BREATHALYZER, DETENTION, AND THE RIGHT TO COUNSEL: *R.* v. *THERENS**

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I. THE COURT OF APPEAL DECISION

A. INTRODUCTION

The meaning of "detention" in relation to s. 10(b) of the Canadian Charter of Rights and Freedoms, and its application to the breathalyzer demand under s. 235 of the Criminal Code, have been the concern of several recent cases. Section 10 of the Charter provides that:[1]

> Everyone has the right upon arrest or detention
> (a) to be informed promptly of the reasons therefore;
> (b) to retain and instruct counsel without delay and to be informed of that right; and
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Section 235 of the Criminal Code provides for the breathalyzer demand and for the penalty for non-compliance:[2]

> (1) Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under section 234 or 236, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician referred to in subsection 237(6) are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.
>
> (2) Everyone who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under subsection (1) is guilty of an indictable offence or an offence punishable on summary conviction and is liable
> (a) for a first offence, to a fine of not more than two thousand dollars, and not less than fifty dollars or to imprisonment for six months or to both;
> (b) for a second offence, to imprisonment for not more than one year and not less than fourteen days; and
> (c) for each subsequent offence, to imprisonment for not more than two years and not less than three months.

When a police officer stops a motorist and demands that he accompany the officer for the purpose of providing a sample of his breath for analysis, and the motorist is taken in the police car to the police station for the administration of the test, is that motorist *detained* so that he must be informed of his right to retain and instruct counsel without delay? Among the more important cases concerning the meaning of detention under the Charter are *R.* v. *Altseimer*,[3] *R.* v. *Currie*,[4] *R.* v. *Trask*,[5] *Rahn* v. *The Queen*,[6] and *R.* v. *Therens*.[7]

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* Part 1 was the winning case comment in the 1984 William Morrow Memorial Essay Contest.

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1. Constitution Act, 1982.
2. 1970 R.S.C., c. C-35, s. 235; 1974-75-76, c. 93, s. 16.
3. (1982) 29 C.R. (3d) 276 (Ont. C.A.).
4. (1983) 4 C.C.C. (3d) 217. (N.S. S.C., App. Div.).
5. (1983) 21 M.V.R. 49 (Nfld. S.C.C.A.).
6. Unreported, 9 January 1984, J.D. of Edmonton, C.A. 16468.
7. (1983) 5 C.C.C. (3d) 409 (Sask. C.A.), leave to appeal to the Supreme Court of Canada granted (Ritchie, Estey and Lamer JJ.) June 6, 1983.

Therens is of particular interest, because of its generous "ordinary language" approach to Charter interpretation in general and to the meaning of detention in particular, and because of its ruling that a court may exclude evidence under s. 24(1) as well as under s. 24(2) of the Charter.

B. *R.* v. *THERENS*

1. The Facts

On April 24, 1982, at about 10:30 p.m., Paul Mathew Therens was driving a motor vehicle on a street in Moose Jaw, Saskatchewan. He lost control of the vehicle and it crashed into a tree. Soon after, Constable Measner of the city police department arrived to investigate the incident. He made a s. 235(1) demand to Therens, requiring Therens to accompany him for the purpose of enabling a sample of Theren's breath to be taken for analysis. Therens complied with this demand. He was not informed of any rights to retain and instruct counsel. He was cooperative throughout the procedure and was not placed under arrest. He registered "over 80" on the breathalyzer test, and was charged with driving with over 80 milligrams of alcohol in 100 millilitres of his blood, contrary to s. 236(1) of the Criminal Code.

2. The Trial

At trial,[8] Therens' counsel objected to the admissability of the Certificate of Analysis on the ground that Therens had been detained within the meaning of s. 10 of the Charter and therefore his rights were violated when Constable Measner failed to inform him of his right to retain and instruct counsel without delay. Muir Prov. Ct. J. allowed the application of defence counsel and excluded the certificate from evidence, exercising a discretionary power to do so as the appropriate and just remedy in the circumstances, pursuant to s. 24(1) of the Charter.

3. The Appeal

The appeal by way of stated case asked the Saskatchewan Court of Appeal for its decision on these questions of law:

> (1) Did the Court err in law in holding that Therens had been detained within the meaning of s. 10 of the Charter?
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> (2) Did the Court err in law in holding that it had a power to exclude evidence under s. 24(1) of the Charter whether or not admitting the evidence in question would bring the administration of justice into disrepute?

