THE APPLICATION OF THE *CHARTER* TO CIVIL LITIGATION

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I. INTRODUCTION

As other panelists have demonstrated, public law lawyers work with the *Charter* a great deal. What impact does the *Charter* have in the field of private law ? Just for fun, and by way of illustration, I have examined the potential impact of the *Charter* upon the "essentially civil" legal woes of a leading Canadian business person, Maxwell Earnings.

Earnings founded a computer software company when Bill Gates was still in diapers. He has worked hard all of his life and as a result became divorced from his wife, Digger, some twelve years ago pursuant to a generous separation agreement that has since permitted Digger to live very graciously. His 21 year old son, Mark, and his 19 year old daughter, Susan, live in Digger's Point Grey mansion and both attend U.B.C.. Earnings still has $50 Million in assets, and is President and CEO of his own TSE listed company, Earnings Corporation. Life was good until his luck turned and he became embroiled in litigation.

As his fate unfolds Earnings turns to his lawyer, Paula Defender, and from time to time asks probing questions about how the *Canadian Charter of Rights and Freedoms* might assist him to defend his economic assets, his reputation, his business, and his more personal rights to privacy, liberty, and equality[1].

II. PRIVATE CIVIL LAW PROCEEDINGS

A. The Applicability of the Charter

One Sunday morning as Earnings relaxed in his Drummond Drive home, a 37 year old woman, Willma Variation, knocked on his door and declared that she was the issue of one of Earnings' youthful liaisons and thus was his daughter. When Earnings demurred, Willma commenced an action for a bare declaration that Earnings was her father and within the action sought an order that some of Earnings blood be removed from him to be DNA-tested in support of her claim. Earnings stomped around Defender's office demanding to know whether or not he had any privacy rights whatsoever and whether the *Charter* applied to protect him from the involuntary removal of his blood ?

Although "the Charter does not apply to private litigation," *R.W.D.S.U. v. Dolphin Delivery Ltd.*, (1986) 9 B.C.L.R. (2d) 273 (S.C.C.) at p. 293, it does apply, by the terms of *Charter* section 32(1)(b), to federal and provincial legislation. Thus, where one party in a private lawsuit "reli[es] on a statutory provision violative of the Charter," *Dolphin Delivery, supra,* at p. 298 , the requisite governmental action is present, and it matters not that neither the plaintiff nor the defendant themselves are state actors.

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[1] *The problems described in this paper are fictional and any similarities to real life characters or events are both purely coincidental and unintended.*

In *Dolphin Delivery*, the Supreme Court referred to *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, *app. for lv. to appeal dismissed* (1986), 58 O.R. (2d) 274 n. (S.C.C.) as an example of the Court's assessment of a *Charter*-based argument arising in private litigation. In *Blainey*, the defendant athletic association relied on a provision of the Ontario Human Rights Code that denied equal protection to young female athletes and thus violated s. 15(1) of the *Charter*. Commenting on *Blainey*, the Supreme Court in *Dolphin Delivery* stated at p. 296:

> *Blainey* then affords an illustration of the manner in which Charter rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation – government action – against the Charter.

Arguably, Rule 30(1) of the *British Columbia Rules of Court*, as interpreted in *Bauman v. Kovacs* (1986), 10 B.C.L.R. (2d) 218 (C.A.) and *C.(M.) v. C.(L.A.)* (1990), 42 B.C.L.R. (2d) 379 (C.A.) violates the rights of Earnings guaranteed by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* to bodily integrity, security of the person, privacy, and liberty, to the extent that the Rule 30(1) authorizes a court to order a party to submit to a blood test to determine the paternity of an adult such as Willma, whose only legal entitlement to such an order is based upon the prospect of a contingent future *Wills Variation Act* application in the event that Earnings predeceases her.

The *Rules of Court* are promulgated as regulations, pursuant to the *Court Rules Act*, R.S.B.C. 1996, c. 80, but nevertheless have the force of statute: Fraser & Horn, *The Conduct of Civil Litigation in British Columbia* (Vancouver: Butterworths, 1978) at vol. 1, p. 31. Section 1(1) of the *Court Rules Act* provides:

> The Lieutenant Governor in Council may, by regulation, make rules that the Lieutenant Governor in Council considers necessary or advisable governing the conduct of proceedings in the Court of Appeal, the Supreme Court and the Provincial Court.

Accordingly, arguably, Rule 30(1) represents the necessary governmental action within the meaning of s. 32 of the *Charter* to trigger the requirement that the court assess whether the Rule, as judicially interpreted, violates Earnings' *Charter* rights.

Indeed, in *Crow v. McMynn* (1989), 49 C.R.R. 290 (B.C.S.C.) Mr. Justice Campbell held, at page 299:

> Clearly the *British Columbia Supreme Court Rules* created under statutory authority, are the result of government activity of the type referred to by McIntyre J. in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*. ... Without Rule 30(1) the court would have no power to order a blood test. As such, it is open to a *Charter* challenge. If it violates the *Charter*, it will be, pursuant to s. 52 of the *Constitution Act, 1982,* of no force and effect and the defendant cannot be ordered to undergo a blood test.

However, in *Schul v. Schulzer* Vancouver Registry: F970144, July 21, 1998, Cohen J, after considering *Crow v. McMynn*, held at para 22 - 24:

> In my respectful view, this issue merits some further examination. [Dolphin] was the seminal case in which the ambit of the Charter's application was explored by the Supreme Court of Canada. ... I think that McIntyre J.'s words make it clear that the Charter is not to apply to court orders in private litigation whether or not such orders are made pursuant to a statutory rule. In my view, the emphasized passages above and below make it clear that statutory activity is only relevant to private litigation in so far as it is the basis for the denial of a right that is central to the claim of the parties. ... **As I interpret Dolphin Delivery, supra, the trigger-point at which the Charter potentially applies to private litigation is with regard to the claim advanced, not the relief sought.** [emphasis added]

It is accordingly somewhat difficult to define when the *Charter* applies to purely private declaratory litigation.

Perhaps Cohen J. meant to say that if the only governmental action relied upon by a private litigant derives from the *Court Rules Act* and the Court Rules then the *Charter* will not apply as those enactments are merely the enabling legislative framework establishing the Courts themselves, which McIntyre, J. made clear in *Dolphin*, at p. 295, were not part of "the government" within the meaning of *Charter* s. 32. Perhaps the true rule is that if a private litigant relies upon any legislation, other than the *Supreme Court Act* or *Court Rules Act* then such legislation will represent, at *Dolphin* p. 295, "A more direct and precisely defined connection between the element of governmental action and the claim advanced..." that will make the *Charter* apply.

Fortunately, given this uncertain state of the law, Earnings can at least afford to instruct Defender to challenge the constitutionality of Rule 30(1) and to appeal, if necessary, all the way to the Supreme Court of Canada for clarification.

B. The Status of The Remedy of a Stay of Proceedings to Protect the Right to be Free from Self-Incrimination in Parallel Criminal Proceedings

While Willma's action was proceeding Sid Salacious, Earnings' former and disgruntled CFO, commenced proceedings against Earnings alleging a civil conspiracy between he and Profit Corporation to interfere with contractual relations between Profit Corp. and Deficit Corporation, for whom Salacious now works. Salacious and Deficit Corp. seek very wide ranging discovery of all of Earnings' personal records and diaries as well as Earnings Corporation's records in purported pursuit of the action.

Initially, Earnings suspects that the purpose of Salacious' action is to discredit Earnings Corporation so that Deficit Corp. can gain market share. The real purpose of the action, however, becomes more apparent when Earnings discovers that Salacious has complained to his brother-in-law, a U.S. District Attorney in Louisiana and that in fact a Louisiana Grand Jury has been convened to conduct a RICO investigation into the business affairs of Earnings.

It appears that Sid has arranged to receive a subpoena *duces tecum* in the U.S. after having obtained discovery of Earnings and Earnings Corporation in the Canadian action. Under RICO, Earnings is exposed to the potential of very long jail sentences, if convicted criminally, and/or exposure to civil RICO's treble damages clause. Earnings immediately demands to know from Defender whether, in light of the differing regimes by which the right to self-incrimination is protected in Canada and the U.S., whether or not the Canadian civil proceedings can be stayed, pending the outcome of the U.S. RICO investigation ?

