The Quest for Meaning in *Charter* Adjudication: Comment on *R.* v. *Therens*

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The author discusses the recent Supreme Court decision on the application of sections 10(b) and 24 of the *Canadian Charter of Rights and Freedoms*. Focusing on the reasoning used to resolve the controversial issues in the case, the author examines certain assumptions that seem to underlie the Court's approach to interpretation and argument. It is evident in these early days that the Supreme Court has not yet developed a coherent theory of *Charter* interpretation, but cases such as *R.* v. *Therens* indicate areas in which development might occur.

L'auteur commente la décision récente de la Cour suprême concernant l'application du sous-paragraphe 10(b) et de l'article 24 de la *Charte canadienne des droits et libertés* à l'obtention de la preuve en vue de l'analyse d'un échantillon d'haleine prévu au paragraphe 235(1) du *Code criminel*. Dans cette perspective, l'auteur examine les prémisses sur lesquelles la Cour semble fonder son étude de cette question. Même s'il est évident que la Cour suprême n'a pas, à ce jour, développé une théorie cohérente d'interprétation de la *Charte*, des arrêts comme *R.* c. *Therens* indiquent des domaines dans lesquels un tel développement pourrait se réaliser.

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I. Introdnction

R. v. *Therens*[1] is the Supreme Court of Canada's first pronouncement on a matter that has been much litigated[2] since the advent of the *Canadian Charter of Rights and Freedoms*[3]: the exclusion of evidence as a remedy, under section 24, for persons who have submitted to a breathalyzer test without being accorded their paragraph 10(b) right to retain and instruct counsel or to be advised of their right to do so. This case involved subsection 235(1) of the *Criminal Code*[4] which empowers a peace officer to demand,

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[1](1985), 59 N.R. 122, [1985] 4 W.W.R. 286, 45 C.R. (3d) 97 [hereinafter *Therens* cited to N.R.].

[2]See, *e.g.*, *R.* v. *Rahn* (1985), 59 N.R. 144, 38 Alta L.R. (2d) 97, 45 C.R. (3d) 134 and *R.* v. *Trask* (1985), 59 N.R. 145, 45 C.R. (3d) 137 decided by the Supreme Court of Canada on the same day as *Therens*. In the Alberta Court of Appeal decision in *R.* v. *Rahn* (1984), 50 Alta R. 43 at 45, 11 C.C.C. (3d) 152, Laycraft J.A. noted that, "[d]uring the research for this decision a computer review showed more than one hundred cases affecting it and reaching a variety of results".

[3]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*]. Section 24 of the *Charter* states:

> (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.
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> (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.

Section 10 states:

> Everyone has the right on arrest or detention ...
>
> (b) to retain and instruct counsel without delay and to be informed of that right ....

[4]R.S.C. 1970, c. C-34, as am. *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93. Subsection 235(1) states:

> 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.

Subsection 234.1(1) states:

> 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.

"forthwith or as soon as practicable", that a suspect provide, "then or as soon thereafter as is practicable", the requisite breath samples. The section also authorizes the officer to demand that the person "accompany the peace officer for the purpose of enabling such samples to be taken". Related issues arise under subsection 234.1(1), although, as we shall see, the argument has been made that subsection 234.1(1) involves different considerations.

Five of the eight Justices[5] who took part in the decision in *Therens* wrote opinions.[6] It is useful at the outset to summarize their positions on the main issues in the case:

1. Were the accused's rights under paragraph 10(b) infringed? Since there was no question that Mr Therens was neither given the opportunity to retain and instruct counsel nor advised of his right to do so, the focus of this issue was whether there had been a "detention" that would bring section 10 into play. All of the Justices agreed that there had been a "detention".

2. May section 1 of the *Charter* be used to justify the infringement of the accused's rights? The court held unanimously that section 1 could not be invoked in the circumstances of this case.

3. Is the remedy of the exclusion of evidence exhaustively provided for in subsection 24(2), or is it available pursuant to subsection 24(1)? On this question, Dickson C.J.C. and Lamer J. explicitly said that they were remaining agnostic for the time being. Estey J.'s position, presumably accepted by Beetz, Chouinard and Wilson JJ., strikes one initially as rather ambiguous. His statement, "because s. 24(2) ... operates to exclude the evidence thereby obtained, s. 24(1) ... need not be invoked",[7] might be taken to imply that he simply felt it unnecessary to consider subsection 24(1). Shortly after, however, he explicitly agreed with Le Dain J. that the admissibility of evidence "falls to be determined by s. 24(2) of the *Charter* and not by reason of subs. (1) of that section".[8] Le Dain J., with whom McIntyre J. agreed, stated unambiguously "that s. 24(2) was intended to be the sole basis for the exclusion of evidence because of an infringement or a denial of a right or freedom guaranteed by the *Charter*".[9] Apparently, therefore, six of the eight Justices viewed subsection 24(2) as exhaustive, although only Le Dain and McIntyre JJ. had to consider this issue for their disposition of the case.

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[5]Ritchie J. did not participate in the judgment.

[6]Those of Dickson C.J.C. and McIntyre J. are very brief, amounting basically to bare concurrences.

[7]*Therens, supra,* note 1 at 124.

[8]*Ibid.*

[9]*Ibid.* at 137.

4. Was there a sufficient connection between the infringement of the *Charter* rights and the obtaining of the impugned evidence to bring subsection 24(2) into play? All the Justices agreed in finding the necessary connection, although Le Dain and Lamer JJ. differed in their rationalizations of it.

5. Would the admission of the evidence bring the administration of justice into disrepute? Six Justices — Dickson C.J.C. and Estey, Beetz, Chouinard, Wilson and Lamer JJ. — thought that it would. Le Dain and McIntyre JJ. dissented on this point.

From this summary, it might be said that there was greater consensus on the issues actually required to determine the case than the apparent diversity of opinions suggests. Indeed, even on what may be considered the "ultimate issue" — whether the admission of the evidence would bring the administration of justice into disrepute — the dissenting view of Le Dain J. could be characterized as being based less on any disagreement in principle with the majority than on his interpretation of the specific factual circumstances of the case.

However, the analysis by the Court of the issues before it at this early stage of *Charter* adjudication is as interesting as the actual outcome of *Therens.* An examination of the reasoning used to resolve the controversial issues in the case raises many questions about the assumptions underlying the Court's approach to interpretation and argument.

II. The Problematical Issues

1. "Detention"

On this issue we may take Le Dain J. to have spoken for the Court, since all the other Justices agreed with at least his conclusion that the accused had been "detained".

