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NOTES ON SECTION 10 OF THE CANADIAN CHARTER OF RIGHTS

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NOTES ON SECTION 10 OF THE

CANADIAN CHARTER OF RIGHTS

Section 10 of the Charter guarantees a person the right on arrest or detention

a) to be informed promptly of the reasons for his arrest or detention;

b) to retain and instruct counsel without delay and to be informed or that right; and

c) to have the validity of the detention determined by way of habeas corpus and to be realeased if the detention is not lawful.

A substantial amount of litigation has arisen concerning the interpretation of the word "detention" as a prerequisite to the application of sections 10(a) and 10(b) of the Charter to persons intercepted by police and required to provide breath samples in accordance with sections 234.1 and 235 of the Criminal Code.

The Supreme Court of Canada, in R. v. CHROMIAK, (1980) 49 C.C.C. (2d) 257, has unanimously held that a person stopped and called upon to provide a breath sample for the purpose of road-side screening under section 234.1 of the Criminal Code is not, at that time, "detained" within the meaning of that word as used in section 2(c) of the Canadian Bill of Rights. In the words of Mr. Justice Ritchie who rendered the judgment of the Court:

"It appears to me obvious that the word detention" does not necessarily include arrest but the words "detain" and "detention" as they are used in section 2(c) of the Bill of Rights, in my opinion, connote some form of compulsory restraint, and I think that the language of s. 2(c) (iii) which guarantees to a person "the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful" clearly contemplates that any person "detained" within the meaning of the section is one who has been detained by due process of law. This construction is supported by reference to ss. (28(2) (b), 30, 136(a), 248 and 250 of the Criminal Code, when the words "to detain" are consistently used in association with actual physical restraint." (at page 262) (underlining added).

Mr. Justice Ritchie then went on to endorse the observations of Mr. Justice Pigeon in R. v. BROWNRIDGE, (1972) 7 C.C.C. (2d) 417, at 429-30, to the effect that:

"The legal situation of a person who, on request, accompanies a peace officer for the purpose of having a breath test taken is not different from that of a driver who is required to allow his brakes to be inspected or to proceed to a weighing machine under ss.39(6) or 78(3) of the Highway Traffic Act, R.S.O. 1970, C.202. Such a person is under a duty to submit to the test. If he goes away, or attempts to go away, to avoid the test, he may be arrested and charged but this does not mean that he is under arrest until this happens. He is merely obeying directions that police officers are entitled to issue...
...The provision under consideration applies to "a person who has been arrested or detained." Such is not, it appears to me, the legal situation of one who has been required "to accompany" a peace officer for the purpose of having a breath test taken..." (underlining added).

Courts called upon to apply section 10 of the Charter have either considered as binding authority the pronouncements of Mr. Justice Ritchie as to the meaning of the word "detention" or have sought to distinguish on various grounds the same judgment with a view to granting the status of detainee to a greater number of accused.

The Nova Scotia Court of Appeal, in R. v. CURRIE, a judgment delivered February 15, 1983, not yet reported, and the Newfoundland Court of Appeal, in R. v. TRASK, a judgment dated January 12, 1983, not yet reported, held that a person agreeing to accompany a police officer to the police station for the purpose of providing a breath sample pursuant to section 235 of the Criminal Code was not detained for the purposes of section 10 of the Charter. Mr. Justice MacDonald, speaking for the Nova Scotia Court of Appeal stated that:

> "Section 235(1) of the Code does not contemplate either arrest or involuntary or compulsory restraint of the individual in order for the breath sample to be made. The individual is free to decline to comply with the demand and the law provides a sanction if such refusal is not founded on reasonable grounds." (at page 19).

The fact that the Supreme Court in CHROMIAK was dealing with a situation under s.234.1 of the Code (road-side screening) and note s.235 (evidence taking) was dealt with by refering to

the endorsation by Mr. Justice Ritchie of the opinion of Mr. Justice Pigeon in BROWNRIDGE, it being clear to the Nova Scotia Court of Appeal that Mr. Justice Pigeon's pronouncements were wide enough to cover, if not intended to cover, situations under what is now s.235 of the Code.