In Defender's view, given the close relations and relatively open border between Canada and the United States, civil proceedings in Canada are likely to often occur on the same facts as criminal proceedings in the United States. In Defender's view, the rights of Canadian citizens facing prosecution in the United States is an issue of general importance, one which brings into focus the lacunae between the different principles against self-incrimination under American and Canadian law. Defender reflects on the state of the law.

The principle against self-incrimination has been described by the Supreme Court of Canada as a fundamental and over-riding concept in the criminal process. Canadian law recognizes a modified right to silence based on the concept of subsequent use immunity. Earnings will be deprived of this basic right if the proceedings continue without an interim stay: (*R v. S(RJ)* [1995] 1 S.C.R. 451 at pp. 511-12)

Earnings has not yet been examined for discovery, nor has he produced documents. Criminal proceedings in the United States have not yet commenced. An order of the Supreme Court of British Columbia would, therefore, be effective if the proceedings are stayed before events progress any further.

The *Rules of Court*, backed by the Court's power to enter default judgement or punish for contempt, require that Earnings attend and give evidence or produce documents at a time when he is under investigation by authorities in the United States. His participation in civil proceedings in Canada at this time might constitute a deprivation of his liberty within the meaning in s. 7 of the *Charter*.

The liberty interest protected by s. 7 is engaged at the point of testimonial compulsion or document production. "Once it is engaged, the investigation then becomes whether or not there has been a deprivation of this interest in accordance with the principles of fundamental justice." (*B.C. Securities Commission v. Branch* (1995), 123 D.L.R. (4th) 462 (S.C.C.), at p. 477)

The principle against self-incrimination, one of the principles of fundamental justice in Canada, requires that persons compelled to testify or produce documents be provided with subsequent use and derivative use immunity with respect to the evidence they give. (*Branch, supra*, at p. 467)

Civil defendants who are subsequently prosecuted in Canada receive use immunity under s. 5(2) of the *Canada Evidence Act* and s. 13 of the *Charter*: the evidence they produce in the civil proceedings cannot be used against them in the criminal proceedings. Civil defendants who are subsequently prosecuted in Canada also receive derivative use immunity under s. 7 of the *Charter*: evidence that would not have been obtained or whose relevance would not have been appreciated but for the defendants' evidence in the civil proceedings is inadmissible in the criminal proceedings. (*Branch, supra*, at pp. 467-9)

In addition, protective orders are available from the Canadian Courts to ensure that testimony and documents obtained from a defendant through the civil discovery process will not be disclosed by Sid to the authorities in Canada so long as there is a criminal investigation underway or possible criminal charges outstanding (*Cheung v. British Columbia (AG)* (1993), 76 B.C.L.R. (2d) 305 (S.C.), at p. 118; *HongKong Bank of Canada v. Legion Credit Union,* Unreported, February 1, 1990, Vancouver Registry No. CA011844 (B.C.C.A.), at pp. 6-7)

For these reasons, the compulsion to testify or produce documents in civil proceedings is in accordance with fundamental justice, so long as the subsequent prosecution is in Canada, where the protection of the *Evidence Act*, the *Charter* and a Canadian Court's supervisory jurisdiction is available. A stay of proceedings, therefore, is not generally justified by the mere existence of a domestic criminal investigation on the same facts as a domestic civil action (*Belanger v. Caughell* (1995), 22 O.R. (3d) 741 (Div.Ct.), at p. 748(d); *Haywood Securities v. Inter-tech Resource Group* (1985), 68 B.C.L.R. 145 (C.A.))

The particular prejudice to Earnings in this case, however, will arise because he will be compelled to give evidence and produce documents without use or derivative use immunity: the *Charter* and the *Canada Evidence Act* do not apply to prosecutions in the United States, and a protective order of a Canadian Court would be unenforceable outside the jurisdiction or in the face of a subpoena to Earnings from a U.S. grand jury. In short, Earnings will be compelled to incriminate himself without the immunity guaranteed to him under s. 7 of the *Charter*.(See: Loewenson Affidavit (November 4, 1997), paras. 14 and 19 referred to in *National Financial Services Corporation v. Wolverton Securities et. al.* Vancouver Reg: C975452, February 6, 1998, Henderson J.)

But unfortunately for Defender, in *National Financial Services Corporation, supra,* Henderson J. ruled, at para. 41, that as a result of these circumstances "no constitutional right enshrined in the *Charter* is threatened. The request for a stay is premised on the notion that a Canadian court should do everything in its power to make up for a presumed deficiency in American Fifth Amendment law".

However, Defender is of the view that Henderson J. may have erred in failing to appreciate that the rights at stake arise by operation of Canadian, not American, law, and in failing to appreciate, and take account of, the threat to Earnings' rights under s. 7 of the *Charter* if the Canadian civil proceedings continue.

Protecting Earnings' right to silence under s. 7 (i.e. the right not to give self-incriminating evidence without subsequent use immunity) arguably does not give extra-territorial effect to the *Charter*. All proceedings in Canada are subject to the *Charter* and full force must be given to the *Charter's* protections, even if protecting the witnesses' rights in Canada will have an incidental effect upon proceedings in the United States. It is the conduct of the Canadian proceedings (compelled testimony and document production) which is subject to the *Charter's* scrutiny, not the conduct of the U.S. proceedings (subsequent use of that evidence). (*R. v. Cook*, (1998) 128 CCC (3d) 1 (SCC); *United States of America v. Dynar* (1997), 147 D.L.R. (4th) 399 (S.C.C.), at pp. 440-1; *United States of America v. Burns* (1997), 116 C.C.C. (3d) 524 (B.C.C.A.), at paras. 27-31)

In addition, recent caselaw interpreting *Charter* s. 7 makes it clear that the *Charter* operates at both stages of the process (i.e. the civil proceedings **and** the subsequent criminal trial) assuming both are in Canada. It is the act of giving incriminatory evidence without protection, not just the subsequent use of that evidence, which violates the *Charter*. Section 7 requires a guarantee of use and derivative use immunity before the witness is required to testify or produce documents. (*Branch, supra*, at pp. 467-77; *Phillips v. Nova Scotia (Westray Inquiry)* (1995), 124 D.L.R. (4th) 129 (S.C.C.), at paras. 82, 91-2)

In addition, Defender reflects, perhaps Henderson J. had failed to appreciate the significance of the *Mutual Legal Assistance in Criminal Matters Act (*hereinafter *M.L.A.T.*) to the proceedings against Earnings. *M.L.A.T.* is intended to assist foreign states with their investigation of cross-border crimes, and requires residents of Canada to answer questions and produce documents to foreign investigators under the supervision of a Canadian court. *M.L.A.T.* creates a procedure which balances the interests of international law enforcement with the rights of Canadian residents, recognizing that Canadian law provides no protection outside the borders of Canada. (House of Commons Official Report (Hansard), 2nd Session, 33rd Parliament, Volumes VII and XIV)

M.L.A.T. stipulates that the evidence collected from a Canadian resident will only be released to foreign authorities by an order of a superior court judge who may impose terms and conditions. The terms which the superior court judge may impose generally should include use and derivative use immunity. *M.L.A.T.* further provides that the evidence shall not be delivered to the foreign authorities until the Justice Minister is satisfied that the foreign state has agreed with the terms and conditions imposed by the releasing judge. In this way, *M.L.A.T.* provides a witness who is required to co-operate with foreign authorities with the same rights as a person under investigation by Canadian authorities. (*United Kingdom v. Hrynyk* (1996), 107 C.C.C. (3d) 104 (Ont.Gen.Div.))

In Defender's view, *M.L.A.T.* was relevant to Henderson J.'s exercise of discretion in two ways. First, if the Canadian proceedings continue against Earnings, the U.S. authorities will be able to obtain his evidence without making a request to the Canadian government under *M.L.A.T.* Earnings, therefore, would be unable assert his right to use and derivative use immunity through the procedures of *M.L.A.T.* Second, the availability of *M.L.A.T.* as an alternative source of evidence means that a stay of the current Canadian civil proceedings will not have the consequence of frustrating a cross-border investigation into possible criminal misconduct against him.

