

Procedurally Shy, Substantively Bold: Conflicting Approaches to Constitutional Review

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There has been an interesting debate in recent years concerning whether the Supreme Court of Canada has exceeded its proper role when determining issues arising under the Charter.

The debate rages, with one commentator suggesting that "the extent of judicial activism in Canada has been seriously exaggerated and, in any event, is not to be feared as inconsistent with democracy" and that "democracy is improved when we are forced to consider the effects of our actions on the unpopular and disadvantaged and that an independent and courageous judiciary is the best institution we have to remind us of those concerns".¹ Another suggests that a "long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy", with judges abandoning deference and self-restraint, transforming the courtroom into "a new arena for the pursuit of interest group politics".²

I believe that an important observation concerning how the Supreme Court has performed has been left out of the debate. The Supreme Court has released nearly 700 judgments in which it has referred to the Charter and many of these are many pages long: its jurisprudence is massive and complex and it is not possible to see it as having only one tone.

Has the Supreme Court been unduly bold or unduly shy when it comes to its role under the Charter? It is not possible to give an unequivocal "yes" or "no" answer to the question. Nevertheless, when one tries to answer the question, an interesting pattern emerges.

First, let me begin by defining my terms. I define "boldness" as a disposition to go beyond the limiting text of the constitution, to disrupt the legal *status quo* or to

interfere with what is normally seen to be the preserve of the legislature. On the other hand, I define "shyness" as a disposition to stay within or even failure to implement the text of the constitution, to confirm the legal *status quo* or to defer to the legislature.

In my view, the Court is not always or even generally bold. I reject broad-brush analyses that conclude that judges have fallen prey to the "seduction of power" and "seized the opportunity" presented by the Charter.³ There are cases where the Court is astonishingly shy.

On the other hand, I disagree with broad-brush suggestions that the "purposive approach" adopted by the Supreme Court was not revolutionary and that there are recent signs it is taking a more "minimalist" or more "deferential" approach.⁴ There are recent examples of boldness.

However, at the risk of engaging in the same sin of broad-brushing but in order to assist this important debate, I do wish to identify one interesting general trend which admits of exceptions from time to time.

In my review of the Supreme Court's jurisprudence, I have noticed that its approach to judicial review seems to be different depending on whether it is dealing with substantive matters⁵ or procedural matters.⁶ In substantive matters concerning the Charter the Supreme Court periodically displays a willingness to be astonishingly bold, while in procedural matters concerning the Charter the Supreme Court is usually shy.

I. Substantively bold

It is beyond the scope of this paper to examine whether the Supreme Court's substantive rulings are good social, political and public policy. Many of the decisions endorse policies that I strongly endorse. But that is beside the point of this paper. The

point is that the Court has boldly waded into these areas, in many cases going beyond the invitation extended by the words of the Charter.

1. Sweeping language about the role of the Court

An interesting feature of the Court's jurisprudence is that nearly all of the broad pronouncements endorsed by the majority of the Court concerning its ability to engage in aggressive review of legislative decisions appear in decisions where it is reviewing the substance of government legislation. For example:

- In its first decision concerning whether the substantive requirements of an offence were constitutionally sufficient, the Court declared, perhaps naively, that doubts concerning the legitimacy of judicial review were over.⁷
- At an early stage in Charter jurisprudence, the famous "living tree" metaphor for constitutional interpretation⁸ was planted into Charter interpretation.⁹
- In its first decision concerning when a state official can search an individual's premises, the Court declared that under the Charter, the judiciary is the "guardian of the constitution" and the function of the Charter of Rights in that constitution is to provide for "the unremitting protection of individual rights and liberties".¹⁰
- In recognizing sexual orientation as an enumerated and analogous ground under s. 15 and reading into Alberta's *Individual Rights Protection Act* a prohibition against discrimination on that basis, the Court strongly affirmed its ability to assess the substance of legislation, noting that the Charter was the choice of the Canadian people through their elected representatives "as part of a redefinition of our democracy".¹¹

2. The purposive approach

Early in its jurisprudence, the Court rejected narrow, textual interpretations of the Charter sections or resort to framers' intentions.¹² It also rejected a comparison between the text of the Charter with the text of similar provisions of the *Canadian Bill of Rights* and the incorporation of that jurisprudence into the law of the Charter.¹³ Instead, the Court quickly endorsed, without much critical analysis or debate, the "purposive approach" to the interpretation of the Charter, an approach which it then aggressively used to define its view of the meaning of the various Charter sections.¹⁴ The Charter is to be interpreted in accordance with its purpose which is that "Canadian society is to be free and democratic".¹⁵ The court must be guided by "the principles and values essential to a free and democratic society" which include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society".¹⁶

In adopting the purposive approach and in defining the purposes in that manner, it chose one side of the debate over judicial activism and, in the words of one commentator, joined the "worldwide rule of judges".¹⁷ The truly surprising thing is that there was virtually no debate in the judgments of the Court concerning this approach to interpretation of the substantive rights set out in the Charter..

While the purposive approach has been used to define the substantive content of the Charter sections, it has not been used to define fundamental procedural justice and this has greatly affected the protection of procedural rights under the Charter.¹⁸

3. The unwritten constitutional principles

The Court has identified four, broad fundamental, substantive, unwritten principles in the Constitution that can be used by litigants as the basis of claims.¹⁹ It has also extended the substantive protections of judicial independence beyond the written guarantees in ss. 96-101 of the *Constitution Act, 1867* and s. 11(d) of the Charter and explicit limitations in those guarantees.²⁰ Some have powerfully asserted that the Court in these cases has boldly created new constitutional rights and obligations with little grounding in law or the text and contrary to the written amendment formula in the *Constitution Act, 1982*.²¹

4. Imposition of positive rights on government

The Court has interpreted the s. 2 freedoms very broadly and boldly,²² even interpreting them as requiring government to take active or positive measures to facilitate speech²³ or association.²⁴ The Court has effectively imposed positive funding obligations on government to end discriminatory regimes²⁵ and to allow a person to have legal representation.²⁶

5. Freedom of expression

The Court has interpreted s. 2(b) of the Charter very broadly and boldly. Any words or conduct intended to express meaning is constitutionally-recognized "expression".²⁷ Any government measure that has the purpose or effect of eliminating, limiting or creating barriers to expression violates s. 2(b) and is subject to judicial scrutiny of its reasonableness under s. 1.²⁸ This has the effect of remitting a very broad range of human and corporate activity to judicial scrutiny.

6. Rights to self-incrimination and rights to silence

The Court has been particularly bold concerning when a person is entitled to refuse to testify or to speak to the authorities. Sections 11(c) and 13 seem to speak to the issue, offering rights of non-compellability and rights against self-incrimination. However, despite the absence of specific constitutional text on the subject and despite these particular guarantees, the Court has found what it terms "residual" protection for these rights in s. 7.²⁹

The Court has interpreted s. 7 as affording accused persons, suspects and witnesses with rights of silence and rights against self-incrimination in a number of circumstances beyond those envisaged by the written text of ss. 11(c) and 13.³⁰

The testimony of those in regulatory proceedings, administrative proceedings, commissions of inquiry or other legal proceedings cannot be used to incriminate them in later proceedings. Section 13 provides that protection. However, s. 7 provides "derivative use protection": all documents and information found as a result of the compelled testimony cannot be used to incriminate that person in later proceedings.³¹

One important contribution made by s. 7 has been to constitutionalize the common law confessions rule as it existed in 1982 and, to some extent, broaden it.³² In the words of the majority of the Court in *Hebert*,

...the drafters of the *Charter* viewed the ambit of the right to silence embodied in s. 7 as extending beyond the narrow formulation of the confessions rule, comprehending not only the negative right to be free of coercion induced by threats, promises or violence, but a positive right to make a free choice as to whether to remain silent or speak to the authorities.³³

Accordingly, whereas it used to be the case that there was no discretion to exclude evidence because of a police trick or other unfairness,³⁴ that discretion now exists as a result of the *Charter* to the extent that the accused's free choice as to whether to remain silent or not is being interfered with or any other principle of fundamental justice is being infringed in cases where imprisonment is a possible consequence.

The traditional rationale for the common law confessions rule was that involuntary confessions were not reliable. Cases under the *Charter* have replaced that rationale with a broader and multi-faceted one: the reputation and integrity of the judicial process, fairness to the accused, the principle against self-incrimination, the principle that the Crown must establish its case without the assistance of the accused and the need to ensure that "the coercive power of the state is held in check" and to "deter improper use of prosecutorial state authority".³⁵ This is a bold departure from the common law.

