Legislation

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CHARTER OF RIGHTS AND FREEDOMS, SECTION 11—DISCIPLINARY HEARINGS BEFORE STATUTORY TRIBUNALS.—With the enactment of the Canadian Charter of Rights and Freedoms,[1] a new era in Canadian law began. Not only must Parliament and the provincial legislatures continue to respect the division of powers imposed by the Constitution Act, 1867,[2] they must now ensure that any law enacted by them conforms to the Charter.[3] In some areas of law, for example, criminal law and civil liberties, the Charter appears to have already had a substantial impact;[4] in other areas, for example, property and torts,[5] it has not yet had any significant effect.

In the field of administrative law, the potential of the Charter remains unclear. Upon initial inspection, only one of its provisions would appear to be directly relevant to proceedings before administrative tribunals. Section

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[1] Part I, Constitution Act, 1982, Schedule B to the Canada Act 1982, c. 11 (U.K.).

[2] The Constitution Act, 1982, contains a schedule which provides for the renaming of the British North America Act 1867 the Constitution Act, 1867.

[3] Section 52 of the Constitution Act, 1982 provides that 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. However, section 33 provides that Parliament or the legislature of a province may opt out of section 2 and sections 7-15 of the Charter.

[4] For example, the decision of the Ontario Court of Appeal in *Regina* v. *Oakes* (1983), 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 389, striking down the reverse onus provisions of the Narcotic Control Act, R.S.C. 1970, c. N-1 as being in violation of section 11(d) of the Charter; and the decision of the Ontario Court of Appeal in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1984), 5 D.L.R. (4th) 766, 38 C.R. (3d) 271, striking down the censorship powers of the Ontario Board of Censors as being in violation of section 2 of the Charter.

[5] *Re Becker and The Queen in Right of Alberta* (1983), 148 D.L.R. (3d) 539 (Alta. C.A.); *The Queen* v. *Estabrooks Pontiac Buick Ltd.* (1983), 144 D.L.R. (3d) 21, (N.B.C.A.) which affirmed on non-Charter grounds the decision of the New Brunswick Supreme Court, *sub nom. The Queen in Right of New Brunswick* v. *Fisherman's Wharf Ltd.* (1982), 135 D.L.R. (3d) 307 (for a comment on the case see (1983), 61 Can. Bar Rev. 398). For a recent case involving tort law see *Dolphin Delivery Ltd.* v. *Retail, Wholesale and Dept. Store Union, Local 580*, [1984] 3 W.W.R. 481 (B.C.C.A.).

7, guaranteeing the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice,[6] has in all probability enshrined in the constitution the principle of fair procedure with respect to certain types of decisions.[7] But is section 7 the only section to be considered? For example, take the case of a disciplinary hearing conducted before the discipline committee of the governing body of a provincial law society. A complaint has been filed against X, a member of the profession, a preliminary investigation has been conducted, and X has been summoned before the disciplinary committee to explain his conduct. Is X entitled to be presumed innocent; is X a compellable witness; is X entitled to a public hearing? If a penalty is imposed in the disciplinary proceedings, what effect may that have on any subsequent criminal proceedings arising out of the same events? At common law, the concept of natural justice[8] would be of no assistance to X.[9] Section 7 of the Charter, if it merely constitutionalizes fair procedure, offers no more assistance than does the common law. In any event, the section requires a threat to life, liberty or security of the person before it comes into play. Whether that requirement is satisfied in the case of a disciplinary proceeding will depend on the jurisdiction of the tribunal involved. In the case of the disciplinary powers of professional bodies, the sanctions that may be imposed range from a fine to a suspension to a disqualification. These are severe consequences to be sure, but not necessarily threats to life, liberty or security of the person. However, another section of the Charter, section 11,

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[6] The section reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

[7] There is some uncertainty whether section 7 goes beyond questions of fair procedure and permits a court to consider "substantive fairness". The majority of the decided cases support the view that section 7 relates only to the question of procedure (*Regina* v. *Stevens* (1983), 145 D.L.R. (3d) 563, 3 C.C.C. (3d) 198 (Ont. C.A.); *Regina* v. *Hayden* (1984), 3 D.L.R. (4th) 361, 36 C.R. (3d) 187 (Man. C.A.)). However in *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979* (1983), 147 D.L.R. (3d) 539, 33 C.R. (3d) 22, the British Columbia Court of Appeal held that section 7 did encompass questions of substantive fairness.

[8] For the purpose of this comment, one need not distinguish between the concepts of natural justice and fairness; regardless of whether the terms are synonyms or separate parts of the common law of fair procedure, the analysis presented in the comment applies.

[9] Most texts which discuss natural justice do not mention the concepts of the presumption of innocence, the right against self-incrimination or the right to a public hearing; see Paul Jackson, Natural Justice (1979); G.A. Flick, Natural Justice, Principles and Practical Application (1979); H.W.R. Wade, Administrative Law (5th ed., 1981); S.A. de Smith, Judicial Review of Administrative Action (4th ed., 1981), p. 195. One author, W.W. Pue, suggest that there is a prima facie presumption in favour of "open hearings" (Natural Justice in Canadas (1981), pp. 114-116). However he acknowledges that the issue is normally one within a tribunal's discretion. It is submitted that the concept of *audi alteram partem* merely guarantees one the right to know the case against you and an opportunity to meet it. Since the concept of an "oral hearing" is not guaranteed it is hard to see how the right to a public hearing is.

guarantees a number of specific procedural rights. May that section be invoked in a disciplinary hearing before a statutory tribunal? This question forms the focus of this comment.

