The *Canadian Charter of Rights and Freedoms*: Its Impact on Law Enforcement.

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In response to expressed concern about the impact that the Canadian Charter of Rights and Freedoms *will have on law enforcement, the author, by examining the enforcement provisions and search or seizure provision of the* Charter, *identifies the reasons for such concern and concludes that it is justified.*

En réponse, à l'inquiétude manifesté par rapport à l'impact qu'aura la Charte Canadienne des Droits et Libertés *sur les recours de la loi, l'auteur à examiné les sections dans la* Charte *se rapportant aux recours, des fouilles, perquisitions et saisies. Il en est venu à la conclusion que l'inquiétude manifesté à ce sujet est justifié.*

INTRODUCTION

The *Canadian Charter of Rights and Freedoms* (the *Charter*) will soon become law as part of the *Constitution of Canada.*[1] One concern presently being expressed is in regard to the future impact of the *Charter* on law enforcement and the administration of justice in the country.[2] In this article the enforcement mechanism provided by section 24[3] of the *Charter* will be examined with a view to making an objective determination as to the need for the expressed concern. Although section 24 provides a remedy for the infringement of any right guaranteed by the *Charter*, its application will be considered only in the context of an infringement of

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[1]The *Charter* is contained in the *Canada Act*, presently before the British House of Lords, which is an Act to give effect to a request to amend the Constitution of Canada by enacting that the *Constitution Act*, 1981 shall have the force of law in Canada. The request was made by the Senate and House of Commons of Canada in a Joint Address to Her Majesty.

[2]The December 19, 1981 issue of the Saint John *Telegraph Journal* reported the concern of Staff Sargeant John Barnstead, staff relations representative for the R.C.M.P.'s New Brunswick Division, about the effect on law enforcement of sections 24 and 8 of the Charter.

[3]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.

(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 proceedings would bring the administration of justice into disrepute.

the right to security against unreasonable search or seizure as provided by section 8.[4]

This article is divided into three principal parts. In the first part, section 24 is considered in light of the enforcement mechanisms provided for violations of rights under the *American Bill of Rights*[5] and the *Canadian Bill of Rights.*[6] Consideration is also given to the development of the Charter provision through the drafting process. In the second part, the scope of section 8 and the existing Canadian law of search and seizure are examined. In the third part, consideration is given to the application of section 24 with particular attention given to possible guidelines for determining when the administration of justice may be brought into disrepute.

THE DEVELOPMENT OF THE ENFORCEMENT PROVISION OF THE CHARTER

The Minutes of Proceedings of the Joint Committee on the Constitution[7] record references to the American experience under the *American Bill of Rights*[8] and the Canadian experience under the *Canadian Bill of Rights*[9] as the Joint Committee developed the remedy provision contained in the final version of the Charter. A general understanding of the remedies available under those documents contributes to an appreciation of the *Charter* remedies.

The American Bill of Rights

The American *Bill of Rights* is a declarative document giving recognition to rights therein declared, but providing no sanctions for a violation of those rights.[10] Judicially created mechanisms were developed as the courts attempted to enforce constitutional rights, but it was not until 1914, 125 years after the Constitution was affirmed, that the exclusion

[4]Everyone has the right to be secure against unreasonable search or seizure.

[5]U. S. Constitution.

[6]R. S. C. 1970, App. III.

[7]Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada respecting: the document entitled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada," published by the Federal Government on October 2, 1980. The Joint Committee heard representations concerning the proposed *Charter* from November 6, 1980, to February 13, 1981 and drew up the draft of the *Charter* which was adopted by the House of Commons, December 2, 1981, House of Commons Debates, Vol. 124, 1st session 32nd Parliament.

[8]Minutes of Proceedings, November 27, 1980, Vol. 14 at 22.

[9]Minutes of Proceedings, November 18, 1980, Vol. 7 at 15.

[10]*Supra*, footnote 5.

of illegally obtained evidence was applied as a remedy. In *Weeks* v. *United States,*[11] the appellant had been convicted on evidence which had been obtained by a United States marshal who had searched the appellant's home while he was at work and who had held neither an arrest warrant nor a warrant to search the premises. An application made before trial to the Federal District Court of Missouri for the return of the seized property was denied, the court holding that matter pertinent to the offence could be retained and used as evidence.[12] The Supreme Court of the United States ordered the property returned. Day J. stated as part of the judgment:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his rights to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[13]

The exclusionary rule established by the decision in *Weeks* applied only to the Federal government and its agencies.[14] As the rule developed in response to infringements of Fourth Amendment guarantees[15] it was adopted by some states, but by 1949 the courts of thirty states had considered the doctrine and rejected it.[16] The issue of whether the guarantee against unreasonable search and seizure and the exclusionary rule applied to those thirty states came before the United States Supreme Court in *Wolf* v. *People of the State of Colorado.*[17] The Court held that although the Fourth Amendment guarantee was part of the law of these states by way of the Fourteenth Amendment[18], the exclusionary rule was not. Frankfurter J., delivering the opinion of the Court, stated:

> We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures, but by overriding the relevant rules of evidence.[19]

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[11]232 U.S. 383 (1914).

[12]*Ibid.*, at 388.

[13]*Ibid.*, at 393.

[14]*Ibid.*, at 399.

[15]*Supra,* footnote 5: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . .

[16]*Wolf* v. *People of Colorado,* 69 S. Ct. 1359 (1949) at 1367.

[17]*Ibid.*

[18]14th Amendment (1868) . . . nor shall any state deprive any person of life, liberty, or property without due process of law.

[19]*Supra,* footnote 16, at 1364.

Mertens and Wasserstrom describe the period following the decision in *Wolf* as one of "intolerable tension between state and federal law"[20]. The cause of the tension they describe as follows:

> As the federal courts continued to expand the range of fourth amendment protections in the course of deciding exclusionary rule cases, the gap between federal and state privacy rights began to widen. In those states whose courts did not apply the exclusionary rule, the privacy rights protected by the fourth and fourteenth amendments remained undeveloped. As a result, while federal law enforcement agencies responded by modifying investigatory practices to conform to evolving fourth amendment standards, in states without an exclusionary rule egregious and premeditated official misconduct continued;. . . .[21]

In 1961 the ambivalency resulting from the *Wolf* decision was resolved by the Supreme Court decision in *Mapp* v. *Ohio.*[22] Miss Mapp had been convicted of having in her possession "certain lewd, and lascivious books, pictures and photographs" contrary to a state statute. The evidence on which the conviction was based had been obtained by police officers who had forcibly entered her home in search of a person wanted in connection with a bombing. During the search, which included a trunk in the basement and her personal papers, Miss Mapp was handcuffed and refused access to her lawyer who was at the door of the house. The Court described the facts of the case as showing "the casual arrogance of those who have the untrammelled power to invade one's home . . ."[23], and held the sanction to be "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court".[24]

Although the right to security against unreasonable search and seizure had been part of state law,[25] the imposition of the exclusionary rule in the thirty states which had been admitting illegally obtained evidence caused "grumbling in police ranks",[26] a response being echoed in the current Canadian experience.[27] Michael J. Murphy, former Police Commissioner of New York State, writing four years after the *Mapp* decision, provided a basis for understanding the police response:

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[20]"The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," (1981) 70 *Georgetown L. J.* 365 at 380.

