the stated premises other than to note that accuracy of the record on interrogation has been the subject of judicial comment[7] and that the Commission's statement of the inadequacy of the law has been the subject of academic criticism[8].

Second, the recent Supreme Court of Canada decision in *R.* v. *Therens*[9] has resulted in uncertainty respecting the potential application of the *Charter* to the interrogation process. Although the facts are limited to a breathalyzer demand situation, the decision (which rejects the application of section 1 of

[4]Law Reform Commission of Canada: Working Paper 32, *Questioning Suspects* (Canada: Minister of Supply and Services, 1984), hereinafter referred to as the Working Paper; Report No. 23, *Questioning Suspects* (Canada: Minister of Supply and Services, 1984), tabled in the House of Commons November 19, 1984, hereinafter referred to as the Report. As noted at 1 of the Report, "this brief Report should be read together with the earlier paper". The Report Recommendations for legislation involve the following: that a new Part XIII.I entitled Investigative Process be included in the *Criminal Code* with section 447.1 being an interpretation section, sections 447.2 and 447.3 providing a warning section including right to silence and right to counsel, section 447.4 requiring record keeping on interrogation and section 447.5 dealing with admissibility of evidence. This modest proposal and the negative police reaction to it are analyzed by P.H. Solomon, "The Law Reform Commission of Canada's Proposals for Reform of Police Powers: An Assessment" (1984-85), 27 *Crim. L. Q.* 123.

[5]Part I, *Constitution Act, 1982* which is Schedule B, *Canada Act 1982*, 1982 (U.K.) c.11, hereinafter referred to as the *Charter*.

[6]Report, *supra*, footnote 4 at 3-4.

[7]The Report Recommendations (section 447.4(1) and (2)) do not appear to go beyond the common law requirements as stated by Limerick J. in *R.* v. *Albrecht* (1966), 49 C.R. 314 at 325 (N.B.C.A.): "The Crown must prove the statement voluntary, i.e. that no inducement was held out. The only way available to the Crown to prove such a negative proposition is to produce evidence of everything that was said to or in the presence of the accused and all the circumstances relevant to the making of the statement..." The recommendations in the Working Paper for mandatory electronic recording when questioning takes place in a police station or prison are presented as an acceptable alternative to written notes in the Report Recommendations.

[8]See D.G. Casswell, "The Law Reform Commission of Canada, the Proposed Canada Evidence Act and Statements by an Accused" (1985), 63 *Can. Bar Rev.* 322. Of considerable interest is the fact that the Commission itself appears to have problems with the approach suggested in the Working Paper and Report as a recent article by S. Coughlan, "Police Detention for Questioning: a Proposal" (1985-86), 28 *Crim. L. Q.* 64 (part 2 of the article to appear next issue) was prepared for the Commission and looks at detention, post *Therens, infra*, footnote 9. Unfortunately for this writer, part 2, wherein the option of taking "steps to prevent ambiguity from arising in police requests for assistance, and guarantee that any co-operation gained is genuinely voluntary" is chosen over the creation by legislation of "a power of detention on grounds less than those necessary for arrest", will not be published before this paper is published.

[9]*R.* v. *Therens* (1985), 18 C.C.C. 481, 45 C.R. (3d) 97, 13 C.R.R. 193, 32 M.V.R. 153 (S.C.C.). See also *Rahn* v. *R.* (1985), 45 C.R. (3d) 134 (S.C.C.) and *Trask* v. *R.* (1985), 45 C.R. (3d) 137 (S.C.C.).

the *Charter*,[10] embraces the concept of detention short of arrest[11] and excludes evidence[12] obtained subsequent to[13] a denial of the right to be informed on detention of the right to retain and instruction counsel without delay[14]) sets the stage for an examination of certain aspects of the interrogation process which may now become the subject of review by courts faced with determining the admissibility of confessions at trial.

Lamer J. in *Therens* suggests that the application of the decision to interrogation is at present problematic:

> Whether s.10(b) extends any further, so as to encompass, for example, the principle of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), (USSC), and apply to matters such as interrogation and police lineups, needs not be decided in this case and I shall refrain from so doing.[15]

[10]The court rejects the application of section 1 of the *Charter* on the narrow basis of no explicit limitation on the right to counsel in the breathalyzer demand section of the *Criminal Code* (Estey J. 13 C.R.R. at 200) or on the wider basis of no explicit limitation by statute or regulation and no implied limitation resulting from the terms of a statute or regulation, or from its operational requirements or the application of a common law rule (LeDain J. at 216).

[11]Detention as utilized in the *Charter* is found to exist short of arrest in a breathalyzer demand situation, notwithstanding the narrow definition adopted by the court previously in *Chromiak* v. *R.* (1980), 1 S.C.R. 471, 49 C.C.C. (2d) 257, 12 C.R. (3d) 300 on consideration of section 2(c)(ii) of the *Bill of Rights* in a roadside demand situation. The narrow basis for the decision in *Therens* appears to be that criminal liability for "failure to comply with a demand or direction of a police officer is sufficient to make compliance involuntary" and thus constitutes detention (LeDain J., 13 C.R.R. at 215). However, a broader approach is advanced in *obiter* by LeDain J. at 215-16 without specific rejection by either the other members of the court who agree with his analysis of detention (McIntyre J. and Dickson C.J.C. at 222 and Lamer J. at 223) or by Estey J. at 199 who is "in agreement with much of what has been there written". The possibility of psychological detention, as suggested by LeDain J., opens the door for a wide application of section 10(b) rights to the interrogation process.

[12]It is difficult to determine whether (as suggested by McIntyre J. in dissent (13 C.R.R. at 244)), the majority position on disposition establishes an absolute rule of exclusion in situations where section 10(b) of the *Charter* has been breached. LeDain J. rejects the "community shock" or any other test for the plain words of section 24(2) and also the notion that the question of whether the administration of justice will be brought into disrepute by the reception of evidence may be determined by public opinion evidence such as opinion polls (at 220-23). Although he regards the right to counsel to be of such fundamental importance that a denial of that right in a "criminal law context must *prima facie* discredit the administration of justice" (at 223), he would admit the evidence in this case on the basis of police good faith reliance. Estey J. for the majority suggests that deterrence of future violations and a reluctance to strip all meaning from the legal rights contained in the *Charter* are considerations that place exclusion of the evidence within the context of section 24(2) (at 201). Section 24(1) is virtually foreclosed as a vehicle to be utilized in exclusion of evidence. See *R.* v. *Dawson* (1985), 22 C.C.C. (3d) 181 (Y.T.C.A.). In the context of this paper it will be assumed that a rule of absolute exclusion is established by the decision in order to illustrate the inflexible situation created once the balancing factors (including section 1) are removed from the application of section 10 *Charter* rights to the interrogation process.

[13]It is clear from *Therens* that although the breach must precede or coincide with the obtaining of the evidence, it is equally clear that a relationship of causation does not have to be proven. The "but for" test is categorically rejected. It is sufficient if the breach "preceded, or occurred in the course of the obtaining of evidence" (LeDain J., 13 C.R.R. at 220). Estey J. considers the evidence to be "direct evidence or evidence thereby obtained directly" and leaves to another day "any consideration of evidence thereby indirectly obtained" (at 201).

[14]The defendant in *Therens* did not request nor was he specifically denied counsel. The issue was that he was not given notice of his right to counsel. The notice requirement is regarded by the court to be evidence that the right to counsel has additional importance under the *Charter*, as contrasted with the *Bill of Rights* provision (LeDain J., 13 C.R.R. at 212). The court clearly establishes the notice requirement to be on equal footing with the right of a person on arrest or detention to retain and instruct counsel without delay. A breach of notice requirement automatically results in a breach of the right to counsel according to Estey J. who states that "neither of the two rights assured... were honoured by the police authority..." (at 200). Thus a breach of either branch of the section 10(b) right is regarded by the court as a flagrant violation of a fundamental *Charter* right.

