



Law Reform Commission  
of Canada

Commission de réforme du droit  
du Canada

# REPORT

**obtaining  
forensic  
evidence**

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Law Reform Commission of  
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Report on obtaining forensic  
evidence : investigative  
procedures in respect of the  
person

REPORT 25

OBTAINING

FORENSIC

EVIDENCE

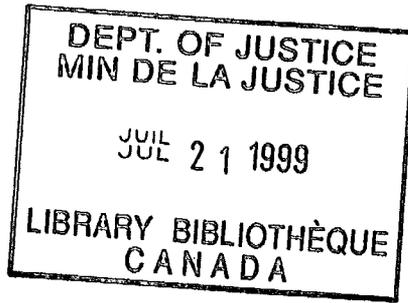
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REPORT

ON

OBTAINING  
FORENSIC  
EVIDENCE

Investigative Procedures  
in Respect of the Person

January, 1985

The Honourable John Crosbie, P.C., Q.C., M.P.,  
Minister of Justice  
and Attorney General of Canada,  
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report, with our recommendations on the studies undertaken by the Commission on obtaining forensic evidence.

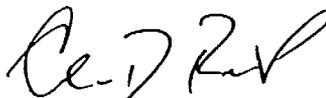
Yours respectfully,



Allen M. Linden  
*President*



Louise Lemelin, Q.C.  
*Commissioner*



Alan D. Reid, Q.C.  
*Commissioner*



Joseph Maingot, Q.C.  
*Commissioner*

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## Acknowledgments

The Commission is grateful to the many individuals, groups and organizations consulted in the course of preparing this Report, all of whom contributed significantly to its development. Although it would not be possible to name all of those from whose advice we benefited, we owe a special word of thanks to Professors Jerome Bickenbach, Alan Brudner, Ed Ratushny and Robert Solomon for their generous assistance and very helpful suggestions. We hasten to add, of course, that the views that have ultimately been expressed herein remain those of the Commission, and do not necessarily reflect the views of these advisers.

Completion of this Report in its present form would not have been possible without the guidance of, and the very active interest taken by Professor Jacques Fortin, the late Vice-President of the Commission.

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## Introduction

As part of its commitment to a fundamental and comprehensive review of criminal law in Canada, and to a principled reformation of criminal procedure, the Law Reform Commission of Canada embarked some time ago upon a number of interrelated projects dealing with the subject of police powers and procedures. The outcome of that undertaking, to date, has been the publication of several separate Study Papers, Working Papers and Reports containing detailed recommendations designed to rationalize, reform and consolidate the law applicable to the conduct of police investigations.

Our work in the area of police powers and procedures is premised on the basic assumption that clear and reasonable limits must be placed on the investigative powers of the police. It proceeds from a recognition that there is no point in the criminal process when a greater potential for disparity between state and individual power and resources exists than at the investigatory stage. This is particularly true in situations where a criminal suspect has been arrested or detained. Wherever "gaps" exist in the laws that govern the various aspects of police investigations, the potential for disparity increases. In the absence of clear and comprehensive rules, there exists enormous opportunity for oppression and intimidation.

Viewed in this light, the effective control and regulation of police activities, through the imposition of clear and reasonable limits, is an essential protection against the arbitrary invasion of personal privacy and security. It is, in short, one of the hallmarks of a free and democratic society.

Besides protecting those individual interests that are directly threatened by the spectre of unchecked state power and unfettered police discretion, the creation of legal rules is necessary to provide the police with adequate guidance as to how they should conduct criminal investigations, and thereby to ensure that such investigations conform to the standards set by the *Canadian Charter of Rights and Freedoms*.<sup>1</sup>

Rules of criminal procedure are more than a purely pragmatic necessity. They both reflect and determine the quality of our justice system and the nature of our society. Procedural rules should not be viewed as measures designed to frustrate successful prosecutions by giving criminals "technicalities" to hide behind. Their function is to define with certainty the limits of permissible governmental intrusion upon the legitimate interests of individuals. If properly formulated, such rules should, in fact, enhance the quality of police investigations and of the evidence that results therefrom.

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1. Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

This Report, having now been placed in its proper perspective, is directed toward the rational and comprehensive statutory regulation of one aspect of criminal investigations that has yet to be adequately addressed by Canadian jurisprudence: namely, investigative procedures in respect of the person. Our concern is with those procedures that may be used as a means of obtaining evidence directly from accused persons and/or criminal suspects, and that either require some form of participation on the accused's or suspect's part, or constitute an intrusive interference with his or her physical or mental integrity. While other related Reports (that is to say, those on *Questioning Suspects*<sup>2</sup> and *Search and Seizure*<sup>3</sup>) have already dealt with investigative procedures that may be thought of as standing on the edge of this sphere, the focus of our present Report is on techniques that go beyond simple interrogation, "frisk" searches and the like. Here we are concerned with investigative procedures (many of which are more or less "scientific" in nature) that are potentially more intimate: specifically, procedures that utilize the person's body or mind as a source of incriminatory evidence. Defined in these terms, "investigative procedures in respect of the person" would include such procedures as: lineups and showups; examination for identifying marks; "strip searches"; forensic physical examination by a trained physician; searches of the person for concealed or foreign objects by means of X-rays, the probing of body cavities, and so forth; photography; fingerprinting; the making of dental or bite impressions; the taking of body measurements; the removal of substances or residues from the subject's skin for laboratory analysis; the taking of hair, blood, saliva or other body substance samples for laboratory analysis; the removal of concealed or foreign objects from within the subject's body; the administration of various drugs or substances (for example, "truth drugs," emetics, enemas); physical performance tests (that is, tests for assessing alcohol- or drug-induced impairment); the taking of handwriting samples; the taking of breath samples; the taking of voice samples; polygraph examination; psychiatric examination; hypnosis; and so on. Common to all of these procedures are a number of far-reaching legal and social policy issues. Resort, by state agents, to investigative techniques of the type described above raises basic questions concerning individual privacy, human dignity, personal safety and security, self-incrimination and the presumption of innocence. Considering the importance and complexity of these issues, we believe the systematic treatment of investigative procedures in respect of the person to be long overdue in Canadian law. Very few investigative procedures in respect of the person have been the subject of clear statutory regulation in this country. No uniform policy is readily discernible. No rational and comprehensive code is in place to deal with questions as to when such procedures may be used, how they should be performed, or what the rights and obligations of prospective subjects are. At present, when we read in the newspapers or law reports that an accused person has been linked to a particular offence by means of "real" or "physical" evidence, oft-times this result has only been made possible through the co-operation of the accused or through the ingenuity of the police. Where such evidence is admitted at trial, moreover, this is not necessarily because its obtaining was authorized or provided for by law; generally, under

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2. Law Reform Commission of Canada, *Questioning Suspects*, [Report 23] (Ottawa: Supply and Services, 1984).
  3. Law Reform Commission of Canada, *Search and Seizure*, [Report 24] (Ottawa: Supply and Services, 1984).

the present law, even evidence that has been improperly obtained is *prima facie* admissible if it is relevant.

Our starting point in this Report, as in our other Working Papers and Reports on police powers and procedures, is the fundamental rule-of-law principle that precludes agents of the state from encroaching upon individual freedom and privacy except to the extent that such encroachment is authorized by law.<sup>4</sup> We believe, as did the recent Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, that “[i]t is fundamental that all investigative techniques not lawfully available to the ordinary citizen be provided for by law.”<sup>5</sup> Our ultimate goal, once again, is that of delineating, through the creation of specific statutory rules, the appropriate limits of police intrusion upon legitimate individual interests. The basic question we address concerns the role that an accused person or criminal suspect should be required to play in the gathering of information that may ultimately be used to establish his or her guilt in a criminal case. At one extreme, it may be argued that the accused or suspected person should be required, in the interest of effective law enforcement, to submit to any potentially probative investigative procedures. At the other extreme, it may be argued that, in an adversary system of criminal justice, the state should be required to prove its case without ever subjecting the accused or suspected person to procedures in which he or she is utilized as a source of evidence. Unfortunately, the doctrine of the rule of law does not in itself dictate what precisely the obligations of the accused or suspected person, or the powers of the state should be.<sup>6</sup> Our own opinion, based on the analysis that follows, and reflected in the recommendations set out at the end of this Report, may be summarized in three simple propositions. First, we believe it to be essential that certain investigative procedures in respect of the person be expressly prohibited in all circumstances. Second, we believe it to be important that other investigative procedures in respect of the person be permitted in cases where the subject has clearly consented. Third, we believe it to be appropriate to require persons to submit to a *limited number* of investigative procedures in respect of the person, but only in certain carefully defined circumstances. Although the circumstances we envision will be explained in more detail below, we should stress at the outset that, in our opinion, *prior judicial authorization* should normally be an essential prerequisite. Having defined the role of the suspected or accused person in accordance with these three propositions, we go on to consider several important ancillary questions relating to the types of procedural protections and safeguards to which the suspect or accused should be entitled, the consequences that should result from a violation of the procedures we are proposing, and the most appropriate method for ensuring the

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4. See E. Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979), p. 12. And see generally E. L. Barrett, Jr., “Police Practices and the Law — From Arrest to Release or Charge” (1962), 50 *Calif. L. Rev.* 11.

5. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Mr. Justice D.C. McDonald, Chairman, *Freedom and Security under the Law*, [Second Report] (Ottawa: Supply and Services, 1981), vol. 1, p. 410. For a view of police powers that differs in some respects from that of the Commission of Inquiry, see the Federal/Provincial Committee of Criminal Justice Officials, R. M. McLeod, Chairman, *Report to Deputy Ministers of Justice, Deputy Attorneys General and Deputy Solicitors General by the Federal/Provincial Committee of Criminal Justice Officials with Respect to the McDonald Commission Report* (Ottawa: Department of the Solicitor General of Canada, 1983).

6. See Ratushny, *supra*, note 4, p. 47.

co-operation of the suspect or accused in those investigative procedures that we propose be authorized. While the recommendations contained in this Report do, in one sense, appear to advocate the expansion of police investigative powers, it must be emphasized that the overall thrust of these recommendations is essentially limitative. Any expansion that may occur as the result of our efforts to rationalize and clarify the law relating to investigative procedures in respect of the person must be viewed in the light of the stringent procedural rules that we are recommending be imposed to govern their use. Essential to our proposed regime is our ultimate recommendation that compliance with these rules be enforced by making improperly obtained forensic evidence presumptively *inadmissible* (a general reversal of the present law).

The scheme envisioned by our recommendations is one that was first propounded, in a slightly different form, in our Working Paper on *Investigative Tests*.<sup>7</sup> For a full appreciation of the background to this Report, therefore, we suggest that document be referred to. Our present recommendations, which represent our final views, are the result of a lengthy consultative process involving various groups, organizations and individuals too numerous to name, but to whom we extend our deepest thanks.

The statutory regime advanced by our recommendations is one that is designed to achieve several purposes. First, it is designed to enhance the certainty, consistency and accessibility of the law. Second, it is designed to recognize and to regulate effectively the use of modern techniques of criminal investigation. Third, it is designed to balance individual and state interests in a manner that minimizes the ambit of police discretion, that ensures fairness, equality and accountability, and that is consistent with the letter and spirit of the *Canadian Charter of Rights and Freedoms*.

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7. Law Reform Commission of Canada, *Investigative Tests*, [Working Paper 34] (Ottawa: Supply and Services, 1984).

## CHAPTER ONE

### The Need for a Rational Comprehensive Regime

The comprehensive statutory regulation of investigative procedures in respect of the person (such as we are proposing) is not a radical concept without precedent or parallel. Several such procedures (for example, photography, fingerprinting, the taking of body measurements, the taking of breath samples) are, in fact, already dealt with in Canadian legislation. The idea of expanding and rationalizing the present regime is hardly a new one. For the ingredients of our proposed scheme, one need only look to the work of the American Law Institute in its *Model Code of Pre-Arrest Procedure* (1975),<sup>8</sup> to the Law Reform Commission of Australia's *Report on Criminal Investigation* (1975),<sup>9</sup> to the New Zealand Criminal Law Reform Committee's *Report on Bodily Examination and Samples As a Means of Identification* (1978),<sup>10</sup> to the *Report* of England's Royal Commission on Criminal Procedure (1981)<sup>11</sup> and to the existing and proposed legislation of other Commonwealth and American jurisdictions. Far from being a startling innovation, the creation of a rational comprehensive regime for the regulation of investigative procedures in respect of the person is, in part, the inevitable response to the realities of modern-day forensic science. The New Zealand Criminal Law Reform Committee's recommendations, for example, originated from a recognition that the use of modern scientific methods may be preferable, in some cases, to reliance on less trustworthy eyewitness identification techniques.<sup>12</sup> In a similar vein, the recommendations of the Law Reform Commission of Australia relating to investigative procedures in respect of the person proceeded in part from a view that the probative value of the evidence obtained through many of these procedures was such that they ought to be permissible, and that the legal rules governing the collection of physical evidence for forensic analysis required "systematic attention ...."<sup>13</sup> By ensuring against arbitrariness and uncertainty, the creation of a rational comprehensive regime is also consistent with a commitment to the ideal of the rule of law. As

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8. American Law Institute, *A Model Code of Pre-Arrest Procedure* (Philadelphia: American Law Institute, 1975).
  9. Law Reform Commission of Australia, *Criminal Investigation*, [Report No. 2] (Canberra: Australian Government Publishing Service, 1975).
  10. New Zealand Criminal Law Reform Committee, *Report on Bodily Examination and Samples As a Means of Identification* (Wellington, New Zealand: Criminal Law Reform Committee, 1978).
  11. The Royal Commission on Criminal Procedure, Sir C. Phillips, Chairman, *Report*, Cmnd. 8092 (London: HMSO, 1981).
  12. *Supra*, note 10, para. 2, p. 1.
  13. *Supra*, note 9, para. 134, p. 58.

noted in the commentary to the American Law Institute's rules, there is a need to provide the police with a "clear mandate ..."<sup>14</sup> as to how they should proceed.

