UNITED NATIONS STANDARDS REFLECTED IN THE CANADIAN CRIMINAL JUSTICE SYSTEM: THE RIGHT TO COUNSEL

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I. INTRODUCTION

Human Rights norms and standards in the administration of criminal justice have long been the focus of United Nations activities. The formulation of these standards and norms is aimed at promoting and ensuring the fair and equitable administration of justice and effective crime prevention. They represent internationally agreed upon principles of desirable practice on which governments can assess their own criminal justice systems and contribute to the development of the concept of the international rule of law. While international instruments such as declarations, principles, and guidelines have no legally binding effect, they can provide practical guidance and substance for the elaboration of conventional rights. This paper limits the focus of UN standards and norms in the administration of criminal justice to the right to counsel. Part II of this paper reviews the basic principles embodied in the international norm of the right to counsel while Part III illustrates how that right is reflected in the Canadian criminal justice system.

Inherent tension exists between individual rights and the interests of society in the administration of criminal justice systems. This tension is reflected in international human rights instruments, such as the *Universal Declaration of Human Rights*[1], which sets out both the rights of people to enjoy domestic tranquillity and security of person and property without encroachment of criminal activity, and also the rights for an equitable systems of justice that

[1] *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948

protect individual's rights and liberties. Striking the appropriate balance between these interests is a complex issue. There is a growing awareness of the structural causes of crime and a recognition that human rights issues are closely linked with criminal justice concerns. As crime becomes more complex and difficult to control, the operation of high standards and fairness also becomes increasingly important in any society that is governed by the rule of law and democratic principles. Part IV of this paper looks briefly at some of the issues that arise from this inherent tension in the Canadian criminal justice system.

II. THE RIGHT TO COUNSEL IN INTERNATIONAL LAW

Before focusing on the specific principles of the right to counsel as embodied in international law, it is important to discuss this right within the overall concept of fair trial. The right to a fair trial is an essential part of any legal system purporting to be based on the rule of law. This right means that anyone facing a criminal charge is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A fair hearing requires respect for the principle of equality, the right to be informed promptly of the charge, the right to counsel, adequate opportunity to prepare a defence, the right to an interpreter, the right to be tried without delay, the right to be tried in one's presence, the right not to be compelled to testify against oneself and the right to be presumed innocent.

The right to a fair trial, in international law, affects not only criminal charges actually made in the various criminal justice systems but also criminal justice policy-making and standard-setting. There is a close link between criminal justice policy and the protection of human rights. Sometimes it is difficult to reconcile the required elements of a fair trial, of which the

right to counsel is one, with the practical need to improve the efficiency of the crime control systems.

An important safeguard to a fair trial is the right to counsel which ensures necessary legal advice and assistance on detention and arrest to make an informed choice about how to exercise the right to silence and thereafter to ensure that the prosecution's case has been put to its proof and to enable the accused to make full answer and defence. All the principles regulating the legal status of the accused in criminal proceedings are aimed at ensuring the proper administration of justice.

In 1948, Member States of the UN unanimously proclaimed the adoption of the *Universal Declaration of Human Rights,* which recognises the interdependence of human rights and the rule of law. The right to retain and instruct counsel is not specifically set out in the *Declaration* but can be inferred from Article 10, the right to a fair trial, and Article 11, the right to be presumed innocent until proven guilty by a fair trial at which everyone " has all the guarantees necessary for his defence".[2] At the time of proclamation, the plan was to use the *Declaration* as a framework for a human rights treaty. In the process of drafting these treaties, the Commission on Human Rights recognised the importance of the right to counsel and in 1961 undertook a study on "The Right of Arrested Persons to Communicate with Others to Ensure

[2]Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him

Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
(2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

their Defence or Protect Their Interests".[3] This study assisted the Commission in elaborating this right in the *International Covenant on Civil and Political Rights.*[4]

The *International Covenant on Civil and Political Rights* (*ICCPR*) sets out the basic human rights that are to be complied with in criminal procedures, and elaborates on the minimum guarantees required for the right to a fair trial. In the *ICCPR*, the right to a fair trial is dealt with, among other issues, in article 14. Article 14 contains the following rights in the following paragraphs: paragraph 1, contains the general provision; paragraph 2, the right of the accused to be presumed innocent; paragraph 3, a list of minimum guarantees to be followed in criminal proceedings; paragraph 4, special procedures for juveniles; paragraph 5, right to review conviction and sentence; paragraph 6, right to compensation; and paragraph 7, rule against double jeopardy. The Human Rights Committee, the treaty organ established to monitor compliance by States of the *ICCPR*, maintains that the right to a fair trial, as provided for in article 14, is one of the cornerstones of the *ICCPR* as a guarantee of the rule of law.[5]

