

THE ADVERSARIAL SYSTEM: A QUALIFIED SEARCH FOR THE TRUTH

Freedom is a system based on courage.

- Charles Peguy

Richard C.C. Peck, Q.C.*
Vancouver

This article considers the extent to which the search for truth must be qualified in criminal proceedings in order to preserve the integrity of our system of justice. The author argues that the fairness of criminal proceedings relies on the power and willingness of judges to invoke measures, such as excluding evidence or staying proceedings, where these are inconsistent with the search for truth in the individual hearing. When viewed in the context of the preservation of fundamental freedoms and the necessity of preserving public confidence in prosecutions, such judicial acts in appropriate cases are essential to the proper administration of justice.

Jusqu'où peut-on pousser la recherche de la vérité dans les procédures criminelles si l'on veut préserver l'intégrité de notre système de justice? Telle est la question soulevée dans cet article. L'auteur soutient que l'équité dans les procédures criminelles repose sur le pouvoir et la volonté des juges de faire appel à des mesures comme l'exclusion de la preuve ou l'arrêt des procédures quand celles-ci sont en contradiction avec la recherche de la vérité dans la procédure qui est en cause. Considérés dans la perspective de la préservation des libertés fondamentales et de la nécessité de conserver la confiance du public dans les poursuites pénales, de tels gestes de la part du juge sont, dans les cas appropriés, essentiels à la bonne administration de la justice.

I.	Introduction.....	457
	A. <i>The Struggle for Freedom</i>	457
	B. <i>The Canadian Experience</i>	460
II.	<i>Protecting Rights in The Search for Truth</i>	463
	A. <i>The Balancing</i>	463
III.	<i>The Core Value of Privacy</i>	463
	A. <i>The Democratic Decision to Qualify the Search for the Truth</i>	468
IV.	<i>Exclusion of Evidence</i>	469
	A. <i>Protection of a Fair Trial</i>	470
	B. <i>Integrity of the Administration of Justice</i>	470

* Richard C.C. Peck, Peck and Company, Barristers and Solicitors, Vancouver, B.C.
The author is grateful to Nikos Harris and Jeffrey Campbell, both of Peck and Company, for their assistance in the research for, and preparation of, this paper.

C.	<i>Deterring Police Misconduct</i>	471
D.	<i>Summary</i>	472
V.	<i>Judicial Stays of Proceedings</i>	473
A.	<i>Introduction</i>	473
B.	<i>Stays Under the Residual Category</i>	473
C.	<i>The Rationales for the Residual Category of Stays of Proceedings</i>	475
D.	<i>Integrity of the Court</i>	476
E.	<i>Public Confidence in the Criminal Justice System</i>	477
F.	<i>Deterring Abusive Practices</i>	478
G.	<i>Effect of Narrowing the Residual Category</i>	478
VI.	<i>Conclusion</i>	480

I. Introduction

This paper addresses the necessity for the search for the truth in the trial process to be qualified in appropriate circumstances in order to preserve the fundamental values which make our justice system unique in the Western World for its fairness and for its dedication to preserving its integrity. The rationales for this qualification are best understood through an analysis of the indispensable value of freedom both to our society, and to the dignity and worth of the individual. Our commitment to freedom necessitates a justice system which sets aside the search for the truth where the manner in which an individual is investigated or prosecuted would fundamentally conflict with our core values as a society and damage the reputation of our justice system. This paper will consider three areas in relation to the necessity for, and manner of, the qualification, namely, the protection of the individual's right to privacy, the exclusion of illegally obtained evidence and the remedy of a stay of proceedings pursuant to an abuse of process.

A. *The Struggle for Freedom*

The history of Western civilization, when reduced to its essence, is nothing more and nothing less than the individual's courageous and indefatigable quest for justice, personal freedom¹ and self-fulfilment — three inextricably interwoven ideals which lie at the core of every free society. The link between justice and personal liberty is undoubted. The American theologian, Reinhold Niebuhr, observed:

¹ Freedom is a concept that runs from the basic to the ethereal. Franklin D. Roosevelt saw freedom as involving four essential matters: freedom of speech and expression, freedom to worship God in one's own way, freedom from want and freedom from fear [taken from Roosevelt's Message to Congress (January 6, 1941); Teilhard de Chardin related it to the possibility of foreseeing the future: Teilhard de Chardin, *The Phenomenon of Man*, trans. B. Wau (London: Collins, 1959) at 306-07.

Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.²

Kathleen Freeman summed the matter up in her classic 1954 treatise:

The ideal of justice, first conceived of perhaps in Mesopotamia, brought fully into men's consciousness by Athens, fashioned into a mighty organ of government by Rome, developed by the different nations of Europe according to their needs, and now as far-flung as civilization, is as necessary for human welfare as a knowledge of hygiene. It must never be allowed to perish in favour of some spurious notion of political expediency. Law must be defended "as our fortifications" in the certainty that law and liberty are one.³

Freeman's work traces the acts and words of individuals in their contribution to the ideal of justice and the development of modern free societies.⁴ And who can debate the thesis that it has largely been the acts of individuals "toiling upward in the night"⁵ which have brought us to where we are today. From Socrates to Lilburne, Voltaire to Anthony, it has been the defiant acts and thoughtful words of thousands of men and women throughout history which have incrementally coalesced into the modern free society which we enjoy.

For his part, Socrates, whose teachings were largely anti-democratic, ironically invoked the right of free speech at his trial.⁶ Lilburne's remarkable defiance of the Court of Star Chamber⁷ is viewed as being an early emanation of the right to silence. The great Voltaire (Françoise Marie Arouet) whose magnificent bust resides at the *Comédie Française* has been described as one of the wittiest and most intelligent persons to have ever graced humankind.⁸ It was Voltaire who gave us the memorable quote: "I disapprove of what you say, but I will defend to the death your right to say it."⁹ Of him it has been said: "When we cease to honour Voltaire we shall be unworthy of freedom".¹⁰

Susan B. Anthony, one of the great suffragettes, stood trial in 1873 for having registered to vote in the presidential election of the previous year. In what has been described as "a remarkable act of judicial tyranny", the trial judge

² R. Niebuhr, *The Children of Light and the Children of Darkness* (New York: Scribner, 1944).

³ K. Freeman, *The Paths of Justice* (London: Lutterworth Press, 1954) at 186.

⁴ See also Sir A. Bryant, *The Search for Justice*, vol. 3 of *A History of Britain and the British People* (London: Collins, 1990).

⁵ H.W. Longfellow, "The Ladder of St. Augustine" in *The Poetical Works of Henry Wadsworth Longfellow*, Riverside ed. (New York: Houghton, Mifflin, 1890).

⁶ I.F. Stone, *The Trial of Socrates* (Boston: Little, Brown, 1988) at 210-14.

⁷ The Hon. R.E. Salhany, *The Origin of Rights* (Toronto: Carswell, 1986) at 91-96.

⁸ K. Clark, *Civilization* (New York: Harper & Row, 1969) at 245.

⁹ Claimed to be a paraphrase: see *Barlett's Familiar Quotations*, 15th ed., (Boston: Little, Brown, 1980) at 344.