Notwithstanding the advances of forensic science, and the fact that similar exercises have been undertaken in other jurisdictions, we believe that any fundamental reform of the present law relating to investigative procedures in respect of the person must be grounded in logic and supported by sound legal and social policy reasons. The particular regime that we are proposing in this Report arises from a number of considerations. First and foremost is our desire to ensure that the law relating to such procedures conforms to certain basic requirements and policy premises. In this regard, we refer to the Government of Canada's recent policy document on *The Criminal Law in Canadian Society*,<sup>15</sup> wherein several principles to which we have long adhered, and which are intended to serve as guidelines for the future development of Canadian criminal law and procedure, are articulated. One of those principles is that "the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations ... without unreasonably or arbitrarily interfering with individual rights and freedoms; ..."<sup>16</sup> Effective implementation of this principle, in our present context, requires, first of all, that the powers of state agents (that is, the police) and the rights of individuals be placed on a statutory footing. We view the interests at stake, in defining the state-individual relationship, to be of considerable importance. As we have stated in our recent Report on *Questioning Suspects*,<sup>17</sup> such interests (tied, as they are, to the fundamental ideal of the rule of law) can only be properly served through the use of a mechanism that guarantees stability, uniformity and accountability. Beyond this, effective implementation of the above-stated principle also requires that an appropriate equilibrium be struck between competing interests.<sup>18</sup> On the one hand, society has an interest in deterring and preventing crime through effective detection and prosecution.<sup>19</sup> Protection of society through the reduction of crime is, as the Canadian Committee on Corrections stated, "the primary purpose of the entire criminal process ...."<sup>20</sup> On the other hand, however, society has an equally important interest in protecting the fundamental rights and freedoms of its individual members through regulation of the manner in which agents of the state go about gathering evidence.<sup>21</sup> To be balanced against the goal of effective policing and prosecution, therefore, are the socially essential concepts of individual privacy, human dignity, personal safety and security,<sup>22</sup> and the presumption of innocence. Even from a

14. *Supra*, note 8, p. 423.

15. Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982).

16. *Ibid.*, p. 53.

17. *Supra*, note 2, p. 9.

18. See the Royal Commission on Criminal Procedure, *supra*, note 11, para. 1.11, p. 4.

19. See Canadian Committee on Corrections, Hon. R. Ouimet, Chairman, *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada, 1969), p. 48.

20. *Ibid.*

21. Hon. Lord Thomson, *Criminal Procedure in Scotland*, [Second Report] Cmnd. 6218 (Edinburgh: HMSO, 1975), para. 2.03, p. 8.

22. See Law Reform Commission of Canada, *Criminal Procedure: Discovery*, [Working Paper 4] (Ottawa: Information Canada, 1974), p. 5; Law Reform Commission of Canada, *Medical Treatment and Criminal Law*, [Working Paper 26] (Ottawa: Supply and Services, 1980), p. 6.

purely pragmatic standpoint, it must be recognized that the interest of society in effective law enforcement ultimately cannot be served by extension of police powers at the cost of community support.<sup>23</sup>

Acceptance of the importance of individual rights and freedoms in the maintenance of balance, in our view, demands that criminal procedure become more concerned with the manner in which evidence is obtained. A state that recognizes the existence of such rights and freedoms must provide the means for ensuring that they are respected. In the past, as indicated by the well-known case of *The Queen v. Wray*,<sup>24</sup> and by a number of cases dealing specifically with physical evidence obtained through the improper use of various investigative procedures in respect of the person,<sup>25</sup> relevance and reliability of evidence appear to have been the major foci of judicial attention. In *Attorney General for Quebec v. Begin*,<sup>26</sup> for example, Kerwin C.J.C. (Abbott J. concurring) expressed the opinion (*obiter*) that the results of a blood test would not be rendered inadmissible simply because the sample had been taken from the accused without his or her consent. His Lordship quoted with approval the statement of the Judicial Committee of the Privy Council in *Kuruma v. The Queen* that "when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortious but excusable but whether what has been obtained is relevant to the issue being tried."<sup>27</sup> In *Wray*, the overriding judicial discretion to exclude relevant admissible evidence that had been improperly obtained was confined to situations in which the evidence was of "trifling" probative value as compared with its prejudicial effect. Unless it affected the probative value of such evidence, therefore, the manner in which it was obtained was of little consequence. With the advent of the *Canadian Charter of Rights and Freedoms*, however (section 24 in particular<sup>28</sup>), the importance of the rule in *Wray* may now be taken to have been reduced considerably; at least where Charter rights are concerned, admission of relevant evidence will now be subject to additional procedural controls. As a result, our courts, and indeed our legislators, should now have a heightened interest in the manner in which evidence is gathered. We believe that "front end" statutory regulation of the procedures by which evidence is obtained is consistent with the basic aims and underlying rationale of the Charter. Such regulation, by providing additional guidance to police officers, can help ensure compliance with the Charter and respect for individual rights and freedoms. In situations where the legitimate interests of individuals might not be

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23. See Canadian Committee on Corrections, *supra*, note 19, p. 48.

24. *The Queen v. Wray*, [1971] S.C.R. 272.

25. See *Attorney General for Quebec v. Begin*, [1955] S.C.R. 593; *R. v. McNamara* (1951), 99 C.C.C. 107 (Ont. C.A.); *R. v. McIntyre* (1951), 102 C.C.C. 104 (Alta. S.C.).

26. *Attorney General for Quebec v. Begin*, *supra*, note 25, p. 595.

27. *Kuruma v. The Queen*, [1955] A.C. 197 (P.C.), p. 204.

28. Section 24 of the *Canadian Charter of Rights and Freedoms*, *supra*, note 1, provides as follows:

24. (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.

protected adequately by the minimum requirements of the Charter, moreover (and, *a fortiori*, in circumstances where the rule in *Wray* would still apply), we believe procedural regulation, including the creation of a separate exclusionary rule, to be particularly important. (We shall be returning to the subject of exclusion of evidence in Chapter Two, Part V of this Report.)

Another principle to which we have long adhered is that “in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls; ...”<sup>29</sup> Implementation of this principle, in the context of investigative procedures in respect of the person, requires, once again, that the rules governing the use of such procedures take a statutory form. Equality of treatment (and, hence, compliance with subsection 15(1) of the Charter<sup>30</sup>) is, in our view, most capable of being achieved once legislation of uniform application is in place. Implementation of the above-stated principle further requires that the conditions under which such procedures may be carried out be narrowly circumscribed by rules that minimize the possibility of their unjustified use. It also requires the creation of mechanisms that ensure accountability and openness (see, in particular, Recommendation 7).

A third principle to which we have long adhered is that “the criminal law should ... clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process; ...”<sup>31</sup> This principle demands that basic and explicit statutory safeguards be established for persons who may be required to submit to investigative procedures in respect of the person, and that such persons be made aware of these safeguards.<sup>32</sup> As was suggested some time ago in a Study Paper entitled *Towards a Codification of Canadian Criminal Law*,<sup>33</sup> codification may be viewed as the primary vehicle for ensuring public access to the law. We believe, moreover, that such access can be enhanced through the enactment of provisions requiring that prospective subjects of investigative procedures in respect of the person be informed of their rights.

Arising out of the general policy considerations expressed by the above principles, we have a number of specific concerns that, to us, suggest a fundamental reform of the present law to be in order and require that investigative procedures in respect of the person be statutorily regulated in a rational and comprehensive fashion. These concerns are: (1) the element of inconsistency and uncertainty that exists in the present law; (2) the outdated nature of the present law; and (3) the Charter implications of investigative procedures in respect of the person.

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29. *Supra*, note 15, p. 54.

30. Section 15 of the *Canadian Charter of Rights and Freedoms*, *supra*, note 1, provides in part as follows:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ....

31. *Supra*, note 15, p. 53.

32. *Supra*, note 15, p. 61.

33. Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law*, [Study Paper] (Ottawa: Information Canada, 1976), pp. 21-24.

## I. Inconsistency and Uncertainty in the Present Law

Only a very few investigative procedures in respect of the person are specifically dealt with by legislation. In fact, the only procedures specifically and unambiguously sanctioned in the relevant federal legislation governing criminal procedure are: fingerprinting;<sup>34</sup> photography;<sup>35</sup> the "measurements, processes and operations practised under the system for the identification of criminals commonly known as the Bertillon Signaletic System ...";<sup>36</sup> and the taking of breath samples.<sup>37</sup> Although the probative value of other investigative procedures in respect of the person is recognized daily in our courts, required submission to such procedures either has not been sanctioned, or has been specifically prohibited.<sup>38</sup> The rationale behind this state of affairs is not readily apparent. This is particularly true in light of the fact that the police retain, in some instances, the power forcibly to compel criminal suspects and/or accused persons to submit to certain notoriously unreliable investigative procedures.<sup>39</sup>

The confused state of the present law is perhaps partially attributable to the fact that the few legislative provisions governing investigative procedures in respect of the person are not gathered together in one place. In circumstances where resort to such investigative procedures is not covered by statute, moreover, the common law retains an undesirable degree of ambiguity. To what extent, for example, might the common law powers of the police to "arrest and investigate" justify the forcible administration of various investigative procedures in respect of the person? As regards procedures that involve the obtaining of body substances, the New Zealand Criminal Law Reform Committee has flatly stated that no common law authority exists, and that the use of force for such purposes would be an assault.<sup>40</sup> While this position would seem to accord with that taken in Canadian

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34. P.C. 1954-1109 (C.R.C. 1955, p. 1855) under the *Identification of Criminals Act*, R.S.C. 1970, c. I-1.

35. *Ibid.*

36. *Identification of Criminals Act*, R.S.C. 1970, c. I-1, subsection 2(1).

37. *Criminal Code*, R.S.C. 1970, c. C-34, as amended, subsections 235(1) and 240.1(1). See also subsection 234.1(1).

38. See subsection 237(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, which provides that:

(2) No person is required to give a sample of blood, urine or other bodily substance for chemical analysis for the purposes of this section except breath as required under section 234.1, 235 or 240.1, and evidence that a person failed or refused to give such a sample or that such a sample was not taken is not admissible nor shall such a failure or refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

39. Section 2 of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, for example, permits the use of force for the purpose of subjecting accused persons to the Bertillon Signaletic System of identification. The outmoded and unreliable nature of this identification system is discussed in Chapter One, Part II of this Report. As noted in the case of *Marcoux and Solomon v. The Queen* (1975), 24 C.C.C. (2d) 1 (S.C.C.), p. 7, force may also be used for the purpose of compelling suspects or accused persons to participate in identification lineups. For a discussion of the unreliable nature of identification lineups, see Neil Brooks, *Police Guidelines: Pretrial Eyewitness Identification Procedures*, [Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1983), pp. 7-11.

40. *Supra*, note 10, para. 9, p. 4. See also Law Reform Commission of Australia, *supra*, note 9, para. 130, p. 57; *Ex parte Kearney*, [1966] Qd. R. 306 (S.C.), p. 311; Canadian Committee on Corrections, *supra*, note 19, p. 62.

decisions specifically relating to the taking of body substances,<sup>41</sup> it appears that procedures aimed at the removal of concealed (as opposed to indigenous) substances from the body of a criminal suspect may fall within the common law power of search incident to arrest — even if such search procedures involve a greater degree of intrusion to the subject than most procedures involving the removal of body substances. In *R. v. Brezack*,<sup>42</sup> for example, the insertion of an officer's fingers into the subject's mouth for the purpose of ascertaining whether a prohibited drug had been concealed therein was held to be lawful, rendering the accused's biting of the officer's hand assault of a "peace officer engaged in the execution of his duty ..." for the purposes of paragraph 296(b) (now paragraph 246(1)(a)) of the *Criminal Code*. In *Reynen v. Antonenko*,<sup>43</sup> it was held that a physician's removal of concealed drugs from an arrested person's rectum at the request of the police fell within the common law power of search and did not, therefore, constitute assault and battery.<sup>44</sup>

As regards procedures that involve the removal from an accused's or suspect's body of substances that are neither indigenous nor concealed (such as fingernail scrapings, gunshot and other residues, and so forth), there is little definitive case-law.<sup>45</sup> A survey of the Canadian jurisprudence, moreover, indicates that there may be some doubt concerning the extent to which an arrested person may be subjected to potentially incriminating physical scrutiny without his or her consent.<sup>46</sup> As suggested by a number of Canadian cases,<sup>47</sup> however, such doubt does not extend to the active performance by the accused of various physical tests (for example, for impairment) at the request of the police. Clearly, there is no obligation for the accused to co-operate to this extent, nor any lawful method (involving physical force or criminal penalty) by which such co-operation may be compelled.<sup>48</sup> Things become less clear, however, where all that is required of the subject is passive submission.<sup>49</sup> In *Marcoux and Solomon v. The Queen*,<sup>50</sup> the Supreme Court of Canada considered *inter alia* the extent to which compelling an accused person to participate in a lineup was an authorized police practice under the common law. Speaking for the court, Dickson J. (as he then was) expressed the opinion that "the application of

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41. See *R. v. Turnick (No. 2)* (1920), 54 N.S.R. 69 (S.C.); *R. v. Frechette* (1948), 93 C.C.C. 111 (Qué. Sess.), aff'd (1949), 94 C.C.C. 392 (Qué. K.B.); *R. v. Burns*, [1965] 4 C.C.C. 298 (Ont. H.C.).

42. *R. v. Brezack* (1949), 96 C.C.C. 97 (Ont. C.A.).

43. *Reynen v. Antonenko* (1975), 30 C.R.N.S. 135 (Alta. S.C.). But see *R. v. Truchanek* (1984), 39 C.R. (3d) 137 (B.C. Co. Ct.).

44. See the judgment of MacDonald J. in *Reynen v. Antonenko*, *ibid.*, pp. 139-144. But see Canadian Committee on Corrections, *supra*, note 19, p. 62.

45. See, however, *Re Laporte and The Queen* (1972), 8 C.C.C. 343 (Qué. Q.B.), a search and seizure case in which the court refused to issue a warrant permitting major surgery to remove a bullet from the accused.

46. See A. E. Popple, "Practice Note" to *R. v. Moore* (1961), 36 C.R. 243, p. 243. See also J. H. Buzzard, R. May and M. N. Howard, *Phipson on Evidence*, 13th ed. (London: Sweet and Maxwell, 1982), p. 10.

47. See, e.g., *R. v. Shaw*, [1965] 1 C.C.C. 130 (B.C. C.A.).

48. *Ibid.*

49. See Indian Law Institute, *Self-Incrimination: Physical and Medical Examination of the Accused* (Bombay: Tripathi, 1963), pp. 12-13. There may be circumstances in which it is difficult to ascertain whether behaviour is active or passive in this sense. See L. House, "Criminal Procedure — Self-Incrimination — Scientific Tests of Body Substances as Evidence" (1955-56), 44 *Kentucky L.J.* 353, p. 358.

