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Uncovering the Presumption of Factual Innocence in Canadian Law

Mark Herrema
Cambridge University

Mark Heerema*

Uncovering the Presumption of *Factual* Innocence in Canadian Law: A Theoretical Model for the "Pre-Charge Presumption of Innocence"

The presumption of innocence has long been regarded as a hallmark of our justice system. Rhetoric abounds and finding a more celebrated legal doctrine is difficult. For most in the legal profession, the presumption of innocence represents the procedural requirement that the Crown prove all elements of an offence. Yet, aside from its procedural and evidentiary protections, does the presumption of innocence offer any protection at the pre-charge phase of the criminal justice process? Specifically, for the majority of Canadians who have never been, or never will be charged with an offence, does the presumption of innocence offer any protection?

Regrettably, Canadian law fails to explain how the presumption of innocence animates the pre-charge phase of the criminal justice system, but rather contents itself merely to assert its relevance. The following paper offers a theoretical conception of the "pre-charge presumption of innocence". In an attempt to demonstrate its application and relevance, this theoretical model will be applied to an emerging technique of police investigation known as the DNA sweep.

La présomption d'innocence a longtemps été considérée comme une marque distinctive de notre système judiciaire. Les traités abondent et il est difficile de trouver une doctrine juridique plus célèbre. Pour la plupart des disciples de Thémis, la présomption d'innocence impose à la Couronne l'exigence procédurale de prouver tous les éléments d'un délit. Mais, mises à part les protections aux chapitres de la procédure et de la preuve, la présomption d'innocence offre-t-elle quelque protection, dans le processus de justice pénale, avant le dépôt des accusations? Plus précisément, la présomption d'innocence protège-t-elle la majorité des Canadiens qui n'ont jamais été accusés d'un délit ou qui ne le seront jamais?

Malheureusement, les lois canadiennes n'expliquent pas comment la présomption d'innocence intervient dans le processus de justice pénale avant le dépôt des accusations, se contentant plutôt d'en affirmer la pertinence. L'article qui suit présente une conception théorique de la présomption d'innocence avant le dépôt des accusations. Dans une tentative d'en démontrer l'application et la pertinence, ce modèle théorique sera appliqué à une nouvelle technique d'enquête policière appelée « DNA sweep » (collecte générale d'ADN).

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Introduction

By necessity the criminal justice system is a site in society where the fundamental balance between state powers and respect for individual liberties must continually be negotiated.[1] In a society marked by rapid technological change, the criminal justice system in Canada must often re-strike this balance. Consider for example the rampant proliferation of police investigative techniques; from fingerprints, to polygraphs, to breathalyzers, to wiretaps, to heat sensors, to satellite imagery to DNA sweeps, police investigative techniques continue to evolve, forcing the criminal justice system to address their propriety.

By adopting legal doctrines (*e.g.,* the reasonable expectation of privacy, arbitrary detention, the principles of fundamental justice, etc.) the criminal justice system aims to provide a normative basis for drawing an appropriate line between state and individual interests. Perhaps the most celebrated legal doctrine in maintaining this balance is the presumption of innocence.[2]

Most legal systems conceptualize the presumption of innocence as being the right of an accused to be considered innocent until the state has proven their guilt in a court of law.[3] This conception of the presumption of innocence is constitutionally protected under Canadian law by s. 11(d) of the *Canadian Charter of Rights and Freedoms.*[4] Section 11(d) of the *Charter* provides procedural and evidentiary safeguards to an accused after a charge has been laid against them. However, if the presumption of innocence as protected by s. 11(d) of the *Charter* only applies "post-charge," so to speak, a very basic question arises: does the presumption of innocence, as a broader principle, have any relevance to individuals prior to being charged with an offence? Put differently, what value is the

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1. *Re Laporte and The Queen* (1972), 29 D.L.R. (3d) 651 at 661-662 (Que. Q.B.) where Hugessen J. aptly described this aspect of the criminal justice system as follows:
   > The criminal law has always had to strike the precarious balance between the protection of society on the one hand and the protection of the rights of the individual members of such society on the other.
2. Thomas A. Cromwell, "Proving Guilt: The Presumption of Innocence and the Canadian Charter of Rights and Freedoms" in William H. Charles, Thomas A. Cromwell & Keith B. Jobson eds., *Evidence and the Charter of Rights and Freedoms* (Toronto: Butterworths, 1989) 125 at 125, where it is stated, "[f]ew principles have inspired such eloquent expression."
3. Peter Brett, "Strict Responsibility: Possible Solutions" (1974) 37 Mod. L. Rev. 417 at 432:
   > The rule that no man should be required to prove his innocence is common to most, if not all, civilized legal systems. It can be found in the Bible, Greek law, Roman law and canon law as well as in the common law, and has been said to be required by reason, religion, and humanity.
4. *Canadian Charter of Rights and Freedoms* [*Charter*], s. 11(d):
   > Any person charged with an offence has the right
   > (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

presumption of innocence to the random Canadian citizen not charged with an offence?

Remarkably, while numerous decisions have asserted that the presumption of innocence has an omni-present status in the criminal justice process and protects citizens at the pre-charge stage, it is almost impossible to ascertain any operational content to these claims.[5] Consequently, the most that can be said about the presumption of innocence at the pre-charge phase of the criminal justice system is that it is relevant, but beyond this, its actual function has escaped articulation.

The following discussion aims to provide a theoretical basis for how the presumption of innocence applies at the pre-charge stage of the criminal justice process. The theoretical model advanced in this paper holds that the "pre-charge presumption of innocence" embraces a normative commitment to view that all citizens are entitled to be presumed *factually* innocent of a crime until there exists information to the contrary. The correlative protections arising from this presumption rest on a simple premise: citizens presumed to be factually innocent are entitled to be treated as if they are innocent of the crime.

Accordingly, police investigative techniques that are inconsistent with how a *factually* innocent person can expect to be treated in Canadian society will violate the pre-charge presumption of innocence. Under the theoretical model advanced below, increasingly invasive police techniques are only permissible as the police progressively rebut the presumption of

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5. The Supreme Court of Canada has repeatedly asserted that the presumption of innocence constitutes an animating principle throughout the criminal justice process. See, e.g., *R. v. Pearson*, [1992] 3 S.C.R. 320 at para. 31:

> This operation of the presumption of innocence at trial, where the accused's guilt of an offence is in issue, does not, in my opinion, exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice.

Further, see *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451 at para. 231 where the Court states,

> Although an individual might freely choose to co-operate in his own investigation, the right to silence and the presumption of innocence require that his refusal to co-operate could almost never be held against him at his own trial.

Examples of lower courts following suit include *R. v. Kooktook*, [2004] 10 W.W.R. 186 (Nun Ct. of J). where at para. 24 it is stated,

> By making a demand that required the suspects to bring tusks in to the wildlife office, the investigating authorities had effectively assumed control over the movement of the suspects. This therefore had the effect of engaging a full range of common law and constitutional legal protections underpinning the presumption of innocence and the right against self-incrimination.

R. v. Carty (1995), 31 C.P.R. (2d) 303 (Ont. Ct. of J.) at para. 39,

> The question regarding whether Mr. Carty possessed drugs at that moment is clearly asked for the purpose of obtaining incriminating statements or evidence from the citizen. Although it follows on the heels of Mr. Carty's admission that he is on probation for trafficking, and to that extent might be seen as a logical follow-up question, it clearly offends against the presumption of innocence.

factual innocence through incriminating information linking an individual to the commission of an offence. Consequently, the pre-charge presumption of innocence effectively calibrates the acceptable level of state power used by the police in the course of their investigations. The model assumes that the basic relationship between incriminating facts and justifiable exercises of state powers can only be deviated from in exceptional circumstances.