7. The protection of self-incrimination in the broad sense

Section 7 has been boldly held to enshrine a protection against self-incrimination in the broad sense (as opposed to the narrower testimonial self-incrimination): accused persons cannot be conscripted against themselves or be forced to assist the Crown in making the case against them.³⁶ The Supreme Court has confirmed that this is a "fundamental organizing principle" or "overarching principle" in criminal law from which many existing evidentiary rules emanate but also has the capacity to create law legal rules.³⁷

8. Innovation concerning substantive matters under the principles of fundamental justice

The Court has been very innovative using the "principles of fundamental justice" under the *Charter* to identify substantive principles and apply them, often changing our

law. It is frequently the case that the Court develops the principle without regard to any consideration of the interests of the state. Some examples include the following:

- Legislation that is substantively vague will be struck.³⁸
- A guilty mind must be present for conviction of offences with "stigma".³⁹
- Legislation cannot be overbroad.⁴⁰
- When Parliament creates a defence to a criminal charge, the defence should not be so illusory or so difficult to attain as to be practically unavailable.⁴¹

9. Right to counsel

In the area of rights to counsel, the court has imposed positive obligations on law enforcement authorities to provide access to counsel.⁴² Interestingly, it has decided under s. 10, the express guarantee of the right to counsel, that there is no constitutional right to state funded counsel.⁴³ However, under s. 7, despite the absence of any specific words guaranteeing a right to counsel and in seeming contradiction to its own jurisprudence, the Court has boldly recognized a constitutional right to state funded counsel in some contexts.⁴⁴

10. Right to equality

The Court boldly interpreted s. 15 as being aimed at redressing historical disadvantage, a policy not evident in the words of the section.⁴⁵ The Court has also

boldly recognized "dignity" at the core of the section.⁴⁶ Claims of discrimination concerning procedural issues have received short shrift.⁴⁷

11. Aboriginal rights

Aboriginal rights under s. 35 are technically not part of the Charter, but the Court's development of this jurisprudence confirms the trend of substantive boldness so evident under the Charter. In developing the jurisprudence under s. 35, the Court has introduced a new law of treaty interpretation⁴⁸ and a new law of evidence.⁴⁹ It has also constructed a new justification test for these rights, a justification test that does not appear in the words of s. 35.⁵⁰

12. Reference to extraneous material

In making its substantive decisions, the Court has occasionally considered evidence not under oath or subject to cross-examination, drawing upon their own understandings of social phenomena. For example, in *R. v. Butler*, the Court drew upon literature written by out of court academics who were not subject to cross-examination. The Court simply adopted their work uncritically.⁵¹ In *R. v. Sharpe*, the Court was confronted by a factual record that was far from ample on the issue of the nature and extent of harm posed by child pornography. This, however, did not stop the majority of the Court: it stated that it had a "reasoned apprehension of harm" concerning child pornography – *i.e.*, an apprehension not based on evidence but based on its "common sense view" that such materials were harmful.⁵²

13. The right to a remedy

The Supreme Court has affirmed, in broad language, a general right to a remedy for rights breach.⁵³ Later, it set out, in the broadest possible manner, an entire code of remedies.⁵⁴ It has also set out broader remedial codes for the enforcement of other substantive rights.⁵⁵

14. Exclusion of evidence

Before the *Charter* came into force the general rule was that illegally obtained evidence, if relevant, was admissible and judges had only a small, rarely exercised discretion to exclude evidence where its admission would be "gravely prejudicial" to the party against whom it was adduced, its admissibility is "tenuous" and its probative value was "trifling".⁵⁶ This formulation of the discretion was broadened in *R. v. Seaboyer*.⁵⁷ Relevant evidence now can be excluded if its probative effect outweighs the prejudice caused by its admission. For example, an accused's criminal record, although admissible under s. 12 of the *Canada Evidence Act*, can be excluded if its probative value is outweighed by its prejudicial effect.⁵⁸

One of the boldest areas has been the exclusion of evidence under s. 24(2). When s. 24(2) was being considered in 1981 by the Joint Committee of the Senate and House of Commons on the Constitution of Canada, it seems that the drafters intended exclusion only in extreme circumstances.⁵⁹ The courts, particularly the Supreme Court of Canada, certainly did not follow the drafters' wishes!⁶⁰

In *R. v. Collins*, the Supreme Court developed a three-fold test to guide the discretion to exclude evidence under s. 24(2):

- (1) whether the admission of the evidence would affect the fairness of the trial;

- (2) the seriousness of the breach; and
- (3) whether the administration of justice would be better served by admission or exclusion of the evidence.⁶¹

The interesting thing about this test is that only the last factor mirrors the text of the section. The first two factors are judicial construction.

The Court has defined fairness of the trial as being whether the evidence being used is conscripted or not.⁶² Conscripted means whether the accused has participated in the discovery or creation of the evidence.⁶³ If this is established and the evidence is not otherwise discoverable, then that is the end of the matter and the evidence is excluded.⁶⁴ The court has exalted the concept of conscription, or as it has put it elsewhere, the "broad principle of self-incrimination", ahead of all other interests, especially privacy interests in s. 8 of the Charter.⁶⁵ There is no justification in the text or structure of the Charter for giving conscription such pre-eminent status under s. 24(2) and it would seem to be against the Court's oft-repeated statement, consistent with the text and structure of the Charter, that there is no hierarchy of rights under the Charter.⁶⁶

Section 24(2) provides that the remedy of exclusion of evidence is available where "a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*". This wording suggests that the party seeking to exclude the evidence must demonstrate a strict causal relationship between the rights breach and the evidence. But that is not the case. Quite contrary to the words "obtained in a manner that infringed..." the Court has held that there is no need for the party seeking to exclude the evidence to demonstrate strict causation in the legal sense⁶⁷ and that there need be only a sufficiently strong temporal or causal relationship⁶⁸ in the sense of a single "chain of events"⁶⁹ or a "single investigatory transaction"⁷⁰ or the commission of the *Charter* violation in the course of obtaining the evidence.⁷¹

Boldness has also been shown in terms of the threshold for exclusion. As a practical matter, the exclusion of a key piece of evidence for *Charter* breach terminates the proceeding as much as an abuse of process, which is also a *Charter* breach,⁷² can end the proceedings. However, the Court has defined the threshold for the former under the Charter as being much lower. Conscripted evidence is often automatically excluded even if its exclusion results in termination of the proceedings but an abuse of process terminates the proceedings only in the "clearest of cases".

Although s. 24(2) is the only section that provides for the exclusion of evidence and although s. 24(2) prescribes an express test for the exclusion of evidence, namely the bringing into disrepute of the administration of justice, the Court has excluded evidence under two other sections of the Charter and on the basis of a test other than bringing the administration of justice into disrepute. Section 11(d) provides for the right to a fair trial and if the admission of evidence impairs the fairness of the trial, it may be excluded whether or not its admission might bring the administration of justice into disrepute.⁷³ Similarly, under the remedial jurisdiction to grant an "appropriate and just" remedy under s. 24(1), the Court may exclude evidence even though exclusion is expressly addressed under a different test in s. 24(2).⁷⁴ In boldly helping itself to these alternative grounds for excluding evidence, the Court was arguably inconsistent with one of its earlier cases.⁷⁵

15. Reading in remedy

On occasion, the Court has been remarkably bold in its use of the reading in remedy. In *Vriend*, the majority of the Court wrote the words "sexual orientation" into the list of prohibited grounds of discrimination in Alberta's *Individual Rights Protection Act*.⁷⁶ It could have declared the Act of no force or effect and suspended its declaration in order to give the Legislature an opportunity to consider its position and perhaps include "sexual orientation" into the legislation either unconditionally or with conditions that it felt were justified.⁷⁷ However, it boldly did the Legislature's work for it, grabbing the legislative pen and writing the words into the Act without any conditions.

16. Interim stays

In the area of interim stays of proceedings in constitutional matters, the Court has developed a test that readily permits Charter challengers to suspend on an interim basis legislation or decisions that they are challenging. Courts will grant stays of proceedings if the challenger has a good, *prima facie* argument, the challenger will suffer irreparable harm and the balance of convenience is in the challenger's favour.⁷⁸ The first two branches are almost always satisfied.⁷⁹ As a result, the test comes down to the last branch which is a simple balancing between the public interests underlying the legislation or decision remaining in place against the interests of the challenger being able to go to court and have his or her rights tested.⁸⁰

This is a simple balance. There is no threshold for the challenger to succeed such as the balance being "clearly" or "decisively" in the challenger's favour. Theoretically, the challenger succeeds if the balance is in his or her favour on a 51%-49% basis.

Further, the public importance of the legislation or decision can be minimized by a tactically intelligent challenger. The shorter the period of time that the legislation or decision is suspended, the lower the impact on the public interest. By undertaking to have the case heard in a short time, the balance can tip in the challenger's favour.

