Controlling the Work of the Police

Alan D. GOLD*

Controlling the Work of the Police has always been a hotly contentious issue because for many years we have lived next to the United States and watched the raging debate there about the extent to which courts would or should be concerned about what the police were doing before the case got to court. Now life in Canada has changed dramatically under the Charter.

But before turning to the Charter I would venture to suggest that courts have always historically been telling the police what to do in various ways. There are some what might be called first order rules. For example, for hundreds of years the courts told the police how they could and could not obtain confessions which is a very important part of police work. Courts said to the police : you cannot make promises and you cannot make threats and more recently started to tell the police that you cannot create an atmosphere of oppression. However, it is fair to say that most first order rules that control the work of the police come from legislative bodies. This body of law now includes the Charter, which came from a legislative body and which contains a number of first order rules : upon arrest or detention, for example, the police are told they have to do certain things. However again, courts here contribute to the exercise because when courts give content to the Charter rules, courts are telling the police what they can and can not do.

Section 8 is couched in general terms. A policeman gets very little from s. 8. It is the courts that control the police work by saying that s. 8 means in general, "get a warrant". That instruction came from the courts; it is not apparent from s. 8 by its express wording. Section 7's right to silence is an even better example. Section 7 is couched in very general terms. But in the *Hébert*[1] case, the courts gave content to s. 7 in a number of ways. For example, the police were told there is nothing wrong with asking questions, but once the person is detained certain restraints come into play. *Hébert* is a very detailed decision that tells the police what they can and can not do with regard to detained persons in the

* Barrister, Gold & Fuerst, Toronto.

1. *R.* c. *Hébert*, [1990] 2 S.C.R. 151.

context of the right to silence. So courts do produce a number of first order rules for the police. They do produce a number of rules that speak directly to the police telling them what they can and cannot do. But what I think you really want to hear about and what produces the vigorous debate are the second order rules. It is the rules about the rules in general, and specifically the rule about what happens when the police break the rules, that is most contentious.

The police for many years claimed to be the only self policing organ in our society. Even judges have discipline proceedings. If you break a rule things can happen to you. But for many years, the police took the institutional posture that "yes, we will obey the law, we know the law, but if we do something wrong you leave it to us to self-discipline. You need not concern yourself with that". Well of course that no longer can be said under the Charter and so the contentious area is the second order rule : when the police break the primary rule, when they act illegally or when they violate the Charter what flows from that.

Now you have to distinguish two separate areas : legal compliance and Charter compliance. In terms of obeying the law we live with the ghost of the common law loophole that illegally obtained evidence is fine, that illegalities in police conduct do not bother the courts; that has started to change. The decision in *Campbell and Shirose*[2] makes that clear. Aside from the Charter, in terms of the general law of the land, *Campbell and Shirose* makes clear that police are expected to obey the law : no person is above the law. I always was very uncomfortable to hear government lawyers argue in 1999 for the contrary proposition. I thought that was always a basic constitutional principle : no person is above the law. But government lawyers argued to the contrary. The Supreme Court rejected that position. However, having said that, the second order rule that comes out of *Campbell and Shirose* I obviously find unsatisfactory, but that is to be expected from the (sort of) losing lawyer. Because the second order rule was that illegality is still not that big a deal. You must obey the law, do not break the law the police are told. But if the police do act illegally, the only legal reflection of that is the doctrine of abuse of process and the doctrine of abuse of process is a very rare creature. Rarely seen, rarely invoked, a remedy of a last resort. And so even in *Campbell and Shirose*, the Supreme Court emphasized the doctrine of abuse of process in a rare remedy involving a case by case approach requiring a delicate balancing : just because the police acted illegally it does not necessarily amount to an abuse of process; and even if an abuse of process is formed, it by no means follows that a stay of proceedings is an appropriate remedy. So, in general terms, police illegality receives a very restrained judicial response. As far as I can tell the only way to arouse the courts' interest is to plead abuse of

2. *R.* c. *Campbell,* [1999] 1 S.R.C. 565.

process and that is very constrained, very limited. In terms of controlling the police or generally regarding police illegality, unless it negatives an element of the offence such as being in the execution of duty, or that sort of thing, abuse of process is the only pleading available and that is going to be hard to plead successfully.