(a.) The Meaning of Detention

The Crown counsel contended that there was no evidence that Therens was detained. It was submitted that "detention" as used in s. 10 requires some form of compulsory restraint, so that a person is not free to refuse to comply with the police officer's orders or not free to leave. The fact that Therens would have been arrested and physically restrained if he had tried to leave or refused to accompany the officer was irrelevant, in the

8. (1982) 70 C.C.C. (2d) 468.

Crown's submission. The Crown further contended that Muir Prov. Ct. J.'s decision equated "detain" with "stop", which, it was claimed, entailed that the operation of spot-checks, road-blocks and roadside breath tests would be frustrated.

The Crown argued that the meaning of "detained" was to be gauged from s. 10(c) of the Charter which gives a person a right to question detention by way of *habeas corpus*. Detention would then usually mean being detained in custody after an arrest. In support of his position, the Crown counsel relied heavily on the decision in *Chromiak* v. *The Queen*,[9] and submitted that the same approach should be taken to cases falling under the Charter.

Tallis J.A., delivering the judgment on behalf of four judges of the five judge panel, noted first that in none of the Crown's "stopping" examples were the consequences as serious as those which a s. 235(1) demand carries. He went on to say that the *Chromiak* case was not closely applicable because it involved roadside screening, rather than the more serious and complex s. 236 blood-alcohol tests. A person confronted with a breathalyzer demand is faced with legal issues such as the consequences of refusal, whether reasonable and probable grounds exist, the time-frame of the tests, and so on, which warrant professional advice. The right to counsel entails the right to advice on these complex issues as soon as possible after the making of the demand.

Tallis J.A. rejected the notion that *Chromiak* was determinative of the issues in the case under appeal. Cases under statutes such as the Bill of Rights could be of no more than interpretive assistance. As a constitutional instrument, the Charter stands on an entirely different footing from the Bill of Rights, which is a mere canon of construction for the interpretation of federal legislation.[10] In contrast, a constitutional instrument guaranteeing individual rights and freedoms calls for a generous interpretation to give individuals the full measure of those rights and freedoms, said Tallis J.A., citing *Minister of Home Affairs* v. *Fisher*.[11]

Applying this general approach to the case, the learned Justice stated that the Charter must be interpreted from the standpoint of the average citizen who seldom has a brush with the law: thus the rights accorded in s. 10(b) should be approached by giving the word "detention" its ordinary meaning and not a narrow legalistic interpretation. To adopt a restrictive definition of "detain" would be to say that the law does not recognize rights under s. 10(b) as applying to an accused before arrest. It was open to the learned trial judge to find that Therens was "detained" within the meaning of s. 10(b). Section 235 authorizes a temporary restraint on the liberty of an accused for the purpose of carrying out procedures authorized by law.

If this temporary restraint were held not to be a detention, an obstreperous or knowledgeable citizen might trigger his arrest and thus his s. 10(b) right by resisting the officer, while the average citizen would acquiesce to avoid embarrassment, and thus lose his s. 10(b) right. The

9. [1980] 1 S.C.R. 471.

10. Tallis J.A. cited *R.* v. *Drybones* [1980] S.C.R. 282.

11. [1980] A.C. 319 (P.C.).

Charter should rather apply equally to ordinary people with little knowledge of the legal system. A person to whom a breathalyzer demand has been made is not free to leave, and to say that he is not detained is a legal fiction. Tallis J.A. pointed out that cases dealing with the tort of false imprisonment capture the average person's concept of detention in a very realistic way.[12]

In concluding that Muir Prov. Ct. J. had not erred in finding a detention, Tallis J.A. agreed with the observation in *R.* v. *Altseimer* [13] that the Charter does not intend a paralysis of law enforcement, but noted that the application of s. 10(b) of the Charter to the breathalyzer demand would pose no hardship for law enforcement officers.

(b.) Exclusion of Evidence

Section 24 of the Charter provides that:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
> (2) Where in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The Crown contended that the exclusion of evidence falls exclusively under s. 24(2), so that evidence may be excluded only where the accused establishes that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. This view of s. 24 has been widely accepted, but Tallis J.A. is very persuasive in his reasoning, in agreement with Muir Prov. Ct. J., that evidence may also be excluded under s. 24(1).