[15]*Supra*, footnote 9, 13 C.R.R. at 226. The application of *Charter* provisions to the interrogation process will be considered by the court in *R.* v. *Manninen* (1983), 8 C.C.C. (3d) 193, 37 C.R. (3d) 162 (Ont. C.A.), leave to appeal granted May 3, 1984. Unfortunately the case deals with a post arrest denial of right to counsel; while the

However, as interrogation frequently involves a situation of arrest or detention, it is difficult to imagine that the decision will not be of major importance when courts are faced with the application of sections 9 and 10 of the *Charter*[16] to the interrogation process. The importance of *Therens* is further exemplified by the work of the Commission which relies heavily on the proposition that detention, as found in the *Charter*, is limited to a state of compulsory restraint following arrest and that during the interrogation process any determination of detention short of arrest would "result in a legal and social absurdity: it would transform vitually every encounter between the citizen and the police into an adversarial or hostile relationship".[17] This statement by the Commission illustrates the proposition that in the area of questioning individuals, as in other areas of enforcement procedure, the measure of rights to be accorded (whether by legislation or the courts) will in the final analysis be determined on the basis of cost to effective law enforcement.[18] It is not difficult to demonstrate that in some cases of detention the cost of granting the right to counsel is negligible. In most breathalyzer demand situations, counsel can only advise the individuals as to the legal consequences of compliance or non-compliance; the potential for legal advice to frustrate the investigation is limited. However, in a roadside demand situation the cost to effective law enforcement is much higher. The right to counsel may in effect result in a com-

court will examine the problem of exclusion of evidence, detention short of arrest is not in issue. See also *Clarkson* v. *R.* (1983), 50 N.B.R. (2d) 226 (N.B.C.A.) and *Baig* v. *R.* (1985), 20 C.C.C. (3d) 515 (Ont. C.A.), both appeals as of right with right to counsel in issue.

[16]Section 9: Everyone has the right not to be arbitrarily detained or imprisoned.

The application of this section to the interrogation process is best illustrated by the Ontario Court of Appeal decision in the pre *Therens* case of *R.* v. *Duguay et al.* (1985), 18 C.C.C. (3d) 289, where three 17-year-olds were arrested without grounds ("[T]hey had neither grounds nor an honest belief that they had the necessary grounds." — MacKinnon A.C.J.O. at 297) and subsequently interrogated. The confessions (and all other evidence obtained following the arrest) were excluded on the basis of a breach of section 9 (arbitary detention being found), the fact that the officers did not act in good faith and deliberately breached the *Charter* for an illegal purpose, the offence being not a serious one, no situation of urgency existing and no danger of flight of the young offenders. The court, while excluding the evidence in this case does not establish a rule of absolute exclusion for evidence obtained subsequent to a section 9 breach.

Section 10: Everyone has the right on arrest or detention
- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

A post *Therens* application of section 10(b) is illustrated by the decision of the British Columbia Court of Appeal in *R.* v. *Rodenbush and Rodenbush* (1985), 21 C.C.C. (3d) 423, 47 C.R. (3d) 10, where individuals, requested to enter the interview room by customs officials who had found a large quantity of cocaine concealed in one of their suitcases, were found to be detained and denied right of counsel under section 10(b) notwithstanding they had not been arrested. With an application of "the principle set out by the majority in that case" (*per curiam* referring to *Therens*, 21 C.C.C. (2d) at 426, 47 C.R. (3d) at 13), the appeal was allowed and a new trial ordered with evidence of the confessions excluded.

[17]Working Paper, *supra*, footnote 4 at 51.

[18]Individual rights can never take precedence over effective law enforcement to the extent that the enforcement is completely frustrated. For an obvious example consider the arrest section (450(1)) of the *Criminal Code*. The "no arrest" section (450(2)) is modified by the need to identify the person, secure evidence, prevent other criminal acts and to secure attendance in court. The Supreme Court has enlarged the statutory power to the benefit of law enforcement: *R.* v. *Biron* (1975), 23 C.C.C. (2d) 513, 30 C.R.N.S. 109, *Moore* v. *R.* (1978), 43 C.C.C. (2d) 83, 5 C.R. (3d) 289 and *Roberge* v. *R.* (1983), 33 C.R. (3d) 289. See also G. Garneau, "Roberge: Judicial Extension of Police Powers" (1983), 33 C.R. (3d) 309. Another prime example is part IV.1 of the *Criminal Code* which regulates the interception of communications: The right of privacy is protected only to the extent that allows for effective enforcement measures.

plete frustration of the investigation, given both the legal requirement that the sample be provided forthwith and that the grounds for arrest are not in existence at the time of making the demand.[19] In cases of detention arising from the execution of a search power,[20] the right to counsel does not affect the likelihood of successful execution. The cost factor is low here as contrasted to granting the right in situations of search incident to arrest where danger to the arresting officer provides one of the grounds for the warrantless search.[21]

As long as detention is seen to follow arrest in interrogation situations, the application of the *Charter* provisions results in a very low cost to effective law enforcement. In the absence of a legal compulsion to arrest when the grounds for arrest exist,[22] the obligation of an enforcement officer to give notice under section 10(b) can be withheld during interrogation until it is opportune to arrest the individual.[23] However, if detention is determined to exist short of arrest, notice may result in a choice by the individual to exercise the

[19]It will be interesting to see if the same application of right to counsel will be given to a roadside demand as is given to a breathalyzer demand in *Therens*. A distinction is drawn by Estey J. (13 C.R.R. at 199) and LeDain J. (at 217) which provides the court flexibility to decide that section 234.1 of the *Criminal Code* limits by statute the right of counsel in a roadside demand situation. The limitation will then be subject to consideration under section 1 of the *Charter* as a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society". See *R.* v. *Drapeau* (1985), 15 W.C.B. 250 (N.S.C.A.). While the rationale in *Chromiak, supra,* footnote 11, is undermined in *Therens*, the result may well be secure. An interesting comparison can be made to the decision of the United States Supreme Court in *Berkemer* v. *McCarty*, 104 S. Ct. 3138 (1984), where the court acknowleged that a traffic stop significantly curtails the driver's freedom of action but held that such delay was not custody for purposes of the *Miranda* formula.

[20]For example, section 10 of the *Narcotic Control Act*, R.S.C. 1970 c. N-1, authorizes (without warrant if not in a dwelling house and with warrant in a dwelling house) entry and search of the premises and also search of any person found therein. It is obvious that the search in this non-arrest situation results in detention, as any attempt to leave would be legally prevented by the enforcement official. Subsequent intrusion of counsel, while bothersome, will not, in most cases, frustrate the object of the detention, *i.e.* the search of the individual for narcotics. The advice of counsel in these circumstances could only be that the officials have the authority to search and the individual must submit. See *Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 at 190 (Ont. C.A.) for an examination of detention in this situation and the question of right to counsel. Compare the low cost to effective law enforcement (at most a delay) to the high cost of intrusion of counsel during interrogation where the advice of the right to remain silent will likely result in a frustration of the interrogation. This high cost was considered acceptable in the United States to provide procedural safeguards which deter a suspect from responding to questions in order to protect the Fifth Amendment privilege: According to Rehnquist J. in *New York* v. *Quarles*, 104 S.Ct. 2626 at 2632 (1984), when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear the costs. However, the *Miranda* formula is limited to custodial interrogation.