The most formidable obstacle to a finding of detention was *Chromiak* v. *R.*,[10] in which the Supreme Court decided unanimously that a person to whom a demand was made pursuant to subsection 234.1(1) was *not* "detained" within the meaning of paragraph 2(c) of the *Canadian Bill of Rights* which reads, "no law of Canada shall be construed or applied so as to ... (c) deprive a person who has been arrested or detained ... (ii) of the right to retain and instruct counsel without delay ...".[11] Some provincial courts of appeal, in dealing with analogous cases under the *Charter*, have felt bound

[10](1979), [1980] 1 S.C.R. 471, 102 D.L.R. (3d) 368, 49 C.C.C. (2d) 257 [hereinafter *Chromiak*].

[11]S.C. 1960, c. 44 reprinted in R.S.C. 1970, App. III [hereinafter the *Bill of Rights*].

by the definition of "detained" in *Chromiak*.[12] Other courts, notably the Saskatchewan Court of Appeal in *Therens* itself, have decided that *Chromiak* was not determinative.[13]

A "conservative" basis on which *Chromiak* might be distinguished is that it dealt with a subsection 234.1(1) situation, which, since it involves only a demand to provide a breath sample for a roadside screening device, is arguably less intrusive than a subsection 235(1) demand. This distinction was in fact made by both the trial judge and by Tallis J.A. in *Therens*.[14]

In the Supreme Court, Estey J. did allow for a possible distinction between subsection 234.1(1) and subsection 235(1), but the importance he attaches to this is not clear. He seems to have related the idea of detention to the delay contemplated by subsection 235(1) "in some circumstances for the administration of this test".[15] Unlike subsection 235(1), subsection 234.1(1) requires that the driver "provide *forthwith* such sample of his breath" [emphasis added], and therefore permits only very brief interference with his freedom. Whether Estey J. is suggesting that one criterion for "detention" is the duration of the restraint is not made explicit. The ambiguity is aggravated by the apparent relevancy of the question of delay to the availability of section 1, a point to which Estey J. alludes in his judgment.[16] Le Dain J. rejects the notion that *Chromiak* should be distinguished on the basis of the difference between subsections 235(1) and 234.1(1):

> The fact that a roadside screening test under a s. 234.1(1) demand is generally administered in the back of a police car, whereas the breathalyzer test under a s. 235(1) demand is generally administered in a police station, amounts to a mere difference of degree in so far as the question of detention is concerned.[17]

Le Dain J. may be right with respect to these two instances, but his argument is problematical, even question-begging. The difference, he says, is "merely" one "of degree". However, as Glanville Williams has remarked, "in law we make sharp consequences hang upon ... words of gradation".[18] Differences of degree do matter. The problem is to ascertain when a difference in degree becomes significant, or what distinguishes it from a difference in kind. Is

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[12]See, *e.g.*, *R.* v. *Currie* (1983), 56 N.S.R. (2d) 583, 147 D.L.R. (3d) 707, 4 C.C.C. (3d) 217 (S.C. A.D.); *R.* v. *Rahn*, *supra*, note 2; and *R.* v. *Trask* (1983), 42 Nfld & P.E.I.R. 30, 150 D.L.R. (3d) 161, 6 C.C.C. (3d) 132 (Nfld C.A.).

[13](1983), 23 Sask. R. 81, 148 D.L.R. (3d) 672, 5 C.C.C. (3d) 409 (C.A.), aff'g 70 C.C.C. (2d) 468, 16 M.V.R. 285 (Sask. Prov. Ct).

[14]*Ibid.* See also the dissent of Tarnopolsky J.A. in *R.* v. *Simmons* (1984), 45 O.R. (2d) 609 at 639-40, 7 D.L.R. (4th) 719, 11 C.C.C. (3d) 193 (C.A.).

[15]*Therens*, *supra*, note 1 at 124.

[16]*Ibid.*

[17]*Ibid.* at 132.

[18]"Language and the Law - II" (1945) 61 L.Q. Rev. 179 at 183.

Le Dain J. saying that the duration of the holding or the distance that the citizen is taken out of his way is never significant in identifying "detention"? Or is he saying only that, as between subsections 234.1(1) and 235(1), these differences of degree are not significant?[19]

Rather than resorting to what he views as strained distinctions between subsections 234.1(1) and 235(1), Le Dain J. prefers a frontal attack. "Detention" under the *Charter* does not mean what it meant (and presumably still means) under the *Bill of Rights*.[20]

One need not be a philosophical realist[21] or have a narrowly referential notion of language[22] to be initially taken aback by this approach, and Le Dain J.'s explanation of his position does not entirely allay the disquiet. He begins by questioning "the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted".[23] Perhaps he is conflating two separate issues in interpretation: "the framers' intent" and the "original understanding" of a word.

As Michael S. Moore has argued,[24] there are serious difficulties in using a speaker's intent in divining meaning. For one thing, intent is generally unknown; for another, to use Moore's terms, while the speaker's intent may determine the "speaker's meaning", it does not necessarily determine the "utterance meaning".[25] It is not clear whether Le Dain J.'s words suggest that he would defer to "legislative intention" but that the application of the word "detention" in *Chromiak* is not the index of that intention, or whether he is doubting the value of speculating on the framers' intention. Legislative intention may thus be a questionable criterion, but that does not answer the *Chromiak* issue. Even if we are concerned only with "utterance meaning", we may still go to the context of linguistic conventions at the time

[19]The problem is illustrated, in another context, by the situation in *R.* v. *Simmons*, *supra*, note 14. A person going through Canada Customs may simply be asked to declare what he is bringing into Canada, or he may be told to open his baggage, or he may be subjected to a search of his person. At what point, if any (see the majority opinion in *R.* v. *Simmons*) is he "detained"?

[20]One might even argue that the nominalization of "detained" in the *Charter* suggests a restricted application. The connotations of "I am detained at my office" and "I am under detention at my office" are quite different!

[21]In the sense of believing that there is some independent abstract entity, "detention", governing the meaning of the word.

[22]In the sense of believing that the meaning of the word "detention" is governed by a closed class of particulars which it denotes.

[23]*Therens*, *supra*, note 1 at 132.

[24]"The Semantics of Judging" (1980) 54 S. Cal. L. Rev. 151 at 246ff.

[25]*Ibid.* at 248 and 252.

the utterance (here, section 10 of the *Charter*) was made. Among these conventions would be the meaning given to "detention" in analogous legal contexts. This would be relevant to our ascertaining the "original understanding" of "detention".

A standard criticism of the "original understanding" approach is exemplified by the following:

> [W]hatever the common sense of the things included or excluded at the time the constitutional language was approved, it is not a reasonable construction of the abstract language to limit it forever to its historic denotations. Matters of constitutionally relevant and controlling fact and value may evolve so that applications unimaginable earlier may become reasonable, and earlier applications may become unreasonable.[26]

If Le Dain J.'s position implies that he is endorsing this criticism, it is probably untenable in this case. One can understand the validity of such observations with respect to constitutional provisions framed a century or two ago, but *Chromiak* was decided in 1979 and the *Charter* came into effect in 1982. Far from the application in *Therens* being "unimaginable" at that time, it is effectively the same as that in *Chromiak*.