50. *Marcoux and Solomon v. The Queen*, *supra*, note 39.

force to compel an accused or a suspect to take part in a line-up may raise a question as to the limits on the powers of the police in relation to detained persons,"<sup>51</sup> but that "[r]easonable compulsion to this end is ... an incident to the police power to arrest and investigate, and no more subject to objection than compelling the accused to exhibit his person for observation by a prosecution witness during a trial."<sup>52</sup> His Lordship went on to quote from the decision of England's Court of Appeal in *Dallison v. Caffery*,<sup>53</sup> where Lord Denning had said that: "When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence ...."

The question of whether or not the forcible fingerprinting of arrested persons is permitted at common law in situations not covered by the *Identification of Criminals Act*<sup>54</sup> has been considered — and answered differently — in a number of Canadian decisions.<sup>55</sup> This issue has yet to be definitively resolved.<sup>56</sup> In several reported cases in other jurisdictions, it has been held that no common law power exists with regard to the photographing of criminal suspects upon arrest.<sup>57</sup> As England's Royal Commission on Criminal Procedure has observed, however, photography may be distinguished from fingerprinting, since it does not necessarily require physical contact with the subject. For this reason, it is difficult to find English cases in which unauthorized photographing of criminal suspects by the police has been held to be unlawful (that is to say, as constituting an assault).<sup>58</sup>

Even where a particular procedure has been made the subject of legislation, such legislation has sometimes been unnecessarily vague. Psychiatric examination, for example, is implicitly (though not explicitly) authorized with respect to certain persons charged with, or convicted of, criminal offences (both summary and indictable) by various sections of the *Criminal Code*.<sup>59</sup> Once an accused person has been remanded to, or ordered to

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51. *Marcoux and Solomon v. The Queen*, *supra*, note 39, p. 7.

52. *Marcoux and Solomon v. The Queen*, *supra*, note 39. See also *Adair v. M'Garry*, *Byrne v. H.M. Advocate*, [1933] J.C. 72, *per* Lord Morison, p. 89.

53. *Dallison v. Caffery*, [1964] 2 All E.R. 610 (C.A.), p. 617.

54. *Supra*, note 34.

55. See *R. v. Buckingham and Vickers* (1943), 86 C.C.C. 76 (B.C. S.C.); *R. v. Daniluk* (1944), 82 C.C.C. 264 (Man. K.B.); *R. v. Hayward* (1957), 118 C.C.C. 365 (N.B. S.C.A.D.); *R. v. A.N.* (1978), 2 C.R. (3d) 55 (B.C. C.A.); *R. v. D.G.* (1978), 45 C.C.C. (2d) 157 (P.E.I. S.C.A.D.); *Brown v. Baugh and Williams* (1984), 11 C.C.C. (3d) 1 (S.C.C.).

56. In *Brown v. Baugh and Williams*, *supra*, note 55, it was held that the provisions of the *Identification of Criminals Act* authorized the forcible fingerprinting of a juvenile who was in custody charged under the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 (now repealed) with a delinquency that was also an indictable offence. Chouinard J. (Dickson, Beetz and McIntyre JJ. concurring) said at page 10: "In view of my conclusion on the statutory point it is unnecessary to express any opinion on the common law point." See L. H. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975), pp. 199-203.

57. See *R. v. Ireland* (1970), 126 C.L.R. 321 (Aust. H.C.) *per* Barwick C.J., p. 334; *R. v. Hass*, [1972] 1 N.S.W.L.R. 589 (C.C.A.); *Adamson v. Martin*, [1916] J.C. 319.

58. The Royal Commission on Criminal Procedure, Sir C. Philips, Chairman, *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure*, Cmnd. 8092-1 (London: HMSO, 1981), para. 95, p. 34.

59. *Criminal Code*, R.S.C. 1970, c. C-34. See, *e.g.*, ss. 465(1)(c), 465(2), 543(2), 543(2.1), 608.2, 691(1), 691(2), 738(5) and 738(6).

attend, a psychiatric facility for "observation," however, these provisions are not very clear as to what procedures the "observers" are authorized to perform, or the extent to which the accused is obliged to co-operate.<sup>60</sup>

It is our opinion that the element of inconsistency and uncertainty that exists in the present law concerning investigative procedures in respect of the person demands rectification. Consistency is necessary in order for the law to be (and to be perceived as being) inherently and demonstrably just. Certainty, insofar as the limits of police powers and the extent of an accused's or suspect's obligations are concerned, is essential to a clear definition of the relationship between the state and the individual. We view consistency and certainty in the area of investigative procedures in respect of the person as being essential to the very maintenance of the rule of law.

## II. Outdated Nature of the Present Law

The law's apparent failure to keep pace with the advances of science is reflected in part by statutorily enshrined references to the outmoded and invalidated scientific principles of a bygone era.<sup>61</sup> By way of example, subsection 2(1) of the *Identification of Criminals Act* continues to sanction the forcible administration of the investigative procedure "commonly known as the Bertillon Signaletic System ...." Developed in France in the late 1800s, this obsolete identification procedure consisted in the taking of five measurements from a subject: skull, feet, forearms, middle fingers, and ears. England and other Western countries adopted this procedure for a time but, as noted by Bouck J. in the case of *R. v. A.N.*,<sup>62</sup> "flaws soon became apparent and most countries then switched to fingerprinting ...."<sup>63</sup> Despite the fact that it continues to enjoy the rare status of a statutorily approved procedure, it has long been recognized as a dangerously outmoded system of identification. As O'Sullivan J.A. remarked in the case of *R. v. Medvedew*, "[i]t is unthinkable that an expert would be allowed to give evidence based on the discredited Bertillon system of identification."<sup>64</sup>

The other side of the coin is the law's failure to sanction specifically (that is, by statute) the use of a number of procedures that are now clearly accepted as valid techniques in the field of forensic science. Commonly used procedures that are relevant here include

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60. As regards the first question, see *Wilband v. The Queen*, [1967] 2 C.C.C. 6 (S.C.C.), p. 9; *Perras v. The Queen* (1973), 11 C.C.C. (2d) 449 (S.C.C.), p. 451. As regards the second question, see *R. v. Sweeney (No. 2)* (1977), 35 C.C.C. (2d) 245 (Ont. C.A.); *Re Chapelle and The Queen* (1980), 52 C.C.C. (2d) 32 (Ont. H.C.); *R. v. Langevin* (1984), 45 O.R. (2d) 705 (Ont. C.A.); *R. v. McAmmond*, [1970] 1 C.C.C. 175 (Man. C.A.); *R. v. Johnston*, [1965] 3 C.C.C. 42 (Man. C.A.).
  61. See, for examples of other anachronisms, the reference to "natural imbecility ..." in subsection 16(2) of the *Criminal Code*, or the reference to "the effect of lactation ..." in section 216.
  62. *R. v. A.N.* (1977), 37 C.C.C. (2d) 9 (B.C. S.C.), p. 14. This decision was subsequently appealed, for reasons unrelated to this point (see, *supra*, note 55).
  63. *Ibid.*
  64. *R. v. Medvedew* (1978), 6 C.R. (3d) 185 (Man. C.A.), p. 201.

those that involve the taking and analysis of palmprints, footprints, toeprints, hair samples, blood samples, saliva samples, various residues (for example, gunshot residues), and so on.

### III. The Charter Implications of Investigative Procedures in Respect of the Person

The *Canadian Charter of Rights and Freedoms* explicitly recognizes the importance of the rule of law.<sup>65</sup> It also demands *inter alia* that persons suspected or accused of having committed criminal offences be afforded certain basic protections. Because Charter jurisprudence is still at the stage of infancy, however, little determinative guidance exists concerning the permissible ambit of investigative procedures in respect of the person. For this reason, we feel that the time is ripe for establishing a framework for such procedures based upon what we take to be the spirit of the Charter and the likely boundaries it has set. We are cognizant of the fact that we are not the final arbiters on the subject, and that the procedures sanctioned in this Report would, in any event (and regardless of what we have to say), have to be carried out in conformity with the standards provided in the Charter as interpreted by the courts.

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65. Preamble to the *Canadian Charter of Rights and Freedoms*, *supra*, note 1. See also the Preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III.



## CHAPTER TWO

### Issues and Guidelines for the Statutory Regulation of Investigative Procedures in Respect of the Person

Having enumerated the reasons that prompted us to undertake our review of the law relating to investigative procedures in respect of the person, and having outlined in general terms the policy premises that have guided us in the development of the regime we are proposing, it is appropriate that we now identify and discuss the key issues to which any rational and comprehensive codification of such procedures must address itself, and the specific guidelines that have emerged from our consideration of these issues.

#### I. Consistency with the Charter

Evidence obtained through investigative procedures that violate the provisions of the *Canadian Charter of Rights and Freedoms* may be excluded by the operation of section 24 of the Charter. More fundamentally, one must be cognizant of subsection 52(1) of the *Constitution Act, 1982*,<sup>66</sup> which would render any law that is inconsistent with the Charter of no force and effect to the extent of such inconsistency (unless it were declared in accordance with subsection 33(1) that such law should operate notwithstanding the provisions in section 2 or sections 7 to 15 of the Charter).

There are five aspects of the *Canadian Charter of Rights and Freedoms* that merit particular examination in the context of investigative procedures in respect of the person: (a) protection against self-incrimination; (b) the presumption of innocence; (c) security of the person; (d) unreasonable search or seizure; and (e) cruel and unusual treatment.

#### A. Protection against Self-Incrimination

The first question to be considered is whether required submission to various investigative procedures in respect of the person would be likely to amount to violation of the constitutionally protected privilege against self-incrimination. In a strictly technical sense,

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66. *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

we believe the answer is negative. The only provisions contained in the *Canadian Charter of Rights and Freedoms* that deal specifically with the so-called privilege against self-incrimination are paragraph 11(c) and section 13. The former states that “[a]ny person charged with an offence has the right ... not to be compelled to be a witness in proceedings against that person in respect of the offence; ...” The latter states that “[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.” While paragraph 2(d) of the *Canadian Bill of Rights* provides in more general terms *inter alia* that “no law of Canada shall be construed or applied so as to ... authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied ... protection against self incrimination ...,”<sup>67</sup> it is amply clear from the case-law that the scope of this provision is in reality no wider than that of section 13 of the Charter. Pretrial investigative procedures have been held to fall outside the ambit of paragraph 2(d)’s prohibition on a number of occasions. In *Curr v. The Queen*,<sup>68</sup> for example, the Supreme Court of Canada dealt *inter alia* with the status of the breathalyzer sections (now sections 235 and 237) of the *Criminal Code vis-à-vis* paragraph 2(d) of the Bill. There Laskin J. (as he then was), in delivering the majority judgment,<sup>69</sup> held that “the compelled provision of a breath sample by a person, without concurrent protection against its use in evidence against him, does not offend against the self-crimination guarantee as it is expressed in s. 2(d).”<sup>70</sup> In His Lordship’s view, paragraph 2(d) went no further than to “render inoperative any statutory or non-statutory rule of federal law that would compel a person to criminate himself *before a Court or like tribunal through the giving of evidence*, without concurrently protecting him against its use against him.”<sup>71</sup> Ritchie J., who wrote a separate judgment, expressed the similar opinion that paragraph 2(d)’s protection extended to incriminating statements, and not to “‘incriminating conditions of the body’ such as the alcoholic content of the breath or blood.”<sup>72</sup>

In *R. v. Devison*<sup>73</sup> the judgments of Laskin and Ritchie JJ. were applied by the Appeal Division of the Nova Scotia Supreme Court to preclude the operation of paragraph 2(d) with respect to the taking of blood samples. In *Marcoux and Solomon v. The Queen*<sup>74</sup> the Supreme Court of Canada decided unanimously that paragraph 2(d) had no application to identification parades (that is, lineups). In *R. v. Sweeney (No. 2)*<sup>75</sup> the Ontario Court of Appeal dealt with paragraph 2(d) in the context of pretrial psychiatric examinations. Speaking for the court, Zuber J.A. acknowledged that “a psychiatric or psychological examination does not readily fit within that classification which would

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67. *Supra*, note 65.

68. *Curr v. The Queen* (1972), 7 C.C.C. (2d) 181 (S.C.C.).

69. Abbott, Hall, Spence and Pigeon JJ. concurring.

70. *Supra*, note 68, p. 197.

71. *Supra*, note 68, p. 201 [Emphasis added].

72. *Supra*, note 68, p. 186.

73. *R. v. Devison* (1974), 21 C.C.C. (2d) 225 (N.S. S.C.A.D.).

74. *Marcoux and Solomon v. The Queen*, *supra*, note 39.

75. *R. v. Sweeney (No. 2)*, *supra*, note 60.

make an accused a source of real or physical evidence”<sup>76</sup> and that “[a] mental examination obviously must draw from an accused verbal responses which will bear directly or indirectly on his guilt.”<sup>77</sup> Nevertheless, His Lordship was of the opinion that the privilege against self-incrimination only embraced “the right of a witness as qualified by the *Canada Evidence Act* ... to refuse to answer certain questions, if the answers will tend to incriminate the witness, and the absolute right of the accused to refuse to go into the witness box ....”<sup>78</sup>

Recent cases under the Charter indicate that such procedures as the taking of breath samples<sup>79</sup> under the *Criminal Code*'s breathalyzer provisions and the taking of fingerprints<sup>80</sup> under the *Identification of Criminals Act* do not violate paragraph 11(c) of the Charter.

Notwithstanding the above analysis, it must be recognized that investigative procedures in respect of the person may have numerous and profound evidentiary implications. In our Working Paper on *Investigative Tests*,<sup>81</sup> we canvassed a number of ways in which such procedures could result in the obtaining of information that might ultimately be used to establish the guilt of a suspect or accused person. In the general and ordinary sense of the term, therefore, it cannot be doubted that we are very much concerned with the issue of “self-incrimination.”<sup>82</sup>

It will have been evident from our work in the area of search and seizure that we are not, in principle, against the obtaining *per se* of relevant and reliable evidence of an objective nature directly from accused persons and criminal suspects where proper authority and reasonable grounds exist — even, in some instances, if it is necessary to use a degree of force in order to do so. If (as traditionally has been the case) a suspected or accused person can be “frisked” for evidence upon arrest where it is reasonably prudent to do so, we do not see how the general notion of self-incrimination, by itself, can be invoked to prohibit the use of more sophisticated investigative techniques. At the same time, however, we strongly believe that an acceptance of the concepts of individual privacy, human dignity, personal safety and personal security demands that the use of potentially incriminating procedures be narrowly circumscribed so as to ensure that they are carried out in the fairest, safest and least intrusive manner possible. Consistent with the philosophy we have expressed with regard to the “right to remain silent” in both our Working Paper<sup>83</sup> and our Report<sup>84</sup> on *Questioning Suspects*, moreover, we believe

76. *Ibid.*, pp. 250-251.

