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# Unchecked Power: The Constitutional Regulation of Arrest Reconsidered

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Over the last twenty years the *Canadian Charter of Rights and Freedoms* has had a profound impact on almost every facet of the criminal investigative process. Arrest provides a conspicuous exception. This article casts a probing light on police arrest powers in Canada, exposing justifiable concerns about how these powers are sometimes used. Gaps in existing intake and bail procedures are explored, revealing how a police officer's partisan assessment of the grounds for an arrest can often control an individual's custodial status long into the criminal process.

A reconsideration of the constitutional treatment of arrest highlights why the *Charter* has not yet provided a meaningful check on police arrest decisions. The article questions the current reading of section 9, the right "not to be arbitrarily detained or imprisoned", for failing to recognize that unlawful arrests are inherently arbitrary. The author also explores how other *Charter* guarantees—including the right "to be secure against unreasonable ... seizure", the right to have the validity of a "detention determined by way of *habeas corpus*" and the right not to be denied one's "liberty" and "security" interests "except in accordance with the principles of fundamental justice"—could be interpreted to augment section 9 and mandate the creation of procedural safeguards to protect against unjustified arrests.

Ultimately, the author concludes that it is necessary for the Supreme Court of Canada to recognize that unlawful arrests are inherently arbitrary and hence unconstitutional under section 9. The Court must also recognize that the structure of current arrest and intake procedures is fundamentally unjust, and therefore at odds with section 7 of the *Charter*. Only then will Parliament be moved to provide the sort of checks that are necessary for the effective regulation of police arrest decisions in future.

Au cours des vingt dernières années, la *Charte canadienne des droits et libertés* a eu un profond impact sur la plupart des facettes du processus d'enquête criminelle. L'arrestation demeure toutefois une exception flagrante. Cet article met en lumière les pouvoirs d'arrestation des corps policiers au Canada en soulevant certaines inquiétudes quant à la manière dont ces pouvoirs sont parfois exercés. L'auteur explore ensuite les lacunes des procédures d'admission et de cautionnement existantes, révélant comment l'évaluation partisane d'un policier des motifs d'arrestation peut souvent contrôler l'état d'arrestation de l'individu tout au long de la procédure criminelle.

Le défaut de ne pas avoir su développer de contrôles constitutionnels efficaces fondés sur la *Charte* pour ce domaine important du droit est ensuite expliqué. Cet article met en question l'interprétation actuelle de l'article 9, le «droit à la protection contre la détention ou l'emprisonnement arbitraires», parce qu'elle n'admet pas que les arrestations illicites sont manifestement arbitraires. L'auteur explore comment les autres garanties juridiques de la *Charte* — compte tenant le droit «à la protection contre [...] les saisies arbitraires», le droit «de faire contrôler, par *habeas corpus*, la légalité de sa détention» et le droit de ne pas être privé des intérêts de l'individu de la «liberté» et la «sécurité» de la personne sauf «qu'en conformité avec les principes de justice fondamentale» — pourraient être interprétés de manière que l'article 9 se prenne plus de force et que la création des sauvegardes de la procédure, se protégeant contre les arrestations illicites, soit commandé.

L'auteur conclut qu'il est nécessaire que le Cours suprême du Canada constate que les arrestations illicites sont manifestement arbitraires et donc inconstitutionnelles par rapport à l'article 9. Le Cour doit reconnaître aussi que présentement, la structure de l'arrestation et les procédures d'admission sont fondamentalement injuste et incompatible avec l'article 7. C'est seulement à travers ces constatations juridiques que le parlement sera motivé à créer la législation nécessaire pour la propre régulation des arrestations policières.

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## Introduction

No other development has had as profound an impact on criminal procedure in Canada as the enactment of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> in 1982. So extensive have been its effects that it is often said to have ushered in a “due process revolution”.<sup>2</sup> But one critical police power has managed to escape this uprising of individual rights entirely unscathed: the authority to arrest—to decide that there is adequate cause to take a suspect into custody—persists very much as it was prior to the *Charter*. Today, much like before 1982, a police officer’s decision to arrest, whether justified or not, will often control an individual’s custodial status long into the criminal process.

The principal claim advanced in this paper is that the current arrest regime, when considered together with deficiencies in existing intake and bail procedures, is inherently unfair. The present scheme fails to minimize the risk of arrests in the absence of adequate cause and to effectively guard against the danger of such arrests escaping prompt detection. The result is that those who are arrested unjustifiably can spend extended periods living under restrictive bail conditions or, much worse, be subject to pretrial detention.

Arrest has historically fixed the point at which the relationship between the individual and the state shifts. In a tangible way, it marks the moment when the needs of law enforcement overtake the liberty interests of the individual. In Canada, the justification that has long been used to rationalize the arrest power is: the police may only arrest if they have objectively reasonable and probable grounds to believe an individual is guilty of a crime. Historically, the courts have held that this standard in itself is a sufficient safeguard to protect the public from unjustified arrest.<sup>3</sup> There is a systemic presumption that the police will not use their arrest powers inappropriately. As will be discussed in Parts I.D and I.E below, however, the “reasonable grounds” standard provides minimal guidance to police. This inexact standard can result in honest police mistakes, and even worse, it may serve to mask the misuse or even the abuse of police arrest powers. This problem is only compounded by the low visibility of police arrest decisions. As is explained below in Part II, existing intake procedures fail to provide an effective early check on police arrest decisions.

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> See Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) (“[t]he effect of the due process revolution was dramatic and enough for one generation to absorb” at 3).