In addition, Defender believes that a B.C. Court should not permit the Louisiana U.S. District Attorney to effect an "end run" around the important statutory protections and obligations provided by *M.L.A.T.* In this regard, Madam Justice Southin's comments in *Henry Bacon Building Materials Inc.* v. *Munsie* (1994), 9 B.C.L.R. (3d) 181 (C.A.) are instructive. The Petitioner in that case sued British Columbian residents in Washington State over mis-graded lumber. The Petitioner claimed treble damages under a Washington statute, which are payable upon a showing of criminal activity. This was coupled with a pleading under a Washington statute which authorized payment of a fine to the State. The Petitioner applied to examine witnesses in British Columbia pursuant to letters rogatory. Madam Justice Southin expressed concern over the application of U.S. criminal statutes to the B.C. residents and noted that there had been no extradition proceedings commenced against them, with all of the attendant protections for a Canadian sought by U.S. authorities:

> Respectful though I am of the principle of comity, I ask, without answering the question, whether, as a matter of the public policy of Canada, this Court should lend its aid by granting the order sought here to the prosecution of such claims against Canadian citizens. Are such statutes, applied by the United State courts against foreigners, an unacceptable end run around the public policy of the *Extradition Act*, R.S.C. 1985, c.E223? (p. 198)

Therefore, Defender reasoned, perhaps the potential "end run" around *M.L.A.T.* is a third, and stand-alone, basis that justifies a stay of proceedings against Earnings. After all, in *Global Securities v. B.C.S.C.*, Unreported, B.C.C.A., No. CA23347, Decision released July 6, 1998, the B.C. Court of Appeal declared s. 141(1)(b) of the *B.C. Securities Act* of no force and effect as ultra vires the provincial legislature because, inter alia, it and a Memorandum of Understanding between the B.C.S.C. and the U.S. SEC purported to pre-empt and substitute s. 141(1)(b) procedures for *Evidence Act* s. 53 letters rogatory procedures.

In addition, Earnings' case closely parallels issues that arose in *Gillis* v. *Eagleson* (1995), 23 O.R. (3d) 164 (Gen.Div.) the only other Canadian authority to address this issue. Eagleson, a defendant to a civil action in Ontario for breach of fiduciary duty, brought a motion for a stay of proceedings pending the final determination of criminal proceedings against him in the United States. Mr. Justice Lang reviewed the authorities, both pre and post-*Charter*, and concluded that applications for a stay of civil proceedings in Canada based upon parallel criminal proceedings in Canada are "routinely refused" because the civil defendant will enjoy, in the criminal proceedings, all of the protections available under the *Canada Evidence Act* and the *Charter of Rights and Freedoms*. His Lordship then reviewed the expert evidence as to U.S. law in that case which was to the effect that: (a) the protection of Canadian law would not be available to Eagleson in the United States; and (b) by giving evidence or producing documents in the Canadian proceedings, Eagleson would waive his Fifth Amendment rights. His Lordship found that there was a real risk that evidence produced in the civil proceedings would filter into the U.S. criminal prosecution, exposing Eagleson to a specific prejudice within the meaning of *Stickney*.

Defender conducted further research and found that in *U.S. v. Balsys*, a decision of the United States Supreme Court, No: 97-873, released June 25, 1998, after Henderson J.'s decision, albeit on obverse facts, that Court demonstrated that it would be entirely unsympathetic to the suggestion that the Fifth Amendment would operate to exclude evidence obtained in a foreign jurisdiction.

Defender is further encouraged to discover that in a series of three judgements in the *National Financial Services* case, CA024344/46/49/50, February 6, April 30, and September 11, 1998, Madam Justice Rowles granted leave to appeal from Henderson J.'s ruling and entered an interim stay of all proceedings including the provision of the Statement of Defence, discovery of documents and persons, and even the discovery of Earnings as a Director of Earnings Corporation, pending the hearing of an appeal from Henderson J.'s ruling . That appeal is now scheduled for November 9-10, 1999.

Again, given the uncertain status of the law, Defender is delighted that Earnings can afford to litigate.

III. FAMILY LAW PROCEEDINGS

While Earnings is contesting the claims of Willma and Sid and trying to protect his right to be free from self-incrimination, Digger reads about his woes in the press and (thinking the timing is right) consults her own family law lawyer about whether or not she can advance a claim for "child support" under the newly enacted *Federal Child Support Guidelines* notwithstanding that both children of their marriage have reached the age of majority under B.C. law. When Earnings is served with Digger's Petition, things really heat up in Defender's office.

Although Earnings is fully prepared to voluntarily support his son's post-secondary education he believes that these Federal "regulations" deprive him of fundamental liberty to make decisions about whether and upon what terms to provide his adult children with support to pursue post-secondary education and his right to equality to the extent that married parents are not compelled by the State to provide such support. Accordingly, Earnings wants the answer to two specific questions:

(i) Do s. 2(1)(b) of the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp.) and the *Federal Child Support Guidelines* enacted pursuant to s. 26 of the *Divorce Act* violate s. 7 of the *Canadian Charter of Rights and Freedoms* to the extent that they interfere with a divorced parent's fundamental personal decisions as to whether to support his adult children who are pursing post-secondary education, how much support to provide, and on what terms to provide it ?

(ii) Do s. 2(1)(b) of the *Divorce Act* and the *Federal Child Support Guidelines* enacted pursuant to s. 26 of the *Divorce Act* violate s. 15 (1) of the *Canadian Charter of Rights and Freedom* to the extent that it compels a divorced parent to provide "child support" for adult children of the marriage who are pursuing post-secondary education where married parents are not so compelled?

A. The Legislative Context

Section 2(1)(b) of the *Divorce Act* defines a "child of the marriage" as a child who "is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life" (emphasis added). In *Jackson v. Jackson* [1973] S.C.R. 205, 8 R.F.L. 172 at 181-82 the Supreme Court of Canada found that "unable, by reason of . . . other cause . . . to withdraw from their charge" includes an adult child of a marriage who is pursuing a post-secondary education.

Section 2 of the *Federal Child Support Guidelines* provides that in the case of an adult child of the marriage, the amount of "child support" to be ordered is either the amount for an under-age child or "if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child."

Earnings' intractable position is that his adult children live with Digger, and thus are in her "custody", the trigger point for a Guidelines order, only as a matter of convenience to the U.B.C. campus and that the regulations that would permit the making of a child support order in the circumstances of his case has the constitutionally impermissible effect of infringing his right to make fundamental personal decisions with respect to his Adult Children and his right to equality under the law.

B. The Charter s. 7 Liberty Interest

As with most rights, the interpretation of the liberty interest guaranteed by the *Charter* in s. 7 has evolved since the entrenchment of the *Charter*. In *Singh v. The Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, Wilson J., agreeing with the majority in the result, broadly defined the liberty interests guaranteed by s. 7 as: "The right to pursue one's goals free of governmental restraint."

The following year, in *R. v. Jones*, [1986] 2 S.C.R. 284, 28 C.C.C. (3d) 513 at 525-26 Wilson J., this time in dissent, stated that liberty is:

> The freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric – to be, in today's parlance, 'his own person' and accountable as such.

Subsequently, in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449 Wilson J., at pp. 550-51, related liberty under s. 7 to human dignity and found that it was "the right to make fundamental personal decisions without interference from the state" and that the right to liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance." Dickson C.J.C. speaking on behalf of himself and Lamer J., as he then was, preferred a narrower approach to the effect that, at page 465, "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person."

Still later, in *Rodriguez v. B.C.* (1994), [1993] 3 S.C.R. 519, 85 C.C.C. (3rd) 15 Sopinka J., on behalf of the majority of the Court, adopted the view that *Charter* s. 7 protects personal autonomy and the freedom to make decisions of fundamental personal importance "at least with respect to the right to make choices concerning ones own body" but emphasized that a section 7 assessment in this context involves a two-stage analysis, as follows, at page 60:

> Section 7 involves two stages of analysis. The first is as to the values at stake with respect to the individual. The second is concerned with possible limitations of those values when considered in conformity with fundamental justice.

In the result, although the Court found that *Code* s. 241(b) deprived Ms. Rodriguez of personal freedom, because such deprivation occurred in accord with fundamental justice, no rights violation was shown. In doing so, the Court fully developed the second-stage test that should be used in examining whether a legal limitation upon liberty violates fundamental justice.