Tallis J.A. declined to adopt the approach advocated by Crown counsel, for the excellent reason that in many criminal cases, such an interpretation would result in no effective remedy for the infringement or denial of a fundamental right: "To have a right or freedom without an adequate remedy is to have a right or freedom in theory only."[14] He adopted Muir Prov. Ct. J.'s reasoning that under s. 24(1) a court has a complete *discretion* to provide any remedy, including the exclusion of evidence, if it is "appropriate and just in the circumstances". Section 24(2) transforms the discretion into a *duty*, when that subsection's test is met. To quote Muir Prov. Ct. J.:[15]

> I regard s. 24(2) not as limiting the provisions of s. 24(1), but rather as strengthening the enforcement mechanism by providing that, in the particular circumstances set forth in s. 24(2), the court *shall* exclude the evidence.

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12. Relevant to this issue, Fleming states that is "a sufficient deprivation of freedom if . . . submission to the control of another is procured by threat of force or assertion of legal authority, as when . . . a policeman without actually laying hands on the plaintiff or formally arresting him gives him to understand that he must submit or else be compelled." *The Law of Torts* (6th ed. 1983) 26.
13. *Supra* n. 3.
14. *Supra* n. 7 at 426.
15. Quoted *supra* n. 7 at 428.

This approach is to be favoured as emphasizing constitutional guarantees, rather than narrowing their application by an artificial construction of the Charter (that is, by inserting the word "only" in s-s. (2)), as Tallis J.A. said in dismissing the appeal.

This theory of the exclusion of evidence under the Charter has been adopted in only a few decisions;[16] however, the analysis makes sense. There is no clause in s. 24 which expressly limits the court's power to exclude evidence to only the circumstances in s-s. 2. There seems no apparent reason why a court should not be able to exclude evidence under s-s. (1) when it may, under that subsection, employ more drastic remedies such as the stay of proceedings. This ruling, if adopted, would not entail that any evidence obtained through violation of a Charter right would automatically be excluded: it would be excluded only if that was the appropriate and just remedy in the circumstances. Thus, merely technical violations (*e.g.*, use of a search warrant containing a typographical error) would be unlikely to result in exclusion. Evidence *would* be excluded more frequently than is presently the case; but the ruling would not result in an American-style "automatic exclusion" rule.

Canadian courts have traditionally been very reluctant to exclude evidence.[17] Most courts, in considering applications to exclude evidence under s. 24(2), have adopted Lamer J.'s extremely restrictive test of what "would bring the administration of justice into disrepute": evidence is to be excluded only if it was obtained by conduct on the part of the authorities that would "shock the community".[18] It is regrettable that this test, from a case concerning a confession obtained by police trickery, should be applied wholesale to a matter which was not under Lamer J.'s consideration — the infringement of a constitutionally protected right. The ruling in *R.* v. *Therens* is to be welcomed as heralding a more generous and flexible approach to enforcing the Charter.

C. IMPORTANCE OF *R.* v. *THERENS* TO THE CHARTER LAW REGARDING THE RIGHT TO COUNSEL

R. v. *Therens* is the first appellate court decision to apply the generous interpretation which is appropriate to a constitutionally protected right,[19]

> avoiding what has been called "the austerity of tabulated legalism," suitable to give individuals the full measure of the fundamental rights and freedoms referred to,

in ruling on the issue of whether a person subject to a breathalyzer demand is detained and thus has the right to retain and instruct counsel without delay and to be informed of that right.

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16. *E.g.*, *R.* v. *Ahearn* (1983) 19 M.V.R. 199 (P.E.I. S.C.).
17. *See generally*, *R.* v. *Wray* [1971] S.C.R. 272, which held that evidence illegally obtained must be admitted into evidence if it is probative and relevant; and *Hogan* v. *The Queen* [1975] 2 S.C.R. 574, wherein it was held that an exclusionary rule could not operate even if the evidence were obtained in violation of the Canadian Bill of Rights.
18. *Rothman* v. *The Queen* [1981] 1 S.C.R. 640 at 697.
19. *Minister of Home Affairs* v. *Fisher*, *supra* n. 11, cited in *R.* v. *Therens*, *supra* n. 7.