77. *Ibid.*, p. 251.

78. *Ibid.*, p. 250.

79. See *R. v. Altseimer* (1982), 29 C.R. (3d) 276 (Ont. C.A.); *R. v. Holman* (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.); *R. v. MacDonald* (1982), 1 C.C.C. (3d) 385 (Ont. Co. Ct.); *R. v. Stasiuk* (1982), 16 M.V.R. 202 (Ont. Prov. Ct.).

80. See *Re Jamieson and The Queen* (1982), 70 C.C.C. (2d) 430 (Qué. S.C.); *Re D.D.F.* (1984), 12 W.C.B. 152 (Ont. Prov. Ct.).

81. *Supra*, note 7, pp. 21-41.

82. See Ratushny, *supra*, note 4, p. 96.

83. Law Reform Commission of Canada, *Questioning Suspects*, [Working Paper 32] (Ottawa: Supply and Services, 1984).

84. *Supra*, note 2.

that, as a general rule, no criminal suspect or accused person should be obliged/in any way to submit to any investigative procedure in respect of the person that (like the making of a pretrial statement) requires his or her *active* participation, or that (like the giving of evidence in court) demands an "honest" or genuine response from him or her (see Recommendations 3 and 4). Among those procedures falling within either or both of these categories are such procedures as psychiatric and psychological examination, physical performance tests for detecting impairment, the furnishing of handwriting or voice samples, polygraph examination, and so on.<sup>85</sup> In our view, a general non-reliance upon the compulsory active and/or honest participation of the accused in generating incriminatory evidence is essential to the maintenance of the distance between the state and the subjectivity of the accused that has characterized the evolution of our system of criminal justice.

## B. The Presumption of Innocence

Paragraph 11(d) of the Charter, which is similar to paragraph 2(f) of the *Canadian Bill of Rights*, provides that "[a]ny person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; ...". In its most commonly accepted sense, the "presumption of innocence" requires simply that, in any criminal case, the prosecution bear the ultimate burden of establishing the accused's guilt beyond a reasonable doubt.<sup>86</sup> Accordingly, recent cases under the Charter have held that such procedures as the taking of breath samples<sup>87</sup> under the *Code's* breathalyzer provisions and the taking of fingerprints<sup>88</sup> under the *Identification of Criminals Act* do not *per se* infringe paragraph 11(d) of the Charter. Nevertheless, it must be noted that the presumption of innocence may still have relevance in connection with the question as to an individual's obligation to submit to various investigative procedures in respect of the person.<sup>89</sup> In the case of *Dumbell v.*

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85. Breathalyzer testing, for detecting and measuring alcohol consumption, would fall into the category of "active participation" tests; however, for the reasons explained in our Working Paper on *Investigative Tests* (*supra*, note 7) and in our Report on *Investigative Tests: Alcohol, Drugs and Driving Offences*, [Report 21] (Ottawa: Supply and Services, 1983), we are of the opinion that the use of breathalyzer testing in the investigation of driving offences should constitute an exception to the general rule. In our view, the voluntary undertaking of a potentially dangerous act such as driving should be regarded as constituting an implied waiver of the right not to be required to submit to any investigative procedure requiring active participation. Put another way, active participation in certain investigative procedures (under certain conditions) should be viewed as the *quid pro quo* for the right to engage in the potentially dangerous act of driving.

86. See Ratushny, *supra*, note 4, p. 185; Sir R. Cross, *Evidence*, 5th ed. (London: Butterworths, 1979), p. 122; *Criminal Code*, R.S.C. 1970, c. C-34, s. 5.

87. See *R. v. Holman*, *supra*, note 79.

88. See *R. v. McGregor* (1983), 3 C.C.C. (3d) 200 (Ont. H.C.); *R. v. Glass* (1982), 9 W.C.B. 164 (B.C. Prov. Ct.); *Re Jamieson and The Queen*, *supra*, note 80; *R. v. Higgins* (1983), 9 W.C.B. 352 (Sask. Q.B.).

89. See *Bell v. Wolfish* (1979), 99 S. Ct. 1861 (U.S. S.C.), pp. 1896-1897, n. 11, where it was noted in the dissenting judgment of Stevens J. (with whom Brennan J. concurred) that in the United States the presumption of innocence has been "relied upon ... as a justification for shielding a person awaiting trial from potentially oppressive governmental actions," and that "the presumption ... of innocence ... colors all of the government's actions toward persons not yet convicted."

*Roberts*, for example, Scott L.J. of England's Court of Appeal expressed the view that, in the absence of statutory authorization, the non-consensual taking of fingerprints from "a person under a charge before he is convicted or even committed for trial" was "inconsistent with our British presumption of innocence until proof of guilt ...."<sup>90</sup> Similarly, in *Marcoux and Solomon v. The Queen*,<sup>91</sup> Dickson J. (as he then was), speaking for the Supreme Court of Canada, stated in an *obiter dictum* that an accused's refusal to participate in a lineup could not ordinarily be admitted as evidence at his trial because its admission might "impinge on the presumption of innocence ..." and "the jury may gain the impression there is a duty on the accused to prove he is innocent." Besides saying that the presumption of innocence generally operates so as to preclude the admission of such evidence, this statement seems to imply that the right to be presumed innocent also generally precludes accused or suspected persons from being required to participate in pretrial investigative procedures in the first place.<sup>92</sup> If this is so, it may be that required submission to investigative procedures in respect of the person will only be permissible (at least where persons charged with offences are concerned), if it is a "reasonable limit" on paragraph 11(d)'s right to be presumed innocent and "can be demonstrably justified in a free and democratic society."<sup>93</sup> Even if this standard is not technically demanded, in our present context, by the Charter's presumption of innocence provision (as ultimately interpreted), we believe its application to be appropriate whenever any derogation from the general freedom from pretrial obligation is concerned. As suggested in a previous Study Report on *Discovery in Criminal Cases*,<sup>94</sup> the adversary system's general requirement that the prosecution establish the guilt of the accused without compelling his or her assistance at any stage of the criminal process may, at least, be subsumed by a broad and liberal interpretation of the presumption of innocence.<sup>95</sup> Consistency with the *spirit* of the Charter, therefore, requires that exceptions to this general rule conform to the standard articulated in section 1. For this reason, we have taken pains to design a regime that is premised on restraint and on the principled application of fairly onerous utilitarian criteria. Under our proposed regime, for example, an obligation to submit to an investigative procedure in respect of the person can only arise in the case of serious offences, and only where the procedure is likely to have significant forensic utility (see Recommendations 4, 5, 6 and 8). Procedures that are of dubious value or that are excessively intrusive either are expressly prohibited or are permitted by consent only (see Recommendations 2, 3 and 10). Except in exigent circumstances, and in cases where fingerprinting or photography is believed on reasonable grounds to be necessary for identification purposes, persons can be required to submit to investigative procedures in respect of the

90. *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), p. 330.

91. *Supra*, note 39, pp. 9-10. See also *R. v. Madden* (1977), 41 C.C.C. (2d) 413 (Ont. Co. Ct.), p. 415.

92. *Quaere*, however, how this interpretation squares with the statement by Dickson J. (as he then was), *supra*, note 39, p. 7, that there would be nothing wrong with using "[r]easonable compulsion ..." to force an arrested person to participate in a lineup.

93. *Canadian Charter of Rights and Freedoms*, *supra*, note 1, s. 1.

94. Law Reform Commission of Canada, *Discovery in Criminal Cases: A Study Report* (Ottawa: Information Canada, 1974), p. 35.

95. This view of the presumption of innocence is supported, in the specific context of investigative procedures in respect of the person, by P. K. McWilliams, *Canadian Criminal Evidence*, 2nd ed. (Toronto: Canada Law Book, 1984), p. 953. Ratushny (*supra*, note 4, p. 185) has suggested, however, that the general freedom from pretrial obligation may emanate more directly from the rule of law.

person only once a judicial order has been obtained (see Recommendations 3, 5, 6 and 8). Further requirements stipulate that persons must be told the reason(s) for any proposed procedures, and whether or not they are required by law to submit to them (see Recommendation 9); that the greatest possible privacy must be afforded, having regard to the nature of the procedure (see Recommendation 11); that any procedure must be conducted by qualified persons (see Recommendation 12); and that any procedure must be conducted in such a manner as to ensure minimum discomfort, having regard to the nature of the procedure and the surrounding circumstances (see Recommendation 13).

The regime that we are proposing for the regulation of investigative procedures in respect of the person may be perceived as narrowing police powers in some areas and expanding them in others. To the extent that implementation of our regime would (numerically at least) expand police investigative powers, it might conceivably be argued that utilitarian principles require actual empirical evidence as to the number of prosecutions that fail owing to the current absence of such powers.<sup>96</sup> In our view, however, the extension of utilitarian reasoning to this extreme would present several logical, as well as practical, problems. First, it would demand proof of the obvious, namely, that the use of accepted forensic procedures contributes to the detection, proof and prosecution of crime. Second, it would imply that the complex moral/legal question at issue here can be resolved by statistical analysis; it would set for us the impossible task of producing statistics that would, in themselves, make the use of a given investigative procedure justifiable. (How many convictions relating to grave offences would have to result on an annual basis from the use of a particular procedure in order for its use to be justified? One? One hundred? One thousand?) Third, by focussing on the increase in the *number* of allowable police intrusions, it would distract us from a more important issue, namely, the *nature* of the procedures contemplated, and their relative intrusiveness as compared with what is currently permissible under the law (for example, under the law of search and seizure). Fourth, it would assume that if, in the past, the police have had little difficulty in obtaining whatever forensic evidence is necessary to secure convictions, then the current state of the law must be adequate. In making this assumption, it would ignore the past willingness of courts to admit relevant and reliable evidence notwithstanding the manner in which it was obtained.

In our analysis, the issue at hand is a theoretical problem, not a statistical one. As we have pointed out in our recent Report on *Questioning Suspects*,<sup>97</sup> moreover, we do not subscribe to the view that the predominant impetus for law reform must be the amelioration of specific practical problems; to do so would be to bestow upon the *status quo* the undeserved advantage of presumptive correctness, and to lose sight of the higher aim of fundamental rationalization through the development of neutral and acceptable principles.

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96. See J. Hannan, "New Zealand Criminal Law Reform Committee on Bodily Samples and Identification," [1980] 4 *Crim. L.J.* 210, p. 214.

97. *Supra*, note 2, pp. 6-7.

### C. Security of the Person

Section 7 of the Charter, which is similar to paragraph 1(a) of the *Canadian Bill of Rights*, states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Implicit in this provision (and, perhaps, in the absence of a Charter provision explicitly protecting “enjoyment of property”) is a recognition of the particularly high value that Canadian culture has traditionally placed *inter alia* on physical (and, perhaps, mental) privacy, dignity and safety.<sup>98</sup> Quite apart from the relevant provisions of the Charter and the *Canadian Bill of Rights*, the number and nature of those protections that have evolved in the fields of tort and criminal law reflect the importance of personal security in Canadian law.<sup>99</sup> Although it is, of course, too early to speculate on the exact meaning and scope of the protection afforded by section 7 of the Charter, it has been recognized in at least one recent case that “[t]he concept of ‘security of the person’ surely extends to protection of one’s bodily substances and embraces an expectation of privacy ....”<sup>100</sup> Less obvious, perhaps, is the precise impact of “the principles of fundamental justice” in our present context. Recent cases have held that the principles of fundamental justice are not infringed by either the taking of breath samples<sup>101</sup> under the *Code’s* breathalyzer provisions, or by the taking of fingerprints<sup>102</sup> under the *Identification of Criminals Act*. Given the inherently intrusive nature of investigative procedures in respect of the person, however, we do not think that conformity with the principles of fundamental justice should be taken for granted. In our view, the essential requirement imposed by section 7 (whether substantive or procedural) is that of fairness. In the context of investigative procedures in respect of the person, we believe that fairness requires that the procedure serve a legitimate purpose (see Recommendations 5(b), 6(b) and 8); that there be fair authorization requirements (see Recommendations 3, 5, 6 and 8); that the degree of intrusion be minimized (see Recommendations 5(c), 6(d), 11 and 13); that there be meaningful procedural safeguards (see Recommendations 9 to 13); and that there be limits on the types of procedures that may be performed (see Recommendation 2).

### D. Unreasonable Search or Seizure

Section 8 of the *Canadian Charter of Rights and Freedoms*, which has no clear equivalent in the *Canadian Bill of Rights*, states that “[e]veryone has the right to be secure against unreasonable search or seizure.” The extent to which section 8 is applicable

98. See P. Garant, “Fundamental Freedoms and Natural Justice,” in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 257, pp. 264-265 and 271-274; M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1983), pp. 250 and 252-253.

99. See Law Reform Commission of Canada, *Police Powers — Search and Seizure in Criminal Law Enforcement*, [Working Paper 30] (Ottawa: Supply and Services, 1983), p. 19; Hon. Mr. Justice A. M. Linden, *Canadian Tort Law*, 3rd ed. (Toronto: Butterworths, 1982), pp. 38-40.

100. *R. v. Dyment* (1984), 12 C.C.C. (3d) 531 (P.E.I. S.C.), p. 534.

101. See *R. v. Holman*, *supra*, note 79. And see *Curr v. The Queen*, *supra*, note 68.

102. See *Re Jamieson and The Queen*, *supra*, note 80.

in our context is initially dependent on the extent to which a given investigative procedure in respect of the person may be regarded as a form of search or seizure. Those procedures that are directed toward the acquisition of tangible substances from the body of the suspect or accused, for example, would likely have to conform to section 8 of the Charter.<sup>103</sup> It is less clear, however, whether procedures that are not aimed at the acquisition of "tangible things" from the subject would fall within the purview of section 8.<sup>104</sup> Recent cases have held, for example, that section 8 is not infringed by the routine taking of fingerprints<sup>105</sup> from an accused person pursuant to the provisions of the *Identification of Criminals Act*, or by the taking of breath samples<sup>106</sup> in accordance with the *Criminal Code's* breathalyzer provisions.