A contrary view was taken in R. v. THERENS (an unreported judgment dated April 15, 1983). There, a majority of tha Saskatchewan Court of Appeal was of opinion that the "fundamental rights accorded to a citizen under section 10(b) (of the Charter) should be approached on the basis of giving the word "detention" its popular interpretation, in other words its natural or ordinary meaning." Such interpretation, in the opinion of a majority of the Court of Appeal, requires a finding that a person accompanying a police officer to a police station for the purpose of providing breath samples pursuant to s.235 of the Code is at that time "detained". Mr. Justice Tallis, for the majority, deals in the following terms with the possible effect of CHROMIAK on the issue before the Court:

> "With respect, I would not fasten too quickly on the reasons in CHROMIAK v. R., supra, because that case involved roadside screening rather that the more complex and serious tests under Section 236 of the Criminal Code to determine blood alcohol levels. In comparison with a roadside A.L.E.R.T. test under Section 234.1, a person confronted with a demand under Section 235(1) of the Criminal Code is in a serious position both from the standpoint of criminal and civil liability. The situation has passed well beyond the "stopping" stage..." (at page 8).

> "I am of the opinion that the principles enunciated in CHROMIAK v. R. ... are not determinative of the issues in this case. While cases under statutes such as the Bill of Rights may be of interpretative assistance, it must be remembered that the CHARTER stands on an entirely different basis. It is not a mere canon of construction for the interpretation of federal legislation..." (at page 9).

The Court of Appeal decision in THERENS is presently on appeal by the Crown in the Supreme Court of Canada.

It must be noted in passing that the above cases deal only with situations when the accused "voluntarily" accompanied the police for the purpose of a breathalizer test. The issue of whether there exist, in other situations, some involuntary of compulsory restraint upon the accused sufficient to constitute "detention", will of course be in each case a question of fact for the court to determine. These situations will continue to arise in the application of breathalizer legislation and will probably be heavily litigated when dealing with persons who, short of formal arrest, are "requested to attend a police station for questioning and investigation."

The substantive rights guaranteed by section 10 of the Charter are as follows:

1. "The right... to be informed promptly of the reasons (for arrest or detention)..."

Section 10(a) is in the same terms as section 2(c) (i) of the Canadian Bill of Rights and apparently guarantees to a person detained, rights already granted under the common law and the Criminal Code (section 29) to persons arrested.

Questions that arise are, the manner in which the information must be transmitted, the delay for transmitting the information and, finally, the content of such information.

a) The manner:

One can easily conclude that no particular form of communicating will be required and that reasons given orally will suffice. Since, however, section 10(a) guarantees not only the right to be told but, more, the right to be informed, police may, in special circumstances, have to take particular measures to ensure that the accused has been made aware of the reasons for his arrest or detention (for example, a written note to a deaf person or recourse to an interpreter).

b) The delay:

Section 10(a) says "to be informed promptly". It is not likely that the intent of the Charter is to require immediate information inasmuch as this would in several cases of arrest require the impossible. Cases to date have held that "promptly" must be taken to mean as promptly as possible in the circumstances or what is reasonable in the circumstances (see R. v. EATMAN, an unreported judgment of the New-Brunswick Court of Queen's Bench, dated December 6, 1982, and R. v. MASON, an unreported judgment of the Supreme Court of British Columbia, dated January 17, 1983).

"Promptly" should also reasonably be read in conjonction with the time requirements of section 10(b) as one may find it almost impossible to instruct counsel if the reasons for arrest or detention have not already been given.

c) The content:

The same right to instruct counsel will require that at least the basics of the offence alleged be given. This should not, however, require from police details such as would be necessary under section 510 of the Code or legal

pronouncements they are not competent to make. A statement such as: "You are held for the killing of Harry Bellows last night at your apartment" should suffice. No mention of cause of death or form of culpable homicide (criminal negligence causing death, manslaughter or murder of either degree) should be required.