It is also my experience that when a stay has been obtained, the case can sometimes settle in the challenger's favour with the result being a modification of an impugned decision or a legislative repeal or amendment – in substance, the interim stay is more like a final determination.

By permitting challengers a fairly easy way of suspending or *de facto* changing legislation, the Court has been substantively bold.

17. Application of the Charter

The Court has gone well beyond s. 32 in its application of the Charter. Although the courts and judge-made rules are not specified under s. 32, the Charter clearly applies to those subject-matters. Common law rules can be shaped, modified or abolished by the *Charter*⁸¹ and quite aggressively so: the Court has held that notions of deference or restraint do not apply when judge-made law is in question.⁸²

In *Vriend v. Alberta*, the Court found Alberta's *Individual Rights Protection Act* underinclusive because it failed to provide a prohibition against discrimination on the basis of same sex orientation.⁸³ It read the words "sexual orientation" into the list of types of prohibited discrimination. *Vriend* can be taken to be authority for the proposition that the Charter can be used against any private human rights regime that is deficient. In effect, one can argue that if a human rights regime does not protect some form of conduct in the non-governmental sector that would otherwise violate the Charter, the regime must be deficient and must be read up to standard. In this way, the Charter applies to both private and public sector conduct.

18. Who can bring a Charter claim?

On the issue of who can properly bring a Charter challenge, the Court has been quite bold.

Corporations and other artificial entities can assert any of the freedoms that can possibly be exercised; only those freedoms that cannot be exercised by artificial entities are excluded. Even when corporations and other artificial entities do not have rights themselves, they can use the rights of others to strike down charging sections or to attack regulatory provisions.⁸⁴

Further, anyone can bring a challenge using rights that they themselves do not possess, through the vehicle of public interest standing as long as they satisfy the judicially-constructed test for public interest standing. That test is a threefold test: the person seeking public interest standing must establish that there is a serious issue raised as to the invalidity of legislation in question, the person is directly affected by the legislation or, if not, has a genuine interest in its validity and finally there is no other reasonable and effective way to bring the issue before the Court.⁸⁵ The first two branches are fairly easy to meet. The question usually comes down to the last branch. In subsequent cases, the Court has applied that branch in an extremely aggressive and bold way to permit persons to be parties when it is perfectly clear that others could have brought the proceeding.⁸⁶

Finally, cases can proceed even though the particular dispute which gave rise to the case has been settled.⁸⁷

19. Summary

On the whole, the Court has pursued some astonishingly bold approaches to the substantive rights under the Charter. It is far less bold - indeed, even shy - when it comes to procedural rights under the Charter.

II. Procedurally Shy

The Charter protects procedural rights primarily in two places: ss. 7 and 11 of the Charter. In both areas, with rare exceptions, the Court has displayed a fair degree of shyness.

1. Procedural rights in s. 11 of the Charter

Section 11 contains a significant number of important procedural guarantees. On the basis of the text of s. 11, the procedural guarantees have been restricted to criminal law contexts or contexts where a "true penal consequence" is involved.⁸⁸ It is interesting that the decision which so limited the application of s. 11 of the Charter, *R. v. Wigglesworth*, did not even once mention the purposive approach even though it was very much in vogue at that time and much of the decision is a careful analysis of the wording of the Charter sections.

Section 11 and the various *Charter* guarantees in it, especially the s. 11(d) right to a fair trial do not apply to those in civil proceedings⁸⁹ or administrative proceedings⁹⁰. Interestingly, while s. 7 has been interpreted to provide "residual protection" for matters not expressly covered by s. 11(c), s. 7 has not been used to afford "residual protection" for procedural protections in administrative law and civil cases.

Further, the test set out for the application of s. 11 of the Charter in *R. v. Wigglesworth* has itself been restrictively interpreted: for example, the s. 11 procedural rights are not available for penitentiary discipline that can lead to loss of remission and solitary confinement.⁹¹

2. The principles of fundamental procedural justice under s. 7 of the Charter

While the "purposive approach" held sway when defining the substantive content of most of the Charter sections and when defining the substantive content of the principles of fundamental justice, it has been noticeably absent when defining the procedural content of the principles of fundamental justice.

The principles of fundamental procedural justice are the longstanding, time-honoured principles of our legal system.⁹² They are not the principles which the judiciary

today believes ought to be part of fundamental justice but instead reflect what our legal system has accepted for decades. This is a profoundly conservative vision of the procedural principles of fundamental justice would be developed at the time when broad purposive approaches were being developed elsewhere under the Charter.

3. The principles of fundamental procedural justice as minimum standards

The principles of fundamental procedural justice have been viewed as minimally acceptable standards of fair treatment, not higher standards that procedural regimes should rise to meet.

One of the most influential cases concerning procedural rights in the Charter was *R. v. Lyons*. The case is discussed in more detail below. It is influential because it was one of the first purely procedural cases to be decided by the Supreme Court of Canada.

In the course of its reasons in *Lyons*, the Court held that "s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined".⁹³ This particular comment has cast a long shadow: it been repeatedly applied in the Court's jurisprudence concerning procedural rights under the Charter.⁹⁴ Provided a procedure meets minimal levels of fairness, it is acceptable.

4. The application of procedural fairness to administrative tribunals and civil proceedings

Administrative tribunals and civil courts are subject to obligations to afford procedural fairness at common law but those obligations can be ousted by clear statutory wording. Can the Charter limit such statutes and guarantee procedural fairness?

The answer to that question depended on how the Court interprets s. 7 of the Charter. Section 7 is the one right under the Charter that theoretically speaks to the issue of procedural fairness. Section 7 guarantees the application of the principles of fundamental justice to those whose rights to liberty and security of the person are infringed. The principles of fundamental justice seem susceptible to an interpretation that would include procedural fairness. Obviously, the broader the interpretation of the rights to liberty and security of the person, the broader the scope of constitutional protection for procedural fairness. A bold court in the area of procedural matters would be inclined to give the rights to liberty and security of the person a broad interpretation to ensure that the standards of "fundamental justice" have a broad application.

However, the rights to liberty and security of the person have been given a fairly narrow interpretation. Perhaps the best way to illustrate this is a close examination of the recent administrative law case of *Blencoe v. British Columbia (Human Rights Commission)*.⁹⁵

Blencoe was a British Columbia Cabinet Minister who was subject to complaints of sexual harassment before the British Columbia Human Rights Commission. The incidents were alleged to have occurred between 1993 and 1995. In November, 1995, the Tribunal informed Blencoe that it set down the matter for hearing for March, 1998.

Blencoe brought a proceeding in the British Columbia Supreme Court alleging that his rights under s. 7 of the Charter and at common law were infringed as a result of undue delay. Blencoe relied on more than just the effluxion of time. Two potential witnesses had died. At first glance, this is a powerful argument, as the Supreme Court had already recognized that in the criminal context, the death of a key witness is sufficient prejudice for even a corporation to mount an unreasonable delay claim under s. 11(b) of the Charter.⁹⁶ Blencoe also raised other important forms of prejudice including unwanted media attention, treatment for depression, inability to be employed while the matter remained outstanding and having to leave British Columbia to escape the scandal.

At this point in the development of Charter jurisprudence, it seemed that Blencoe might get his relief under s. 7 of the Charter. The Supreme Court had already recognized pre-charge delay under s. 7 of the Charter in criminal proceedings.

Further, the success of Blencoe's Charter argument very much turned on the extent to which the principles of fundamental justice applied to administrative hearings generally and there had been some recent movement in that area. The principles of fundamental justice apply when a person's right to liberty and security of the person are threatened or infringed. By the time of Blencoe's argument in the Supreme Court, the scope of the rights to liberty and security of the person under s. 7. had broadened.

In the first few cases under s. 7 of the Charter, the Court seemed to limit the rights to liberty and security of the person to freedom from physical constraint and imprisonment.⁹⁷ Civil and administrative proceedings do not usually implicate the right to liberty and security of the person in this sense⁹⁸ and so the broad "principles of fundamental justice" do not apply. A forest of authority against the general application of s. 7 to private law civil and administrative proceedings grew.⁹⁹

The prospects for any further expansion of the scope of s. 7 were bleak: after all, in an early case only half of the Court accepted that immigration decisions concerning whether a person is a convention refugee affect the person's rights to liberty and security of the person¹⁰⁰ and a little while later, even that was cast into doubt.¹⁰¹ The one glimmer of hope was *R. v. Morgentaler* in which the Court canvassed the possibility of infringements of privacy and psychological well-being associated with the statutory procedures for obtaining a therapeutic abortion but the decision could be explained as a security of the person case that would not affect a significant number of administrative tribunals.