Although it is too early to estimate the full impact of section 8 of the Charter in the context of investigative procedures in respect of the person,<sup>107</sup> we believe that some insight might be gained from American experience under the Fourth Amendment. A review of the relevant jurisprudence persuades us that ensuring the reasonableness of a procedure demands that careful consideration be given to at least five factors: (1) the gravity of the offence being investigated (see Recommendations 5(a) and 6(a)); (2) the grounds and authority for performing the procedure (see Recommendations 3, 5(b), 5(c), 6(b), 6(c) and 6(d)); (3) the manner in which the procedure is performed (see Recommendations 11 to 13); (4) the inherent intrusiveness of the procedure [certain highly intrusive procedures may, in fact, be inherently unreasonable and, therefore, unjustifiable in any circumstances (see Recommendation 2); others may be justifiable only where consent has been obtained (see Recommendation 3(a))]; and (5) the potential probative value of the procedure (see Recommendations 4, 5(b) and 6(b)).<sup>108</sup> Accordingly, we have devised a regime that utilizes these parameters. We have every reason to believe, moreover, that American jurisprudence will significantly influence the development of our own jurisprudence on the subject of "unreasonable search or seizure." In the recent case of *Hunter v. Southam Inc.*,<sup>109</sup> for example, the Supreme Court of Canada considered carefully the conclusion of Stewart J. in *Katz v. United States*<sup>110</sup> that warrantless searches were *prima facie* unreasonable for the purpose of the Fourth Amendment. Having stated

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103. See F. Chevette, "Protection upon Arrest or Detention and against Retroactive Penal Law," in Tarnopolsky and Beaudoin, *supra*, note 98, 291, p. 293.

104. *Ibid.*

105. See *R. v. Glass*, *R. v. McGregor*, *R. v. Higgins*, *supra*, note 88.

106. See *R. v. Holman*, *supra*, note 79. But see *R. v. Giesbrecht* (1984), 12 W.C.B. 331 (Man. Prov. Ct.).

107. See *R. v. DeCoste* (1983), 60 N.S.R. (2d) 170 (S.C.T.D.); *R. v. Dymont*, *supra*, note 100; *R. v. Meikle*, April 29, 1983 (unreported) (Ont. Co. Ct.); *R. v. McCready* (1982), 9 W.C.B. 109 (B.C. Prov. Ct.); *R. v. Alderton* (1984), 12 W.C.B. 168 (Ont. Co. Ct.); *R. v. Morton* (1984), 12 W.C.B. 321 (Ont. Co. Ct.); *R. v. Tompson* (1984), 12 W.C.B. 414 (B.C. Prov. Ct.); *R. v. Pohoretsky* (1984), 12 W.C.B. 369 (Man. Co. Ct.); *R. v. Truchanek*, *supra*, note 43; *R. v. Simmons* (1984), 39 C.R. (3d) 223 (Ont. C.A.); *R. v. Myers* (1984), 14 C.C.C. (3d) 82 (P.E.I. S.C.A.D.).

108. For a review of American cases dealing with investigative procedures in respect of the person in this context, see J. W. Hall, Jr., *Search and Seizure* (Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1982), pp. 505-529 (and 1984 supplement). See also Chevette, *supra*, note 103, p. 298.

109. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; (1984), 14 C.C.C. (3d) 97 (S.C.C.).

110. *Katz v. United States* (1967), 389 U.S. 347 (U.S. S.C.).

that “where it is feasible to obtain prior authorization, I would hold that such authorization is a pre-condition for a valid search and seizure,”<sup>111</sup> Dickson J. (with whom Ritchie, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ. concurred) said that he “would in the present instance respectfully adopt Stewart J.’s formulation as equally applicable to the concept of ‘unreasonableness’ under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness.”<sup>112</sup>

## E. Cruel and Unusual Treatment

Section 12 of the Charter provides that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” This section is similar to paragraph 2(b) of the *Canadian Bill of Rights*, which provides that “no law of Canada shall be construed or applied so as to ... impose or authorize the imposition of cruel and unusual treatment or punishment; ...” The question of what constitutes cruel and unusual treatment under the Charter has yet to be conclusively answered. Although one recent case has held that the taking of fingerprints does not qualify as such,<sup>113</sup> the possibility of a cruel and unusual treatment argument being raised with respect to investigative procedures of an extremely intrusive nature, however, cannot be ruled out.

In our view, conformity with the spirit of sections 12 and 1 of the Charter demands that investigative procedures in respect of the person adhere to basic and accepted standards of decency (see Recommendations 4 and 11); be no more intrusive than is necessary in order to achieve their purpose (see Recommendations 5(c), 6(d) and 13); and not be disproportionately intrusive in relation to the gravity of the offence being investigated (see Recommendations 4, 5(a), 6(a) and 8).

## II. Permissible Procedures

In devising our statutory scheme for the regulation of investigative procedures in respect of the person, it has been necessary to consider whether any procedures ought specifically to be prohibited as “unreasonably ... interfering with individual rights and freedoms; ...”<sup>114</sup> *per se*. From our review of the various procedures discussed above, and of the legal issues that may be applicable to them, we are of the opinion that “prohibitible” procedures might fall into two categories: (1) procedures that are not sufficiently reliable from a scientific standpoint; and (2) procedures that are inherently too intrusive to be used as methods of criminal investigation (that is to say, procedures

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111. *Supra*, note 109, p. 109 (C.C.C.).

112. *Supra*, note 109, pp. 109-110 (C.C.C.).

113. See *R. v. McGregor*, *supra*, note 88.

114. Government of Canada, *supra*, note 15, p. 53.

that would be inherently unreasonable if performed for purely investigative purposes without the subject's consent, and that, if not therapeutically indicated, would render any consent thereto unreasonable). This having been said, there remains the very difficult task of deciding exactly which of those procedures discussed would fall into either one of these categories. Although we recognize that, in making our choice, we run the risk of erroneously omitting or including some procedures, we feel strongly that measures must be taken to discourage the use of procedures that are inherently too intrusive and that cannot, in our view, be justified as methods of obtaining forensic evidence. Rather than attempting to define the permissible limits of investigative procedures in respect of the person in a blunt fashion, however, by simply allowing certain procedures to be forcibly conducted while prohibiting outright the use of certain others, we prefer to enumerate those procedures to which accused persons or criminal suspects should, in certain circumstances, be required to submit (see Recommendations 4, 5, 6 and 8); enumerate those procedures that should not, under any circumstances, be resorted to for investigative purposes (see Recommendation 2); and recommend that other procedures be allowed only with the subject's consent (see Recommendation 3(a)).

In deciding what procedures ought to be designated as procedures to which a person might be required to submit, we have been governed *inter alia* by two important considerations: (1) potential probative value; and (2) inherent intrusiveness (that is to say, the degree to which physical or mental integrity, privacy, dignity, safety or security is interfered with). It is our view that before submission to a given procedure may be required, such procedure must, as a general rule, be likely to produce evidence that will be of some value and assistance at trial. Although we recognize that potential probative value depends, in large measure, upon the circumstances of each individual case,<sup>115</sup> we believe that the procedure involved, to be acceptable, must be one the validity of which has gained general recognition in the field to which it belongs.<sup>116</sup> Acknowledging, as we have, that different investigative procedures in respect of the person possess varying inherent probative capabilities, and involve varying degrees of intrusion upon the subject, we believe that a person should not be required to submit to any procedure the potential probative value of which is outweighed by its inherent intrusiveness.

### III. Grounds and Authority for Conducting Investigative Procedures in Respect of the Person

It is our opinion that investigative procedures of the type dealt with in this Report should not generally be authorized until after the proposed subject has been arrested or charged with an offence, unless the subject has consented (see Recommendations 3(a),

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115. Fingerprint evidence, for example, though it may in some circumstances be conclusive on the issue of identity, is capable (like all other circumstantial evidence) of being explained away in other cases. See McWilliams, *supra*, note 95, pp. 70-90. In still other cases, fingerprint evidence, though not capable of establishing the identity of the perpetrator, may be corroborative on this issue. See, *e.g.*, *R. v. La Rochelle* (1952), 104 C.C.C. 349 (N.S. S.C.).

116. See *Frye v. United States* (1923), 293 F. 1013 (D.C. Cir.), p. 1014; *R. v. Medvedew*, *supra*, note 64, p. 200.

5(a), 6(a) and 8). Although it may be argued that restricting the use of such procedures to post-arrest or post-charge circumstances might induce the police to arrest or charge in situations where they ought not to,<sup>117</sup> we believe that, given the intrusive potential of such procedures, the standard of suspicion necessary for arresting or charging is an essential protection against unjustified encroachments upon the freedom or personal security of the individual.<sup>118</sup> Rather than protecting suspected persons from over-zealous police investigators, the availability of pre-arrest, pre-charge powers with regard to investigative procedures in respect of the person might be viewed as increasing the potential for unwarranted harassment of citizens by the police.<sup>119</sup>

Because all investigative procedures in respect of the person involve interference with the physical or mental integrity of the subject to one degree or another, we also believe that, absent the subject's consent (see Recommendation 3(a)), (a) such procedures should only be allowable in connection with the investigation of offences of a serious nature (that is, they should be used with *restraint*; see Recommendations 5(a), 6(a) and 8), and (b) reasonable justification for any proposed procedure (that is, some legitimate purpose) must be a minimum logical requirement (see Recommendations 5(b), 6(b), and 8). In order to be reasonable or legitimate, moreover, the required justification must generally be assessed according to a higher standard than that which would be applicable, for example, in the case of an interference by the state with an individual's property or possessions. As Dickson J. (as he then was) reasoned in *Hunter v. Southam Inc.*,<sup>120</sup> "[t]he State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion." Although His Lordship noted that "[h]istory has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement,"<sup>121</sup> he was quick to point out that "where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one."<sup>122</sup> Accordingly, we believe that the precepts of reasonable justification and restraint generally require either proof or a reasonably grounded belief that the proposed procedure will provide probative evidence of, or relating to, the offence being investigated (see Recommendations 5(b) and 6(b)), and that there is no less intrusive means practicable for obtaining the evidence to which the proposed procedure is directed (see Recommendations 5(c) and 6(d)).

We are further of the opinion that, in order to guard against unjustified intrusion, judicial authorization should normally be required for any investigative procedure conducted in the absence of the subject's consent (see Recommendation 3(b)). As Dickson J. (as

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117. See New Zealand Criminal Law Reform Committee, *supra*, note 10, para. 27, p. 14.

118. *Ibid.*, Minority Report, para. 3, pp. 1-2.

119. *Ibid.*, para. 7, p. 3.

120. *Supra*, note 109, pp. 114-115 (C.C.C.).

121. *Ibid.*, p. 115 (C.C.C.).

122. *Ibid.*

he then was) stated in *Southam*, a requirement of prior authorization “puts the onus on the State to demonstrate the superiority of its interests to that of the individual.”<sup>123</sup> In so doing, “it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from State interference to the interests of the State in advancing its purposes through such interference.”<sup>124</sup> We are, with the greatest respect, in full agreement with His Lordship on this point. We must emphasize, however, that while we endorse prior judicial authorization as the general rule, we do not think that it should be an absolute and inflexible requirement. In our view, the destructible or evanescent nature of some forensic evidence may make the obtaining of judicial authorization highly impractical in certain cases. Provided that procedures are established to ensure the accountability of peace officers after the fact, therefore (see Recommendation 7), we believe that a limited exception to the judicial authorization requirement should be made in such exigent circumstances (see Recommendation 6).

Notwithstanding our general preference for prior judicial authorization, moreover, we also believe that a strong case exists for relaxing this requirement in the case of certain investigative procedures when they are used solely for identification purposes. The particular procedures we have in mind are fingerprinting and photography. These procedures are, of course, often useful for the purpose of linking a particular suspect with a particular offence. When they are resorted to for an incriminatory purpose such as this, we believe they should be subject to the general requirement for prior judicial authorization. However, the procedures of fingerprinting and photography may also serve a more basic function, namely, that of establishing or recording the identity of persons charged with criminal offences. Fingerprints and photographs may be indispensable tools in the apprehension of known fugitives; fingerprints, moreover, may facilitate, or be crucial to, the operation of various sections of the *Criminal Code* dealing with previous convictions.<sup>125</sup> Indeed, owing to the number of instances in which identity and/or previous convictions may need to be established prior to adjudication, it seems likely to us that judicial authorization, if it were to be required in all cases, would be unduly burdensome or would run the risk of becoming an empty formality. In light of this practical drawback, and considering the minimally intrusive nature of fingerprinting and photography when compared with other investigative procedures in respect of the person, we are of the opinion that judicial authorization ought not to be mandatory whenever such procedures are utilized for the purpose of identification (see Recommendation 8).

#### IV. Protections and Safeguards

The goals of fairness, accessibility, minimization of intrusion and, ultimately, public acceptance require some additional safeguards. They demand, first of all, that investigative

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123. *Ibid.*, p. 109 (C.C.C.).

124. *Ibid.*

125. See *Re Jamieson and The Queen*, *supra*, note 80, p. 445. Such sections of the *Code* would include, for example, ss. 83(1)(d), 236(1), 457.3(1)(c), 536-538, 592-594, 662.1(3)(b) and 740. See also section 12 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10, as amended.

procedures in respect of the person be conducted only by qualified persons (see Recommendation 12). Besides protecting the health and safety of the subjects of these procedures, such a requirement is essential to ensure that a given procedure is not conducted in a manner that detracts from the value of the evidence obtained, and that runs the risk of rendering the procedure a pointless exercise. Second, these goals demand that the procedure be performed in a manner that affords the subject the greatest degree of privacy possible, having regard to the nature of the investigative procedure (see Recommendation 11). Third, these goals demand that any investigative procedure in respect of the person be conducted in such a manner as to ensure minimum discomfort to the subject, having regard to the nature of the procedure and the surrounding circumstances (see Recommendation 13). Fourth, these goals demand that prospective subjects be told the reason why they are being asked to submit to a particular procedure, and whether or not they are required by law to submit to a particular procedure (see Recommendation 9). Fifth and finally, these goals demand that, whenever consent is required, its validity be ensured by prior notification as to the nature and purpose of the proposed procedure, any significant health or safety risks involved, the subject's right to consult with counsel, and the subject's right to refuse to consent or to withdraw his or her consent at any time (see Recommendation 10).