1. Other Recent Appellate Court Decisions

Most other appellate courts have been content to apply the Supreme Court decision in *Chromiak* v. *The Queen*,[20] which defined "detention" in very narrow terms. This is unfortunate because, as will be discussed more fully later, *Chromiak* was poorly reasoned, dealt with the s. 234.1 roadside screening demand which is very different from the s. 235 breathalyzer demand, and it was decided under the *Bill of Rights* and not the Charter. I shall review the appellate decisions briefly before proceeding to an analysis of *Chromiak*. Some of the points noted below will be discussed in connection with *Chromiak*.

In *R.* v. *Altseimer* [21] the Ontario Court of Appeal held that a motorist stopped for a vehicle check had not been arbitrarily detained in contravention of s. 9 of the Charter, because stopping the vehicle had not been a detention. The court simply cited *Chromiak* as precedent, without reasons.

The remaining three decisions to be discussed all deal with the s. 235 breathalyzer demand and s. 10(b) of the Charter.

In *R.* v. *Currie*,[22] the Nova Scotia Court of Appeal held that a motorist subject to a breathalyzer demand is not detained and therefore a police officer is not required to comply with the requirement in s. 10(b) of informing an arrested or detained person of his right to retain and instruct counsel. Macdonald J.A., delivering the judgment of the court, said that the wording of s. 10 of the Charter was substantially similar to that of s. 2(c) of the Bill of Rights and therefore *Chromiak* remained an authoritative ruling on the meaning of "detention" as contemplated by those sections. Accordingly, to have the right to counsel under s. 10(b), a person must be involuntarily detained by operation of some legal process which is reviewable by way of *habeas corpus*. As noted by the learned Justice, a condition precedent to the invocation of *habeas corpus* is that the applicant be in custody.[23]

R. v. *Trask*,[24] in the Newfoundland Supreme Court, also followed *Chromiak*, holding that s. 235 does not contemplate detention. Gushue J.A. said that he could,[25]

> discern no difference in substance between the intent and meaning of s. 2(c) of the Bill of Rights and s. 10 of the Charter which would warrant another finding. The Charter of Rights and Freedoms creates no new rights in this regard, but rather constitutionally guarantees existing rights.

The Alberta Court of Appeal, in *Rahn* v. *The Queen*,[26] followed *Chromiak* and disagreed with *Therens*, holding that there was no valid distinction of *Chromiak* based upon differences between the road-side screening test and the breathalyzer test. The road-side test was said to be

20. *Supra* n. 9.
21. *Supra* n. 3.
22. *Supra* n. 4.
23. He cited *Ex parte Simpson sub nom R.* v. *Keeper of Halifax County Jail* (1918) 30 C.C.C. 334.
24. *Supra* n. 5.
25. *Id.* at 53.
26. *Supra* n. 6.

"merely the first stage in a process which progresses to a breathalyzer demand and then to the test itself".[27] The court adopted the meaning of "detention" stated in *Chromiak* and in *Currie*. Laycraft J.A. said that a wider meaning of detention "would enable even the motorist called upon to wait for three minutes, while a traffic policeman permits cross-traffic to proceed, to call in aid the Constitution of Canada".[28]

2. *Chromiak* v. *The Queen*: A Bill of Rights Case

In *Chromiak*, the Supreme Court considered the question of whether a person has the right to legal counsel when a demand for a road-side screening test has been made upon him pursuant to Criminal Code s. 234.1. Section 234.1 provides:

> (1) Where a peace officer reasonably suspects that a person who is driving a motor vehicle or who has the care or control of a motor vehicle, whether it is in motion or not, has alcohol in his body, he may, by demand made to that person, require him to provide forthwith such a sample of his breath as in the opinion of the peace officer is necessary to enable a proper analysis of his breath to be made by means of an approved road-side screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of his breath to be taken.
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> (2) Every one who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under subsection (1) is guilty of an indictable offence or an offence punishable on summary conviction and is liable
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> (a) for a first offence, to a fine of not more than two thousand dollars and not less than fifty dollars or to both;
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> (b) for a second offence, to imprisonment for not more than one year and not less than fourteen days; and
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> (c) for each subsequent offence, to imprisonment for not more than two years and not less than three months.

Section 234.1 was considered in relation to s. 2(c) of the Bill of Rights:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
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> . . .
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> (c) deprive a person who has been arrested or detained
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> (i) of the right to be informed promptly of the reason for his arrest or detention,
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> (ii) of the right to retain and instruct counsel without delay, or
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> (iii) of 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; . . .

