Introduction
Marc Rosenberg

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Introduction

The Hon. Justice Marc Rosenberg

When Parliament decided to include a charter of rights in the newly repatriated Constitution, few people associated with the criminal justice system expected a dramatic change in the practice and administration of the criminal law. There were many signs that the judiciary and, indeed, the public would be reluctant to embrace a significant expansion of individual rights, especially rights for accused persons. There was the example of the Supreme Court’s appalling treatment of the Canadian Bill of Rights.1 And, there was the perception that a robust interpretation of the American Bill of Rights had led to increasing crime and general lawlessness in the United States, with few, if any, advances in security and rights protection for the law-abiding.

As the essays in this remarkable volume amply demonstrate, the Canadian Charter of Rights and Freedoms2 has indeed had a profound effect on the fabric of the law and especially on the development and application of the criminal law. Even when the Charter is not directly engaged, Charter values have infused the interpretation and application of the criminal law. Twenty-five years after proclamation of the Charter much has changed in the practice of the criminal law. The Charter experience is entirely different from the experience under the Canadian Bill of Rights. Granting constitutional protection to individual rights and especially legal rights has made a significant difference in the everyday work of law enforcement and of the prosecution and defence of criminal cases.

Of course, once the Supreme Court of Canada demonstrated that it was willing to engage in a robust interpretation of the Charter in cases such as Therens3, Oakes4 and Collins,5 in short, to take the Charter seriously, the Court raised expectations amongst many in the criminal justice system. Not surprisingly, after the initial burst of enthusiasm there followed a period

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1 R.S.C. 1985, App. III.
of consolidation and in some cases retrenchment that has disappointed some but to be fair also reassured others. For example, in search and seizure the approach favouring protection of privacy interests through a presumption requiring judicial pre-authorization for a valid search as enunciated in Hunter v. Southam Inc.\(^6\) gave way in Edwards,\(^7\) to one more aligned with traditional concepts of property and to a narrowing of categories attracting the warrant requirement in Tessling.\(^8\) As well, while the Supreme Court has adopted a principled approach in many areas of criminal law, an approach that has particularly helped direct the development of the law of evidence, the principled approach has not always guided the work of the Court as it sought to apply the Charter to the criminal law. The exclusion of evidence under section 24(2) provides one example. While the Court in Stillman\(^9\) developed a principled approach to the trial fairness component of the Collins test for exclusion of evidence, a coherent test for what Professor Stuart and others would consider the most important element of the test, the measure of the seriousness of the violation, has eluded the Court.

And, even where the Court has attempted to enunciate a principled approach, that approach is rarely greeted with universal acclaim. The Court’s approach to cruel and unusual punishment, for example, continues to disappoint, and substantive due process has proved a difficult concept to implement in a coherent and principled manner because subjective factors like fault, stigma and gross disproportionality stand at the centre of the Court’s approach. Thus, Professor Cameron argues with some force in her paper that the constitutionalization of the substantive criminal law remains stymied and that substantive review under section 7 ought to be abandoned.

In addition to concerns about the substantive interpretation of the Charter, the public and persons involved in the administration of criminal justice worry about the impact of the Charter on management of criminal trials. There is a perception that resolution of cases on the merits has been sacrificed in favour of endless motions dealing with trivial matters. The constitutionalization of disclosure obligations on the Crown sometimes seems to have led to nothing more than endless pre-trial skirmishing to little if any benefit.

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But, as Professor Roach observes in his paper, it is important to have a sense of perspective, and while he is right in detecting a more sombre mood in the 25th anniversary conferences than greeted the 20th anniversary conferences, there is much to celebrate after 25 years, from enhanced protections against wrongful convictions and intrusions into privacy, to access to justice. In this introduction to this important work, I would like to measure some of the impacts of the Charter on the criminal law.

There is no better place to begin than with Crown disclosure. The disclosure obligations imposed by the Court in Stinchcombe have sometimes proved to be an onerous burden not just for the prosecution but for the courts as they attempt to mediate the claims, and for legal aid, which must fund the defence. But in considering the value of a case such as Stinchcombe one cannot lose sight of the pre-Charter state of the law. Before the Charter, disclosure was at the whim of Crown counsel and disclosure law was shaped by a presumption of guilt; accused could not and should not be given disclosure because they would use the disclosure to fabricate evidence and suborn perjury. If defence counsel were fortunate enough to get some form of disclosure, it almost invariably came with conditions such as an undertaking that disclosed witness statements not be used to cross-examine the witnesses who provided them.

The toleration of that regime by counsel, lawmakers and the courts illustrates the poverty of the pre-Charter legal culture and the profound impact of the Charter. It may be that with time the disclosure rules would have changed, but the Charter accelerated that process, and greatly expanded the concept of the scope of what constitutes a minimum acceptable standard. Equally as important as the change in the substance and mechanics of disclosure catalyzed by Stinchcombe was the realignment of attitudes about state investigation of crime. The Charter led to a shift in paradigms. The view that the results of police investigations were the property of the prosecution to be dispensed through the largesse of the Crown was replaced with the perspective that the fruits of investigations were, in the words of Sopinka J. in Stinchcombe, “the property of the public to be used to ensure that justice is done”. In our adversarial system, justice is done by enhancing so far as possible the right of the accused to make full answer and defence. A constitutionally recognized right to full disclosure is a fundamental condition precedent to the fulfillment of the full answer and defence guarantee. A legally enforceable disclosure regime

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has helped detect past wrongful convictions and should continue to reduce their number in the future.

Accepting the not undeserved criticism of Professor Stuart and others about the state of the law of search and seizure, there is nevertheless reason to take the long view. The gross abuses of privacy interests through tools such as writs of assistance are a thing of the past. The mere existence of an exclusionary power to enforce the guarantee against unreasonable search and seizure has changed police behaviour. And, while the search and seizure guarantee is seen in operation usually only in the sordid world of guns, drugs and gangs, that criminal defendants have an interest in litigating those issues has led to broader protections for all persons in this country.

Moreover, as Professor Stewart and other contributors to this volume point out, while dramatic changes to the law may no longer be expected, the norms that underlie the Charter can be a source for incremental change and even reversal of what some might see as undesirable developments.

Admittedly, all is not well. The legal recognition of a common law stop and search power in Mann\textsuperscript{12} operating outside the right to counsel, arbitrary detention and search and seizure protections is proving problematic. Since there are few bright lines to guide police in the exercise of the stop and search power, the judicial evaluation of the exercise of the power sometimes seems capricious and result-driven. More troubling still is that because much of the routine state-citizen encounters fall outside Charter scrutiny there is a perception that aberrant state conduct is tolerated if not encouraged. It has been argued that the courts have not been able to come up with an effective and principled approach to systemic racism. As Professor Tanovich points out, Charter litigation remains an important means of addressing fundamental racial injustice. But the opportunity to address these issues will be muted if the courts are unable to take a critical race perspective. And, if the Charter continues to be interpreted to have limited application to the most common interactions between persons of colour and the police — the vehicle stops and pedestrian stops — we risk an increasing sense of injustice amongst many members of society. Administering the criminal justice system so that young men who are stopped on the streets in poorer neighbourhoods must rely only on their own wits and resources can only lead to increasing cynicism, alienation and a perception that the enforcement of the criminal justice system depends upon ignorance of rights and inequality of opportunity.

The Charter’s impact on access to justice is one of the most difficult areas to assess. The Supreme Court’s refusal to adopt a hierarchy of rights approach that would have the accused’s fair trial rights trump the rights of victims and witnesses to equality and security offers the promise of increased and more meaningful participation by victims and witnesses in the criminal justice system. However, as Ms Barrett points out in her paper, there are lingering concerns and very practical barriers to full participation by victims and others who find themselves caught up in the criminal justice system.

Other aspects of access to justice require some comment. In the increasingly complex world of criminal litigation, the right to counsel is crucial. The guarantees in section 10(b) to information about counsel and the right to consult counsel were long overdue and offer enhanced protection at the arrest stage. Yet as Justice Trotter and Professor Sherrin point out, the Charter has had only a limited impact in the interrogation room. While Justice Trotter argues persuasively that sensible reforms to the confession rules need not depend upon the Charter, more problematic is the inability of the courts and Parliament to translate the right to counsel at the arrest stage into a robust right to counsel at the trial stage. Legal aid entitlement is set so low that our courts are increasingly confronted with unrepresented (euphemistically referred to as self-represented) accused. While section 10(b) has been interpreted as guaranteeing a right to counsel of one’s choice and the right to be represented by that counsel throughout the proceedings, this has generally been understood as preventing the state from doing anything to interfere with the right to counsel. The section 10(b) right has not been translated into a right to state-funded counsel at all stages of the proceedings. Only in unusual circumstances is an accused who has been refused legal aid for trial entitled to a remedy such as a Rowbotham order for a stay of proceedings until state funding for counsel is provided. Legal aid funding issues are, of course, complex and with limited resources, the legal aid authorities are forced to make difficult choices. It is to be hoped that Charter values at least will continue to fuel the debate about access to justice and lead to a more vigorous right to entitlement to competent counsel.

Access to justice is also about timely resolution of disputes. The Charter is both the source of delay and its remedy. The increasing complexity of criminal litigation caused by the Charter has burdened the courts and led to worrisome trial delays even for accused detained pending

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trial. In the Askov case, the Supreme Court signalled that it was prepared to take trial delay seriously by suggesting guidelines for institutional delay and sanctioning the use of a stay of proceedings as the only remedy for unacceptable delay. The hope of the Askov decision, however, was not that courts would be able to resolve cases within the suggested guidelines, but that the guidelines would serve as the outer limits. Some even imagined shortening of the Askov guidelines as governments recognized the need to contribute more resources to the criminal justice system. But, the constitutional maximum seems, in busy jurisdictions, to have become the operating minimum. There is thus the perception that the state has not been forced to deal in a serious way with the appalling consequences of delay: the emotional and financial toll on the innocent while they await vindication; the attenuation of the impact of punishment of the guilty when the sanction is imposed months or years after the offence; the impact on victims who are in limbo for lengthy periods of time; the impact on the reliability of the verdict when witnesses are required to reconstruct events years later; and most disturbing, the lengthy periods of time spent in pre-trial custody, which have resulted in an increasing number of persons serving their sentences before conviction — either in jail or on house arrest — rather than after conviction. This is an obvious distortion of our punishment system. Increasing use of plea bargaining to keep trial lists in check is also an unhappy consequence of the need for the state to come up with a cost-neutral remedy for delay.

However, delay is not a new problem, and the value of the section 11(b) guarantee is that the criminal justice system has been forced to confront it. It is to be hoped that in the future, more resources can be found to enhance the system and that the courts can come up with an expanded portfolio of remedies in addition to the extreme remedy of a stay of proceedings. It may be that a more nuanced approach, with a broader range of remedies, might be more satisfactory for society and also more effective.

I conclude this introduction with a few comments on sentencing. The Charter has contributed little towards a more rational, fair and humane system of punishment. Thus, the courts have generally not interfered with Parliament’s fascination with minimum jail terms as a solution to

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crime.\textsuperscript{15} But at least in one aspect of sentencing the Charter has proved to be of great and lasting significance. Less than 10 years after a misstep in 1992\textsuperscript{16} the Supreme Court returned to the vexing problem of capital punishment in the extradition context. In \textit{Burns and Rafay}\textsuperscript{17} the Court held that the Charter would not permit the government to extradite without obtaining assurances from the extradition partner, in this case the United States, that the death penalty would not be imposed. Although this decision was made in the extradition context, the reasoning would apply equally in the domestic context. As a result, it seems unlikely that the courts would uphold capital punishment should Parliament attempt its reintroduction.

But, just as importantly, there is no longer any real appetite in the public for the return of capital punishment. There are many explanations, the most obvious being the well-publicized wrongful convictions of persons who might have been executed had the death penalty been available. But, this attitudinal change can also be attributed to the Charter. The values inherent in the legal rights protected by the Charter are not solely the preserve of the legal culture but have been accepted by the public. The Charter has not simply changed the way that crimes are investigated, prosecuted and defended but has changed the way we all value due process. That is not a bad legacy of 25 years of Charter experience.

\textsuperscript{15} Most recently in \textit{R. v. Ferguson}, [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.) again upholding the four-year minimum for manslaughter where a firearm is used and all but shutting the door to constitutional exemptions from minimum punishments.