[21]An enforcement officer has the common law right to search incident to arrest, the object of the search being evidence or weapons, which in the latter case might endanger the individual under arrest, the officer or the general public. Thus the cost to effective law enforcement of the exercise of the right to counsel on arrest is great, as public safety is involved. In *New York* v. *Quarles, supra,* footnote 20, the United States Supreme Court in an analogous situation recently created a "public safety" exception to the requirement for a *Miranda* warning, as "the cost would have been something more than the failure to obtain evidence useful in convicting Quarles" (Rehnquist J. at 2632). See *R.* v. *Guberman* (1985), 15 W.C.B. 299 (Man. C.A.).

[22]A proper exercise of the legal discretion which a peace officer enjoys to not arrest unless there are compelling reasons to exercise the power, combined with the legislative prohibition in less serious offences (subject to the satisfaction of certain enforcement interests — section 450(2) of the *Criminal Code*) produces an anomalous result: a more humane application of the arrest provisions but also a greater likelihood of avoidance of *Charter* rights which are triggered on arrest.

[23]The issue of a constitutional right to be arrested at the moment of establishment of probable cause to do so has been advanced and rejected in the United States. See for example *United States* v. *Davis*, 646 F.2d. 1298, 1302 (8th Cir. 1981), where the *Miranda* formula was found to be inapplicable when the defendant voluntarily conversed with an informant over the telephone while not under arrest, *cert. denied*, 454 U.S. 868 (1981). However, see, *supra*, footnote 16 and, *infra*, footnote 24 for a discussion of the danger of avoidance of arrest for the purpose of interrogation when detention is found to exist short of arrest.

right to counsel before the grounds for arrest are established, which in most cases will tend to have a chilling effect on the interrogation process. On the other hand, failure to provide notice may result in the exclusion of the confession on the basis of a breach of either section 10(b) or section 9 of the *Charter*.[24] Thus detention short of arrest is the point at which the legal rights of an individual being questioned come into direct conflict with the use of interrogation as a viable investigative procedure. Here the individual has the greatest need to obtain and instruct counsel without delay and enforcement officials have the strongest aversion to the intrusion of counsel.[25]

## LEGAL POSITION OF AN INDIVIDUAL BEING QUESTIONED

The preoccupation of the Commission with the importance of notice of the right to remain silent has the effect of diminishing the importance of the right to counsel found in the *Charter* which, if exercised, encompasses the right to remain silent and provides additional procedural safeguards for the individual. A brief consideration of the legal advice that is available to an individual being questioned by law enforcement officials illustrates the potential effect of the presence of counsel on the interrogation process.

Counsel in attendance during the questioning of an individual[26] will first ascertain from the authorities whether an arrest has been made and, if so,

[24]In a situation where detention is found to exist short of arrest and no notice is given, it is obvious that section 10(b) of the *Charter* has been breached. Also, because section 10(a) requires that a detained person be promptly informed of the reasons for detention, lack of such information may result in a situation of arbitrary detention under section 9. At present the common law does not authorize detention for the purposes of investigation or interrogation (see, *infra*, footnote 29); and (unlike the breathalyzer demand situation post *Therens*) as there is no statutory authority for such detention, the enforcement officer is unable to specify the reason for detention. Also, in certain circumstances (where the offence falls within section 450(2) of the *Criminal Code* and all the conditions of the section are satisfied) the officer is prohibited from arresting the individual. For example, in *Therens* if the conditions of section 450 were satisfied, the officer would have been prohibited from arresting and unable to give reasons for the detention as none existed. Although this point was not argued in the case, it supports LeDain's J.'s dissent on the issue of good faith of the police officer. Thus until the scope of detention is determined in the interrogation process, the enforcement officer faces a dilemma. At present it is suggested that a section 9 breach may occur in two situations: (1) on arrest with no grounds (*Duguay et al., supra*, footnote 16) and (2) on detention short of arrest (an after the fact finding by the court) and without section 10(a) and 10(b) compliance, although this alternative will more likely be treated as a section 10 breach.

[25]For example, in *Rodenbush and Rodenbush, supra*, footnote 16, the avoidance of formal arrest was for the express purpose of obtaining confessions: "Then Gurley's superintendent came to the door and told him privately that suspected cocaine had been found in the suitcases. He was asked to question the appellants about the suitcases and then arrest them" (*per curiam*, 21 C.C.C. (3d) at 425, 47 C.R. (3d) at 13). In *R.* v. *Lemsatof* (1976), 64 Cr. App. R. 242 at 245 *et seq.*, a customs officer under oath gave very candid evidence explaining his reason for denial of counsel during interrogation in response to the question demanding the reason for not allowing the solicitor access to his client: "because at this particular time it was considered it would be prejudicial to our inquiries which were still continuing".

[26]Under the *Miranda* formula, *infra*, footnote 44, the suspect has the right to the presence of counsel during interrogation. Unlike the situation under the breathalyzer demand provisions of the *Criminal Code* (see R.M. McLeod, J.D. Takack and M.D. McLeod, *Breathalyzer Law in Canada*, 2d ed. and supplements (Toronto: The Carswell Company Ltd., 1982) 6-34), in Canada the position on interrogation of counsel *vis-à-vis* enforcement officers has not been fully litigated. This is especially true in situations of interrogation of individuals under arrest. See, for example, Culliton C.J.S., *R.* v. *Settee* (1974), 29 C.R.N.S. 104 at 117 (Sask. C.A.): "While counsel had every right to advise the accused to give no statement to the police, and while the accused had every right to follow that advice, counsel could not prevent the police officers from following the investigation of the alleged offence, including proper interrogation of the accused."

See also *R.* v. *Chow et al.* (1978), 43 C.C.C. (2d) 215 (B.C.C.A.). Of interest, the *Miranda* formula is triggered in situations of custodial interrogation, the Commission recommendations for notice come into effect on suspect

whether the individual has been informed of the reasons thereof.[27] The principle that "police officers, otherwise than by arrest, cannot compel any person against his will to come or to remain in any police station"[28] has recently been the subject of comment by Dickson C.J.C. in *R.* v. *Dedman*: "Short of arrest, the police have never possessed legal authority at common law to detain anyone against his or her will for questioning, or to pursue an investigation."[29] Thus in non-arrest situations counsel can be expected to advise the individual as to his freedom to leave and the probable consequences of exercising that right.[30]

In situations where an individual is being questioned as a potential witness, counsel will be aware of the public duty which exists "to help a police officer to discover and apprehend offenders"[31]. In these situations counsel will normally advise the individual that if he chooses to remain and co-operate with the authorities, further questioning should only be carried out with counsel present to advise in case the interview turns into an interrogation. Given the fact that a non-inculpatory statement has the potential to form the basis for conviction, counsel will be very careful to ascertain that the individual is being interviewed only as a potential witness and not as a suspect or potential accused.[32] Although police agreements to not prosecute an individual in return for a

questioning and the Judges' Rules apply specifically to interrogation situations, whereas the *Charter* notice comes into effect on arrest or detention and has no explicit reference to the interrogation aspect. Thus in cases of continuing custody it will be interesting to observe how the courts deal with situations of arrest and *Charter* notice followed by a period of custody and subsequent interrogation without notice. On right to counsel generally, see B. Donnelly, "Right to Counsel" (1968-69), 11 *Crim. L. Q.* 52, A. Gold, "Confessions — Police By-Passing Defence Counsel" (1981-82), 24 *Crim. L. Q.* 162, J. Leon "Rights, Fairness and Effectiveness in Canada and the United States: Counsel and Client in the Criminal Process" (1977-78), 20 *Crim. L. Q.* 29 and R. Conway, "The Right to Counsel and the Admissibility of Evidence" (1985-86), 28 *Crim. L. Q.* 28. See also the following recent cases regarding the scope of the right to counsel on interrogation: *R.* v. *Eatman* (1982), 45 N.B.R. (2d) 162 (Q.B. T.D.), *Clarkson* v. *R.*, *supra*, footnote 15, *R. v. Dombrowski* (1985), 18 C.C.C. (3d) 164, 14 C.R.R. 165 (Sask C.A.), *R.* v. *Wood* (1984), 14 C.R.R. (B.C. Co. Ct.), *Porter* v. *R.* (1985), 46 C.R. (3d) 232 (Sask. Q. B.), *R.* v. *Baig* and *R.* v. *Manninen* both *supra*, footnote 15, and *R.* v. *Ferguson* (1985), 20 C.C.C. (3d) 256 (Ont. C.A.).