[21]*Ibid.*

[22]81 S. Ct. 1684 (1961).

[23]*Ibid.*, at 1700.

[24]*Ibid.*, at 1691.

[25]*Supra*, footnote 18.

[26]Yale Kamisar, "Is the exclusionary rule an 'illogical or unnatural' interpretation of the Fourth Amendment?," (1978-79) 62 *Judicature* 67 at 68.

[27]Staff Sergeant Barnstead, *supra*, footnote 2, described the *Charter* as a "criminal's best friend", and expressed his concern that the "constitutional resolution was passed and sent to London with no satisfactory explanation of its implications on law enforcement and the administration of justice".

> I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this. It is quite clear that the effects of *Mapp* are still being felt and will continue to be felt in law enforcement procedures, attitudes, and techniques. As the then commissioner of the largest police force in this country I was immediately caught up in the entire problem of reevaluating our procedures, which had followed the Defore rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp*. The problems were manifold. I dwell on the details of this impact in terms of the administration of a large police force so that you may understand that the decisions arrived at in the peace and tranquillity of chambers in Washington, or elsewhere, create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundations upward. Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function. Hundreds of thousands of man-hours had to be devoted to retraining 27,000 men. Every hour in the classroom was an hour lost from the basic function of the police department: the protection of life and property on the street.[28]

It is noteworthy that the impact on law enforcement in New York State was not caused by a change in the law but by the imposition of a sanction, albeit a stringent sanction, for a violation of the law.

The Canadian Bill of Rights

The *Canadian Bill of Rights* is restricted in application, having the status of a federal statute, applying only to the federal sphere, containing only the remedy of invalidating federal legislation which infringes on the rights declared therein.[29]

As has been seen, the American exclusionary rule developed at common law as a means of enforcing constitutional rights. The issue of appropriate enforcement mechanisms was before the Supreme Court of Canada in *Hogan* v. *The Queen*[30] where the appellant took a breath test rather than be charged with refusal even though he was refused permission to speak to his lawyer who was at the police station before the test was given. This refusal was a violation of the appellant's right to counsel pursuant to paragraph 2(c)(ii)[31] of the *Canadian Bill of Rights*. In dissent, Laskin J. held that the subsequently obtained breathalizer evidence should be inadmissible "when it is obtained following a deliberate violation of a

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[28]Michael J. Murphy, "Judicial Review of Police Methods in Law Enforcement", (1966) *Texas Law Review* 939 at 941.

[29]*Canadian Bill of Rights*, section 2: Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge, infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared. . ."

[30][1975] 2 S.C.R. 574.

[31]2. . . . no law of Canada shall be construed or applied so as to
(c) deprive a person who has been arrested or detained
(ii) of the right to retain and instruct counsel without delay.

right of that person under the *Canadian Bill of Rights*".[32] Recognizing the absence of an appropriate remedy in the Bill, Laskin J. argued on basic principles of justice for the development of common law remedies as had evolved under the *American Bill of Rights:*

> There being no doubt as to such denial and violation, the Courts must apply a sanction. We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation. Moreover, so far as denial of access to counsel is concerned, I see no practical alternative to a rule of exclusion if any serious view at all is to be taken, as I think it should be, of this breach of the *Canadian Bill of Rights.*[33]

The majority of the Court held that the common law rule enunciated in *The Queen* v. *Wray*[34], that illegally or improperly obtained evidence is admissible if relevant, applied.[35] Ritchie J., writing the majority opinion, summarily dismissed Laskin J.'s argument that the breathalizer evidence should be excluded on the basis that Laskin J. had relied on the American case of *Mapp* v. *Ohio* which had no application in the Canadian context.[36] The majority opinions clearly conveyed that the Court would not adopt the exclusionary rule for breach of a provision of the *Bill of Rights.*[37] The result was that Hogan's right to counsel was unenforceable; the Canadian *Bill of Rights* declared rights but there existed no sanction for a violation of those rights.

The Canadian Charter of Rights and Freedoms

The September draft of the proposed Charter, which was the base document for representations before the Special Joint Committee on the Constitution of Canada,[38] contained in section 26 a provision which could allow the gradual development of an exclusionary rule as had developed in the American experience. This section provided:

> 26. No provision of the Charter, other than section 13 [provision against self crimination] affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or of Legislature to make laws in relation thereto.

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[32]*Supra,* footnote 30, at 590.

[33]*Ibid.,* at 598.

[34][1971] S.C.R. 272.

[35]*Supra,* footnote 30, at 592.

[36]*Ibid.,* at 583.

[37]*Ibid.,* at 584, 585.

[38]*Supra,* footnote 7.

Section 26 was supported by the Canadian Association of Chiefs of Police[39] and by the Canadian Association of Crown Counsels[40] which argued that the law regarding the admissibility of evidence should be left to "the type of evolution that we have been used to in this country, that is a combination of Parliament and the Courts"[41].

The Canadian Civil Liberties Association opposed section 26 of the draft proposal arguing that rather than providing for the gradual development of evidentiary rules, it "enshrines the rule that evidence, even if illegally obtained, is admissible if relevant . . ."[42]. The association stressed that section 26 preserved "the *Wray* rule and the approach of the Court in the *Hogan* case"[43]. Walter Tarnopolsky, President of the Canadian Civil Liberties Association, made the following proposal to the Joint Committee in respect of a remedies provision in answer to a question from House of Commons member Irwin[44]:

> Professor Tarnopolsky: We are not suggesting that you substitute the exclusionary rule for Section 26, what we are suggesting is that you have a broad remedies clause in which the court could weigh on the one hand the gravity of the offence, the circumstances and on the other, the seriousness of infringement of the Canadian Bill of Rights and that there are other remedies that might be available.
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> Mr. Irwin: Mr. Chairman, I would like to follow that up because I understood you were suggesting in cases of any illegal evidence that evidence was not to be used in a court of law?
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> Professor Tarnopolsky: No, we have not gone that far, but on the other hand we do not want to see the rule continue that the evidence is admissible, which is really what has been tried in the *Hogan* case, ... If I could draw to your attention another one which is to be found in a study by the Manitoba Law Reform Commission on a possible bill of rights. That, too, has a remedies clause which is very broad, which is basically that the courts should have the power to grant whatever writs, remedies, directions, orders, payment of compensation is necessary for the proper compensation of anyone injured by infringement of the bill. In other words, that kind of a positive remedies clause.[45]

The need for including a remedies clause in the Charter has been argued on the basis that Canada's experience with the *Canadian Bill of Rights* indicates that a declaration of rights without enforcement provisions cannot protect those rights. Mewett,[46] writing in this vein, stated:

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[39]Minutes of Proceedings and Evidence of the Special Joint Committee (Minutes of Proceedings), November 27, 1980, Vol. 14 at 8.

[40]*Ibid.*, at 11.

[41]*Ibid.*

[42]Minutes of Proceedings, November 18, 1980, Vol. 7 at 15.

[43]*Ibid.*, at 27.

[44]Ron Irwin, Liberal Member of Parliament, Sault Ste. Marie.

[45]*Supra*, footnote 42, at 27, 28.

[46]A. W. Mewett, "Entrenching the Enforcement of Rights", 23 *Crim. L.Q.* 129.