Section 11[10] confers a number of rights on "any person charged with an offence". The rights that are entrenched (subject to section 1[11] and section 33[12]) are usually associated with the criminal trial process. They include, for example, the right to a trial within a reasonable time,[13] the presumption of innocence,[14] the right to a jury trial,[15] and the protection against double jeopardy.[16] However, the breadth of the opening words of the section, "any person charged with an offence", suggests the possibility that the section might also apply to non-criminal proceedings.[17] That possibility can be explored by considering first, the language and history of the section and the nature of the rights contained therein; second, the

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[10] The section reads: "Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment".

[11] Section 1 permits such encroachments on the guarantee of rights and freedoms contained in the Charter which are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic country".

[12] Section 33 permits an express legislative override of the freedoms and rights contained in section 2 and sections 7-15.

[13] S. 11(b).

[14] S. 11(d).

[15] S. 11(f).

[16] S. 11(h).

[17] By the term criminal proceedings, I would, with respect to a criminal charge, include pre-trial proceedings (such as the preliminary hearing), trial proceedings and post trial proceedings (sentencing). Non-criminal proceedings would encompass the range of both civil trial proceedings and administrative proceedings.

decisions in which the issue has so far arisen; and third, if *prima facie* section 11 of the Charter is applicable, the effect of section 1.

Language, History and Nature of Rights

The words "any person charged with an offence" cannot be said to be determinative of the question of section 11's applicability to non-criminal proceedings. The section refers to "offence", as opposed to a "criminal offence". The Shorter Oxford English Dictionary defines "offence" to be "a breach of law, duty, propriety or etiquette", Webster's Third New International Dictionary defines "offence" to be "a breach of morals or social conduct" or "an infraction of the law". Thus, on its face, section 11 is not necessarily restricted to criminal proceedings and could apply to all penal offences whether criminal in nature or not.

At least two commentators subscribe to the view that the section has a broader application than to simply criminal offences. In their view, regulatory offences are also caught by it. Morris Manning, in his book, Rights, Freedoms and The Court, A Practical Analysis of the Constitution Act,[18] states that "there is an enforcement provision and a breach of the law carries a penalty of some kind, that can be categorized as a 'penal' matter and is an 'offence' ". He futher suggests that the absence of the word "criminal" illustrates the intent of the drafters of the Charter to have section 11 cover all offences and not just criminal offences.[19] The Honourable Mr. Justice McDonald in his book, Legal Rights in the Canadian Charter of Rights and Freedoms, suggests:[20]

> . . . 'offence' may include 'offences . . . which may be committed only by persons who are members of certain organizations such as the Armed Forces, and the R.C.M.P. . . . The word offence which signifies 'a breach of law' of 'an infraction of law' may be so broad as to include conduct which constitutes a ground upon which, by statute, a professional body may impose discipline upon its members, by disqualification, suspension or fine.

This interpretation of "offence" may also be supported by an inference that can be drawn from clause (f) of section 11. That clause exempts from the scope of its operation offences under military law tried before military tribunals. The term military tribunal is not defined in the Charter, nor is it defined in the National Defence Act.[21] The latter act refers instead to "service tribunals" which are defined to mean a court martial or a person presiding at a summary trial.[22] The act also defines a number of service offences, not all of which are offences under the Criminal code.[23] Thus, a

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[18] (1983), p. 362.

[19] *Ibid.*

[20] David C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources (1982), Chap. 7, p. 83.

[21] R.S.C. 1970, c. N-4.

[22] *Ibid.*, s. 2.

[23] R.S.C. 1979, c. C-34.

service tribunal has the jurisdiction to hear not only indictable and summary conviction offences, but also disciplinary offences. If therefore the exemption in clause (f) excludes military disciplinary offences, is not the inference that these types of offences fall within the other provisions of the section? And if military disciplinary offences are included in section 11, why not all "disciplinary offences"?[24]

The marginal note, which refers to "proceedings in penal matters", might also suggest a broad reading of the section. It must be conceded that the use of such notes as aids to interpretation is questionable as they do not form part of the act.[25] However, there is authority for the view that one may refer to marginal references in "considering the general sense in which the words are used in Acts of Parliament".[26] Further, in the first major decision involving the interpretation of the Charter, *The Law Society of Upper Canada* v. *Skapinker*,[27] the Supreme Court of Canada has adopted a more liberal attitude to the use of statutory signposts[28] as aids to the interpretation of the substantive sections of the Charter. Estey J., speaking for a unanimous court,[29] held that statutory headings may be used as aids to interpretation. He placed substantial reliance upon the fact that the headings were systematically and deliberately included as part of the Charter and formed part of the resolution which Parliament considered. He stressed that the document is intended to be read and interpreted by the populace generally and the headings provide an easy reference to the sections. All of the points which found favour with the court regarding the use of headings apply equally to marginal notes, suggesting that they too ought to be available as aids to interpretation. The extent of their influence depends upon a number of factors,[30] but the case certainly establishes that statutory

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[24] See *Bolan* v. *Disciplinary Board of Joyceville Institution* (1984), 2 Admin. L.R. 107, at p. 116 (Bd. Chair.).

[25] E.A. Driedger, The Construction of Statutes (2nd ed., 1983), says: "Marginal notes, therefore, cannot influence the sense or scope of the words in the Act . . ." (p. 133). P.B. Maxwell, The Interpretation of Statutes (12th ed., 1969) concedes that marginal notes have sometimes been used as an aid to construction but states that the authorities suggest that marginal notes "should not be considered" (p. 10). W.F. Craies, Statute Law (7th ed., 1971) is of a similar view (p. 195).

[26] *Sheffield Waterworks* v. *Bennett* (1872), L.R. 7 Ex. 409, at p. 421; *Stephens* v. *Cuckfield R.D.C.*, [1960] 2 Q.B. 373, at p. 383, [1960] 2 All E.R. 716, at p. 720 (C.A.).