Contrasted with that situation is the situation under the Charter. Because the Charter is the prime law of the land courts have been much more sensitive towards enforcing a second order rule regarding Charter breaches; and of course this was made easier because of s. 24, the remedy section. Although again, you would have to have been in a coma for the last 20 years not to realise that the debate around what s. 24 means has little to do with the wording of the section and much to do with peoples' beliefs, philosophies and all the other things that make us interesting creatures. We know that when the Charter first came into force there were some very early interesting cases. My favourite is *Duguay*,[3] a 2 to 1 Ontario Court of Appeal decision in 1983 where the majority talked about how the police conduct was so bad the evidence had to be excluded. The majority said that if the court should turn a blind eye to this kind of conduct then the police may assume that they have the courts' tacit approval, "I do not view exclusion of evidence as a punishment of the police, although I hope it would act as a future deterrent", the court said. The dissenting judgment of Mr. Justice Zuber in contrast affirmed that control of the police has no place in the application to s. 24 (2). In one case there you had two opposing philosophies. We in Ontario have always looked at that judgment as a turning point, because Justice Martin concurred with Associate Chief Justice McKinnon in the majority judgment and that made it a crucial precedent. When the Charter came into force we in Ontario were very interested in how Justice Martin would view the Charter. He was a traditional common law lawyer; would he believe in it, would he view it as too American? So *Duguay* in 1983 was a real bell weather for us.

Now where are we today? Well today we get this type of language as appeared in the *Stillman* case, Justice Cory speaking :

> *it's easy to understand the sense of frustration of the police officers, they were attempting to obtain evidence implicating the person they suspected had murdered a young girl. Yet Charter rights are the rights for all people in Canada. They can not be simply suspended when the police are dealing with those suspected of committing serious crimes. Frustrating and aggravating as it may seem, the police as respective and as mire agents of our country must respect the Charter rights of all*

3. *R.* c. *Duguay* (1985), 18 C.C.C. (3d) 289 (Ont. C.A.).

> *individuals even those who appear to be the least worthy of respect. Anything less must be unacceptable to the courts.*[4]

Also, you are all familiar with the substantial body of commentary from the Supreme Court of Canada in a variety of decisions which talks about how, in deciding the remedy for Charter breaches, the court must disassociate itself from improper conduct of the police. "In this case which was a flagrant and serious violation of the rights of an individual," that is from the *Collins*[5] case. In *Genest*,[6] it was said that while the purpose of s. 24(2) is not to deter police misconduct, courts should be reluctant to admit evidence that shows signs of being obtained by an abuse of common law and Charter rights by the police. And in *Kokesh* : "the court must refuse to condone and must disassociate itself from egregious police misconduct."[7] In *Burlingham*[8] : "it must be emphasized that the goals in preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are a fundamental importance in applying s. 24(2)."

So, as far as I can tell the debate is over. It is too late in the day to suggest that controlling police conduct is no longer the work of the courts. My suggestion is that it is very, very clear that controlling police work is very much the business of the courts when Charter rights have been breached. It is obviously disappointing that mere illegality does not arouse the same interest, but that is the present situation.

Now how does the court carry out this function, what is the legal envelope in which these decisions are reached? The classification under s.24(2) of the Charter is between violations that render the trial unfair and those that do not. With regard to breaches that render the trial unfair and where the Crown is unable to prove inevitable discoverability, the police Charter breach is not directly relevant because the evidence is automatically excluded. Concerns about how the police operate in that context have driven the court to that automatic exclusionary rule. Police obtaining of confessional material and bodily samples provide examples of some of the worst police conduct and so it is not surprising that in that context the courts informed by these underlying concerns have taken a certain absolutist position. So if it is confessional material and the Crown can

---

4. *R.* c. *Stillman*, [1997] 1 S.C.R. 607.

5. *R.* c. *Collins*, [1987] 1 S.C.R. 265.

6. *R.* c. *Genest*, [1989] 1 S.C.R. 59.

7. Unreported.

8. *R.* c. *Burlingham*, [1995] 2 S.C.R. 206.

not prove inevitable discovery, then there is an automatic rule of exclusion. So, you need not get into any further analysis of the police misconduct once you prove the Charter breach.

Now in the second category of cases where you have a Charter breach that is either non-confessional or confessional where the Crown proves inevitable discovery, then of course one must get into the other two categories of factors identified in *Collins*. In applying a remedy under s. 24(2), the court looks at the seriousness of the violation and the impact of exclusion on the repute of the administration of justice. The latter involves a balancing of the seriousness of the offence, and the seriousness of the breach. The former involves factors such as good faith on the part of the police. The court looks at : was there good faith? Was it deliberate? Was it willful? Flagrant? Was is a serious violation or merely technical? Was it motivated by a situation of urgency or necessity? Were there other investigative means available? Our courts are still working through the calculus in this category, but clearly these factors involve an assessment of the police work. Factors such as the mental state of the police involved. Good faith clearly requires an analysis of the mental state of the police. Good faith of course does not refer to their motive, why they breached the Charter : it means what was their good faith belief about whether or not they were breaching the Charter. In other words, it is good faith in relation to the Charter breach not the police motive. Were they relying on a statute? If the police were relying on a statutory power even if the court subsequently declares it unconstitutional, police are generally held to be acting in good faith.