> What is infinitely more important is the practical, effective way of helping the individual secure protection against the *de facto* abuse of those rights and freedoms by individuals, by bureaucrats, and by the system itself.[47]

In section 24 of the final draft of the *Charter* the Joint Committee adopted the type of enforcement mechanism advocated by Tarnopolsky and Mewett. The *Charter* also contains, in section 52,[48] a remedy comparable in effect to section 2 of the *Canadian Bill of Rights*[49] providing that any law inconsistent with the provisions of the *Charter* is invalid.

When the Federal Government made the recommendation to the Joint Committee that the *Constitution Act* be amended by adding section 24(1) and (2) as the enforcement provision, E. G. Ewaschuk of the Department of Justice explained the intent of the government in respect of subsection 24(2) as follows:

> So what this clause is doing is taking the dissent in *Wray*, it was a 5-4 judgment, and would say no, in relation to constitutional violations if the court finds the admission of the evidence, having regard to all of the circumstances, would bring the administration of justice into disrepute, then they shall exclude it.[50]

Thus the *Charter* contains a broad remedies provision to be interpreted and developed by the courts as applications are made for redress of any infringement of a right guaranteed by the *Charter*. And the *Charter* also contains an explicit statement that in certain limited circumstances the sanction to be applied is the exclusion of evidence obtained in violation of a constitutional right.

Undoubtedly these provisions will have a real impact on law enforcement. As the *Charter* is implemented there will be challenges to the reasonableness of police actions.[51] The immediate impact will result from

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[47]*Ibid.*, at 130.

[48]*Constitution Act, 1981*, s. 52(1): The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes:
(a) the Canada Act, including this Act.
(b) the Acts and orders referred to in Schedule I; and
(c) any amendment to any Act or order refered to in paragraph (a) or (b).

[49]*Supra*, footnote 29.

[50]Minutes of Proceedings, January 29, 1981, Vol. 48 at 124.

[51]Under the *Canadian Bill of Rights* the issue most litigated has been denial of right to counsel in the context of a demand for a breath test pursuant to s. *235* of the *Criminal Code*. The number of these cases creates a distortion in *Canadian Bill of Rights* case law in that this litigation does not reflect the allegations of infringements that could have been made on consideration of the area of rights covered by the Bill. The reason for this litigation is that denial of counsel constitutes reasonable excuse pursuant to s. 235(2) to refuse to take the test. (*Brownridge* v. *The Queen*, 7 C.C.C. (2d) 417) This case law indicates that challenges to police actions will be made when there is a possibility of obtaining some desired result. The possibilities for redress under section 24 provide sufficient reason for challenges to be made to police actions under the *Charter*.

the simple fact that questions will be asked, regardless of the answers given. This is why, in spite of the probability of vast differences in the applications of the Canadian and American exclusionary rules, that the conclusion can be drawn that the experience in Canada as the *Charter* is being implemented will be similar to the experience of Michael Murphy and other State Police Commissioners in the United States as they implemented the sanction imposed by the decision in *Mapp*.

The experience, of course, can have positive results. Kamisar, a writer on constitutional-criminal topics, has stated:

> It was not until the U.S. Supreme Court adopted the exclusionary evidence rule in 1961 that most police recognized the requirements of the Fourth Amendment and its state counterparts as binding rules upon their conduct. *Mapp* generated serious discussions about how to develop lawful arrest, search, and seizure practices into the training sessions and police manuals of American law enforcement in a way that had rarely occured before.[52]

UNREASONABLE SEARCH OR SEIZURE

The Scope of the Section 8 Guarantee

Section 8 of the *Charter* is stated as follows:

> Everyone has the right to be secure against unreasonable search or seizure.

The right to be secure against unreasonable search or seizure is not newly conferred by the *Charter;* it has been described by prominent Canadian writers on Criminal procedure as "fundamental"[53] and "firmly rooted in the common law".[54] However, this common law right has been generally accepted to mean that any search or seizure authorized by law is reasonable *per se.*[55] It is clear from the Minutes of Proceedings of the Joint Committee that it was the intention of the drafters of the final version of the provision that this common law right be extended.

The September draft of the *Charter* contained the search and seizure provision in the following form:

> Everyone has the right not to be subjected to search or seizure except on grounds and in accordance with procedures established by law.[56]

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[52]"Mondale on Mapp", (1976-77) 3 *Civil Liberties Review* 6:62, at 64.

[53]Stanley A. Cohen, *Due Process of Law* (Toronto: Carswell, 1977), at 89.

[54]Roger E. Salhaney Q.C., *Canadian Criminal Procedure* (Toronto: Canada Law Book Limited, 1978) at 51.

[55]*Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.): Minutes of Proceedings, November 18, 1981, Vol. 7 at 11; Magnet, "Spot Checks" vs Charter: Roadside Justice", *Toronto Globe and Mail,* January 7, 1982 at 7.

[56]Minutes of Proceedings, November 18, 1980, Vol. 7 at 11.

Alan Borovoy, General Counsel to the Canadian Civil Liberties Association, described the September version to the Joint Committee as a "verbal illusion in the sense that it may pretend to give us something, but in fact, gives us nothing more than we already have."[57] He suggested the wording which appeared in the final version of the *Charter* "so as to create an opportunity to challenge the reasonableness of the law itself".[58] Thus, under the *Charter* a search or seizure permitted by law will not be immune from challenge.

Another issue raised before the Joint Committee concerning the scope of section 8 was in respect of the need to include a specific reference to premises as that which appears in the American Fourth Amendment.[59] An amendment was proposed by NDP Member of Parliament for Burnaby, Svend Robinson, which would have added the words "or property" to the section because the provision "could be interpreted narrowly to mean that we are strictly speaking about the person. . ."[60]. The Justice Minister, the Honorable Mr. Chrétien, described the porposed amendment as a "unnecessary addition" adding that "I am told that it might be under particular circumstances interpreted to restrict the meaning rather than to expand the meaning."[61] Mr. Roger Tassé, Deputy Minister of the Department of Justice, elaborated, stating:

> . . . if we were to restrict it in the way that Mr. Robinson in his amendment proposes it might have the effect of curtailing or restricting the right that is guaranteed by clause 8 in this way, that in the United States similar provisions have been interpreted to cover voice communications, telephone conversation, and in effect if we were to restrict it to the seizure of persons or property we might leave out the possibility that a court would in the future say that this clause does in effect extend to the interception of voice communications.[62]

A question also raised before the Joint Committee concerned the interpretation of the word "everyone". Consensus before the Committee was to the effect that "everyone" would not be "restricted to natural persons"[63] but would include corporations, including multinational corporations.[64]

Parliamentary intention in respect of section 8 of the Charter as revealed in the Minutes of Proceedings before the Joint Committee was that the *Charter* provision would have the broad scope of the American

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[57]*Ibid.*, at 12.

[58]*Ibid.*

[59]Question asked by Warren Allmond, Liberal member of Parliament for Notre-Dame-de Grace, *supra*, footnote 7, Minutes of Proceedings, December 11, 1980, Vol. 24 at 53.

[60]Minutes of Proceedings, January 27, 1981, Vol. 46 at 102, 103.

[61]*Ibid.*, at 104.