Le Dain J. is in fact saying more than that the "original understanding" of "detention" no longer obtains: the *Chromiak* sense of "detention" never was the understanding in the *Charter* context. This leaves unanswered the question as to what was the "original understanding" which would supply the "utterance meaning". The implication of Le Dain J.'s position is that there need not have been any such understanding. He repeats what has by now become a platitude in *Charter* interpretation: "By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts."[27] The text does not have determinate meaning; it is given meaning by the reader. While, as the growing literature on this issue attests,[28] this is a defensible position, Le Dain J. leaves its implications unexplored.

A new reading of "detention" is justified in Le Dain J.'s view, not only by the assumption that constitutional language is less determinate than, say,

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[26]D.A.J. Richards, "Interpretation and Historiography" (1985) 58 S. Cal. L. Rev. 490 at 507. This is reminiscent of Dickson J. (as he then was) speaking of the Constitution in *Hunter* v. *Southam Inc.* (1984), [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97 [hereinafter *Hunter* cited to S.C.R.]: "It must ... be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."

[27]*Therens*, *supra*, note 1 at 132. For several examples of judicial assertions of the need to interpret the *Charter* "liberally", see S.A. Cohen, "Controversies in Need of Resolution: Some Threshold Questions Affecting Individual Rights and Police Powers under the Charter" (1984) 16 Ottawa L. Rev. 97 at 99-100.

[28]See, *e.g.*, the discussions in (1982) 60 Tex. L. Rev. and (1985) 58 S. Cal. L. Rev.

statutory language, but also by the status of the *Charter*, which "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".[29] From this new role of the courts, Le Dain J. derives a principle of interpretation. One might object to changing the meaning of words as a result of greater formal powers being given to the courts. It is difficult to deny, however, that courts will and indeed ought to be conservative in their interpretation of statutes like the *Bill of Rights* in the face of parliamentary sovereignty. On the other hand, where they have a constitutional mandate to invalidate laws, deference to the legislature need not be part of their theory of interpretation.[30]

Two other distinctions drawn by Le Dain J. between the *Bill of Rights* and the *Charter* warrant comment. One is that the grafting of the right to be informed onto the basic right to counsel "shows the additional importance which the *Charter* attaches to the right to counsel".[31] This may be. However, it does not clearly follow that this addition of a right changes the meaning of "detention". The second is that, since the *Bill of Rights* lacks the equivalent of section 1 of the *Charter*, courts had to use interpretation of the rights themselves as a way of imposing "reasonable limits" on their exercise. Two further points might be made about this. First, it may indicate that the Supreme Court will be disinclined to limit rights under the *Charter* by initially defining them restrictively; rather, the Court may prefer to make section 1 the focus for considering limitations. It is worth remarking the effect of this approach in the *Therens* situation where, as we shall see, section 1 does not apply. Whereas in *Chromiak* the Court was justified in resorting to a narrow reading of "detention" to save a reasonable limit on a right, neither this technique nor section 1 is available in *Therens*. Second, Le Dain J. seems to approve the limitations imposed by *Chromiak*: "The meaning and application given to the word 'detained' in *Chromiak* was the only means by which reasonable limits could be placed on the right to counsel."[32] Does this mean that when a subsection 234.1(1) case comes before the Supreme Court "detention" may be defined as in *Therens*, but that the

[29]*Therens*, *supra*, note 1 at 132.

[30]There was, of course, no issue of invalidating a law in *Therens* since, as we shall see in another context, the time constraints of a s. 235(1) demand are not such as to preclude consultation with counsel as a necessary implication from the statutory provision. This might be another basis for distinguishing *Chromiak*: there, since the word "forthwith" in s. 234.1(1) arguably forecloses the possibility of consulting counsel, a finding of "detention" would have involved challenging the statute — the very thing the courts, under the *Bill of Rights*, were reluctant to do. One might argue, then, that the reading of "detention" in *Chromiak* was distorted by the court's deference to the will of Parliament — a consideration doubly absent from *Therens*.

[31]*Therens*, *supra*, note 1 at 133.

[32]*Ibid.*

statutory limitation will be found to be reasonable under section 1? Or will the Court say that what was "reasonable" in the context of the *Bill of Rights* (an issue that was not considered in *Chromiak*) is not the same as what is reasonable under the *Charter*?

So far I have focused on Le Dain J.'s concern with why a court is not bound by *Chromiak*. This still leaves unresolved the meaning of "detention" in section 10.

To solve this problem, Le Dain J. adopts the "purposive" approach to *Charter* interpretation cnunciated by Dickson J., as he then was, in *Hunter*.[33] To understand what paragraph 10(b) means, we must look to its "purpose". Again, while it might seem appropriate, this approach too is problematical. For one thing, as Moore explains, "purpose" has been used in at least five senses in this context.[34] Most of these involve variants of "intention" and are subject to the sorts of objections that have already been referred to.[35] Moore considers only the fifth sense — "'purpose' ... used to mark the distinction between the function the statute serves (*its* purpose) and legislative intent" — as a "legitimate inquiry for judges".[36] To explain this meaning of "purpose", Moore uses the analogy of a carburetor: the purpose of a carburetor is to supply fuel to the engine. To discern this "purpose", one need not resort to the designer's intention or purpose; one can infer the carburetor's purpose from observing what it does. The analogy is fragile, however, because in the case of a statute and especially a constitution, what it does is determined by the observer (the judge) who purports to be discovering its purpose. Thus, the "purposive approach" tends to be tautological, and it is therefore not surprising that when Le Dain J. tells us the purpose of paragraph 10(b) he seems merely to repeat what the paragraph says: "The purpose of s. 10 ... is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay."[37] This, in itself, does not answer the question; it just reformulates it in terms of "purpose".

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[33]*Supra*, note 26 at 156. See also the comment on this case by N. Finkelstein, "Search and Seizure after Southam" (1985) 63 Can. Bar Rev. 178.

[34]*Supra*, note 24 at 262.

[35]It is not entirely elear from Dickson J.'s language in *Hunter*, *supra*, note 26 at 156 and 157 how he understands "purpose". He says that a "broad, purposive analysis" should be used to interpret "specific provisions of a constitutional document in the light of its larger objects", and that a purpose must be identified for s. 8 of the *Charter*, *e.g.*, "to delineate the nature of the interests it is meant to protect". While such "teleological interpretation" is quite feasible in relation to provisions which are fairly specific — *e.g.*, s. 23 of the *Charter* as it was considered in *A.G. Quebec* v. *Quebec Association of Protestant School Boards* (1984), [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 [hereinafter cited to S.C.R.] — I suspeet that in the typical "vague", "broad" *Charter* provision, it will always involve speculation.