[27]The authorities have both a statutory obligation (section 29 of the *Criminal Code*) and a constitutional obligation (section 10(a) of the *Charter*) to inform the individual of the reasons for the arrest.

[28]This principle is found in the preamble of the Judges' Rules as a summary of the common law.

[29](1985), 20 C.C.C. (3d) 97 at 104, 46 C.R. (3d) 193 at 202, 34 M.V.R. 1 at 22 (S.C.C.). The authority cited by Dickson C.J.C. for that proposition is overwhelming notwithstanding his position of dissent on the question before the court. The majority decided the validity of a police stop without grounds to check for alcohol related offences on the basis that the interference with liberty was a necessary and reasonable one incidental to the duties of the police, as the narrow issue of *Charter* detention was not before the court. The decision in this case is compelling authority for the proposition advanced in, *supra*, footnote 18.

[30]The most probable consequence will be arrest if the grounds for arrest exist. The arrest then triggers the right to process the individual under the provisions of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, which might not be in the best interest of the client.

[31]Found in the preamble of the Judges' Rules. See also *Rice* v. *Connolly* [1966] 2 Q.B. 414, [1966] 3 W.L.R. 17, [1966] 2 All E.R. 649, which outlines the limits of the moral duty of a citizen to assist the police.

[32]For example in *R.* v. *Howlett* (1950), 9 C.R. 196 (Ont. C.A.) the non-inculpatory statement on the first interview became the basis for the charge, given the information obtained by potential witnesses interviewed subsequent to the accused. Also, in certain complicated cases, with the wide scope of section 21 and the conspiracy provisions of the *Criminal Code*, it is difficult to determine the legal status of the client without knowledge of information held by the investigating authorities. In any case, it is very unlikely that enforcement officers will disclose to counsel their perception of potential criminal liability of the individual at the early stage of investigation (not that disclosure would determine the status of the individual) as police may change their minds once the evidence gathering process is in motion and circumstances change.

full statement indicating his involvement as well as the involvement of others must be honoured by the prosecuting authorities, counsel will provide legal advice to individuals who have been offered immunity from prosecution in return for such a statement to ensure the adequacy of the agreement.[33]

An individual has the right to remain silent when being questioned by the authorities,[34] although the effect of remaining silent has at times been both the subject of comment by trial judges respecting the guilt of an accused[35] and the reason for arresting the individual.[36] That the individual is not compelled to answer questions finds expression not only in the caution often administered during interrogation[37] but also in many recorded decisions, and has been a favorite topic for academic analysis.[38] However, the right to remain silent, which in many situations will be the best legal advice to follow, might well be qualified by counsel should the situation under investigation involve alibi, provocation or some other mitigating factor where an explanation to the authorities at the first available opportunity is likely to be of benefit.[39]

Counsel may also find it appropriate to advise the individual respecting his legal situation in response to potential requests for physical samples, fingerprints and photographs as well as lineups and polygraph tests.[40]

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[33]The agent of the Attorney-General is bound by a non-prosecution agreement: *R.* v. *Smith* (1974), 30 C.R.N.S. 383 (B.C.S.C.), *R.* v. *Betesh* (1975), 35 C.R.N.S. 238 (Ont. Co. Ct.). However, since abuse of process is the procedural remedy for ensuring enforcement, until the scope of that procedure is better defined it may be advisable to insist that there is Crown involvement in such an agreement with the police — an involvement which may be difficult to obtain in some provinces. See also *R.* v. *Weselak* (1972), 9 C.C.C. (2d) 193 (Court Martial A.C.), where a confession was admitted in a military court martial notwithstanding a promise for non-prosecution in the criminal courts.

[34]The right to remain silent is subject to any statutory enactments which may compel the individual to answer (see, for example, *Moore* v. *R.*, *supra*, footnote 18). For the right on interrogation, see E. Rutushny, *Self Incrimination* (Toronto: The Carswell Company Ltd., 1979) chapters 1-5.

[35]*Ibid.*, Rutushny at 122-26 and 184-85.

[36]*Nelles* v. *R. in Right of Ontario et al.* (1985), 46 C.R. (3d) 289 (Ont. C.A.). Thorson J.A. states at 318-19: "... when Staff Sergeant Press and Sergeant Warr went to Miss Nelles' home on 25th March 1981 to interview her about certain of the baby deaths at the Hospital for Sick Children they began the interview by first giving her the usual caution, and they then asked her if she wished to give any explanation for baby Justin Cook having been given the drug digoxin. When she replied that she wanted to speak to a lawyer (after having told them that her roommate was a law student and that she believed she knew what her rights were), she was formally arrested and taken to the police station for further questioning. The further questioning occurred after she had met with her lawyers and received advice on how to reply to questions asked of her when she was unsure of any factual matter. When in the course of that questioning she answered some questions but declined to answer others, it is said that the reaction of the police officers was that she "was fencing with them" and that this served to reinforce their conviction as to her guilt."

[37]The standard warning given by enforcement officers on interrogation is as follows: "You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence."

[38]For an interesting debate on the right, see R. Salhany and R. Carter, *Studies in Canadian Criminal Evidence* (Toronto: Butterworth & Co. (Canada Ltd.), 1972) chapter 10 entitled "Future of the Law of Evidence — The Right to Remain Silent — Two Views", articles by The Hon. E. Haines and by A. Maloney and P. Tomlinson.

[39]The alibi situation, given the obligation of an individual relaying on alibi to disclose the particulars to enforcement officers as early as possible in the investigative process, provides the most striking example of a situation where the maintenance of silence may prove harmful.

[40]An illustration of the need for legal advice of an individual in custody is found in *R.* v. *Alderton* (1985), 17 C.C.C. (3d) 204 (Ont. C.A.), where the accused was told by the arresting officer that he needed a hair sample and that the accused could either give the sample freely or the police would take it. The accused provided the sample

Given the wide range of legal advice that counsel can legitimately offer an individual being questioned by the authorities, the right afforded by the *Charter* to a person on arrest or detention to retain and instruct counsel without delay and to be informed of that right is a most effective means to ensure that the procedural rights of an individual under interrogation are observed.

## CATEGORIZATION OF QUESTIONING SITUATIONS

For purposes of illustration it is possible to identify at least five distinct situations that may exist during questioning of an individual by law enforcement officials in the process of investigating an offence, and to indicate the level at which notice provisions in Canada (the Commission Recommendations[41] and *Charter* notice[42] based on the narrow view that detention follows

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which proved to be essential evidence. The court upheld the validity of the seizure as being seizure incident to arrest and in any case not being accomplished by violence or threats of violence or in contravention of section 8 of the *Charter* (although if in contravention, the evidence would be admissible under section 24(2)). With due respect it appears that counsel could advise the individual as to the danger of compliance with such a request which must, in the absence of consent, result in an assault by the officer. On the other hand, faced with a request for fingerprints and photographs, advice of counsel must be for compliance with a caution that any conversation with the investigating authorities can be dangerous: For example in *Alward and Mooney* v. *R.* (1977), 35 C.C.C. (2d) 392, 39 C.R.N.S. 281 (S.C.C.), the transcript on the *voir dire* at 495-96 discloses the evidence of Detective Scott:

Q. Did you show him any of the items we have marked for identification during this conversation?
A. I only showed them the calculator. I showed him a pair of boots while I was questioning him.

