3 C. of R. Newsl., No. 7 ISSN 0838-4843 January 1991

CHARTER OF RIGHTS

NEWSLETTER

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

WHAT IS "THE GOVERNMENT?"

To "Whom" Does the Charter Apply?

The so-called "age discrimination" cases recently released by the Supreme Court of Canada are important not for what they say about equality standards, but for their impact on the determination of what agencies and organizations are subject to the terms of the Charter: *McKinney v. University of Guelph* (December 6, 1990) [*091002044 - 294 pp.]; *Stoffman v. Vancouver General Hospital* (December 6, 1990) [*091002047 - 120 pp.]; *Harrison v. University of British Columbia* (December 6, 1990) [*091002048 - 54pp.]; and *Douglas/Kwantlen Faculty Assn. v. Douglas College* (December 6, 1990) [*091002049 - 72 pp.].

Section 32 of the Charter prescribes that it is applicable to "the Parliament and government of Canada" and "to the legislature and government of each province". In its seminal decision defining the application of the Charter, the Supreme Court held in *RWDSU, Local 580 v. Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 at p. 194, [1986] 2 S.C.R. 573 [*087006040 - 46 pp.], that s. 32 refers "not to government in its generic sense — meaning the whole of the governmental apparatus of the State — but to a branch of government". The important issue which remained open was the extent to which the Charter applies to the action of subordinate bodies that are created and supported by Parliament and the provincial legislatures. As a precondition to the determination of whether the mandatory retirement policies of the universities, hospitals and community colleges in question violated the age discrimination provisions of s. 15 of the Charter, the Court was required to determine whether such government-funded facilities were subject to Charter standards.

Although the entire Court agreed that mandatory retirement determined by age violated s. 15(1) of the Charter, it split with respect to whether the facilities in question constituted "government" and whether age discrimination was demonstrably justifiable in a free and democratic society. In the first step of its s. 1 analysis, the Court found that age discrimination was in pursuit of a valid, pressing and substantial, and untainted State interest. Accordingly, as the legislatures and agencies possessed a "reasonable basis" for their election as to social policy choices involving the allocation of scarce resources, the Court applied an attenuated standard of minimal rights impairment assessment under s. 1.

With respect to the broader issue, however, La Forest J., for the majority in *McKinney* [at p. 18] (Dickson C.J.C., L'Heureux-Dubé, Gonthier and Sopinka JJ., concurring), unfortunately focused on the definition of what was *not* government. According to the majority, government did not consist of the "apparatus of the state" or of "non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing" or of "entities controlled through funding over which the government holds no legal power". Clearly, "government" does consist of those entities capable of enacting coercive laws binding on the public generally and for which offenders may be punished. While in the view of the majority, the universities of Guelph, Toronto, British Columbia and Vancouver General Hospital did not constitute "government" because they operated under the supervision of generally independent boards, it was held that, Douglas College (a community college), was "government" because it was both government-funded and because it appeared less independent than the other academic institutions before the Court as its entire board had been appointed by Cabinet, thus making it more likely to be subject to direct government control.

Regrettably, the majority failed to develop a comprehensive theory to guide this fundamental designation. All attempts at the definition of government included the word government. In *Stoffman*, the definition of government control was further narrowed by distinguishing between "ultimate or extraordinary, and routine or regular control". As this test was applied in *Harrison*, the Cabinet's appointment of a majority of a governing board for fixed terms according to statutory limitations, was held not to constitute "routine and regular control". Commentators have been left perplexed by the fact

In This Issue:

Second Class Mail Registration No. 8377

3 C. of R. Newsl., No. 8 ISSN 0838-4843 February 1991

CHARTER OF RIGHTS

NEWSLETTER

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

FAIRNESS AND THE INFORMER PRIVILEGE

Issues Engaged by R. v. Scott

The Supreme Court of Canada has delivered its first major post-Charter decision entailing the delicate balancing of a defendant's right to a fair trial and the interests of law enforcement in relation to the public interest/police informer privilege. Although clouded by procedural complexity, the court's judgment in *R. v. Scott* (December 13, 1990) [*090352002 - 31 pp.] defined the circumstances in which informer privilege gives way to fairness. Cory J. for the court, concluded that the rule which protects the identity of a police informer from disclosure is not absolute and went on to identify three exceptions to the privilege:

(1) where the informer is a material witness to the crime;
(2) where the informer acted as an agent provocateur, and
(3) where the accused seeks to establish that a search of some type was not undertaken on reasonable grounds and therefore contravened s. 8 of the Charter.