[36]*Supra*, note 24 at 263.

[37]*Therens*, *supra*, note 1 at 134.

However, Le Dain J. does go on from here and in a sense treats the situations contemplated by "detention" as co-extensive with the rights specified in paragraph 10(b). Since paragraph 10(b) protects the right to counsel and the right to be informed, the situations comprehended by "detention" are those in which what is protected by paragraph 10(b) might be absent. "Detention" thus becomes any situation "in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel".[38] The argument is specious. Suppose, for example, that section 10 did not mention "detention" at all, but said only "on arrest": would "arrest" be defined as any situation in which what is protected by paragraph 10(b) might be absent? By calling the argument specious, I mean only that Le Dain J.'s definition is not clearly compelled by any objective purpose in paragraph 10(b); rather, it is a stipulative definition.[39] This is not, however, to say that the stipulative definition is not a "reasonable" one.

The breadth of the definition is clear from Le Dain J.'s elaboration. A person is "detained" not only when he is subjected to physical constraint, but also when he is subjected to "psychological constraint" — when he has "a reasonable perception of suspension of freedom of choice".[40] This is exemplified by the *Therens* situation, where a person subject to a demand perceives himself to have no choice, because refusal to comply carries with it penal sanctions.[41] In terms of this definition, which emphasizes the subjective apprehension of the individual, presumably a person asked by a customs officer to open his suitcase would be "detained"; so would a person who saw the flashing light of a police cruiser behind him.[42] The implication of Le Dain J.'s position is that section 10 should have a wide scope and that, having defined "detention" inclusively, courts may resort to section 1 or subsection 24(2) to modify the effects of a breach of rights.

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[38]*Ibid.*

[39]See Moore, *supra*, note 24 at 242. Moore refers to "theoretical terms [like 'detention'?] which seem to hold open the possibility of clear criteria because of the ability to stipulate definitions for them".

[40]*Therens, supra*, note 1 at 135.

[41]Le Dain J. would go further and find involuntary constraint — and hence "detention" — "even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it". *Ibid.*

[42]S.A. Cohen, "The Impact of Charter Decisions on Police Behaviour" (1984) 39 C.R. (3d) 264 at 272-3, points to the "danger posed by an unduly expansive interpretation" of "detention". Citing the Law Reform Commission of Canada, *Questioning Suspects* (Working Paper 32) (Hull, Que.: Supply & Services, 1980) he suggests that this danger is "the paralysis of law enforcement".

2. *The Application of Section 1*

An approach which defines "detention" inclusively, or even subjectively, and then shifts the inquiry to section 1 or subsection 24(2) is perhaps the correct one — at least if the *Charter* is to be an instrument of "policy". Such an approach recognizes the futility of attempting to *find* the meaning of a word like "detention", as if it described something determinate that could be isolated simply by applying the right strategy of interpretation. The approach directs attention away from "sterile disputations" about words to what is arguably the real issue: the *reasonableness* of the scope to be given a constitutional provision. Section 1 especially, but also subsection 24(2), invites this inquiry; there is now no need, as there might have been in *Chromiak*, to define "detention" in such a way as to give reasonable scope to the guarantees.

Several observations are appropriate here. For one thing, as I have already intimated, this approach to meaning raises large questions about the nature of linguistic signification and the generation of authoritative texts. Furthermore, coupled with this vaguely "deconstructive" attitude toward the text, one sees the anomalous endeavour of judges to maintain the pretense that they are divining the right meaning.

More particularly in the present context, the approach gives rise to two comments.

One is a point to which I have alluded: the Court in *Therens* found that section 1 was not applicable. As Estey J. says, "[t]he limit on the respondent's right to counsel was imposed by the conduct of the police officers and not by Parliament".[43] Le Dain J. finds that the terms of subsection 235(1) do not expressly limit the right to counsel; nor does a limit arise implicitly or from the "operating requirements" of subsection 235(1).[44] Therefore, the infringement here was not "prescribed by law", which is required before section 1 can apply. What effect does this have on an approach which emphasizes inquiry into the reasonableness of the scope of a *Charter* guarantee? Is that inquiry not foreclosed here? After all, Le Dain J. has ruled out the interpretation of "detention" as a locus for accommodating reasonableness and section 1 is not available. One might think that Le Dain J. is precluding the inquiry he prescribes. There are, of course, answers to such a concern. For one, it is quite proper that the scope for assessing the reasonableness of administrative violations of rights should be narrower than that for assessing legislative violations. For another, in

[43] *Therens, supra*, note 1 at 124.
[44] *Ibid.* at 136.

any case, a variation on the question of reasonableness may come up in the context of subsection 24(2).[45]

The other point has to do with the general relationship between section 1 and subsection 24(2). It is possible to imagine a case involving section 234.1 in which there is, apparently, an implied limit on the paragraph 10(b) right to counsel. A court would have to consider section 1.[46] Suppose the court found that the limit was not "reasonable", was not "demonstrably justifiable in a free and democratic society". Would this not largely determine the outcome when subsection 24(2) came to be considered? Would not the court, in deciding the section 1 issue, have effectively considered the social values relevant to subsection 24(2)?[47] It seems hard to conceive that the admission of evidence garnered as the result of a violation found to have been unreasonable or unjustifiable in a free and democratic society could be said not to bring the administration of justice into disrepute. On the other hand, as we shall see, it could be argued that the administration of justice would never be brought into disrepute by the admission of evidence obtained by a police officer doing in good faith only what the law (albeit "unreasonable") prescribed.

Perhaps the dubiety — either that the unreasonableness of a law inevitably taints its administration or that any conscientious administration of even an unreasonable law will be reasonable — is escapable. But escaping it will depend upon the making of what may be an unconvincing distinction between the issues of violation and admission. Thus the difficulties involved in making distinctions that are "narrowly linguistic" will not necessarily be obviated by shifting the focus of inquiry to what is broadly "reasonable".

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[45]But see Estey J.'s approach, *infra*, note 69 and accompanying text. He seems to say that, because there was no statutory authority for the violation of the *Charter* right, not only is s. 1 not available, but the test in s. 24(2) is automatically met.

