in his statement to investigators, but gave an exculpatory explanation. As the only purpose the prosecution ever had in regard to the statement was to use it to demonstrate that Calder had lied, the claim of a material change was not very strong. It is this lack of merit in the prosecution's position that seems to have swayed the majority. In the result, denial of section 10(b) rights, even in the most technical sense of failing to advise someone who does not need the information, continues to be seen as inherently prejudicial to respect for the administration of justice.

[T]he right to counsel is not only not a right to counsel of choice, but is also now a right that must be asserted "reasonably" (in the view of a court anxious to process cases expeditiously).

A similarly mechanical view of section 10(b) was offered as the basis for restoring an acquittal in *R.* v. *Paternak*, (1996) 110 C.C.C. (3d) 382, from the Alberta Court of Appeal reversal (101 C.C.C. (3d) 452). The trial judge gave detailed, complex reasons concerning the impact on the accused of a lengthy and sophisticated interrogation, reasons which the Alberta Court of Appeal found to be in error both on the question of voluntariness and on admissibility under section 24(2). However, the oral judgement of the Court delivered by Mr. Justice Sopinka makes no reference to these issues. The Court simply restored the acquittal entered by the trial judge on the (unexplained) ground that the *Charter* right to counsel should have been given again when the interrogating officer concluded that the accused was indeed responsible for the offence (a manslaughter). Once again, it appears to be a mechanical application of the exclusionary rule for breach of the informational component of the right to counsel.

The substantive right to counsel is not given anything like as much protection. In a very brief judgement upholding the majority decision of the Nova Scotia Court of Appeal, *R.* v. *Howell*, (1996) 110 C.C.C. (3d) 192, the right is clearly seen as contingent. The unrepresented accused, Howell, is portrayed unsympathetically as deliberately divesting himself of counsel as a device to delay and obstruct his trial. Unfortunately, this characterization in effect becomes an exception to section 10(b) rights. Because of limits imposed by Legal Aid in Nova Scotia, Howell's usual lawyer could not represent him and Howell ultimately dismissed the lawyer provided to him instead. This is the heart of the conduct characterized as obstruction. In the result the right to counsel is not only not a right to counsel of choice, but is also now a right that must be asserted "reasonably" (in the view of a court anxious to process cases expeditiously). This is an ominous sign of how a more cleanly raised entitlement case might be handled. One can only hope that the Court will take more care when actually faced with this most fundamental right to counsel issue.

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THE RISE AND FALL OF THE CHARTER EMPIRE

BY ALAN N. YOUNG

The past year will not go down in history as an exciting one for *Charter* jurisprudence. In fact, 1996 was probably the most boring and pedestrian year of *Charter* jurisprudence since the enactment of the *Charter* in 1982. It appears that the love affair with the *Charter* is over and courts are beginning to take a sober, second thought with respect to the application of *Charter* rights in the criminal process.

In my opinion, the Supreme Court of Canada has not broken any new ground since the 1995 decision in *Daviault* (1995) 93 C.C.C. (3d) 21, in which the Court constructed a new defence of extreme intoxication in order to ensure that the approach to the liability of intoxicated offenders was consistent with the principles of fundamental justice. Even this groundbreaking decision was short-lived as Parliament quickly responded by effectively overruling it with the enactment of a restrictive intoxication defence in section 33.1 of the *Criminal Code*. In a similar fashion, the Supreme Court of Canada decision in *O'Connor* (1996) 103 C.C.C. (3d) 1, with respect to the production of sensitive third-party records, was the subject of swift and critical Parliamentary response (Bill C-46 is currently before the House of Commons). Perhaps the Supreme Court has read the writing on the wall suggesting that Canadians and their elected representatives do not want the Court engaged in activist judicial review and, as a result, the Court has decided to adopt a fence-sitting, moderate approach to *Charter* litigation. If the Court can return to its pre-*Charter* position of relative anonymity, it can effectively insulate itself from public criticism.

When one reviews the 21 criminal process cases from the past year, one is struck by the gap between the rights rhetoric of the Court (which still retains its vibrant and passionate qualities), and the absence of effective remedies for lack of compliance with the constitutional imperatives. One case stands out as representative of the parsimonious approach of the Court to remedies for rights violations. In *R.* v. *Evans* (1996), 104 C.C.C. (3d) 23, the police obtained a tip concerning a hydroponic marijuana-growing operation and, in order to corroborate this tip, attended at the residence in order to employ their "heightened" olfactory sense to determine whether the pungent aroma of marijuana could be detected while standing at the front door. The

Court concluded that this "knock-on", olfactory investigation should be constitutionally classified as a search and, as such, it must be predicated upon reasonable and probable grounds and the obtaining of a warrant (unless some exigency is present).