The background to the conflicting interests is essential to an understanding of the issues which remain undecided and how *Scott* may be extended and applied.

Disclosure in Criminal Cases

The public interest in complete disclosure was best summarized by the Saskatchewan Court of Appeal in *R. v. Bourget* (1989), 35 C.C.C. (3d) 371 at p. 380, 41 D.L.R. (4th) 756 [*087041017 - 14 pp.]

> Section 7 is no longer limited to the notion of procedural fairness in court and encompasses the whole process including discovery and disclosure. If our system of criminal justice is to be marked by a search for truth, then disclosure and discovery of relevant materials, rather than suppression, should be the starting point.

Judicial supervision of the disclosure process has varied somewhat, not only from province to province, but sometimes even within provinces. In *R. v. Cruickshank* (1988), 6 W.C.B. (2d) 326 [*089016027 - 10 pp.], Paris J. preferred to follow the restrictive 1960's approach reflected in *R. v. Lantos*, [1964] 2 C.C.C. (2d) 52 (B.C.C.A.) when dismissing the accused's requests to examine, before trial, previous statements of prospective Crown witnesses. In an Ontario segment of the same prosecution, Watt J. in *R. v. Neeb* (November 14, 1988), emphatically found that s. 7 of the Charter imposes on the prosecution a duty to make not only full but timely pre-trial disclosure.

The remedy for a breach of this duty to disclose is a judicial stay. In *R. v. Denbigh* (1989), 10 W.C.B. (2d) 333 (B.C.S.C.) [*090191051 - 31 pp.] Stewart J. ordered such a stay when it was demonstrated that the prosecution had failed to disclose, in a timely fashion, material which it had in its possession that would have permitted the accused to corroborate unavailable exculpatory evidence so assisting the defence in bringing itself within the hearsay exception created by *R. v. Williams* (1985), 18 C.C.C. (3d) 356, 50 O.R. (2d) 321 [*190260878 - 43 pp.], leave to appeal to S.C.C. refused [1985] 1 S.C.R. xiv, 18 C.C.C. (3d) 356.

A Privilege Without Empirical Foundation

Although the assessment of informer privilege arises within a judicial environment appropriately concerned with adjudicative fairness, the privilege is based on pure policy considerations which are unsupported by underlying empirical data related to the efficacy of law enforcement. Owing to its vague underpinnings, the *exception* to the informer privilege was summarized by Mr. Justice Beetz in *Bisaillon v. Keable* (1983), 7 C.C.C. (3d) 385 at p. 411, [1983] 2 S.C.R. 60 [*189236836 - 78 pp.] in equally vague language:

> It follows from these reasons that at common law the secrecy rule regarding police informers' identity has chiefly taken the form of rules of evidence based on the public interest, which prohibits judicial disclosure of police informers' identity by peace

In This Issue:

Second Class Mail Registration No. 8377

3 C. of R. Newsl., No. 9 ISSN 0838-4843 March 1991

CHARTER OF RIGHTS
NEWSLETTER

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

REVENUE CANADA AND THE CHARTER

The chief source of revenue for the federal government is the income tax collected pursuant to the *Income Tax Act*. That Act requires taxpayers to file annual returns and to estimate their tax payable as a result of calculations made in those returns. In short, the system is self-reporting and self-assessing and depends on taxpayers' honesty and integrity for its success.

In *R. v. McKinlay Transport Ltd.* (1990), 55 C.C.C. (3d) 530, 68 D.L.R. (4th) 568 [*090094054 - 38 pp.], the Supreme Court of Canada upheld the investigative audit procedures enunciated in s. 231 of the *Income Tax Act* on the basis that administrative searches involving lower expectations of privacy and the availability of pre-execution judicial review, are exempt from the panoply of s. 8 safeguards described in *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641 (S.C.C.). Section 231 was held not to be criminal or quasi-criminal legislation, but rather a regulatory provision as its purpose is not to penalize criminal conduct but to enforce compliance with the Act.

The court has, generally speaking, taken a flexible approach to s. 8 of the Charter in relation to a wide variety of similar regulatory schemes. Accordingly, information demands by human rights commissions, professional governing bodies, by-laws inspectors, etc., have been subjected to attenuated s. 8 review.