The application of this test requires the Court to balance the interests of the State and the liberty interests of the individual. In this regard, Sopinka J. found, at p. 68:

> **Where the deprivation of the right in question does little or nothing to enhance the state's interest** (whatever it may be), **it seems to me that a breach of fundamental justice will be made out, as the individual's right will have been deprived for no valid purpose.** [Emphasis Added]

In addition, at page 69, Sopinka J. for the Court articulated what may be the essential test:

> The issue here, then, can be characterized as being whether [the law] is **arbitrary or unfair** in that it is unrelated to the state's interest in [advancing the purpose of the law] and that **it lacks a foundation in the legal tradition and societal beliefs which are said to be represented** [by the law].
> [*Language universalized*] [Emphasis Added]

Subsequently, in *B.(R) v. Children's Aid Society*, [1995] 1 S.C.R. 315, the broad interpretation of the liberty interest protected by *Charter* s. 7 initially developed by Wilson J., was adopted by four, and possibly five, members of the Supreme Court of Canada. In *B.(R.)*, Jehovah's Witness parents challenged provisions of the *Child Welfare Act* which permitted the apprehension of their children in need of blood transfusion. Although only some members of the Court found a breach of the liberty component of *Charter* s. 7, all found that such breach was not contrary to fundamental justice. Accordingly, the judgment may be of assistance in defining the scope of *Charter* s. 7 liberty interests in the context of parental rights in relation to children, albeit in *B(R)*, infant children.

Initially, at a general level, speaking for four members of the Court, La Forest J. reviewed the evolution of the *Charter* s. 7 jurisprudence to that date and defined the scope of the liberty protection , at para. 80, as follows:

> Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. **On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.** [Emphasis Added]

More specifically, La Forest J. found, at paragraph 85:

> Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. **But such intervention must be justified. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.** [emphasis added]

Finally, La Forest J. described the relationship between the separate determination of whether liberty was infringed and, if so, whether the infringement is contrary to fundamental justice, at para. 87 as follows:

> Once it is decided that the parents have a liberty interest, further balancing of parents' and children's rights should be done in the course of determining whether state interference conforms to the principles of fundamental justice, rather than when defining the scope of the liberty interest.

Although Justices Iacobucci and Major also found that the impugned child welfare provisions in *B(R)* operated in a manner not contrary to fundamental justice, they, at paragraph 212 to 222, specifically left open for another day the final determination of the scope of the *Charter* s. 7 liberty protection. In essence, Justices Iacobucci and Major were at pains not to unduly restrict the Court's *parens patriae* jurisdiction. Both implicitly and explicitly the Iacobucci and Major decision does not preclude a liberty violation finding where parental liberty is violated as a result of laws without valid legislative purpose. Finally, Justice Sopinka also dismissed the appeal because, whatever the scope of the liberty guarantee, he found the impugned provisions did not violate fundamental justice.

Thus the combined effect of the majority analysis of "fundamental justice" in *Rodriguez* and the emerging analysis of "liberty" in *B.(R.) v. CAS* constitutes the established jurisprudence, such as it is, interpreting *Charter* s. 7.

In Earnings' view, if Digger succeeds in her child support claim for the Adult Children of his marriage, his decision-making with respect to a significant area of his life will have been taken away from him.

Defender will submit that Earnings' decision-making in relation to the funding of the post-secondary education of his Adult Children involves not only decisions about how to manage finances, but more importantly, decisions that implicate Earnings' philosophical and moral choices with respect to the way in which he will deal with his Adult Children--who, in every other area of the law, are recognized as separate, independent persons: *Age of Majority Act,* R.S.B.C. 1996, c. 7.

Defender will submit that the blunt effect of section 2(1)(b) of the *Divorce Act* and the Federal Guidelines is to prevent Earnings from making the following fundamental personal decisions with respect to both himself and his Adult Children:

- Should he pay entirely for his Adult Children's post-secondary education or should he require his Adult Children to support themselves, with all of the effects of this requirement, wholly or partially, through part-time work? This decision involves Earnings' views about the benefits that his Adult Children might receive from working and earning money, as independent persons, in order to advance their educational interests.

- If he elects to entirely pay for his Adult Children's post-secondary education what are the limits? What is in the best interests of the Adult Children ? Funding for one degree? Two ? For what types of courses? Should academic performance conditions be imposed? These decisions involve Earnings' views about the benefits that his Adult Children might receive from having the opportunity to evaluate the importance of education and to make, as adults, critical choices about their own futures.

- The effects of the regulations extend beyond mandatory payment of adult child education expenses. In order to ensure inter-child equity, for example, if only one of two children wishes or is able to go to university, or pursues only one, rather than two degrees, will not a "fair" parent be required to provide assistance to the other in the form of a loan to start a small business or for a down payment on a first home? These decisions involve considerations of the distribution of equities between adult children, considerations that are uniquely personal and parental and in which the state—at least in the case of healthy, presumptively self-sufficient adult children—has no valid legislative interest.

In the end, applying the legal framework outlined above, Defender will submit that as the general law does not require married parents to financially support their Adult Children's post-secondary education the impugned regulations violate Earnings' liberty interest to make these intensely personal and important decisions free from state coercion. In addition, Defender will submit that as the State has no valid legislative interest in requiring either married or divorced parents to support the post-secondary education of their Adult Children, and as the Guidelines operate arbitrarily and unfairly, they do so contrary to fundamental justice and thus, violate *Charter* s. 7.

C. The Charter s. 15 Equality Guarantee

Like its *Charter* s. 7 jurisprudence, the Supreme Court of Canada's analysis of the equality rights protected by s. 15 of the *Charter* has evolved and has been clarified very substantially since *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. The evolution of this jurisprudence most apt to Earnings' problem is reflected in two recent and pivotal decisions: *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Vriend v. Alberta* [1998] 1 SCR 493 (S.C.C.).

In *Miron*, McLachlin J., speaking for the majority of the Court, found that the exclusion of unmarried partners from accident benefits under policies of insurance, available to married partners, violates s. 15(1) of the *Charter*. In doing so, the Supreme Court found that the denial of the equal benefit of the law on the basis of marital status results in prohibited discrimination on the basis that marital status constitutes an analogous ground within the meaning of the Court's *Charter* s. 15 jurisprudence. The Court found that the distinction created between married and unmarried persons constitutes discrimination because it violated fundamental human rights, effected an historically disadvantaged group and distinguished between persons upon the basis of personal immutable characteristics.

Thus *Miron* represents an abandonment by the Court of the rigid *Andrews* and progeny requirement that only distinctions based upon s. 15(1) enumerated or **strictly** analogous grounds be shown. A detailed analysis of the majority opinion in *Miron* informs the analytic framework for the assessment of the issues raised in Earnings' case.

At paragraph 128, McLachlin J. summarized the analysis to be applied in equality litigation:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presume group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the Charter.

The Purpose of Charter s. 15

It appears that *Miron* represents a watershed in the Court's purposive approach to *Charter* s. 15. In the words of McLachlin J. at para. 131, on behalf of the majority of the Court:

> Enumerated and analogous grounds serve as a filter to separate trivial inequities from those worthy of constitutional protection. They reflect the overarching purpose of the equality guarantee in the Charter – to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens **through the stereotypical application of presumed group characteristics** rather than on the basis of individual merit, capacity or circumstance. [Emphasis added]

The role of the enumerated and analogous grounds criteria are, therefore, at para. 132:

> ...ready indicators of discrimination because distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics.

They are merely indicators because even legal distinctions based upon enumerated and analogous grounds may not necessarily result in discrimination, at para. 132, if they do not:

> ...have the effect of imposing a real disadvantage in the social and political context of the claim....

Accordingly, in McLachlin's words, at para. 134, in contrast to the approach of the minority of the Court:

> In approaching the concept of relevance within s. 15(1), great care must be taken in characterizing the functional values of the legislation.

And, if focus upon the relevance of the distinction created to the legislative goal is not overarching then the critical task, also at para. 134, is:

> ...to examine **the actual impact of the distinction on members of the targeted group.** This, as I understand it, is the lesson of the early decisions of this Court under s. 15(1). The focus of the s. 15(1) analysis must remain fixed on the purpose of the equality guarantees which is **to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.** [Emphasis Added]

Without belaboring the point, Defender will submit that the essential task in this field was summed up by McLachlin J. at para. 136, as follows:

> ...if we are not to undermine the promise of equality in s. 15(1) of the Charter, **we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate.** [Emphasis Added]

Defender will submit that there is no apparent valid legislative purpose underpinning the impugned regulations. As discussed, infra, the onus is on the government as the defender of the regulations to demonstrate the valid legislative purpose animating the legislation, if any. Defender will argue that if any facial purpose underlies the impugned regulations such purpose appears to be based upon a stereotypical presumption that divorced parents will not act ethically in relation to the financial support of their Adult Children's post-secondary education. The absence of valid legislative purpose is illustrated by virtue of the fact that there is neither any legal requirement upon married parents to support their adult children nor any generally accepted societal or ethical standard applicable to parents in this field. Indeed, the contrary is the case. Defender will argue that the consensus of our society is that parents of Adult Children are free to make these decisions pursuant to the dictates of their own conscience and circumstances.