[27] (1984), 9 D.L.R. (4th) 161, 11 C.C.C. (3d) 481 (S.C.C.).

[28] For example, the title of the Act, marginal notes, punctuation, headings, section numbers and the preamble.

[29] Ritchie, Dickson, Beetz, McIntyre, Lamer and Wilson JJ. concurred.

[30] Such things as: the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision in question; the apparent homogeneity of the provisions appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the Charter; and the relationship of the terminology employed in the heading to the substance of the headlined provision (*supra*, footnote 27, at pp. 176 (D.L.R.), 496 (C.C.C.)). The list is not intended to be all-embracing.

signposts such as headings ought to be considered. Thus, in the case of section 11, the marginal note, with its reference to "criminal and penal matters", reinforces the view that the term "offence" is not limited to criminal offences.

The legislative history of the section is not determinative of the question either. Some of the provisions of section 11 can be traced to the Canadian Bill of Rights,[31] specifically clause (f) (the presumption of innocence and the right to reasonable bail) and clause (d) (the protection against self incrimination before courts, boards or tribunals). The latter provision was not restricted to criminal proceedings, the former was. Other provisions of section 11 (clauses (a), (b), (g), and (i)) can be traced to the International Covenant on Civil and Political Rights[32] and the European Convention on Human Rights and Fundamental Freedoms,[33] both of which expressly limited such guarantees to persons charged with a criminal offence. All of this cannot be said to be conclusive. Did the legislators, aware of the term "criminal" in the international documents, intend, by deleting the word "criminal", to give the Charter a broader scope? Or did they believe that since the sections could be traced to these documents, the term "criminal" would be implied?

A further point which ought to be considered is whether the specific rights guaranteed by section 11 are by their very nature restricted to criminal proceedings. Certainly, some of the rights, such as those respecting reasonable bail and a jury trial, can only be understood in the context of the criminal process. However, others clearly do have a broader application. For example, the right to a hearing by an independent and impartial tribunal, which forms part of section 11 (d), illustrates one branch of the principle of natural justice, the rule against bias. The other parts of section 11 (d), the presumption of innocence and a public hearing, clearly could apply to proceedings other than criminal proceedings. Thus, it is not possible to limit the section to criminal proceedings on the basis that, inherently, the rights contained therein have no application to other types of proceedings.

The Decisions

It is obvious that a consideration of the language, history and inherent nature of the rights protected by the section will not in itself lead to a definition of offence, though at least it does make it clear that the word may be read as encompassing more than criminal offence. On further analysis, it would seem that two broad definitions of offence are possible, one of which

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[31] R.S.C. 1970, Appendix III.

[32] The International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations, Resolution 2200A [XXI] of 16 December 1966]Adhered by Canada in 1976]; Art. 9.3, 14.3, 15.

[33] The European Convention on Human Rights, Arts. 6(3) and 7.

may be described as a formal and the other as a substantive definition. Both have support in the cases.

Support for the formal definition is found in one of the first cases that had to consider the proper scope of section 11, *Regina* v. *Mingo et al.*[34] The accused, who were inmates of a federal penitentiary, were charged under section 387 and 389 of the Criminal Code[35] with committing mischief in relation to public property by wilfully damaging and wilfully setting fire to the penitentiary. They had already been punished for their conduct by the internal disciplinary court established pursuant to the Penitentiary Service Regulations.[36] In the subsequent criminal trial it was argued that section 11 (h), which provides that a person, if found guilty of an offence and punished, may not be tried or punished for it again, precluded further punishment for the same conduct. The basis for this submission was that the accused, having been found guilty of an offence under the penitentiary regulations and punished, could not be tried by a different court and punished again.

Toy J. dismissed the argument on the basis that section 11 applied only to criminal or quasi-criminal proceedings. He proposed a test for the application of the section which depends on the identity of the decision-maker. If it is a court, then the section applies; otherwise, it does not. More specifically, he suggested that, if federal legislation is in question, the issue is whether the allegation is "dealt with by a court with jurisdiction to hear an indictable or summary conviction offence";[37] if provincial legislation, whether it is "dealt with by a court with a jurisdiction to hear an offence triable under the provisions of the *Offence Act*".[38] He ascribed the absence of the word criminal in section 11 to the peculiar constitutional division of powers in Canada. The term offence was used, he said, in order to provide "for the equal protection of Canadian citizens from breaches of their rights under provincial as well as federal laws insofar as public as opposed to private or domestic prohibitions were concerned".[39] The use of the term "criminal offence" in section 11 might have led to the conclusion that the section only applied to those offences which were criminal in a constitu-

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[34] (1982), 2 C.C.C. (3d) 23 (B.C.S.C.).

[35] *Supra*, footnote 23.

[36] Consolidated Regulations of Canada 1978 Vol. XIII, c. 1251 as amended by S.O.R./80-209. These regulations provide for the Minister to appoint a person to serve as a disciplinary court. The disciplinary court holds a hearing, determines the guilt or innocence of the inmate and imposes punishment for breach of penitentiary regulations. In this particular case, Mingo received a sentence of 90 days punitive dissociation (solitary confinement) and the loss of 135 days of earned remission thereby postponing his release on mandatory supervision by that period of time.

[37] *Supra*, footnote 34, at p. 36.

[38] *Ibid.* The reference in the passage cited to the "Offence Act" is to The Offence Act, R.S.B.C. 1979, c. 305.