The fundamental characterization of tax enforcement procedures as "administrative" or "regulatory" has resulted in the rejection of most Charter challenges to the *Income Tax Act*. Thus it has been held, (a) that significant delays in issuing income tax assessments do not violate s. 11(b) because an individual who is assessed tax and penalties is not being charged with an offence (*Rahey v. M.N.R.*, [1990] 1 C.T.C. 2272, 90 D.T.C. 1053 (Tax. Ct. Can.) [*090009002 - 14 pp.]); (b) that s. 7 is not violated because fundamental justice guarantees do not reach to protect property rights (*Rahey, supra*); and (c) that the imposition of assessments and penalties does not constitute a finding of guilt within the meaning of s. 11(h) with the result that a taxpayer so assessed and punished administratively may still be subjected to criminal prosecution pursuant to s. 239 of the Act (*Lavers v. British Columbia (Minister of Finance)* (1989), 64 D.L.R. (4th) 193, 74 C.R. (3d) 21 (B.C.C.A.) [*089349054 - 52 pp.]). Recent cases, however, have emphasized that when assessing provisions of the Act aimed either directly or indirectly at the discovery and preservation of evidence for the purpose of criminal proceedings nothing less than full Charter protection is appropriate.

In *Baron v. Canada*, [1991] 1 C.T.C. 125, 91 D.T.C. 5055 [*091015044 - 27 pp.], the Federal Court of Appeal ruled that s. 231.3(3) of the *Income Tax Act*, which uses the word "shall" when referring to the duty of a judge to issue a warrant to search, breaches both ss. 7 and 8 of the Charter because it authorized unreasonable searches and seizures in breach of fundamental justice. In so deciding, the court refused to follow the British Columbia Court of Appeal's decision in *Kourtessis v. M.N.R.* (1989), 50 C.C.C. (3d) 201, [1990] 1 W.W.R. 97 [*089257056 - 52 pp.], which upheld the search warrant regime prescribed by the *Income Tax Act* notwithstanding the imperative terms of s. 231.3(3). The court also went on to find that the provisions of s. 231.3(3)(b) which required authorizing judges to issue a warrant for a document that "may" afford evidence of the commission of an offence, represented an unconstitutional diminution of the *Hunter* standard with respect to the probability of finding evidence and constituted an additional infirmity. Holding that the categories of unreasonable searches are not closed and can never be so, the court held [at p. 135]:

> Parliament, in my opinion, is both legally and factually incapable of exhaustively defining unreasonable searches. The ultimate protection for the citizen against such searches lies in the vigilance of the issuing judge and in his power to refuse to issue the warrant even where all the conditions established by Parliament have been met. For Parliament to say and to mean that the judge "shall" issue the warrant no matter what the circumstances

In This Issue:

Second Class Mail Registration No. 8377

3 C. of R. Newsl., No. 10 ISSN 0838-4843 May 1991

CHARTER OF RIGHTS

NEWSLETTER

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

THE GOOD FAITH EXCEPTION

The United States Supreme Court's introduction of the good faith exception to the exclusionary rule in *United States v. Leon* (1984), 104 S.Ct. 3405, generally coincided with the enactment of the Charter in Canada including the balanced exclusionary rule defined by s. 24(2). Since that time, Canadian courts have engaged in an ad hoc characterization of police conduct as either "deliberate, wilful and flagrant" or "in good faith". Generally, subjective characterization has substituted for principled analysis. The presence or absence of probable cause has emerged as an important feature of good or bad faith. Cases which turn on the admissibility of evidence obtained by the police acting in reliance on Supreme Court decisions which are subsequently distinguished or legislation which is subsequently declared unconstitutional brings the issue into sharp relief. This is especially so in the many cases now being litigated with respect to the admissibility of one-party consent wiretap evidence which was obtained prior to the handing down of the Supreme Court of Canada's decision in *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240 [*090031102 - 45 pp.], but while that case was pending before the appellate courts.