Suddenly, in 1995, there was a marked broadening of the Court's view of the rights to liberty and security of the person. In *R. v. O'Connor*, four of nine Justices held that privacy interests are included in the right to liberty.¹⁰² Half of the Justices in *B.(R.)*

v. Children's Aid Society of Metropolitan Toronto held that these rights included the right to make decisions of fundamental personal importance.¹⁰³ Again, half of the Justices in *Godbout v. Longueil (City)* endorsed this approach.¹⁰⁴ Finally, the court unanimously endorsed this approach in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*¹⁰⁵ and opened the way to the use of the principles of fundamental justice in any administrative hearing concerning decisions of fundamental importance.

Right around the time of *Blencoe*, the Court had rendered decisions of breathtaking scope.¹⁰⁶ The facts of *Blencoe* were somewhat sympathetic. The table seemed set for expansion of the rights to liberty and security of the person under s. 7 and thus the broader applicability of the principles of fundamental justice to administrative tribunals.

Blencoe was a retrenchment. The Court confirmed that the right to liberty applied to "state compulsions or prohibitions" that affect "important and fundamental life choices".¹⁰⁷ The Court did not allow an extension of *Godbout* to allow for the application of s. 7 to "any and all decisions that individuals might make in conducting their affairs".¹⁰⁸ Further, the fact that a person was caught up in an accusatory regime potentially subject to significant remedial orders was irrelevant. Instead, only fundamental important decisions were within the protection of s. 7 - a holding of very limited impact to administrative tribunals.

As for security of the person, only state-induced stress that had a "serious and profound effect" or some effect upon "an individual interest of fundamental importance" was covered, not "the type of stress, anxiety and stigma that result from administrative or civil proceedings".¹⁰⁹ The types of matters allegedly suffered by *Blencoe* - quite extreme - were not covered and there was no interference with his ability to "make essential life choices".¹¹⁰

Blencoe has slammed the door on the application of the principles of fundamental justice - where constitutionalized procedural fairness resides - to most administrative

tribunals and civil courts. Constitutionalized procedural fairness is something potentially¹¹¹ afforded in criminal proceedings but is not generally available elsewhere.¹¹²

5. Consideration of the state interest when assessing procedural requirements

In assessing procedures under s. 7, the court must assess the broader state interest and the interests of society and balance them against the rights of the Charter claimant.¹¹³ This is quite contrary to earlier statements of the Court in substantive contexts that emphasized that the issues of state interest and rights breach should be dealt with separately, with the former being considered under s. 1.¹¹⁴ By considering the state interest under s. 7 and engaging in a simple balance of that interest against the individual's interest, rather than requiring the state's interest to be considered under the more demanding *Oakes* proportionality test under s. 1, limits on procedural rights under s. 7 are more easily justified and more likely to be upheld.

Another limiting consideration is that the principles of fundamental justice must vary according to the context in which they are invoked.¹¹⁵ This is another way of suggesting that state policies come to bear when procedures are being considered under the principles of fundamental justice.

6. Unwritten constitutional principles and procedural guarantees

The existence of unwritten constitutional principles gave rise to the possibility that procedural rights, such as the right to a hearing by an independent tribunal, might be available to administrative tribunals despite the absence of s. 7 protection. The unwritten constitutional principles had been applied to guarantee the independence of provincial courts in non-criminal jurisdiction despite the fact that they did not enjoy the protection of s. 11(d) of the Charter or ss. 96-101 of the *Constitution Act, 1867*.¹¹⁶ Could the unwritten principles be applied to administrative tribunals?

In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, the Supreme Court rejected that argument at least in the case of regulatory tribunals with a fair degree of policy content to their decisions.¹¹⁷

7. There is not always a right to a remedy

In *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*,¹¹⁸ a gay and lesbian bookstore alleged discrimination by customs officials concerning their reviewing under the *Customs Act* of materials imported into Canada. The majority of the Court¹¹⁹ found that there was discriminatory enforcement of the Act. However, it granted no remedy for this particular problem.¹²⁰ The minority¹²¹ agreed with the majority that deference was appropriate but felt that some remedy to address the discriminatory enforcement was required. In its words, the Court should not "abdicate its duty to demand that the government justify legislation limiting Charter rights".

8. Impartiality

The principles of fundamental justice include a concept of a procedurally fair hearing before an independent and impartial decision-maker¹²² but these only enshrine what was available under the common law¹²³ and apply only if there is a breach of the rights to liberty and security of the person and these have been interpreted restrictively. Absent these rights, and absent a charge under s. 11, there is no general constitutional guarantee elsewhere or under the unwritten constitutional principles that a tribunal be independent and impartial and act fairly.¹²⁴

9. Criminal law procedures

There are a number of decisions that demonstrate shyness in the area of procedural protection.

Section 643(1) of the *Criminal Code* provides that the Crown may admit evidence given at a preliminary inquiry when a witness is unavailable or unwilling to testify. The Court rejected a s. 7 Charter challenge to the section.¹²⁵

A challenge to the procedures for fingerprinting and the absence of any guidelines for the exercise of discretion to fingerprint were unanimously rejected by the Court.¹²⁶

Amendments to the *Parole Act* in 1986 that were said to be procedurally unfair were upheld.¹²⁷

Concerns regarding the fairness of procedures followed in extradition proceedings have routinely been rejected.¹²⁸ For example, in one case, the Court unanimously rejected arguments that greater procedural fairness should be afforded to an individual facing extradition.¹²⁹

In *R. v. Lyons*, the Court rejected arguments under s. 7 of the Charter that a dangerous offender application under the *Criminal Code* (which results in a sentence of imprisonment to a penitentiary for an indeterminate period) be determined on the basis of trial by jury.¹³⁰ Further, the Court rejected an argument that s. 688 of the *Criminal Code*, in requiring proof that the offender constitutes a "threat" to the life, safety or physical or mental well-being of other persons, or that there is a "likelihood" of the offender causing injury, pain or other evil to other persons through a failure in the future to control his or her sexual impulses, is fundamentally unfair because it lowers the standard of proof required of the Crown below proof beyond a reasonable doubt.

In *Lyons*, the Court noted that the application procedure, set out in Part XXI of the *Criminal Code*, provided considerable protection and stated that s. 7 of the Charter "s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined".¹³¹ This particular comment has cast a long shadow: it been repeatedly applied in the Court's jurisprudence concerning procedural rights under the Charter.¹³² The Court noted that in a later hearing to review the indeterminate sentence, considerations of fundamental justice might require "enhanced procedural protections at such a review". However, the court specifically suggested that a recommendation by a special report¹³³ that a review be conducted every three years is not constitutionally required.¹³⁴

In *R. v. Rose*, a challenge to ss. 651(3) and ss. 651(4) of the *Criminal Code* concerning the order of closing addresses to juries narrowly failed in the Supreme Court.¹³⁵ Subsection 651(3) of the *Criminal Code* requires counsel for the accused to make his or her closing address to the jury first if witnesses are called and examined by the defence. Subsection 651(4) of the *Criminal Code* compels this same order of address where two or more accused are tried jointly and any one of them calls and examines witnesses. By a narrow 5-4 margin, the Supreme Court held that these provisions did not infringe the right of the accused to make full answer and defence under s. 7 of the *Charter* or the right to a fair trial under s. 11(d) of the *Charter*.

Rose is important because it defines, and in my view, substantially devalues the accused's right to make full answer and defence under s. 7. The majority held that the right does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence. Rather, the right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case. The central rationale of the majority is that the order of jury addresses does not significantly affect the knowledge that the accused will have, at the time of the defence address, regarding the Crown's theory of the case and interpretation of the evidence. The majority seems to overlook the value of the "last word", an advantage that should belong to the accused who enjoys the benefit of the presumption of innocence in s.