¹⁰ W. Durant & A. Durant, *The Story of Civilization*, vol. 1 (New York: Simon and Schuster, 1965) at 786.

directed the jury to enter a verdict of guilty.¹¹ When the jury sat mute the judge directed the Clerk of the Court to record a guilty verdict. When asked by the judge if she had anything to say as to why sentence should not be pronounced, a recalcitrant Ms. Anthony replied:

Yes, your Honour, I have many things to say; for in your ordered verdict of guilty, you have trampled underfoot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all alike ignored. Robbed of the fundamental privilege of citizenship, I am degraded from the status of a citizen to that of a subject; and not only myself individually, but all of my sex, are, by your Honour's verdict, doomed to political subjection under this, so-called, form of government.¹²

In his encomium to Ms. Anthony, Alan Dershowitz wrote:

Susan B. Anthony's trial was a political milestone on the long road to sexual equality, but it is a legal millstone around the neck of justice.¹³

Countless others have contributed to the panoply of thoughts, ideas, actions and words that has led to the unprecedented, liberated condition of the individual in modern Western society. Sir Thomas More fell to the axe in 1535 for his religious beliefs and refusal to acknowledge Henry VIII as head of the Church of England.¹⁴ More died because he "was not prepared to surrender the inner citadel of his being, his conscience as he termed it, by taking an oath with his tongue in his cheek", thus refusing to sacrifice "selfhood".¹⁵

More's greatest contribution comes to us from the language attributed to him by the playwright, Robert Bolt. In response to his son-in-law, Roper, who advocated striking down the law in order to get at the Devil, More's reply was apt and timeless :

And when the last law was down, and the Devil turned around on you-where would you hide, Roper, the laws all being flat? This country's planted thick with laws- man's laws, not God's-and if you cut them down then do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law for my own safety's sake.¹⁶

These words, even if, in part, apocryphal, represent a succinct, verbal expression of the Rule of Law. The American journalist, Edwin Yoder, Jr., interpreted these words in the following way:

¹¹ "Introduction" in Notable Trials Library, *The Trial of Susan B. Anthony* (New York: Gryphon Editions, 1997).

¹² *Ibid.* at 82.

¹³ *Supra* note 12.

¹⁴ As to which see generally E.E. Reynolds, *The Trial of St. Thomas More* (New York: P.J. Kenedy & Sons, 1964).

¹⁵ *Ibid.* at "Preface".

¹⁶ R. Bolt, *A Man for All Seasons* (New York: Random House, 1962). J. Burke in his insightful book, *The Day the Universe Changed* (London: BBC, 1985) at 19, pays homage to the Rule of Law with the following: "Because the rule of law exists, and above all because it encourages and protects acts of innovation with patent legislation, we in the modern world expect that tomorrow will be better than today."

The law will protect the good man and the righteous cause only if it also extends an even hand to the evil and iniquitous as well. That lesson, hard to grasp and still harder for most of us to embrace, is the heart of the Rule of Law.

A little more than two and a half centuries later, Gracchus Babeuf also lost his head for his ideals which he propounded in revolutionary France. Babeuf's fulminations against government restrictions on expression of thought in speech and writing ran at cross-grains to the will of the Directory. After being refused the right to counsel of his choice at his trial, Babeuf chose to defend himself. His three day speech in his own defence remains a pantheon to the ideals of liberty and equality.¹⁷

The foregoing accounts are a small representation of the contributions of many individuals to the modern notion of freedom.¹⁸ Other examples abound. What is remarkable is the fact that so often it is the individual standing alone¹⁹ against the power of the state and popular belief who has made the difference. What is lamentable is the fact that on so many occasions the cost of making a difference was the individual's life. However, such loss may be seen, in one sense, as an historical imperative; the exclamation mark on the life lived that indelibly etches, in society's consciousness, the individual's heroic adherence to an ideal. As "Junius" wrote: "The injustice done to an individual is sometimes of service to the public."²⁰ It is axiomatic that acts of injustice will often, over time, give rise to justice itself.

B. *The Canadian Experience*

In Canada, as we stand on the brink of a new millennium, it is appropriate to pause and reflect upon the remarkable array of individual and societal freedoms and liberties which marks Canada as a free and democratic society. The previous section of this paper opines on how we evolved to this state. Of equal importance is how we have maintained it and how we will sustain it in the future. To be sure, Canada has not always been as free as it appears to be today. The charge by the Royal North-West Mounted Police into a crowd of labourers during the Winnipeg General Strike in June 1919, and the invocation of the emergency powers of the *War Measures Act* during the October Crisis of 1970, and the internment of persons of Japanese descent during World War II are but a few examples of events in Canadian history that struck at the heart of

¹⁷ See generally J.A. Scott, ed., *The Defense of Gracchus Babeuf before the High Court of Vendome*, trans. J.A. Scott (Amherst: University of Massachusetts Press, 1967).

¹⁸ "If I have the potential of the good life within me and the compulsion to express it, then it is a power and compulsion common to all men. What I must have for myself to conduct my search, all men must have: freedom of choice, faith in the power and the beneficent qualities of truth."; taken from S. Cobb, "Causes are People" in E.P. Morgan, ed., *This I Believe* (New York: Simon and Schuster, 1952).

¹⁹ As Edward R. Murrow noted: "The individual is unpredictable, and in the area of what he believes, he is still sovereign." *Ibid.* at "Foreword".

²⁰ *Oxford Dictionary of Quotations*, New Ed. (London: Oxford University Press, 1985) at 287.

individual rights and freedoms.²¹ While these events are blotches on the scutcheon of liberty in Canada, the record of respect for civil rights in this country eclipses the experience in other Western states, particularly in light of some of the notorious human rights abuses which have marred this century.²²

A rational argument can be mounted that the most significant event in the evolution of rights and liberties in Canada was the repatriation of the Constitution and the consequent *Constitution Act* of 1982.²³ However, it is difficult to ignore the individual sacrifices of Canadians in two World Wars which were crucial to the maintenance of Canada as a nation.²⁴ In the two World Wars a total of 102,703 Canadians fell. This tragic loss of the flower of two generations brings to mind the poignant words of the author, John Fowles:

Night fell again. There was war to the south, but our sector was quiet. The battle was over. Our casualties were some 13,000 killed -13,000 minds, memories, loves, sensations, worlds, universes - because the human mind is more a universe than the universe itself-and all for a few hundred yards of useless mud.²⁵

What was it that all these Canadians died for and how does this fit into a thesis on the modern criminal trial in Canada? The answer to the first question is self-evident. Canadians in both World Wars died in the belief that they were preserving a way of life which they cherished. The answer to the second question goes to the heart of the ongoing debate between those who argue that the criminal trial must remain nothing more than a solemn inquiry into the truth, and those in opposition who believe that the adversarial system is a qualified search for the truth, in which the truth must, from time to time, be subordinated to a value of equal importance: the worth and dignity of the individual.²⁶ This paper will formally engage in this debate; but first a moment of digression.

In Canada we live under one of the most remarkable forms of government in the history of humanity. The genesis was the 1867 *British North American*

²¹ One recent aberration may involve the alleged suppression of civil rights protesters at the 1998 APEC Summit in Vancouver. This incident resulted in a major Commission of Inquiry into the event.

²² The McCarthy hearings into alleged communism in the U.S. in the early 1950s, the Kent State University shootings on May 4, 1970 in Ohio, U.S.A., and the "Bloody Sunday" shootings of civilian demonstrators in Derry, Ireland in 1972 are but a few examples.