In an attempt to demonstrate the application of this model, this paper will scrutinize the increasingly frequent use of "DNA sweeps" in Canada. Typically used where police have no significant leads, except for some genetic material left at a crime scene, DNA sweeps involve the police requesting members of the community to volunteer DNA samples. Those requested to volunteer samples are those deemed by the police to have had the physical opportunity to commit the crime; for example, all males between the ages of fifteen and forty who live within a two-kilometre radius of the crime scene.

By collecting DNA samples, the police hope to match one of the volunteered samples with the sample found at the crime scene. While partaking in a DNA sweep is technically a "voluntary" decision, participation in many respects is the product of the "lesser-evil" as citizens who refuse to "volunteer" a sample face increased police surveillance and find themselves subject to heightened suspicion.

Following a discussion of the pre-charge presumption of innocence, this paper will examine the propriety of DNA sweeps in light of the model advanced below.[6]

I. *The pre-charge presumption of innocence*

1. *Background: distinguishing legal innocence from factual innocence*

Fully appreciating the presumption of innocence and how it relates to the use of state powers first requires an understanding of what is meant by the word "innocent." When using the word innocent it is imperative to distinguish between the concepts of *factual* innocence and *legal* innocence. While self-evident, being *factually* innocent implies that the individual did not *in fact* commit the crime, whereas being *legally* innocent implies that the person has not been found guilty of the offence charged in a court of law.

6. For an excellent review of the use of DNA evidence, and the practice of DNA sweeps in Canada see Neil Gerlach, *The Genetic Imaginary: DNA in the Canadian Criminal Justice System* (Toronto, University of Toronto Press, 2004). With respect to the propriety of DNA sweeps the author makes the following claim at 11: "DNA sweeps of entire communities have thrown the presumption of innocence into question."

A poignant example of innocence, in both its factual and legal sense, can be seen in the recent Cecilia Zhang investigation. Following an exhaustive and lengthy investigation into the brutal murder of this young girl, Peel Regional Police detained a suspect. During the ensuing press conference the residing Police chief held a picture of the suspect-turned accused and made the following statement:

> This is not just a murderer, this is the most despicable of criminals, this is a child murderer.[7]

The preceding statement was roundly criticized as being contrary to the "presumption of innocence."[8] The objectionable aspect of this statement was the premature labelling of this accused as a "murderer." The right to be presumed *legally* innocent guarantees that a person will not be labelled as a criminal until they have been proven to be one in a court of law pursuant to s. 11(d) of the *Charter*.[9] Therefore, the accused in the Cecilia Zhang investigation is entitled to be considered *legally* innocent of this crime up and until the Crown has proven otherwise in a court of law.

The Cecilia Zhang investigation is also instructive in how it relates to the concept of *factual* innocence. It is important to note the lack of criticism levelled against the 24-hour detention of this accused. Considering that pursuant to s. 11(d) of the *Charter* this individual is as *legally* innocent as any random bystander, it is important to reflect on how the justice system condones his detention.

The answer to this dichotomy—on the one hand condemning the practice of labelling an accused as a "murderer," while on the other hand, accepting his detention—is so obvious that its significance is easy to miss. His detention is justified because the *facts* obtained by the police suggested that this individual was *not* innocent. On the *facts* his innocence is no longer presumed, but rather seriously questioned.

Undeniably, the Canadian justice system abhors the detention of random bystanders. However, in contrast to the random bystander, for whom there are no *facts* suggesting a lack of innocence, our acceptance of the detention of a suspect or an accused may be justified in light of the incriminating information linking them to the commission of an offence.

The Cecilia Zhang investigation helps demonstrate how "innocence" has both a factual and a legal aspect. Fundamental to understanding the

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7. Jason Botchford "Chief 'over the line'" *Toronto Sun* (23 July 2004).
8. *Ibid.* Eddie Greenspan offered the following denunciation:
   The man charged is entitled to the presumption of innocence. It's actually in our constitution but I guess the chief doesn't know that... I may be too old to have my jaw drop but it was quite a remarkable statement to be made by the chief law officer in Peel.
9. *Supra* note 4.

broader legal doctrine of the presumption of innocence is the recognition that both meanings of the word deserve to be addressed.

Despite the presumption of innocence most commonly being associated with placing the evidentiary burden on the Crown to prove all elements of an offence beyond a reasonable doubt, this procedural requirement does not exhaust the broader principle,

> This operation of the presumption of innocence at trial, where the accused's guilt of an offence is in issue, does not, in my opinion, exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice.... The fact that it comes to be applied in its strict evidentiary sense at trial pursuant to s. 11(d) of the Charter, in no way diminishes the broader principle of fundamental justice.[10]

Being presumed *legally* innocent, as protected by s. 11(d) of the *Charter,* reflects our commitment to procedural fairness.[11]

However, the presumption of innocence additionally reflects our faith in humanity; it reflects our commitment to view citizens as being law-abiding in the absence of incriminating information.[12] Where no incriminating evidence exists to the contrary, the presumption of innocence embodies the Canadian justice system's normative commitment to conceptualize citizens as being presumed *factually* innocent.

Conceptualizing the broader presumption of "innocence" then requires giving attention to both the legal and factual presumptions. Being presumed *legally* innocent is constitutionally recognized in s. 11(d) of the *Charter* which reads as follows:

> Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal[13]

The landmark *Charter* decision of *R. v. Oakes* is the leading authority on s. 11(d). In *Oakes* the operation of the presumption of legal innocence was described as follows:

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10. *Pearson, supra* note 5 at para. 31. For a similar statement showing that the presumption of innocence may also operate at investigative stage see again *S.(R.J.), supra* note 5.
11. *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para 13, "It is one of the principal safeguards which seeks to ensure that no innocent person is convicted."
12. *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.) at 333-334:
    The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.
13. *Supra* note 4.

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct . . . . It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.[14]

When referring to s. 11(d) it is preferable to refer to the "post-charge presumption of innocence." This nomenclature signifies that along a spectrum of the criminal justice process, the protections of s. 11(d) arise only after an individual has been charged with an offence. The presumption of legal innocence contained within s. 11(d) is evidentiary and procedural in nature, which by extension renders it of little relevance to the pre-charge stage of the criminal justice process.

The presumption of innocence in its *factual* sense is a commitment to consider that citizens are law abiding without information indicating the contrary. This presumption occupies a much subtler role in Canadian law. Rather than being constitutionally recognized, the presumption of *factual* innocence appears to operate at a more tacit level, serving to animate the operation of other pre-charge legal doctrines.[15]

It is preferable to refer to the presumption of factual innocence as the "pre-charge presumption of innocence." This nomenclature denotes that, unlike the post-charge presumption of innocence which is a safeguard for those charged with an offence, the pre-charge presumption of innocence primarily protects citizens in the pre-charge phase of the criminal justice process.

What follows is an attempt to provide a theoretical conception of the pre-charge presumption of innocence. In doing so attention must be paid to three characteristics: (1) the nature of the presumption of factual innocence contained within the pre-charge presumption of innocence; (2) the protection offered by the pre-charge presumption of innocence; and lastly, (3) when the protections offered by the pre-charge presumption of innocence are rendered inoperative.

2. *The nature of the presumption of factual innocence contained within the pre-charge presumption of innocence*

Before illustrating how the pre-charge presumption of innocence can serve to regulate the use of state powers it is imperative to further examine the nature of the presumption of factual innocence contained within the pre-charge presumption of innocence.