Ritchie J., delivering the unanimous judgment of the court,[29] held that a person subject to the s. 234.1 demand is not arrested or detained, and therefore has no right to retain and instruct counsel without delay. In the result, the police officer's denial of Chromiak's request for counsel did not provide a reasonable excuse for Chromiak's refusal to comply with the breath demand.

There are a number of reasons why the decision in *Chromiak* should not be regarded as precedent for Charter cases concerning the s. 235 breathalyzer demand. It is submitted that the judgment contains a number of errors in reasoning. In addition, there are important dif-

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27. *Id.* at 13.

28. *Id.* at 15.

29. Martland, Pigeon, Beetz, Estey, McIntyre and Chouinard J.J. were the other members of the court present.

ferences between the relevant Criminal Code sections and between the provisions of the Charter and the *Bill of Rights* which make the judgment inapplicable to post-Charter decisions.

The first point to be noted is that Ritchie J. said that s. 234.1 and s. 235 are virtually identical:[30]

> In fact, the penalty provisions (subs. (2)) of the two sections are identical, and the essential difference between the two sections is that s. 234.1 provides procedure requiring the driver of a motor vehicle to provide breath samples for analysis in a roadside screening device, whereas in s. 235 the procedure relates to the furnishing of a sample for analysis by a qualified technician. For the purposes of the present appeal, I share the view of Clement J.A. that the cases which have been decided in relation to s. 235 are relevant for consideration here.

This has been taken as support for the proposition that *Chromiak* decides that there is no detention in the circumstances of a s. 235 demand.[31] However, the procedure which is carried out pursuant to s. 235 involves considerably more coercion than does the s. 234.1 procedure. Typically, a person given a breathalyzer demand is asked to leave his car, is placed in a police cruiser, and is driven some distance to the police station where the test is administered; whereas s. 234.1 requires only that the person go over to the nearby police cruiser to blow into the A.L.E.R.T. testing device. Section 235 thus involves both more physical disturbance and more psychological intrusion than does s. 234.1. I would submit that these factors are relevant to the determination of whether there is a detention.

Even more importantly, although the penalties for refusal are identical, the consequences of compliance are not. One who complies with a s. 235 demand and blows "over 80" on the breathalyzer is immediately charged with driving with over 80 milligrams of alcohol in 100 millilitres of his blood, contrary to s. 236(1) of the Code. There is no immediate criminal consequence pursuant to compliance with the s. 234.1 demand: there is no charge of "blowing red on a roadside testing device" in the Criminal Code. As the reference in s. 234.1 to a "roadside screening device" indicates, s. 234.1 functions merely to "screen out" the persons to whom the breathalyzer demand will be made. It is at *that* point that the individual is faced with complex legal issues which warrant professional advice, as Tallis J.A. said in *Therens*.

Ritchie J. defined "detained", as found in the *Bill of Rights*, to mean some form of "compulsory restraint".[32] He added that s. 2(c)(iii), which guarantees to a person "the remedy of *habeas corpus* for the determination of the validity of the detention and for his release if the detention is not lawful", contemplates that any person "detained" within the meaning of the section is one who has been detained by due process of law. This construction was supported by reference to Criminal Codes ss. 28(2), 30, 136(a), 248 and 250 where the learned Justice said that the words, "to detain", are used in association with "actual physical restraint".[33]

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30. *Supra* n. 9 at 476; referring to the lower court decision, 46 C.C.C. (2d) 310 (Alta. C.A.).
31. *E.g.*, *Rahn* v. *The Queen*, *supra* n. 6 at 17-18.
32. *Supra* n. 9 at 478.
33. *Id.*

As noted in the *Currie* case,[34] a condition precedent to the invocation of *habeas corpus* is that the applicant be in custody. Now, while "custody" *is* one sense of "detention", it surely was not the only sense of the word that Parliament intended to include in s. 2 of the *Bill of Rights* or in s. 10 of the Charter. If this were all that was intended by "detention" or "detained", Parliament could simply have used the more specific word, "custody." The use of the more general word demonstrates an intention that the right to counsel exist in the broader range of circumstances encompassed by the ordinary meanings of "detention" when an individual is faced with immediate criminal consequences and legal issues which warrant professional advice. Although Ritchie J. said " the word 'detention' does not *necessarily* include arrest",[35] his definition makes the words virtually synonymous, since a detention by a police officer, in the sense of "compulsory restraint", "actual physical restraint", or "custody", cannot, in practical terms, occur without an arrest, formal or informal. Thus *Chromiak*, and the decisions which have applied it to cases arising under the Charter, say that Parliament intended no one, before his arrest, to have a right to counsel.