The right to retain and instruct counsel is one of the minimum guarantees for a fair trial found in Article 14(3) of the *ICCPR*. Article 14(3)(b) allows for adequate time and facilities for the presentation of a defence as well as to communicate with counsel of one's choice. Article 14(3)(d) sets out the right to be tried in one's presence and to defend oneself in person or through counsel of one's choice. It further provides for a person to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him in any case

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[3] The Study on the Right of Arrested Persons to Communicate with Others to ensure their Defence or Protect their Interests, preliminary report, E/CN.4/836; progress reports, E/CN.4/871, E/CN.4/881, E/CN.4/924; final report, E/CN.4/996.

[4] *The International Covenant of Civil and Political Rights* (1976) 999 UNTS 171. Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force 23 March 1976.

[5] Human Rights Committee General Comment #13, (Article 14), contained in UN Document CCPR/C/21/Rev.1 of 19 May 1989.

where the interests of justice so require and without payment by him in those cases where he does not have sufficient means.

The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[6] takes the right to counsel out of the fair trial context so as to make it applicable from the time of arrest or detention. These principles elaborate on the rights contained in the *ICCPR*. Principle 13 states that at the moment of arrest or detention, or promptly thereafter, a person shall be provided with information on and an explanation of his rights and how to avail himself of such rights. Principle 17(1) entitles a detained person to have the assistance of legal counsel and be informed of this right and provided with reasonable facilities for exercising this right. Principle 17(2) sets out the right to legal aid where a detained person cannot afford to pay and the "interests of justice" requires that he have counsel. Principle 18 elaborates on the right to communicate with counsel in confidence and privacy, allowing for adequate time and facilities in order to do so.

The *Basic Principles on the Role of Lawyers*[7] state that adequate protection of human rights require that all persons have adequate access to legal services provided by an independent legal profession. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights to defend them in all stages of criminal proceedings. The government is required to ensure the provision of sufficient funding and other sources for legal services to the poor. Governments must ensure prompt access to a lawyer for all persons

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[6] *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173 of 9 December 1988.

[7] *The Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders

arrested or detained and, in any case, not later than forty-eight hours from the time of arrest or detention.

It is recognised that children should be treated differently from adults when they are accused or convicted of criminal conduct. When regulating the legal status of juveniles in criminal proceedings, the *ICCPR* ensures that age be taken into account. A child who comes into conflict with the law has the right to be treated with dignity and worth, taking into account his age. Upon arrest or detention, children have the right to prompt legal and other assistance, such as medical or psychological services, as well as to contact family.

The *Convention on the Rights of the Child*[8] in Article 37(d) ensures that every child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. Article 40 provides for minimum guarantees for every child alleged or accused of having infringed the penal law, including the right to counsel.

The *Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*[9] in Article 15.1 provide that throughout proceedings, juveniles have the right to be represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country. The right to legal aid for juveniles does not require proof of indigence nor is it limited to cases that are deemed to be in the "interests of justice". Article 15.2 allows for the

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[8] *The Convention on the Rights of the Child*, adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990.

[9] *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* General Assembly resolution 40/33 of 29 November 1985

participation of parents in these proceedings. This right is viewed as emotional assistance to the juvenile and can be denied if the court determines it would have a negative impact. The *UN Rules for the Protection of Juveniles Deprived of Their Liberty*[10] provide that where juveniles are detained under arrest or awaiting trial, they have a right to legal counsel and to be able to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisor. Privacy and confidentiality shall be ensured for such communications.

As discussed above, the basic principles in international law require some form of legal aid to be available to ensure that persons who cannot afford counsel have the ability to retain and instruct counsel. However, this right to free legal assistance is limited to cases where the "interests of justice" so requires. At the first UN Conference on Human Rights in Teheran, 1968, a resolution was approved that called upon Member States to guarantee progressive development of comprehensive systems of legal aid, including devising standards for granting legal assistance.[11] This resolution recognised that the provision of legal aid to those in need would strengthen the protection of human rights. There has been a lack of follow-up within the United Nations regarding the progress made by countries in developing comprehensive legal aid systems.