[46]See *R.* v. *Talbourdet* (1984), 9 D.L.R. (4th) 406, [1984] 3 W.W.R. 525, 12 C.C.C. (3d) 173 (Sask. C.A.). Presumably s. 234.1(1) should not be read as denying (as opposed to limiting) the s. 10(b) rights — or, to use the words of the Supreme Court in *A.G. Quebec* v. *Quebec Association of Protestant School Boards, supra*, note 35 at 88 as "collid[ing] directly" with them, so as to preclude recourse to s. 1. I take it that "direct collision" must involve a limit that is more or less co-extensive with the rights themselves — *e.g.*, if the *Criminal Code* provided, "on arrest or detention, there is no right to consult counsel". In other words, a denial of the right in circumscribed circumstances would be merely a "limit".

[47]S. 24(2) should be distinguished from those provisions (*e.g.*, s. 7 and s. 8) where "reasonableness" is part of the definition of the right, and where, therefore, the s. 1 inquiry would appear to be redundant. The "policy" issue in s. 24(2) — and, for that matter, in s. 24(1) — arises not at the point of defining a right but in relation to the granting of a remedy. Thus, perhaps a negative finding on s. 1 (presumably the only situation in which a court would have to move on to s. 24(2)) would not necessarily conclude the s. 24(2) question.

3. *The Exclusivity of Subsection 24(2)*

As we have seen, the approach taken by Le Dain J. in characterizing "detention" might be regarded as part of a movement away from what has been called "dry literalism in *Charter* interpretation cases".[48] Although "literalism"[49] often connotes narrow or restrictive interpretation, it does not always have that effect. Paradoxically, "literalism" may in some circumstances coincide with a broader, more liberal, reading. This seems to be the case where the relationship between subsections 24(1) and 24(2) is concerned.[50]

The problem arises because subsection 24(1), read literally, empowers a court to grant any remedy it considers "appropriate and just in the circumstances". There is no explicit exception for the exclusion of evidence. Moreover, subsection 24(2) does not say "evidence shall be excluded *only* if ..." — which would indicate that subsection 24(2) is exhaustive. Further, the remedy in subsection 24(2) is mandatory ("shall") which suggests that, where an infringement is of a certain kind or of a certain magnitude, a court has no choice but to exclude the evidence thus obtained. In other circumstances, the argument goes, a court may exclude evidence, although it does not have to. A further peculiarity of section 24, supporting this reading, is the phrase "in proceedings under subsection (1)" near the beginning of subsection (2).[51] What are these proceedings? Clearly, an application for a remedy. And, it would seem, an application for the "remedy" of the exclusion of evidence. In the context of what other proceedings would the subsection 24(2) remedy arise? One might say then that subsection 24(2) envisages that an application for the exclusion of evidence has already arisen under subsection 24(1), and that subsection 24(2) relates to a sub-category of that remedy as contemplated by subsection 24(1).

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[48]Y.-M. Morissette, "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do" (1984) 29 McGill L.J. 521 at 546.

[49]What those who use "literalism" as a pejorative understand by the term is not always clear to me. If they mean the paying of attention to accepted meanings of words and the conventions of syntax, I am not sure what is wrong with this. I suspect that the phenomenon referred to is rather similar to that described by the more euphemistic "finding the plain grammatical meaning", sometimes used even by critics of "literalism".

[50]Thus, Morissette, *supra*, note 48 at 550, describes as a "conceptual jumble produced by an excess of literalism ... the theory according to which section 24(2) created a *duty* to exclude evidence, whereas section 24(1) encompasses among other appropriate and just remedies a *discretion* to do so". The trial judge and the majority of the Court of Appeal accepted this theory in *Therens*, *supra*, note 13. As we have seen, Le Dain J. rejected it, and he appears to have had the agreement of five other Justices.

[51]The phrase has been called "more than a bit ambiguous": A.A. McLellan & B.P. Elman, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983) 21 Alta L. Rev. 205 at 238.

Le Dain J.'s reasoning in rejecting the argument that evidence may be excluded under subsection 24(1) as well as subsection 24(2) is not irresistible. It consists largely of assertions: "I am satisfied *from the words*[52] of s. 24 that s. 24(2) was intended to be the sole basis"; "[i]t is clear, in my opinion, that ... the framers of the *Charter* intended"; "[i]t is not reasonable to ascribe to the framers of the *Charter* an intention".[53] It is worth noting not only the conclusory character of these assertions, but also Le Dain J.'s repeated deference to what he surmises was the framers' "intention". This contrasts rather sharply both with his earlier downplaying of any argument about the framers' intention respecting the meaning of "detention", and with his position that the courts have to impart meaning to the capacious language of the *Charter*.

Of the opening words of subsection 24(2), "[w]here, in proceedings under subsection (1)", Le Dain J. says that they "simply refer, in my view, to an application for relief under s. 24(1). They reinforce the conclusion that the test set out in s. 24(2) is to be the exhaustive one for the remedy of exclusion of evidence."[54] This conclusion is not inescapable.[55] If the words refer to an application for relief under subsection 24(1), they seem "simply" to limit the subsection 24(2) remedy to the context of such an application. However, the fact that the subsection 24(2) remedy arises only in the context of a subsection 24(1) application does not mean that the scope of a subsection 24(1) remedy is limited to the terms of subsection 24(2).

Le Dain J. also argues that "[t]he inevitable result of this alternative test or remedy [subsection 24(1)] would be that s. 24(2) would become a dead letter".[56] While the availability of two tests might "generate confusion",[57] and while they might overlap, I doubt that it is "inevitable" that subsection 24(2) would become a "dead letter". One can quite easily imagine a trial judge considering subsection 24(1) and admitting the evidence, and a court of appeal deciding that he did not have that option because the circumstances were such that the admission would bring the administration of justice into disrepute.

While I do not altogether disagree with Le Dain J.'s position, many of his arguments simply do not convince. His strongest point is the general one that where specific provision is made for one situation, that situation is exclusively covered by that provision, and not by some more general

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[52]Does this suggest he is reading the provision "literally"? [emphasis added]

[53]*Therens, supra*, note 1 at 137.

[54]*Ibid.* at 138.

[55]McLelland & Elman, *supra*, note 51 at 238, follow reasoning similar to that of Le Dain J.

[56]*Therens, supra*, note 1 at 138.

[57]Morissette, *supra*, note 48 at 550.

provision.[58] Unfortunately, that does not answer the objection that subsection 24(2) addresses only part of the specific situation in question.[59] Le Dain J. declines to examine the legislative history of section 24. He might have buttressed his position by so doing and by pointing out, for example, as Morissette does, that the broad exclusionary discretion that would flow from subsection 24(1) would be "a curious result in a jurisdiction that resisted for so long any policy of exclusion".[60] However, this might have involved getting into the kinds of questions about "original understanding" that Le Dain J. earlier tried to keep at a distance.

