EMERGING ISSUES IN RELATION TO THE LEGAL RIGHTS OF A SUSPECT UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

ED RATUSHNY*
Ottawa

The Charter has generated an explosion of judicial decisions which vary greatly in quality and result. While a radical transformation of our legal system is not likely to occur, it will never be the same. The courts will be expected to take greater responsibility for the integrity of the Charter's formulation of legal rights by eliminating anomalies, inconsistencies and omissions in that formulation.

Two specific areas of potential application of the Charter to criminal suspects are examined. The key issues for interpretation are the meanings of "detention" in relation to section 10(b) and "charged with an offence" in relation to section 11(c). A strict reading of these provisions would suggest that they have little or no application, respectively, to suspects who have not yet been arrested or not yet charged. Nevertheless, a bold interpretation may be necessary to maintain the "integrity" of the Charter.

La Charte a engendré une abondance de décisions judiciaires dont la qualité et l'effet varient considérablement. Alors qu'il est peu probable que survienne une transformation radicale de notre système juridique, rien ne sera cependant jamais plus pareil. On demandera aux tribunaux d'assumer une plus grande responsabilité pour maintenir l'intégrité des garanties juridiques telles que formulées dans la Charte, par l'élimination des anomalies, des contradictions et des omissions que la formulation de ces garanties aura fait apparaître.

On examinera ici deux aspects spécifiques de l'application possible de la Charte aux personnes soupçonnées d'actes criminels. En matière d'interprétation, le problème de base est de déterminer le sens du mot "détention", relativement à l'alinéa (b) de l'article 10 et celui du mot "inculpé" relativement à l'alinéa (c) de l'article 11. Ces dispositions, si elles sont prises à la lettre, sembleraient être peu ou pas du tout applicables aux suspects qui n'ont pas encore été soit arrêtés soit inculpés. Néanmoins, il peut s'avérer nécessaire d'en faire une interprétation large pour pouvoir garder à la Charte toute son intégrité.

Introduction

The explosion of cases dealing with the application of the Charter provisions in relation to legal rights poses extreme difficulties for legal analysts. In less than a year, literally hundreds of judicial decisions have been rendered, mostly at the lower court levels and most in criminal cases. The quality of these decisions ranges widely and, no doubt, this often reflects the degree of thought and preparation which was invested by counsel in their submissions to the courts. For every decision which reaches a conclu-

* Ed Ratushny, of the Faculty of Law, Common Law Section, University of Ottawa.

sion on a point of law, there is a real possibility of finding a counterpart which reaches an opposite conclusion. Only a fraction of these decisions have been reported fully in the law reports.

In one of the first cases to reach the provincial Court of Appeal level, Mr. Justice Zuber was moved to comment:[1]

> In view of the number of cases in Ontario trial courts in which Charter provisions are being argued, and especially in view of some of the bizarre and colourful arguments being advanced, it may be appropriate to observe that the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter, which is a part of the supreme law of this country.

According to recent reports of the treatment of counsel by the Supreme Court of Canada, that court has already given some clear indications that it will not show much patience for superficial arguments based on the Charter which are merely "thrown in" with a "long-shot" hope of success.

The concern about "trivializing" the Charter is a real one. If the proportion of far-fetched arguments to reasonable ones becomes too high, there is a danger that the Charter will be taken less seriously in cases which truly call for its application. To some extent that may have happened in relation to the Canadian Bill of Rights.[2] However, preliminary indications suggest that the lower courts have recognized the transcending nature of the Charter as a constitutional force. Nor, apart from occasional aberrations, have these courts indicated any inclination to effect a "paralysis of law enforcement". The constant reminder in section 1 that all of the rights and freedoms are subject ". . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", seems, so far, to have been effective in this respect.

Nevertheless, the Charter has already modified our legal system and, while a complete transformation is not likely, it will never be the same. As much as some of our judges might prefer merely "to interpret the law as it has been expressed by Parliament", much more is now required of them. There is a broader responsibility which goes beyond the interpretation of specific legislation provisions or the application of precedent to factual situations. That responsibility relates to the integrity of our legal process.

By holding the key to the meaning of the Charter's comprehensive statement of the "Legal Rights" of Canadians, our judges will find it considerably more difficult to avoid criticism for anomolies, inconsistencies and omissions in that formulation. Professor Gibson elaborates:[3]

---

[1] *R.* v. *Altseimer* (1983), 29 C.R. (3d) 276, at p. 282. (Ont. C.A.).