Rule 93 of the *United Nations Standard Minimum Rules For the Treatment of Prisoners, 1955*[12] specifically states that an untried prisoner shall be allowed to apply for free legal aid where such aid is available.

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[10] *The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, General Assembly resolution 45/113 of 14 December 1990

[11] General Assembly resolution 2449 (XXIII), Legal Aid.

[12] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Economic and Social Council resolution 663 (XXIV).

Principle 27 of the *Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order*[13] deals with unrestricted access to the legal system. It mentions that appropriate mechanisms for legal aid and the basic protection of human rights should be established wherever they do not exist.

As can be seen from a review of the norms and standard on the right to counsel, there are a number of basic principles incorporated into that right. These include: the right to counsel of one's choice; from a professional association of lawyers that is separate from the state; the right to communicate with counsel in circumstances that ensure confidentiality between counsel and client; the right to have adequate time and facilities to prepare one's defence; the right to legal assistance without payment where the interests of justice so requires and where the person does not have sufficient means to pay; the right to self-representation, if one so chooses; and the right to have counsel at all stages of any criminal prosecution, including the preliminary investigation, periods of detention, trial and appeal proceedings. The right to counsel may also imply the right to competent counsel, but this is not expressly stated in the international instruments. However, the representation by incompetent counsel would be tantamount to the denial of the basic right to counsel. The Commission on Human Rights are presently discussing a draft Declaration on the Right to a Fair Trial and a Remedy[14], which sets out in detail the basic principles of this right, including the right to counsel. This draft Declaration attempts to bring together in one instrument the principles of the right to counsel that have been developed since 1948.

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[13] *The Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order*, adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

III. THE RIGHT TO COUNSEL AS REFLECTED IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

The Canadian criminal justice system is based on the tradition of British common law, which features an adversarial system with an independent judiciary, the presumption of innocence, the burden of proof resting with the crown beyond a reasonable doubt (with exceptions), the noncompellability of the accused, trial by jury for serious offences, no criminality or punishment unless specified by law (*nullum crimen sine lege*, *nulla poena sine lege*) and the rule against double jeopardy.[15] Many of these features are part of the concept of the rule of law which was developed to guard against the abuse of authority by the State. The passage of the *Canadian Charter of Rights and Freedoms*[16] in 1982 has even more strongly entrenched the rule of law and its various components in our criminal justice system.

A key component of the adversarial system is the principle of " a case to meet". The Crown bears the ultimate burden of proving guilt beyond a reasonable doubt. The accused need not assist the prosecution in making the case against him. The right to remain silent, the right to counsel and the voluntary confession rule are bound together by a common element, the right of individuals to make choices on whether to speak to the authorities or not.[17] The purpose

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[14] This Declaration is contained as an annex in the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary of its Strengthening, Final Report by S. Chernichenko and W. Treat, Special Rapporteurs, UN Doc E/CN.4/Sub.2/1994/24.

[15] Quigley, Tim, **Procedures in Canadian Criminal Law**, (1997: Carswell Thomas Professional Publishing) p.18.

[16] *Canadian Charter of Rights and Freedoms*, Schedule B, Part I, Constitution Act, 1982 (R.S.C. 1985, Appendix II, No. 44).

[17] *R v Whittle* [1994] 2 S.C.R. 914, 32 C.R. (4th) 1.

behind the right to counsel is to enable the accused to learn about his legal position, in particular about the principle against self-incrimination and the right to remain silent.

The *Canadian Charter of Rights and Freedoms* guarantees the right to counsel. Section 10(b) of the *Charter* holds that "everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right". The Supreme Court of Canada has summarised the purpose behind s.10(b) as follows:

> The purpose of the right to counsel guaranteed by section 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations. This opportunity is made available because when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him or herself. Accordingly, a person who is "detained" within the meaning of section 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty. Under section 10(b), a detainee is entitled as required to seek such legal advice without delay and upon request.[18]

The basic framework of the right to counsel in the Canadian criminal justice system has been elaborated by case law, which imposes fairly extensive duties on police authorities to ensure full understanding of the right. Whenever an individual is detained or arrested (hereinafter

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[18] *R v Bartle* [1994] 3 S.C.R. 173, 33 C.R. (4th) 83.