²³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁴ In World War I 60,661 fell; in World War II 42,042.

²⁵ J. Fowles, *The Magus* (New York: Dell Publishing, 1965) at 126.

²⁶ The search for the truth has bedeviled the Western system of criminal law for centuries. At one time it was believed that absolute truth was ascertainable through trial by ordeal. As Wigmore stated: "The theory of the ordeal is that a Divine or supernatural Power can make manifest to mankind the truth in a controversy, and that It will do so when properly besought." J.H. Wigmore, *A Kaleidoscope of Justice* (Washington, D.C.: Washington Law Book, 1941) at 5. We now accept that "absolute truth" is not ascertainable and, thus, we settle for what the Hon. Mr. Justice Michel Proulx has termed "the legal truth". (From a speech by Proulx J.A. at the Federation of Law Societies' National Criminal Law Program, Vancouver, B.C., July 1994).

Act,²⁷ which provided for Confederation. This had the effect of joining two distinct and historic cultures while, at once, preserving their identities. That the French and English would coalesce in such an ostensibly compatible way is, perhaps, personified by the fact that the original Parliament buildings had two principal architects; one, Charles Baillairge, scion of four generations of architects from France and Québec City; the other, Thomas Fuller, who was born in England and emigrated to Canada, eventually earning, in 1881, appointment as Dominion chief architect.²⁸

Over time, Confederation has given rise to a unique system of democracy which has begun to acknowledge the inherent rights of First Nations peoples and which embraces a concept of multiculturalism recognizing the existence of disparate ethnic and cultural entities. In one sense, Canada's national identity is its diversity.

The essential underpinnings of our system are two-fold: firstly, constitutionally entrenched rights and freedoms exercised in a responsible manner; and secondly, tolerance.²⁹

The stresses of competing interests place democracy under considerable strain. The irresponsible exercise of rights on the part of an individual, or group of individuals, tests the system. So, too, does the violation of individual rights and freedoms. Democracy is a fragile institution. Its continued existence depends upon understanding and tolerance. The violation of individual rights, if left unredressed, begins a process of erosion and invites increasing rationalization. In due course, this leads to a blurring of the separation between the individual and the state and the suppression of free will. In this scenario, the right to privacy,³⁰ a core value³¹ essential to the evolution and sustainment of a free society, suffers. A free society will only flourish where the individual is able to act, think and express him or herself freely, without fear of censure and without fear that his or her every act, word and recorded thought will be monitored by the state.³² Fear is the father of intolerance. Intolerance is the enemy of democracy.

²⁷ Now *The Constitution Act, 1867*.

²⁸ C. Brown, ed., *The Illustrated History of Canada* (Toronto: Lester & Orpen Dennys, 1987) at 328; J.M. Marsch, ed., *The Canadian Encyclopedia* (Edmonton: Hurtig Publishers, 1985) at 128-29 & 701.

²⁹ "We live in a world of divided opinions and the main essential to its continued existence is a wise and kindly tolerance". Sir R.B. Lockhart, *Scotch: The Whisky of Scotland in Fact and Story* (Longbank Works, Alva, Scotland: Robert Cunningham and Sons, 1951).

³⁰ Secured by Section 8 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* *supra* note 24.

³¹ A 1993 survey by Ekos Research Associates Inc., entitled *Privacy Revealed: the Canadian Privacy Survey*, revealed that there was a remarkable level of concern about individual privacy by Canadian citizens. This concern placed privacy on a par with other important public opinion issues such as unemployment and the environment.

II. *Protecting Rights in The Search for Truth*

A. *The Balancing*

Some hold the view that the Courts have gone too far in breathing life into individual rights. There are a few who advocate that the violation of rights is made legitimate if it uncovers criminal conduct. The essential flaw in this reasoning is that the rights and freedoms protected by the *Charter* are the rights and freedoms of all citizens, enshrined to ensure the preservation of democracy. To permit the violation of one individual's rights to be unremedied will foster further violations and gradually lead to a diminishment of the rights of Canadians as a whole. In turn, people become inhibited in their actions and thoughts, and democracy suffers. A subtle shift in the delicate balance between individual rights and the interests of the state will necessarily occur. This lesson flows to us over the past decades where we have seen democracies fail, only to be replaced by repressive regimes.³³ There can be no justification for the unequal application of the law based on the nature of one's conduct. It is essential to freedom that the law be applied equally and to all. The superficially attractive temptation to shunt individual rights must be avoided.

One aspect of the commitment to the preservation of freedom and individual liberty is that the search for the truth be qualified where a failure to do so would contribute to the erosion of our democratic society.

III. *The Core Value of Privacy*

In order to preserve our freedom and the Rule of Law other objectives must, from time to time, take precedence over the search for the truth. One such situation is where state authorities trench upon privacy rights. As noted earlier, the right to privacy is a core value in a free society. It can be argued that, when reduced to their essence, most individual rights protected by the *Charter* relate in some way to an individual's privacy. Much has been written on this topic but few have characterized the issue as succinctly as Arthur Schafer in his essay "Privacy: A Philosophical Overview".³⁴ Schafer holds the view that the "ideal of privacy is clearly one of the fundamental values of our culture." Schafer observed that:

J.S. Mill has provided us with many of the standard liberal arguments for the psychological, sociological and political utility of individual privacy. As Mill points

³² See generally D. Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John M. Sharp* (Toronto: Butterworths, 1980).

³³ See generally L. Rees, *The Nazis: A Warning from History* (New York: The New Press, 1997). Ironically, the inverse may also occur. In his remarkable examination of South Africa, Allister Sparks has written: "...South Africa has the ability to transform itself into one of the world's few truly non-racial societies." *The Mind of South Africa* (New York: Alfred A. Knopf, 1990) at 397.

³⁴ *Supra* note 33.

out, there is a close correlation between the availability of a protected zone of privacy and the individual's ability freely to develop his individuality and creativity. In a society which is frequently intolerant of, or hostile to, non-conformity, freedom from constant surveillance is an important pre-condition for the development of independent and critically-minded individuals. Diversity and non-conformity will, in turn, promote the vitality and progress of society and contribute thereby to long-run utility.³⁵

For his part, John Stuart Mill, in his historic 1859 treatise "On Liberty", set forth what he considered to be the essential aspects of human liberty:

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological.³⁶

The concept of privacy, in its many manifestations, has a long lineage in our common law. In *Semayne's Case* it was said "[t]hat the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose..."³⁷ *Semayne's Case* was referred to as "vintage common law" in *Eccles v. Bourque et al.*³⁸

As the common law evolved, privacy interests were extended from the sanctity of the home to personal effects, such as papers. In *Entick v. Carrington*, Camden L.C.J. stated:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.³⁹

The extension of privacy to the private works of the individual was later referred to in the case of *Prince Albert v. Strange*,⁴⁰ a case involving the question of whether the defendant would be permitted to publish a catalogue involving certain works of the plaintiff. In submissions on behalf of the plaintiff, the Solicitor-General (Romilly) referred to the general principle "...that this Court will protect every person in the free and innocent use of his own property, and will prevent anyone from interfering with that use, to the injury of the owner. A man has the right of property in the production of his mind, and incident to that right is the right of making the same public."⁴¹

The Solicitor-General then referred to the earlier case of *Millar v. Taylor*

³⁵ *Ibid.* at 15.