[62]*Ibid.*

[63]*Ibid.*, at 105.

[64]*Ibid.*

Fourth Amendment regarding protection of property and that it would permit challenges to the reasonableness of all searches or seizures, even if provided by law. The interpretation to be given by the Courts remains to be seen.

A Canadian Law of Search and Seizure

New York State law enforcers under Police Commissioner Michael Murphy[65] faced problems in implementing the existing law and in interpreting the effect of case law[66] but it was possible for them to determine, for the most part, the existing American law of search and seizure. The federal Courts had been applying the exclusionary rule for almost fifty years,[67] during which time the law of search and seizure had developed and was collated and published in texts such as the comprehensive two-volume edition of *Searches, Seizures and Immunities*[68] which was available in 1961 as the exclusionary rule was being implemented. The Canadian law of search and seizure is not so readily available. Because illegally obtained evidence has been admissible, there has been no incentive to challenge violations of rights in the obtaining of the evidence. It was the exclusionary rule that had "fueled the development of Fourth Amendment law".[69] The relevant Canadian law is only sketchily developed and only briefly set out in general criminal procedure texts.[70]

Although the *Charter* provides for security against *unreasonable,* and not *unlawful,* search or seizure, the implementation of the *Charter* demands that we attempt to define the Canadian law since the legality or illegality of any such act is material to its reasonableness. In doing so, it is possible to make cautious use of that accessible body of American law. Laskin C.J.C. commented on the use of decisions of the United States Supreme Court in reference to provisions of the *Canadian Bill of Rights* as follows:

> The Court has found such decisions to be helpful in the past and remains receptive to their citation, but they do not carry any authority beyond persuasiveness according to their relevance in the light of context, ...[71]

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[65]*Supra,* footnote 28.

[66]*Ibid.,* at 940.

[67]*Supra,* footnote 11.

[68]Joseph A. Varon, *Searches, Seizures and Immunities,* (Indianapolis: Bobbs-Merrill, 1961). Note also the publication in 1978 of a three-volume treatise *Search and Seizure,* Wayne Le Fave (St. Paul: West Publishing, 1978). A book written for law enforcement officials is *The Law of Arrest Search and Seizure* by J. Shane Creamer, (New York: Holt Rinehart and Winston, Third Edition 1980).

[69]*Supra,* footnote 26.

[70]*Supra,* footnotes 53, 54; Cohen at 89-96, Salhaney at 50-64.

[71]*Morgantaler* v. *The Queen* (1975), 30 C.R.N.S. 209 (S.C.C.) at 224.

When using American case law it is necessary to examine the context in which the decision was made. For example, in *Search and Seizure,* Volume 2[72], the author refers to *United States* v. *Crowder*[73] as a leading case in respect of search of a person. In that case a Court order had been made for the surgical removal of a bullet from the forearm of Crowder, the judge holding that such minor surgery can be a justified intrusion in some circumstances. When a warrant was granted by Laganiere J.S.P. of Quebec for a similar surgical removal of a bullet in reliance on the American case law,[74] Hugessen J. of the Quebec Court of Queen's Bench ordered the warrant quashed as illegal and issued without jurisdiction. Hugessen J. pointed out that in the United States the Federal Criminal Rules of Practice provide for the issuance of a search warrant for a *person* or place[75] but that in Canada there is no corresponding authority for the search of a person in the *Criminal Code.*[76] He concluded:

> . . .Even if the operation were minor, and the evidence is that it is not, I would not be prepared to sanction it and I do not do so. The *Crowder* case may or may not be the law in the United States; it is not the law in Canada.[77]

There is an immediate need in Canada for collection and consideration of existing case law with reference to American case law as a supplement when the basis for the American decision can be justified in the Canadian context. This will be attempted in this article only in respect of the common law right of search or seizure. The task is made difficult by the arrested development of Canadian case law on search and seizure issues and the uncertainty as to the degree of acceptability of the decisions and concepts that have developed in the American case law.

Common Law Right To Search Persons

The basic principles of the common law right to search persons are summarized in general criminal procedure texts.[78] Such a right exists only as an incident of arrest and only for the purposes of finding weapons that could be used against the arresting officer or others or to effect escape[79] or for the purpose of preventing the destruction of evidence of the offence for which the person has been arrested.[80] The validity of the

[72]*Supra,* footnote 68, Le Fave, at 14.

[73]543 F.2d 312 (D.C. Circ. 1976).

[74]*Re LaPorte and The Queen* (1972), 8 C.C.C. (2d) 343 (Que. Ct. of Q.B.) at 344.

[75]*Ibid.,* at 349.

[76]*Ibid.,* at 353.

[77]*Ibid.,* at 354.

[78]*Supra,* footnotes 53, 54.

[79]*Gottshalk* v. *Hutton* (1922), 36 C.C.C. (2d) 289 (Alta. C.A.) at 302.

[80]*Reynen* v. *Antonenko* (1975), 30 C.R.N.S. 135 (Alta. Sup. Ct.) at 142.

search depends upon the searcher having reasonable and probable grounds for believing it necessary, the existence of reasonable and probable grounds being a question of fact.[81] The validity of the search necessarily depends on there also being reasonable and probable grounds for the arrest.

Some American jurisdictions have found it necessary to supplement the common law right of search by legislation. The *Ouimet Report* (1969)[82] refers to "stop and frisk" statutes passed by some American states authorizing "a police officer to stop a person in a public place where he reasonably *suspects* that such a person is committing, has committed, or is about to commit a felony, demanding his name, address, and an explanation of his conduct"[83]. The search is for weapons only and is based on the officer's reasonable suspicion that he is in danger of physical injury.[84] The *Ouimet Report* recommends that such legislation not be implemented in Canada because Canadian arresting powers are wider than in the United States, and because the exclusionary rule does not apply in Canada.[85]

If in Canada such legislation is not passed, what is the law in the situation described in *Terry* v. *State of Ohio*[86] in which a police officer who had patrolled a particular area of downtown Cleveland for 30 years became suspicious of two men who "didn't look right"[87] to him? The police officer concluded after a period of observation that they were about to rob a store. He accosted them, identified himself, asked their names, got only a mumbled response, and then grabbed and searched each man in turn, relieving each of a revolver and bullets. The search was not an incident of arrest and the officer had no authority by statute

[81] *Regina* v. *Jewers* (1972), 6 C.C.C. (2d) 301 at 303.

[82] *Report of the Canadian Committee on Corrections* (Ottawa: Queens Printer, 1969).

[83] *Ibid.*, at 57.

[84] Laws of New York, Criminal Procedure Law, 140.50 as amended: Temporary questioning of persons in public places; search for weapons
1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such oficer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.
3. When upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

[85] *Supra*, footnote 82 at 57.

[86] 88 S. Ct. 1868 (1968).

[87] *Ibid.*, at 1871.

to effect such a search since Ohio had not passed "stop and frisk" legislation. On a motion to suppress the evidence of possession of firearms as being illegally obtained, the United States Supreme Court refused to apply the exclusionary rule. The rationale was that the 4th amendment does not prohibit all searches and seizures, but only unreasonable searches and seizures.[88] The Court stated that the test for reasonableness is "balancing the need to search against the invasion which the search entails."[89]

Although the ratio of the *Terry* decision would be applicable in the Canadian context in that an infringement of rights in both American and Canadian constitutions is based on reasonableness, such application would solve only the issue of the constitutionality of the search. The search may still be illegal as not authorized by statute or by common law since the suspicion may not have amounted to reasonable and probable grounds for arrest. As the light of the *Charter* is turned on their actions, law enforcement officials will need direction as to the precise criteria for the existence of reasonable and probable grounds and answers concerning the legality of their actions not provided by the ratio in the *Terry* judgment.