Although the "liberal", or "literal", view of subsection 24(1) seems to have been rejected by the Court in *Therens*, we may not have seen the last of it. The reservation of judgment by Dickson C.J.C. and Lamer J. and the fact that a decision on subsection 24(1) was not necessary for the determination of the case, may leave room for it to be considered again. If it is, it merits a more searching examination.[61]

4. The Connection Between the Infringement and the Evidence

Before subsection 24(2) applies, the evidence in question must have been "obtained in a manner that infringed or denied ... rights or freedoms guaranteed by this Charter". In the words of Le Dain J.,

> there must be some connection or relationship between the infringement or denial of the right or freedom in question and the obtaining of the evidence the exclusion of which is sought by the application.[62]

The problem is what the nature of that connection must be.

As Le Dain J. notes, some courts seem to have required a causal relationship. He cites the judgment of Gushue J.A. in *R.* v. *Trask*:

> There is no evidence that the accused had any reasonable excuse to refuse to provide samples of his breath. If he had been informed of his right to retain and instruct counsel and had indeed consulted counsel, counsel would have undoubtedly advised him to provide the samples demanded.[63]

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[58]*Ibid.*

[59]Le Dain J. himself adopts the position, *supra*, note 1 at 141, that "where a judge concludes that the admission of evidence would bring the administration of justice into disrepute, he or she has *a duty, not a discretion*, to exclude the evidence" [emphasis added].

[60]*Supra*, note 48 at 551. See also McLellan & Elman, *supra*, note 51 at 206-8 and 225-34.

[61]Cohen, *supra*, note 27 at 106, called the Saskatchewan Court of Appeal's approach to s. 24(1) in relation to s. 24(2) "an attractive argument, powerfully put, which will have to be squarely confronted by the Supreme Court of Canada in the days ahead". I am not sure that it has been.

[62]*Therens*, *supra*, note 1 at 138.

[63]*Ibid.*

In other words, the denial of the right did not result in the obtaining of the evidence; it would have been obtained anyway.

There are several responses to this position. One is that, as Morissette notes, the language of subsection 24(2) does not require causation: it does not say, for example, evidence obtained "by reason of an infringement".[64] Moreover, as Le Dain J. observes, the French version — "obtenus dans les conditions qui portent atteinte aux droits et libertés" — clearly envisages something broader than causation. Further, Gushue J.A.'s approach supposes an answer to what is in fact the question: we do not know how a lawyer would have assessed the situation or what advice he would have given, or how, given that advice, the suspect would have responded. Because we cannot know what *would* have been, we cannot say what the relationship between the violation of the right and the obtaining of the evidence was.

If subsection 24(2) does not require causation, what does it require? *Therens* does not give us a clear answer to this question. The position of Estey J. and those concurring with him is obscure. Although he does not explicitly discuss the point, he seems to have been thinking in terms of some variant of causation. Thus, he repeatedly speaks of evidence "thereby obtained". One supposes that this means "obtained by virtue of the violation". But he explains neither the elements constituting the connection required by subsection 24(2) nor how the facts of *Therens* satisfy them. He merely assumes the necessary connection.

Le Dain J. suggests an essentially temporal test: "It is sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, the obtaining of the evidence."[65] Stated thus, the test seems too broad. One can imagine situations in which the obtaining of evidence follows or coincides with the infringement of a *Charter* right that is otherwise unrelated to the evidence. For example, a *Therens* situation might occur in which the suspect was accorded his paragraph 10(b) rights and gave the breath samples, but while he was doing so one of the police officers searched his car in violation of his section 8 rights. Should the breathalyzer evidence come within subsection 24(2)? Le Dain J. seems to say it should. His view, in his words, "gives adequate recognition of the intrinsic harm that is caused by a violation of a *Charter* right or freedom, apart from its bearing on the obtaining of evidence".[66] Surely, however, the words "evidence obtained in a manner that infringed or denied ..." imply that the infringement must have *some* bearing on the obtaining of evidence.

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[64]*Supra*, note 48 at 526.
[65]*Therens, supra*, note 1 at 138.
[66]*Ibid.*

I prefer Lamer J.'s approach, concurred in by Dickson C.J.C., which, while not requiring affirmative causation, does require more than a temporal relationship. Although the statement of his position is not transparently clear, I infer that the infringement must be found to be a circumstance capable of affecting the obtaining of the evidence in question. Lamer J. reaches his position by "giving content" to the paragraph 10(b) rights, including finding the imposition of "a duty not to call upon the detainee 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".[67]

Although this might appear to be reading rather a lot into paragraph 10(b), it does accord with the Court's view of "detention" in this case. As we have seen, Le Dain J. regards detention in this context as involving a demand plus the apprehension of penal sanctions: this creates the necessary "constraint". Here, however, the demand is a demand to give evidence. Arguably, a "purpose" of paragraph 10(b) is to allow the detainee to question the validity of his detention. Where, as here, a demand is part of the detention, the detainee has the right to seek legal advice regarding the demand. Because the demand is a demand to supply evidence, the denial of that right has an intimate bearing on the obtaining of the evidence. Again, this is not to say that the obtaining of the evidence must be found positively to have resulted from the infringement of the right.

5. *"Bring the Administration of Justice into Disrepute"*

Although there are several difficult issues in *Therens*, perhaps the most notorious involves the meaning and application of the test in subsection 24(2): when would the admission of evidence "bring the administration of justice into disrepute"?

Among the approaches to meaning discussed by Moore are two that are particularly relevant to the opinions on this issue in *Therens* — the "referential" and the "criterial".[68] In the referential theory, the meaning of the word or expression is all the things which it denotes; the method of "explaining" the term's meaning is to point to what is denoted by the term. On the other hand, the criterial approach endeavours to formulate criteria for the word or expression or, in other words, to define it, and then asks whether an object or circumstance meets the criteria. The judgments of Estey J. and Le Dain J., respectively, reflect these different approaches.

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[67]*Ibid.* at 143.

[68]*Supra*, note 24 at 167-70 and 173-5. Moore is critical of both these approaches.