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

[3] Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations, in Tarnopolsky and Beaudoin (eds), Canadian Charter of Rights and Freedoms: Commentary (1982), p. 28.

> The courts are not entirely on their own in this process, of course. They cannot ignore the text of the applicable constitutional document, for it is the Constitution, not the courts, that is the "supreme law" of the land. They should however, seek the guidance in the spirit of the Constitution rather than from its inevitably imperfect language.

In the end, short of further constitutional amendment, the legal rights of Canadians are what the Supreme Court of Canada says they are. A simple Act of Parliament can no longer over-ride the court's definition of those rights.

In the discussion which follows,[4] two specific areas of potential application of the Charter to criminal suspects are considered. The first relates both to police interrogation prior to an actual arrest and to interrogation during subsequent detention following an arrest but prior to trial. The second involves the situation where a suspect is called as a witness at a related hearing with a view to enhancing a criminal investigation against him. The manner in which the courts treats these situations will be fascinating to observe since a strict reading of the Charter would suggest that it has little or no application to them. On the other hand, it might be argued that the "spirit" of the Charter and the "integrity" of the enumerated rights demand that protection be extended to these situations as well.

In relation to pre-trial interrogation, the extent of the protections in section 10, and particularly the "right to counsel" could be expanded considerably by a broad interpretation of the word "detention" in this section. The Charter appears specifically to have avoided offering the protection of section 11(c) (non-compellability) to a suspect who has not yet been charged. The protection of section 11(c) could be expanded considerably if the courts were to look beyond whether a person was actually "charged with an offence" to the reality of whether he was "likely to be" or "effectively" charged with an offence.

I. "*Detention*".

Section 10 provides that:

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

While the meaning and implications of "arrest" are well-understood,[5] little attention has been paid to the word "detention".

---

[4] This discussion is based largely upon an earlier article by the author entitled, The Role of the Accused in the Criminal Process published in Tarnopolsky and Beaudoin (eds), *op. cit., ibid.*, p. 335.

[5] See, for example, Part XIV of the Criminal Code, R.S.C. 1970, c. C-38, the classic common law case of *Christie* v. *Leachinsky*, [1947] A.C. 573 and the Supreme Court of

Section 10(a) contains the implicit suggestion that there might be a legally justified reason for "detaining" a person quite apart from the power of arrest. Section 9 establishes that everyone ". . . has the right not to be arbitrarily detained . . .". Presumably, the word "arbitrarily" means ". . . without specific authorization under existing law".[6] In what circumstances, then, may a person be "detained", quite apart from those situations in which an arrest might lawfully be made? Is it possible to "detain" a suspect for investigation purposes? Are there any circumstances in which a suspect, lawfully, may be "detained" (involuntarily) for questioning? If a person already in lawful custody is entitled to be released, may that initial lawful custody be extended, that is the accused "detained", for further investigation including questioning?

The meaning of "detention" has been considered in a number of cases dealing with roadside screening devices and breathalyzer tests. In one case, Mr. Justice Macdonald commented that:[7]

> Parliament in using the words "arrested" or "detained" in s. 2(c)(ii) of the Canadian Bill of Rights contemplated different situations because although arrest includes detention, detention does not necessarily include arrest.

Mr. Justice Ritchie, delivering the judgment of the Supreme Court of Canada in *Chromiak* v. *The Queen*, agreed with this comment but added that:[8]

> . . . the words "detain" and "detention" as they are used in s. 2(c) of the Canadian Bill of Rights, in my opinion, connote some form of compulsory restraint.

He concluded that the right to retain and instruct counsel, the remedy by way of *habeas corpus* and, implicity, the right to be informed promptly of the reason for detention, all come into operation only where there is a detention authorized by law and, therefore, implying an "actual physical restraint".

In the *Chromiak* case, the driver of a motor vehicle was stopped by a police officer who believed that his ability to drive might be impaired. The officer made a demand that the driver provide a breath sample for analysis in a roadside screening device. The accused refused to take the test unless his lawyer was present and, as a result, was issued with an appearance notice on the charge of failing, without reasonable excuse, to comply with the demand of an officer for a breath sample contrary to section 234(2) of the Criminal Code.[9] The Supreme Court upheld the driver's conviction on the basis that he was never "detained" since he had voluntarily co-operated with the police up to the point of refusing to provide a breath

---

Canada decision in *R.* v. *Whitfield* (1970), 9 C.R.N.S. 59. See also, Bruce P. Archibald, The Law of Arrest in Del Buono (ed.), Criminal Procedure in Canada (1982), p. 125.

