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CHARTER OF RIGHTS

NEWSLETTER

Editor: David J. Martin, LL.B., of the British Columbia and Ontario Bars

FREEDOM OF ASSOCIATION

Reaffirmation of the Trilogy

The Supreme Court of Canada's decision in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* (August 16, 1990) [*090233001 - 66 pp.] ("*P.I.P.S.*") dashed any hope that labour lawyers and their union clients might have had that the s. 2(d) guarantee of freedom of association could be extended beyond the mere formation of union organizations.

The appellant institute had been the bargaining agent for a number of nurses employed by the federal government in the Northwest Territories until the nurses became employees of the territorial government. As a result of this change of employment, the nurses ceased to belong to the bargaining unit (on behalf of which the institute had been certified) and became eligible for membership in the respondent association. The association had been incorporated to bargain collectively on behalf of all non-excluded territorial employees. The institute sought incorporation as required by s. 42(1)(b) of the *Northwest Territories Public Service Act* for the purposes of representing its former members. Under s. 42(1)(b), an employees' association must be incorporated by an Act if it is to bargain collectively on behalf of its members. The territorial government declined to enact the required legislation and the institute attacked the provisions of the Act as being inconsistent with s. 2(d).

Sopinka J., for the majority, reviewed the *Reference re Public Service Employee Relations Act* (1987), 38 D.L.R. (4th) 161, [1987] 1 S.C.R. 313 ("*Alberta Reference*"), *PSAC v. Canada* (1987), 38 D.L.R. (4th) 249, [1987] 1 S.C.R. 424 and *Saskatchewan v. RWDSU, Locals 544, 496, 635 and 955* (1987), 38 D.L.R. (4th) 277, [1987] 1 S.C.R. 460 trilogy and [at p. 11] distilled and affirmed four separate propositions that emerge from those judgments:

> ... first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.

Hence, while the monopoly created by the impugned section prevents a rival union from bargaining for its members, such legislative frustration of an association's *objects* is not a violation of s. 2(d) if the restriction is not aimed at and does not affect the establishment or existence of the association — unless its activity involves another Charter-protected right or an activity that may lawfully be performed by an individual. Thus, according to the majority, the monopoly created by the legislation had no effect on the existence of the institute or the ability of any individual to be a member of it. As the activity of collective bargaining for working conditions is not constitutionally protected, incorporation for that purpose was equally unsheltered.

Cory J. in dissent (Wilson and Gonthier JJ. concurring) found that the absence of guidelines defining the exercise of the government's discretion to grant or refuse permission to incorporate the union represented a *prima facie* violation of s. 2(d). Cory J. dismissed the fact that those who formed the association may still meet without interference from the State as having no meaning if the association could not be recognized under the relevant legislation. Finding that the right of employees to join the association of their choice and their right to change their collective bargaining association were of fundamental importance, the minority concluded that the legislation was not justifiable under s. 1, as the denial of the employees' right to select their own bargaining agent in a manner contemplated in other Canadian jurisdictions could not be justified as a reasonable limit. In the minority view, although structured collective bargaining processes were valid, the scheme in question gave the government complete control over the designation of the employees' bargaining agent, thus wholly frustrating the right of the employees to associate meaningfully.

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NEWSLETTER

Editor: David J. Martin, LL.B., of the British Columbia and Ontario Bars

MENS REA: THE MINIMUM CONSTITUTIONAL STANDARD

Constructive Felony Murder Unconstitutional

The grisly assessment of the constitutionality of the constructive felony murder rule stripped away and revealed fundamental conflicts in the Supreme Court of Canada's approach to constitutional adjudication under the Charter. In a series of decisions, the Supreme Court considered the constitutionality of s. 213(a) of the *Criminal Code* [now s. 230(a)] in light of its prior decision in *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, [1987] 2 S.C.R. 636, assessed the constitutional validity of the liability of parties pursuant to s. 21(2) of the Code in light of its decision in *R. v. Ancio* (1984), 10 C.C.C. (3d) 385, 6 D.L.R. (4th) 577, [1984] 1 S.C.R. 225, and upheld the constitutionality of s. 214(5) of the Code [now s. 231(5)] which defines homicides committed during the commission of serious predicate offences as murder in the first degree.

The Court split over whether proof of subjective *mens rea* as the foundation for a conviction for murder was a constitutional requirement of fundamental justice guaranteed by s. 7 of the Charter, whether prospective opinions should be expressed with respect to analogous *Criminal Code* sections, and ultimately, whether the Court was engaged in a process of fiddling with criminal law policy. The majority judgments take a liberal approach to the hypercharged emotional question of whether constructive *mens rea* can be attached to those who have and use weapons during the commission of, or flight from, serious crime. In this controversial terrain some trial judges have said they will refuse to follow, and devise means of circumventing, the majority judgments.