In *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508 (S.C.C.) [*087119098 - 16 pp.], the Court segregated the factors affecting the s. 24(2) exclusionary determination into three groups. First, trial courts must consider whether the admission of evidence obtained in violation of the Charter will affect the fairness of the trial. If the admission of the evidence would tend to bring the administration of justice into disrepute, the evidence should generally be excluded. The primary factor affecting trial fairness is the nature of the evidence; if the evidence is real (existing independently of the violation) its admission will rarely render the trial unfair whereas the admission of evidence conscripted from the accused, eroding as it does the right to be free from self-incrimination and the presumption of innocence, will result in unfairness. The second set of factors concerns the seriousness of the violation. This is where good faith becomes relevant. *Collins* suggested that inadvertent or technical breaches, breaches motivated by urgency and the inevitable discoverability of the questioned evidence were material factors to be considered. Finally, *Collins* instructed that the effect of exclusion or admission upon the repute of the administration of justice was to be considered "in all the circumstances". Accordingly, self-incriminatory evidence has been consistently excluded: *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493 (S.C.C.) [*086135023 - 32 pp.]; *R. v. Manninen* (1987), 34 C.C.C. (3d) 385, 41 D.L.R. (4th) 301 (S.C.C.) [*087189078 - 14 pp.]; and *R. v. Ross* (1989), 46 C.C.C. (3d) 129, [1989] 1 S.C.R. 3 [*089045002 - 19 pp.].

Yet in January, 1990, the Supreme Court of Canada held in *Duarte* and *R. v. Wiggins* (1990), 53 C.C.C. (3d) 476, [1990] 1 S.C.R. 62 [*090031103 - 14 pp.], that self-incriminating evidence emanating from the accused was admissible notwithstanding the declaration that such evidence was obtained by virtue of an unreasonable warrantless search contrary to s. 8 of the Charter because the police had relied on prior decisions of the Court which upheld the constitutionality of one-party consent interceptions of private communications. The Court held that as the police had good reason to believe that they were acting within the law, that they otherwise had reasonable and probable cause and that as they could have obtained a warrant had they properly understood the law, they had acted entirely in good faith. The unarticulated premise of the judgments necessarily became that such good faith was capable of overriding trial unfairness.

How far can "good faith" be extended? McEachern C.J.S.C. in *Nystad v. Harcrest Apartments Ltd.* (1986), 3 B.C.L.R. (2d) 39 (S.C.), adopted the Black's Law Dictionary definition of good faith as a term used: "to describe that state of mind denoting honesty of purpose, freedom from intention to defraud" and "an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, *together with absence of all information, notice*, or benefit or belief of facts which render transactions unconscientious".

Accordingly, in *R. v. Wile* (1990), 58 C.C.C. (3d) 85, 74 O.R. (2d) 289 [*090214137 - 52 pp.], the Ontario Court of Appeal

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 1 ISSN 0838-4843 June 1991

CHARTER OF RIGHTS
NEWSLETTER

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

THE COMMON LAW AND THE CHARTER

Adversary System Guaranteed by s. 7

In *R. v. Swain* (1991), 12 W.C.B. (2d) 582 [*091134001 - 162 pp.], the Supreme Court of Canada assessed the constitutional validity of the common law rule which permits the prosecution to lead evidence of an accused's insanity in its case-in-chief. In so doing, the Court further defined the scope of s. 7 of the Charter and for the first time considered the analytic framework for assessing the common law in light of the Charter. Needless to say, this milestone decision will have a significant impact on the development of our constitutional law.

The appellant was charged with aggravated assault. While in psychiatric remand, his condition improved rapidly and he was declared fit to stand trial and released on bail. At trial, the prosecution sought to adduce evidence with respect to the appellant's insanity over the objection of his counsel. Ultimately, the trial judge found the appellant not guilty by reason of insanity, dismissed the constitutional and Charter challenges to the Lieutenant Governor's warrant scheme and remanded the appellant to strict custody pending the Lieutenant Governor's pleasure. On appeal, the Supreme Court of Canada declared the provisions of s. 542(2) [now s. 614(2)] of the *Criminal Code* (which provides for indeterminate remand pending the Lieutenant Governor's pleasure) of no force and effect for violating s. 9 of the Charter. The Court, however, declined to rule upon the rest of the Lieutenant Governor's warrant scheme, *i.e.*, ss. 545 and 547 [now ss. 617 and 619], although it had "attracted suspicion".

The Court's examination of the common law rule permitting the prosecution to adduce evidence of insanity required the Court to further define s. 7 of the Charter. The case *Reference re Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536 (S.C.C.) [*086003002 - 40 pp.], required that the "basic tenets of the legal system" be plumbed — that the nature, source and *rationale* of operative principles be examined.

The Court held that the "fundamental justice" guarantee of s. 7 reflects the basic principles underlying our legal system and that essentially, all of those principles are built on respect for the autonomy and intrinsic value of all individuals. The principles of fundamental justice contemplate and include an accusatorial and adversarial system of criminal justice. Thus, in this context, the principles of fundamental justice require that an accused person has the right to control his or her own defence. Such control includes the right of the accused to waive defences, *i.e.*, "any answer which defeats a criminal charge", such as insanity. Thus, if the Crown was permitted to raise a defence which the accused did not wish to raise then the accused would be deprived of a degree of control over the conduct of his defence contrary to fundamental justice and s. 7 of the Charter.