[6] Walter S. Tarnopolsky, The Canadian Bill of Rights (2nd ed. rev., 1975), p. 235.

[7] *R.* v. *MacDonald* (1974), 22 C.C.C. (2d) 350, at p. 356 (N.S.C.A.).

[8] (1980), 49 C.C.C. (2d) 257, at p. 262.

[9] *Supra*, footnote 5.

sample and then was allowed to go away. Since there was no detention, the Bill of Rights provision did not come into play and the failure to provide an opportunity to consult counsel did not furnish the "reasonable excuse" permitted by the Criminal Code for refusing to comply.

In *R.* v. *Dedman*,[10] the officer did not have any reason to believe that the driver's ability to drive was impaired but stopped him as part of a programme to check drivers for impaired driving on a random basis. The former basis is authorized under the Criminal Code. The latter is not. Under the programme, the sole purpose of asking drivers to produce valid driver's licenses was to initiate conversation or contact in order to detect whether the driver had been drinking. In this case, the officer detected the odour of alcohol on Dedman's breath and, therefore, demanded a breath sample for analysis on a roadside screening device. When he failed to provide an adequate sample, he was charged under section 234.1(2) as in the *Chromiak* case.

The trial judge acquitted the accused and this decision was affirmed on appeal.[11] Mr. Justice Maloney held that, while the Highway Traffic Act[12] did authorize an officer to stop a motor vehicle for the purpose of checking the driver's license, it did not authorize a stopping for the purpose of attempting to detect an impaired driver. The officer had, therefore, exceeded his powers in stopping the driver on a random basis. Since the officer's conduct was not authorized by law, it was an unjustified interference with the liberty of the citizen which constituted a "reasonable excuse" for not providing a breath sample.

In the Ontario Court of Appeal, Mr. Justice Martin agreed that there was an implied power under the Highway Traffic Act to stop a vehicle in order to check the driver's license. However, his Lordship refused to decide whether the officer was validly exercising that power in this case. Rather, he concluded that the motorist simply had been "requested" to stop and voluntarily complied. Therefore, there was clearly no lawful detention.

It may be suggested, on the limited basis of these decisions, that our courts may not be inclined to give a broad interpretation of the word "detention" in section 10 for the purpose of making operative the rights embodied in subsections (a), (b) and (c) (that is to be informed promptly of the reason therefore to retain and instruct counsel without delay and to review by *habeas corpus*).

---

[10] (1981), 55 C.C.C. (2d) 97 (Ont. H.C.).

[11] (1981), 59 C.C.C. (2d) 97. Martin J.A. delivering the judgment of a five-member court (Howland C.J.O., Brooke, Lacourciere and Weatherston JJ.A.). At the time of writing, leave to appeal had been granted by the Supreme Court of Canada but the appeal had not yet been heard.

[12] R.S.O. 1970, c. 202, s. 14(1).

However, in the course of his reasons in the *Dedman* case, Mr. Justice Martin expresses, unequivocally, the limits of police power in the investigation of an offence:[13]

> On the other hand, 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 useful information may be obtained. Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or for further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to police officers as to anyone else. Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless, of course, the officer arrests him on a specific charge or arrests him pursuant to s. 450 of the Code where the officer has reasonable and probable grounds to believe that he is about to commit an indictable offence.

It is clear, therefore, that the word, "detention" in section 10, should not be interpreted as acknowledging some power on the part of police, falling short of actual arrest to detain suspects for questioning or for other investigative purposes unless specifically authorized by law.