referred to as the detainee), the police must advise him of his right to counsel and inform him of the availability of legal aid and duty counsel and the phone number for reaching duty counsel. Duty counsel is a service provided by the government wherein counsel is available to give detainees preliminary legal advice free of charge. Upon being advised by the police of the right to counsel, a detainee may waive the right or assert it. If the detainee asserts his right, the police must cease questioning until a reasonable opportunity to consult counsel has been provided. The “holding off” period will vary based upon whether the detainee is reasonably diligent in contacting counsel. If a given jurisdiction provides free legal advice through duty counsel then the holding off period will be shortened. However, apart from an emergency, the holding off period cannot be shortened because of administrative expediency or convenience to the State. If the detainee has not been reasonably diligent or has waived his right, the police can continue with the investigation without counsel being present. However, waiver is subject to an exacting standard. It must be voluntary and informed. The detainee must be aware of the consequences of waiving the right. Incapacitation or deception by the police can negate what may appear to be a knowing waiver. But, waiver need not be explicit.

The right to counsel includes four main elements for discussion.

a) The triggering mechanism: detention or arrest

The right to counsel under the *Charter* is not absolute. It is only available to someone under arrest or being detained. Therefore the judicial interpretation of the meaning of arrest or detention will substantially affect the right to counsel. Detention has been broadly defined by the Supreme Court of Canada as “ a form of control by an agent of the State over the

movements of a person by a demand or direction which may have significant legal consequences".[19] In other words, the person is not free to leave the presence of the police.

b) The right to information

The two rights in s.10(b) impose two different sets of duties on police. First, there is an informational duty, and second, there is an implementation duty, which is a duty to facilitate the exercise of the right to consult counsel. The type of information that must be provided by the police has changed over the years. The police must inform the detainee of the availability of legal aid and/or duty counsel services, if any, that are available in the jurisdiction, usually the local area.[20] This must also include information on how to contact these services, such as toll-free numbers.[21] The police need only mention those services available at the time of the detention.[22] If there is any indication that the detainee lacks the capacity to understand the rights, the police must explain the right in terms that he can understand and at a time when he is capable of understanding.[23] It is interesting to note that in the discussion regarding legal aid information required to be given, the Supreme Court said that this did not impose the duty on provinces to ensure that duty counsel or legal aid was available to all detainees in order to provide free and immediate preliminary advice. The court reasoned that s.10(b) did not expressly provide for such a right and the legislative history of the section showed that such a provision had been rejected. The court also stated that it would not impose the cost implied in

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[19] *R v Therens* [1985] 1 S.C.R. 613.

[20] *R v Brydges*[1990] 1 S.C.R. 474, 46 C.R. (4th) 195.

[21] *R v Bartle, supra* note 17.

[22] *R v Latimer* [1995] 41 C.R. (4th) 1.

[23] *R v Baig* [1987] 2 S.C.R. 537, 61 C.R. (3d) 97.

requiring these services to be established on the provinces.[24] It should be mentioned that the division of responsibility between the Federal government and the provinces is probably unique and must be differentiated from other countries with unitary systems.

c) Implementation duties

The implementation duties require that police provide the detainee with a reasonable opportunity to retain counsel. This includes providing reasonable means to facilitate contact with counsel; such as providing a telephone and privacy. Further, s. 10(b) imposes a duty on police to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. These duties are not triggered unless and until a detainee indicates a desire to exercise his right to counsel. The right to counsel also includes the right to retain counsel of one's choice. In determining what is reasonable opportunity, police must take into account the particular circumstances. It is important to remember that the detainee is under the control of the police and cannot effectively exercise his right to counsel unless they provide him with the means and the reasonable opportunity to do so, including allowing for privacy in communications.

There is no absolute requirement for police to ascertain whether the detainee understood the information provided. The onus is on the detainee to demonstrate that he did not understand his right to retain counsel.[25] A detainee who fails to understand the information because of linguistic problems or mental disability must somehow convey the difficulty to police before the police are placed under any additional duty to ensure understanding.

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[24] *R v Prosper*[1994] 3 S.C.R. 236, 33 C.R. (4th) 85.

d) Waiver and duty to be reasonably diligent in exercise of right

The detainee also bears some responsibility under s.10(b). He must exercise due diligence in pursuing the right. Failure to do so may be taken as a waiver of the right. The Supreme Court of Canada has clearly indicated that the duties imposed on the police can be suspended when the arrested or detained person is not reasonably diligent in the exercise of his rights.[26] The right to retain and instruct counsel can also be waived. In order for an alleged waiver to be valid however, it must be clear and unequivocal that the person waiving the procedural safeguard is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.