2. "The right to retain and instruct counsel without delay and to be informed of that right"

The right to counsel, per se, was already provided for at section 2(c) (ii) of the Bill of Rights and has been considered by the Supreme Court of Canada in cases such as BROWNRIDGE (1972) 7 C.C.C. (2d) 417, HOGAN (1974) 18 C.C.C. (2d) 65, and JUMAGA (1976) 29 C.C.C. (2d) 269. The right to be informed of one's right to counsel is, however, an important new feature of the Charter in that it creates a corresponding and positive duty upon those having custody of a person arrested or detained to inform the latter of a right, the exercise of which is not likely to facilitate the work of those on which, ironically, the duty to inform is imposed.

The issue of what may be a proper manner of informing a person of his right to counsel can be considered in the light of comments made, supra, pertaining to the use of the same term in section 10(a). Mr. Justice Campbell of the

Supreme Court of Prince-Edward Island, sitting on appeal in the case of R. v. AHEARN, upheld, on the facts, a finding by the trial judge that the mere posting of a sign in the police station informing detainees of their right to counsel was insufficient, per se, to satisfy the requirements of section 10(b) of the Charter. (The judgment is unreported and dated February 15, 1983). With respect generally to the issue of how a person should be properly informed of his rights, Mr. Justice Campbell wrote:

> "The question whether a person is informed of his rights is a question of fact to be determined by the trial judge on the evidence. Obviously, circumstances will dictate the need for different modes to be used in transmitting information. Language, physical or mental disabilities are circumstances which will have to be taken into account. In my opinion, a person may be informed by way of verbal or written communication, although caution must be exercised in accepting a sign on the wall as proof that the Charter's guarantee has been sufficiently discharged". (At page 7)

Again, the emphasis is on the fact that a person must be made aware of his rights.

The issue of when a detainee must be advised of his right to counsel raises a preliminary question of construction as section 10(b) guarantees the right to retain

and instruct counsel without delay, but does not specify the delay within which a person must be informed of that right. Logic however commands that if a person is to be guaranteed the right to retain and instruct counsel without delay, he must also be informed without delay of the existence of such right; to hold otherwise would allow the "information" part of section 10(b) to become dead letter.

As to the meaning of the expression "without delay" in the context, one might wish to consider the attempt by Allan J. of the Provincial Court of Saskatchewan at formulating a common-sense rule, as he wrote, in R. v. RAFFAI (an unreported judgment dated February 9, 1983), at page 7:

> "... to retain and instruct counsel without delay would entail the accused receiving legal advice, if such advice was wanted by the accused, before he did anything or said anything which might, in any way or to any degree, alter his position under the law from what his legal position was at the instance of his arrest or detention.
>
> In my view, so long as the right of the accused to retain and instruct counsel without delay is communicated to the accused before he commits himself in any legal sense or alters his legal position in any way, then, even thought that communication may not have occurred immediately upon the arrest or detention or the accused, there has been no infringement of his second right to be advised of his first right."

3. "The right to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."

(We make no comment under this heading.)

NOTES ON SECTION 11(d) OF

THE CANADIAN CHARTER OF RIGHTS

Section 11(d) of the Charter guarantees several rights which may be stated as follows:

a) the right to be presumed innocent
b) the right to a fair hearing
c) the right to a public hearing
d) the right to an independant tribunal
e) the right to an impartial tribunal

1. "The right to be presumed innocent until proven guilty according to law..."

This constitutional guarantee has generated to date the greatest amount of litigation under s. 11(d) of the Charter as defendants have attempted to have declared inoperative several reverse onus clauses and presumptions of law found in both federal and provincial legislation.