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14. *Supra* note 12.

15. How the pre-charge presumption of innocence undergirds other legal doctrines will be surveyed below in Part I.3.

a. *All citizens initially presumed to be factually innocent*

The foundation of the pre-charge presumption of innocence embodies the normative commitment contained within the criminal justice system to presume that random bystanders[16] are factually innocent.

> The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.[17]

Conceptualizing citizens as innocent in the abstract captures the essence of the pre-charge presumption of innocence; in the absence of evidence to the contrary, all citizens have the *right* to be considered factually innocent of criminal involvement.

b. *The rebuttable or reducible nature of the presumption of factual innocence*

The pre-charge presumption of innocence is a "presumption" in the true sense of the word. As the police begin to gain incriminating information linking an individual to a crime, the *presumption* of factual innocence weakens.

Consider the following series of hypothetical events. Picture an anonymous person walking down the street. In the absence of information linking her to the commission of a crime, the pre-charge presumption of innocence ensures that she is presumed factually innocent of criminal involvement. Now, assume that the police have observed that she is in possession of a stolen watch. Effectively, this information begins to rebut the presumed factual innocence of this individual. Further, suppose that the police have now located a witness claiming to have observed this woman emerge from the watch store with the watch in hand. This additional information again serves to further question her factual innocence. Finally, assume that the police have now obtained surveillance footage showing the woman stealing the watch. The consequence of such incriminating information effectively upsets the presumption that she is factually innocent.

The above progression represents a simple proposition contained within the pre-charge presumption of innocence: the more incriminating information that is gained, the less likely one is actually innocent. This characteristic renders the pre-charge presumption of innocence as being "reducible." Simply put, as incriminating information increases, the

16. That is, individuals for whom the state has no information linking them to the commission of an offence.

17. *Supra* note 12.

presumption of factual innocence within the pre-charge presumption of innocence reduces.

Admittedly, there is something unsettling about conceiving the pre-charge presumption of innocence as being reducible. To do so puts it in direct contrast with the post-charge presumption of innocence. Bearing in mind that perhaps the true value of the post-charge presumption of innocence is the entitlement to retain a presumption of legal innocence until formal disposition (and is, so-to-speak, completely irreducible until then), conceptualizing the right to a presumption of factual innocence as reducible is a departure from its post-charge counterpart.

Nevertheless, support for the reducible nature of the pre-charge presumption of innocence can be seen in other prominent pre-charge legal protections which similarly become diluted in the presence of incriminating information.

c. *Other "reducible" pre-charge legal doctrines*

i. *Reasonable expectation of privacy*

Pursuant to the *Charter* all citizens are given the right to be secure against unreasonable search and seizure.[18] This right has primarily been interpreted to protect a reasonable expectation of privacy, or a "right to be left alone."[19] Yet, this right to be left alone is tempered by the acknowledgement that the police are not expected to leave people alone who they think, or know, have committed crimes. Accordingly, the case law demonstrates a basic relationship: as the police increasingly link a particular person to a particular crime their right to be left alone correlatively begins to decrease.

Legally, this relationship manifests itself in how a reasonable expectation of privacy corresponds to the level of incriminating information the police have against an individual. The reasonable expectation of privacy, like the pre-charge presumption of innocence, changes according to each situation.[20]

For example, consider the privacy expectations of prisoners. The Supreme Court of Canada has held that prisoners hold a significantly reduced expectation of privacy.[21] Binnie J. in *R. v. Tessling* noted that in

18. *Supra* note 4, s. 8.

19. See, *e.g.*, *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145 [*Hunter*]. Note in *Hunter* the Court made it explicit that s. 8 may protect further interests than privacy, and indeed, in *R. v. S.A.B.*, [2003] 2 S.C.R. 678 the Supreme Court indicated that s. 8 also protects the principle against self-incrimination.

20. *R. v. Tessling*, [2004] 3 S.C.R. 432.

21. See, *e.g.*, *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 where at para 5 La Forest J. for the court noted that the security of the institution, the public and indeed the prisoners themselves warranted a "substantially reduced level of privacy."

the range of possible expectations of privacy, prisoners are at the furthest end of the spectrum.[22]

Yet, even before a conviction or a charge is entered, privacy remains responsive to the *likely* state of guilt or innocence. In *R. v. Beare* the Supreme Court of Canada offered the following:

> It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice has been made out, must expect a significant loss of personal privacy.[23]

Accordingly, as the police begin to link an individual with the commission of an offence, their right to expect privacy diminishes. Therefore, the presence of incriminating evidence reduces one's reasonable expectation of privacy.[24]

ii. *Arbitrary detention*

Similar to the reasonable expectation of privacy, "arbitrary detention" offers less protection as increasingly incriminating information comes to light.

The power to detain will be considered arbitrary if there are "no criteria, express or implied, which govern its exercise."[25] The practical implication is that police may only detain citizens where there is a reasoned foundation apparent on the facts to do so.[26] Accordingly, whether a detention is arbitrary depends on the presence of incriminating facts.

Illustrative of this relationship is the random stopping of motor vehicles, an issue addressed by the Supreme Court of Canada in the *Dedman, Hufsky* and *Ladoceur* trilogy.[27] In these decisions the court was clear that random stops were arbitrary as in all cases there was no information linking the detained drivers with a driving offence prior to the stoppages. Where no incriminating information is present, a detention will be arbitrary.

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22. *Tessling*, *supra* note 20 at para 22.
23. [1988] 2 S.C.R. 387 at 413.
24. See also *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 508:
> This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt.
25. *R. v. Hufsky*, [1988] 1 S.C.R. 621 at 623.
26. *Regina v. Iron* (1987), 33 C.C.C. (3d) 157 at 177 (Sask. C.A.).
27. In *R. v. Dedman*, [1985] 2 S.C.R. 2. The Supreme Court deemed the Ontario R.I.D.E. program to be "arbitrary" but nevertheless upheld it under the common law. In *Hufsky*, *supra* note 25 the Supreme Court held that random fixed police check points violate s. 9. In *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 the Court held that roving random stops violate s. 9. It should be noted that in *Hufsky* and *Ladouceur* these violations were saved under s. 1 of the *Charter*, an issue to be addressed further in this paper.

Conversely, where the police have specific information linking a particular individual with the commission of an offence, their detention will generally not be considered arbitrary. For example, where reasonable grounds are present, numerous forms of detention will be considered non-arbitrary including being arrested, being subject to a search warrant and being fingerprinted.

Where information amounts to a reasonable suspicion, but not reasonable and probable grounds, the right to be free from arbitrary detention exists in a reduced form. As illustrated in *R. v. Mann*, when the police are in possession of information amounting to a reasonable suspicion, they may detain for limited purposes.[28] The ability to detain in Canadian law without violating the doctrine of arbitrary detention depends on the state of police knowledge: from no grounds, to reasonable suspicion, to reasonable grounds, what is considered to be an arbitrary detention varies accordingly.

Both the reasonable expectation of privacy and the concept of an arbitrary detention demonstrate that the strength of their protections are responsive to the level of incriminating facts linking an individual with a particular offence. As the police discover increasingly incriminating evidence, the entitlement to be left alone diminishes as does the likelihood that a subsequent detention will be considered arbitrary. Accordingly, by conceptualizing the presumption of factual innocence contained within the pre-charge presumption of innocence as being reducible, it is consistent with other prominent legal doctrines in Canadian law.

d. *The presumption of factual innocence may be totally rebutted*

Brought to its logical end, the pre-charge presumption of innocence may be so weakened that it fails to hold any presumptive value; conclusive information linking an individual to the commission of an offence may completely rebut the presumption of factual innocence.