Q. At what stage?
A. While I was fingerprinting him, while we were talking about kicking. How many times he had kicked him, and I had asked how many times it took to knock the old man down, and at this point I turned around and I went to my locker and I opened up my locker, and a pair of green steel capped rubber boots I had taken out — these are the boots — I had taken out and shown to Michael Alward and asked —

Q. You're referring to the boots, the gum rubber boots of Michael Alward, item C for Identification?
A. Yes, and these were the boots that were shown to Michael Alward, and Corporal Peck and Detective Munn were there at the time, and he laughed.

Counsel may also have valuable advice to give to the individual respecting the evidentiary effect of refusing a lineup request. As far as a polygraph request is concerned, in most cases it will be properly regarded by counsel as an extension of the interrogation process.

[41]The Commission Recommendations in the Report prohibit police questioning of a suspect without warning in respect to the right to remain silent, the potential use of a statement and the right to contact a lawyer:

447.2 (1) A police officer shall not question a suspect with regard to any offence for which that person is a suspect unless he has given that person a warning in the following terms:

> You have a right to remain silent, and you are free to exercise that right at any time. If you wish to make a statement or answer questions, anything you say may be introduced as evidence in court. Before you make a statement or answer any questions you may contact a lawyer.
>
> This warning shall be given orally and may also be given in writing.

(2) A warning need not be repeated if a warning has recently been given or in other circumstances where repetition would be self-evidently unnecessary.

(3) Subsection (1) does not apply where the police officer is acting under cover and the suspect is not under arrest or detention.

Admissibility of evidence is governed by statute and appears to be a half-way house between the ordinary rules of admissibility on the basis of voluntariness and a rule of absolute exclusion.

447.5 Evidence obtained in contravention of this Part is not admissible at the instance of the prosecution at a preliminary inquiry or trial unless the prosecution established that the admission of the evidence would not bring the administration of justice into disrepute.

[42]The *Charter* notice is triggered by arrest or detention (rather than by interrogation) and is limited to right to counsel and notice of that right:

arrest), England (the Judges' Rules[43]) and the United States (the *Miranda* formula[44]) come into effect. The comparison is made initially to indicate that notice to the individual being questioned is a common element in all three jurisdictions under consideration whether the notice is limited to the right to counsel, the right to remain silent, or includes a combination of both rights.

**Potential Witness Interview**

Interviews are often held by law enforcement officials to obtain information on which the investigation into an offence may be commenced or continued. As stated in Rule I of the Judges' Rules:

> When a police officer is trying to discover whether, or by whom an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained....

At the commencement of the interview the authorities may be uncertain as to whether the individual being questioned is a potential witness, potential accused or simply a source of useful information. The purpose of the interview is to explore the extent of the knowledge possessed by the individual and to have

10(b) Everyone has the right on arrest or detention... to retain and instruct counsel without delay and to be informed of that right.

Admissibility of evidence is governed by section 24:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[43]The Judges' Rules are neither statutory provisions (contrast to Commission Recommendations) or constitutional guarantees (contrast to *Charter* notice and the *Miranda* formula), but merely administrative directions to police agencies, which were first issued from the Lord Chief Justice (1906), later from a group of judges (1912) and subsequently from the Home Office with the approval of the judges (1930 *et seq.*). The warning triggered by interrogation is restricted to the right to silence and the potential use of a statement. For the exact wording, see the text at paragraphs (b) and (c) of *Characterization of Questioning Situations*. Admissibility of evidence is governed by the ordinary rules of evidence on voluntariness plus a discretion to exclude on the basis of a breach of the Rules. As noted in the Preamble to the Rules:

> These rules do not affect the principles:
>
> (e) that as a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from his by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.
>
> The principal set out in para. (e), *supra*, is overriding and applicable in all cases. Within that principle the following rules are put forward as a guide to police officers conducting investigations. Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

See L.H. Leigh, *Police Powers In England and Wales* (London: Butterworth & Co. (Publishers) Ltd., 1975) 141-48 for admissibility for application to police procedure on interrogation.

[44]The *Miranda* formula derives from the extension of the Fifth Amendment guarantee that "no person... shall be compelled in any criminal case to be a witness against himself" to the pre-trial investigatory stage in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The extension was based on the presumption that interrogation of an individual in custody is inherently coercive. The warning, triggered by custodial interrogation, includes the right to remain silent, the potential use of evidence, the right to the presence of an attorney during interrogation and the additional guarantee that an attorney will be provided if the individual cannot afford one. Statements made on custodial interrogation are inadmissible unless the suspect is specifically informed of his rights and freely decides to forego these rights.

him commit his statement of the events to paper with appropriate acknowledgements and signatures for subsequent use in court proceedings.[45]

**Suspect Interrogation**

In this category the grounds for arrest or for laying an information do not exist although the authorities have reasonable grounds to suspect that the individual being questioned committed the offence.[46] The process is described as interrogation rather than interview, as the purpose of the questioning is directed toward obtaining admissions concerning the offence from the individual.

Rule II of the Judges' Rules requires a caution to be given at the commencement of suspect interrogation:

> As soon as a police officer has evidence which would afford *reasonable grounds for suspecting that a person has committed an offence*, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to the offence.
>
> The caution shall be in the following terms: "You are not obliged to say anything unless you wish to do so but what you say may be put in writing and given in evidence." (emphasis added)

**Potential Accused Interrogation**

The situation described in this category differs from suspect interrogation to the extent that the grounds for arrest or laying of an information exist[47]

[45]That is, to have the potential witness commit his statement to writing, properly acknowledged, to be easily utilized under section 9 or 10 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 and also to provide material in the form of written statements on which to form the basis for laying an information.

[46]The Commission Recommendations advanced in the Working Paper would have included this situation: see recommendation 2(1) and explanatory notes at 48-52. This criterion was abandoned for that of potential accused interrogation due to adverse reaction from the law enforcement community (see Solomon, *supra*, footnote 4). The United States Supreme Court has categorically rejected suspect interrogation in non-custody situations as the point where the *Miranda* warning must be given. The focus test, which developed out of a cryptic footnote in the *Miranda* judgment, was specifically rejected in *Beckworth* v. *United States*, 96 S.Ct. 1012 (1976) as was the argument that psychological restraint was equivalent to custody. See also *Oregon* v. *Mathiason*, 97 S.Ct. 711 (1977) where the defendant, on parole, voluntarily came to the police station in response to a request by a police officer who immediately informed him that he was not under arrest, and in fact did not arrest him after a one-half hour interview during which the defendant made a taped confession of burglary. As noted *per curiam* at 714: "Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment". Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody". It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." The principle in *Oregon* v. *Mathiason* was affirmed by the court in *California* v. *Beheler*, 103 S.Ct. 3517 (1983) *per curiam* at 3519-20: "Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving of *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest... But we have explicitly recognized that *Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect'."

[47]For the purpose of this paper it is assumed that the grounds for arrest (section 450(1) of the *Criminal Code*) are identical to the grounds for laying an information (section 455) whereas that is true only in indictable offences, as the grounds for arrest in summary conviction offences are less, notwithstanding *R.* v. *Biron*, *supra*, footnote 18: see *R.* v. *Stevens* (1976), 33 C.C.C. (2d) 429 (N.S.S.C. App. Div.).

although the individual has not been arrested or charged. The purpose of the questioning is directed to obtaining additional evidence to strengthen the prosecution case or to better determine the degree of culpability of the potential accused.