Estey J. may be said to have spoken for the majority of six on this issue,[69] but his judgment is rather disappointing. It consists essentially of an assertion that the test in subsection 24(2) refers to the situation in *Therens*, without any attempt to generate criteria for the application of the test. Indeed, Estey J. explicitly eschews definition:

> I am strongly of the view that it would be most improvident for this Court to expatiate,[70] in these early days of life with the *Charter of Rights*, upon the meaning of the expression "administration of justice" [*sic*] and particularly its outer limits. There will no doubt be, over the years to come, a gradual build-up in delineation and definition of the words used in the *Charter* in s. 24(2).[71]

Presumably, when all the situations to which subsection 24(2) refers are identified, the meaning of the test will be known. In the interim, however, one problem is, to use Moore's words, "how does a judge know whether the thing in front of him is or is not within the extension of the words or phrase?"[72]

Having eschewed a search for criteria, and recognizing this case as within the reference of subsection 24(2), Estey J. substitutes vigorous assertion of his position for argument. Unfortunately, some of the rhetorical features of his judgment leave a doubt about the cogency of his reasons.[73]

For one thing, Estey J.'s judgment seems to imply that the exclusion of evidence should follow almost automatically from the violation of a paragraph 10(b) right. The only indication that something more is required, as subsection 24(2) ostensibly suggests, is his use of modifiers of the violation here. Thus, "the police authority has flagrantly violated a *Charter* right without any statutory authority for so doing".[74] The lack of statutory authority forecloses a section 1 inquiry. Does it foreclose a subsection 24(2) inquiry as well? And what about "flagrantly"? Certainly, as we shall see, Le Dain J.'s characterization of the facts would hardly justify this adverb. Then, Estey J. calls the violation "overt".[75] Would it have been better had it been "covert"? A feature of the case is that the police apparently acted openly and in good faith. Further on, Estey J. says, "[t]he violation ... of a fundamental *Charter* right, which transpired here, will render this evidence

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[69]Dickson C.J.C. agrees with Lamer J., who agrees with Estey J.

[70]Note the mildly pejorative connotation of this word.

[71]*Therens, supra*, note 1 at 125.

[72]*Supra*, note 24 at 169.

[73]In M. Gold, "The Rhetoric of Constitutional Argument" (1985) 35 U.T.L.J. 154 at 182, a review article of P. Bobbit, *Constitutional Fate: Theory of the Constitution*, Gold makes the point that the "rhetorical perspective" can "significantly enhance our understanding of the judicial process". See also M. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985) 7 Sup. Ct L. Rev. 455.

[74]*Therens, supra*, note 1 at 125.

[75]*Ibid.*

inadmissible".[76] Here the qualifier is attached not to the violation, but to the right. What is serious about this case is that a "fundamental *Charter* right" has been violated. What makes this right "fundamental" as compared with other *Charter* rights? Are they not all, as part of the Constitution, "fundamental"? Again, Estey J.'s words suggest that the violation of the right concludes the subsection 24(2) inquiry. However, on the wording of subsection 24(2), this transmutes a necessary condition into a sufficient condition.

Another technique that Estey J. uses is argument from consequences. While this may be quite acceptable where the apprehended consequences are likely to ensue, here it is questionable. Thus, he says "[t]o do otherwise than reject this evidence ... would be to invite police officers to disregard *Charter* rights of the citizen and to do so with an assurance of impunity".[77] A resolution of this case such as that proposed by Le Dain J. would hardly have the extreme effect envisaged by Estey J. Moreover, what are we to make of the word "impunity"? Is the purpose of subsection 24(2) to punish the police? A potential controversy about the rationale for subsection 24(2) is embedded in this word.[78] Estey J.'s next sentence is similarly alarmist:

> If s. 10(b) of the *Charter of Rights* can be offended without any statutory authority for the police conduct here in question and without the loss of admissibility of evidence obtained by such a breach then s. 10(b) would be stripped of any meaning and would have no place in the catalogue of "legal rights" found in the *Charter*.[79]

Here, yet again, we have the implication that the fact that the violation occurred "without any statutory authority" disposes of the matter. We also have an assertion, in terms of a metaphor, that paragraph 10(b) would be "stripped of any meaning" if such evidence were admitted. Once more, as Le Dain J.'s approach attests, this is simply not the case.

Estey J. concludes: "Admitting this evidence under these circumstances would *clearly* 'bring the administration of justice into disrepute'".[80] "Clearly" seems to be used in lieu of reasons here. As James Lindgren has observed, the kind of "metadiscourse" exemplified by the word "clearly" does have its place in writing.[81] For example, it may indicate that a point accepted by everyone is part of the writer's argument or that the writer considers the

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[76]*Ibid.*

[77]*Ibid.*

[78]See Morissette, *supra*, note 48 at 534 for some observations on the question whether "deterrence" is a rationale for s. 24(2).

[79]*Therens*, *supra*, note 1 at 125.

[80]*Ibid.* [emphasis added]. Compare Lamer J., *ibid.* at 143.

[81]J. Lindgren, "Style Matters: A Review Essay on Legal Writing" (1982) 92 Yale L.J. 161 at 176-8.

point self-evident and therefore will not try to prove it.[82] How Estey J. is using the word, however, is open to doubt. Perhaps he thinks that he has proven what he is stating, and that it is now clear, or perhaps he is saying that he regards the truth of his assertion as self-evident. That nothing is either proven or self-evident is attested to by the dissent of Le Dain J. and, even more so, by that of McIntyre J.

I find the opinion of Le Dain J. on this aspect more satisfactory, for he does try to elaborate reasons.

I mentioned earlier that Le Dain J.'s approach was "criterial", in the sense that he attempts to enunciate standards against which to apply the subsection 24(2) test. This "criterial" approach might in fact take different forms. One involves simple definition, or perhaps more accurately, reformulation of an expression — often in terms which are as much in need of explanation as those in the original. One has to be wary of this process, for it may involve the dubious assumption that giving something a different name explains it.[83] Another form of the criterial approach is to enumerate fairly specific factors that should be considered in applying the original expression. Le Dain J. attends to both variants.

First, he looks at the two definitions of "bring the administration of justice into disrepute" that have been most prominently proposed in the Canadian legal context: Lamer J.'s "shocks the community" test, and Estey J.'s what "would prejudice the public interest in the integrity of the judicial process", both asserted in *Rothman* v. *R.*[84] Le Dain J. in fact prefers not to endorse either of these reformulations. Citing the words of Howland C.J.O. in *R.* v. *Simmons*,[85] he says that he agrees "that we should not substitute for the words of s. 24(2) another expression of the standard drawn from a different jurisprudential context".[86]

Having said this, he does nevertheless seem to lean towards the Estey J. reformulation. Thus, for example, he notes that the "community shock" test appears to be narrower than the other, and he seems to agree with Howland C.J.O. that the Lamer test is not exhaustive.

Perhaps more important, his approach to determining "disrepute" is arguably more in accord with the Estey J. approach than with that of Lamer J. I said above that reformulations such as these may be merely question-begging, no more transparent than the originals they purport to explain.

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[82]*Ibid.* at 177-8.

[83]D. Bolinger, *Aspects of Language*, 2d ed. (New York: Harcourt Brace Jovanovich, 1975) at 251-2.

[84](1981), [1981] 1 S.C.R. 640 at 697 and 649, 121 D.L.R. (3d) 578, 59 C.C.C. (2d) 30.

[85]*Supra*, note 14 at 634.

[86]*Therens, supra*, note 1 at 140.