Despite sounding revolutionary this statement should actually be quite unsurprising. First, it is important to recall that pursuant to s. 11(d) of the *Charter* the individual is still presumed *legally* innocent. The presumption of *legal* innocence remains irreducible and can only be upset after the Crown has proven all elements of the offence against the individual in a court of law. Consequently, even where the police have obtained the "smoking gun," the accused is still guaranteed an unblemished presumption of legal innocence with its correlative procedural and evidentiary safeguards.

Secondly, many of our legal doctrines are expressly premised on construing individuals as *not* being factually innocent. Consider for

28. *R. v. Mann*, [2004] 3 S.C.R. 59.

example, the right against self-incrimination contained within s. 7 of the *Charter*. On a very basic level, the factually innocent are in no danger of incriminating themselves. Protecting the right against self-incrimination is tacit recognition that some individuals are *not*, as a matter of fact, innocent of the crime being investigated, and thus *do* have the potential to incriminate themselves.

The pre-charge presumption of innocence embodies the normative commitment to conceptualize individuals as entitled to an initial presumption of factual innocence. The entitlement to be presumed factually innocent of a crime only diminishes in the face of information which links that individual with the commission of an offence. As the information becomes more incriminating, the less an individual is presumed to be factually innocent. Axiomatically, in the absence of incriminating information, the presumption of factual innocence exists undiminished.

3. *The protection offered by the pre-charge presumption of innocence*

a. *The relationship between the presumption of factual innocence and state powers*

The protections offered by the presumption of factual innocence rest on a basic premise: people who are innocent should be treated as if they are innocent, and people who are not innocent are not entitled to be treated as if they are. Accepting the preceding premise as true renders the following conclusions inescapable: all citizens who are factually innocent must be treated as if they are factually innocent; all citizens whose factual innocence has been questioned may be treated as if their factual innocence is in doubt; and all citizens whose factual innocence has been rejected may be treated as if their factual innocence has been rejected.

Accordingly, whenever the police conduct an investigation, the two-step inquiry demanded by the pre-charge presumption of innocence is as follows:

(1) what is the level of factual innocence afforded to the individual subject to the investigation; and

(2) are the state powers used in the investigation exercised in a manner which is consistent with the level of factual innocence afforded to the individual?

The nature of the inquiry assumes the existence of a predictive relationship between factual innocence and permissible state powers. As being factually innocent forms a starting point for all citizens, where police have no information that would question the innocence of an individual, their investigatory powers must reflect how an innocent person should be

treated. As an example, subjecting a random bystander to a search or an interrogation is fundamentally at odds with conceptualizing them as factually innocent.

Only once the police gain information questioning the factual innocence of an individual do their powers of investigation increase. As more incriminating information is discovered, more intrusive and more invasive forms of investigation are jusified. Case law demonstrates that investigations can be intrusive and invasive in different respects. While traditionally bodily and territorial integrity have been recognized, interference and invasion can also relate to privacy interests associated with personal information such as genetic information.[29]

Admittedly, the infinite number of police investigatory tactics renders it difficult to articulate how one is to determine what is permissible according to the degree to which the presumption of factual innocence has been rebutted. With respect to this concern, the pre-charge presumption of innocence looks to and relies on the existing jurisprudence and legislation for guidance.

Applying the model to a hypothetical fact scenario

A hypothetical example may bear witness to the practical implications of this inquiry. Consider that in a new effort against the war against drugs, the police have decided to install drug monitors in all public toilets. The first step in the analysis is to determine the level of factual innocence afforded to those subject to this investigatory technique. On the facts of this example the following question would be asked: do the police have any information which can reduce the presumption of factual innocence for random users of public toilets?

The second step in the analysis is determining whether this type of investigative technique is consistent with how factually innocent citizens can expect to be treated in Canadian society. This step of the inquiry will look at a number of sources, for example: what fact threshold is normally required to obtain a bodily fluid sample under the *Criminal Code*; do we usually afford innocent citizens a privacy interest in public toilets; are there informational interests worthy of protecting in the excreted bodily fluids, etc.

The right to the pre-charge presumption of innocence requires that the police not exceed their powers. Accordingly, the pre-charge presumption of innocence as a legal doctrine prevents unjustifiable uses of state powers

29. See *e.g.*, *R. v. Dyment*, [1988] 2 S.C.R. 417 at 428 where the Supreme Court of Canada discusses the three zones of privacy: personal, territorial and informational; see also *R. v. Plant*, [1993] 3 S.C.R. 281 where the Supreme Court of Canada states there is an inherent privacy interest in controlling personal information relating to oneself.

in the investigative stage. While novel in articulation, there is nothing unique about the existence of a relationship between incriminating facts and state powers. Indeed, this basic relationship can be seen to animate other pre-charge doctrines.

b. *Exploring the relationship between incriminating facts and state powers in other legal doctrines*

i. *Privacy*

The ability of the police to invade one's privacy is not static but rather dependent on the facts of each case.[30] As a general rule the more incriminating facts the police have against an individual, the more they will be allowed to intrude their privacy. Equally true is the converse: the fewer incriminating facts, the less power to invade one's privacy.

Consider for example the warrant provisions contained within the *Criminal Code* of Canada. At a basic level, as the intrusiveness of the desired search increases, more incriminating facts will be needed for its authorization.

Illustrative of one end of the spectrum are ss. 492.1 & 492.2 of the *Criminal Code* authorizing tracking warrants and number recorders.[31] Both of these measures require "reasonable grounds to suspect" that an offence has been committed and that assisting information would be found. Installing a tracking device or a number recorder are relatively innocuous and un-intrusive investigative measures, reflected in the relatively low fact threshold needed for their authorization.

In the middle of the spectrum are the search warrant provisions found in s. 487 of the *Criminal Code*. These provisions allow a broad search power provided that there are "reasonable grounds to believe" that there is evidence relating to a past or future crime. Reasonable grounds to believe that relevant evidence may be collected marks an increase from "reasonable grounds to suspect," which reciprocally reflects the increased level of intrusion and invasion possible.

At the far end of the spectrum are examples like DNA warrants which authorize the collection of genetic materials for forensic DNA analysis.[32] The ability to obtain bodily samples with as "much force as necessary" bespeaks a very significant and intrusive state power. Correspondingly,

30. *E.g.*, *S.A.B.*, *supra* note 19 at para. 40:
The taking of bodily samples can involve significant intrusions on an individual's privacy and human dignity...[T]he extent to which there is such an intrusion will depend on the circumstances.

31. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 492.1(1) & 492.2(1).

32. *Ibid.*, s. 487.04. See also *S.A.B*, *supra* note 18 where the constitutionality of this scheme was upheld.

the threshold requirements are more stringent. Amongst the additional requirements are "reasonable grounds to believe...that a person was a party to the offence."[33]

The warrant provisions in the *Criminal Code* are more complicated than reviewed above, however, on a basic level they can be seen to honour a reciprocal link between the intrusiveness of state powers and the level of incriminating information linking an individual with an offence.[34]

ii. *Arbitrary Detention*

As noted above, the pre-charge presumption of innocence holds there to be a relationship between the existence of incriminating information and the permissible level of police powers. This basic relationship can also been seen in the doctrine of arbitrary detention; the ability to detain an individual increases as the police further link that person with the commission of an offence.