[39] *Ibid.*

tional law sense, thus limiting the application of the section to federal legislation. By using the word "offence" the Charter makes it clear that provincial quasi-criminal legislation is covered as well.[40]

A quite different approach to the meaning of "offence" and, therefore, to the application of section 11(h) was adopted by the Saskatchewan Court of Appeal in *R.* v. *Wigglesworth*.[41] A constable in the Royal Canadian Mounted Police was alleged to have grabbed and slapped a prisoner. The constable was charged under section 25(1) of the Royal Canadian Mounted Police Act[42] with a major service offence, tried by an internal disciplinary tribunal, convicted and fined $300. The maximum penalty possible was a sentence of one year imprisonment.[43] Subsequently the constable was charged with common assault under the Criminal Code.[44] At the criminal trial, defence counsel successfully argued that section 11(h) precluded the "criminal court" from hearing the charge.[45] The provincial court judge held that both the disciplinary proceedings and the criminal trial were penal in nature, involving an allegation of an offence, proceedings by way of a trial, punishment and the potential of a possible term of imprisonment. He held that section 11 would apply to a statutory decision maker when conducting penal proceedings. On appeal, that decision was reversed but only on the narrow question of the application of the concept of double jeopardy.[46] The Saskatchewan Court of Appeal held that the disciplinary offence and the criminal charge were not the same offence. Cameron J.A. stated:[47]

> A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same

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[40] *Mingo* has been followed or a similar definition adopted in the following cases: *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1984), 4 D.L.R. (4th) 147 (F.C.T.D.); *James* v. *Law Society of British Columbia* (1982), 143 D.L.R. (3d) 379, [1983] 2 W.W.R 316 (B.C.S.C.); *Belhumer* v. *Discp. Comm. of the Quebec Bar Assn.* (1983), 34 C.R. (3d) 279 (Que. S.C.). It was however expressly disavowed in *Bolan* v. *Disciplinary Board of Joyceville Institution, supra*, footnote 24 and in *Re Russell et al and Radley* (1984), 11 C.C.C. (3d) 289 (F.C.T.D.); and see the immediately following text.

[41] (1984), 7 D.L.R. (4th) 361, 38 C.R. (2d) 388, 11 C.C.C. (3d) 27 (Sask. C.A.), (leave to appeal to the Supreme Court of Canada was granted on May 3rd, 1984).

[42] R.S.C. 1970, c. R-9, s. 25(1): Every member who is cruel, harsh or unnecessarily violent to any prisoner or other person is guilty of an offence, and is liable to trial and punishment as prescribed in this part.

[43] *Ibid.*, s. 36(1)(a).

[44] *Supra*, footnote 23, s. 245(1).

[45] (1983), 33 C.R. (3d) 44 (Sask. Prov. Ct.).

[46] The decision was appealed to the Court of Queen's Bench, (1984), 150 D.L.R. (3d) 748, 35 C.R. (3d) 322, which reversed the trial judge. The decision was then appealed to the Court of Appeal which dismissed the appeal, *supra*, footnote 41.

[47] *Supra*, footnote 41, at pp. 365-366 (D.L.R.), 395 (C.R., 32 (C.C.C.).

> time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages, for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example . . . a policeman who assaults a prisoner is answerable: to the state for his crime; to the victim for the damage he caused; and to the police force for discipline.

Thus the court considered the nature of the offence as the test for the application of section 11(h). Further, the Court of Appeal specifically left open the question of the application of the section generally in the case of disciplinary proceedings.[48]

In the normal course of events the application of this substantive definition adopted in *Wigglesworth* will arise in cases where the issue is whether a person appearing before some body other than a court has been charged with an offence. On occasion, however, the question can arise in respect of court proceedings. In *Attorney-General of Quebec* v. *Laurendeau*,[49] the Quebec Superior Court held that a person appearing before that court on a summary motion for a citation for contempt is not a person charged with an offence, even though the proceedings are criminal. The court held that the powers of contempt are an aspect of the exercise of inherent powers essential to the administration of justice in any criminal case. Thus, this case supports the view that the nature of the offence in a substantive sense must be considered in the application of section 11.

It is submitted that the approach adopted in *Wigglesworth* to the interpretation of section 11 is to be preferred to that adopted in *Mingo*, although it must be confessed at the outset that it may be the more difficult of the two to work with. For example, there may be some concern about the ability to determine whether a sanction is penal or not. One test which has been suggested focusses upon the purpose of the sanction—is it imposed in order to punish an individual for past (mis) conduct (penal), or in order to protect a continuing public interest (remedial)?[50] Another suggests that the answer to the question is whether the sanction is based upon a deliberate or careless disregard of the established standards (penal), or upon a demonstration of incompetence or inability to meet the standard (remedial).[51] Another commentator has suggested a distinction based upon the type of sanction which may be imposed—fines and imprisonment as a form of

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[48] "Nothing in this judgment is intended to suggest that the power given to the R.C.M.P., under its enactment, to imprison members who are found guilty of major service offences is or is not, in any respect, contrary to any of the provisions of the Charter. I see no need to address that issue"; *ibid.*, at pp. 367 (D.L.R.), 396 (C.R.), 33 (C.C.C.).

[49] (1983), 145 D.L.R. (3d) 526, 3 C.C.C. (3d) 250 (Que. S.C.). On appeal to the Quebec Court of Appeal, the issue became one involving the interpretation of s. 24(1) of the Charter: (1984), 9 C.C.C. (3d) 206.

[50] Notes and Comments: The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope (1962-63), 72 Yale L.J. 1568, at pp. 1583-1589.

[51] *Ibid.*, at p. 1586, footnote 88.

punitive punishment (penal), or job-related sanctions such as suspension or disqualification (non-penal).[52] However, in the context of a disciplinary hearing wherein an individual stands charged with a violation of a statutory standard, the potential effect of the sanction upon an individual's reputation and career would appear sufficient to label the proceedings penal. And, if that be so, why should section 11 not apply?