Common Law Revision Principle

How then is such a common law violation to be treated? As the common law rule was fashioned by judges and not by Parliament or a provincial legislature, judicial deference to representative government principles did not arise. Thus, as a matter of constitutional law, s. 1 of the Charter was not immediately engaged. The initial and primary duty of the Court was to reformulate the common law rule so that it would not conflict with the Charter. Lamer C.J.C. instructed [at pp. 30-31]:

> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Courts simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could none the less be upheld under s. 1 of the Charter. Given that the common law rule was fashioned by judges and not by Parliament or a

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 2 ISSN 0838-4843 July 1991

CHARTER OF RIGHTS
NEWSLETTER

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

FREEDOM FROM COMPELLED ASSOCIATION

The Essence of Freedom

Freedom of association, the bedrock necessary to the exercise of all other democratic values, has become one of the most cherished and protected Charter rights. The fundamental nature of the guarantee, examined extensively in *Reference re Public Service Employee Relations Act* (1987), 38 D.L.R. (4th) 161, [1987] 1 S.C.R. 313 [*087119103 - 109 pp.], has been repeatedly described by the Court as nothing less than imperative. Moreover, while freedom of association is an extension of individual freedom, it also entails a community interest in the advancement of political, economic, social and cultural matters which can only be effected if people are free to work in concert. Sustained democracy requires that associational activity be protected.

The question is, does s. 2(d) of the Charter provide constitutional protection for the negative or bilateral right to be free from compelled association? That is, does it protect the right of an individual to live in isolation? As has so often been the case, the most recent assessment of the negative aspect of s. 2(d) arose in the context of union organization issues: *Lavigne v. Ontario Public Service Employees Union* (June 27, 1991) [*091186070 - 186 pp.].

Lavigne was a teacher in an Ontario Community College who had never become a member of the Ontario Public Service Union which was certified to bargain on behalf of community college teachers with the Ontario Council of Regents established by provincial legislation. However, pursuant to a Rand formula collective agreement and Ontario legislation, Lavigne was subject to a compulsory dues check-off provision. That is, on joining the staff of the college, Lavigne had become *ipso facto* a member of the bargaining unit represented by the union and the governing collective agreement provided that there be "an automatic deduction of an amount equivalent to the regular monthly membership dues from the salaries of all employees in the bargaining unit". He challenged the provisions of the provincial legislation on the basis that the compulsory payment of union dues and the utilization of such dues for purposes which he did not support (*e.g.*, anti-Skydome lobbies, the NDP, pro-abortion groups, etc.) violated both his freedom of association and his freedom of expression.

While at trial Lavigne's arguments were accepted, the Ontario Court of Appeal reversed the decision. On further appeal to the Supreme Court, all members of the seven-member Court hearing the appeal agreed that Lavigne's appeal should be dismissed, but for radically different reasons.

La Forest J. (Sopinka and Gonthier JJ. concurring) concluded that compelled association could in fact violate s. 2(d) of the Charter. In his judgment [at p. 19]:

> Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice. Instead, it can expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. One need only think of the history of social stagnation in Eastern Europe and of the role played in its development and preservation by officially established "free" trade unions, peace movements and cultural organizations to appreciate the destructive effect forced association can have upon the body politic.

His view in this regard was strengthened by the fundamental definition of "freedom" developed by Dickson C.J.C. in *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 at pp. 417-18, 18 D.L.R. (4th) 321 [*188316260 - 60 pp.]:

> Freedom can primarily be characterized by the absence of coercion or constraint. *If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.* One of the major purposes of the Charter is to protect, within reason, from compulsion or

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 3 ISSN 0838-4843 August 1991

CHARTER OF RIGHTS
NEWSLETTER

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

THE CHARTER JURISDICTION OF ADMINISTRATIVE TRIBUNALS

The Impact of s. 52(1) of the Constitution Act, 1982

The question of whether an administrative tribunal is vested with the jurisdiction to interpret its enabling legislation and to apply the Charter in respect of proceedings before it was finally determined by the Supreme Court of Canada in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* (1991), 81 D.L.R. (4th) 121, 3 O.R. (3d) 128 [*091162005 - 28 pp.]. In that case, an application by the food workers' union for certification under the Ontario *Labour Relations Act* was opposed by the company which relied on s. 2(b) of the Act, which provides that the Act does not apply to a person employed in agriculture. The union attacked the constitutionality of the exemption relying on the Charter's freedom of association and equality guarantees.