Subsections 10(a) and (b) could have practical consequences in relation to the admissibility of statements. Suppose, for example, that a suspect refuses to accompany an officer voluntarily to the police station. However, after further discussion, he perceives that he is required to do so, even though the circumstances are not sufficient to constitute an arrest. Or, suppose that the suspect attends voluntarily but subsequently asks to be excused. He is not told that he must remain but the subject is changed and further questions are asked. It would be open to the courts to consider these circumstances to constitute a "detention" so that if the suspect had not been "informed promptly of the reasons therefor" or if he had not been informed of his rights to retain or instruct counsel, section 24(2) could be invoked at his trial to reject any confession or statement which he might have made.[14]

Nevertheless, if the suspect does attend at the police station in circumstances falling short of an arrest, there may be a temptation to conclude that there has been no "detention" so that the protections contained in section 10 could not be invoked. Suppose that a suspect attends for questioning and repeatedly asks to call his lawyer. The request is denied but there is no indication that the accused would be prevented from leaving. If his attendance is construed as having been "voluntary", section 10 would

---

[13] *Supra*, footnote 1, at pp. 108-109. *Cf.* the strange case (and decision) of *R.* v. *Moore*, [1978] 6 W.W.R. 462 (S.C.C.) which was not referred to by Martin J.A. The case is discussed in Ratushny, Self-Incrimination in the Canadian Criminal Process (1979), pp. 147 *et seq.*

[14] Indeed, such detention might be considered to be "arbitrary" for the purpose of bringing s. 9 into play as well.

not be operative. On the other hand, if our judges wish to apply the spirit as well as the strict letter of the right to counsel contained in the Charter, it would be open to them to consider such circumstances as amounting to an effective detention, thereby bringing into play the rights listed in section 10 together with the potential remedies contained in section 24.

Suppose that the police call on the suspect and he agrees to accompany them to the police station. However, before leaving he asks his wife to call his lawyer and ask him to attend at the station. The police and suspect arrive at the station and questioning commences. The lawyer subsequently arrives but the desk sergeant refuses to permit the lawyer to enter the interrogation room. After a few hours, a statement is obtained. Once again, an extended view of "voluntary co-operation" would render section 10 inapplicable while a broad approach to the objectives of the Charter would require that a "detention" be imputed.

In sum, the whole area of police questioning of suspects who submit to custody "voluntarily" may not fall within the ambit of section 10 of the Charter. It will only be applicable to the extent which the courts might be prepared to give a broad interpretation to the concept of "detention". In order to do so, they would have to look beyond the apparent conduct of the police officer and the suspect's strict position in law to the "dynamics" of the situation and the suspect's perception of that situation. Of course, where the circumstances amount to an arrest, section 10 is clearly brought into operation.

An expanded judicial interpretation of "detention" could also have implications for the extention of the section 10 guarantees to the stage beyond the time of arrest. Suppose, for example that an accused receives the appropriate "instruction" (respecting counsel) from the police at the time of his arrest. However, he is then detained in custody for a period of time and subjected to interrogation. Need the accused only be told of his right to counsel at the outset or should the instruction be repeated prior to each session of interrogation? If being informed of the right to counsel is only required at the time of arrest, presumably the right to retain and instruct counsel exists at the same time. Does this mean that it also exists *only* at this time? If an arrested person does not request counsel at the time of arrest, can he be denied counsel during a period of subsequent detention and interrogation?

Even if the arrested person chooses to retain counsel, how effective is preliminary consultation likely to be? The best advice of counsel will be, almost inevitably, to say nothing. The effectiveness of such advice, during a subsequent period of custody, will vary with the intelligence and personality of the individual involved. It will also depend upon the skillfulness of the police interrogators attempting to break down the resistance of the person in custody.

Situations have arisen where counsel has firmly instructed his client to remain silent and has asked the police not to question the client in the absence of the lawyer but where such questioning has occurred, nevertheless, and statements obtained. In some reported cases, this course of conduct has not been a bar to the admissibility of such statements into evidence.[15] It would be entirely speculative to predict whether the courts will consider such circumstances to be a breach of section 10(b). Again, much will depend upon whether our judges will give a narrow and literal interpretation to its wording or whether they will perceive it as a general "right" to be applied in spirit as well as in form.

II. *"Person Charged"*.

A well-recognized protection for an accused at his criminal trial is his right not to testify as a witness at that trial. Section 11(c) of the Charter provides:

> Any person charged with an offence has the right
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

However, prior to the Charter, there was no express provision making the accused non-compellable as a witness at his trial. The Canada Evidence Act[16] contains no such provision. Rather, the non-compellability arises by incorporation of the position of an accused at common law. At common law, the accused was neither competent nor compellable as a witness. The Canada Evidence Act has modified the common law position by making the accused competent to testify in his own defence[17] but has not changed his status of being non-compellable by the Crown. Thus, while it may sound contradictory, it can properly be said that the non-compellability of an accused was specifically adopted in Canada by the implied incorporation of a common law principle.[18]

Section 11(c), therefore, clearly establishes for the first time in Canada, the concept of the non-compellability of the accused at his trial as a fundamental right.[19] However, a difficulty arises where the person has not yet been charged and is called as a witness to testify about matters which might incriminate him. He is not a "person charged with an offence" at the time of testifying so that section 11(c) of the Charter appears to offer no protection in these circumstances.