The starting point is that individuals are entitled to be free from detention by the police. In his dissent in *Ladouceur,* Sopinka J. strenuously noted that the police have no power to detain a random bystander without having any reason to do so.[35] There is no justification for stopping an innocent person unless there is information specifically linking them with a crime.

The ability to detain increases as incriminating facts arise. The existence of this reciprocal progression is especially apparent in the concept of investigative detentions for limited purposes. When the police have reasonable grounds to *suspect* a person was involved in criminal activity, the police are authorized to detain them for "investigative" purposes.[36] While not authorizing a broad power of detention, the doctrine of investigative detention attempts to provide very limited and circumscribed powers to reflect the reality that there is information linking this individual to a crime, despite the fact that there are not reasonable and probable grounds. Investigative detentions symbolize a regulated middle ground.

As alluded to above, once the police have gained information amounting to reasonable grounds our justice system enables various forms

33. *Ibid.*, s. 487.05(1)(c).

34. This basic relationship can also be seen in warrantless searches. As an example, when contemplating the appropriateness of searches of varying degrees of intrusion at international borders, it is the level of incriminating facts which governs. See, *e.g., R. v. Monney*, [1999] 1 S.C.R. 652 at para. 38:

> In other words, the more intrusive the search, the greater the degree of constitutional protection required in terms of the standard of suspicion or belief which must be met prior to subjecting a traveller to a search by customs officers.

35. *Ladouceur, supra* note 27 at 1265.

36. *Mann, supra* note 28.

of detention, including the principal power of arrest. The more robust detention powers attaching to reasonable grounds support the premise that police powers are linked to the presence of incriminating information.

c. *Does the pre-charge presumption of innocence offer merely duplicative protection?*

If the relationship between incriminating facts and the use of state powers forms the substratum of other pre-charge legal doctrines, does the pre-charge presumption of innocence merely offer duplicative protection? For example, if being detained by a police officer on a purely discretionary basis violates the right to be free from an arbitrary detention, is it necessary to talk about the pre-charge presumption of innocence? Similarly, to subject a random bystander to a highly intrusive and invasive search is contrary to their right to be free from unreasonable search and seizure. The question becomes: is there any value in declaring that such actions additionally violate the pre-charge presumption of innocence?

Conceptualized pursuant to the explanatory model offered above, the pre-charge presumption of innocence may in fact offer duplicative protection. Nevertheless it remains worthwhile to distinguish its operation. Illustrative of this need is the increase in investigative technology. Technology is becoming more accurate, less intrusive, and increasingly more attractive to advance state interests in crime control. The net effect is that increases in technology may be able to diminish the operational value of some of our existing doctrines.

Consider arbitrary detention. "Detention," as a descriptor, has been given a wide interpretation by the Supreme Court. In *Therens* the Supreme Court was willing to extend "detention" to include the concept of psychological detention.[37] But could such a broad principle enfold the use of cameras that determine alcohol content in the blood stream? Or consider the rapidly increasing field of pheromones: soon DNA samples may not be needed, but rather the police may be able to match scents without ever needing a blood sample.

Technology grows increasingly sophisticated. Where our legal fictions have cracks, technology will fill them: detention, without actually being detained; invasions of privacy which are not invasive; self-incrimination by emitting smells, skin, hair, images, prints, tracks, heat images, etc. The pre-charge presumption of innocence as a legal doctrine is not easily circumvented by technological change in the same manner as these other legal doctrines. It rests on the normative and philosophical commitment that Canadians are deemed to be presumed factually innocent and entitled

37. *R. v. Therens*, [1985] 1 S.C.R. 613.

to be treated accordingly—changes in technology have no bearing on this commitment.[38]

While the pre-charge presumption of innocence may, in operation, duplicate protections offered by other legal doctrines, it does provide a distinctive form of protection not expressly covered by other legal doctrines.

4. *When are the protections offered by the pre-charge presumption of innocence inoperative?*

The reciprocal relationship between the pre-charge presumption of innocence and state investigatory powers outlined above is intended to represent the normal balance between state and individual interests. However, occasionally there exists pressing state interests that courts and governments are willing to upset the reciprocal relationship outlined above. One need not look any further than our post-9/11 world to see how fighting terrorism has vindicated the use of pre-emptive state investigatory powers in certain instances.

Where state interests of sufficient magnitude exist, state investigative powers may not bear a direct relationship with the presumption of factual innocence contained within the pre-charge presumption of innocence. Effectively, there may be no factual basis to reduce an individual's pre-charge presumption of innocence and yet the police will still be granted measured investigative powers. For example, being subject to radar detection and a frisk search is not consistent with how a factually innocent person is normally treated, and yet, in the context of an airport, such powers are considered justifiable.

Accordingly, in every analysis under the pre-charge presumption of innocence a third inquiry must be added. Therefore, the analysis now becomes:

(1) what is the level of factual innocence afforded to the individual subject to the investigation;

(2) are the state powers used in the investigation exercised in a manner which is consistent with the level of factual innocence afforded to the individual; and

38. The normative commitment contained within the pre-charge presumption of innocence cannot be circumvented by technological advances. In this respect, this characteristic of the pre-charge presumption of innocence mirrors the rationale for holding that polygraph results are inadmissible. In *R. v. Beland*, [1987] 2 S.C.R. 398 at 404 the majority of the Supreme Court of Canada explicitly held that polygraphs are inadmissible, not because of their technological frailties, but rather because they unjustifiably usurp the role of the court to assess credibility. Analogously, advances in technology have no bearing on the *role* of the court to assess credibility, just as advances in technology have no bearing on the justice system's commitment to treat innocent people as innocent.

(3) if the state powers are inconsistent, are there exceptional state interests which would justify their use?

What follows are two prominent exceptions to the normal relationship between state powers and the presence of factually incriminating evidence.

a. *The drinking and driving exception*

As noted above, in *Dedman, Hufsky* and *Ladouceur* random police stops of vehicles were held to violate the right to be free from arbitrary detention. Those conclusions accord with the basic relationship outlined above: in the absence of information collected by the police linking a particular driver with an offence, permitting police officers to stop random vehicles would usurp the initial starting point that an individual is considered factually innocent and entitled to be treated accordingly. Simply put, drivers who are, in the absence of contradictory information, factually innocent of any driving related offence should not be subject to a roadside stop.

Nevertheless, in *Dedman*, *Hufsky* and *Ladouceur* the random stops were ultimately considered acceptable. In justifying the constitutionality of these practices the Supreme Court of Canada focused on the cumulative effect of two rationales. First, the court noted that the nature of driving offences makes it impractical to form reasonable grounds; merely observing a passing vehicle cannot provide police with an opportunity to gain useful information.[39] The nature of the activity makes it nearly impossible for the police to rebut the presumption of factual innocence. Secondly, the court noted the prevalence of drinking and driving and its consequences, "incurable terminal traged[ies]," "a depressing picture of ... killing and maiming," and "carnage."[40] The alarming consequences of drinking and driving and the difficulty in its detection justify stopping random vehicles in Canadian law.

Despite how these factors operate to provide exceptional circumstances granting unusual police powers in the drinking and driving context, the combination of difficulty in detection and dreadful consequences does not amount to a general exception. Consider the state interest in curtailing crime and drug use in high crime areas of society. As a matter of statistics, police can pinpoint and locate high crime areas. Despite the high statistical probability of crime, police are not permitted to regulate the entrance to these areas, insist on pat-downs and searches, etc. In *R. v.*

39. *Hufsky, supra* note 25 at 535-536.

40. *Ladouceur, supra* note 27 at paras 1279-1281. The employment of such strong rhetoric may provide insight into the degree of justification required to allow pre-emptive state investigative powers.