As s. 106(1) of the *Labour Relations Act* empowers the Ontario Labour Relations Board to decide questions of law relevant to proceedings before it, the Board held that it was a "court of competent jurisdiction" and assumed Charter s. 24(1) jurisdiction. The Ontario Divisional Court affirmed the Board's finding that it was a court of competent jurisdiction within the meaning of s. 24(1) and thus was capable of granting relief. The Ontario Court of Appeal, although affirming the Board's jurisdiction, did so pursuant to s. 52(1) of the *Constitution Act, 1982*. The Ontario Court of Appeal ruled that the Board's jurisdiction did not extend to permitting it to declare legislation inoperative but was instead limited to a declaration that the legislation was ineffective as between the parties. Hence the Court of Appeal found it unnecessary to resort to s. 24(1).

The Supreme Court, echoing its prior decision in *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94, [1990] 3 S.C.R. 570 [*091002049 - 72 pp.], affirmed the approach of the Ontario Court of Appeal. The basic principle articulated by the Court in *Douglas* was that administrative tribunals which have been conferred the power to interpret the law hold concomitant power to determine whether the law is constitutionally valid. This result was dictated by the principle of the supremacy of the Constitution and the requirement that the supreme law be respected by administrative tribunals called on to interpret law.

The Court ruled, however, that not all administrative tribunals possess Charter jurisdiction. Section 52(1) does not itself confer jurisdiction. In the words of La Forest J. [at p. 128]: "Rather, jurisdiction must have expressly *or impliedly* been conferred on the tribunal by its enabling statute *or otherwise*." In general, the tribunal must have jurisdiction over the parties, subject-matter and remedy, and although these preconditions coincide with those necessary to the assumption of s. 24(1) jurisdiction by a court, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the Charter.

However, limitations do apply. Administrative tribunals vested with Charter jurisdiction — perhaps labour boards in particular — can expect no curial deference with respect to constitutional decisions. The decision of a tribunal that a provision of its enabling statute conflicts with the Charter does not constitute a declaration of formal invalidity, lacks the effect of a binding precedent and merely permits the agency to treat the impugned provision as ineffectual as between the parties before it.

Implied Charter Jurisdiction

The Court then applied these principles in *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)* (1991), 27 A.C.W.S. (3d) 147 [*091162004 - 44 pp.]. In that case, the applicant lost her job shortly after her sixty-fifth birthday and

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 4 ISSN 0838-4843 September 1991

CHARTER OF RIGHTS

NEWSLETTER

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

THE SUPREMACY OF FUNDAMENTAL JUSTICE

"Rape-Shield" Scheme Unconstitutional

Fundamentally different perceptions of the integrity, sensitivity and responsiveness of the Canadian judiciary underpin the clash between the majority and minority opinions in *R. v. Seaboyer; R. v. Gayme* (August 22, 1991) [*091248047 - 80 pp.]. However, if Parliament re-legislates some altered form of "rape-shield" regime the *Seaboyer* decision will ultimately be remembered more for its impact on substantive criminal law and procedure than for its effort to balance the rights of the accused against those of the victim in sexual assault proceedings.

Seaboyer and Gayme were each charged with the crime of sexual assault. At their preliminary inquiries each of the accused, who were charged following two separate and unrelated incidents, sought to cross-examine the complainants involved as to their prior sexual history contrary to s. 276 of the *Criminal Code*. That section precluded the defence from adducing evidence concerning the sexual activity of the complainant with any person other than the accused unless such evidence was lead in rebuttal, went to the identity or related to consent to the sexual activity that took place on the same occasion as the sexual activity that formed the subject-matter of the charge. Seaboyer sought to cross-examine the complainant about her sexual conduct on other occasions in order to establish that bruises and aspects of her condition upon which the Crown had relied, may have been caused by persons other than himself. Gayme, relying on the defence of honest belief in consent, attempted to elicit evidence of the complainant's prior and subsequent sexual conduct.