The rights set out in the Charter, and in particular the right to retain and instruct counsel, are not absolute and unlimited. They must be exercised in a way that is reconcilable with the needs of society. The duty of the detainee to act in a reasonably diligent manner limits the right to counsel. This limit perhaps addresses concerns that it could otherwise be possible to delay needlessly an investigation and in certain cases to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. From such a point of view, an arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner that the police cannot adequately carry out their tasks. Prior to the Charter, it was standard police practice to proceed without delay after arrest to interrogate the person charged. The importance of the s.10(b) right with its correlative restraint on police action places a duty on the detainee to act accordingly with reasonable diligence.

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[25] *R v Baig, supra* note 22.

[26] *R v Smith* [1991] 1 S.C.R. 714, 4 C.R. (th) 125.

IV. ISSUES FOR DISCUSSION REGARDING THE RIGHT TO COUNSEL

In Canada, there is no express law providing police with authority to talk to people. It is important to bear in mind that many people will speak to the police because they are the police, that is, out of respect for or fear of authority rather than out of a desire to voluntary engage in conversation. The situation changes when the police assert some legal constraint against the person with whom they are speaking. There is a strong principle in anglo-canadian law that individuals have the right to be free of restraints on their liberty unless the law states otherwise. Therefore police require either the consent of the individual to restrain or an express legal power to arrest or detain before any such restraint is permissible. Mere acquiescence or compliance with a police direction is not equated with consent. In order for there to be valid consent given to police, there must be a clear indication from police that there is a choice whether or not to follow the direction.

The right to counsel is designed to offset pressures created by the coercive environment of the police station, yet the Supreme Court of Canada's concept of the right as discussed above has never been expanded to bar altogether the taking of statements by police. One criticism of the *Charter* cases is that they illustrate that the crucial right to counsel depends on the persistent assertion of the detainee and thus may not protect the most vulnerable accused.[27] Unlike other jurisdictions, there is no requirement for lawyers to be present during custodial interrogations. In the United States, an assertion of the right to counsel means that interrogation will be

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[27] Stuart, Don *"Charter Protection Against Law and Order, Victim's Rights and Equality Rhetoric"* 327 at p 333, in **The Charter's Impact on the Criminal Justice System** ed. Jamie Cameron (Carswell: 1996)

suspended until counsel is present. Whereas in Canada, upon assertion of the right to counsel, the police must suspend the interrogation until the accused has been given a reasonable opportunity to consult a lawyer. In Italy, no statement or admission is admissible in court unless the statement was taken in the presence of a lawyer.[28]

As noted previously, in discussing individual human rights in the administration of criminal justice systems, there is an inherent tension between the protection of the individual against the state and the interests of the society. International and national law are continually balancing the interests of both. On one hand, there are "crime control" advocates who believe that repression of crime is the paramount objective and the fewer restrictions placed upon police the better. They emphasis efficiency, speed and administration informality. On the other hand, there are "due process" advocates, who believe the criminal process is the appropriate forum for correcting its own abuses and abuses are to be minimised by the establishment of a full panoply of procedural rights for the individual.

In these " law and order" times, it has been argued that too much emphasis is placed on individual rights, which in effect subordinate society's interest to have a safe community. Confessions are necessary or at least perceived by many to be necessary for effective police enforcement. The suspect is seen as a prime source of information concerning the crime and police believe it essential to question him early and record his position. A statement to the police can be received into evidence if it is proved to be voluntary. A voluntary statement promotes trustworthiness and is therefore considered to be more deserving of credit. In order for a statement to be considered voluntary, the individuals rights must be respected. Yet it is

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[28] Young, Alan *"The Charter, the Supreme Court of Canada and the Constitutionalisation on the Investigative Process"* 2 at p 5 in Cameron,

noted that the relatively smooth functioning of our criminal justice system is very dependent upon the accused person waiving his right to require proof by the crown by pleading guilty.[29] Hence the continual balance between crime control and due process rights. Interestingly, a US study noted that although many Americans have condemned the investigational constraints imposed by their Supreme Court, less than 3% of criminal cases are actually lost in the US because of successful suppression of evidence hearings.[30]