Under Commission Recommendations this category requires notice, as the definition of suspect on which the application of the rules depends is based on the arrest power:

> ... any person who a police officer *has reasonable and probable grounds to believe has committed an offence*... including any person under arrest or detention, any person, who is an accused within the meaning of section 448 of this Act, and any person charged with an offence.[48] (emphasis added)

The Judges' Rules emphasize in the preamble that the Rules do not affect the principle:

> d) that when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence.

Of greater importance, Rule III purports to limit further questioning and requires other cautions to be given:

> a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:
>
> "Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."
>
> b) *It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.* Such questions may be put where they are necessary for the purpose of preventing or minimizing harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.
>
> Before any such questions are put the accused should be cautioned in these terms:
>
> "I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions and answers will be taken down in writing and may be given in evidence. ..." (emphasis added)

### Accused and Post-Indictment Interrogation

This category includes any situation where the individual being questioned by authorities at the time is under arrest, has been charged or is incarcerated in respect to any offence, and the interrogation is for the purpose of obtaining admissions concerning that offence or other offences. The Commission Recommendations and the Judges' Rules cover this situation although, as noted, both come into effect earlier. A narrow view of detention means that *Charter* notice is applicable only at this level although it will not be required

[48] Report, *supra*, footnote 4, chapter 2.

where an individual is charged but not arrested or detained. The *Miranda* formula, with certain exceptions, also comes into effect at this level.[49]

**Psychological Detention**

A major problem inherent in any system of notification that relies on an objective basis for categorization of questioning situations is that the system does not take into account the possibility of a situation of psychological detention — a situation where actual arrest or detention does not exist but the individual being questioned, on reasonable grounds, believes he is compelled to attend or remain at the place of questioning and to co-operate with the authorities.[50] In *Therens* LeDain J. describes the situation as follows:

> Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. *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.*[51] (emphasis added)

It should be noted that the Commission Recommendations, the Judges' Rules and the *Miranda* formula all avoid utilization of the concept of psychological detention. In the context of the interrogation process, psychological detention presents difficult problems for both law enforcement

[49]Under the *Miranda* formula, custodial interrogation is characterized as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The courts of appeal have looked at custody in different ways since *Miranda* to determine its scope: a subjective test in which the court considers the existence of probable cause for arrest, the subjective belief of the suspect regarding his freedom and the focus of the investigation [*United States* v. *Montos*, 421 F.2d. 215, 223 (5th Cir.); *cert. denied*, 397 U.S. 1022 (1970), *United States* v. *Wasler*, 670 F.2d. 539, 542 (5th Cir. 1982)]; an objective test in which the court considers the language used by the officer to summons the suspect, the physical surroundings of the interrogation, the extent to which the suspect is confronted with evidence of his guilt, and the amount of pressure exerted to detain the suspect [*United States* v. *Crisco*, 725 F.2d. 1228, 1230, 1231 (9th. Cir.); *cert. denied*, 104 S.Ct. 2360 (1984)], and various combinations of the two tests. However, the United States Supreme Court, in a number of recent decisions, has narrowed custody to the scope of the original test, the ultimate inquiry being simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest: *California* v. *Beheler*, 103 S.Ct. 3517 (1983), *Berkemer* v. *McCarty*, 104 S.Ct. 3138 (1984), *New York* v. *Quarles*, 104 S.Ct. 2636 (1984) and *Minnesota* v. *Murphy*, 104 S.Ct. 1136 (1984). It is clear that the "in custody" requirement is equivalent to arrest or a very narrow view of detention where in fact the individual is detained although not formally arrested, *i.e.* handcuffed [*United States* v. *Booth*, 669 F.2d. 1231, 1236 (9th. Cir. 1981)], or as found in an earlier case where the accused was questioned by authorities in his bedroom at 4 a.m. and not free to go where he pleased being, for all intents and purposes, under arrest [*Orozco* v. *Texas*, 89 S.Ct. 1095 (1969)]. The major exception to the *Miranda* formula is that of public safety developed in *New York* v. *Quarles*, *supra*, footnote 20.

[50]The difficulty with this concept is that, as noted by the Commission in the Working Paper (see text supported by, *supra*, footnote 17), almost every encounter between citizen and police can be viewed as this type of situation for the citizen. That proposition is clearly supported by both majority and dissenting judgments in *Dedman*, *supra*, footnote 29. See also, *supra*, footnote 46 for *per curiam* discussion of that issue on interrogation in *Oregon* v. *Mathiason*.

[51]*Supra*, footnote 9, 13 C.R.R. at 215-16.

officials[52] and accused individuals[53], although it is suggested that the concept (as articulated by LeDain J.) best describes the reality of most interrogation situations and will become the focus for defence counsel testing the limits of *Charter* rights until the issue is decided by the Supreme Court of Canada.

## APPLICATION OF CHARTER NOTICE TO THE INTERROGATION PROCESS

Having outlined the legal advice available to an individual being questioned and having noted the variety of possible questioning situations, an attempt will be made to illustrate different approaches that might be taken by courts to determine when detention exists in the interrogation process. The factual situation found in *R* v. *Howlett*[54] is utilized to demonstrate the possibilities and also to indicate the conflict which arises on interrogation between the two legitimate objectives of protection of the rights of the individual and of effective law enforcement.

In *Howlett* information is received by police officers that the accused was seen in the company of the deceased immediately prior to his death. The officers seek out and bring Howlett to the station for questioning. Within a short time the chief investigator makes assertions such as "you killed Harry Brown" and "... you sat there and you saw he had money, and that is why you did it...", all of which are denied by Howlett orally and in a signed statement. Although Howlett is not cautioned or arrested, he is directed to leave the room under police supervision while another individual is interviewed concerning money spent by Howlett subsequent to the homicide. At a second session when the investigator questions him concerning the money, Howlett identifies his wife as the source. Once again the questioning is interrupted while the investigator interviews Howlett's wife at their home. She denies in a signed statement the fact of giving money to her husband. At a third session after further questioning, Howlett is notified that he will be charged with the homocide and is given the usual police caution. Howlett then signs a statement to the effect that he struck the old man with a wine bottle resulting in his fall to the floor. Subsequently Howlett is placed under arrest, locked up for the night and formally charged with murder the next morning.

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[52] Law enforcement officials are faced with two major problems: overanticipation of a detention situation resulting in arbitary detention and underanticipation resulting in breach of the right to counsel (see, *supra*, footnote 24).

[53] Accused individuals are faced with having to give evidence on the issue, as in most cases psychological detention can only be established by the individual aware of his own state of mind. If the issue is to be determined on a *voir dire* respecting admissibility of a confession, can the accused, once sworn, limit his evidence to the *Charter* issue? A stong case can be made that the onus must shift to the accused to establish this condition, as it is difficult to imagine how the prosecution could prove beyond a reasonable doubt that situation of psychological detention did not exist during the interrogation process. See *R.* v. *Lundrigan* (1985), 15 C.R.R. 256 (Man. C.A.), where the court held that the onus rests on the accused to establish that his version of the events in relation to a *Charter* infringement should be accepted.

[54] *R.* v. *Howlett, supra,* footnote 32, is chosen to illustrate the various situations existing during the interrogation process. The facts, analysis and discussion are related in the present tense to make more credible the application of *Charter* rights to a 1950 situation. The Ontario Court of Appeal allowed the appeal and ordered a new trial as the trial judge incorrectly applied the principles respecting admissibility of confessions. Thus it is not known whether the confession would be admissible under the ordinary rules of voluntariness.