It is suggested that the difficulties in the application of the substantive definition are not insurmountable, and so far as they may be a source of difficulty it is a price worth paying. The adoption of the substantive approach will both avoid unfortunate consequences that might flow from the adoption of the formal definition, and will also further the purposes behind section 11.[52a]

The allocation of jurisdiction to a court or to a tribunal may often be made without full realization of the consequences of that choice being made. For example, exactly the same disciplinary jurisdiction over lawyers could be conferred on a court or on a statutory tribunal. Surely the application of such important provisions as those contained in section 11 ought not to turn solely on what may be a fortuitous allocation of jurisdiction. This consideration assumes major significance in light of the recently proposed constitutional amendments to section 96 of the Constitution Act, 1867. The proposal under discussion recommends that section 96 be amended to permit the provinces to transfer the resolution of disputes involving matters exclusively within provincial jurisdiction to non-judicial decision makers, subject only to the right of judicial review.[53] As a result provincial "penal" offences could be dealt with by statutory tribunals. Such proceedings would, under the formal definition, be free of the procedural obligations contained in section 11. They would, however, be subject to the section if the substantive definition was accepted.

The substantive definition would also enable the courts to give effect to the purposes which underlie section 11. That may be illustrated by considering the operation of section 11(h), (c) and (d).

The object of section 11(h) appears to be to constitutionalize the principle that it is wrong to re-try an innocent person, wrong to harass a person with continual prosecution and wrong to punish a person more than once for the same offence.[54] The focus of section 11(h) should be on the nature of the offence and not on the status of the decision maker. In criminal

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[52] Don Stuart, Annotation to *R.* v. *Wigglesworth, supra*, footnote 41, at pp. 388-389 (C.R.).

[52a] For a further illustration of the substantive approach see *Re Russell et al. and Radley, supra*, footnote 40.

[53] The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals, a discussion paper by the Department of Justice (August 1983).

[54] T.R. Bossert, Double Jeopardy (1971), 76 Dickinson L.R. 292, at p. 283. The comment was made in reference to the Fifth Amendment of the United States Constitu-

law the concept of double jeopardy has generated substantial debate.[55] A number of tests have been put forward as a means of deciding the issue of double jeopardy, such as the "in peril" test,[56] the "same evidence" test,[57] the "same transaction" test,[58] and "interest to protect" test.[59] Whatever the merits of these various tests may be, all focus on the nature of the offence and not on the status of the decision maker.

The adoption of a substantive definition will achieve the purposes section 11(h) has in mind. It is true that in some cases the formal definition would achieve the same results. Thus arguably in both *Wigglesworth* and *Mingo* it may not have mattered in the end which test was applied. In some cases, however, the adoption of one test rather than the other may be crucial to the outcome. In *Regina* v. *B. & W Agricultural Services Ltd.*[60] the accused had been punished by the Air Transport Committee for operating in violation of its licence. The licence was suspended. Subsequently, the accused was charged with a violation of the Aeronautics Act[61] for operating in violation of the licence. The basis of the charges were founded upon the same set of facts for which the company had had its licence suspended. Defence counsel successfully argued that the two offences were identical in nature and that section 11(h) applied. *Mingo* was distinguished on the basis that in that case the criminal offence and the prison disciplinary offence were not identical.

This case and *Wigglesworth* illustrate the approach to one of the issues raised at the outset, the relationship between a criminal conviction and a professional disciplinary offence. Suppose X, a lawyer, has been convicted of a criminal offence and punished. May X now be disciplined, or does section 11(h) preclude further proceedings? The formal definition says that

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tion—"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

[55] See, for example, J. Atrens, Double Jeopardy, in J. Atrens, P.T. Burns, J.P. Taylor (Eds.), Criminal Procedure: Canadian Law and Practice (1981), Ch. XII; M. Friedland, Double Jeopardy (1969). The decision in *Kienapple* v. *The Queen*, [1975] 1. S.C.R. 729, (1974), 44 D.L.R. (3d) 351 caused substantial comment. See Atrens, *ibid.*, p. 261.

[56] The "in peril" test precludes a second prosecution if the accused was in peril of conviction of that offence on the trial of the first indictment. A.F. Sheppard, Criminal Law—The Rule Against Multiple Convictions (1976), 54 Can. Bar Rev., at p. 637.

[57] The "same evidence" test precludes a second prosecution only if the evidence necessary to sustain a conviction of the second offence is also sufficient to support a conviction of the offence charged in the first indictment: Sheppard, *ibid.*, at p. 637.

[58] The "same transaction" test treats all charges arising out of a single criminal "act, occurrence or transaction" as the same offence for the purposes of double jeopardy; Sheppard, *ibid.*, at p. 637.

[59] The "interest to protect" test requires that all offences which seek to protect substantially the same interest or to prohibit substantially the same conduct, be treated as the same offence for the purposes of double jeopardy; Bossert, *loc. cit.*, footnote 54, at p. 291.

[60] (1983), 3 C.R.R. 354 (B.C. Prov.Ct.).

[61] R.S.C. 1970, c. A-3.

section 11(h) does not apply, not because the offences are different, but because the professional disciplinary hearings are not heard by a court. The substantive definition suggests that an evaluation of the two offences is required. Are they the same? Do they serve the same purpose? For example, if a lawyer misappropriates monies from his trust accounts, his conduct may indicate both a threat to society which warrants criminal proceedings and a threat to his profession which warrants disciplinary proceedings. However, if a lawyer operates a motor vehicle while intoxicated, his conduct may indicate a threat to society but not to his profession. Thus if disciplinary proceedings were commenced against a lawyer on the basis of a criminal conviction, the nature of the criminal conduct and its relationship to his professional activities must be examined. If the basis of the disciplinary action is simply a criminal conviction per se, then section 11(h) ought to be available as a defence. At the very least, such an approach would require the disciplinary committee to articulate the reasons for their action.