---

[15] See *e.g.*, *R.* v. *Dinardo* (1981), 61 C.C.C. (2d) 52; *R.* v. *Settee* (1974), 29 C.R.N.S. 104; *R.* v. *McCorkell* (1962), 27 C.R.N.S. 155 (Ont.). See also Harris, (1964-5), 7 Crim. L.Q. 395. *Cf. Brewer* v. *Williams*, (1977), 430 U.S. 387.

[16] R.S.C. 1970, E-10.

[17] S. 4(1).

[18] See generally, Ratushny, Is There a Right Against Self-Incrimination in Canada? (1973), 19 McGill L.J. 1, at pp. 28 *et seq.*

[19] In *Curr* v. *The Queen* (1972), 18 C.R.N.S. 281, at p. 300, Laskin J. stated in *obiter* that s. 2(d) of the Canadian Bill of Rights also embodied such a protection. However, such an interpretation is questionable. See Ratushny, *op. cit.*, footnote 12, p. 90.

At common law, a witness was entitled to refuse to answer particular questions where the answer would tend to incriminate the witness or expose him to a penalty or forfeiture. This common law privilege is still operative in England today. In Canada, it was abolished by section 5(1) of the Canada Evidence Act.[20] In its place, section 5(2) provided:

> 5.(2) Where with respect to any question a witness objects to answer upon the ground that his answer might tend to incriminate him . . . then although the witness is by reason of this Act . . . compelled to answer, the answer so given shall not be used or received in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

The future exclusion of evidence permitted by section 5(2) expressly extends to statements made under compulsion of provincial statutes.

A significant feature of section 5(2) is that the prohibition against subsequent use of testimony is only operative if the witness expressly invokes the protection prior to the testimony being given.[21]

In the leading case of *Tass* v. *The King*, Kerwin J. pointed out that:[22]

> [T]he matter seems quite clear that if the person testifying does not claim the exemption, the evidence so given may be later used against him, and this notwithstanding the fact that he may not [have] known his rights.

Numerous attempts have been made to exclude, at subsequent proceedings, testimony which had been given without claim of the section 5(2) protection.[23] In every case, the arguments were rejected and the plain words of this subsection were applied.

The potential unfairness to a witness who is unaware of this legal protection has been recognized by the Charter. It now provides for automatic protection without the necessity of the witness expressly invoking it. Section 13 provides:

> 13. A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

While section 13 of the Charter does improve the existing state of the law in this area, it leaves a serious gap in the protection of individual rights.

---

[20] *Supra*, footnote 16.

[21] Although: "In practice when a witness is being examined upon an incident or series of incidents and he thinks that all or any of his answers might tend to incriminate him, the judge might, of course, permit a general objection to the series of such questions and not require a specific objection to each and every question.": *R.* v. *Mottola and Vallee* (1959), 31 C.R. 4, at p. 11, per Morden J.A. delivering the judgment of the Ontario Court of Appeal (Porter C.J. and Lebel J.). See also the helpful recent decisions in *A.G. Que.* v. *Cote* (1979), 50 C.C.C. (2d) 564 (Que. C.A.) and *R.* v. *Chaperon* (1979), 52 C.C.C. (2d) 85 (Ont. C.A.).

[22] [1947] S.C.R. 103, at p. 105.

[23] *R.* v. *Mazerall* (1946), 2 C.R. 261 (Ont. C.A.); *Boyer* v. *The King* (1948), 7 C.R. 165 (Que. C.A.); *R.* v. *Brown (No. 2)* (1963), 42 W.W.R. 448 (S.C.C.); *R.* v. *Bouffard*, [1964] 3 C.C.C. 14 (Ont. C.A.).

The problem has been documented extensively[24] and that discussion will not be repeated here. The basic problem is that many of the protections provided by the criminal process may be subverted by calling the suspect or accused as a witness at some other proceeding prior to his criminal trial.