Mann, Iacobucci J. for the majority explicitly rejected this notion, stating that "the high crime nature of a neighbourhood is not by itself a basis for detaining individuals."[41]

In *R. v. Mellenthin* the Supreme Court of Canada further illustrated the narrow scope of the "drinking and driving" exception (and conversely the strength of the basic relationship). At issue in *Mellenthin* was the propriety of an officer searching a gym bag located in the passenger seat of vehicle after it had been stopped at a police check-point. After re-affirming the drinking and driving exception which permitted police to stop random vehicles, the court held that this exception did not permit other pre-emptive state powers.

> However, the subsequent questions pertaining to the gym bag were improper. At the moment the questions were asked, the officer had not even the slightest suspicion that drugs or alcohol were in the vehicle or in the possession of the appellant. The appellant's words, actions and manner of driving did not demonstrate any symptoms of impairment. Check stop programs result in the arbitrary detention of motorists. The programs are justified as a means aimed at reducing the terrible toll of death and injury so often occasioned by impaired drivers or by dangerous vehicles. The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search.[42]

Mellenthin clearly re-enforces the vitality of the reciprocal relationship between state powers and the factual presumption of innocence,

> [n]onetheless, the violation must be considered a serious one. It was conducted as an adjunct to the check stop and was not grounded on any suspicion, let alone a reasonable and probable cause.[43]

b. *International borders—the national security exception*

The exercise of state powers at international borders provides a further example where courts and legislatures have been prepared to deviate from the reciprocal relationship between incriminating information and the powers of the police.

International borders present an exception to this basic relationship by justifying disproportionately high levels of state powers. For example, where reasonable suspicion of criminal involvement in normal conditions

41. *Mann, supra* note 28 at para 47.
42. *R. v. Mellenthin,* [1992] 3 S.C.R. 615 at 624.
43. *Ibid.,* at 630.

would entitle police to exercise a limited power to detain for investigative purposes,[44] reasonable suspicion at a border crossing will justify a more robust repertoire of state powers. Consider for example, the ability of the police to conduct strip searches.

In a non-border context, strip searches are only permissible if the state can demonstrate that there are reasonable and probable grounds justifying the necessity of the search. Further, in normal circumstances strip searches are considered so intrusive that they form an exception to the normal "search incident to arrest" rule.[45]

At international borders strip searches are permitted merely on a basis of reasonable suspicion. The constitutionality of this lower-than-normal threshold was upheld in *Simmons* and *Monney*, and justified on the weighty concern that "the security of Canada's interior is engaged."[46] Dickson C.J in *Simmons* captures the essence of the exception as follows:

> The dominant theme uniting these cases is that border searches lacking prior authorization and based on a standard lower than probable cause are justified by the national interests of sovereign states in preventing the entry of undesirable persons and prohibited goods, and in protecting tariff revenue. These important state interests, combined with the individual's lowered expectation of privacy at an international border render border searches reasonable under the Fourth Amendment. In my view, the state interests enunciated throughout the American jurisprudence that are deemed to make border searches reasonable, are no different in principle from the state interests which are at stake in a Canadian customs search for illegal narcotics. National self-protection becomes a compelling component in the calculus.[47]

In considering both the drinking and driving and international border exceptions, it becomes evident that the predictive relationship between the pre-charge presumption of innocence and the investigatory powers of the police is subject to exceptional circumstances.

It is important to recognize the types of situations where courts will permit deviations to the basic relationship between state powers and factual innocence. The examples outlined above are not exhaustive of this class, but merely illustrative. Also deserving of note is the degree to which courts have confined and restrained the creation of exceptions in deference to the general rule. The judgments of the Supreme Court of Canada with respect to both the drinking and driving exception and the international border exception demonstrate a lot of "heavy lifting" and a conscious

44. *Supra* note 28.
45. *R. v. Golden*, [2001] 3 S.C.R. 679.
46. *Monney*, *supra* note 34 at para. 34. See also *Customs Act*, R.S.C. 1985 c. 1, s. 98.
47. *R. v. Simmons*, [1988] 2 S.C.R. 495 at 527-528.

attempt to narrow the exceptions. For example, in *Mellenthin* the court restricted the drinking and driving exception from becoming a new, and more liberal search tool of the police; similarly, the international border exception permitting liberal search powers is restricted to occasions when Canada's national security is engaged.

Accordingly, there are exceptions to the basic relationship between the pre-charge presumption of innocence and the use of state investigatory powers. However, these exceptions are narrow in scope, and do not threaten the general application of the basic relationship.

II. *Pre-charge presumption of innocence and DNA sweeps*

The preceding explanatory model aims to clarify the operational content of the presumption of *factual* innocence contained within the broader presumption of innocence. Referred to as the "pre-charge presumption of innocence," the value and utility of this legal doctrine should be measured by its ability to assist in the analysis of the fact patterns which the criminal justice system must address daily. To demonstrate the application of the pre-charge presumption of innocence as a legal tool, it will be applied to a new and highly controversial form of police investigation: the DNA sweep.

1. *The practice of DNA sweeps*

Effectively, DNA sweeps are large scale processes of elimination.[48] Seductively simple in concept, they are typically used when police have obtained genetic material deposited at a crime scene which they believe came from the perpetrator but have no other leads to guide their investigation. The genetic material is first analyzed to gain a DNA profile. Once this profile is attained, police attempt to determine the class of individuals who had the physical opportunity to commit the offence. A review of police practice in this regard shows no real guidance for how this class is determined, as DNA sweeps can vary significantly in their breadth.[49] An example of criteria may be: white males aged eighteen to forty with a residence within five kilometres of the crime scene.

Once the sweep-list criteria are settled on, all individuals fitting the description are approached and asked to volunteer a genetic sample

48. For an excellent definition of DNA sweeps see Jeffrey S. Grand, "The Blooding of America: Privacy and the DNA Dragnet" (2001-2002) 23 Cardozo L.Rev. 2277 at 2277 note 1 where he describes the practice as follows:

> The mass collection of biological samples from individuals whom the police have no reason to suspect committed the crime under investigation. These samples are used to create DNA profiles that are compared to the profile of the perpetrator.

49. Past examples have shown DNA sweeps to be as narrow as male employees of a small company to an entire community.

for DNA testing. All samples are then analyzed for a DNA profile and compared with the DNA profile found at the crime scene.

Those individuals who refuse to provide a sample will be subject to increased surveillance.[50] The increased surveillance ultimately serves the dual purpose of gaining any possible non-genetic information linking this individual to the crime, but more importantly, to circumvent the lack of consent by gaining materials which may contain genetic information for profiling (*e.g.*, a discarded pop can or a cigarette butt).

Currently, DNA sweeps remain unregulated by legislation and to date their propriety has not been the subject of judicial commentary in Canada. Nevertheless, DNA sweeps are being used with increasing frequency in both the United States of America[51] and Canada.[52] Recent examples of their use in Canada include both the Holly Jones and Cecilia Zhang murder investigations.[53]

The reception to DNA sweeps has been mixed. Some laud it as highly efficient, effective and desirable:

> [A]dvocates support the use of large-scale DNA sweeps. They contend the practice saves time and effort by quickly eliminating large numbers of potential suspects, leaving police free to concentrate on more promising leads.[54]

Others characterize DNA sweeps as threatening basic individual liberties:

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50. As Grand, *supra* note 48, asserts "any individual who declines to volunteer a sample falls under the heightened scrutiny of the police – his refusal alone arouses police suspicion..."