In support of his definition of "detention", Ritchie J. adopted the following from Pigeon J.'s dissenting judgment in *Brownridge* v. *The Queen*:[36]

> 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 s. 39(6) or s. 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. *Motorists cannot reasonably expect to seek legal advice before complying with such orders.* Police officers are fully justified in treating as a definitive refusal a refusal to comply until legal advice is obtained.
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> Does s. 2(c)(ii) of the Bill of Rights alter the common law situation with respect to motorists requested to submit to a test required by the Criminal Code as opposed to tests required by provincial legislation? I do not think so. The provision under consideration applied 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. The test may well be negative and, in such a case, it would be quite wrong to say that this person was arrested or detained and then released. *Detained means held in custody* as is apparent from such provisions as s. 15 of the Imigration Act, R.S.C. 1970, c. I-2. [Emphasis added.]

The majority in *Brownridge*[37] held that the denial of the right to counsel to the appellant, who had been arrested and was being held in the police cells, constituted a defence to the charge of refusing to provide a sample for the breathalyzer, contrary to s. 223 (now s. 235). No other member of the court concurred in Pigeon J.'s dissenting judgment.

Ritchie J. distinguished *Brownridge* from *Chromiak* on the basis that Brownridge had been *arrested* and held in custody when he was denied access to counsel. This distinction is inconsistent with the decision in

34. *Supra* n. 23.

35. *Supra* n. 9 at 476 (emphasis in the original).

36. [1972] S.C.R. 926, at 943-944.

37. Mr. Justice Ritchie delivered one majority judgment, and Mr. Justice Laskin (as he then was) delivered the other.

Hogan v. *The Queen*.[38] Hogan had been taken to a police station for a breathalyzer test but *was not arrested* at the time that his access to counsel was denied. The issue in the case was whether the breathalyzer certificate was admissable. The Supreme Court held that it was, even though it was obtained in violation of Hogan's right to counsel. Since he was not arrested, the court must have assumed that he was detained: otherwise the question of the effect of a violation of his right would not have arisen.[39]

As will be readily appreciated, the facts in *Brownridge* are very different from those in *Chromiak*. Pigeon J.'s dissent is directed toward denying the right to counsel even to someone who is *arrested*, as Brownridge was. This is in direct contradiction to s. 2(c) of the *Bill of Rights* and thus clearly wrong.

The learned Justice cited the Ontario Highway Traffic Act in support of his argument. Since the quasi-criminal provisions he cited have much less serious consequences than do the breathalyzer demand and accompanying Criminal Code sections and furthermore are, as provincial legislation, not subject to the *Bill of Rights*, there was no proper basis for the comparison. Both Ritchie and Pigeon JJ. used ordinary statutory provisions as canons of construction to assess the extent of the right to counsel under the *Bill of Rights*. This is surely standing the appropriate mode of analysis on its head, since the *Bill of Rights* is a canon of construction for the interpretation of federal legislation.[40] The inverted analysis used in *Chromiak* and in the *Brownridge* dissent is even less appropriate to use in determining the extent of the right to counsel now that it has been elevated to constitutional status.

"Motorists cannot reasonably expect to seek legal advice before complying" with police orders, said Pigeon J. in *Brownridge*,[41] implying that the onus is on the individual to demonstrate that his expectations of his legal rights are reasonable. This logic is inapplicable to Charter cases. Section 1 of the Charter provides that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Under the Charter, a person alleging his rights have been violated need only establish a *prima facie* violation of the right. If he succeeds, the onus then shifts to the Crown to demonstrate that there exists a reasonable limitation on the right, prescribed by law, that can be justified in a free and democratic society.[42] The onus is on the Crown, *not* the individual, to demonstrate the reasonable limits of a Charter right. None of the decisions which applied *Chromiak* to the Charter appear to have considered this aspect of the Charter.

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38. *Supra* n. 17.

39. No specific finding to this effect is in the reasons for the majority, although Laskin J. (as he then was) made a specific finding, in his dissenting judgment, that Hogan was detained (*supra* n. 17 at 587).

40. *Supra* n. 10.

41. *Supra* n. 37.

42. See *Quebec Association of Protestant School Boards* v. *Attorney-General of Quebec (No. 2)* (1982) 140 D.L.R. (3d) 33.