Section 9 of the Narcotics Control Act has borne the brunt of these attacks as several courts of appeal have already found it unconstitutional essentially on the basis that there is, per se, no rational connection between the mere possession of a narcotic drug and the intent to traffic in such drug (see

R. v. OAKES, (1983) 2 C.C.C. (3d) 339, Ont. C.A.: R. v. CARROLL, (1983) 32 C.R. (3d) 235, P.E.I.C.A.; R. v. COOK, an unreported decision of the Nova Scotia Court of Appeal released March 16, 1983).

The Ontario Court of Appeal has also recently found unconstitutional the presumption under section 312(2) of the Criminal Code which requires, in the absence of evidence to the contrary, a finding that the accused knew that a motor vehicle (or part thereof) had been obtained by the commission of an indictable offence upon the prosecution proving beyond a reasonable doubt that the vehicle identification number of the motor vehicle (or part thereof) has been obliterated. The Court, however, declared valid the presumption under s.312(2) of the Code that the vehicle (or part thereof) bearing an obliterated identification number had, during the course of its history, been obtained by the commission of an indictable offence (see R. v. BOYLE, an unreported decision of the Ontario Court of Appeal released June 14, 1983).

Decisions pertaining to the constitutional validity of reverse onus provisions and presumptions of law have to contend with existing jurisprudence under section 2(f) of the Canadian Bill of Rights and more particularly with the Supreme Court of Canada decisions in R. v. SHELLEY. (1981) 59 C.C.C. (2d) 292, and R. v. APPLEBY (1972) 3 C.C.C. (2d) 354. Courts

have either sought to distinguish these cases or to question their binding authority in view of the constitutional status of the Charter as opposed to the "quasi-constitutional" status of the Bill of Rights (see OAKES: A Bold Initiative Impeded by Old Ghosts, by A.M. Mackay and T.A. Cromwell in (1983) 32 C.R. (2d) 221). The Ontario Court of Appeal's decision in Oakes is presently before the Supreme Court of Canada and it will be interesting to see how that Court deals with its own precedents in applying the Charter.

2. "The right to ... a fair hearing..."

The right to a fair trial has been guaranteed by the common law, by the Criminal Code, by sections 2(e) and 2(f) of the Canadian Bill of Rights, and now also by section 11(d) of the Charter. For a definition of this right, reference can be made to the words of Fauteux C.J.C. in R. v. DUKE, (1972) 7 C.C.C. (2d) 474, at page 479:

> "...Under s. 2(a) of the Bill of Rights no law in Canada shall be construed or applied so as to deprive him of" a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case." (at page 479).

The Court of Appeal of Ontario, in R. v. POTMA, (1983) 2 C.C.C. (3d) 383, found that the accused's right to a fair hearing had not been infringed by the routine and non-malicious destruction by police of ampoules used for the accused's breathelizer test. R. v. DUKE, supra, had dealt in the same way with the same issue in the light of similar language in the Canadian Bill of Rights. The Court of Appeal in POTMA found the Supreme Court of Canada decision in DUKE determinative of the matter.

The Court of Appeal of Nova Scotia recently found in R. v. OWEN, an unreported judgment delivered June 3, 1983, that an accused's right to a fair hearing in Nova Scotia was not denied him for the reason only that members of the Court of Appeal of the Province had expressed, in a previous judgment ordering a new trial for the accused, their opinion as to the admissibility of a statement offered in evidence at the first trial.

A public statement made however in the course of trial by the Premier of Quebec pertaining to the credibility of a defence witness brought about not only a mistrial but also a subsequent ruling that the accused could no longer expect a fair hearing in Quebec. A stay of proceedings was thus ordered in the case of R. v. VERMETTE, (1982) 1 C.C.C. (2d) 477. The judgment of Mr. Justice Greenberg (Quebec S.C.) ordering

the stay of proceedings is now on appeal to the Quebec Court of Appeal. The right to a fair hearing has also been held to justify restrictions upon freedom of the press. In the matter of Extradition proceedings against Catherine Evelyn Smith, Mr. Justice Linden of the Supreme Court of Ontario, in an unreported judgment released April 11, 1983, confirmed an order pursuant to section 457.2(1) of the Code banning publication of evidence given at the bail proceedings. In the course of his reasons, Mr. Justice Linden wrote:

> "Furthermore, it must be recognized that this order, though interfering with freedom of the press, protects another interest which is also guaranteed by the Charter. That other interest contained in section 11(d) is the fugitive's right to be "presumed innocent until proven guilty according to law in a fair and public hearing by an independant and impartial tribunal." To allow publication of the banned material may taint the minds of potential jurors with irrelevant, inadmissible or unchallenged evidence, damaging the fugitive's ability to be fairly tried." (at page 13)

The same right did not however justify continuing the temporary order prohibiting the broadcast and publication of the name, address and other information that would identify the applicant who had been charged with murder under section 218 of the Criminal Code (see R. v. ROBINSON, an unreported judgment of Mr. Justice Boland of the Supreme Court of Ontario rendered april 7, 1983).

It has also been held that, in criminal proceedings, it is at trial only that a person charged with an offence has the right to a fair and public hearing as required by section 11(d) of the Charter (see the judgment of Mr. Justice Maher of the Court of Queen's Bench for Saskatchewan in R. v. DAHLEM, dated February 1st 1983, not yet reported).

3. "The right to ... a public hearing..."

Public trials have long been a hallmark of Canadian criminal justice and unjustified breaches of the right have resulted in loss of jurisdiction by the courts (see, for example, R. v. BRINT, (1979) 45 C.C.C. (2d) 560, Alb. C.A.).

The most significant application of the public hearing guaranty under S. 11(d) of the Charter as been with respect to the requirement under section 12(1) of the Juvenile Delinquents Act that "the trials of children shall take place without publicity." Struck down as unconstitutional because in violation of the free press quarantee in section (b) of the Charter (see R. v. SOUTHAM INC., an unreported judgment of the Ont. C.A. delivered March 31, 1983), this requirement was also found to be inoperative in that it arbitrarily preculded public trials in the case of juvenile whilst there is no good reason for every juvenile trial to be held in camera (see R. v. G.B., unreported judgment of J. Dea of the Alberta Q.B. delivered January 7, 1983).

In contrast, the provisions of section 442(1) of the Criminal Code are not likely to be successfully challenged under the public hearing guarantee in that the decision to order exclusion of the public is discretionary and subject to conditions specified in the section which are, per se, reasonable.

4. "The right to ... an independent tribunal"

This guarantee took on far-reaching dimensions when it was successfully raised in the Provincial Court of Ontario to bring about a finding that, as a matter of law, the said Provincial Court (Criminal Division), as an institution, was not independent because of the potential control which the Executive or the Attorney General could exercise under applicable statutes and regulations, either singly or cumulatively. (see R. v. VALENTE, (1983) 3 C.R.R. 1). After detailed examination of the Attorney General's influence or control over subject matters such as provincial judges' appointment, tenure, salary and other financial benefits, the Ontario Court of Appeal, in an unreported judgment released February 15, 1983, held that the Provincial Court, per se, was is independent tribunal in that "a reasonable person who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically" would not conclude that there was" a reasonable apprehension that the tribunal was not independent and impartial so

far as its adjudication was concerned." The judgment of the Ontario Court of Appeal is on appeal to the Supreme Court of Canada.

5. "The right to ... an impartial tribunal."

Little litigation has arisen under this title since the coming into effect of the Charter. Not surprisingly, however, the Crown's allegedly favoured position in the jury selection process under section 563 of the Criminal Code was one of the first objects of such litigation. In the case of R. v. PIRAINO, Mr. Justice O'Leary of the Ontario High Court of Justice was asked by the accused, prior to the selection of the jury for his trial, inter alia, for a holding "that it is unfair that the Crown be allowed to stand aside 48 jurors and that the accused must exercise his right to challenge peremptorily before the Crown has to decide whether to challenge or stand aside a juror." In his judgment reported at (1982) 67 C.C.C. (2d) 28, Mr. Justice O'Leary affirmed the constitutional validity of section 563 of the Code and reasoned has follows:

> "To a great extent, the exercise of a peremptory challenge is guess work...
> These is no doubt that the right given the Crown to challenge four juror peremptorily and to stand aside 48, while the accused on a rape charge can challenge byt 12 jurors peremptorily and the requirement that the accused declare first whether he clallenge a juror, gives the Crown an unfair advantage in the jury

> selection process. This does not mean, however, that there is any danger that the jury chosen will not be independent and impartial. It simply means the Crown has a much better chance that the defense of selecting out of the entire jury panel a jury if hopes will be must sympathetic to its position." at 208 (underlining added).

It is also quite conceivable that the constitutional right of a judge to hold contempt proceedings could be questionned under the "impartial tribunal" guarantee when he seeks to deal summarily with contempt committed in his presence. If found not to be impartial because of reasonable apprehension of bias, such judge might however still retain constitutional jurisdiction to dispose of the contempt proceedings of the basis that, under section 1 of the Charter, the breach of section 11(d) falls within "reasonable limits" determined by the need for trial courts to deal summarily with incidents which would otherwise threaten the trial process.

NOTES ON SECTION 8 OF THE

CANADIAN CHARTER OF RIGHTS

Section 8 of the Charter reads as follows:

"Everyone has the right to be secure againts unreasonable search or seizure."

The French version states:

"Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives."

Although an historic common law right, the right to be protected against unreasonable search or seizure is a new addition to Canadian constitutional or quasi-constitutional law and bears strong resemblance, in its drafting, to the American Fourth Amendment. Its scope and intent are well expressed by Mr. Justice Prowse of the Alberta Court of Appeal in SOUTHAM INC. and HUNTER (an unreported decision dated January 31, 1983) where, at page 5, he wrote:

> "...This section does not confer powers of search and seizure on the Government of Canada or the Provinces but rather it is a limitation upon the powers they derive from other sources. It secures the public against the abuse of such powers. It deals with one aspect of what has been referred to as a right of privacy which is the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society. However, the determining the rights given under s.8 of the Charter the public's need for effective law enforcment must be balanced against the individual's right to be secure against unreasonable search and seizure."

Let us consider the language of section 8 and the different issues arising thereunder:

1. "Everyone has the right..."

Although there are pronouncements to the contrary, the better view appears to be as expressed by Mr. Justice Cavanagh, in SOUTHAM INC. AND HUNTER (1982) 68 C.C.C. (2d) 356, Alb. Q.B., that "everyone" should include all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search, and thus, would include corporations.

2. "... to be secure ..."

Section 8, like every other part of the Charter, applies only to Parliament, provincial legislatures and to the governments of Canada and the provinces (see section 32 of the Charter); accordingly, it, per se, creates no right as between individuals, unless the individual involved in an unreasonable search or seizure as acting as an agent for one of the parties bound by the Charter. Thus, a person in possession of stolen property in his own house is protected from unreasonable search by the police (agents of fovernment), but not from unreasonable

search by a suspicious neighbor. By the same reasoning, section 8 does not apply to a foreigh state (see CARRATO v. U.S.A., an unreported judgment of the Supreme Court of Ontario, released December 17, 1982).

Further, accused persons will probably have no success in invoquing the protection of section 8 in cases where incriminating evidence has been obtained through unreasonable search of a third party. Thus, for example, it is unlikely that an accused would obtain, pursuant to section 8 and 24 of the Charter, the exclusion from evidence of pictures taken of him committing the crime of which he is accused where they have heen illegally seized from an amateur photographer who witnessed the scene.

3. "... against unreasonable..."

Reasonableness appears generally to be the key to legal rights under the Charter (see section 1), and, more specifically, the key to section 8.

a) Illegal behaviour:

Little analysis has to date been made of the meaning of the word "unreasonable" in section 8; most litigated cases have been brought about as a result of allegations of illegal

behaviour by police, and courts, upon a finding of illegality, have concluded that the search or seizure was, ipso facto, an unreasonable one. Case law has in fact principally developed around the issue of whether the evidence obtained in contravention of section 8 should be excluded pursuant to section 24.