51. Numerous articles have reviewed the use of this practice in the United States of America: Grand, *supra* note 48; Fred W. Drobner, "DNA Dragnets: Constitutional aspects of Mass DNA Identification Testing" (1999 – 2000) 28 Capital U. L. Rev. 479; Jonathon F. Will, "Comment: DNA as Property: Implications on the Constitutionality of DNA Dragnets" (2003 – 2004) 65 U. Pitt L. Rev. 129; & Mark Hansen, "DNA Dragnet" (May, 2004) 90 ABA Journal 38.

52. Academic commentary of the use of DNA sweeps in Canada is more limited. See Ricardo G. Federico & Vincenzo Rondinelli, "The Genetic Witness: Mass DNA Testing" PDNA: *Pushing the Envelope – DNA Articles and case comments* (1 May 2000) (QL); Vincenzo Rondinelli, "The DNA Dragnet: A Modern Day Salem Witch Hunt?" (2003) 10 C.R. (6th) 16.

53. Melissa Leong & Michelle Shephard, "Cecilia case sparks privacy worries DNA sampling called rights issue: Investigation third in a year to use it" *Toronto Star* (January 4, 2004); Alison Dunfield & Kirk Makin, "DNA sweep in Toronto alarms many" *Globe and Mail* (May 25, 2003).

54. See Hansen, *supra* note 51 at p. 43. For a Canadian endorsement of the practice see Jeff White, "A new way to catch killers: In an era of coddled criminals, DNA sweeps help even the score" *National Post* (18 June 2004) A-20 where the author states,

> The unfortunate thing is not that Toronto police have done three DNA sweeps in the last two years, but that this tactic wasn't available in 1984 to catch the killer of Christine Jessop and exonerate wrongly accused Guy Paul Morin before his 10-year nightmare had even begun.
>
> Use of DNA sweeps may escalate if other police forces decide they balance, to some small extent, the Charter sections that have made "getting away with murder" the rule rather than the exception.

> [C]riminal defense and civil libertarians decry the practice, which they say is overly broad and seldom, if ever, truly voluntary. They also question its effectiveness, and worry about what will happen to the DNA samples once the donors have been eliminated as suspects.[55]

DNA sweeps potentially raise many legal issues such as the reasonable expectation of privacy, the principle against self-incrimination, consent, etc. While these legal issues remain outside the scope of this analysis, do DNA sweeps violate the presumption of innocence?

2. *DNA sweeps and the presumption of innocence*

a. *DNA sweeps and the presumption of legal innocence, or the "post-charge presumption of innocence"*

The post-charge presumption of innocence as contained within s. 11(d) of the *Charter* protects the right of all citizens to be presumed legally innocent of a crime until the Crown has proven otherwise in a court of law. The protections offered by s. 11(d), which are procedural and evidentiary in nature, appear to have little relevance to the practice of DNA sweeps. Due to the fact that those on the sweep-list have not been charged with an offence, it remains difficult to see how the protections offered by s. 11(d) pertain to these individuals.

b. *DNA sweeps and the presumption of factual innocence, or the "pre-charge presumption of innocence"*

The pre-charge presumption of innocence protects the right of all citizens to be free from state powers which are inconsistent with their level of innocence as apparent on the facts. Accordingly, the pre-charge presumption of innocence restrains the police from engaging in investigative measures which are inconsistent with the imputed factual innocence of each individual. Deciding whether DNA sweeps infringe the pre-charge presumption of innocence requires the following inquiry:

(1) What is the extent to which the presumption of factual innocence for those on the sweep-list has been rebutted before the DNA sweep is conducted;

(2) Are DNA sweeps consistent with the extent to which the presumption of factual innocence has, or has not been rebutted; and

(3) If DNA sweeps are deemed excessive, are there any state interests present to justify deviation?

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55. See Hansen, *supra* note 51 at 43. For a Canadian admonishment of these practices see Allison Dunfied & Kirk Makin, "DNA sweep in Toronto alarms many" *Globe and Mail* (25 May 2003) where Canadian law professor Sanjeev Anand is quoted as stating "Make no mistake, it is a form of state-imposed coercion."

(1) To what extent has the presumption of factual innocence been rebutted for those on DNA sweep-lists?

The issue at this stage of the analysis with respect to DNA sweeps becomes: to what extent have the police been able to rebut the presumption of factual innocence through information linking these individuals with the commission of the offence under investigation?

Those subject to a DNA sweep have an extremely loose factual relationship to the offence being investigated. Their inclusion is based on mere opportunity alone, that is, citizens who physically had the opportunity to commit the offence.[56] Mere opportunity is not a standard of suspicion or belief which can reduce an individual's pre-charge presumption of innocence to any degree. Accordingly, those on a DNA sweep-list, without more than "mere opportunity" linking them to the offence, are entitled to a virtually unreduced presumption of factual innocence.

(2) Are DNA sweeps inconsistent with a virtually unreduced presumption of factual innocence?

The pre-charge presumption of innocence protects citizens from being subject to state powers that are inconsistent with the extent to which their presumption of factual innocence has been rebutted. The issue at this stage of the analysis becomes whether DNA sweeps are consistent with a virtually unreduced presumption of factual innocence. At a practical level this question asks: if we really believe that the citizens on a DNA sweep list are, on the facts, innocent of the crime being investigated is it appropriate to subject them to a DNA sweep?

It can be safely stated that citizens, whom we believe to be innocent of the crime being investigated, are not expected to volunteer a DNA sample for profiling. To hold that this form of investigation is defensible requires accepting that in Canadian society it is permissible to have all potential perpetrators *prove* their innocence.[57] Rejecting this form of state power is conceptually similar to why after a robbery all citizens in the neighbourhood are not asked to come down to the police station and provide an alibi. Asking for alibis and genetic samples are not repulsive in every

56. Drobner, *supra* note 51 at 485.

57. See, *e.g.*, Federico & Rondinelli, *supra* note 52 where the authors echo this conclusion: While authorities have maintained that a main purpose of mass DNA testing has been to eliminate possible suspects, the practice seems to spread a wider net than claimed. Rounding up a town's citizens to prove their innocence threatens the basic tenet of our administration of justice and democratic state. Many will argue that the inconvenience caused to a few individuals in order to apprehend a serial rapist is a small price to pay. The authors however, echo Ben Franklin in saying, "Those who would give up their Liberty for a bit of temporary safety, deserve neither Liberty, nor safety."

circumstance, but at a minimum they demand some factual foundation linking those asked to the commission of the offence. Asking innocent citizens of Canada to clear their names is inconsistent with how our justice system operates; a mere physical opportunity to commit a crime is not a fact-based threshold recognized in Canadian law as justifying increased state powers, such as a DNA sweep.

It is instructive to focus on the level of incriminating information which may justify asking individuals for a DNA sample. Perhaps the best evidence of what Canadian society feels to be acceptable can be seen in the DNA warrant provisions in the Criminal Code, "reasonable and probable grounds to believe... that a person was a party to the offence."[58] Notably, the level of incriminating information needed to sustain this level of belief, far exceeds information suggesting a mere physical opportunity to commit an offence.

(3) Do state interests exist to justify DNA sweeps as an exceptional use of state powers?

In the presence of exceptional circumstances the basic relationship between state powers and the presumption of factual innocence may be upset. As noted in the case law, to do so places a heavy onus on the state as courts have zealously guarded against unbalanced state powers. While the drinking and driving and international border exceptions appear to be well entrenched, they are not exhaustive of when this basic relationship may be circumvented.

With respect to DNA sweeps, potential interests which may allow their pre-emptive use are the need for efficiency and the existence of an otherwise unsolvable crime.