Viewed solely from a law enforcement perspective, the investigation is indeed a model of police efficiency. In just three hours the investigator moves from a no evidence situation to a solution of the homicide by using the initial denials of the accused as a basis for further inquiry. Howlett is not arrested although he is kept under control at the station — a key factor which prevents communication with his wife. Howlett is also kept unaware of the fact that his wife is not a potential witness against him in a subsequent prosecution[55] and that the effect of her signed statement is minimal except to further focus the investigation on himself. The investigator quite easily obtains the essential confession from Howlett by keeping him in a state of ignorance concerning his rights and under control although not under formal arrest.

Under the *Charter*, should Howlett be notified of his right to retain and instruct counsel without delay (1) when he is brought to the station as a potential witness for questioning, (2) when the situation at the station changes from an interview to interrogation, (3) when the chief investigator has grounds to arrest him for the homicide, (4) when Howlett is informed that he will be charged with the offence or (5) when he is formally placed under arrest? Should the answer be based on formal arrest or on an interpretation of detention short of arrest? If formal arrest is the answer, the only advice which Howlett's lawyer is able to offer will be limited to the eventual court proceedings.

Although not an issue at trial, it appears that Howlett can in all probability be considered to be in a state of psychological detention (as described by Le-Dain J. in *Therens*) from the moment of his initial contact with the authorities. Should detention be found to exist at this point, two problems are evident. First, the investigating officer is caught in a dilemma: In addition to giving notice he is required to inform Howlett of the reasons for the detention although (as noted by Dickson C.J.C. in *Dedman*) he has no authority to detain, he cannot arrest (the grounds for arrest do not exist) and he must be aware of Howlett's state of mind in order to determine psychological detention. Second, notification at this point will draw counsel in at the earliest stage of the investigation and in many situations frustrate the investigation completely in respect to potential witness interviews. As noted previously, notwithstanding the public duty that rests on citizens to help law enforcement officers discover and apprehend offenders, the basic legal proposition that an individual is not compelled to answer the questions of an enforcement official or to accompany that person short of arrest, applies to potential witnesses as well as suspects, potential accused and to accused persons. For example, both Howlett's wife and the witness who is interviewed concerning money spent by Howlett subsequent to the homicide, may refuse to co-operate with the authorities without risking legal liability. At the initial stage of the investigation, the police inspector in all likelihood will not be able to distinguish between the legal position of the two witnesses and of Howlett. All three will be categorized in his mind as potential witnesses until evidence begins to emerge which points to Howlett as a suspect or potential accused. Although potential witnesses have a right to counsel, this right has not been categorized in the *Charter* as a constitutional right, as under ordinary circumstances the

[55]This principle is based on the common law rule of spousal incompetency: see section 4 of the *Canada Evidence Act*.

possibility of loss of personal freedom does not exist.[56] Law enforcement officials will be hard pressed to inform a potential witness of the advantages of seeking counsel, as the cost to effective law enforcement is prohibitive. Although Howlett is caught in an unfortunate position on a potential witness interview, it is suggested that the extension of detention to this stage of the investigation would, for the reasons stated, have a disastrous effect on the interrogation process.

At the opposite extreme *Howlett* illustrates that the right to counsel may become meaningless if detention is seen to exist only on formal arrest. Notification of the right is then entirely under the control of the law enforcement official. It is further suggested that questioning of the investigating officer will reveal that, should Howlett attempt to leave at any point beyond the initial interview, he will be arrested and compelled to remain at the station, although it is clear that the grounds for arrest are not in existence until the third session of interrogation.[57]

Three other possibilities of detention short of arrest remain for consideration: when Howlett becomes the focus for suspect interrogation, when grounds for arrest exist and when he is informed that he will be charged with the offence.

Howlett's rights are most adequately protected if detention is found to exist on the commencement of suspect interrogation, although (with the exception of the warning found in Rule II of the Judges' Rules) this alternative will represent a radical departure from established standards in the systems under consideration and will impose a high cost on effective law enforcement. While it may be difficult to accept the possibility of a breach of the right to counsel should the authorities fail to give notice at the commencement of suspect interrogation, one cannot help but speculate that if Howlett clearly requests and is denied counsel at this point, it will be equally difficult for the courts to rule that a breach has not occurred. An indication of the reluctance of the courts in England to apply Rule II of the Judges' Rules in a mechanical fashion early in the interrogation process is evident by recent rulings that in suspect interrogation the investigator "... is not bound to caution until he has got some information which he can put before the court as the beginnings of a case".[58]

Should detention then be found to exist once the grounds for arrest are established? The strongest arguments for this proposition appear to be that enforcement officials are provided with some degree of certainty as they know

[56] As suggested by LeDain J. in *Therens, supra,* footnote 9, 13 C.R.R. at 214: "... the situations specified by s.10 — arrest and detention — are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty may otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel..."

[57] Without suggesting bad motives on the part of enforcement officials, the situation which existed pre *Charter* encouraged a loose approach to arrest, as in most cases the validity of the arrest (especially on interrogation) was seldom in issue at trial. Also, for unknown reasons some enforcement officials believed that the "24 hour rule" (section 454(1) of the *Criminal Code*) entitled an arrest for the purpose of interrogation, the arrest being subsequently justified if a confession was forthcoming. Hopefully the application of *Charter* rights on arrest will lead to more precision in the execution of this important power.

[58] Leigh, *supra,* footnote 43 at 150.

when the grounds exist, and notice cannot be avoided merely by avoiding formal arrest. Of more importance the courts are able to ascertain detention without having to examine the subjective state of mind of the accused, as evidence of compliance can be obtained solely from prosecution witnesses.

In *Howlett* grounds for arrest and the notification of the charge coincide. Without question, this is the last sequence of events where notification will be of any benefit to the accused, as a written statement is obtained after notification that he will be charged with the offence and after the usual caution is given informing him of his right to remain silent. Assuming that no inculpatory oral admissions were made previously, it is interresting to note that Howlett (like most individuals when informed that they will be charged or that they are under arrest) no doubt believes that his past is known, his future fixed and that full co-operation with the authorities can only enhance his position before the courts — a situation far from the truth. While notification of the right to counsel at the point of notification of the impending charge is helpful, it (like formal arrest) suffers from the possibility of intentional delay by enforcement officials.

*Howlett* involves a relatively uncomplicated investigation compared to many situations described in the law reports. However the case raises most of the issues that will be before courts called upon to answer the question of whether detention should be found to exist short of arrest in the interrogation process. At one extreme (psychological detention), individual rights are protected with prohibitive costs to effective law enforcement. At the other extreme (formal arrest), notice of the right to counsel is granted, but in a meaningless fashion due to the damage already done to the individual by the time notice is given. Is there a satisfactory middle ground where the competing interests can both be accommodated without having to rely on the generosity of enforcement officers? Has the flexibility, which existed in respect to the admission of confessions based on voluntariness, been foreclosed by a combination of *Charter* provisions and the decision in *Therens*?

## CONCLUSION

The notion that counsel might play an active role in providing legal advice to an individual under interrogation by law enforcement officials is of recent origin. Prior to the enactment of the *Bill of Rights*,[59] while it was accepted that an individual, once arrested, should not be held *incommunicado* subject to reasonable and necessary delays,[60] it appears that the "24 hour rule"[61] found in the *Criminal Code* was more effective in bringing counsel and client together than any right enshrined in common law.

[59] *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, 1970 (8-9 Elizabeth II) c.44, Appendix III., proclaimed in force January 1, 1972, herein referred to as the *Bill of Rights*.

[60] *Koechlin* v. *Waugh and Hamilton* (1957), 118 C.C.C. 24 (Ont. C.A.).

[61] Section 454(1) of the *Criminal Code* requires a peace officer who has arrested and not released an individual to bring the same before a justice to be dealt with according to law within a period of 24 hours or as soon as possible thereafter if the justice is not available within that 24 hour period.