³⁶ J.S. Mill, *On Liberty* (London: John W. Parker & Son, West Strand, 1859) at 26.

³⁷ (1604), 5 Co. Rep. 91a, 77 E.R. 194 at 195.

³⁸ [1975] 2 S.C.R. 739 at 742-43; see also *Colet v. R.*, [1981] 1 S.C.R. 2.

³⁹ (1765), 19 St. Tr. 1029 at 1066.

⁴⁰ (1849), 1 Mac. G. 25, 47, 41 E.R. 1171 [hereinafter cited to E.R.].

where it was stated that:

Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion. It is certain every man has a right to keep his own sentiments, if he pleases...⁴²

Decades later, through their hallmark work on privacy, Brandeis and Warren are reputed to have coined the phrase "the right to be left alone".⁴³ In fact, the phrase was probably first used by Judge Cooley in his work on torts.⁴⁴ Years later, writing in *Olmstead v. U.S.*,⁴⁵ Brandeis J. referred to privacy as "...the right to be let alone- the most comprehensive of rights and the right most valued by civilized men."

In the case of *Hunter v. Southam*,⁴⁶ which stands out on the legal horizon like "Mars at the perihelion",⁴⁷ Dickson J. (as he then was) rejected the notion that section 8 of the *Charter* was connected solely to trespass. He adopted the approach of the United States Supreme Court that the right to privacy "protects people, not places".⁴⁸ In doing so, Dickson J. relied on the case of *Katz v. United States*,⁴⁹ where Stewart J. described the right to privacy as "the right to be let alone by other people."⁵⁰

Other judicial statements respecting the right to privacy flow to us from the pens of La Forest J. and Wilson J. In *R. v. Dymont*,⁵¹ La Forest J. stated that *Hunter v. Southam* had "ruptured the shackles that confined these claims to property" and added that this new focus on privacy was:

...altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state: see Alan F. Westin, *Privacy and Freedom* (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.⁵²

Later, writing in *R. v. Duarte*,⁵³ La Forest J. defined the right to privacy in Section 8 of the *Charter* as "the right of the individual to determine for himself

⁴¹ *Ibid.* at 1175.

⁴² (1769), 4 Burr. 2303 at 2379.

⁴³ L. Brandeis & S. Warren, "The Right to Privacy" (1890), 4 Harv. L.Rev. 193.

⁴⁴ T.M. Cooley, "A Treatise on the Law of Torts", 2d ed. (Chicago: Callaghan & Col., 1888) at 29.

⁴⁵ 277 U.S. 438 (1928).

⁴⁶ [1984] 2 S.C.R. 145.

⁴⁷ E. Hubbard "A Message to Garcia", in *Selected Writings of Elbert Hubbard*, Vol. 2 (New York: Wm. H. Wise & Co., 1922) at 254.

⁴⁸ *Supra* note 47 at 159.

⁴⁹ 389 U.S. 347 (1967).

⁵⁰ *Supra* note 47 at 159; see also *Katz v. United States*, *ibid.* at 350.

⁵¹ [1988] 2 S.C.R. 417.

when, how and to what extent he will release personal information about himself.”⁵⁴ In *Thomson Newspapers Ltd. v. Canada (Director, R. T. P.C.)*⁵⁵ Wilson J. stated:

There is no doubt that an individual's expectation of privacy goes beyond a concern for the inviolability of his body and extends to his possessions including his books, records and other documents. Matters of the utmost confidence are often recorded in retrievable form, be they business strategies, trade secrets or personal reflections noted in a diary.⁵⁶

If we accept the imperative of privacy as an integral value in Canadian society, essential to maintaining the worth and dignity of the individual, we must then move to consider how it could be best protected. The notion that state authorities who wilfully infringe privacy rights be subjected to nothing more than civil or regulatory sanction is an anathema. Something more is surely required. The answer to the problem lies in the *Charter*. The *Charter* protects individual privacy by creating standards which regulate the state's ability to intrude upon the individual, and by providing a remedy for individuals whose privacy has been unreasonably violated. In many instances, that which has been obtained through the violation of the right to privacy may be essential to the search for the truth. However, as numerous of the above authorities indicate, the objective of the truth finding process must yield where a fundamental violation of privacy rights has occurred.

The *Charter* is the offspring of our nation. Through the *Charter*, the Canadian people have spoken⁵⁷ and have reposed in the judiciary the power to both exclude evidence and stay proceedings when infringement of individual rights has taken place. Such remedies are appropriate because they place a significant sanction on state violations of individual rights while at the same time acknowledging the fundamental importance of those rights to society as a collective.

In a recent article,⁵⁸ Burnstein and Lawn made an interesting reference to the words of Laskin J. (as he then was), dissenting in *Hogan v. R.*,⁵⁹ a case decided under the *Canadian Bill of Rights*.⁶⁰ Hogan had been detained for suspicion of impaired driving and requested to speak to his lawyer before taking a breathalyser test. The police officer refused and threatened to charge him with refusing to provide a breath sample. In the result, Hogan took the test. In the

⁵² *Ibid.* at 427-28.

⁵³ [1990] 1 S.C.R. 30.

⁵⁴ *Ibid.* at 46.

⁵⁵ [1990] 1 S.C.R. 425.

⁵⁶ *Ibid.* at 492.

⁵⁷ Speaking for a majority of the Court in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, Iacobucci J. stated (at para. 134): "...it should be emphasized again that our *Charter's* introduction and the consequential remedial role of the Courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy."

⁵⁸ A. Burnstein & J. Lawn, "Primacy to Privacy?: The Supreme Court and the Privacy Threshold in *Edwards*" (1997) 55 U.T. Fac. L. Rev. 341.

⁵⁹ [1975] 2 S.C.R. 574 at 597.

course of his dissenting judgment, Laskin J. noted that the "...common law rule of admissibility of illegally or improperly obtained evidence rests simply on the relevancy of the evidence to issues on which it is adduced, without regard to the means by which it was procured..."⁶¹ In words which were prescient, Laskin J. summed the matter up as follows:

It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. *The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means*; it would equally challenge the present law as to confessions and other out-of-Court statements by an accused. In the United States, its Supreme Court, after weighing over many years whether other methods than exclusion of evidence should be invoked to deter illegal searches and seizures in state as well as in federal prosecutions, concluded that the constitutional guarantees could best be upheld by a rule of exclusion.⁶²

Thus, some seven years before the advent of the *Charter*, one of the pre-eminent jurists in the history of Canada concluded that the surest way to secure and maintain individual rights was through the mechanism of exclusion. Logic would have it that the framers of the *Charter* had such high judicial comment in mind when they fashioned sections 24(1) and (2).

Legal writings abound with comments similar to those of Laskin J. Very recently, in an article in the McGill Law Journal, Professor Don Stuart stated:

...if *Charter* rights are to be taken seriously, there must be a real risk of exclusion of evidence obtained in violation of the *Charter*, even in serious cases and even at the cost of determining the truth.⁶³

Finally, it can be argued that if Canadians saw the trial process as a search for the truth, and nothing more, then sections 24(1) and (2) would not have been incorporated in the *Charter*. The fact that they have been is a clear indication that Canadians believe that the best way to protect individual rights is through the mechanisms of exclusion and judicial stays of proceedings.