An unresolved issue regarding search of persons is the limit of acceptable intrusion within the body. In *Reynen* v. *Antonenko*[90] a rectal search for drugs was permitted where there were reasonable and probable grounds to believe the drugs were thus being carried, where the police believed the suspect was co-operating, and where no particular force was required. In *Re Laporte and the Queen,*[91] the Quebec Court of Queen's Bench quashed a warrant ordering surgical removal of bullets and expressly withheld comment on whether "the common-law right of search might extend as far as minor medical procedures such as the taking of a blood test or examination by x-ray. . ."[92].

Seizure of the Person

Section 9 of the *Charter* provides that everyone has the right not to be arbitrarily detained or imprisoned. Most issues involving seizure of a person would be argued as possible violations of the section 9 guarantee.

However, the term "detained" has been narrowly interpreted in connection with the right provided by section 2(c) of the *Canadian Bill of*

[88]*Ibid.*, at 1873.

[89]*Ibid.*, at 1879.

[90]*Supra*, footnote 80.

[91]*Supra*, footnote 74.

[92]*Ibid.*, at 350.

Rights that a person arrested or detained must not be deprived "of the right to retain and instruct counsel without delay". In *Brownridge* v. *The Queen*[93] Pigeon J. in dissent, defined detention as follows: "Detained means held in custody as is apparent from such provisions as s. 15 of the *Immigration Act,* R.S.C. 1970, c.1-2". This definition of Mr. Justice Pigeon was quoted in the majority judgement of Ritchie J. in *Chromiak* v. *The Queen,*[94] where it was held that a motorist required to take a breath test at a roadside screening device was not detained within the meaning of the *Bill of Rights.* Ritchie J. stated that "any person detained within the meaning of the section is one who has been detained by due process of law."[95]

In *Terry* v. *State of Ohio*[96] Warren C. J., writing for the majority, stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime, "arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized that person".[97]

It may be that there will be situations of seizure of a person that do not fall within the scope of section 9 but may be argued as coming within the scope of the section 8 provision.

Common Law Right to Search Premises

For premises as for persons the right to search without a warrant must be as an incident of arrest, and only to find weapons that may cause injury or be used to effect escape, or to prevent the destruction of evidence. The precise limits of the right to search premises as an incident of arrest have received very little consideration in Canadian case law.

The American law on warrantless searches of premises has become more specific because of litigation engendered by the exclusionary rule. The general principle is that the common law right to search premises extends only to the "area within the immediate control" of the person arrested.[98] *Chimel* v. *California*[99] provides a review of the law relevant to

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[93]7 C.C.C. (2d) 417 (S.C.C.).

[94][1980] 1 S.C.R. 471.

[95]*Ibid.*, at 478.

[96]*Supra,* footnote 86.

[97]*Ibid.*, at 1877.

[98]*Chimel* v. *California,* 89 S. Ct. 2034 (1969) at 2040.

[99]*Ibid.*

warrantless searches of premises. In *Chimel,* after a person was arrested in his home for burglary of a coin shop, the police conducted a one hour search of the entire three-bedroom house. The coins confiscated during the search were subject to the exclusionary rule. Although the restriction in *Chimel* has been liberally interpreted,[100] search of premises as an incident of arrest is confined generally to the area from within which a person arrested "might gain possession of a weapon or destructible evidence"[101].

Problems arose in America case law regarding the extent of the Fourth Amendment guarantee. Security of one's home was certainly within the provision, but what about a friend's home, a business office, or a telephone booth? A measuring stick was provided by the judgment in *Katz* v. *United States,*[102] a case in which a conviction for transmitting wagering information in violation of a federal statute, based on evidence obtained by an electronic listening device attached to a public telephone booth, was reversed. Stewart J. held that the definition of constitutionally protected areas, the basis of the parties' arguments, was not at issue. He stated:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[103]

Harlan J. gave further articulation to what has become known as the "expectation of privacy" rule:

> My understanding of the rule is that there be a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable".[104]

The *Katz* test of expectation of privacy has been applied as the scope of Fourth Amendment protection has been defined. The issue in *United States* v. *Chadwick*[105] was whether a warrantless search was permitted of a double-locked footlocker seized by federal narcotics agents who had reasonable grounds to believe that the footlocker contained narcotics. The search was not made until the footlocker had been transported to

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[100]Steve Emanuel and Steven Knowles, *Criminal Procedure* (New Rochelle: Emanuel Law Outline, 1980) at 44.

[101]*Supra,* footnote 98 at 2040.

[102]88 S. Ct. 507 (1967).

[103]*Ibid.,* at 511.

[104]*Ibid.,* at 516.

[105]97 S. Ct. 2476 (1977).

the Federal Building in Boston nearly two hours after the arrest and thus not excepted from the requirement for warrant as an incident of arrest. The evidence thus obtained was excluded. The accused had "manifested an expectation that the contents would remain free from public examination",[106] a privacy interest which could not be interfered with without a search warrant.

American cases involving search of a person must be used with caution as it is possible to obtain a statutory warrant for such a search in the United States but not in Canada.[107] American cases involving warrantless search of premises have been decided within the context of the basic principles that are accepted in Canada[108] and should be acceptable to Canadian courts. It remains to be seen whether the "expectation of privacy" test defined in *Katz*[109] becomes the measure of the scope of the *Charter* provision. The *Chadwick* situation was expressly covered by the Fourth Amendment which includes the term "effects" in its provision. Section 8 of the *Charter* is worded in general terms but open to such an interpretation.

Seizure of Property During a Common Law Search

It is clear that when a search is conducted of a person or premises as an incident of arrest, the arresting officer may seize property that may be evidence of the offence charged, since "the interest of the state in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial"[110]. The seizure of property without a prior search warrant is limited, however, to property that may be used or destroyed by the person arrested.[111] Logic would limit such a seizure to property within possible reach of the person being arrested, which is the *Chimel*[112] restriction.

In American case law the *Chimel* restriction has been extended by application of the "plain view" doctrine. This doctrine holds that a police officer may seize property in his plain view if he has the right to be in

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[106]*Ibid.*, at 2483.

[107]*Supra*, footnote 76.

[108]That is, the search is permitted only as an incident of arrest and for the same reasons that search of a person as an incident of arrest is permitted.

[109]*Supra*, footnote 105.

[110]*Dillon* v. *O'Brien and Davis* (1877), 16 *Cox C.C.* 245 at 250.

[111]*Supra*, footnote 80.

[112]*Supra*, footnote 98.

a position to have that view.[113] Thus a registration card with the name of the robbery victim on it, found on the metal stripping of the car door by a police officer who was securing an impounded car pursuant to Police Department regulations, was held to be admissible as evidence against the accused. The "plain view" doctrine applies where a justified search is in progress, as a search incident to arrest and only where police inadvertently come upon a piece of evidence. It does not permit a general exploratory search.[114]

Interpretation of the Term "Unreasonable"

A search or seizure may be unreasonable at its outset, or a reasonably begun search or seizure may become unreasonable as the action progresses.