It appears we have reached the absurd point of refusing to remedy a violation unless the violation is malicious and mean-spirited. Compliance with the constitutional imperatives is optional if public officials are polite, pleasant, and respectful while ignoring your constitutional rights.

For many people who perceive due process to be a nuisance or an obstacle in the path of justice, this decision might be criticized as yet another example of the Court handcuffing the police in the execution of their duty. There is little doubt that a "knock-on" olfactory search is relatively non-intrusive and that there may be no compelling reason to protect residents of Canada from this harmless investigative activity. In fact, "knock-on", olfactory investigations are generally not covered by Fourth Amendment protection in the United States. Accordingly, it would not be unreasonable to conclude that the *Evans* case is evidence that the Court is still living in the throes of its love affair with the *Charter* and, as we all know, love is blind.

In my opinion, this case reflects the exactly opposite perspective. Even though Mr. Evans' rights were violated, Mr. Evans was convicted and incarcerated on the basis of illegally obtained evidence. The Court asserted its judicial muscles with respect to the rights violation and then transformed itself into a cowardly weakling with respect to providing a remedy for the violation. Once again, the Court concluded that the police acted in good faith and a good faith rights violation is simply not serious enough to warrant the exclusion of real evidence. It appears we have reached the absurd point of refusing to remedy a violation unless the violation is malicious and mean-spirited. Compliance with the constitutional imperatives is optional if public officials are polite, pleasant, and respectful while ignoring your constitutional rights.

Putting aside the issue of whether good faith is a legitimate exception to exclusion, one must question the good faith demonstrated in this case. In 1991, the Court ruled that a perimeter search of the exterior of a home is a search requiring probable cause and a warrant (*Kokesch* (1991), 61 C.C.C. (3d) 207). In 1995, the Court waxed poetic about the sanctity of the home and ruled that the police were not constitutionally permitted to enter a home and secure the premises while awaiting the arrival of a search warrant (*Silveria* (1995), 97 C.C.C. (3d) 450). In light of these decisions, one would have expected the police to have known that their "knock-on" search was violative of Mr. Evans' rights. In *Kokesch*, Mr. Justice Sopinka refused to excuse the unauthorized perimeter search because "either they knew they were trespassing or they ought to have known". Five years later, the Court was willing to excuse an unreasonable mistake made by the police with respect to the scope and limits of their powers of search. It appears that the Court is no longer that concerned with the taint upon judicial integrity triggered by judicial condonation of unconstitutional conduct. After 15 years of the *Charter*, the Court's bark has maintained its strength while its bite has become soft and symbolic.

Reconsidering the application of constitutional rights is part and parcel of the process of constitutional adjudication, and one should expect a court to back-pedal somewhat once it has been made aware of the impact and implications of earlier decisions. What is surprising is the speed with which the Court has reversed gears.

It may be many years before we find the Court issuing groundbreaking rulings like *Manninen*, [1987] 1 S.C.R. 1233, *Duarte* (1990), 74 C.R.(3d) 281, *Wong* (1990), 60 C.C.C. (3d) 460, and *Brydges* (1990), 74 C.R. (3d) 129. Just as the Warren court with its celebration of due process gave way to the Burger court and its worship of crime control in the United States, we find the Supreme Court of Canada is in a period of judicial back-pedalling. In 1996, the Court began the process of dismantling the exclusionary rule with its pronouncement of a restrictive standing requirement for asserting a right (*Edwards* (1996), 104 C.C.C. (3d) 136), and with its pronouncement of a limiting doctrine of remoteness for exclusion of evidence (*Goldhart* (1996), 107 C.C.C. (3d) 481). We are now awaiting the final nail in the coffin as the Court solicited submissions from numerous intervenors in *R.* v. *Stillman* (argued in November 1996) to assist the Court in revisiting, and presumably remodelling, the *Collins* test for exclusion.

One cannot fault the Court for exercising a sober, second thought with respect to the effective implementation of *Charter* rights. Reconsidering the application of constitutional rights is part and parcel of the process of constitutional adjudication, and one should expect a court to back-pedal somewhat once it has been made aware of the impact and implications of earlier decisions. What is surprising is the speed with which the Court has reversed gears. The Court may have characterized the *Charter* as a "living tree" in 1984, but by 1996 it has become apparent that this is a living tree like no other—it is a tree capable of shrinking, but not necessarily dying, in the face of lack of nourishment.

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