Because of the complexity and uncertainty of the present law regarding adverse inferences that may in some circumstances be drawn against accused persons who refuse to undergo investigative procedures they are not required by law to undergo, we realize that any warning concerning the right to refuse to submit to tests that require consent might run the risk of being incomplete or misleading. It is for this reason that we suggested in our Working Paper on *Investigative Tests* that providing information to prospective subjects in this area might best be left to counsel. Having crystallized our thinking on this point, however, we believe that the better course would be to revise the law relating to adverse inferences, if need be, rather than to compromise unduly the principle of informed consent.

The various protections and safeguards discussed above constitute what we believe to be the most practical and important measures for upholding the legitimate interests of the individual. While other protections and safeguards might be added to this list (for example, the presence of counsel; the presence of one's own physician; or the separate, independent analysis of any substance(s) removed from the subject), certain practical considerations militate against their inclusion as guaranteed rights in a statutory scheme. Although we believe that arrested or detained persons should continue to enjoy their rights under paragraph 10(b) of the Charter "to retain and instruct counsel without delay and to be informed of that right; ...," and would hope that a desire to have counsel present during the actual investigative procedure would be accommodated wherever practical, we fear that any benefit accruing from a specific statutory right of this sort might be outweighed by obvious potential problems inherent in its administration. The same holds true with regard to the right to have one's own physician present. If the other protections and safeguards we are proposing were to be adopted, we would not see the right to have counsel and/or one's own physician present as an essential protective measure.

While independent analysis of removed substances might be beneficial in some cases,<sup>126</sup> a number of practical problems would frustrate the creation of a general statutory right that goes beyond that already provided by section 533 of the *Criminal Code*.<sup>127</sup> In many cases (for instance, in the case of fingernail scrapings where the samples are minute, or where the searched-for evidence is in only part of the sample), it may not be feasible to divide samples into two parts for separate analyses. In other cases (such as in the case of saliva samples taken for the purpose of ascertaining whether the donor is a "secretor" and, if so, what his or her blood type is) such procedure may not be necessary; since secretor status and blood type do not change over time, the donor will always be able to have the same samples taken independently at a later time. In view of these considerations, we are content for the time being to confine our recommendations relating to access to evidence obtained through the use of investigative procedures in respect of the person to those already made in our recent Report on *Disclosure by the Prosecution*.<sup>128</sup> In that Report, we expressed the view that the accused should be entitled "to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, to receive copies thereof; ..." <sup>129</sup> As we further noted, "our proposals would entitle the accused to the reports of any forensic tests where the expert is a proposed witness."<sup>130</sup>

It goes without saying that persons acting competently within the confines of any statutory scheme for the regulation of investigative procedures in respect of the person should be protected from legal liability. The precise formulation of such protection is not, however, something on which the Commission has taken a firm position and, in any event, is not something that need concern us in this Report. The issue of protection from liability is not unique to the area of investigative procedures in respect of the person. For this reason, we shall be returning to it in greater depth in our forthcoming Report on Criminal Law: The General Part — Liability and Defences.

Related to this topic is the question of whether qualified persons, such as physicians, ought to be placed under a statutory obligation with regard to the conducting of investigative procedures in respect of the person. One approach would be statutorily to compel physicians and/or other qualified persons to conduct certain investigative procedures as a matter of course in certain circumstances. Legislation of this type has been enacted in

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126. See, e.g., the recommendation we have made with regard to blood samples in our Report on *Investigative Tests: Alcohol, Drugs and Driving Offences*, *supra*, note 85, p. 23.

127. Section 533 of the *Criminal Code*, R.S.C. 1970, c. C-34, provides as follows:

533. (1) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, after three days notice to the accused or prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.

(2) Every one who fails to comply with the terms of an order that is made under subsection (1) is guilty of contempt of court and may be dealt with summarily by the judge or magistrate who made the order or before whom the trial of the accused takes place.

128. Law Reform Commission of Canada, *Disclosure by the Prosecution*, [Report 22] (Ottawa: Supply and Services, 1984).

129. *Ibid.*, p. 14.

130. *Ibid.*, p. 26.

at least one Commonwealth jurisdiction with regard to the taking of blood samples in motor vehicle accident cases.<sup>131</sup> A second approach would be to place physicians and/or other qualified persons under compulsion to conduct certain investigative procedures only where they have been specifically required by a law enforcement officer to do so (and only, perhaps, where no health or safety risk to the subject is involved). This approach would, in effect, be an extension of paragraph 118(b) of the *Criminal Code* which currently makes every one who "omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so ..." guilty of an offence. A third approach, and the one favoured by this Commission, would be to forego the enactment of any statutory provision that would compel physicians, or any other persons not employed by the government for that particular purpose, to conduct any form of investigative procedure under any circumstances. This approach is consistent with that taken in our recent Report on *Investigative Tests: Alcohol, Drugs and Driving Offences*.<sup>132</sup> Our opinion, once again, is that the conscription of such persons into the field of criminal investigation would constitute both an unjustified infringement of the individual rights of private citizens and, in some instances, an unconscionable intrusion into the special relationship of doctor and patient. Accordingly, the legislation envisioned by our recommendations would necessarily be drafted so as to reflect and ensure a clear absence of legal obligation in this regard.

## V. The Consequences of Violation of Procedural Requirements

Adherence to the procedural requirements of legislation concerning investigative procedures in respect of the person may be enhanced *inter alia* by the enactment of a penalty for violation of such requirements (such as liability to criminal or police disciplinary proceedings), or by the exclusion of any evidence obtained as the result of such violation. As we indicated some time ago in our Report on *Evidence*, we believe that exclusion of evidence is an appropriate means by which to "protect the integrity of the adjudicative process."<sup>133</sup> As we have indicated more recently in our Report on *Questioning Suspects*,<sup>134</sup> we also believe exclusion of evidence to be an appropriate mechanism for controlling investigative powers. What remains to be considered in this Report is whether, in light of the exclusionary rule now contained in section 24 of the Charter, it is necessary to attach a separate exclusionary rule to the procedures we are recommending for the regulation of investigative procedures in respect of the person. We believe that it is.

It must be recognized that violations of the procedures proposed in our recommendations — even substantial ones — would not necessarily amount to violations of the Charter. In the absence of a separate exclusionary rule, therefore, there might well be

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131. See Law Reform Commission of Canada, *supra*, note 7, p. 73.

132. *Supra*, note 85, p. 25.

133. Law Reform Commission of Canada, *Evidence*, [Report 1] (Ottawa: Information Canada, 1975), p. 61.

134. *Supra*, note 2.

circumstances in which the rule in *The Queen v. Wray*<sup>135</sup> would still apply. Such an eventuality would, in our view, be highly unsatisfactory. It would, in essence, betray our commitment to the fundamental principles upon which our proposed regime is premised. If these principles are to be taken seriously, and if the rule of law is to be properly served, it seems to us to be only logical that a state prescribing certain minimum rules of procedure based upon such principles should not generally be allowed to benefit from their breach.<sup>136</sup>

It is our further belief that in the sensitive area of investigative procedures in respect of the person, considerations relating to intrusiveness and reliability of evidence require a standard of protection pitched slightly higher than that provided by the Charter's formula. At the same time, however, it is also our opinion that the possibility of having reliable evidence automatically excluded as the result of minor or inadvertent defects in formalities ought to be avoided; we believe, therefore, that the consequences of a failure by the authorities to observe procedural requirements in the carrying out of investigative procedures in respect of the person should depend to a large extent on the nature and seriousness of the violation. For all of these reasons, we are in favour of a qualified (as opposed to absolute) exclusionary rule that places the burden on the prosecution to satisfy the court that admission of evidence obtained in contravention of our proposed rules would not bring the administration of justice into disrepute<sup>137</sup> (see Recommendation 14). It is our opinion that this approach is most consistent with the fundamental principles of the Criminal Law Review, as articulated by the Government of Canada in *The Criminal Law in Canadian Society*. In its view, "presumption, onus, or burden of proof ..." <sup>138</sup> constitute "a ... practical approach, an implicit methodology that can be used to sort out competing claims as to the appropriate point of balance" <sup>139</sup> when dealing with the "balance between individual liberties and the provision of adequate powers for the state to allow for effective crime prevention and control; ..." <sup>140</sup>

In general, we view subsection 24(2) of the Charter as providing a threshold or minimum protection. In principle, the existence of subsection 24(2) should not preclude resort to a different or higher standard of protection where policy reasons support such extension. Extraconstitutional "exclusionary rules" are by no means new.<sup>141</sup> The time-honoured doctrine of "solicitor-client privilege," for example, functions independently to preclude the revelation of relevant information in court in circumstances where the preservation of an overriding social interest is at stake.<sup>142</sup> Having premised our proposed

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135. *Supra*, note 24.

136. See Law Reform Commission of Canada, *The Exclusion of Illegally Obtained Evidence*, [Study Paper] (Ottawa: Information Canada, 1974), pp. 22-23.

137. See Law Reform Commission of Australia, *supra*, note 9, para. 298, p. 141.

138. *Supra*, note 15, p. 50.

139. *Ibid.*

140. *Ibid.*

141. See generally R. J. Delisle, *Evidence: Principles and Problems* (Toronto: Carswell, 1984), Chapter 6.

142. See Law Reform Commission of Canada, *supra*, note 136, pp. 3-4; Delisle, *supra*, note 141, Chapter 6.

statutory regime on what we believe to be the most basic of social policy principles, we view the inclusion of a separate exclusionary rule as being essential for the protection of social interests that transcend the state's interest in the search for truth.

## VI. Ensuring the Subject's Co-operation

There are basically three ways by which we may seek to enforce the subject's compliance with any lawful investigative procedures in respect of the person. One method would be to allow the use of a degree of force. This method has already been adopted in connection with some forms of investigative procedures in respect of the person in Canada. Subsection 2(2) of the *Identification of Criminals Act*, for example, provides that "[s]uch force may be used as is necessary to the effectual carrying out and application of [the] measurements, processes and operations" authorized thereunder. In *Marcoux and Solomon v. The Queen*, Dickson J. (as he then was), speaking for the Supreme Court of Canada, answered the question as to whether or not a suspect or accused person could be compelled by force to participate in a lineup by saying that "[r]easonable compulsion to this end is ... an incident to the police power to arrest and investigate, and no more subject to objection than compelling the accused to exhibit his person for observation by a prosecution witness during a trial."<sup>143</sup>

A second method of ensuring the subject's submission to investigative procedures would be to enact a penalty for failure or refusal to participate in such procedures. Again, this method has been employed to some extent in Canada. Subsections 234.1(2) and 235(2) of the *Criminal Code*, for example, provide that everyone who fails or refuses, without reasonable excuse, to comply with a peace officer's demand for a breath sample under subsections 234.1(1) or 235(1) respectively is guilty of a "hybrid" offence. Subsection 240.1(2) makes unreasonable failure or refusal to comply with a peace officer's demand under subsection 240.1(1) a summary conviction offence. By virtue of sections 133, 453.4 and 455.6 of the *Code*, failure to *appear* for the purposes of the *Identification of Criminals Act* may constitute an offence and give rise to the issuance of a warrant for the arrest of the accused for the offence with which he or she is charged, although no specific mention is made of any legal consequences for an accused's failure or refusal to co-operate further. No specific statutory penalty exists for failure to co-operate with psychiatrists or psychologists in the course of examinations authorized under the provisions of the *Criminal Code*. Where an accused has failed to "attend" for "observation" pursuant to a court order under one of the *Criminal Code*'s observation provisions, he or she could, presumably, be liable for disobeying that order, although it is doubtful whether, having "attended," an accused could be penalized for refusing to undergo any investigative procedures suggested. Refusal to submit to some investigative procedures might, however, constitute the offence of obstruction. According to paragraph 118(a) of the *Criminal Code*, a person who "resists or wilfully obstructs a public officer

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143. *Supra*, note 39, p. 7.

or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer, ..." is guilty of a "hybrid" offence.

A third available method of enforcement is the enactment of a provision permitting the trier of fact to draw an adverse inference at trial from the accused's failure or refusal to participate in a given investigative procedure. Once more, this method has already been adopted in Canada in connection with some forms of investigative procedures in respect of the person. Subsection 237(3) of the *Criminal Code*, for example, which deals with proceedings for impaired driving, provides:

(3) In any proceedings under section 234, evidence that the accused, without reasonable excuse, failed or refused to comply with a demand made to him by a peace officer under section 234.1 or subsection 235(1) is admissible and the court may draw an inference therefrom adverse to the accused.

By section 240.3 of the *Criminal Code*, this provision is made applicable to proceedings under subsection 240(4) (impaired navigation or operation of a vessel) and section 240.2 (navigation or operation of a vessel when blood alcohol level is over 0.08) as well.

Even in the absence of statutory provisions, it is clear from the case-law that an accused or suspected person's failure to submit to certain investigative procedures in respect of the person may, in some circumstances, have adverse evidentiary consequences.<sup>144</sup>

If, as we have recommended, requiring submission to investigative procedures in respect of the person is only to be permissible in cases where serious offences are involved, it seems apparent to us that only one of the above alternative measures — resort to a degree of force — can be relied upon to ensure the co-operation of subjects in authorized investigative procedures. In our assessment, the possibility of conviction for a separate, less serious offence would be unlikely to achieve a guilty subject's co-operation in the use of procedures that may produce evidence linking him or her to the commission of a grave offence.<sup>145</sup> The same holds true with respect to the possibility of an adverse inference. Indeed, the very allowance of an adverse inference may not be logically defensible in any case where the subject has failed or refused to submit to an investigative procedure of a particularly intrusive nature. For these reasons, we are of the opinion that the provisions relating to the use of force in our forthcoming Report on The General Part — Liability and Defences should apply to the administration of investigative procedures in respect of the person, and have not included a specific provision for the use of force in our present recommendations.