A final example of the superiority of the substantive over the formal definition may be illustrated by a variation on the facts of *Wigglesworth*. Suppose that in that case the constable was subsequently charged with a second service offence, the charge being based upn the same set of facts as the first offence. Would section 11(h) apply? Under the formal definition, it would not, even if the offences are identical, unless the service tribunal is found to be a court. If, however, "offence" is interpreted in section 11 in a substantive sense then it is open to ask if the two offences are identical, and if they are, section 11(h) would apply.

Section 11(c) and (d) have been most often, though not exclusively, invoked in the context of legal disciplinary hearings. Clause (c), it will be recalled, provides that a person cannot be compelled to be a witness in proceedings against that person in respect of an offence, and clause (d) that a person is entitled to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. The courts have generally rejected the application of these provisions to disciplinary hearings but without giving cogent reasons, often saying no more than that the provisions apply only to criminal or quasi-criminal proceedings, but not to disciplinary proceedings. Thus in *James* v. *Law Society of British Columbia*,[62] it was decided that clause (c) did not apply to Law Society disciplinary hearings. The court adopted the interpretation of section 11 given in *Mingo*. In *The Law Society of Manitoba* v. *Savino*,[63] the Manitoba Court of Appeal refused to permit the application of clause (d) to a disciplinary hearing. Monnin C.J. stated that he was "far from convinced that section 11(d) has any application to a professional body conducting an

[62] *Supra*, footnote 40.

[63] (1984), 1 D.L.R. (4th) 285 (Man. C.A.).

investigation about the conduct of one of its members''.[64] In *Belhumer* v. *Disciplinary Committee of Quebec Bar Association*,[65] the Quebec Superior Court also rejected the application of section 11(c) to disciplinary hearings, but on somewhat sounder grounds. The court stressed that the proceedings were not penal. It referred to section 27(1) of the federal Interpretation Act,[66] which refers to ''offences'' as being either indictable or summary. The court also indicated that the use of the term ''inculpé'' in the French version indicates criminal or quasi-criminal charges. Finally, it stressed that the right to practice law was a privilege granting a monopoly, and, as such, imposes duties and obligations on the recipient, including those of submitting to a disciplinary code.

However, even making allowance for the reasons given for the decision in *Belhumer*, it is unfortunate, and indeed somewhat strange, that the courts have not adopted a substantive definition of offence which would further the purposes behind clauses (c) and (d). They have generally acknowledged that disciplinary hearings often involve the allegation of an offence, a trial process, a conviction and a punishment.[67] They have also recognized that the hearings are not intended to establish civil liability but rather to establish guilt in respect to a defined statutory offence. The proceedings may be seen as necessary to ensure the observance of a proper standard of conduct in order to warrant the continued confidence of the public in a profession, or in order to maintain order and discipline within the regulated group. However, with respect to the individual disciplined, it is difficult to see that the proceedings are not penal in nature and that the attendant consequences are not penal.

There may be two reasons why the courts are reluctant to apply clauses (c) and (d) in disciplinary hearings. First, it may be feared that the wholesale application of section 11 would result in the emasculation of the disciplinary process. It should be stressed, however, that the application of the section would not interfere with the substantive grounds on which a person may be disciplined. It would simply ensure that certain procedural protections guaranteed therein are obeyed. Second, it may also be the case that the courts are concerned that if they decided that clauses (c) and (d)

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[64] *Ibid.*, at p. 292. Huband J.A. in concurring with Monnin C.J. stated: ''I agree with Monnin C.J.M., however, that s. 11 does not apply to disciplinary matters within a professional body such as is here involved'' (p. 300). O'Sullivan J., in his dissent, did not discuss section 11. In a subsequent case *Re Rosenbaum and The Law Society of Manitoba* (1984), 3 D.L.R. (4th) 768, [1984] 4 W.W.R. 95 (Man. C.A.), Monnin C.J. upheld a decision of the lower court ((1984), 150 D.L.R. (3d) 352 [1983] 5 W.W.R. 752)) that section 11 does not apply to bar disciplinary offences as such proceedings are civil in nature.

[65] *Supra*, footnote 50.

[66] R.S.C. 1970, c. I-23.

[67] *Donald* v. *Law Society of British Columbia* (1984), 2 D.L.R. (4th) 385, [1984] 2 W.W.R. 46 (B.C.C.A.), leave to appeal to the Supreme Court of Canada denied May 3, 1984.

applied to disciplinary proceedings then clause (h) would apply in any subsequent criminal proceedings.[68] That does not inevitably follow. Applying the substantive definition of offence, clause (h) would only apply if exactly the same offence were involved. *Wigglesworth* illustrates that will not always be the case.