It is true that such a witness may prevent his testimony being introduced at any subsequent criminal trial. However, the damage may be done in other ways. The earlier hearing might be used as a "fishing expedition" to subject the witness to extensive questioning with a view to uncovering possible criminal conduct. The questioning might also be used to investigate a particular offence. For example, the accused might be required to reveal possible defences, the names of potential defence witnesses and other evidence. Moreover, the publicity generated by the hearing may seriously prejudice the likelihood of a fair trial.

The problem is that the initial hearing is likely to have none of the protections guaranteed by the criminal process. There will be no specific accusation, no presumption of innocence, no protection against prejudicial publicity, no right to counsel and no rules of evidence. The person presiding at the haring may not have any legal training or any sense of impartiality. Indeed he may consider himself to be an arm of law enforcement!

What is the integrity of the protection in section 11(c) if the actual laying of the charge can be delayed while the person, who is intended to be charged, is called as a witness at some other proceeding in order to further the investigation against him?

In *Re Morris Jones*[25] the father was summoned to testify at the coroner's inquest into the death of his deceased child. Although no charges had been laid, the facts pointed to child battery. The Alberta Coroners Act specifically compelled the testimony of a person:

> . . . who is suspected of causing a death, or who . . . is likely to be charged with an offence relating to the death. . . .[26]

Moreover, the Alberta Court of Appeal expressly recognized that the witness in question was suspected of causing the death and was likely to be charged:

> I think it fair to state that it seems likely that Johansen will be charged with an offence relating to the death of the child.[27]

And:

> [T]he inference is irresistible that Johansen is suspected of causing the death or is likely to be charged with an offence relating to it.[28]

---

[24] *Op. cit.*, footnote 13, pp. 78-87 and 347-404.

[25] (1976), 28 C.C.C. (2d) 524.

[26] R.S.A. 1970, c. 69, s. 24(2).

[27] *Supra*, footnote 25, at p. 526, per McGillivray C.J.

[28] *Ibid*, at p. 534, per Sinclair J.A. (Clement J.A. concurring).

Nevertheless, the court held that the compellability of a witness to testify in these circumstances, did not impinge upon the rights of that witness as a potential accused at a subsequent criminal trial. The use of the coroner's inquest as an investigative mechanism for the criminal process, effectively, had been sanctioned by the Supreme Court of Canada in *Faber* v. *The Queen*.[29]

An extreme example of the use (and abuse) of the coroner's inquest as an investigative mechanism is to be found in the case of *Chartier* v. *A.G. Quebec*.[30] There, the coroner had issued a warrant for the arrest of a suspect "solely in order for the police force to question him while he was in confinement". Moreover, when the inquest was actually held, the coroner would hear only witnesses which might inculpate the accused. He "refused to hear those who might have established" that the suspect was not at the scene of the crime.

It now appears to be a frequent practice in the province of Quebec to use the coroner's inquest in place of the preliminary inquiry where a death is involved. The criminal charge is postponed, the inquest is held and the suspect is either examined or imprisoned for a year for contempt if he refuses. Moreover, the Quebec Police Commission Inquiry into Organized Crime[31] appears to have become a regular part of the machinery of criminal justice in that province. The result is that the rights of the accused, in practice, may vary drastically from province to province.

The Charter was recently invoked in a case involving a coroner's inquest in Fredericton. In July of 1982, one Michaud was charged with the murder of his wife. On September 10th, following a preliminary inquiry, the accused was discharged on the basis that no sufficient case had been made out to put him on trial.

At the direction of the Minister of Justice, the Chief Coroner then convened an inquest into the death. When Michaud received a summons to appear and testify as a witness, he brought an application to quash the summons on the ground that it contravened his rights under the Charter.

Mr. Justice Stevenson of the Court of Queen's Bench did not consider it necessary to determine whether the applicant was a "person charged with an offence". Even assuming that he was, section 11(c) offered no protection:[32]

---

[29] (1975), 32 C.R.N.S. 3.

[30] (1979), 9 C.R. (3d) 97 (S.C.C.).