The need for clear authority before the rights of an individual can be invaded is the ratio of the decision in *Colet* v. *R.*[115] in which the Supreme Court of Canada held that the "extraordinary powers to search dwelling houses, property and/or persons", could not be implied from a statutory provision but must be "spelled out with particularity"[116]. The Canadian Supreme Court was addressing the question of legality and not reasonableness. An issue that will surely be raised under the *Charter* is that of determining if a search not authorized by law can be held in any circumstances to be reasonable. The American case, *Terry* v. *State of Ohio,*[117] was decided on the ratio that an illegal search could be held to be reasonable within Fourth Amendment standards.

In order for a search to be lawful according to statute, there must exist reasonable and probable grounds for the belief that such a search is necessary.[118] Logic and American case law hold that where the search is at common law the same burden of proof must be met. A search as an incident of arrest is valid only if reasonable and probable grounds exist so that a warrant would have been issued on the information which enabled the law enforcement officers to act.[119]

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[113]*Harris* v. *United States,* 88 S. Ct. (1967) 992 at 993.

[114]*Ibid.*

[115](1981) 19 C.R. (3d) 84.

[116]*Ibid.*, at 88, 89.

[117]*Supra,* footnote 86.

[118]Section 443, *Criminal Code,* R.S.C. 1970, c. C-34.

[119]This test was enunciated in *Wong Sun* v. *United States,* 83 S. Ct. 407 (1963) at 414, in reference to a warrant for arrest but has been applied in reference to search warrants, as in *Katz* v. *United States, supra,* footnote 102.

A search lawful at its outset can become unreasonable on the facts as the search progresses. The American test for reasonableness enunciated in *Terry* v. *State of Ohio* based on "balancing the need to search against the invasion which the search entails"[120] would seem applicable at this point.

This brief consideration of some aspects of the common law of search and seizure is meant to serve as an indication of the problems that face Canadian law enforcers in defining Canadian law and incorporating relevant American case law. The Canadian problem is not unique. In spite of the development over time of an extensive body of American search and seizure law, Harlan J. of the United States Supreme Court recently stated:

> From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends to such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used in the commission of a crime.[121]

APPLICATION OF THE CHARTER REMEDIES

Standing

Subsection 24(1) provides that applications for remedies pursuant to subsections 24(1) and 24(2) may be made by "anyone whose rights and freedoms, as guaranteed by this *Charter*, have been infringed or denied. . .". This is the basis for challenge enunciated in *Mapp* v. *Ohio*,[122] that is, that individuals who "belong to the class for whose sake the constitutional privilege is given"[123] can move for suppression of illegally obtained evidence.

Standing to object to governmental use of illegally obtained evidence was one of the issues in *Alderman* v. *United States*[124] where a conviction for conspiring in the interstate transmission of murderous threats was based on evidence obtained by the electronic surveillance of the place of business of one of the conspirators. The court held that a person whose conversation was overheard or who owned the premises could apply for

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[120]*Supra*, footnote 86, at 1879.

[121]*Coolidge* v. *New Hampshire* 91 S. Ct. 2022 at 2050.

[122]*Supra*, footnote 22.

[123]*Ibid.*

[124]89 S. Ct. 961 (1969).

suppression of the evidence.[125] The judgment of White J. stated the general rule that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted"[126]. Standing is not available to "one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at somebody else"[127]. Recently[128] the United States Supreme Court affirmed the standing requirement stated in *Alderman.*[129]

Procedure

Most American jurisdictions require that objections to the admission of evidence obtained in violation of constitutional rights be presented by a pre-trial motion to suppress.[130] K. Chasse[131] uses the same terminology in reference to applications under s. 446(3) of the *Criminal Code* which provides for the disposal of seized property not required as evidence at a preliminary inquiry or trial. This application is usually made in the context of a solicitor-client privilege with the applicant alleging that the property, because of the privilege, could not be used as evidence. It has become acceptable in the last few years to make the application as a pre-trial motion rather than objecting to its admission at the point in the trial at which it is presented to the Court.[132] Of this procedure Chasse stated: ". . .we have the beginning of a new procedure under the Code — a pre-trial motion to suppress evidence"[133]. Chasse contended that such new procedures must be established under the *Criminal Code.*[134] In *Re Froats,*[135] also an application under s.446(3), Arnup J. A. of the Ontario Court of Appeal looked for legislative direction, stating:

> We were invited in this case to set out our views with respect to the appropriate procedures, for the benefit of the Crown and of the legal profession. We do

[125]*Ibid.*, at 968.

[126]*Ibid.*, at 967.

[127]*Ibid.*, at 966.

[128]*Rakas* v. *Illinois*, 99 S. Ct. 421 at 426.

[129]*Supra*, footnote 124.

[130]Jerold Israel, Wayne LeFave, *Criminal Procedure: Constitutional Limitations* (St. Paul: West Publishing Co., 1980).

[131]"The Solicitor — Client Privilege and Search Warrants" (1977), 36 C.R.N.S. 349.

[132]*Regina* v. *Colvin: Ex Parte Merrick* (1970), 3 O.R. 612; *Re Presswood and Delzotto* v. *International Chemalloy Corporation* (1977), 36 C.R.N.S. 322 (B.C. Sup. Ct.).

[133]*Supra*, footnote 131, at 355.

[134]*Ibid.*, at 352.

[135](1977), C.R.N.S. 334 (Ont. C.A.).

> not think it appropriate for us to do so. The need for considering possible legislation is abundantly apparent from cases such as the present, but the Courts' function must be limited to dealing with each individual case as it arises.

The experience with pre-trial motions under s. 446(3) of the *Criminal Code* suggests the need for legislative direction as to the procedure of applying for relief provided by section 24 of the *Charter*.

Application of Subsection 24(1)

For any infringement of the Charter provision guaranteeing security against unreasonable search or seizure, subsection 24(1) provides for application to the court for any remedy "as the court considers appropriate and just in the circumstances".[137] The scope of the remedies that may be developed by the courts was described by Tarnopolsky in his recommendation to the Joint Committee.[138] The return of property unconstitutionally seized is a remedy most applicable to a violation of section 8 rights and may be an appropriate remedy under subsection 24(1). The power of the Court to order the return of illegally seized property was held in *Bergeron* v. *Deschamps*[139] to inhere in the Courts as incidental to its jurisdiction to quash a search warrant on *certiorari*.[140] It would be within the broad discretion granted to the courts by section 24 to develop that remedy for unconstitutionally seized property.

In accordance with common law rules of evidence,[141] however, property seized would be retained if it is to be used as evidence in a court proceeding. Accordingly, such designated property would not be returned on an application under subsection 24(1) but would be subject to the stringent test enunciated in subsection 24(2).

Application of Subsection 24(2)

Subsection 24(2) provides for the mandatory exclusion of evidence where there has been an infringement of a constitutional right and where the admission of evidence obtained by that infringement would bring the administration of justice into disrepute. The difficulties of consistency in applying such a two-fold test are described by Kamisar who speaks in

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[136]*Ibid.*, at 348.