11(d) of the *Charter*. As well, there is a powerful argument that the sections unfairly require the accused to choose between two constitutionally protected rights, namely, the right to testify and to call and examine witnesses in one's defence, and the right to make full answer and defence to the Crown's jury address.¹³⁶

Cross-examination has been recognized as a principle of fundamental justice under s. 7 of the *Charter* that is critical to the fairness of the accused's trial.¹³⁷ As a result, it has been held that the right to cross-examination should be interpreted in the "broad and generous manner befitting its constitutional status".¹³⁸ But despite its importance, there are limitations on cross-examination and many of these have been upheld under the *Charter*. For example, cross-examination must conform to the basic principle that all evidence must be relevant in order to be admissible and the probative value of evidence must be weighed against its prejudicial effect.¹³⁹ It has been said that contemporaneous cross-examination of a witness is not necessary to guarantee a fair trial.¹⁴⁰ Another limitation is that it cannot be used to elicit the prior sexual history of a complainant for the purpose of impugning her credibility¹⁴¹ and in this regard, the Supreme Court upheld the prohibition in s. 277 of the *Criminal Code* of cross-examination on prior sexual history for the purpose of impugning credibility of the complainant.¹⁴² On the other hand, s. 276 was struck down since it provided a blanket prohibition on cross-examination on previous sexual history of the complainant in a sexual assault case regardless of the purpose for which that evidence was being adduced and such evidence could not be said to be of such trifling weight that its prejudicial effect would always outweigh its probative value.¹⁴³

Closely related to the right of cross-examination is the right to confront a witness in person. This right has not been upheld in the case of child witnesses.¹⁴⁴

The Crown cross-examining accused persons under s. 12(1) of the *Canada Evidence Act* about earlier convictions for the purpose of assessing credibility is not contrary to s. 7 of the *Charter*.¹⁴⁵

The right to "trial fairness" in s. 11(d) did not permit an accused to impeach earlier incidents which led to convictions even though they were ruled admissible as "similar facts". The accused had, apparently with some pressure, pled guilty to those incidents and trial fairness did not outweigh the significant societal interest in upholding the finality of earlier criminal determinations.¹⁴⁶

In *R. v. Stinchcombe*¹⁴⁷ the Supreme Court constitutionalized the accused's right to obtain pre-trial disclosure of evidence that may be relevant. This may be seen as procedurally bold. However, *Stinchcombe* was largely confirmatory of existing Crown roles¹⁴⁸ and obligations¹⁴⁹ and later cases have not been fully protective of the accused's right to make full answer and defence¹⁵⁰ and disclosure of relevant evidence from third parties.¹⁵¹

Indeed, the area of pre-trial disclosure was the venue for one of the Court's most notable acts of deference to Parliament's will. In *R. v. O'Connor*, the Supreme Court set out a test concerning when an accused should be granted disclosure of counseling and other records in the hands of third parties in sexual assault cases.¹⁵² Parliament followed with legislative amendments which enacted the scheme envisaged by the dissenters in *O'Connor*.¹⁵³ The Supreme Court, invoking the language of "dialogue", responded by accepting Parliament's will even though it was only supported by a minority in *O'Connor*.¹⁵⁴ This legislation has been termed "in your face" legislation designed to overcome an unpopular Charter ruling.¹⁵⁵

Finally, in criminal proceedings, when there is procedural conduct by the Crown that is substandard, the Court may well recognize it as being substandard and may term it a breach of s. 7 but will seldom vindicate it through the granting of a stay of proceedings. The threshold for that remedy - the remedy that is often the only one in the circumstances that could fully vindicate the procedural wrong done - is very high indeed.¹⁵⁶

10. Immigration procedures

Immigration is an area of considerable shyness. For example, in *Canada (Minister of Employment and Immigration) v. Chiarelli*¹⁵⁷ the Charter complainant attacked the general scheme in the *Immigration Act* for the deportation of permanent residents who had been convicted of certain offences. Under the scheme a person was deported without the decision-maker having to consider any information particular to the individual. This was upheld on the basis that the content of the principles of fundamental justice must be considered in light of the principles and policies underlying immigration law, the foremost of which is that the individual does not have an unqualified right to enter or remain in the country.

11. Disclosure of evidence in administrative proceedings

The need for government confidentiality has been affirmed in many cases and has been invoked as a reason to deny disclosure in the administrative context.¹⁵⁸ In *Chiarelli*, although the Charter complainant faced serious consequences (deportation), the Court held that the rather limited documentation disclosed to him and the general summary from an *in camera* proceeding did not violate the principles of fundamental justice. Failure to disclose evidence will not be a problem if, after the fact, the court considers it "an omission of much significance".¹⁵⁹

Those trying to assert Charter claims in administrative law and constitutional law can face an enormous obstacle. Although it is often relevant to legal tests under the Charter to determine the "predominant purpose" of a body¹⁶⁰ or to determine whether there is bad faith by the body,¹⁶¹ the Court has limited the availability of subpoenas that would shed light on those issues¹⁶² and has upheld the ability of government to suppress relevant evidence under s. 39 of the *Canada Evidence Act*.¹⁶³ The problem is that requirements on administrative bodies to pass their records cannot be used for discovery purposes and discovery is not otherwise available against them.

12. Provision of advance notice

In a dangerous offender application under the *Criminal Code*, the consequence of which is indeterminate detention of the respondent to the application, the Crown need not give advance notice that it intends to make such an application.¹⁶⁴ This has been applied in other contexts.¹⁶⁵ In regimes that do provide for notice, there is no requirement that notice be supplied at the earliest possible time – the only requirement is reasonable notice of hearing in which rights might be affected and "reasonable" is a flexible criterion that permits adjustments to different situations.¹⁶⁶

13. Hearing rights

The complete absence of a hearing before an important determination will violate the principles of fundamental justice.¹⁶⁷ Note, however, that the general rule remains that a person is entitled to a hearing, not necessarily the best hearing that can be imagined. The principles of fundamental justice, however, merely confirm administrative law understandings; they do not extend them in any way.¹⁶⁸ In this regard, the principles of fundamental justice insofar as procedures are concerned, unlike almost every other area of the Charter including the principles of fundamental justice in substantive matters, is merely confirmatory.

The recent case of *Suresh v. Canada (Minister of Citizenship and Immigration)* is very shy concerning the issue of hearing rights.¹⁶⁹ The case in part concerned the procedures that s. 7 required the Minister to follow in determining whether a refugee should be deported in circumstances where the refugee believes that he or she will be tortured or killed in the receiving country. The Court held that s. 7 of the *Charter* does not require the Minister to conduct a full oral hearing or judicial process. A refugee facing deportation to torture must be informed of the case to be met and this is to be

accomplished by provision of written material to the refugee subject to privilege and other valid reasons for reduced disclosure. The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister's information. In those submissions, the refugee is entitled to present evidence and make submissions.

I find *Suresh* to be a remarkably "shy" decision in the area of procedural rights and s. 7. The interests at stake for the refugee are about as high as they can be - freedom from torture or death - and there is no doubt that part of the assessment is the credibility of the particular refugee. To hold that a written hearing is a satisfactory way of determining such important issues that may have matters of credibility bound up with them is astonishing!

III. Assessment

As I mentioned at the outset of this paper, it is certainly possible for one to find cases that seem to conflict with the central theme of this article. For example, some aspects of *R. v. Morgentaler* are procedurally bold. However, these cases are rare and arguments can be mounted explaining them away.¹⁷⁰ The Court seems to be substantively bold and procedurally shy.

I find this strange. In substantive matters, the Court is examining the substance of government legislation, assessing its decisions and, if necessary, striking them down or rewriting them. This opens it up to charges of interference and one would expect it to tread lightly. On the other hand, in procedural matters the Court is reviewing matters of process that are more firmly rooted in its experience and expertise and one would expect it to be confident and aggressive.¹⁷¹ Denials of procedural fairness by administrative tribunals, for example, are frequently met with immediate and bold responses by courts.

Although there is a good case to be made that the Court should be substantively shy and procedurally bold, it would seem that the reverse is true – the Court is frequently substantively bold and procedurally shy.

For reasons unknown to me, the Court seems to have reserved the purposive approach under the Charter to the definition of substantive rights. Had it applied the purposive approach to the definition of procedural rights, it would have understood that fair process in decision-making is vitally important - it is not a subject-matter for minimal standards and refusal to provide the higher standards. The highest praise that a judicial or administrative process can receive is when the losing party in a ruling says, "I'm upset that I lost, I disagree with the decision, but at least I was given the fullest opportunity to make the best case I could."

Procedural fairness, when afforded, enhances the repute of the administration of justice, which is a Charter value specifically mentioned in s. 24(2) of the Charter. It deserves a large and liberal, purposive interpretation just like all of the other important interests under the Charter.

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¹ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), at 9 and ix.

² F.L. Morton and Rainer Knopff, *The Court Party* (2000), at 13.

³ *Ibid.*, at 22-23. In this regard, I do agree with Roach's comments (*e.g.*, at 95) that critics of "judicial activism" tend to be overly simplistic.

⁴ *The Supreme Court on Trial*, *supra*, n. 1, at 140, 154, 172-183

⁵ I define "substantive" cases as those in which the Court is reviewing the substance of government legislation involving matters other than the fair treatment of individuals caught up in a judicial or administrative process. Frequently, these cases consider prohibitions against conduct or requirements that some conduct be performed.

⁶ I define "procedural" cases as those involving the review of judicial or administrative processes and how people are treated within those processes, including rights to cross-examine witnesses and obtain disclosure.

⁷ *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 496-497: "Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy."

⁸ *Edwards v. Attorney General for Canada*, [1930] A.C. 124 at p. 136 (P.C.).