A. *The Democratic Decision to Qualify the Search for the Truth*

It is anomalous that the thrust and content of this paper is designed to persuade the reader that the suppression of evidence is not offensive to the

⁶⁰ S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

⁶¹ *Supra* note 60 at 594.

⁶² *Ibid.* at 597 [emphasis].

⁶³ D. Stuart, "A Review of David M. Paciocco, Getting Away with Murder: The Canadian Criminal Justice System" (1999) 44 McGill L.J. 1049 at 1054.

adversarial system. The anomaly arises from the simple fact that the early development and rationale of the law of evidence accepted that there would be "exclusion of all but the best evidence".⁶⁴ As noted by Cross, the law of evidence "still consists, to a large extent, of exclusionary rules, rules declaring that certain matters which might well be accepted as evidence of a fact by other responsible inquirers will not be accepted by the Courts, rules declaring, in other words, what is not judicial evidence."⁶⁵ Cross referred to this as the "largely exclusionary character of the law of evidence."⁶⁶

There is a further anomaly in all of this that relates to the argument at hand. The historic rules of evidence were based largely on the notion of trustworthiness. Reduced to its nub, this concept required that, absent some inherent or intrinsic reliability, proffered evidence that could not be tested through cross examination would be excluded. Accordingly, the law developed a host of exceptions to various categories of evidence.⁶⁷

The central thesis of this paper is that evidence ought be excluded where it has been obtained through state actions which violate human rights. This engages the central debate as to whether the value of the search for the truth, which must, of necessity, involve trustworthiness, is of a higher ordinate than the worth and dignity of the individual. The juxtaposition of these concepts brings us back to the advent of the *Charter*.

Cross has opined that significant changes in the law of evidence have been wrought in climacteric times.⁶⁸ It is noteworthy that the repatriation of the *Constitution* in 1982, and the concomitant entrenchment of rights, did not occur in a critical period in Canadian history. Rather, these events took place during a time of deep and thorough reflection.⁶⁹

In its preamble, the *Charter* recognizes the supremacy of God and the rule of law. It also guarantees the rights and freedoms expounded, subject only to the limits prescribed by section 1.⁷⁰ The fact is that the constitutional events of April, 1982, represented a profound change in the manner in which Canadians chose to view their place in society and, most importantly, the relationships among the branches of government. As noted earlier,⁷¹ Canada changed profoundly in 1982, from a system based on Parliamentary supremacy, to a system based on the supremacy of the *Constitution*.⁷²

⁶⁴ C. Tapper, *Cross and Tapper On Evidence*, 8th ed., (London: Butterworths, 1995) at 1.

⁶⁵ *Ibid.* at 1.

⁶⁶ *Ibid.* at 2.

⁶⁷ The traditional exceptions to the rule against hearsay evidence are but one example; see *Cross, ibid.* at 1-2.

⁶⁸ *Ibid.* at 2.

⁶⁹ Salhany, *supra* note 8 at 6-8.

⁷⁰ An analysis of these limits is beyond the scope of this paper, although it is fair to say that section 1 has been charily applied by the Supreme Court.

If we accept the notion of constitutional supremacy it then becomes difficult, if not impossible, to argue that the societal value of the search for the truth is somehow superordinate to the values contained in the *Constitution*. Indeed, it becomes a logical cleft stick to argue otherwise. The events of 1982, involving as they did the institution of the *Charter*, were akin to an Herculean meteorite plunging into the ocean- the littorals of the legal landscape would feel the effects for years to come.⁷³

IV. *Exclusion of Evidence*

Prior to 1982, evidence in a criminal trial was admissible whether or not it was obtained by the police in a manner that violated basic Western societal notions of fairness.⁷⁴ In those times, the truth was paramount and the propriety of the conduct of the state was not in issue.⁷⁵ Our system has since developed a practice of excluding evidence in circumstances where it has been obtained in a manner that is unacceptable in a free and democratic society.

It is ironic that, on occasion, the exclusion of evidence may be consistent with the search for truth, as when the inherent unreliability of a drunken confession requires that it not go before the trier of fact. In other situations, however, evidence which was obtained in breach of the *Charter* is not admitted, though it be reliable and credible evidence of guilt. The search for the truth is set aside in order to maintain the integrity of the justice system.

It is trite to say that a breach of *Charter* rights will not necessarily lead to the exclusion of evidence. The Courts weigh the unique facts of each breach and determine whether it is necessary to exclude the evidence in order to avoid bringing the administration of justice into disrepute. Reasonable people may disagree about whether the exclusion of tainted evidence brings the reputation of the justice system into disrepute. For some, the use of any illegally-obtained

⁷¹ *Supra* note 58.

⁷² See *Constitution Act*, *supra* note 24, s. 52.

⁷³ The import of the *Charter* was not immediately evinced by the Courts. In *Re Potma And The Queen* (1982), 67 C.C.C. (2d) 19 (Ont. H. Ct.) it was stated at 28: "It cannot be thought that the intent of the provisions of the *Charter* that are in issue in this case, is to undermine and bring to the ground the whole framework of laws and the legal system of the country at the stroke of a pen, even if it be a Royal pen."

⁷⁴ "It matters not how you get it; if you steal it even, it would be admissible". *R. v. Leatham* (1861), 8 Cox C.C. 498 at 501. As late as 1980, the House of Lords affirmed that a trial judge has "no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained"; *R. v. Sang*, [1980] A.C. 402 at 437.

⁷⁵ For the Canadian, pre-*Charter* view see *R. v. Wray*, (1970) 4 C.C.C. 1 at 17: "The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly."

evidence represents a smear on the justice system. For others, ignoring evidence which may be reliable proof of guilt is a failure of justice. Perspectives vary because fairness is judged not only by the treatment of the accused, but also by the views of the public, who equally have an interest in the criminal justice system.

At the heart of the decision to exclude evidence lies the proposition that the search for the truth may be outweighed by the need to protect the fairness of the trial, maintain the integrity of the administration of justice, or prevent judicial condonation of unacceptable state conduct. As one author has recently stated:

When executive agents bypass the warrant application procedure or disregard the terms and conditions of search warrants, they engage in unlawful behaviour....The judiciary can respond to executive mischief by barring the admission of illegally seized evidence in criminal trials. The purpose of the exclusionary rule is to compel respect for the judiciary's warrant - issuing prerogative.⁷⁶

A. *Protection of a Fair Trial*

Evidence which may be probative of guilt will generally be excluded where its inclusion would affect trial fairness. Where an accused is compelled to provide evidence against himself as the result of a *Charter* breach, the proceedings have been rendered unfair because the accused has been denied his or her right against self-crimination. This right against self-crimination has been held to be so fundamental to our system of justice that it spans both statements and bodily substances obtained from an accused at the behest of the state.⁷⁷ While the evidence obtained from the seized bodily substances may be highly probative of whether an accused committed an offence, it is nevertheless subject to a general rule of exclusion in order to preserve the innate dignity of the individual from being interfered with, absent lawful authority. The routine admission of evidence compelled from an accused in violation of the *Charter* would render the right against self-crimination meaningless and diminish the security of the integrity of the person, which Canadians rightfully take for granted as a core value in our society.