[31] The compellability of suspects by this body has also met the legal sanction of the Supreme Court of Canada: *Di Iorio* v. *Montreal Jail Warden* (1976), 35 C.R.N.S. 57. See also the cases dealing with other proceedings such as public inquiries: *R.* v. *Que. Mun. Comm.*; *Ex Parte Longpré,* [1970] 4 C.C.C. 133 (Que. C.A.); *Royal Amer. Shows Inc.* v. *Laycraft,* [1978] 2 W.W.R. 169 (Alta S.C.); *Orysiuk* v. *The Queen* (1977), 37 C.C.C. (2d) 445 (Alta C.A.).

[32] *Re Michaud and the Minister of Justice for New Brunswick et al.*, Dec. 3rd, 1982, at p. 3, not yet reported.

> Paragraph 11(c) states that a person charged has the right not to be compelled to be a witness in *proceedings* against that person *in respect of the offence*. A coroner's inquest is not a proceeding in respect of an offence. The courts have repeatedly pointed out that at an inquest there is no *lis*, no accused and no charge. I reject counsel's argument that in this instance the inquest is being used as an instrument in the criminal process.

When Michaud decided to appeal this ruling to the Court of Appeal, the Chief Coroner decided to proceed with the inquest without his testimony.

The coroner's jury was duly instructed that the inquest was not a criminal trial and that the jurors were not there to determine guilt or innocence. Nevertheless, they were told that they could conclude that the deceased was the victim of culpable homicide and, if so, they could point to "a person or persons unknown" or to Mr. Michaud. They reached a finding that the deceased had met her death through "culpable homicide by Jean-Marc Michaud". A warrant was issued for his arrest and he was taken into custody a few hours later and charged again.

The accused then brought an application to quash the finding of the coroner's jury. However, Mr. Justice Dickson concluded that both the instruction and the verdict were proper.

The *Michaud* decision is not likely to be the last challenge by a potential accused who is called to testify as a witness at another proceeding. The decision here adopted the approach taken in earlier Canadian decisions of focussing upon the status of the person *qua* witness at the proceeding in question. Perhaps that was the only correct approach in the absence even of statutory recogntion of the accused's non-compellability at his criminal trial.

However, section 11(c) now enshrines in our Charter the right of non-compellability. If the courts were ultimately to change their focus from the status of the witness *qua* witness to the status of the witness *qua* potential accused, a different result could be achieved. In other words, it would be open to the Supreme Court of Canada to hold that the non-compellability provision in section 11(c) is so undermined by compellability at other hearings that "person charged with an offence" should be interpreted as including a "person likely to be charged" and that "proceedings against that person" should be interpreted as any proceedings which would be likely to prejudice his status as a potential accused in another forum by requiring him to testify as to the same subject matter.

There is no doubt that such an approach raises a number of problems. How would a court determine whether a person is "likely to be charged"? The most opportune time to deal with this question would likely be after the witness has been sworn and questioning has commenced. In other words, the challenge would not be to the compellability of the person as a witness but to a line of questioning which relates to a potential criminal charge against that witness. If such a witness were permitted to decline to answer

the particular question, we would simply be back to the common law privilege, which is still operative in England today.

While such a rule suggests difficulties in its application, there appear to have been few practical problems in England. Moreover, if the testimony at the hearing in question is more important to the state than the potential criminal prosecution, immunity against prosecution may be granted and the testiony compelled. Such an extended interpretation of section 11(c) would not be inconsistent with section 13. The immunity which it gives to subsequent "use" of testimony could still operate where the witness makes no objection along the lines suggested above.

Of course, our courts are not likely to put such a strained interpretation upon section 11(c) without good reason. But an argument can be made that a parallel system of "non-criminal" proceedings at which an accused can be subjected to a compelled "fishing expedition" merely by delaying the laying of charges, makes a mockery of the right not to testify at the criminal trial.[33] If the courts are now to be responsible for the integrity of the legal rights enshrined in our Charter, they cannot neglect the anomalous results which may have been created by the conscious or unconscious design of the drafters.

Conclusion

The areas discussed here are merely two examples of the frontiers which our courts will be required to explore in the years to come. In reaching their ultimate conclusions, they will not easily be forgiven for basing their interpretations solely on a strict reading of the wording of the Charter or a rigid adherence to precedent. A keen appreciation of the actual practices of the police and other officials will be important to providing interpretations which will command sustained respect from the public. The challenge to the judiciary and to counsel is imposing. At the same time there has never been greater scope for creativity in developing consistent principles which can ensure the integrity of our criminal process.

---

[33] See, *op. cit.*, footnote 13, pp. 78-87 and 347-404.