<sup>3</sup> See *Criminal Code*, R.S.C. 1985, c. C-46, s. 495(1). See also *R. v. Storrey*, [1990] 1 S.C.R. 241 at 249-51, 53 C.C.C. (3d) 316 [*Storrey* cited to S.C.R.], quoting with approval *Dumbell v. Roberts*, [1944] 1 All E.R. 326 at 329 (C.A.) [*Dumbell*].

Although many believed that the *Charter* would alter the historic balance between individual and state in the context of arrest,<sup>4</sup> little has really changed since 1982. To date, constitutional redress for unjustified arrests has depended exclusively upon “the right not to be arbitrarily detained or imprisoned” guaranteed in section 9 of the *Charter*.<sup>5</sup> Although “arbitrarily” may aptly describe how police powers are sometimes used in authoritarian states, in Canada this standard has proven a crude measure for scrutinizing police arrest decisions. As will be discussed in Part III.A, below, the jurisprudence remains unclear as to whether an unlawful arrest—that is, an arrest undertaken in the absence of the legislatively prescribed grounds—is necessarily “arbitrary” and therefore unconstitutional. This interpretive confusion in the case law has not fostered the development of constitutionally mandated procedural safeguards capable of providing an effective check upon police arrest powers.

Despite the *Charter*, the right to be free from unjustified arrest remains largely in the hands of the police well into the advanced stages of the criminal process. Under the existing regime, a person could be arrested by police in circumstances where the required reasonable and probable grounds are lacking. At present, a review of the supporting grounds for an arrest and charge(s) is not a precondition for a bail determination. This means that unjustifiably arrested persons can often spend extended periods living under onerous bail conditions, such as curfews, reporting requirements, and travel restrictions. If the person affected happens to be a poor candidate for bail, the consequences can be far worse: despite the fatal inadequacy of the Crown’s case, he or she may be detained pending trial. The accused could then spend days or weeks in custody, hoping that a prosecutor will recognize the insufficiency of the evidence and withdraw the charge(s).

At present, *Charter* claims under section 9 only arise in those cases where incriminating evidence (usually a confession) is obtained following an unlawful arrest. In such cases, the Crown will usually press forward with the charges and litigate the constitutionality of the arrest. If an improper arrest does not yield any incriminating evidence, there is rarely an opportunity to raise the unjustified arrest in criminal proceedings. Instead, the charge(s) will normally be withdrawn by the prosecution prior to, or on the morning of, a scheduled preliminary inquiry or trial. This means that in the worst cases of unjustified arrest, when an accused is most likely to be innocent of any wrongdoing, judicial review under the *Charter* is unlikely.

<sup>4</sup> See Bruce P. Archibald, “The Law of Arrest” in Vincent M. Del Buono, ed., *Criminal Procedure in Canada: Studies* (Toronto: Butterworths, 1982) 125 at 168; Law Reform Commission of Canada, *Arrest* (Working Paper 41) (Ottawa: Law Reform Commission of Canada, 1985) at 8-12 [Law Reform Commission of Canada, *Working Paper 41*]; Law Reform Commission of Canada, *Arrest* (Report 29) (Ottawa: Law Reform Commission of Canada, 1986) at 5 [Law Reform Commission of Canada, *Report 29*].

<sup>5</sup> *Supra* note 1, s. 9.

The present scheme for regulating arrests under the *Charter* is flawed. Although an individual who is unlawfully arrested may potentially obtain *Charter* redress at trial, due to the exclusion of evidence obtained at the time of an unlawful arrest, no constitutional mechanism has been developed to prevent unjustified arrests before they occur. Even more troubling, no procedure currently exists for promptly and objectively reviewing the grounds supporting police arrest decisions. In the worst cases, this can mean that someone who is unjustifiably arrested will spend a substantial period in custody before regaining her or his freedom. Although existing procedures ensure that those aggrieved by an unlawful arrest are ultimately released, for most, justice delayed will usually mean justice denied.

The effective regulation of police arrest powers is possible under the *Charter*, but it requires a change in approach. This does not mean that section 9 of the *Charter* should be abandoned. To the contrary, the continued relevance of section 9 is difficult to deny, given that it speaks so directly to the immediate by-products of police arrest decisions, namely, “detention” and “imprisonment”. In fact, positive change should begin with section 9 of the *Charter* and an overdue acknowledgment by the Supreme Court that an unlawful arrest—again, an arrest in the absence of the legislatively prescribed grounds—is necessarily “arbitrary”. As the discussion in Part III.A will demonstrate, this view is supported by a combination of interpretive factors. Meaningful constitutional safeguards, however, will also necessitate a move beyond section 9.

The development of effective protections will require Canadian courts to look towards other guarantees within the legal rights provisions of the *Charter* that are engaged by an arrest.<sup>6</sup> The due process purpose of these guarantees makes them the natural starting point for building constitutionally mandated procedural safeguards capable of more meaningfully regulating police arrest decisions. Beyond section 9, there are three other sections among the legal rights provisions that seem capable of anchoring the development of greater protections: subsection 10(c) (habeas corpus), section 8 (unreasonable searches or seizures), and section 7 (principles of fundamental justice).<sup>7</sup> The feasibility of using each of these guarantees to develop more effective constitutional controls over police arrest decisions is explored below in Part III. The search for solutions, however, ultimately leads to section 7.

To date, section 7 of the *Charter* has not played any role in regulating police arrest powers. This is quite surprising given that arrests (and the intake procedures that follow) easily engage section 7 because of their obvious impact on “liberty” and “security of the person”. Such encounters trigger a need for compliance with the “principles of fundamental justice”—principles that are said to have both substantive

<sup>6</sup> *Ibid.*, ss. 7-14.

<sup>7</sup> *Ibid.*, ss. 7, 8, 10(c).