⁹ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155-156; *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, n. 7, at 509.

¹⁰ *Hunter v. Southam Inc.*, *supra*, n. 9, at 155.

¹¹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 134.

¹² *Hunter v. Southam Inc.*, *supra*, n. 9, at 155.

¹³ *R. v. Therens*, [1985] 1 S.C.R. 613 at 638; *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, n. 7, at 509; *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at 124; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Oakes*, [1986] 1 S.C.R. 103.

¹⁴ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

¹⁵ *R. v. Oakes*, *supra*, n. 13, at 136.

¹⁶ *Ibid.*, at 136.

¹⁷ R. Bork, *Coercing Virtue* (2002).

¹⁸ *Infra*, text to n. 95, *et seq.*

¹⁹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

²⁰ *Ref. re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3.

²¹ See, e.g., Jamie Cameron, "The Written Word and the Constitution's 'Vital Unstated Assumptions'" in *Essays in Honour of Gérard-A. Beaudoin*.

²² *R. v. Big M Drug Mart Ltd.*, *supra*, n. 14.

²³ *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Peterborough (City) v. Ramsden*, [1993] 2 S.C.R. 1084.

²⁴ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

²⁵ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. See also the recent case of *Auton v. British Columbia (Attorney General)*, 2002 BCCA 538 (October 9, 2002).

²⁶ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46

²⁷ *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 923. The only recognized exception is violence or threats of violence.

²⁸ *Ibid.*

²⁹ *Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation)*, [1990] 1 S.C.R. 425.

³⁰ Section 7 provides as follows: "Everyone has the right to life, liberty and security of the person and right not to be deprived thereof except in accordance with the principles of fundamental justice." If the normal rules of statutory interpretation were applied, one would be surprised that a general, vague section such as this could be used to supplement the express, detailed wording of ss. 11(c) of 13 of the *Charter*. However, the Court resorted to a "purposive interpretation" of s. 7 and found residual protection of these rights in s. 7: see *Thomson Newspapers v. Canada (Director of Research and Investigation)*, *supra*, n. 29; *R. v. Hebert*, [1990] 2 S.C.R. 151.

³¹ *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.

³² *R. v. Hebert*, *supra*, n. 30; *R. v. Whittle*, [1994] 2 S.C.R. 914. Recently, the Supreme Court held that the common law confessions rule can offer protections beyond those guaranteed by the *Charter* – the scope of protection offered by the two are not coextensive: *R. v. Oickle*, [2000] 2 S.C.R. 3.

³³ *R. v. Hebert*, *supra*, n. 30, at 177.

³⁴ *Ibid.*, at 178, citing *R. v. Wray*, [1971] S.C.R. 272 and *Rothman v. The Queen*, [1981] 1 S.C.R. 640.

³⁵ *R. v. Hebert*, *supra*, n. 30, at 173; *R. v. Calder*, [1996] 1 S.C.R. 660, para. 27; *R. v. Hodgson*, [1998] 2 S.C.R. 449 at paras. 17, 23, 62, 65; *R. v. White*, [1999] 2 S.C.R. 417, at para. 43.

³⁶ *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555 at 577: "Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution... This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a "case to

meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegation against him or her). See also *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451 at 469 *per* Lamer C.J. and at 486 and 489 *per* Iacobucci J.; *R. v. Jones*, [1994] 2 S.C.R. 229 at 249.

³⁷ *R. v. White*, *supra*, n. 35, at para. 44.

³⁸ *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 *per* Dickson C.J.C.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1141 *per* Dickson C.J.C.

³⁹ *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, n. 7; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Logan*, [1990] 2 S.C.R. 731. There are many other examples.

⁴⁰ *R. v. Heywood*, [1994] 3 S.C.R. 761.

⁴¹ *R. v. Morgentaler*, *supra*, n. 38, at 72 *per* Dickson C.J.C.

⁴² *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Prosper*, [1994] 3 S.C.R. 236 and *R. v. Bartle*, [1994] 3 S.C.R. 173.

⁴³ *R. v. Prosper*, *supra*, n. 42; *R. v. Matheson*, [1994] 3 S.C.R. 328.

⁴⁴ *New Brunswick (Minister of Health and Community Services) v. G.(J)*, *supra*, n. 26.

⁴⁵ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

⁴⁶ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

⁴⁷ See, e.g. *R. v. Turpin*, [1989] 1 S.C.R. 1296 and *R. v. S.(S.)*, [1990] 2 S.C.R. 254. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, the majority of the Court recognized that customs officials were following procedures that had discriminatory and unfair effect, but no relief was given.

⁴⁸ *R. v. Marshall*, [1999] 3 S.C.R. 456.

⁴⁹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

⁵⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075

⁵¹ *R. v. Butler*, [1992] 1 S.C.R. 452.

⁵² *R. v. Sharpe*, [2001] 1 S.C.R. 45.

⁵³ *R. v. Gamble*, [1988] 2 S.C.R. 595 at 636-646; see also *R. v. Mills*, [1986] 1 S.C.R. 863 per Lamer J.

⁵⁴ *Schachter v. Canada*, [1992] 2 S.C.R. 679

⁵⁵ See, e.g., *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

⁵⁶ *R. v. Wray*, *supra*, n. 34.

⁵⁷ [1991] 2 S.C.R. 577 at 610-611.

⁵⁸ *R. v. Corbett*, [1988] 1 S.C.R. 670.

⁵⁹ Special Joint Committee on the Constitution of Canada, *Proceedings*, 32nd Parl. sees. 1 (1980-1981) No. 7 at 99-100 (testimony of E. Ewaschuk).

⁶⁰ David M. Paciocco compellingly argues that the Supreme Court effectively repealed s. 24(2) and developed its own exclusionary rule: see "The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule" (1990), 32 *Crim. L.Q.* 326.

⁶¹ *R. v. Collins*, [1987] 1 S.C.R. 265.

⁶² *R. v. Collins*, *supra*, n. 61, at p. 287: "the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination". The notion of self-incrimination is very broad, much broader than statements, and extends to the production of bodily samples. See also *R. v. Stillman*, [1997] 1 S.C.R. 607.

⁶³ Cory, P. *General Principles of Charter Exclusion*, National Criminal Law Program, Halifax, N.S. July 1997, Vol. 2, cited and approved by the Ontario Court of Appeal in *R. v. Lewis* (1998), 122 C.C.C. (3d) 481 at 495 (Ont. C.A.). In *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 80, Cory J. stated that "[e]vidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.

⁶⁴ See, e.g., *R. v. A.J.R.* (1994), 94 C.C.C. (3d) 168 at 181 (Ont. C.A.); *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 29 ("Once impugned evidence has been found to come within the trial fairness rationale, exclusion is virtually certain to follow.").

⁶⁵ *R. v. Law*, [2002] 1 S.C.R. 227, at para. 34: "The concept of trial fairness is ultimately concerned with the continued effects of unfair self-incrimination on the accused..."

⁶⁶ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *R. v. Mills*, [1999] 3 S.C.R. 668; *United States of America v.*

Kwok, [2001] 1 S.C.R. 532, at para. 82; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, *per* Arbour J. at para. 344.

⁶⁷ *R. v. Strachan*, [1988] 2 S.C.R. 980.

⁶⁸ *R. v. Goldhart*, [1996] 2 S.C.R. 463. Even with the absence of a causal connection, a court faced with a flagrant and intrusive violation of s. 8 of the *Charter* that has close temporal connection to the finding of the evidence must give "adequate recognition to the intrinsic harm that is caused by a violation of a *Charter* right or freedom" by finding sufficient connection to allow s. 24(2) to be applied: *R. v. Flintoff*, [1998] O.J. No. 2337, at para. 30 (C.A.).

⁶⁹ *R. v. Strachan*, *supra*, n. 67, at 1005.

⁷⁰ *R. v. Flintoff*, *supra*, n. 68, at para. 30 (C.A.).

⁷¹ See also *R. v. Grant*, [1993] 3 S.C.R. 223 where a warrantless perimeter search that contravened s. 8 of the *Charter* was relied upon to procure a search warrant, a warrant that was considered to be valid. However, the evidence found under the search warrant still could have been excluded under s. 24(2). There was a "sufficient temporal connection" (at 255) between the warrantless perimeter search and the evidence obtained. The evidence was nevertheless admissible because it was real evidence and it was obtained in good faith. Another example is *R. v. Burlingham*, *supra*, n. 64, where the Court considered whether it should exclude an accused's statement to his girlfriend about how he had led police to a murder weapon. The Court held that there was a sufficient temporal connection between the accused's statements to police that were obtained contrary to s. 10(b) of the *Charter*.

⁷² *R. v. O'Connor*, [1995] 4 S.C.R. 411.