Equality Step 1 – Denial of Equal Benefit / Protection

Defender will submit that the impugned regulations therefore deny divorced or divorcing parents the freedom to make decisions about whether or not to provide financial support, and upon what terms, for the secondary education of their Adult Children notwithstanding that married parents are free to make such decisions. Thus, denial of equality on the basis of marital status is established. As the denial of equality is direct, no question of indirect discrimination, as a result of the effect of the legislation, as opposed to its facial wording, arises.

Equality Step 2 - Is Marital Status an Analogous Ground and if so Is the Distinction on the basis of Marital Status discriminatory?

Miron has established that marital status constitutes an analogous ground and Defender will adopt Madam Justice McLachlin's analysis to this effect, at paragraphs 143 through 157. One aspect of Madam Justice McLachlin's analysis was that unmarried "spouses" have suffered historical discrimination. It should be noted that on this point the minority in *Miron*, which was of the view that laws which distinguish between married and unmarried spouses did not have discriminatory effect, nonetheless opined, para. 91,

> The subgroups within the ground of marital status that have typically suffered the most historical disadvantage and marginalization are individuals who are single parents, **or are divorced or separated**. [Emphasis Added]

The majority in *Miron* moved beyond an assessment of indicators which suggest analogous grounds to a larger, more functional test, at para. 149:

> All these and more may be indicators of analogous grounds, but **the unifying principle is larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group** rather than the true capacity, worth or circumstances of the individual. [Emphasis Added]

Although Defender will submit that *Miron* is governing, for the assistance of the Court and for the purposes of completeness, she will also refer to the Supreme Court's recent decision in *Vriend*. In that case, the Court found that the Alberta legislature's under-inclusive *Individual Rights Protection Act* which failed to protect against discrimination based upon sexual orientation breached *Charter* s. 15(1). *Vriend* follows the *Miron* approach and completes the Court's shift from a focus upon single determinative characteristics to uncovering and understanding the negative impacts that the legislative distinction in question has upon the effected group or individual.

Again, applying the legal framework outlined above to Earnings' case, Defender will submit that as the general law does not require married parents to financially support their Adult Children's post-secondary education the impugned regulations violate his right to equality in making these intensely personal and important decisions free from state coercion. In addition, Defender will also submit that as the State has no valid legislative interest in requiring either married or divorced parents to unconditionally support the post-secondary education of their Adult Children, the Guidelines operate arbitrarily and unfairly. Finally, as the Guidelines effect these purposes upon the basis of stereotyped preconceptions about the attributed characteristics of a group they violate Earnings' human dignity and freedom in a discriminatory manner and thus violate *Charter* s. 15.

Finally, Defender will refer to the only case to explicitly consider the constitutional issues raised by Earnings' case, *Michie v Michie*, [1997] S.J. No. 668 (Sask. Q.B.), wherein McIntyre J. considered the applicability of the guidelines to Adult Children and found that they violated *Charter* s. 15(1) but were justifiable under *Charter* s. 1. Defender will adopt the first aspect of the *Michie* decision and make supplementary decisions regarding *Charter* s. 1.

Charter s. 1 - Onus of Proof

Oakes and its s. 1 progeny, including *Miron*, have repeatedly reiterated that the onus of proof to demonstrate that legislation that is violative of the *Charter* is demonstrably justifiable in a free and democratic society rests firmly upon the government defender of the violative legislation. The standard of proof under s. 1 is proof by a preponderance of probability. Given that the government is invoking s. 1 for the purpose of justifying a violation of constitutional rights that the *Charter* was designed to protect a very high degree of probability "commensurate with the occasion" is required. The evidence must be "cogent and persuasive and make clear to the Court the consequence of imposing or not imposing the limit".

One of the critical questions facing the Court in the proceedings involving Earnings will entail the identification of the legislative goal of the impugned regulations. In the words of McLachlin J. in *Miron* at para. 164:

> Examination of the goal of the legislation is vital in discrimination cases as elsewhere. Sometimes the legislative goal is apparent on the face of the legislation. Other times it may not be. Legislation aimed at affecting a less than worthy goal may be cloaked in the rhetoric of justice and reason. The task of the court in every case is to identify the functional values underlying the law.

Defender's position will be that the impugned regulations have no valid legislative purpose. On the contrary, if any legislative purpose is apparent it is a discriminatory purpose based upon stereotypical presumption.

Charter s. 1 - Legislative Objective

Defender will submit that the correct issues involved in the Court's first step *Charter* s. 1 analysis - assessment of the legislative objective of the Guidelines - includes questions such as, inter alia:

- What evidence is there in support of the government's claim that this discriminatory legislation advances a valid, pressing and substantial state interest ?
- What social policy supports the assertion that adult children, as distinct from infant children, are to be protected from the adverse effects of their parent's divorce? If such a policy exists why shouldn't adult children be protected from the adverse effects of their divorced parent's investment decisions, capital expenditure decisions, etc.?
- What are the economic impacts of divorce upon adult, as opposed to infant, children?
- Does the evidence presented support the assertion that adult children need to be protected from the proven adverse effects, if any, of their parent's divorce ?
- If there is some proven adverse effect how long and under what circumstances should protection prevail? How many university degrees are divorced parents responsible to pay for ? What types of educational pursuits qualify for support ? Can a 28 year old, 37 year old or 45 year old child of divorced parents return to the residence of one parent thus triggering the right of one parent to claim support under the Guidelines and the obligation of the other parent to pay ?

Charter s. 1 - Rational Connection

Again, Defender will submit that the correct issues for the Court's assessment fulcrum around the fact that adult children of married parents are not entitled in law to financial assistance from their married parents and "might" or "might not" receive financial assistance to pursue secondary education. Accordingly, the correct issues in this branch arise as follows:

- Married parents of adult children may or may not choose to provide financial assistance to their "grown up" and legally independent adult children. (*NOTE*: even the pre-Guidelines post-*Jackson* common law imposed limits see: *Bamford v. Bamford*, (1986) 1 R.F.L. (3d) 145)
- Whether and to what extent to provide financial support to adult children are intensely personal parental decisions: To pay for secondary education or let the adult child experience and learn from "the real world" for themselves is the prototypical issue. Other illustrations are trite but equally important: To provide financial assistance for a first home down payment ? To make an inheritance "advance" to start a small business for children who do not pursue secondary education?
- Why should adult children of divorced parents be treated any differently ?

- If there is some vague suggestion that adult children of divorced parents should be able to obtain financial assistance from their parents, does this justify discriminatory laws ?
- The *Age of Majority Act* intersects with a variety of other legislation to uncouple children from parents and to give children who reach the age of majority and become adults full legal personality and independence. Are all of the social policies and principles inherent in this regime upset merely because the parents of adult children elect to no longer maintain the state of marriage from which these adult children have emerged ?

Charter s. 1 - Minimal Impairment

In the second branch of the proportionality test - minimal impairment – Defender knows that Digger's lawyer will rely upon the Guidelines s. 3(2)(b) judicial discretion as to quantum in satisfaction of this branch.

Again, Defender will submit that the correct issues for analysis in this branch are:

- If divorced parents are to be required to pay for the education of their adult children, why is the non-custodial parent the only parent required to pay ? (And see: *Bamford* at p. 147)
- What does "custody" in this context mean? Of course the general law is that neither a person who has reached the age of majority, nor his estate, can be in the "custody" of another unless pursuant to the provisions of the *Patient Estate Act*.
- Why are the payments required to be made to the custodial spouse (a profoundly tax-ineffective conduit) rather than directly to the adult child ?
- If payments are to be made to the custodial parent why is there no requirement that the funds paid be actually used for the benefit of the adult child ?
- Is it the intent of the Guidelines to upset the statutory protections governing the assets of children set out in the *Trustee Act* and the *Infants Act* ?
- How are inter-child equities addressed ? etc.

Charter s. 1 - Balancing

In the third branch of the proportionality test, Defender will point out that married parents have no legal obligation to pay for the secondary education of their adult children.