The existence of the right to counsel at the arrest or detention stage of criminal procedure as enacted in section 2(c)(ii) of the *Bill of Rights* was considered by McIntyre J.A. (as he then was) in *R.* v. *Chow et al.*:

> An unqualified right to counsel is by no means long established in our law. In early times there was no such right at common law and it is difficult to find authorities for the flat proposition that an accused has a right to counsel save in recent times. The *Canadian Bill of Rights* may accord such a right in s.2(c)(ii). It has been so considered in various cases: *R.* v. *Ballegeer* in the Manitoba Court of Appeal is an example. But it is difficult to read the language of the *Bill of Rights* to give that result, save in cases where some law of Canada must be construed. However, I assume, for the purpose of this judgment that such a right exists.[62]

However, the effect of the *Bill of Rights* provision was slight, as denial of counsel not only became just one of the factors to be considered in determining the admissibility of a confession, but also frequently failed as the basis for exclusion of evidence due to the reluctance of courts to treat the enactment as a constitutional instrument. As noted by McFarlane J. in the same case:

> Counsel for Limerick submitted further that her statements should have been excluded because her right to consult counsel was interfered with. This was said to be in violation of the *Canadian Bill of Rights*... which provides that in the absence of express declaration by Parliament to the contrary, no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay. Apart from the difficulty of ascertaining what law of Canada is to be construed and applied here, it is, I think, pertinent to observe that Mr. McGinley himself appears to have acquiesced in the delay, saying he "had other things to do and would appreciate being advised as soon as possible". In any event, assuming, without deciding, that there was a violation of s. 2(c)(ii), I think the trial Judge was right in treating it as a factor for consideration in deciding the essential question of voluntariness but not as a factor which required exclusion of itself. In doing so he applied the judgment of the Supreme Court of Canada in *Hogan* v. *The Queen*, and that of the Manitoba Court of Appeal in *R.* v. *Letendre*. In the former case Pigeon, J., at 73 C.C.C., p. 585 S.C.R., referring to the majority judgment delivered by Ritchie, J., said:
>
> > I agree with Ritchie, J., that this appeal should be dismissed on the basis that, even if the *Canadian Bill of Rights* is given the same effect as a constitutional instrument, this does not mean that a rule of absolute exclusion, which is in derogation of the common law rule, should govern the admissibility of evidence obtained wherever there has been a breach of one of the provisions contained in that Bill.
>
> I am, accordingly, of the opinion that the statements of Limerick admitted in evidence were properly admitted by the trial Judge....[63]

The Supreme Court of Canada, in *R.* v. *Turgeon*,[64] recently affirmed the view that there is no rule of absolute exclusion of a confession based on a breach of the *Bill of Rights* provision, notwithstanding the decision of the court to uphold exclusion of the confession on the basis of voluntariness.

Thus the *Bill of Rights* situation (with no notice provision, no rule of absolute exclusion of evidence on a breach of the right to counsel and with a

[62] *Supra*, footnote 26 at 230.

[63] *Ibid.*, at 225.

[64] (1983), 33 C.R. (3d) 200 (S.C.C.). The court was careful to point out that Dubé J.A.'s assertion in the court below that an accused's statement should never be admitted in evidence when his unquestionable right to counsel had been denied by a person in authority was *obiter*.

determination of detention fixed on arrest) tended to favour effective law enforcement over individual rights. However, notwithstanding the numerous decisions that admitted confessions obtained after a breach of the right to counsel, the system maintained sufficient flexibility to foster the notion that in the appropriate situation individual rights would be protected by the courts. Law enforcement officials always lived with the possibility that violation of the right to counsel on interrogation would lead to exclusion of the confession, which may have had more effect on restricting excessive action of officials than the more formalistic approach which developed in the United States under the *Miranda* formula[65].

This paper is written on the assumption that with the decision in *Therens,* there is very little flexibility left in the application of section 10(b) of the *Charter* to the interrogation process other than to establish the limits of detention. However, the assumption that *Therens* has limited the options may prove erroneous: The courts may find section 1 of the *Charter* to be applicable in interrogation situations, although it is difficult to imagine what explicit or implied limitations might apply to the right to counsel other than the arbitrary conduct of enforcement officials; a confession may be found not to have been obtained in a manner that infringed or denied a right (that is, causation might be required), although the obtaining of the certificate appears to bear no relationship to the denial of counsel in *Therens*; or, of most importance, there may not be a rule of absolute exclusion established in breach of right to counsel situations, although it is impossible to conjure up a more onerous consequence for an individual under interrogation than the effect of a breach during the investigation of a serious criminal offence.

A comparison of the American situation (the *Miranda* formula) with the English (the Judges' Rules) reveals that the greater the protection of rights at the notice stage, the more likely that the notice requirement will be delayed in the interrogation process. With notice of the right to remain silent, the right to the presence of an attorney during interrogation and the right to have an attorney appointed if the individual is unable to afford his own, plus a rule of absolute exclusion of evidence, it is not surprising that the United States Supreme Court has not enlarged to any significant extent the concept of custodial interrogation, notwithstanding a constant barrage of arguments advancing this enlargement.[66] Lacking a rule of absolute exclusion (with breach of the notice requirement being considered as one factor in voluntariness) and with notice restricted to the right to remain silent, the Judges' Rules require notification as early as suspect interrogation. The Commission Recommendation with notice to a potential accused (subject to arrest at the discretion of the investigating officer) appears to be a compromise measure which satisfies in part the definition of detention formulated in *Therens* by LeDain J. as the assumption of control by a police officer or other agent of the state "over the

[65]See A. Mandaville, "Miranda Warnings" (1977), 5 *Am. J. Crim. L.*, 335, for a general overview of the effect of the *Miranda* formula.

[66]See, *supra*, footnote 49.

movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel"[67].

The real problem created by *Therens* is the possibility that courts will extend the application of the decision to situations outside the ambit of the breathalyzer demand provision without careful consideration of the potential effect of the extension on important investigative techniques such as the interrogation process.[68] It is suggested that courts might approach application of the *Charter* provisions to interrogation in the following manner: First, the strength of the right to counsel (which appears to fall between the American and English models) would be determined. Second, the extent of the application of *Therens* to the interrogation process would be examined to ascertain if the flexibility necessary to balance the two competing interests rests with a determination of the scope of detention. Third, an assessment of the cost to effective law enforcement of a determination of detention short of arrest would be undertaken. Finally, a choice would be made of the method to be utilized to determine detention on interrogation. In the event that detention is the only major issue left undetermined, the courts will find the policy arguments advanced in the American cases to be of utmost significance given the close parallel existing between the two jurisdictions.[69]

[67] *Supra*, footnote 9, 13 C.R.R. at 214.

[68] See *Rodenbush and Rodenbush, supra*, footnote 16, and *Re Patricia Randazzo* (1985),15 W.C.B. 135 (B.C.S.C.) for decisions where psychological detention was found to exist short of arrest in interrogation situations. The courts relied solely on the principle in *Therens* for authority, with no analysis of the potential effect of this application.

[69] Notwithstanding the differences in source and scope of the *Miranda* formula as compared to *Charter* notice of right to counsel, once the issue is limited to the nature of custody (under *Miranda*) or detention (under the *Charter*), then the 20 years of litigation in the United States on the issue of interrogation must be reviewed if Canadian courts hope to avoid "reinventing the wheel" in respect to the necessity of balancing the two competing but legitimate interests. The decision in *Miranda* was once considered to be an extreme extension of individual rights at the expense of effective law enforcement. However, with the reluctance of the United States Supreme Court to subsequently enlarge the scope of custodial interrogation, the judgment, read in light of recent decisions, must now be regarded a masterpiece of judicial reasoning, which has withstood the test of time.