This failure of the court to articulate a clear policy rationale for their holdings has led, in at least one instance, to a rather peculiar result regarding the rights of lawyers in disciplinary hearings. As a result of *James* and *Mingo*, in British Columbia a lawyer may be a compellable witness in proceedings to investigate his conduct. However, in *Donald* v. *Law Society of B.C.*,[69] the British Columbia Court of Appeal held that evidence given by the lawyer in other proceedings (for example, at a civil trial) which would tend to incriminate him before the disciplinary committee was inadmissible. This was based on a finding that section 13 of the Charter does apply to disciplinary proceedings. Section 13 provides that anyone who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings. The court's interpretation of "incriminate" was "exposure to a penalty", not necessarily a criminal penalty. Thus, the court acknowledged the "penal" nature of the disciplinary proceedings.[70] The combination of *James* and *Donald* results in a peculiar inversion of the concept of self-incrimination. A person is a compellable witness in penal proceedings. A lawyer becomes a compellable witness in a disciplinary hearing (*James*) but has the protection of section 13 (*Donald*), so that any evidence he has given in other proceedings relevant to the disciplinary action is inadmissible. But why grant such protection if the lawyer is compellable? In Canada, the right of a witness to refuse to answer any questions which tend to incriminate him has been statutorily abolished.[71] There is no equivalent to the United States "taking the Fifth amendment". Thus, if one can be compelled to testify, why refuse to admit evidence obtained in other proceedings? Any question asked in the earlier proceeding can be put directly to the witness in the disciplinary proceeding.

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[68] In *R.* v. *Heit*, [1984] 3 W.W.R. 614, 11 C.C.C. (3d) 97, the Saskatchewan Court of Appeal, in reference to the interpretation of section 11, held that "the whole phrase 'any person charged with an offence' must maintain a constant meaning when used in relation to any of the paragraphs (a) to (i) found in s. 11" (pp. 617 (D.L.R.), 100 (C.C.C.)).

[69] *Supra*, footnote 67.

[70] Hinkson J.A. characterized the disciplinary proceedings as being contained within the class of proceedings "where an individual is exposed to a criminal charge, penalty or forfeiture" (pp. 391 (D.L.R.), 54 (W.W.R.)). Anderson J.A. said "that the proceedings against the accused are not "civil" in the sense that they do not deal with the establishment of civil liability but rather with establishment of guilt in respect of a statutory offence. In other words, the proceedings are penal in nature with penal consequences" (pp. 396 (D.L.R.), 59 (W.W.R.)).

[71] See Canada Evidence Act, R.S.C. 1970, c. E-10, s. 5(1), (2). The provinces have similar provisions in their evidence acts.

It is submitted that the failure of the courts to adopt a "purposive" approach to the interpretation of the Charter results in such anomalies. The language of the charter is obviously not crystal-clear. It leaves much room for judicial interpretation. But the courts should be consistent in their approaches. The term "charged with an offence" can be given a broad or narrow interpretation; so may the word "incriminate" in section 13. A broad interpretation of both would permit the application of both sections to disciplinary hearings; a narrow interpretation would limit their application to criminal or quasi-criminal proceedings. To adopt a narrow interpretation of one and a broad interpretation of the other without cogent reasons on the basis that the language of each section permits of only one interpretation, is to endanger the respect which is due to both the courts and the Charter.

Section 1

Section 1 of the Charter provides that the rights and freedoms protected by it are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Thus, even if it were decided that section 11 applied to disciplinary hearings it may always be argued that section 1 operates to exclude that section. This may be best illustrated by means of a specific example, for instance, section 11(c), the right against self-incrimination. There may be valid reasons why section 11(c) ought not to apply to disciplinary hearings generally or to lawyer disciplinary hearings specifically. In the United States, the decisions of the Supreme Court of the United States in *Spevack* v. *Klein*[72] and *Re Ruffalo*[73] generated substantial debate on the issue of self-incrimination in state-bar disciplinary actions.[74] In *Spevack*, a lawyer was subpoenaed to appear before a judicial inquiry into his professional conduct. He was ordered to bring with him certain records. The lawyer appeared but refused to testify or produce any documents, relying on the fifth amendment of the United States Constitution—the privilege against self-incrimination. He was disbarred for his failure to answer the questions. The United States Supreme Court struck down the disbarment on the ground that the lawyer had been denied his constitutional rights as guaranteed under the fifth amendment. In *Ruffalo* the court held that state disbarment proceedings, even where designed to protect the public, involve a punishment or penalty

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[72] 385 U.S. 511, 87 S. Ct. 625 (1967).

[73] 390 U.S. 544, 88 S. Ct. 1222 (1968). In *Ruffalo* the United States Supreme Court characterized state disbarment proceedings as quasi-criminal, ". . . disbarment designed to protect the public, is a punishment or penalty imposed on the lawyer" (p. 550).

[74] W.W. Cole, Bar Discipline and *Spevack* v. *Klein* (1967), 53 A.B.A.J. 819; M. Franck, The Myth of *Spevack* v. *Klein* (1968), 54 A.B.A.J. 970; R.D. Niles and J.S. Kaye, *Spevack* v. *Klein*: Milestone or Millstone in Bar Discipline? (1967), 53 A.B.A.J. 1121; J.C. Chilingirian, State Disbarment Proceedings And The Privilege Against Self-Incrimination (1968-69), 18 Buff. L. Rev. 489; Notes: Self-Incrimination: Privilege, Immunity and Comment in Bar Disciplinary Proceedings (1973-74), 72 Mich. L. Rev. 84; The Supreme Court, 1966 Term (1967), 81 Harv. L. Rev. 200.

being imposed on a lawyer, thus attracting the concept of due process. As a consequence insufficient notice of a charge would invalidate the proceedings.