Accordingly, Defender will submit that the correct issues for the Court's assessment in this branch are:

- Married parents are entitled to decide whether to provide their children with financial support in their pursuit of post-secondary education. If they elect to do so, married parents are entitled to require their children to agree to certain conditions before financial assistance is given (work to match ? academic performance conditions? - terms with which we are all familiar as parents - do we not all intuitively know that adult children who are given too much too easily often become "spoiled" - even in adulthood).
- Married parents are entitled to attempt to treat their children who attend secondary education and those who do not equally. Why are divorced parents deprived of this right?
- Why should divorced parents be deprived of the right to make these fundamental personal decisions?

Defender might well conclude her submissions by referring to expert polling evidence that she had obtained in a properly structured opinion poll that asked the following question: "should the government impose a law requiring parents to unconditionally fund the secondary education of their adult children ?" to show that the answer was a resounding 99.9% "no". The government of Canada provides a variety of incentives to parents to encourage them to assist their adult children in their educational endeavours. The recently enacted expansion of the RESP program and grants associated therewith illustrate valid legislative incentive initiatives in this field. In the end, Defender would submit that coercive, unconditional, discriminatory laws are another matter. They are not proportionate to the unproven benefit that the Attorney General of Canada would necessarily advance by virtue of its defence of the impugned regulations.

IV. BANKRUPTCY LAW PROCEEDINGS

While litigation with Willma, Sid, and Digger proceeds apace, Earnings' primary lender, Grand Bank, which has been somewhat lax in perfecting their security documentation over the years, begins to become concerned about Earnings' solvency in the face of all of these claims and in light of the U.S. Grand Jury proceedings. Accordingly, Grand Bank applies under s. 46 of the *Bankruptcy and Insolvency Act* (hereinafter the *BIA*) for the appointment of an Interim Receiver to take control of Earnings' global assets with the intent to ultimately petition Earnings into bankruptcy in order to enhance their security.

One of the first things Grand Bank does is apply to the Bankruptcy Court for leave to examine Earnings under Rule 14 of the Bankruptcy and Insolvency General Rules in order to find out how extensive Earnings' potential civil liabilities may be in order to attempt to prove their *BIA* s. 42(1)(j) allegation that Earnings may have ceased to meet his liabilities generally as they become due. Obviously, Earnings is in shock and demands to know from Defender whether or not he can be subjected to pre-receiving order discovery by either Grand Bank or the Interim Receiver.

A. The Common Law No Discovery of the Debtor Rule

On April 22, 1910 in a case called *In Re Debtor* (No. 7 of 1910) 79 KB 59 (C.A.) the entire English Court of Appeal sat to consider whether to grant leave to petitioning creditors under an equivalent English rule to examine a debtor in support of a petition for receiving order. Speaking for himself and others, Vaughan Williams, L.J. said at page 1068:

> I can only say that, according to the Rules of the Supreme Court, as a rule, no order at that stage could be made, and, in my opinion, it is of the utmost importance to consider that, in the sections of the Bankruptcy Act and in the Bankruptcy Rules, it is always recognized that anything in the nature of discovery, and anything in the nature of examination of the bankrupt, is something which must take place, not before the receiving order is made, as in this case, but after the receiving order is made.

Joining him, Lord Fletcher Moulton, L.J. said at page 1069:

> Now proceedings in bankruptcy are of course not actions, but, in my opinion, what the petitioner seeks by his petition is in the highest degree penal in its consequences. It amounts to loss of civil status carrying with it grave disqualifications, and the principles, which in actions have guided the court in giving or refusing discovery in the High Court, appear to me to apply with special force to proceedings in bankruptcy, and show that we ought not here to allow either discovery or interrogatories.

Finally Lord Farwell explained at page 1070:

> Further, I agree with Lord Justice Fletcher Moulton that an adjudication of bankruptcy involves very grave disqualifications. Under section 32 of the Bankruptcy Act, 1883, a bankrupt cannot sit in the House of Lords or House of Commons, he cannot act as a Justice of the peace, he cannot be a mayor, or a guardian of the poor, or a select vestryman.

The *In Re Debtor* common law rule was considered and confirmed by Mr. Justice Holden in 1970 in Canada *Re Media-1-Stop (London Ltd.)* 1970 14 CBR 96. In British Columbia in *Zurich Indemnity Co. of Canada v. Reemark* [1992] BCJ, No. 2902, on an application for leave to appeal, Madam Justice Southin held at paragraph 16:

> What underlies this principle is the notion that bankruptcy proceedings are quasi-criminal in nature. While that notion made a good deal of sense in the days when personal bankruptcy was considered a disgrace and brought with it many civil disabilities, such as being "hammered" on the London Stock Exchange if the bankrupt were a member of the Exchange, in these days when, so it seems, only a few holdovers from the past such as myself consider bankruptcy disgraceful, the principle seems to have lost its foundation. Sir Walter Scott is rarely emulated.

Continuing at paragraph 18, Her Ladyship held:

> However, I consider it would not be appropriate for a single judge to say that the principle should be swept away when, as recently as 1970, Mr. Justice Houlden, an acknowledged master of the law of bankruptcy, re-affirmed it.

Defender was driven to wonder whether or not the *Charter* informed the question of the correctness of this common law "no pre-receiving order discovery" rule. She knew that the Supreme Court of Canada's decision in *Slaight Communications v. Davidson* [1989] 1 SCR 1038 directed that Courts should construe legislation and the common law in a manner consistent with the *Charter*.

B. The Constitutional Characterization of the Bankruptcy Act

Defender knew that her first task was to properly characterize, in constitutional terms, the nature and effect of the making of a receiving order. She turned to the architecture of the *BIA* and discovered that the *B.I.A.*, by s. 70-74, strips the citizen who is made the subject of a receiving order of many important civil rights including the right to the ownership of property, the right of independent access to the Courts and compels various duties, pursuant to s. 158, that are far more extensive than would be contained in any criminal post-conviction probation order.

Federal legislation compounds these direct effects with various additional disqualifications including prohibiting someone with the status of a bankrupt from incorporating or acting as the director of a company. Provincial legislation effects further economic, professional and civil disabilities including the dissolution of any partnership of which the bankrupt is a member. At common law, even solicitor-client confidentiality is stripped away: *Re: Chilcott and Clarkson Co.* [1984] 48 OR (2d) 545 (Ont.C.A.). Defender concluded that the legal and stigmatizing effects of being involuntarily petitioned into bankruptcy are not a matter of mere subjective social impression, as some cases have suggested, but rather, instead, operate by virtue of statute.

In *Re: McDonnell* (1995) 33 CBR (3d) 75 Madam Justice Allan of the B.C. Supreme Court described the nature of bankruptcy proceedings in this way, at para. 10:

> Bankruptcy proceedings are penal in nature and creditors who seek to take advantage of them must comply strictly with the statute.

In doing so, Her Ladyship adopted the words of Henry J. in *Re Holmes*:

> Under the jurisprudence – [the Act] being a quasi-criminal statute – the act of bankruptcy and every allegation in the petition must be strictly proved.

For those reasons, Madam Justice Allan found, at para. 8:

> The petitioning creditor is required to adhere to a stricter standard of proof than the plaintiff in civil litigation with respect to those elements which are essential to found the receiving order.

And at paragraph 9:

> Unlike pleadings in a statement of claim in a civil action, the allegations in a petition for a receiving order must be specific and supported. Section 43(3) of the Act requires the petition to be verified by the "affidavit of the petitioner or by someone duly authorized on his behalf having person knowledge of the facts alleged in the petition".

C. The B.I.A. *Charter* Jurisprudence to Date

There does not appear to be any post-*Charter* jurisprudence interpreting and applying the common law "no discovery of the debtor" principle. All of the cases to date in which the *Charter* was considered deal with challenges to the explicit statutory compulsion powers of a trustee under *BIA* s. 161-164, or the Superintendent under *BIA* s. 10, after the making of a receiving order. These decisions are referred to here for completeness only as they obviously deal with an entirely different context, to wit: the limited rights of an "adjudged" bankrupt. The constitutional characterization of the *BIA* and the putative compulsion and subpoena duces tecum powers of petitioning creditor or an interim receiver, prior to the entry of a receiving order, appear to be questions of first impression.