⁷³ *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841; *R. v. Terry*, [1996] 2 S.C.R. 207; *R. v. Harrer*, [1995] 3 S.C.R. 562 *per* La Forest J. p. 579 "The effect of s. 11(d), then, is to transform this high duty of the judge at common law to a constitutional imperative. As I noted in *Thomson Newspapers*, at p. 563, judges must, as guardians of the Constitution, exercise this discretion where necessary to give effect to the *Charter*'s guarantee of a fair trial. In a word, there is no need to resort to s. 24(2), or s. 24(1) for that matter. In such circumstances, the evidence is excluded to conform to the constitutional mandate guaranteeing a fair trial, i.e., to prevent a trial from being unfair at the outset." See also *R. v. Barouche* (1996), 28 O.R. (3d) 737 (C.A.), appeal to the Supreme Court of Canada dismissed (1997) 32 O.R. (3d) 320.

⁷⁴ *R. v. White*, *supra*, n. 35.

⁷⁵ See *R. v. Therens*, *supra*, n. 13, at 648 where Le Dain J., writing for a majority of the Court held that after the court finds that the administration of justice would not be cast into disrepute by the admission of the evidence, the court had no discretion to exclude the

evidence, even if the court felt it to be "appropriate and just" under s. 24(1) of the *Charter*.

⁷⁶ *Vriend v. Alberta*, *supra*, n. 11, *per* Cory and Iacobucci JJ.

⁷⁷ This was the approach of Major J. in *Vriend*.

⁷⁸ *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, *supra*, n. 13.

⁷⁹ Only frivolous arguments, *i.e.*, those liable to be struck out on a pleadings motion, will fail to meet the first branch of the test: *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Injury to a constitutional right constitutes irreparable harm for the purposes of the test: *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339.

⁸⁰ The public interest in the continued use of the section or the administrative tribunal's statutorily authorized exercise of jurisdiction is to be given large weight under this branch of the test: *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, *supra*, n. 13; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, *supra*, n. 80. However, the weight of the public interest element can be effectively minimized by a Charter challenger, as explained *infra*.

⁸¹ *R. v. Salituro*, [1991] 3 S.C.R. 654; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at 184; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at 876; *R. v. Golden*, [2001] 3 S.C.R. 679, at para. 86; *Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at paras. 18-19.

⁸² *R. v. Swain*, [1991] 1 S.C.R. 933, at 983.

⁸³ *Vriend v. Alberta*, *supra*, n. 11.

⁸⁴ *R. v. Big M Drug Mart Ltd.*, *supra*, n. 22; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.

⁸⁵ *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

⁸⁶ In *Vriend v. Alberta*, *supra*, n. 11, the Court granted standing to Gala-Gay and Lesbian Awareness Society of Edmonton, the Gay and Lesbian Community Centre of Edmonton Society and Dignity Canada Dignité for Gay Catholics and Supporters even though the issue could have been brought to court by a directly affected person - in fact, in that case, the directly affected person, *Vriend*, was already a party!

⁸⁷ See, for example, *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, *supra*, n. 26; *M. v. H.*, [1999] 2 S.C.R. 3.

⁸⁸ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

⁸⁹ See, e.g., *Wittman v. Emmott* (1991), 77 D.L.R. (4th) 77 (B.C.C.A.).

⁹⁰ See, e.g., *R. v. Wigglesworth*, *supra*, n. 88.

⁹¹ *R. v. Shubley*, [1990] 1 S.C.R. 3.

⁹² *Ref. re Motor Vehicle Act (B.C.)*, *supra*, n. 7.

⁹³ *Lyons*, [1987] 2 S.C.R. 309, at 362.

⁹⁴ *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Beare*, [1988] 2 S.C.R. 387 at 412; *Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation)*, *supra*, n. 29 *per* La Forest J.; *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Mills*, *supra*, n. 66, *per* McLachlin and Iacobucci JJ.

⁹⁵ [2000] 2 S.C.R. 307.

⁹⁶ *R. v. C.I.P. Inc.*, [1992] 1 S.C.R. 843.

⁹⁷ See, e.g., *Ref. re Motor Vehicle Act (B.C.)*, *supra*, n. 7.

⁹⁸ The only exception in civil and administrative law contexts is the issuance of subpoenas that are punishable through imprisonment levied as a result of a contempt proceeding. See *Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation)*, *supra*, n. 29; *British Columbia Securities Commission v. Branch*, *supra*, n. 31.

⁹⁹ *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (the rights to liberty and security of the person do not include corporate commercial economic interests); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, n. 38; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *Kopyto v. Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259 (Ont. C.A.), *Biscotti v. Ontario Securities Commission* (1991), 76 D.L.R. (4th) 762 (Ont. C.A.), *Bennett v. British Columbia (Securities Commission)* (1991), 82 D.L.R. 129 (B.C.C.A.) and *B.C. Teachers' Federation v. School District No. 39 (Vancouver)*, 2003 BCCA 100 (B.C.C.A.) (the rights to liberty and security of the person do not include the right to practice a profession or to pursue a livelihood); *Canadian Association of Regulated Importers v. Canada*, [1992] 2 F.C. 130 (C.A.).

¹⁰⁰ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

¹⁰¹ *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

¹⁰² [1995] 4 S.C.R. 411, *per* L'Heureux-Dubé J. at para. 113.

¹⁰³ *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, *supra*, n. 94, *per* La Forest J. writing for three of six Justices.

¹⁰⁴ [1997] 3 S.C.R. 844, at para. 66 *per* La Forest J., writing for 3 of 6 justices (the right to liberty protects "those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence)

¹⁰⁵ [1999] 3 S.C.R. 46. See also *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. 925 (liberty to refuse state-imposed addiction treatment); *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, *supra*, n. 26 (parental rights in the custody context).

¹⁰⁶ *Judges Reference*, *supra*, n. 20; *Secession Reference*, *supra*, n. 19.

¹⁰⁷ *Blencoe*, *supra*, n. 95, at 340.

¹⁰⁸ *Blencoe*, *supra*, n. 95, at 341.

¹⁰⁹ *Blencoe*, *supra*, n. 95, at 355-356. Bastarache J. later (at 365) virtually excludes the principles of fundamental justice (and thus constitutionalized procedural fairness) from having any impact in most administrative law contexts when he states that "[i]f the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted" and in that same paragraph he seemed to identify matters such as "regulation of a business, profession or other activity" and a "civil suit involving fraud, defamation or the tort of sexual battery" as situations of acceptable stress and stigma.

¹¹⁰ *Blencoe*, *supra*, n. 95, at 358.

¹¹¹ I say "potentially" because there are many, many examples of shyness on the part of the Court in applying aggressive notions of procedural fairness in criminal contexts.

¹¹² In *Gosselin v. Quebec (Attorney General)*, *supra*, n. 66, McLachlin C.J.C., writing for a majority of the Supreme Court, observed (at paras. 78-79) without deciding the issue that the simple presence of adjudicative proceedings "might be sufficient" for s. 7 to apply. Deprivations of liberty and security of the person "that occur as a result of an individual's interaction with the justice system and its administration", meaning "the state's conduct in the course of enforcing and securing compliance with the law", are protected by s. 7 (para. 77). McLachlin J. did not decide the point but rather left the issue of when s. 7 applies to matters concerning the administration of justice to be developed "incrementally" (para. 79). This incremental development, however, is unlikely to allow for the full scale importation of the principles of fundamental justice into civil and criminal proceedings - the Court will not be inclined to overrule *Blencoe* and the other cases concerning the rights to liberty and security of the person, cited *supra*.

¹¹³ *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 151-152; *Re B.C. Motor Vehicle Act*, *supra*, n. 7, at pp. 502-3, *per* Lamer J.; *Singh v. Minister of Employment and Immigration*, *supra*, n. 100, at p. 212, *per* Wilson J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882, *per* Iacobucci J.); *Canada (Minister of Employment and Immigration) v. Chiarelli*, *supra*, n. 101.

¹¹⁴ See, e.g., *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 489.

¹¹⁵ *R. v. Lyons*, *supra*, n. 93.

¹¹⁶ *Judges Reference*, *supra*, n. 20.

¹¹⁷ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781. Currently before the Supreme Court and under reserve is *Bell Canada v. Communications, Energy and Paperworkers Union of Canada, et al.* (28743) in which Bell argued that the unwritten principle of adjudicative independence developed in the *Judges Reference* applies to "court substitute tribunals" such as the Canadian Human Rights Tribunal.

¹¹⁸ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, *supra*, n. 47.

¹¹⁹ *Per* Binnie J., writing for six of nine Justices on the Court.

¹²⁰ The majority did rule a statutory reverse onus clause unconstitutional.

¹²¹ *Per* Iacobucci J., writing for three of nine Justices on the Court.