Back in 1988, the Law Reform Commission of Canada produced an interesting document discussing, in part, the political and moral philosophy behind our criminal procedure.[31] Such a discussion sheds light on the elaboration of the right to counsel in Canada. Canadian criminal procedure is seen to take into account three interrelated concerns; one, the pursuit of truth, two, the respect for human dignity (a notion which is broad enough to encompass the protection of society and the preservation of peace) and three, the protection against the risk of convicting innocent persons. These concerns are present within our system subject to certain tensions and disputes. One such tension is the tension between truth and justice. A major objective of the criminal process is to bring alleged offenders to justice. This involves a fair determination of their guilt or innocence using criminal procedures which ultimately are concerned with the discovery of truth. But truth is placed in the context of a larger concern to do justice. Prejudice, opinion and speculation are not seen to help the cause of justice, therefore not every piece of such evidence is allowed to be regarded. The law values truth but

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supra note 27.

[29] Quigley, *supra* note 14, p 127.

[30] Young, *supra* note 28, p 2.

[31] Law Reform Commission of Canada, **Our Criminal Procedure**, Report 32 (1988).

also concepts of human dignity and privacy. Therefore the Canadian criminal process can be described as a qualified search for truth. It may, however, be the best method of securing the truth, since the process is ultimately a human one.

Another tension exists between the dual purpose of convicting the guilty and acquitting the innocent. Common law is haunted by the ghost of the innocent man convicted. One safeguard to counter this fear is the principle of the presumption of innocence. However, the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty, thereby increasing the risks to society's safety. In Western society, especially in the common law countries, the adage "it is better to let nine guilty persons go free than one innocent person to be convicted" is very important as a real social and political value.

Another tension that exists is how to safeguard people's freedoms. Protection of society entails the protection of citizens from the harmful behaviour of others. Laws are necessary to define unacceptable acts and to protect people. Basic values must also be protected for society to retain its integrity. This involves the use of state authority, which leads to the wielding of power. This carries with it the possibility of abuse. In order to safeguard freedom, it is sometimes necessary to limit it. A task of justice is to keep a balance. If human dignity, freedom and justice are among the major values which the criminal law enshrines, we must assess carefully the way in which the law is enforced to ensure respect for these values. The elimination of crime, while important, must be subordinate to the larger purpose of maintaining and protecting important values. Repression of crime is not viewed as a self-sustaining goal. Rather it is only one method for pursuing the higher goal of maximising freedom in a democratic state.

Striking an appropriate balance between the interests of the community in bringing offenders to justice and the rights and liberties of the individual is a complex issue and can't simply be resolved by means of a formula. Crime itself ultimately must be regarded as a human or social problem. The Canadian criminal procedure undeniably inclines toward the protection of rights and liberties. The presumption of innocence, the crown's burden of proof in a criminal trial, the right to silence, the right to make full answer and defence all bear testimony to this fact.

V. CONCLUSION

The right to counsel in Canada is, by and large, in compliance with the right to counsel in international law. But like most societies, Canadians do not like crime and would prefer to apprehend and punish criminals. Canadian criminal procedure provides extensive protection for individual rights, yet restrains individual freedoms with societal interests and concerns about police efficiency and safety. Our Charter rights are balanced, both through the operation of section 1 justification or through the balancing required by section 24(2) in deciding whether to admit or exclude evidence obtained in the course of a Charter violation. It can be summarised by these words, "Canadian criminal procedure is quintessential Canadian. Principled perhaps but certainly not dogmatic, neither individualistic in the extreme nor totalitarian, unwieldy at times and contradictory at other times in its quest for both efficiency and justice. Particular rights must be balanced and where in conflict and sometimes within rights, both the individual rights and societal interest must be balanced."[32]

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[32] Quigley, *supra* note 14, p 22.

The United Nations, through the UN Crime Prevention and Criminal Justice Network, promotes the use and application of human rights standards and norms in the administration of criminal justice. The UN Network of Institutes that support the work of the UN and the implementation of the Justice Programme, consists of the UN Crime Prevention and Criminal Justice Division and a number of interregional and regional institutes around the world, as well as specialised centres. The International Centre for Criminal Law Reform and Criminal Justice Policy, the interregional institute based in Vancouver, Canada, plays a definite and active role in assisting the international community in strengthening international cooperation in crucial areas of crime prevention and criminal justice and implementing the UN programme. The UN programme aims to provide appropriate assistance to Member States, through training, advisory services, emergency assistance and action-oriented research, and assisting in setting up projects in developing countries and countries in transition to implement the rule of law, basic human rights and democratic principles.