(i) *Efficiency*

When police are faced with numerous potential suspects, DNA sweeps have an ability to exonerate suspects in a highly efficient manner. Undeniably, there is administrative appeal to this aspect of DNA sweeps. Nevertheless, our justice system is not solely driven by efficiency. In addition to efficiency and crime-control measures, Canada's justice system is equally concerned with respecting the liberty, freedom and dignity of Canadian citizens.[59] To accede only to the goal of efficiency would by logical extension endorse measures such as cameras on street corners, DNA samples given at birth, implanted tracking devices, etc. The criminal justice system represents

58. *Supra* note 31 at s. 487.05
59. *Re Laporte, supra* note 1.

a balance, and therefore the goal of efficiency cannot be pursued in an unbridled fashion.

The pre-charge presumption of innocence has a forceful normative answer for why we as individuals do not have to go to the police station every time a crime is committed. While the desire to control crime is noted, our justice system equally protects the ability of individuals to be treated as innocent and to enjoy basic liberties and freedoms. The price of this balancing of interests may sacrifice "effective and efficient" policing, however, our system is not guided merely by these state interests. Upsetting this balance and subjecting individuals to heightened state powers is exceptional and reserved for exceptional circumstances.

(ii) *Inability to solve crime*

The inability of police to otherwise solve a crime is often marshalled as a justification for using DNA sweeps. It invokes a form of "but-for" logic: but for DNA sweeps there are crimes which may go unsolved. This reasoning is familiar as the Supreme Court of Canada did rely on the inability to catch drinking and driving offences without allowing police to detain random vehicles.

The strength of this argument likely depends on the nature of the crime being investigated. First, what crimes would *not* meet the requisite level? Consider where the police retrieve a stolen purse with a hair on it, and yet have no other leads. While the state has an interest in stopping property offences, it does not meet the level of sufficiency as would be required to set aside the predictive relationship. In other words the desire to solve a crime of this nature is likely insufficient to displace the normal balance between state and individual interests – a conclusion amply supported by the case law.[60] The difficulty in solving a crime is not, in and of itself, a recognized exception for increasing state powers.[61]

60. See, *e.g.*, *Mellenthin*, *supra* note 42.

61. See, *e.g.*, *R. v. Mack*, [1988] 2 S.C.R. 903 at 938-939 where Lamer J states as follows:
> It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price. This proposition explains why as a society we insist on respect for individual rights and procedural guarantees in the criminal justice system. All of these values are reflected in specific provisions of the Charter such as the right to counsel, the right to remain silent, the presumption of innocence and in the global concept of fundamental justice. Obviously, many of the rights in ss. 7 and 14 of the Charter relate to norms for the proper conduct of criminal investigations and trials, and the courts are called on to ensure that these standards are observed. The principles expressed in the Charter obviously do not emerge in a legal, social, or philosophical vacuum. With respect to criminal law in particular, the courts have, throughout the development of the common law and in the interpretation of statutes, consistently sought to ensure that the balance of power between the individual accused and the state was such that the interests and legitimate expectations of both would be recognized and protected.

However, at the other end of the spectrum are more reprehensible offences, such as murder and sexual assault. Arguably, the consequences of these offences are just as deplorable as the "maiming" and "carnage" caused by drinking and driving. Consider the example of an elusive serial murderer in a small town. A serial murderer represents not only the reality of past crimes but also a continuing threat to the safety of citizens. It is conceivable that in such situations the use of police powers such as a DNA sweep may be appropriate.

However, the difficulty with permitting the use of DNA sweeps for "serious" offences is its indeterminacy. Accordingly, perhaps the best place for the exceptions to be enumerated is in an amendment to the *Criminal Code*. For example, the warrant provisions for DNA forensic analysis contained with in the *Criminal Code* are limited to certain designated offences.[62] Restricting the use of DNA sweeps to these exceptional circumstances would provide much needed guidance and certainty to these practices.

The practice of DNA sweeps premised on the mere physical opportunity to commit a crime violates the pre-charge presumption of innocence. Asking citizens to provide a DNA sample for forensic analysis in these situations is inconsistent with the use of state powers against a Canadian citizen who maintains a virtually unreduced presumption of factual innocence. While DNA sweeps conceivably may be utilized in exceptional circumstances, there should be a heavy onus on the police to justify their propriety.

Conclusion

Just as the criminal justice system is not exclusively concerned with the eradication of crime, it is also not exclusively concerned with the protection of individual liberty interests. The criminal justice system is concerned with both. In Canadian society it is called upon to strike a difficult balance between these two interests which often diverge: trumping state interests in controlling crime can impair the rights and liberties of citizens; trumping the rights and liberties of citizens can diminish the ability of the state to effectively control crime. As noted above, the inherent tension between these interests manifests itself in the practice of DNA sweeps. DNA sweeps represent a common dilemma of balancing state and individual interests.

To mediate between these competing interests and settle on an appropriate balance, the criminal justice system invokes legal doctrines for guidance. The "pre-charge presumption of innocence," as conceptualized

62. *Criminal Code*, *supra* note 31, see designated offences in s. 487.04.

above, represents a novel addition to existing doctrines. To date the presumption of innocence, as a legal doctrine, has not been operationally defined for the pre-charge phase of the criminal justice process. While courts have asserted that the presumption of innocence is relevant throughout the entire criminal justice process, they have thus far failed to explain how it relates to citizens not charged with an offence.

While novel in its articulation, the pre-charge presumption of innocence does share a fundamental characteristic with other pre-charge doctrines. Common to the doctrines of "reasonable expectation of privacy" and "arbitrary detention," the pre-charge presumption of innocence maintains a basic relationship between the level of incriminating facts, and the acceptable level of police powers.

Nevertheless, despite having this common thread with other pre-charge legal doctrines (which, admittedly may result in duplicative protection), the pre-charge presumption is worthy of independent status in lieu of its distinct normative foundation. The normative foundation, which states that innocent citizens are entitled to be treated as innocent, is a premise which has legal utility on its own. It is a premise which cannot be diluted by increases in technology or advances in investigative capabilities. For example, conceivably the police may soon be able to match genetic samples through scent technology, and thus not need to detain. So while there may be no "detention" or no reasonable expectation of privacy in abandoned smells, allowing the police to process biological information in a criminal investigation is *not* consistent with how the police should act towards a person who is factually innocent.

By expressly linking the presumption of factual innocence with state powers in investigation, the pre-charge presumption of innocence represents a further tool for maintaining a balance between state and individual interests. As a model it balances both our need for effective law enforcement and our desire to protect individual liberties.

The pre-charge presumption of innocence forces both state interests and individual interests to accommodate each other. While not allowing unlimited state powers in fighting crime, the model does contemplate that there are appropriate circumstances when the police may use invasive tactics. Rationalizing increased state powers on the premise of incriminating information recognizes that individual liberty interests too will need to yield at times. This calibrated relationship accords with the sense of balance which underpins the criminal justice system.

Ultimately, the pre-charge presumption of innocence answers a question that has escaped resolution: what relevance does the presumption of innocence have to the majority of Canadians who have not, or will

never be, charged with an offence? Its relevance to these Canadians is simple: you are given the benefit of being presumed factually innocent of criminal behaviour as a starting point. This starting point mandates that until incriminating information begins to weaken this presumption, the state is constrained to use powers which are consistent with how a Canadian who is *legally* and *factually* innocent of a crime can expect to be treated. The pre-charge presumption of innocence protects this reciprocal treatment, justifying deviations only in exceptional circumstances.