[137]*Supra*, footnote 3.

[138]*Supra*, footnote 42, at 27, 28.

[139][1978] 1 S.C.R. 243.

[140]*Ibid.*, at 244.

[141]*Supra*, footnote 34.

terms of a judge's threshold for excluding evidence.[142] Kamisar describes how the exclusion threshold of Earl Warren, Chief Justice of the United States, changed over time, how Justices Holmes and Brandeis had consistently low thresholds for exclusion, and how Justice Jackson had a consistently high one. Kamisar stated, referring to Mr. Justice Jackson: "For him unconstitutional police conduct was not enough, not even serious or aggravated unconstitutional conduct. It had to involve physical violence as well."[143]

It would appear from the Minutes of Proceedings of the Joint Committee[144] that it was the intention of the federal Department of Justice officials who introduced the provision that there be a high exclusion threshold. When Mr. Ewaschuk,[145] appearing for the Department of Justice, was asked for a definition of the test "bring the administration of justice into disrepute", he described the required conduct as being "very blameworthy, repugnant, very reprehensible".[146]

American case law which illustrates this high threshold for exclusion exists in a line of Supreme Court decisions prior to the *Mapp*[147] decision of 1961 in which the issue was the need to overrule a state court decision to admit illegally obtained evidence. The test for such a decision has become known as the "shock the conscience" test.

The policy of the Supreme Court was to respect the authority of the States to administer the criminal justice systems within their borders, overturning the decisions of state courts only where the state proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[148]

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[142]*Supra*, footnote 26 at 82.

[143]*Ibid.*, at 83.

[144]*Supra*, footnote 7.

[145]*Ibid.*, Minutes of Proceedings, January 29, 1981, Vol. 48 at 124. Mr. Ewaschuk is E. G. Ewaschuk, Q.C., Director of the Criminal Law Amendments Section, Department of Justice.

[146]The complete answer given by Mr. Ewaschuk is as follows: "Well, somebody told me today — I am on a task force to revise the rules of evidence — and Doctor Tellefson from the federal Department of Justice is the head of it and he says the test is as articulated by the former Justice Black in the United States that the admission of this evidence would make me vomit, it was obtained in such a reprehensible manner. I said to Doctor Tollefson, it might be a little tough writing that in, but that is the type of case, he is saying, where the conduct is very blameworthy, repugnant, very reprehensible, what the police did in the circumstances and therefore although, and this is the other argument, they being law breakers allow another lawbreaker, an accused, to go free, that once it has reached this certain level of reprehensibility it should be excluded."

[147]*Supra*, footnote 22.

[148]*Rochin* v. *California* 72 S. Ct. 205 (1952) at 208.

Shortly after the *Wolf*[149] decision holding that state courts were not subject to the exclusionary rule, the Supreme Court considered the case of *Rochin* v. *People of California*[150] where deputy sheriffs, having some information that the appellant was selling narcotics, entered the appellant's home, forced open his bedroom door, and forcibly attempted to extract capsules which he had swallowed. Failing in this, they took him handcuffed to a hospital where they obtained the capsules by forcing an emetic solution through a tube into his stomach against his will. The appellant was convicted on the evidence thus obtained. The Supreme Court held that the evidence was subject to the exclusionary rule on the basis that "[t]his is conduct that shocks the conscience".[151] The "shock the conscience" test was again considered in *Breithaupt* v. *Abram*[152] where a blood sample was taken from the appellant as he lay unconscious after an accident. The Supreme Court held the evidence admissible because "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician"[153]. In Canada, Hugessen J. of the Quebec Court of Queen's Bench, has questioned the legality of such a process.[154]

In *Irvine* v. *People of the State of California,*[155] the judgment of Jackson J. gives support to Kamisar's[156] attribution to him of a high exclusion threshold. In that case, police officers had surreptitiously entered the appellant's home to obtain evidence of gambling activities contrary to state law. Using a key they had made, they concealed a microphone in a hall, bored a hole in the roof of the house, and strung wires to a neighboring garage. They subsequently made other entries moving the microphone to various locations in the appellant's bedroom. The evidence on which the appellant was convicted was obtained during a month of listening to intercepted conversations. The Court upheld the decision in *Wolf,* holding the evidence not subject to the exclusionary rule because a required element of "coercion, violence or brutality to the person"[157] was lacking. Clark J., concurring, commented on the difficulties of determining "just how brazen the invasion of the intimate privacies of one's

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[149]*Supra,* footnote 16.

[150]*Supra,* footnote 148.

[151]*Ibid.,* at 209.

[152]77 S. Ct. 408 (1956).

[153]*Ibid.,* at 410.

[154]*Supra,* footnote 74.

[155]74 S. Ct. 381 (1953).

[156]*Supra,* footnote 26 at 82.

[157]*Supra,* footnote 155 at 383.

home must be in order to shock itself into the protective arms of the Constitution"[158].

A test for conduct which would bring the administration of justice into disrepute and require the exclusion of evidence thus obtained was enunciated by Lamer J. of the Supreme Court of Canada in *Rothman* v. *The Queen.*[159] In *Rothman* the appellant was arrested on a charge of possession of narcotics for the purpose of trafficking. He explicitly refused to make any statement to the police. A statement was subsequently obtained by a police officer in casual dress who was placed in the cell with the appellant and who convinced the appellant that he was not a police officer. The majority of the court held that the statement was admissible at trial because it was not subject to the special rules for admissions made to persons in authority, the test for "persons in authority" being subjective. Lamer J. held that a statement so acquired should be excluded if its admission would bring the administration to justice into disrepute. This situation did not qualify, however, according to the test enunciated by Lamer J. which was as follows:

> The Judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal aid lawyer eliciting in that way incriminating statements from suspects or acused; injecting pentothol into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.[160]

The tests in the American line of cases and in *Rothman* are based on the same concept although in application the test enunciated by Lamer J. would be less stringent in that it did not require the element of physical violence which was a requisite for a successful application to the American court. It is possible, however, that the "shock the community" test in Canada would result in a high exclusionary threshold. In a comparison

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[158] *Ibid.*, at 386.

[159] (1981) 59 C.C.C. (2d) 30 (S.C.C.).

[160] *Ibid.*, at 74, 75.

of Canadian and American awareness of individual rights an American, Katz, stated in reference to Canadians:

> There has been, at least until very recently, a general insensitivity to police misconduct in conducting searches. . . . the issue of where police powers end and individual rights take precedence is not high in the consciousness of the legal community. Neither is it so among the press nor among the general public.[161]

It is difficult to dispute the conclusions of this American commentator when we consider that Canadians have accepted as part of Canadian law, the granting of writs of assistance[162] which give law enforcers a blanket warrant to search for particular things anywhere and at any time.[163] The Fourth Amendment clause was largely the result of colonists' concern with the sweeping powers granted agents of the King under writs of assistance,[164] but the writs have caused little public outcry in Canada in spite of being so susceptible to challenge that the Department of Justice has now imposed a moratorium on their issuance.[165]

In *Mapp* v. *Ohio*[166] the Supreme Court rejected "the confusing 'shock the conscience' standard of the *Wolf* and *Rochin* cases,[167] opting for the certainty of applying a mandatory exclusionary rule when evidence is unconstitutionally obtained. This inflexible application of the exclusionary rule has been under considerable attack[168] and there is recent evidence in case law[169] of successful attempts to limit its application.