D. CONCLUSION

The decisions which applied *Chromiak's* definition of detention to the Charter have said that there is no difference between s. 2(c) of the *Bill of Rights* and s. 10 of the Charter which would warrant another finding. This is not correct, even if s. 10 is considered in isolation from the rest of the Charter. Section 10 is worded as a positive right, "[e]veryone has the right upon arrest or detention . . .", not in negative terms as is s. 2(c) which says; ". . . no law of Canada shall be construed or applied . . . so as to deprive a person who has been arrested or detained . . .". Further, s. 10(b) adds the requirement that an arrested or detained person be informed of his right to counsel. These things are indications of Parliament's intention that the right to counsel is to be a stronger, more enforceable right than it was under the *Bill of Rights.*

Furthermore, no Charter right or freedom can be fully understood when considered in isolation. Each must be considered in its relation to ss. 1, 24, and 52 of the Charter. Section 1 permits only reasonable limitations on Charter rights and freedoms, and those limitations must be prescribed by law and demonstrably justified in a free and democratic society. Section 24 provides for the complete discretion of courts to remedy Charter violations, thus correcting a major weakness of the *Bill of Rights.* And s. 52 says that the Charter, as part of the Constitution, is the supreme law of Canada. As the supreme law, it must be given a generous interpretation to guarantee to individuals the full measure of Charter rights and freedoms.

In *Chromiak*, Ritchie J. defined "detention" far more narrowly than was necessary to decide that a person subject to a roadside screening demand is not detained and does not have the right to counsel. Applying that kind of technical, legalistic interpretation to cases under the Charter can only serve to perpetuate the failings of the *Bill of Rights.* It is time for Canadian courts to move into a new era for Canadian civil liberties, as the Saskatchewan Court of Appeal has done in *R.* v. *Therens.*

II. THE SUPREME COURT DECISION

A. INTRODUCTION

On May 23, 1985 the Supreme Court of Canada dismissed the Crown's appeal of *R.* v. *Therens.*[43] The Court, McIntyre and Le Dain JJ. dissenting, upheld the Saskatchewan Court of Appeal's ruling on every point except that of the exclusion of evidence under s. 24(1) of the Charter. The decision is striking not only for its rulings on the specific issues of detention, the role of s. 1 of the Charter, and the exclusion of evidence, but also for its strong statements concerning proper methods of Charter interpretation and application.

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43. *R.* v. *Therens*, unreported, 23 May 1985, 17692 (S.C.C.). On the same day, the Supreme Court overturned the Newfoundland Court of Appeal decision in *R.* v. *Trask* (17747, S.C.C.) and the Alberta Court of Appeal decision in *R.* v. *Rahn* (18376, S.C.C.), applying the reasons given in *R.* v. *Therens.*

B. DETENTION AND VIOLATION OF THE RIGHT TO COUNSEL.

The panel was unanimous in ruling that Therens' rights under s. 10(b) of the Charter had been violated. A person faced with a breathalyzer demand is "detained" and is entitled to be informed of his right to retain and instruct counsel without delay. On this issue, Dickson C.J.C. and Lamer and McIntyre JJ. concurred in Le Dain J.'s reasons for judgment, which are similar in approach to those of Tallis J. in the Saskatchewan Court of Appeal, but provide a more detailed description of the concept of "detention" under the Charter.

The word "detention" in s. 10 is directed to a restraint of liberty of varying duration, other than arrest, in which a person may reasonably require the assistance of counsel and might be prevented from retaining and instructing counsel without delay, but for the constitutional guarantee. In addition to the case of deprivation of liberty by physical constraint, there is also a "detention" within s. 10 by means of psychological compulsion when a police officer assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel. Le Dain J. emphasized that the key requirement is some form of compulsion or coercion. Any criminal liability for failure to comply with a demand or direction of a police officer is sufficient to make compliance involuntary.

In a discussion generally applicable to Charter interpretation, Le Dain J. held that despite any similarity to s. 10 of the Charter, the meaning of the word "detained" in s. 2(c) of the *Bill of Rights* as adopted in *Chromiak* [44] was not determinative. The premise that the framers of the Charter intended that its words should retain the meaning given them by judicial decisions before it was enacted is not a reliable guide to Charter interpretation and application. It is the purpose of the Charter section itself that must be considered in determining its meaning. By its very nature, a constitutional charter of rights and freedoms must use general language which is capable of development by the courts. The Charter must be regarded as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection, said Le Dain J. in a strong statement of judicial activism.