B. *Integrity of the Administration of Justice*

At the core of the determination of whether evidence should be excluded under section 24(2) is the effect of the admission on the reputation of the administration of justice. This determination necessarily involves direct or indirect supervision of the investigatory practices of the authorities. As was stated by Iacobucci J. in *R. v. Burlingham*:

[W]e should never lose sight of the fact that even a person accused of the most heinous

⁷⁶ T. Lynch, "In Defence of the Exclusionary Rule", (2000) 23 Harv. J.L. & Pub. Policy 711.

⁷⁷ *R. v. Stillman*, [1997] 1 S.C.R. 607.

crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).⁷⁸

By excluding evidence, the courts acknowledge the scope of the misconduct and provide the accused with a meaningful anodyne for the breach of his or her rights. The importance of a remedy was considered in *Nelles v. Ontario*:

...access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur.⁷⁹

Some contend that the breach of a legal right may be adequately remedied by civil damages or regulatory sanctions rather than the exclusion of evidence. This argument does not consider, however, that the proper course of justice may demand that the court in a criminal trial reject the tainted evidence, for the courts cannot be seen to condone egregious police misconduct. It may be necessary to exclude the tainted truth to give meaning to the right:

In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.⁸⁰

C. *Deterring Police Misconduct*

United States Supreme Court Justice, Warren E. Burger once said:

After the passage of many years, and more than thirty years as a lawyer and a judge, I cannot tell you who, under our existing law and institutions, will watch the watchman - the policeman - in the sense of holding him individually accountable when he breaks one law in his effort to enforce another.⁸¹

In contrast to U.S. practice, the exclusion of evidence in Canadian courts is not primarily designed to punish police misconduct. It is settled law that the purpose of excluding evidence is not to control the conduct of the police, but to protect the integrity of the judicial system. Evidence may be excluded, not because there was police misconduct, but because the administration of justice would suffer from the judicial condonation of such conduct. In *R. v. Kokesch*, it was said that "the court must refuse to condone and must disassociate itself from

⁷⁸ *R. v. Burlingham*, [1995] 2 S.C.R. 206 at 242; see also D. Stuart, *Charter Justice in Canadian Criminal Law*, 2d ed., (Scarborough: Carswell, 1996) at 489-91.

⁷⁹ *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 196.

⁸⁰ *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 104.

⁸¹ W.E. Burger, "Who Will Watch the Watchman?" (1964) 14 Am. U.L.R. 1 at 2.

egregious police misconduct.”⁸² Sopinka, J. stated the rule in these terms:

This Court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy.⁸³

While the mandate of our justice system may not expressly include the responsibility of regulating the police, the exclusion of evidence due to police misconduct cannot help but influence police conduct. Exclusion can have a tangible and positive effect on the propriety of police practices and may have a deterrent effect on future misconduct. When evidence is excluded as the result of a particular police practice, then the police will tend to avoid such conduct in future investigations. The corollary is that if evidence obtained by unlawful police practices were routinely admitted, it would have the effect of encouraging such practices. To admit such evidence would send a clear message to the police that the rights set out in the *Charter* are unworthy of protection and thus lack importance. Without the exclusionary rule, our justice system would be complacent in the face of searches without proper authority, detention without proper cause, and interrogation without regard for the right to counsel. Where the breach of a legal right is the quickest path from mere suspicion to probable evidence of guilt, police may act without regard for due process in the belief that the fruits of the breach will be admitted. How can the failure to exclude unlawfully-obtained evidence not result in a diminishment of the legal rights of the individual?

Excluding evidence impacts upon police conduct. This is not an undesirable result. There is a clear societal interest in regulating police conduct and in ensuring that those who enforce the authority of the state act ethically and lawfully. Courts are called upon to remedy violations of the rights and freedoms guaranteed to Canadian citizens under our law. The most common infringements upon the rights and freedoms of Canadians arise in the course of criminal investigations, which, in due course, fall under the scrutiny of the Courts. There is an undeniable, supervisory relationship between the courts, as guardian of individual rights and freedoms, and the police, whose investigative practices will inevitably test the boundaries of those rights.

D. Summary

The exclusion of evidence accordingly may act in direct conflict with the search for the truth in a given proceeding. It cannot be doubted that exclusion of evidence may have the effect of permitting the guilty to go free. In cases where there is no evidence of guilt, except that which was obtained in breach of the *Charter*, the exclusion of the evidence may result in the acquittal of a guilty party. No other judicial decision invokes a stronger reaction from the public than an acquittal based on the exclusion of evidence. However, it is the public interest

⁸² *R. v. Kokesch*, [1990] 3 S.C.R. 3 at 29.

⁸³ *Ibid.* at 35.

which is served by such exclusion through the protection of the right of all citizens to a fair trial and the preservation of the integrity of our criminal justice system as a whole. Informed public opinion must be in favour of a justice system which reflects our core values and the Rule of Law. It was the public after all which, through its legislators, reposed in the courts the power to exclude evidence under section 24(2). As guardians of those *Charter* rights, the courts are called upon to make difficult decisions which will raise the uninformed public ire, but ultimately protect the public interest in preserving the most basic elements of our free and democratic society. As was forcefully stated by Sopinka J. in *R. v. Feeney*⁸⁴:

If the exclusion of this evidence is likely to result in an acquittal of the accused as suggested by L'Heureux-Dubé J. in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law.

V. *Judicial Stays of Proceedings*

A. *Introduction*

There may be no act of a court in a criminal proceeding more inconsistent with the search for the truth than entering a judicial stay pursuant to an abuse of process. While wholly inconsistent with the discovery of whether a particular accused is guilty or innocent of an offence, such a procedure not only acts as the ultimate guardian of accused persons' substantive *Charter* and common law rights, but is also one of the pillars of the Rule of Law and an independent judiciary. There is a line of opinion, which appears to be gaining some acceptance in appellate courts, that the societal interest in having a case heard on its merits should narrow the judiciary's ability to enter a stay of proceedings to the extent that it effectively becomes an illusory remedy. This view fails to understand the invaluable role of both the presence and use of this remedy to the proper administration of justice. A judicial stay, entered pursuant to an abuse of process, provides one of the primary illustrations of where the search for the truth must be sacrificed in order to preserve our system of justice.

B. *Stays Under the Residual Category*

Not all judicial stays of proceedings are wholly inconsistent with a search for the truth in a given proceeding. For example, a judicial stay of proceedings may be entered where there has been an irreparable violation of an accused's right to a fair trial, such as where evidence is lost or destroyed that fundamentally impairs the ability of the defence to make full answer and defence.⁸⁵ In such circumstances, a stay is entered because the state of the evidence would only permit an unreliable search for the truth which is weighted toward a wrongful conviction.

⁸⁴ (1997), 115 C.C.C. (3d) 129 at 170.

The type of stay of proceedings to be examined here is that which has been termed the “residual category”. It is a stay entered where “...a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes the fundamental notions of justice and thus undermines the integrity of the judicial process”.⁸⁶ In these circumstances, where a stay is entered because the conduct of the investigation or prosecution has amounted to an abuse of the judicial process, the remedy is antithetical to a search for the truth. As noted by Dickson C.J.C. in *R. v. Jewitt*, a stay of proceedings for an abuse of process acts to prevent a consideration of the merits of a case which may have necessarily led to a conviction.⁸⁷

The Supreme Court has consistently held that a judicial stay should only be entered in a criminal proceeding in the clearest of cases where no other remedy is reasonably capable of removing the prejudice to the accused or the administration of justice.⁸⁸ L’Heureux-Dubé J., however, has noted that the remedy may be necessary to address a “...panoply of diverse and sometimes unforeseen circumstances”⁸⁹ where the conduct of a prosecution contravenes fundamental notions of justice. This approach recognizes the profound societal interest in having criminal cases heard on their merits, but still accords the judiciary a broad discretion to invoke a stay under the residual category.