It has been suggested that the recognition of the right against self-incrimination in disciplinary hearings as found by the majority in *Spevack* was unwise. It has been argued that the court should not apply the rule against self-incrimination simply because the proceedings are penal.[75] Instead, the importance of the objective sought to be achieved by the disclosure requirement, the need for self-disclosure as a means of achieving this objective, and whether such disclosures are protected from use in criminal proceedings all should be considered.[76] It is submitted that a similar approach ought to be adopted in Canada; one that requires both an evaluation of the type of proceedings and the need for an encroachment upon rights contained in section 11. In fact, section 1 of the Charter invites such an approach. If a *prima facie* infringement of the Charter has been demonstrated, section 1 establishes a means by which such infringements may be permitted. If the infringement is authorized by statute[77] (''prescribed by law''), seeks to obtain a proper objective (''demonstrably justified''), and provides a reasonable means of doing so (''reasonable limits''), then the infringement is permissible.[78]

At least one Canadian court has tried this approach. In *Re Lazarenko and Law Society of Alberta*,[79] Sinclair C.J. of the Alberta Court of Queen's Bench, after considering the cases of *James* and *Savino*, held that section 11(c) could apply to lawyer disciplinary hearings. Dictionary definitions[80] of the word ''offence'' (a breach of social conduct) and ''charge'' (to bring

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[75] The Supreme Court, 1966 Term (1967), 81 Harv. L. Rev. 200.

[76] *Ibid.*, at p. 201.

[77] The requirement ''prescribed by law'' would be met whenever the limit is authorized pursuant to statutory authority. It may be that ''prescribed by law'' would also encompass limits created by means of common law. However, with respect to disciplinary hearings before statutory tribunals, the proceedings will be created pursuant to a statute and, as such, any infringement of the rights contained in section 11 would be found within the statute.

[78] This is the test adopted for section 1 by Deschênes C.J. in *Quebec Association of Protestant School Bds.* v. *A.G. of Quebec (No. 2)* (1982), 140 D.L.R. (3d) 33 (Que. S.C.). The decision of Deschênes C.J. was affirmed by the Quebec Court of Appeal (1983), 1 D.L.R. (4th) 573 and the Supreme Court of Canada, unreported July 26, 1984.

See also *R.* v. *Carson* (1984), 34 C.R. (3d) 86 wherein the Ontario Court of Appeal held that section 9 of the Ontario Provincial Offences Act, R.S.O. 1980, c. 400 was in violation of s. 11(d) (the requirement of a public hearing) but ''having regard to the type and class of offences (highway traffic), the number of cases, the reasons for the legislation, the options given to the person charged as to the disposition of his case and the provisions of sec. 11 and 118 (of the Provincial Offences Act) to avoid any miscarriage of justice . . . [it] is a reasonable limitation such as is contemplated by sec. 1'' (at p. 90).

[79] (1984), 4 D.L.R. (4th) 389, [1984] 2 W.W.R. 24 (Alta. Q.B.).

[80] Webster's Third International Dictionary (1976).

an accusation against; to make an assertion against)[81] were held to be sufficiently broad to bring lawyer disciplinary proceedings within the purview of section 11. However, the Court held the statutory provisions of the Legal Profession Act[82] which made the lawyer a compellable witness (and permitted a sanction to be imposed for refusal to attend) were nevertheless valid as being a reasonable limitation of the right contained in section 11. Although the basis for accepting that the legislation fell within section 1 of the Charter is somewhat unclear, the court seemed to suggest that, in order to properly regulate the profession to ensure that no misconduct is occurring, the power to compel testimony in an inquiry is necessary.

The approach suggested in *Lazarenko* is, in essence, a two-step process.[83] First, the court must decide if section 11 applies to such proceedings. This requires that the court adopt a purposive approach. Should section 11 be interpreted to apply to disciplinary hearings? Are such proceedings penal in nature? Is there an offence created and a charge laid? The court should focus on the particular proceedings, not upon the identity of the decision maker. By examining the statutory provisions in question (the use of such terms as offence, guilty of an offence) and the potential effect of any sanction which can be imposed (is there a penalty imposed for breach of a prescribed standard?) the court would decide if the proceedings were penal in nature.

Secondly, the court, if it found that section 11 did apply, would have to decide whether any infringement of the right was permitted pursuant to section 1. This would necessitate that any infringement be prescribed by law, thus requiring a conscious decision by the legislature to restrict the right. The legislature would be forced to consider the particular nature of the proceedings and to decide whether any infringement of such rights was necessary. Further, if such infringement were challenged in court, it would require that the infringements be reasonable and demonstrably justified.

It is submitted that this two-step process ensures that the Charter is given an interpretation which respects the rights contained therein and yet recognizes the possibility that such rights may need to be qualified in certain circumstances. Further, it requires that both the legislature and the courts consider what procedure is appropriate when a person is subjected to penal proceedings. Those basic procedural rights contained in section 11 which are relevant to disciplinary proceedings before both statutory decision makers and courts are preserved, subject only to such infringements as are justified under section 1.

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[81] *Supra*, footnote 79, at pp. 398 (D.L.R.), 35 (W.W.R).

[82] R.S.A. 1980, c. L-9. The provisions are similar to the provisions in question in *Spevack* v. *Klein*, *supra*, foonote 72.

[83] This two step approach was also adopted in *Re Russell et al. and Radley*, *supra*, footnote 40.

Conclusion

In conclusion, it is submitted that the question of the applicability of section 11 of the Charter to non-criminal penal proceedings should not be ruled out. The language and history of section 11 and the protections contained therein do not clearly support a restricted application. Nor have compelling reasons been advanced to support a restricted interpretation. An alternative wider application based upon a purposive interpretation is possible. This approach would consider the nature of the offence, the severity of the punishment which may be imposed, and the necessity for restricting the rights contained in section 11. The adoption of such an approach is consistent with the language of section 11. Further, this approach acknowledges the reality of a modern regulatory state wherein substantial penalties may be provided for in non-criminal legislation. In such cases, certain basic procedural rights ought to be guaranteed and their removal carefully scrutinized. It is hoped that when the issue of the application of section 11 to non-criminal penal proceedings clearly presents itself to the Supreme Court of Canada this purposive approach will be adopted.

HOWARD L. KUSHNER*

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* Howard L. Kushner, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.