C. THE RIGHT TO COUNSEL IS NOT, BY VIRTUE OF S. 235(1), SUBJECT TO A LIMIT PRESCRIBED BY LAW.

The majority of the court ruled that s. 1 of the Charter does not apply to the breathalyzer demand because Parliament, in s. 235(1) of the Code, has not purported to limit the detained person's right to counsel. The two-hour operating requirement imposed by s. 237(1)(b)(ii) does not preclude contact with counsel prior to the breathalyzer test. Therefore, when a person is detained because of a s. 235(1) demand, the right to be informed of the right to retain and instruct counsel without delay is not subject to a limit prescribed by law within the meaning of s. 1 of the

44. [1980] 1 S.C.R. 471.

Charter. In Therens' case, the limit on his right to consult counsel was imposed by the conduct of the police officers and not by Parliament. Lamer J. held that it was therefore not necessary to consider the role of s. 1.

D. EXCLUSION OF THE BREATHALYZER EVIDENCE.

Estey J., Beetz, Chouinard and Wilson JJ. concurring, provided the majority opinion on this issue. He rejected the view of Tallis J. that evidence may be excluded under s. 24(1) of the Charter, but provided an expanded view of the circumstances in which s. 24(2) will apply, while refraining from making a definitive statement of the meaning of "bring the administration of justice into disrepute." Estey J. held that the police had flagrantly violated a Charter right without any statutory authority for so doing, and that to do otherwise than reject the evidence would be to invite police officers to disregard citizens' Charter rights and to do so with impunity. This ruling corrects a major failing of the *Bill of Rights* by placing importance on s. 24 as the enforcement mechanism for Charter rights.

Lamer J., with whom Dickson C.J.C. concurred on this point, held that it was unnecessary to rule on whether evidence could properly be excluded as the "appropriate and just remedy" under s. 24(1) of the Charter, since clearly the test of s. 24(2) was met. The evidence was "obtained in a manner that infringed" the Charter: there was more than a mere temporal relation between the violation of the right and the obtaining of the evidence. Where a detained person is required to provide evidence which may be incriminating and where refusal to comply is punishable as a criminal offence, s. 10(b) imposes a duty not to call upon him to provide that evidence without first informing him of his s. 10(b) rights and providing him with a reasonable opportunity and time to retain and instruct counsel. Failure to abide by that duty will lead to the obtaining of evidence in a manner which infringes or denies the detained person's s. 10(b) rights. To admit the breathalyzer evidence in these circumstances would bring the administration of justice into disrepute, since s. 10(b) would then become a near-empty right.

This generous view of the circumstances in which evidence should be excluded is a complete reversal of the narrow test promulgated by Lamer J. in the pre-Charter case of *Rothman*,[45] and adopted by many lower court Charter rulings, that the evidence must have been obtained by conduct on the part of the police that would "shock the community".

Le Dain and McIntyre JJ. dissented on this issue and would therefore have allowed the Crown's appeal. Le Dain J. held that because of the ruling in *Chromiak*, the police officer in this case was entitled to assume in good faith that Therens did not have a right to counsel on a demand under s. 235 of the Code. McIntyre J. said that excluding the evidence in the circumstances would be tantamount to applying an automatic exclusion rule, and would itself bring the administration of justice into disrepute.

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45. [1981] 1 S.C.R. 640 at 697.

E. CONCLUSION

When the Saskatchewan Court of Appeal ruled that Therens had been detained and his right to counsel violated, it was alone among Canadian courts of appeal in ruling that the circumstances of a breathalyzer demand constitute a detention under the Charter. Decisions in Nova Scotia,[46] Newfoundland,[47] and Alberta[48] had been content to follow the *Bill of Rights* decision in *Chromiak*.[49] The Supreme Court of Canada's ruling in *Therens* demonstrates that the Saskatchewan Court of Appeal was correct in ruling that *Bill of Rights* decisions cannot be regarded as binding precedent for Charter cases. In the words of Le Dain J., "[t]he Charter must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection."[50]

46. *Currie*, *supra* n. 4.
47. *Trask*, *supra* n. 5.
48. *Rahn*, *supra* n. 6.
49. *Chromiak*, *supra* n. 9.
50. *Therens* at 21.