Relatively recent jurisprudence from the Supreme Court may be viewed as having significantly raised the “clearest of cases” threshold for the residual category of stays of proceedings. In *Canada v. Tobiass*,⁹⁰ the Court emphasized that a stay of proceedings under the residual category is a prospective remedy which is aimed at preventing future prejudice in a proceeding. The Court held that for a stay to be entered under this category, it must, in almost all cases, be shown that state misconduct will likely continue in the proceedings. The Court emphasized that the residual category is a “small one” and that it will only be in the rarest of cases that the fact of the impugned conduct, alone, will necessitate a stay of proceedings. The Court held that:

There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.⁹¹

The decision in *Canada v. Tobiass*, (in conjunction with the Court’s decisions not to uphold stays in cases such as *R. v. O’Connor*, *supra*, and *R. v. Scott*⁹²) could be interpreted as constituting a practical direction to trial courts that stays

⁸⁵ *R. v. La*, [1997] 2 S.C.R. 680 at 693.

⁸⁶ *R. v. O’Connor*, [1995] 4 S.C.R. 411 at 463.

⁸⁷ *R. v. Jewitt*, [1985] 2 S.C.R. 128 at 148.

⁸⁸ *R. v. O’Connor*, *supra* note 87 at 461-64.

⁸⁹ *Ibid.* at 463.

⁹⁰ [1997] 3 S.C.R. 391.

⁹¹ *Ibid.* at 428.

of proceedings should all but disappear as a remedy for the past misconduct of state authorities. Such an interpretation would have far reaching effects which would be contrary to the proper functioning of our criminal justice system which depends on both the presence, and use, of the remedy in such circumstances. While preserving the search for the truth, rendering the residual category of stay of proceedings an illusory remedy could have long-term effects on the reputation of the administration of justice and ultimately hinder the pursuit of truth in our justice system as a whole. Where abusive investigatory and prosecutorial processes take place without serious judicial consequences, authorities are indirectly encouraged to not only subvert one aspect of a proceeding, but also to exert control over the entire body of evidence. As will be noted later in this paper, such a lack of supervision can lead to a system of justice which routinely results in wrongful convictions.

C. *The Rationales for the Residual Category of Stays of Proceedings*

A court's power to stay criminal proceedings based on an abuse of process can be traced to a discretion developed centuries ago by the Court of Chancery and common law courts to summarily dispose of vexatious and repetitious civil actions. As far back as the late 1700's, courts of common law were granting stays of proceedings to block meritless civil actions, designed to harass defendants, which could not be dismissed through any other established remedy.⁹³

In a decision which is arguably the criminal law equivalent of *Donoghue v. Stevenson*,⁹⁴ in its ability to make a profound development in a field of law through drawing on general principles of fairness, the House of Lords, in *Connelly v. Director of Public Prosecutions*,⁹⁵ bridged the doctrine of a stay of proceedings into criminal prosecutions. Lord Devlin, in *Connelly*, not only held that judicial stays could be applied to criminal proceedings, but also established that the remedy provided a broad discretion to courts to prevent unfairness to accused persons. He held that the courts, by virtue of their control of their own process, had a duty to halt prosecutions which involved abusive conduct by state authorities. In setting out a broad discretion to stay criminal proceedings, Lord Devlin held that:

...nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.⁹⁶

After a series of conflicting appellate decisions regarding the existence of such a judicial discretion in Canada, Dickson C.J.C. held in *R. v. Jewitt* that Canadian criminal courts possess a power to stay criminal proceedings in circumstances

⁹² [1990] 3 S.C.R. 979.

⁹³ See D. Johnson, "Abuse of Process and the Charter" (1995) 37 Crim. L.Q. 309 at 311-14.

⁹⁴ [1932] A.C. 562 (H.L.).

⁹⁵ [1964] A.C. 1254.

⁹⁶ *Ibid.* at 1347.

where "...compelling an accused to stand trial would violate the fundamental principles of justice which underlie the community's sense of fair play and decency".⁹⁷ This common law power was constitutionalized when it was held to have been subsumed into section 7 of the *Charter* in *R. v. O'Connor*.⁹⁸

The necessity of both the presence and use of the remedy of a stay of proceedings pursuant to past abusive conduct, and the risks posed to the system by rendering such a remedy illusory, is best understood in analysing the rationales behind the remedy. A stay of proceedings based on an abuse of process is the ultimate safeguard used to protect not only the fairness of trials, but also the overall integrity and reputation of the Courts' processes.

D. *Integrity of the Court*

The rationale for a stay of proceedings pursuant to an abuse of process is first grounded in a court's power to control its own process and as part of the inherent domain of the judiciary as guardians of the justice system.⁹⁹ The remedy prevents a court's complicity in abusive prosecutions and protects the integrity of the judicial process through the ultimate means of controlling what happens in a courtroom by putting an end to the proceedings.¹⁰⁰ To the extent that a court allows a prosecution to proceed which contains abusive and oppressive conduct, its legitimacy and authority are undermined. As noted by Sopinka J. in *R. v. Carosella*, "[c]onfidence in the justice system would be undermined if the administration of justice condoned conduct designed to defeat the processes of the court".¹⁰¹ As L'Heureux Dubé J. also held in *R. v. O'Connor*, a stay of proceedings is necessary in the public interest where a prosecution contravenes fundamental notions of justice "...and thus undermines the integrity of the judicial process".¹⁰²

The responsibility of a court, as sovereign of its own process, to be the principal guardian against abusive prosecutions was addressed in forceful language by Lord Devlin in *Connelly*, who stated:

Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.¹⁰³

Similar sentiments were expressed in the United States Supreme Court by

⁹⁷ *Supra* note 88 at 136-37.

⁹⁸ *Supra* note 87.

⁹⁹ See *R. v. Mack*, [1988] 2 S.C.R. 903 at 942.

¹⁰⁰ See D. MacAlister, "Does the Residual Category for Abuse of Process Still Exist?" (1999) 28 C.R. (5th) 72 at 73.

¹⁰¹ [1997] 1 S.C.R. 80 at 114.

¹⁰² *Supra* note 87 at 463.