In an early decision, *Re Bookman* [1984] CBR 267 (Ont.CA), Sutherland J. considered whether or not then s. 133 of the B.I.A. which authorized the trustee's examination of a bankrupt was of no force and effect and concluded that it was not. Mr. Justice Kennedy considered the constitutional validity of the examination powers conferred by the B.I.A. s. 163 and 164 in *Re Leard* [1993] OJ No. 3242 (Ont. Gen Div). On an application for leave to appeal to the Ontario Court of Appeal in *Leard* Madam Justice Weiler dismissed on the basis that *Tabah* suggested that inspections may be constitutionally valid in a post-receiving order context. In *R. v. Ezzeddine* [1996] 6 WWR 684 (Alta. Q.B.) Mr. Justice Dea reviewed the jurisprudence in the context of a challenge to a trustee's power of inspection in relation to a bankrupt. Significantly Mr. Justice Dea considered the balance of interests from the perspective of a citizen who had affected a voluntary assignment into bankruptcy and thus had voluntarily brought himself within constitutional licensing theory (see para. 54) and had triggered his own reduced expectation of privacy as a result of his own act assignment, and thus, had effectively waived his privacy rights (see para. 63).

Accordingly, Defender will submit that the constitutional assessment is radically different where a private litigant applies to the Court for an order declaring a citizen to be bankrupt and thus necessarily seeks a judicial order that the citizen be stripped of his civil, economic and political rights as described above.

In this context, post-*Charter*, Defender will submit that the values reflected in Mr. Justice Holden's decision in *Media-1-Stop* have indeed continued to shift but contrary to the suggestion in *Zurich*, against self-incrimination not in its favour: *R. v. Hebert* [1990] 2 SCR 151, *R. v. Chambers* [1990] 2 SCR 1293, *R. v. S. (R.J.)* [1995] 1 SCR 451, *B.C. Securities Commission v. Branch* [1995] 2 SCR 3. In sum, Defender will submit that the common law "no discovery of the debtor" rule has been confirmed and, indeed, perhaps even constitutionalized by the *Charter*.

V. SECURITIES ACT PROCEEDINGS

Unfortunately for Earnings, after Sid's Canadian civil action was stayed, Sid decided to expand the ambit of his attack against his former employer. He visited Patricia Roberts, a staff investigator at the B.C. Securities Commission and in a recorded deposition alleged that Earnings had been involved in wash trading the stock of Earnings Corporation for many years.

A. Securities Act s. 144 – Subpoenas to a Target

With this evidence in hand, Patricia applied to the Securities Commission which issued an Investigation Order pursuant to s. 142 of the *Securities Act* directing her to inquire into the affairs of Earnings and Earnings Corporation.

The Investigation Order further provided that *"...without limiting the generality of the foregoing..."* Patricia was also authorized to investigate *"...such further matters as may be properly incidental to the foregoing investigation*". Pursuant to the Investigation Order, Patricia served a summons upon Earnings to attend her offices to give evidence.

Earnings hotly denied to Defender that he had ever been involved in any market manipulation of any kind and demanded that Defender answer this question:

> Are ss. 8(1), 142, 143, and 144 of the *Securities Act,* S.B.C. 1985, c. 83 of no force and effect, pursuant to *the Constitution Act*, 1982, s. 52 for inconsistency with the *Canadian Charter of Rights and Freedoms*, s. 7 and 8 in that the said provisions violate the right to privacy by purporting to compel the disclosure of private information and documents:
>
> (i) without any limiting requirement of relevancy;
> (ii) without minimization of the violation of the constitutional right to privacy to only that information and those documents necessary to achieve the object of the statutory scheme created by the *Securities Act;*
> (iii) without minimizing the extent to which the information obtained for the purposes of the *Securities Act* may be distributed to third parties, including other state agencies.

Defender reasoned that the combined effect of Sections 142, 143 and 144 is to empower a Securities Commission investigator to compel a person to attend before her and to answer any questions and produce any documents relating to the matters enumerated in Section 142(1)(a) through (e). No limitations are placed on the investigator's power and there is no statutory restriction concerning the matters upon which the person may be questioned and compelled to answer or upon the documents, records or other like material that the person may be compelled to produce. In short, Defender reasoned, as there is nothing in the language of Sections 142 and 143 that restricts the ability of the Commission to intrude upon an individual's privacy interests, and thus perhaps, even post-*Branch*, a further attack upon s. 144 of the *Securities Act* remained available to Earnings.

After conducting further research, Defender discovered that Mr. Justice MacKinnon had assessed these questions in *British Columbia Securities Commission v. Stallwood* (1995) 7 BCLR 3rd 339 but had upheld the legislation. Again, Defender discovered that an application for leave to appeal had been taken to the British Columbia Court of Appeal. In that application, Rowles, J.A. had granted leave to appeal (CA020612, Feb 22, 1996) from the decision of McKinnon, J. but had refused an interim stay of the subpoena. Defender dug deeper and discovered from counsel involved that the appeal in *Stallwood* had not proceeded only because the targets had settled with the Securities Commission.

Buoyed by this development, Defender advised Earnings to take a similar objection.

B. Securities Act s. 144 – Subpoenas to Third Parties

Having been deflected by Earnings' personal objection, Patricia issued a summons to Earnings' senior external accountant, Dalton Conservative, who had long counseled Defender in his market activities. Defender also discovered that Patricia was conducting her investigation hand in hand with the local RCMP as well as the Louisiana U.S. District Attorney. Earnings demanded that Defender advise him as to whether or not a regulatory investigative power could be used to covertly advance a criminal investigation.

When Dalton refused to respond to the summons on the basis that it was animated by a predominant criminal investigative purpose, he also retained Defender to resist the Securities Commission contempt application and to apply to the Court for an order requiring the Securities Commission to disclose files in order to permit Dalton to demonstrate the true purpose of the summons in order to claim compulsion exemption within the meaning of *Branch*.

In applying for disclosure, Defender argued that the Commission's application made pursuant to the *B.C.S. Act* s. 144(2) to cite Dalton for contempt threatened his present liberty interest such that *Charter* s. 7 is engaged. In *B.C.S. Commission v. Branch* (1995) 2 SCR 1, at page 26, Justices Sopinka and Iacobucci made clear that:

> **The liberty interest is engaged at the point of testimonial compulsion**. Once it is engaged, the investigation then becomes whether or not there has been a deprivation of this interest in accordance with the principles of fundamental justice.
> [Emphasis Added]

Madam Justice L'Heureux Dube expanded, at page 45, as follows:

> **At this stage, the possibility of imprisonment flowing from a failure to testify is sufficient to trigger s. 7 protection.** Where the witness can demonstrate at that time that, under the circumstances, it would be fundamentally unfair to require that he testify at all, then the principles of fundamental justice under s. 7 require that he not be compellable.
> [Emphasis Added]

In *R. v. S (RJ)* [1995} 1 SCR 451 Sopinka, J. described that a citizen is entitled to exemption from compulsion, as a principle of fundamental justice, if it can be shown that the prejudice to the citizen's interest overbears the state interest in obtaining evidence. In *Branch*, a more united Court, in the specific context of a *Securities Act* summons, confirmed this aspect of *S* and held that a citizen in Dalton's circumstances is simply not compellable if the predominant purpose of the compulsion is criminal investigative.

Defender acknowledged that *on the facts as shown in Branch*, there was no evidence to demonstrate that the Securities Commission's predominant purpose was criminal investigative as emphasized by Justices Sopinka and Iacobucci at page 28:

> More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch and Levitt.

Acknowledging that *Branch* required that Dalton bore the burden of proof, in the first instance, to demonstrate the Commission's predominant purpose, Defender argued that the Commission could not both prosecute Dalton for contempt and refuse to make disclosure of materials that would enable him to discharge the burden imposed upon him to demonstrate that he had not committed the actus reus of contempt because he was not compellable.

In making this argument Dalton relied upon a decision of Mr. Justice Oppal in *Gmur et. al.v. B.C.S.C.*, Vancouver Registry A973382, Aug 6, 1988, leave to appeal granted CA025027, Feb 23, 1999, Huddart, J.A., wherein Oppal, J. ordered disclosure "to Wiebe of all Commission files relating to its investigation of Wiebe" on the basis that:

> I am persuaded that in spite of the provisions and the objectives of the Securities Act, and in spite of the fact that the Commission is entitled to pursue investigations wherein there are violations of the provincial statute, that the predominant purpose of these proceedings is criminal. I have come to that conclusion for the following reasons. There is ample evidence here to conclude that the joint investigation between the Commission and the RCMP was conducted, not only for the purpose of determining a violation of the Securities Act, but also to further a criminal investigation, not only in this country, but to assist the American authorities in their investigation. The fact that the police are involved does not in and of itself make these proceedings criminal in nature, but one must examine the whole of the circumstances.
>
> It is apparent that the objective of this investigation is not only to determine whether there have been violations of the provincial statute, but whether criminal laws have been violated. Clearly, the convening of a grand jury in the United States is a compelling factor. No assurances have been given that the derivative evidence will not be used in those proceedings. In fact, I doubt very much whether such assurance can be given.
>
> Moreover, it is not shown that the disclosure of the materials sought in this case would result in any prejudice to the conduct of the investigation by the Securities Commission.