The facts of *R. v. Martineau* (September 13, 1990) [*090267007 - 75pp.] disgusted the Court. Martineau and a friend, Tremblay, both set out, armed with firearms, knowing they were going to commit a crime. Martineau testified that he thought that they would only commit a break and enter. Both accused entered a residence and subdued the occupants, placing blankets over their heads and binding their hands before robbing them. Tremblay shot and killed the male householder as Martineau left the premises. Martineau said or thought, after he heard the shot which killed the first victim, "Lady say your prayers." The female householder was then also killed. At trial Martineau was convicted of second degree murder, the jury having been charged on s. 213(a) and (d) and on s. 21(1) and (2). The Alberta Court of Appeal ordered a new trial, holding that s. 213(a) was inconsistent with ss. 7 and 11(b) of the Charter, for the reasons given by the Supreme Court of Canada in *R. v. Vaillancourt, supra*, which found that s. 213(d) was of no force and effect because it removed the requirement of proof of even objective foreseeability of death.

Chief Justice Lamer, speaking for the majority (Dickson C.J.C., Wilson, Gonthier and Cory JJ. concurring), dismissed the Crown appeal and declared s. 213(a) of the Code unconstitutional because it expressly removed the Crown's burden of proving beyond a reasonable doubt that an accused had subjective foresight of death. Attempting to place the issue in context, Chief Justice Lamer emphasized that since the advent of the Charter in 1982, the Court had consistently assumed its duty to measure the content of legislation against the guarantees of the Charter designed to protect individual rights and freedoms. The Chief Justice then emphasized that the *ratio* of *Vaillancourt*, strictly speaking, was that fundamental justice requires that there must be proof beyond a reasonable doubt of at least objective foreseeability of death

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CHARTER OF RIGHTS
NEWSLETTER

Editor: David J. Martin, LL.B., of the British Columbia and Ontario Bars

SUPREME COURT OF CANADA RENEWS COMMITMENT TO PRIVACY

A New Wiretap Trilogy

In the absence of procedural rules complementing the protection of privacy provisions of Part VI of the *Criminal Code*, the Supreme Court of Canada has been forced to occupy itself considering such matters. In January, 1990, the Court held in *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, that unauthorized State-activated participant surveillance violated the s. 8 guarantee against unreasonable search and seizure (see 2 C. of R. Newsl., No. 8). More recently, in *Dersch v. Canada (Attorney General)* (November 22, 1990) [*090331009 - 23 pp.], the Court ruled that the interim secrecy provisions of s. 178.14(1)(a)(ii) of the Code interpreted in light of s. 7 of the Charter, means that an accused whose communications have been intercepted has an absolute right to inspect the affidavit material led in support of an *ex parte* application for authorization to conduct such interceptions. Though an apparently innocuous procedural matter, this issue engaged the fundamental question of the openness of court processes in a democratic society. In *Nova Scotia (Attorney General) v. MacIntyre* (1982), 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, [1982] 1 S.C.R. 175, Dickson J. (as he then was) quoted Bentham to emphasize his point respecting the importance of openness and access to court records [at p. 144]:

> "In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial."

In finding that an accused seeking access to affidavit material need not make a preliminary showing of fraud or non-disclosure, the Court in *Dersch* elected to reaffirm its commitment to openness and to reject the view of the British Columbia Court of Appeal that the constitutionally protected right to make full answer and defence did not include the "technical" right to effectively challenge the admissibility of evidence. Perhaps the most remarkable feature of the case was that this fundamental question so occupied the Court that decision was reserved for over two and a half years.

In related developments, the Court has struggled to clarify and resolve various procedural and Charter questions relating to the determination of the admissibility of wiretap evidence. In *R v. Garofoli* (November 22, 1990) [*090331004 - 94 pp.] Sopinka J., speaking for the majority, described this body of law as a "procedural quagmire".

Throughout the 1980's, trial and appellate courts alike struggled with the procedures for challenging the validity of wiretap authorizations, the appropriate editing of wiretap affidavits when released and the grounds necessary to establish leave (if so required) to cross-examine the deponents of such affidavits on applications attacking the resulting authorizations. In *R. v. Wilson* (1983), 9 C.C.C. (3d) 97, 4 D.L.R. (4th) 577, [1983] 2 S.C.R. 594, the Court determined that like applications to set aside *ex parte* orders in non-criminal cases, authorizations to intercept private communications are subject to attack on the grounds of material fraud or non-disclosure. The issue that remained to be determined was whether the admissibility of evidence obtained pursuant to an authorization made without cause resulted in substantial defect automatic exclusion pursuant to s. 178.16(1)(a) of the Code or pursuant to the administration of justice disrepute criteria of s. 24(2) of the Charter.

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