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144. See *Marcoux and Solomon v. The Queen*, *supra*, note 39; *R. v. Sweeney (No. 2)*, *supra*, note 60; *R. v. Brager* (1965), 47 C.R. 264 (B.C. C.A.). But see also *R. v. Madden*, *supra*, note 91; *R. v. Shaw*, *supra*, note 47; *R. v. Burns*, *supra*, note 41; *R. v. Gowland* (1978), 45 C.C.C. (2d) 303 (Ont. C.A.); *R. v. McCormack* (1984), 28 Man. R. (2d) 29 (C.A.), p. 32.

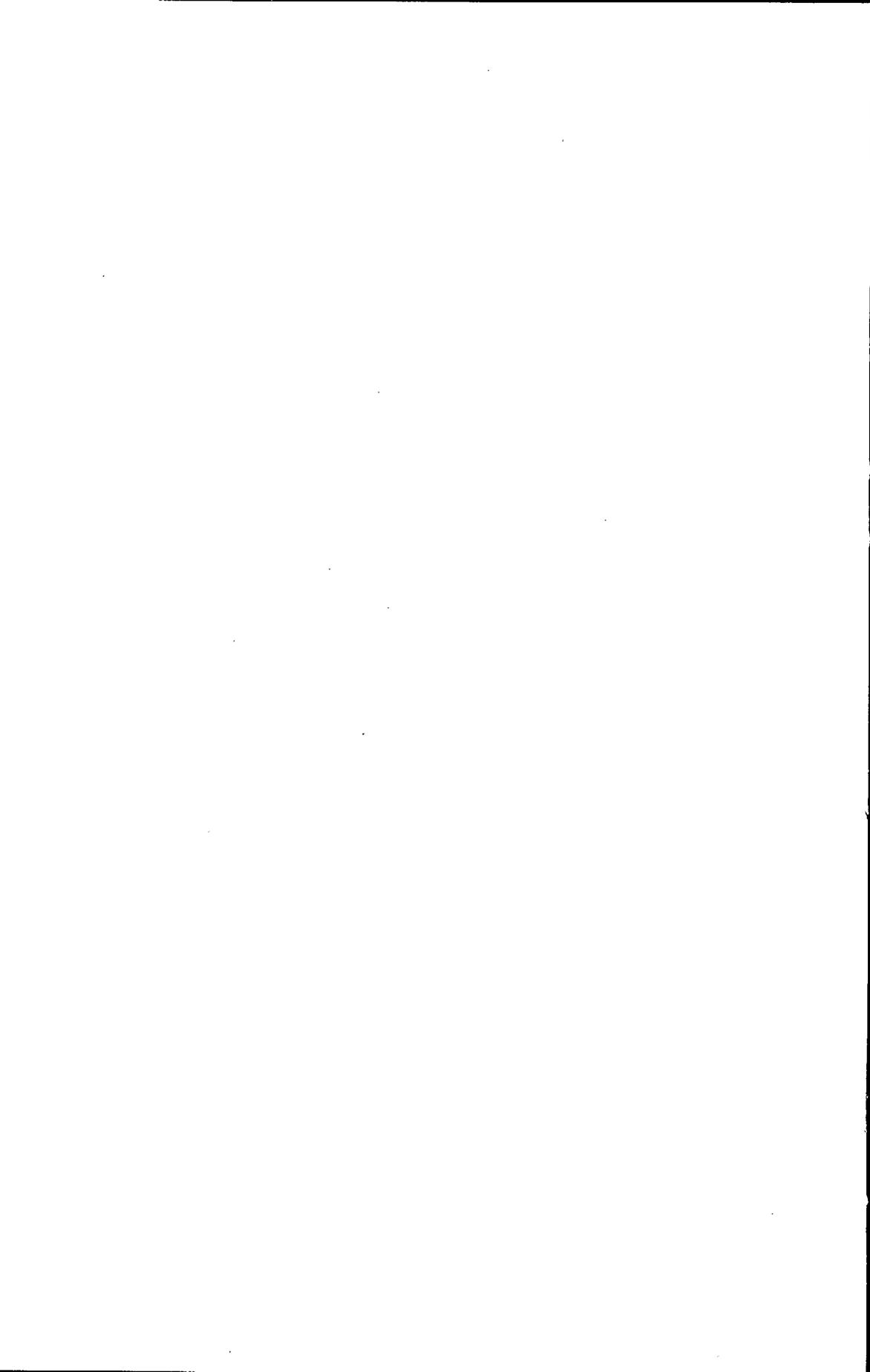
145. See the Royal Commission on Criminal Procedure, *supra*, note 11, paras. 3.135 and 3.136, pp. 67-68, where a similar opinion is expressed.

Although the precise formulation of the recommendations we shall be making on this subject has yet to be finalized, we must emphasize that, in our view, the degree of force permissible in our present context ought to be significantly limited. As suggested by the tentative draft provisions contained in our Working Paper on *The General Part*,<sup>146</sup> we do not, for example, believe that the law should countenance the use of unnecessary force, or any force known likely to cause serious physical injury. The availability of a limited degree of force, therefore, should not inevitably conjure up images of police brutality. Prohibiting unnecessary force would recognize that resistance may take various forms. It may be purely passive (as in the mere withholding of consent), violently active, or anywhere in between. Prohibiting all force known likely to be seriously injurious, regardless of its necessity, would recognize the need to place reasonable limits on the lengths to which police officers may go in the investigation of crime.

Before leaving this subject, we should also point out that, under the regime we are proposing, the limited degree of force to which we have been referring generally would only be available to ensure compliance with a judicial order. Put another way, judicial orders would issue with the knowledge that force would be allowable to enforce them (subject to the limitations that would be set out in our forthcoming Report on *The General Part*); hence, force generally would be used to impose judicial will (not just the will of the police), and the use of force generally would be subject to judicial control.

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146. Law Reform Commission of Canada, *The General Part — Liability and Defences*, [Working Paper 29] (Ottawa: Supply and Services, 1982).



## CHAPTER THREE

### Our Recommendations

As the result of the foregoing analysis, we have formulated a number of recommendations regarding the manner in which investigative procedures in respect of the person ought to be statutorily regulated. These recommendations, while not intended as an exhaustive and detailed prescription for the codification of such procedures, comprise what we consider at least to be the basic framework for the creation of any such statutory scheme.

We have omitted from the recommendations set out below the separate recommendations we have formulated to deal with certain investigative procedures in the context of drug- and alcohol-related driving offences. As we are of the view that the taking of body samples in the investigation of such offences involves special considerations, we have considered this issue outside the context of our general regime, and have dealt with it separately in our Report entitled *Investigative Tests: Alcohol, Drugs and Driving Offences*.<sup>147</sup>

We wish to emphasize that our proposed regulation of investigative procedures in respect of the person is *not* intended as a recommendation that adherence to the proposed procedures should automatically render the evidence thereby obtained admissible.

Our recommendations are as follows:

#### *Definition*

**1. (1) For the purpose of statutory codification, the term “investigative procedure in respect of the person” should be defined as any pre-adjudication procedure whereby a person in authority or any agent of such person endeavours to obtain or record, from a person suspected or accused of having committed a criminal offence, information concerning**

- (a) the physical or mental condition or characteristics of that person, or**
- (b) the offence in question.**

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147. *Supra*, note 85.

(2) Notwithstanding part (1) of this recommendation, the term "investigative procedure in respect of the person" should be defined so as to exclude from its scope:

- (a) any procedure that does not require either physical contact with the subject or the subject's conscious co-operation;
- (b) the simple interrogation of the subject; and
- (c) the external search of the clothed body of the subject for "objects of seizure" as defined in Recommendation One, proposed subsection 3(1) of our Report on *Search and Seizure*.

The purpose of this recommendation is to define the term "investigative procedure in respect of the person." Part (1) begins by stating an all-encompassing definition. In specifying that the definition should only embrace "pre-adjudication" procedures, this part is designed to make it clear that we are not attempting to regulate procedures that are not really "investigative" in nature, such as any identification or search procedures to which a person convicted of a criminal offence may be subjected in a prison or penitentiary prior to the expiration of his or her sentence. While it may be that the use of identification or search procedures in the post-conviction context would also be an appropriate subject for reform-orientated recommendations, consideration of this separate issue is beyond the scope of this Report.

Part (2) then narrows the definition. Paragraph (a) of part (2) is designed to make it clear that we are not here concerned with the regulation of procedures that in no way interfere with, or constitute an intrusion upon, the physical or mental integrity of the subject. While "inspection of the body of the subject ..." and "the photographing of the subject ...," for example, would be designated as investigative procedures in respect of the person by paragraphs (a) and (d) of Recommendation 4 respectively, they would only be designated as such in cases where they involve the co-operation of the subject or the "laying on of hands" by the authorities (that is, the police) or their agents. Surreptitious inspection of the subject's body, and the surreptitious photographing of the subject, on the other hand, would not be investigative procedures in respect of the person for the purposes of our recommendations, and would not be affected by our proposed statutory regime.

Paragraphs (b) and (c) of part (2) are designed to make clear that we are not, in this Report, concerned with the regulation of interrogation or normal search procedures; these have been dealt with, respectively, in our recent Reports on *Questioning Suspects* and *Search and Seizure*.

### *Prohibited Procedures*

2. Notwithstanding anything in these recommendations, the following investigative procedures in respect of the person should not be permitted under any circumstances:

- (a) the administering to the subject of any substance;

- (b) any surgical procedure that involves the puncturing of human skin or tissue;
- (c) any procedure designed to remove the contents of the subject's stomach; or
- (d) any procedure designed to produce a pictorial representation of any internal part of the subject that is not exposed to view.

The purpose of this recommendation is to prohibit outright the use of certain "medical" procedures that, if transposed to a non-therapeutic context, would be inherently unreasonable if performed without the subject's consent and (by their very nature) would also inevitably render any consent thereto unreasonable. Paragraph (a), for example, would prohibit the administration of "truth drugs," emetics, enemas, and so forth. Paragraph (b) would prohibit the surgical removal of bullets, and so forth, although it is not designed to prohibit the less intrusive (and only quasi-surgical) procedures by which blood specimens are taken. Paragraph (c) would prohibit any procedure in the nature of stomach pumping or gastric lavage. Paragraph (d) would prohibit the use of X-rays, ultrasound or other potentially dangerous procedures having a similar purpose.

This recommendation is designed to place a clear limit on the investigatory options open to the police or their agents, by drawing the line at procedures that would, under any circumstances, be objectionable as methods of obtaining evidence. It is not intended, however, to prevent suspected or accused persons from having any of the enumerated procedures performed for their own purposes; where this occurs, such procedures do not constitute "investigative procedures in respect of the person" as defined by Recommendation 1, since they are not attempts by "a person in authority or any agent of such person ..." to "obtain or record ... information...."

### *Procedure*

- 3. Except as otherwise provided in these recommendations, the carrying out of an investigative procedure in respect of the person should not be permitted except**
- (a) with the subject's consent, or
  - (b) pursuant to a judicial order issued for that purpose in accordance with Recommendation 5.

The purpose of this recommendation is to make *consent* or a *judicial order* the normal prerequisites for the use of investigative procedures in respect of the person. Consent is permitted — even in situations where a judicial order might not be obtainable — so as to enable those persons who wish to co-operate with the police (whether to "clear" themselves of suspicion, or simply to be "good citizens") to do so. Provided that the genuineness of any consent is ensured (see Recommendation 10) we do not regard the use of investigative procedures in respect of the person (other than those referred to in Recommendation 2) in situations where a judicial order has not been obtained as any

infringement of individual rights or freedoms. Indeed, to deny persons categorically the right to participate in all such procedures on a consensual basis would, in our view, amount to an unjustified curtailment of individual rights, and would be analogous to preventing accused or suspected persons from making voluntary statements to the police.

**4. The issuance of a judicial order referred to in Recommendation 3 should only be permitted with respect to the following investigative procedures in respect of the person:**

- (a) inspection of the body of the subject for the purpose of detecting identifying features, which might be concealed from view, in the nature of tattoos, wounds, scars, birthmarks or other physical peculiarities, and so forth;**
- (b) inspection of the body and/or body cavities of the subject, not involving the probing of the body or body cavities of the subject, for the purpose of ascertaining whether the subject is carrying or concealing an "object of seizure" as defined in Recommendation One, proposed subsection 3(1) of our Report on *Search and Seizure*;**
- (c) forensic physical examination by a qualified medical practitioner;**
- (d) the photographing of the subject, not involving the exposure of the subject's private parts;**
- (e) the taking of prints or impressions from any exterior part of the subject's body;**
- (f) the taking of hair combings, brushings or clippings from the subject;**
- (g) the taking of scrapings or clippings from the subject's fingernails;**
- (h) the removal or attempted removal of residues or substances from the external body of the subject by means of washings, swabs or adhesive materials;**
- (i) the taking of saliva samples from the subject for purposes other than the detection of intoxicating substances;**
- (j) the search for, removal of, or attempted removal of, "objects of seizure" (as defined in Recommendation One, proposed subsection 3(1) of our Report on *Search and Seizure*) concealed within the subject's body cavities, by a qualified medical practitioner;**
- (k) the making of dental or bite impressions; and**
- (l) the seizure of any clothing concealing the subject's private parts.**

This recommendation enumerates those investigative procedures in respect of the person to which, in those circumstances specified in Recommendation 5 (see also Recommendation 6), it would be useful, appropriate and practical to require a person charged with a serious offence to submit. Absent from the list above are three categories of procedures. One category consists of those procedures that, while not necessarily devoid of value or "prohibitible" for the reasons outlined in the commentary to Recommendation 2, were thought to be either too intrusive or insufficiently valuable to be permitted other than on a consensual basis (see Recommendation 3). Procedures such as identification lineups (the limited value of which would likely be destroyed by the forcible

introduction of a non-consenting participant) and the taking of blood samples belong in this category. A second category of procedures that is absent from the list above consists of the prohibited procedures referred to in Recommendation 2. The third category consists of procedures that require active participation or an "honest" or genuine response from the subject, and to which it would, therefore, be impractical (see discussion in Chapter Two, Part VI) and/or inappropriate (see discussion in Chapter Two, Part I.A) to require submission by means of a judicial order; hence, consent is required. Procedures such as the taking of voice or handwriting samples, and psychiatric examination belong in this category.