This may be true of the tests of Estey and Lamer JJ., but there is, aside from their scope, a significant difference between them. The "shocks the community" test leads more naturally to the argument that public opinion should be consulted[87] than does "the public interest in the integrity of the judicial process". Admittedly, on one view the notion of "disrepute" does suggest that it is the public opinion of the administration of justice that is in issue. Le Dain J. pays some deference to this when he says "[t]he central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in the administration of justice".[88]

However, he clearly sees the issue as one that is not to be determined by attempting to gauge public reaction:

> [T]he question whether evidence must be excluded because, having regard to all the circumstances, its admission would bring the administration of justice into disrepute is a question of law which may be determined by a court without evidence of the actual or likely effect of such admission on public opinion.[89]

An approach which emphasizes not popular views[90] but the "public interest", in a judicial process which coherently reflects fundamental legal values, is to be preferred. Such inquiry is properly conducted by those who, one hopes, are learned in those values and their implications.[91] Thus, although he expressly declines to adopt either the test of Lamer or Estey JJ., Le Dain J.'s emphasis is more consistent with the latter.

He explicitly favours the second kind of "criterial" approach to the meaning of subsection 24(2): what factors are relevant to determining whether the test is satisfied? The two principal factors are "the relative seriousness of the constitutional violation" and "the relative seriousness of the criminal

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[87]See D. Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 377, referred to by Le Dain J. in *Therens, ibid.* at 141.

[88]*Therens, ibid.* at 140.

[89]*Ibid.*

[90]Perhaps exemplified by the reaction to *Therens* of John Bates, president of a group called People to Reduce Impaired Driving Everywhere, quoted in M. Cernetig, "Drunk-Driving Charges Threatened by Ruling", *The [Toronto] Globe and Mail* (30 May 1985) 1: "We think it's absolutely disgraceful that they could get off on this type of *technicality*" [emphasis added].

[91]See P. Brest, "Who Decides?" (1985) 58 S. Cal. L. Rev. 661 at 665. He cites statistics, relating to the American context, from H. McCloskey & A. Brill, *Dimensions of Tolerance: What Americans Believe About Civil Liberties* (New York: Russell Sage Foundation, 1983) indicating that, as compared with the public at large, lawyers scored high on an "omnibus civil liberties" scale. Thus, while only 60 per cent of the general public felt that it was better to let a guilty person go free than to convict an innocent person, 91 per cent of lawyers held this opinion.

charge".[92] Particularly germane to this case is the issue of the relative seriousness of the violation, to which the following sub-factors are relevant:

> whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence.[93]

Le Dain J. regards the denial of the right to counsel in relation to the integrity of the judicial process as very serious — in fact, he says it "must prima facie discredit the administration of justice".[94] Access to counsel is itself an integral part of the administration of justice. This is a telling point; it is at least more comprehensible than Estey J.'s enigmatic reference to "a fundamental *Charter* right". At the same time, Le Dain J., I think correctly, allows that the violation of paragraph 10(b) rights is not conclusive. If it were, it would, to use Le Dain J.'s words from another context, render the subsection 24(2) test a "dead letter" in respect of those rights.[95]

Here Le Dain J. would have found that the *prima facie* inference is rebutted on the basis that the police officer can be taken to have relied in good faith on the ruling in *Chromiak*, and was justified in assuming that Mr Therens did not have the paragraph 10(b) rights. A few observations might be made about this quite reasonable approach.

In the first place, one might object that it should not matter how the rights were violated, that the innocence or otherwise of the police should not figure in the vindication of the individual's rights. However, subsection 24(2) envisages that, in respect of the particular "remedy" of exclusion of evidence, the vindication of individual rights is not the sole criterion. Rather, the "repute" of the administration of justice is the final criterion, and this justifies a court's looking at the quality of the behaviour of those enforcing and administering the law. This is not, however, to say that subsection 24(2) should be seen as providing sanctions against the police, as Estey J.'s use of the word "impunity" might suggest.

Another point worth reiterating is that Le Dain J.'s disposition of the case would have been on very narrow grounds, namely the police officer's justifiable understanding of the law in the light of *Chromiak*. Were the same case to come up now, even in terms of Le Dain J.'s approach, the evidence

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[92]*Therens, supra*, note 1 at 140. See also Morissette, *supra*, note 48 at 528ff.

[93]*Therens, ibid.*

[94]*Ibid.*

[95]*Ibid.* at 141. McIntyre J. states explicitly: "[T]o exclude the questioned evidence in this case solely on a finding that a *Charter* right was breached in obtaining it would be to disregard the provisons of s. 24(2) . . . . In my view this section must have its effect."

would be excluded because there would be no room to say that the police justifiably believed that the citizen was not "detained" and therefore did not have the paragraph 10(b) rights.

A further implication of Le Dain J.'s approach is more problematical. His deference to the belief imputed to the police officers that they were not in a section 10 situation raises the question, to which I have already alluded, of the relevance of the ostensible legality of a peace officer's actions to deciding the subsection 24(2) issue. In a *Therens*-like situation, the issue is reasonably clear-cut: one can either say with Estey J. that there is no statutory authority; therefore, the administration of justice is brought into disrepute. Or one can say with Le Dain J. that even though there was no statutory authorization, we still have to look at other factors, including the peace officer's reasonable apprehension of the law.

What result follows from the Le Dain approach where there *is* statutory authority, as arguably there is where the case involves subsection 234.1(1)? Even if it were decided that the subsection 234.1(1) limit was not saved by section 1, could it ever be said that the admission of evidence would bring the administration of justice into disrepute where the police officers were doing precisely what they believed to be legal? The hypothetical can, in fact, be seen as rather close to *Therens*: if subsection 234.1(1), in so far as it directs a breath sample to be taken "forthwith", thus precluding access to counsel, were invalid, then the peace officers might be said to have only *ostensible* statutory authority. Their action would be based, as in *Therens*, only on their reasonable, though mistaken, apprehension of the law. The Le Dain approach might thus effectively preclude the exclusion of evidence under subsection 24(2) wherever the police were simply following the legislature's prescriptions. Perhaps it was this kind of difficulty that impelled Estey J. to avoid an inquiry such as Le Dain J.'s and simply treat *Therens* as a paradigm case.

III. Conclusiou

Therens leaves many questions unresolved, of which one category might be termed "methodological". It is not clear from *Therens* that the Supreme Court has worked out with much sophistication or coherence a theory of *Charter* interpretation. I cannot say from *Therens* what meaning and importance the Court is giving to notions such as "framers' intention" and "purpose". Another category of questions could be labelled "substantive". Thus, for example, the majority here decides the case without telling us

what the test in subsection 24(2) should be taken to mean. Further, although they did not have to be answered in *Therens*, questions of the relation of subsection 24(2) to section 1 emerge by implication: these may prove intransigent when the Court has to deal with them directly.