Each of the accused challenged his committal by way of *certiorari* on the ground that the provincial judges presiding at the preliminary inquiries had exceeded their jurisdiction and violated s. 7 of the Charter by enforcing the provisions of s. 276. An Ontario Supreme Court judge allowed their applications, declared s. 276 of no force and effect and remitted the cases back to the preliminary inquiry judges for continuation. The Ontario Court of Appeal reversed on the basis that the preliminary inquiry judges lacked jurisdiction to determine the constitutional question. The five-justice panel hearing the appeal went on to find that in some circumstances, s. 276 was capable of violating s. 7 of the Charter. The majority found that although the legislation was generally valid, it should only be found inapplicable where it would lead to a Charter breach, *i.e.*, where the accused demonstrated that he was entitled to a "constitutional exemption" from the Code provisions. The minority was of the view that s. 52 of the *Constitution Act, 1982* required that the provision be wholly invalidated. In a 7-2 judgment, the Supreme Court affirmed the decision of the minority and declared s. 276 unconstitutional.

The Fundamentals of Justice

McLachlin J., for the majority, commenced her analysis of s. 7 by finding that the fundamental justice guarantee reflected a spectrum of interests which included *both* the rights of the accused as well as broader societal concerns. In her view, the question of whether a law violates s. 7 of the Charter is answered by determining whether it conforms to the fundamental precepts which underlie our system of justice. Although s. 7 should be construed in light of the interests of complainants as a class to security of the person and to equal benefit of the law, its purpose is the protection of a variety of *individual* interests. Thus, she pointed out "all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event".

In the course of her judgment, McLachlin J. stated that the purpose of s. 276 was an entirely laudable effort to rid the criminal law of outmoded and illegitimate evidence rules that permit wide ranging cross-examination of complainants with respect to irrelevant and often collateral reputation and con-

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 5 ISSN 0838-4843 October 1991

CHARTER OF RIGHTS

NEWSLETTER

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

A RULE OF EXCLUSION CONFIRMED

Criminal law specialists have been concerned that the retirement of Dickson C.J.C. and Wilson J. could result in the Supreme Court of Canada reconsidering its approach to the employment of s. 24(2) of the Charter to exclude certain evidence. A recent decision of the newly constituted Court, *R. v. Elshaw* (September 26, 1991) [*091276005 - 69 pp.], dispels these fears and reveals a Court more strongly committed than ever to the vindication of Charter values.

The appellant in *Elshaw* had been seen crouched in park bushes with young boys in suspicious circumstances and was overheard telling them to keep their secret. Upon the arrival of the police, the appellant fled and was stopped while attempting to leave the park by jumping a fence. A police officer took identification from the appellant and advised him that he was being investigated for possible child molestation. The appellant was then placed in the back of a police van. Approximately five minutes later, one of the officers opened the van door and asked the appellant what would have happened had the police not come along. The appellant stated that he sometimes experienced certain urges and that he needed help. At no time prior to this conversation had the police either advised the appellant of his right to retain counsel pursuant to s. 10(b) of the Charter or administered the standard police caution advising the appellant of his right to silence.

While the trial judge found that the appellant had been detained and that his s. 10(b) rights had been violated, he none the less admitted the statements into evidence. The appellant did not testify, was convicted of two counts of attempted sexual assault, declared a dangerous offender and sentenced to indeterminate custody. The British Columbia Court of Appeal dismissed an appeal on the basis that, notwithstanding *R. v. Collins* (1987), 38 D.L.R. (4th) 508, 33 C.C.C. (3d) 1 (S.C.C.) [*087119098 - 16 pp.], the self-incriminatory nature of the evidence was but one of many factors to be considered. Relying on *R. v. Strachan* (1988), 56 D.L.R. (4th) 673, 46 C.C.C. (3d) 479 (S.C.C.) [*089005031 - 44 pp.], the Court of Appeal held that the statements were admissible given that the police had acted in good faith, were required to make hasty decisions and the short detention was not unreasonable. Ultimately, the court was of the view that even if the police had proceeded as they were required to do, the appellant would have probably made the same statements in any event.

Section 10(b) Violation: Exclusion

Iacobucci J. (Lamer C.J.C., Sopinka, Gonthier, McLachlin and Stevenson JJ., concurring) delivered the disciplined judgment of the newly constituted Court which reversed the decision of the Court of Appeal.

The Court found that in light of *Collins*, s. 24(2) determinations must consistently take into consideration three groups of factors. The first group to be considered, the essential first step of analysis, involves an examination of the impact the admission of the unconstitutionally obtained evidence would have on the fairness of the trial of the accused.