**5. The issuance of a judicial order with respect to any investigative procedure referred to in Recommendation 4 should be permitted where, and only where:**

- (a) the subject of the proposed procedure has been charged with an offence punishable with imprisonment for five years or more;**
- (b) there are reasonable grounds to believe that the carrying out of the proposed procedure will provide probative evidence of, or relating to, the offence with which the subject has been charged; and**
- (c) there is no less intrusive means practicable for obtaining the evidence to which the proposed procedure is directed.**

This recommendation establishes the conditions under which a judicial order may be obtained with respect to the procedures enumerated in Recommendation 4. Paragraphs (a), (b) and (c) are cumulative and are designed to ensure that persons are not compelled to submit to investigative procedures in respect of the person unless clear justification exists.

Paragraph (a) has two salient features. The first is its requirement that a judicial order be obtainable only in cases where serious offences are being investigated. Designating serious offences, for the purposes of this regime, as those punishable with imprisonment for five years or more is, in our opinion, consistent with the procedural threshold utilized in paragraph 11(f) of the Charter. That paragraph treats offences punishable with imprisonment for five years or more as sufficiently serious to require special procedural treatment (namely, a guaranteed right "to the benefit of trial by jury"). The second salient feature of paragraph (a) is its requirement that the prospective subject be charged (see discussion in Chapter Two, Part III).

Paragraphs (b) and (c) of this recommendation are designed to prevent unreasonable or unnecessary intrusions.

**6. Notwithstanding Recommendation 3, but subject to Recommendation 12, a peace officer should be authorized to carry out, or to cause to be carried out, in the absence of a judicial order and without the expressed consent of the subject, an investigative procedure referred to in Recommendation 4 where:**

- (a) the subject of the proposed procedure has been arrested for an offence punishable with imprisonment for five years or more;**

- (b) the peace officer on reasonable grounds believes that the carrying out of the proposed procedure will provide probative evidence of, or relating to, the offence for which the subject has been arrested;
- (c) the peace officer on reasonable grounds believes that the delay that would be caused by applying for a judicial order would result in destruction or disappearance of the evidence toward which the proposed procedure is directed; and
- (d) the peace officer on reasonable grounds believes that there is no less intrusive means practicable for obtaining the evidence toward which the proposed procedure is directed.

This recommendation creates a *limited exception* to the requirement for consent or a judicial order set out in Recommendation 3. It constitutes the exception, rather than the rule. The purpose of this recommendation is to permit the requirement for a judicial order to be dispensed with in exigent circumstances (see paragraph (c)), and to enable peace officers to require persons to submit to investigative procedures in respect of the person in circumstances similar to those in which a judicial order might otherwise have been obtained. The reference in paragraph (c) to “destruction or disappearance of ... evidence ...” is designed to cover a variety of contingencies. It could, for example, apply to the intentional removal by the subject of incriminating substances concealed or lodged on or about his or her person, to the spontaneous alteration of a temporary physical condition, and so on.

Paragraphs (a), (b), (c) and (d) are cumulative and, once again, are designed to ensure that persons are not compelled by peace officers to submit to investigative procedures unless clear justification exists.

Here, for obvious reasons, the prospective subject is required to have been arrested for, rather than charged with, an offence punishable with imprisonment for five years or more. We regard this recommendation as being consistent with paragraph 450(2)(d) of the *Criminal Code*<sup>148</sup> and Recommendation 1 in our forthcoming Working Paper on Arrest,<sup>149</sup> which affirm the preservation of evidence as a valid function of the arrest power.

Note that while this recommendation permits peace officers to carry out certain investigative procedures themselves in exigent circumstances, it does not dispense with the requirement contained in Recommendation 12 for the procedures to be done by qualified persons.

148. Paragraph 450(2)(d) of the *Criminal Code* makes “the need to ... secure or preserve evidence of or relating to the offence, ...” relevant to a determination of the lawfulness of arrests for summary conviction offences, “hybrid” offences and indictable offences mentioned in section 483.

149. In the forthcoming Working Paper of the Law Reform Commission of Canada on Arrest, Recommendation 1 states in part as follows:

1. That, as at present, the authority to arrest should be used to compel attendance of an accused person in court to answer criminal charges only where documentary notice of criminal proceedings is inadequate for this purpose because of a need

(1) to prevent the accused person’s interference with the administration of justice by any means, including failing to appear, concealing identity, destroying evidence, or tampering with witnesses ....

7. (1) Where a peace officer has carried out, or has caused to be carried out, an investigative procedure in respect of the person pursuant to Recommendation 6, the peace officer should be required to complete an investigative procedure report.

(2) An investigative procedure report should include:

- (a) the date, time and place of the procedure;
- (b) the nature of the procedure;
- (c) a statement of the grounds that gave rise to the peace officer's belief that the carrying out of the procedure would provide probative evidence of, or relating to, the offence for which the subject was arrested;
- (d) a statement of the grounds that gave rise to the peace officer's belief that the delay that would have been caused by applying for a judicial order would have resulted in destruction or disappearance of the evidence toward which the procedure was directed; and
- (e) a statement of the grounds that gave rise to the peace officer's belief that there was no less intrusive means practicable for obtaining the evidence toward which the procedure was directed.

(3) A peace officer who completes an investigative procedure report should be required to provide a copy of the report to the subject of the procedure.

The purpose of this recommendation is to ensure accountability in cases where, in exigent circumstances, application for a judicial order is not feasible. It is similar to proposed section 23 contained in Recommendation One of our recent Report on *Search and Seizure*. As we explained in that Report at page 40, the requirement for a report of this nature is designed to facilitate review of the procedure's legality.

8. Notwithstanding Recommendations 3 and 5, a peace officer should be authorized to carry out, or to cause to be carried out, without the expressed consent of the subject, the fingerprinting and/or photographing of the subject

(a) where

- (i) the subject of the proposed procedure is in lawful custody charged with an indictable offence, or has been apprehended under the *Extradition Act*<sup>150</sup> or the *Fugitive Offenders Act*;<sup>151</sup> and
- (ii) the peace officer on reasonable grounds believes that the carrying out of the proposed procedure is necessary to establish or record the identity of the subject;

or

(b) where the subject of the proposed procedure is alleged to have committed an indictable offence and, on the basis of a reasonably grounded belief that the carrying out of the proposed procedure is necessary to establish

150. *Extradition Act*, R.S.C. 1970, c. E-21, as amended.

151. *Fugitive Offenders Act*, R.S.C. 1970, c. F-32, as amended.

**or record the identity of the subject, has been required, in an appearance notice, promise to appear, recognizance or summons, to appear at a time and place stated therein for the purpose of having such procedure carried out.**

This recommendation creates another limited exception to the requirements of Recommendation 3. It is designed, essentially, to retain the present law pertaining to the compulsory pre-adjudication fingerprinting and photographing of persons *for identification purposes*.<sup>152</sup> Although (for the reasons discussed in Chapter Two, Part III of this Report) this recommendation does not make the obtaining of a special judicial order mandatory, it does include a new requirement for a reasonably grounded belief as to the need, in any given case, for fingerprinting and/or photographing a subject in order to establish or record his or her identity. The purpose of this requirement is twofold. First, it is intended to leave intact the requirement that judicial authorization be obtained in accordance with Recommendations 3 and 5 in cases where the sole reason for the taking of fingerprints or photographs is to link the subject, in an incriminatory sense, to the offence under investigation. Second, it is intended to discourage the arbitrary fingerprinting or photographing of persons where such procedures are clearly unnecessary for identification purposes.

### *Protections and Safeguards*

**9. The subject of any proposed investigative procedure in respect of the person should be statutorily entitled to be told, prior to such procedure being carried out:**

- (a) the reason(s) for the proposed procedure; and**
- (b) whether or not he or she is required by law to submit to the proposed procedure.**

The purpose of this recommendation is twofold. Paragraph (a) is designed to ensure that the law is made comprehensible to persons required to submit to investigative procedures in respect of the person, and that it is not perceived as being arbitrary. Paragraph (b) is designed to enhance compliance with the law by ensuring that persons are advised of the extent of their obligations.

**10. (1) Where consent is required for any investigative procedure in respect of the person, the subject should be statutorily entitled to be told, prior to the obtaining of such consent:**

- (a) what the nature and purpose(s) of the proposed procedure are;**
- (b) whether the proposed procedure entails any significant risks to the health or safety of the subject and, if so, what those risks are;**
- (c) that he or she has the right to consult with counsel before consenting to, or refusing to consent to, the proposed procedure; and**

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152. See *Identification of Criminals Act*, R.S.C. 1970, c. I-1, subsection 2(1); P.C. 1954-1109, *supra*, note 34; *Criminal Code*, R.S.C. 1970, c. C-34, subsections 453.3(3) and 455.5(5).

- (d) that he or she has the right to refuse to consent or to withdraw his or her consent at any time.
- (2) For the purposes of determining whether or not the subject of an investigative procedure in respect of the person has consented to such procedure
  - (a) the signature of the subject on a document informing the subject of the facts that he or she is required to be told in accordance with part (1) of this recommendation should be *prima facie* proof of the subject's consent, and
  - (b) the absence of the subject's signature on a document of the type referred to in paragraph (2)(a) of this recommendation should be *prima facie* proof that the subject did not consent.
- (3) The absence of an express written waiver by the subject of any of the rights referred to in these recommendations should be *prima facie* proof that there was no such waiver.

This recommendation is similar, in part, to the recommendation we have made with respect to consent to searches in our proposed section 18, Recommendation One of our recent Report on *Search and Seizure*. Owing to the potentially more intrusive nature of investigative procedures in respect of the person, however, the protections afforded by this recommendation are somewhat more stringent; there does not exist in our *Search and Seizure* Report any equivalent to paragraphs (1)(a), (b) or (c), or to paragraph (2)(b) of this recommendation.

Although the recommendation does not specify by whom the prescribed information must be given, it is envisioned that the person informing the subject would, necessarily, have to be someone who is knowledgeable about the things described in paragraphs (1)(a) and (b). Generally, this would be the "qualified person" conducting the procedure pursuant to Recommendation 12. In the case of investigative procedures having a "medical" character, therefore, the appropriate person, oft-times, would be a doctor. It is, perhaps, worth emphasizing here two points made earlier in our discussion, namely, that we are against the enactment of any provision that would compel physicians or other private citizens to conduct investigative procedures; and that we recognize that, in order to enlist the assistance of such persons, appropriate measures must be taken to protect them from legal liability (see Chapter Two, Part IV).

The underlying rationale for parts (1) and (2) of this recommendation is to ensure, as well as possible, the genuineness of any consent given in circumstances where such consent is required, without creating a complete impediment to consensual investigative procedures in cases where the execution of a formal document might not be feasible. The underlying rationale for part (3) is to ensure the genuineness of any waiver of rights, such as those contained in Recommendations 11 and 12.

**11. The subject of any investigative procedure in respect of the person should be statutorily entitled to the greatest possible privacy during its administration, having regard to the nature of the procedure.**

This recommendation is designed to ensure maximum privacy. It is, however, flexible in two respects. First, by providing that regard must be had to the nature of the procedure, it recognizes that the need for privacy may vary; the degree of privacy required for procedures that require the subject to expose his or her private parts, for example, would doubtless be greater than that required for procedures such as fingerprinting or the taking of scalp hair samples. Second, by stating in general terms that the subjects of investigative procedures in respect of the person should be afforded "the greatest possible privacy ...," it makes allowance for the particular circumstances of each case. While it would, in our view, be preferable that procedures involving the exposure of private parts be conducted by persons of the same sex as the subject, we recognize that a specific and absolute requirement of this sort might be impractical in some cases (for example, in remote areas where there may be a shortage of qualified personnel of both sexes, and where time is of the essence) or unduly fastidious in others (for example, where the person performing the procedure is a qualified medical practitioner).

**12. The subject of any investigative procedure in respect of the person should be statutorily entitled to have such procedure conducted by qualified persons.**

The purpose of this recommendation is to ensure maximum safety and reliability. Some procedures, such as the taking of blood samples (which would be a "consent only" procedure, by virtue of Recommendations 3 and 4), may involve an element of risk to the health or safety of the subject if they are not performed by qualified persons. Other procedures, such as the taking of hair combings, brushings or clippings, might be rendered unreliable (and, therefore, an unnecessary intrusion upon the subject) if the person performing the procedure has not been instructed as to the proper method, the importance of preventing sample contamination, and so on.

In cases where an investigative procedure in respect of the person is carried out pursuant to a judicial order issued in accordance with Recommendation 5, we envision that such order could specify in advance who a "qualified person" would be. By virtue of paragraphs (c) and (j) of Recommendation 4, the procedures described in those provisions would in all cases have to be performed by qualified medical practitioners. Where an investigative procedure is carried out otherwise than pursuant to a judicial order in which a qualified person has been specified in advance, and is not one of the procedures described in paragraphs (c) or (j) of Recommendation 4, the question of whether or not the procedure was conducted by a qualified person would have to be determined after the fact.

**13. The subject of any investigative procedure in respect of the person should be statutorily entitled to have such procedure conducted in such a manner as to ensure minimum discomfort to the subject, having regard to the nature of the procedure and the surrounding circumstances.**

This recommendation is designed to minimize the intrusion involved in any given investigative procedure in respect of the person. As with Recommendation 11, it is flexible in two respects. First, by providing that regard must be had to the "nature of the procedure

...," it recognizes that the degree of inevitable discomfort may vary; the degree of discomfort involved in the search for, or removal of, "objects of seizure" concealed within the subject's body cavities, for example, will inevitably be greater than that involved in the photographing of the subject or in the removal of residues from the subject's hands by means of washings. Second, by providing that regard must be had to "the surrounding circumstances," it recognizes that the degree of discomfort may be affected by factors such as the extent to which the subject co-operates, and so on.

### *Exclusion of Evidence*

**14. Evidence obtained in contravention of any of the procedures outlined in the above recommendations should not be admissible at the instance of the prosecution at a preliminary inquiry or trial unless the prosecution establishes that the admission of the evidence would not bring the administration of justice into disrepute.**

This recommendation is similar to that made with regard to the exclusion of improperly obtained evidence in our proposed section 447.5 of the *Criminal Code* in Report 23 on *Questioning Suspects*. Its purpose and rationale have been explained fully in Chapter Two, Part V of this Report. The exclusionary rule envisioned by this recommendation would constitute a clear departure from the general rule concerning the reception of evidence in criminal cases, wherein admissibility is tied to relevance; our rule would effectively create a presumption that the admission of evidence obtained in contravention of our proposed rules would bring the administration of justice into disrepute.