Frankfurter J. in *McNabb v. United States*.¹⁰⁴ Outlining the rationale for courts to carefully supervise the investigation and prosecution of criminal offences, Frankfurter J. stated:

A democratic society, in which respect for dignity of all men is central, naturally guards against the misuse of the law enforcement process.....The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal law is therefore divided into separate parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.¹⁰⁵

E. *Public Confidence in the Criminal Justice System*

Another rationale for a stay of proceedings under the residual category is to provide one of the most important means for maintaining public confidence in our system of justice. A stay of proceedings pursuant to an abuse of process not only serves as a remedy against individual investigations and prosecutions which are carried out in a manner which is inconsistent with basic fairness, but on a wider level, ensures that our system of justice is consistent with our core societal values. This concept was eloquently articulated by L'Heureux-Dubé J. in *R. v. Conway*¹⁰⁶ where she stated the following in regard to a judicial stay pursuant to an abuse of process:

The prosecution is set aside, not on the merits...but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental value as a society" ...It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function.¹⁰⁷

The notion that the reputation of the entire administration of justice is imperilled by unchecked abusive prosecutions was also set out in *McNabb v. United States*, *supra*, where Frankfurter J. held:

Plainly, a conviction resting on evidence secured through such a flagrant disregard for procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law...The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.¹⁰⁸

F. *Deterring Abusive Practices*

Finally, stays of proceedings under the residual category provide what may

¹⁰³ *Supra* note 96 at 1354.

¹⁰⁴ 318 U.S. 332 (1943).

¹⁰⁵ *Ibid.* at 343.

¹⁰⁶ [1989] 1 S.C.R. 1659.

¹⁰⁷ *Ibid.* at 1667.

¹⁰⁸ *Supra* note 105 at 345.

be the only practical manner of providing a remedy and deterrent for abusive state conduct. In *R. v. Jewitt*, Dickson C.J.C. held that a stay based on an abuse of process is designed to "...control prosecutorial behaviour prejudicial to accused persons..." and that the remedy acts to disentitle the Crown to a conviction.¹⁰⁹ Laskin C.J.C. held in *Rourke v. the Queen* that the doctrine of abuse of process acts to require fair behaviour of the Crown towards accused persons.¹¹⁰ As stated by Professor Stuart in his text *Charter Justice in Canadian Criminal Law*,¹¹¹ the power of a court to enter a stay based on abuse of process provides the most effective form of accountability for those state officials entrusted with the solemn duty of prosecuting individuals.

G. *Effect of Narrowing the Residual Category*

Given that the "residual category" of stays of proceedings serves to protect an individual accused against prosecutorial abuses, to stop the legitimacy of the judiciary from being undermined, and to protect the integrity of the system as whole, our criminal justice system cannot effectively function if this power is rendered illusory and is applied in a manner which presumptively forgives past abuses of process as long as they are not likely to continue throughout the course of the proceeding. The rationales for the remedy bespeak the need for its application in circumstances where state officials have engaged in serious abusive practices, regardless of whether they are likely to recur. The remedy should be applied in a prospective manner. However, the prospective analysis cannot be limited to whether there are likely to be further abuses of process in a given proceeding, but must equally assess the impact of forgiving past misconduct on the future integrity of the entire justice system.¹¹²

Trial courts have continued to be vigilant and courageous in imposing stays of proceedings under the residual category. The use of the remedy has included circumstances where the abuse of process was based, in large part, on egregious past misconduct which would harm the integrity of the criminal justice system as a whole were the prosecution permitted to continue. Recent examples include: *R. v. Kane*¹¹³ (first degree murder charges stayed on the basis of perjured eyewitness testimony from an R.C.M.P. officer); *R. v. Greganti*¹¹⁴ (serious drug charges stayed due to deliberate non-disclosure of materials which would have assisted the defence); *R. v. S.L.*¹¹⁵ (sexual abuse charges stayed due to material non-disclosure and improper police investigatory procedures); and *R. v. Elliott*¹¹⁶ (murder charged stayed due to massive *Charter* violations by both the police and Crown, including fabrication of evidence, misleading the

¹⁰⁹ *Supra* note 88 at 148.

¹¹⁰ [1978] 1 S.C.R. 1021 at 1034.

¹¹¹ D. Stuart, *supra* note 78 at 132-33.

¹¹² *Supra* note 101.

¹¹³ [1998] N.S.J. No. 558 (S.C.).

¹¹⁴ [2000] O.J. No. 34 (S.C.J.).

¹¹⁵ [1999] O.J. No. 252 (S.C.J.).

court, deliberate non-disclosure, and the loss of evidence).

The search for the truth in those cases was jettisoned at great cost to the societal interest in having cases determined on their merits, and also at a cost to the reputation of the administration of justice in its failure to have the accused tried for these most serious offences. However, the societal costs of not staying the proceedings, even where the search for the truth was not rendered impossible by the abusive conduct, were even greater. As was held by Cacchione J. in *R. v. Kane*:

The misconduct in this case is so egregious that the mere fact of going forward in light of it will be offensive. In arriving at my conclusion I have considered the societal interest in the effective prosecution of this case. I am well aware that this is the most serious offence in the Criminal Code and one that in normal circumstances ought to be determined on its merits. However, the facts in this case have led me to conclude that the affront to decency and fair play, together with the damage caused to the integrity of the judicial system by the actions of some police officers, is disproportionate to the societal interests involved.....To allow this case to proceed even with the exclusion of the identification evidence would not be fair to the accused, nor would it be fair to the community.¹¹⁷

We need not look far to see what may happen when the investigation and prosecution of criminal offences do not operate with effective oversight. In California, thousands of criminal convictions are currently being reviewed due to the uncovering of what are alleged to be deeply systemic, abusive police procedures in the Rampart Division of the Los Angeles Police Department. In that division, officers are alleged to have engaged in such perverse practices as shooting unarmed persons and routinely planting evidence against innocent people. According to American media sources, 70 current and former officers are under investigation, 100 convictions have already been overturned, and thousands of other potentially wrongful convictions are being re-visited. The institutionalized practices were discovered, in large part, by chance when one officer from the division was caught stealing seized drugs from a police locker and agreed to testify about the practices of his fellow officers in return for a reduced sentence. The harm done to the administration of justice in individual cases might only be outweighed by the costs to the reputation of the criminal justice system as a whole in that jurisdiction.

To date, our justice system appears to have avoided standardized abusive practices, and the resulting damage to the integrity of the system, due in part to the presence and use of stays of proceedings under the residual category. Those authorities who would consider using pernicious practices in order to secure a conviction are aware that such conduct, even in a case with strong evidence against an accused, will put the future of the entire proceeding at risk. The implications of rendering nugatory the remedy for past misconduct, and therefore excusing abuse of the legal process by state authorities as long as it does not occur again in the proceedings, is almost incalculable. As Brandeis J.

¹¹⁶ [1999] O.J. No. 3265 (S.C.J.).

¹¹⁷ *Supra* note 114 at paras: 50-51.

stated in *Olmstead v. United States*:

In a government of law, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omni-present teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.¹¹⁸

VI. Conclusion

While the search for the truth is properly a fundamental objective of our criminal justice system, a twin objective must also be the qualification of this search when it is necessary to protect the reputation of the system. As was noted by one of the pre-eminent criminal law jurists, The Honourable G. Arthur Martin, the search for the truth "is not...an absolute value in a criminal trial and must sometimes yield to other values recognized by the criminal justice system..."¹¹⁹ Those other values include the protection of fundamental rights and the preservation of the integrity of our court system. If our society is not willing to continue to be vigilant in qualifying the search for the truth by excluding evidence or staying proceedings where necessary, we put at risk the reputation of our entire justice system and may ultimately render our core values chimeric.

¹¹⁸ *Supra* note 46 at 470.

¹¹⁹ *R. v. Yakeleya* (1985), 46 C.R. (3d) 282 (Ont. C.A.) at 284.