In granting leave to appeal and a stay of the disclosure order, Huddart, J.A. held, at para. 10-12:

> For the Commission , the issue is whether it can cooperate with the police or foreign authorities without compromising its investigation. ...
>
> For Mr. Wiebe, the issue is whether he is entitled to disclosure to assist him in establishing his entitlement to an exemption from the compulsion to attend and answer questions and produce documents in circumstances where he has been able to establish to the satisfaction of the chambers judge a prima facie case that the predominant purpose of the Commission in questioning him is to obtain evidence that will incriminate him in criminal activity.

> In my view, the appreciation and application of the predominant purpose test in the regulatory context is a question of sufficient importance to justify the granting of leave.

C. Securities Act s. 143(3) – Search Warrants

Frustrated by Dalton's objection to compulsion and application for disclosure Patricia turned to s. 143(3) of the *Securities Act* and applied to a Supreme Court judge for the issuance of a *Securities Act* search warrant for the offices of Earnings Corporation.

Unfortunately for Patricia, Defender had been thinking about the general validity of the *Securities Act* compulsion and search powers and, immediately after the search warrant had been executed, applied on behalf of Earnings Corporation for an order declaring s. 143(3) of the *Act* of no force and effect and for an order impounding the product of the search warrant pending the determination of the challenge.

Defender based her application upon a decision of Madam Justice Dillon in *Mitton and Wiebe v. Her Majesty*, Vancouver Registry : BL0064, October 23, 1997 wherein Her Ladyship had granted such an order for these essential reasons, at para. 9:

> Dealing with, then, the essence of the question of law to be tried, the applicants will assert that s. 143(3) of the *Securities Act* is unconstitutional because it does not meet the test set out in *Hunter et al. v. Southam Inc.* (1984) 14 CCC (3d) 97 that requires reasonable and probable grounds to believe that an offence had been committed. Secondly, the section is contrary to s. 8 of the Charter of Rights and Freedoms because the section says that "there may be anything that may reasonably relate to an order made under s. 142", which reference to the word "may" is argued to be a very low standard that validates the intrusion on the basis of suspicion and authorizes a fishing expedition contrary to *Hunter v. Southam, supra.*

Fortunately, shortly after the Earnings Corporation search impoundment order was made, Sid admitted to Patricia that his allegations were totally false and the Securities Commission investigation was dropped.

VI. ABUSE OF STATUTORY AUTHORITY - COSTS

With this development, Sid's civil action and the Grand Jury proceedings were also dismissed. Unfortunately for Earnings, however, Hank Collector, an eager Revenue Canada Special Investigations Officer, had learned of Sid's and the Securities Commission's actions, made demands for information upon Earnings under the *Income Tax Act*, s. 231.1, (while holding himself out as a mere agent of Revenue Canada's civil audit division), obtained Warrants based upon these invalid demands and laid tax evasion charges against Earnings three years into this saga.

Defender successfully defended the criminal charges by demonstrating that Hank had abused the civil audit power and has obtained an exclusion of all evidence and a stay of proceedings order based upon a line of cases commencing with *R. v.* Roberts [1991] 95 Nfld. & PEIR and 301 APR 49; *R. v. Jarvis* (1997) 195 A.R. 251 (Alta Prov. Crt); *R. v. N*orway *Insulation* 95 DTC 5328 (Ont. C.J. (Gen Div)); *R. v. Warawa* 98 DTC 6471 (Alta. Prov. Crt.); *R. v. Roberts & Viccars*, Vancouver Prov. Registry: 17195-01, Dec 18, 1998 as now all confirmed by the Supreme Court of Canada in *MNR v. Del Zotto*, S.C.C. File: 26174, Jan 21, 1999.

Stinchcombe disclosure made during the tax evasion prosecution had demonstrated that Hank knew that Sid had fabricated his allegations when he applied for the Search Warrants and laid the charges. Indeed, after Crown charge approval files were ordered produced pursuant to *R. v. Gray*, (1992) 74 CCC (3d) 267, aff'd (1993) 79 CCC (3d) 332 (BCCA), application for leave to appeal to the Supreme Court of Canada dismissed (1994) 83 CCC (3d) vi ; and *R. v. Sander* [1992] 96 D.L.R. (4th) 85 and (1993) 79 CCC (3d) 63, aff'd (1994) 90 CCC (3d) 41 (BCCA) it has become apparent that Hank filed a post-charge report to Crown wherein he admitted that he had been told by Patricia that Sid had withdrawn his allegations even before the evasion charges were laid.

Bruised, but undeterred, Earnings demands to know from Defender whether or not his criminal tax evasion trial court judge has jurisdiction under *Charter* s. 24(1) to order solicitor-client costs against the Crown in the unique facts of his case?

A complete review of the emerging jurisprudence that has established that citizens should be compensated for costs in consequence of an overreaching criminal prosecution is beyond the scope of this already lengthy paper. Suffice to say, that the Ontario Court of Appeal's exhaustive analysis of the circumstances under which a cost order is appropriate in a criminal case undertaken in *Re Regina and Powlowshi* (1993) 79 CCC (3d) 353 was accepted in British Columbia in 1994 by Mr. Justice Mecklem in *R v. Lougheed* 1994 BCJ No. 175. Subsequently, Mr. Justice Davies applied *Powlowshi* in awarding costs to the accused for non-disclosure which appeared to be the result of "deliberate editing" in *R v. Glendate*, Powell, R. No. X9218, March 26, 1996.

Solicitor-client costs thrown away as a result of non-disclosure were awarded by Richard J. in *R v. Dostager* [1994] NWTR 246.

It appears that costs orders have been made more frequently in Ontario. The directions given by Goodearth J. to Provincial Court trial judges in *R v. Jedynach* [1994] O.J. No. 29 have been applied in a variety of diverse circumstances in that Province.

Costs were awarded for non-disclosure falling short of gross negligence in *R v. Moreina* [1995] O.J. No. 104.

In another non-disclosure case *R v. McKillip* [1996] O.J. No. 2757, O'Connor J. of the Ontario General Division, ordered that substantial costs be paid to an accused as a result of "lost" court time.

Perhaps the case that provides the most guidance in the rather unique circumstances prevailing in Earnings' case is *R v. Campbell*, [1997] O.J. No. 5422. In *Campbell*, Hogan J. made an order of Solicitor-client costs against the Crown, after entering a stay of proceedings for abuse of process, in light of her findings that an accident report had been altered and that the evidence of the investigating officer was not worthy of belief.

It is significant that the Court awarded Solicitor-client costs in *Campbell* commencing from that point in time when "The Crown ought to have been taking a hard look at whether or not the prosecution should proceed".

After further research, Defender was also delighted to discover that on February 19, 1999 Mr. Justice MacKenzie of the Ontario General Division, in *R. v. Saplys*, Toronto Registry #1150/97, ordered solicitor-client costs against the Crown, with quantum yet to be determined, for a voir dire that unearthed abuse by Revenue Canada of the *Income Tax Act* s. 231.1 compulsion power.

Accordingly, Defender will invite the criminal trial court judge who presided at Earnings' tax evasion trial to order, pursuant to *Charter* s. 24(1), that the Crown should bear the responsibility for the solicitor-client cost incurred by Earnings as a result of the improvident criminal prosecution initiated by Hank.

VII. CONCLUSION

After five long years of litigation, Earnings has generally prevailed. His right to protect the privacy of his bodily fluids is still pending before the Supreme Court of Canada. Sid's suit never went to discovery. Faced with the compelling logic of his liberty and equality arguments, Digger went back to UBC and is now pursing a law degree. Without the ability to compel Earnings on an interim basis Grand Bank's petition for a Receiving Order was dismissed. The Securities Commission investigation was dropped and his tax evasion charges were stayed. Earnings proceeded with his costs application and won. That ruling was upheld on appeal. After recovering $500,000 in costs, Earnings' asset base is now a mere $40,500,000 and Earnings is looking forward to a peaceful retirement. As for Defender, she is referred to by her colleagues as the fortunate lawyer who charged her client $10,000,000 in fees over five years and still has a happy client.