Somewhere between the adoption of an absolute exclusionary rule and the reliance on the "shock the conscience of the community" test is the "balancing interests" test as enunciated in a line of Scottish-Irish cases referred to by Laskin J. in *Hogan* v. *The Queen.*[170]

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[161]Lewis R. Katz, "Reflections on Search and Seizure and Illegally Obtained Evidence", 3 *Canada - United States Law Journal* 103 at 138.

[162]Writs issued to the R.C.M.P. under four federal statutes: *Narcotic Control Act* R.S.C. 1970, c. N-1; *Food and Drug Act,* R.S.C. 1970, c. F-27; *Customs Act,* R.S.C. 1970, c. C-40; *Excise Act,* R.S.C. 1970, c. E-12.

[163]John Faulkner, "Writs of Assistance in Canada", (1971) 9 *Alta. L. Rev.* 386 at 386.

[164]*United States* v. *Chadwick,* 97 S. Ct. 2476 (1977) at 2481.

[165]Minutes of Proceedings, January 27, 1981, Vol. 46 at 108.

[166]*Supra,* footnote 22.

[167]*Ibid.,* at 1697.

[168]*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 91 S. Ct. 1999 (1970) at 2013, dissenting opinion of Burger C.J.

[169]*United States* v. *Williams,* 622 F. 2d. 830 (5th Circuit 1980).

[170]*Supra,* footnote 30.

In *Hogan,* Laskin J., in dissent, would exclude breathalizer evidence obtained in deliberate violation of the appellants' right to counsel as declared in the *Bill of Rights,* indicating a lower threshold for exclusion than that enunciated in cases decided on the basis of shocking the community.[171]

The alternative to the rule in *Wray* proposed by Laskin J. is that the courts "balance the competing interests by weighing the social interest in the particular case against the gravity or character of the invasion, leaving it to the discretion of the trial judge whether the balance should be struck in favour of reception or exclusion of particular evidence"[172]. The basis of the test is the same as that enunciated in *Rothman.*[173] The reference to the Scottish-Irish cases suggests a difference in application in that exclusion would result from imbalance alone and not from an imbalance sufficient to shock the community.

The line of Scottish and Irish cases referred to by Laskin J.[174] has been reviewed and commented on by Heyden, *The Criminal Law Review*[175] and by Peiris, *Ottawa Law Review.*[176] Both articles extract from these cases the factors to govern the exercise of the courts discretion to exclude evidence. The questions to consider in determining whether improperly obtained evidence should be excluded are listed by Heyden as:

1. Did the irregularity occur as a vital part of a deliberate attempt to get the evidence, or did it happen accidentally?

2. How serious was the illegality?

3. Were there circumstances of urgency or emergency?

4. Were those responsible for the illegal conduct public officials or mere private individuals?

5. How easy would it have been to obey the law?

6. How serious is the offence being inquired into?

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[171] *Ibid.,* at 589.

[172] *Ibid.,* at 595.

[173] *Supra,* footnote 159.

[174] *Supra,* footnote 30 at 596.

[175] "Illegally Obtained Evidence", (1973 *Criminal Law Review,* 603).

[176] "The Admissibility of Evidence Obtained Illegally: A Comparative Analysis", (1981) *13 Ottawa Law Review* 309.

7. How important were the particular means used in the detection of the type of crime committed?[177]

The case *Lawrie* v. *Muir*[178] is usually referred to as the leading case in this line of authority. Jeanie Lawrie, a dairymaid, was convicted of using milk bottles not her own in violation of a municipal regulation. The evidence on which she had been convicted was obtained by inspectors for the Milk Marketing Board who obtained her consent to search her shop by showing an invalid warrant. On a balancing of the "relative importance of the public interest and the protection of the individual",[179] the evidence was excluded and the conviction quashed.

In his judgment Lord Justice-General (Cooper) stated:

> Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed.[180]

A case decided on the same principles is *Gordon Hay* v. *Her Majesty's Advocate*[181] in which teeth marks were left on the breast of a young girl who had been murdered and raped. A suspect was taken to a dental hospital for teeth impressions under the first Scottish warrant for the search of a person. On the basis of *Lawrie* v. *Muir* the court held such evidence admissible "even if there had been some irregularity in the method by which it was obtained"[182].

THE IMPACT OF THE CHARTER ON LAW ENFORCEMENT

In representations to the Joint Committee, the spokesman for the Canadian Association of Chiefs of Police[183] and the spokesman for the Canadian Association of Crown Counsels[184] expressed their concern about the inclusion in the Charter of a discretion to exclude illegally obtained evidence. Their principal objection was that such a discretion when exercised by individual trial judges would result in a degree of

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[177]*Supra*, footnote 175 at 608, 609, 610.

[178](1950) J.C. 19 (High Court of Justiciary).

[179]*Ibid.*, at 23.

[180]*Ibid.*, at 27.

[181](1968) J.C. 40.

[182]*Ibid.*, at 42.

[183]Chief John Ackroyd, Chief, Metro Toronto Police; Minutes of Proceedings, November 27, 1980, Vol. 14 at 8, 9.

[184]Mr. Roderick McLeod, Q.C., Assistant Deputy Attorney General of Ontario; Minutes of Proceedings, *Ibid.*, at 11.

uncertainty unacceptable in the trial process.[185] In the *Mapp* decision, the United States Supreme Court opted for the certainty of an absolute exclusionary rule. If a constitutional right was infringed in any way, evidence obtained in violation of that right would not be admissible.[186] In the *Wray* decision, the Supreme Court of Canada opted for the certainty of admitting illegally obtained evidence, if relevant. The discretion in Canada to exclude illegally obtained evidence has been so limited since *Wray* as to be non-existent in most circumstances.[187] The Canadian Parliament, in reference to violation of Constitutional rights, has now opted for the compromise in subsection 24(2) of the *Charter.* There is no question that the *Charter* option will lead to a degree of uncertainty regarding the admissibility of any illegally obtained evidence, no matter how stringent the test for bringing "the administration of justice into disrepute".

In addition, Canadian law enforcement officials will have to contend with applications made under the broad remedies provision of subsection 24(1). Pursuant to this section a court may grant appropriate remedies for any infringement of a constitutional right. No matter how restrictive the court is in the development and granting of such remedies, the fact that section 24(1) will be invoked means that law enforcement officials will be called upon to justify their actions. When we consider the difficulties of determining the precise limits of a law that is is only generally defined, the degree of uncertainty which must be faced is increased.

In general, the legal rights[188] entrenched by the *Charter* have long existed at common law. The American experience after *Mapp,* however, indicates that it was not a change in the law which created the impact at that time, but the imposition of a remedy for violation of that law.[189] *The Canadian Charter of Rights and Freedoms* contains remedies that will create in law enforcement and the administration of justice a Canadian version of the "tidal waves and earthquakes"[190] suffered by the New York Police Department after *Mapp.*

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[185]*Ibid.*, at 20.

[186]*Supra,* footnote 22, at 1697.

[187]*Supra,* footnote 34.

[188]Sections 7 to 15.

[189]*Supra,* footnote 28.

[190]*Ibid.*