The absence of good faith leaves open a whole range of possibilities, all the way from willfulness to negligence in breaching the Charter. One can dredge through the various decisions and find support for many and various propositions : were the police acting on legal advice? Were there policy directives? Was it good legal advice? Bad legal advice? Necessity is an issue : was there a necessity to breach the Charter because evidence was being destroyed?

One of the factors sometimes identified is whether there was a pattern of disregard for Charter rights? This is an area that I think is ripe for development by defence counsel in the following way. Now that we are into this, now that we are into assessing the police work we are measuring it against various scales in deciding whether the evidence should be admitted or not. There is lots of room for innovative defence lawyering and I think lots of room to open judges eyes because one of the things that has always had a low visibility in our society is the actual police training, actual police instructions. If we are going to assess officers good faith what you are going to find is that in many cases the individual officer and the defence lawyer are at odds because they live in different worlds. The

officer by virtue of their training does not even understand what the defence lawyer is complaining about. You recall that in the United States the *Miranda*[9] decision was generated in no small part because the Supreme Court looked at the police training manuals as to how police were trained. If you look at Canadian training materials you may find some of the same stuff. It is very hard to get police training materials. We in the Criminal Lawyers Association have tried to file freedom of information act requests. Police for example hold training seminars on how to investigate child abuse cases and we suspect that one of the things they are taught is that if the suspect turns down a lie detector test go ahead and charge them because that is a sure sign of guilt. Now we know that is nonsense because no reputable criminal lawyer is going to allow their client take a lie detector test. I would rather flip a coin, I would have better odds. But if the police are taught that, that is worrisome. We have had very little success in finding out exactly what the police are taught; but there are some books that the police use and I found one. Now it is a 1993 book, but that is still eleven years after the Charter came into force and this book and it is written by someone who teaches at a police college. This book discusses the Charter obligation to "Charter" suspects on *arrest*. The word "detention" appears nowhere in the section. A policeman using this book would not know that you have to Charter someone when they are detained. They would think you only have to Charter them when you arrest them. I do not know your experience but defence counsel certainly found that in the first decade of the Charter many policemen would say, "I didn't give them the right to counsel because I hadn't arrested them yet". So books like this may explain that kind of thing. This book also talks about verbal indicators of deception and these were given as dead giveaways of a lying suspect : sudden silence, unexpected politeness, anger — as if an innocent person is expected to keel over with laughter upon being accused of a crime. The section on interrogation techniques begins with an almost 19th century quote : "The way must be paved for a man to tell the truth". There is nowhere in the rest of the section that you will find the slightest indication that the suspect may be innocent. What you will find is that everything is geared towards helping the guilty confess and the police officers must never waiver in their belief of guilt because diminished belief reduces the effectiveness of questions and comments and results in "unsuccessful interrogation". And then there is a whole chapter to detecting deception and we get more verbal indicators and non verbal indicators such as hand to face movements, self manipulation, nervous gestures, eye contact or lack of eye contact. So I would like to cross-examine a police officer on what is the precise amount of proper eye contact by an innocent person. Then for several pages the polygraph is extolled as an absolutely wonderful device for

9. *Miranda* c. *Arizona*, (1966) 384 U.S. 436.

detecting truth. This is not an 1873 book, this is not a 1923 book. This is a 1993 book , eleven years after the Charter.

You go to the United States, the situation is even worse. You can read the FBI Law Enforcement Bulletin. It is their magazine and the FBI is widely regarded as the "crème de la crème" of American Law Enforcement. Well you can go read a 1997 article about the *Miranda* decision called "Intentional Violations of Miranda, a Strategy", and you will read in this article in 1997, the FBI teaching its agents that as follows : "that by limiting the legal consequences of *Miranda* violation the court may have encouraged law enforcement officers to develop interrogation strategies that incorporate intentional violations of the *Miranda* rule. These limitations have encouraged law enforcement officers to conclude that they have little to lose and something to gain by disregarding the *Miranda* rule". There is a case in 1992 in Arizona, where law enforcement officers to solve a very bad case called "the prime time rapist"case decided they knew who did it, they strategised this interrogation strategy, they brought this person in, every time he asked for *Miranda* they would ignore it and it went as planned and ultimately they got the confession they wanted. It was a great plan, unfortunately they happened to arrest the wrong person. He was subsequently shown to be completely innocent and now they have a massive lawsuit on their hands. You can do that in the States because of contingency fees. I do not recommend suing the police in Canada. I only mention these things because you have to understand that controlling the work of the police is very, very important. If courts do not do it, in the real world no one else really will do it. The New York Times recently ran a series on *Miranda* entitled "Police are Skirting Restraints to get Confessions", "Police training videos show prosecutors inciting police by proclaiming that no police have ever been sued or charged for violating *Miranda* and getting the evidence is useful whatever a court rules". This is how American prosecutors teach police. As I explained to you I am not saying it is the same in Canada because we can not get our hands on their training materials. But what I am saying is that under s. 24(2) this matters. You have told us it matters. You said that whether there is a pattern of abuse is significant. We at the defence bar are trying to get you to look at some of these things that are going on in police training sessions because we think, based on what you have told us, it is highly relevant to section 24(2) in the exclusion. As one of the more reasonable police officers pointed out in this New York Times article, when police officers in major cities are suspected of wrongdoing they have rights far more extensive than the reading of *Miranda* warnings. In New York for example, officers implicated in the death of a civilian in custody are entitled to two business days to consult a lawyer before they must speak with departmental investigators. "This is a great irony of the police who resist *Miranda*", says a former police chief, "when it comes to police, then suddenly rights are precious because they know the danger of being innocently convicted". So that the s. 24(2) analysis as

presently formulated is the best method we have for controlling the work of the police. It is very, very important not just on some theoretical level that it is nice for the police to be polite, but on the horribly practical level that this is necessary to prevent wrongful conviction.

False confessions and false identifications were identified as the two major causes of miscarriages of justice. Courts have always been suspicious of police confessional material. That is why judges developed the *voir dire* requirement hundreds of years ago. This is not just about principle. This is not just about everyone should be nice to each other. It is about the fact that police misconduct nine times out of ten may be functionally insignificant in the sense that yes they happen to have the right person — although I do not think that is right then either, but, one time out of ten they will have the wrong person and that wrong person will be on the way to spending time in jail for something they did not do. These are not just theoretical issues, they are real issues. I suggest that what we have learned is that the Charter rights are important for everybody including the innocent. And once you accept they are important, how can you deny their enforcement? Otherwise it is simple hypocrisy. You have the right to a lawyer but we will not enforce it. We will leave it to self-help. I just do not understand the position that the rights are important but we will not enforce them. That is hypocrisy. So once you decide these rights are important as the Charter has done, they must be enforced. Section 24(2) enforces them. That necessarily involves you controlling the work of the police.

One last area that has arisen in Canadian law I think rather unexpectedly is a common law exclusionary power. As you know in a few recent cases the Supreme Court of Canada has said that aside from Charter violations, there is a common law exclusionary principle. The clearest enunciation of this is the *Harrer*[10] case where the court said the following : “that whether or not there is a Charter breach, if the method of obtaining the evidence renders it unreliable, if given its nature it could be misleading”, or thirdly, “the misconduct is so serious that the admission would violate the accused right to a fair trial, and as a result of the unfair conduct the accused is compelled to incriminate himself, then the judge has a common law discretion to exclude”. So again you are dealing essentially with self incriminating confessional material. Thus, there is a common law discretion similar to s. 24(2) with regard to confessional material. It is not going to come up very often obviously because usually you will have some kind of Charter breach. But there will still be cases where that is important.

10. *R.* c. *Harrer*, [1995] 3 S.C.R. 562.

So to conclude my topic, controlling the work of the police, I suggest that it is important for courts to realise that unlike other organizations controlled by the courts via judicial review, the courts are daily concerned with the police work product. They are not just some arms-length third party. They feed into your system, they produce the work product for you to do your work. Your doing justice depends upon what the police have done. And therefore our justice system has recognised in the modern Charter precedents that courts can not escape responsibility for what the police have done, and especially under the Charter your obligation could not be clearer. You must assess the work of the police, you must control the work of the police, you must ensure that they obey the imperatives that have been constitutionally entrenched in the Charter of Rights. If only you would do the same thing with regard to general police illegality under the doctrine of abuses of process.