¹²² *Pearlman v. Manitoba Law Society Judicial Committee*, *supra*, n. 113.

¹²³ In *Pearlman*, the Court adopted the standards applied under administrative law cases outside the Charter. An attempt to use the requirement of independence and impartiality to attack the Minister's exercise of discretion under s. 25 of the *Extradition Act*, R.S.C. 1985, c. E-23 failed in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631.

¹²⁴ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, *supra*, n. 117.

¹²⁵ *R. v. Potvin*, [1989] 1 S.C.R. 525 at 542: "In the absence of circumstances which negated or minimized the accused's opportunity to cross-examine the witness when the previous testimony was given", the procedure is not unfair. In the words of Vancise J.A. in *R. v. Rodgers* (1987), 35 C.C.C. (3d) 50 (Sask. C.A.), at pp. 60-61, "[t]his is not a mechanism for the introduction of evidence which is not admissible, but rather a system for the use of evidence which would otherwise be lost". See also *R. v. Davidson* (1988), 42 C.C.C. (3d) 289 at 298-299 (Ont. C.A.).

¹²⁶ *R. v. Beare*, *supra*, n. 94.

¹²⁷ *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 153-154.

¹²⁸ See, e.g., *Canada v. Schmidt*, [1987] 1 S.C.R. 500, in which the Court emphasized that extradition involves decisions by the executive where the executive is likely to be far better informed than the Courts and where courts must be circumspect because of the international relations aspect. See also *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631.

¹²⁹ *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631.

¹³⁰ *R. v. Lyons*, *supra*, n. 93.

¹³¹ *Ibid.*, at 362.

¹³² *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, *supra*, n. 94, at 380 ("it does not guarantee the most equitable process of all; it dictates a threshold below which state intervention will not be tolerated"); *R. v. Beare*, *supra*, n. 94 at 412; *Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation)*, *supra*, n. 29 *per* La Forest J.; *R. v. L.(D.O.)*, *supra*, n. 94; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Mills*, *supra*, n. 66, *per* McLachlin and Iacobucci JJ.

¹³³ *Report of the Canadian Committee on Corrections* (the Ouimet Report, 1969).

¹³⁴ *R. v. Lyons*, *supra*, n. 93, at 363.

¹³⁵ *R. v. Rose*, [1998] 3 S.C.R. 262.

¹³⁶ See the dissenting judgment of Binnie J., writing for four of nine members of the Court in *R. v. Rose*, *supra*, n. 135.

¹³⁷ *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577.

¹³⁸ *R. v. Potvin*, *supra*, n. 125, at p. 544; *R. v. Osolin*, [1993] 4 S.C.R. 595 at 665.

¹³⁹ *R. v. Osolin*, *supra*, n. 138, at 665.

¹⁴⁰ *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. Cook*, [1997] 1 S.C.R. 1113.

¹⁴¹ *R. v. Osolin*, *supra*, n. 138, at 666.

¹⁴² *R. v. Seaboyer*; *R. v. Gayme*, *supra*, n. 137.

¹⁴³ *Ibid.* The rules established in *Seaboyer* were summarized by Cory J. in *Osolin*, *supra*, n. 138, at 671 as follows: "A complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice

which might flow from it. Cross-examination for the purposes of showing consent or impugning credibility which relies upon 'rape myths' will always be more prejudicial than probative. Such evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility. Cross-examination which has as its aim to elicit such evidence should not be permitted." Cory J. emphasized at 671 that "[i]n each case the trial judge must carefully balance the fundamentally important right of the accused to a fair trial against the need for reasonable protection of a complainant, particularly where the purpose of the cross-examination may be directed to 'rape myths'."

¹⁴⁴ *R. v. L.(D.O.)*, *supra*, n. 94 (videotaping children's testimony); *R. v. Levogiannis*, *supra*, n. 140 (children testifying behind a screen).

¹⁴⁵ *R. v. Corbett*, *supra*, n. 58. See also *R. v. Underwood*, [1998] 1 S.C.R. 77.

¹⁴⁶ *R. v. Heyden*, [1998] O.J. No. 1391 (Gen. Div.)

¹⁴⁷ [1991] 3 S.C.R. 326.

¹⁴⁸ *Boucher v. The Queen*, [1955] S.C.R. 16 at 23-24.

¹⁴⁹ Canada. Law Reform Commission. Report 22. *Disclosure by the Prosecution*. Ottawa: Minister of Supply and Services Canada, 1984. *Stinchcombe*, *supra*, n. 147 at 339 (failure to disclose is a breach of legal ethics)

¹⁵⁰ If the state has failed to preserve evidence which is necessary to make full answer and defence and which would otherwise have to be disclosed, it is difficult for the accused to obtain a remedy – the high "clearest of cases" test for abuse of process must be established: *R. v. Carosella*, *supra*, n. 150; *R. v. La*, [1997] 2 S.C.R. 680. Once the Crown alleges that it has disclosed everything in accordance with *Stinchcombe*, the accused bears a burden of proving that there is in existence further material which is potentially relevant: *R. v. Chaplin*, [1995] 1 S.C.R. 727. Informers' privilege is extremely important and will be respected: *R. v. Leipert*, [1997] 1 S.C.R. 281. Further, the accused must prove on the balance of probabilities that evidence in the hands of third parties is necessary to make full answer and defence: *R. v. O'Connor*, *supra*, n. 72.

¹⁵¹ *R. v. O'Connor*, *supra*, n. 72.

¹⁵² The majority's attempt was to balance the accused's right to make full answer and defence, which is part of the fair trial right under ss. 7 and 11(d) of the *Charter*, and the privacy rights of complainants in sexual assault cases under ss. 7 and 8 of the *Charter*. In dissent, L'Heureux-Dubé J., writing for four justices, would have formulated a test that was more favourable to complainants and that would have balanced their s. 15 rights.

¹⁵³ *Criminal Code*, R.S.C., 1985, c. C-46, ss. 278.1 to 278.91.

¹⁵⁴ *R. v. Mills*, *supra*, n. 66. The Supreme Court upheld the use of a form of s. 15 Charter rights as matters to be balanced against the rights of accused persons to make full answer and defence. (I say "a form" of s. 15 rights, as the Court balanced accused persons' rights to make full answer and defence against a general concept of "equality" rather than balancing it against what is actually protected under s. 15 under the test in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.)

¹⁵⁵ D. Stuart, *Charter Justice in Canadian Criminal Law* (Toronto, 3d ed.: Carswell, 2001) at p. 8.

¹⁵⁶ *R. v. Carosella*, *supra*, n. 150; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. O'Connor*, *supra*, n. 72; *R. v. Regan*, [2002] 1 S.C.R. 297.

¹⁵⁷ *Canada (Minister of Employment and Immigration) v. Chiarelli*, *supra*, n. 101.

¹⁵⁸ See, e.g. *Canada (Minister of Employment and Immigration) v. Chiarelli*, *supra*, n. 101 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

¹⁵⁹ *B.(R.)*, *supra*, n. 94, at 379. This is a high threshold.

¹⁶⁰ E.g., *Branch v. British Columbia (Securities Commission)*, *supra*, n. 31; *R. v. Jarvis*, 2002 SCC 73.

¹⁶¹ *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405 (Charter damages claims).

¹⁶² *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3.

¹⁶³ *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (challenge under s. 96 of the Constitution Act, 1867).

¹⁶⁴ *R. v. Lyons*, *supra*, n. 93. In a strong dissent, Wilson J. held that it is a principle of fundamental justice under s. 7 of the Charter that an accused know the full extent of his jeopardy.

¹⁶⁵ *R. v. Albright*, [1987] 2 S.C.R. 383 (no requirement on the Crown to give advance notice that it intends to prove previous convictions by producing a "certificate of driving record"); *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 (no requirement to give advance notice of an injunction on the facts of the case).

¹⁶⁶ *B.(R.)*, *supra*, n. 94, at 377

¹⁶⁷ *R. v. Swain*, *supra*, n. 82.

¹⁶⁸ *Pearlman v. Manitoba Law Society Judicial Committee*, *supra*, n. 113.

¹⁶⁹ *Suresh*, *supra*, n. 158.

¹⁷⁰ For example, there was a very strong substantive content to the holdings in *Morgentaler*, *supra*, n. 38 and these alone would have resulted in the striking down of s. 251 of the *Criminal Code*. Dickson C.J.C., for example, held that it is a substantive principle of fundamental justice that Parliament cannot prescribe a defence that is purely illusory.

¹⁷¹ The Court itself has recognized this in *R. v. Swain*, *supra*, n. 82, when it recognized that judge-made rules are subject to strict scrutiny under s. 1 because considerations of deference to legislatures do not apply.