An interesting by-product of the "illegal necessarily implies unreasonable" rule has been a judicial awakening to the state of the law of search and seizure in Canada. Limits which were of little interest in a system which admited evidence on the sole basis of relevancy (subject to the exception recognized in R. v. WRAY, (1973) 10 C.C.C. (2d) 215) suddenly determine, at least in great part, the admissibility of such evidence. Thus, for example, several courts have recently considered and condemned the systematic and unjustified resort to "throat-holds", "strangle-holds" or "chocking-holds" upon the arrest of persons suspected of an offence under the Narcotics Control Act (see R. v. COHEN, B.C.C.A., dated March 22, 1983, unreported) as well as spot-searches for drugs which are based on mere convenience or suspicion (see R. v. HEISLER, Alb. Prov. Ct., dated March 17, 1983, not yet reported).

b) Legal behaviour

While behaviour contrary to statute or common law has uniformely invited a finding of unreasonableness, the converse

has not always been true. Judicial ground has already been broken under section 8 of the Charter by holdings that unreasonable searches or seizure may occur through police behaviour which, before the coming into force of the Charter, would have been perfectly lawful. A case inpoint is the judgment of Mr. Justice Bélanger of the Ontario Provincial Court who, in R. v. CARRIERE, an unreported decision dated January 5, 1983, found unreasonable under section 8 a search under the authority of and in accordance with the requirements of a writ of assistance (see s.10 of the Narcotics Control Act). Mr. Justice Bélanger made in that case a very forceful argument to the effect that, in the absence of judicial supervision or control, writs of assistance constitute an invitation to arbitrariness and abuse. "I am of the view", he writes "that so long as writs of Assistance exist no one is ever secure against unreasonable search and seizure."

At least three identifiable approaches have then taken for determining the reasonableness of validly enacted legislation and corresponding police activity. One approach suggest reliance upon the "balancing test" developed by American Courts in which the degree of government intrusion must be balanced against the legitimate government interest it serves (see R. v. MCGREGOR, (1983) 3 C.C.C. (2d) 200); another approach is to the effect that to be reasonable under section 8, a search or seizure must meet recognized common law and statu-

tory requirements and, more specifically, must meet, inter alia, all of the requirements of section 443 of the Criminal Code pertaining to judicial authorization, reasonable belief and information under oath (see SOUTHAM INC. v. HUNTER, supra, Alb. C.A.); a third approach would set no minimum procedural standard for a finding of reasonableness, but would merely require that legislation require and that behavior be based upon reasonable grounds or beliefs (see R. v. Esau, an unreported decision of the Manitoba Court of Appeal delivered March 1st 1983).

4. "... search or seizure."

The determination of what would, in material terms, be protected from unreasonable "search" or "seizure" requires, at the outset, a definition of these words. Black's Law Dictionary, Revised 4th Edition, defines "seizure" as "to take possession of forcibly, to grasp to snatch or to put in possession." "Search" is defined as, in criminal law, "An examination of a man's house or other buildings or premises, or of his person with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offence with which he is charged." This definition of "search" clearly contemplates a search of both the property and the person of a suspect or accused. That this dual aspect is contemplated by section 8 is clearly, confirmed by the

French version which uses two words, "perquisition" and "fouille", for "search", the first word refering specifically, in French, to the search of places only, while the second referes to the search of persons (see SOUTHAM INC. and HUNTER, Alb. Q.B. supra). Expropriation of real property has been held not to be a seizure within section 8 of the Charter (see BECKER v. R., an unreported decision of the Alberta Court of Appeal, dated June 6, 1983). It has also been held that a seizure necessarily involves the taking of something tangible and that, accordingly, it does not apply to the taking of finger prints (see R. v. MCGREGOR, supra, Ont. H. C.)