The Court rejected the Court of Appeal's determination that the violation of s. 10(b) was not serious in the circumstances. As a constable had begun to question the appellant without advising him of his respective rights to counsel and to silence, the Court held [at p. 14] that the violation, "denied [the appellant] access to counsel or even the opportunity to take refuge in silence at the very moment when he could have most benefited from the exercise of these rights". As the statement given by the appellant substantially contributed to his conviction and provided a nexus to similar fact evidence which consequently led to the determination that he was a dangerous offender, the breach had serious consequences indeed.

The Court also rejected the argument that urgency or necessity justified the breach and that the evidence would have been obtained in any event [at p. 15]: "It may have been reasonable and necessary to place the accused in the patrol wagon but the question is whether it was necessary to violate the appellant's Charter rights in the circumstances." Prior jurisprudence of the Court *(R. v. Clarkson* (1986), 26 D.L.R. (4th) 493, 25

In This Issue:

Second Class Mail Registration No. 8377

CHARTER OF RIGHTS
NEWSLETTER

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

A MOTOR VEHICLE WARRANT REQUIREMENT

In *R. v. Rao* (1984), 9 D.L.R. (4th) 542, 12 C.C.C. (3d) 97 (Ont. C.A.) [*189087780 - 64 pp.], Martin J.A., in assessing the constitutional validity of the power of warrantless searches contained in s. 10 of the *Narcotic Control Act*, said [at p. 570]:

> Further, a warrantless search of vehicles, vessels or aircraft, which may move quickly away, may be reasonable where there are reasonable grounds for believing that such contains a narcotic.

The fact that this view came to be accepted thereafter as constitutional dogma is a testament to the persuasive influence of His Lordship's opinions regarding criminal and constitutional law issues. However, in *R. v. Klimchuk* (October 11, 1991) [*091290041 - 66 pp.], Wood J.A., on behalf of a majority of the British Columbia Court of Appeal, returned to first principles to affirm a mandatory warrant requirement in order to search motor vehicles in light of the dictates of s. 8 of the Charter.

The appellant had been convicted at trial on a charge that he had been in possession of instruments "suitable for breaking into a coin-operated device" contrary to s. 352 of the *Criminal Code*". The main issue raised at trial was whether s. 8 of the Charter had been violated and whether the instruments and other evidence seized from an automobile occupied by the appellant should have been excluded under s. 24(2).

The automobile in question had first drawn attention when it was noticed parked near a closed gas station. The police, responding to the report of a suspicious vehicle, located the car behind a McDonalds' outlet a few kilometres from the gas station. The engine was running and the appellant was asleep at the wheel. The police officer asked to see the appellant's driver's licence and vehicle registration and was informed by the appellant that he had been waiting for the outlet to open. The vehicle was registered to a third party. The police officer received radio information that the appellant was suspected by police officers from another detachment of breaking into vending machines with the help of stolen keys. The officer then directed the appellant to move along. Shortly thereafter, another witness indicated that he had seen a person other than the appellant do something in the bushes not far from where the appellant's car had been parked. At this location a bag of coins was found. At this point, the police officer searched for and located the appellant's vehicle in the parking lot of a nearby doughnut shop. Trial evidence revealed that because he did not believe that he had sufficient evidence "to warrant a charge", the officer did not arrest the appellant but purported to detain him for "investigation into stolen moneys". After the appellant had been removed to a police station, other police officers searched the vehicle and located vending machine keys, loose coins and a number of coin wrappers.

Although the trial judge concluded that the appellant had been arbitrarily detained contrary to s. 9 of the Charter, that he had been subjected to an unreasonable search contrary to s. 8 and that the police officers had acted in bad faith in so far as they had conducted a warrantless search on the basis of mere suspicion, he none the less felt compelled to admit this real evidence.

Court of Appeal's Return to First Principles

Wood J.A. returned to the foundational words of Lamer J. in *R. v. Collins* (1987), 38 D.L.R. (4th) 508 at p. 521, 33 C.C.C. (3d) 1 (S.C.C.) [*087119098 - 16 pp.], to assess the validity of the search:

> A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

On this basis, Wood J.A. distilled the obvious but often ignored proposition that there are only two possible sources of legal authority for a search and consequent seizure: the common law and statute law. His Lordship then emphasized the basic principle that Dickson C.J.C. had determined in *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97 (S.C.C.): that a warrantless search is *prima facie* unreasonable and once it has been established that a search was conducted without a warrant, the onus shifts to the Crown to establish that

In This Issue: