4 C. of R. Newsl., No. 7 ISSN 0838-4843 January 1992

CHARTER OF RIGHTS
NEWSLETTER
Editor: David J. Martin, L.L.B., of the British Columbia and Ontario Bars

JUSTICE SYSTEM RECORDS: A PUBLIC UTILITY

In *R. v. C. (M.H.)* (1991), 63 C.C.C. (3d) 385, [1991] 1 S.C.R. 763 [*091115001 - 24 pp.] (see 4 C. of R. Newsl., No. 2), McLachlin J. stated that the Supreme Court had yet to assess the standards and procedures that should be employed to review the pre-trial disclosure of evidence and documents in a criminal case in light of the Charter.

Trial courts invited to conduct disclosure review hearings in recent years have come to radically different conclusions both as to jurisdiction and as to the standard for review: *R. v. Bourget* (1987), 41 D.L.R. (4th) 756, 35 C.C.C. (3d) 371 (Sask. C.A.) [*087041017 - 14 pp.]; *R. v. Cruickshank* (1988), 6 W.C.B. (2d) 326 (B.C.S.C.) [*089016027 - 10 pp].

The Supreme Court has now finally provided far-reaching assistance through its decision in the case of *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 [*091317026 - 33 pp.].

The appellant, a lawyer, was charged with fraud-related offences. At his preliminary inquiry, his former secretary testified as a Crown witness in a manner apparently favourable to the defence. Prior to trial, the police took two further recorded statements from this witness. Although defence counsel was informed of the existence of these statements, disclosure was refused. When the Crown announced at trial that it would not be calling the witness, the defence sought an order that the witness be called, or in the alternative, that all of the prior statements of the witness be disclosed. Remarkably, this defence application was dismissed at trial. An appeal from conviction was dismissed by the Alberta Court of Appeal without reasons.

The General Principles

Sopinka J., speaking on behalf of a unanimous Court, had little difficulty with the general principle that full and complete disclosure is necessary to the fair and effective administration of criminal justice. While acknowledging that in the early history of the common law the element of surprise, as an adversarial tactic, was present in both criminal and civil proceedings, Sopinka J. pointed out that in modern times, full discovery of documents and evidence has long been the rule in the civil law context. The Court, finding it "surprising" that in criminal cases, where the liberty of the subject is usually at stake, the rather primitive tactical consideration of surprise had lingered on, concluded that it was time for this to change. In the words of the Court [at p. 7]:

> . . . the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.

The Court, dismissed as "groundless" the various arguments mounted against finding that the Crown has a legal duty to disclose all relevant information in criminal proceedings and held that those arguments in favour of such duty were "overwhelming". The absence of a reciprocal duty of disclosure on the defence, although arguably deserving of consideration in the future, was generally explained by reference to the different roles the prosecution and defence play in the administration of criminal justice.

Arguments that the duty of disclosure would impose unduly onerous obligations on the prosecution were rejected as unfounded, given that voluntary disclosure presently exists and that any increase in resources dedicated to disclosure would be saved both by eliminating the need for unnecessary adjournments and by significant increases in the number of cases settled by way of plea or withdrawal. It was pointed out that *in terrorem* fears that the accused, informed through the disclosure process, would engage in the tailoring of evidence, applies to all forms of discovery and that the common law had accepted the principle that the search for truth is advanced rather than retarded by the disclosure of all relevant material. Finally, security concerns would be met by the dual regime of rules of privilege, particularly with respect to informers, and a residual discretion vested in the prosecution with respect to the timing and manner of disclosure.

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 8 ISSN 0838-4843 February 1992

CHARTER OF RIGHTS
NEWSLETTER

POTENTIAL FOR ABUSE RENDERS LEGISLATION UNCONSTITUTIONAL

The fundamental logic of Canadian constitutional law has now been well defined: federal and provincial statutes must have a valid legislative purpose and if they violate or attenuate Charter rights, then to survive attack, the legislative regime must be both articulate in addressing clear goals and carefully crafted to minimize interference with Charter-protected rights. Charter challenges to the validity of a statutory provision can arise in a number of ways. Obviously, where the rights of an individual applicant/accused are directly breached by a legislative scheme or the actions of a government agency, the assessment of constitutionality occurs exclusively within the context of the specific facts revealed by the circumstances of the particular case involved. In other instances, legislation can create the *potential* for rights violation, for example, legislation that sets out minimum penalties, exclusionary rules of evidence or uncircumscribed discretionary powers. In the latter circumstance, the constitutional law question posed is whether or not the mere fact that the legislation or power may lead to unjust results or may be abused, constitutes sufficient reason for the legislation to be struck down.

The Supreme Court of Canada's initial approach to this question, reflected in *Reference re Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536, 23 C.C.C. (3d) 289 [*086003002 - 40 pp.], *R. v. Smith* (1987), 40 D.L.R. (4th) 435, 34 C.C.C. (3d) 97 [*087189081 - 36 pp.], and *R. v. Seaboyer; R. v. Gayme* (1991), 83 D.L.R. (4th) 193, 66 C.C.C. (3d) 321 [*091248047 - 180 pp.], was recently questioned in *R. v. Goltz* (1991), 67 C.C.C. (3d) 481, 61 B.C.L.R. (2d) 145 [*091323002 - 70 pp.]. Even more recently, in *R. v. Bain* (unreported, January 23, 1992) [*092034098 - 104 pp.], a high standard of constitutional scrutiny was re-established.

The History of All-Encompassing Assessment

While the Charter was still in its early development (1982-1990), the Supreme Court of Canada had occasion to weigh the minimum seven-year sentence that could be imposed on a conviction for narcotic importation against the s. 12 protection against cruel and unusual punishment. In *Smith*, the appellant had imported 7 1/2 ounces of pure cocaine and thus could and in fact, at trial was, sentenced to a period of imprisonment in excess of the statutory minimum. The Supreme Court's assessment of the minimum sentence provision did not focus on the circumstances of the particular case before it. Rather, the full range of potential applications of the statute were examined to determine whether the violation of an individual's Charter rights could theoretically occur. Accordingly, the minimum sentence was found to be unconstitutional because it could result in an accused being subjected to cruel and unusual punishment. The example given to support this conclusion was the possibility of a seven-year prison sentence being imposed on a returning vacationer caught carrying his first joint of marijuana. In the words of Lamer J., as he then was [at p. 462]:

> While no such case has actually occurred to my knowledge, that is merely because the Crown has chosen to exercise favourably its prosecutorial discretion to charge such a person not with the offence that that person has really committed, but rather with a lesser offence. However, the potential that such a person be charged with importing is there lurking.

The principle that emerged from *Smith* extends beyond a methodology for assessing the constitutionality of legislation. Once it has been determined that a legislative provision could

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 9 ISSN 0838-4843 March 1992

CHARTER OF RIGHTS
NEWSLETTER

THE REVIEWABILITY OF EXECUTIVE DECISION MAKING

Charter litigation is an intrinsically difficult type of complex litigation. This is so because the articulation and definition of entrenched constitutional guarantees necessarily involves an intricate weighing of conflicting social and political values. At the root of all constitutions containing entrenched human rights provisions is the struggle to continue to create, refine, administer and defend, ever more free and ever more democratic societies. However, new constitutions are built upon the foundations of old democratic principles that have served free and democratic societies well.

It is thus understandable, that when conflicts occur between new constitutional dictates and those few "verities" that have evolved from the application of the somewhat rough rules of the common law, judicial decisions are marked by hesitancy and contradiction. It is in the criminal law area that this ambivalence is often brought into the sharpest relief. In this field, no subject is marked with more hesitancy than the common law notion of the division of executive and judicial powers. However, after a halting start, recent decisions reveal a more mature judicial temperament characterized by the acceptance by the judiciary of the clear Charter jurisdiction to review executive decision making.

The Early Jurisprudence

Early judicial reluctance to review executive decision making is best reflected in the judgment of Monnin C.J.M. in *R. v. Balderstone* (1983), 4 D.L.R. (4th) 162, 8 C.C.C. (3d) 532 (Man. C.A.) [*191029261 - 17 pp.], leave to appeal to S.C.C. refused 4 D.L.R. (4th) 162*n*, who, commenting upon the reviewability of the Attorney General of Manitoba's decision to directly indict the accused pursuant to s. 577 of the *Criminal Code* stated [at p. 539]:

> The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General — barring flagrant impropriety — he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.

The Supreme Court of Canada's early interpretation of the applicability of the Charter in *Operation Dismantle Inc. v. Canada* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441 [*190130159 - 85 pp.], defined the basic rule. In the words of Dickson J. [at p. 491]:

> I agree with Madam Justice Wilson that Cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian Government is duty bound to act in accordance with the dictates of the Charter.

Madame Justice Wilson expressed the rationale for a judicial review of executive decision making in this way [at p. 504]:

> . . . if the court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the *effect* of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. This is a totally different question. I do not think there can by any doubt that this is a question for the courts.

Post-Operations Dismantle Jurisprudence: Effect Review

Early decisions distinguished the clear direction of the Supreme Court's decision in *Operation Dismantle*. In *R. v.*

In This Issue:

Second Class Mail Registration No. 8377

4 C. of R. Newsl., No. 10 ISSN 0838-4843 April 1992

CHARTER OF RIGHTS
NEWSLETTER

POLICY AND THE EXCLUSIONARY RULE

The exclusion of evidence remedy mandated by s. 24(2) of the Charter reflects some of the same values vindicated by the abuse of process doctrine. The Canadian balanced exclusionary rule, unlike the U.S. punitive or deterrence rule, focuses upon the belief that the administration of justice must be kept free of disrepute. The Supreme Court of Canada has repeatedly reaffirmed this principle first comprehensively stated in *R. v. Collins* (1987), 38 D.L.R. (4th) 508, 33 C.C.C. (3d) 1 [*087119098 - 16 pp.]. The Court in *Collins* first observed the obvious when Lamer J., speaking for the majority, stated [at p. 523]: "Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice".

However, the Court went on to hold that:

> ... the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This *further disrepute* will result from the admission of evidence that would deprive the accused of a fair hearing, *or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.*

[Emphasis added.]

In *R. v. Kokesch* (1991), 61 C.C.C. (3d) 207 at p. 227, [1990] 3 S.C.R. 3 [*090331006 - 49 pp.], the Court split 5-4 to exclude evidence obtained in violation of s. 8 of the Charter, concluding that "the unavailability of other, constitutionally permissible, investigative techniques is neither an excuse nor a justification for constitutionally impermissible investigative techniques". The Court's recent decision in *R. v. Wise* (1992), 70 C.C.C. (3d) 193 [*092063061 - 70 pp.], re-exposed differences in the Court and raises many new and important questions.

Movement Monitors Violate s. 8

In *R. v. Wise*, the appellant was charged with mischief to property as a result of the destruction of a two million dollar communications tower. What complicated the case was how the police came to identify the appellant as the person who had perpetrated the sabotage. Originally, the appellant had been a suspect in a series of homicides, and it was as a result of being so suspected that the police had obtained a search warrant for his home and automobile. When these warrants were executed they bore no fruit. However, many hours after the warrant had expired, the police towed the appellant's car to a police garage where an officer installed an unsophisticated "beeper" or tracking device in the rear seat cushion of his automobile. The appellant was kept under almost constant surveillance by the police from that point on. As a result of the installation and monitoring of the beeper, the police were assisted in their surveillance of the appellant, ultimately observing him to be in the environs of the communications tower when it was sabotaged. Approximately two weeks after the destruction of the tower, the appellant and his vehicle were searched without warrant. Later that same day, a further search warrant was obtained for the appellant's automobile, resulting in the detection of metal pieces consistent with the guy wires of the communications tower.

At the appellant's trial for the offence of public mischief, the trial judge excluded all evidence obtained directly and indirectly as a result of the electronic surveillance conducted without warrant on the basis of suspicion alone. The Ontario Court of Appeal reversed the decision.

At all levels, the Crown conceded that the warrantless installation of the monitoring device violated s. 8 of the Charter. The Court, however, unanimous in this respect, held that the warrantless monitoring itself also constituted an independent, continuing s. 8 violation. La Forest J., although speaking for the minority, most eloquently articulated the nature of the privacy interests engaged. In his view, freedom of movement, without constant government surveillance, was as important to individual liberty as freedom of speech and freedom of assembly. Accordingly, in Justice La Forest's words [at p. 203]:

> I must confess to finding it absolutely outrageous that in a free society the police or other agents of the state should have it within their power, at their sole discretion and on the basis of mere

In This Issue:

Second Class Mail Registration No. 8377

5 C. of R. Newsl., No. 1 ISSN 0838-4843 May 1992

CHARTER OF RIGHTS NEWSLETTER

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

"STANDING" AND CHARTER s. 7

Two recent decisions of the Ontario and British Columbia Courts of Appeal, *R. v. Pugliese* (unreported, March 11, 1992, Ont. C.A.) [*092073020 - 24 pp.] and *R. v. Borglund* (unreported, March 18, 1992, B.C.C.A.) [*092093026 - 3 pp.], holding respectively that an accused is disentitled to a remedy for unlawful conduct because of "standing" rules, highlight contradictions within Canadian constitutional law. As formulated, these rulings, reflecting prior decisions in *R. v. Model Power* (1981), 21 C.R. (3d) 195 (Ont. C.A) and *R. v. Fraser* (1990), 55 C.C.C. (3d) 551 (B.C.C.A.) [*09088022 - 15 pp.], purport to preclude an accused from relief for police lawlessness, no matter how egregious. Relief would be unavailable even in circumstances where the police misconduct was directed against the accused, but the actual victim was a third party, and even where the third party is a potential co-accused subject to joint enterprise allegations.

Canadian courts have generally failed to distinguish between the various bases upon which standing can or should be analyzed. Various standing theories (*i.e.*, automatic, target, derivative) entail different policy implications. In this area, Canadian Appellate Courts appear to have followed American jurisprudence somewhat slavishly. This is particularly surprising in light of the fact that it is in this area that the values protected by the Canadian exclusionary rule should inform a broader, more purposive approach.

The Ontario Court in *Pugliese* rejects the "target" theory of standing first developed by the U.S. Supreme Court in *Jones v. U.S.*, 32 U.S. 257 (1960), subsequently reversed in *U.S. v. Salvucci*, 448 U.S. 83 (1980). In doing so, the Court restrictively reads s. 8 of the Charter down to property or expectation of privacy concerns. The British Columbia Court of Appeal approaches the issue from the same perspective, rejecting arguments that the police ought not to be able to benefit from their unlawful acts.

Derivative standing has fared better in Canadian law. In *R. v. Montoute* (1991), 62 C.C.C. (3d) 481, 113 A.R. 95 (C.A.) [*091036055 - 103 pp.], Harradence J.A. said [at p. 506]:

> If a co-conspirator's Charter rights have been breached in obtaining his declaration furthering the conspiratorial objectives to the extent that its admission would bring the administration of justice into disrepute, it would drag the administration of justice even further and deeper into the mire of disrepute to give "judicial condonation to unacceptable conduct by investigatory agencies" by the admission of that evidence on the pretext that s. 24(2) was not available to a co-conspirator as his Charter rights had not been breached. This would be a classic example of relying on a legal fiction to incriminate an accused and then resorting to the "austerity of tabulated legalism" to deny a Charter remedy.

This approach echoes that of the U.S. State Courts which, in some states, still apply automatic or target standing rules. The rational of these rules was best expressed by Compton J. in *Waring v. State*, 670 P. 2d 357 [at p. 362]:

> Underlying this exception to the standing requirement is our refusal to condone improper police conduct. If a defendant were not given standing to assert the knowing violation of a co-defendant's rights, police could be encouraged to intentionally violate the rights of persons who will not be prosecuted in the hopes that the illegally obtained evidence could eventually be used against another defendant. Refusing to permit standing would represent an open invitation to adopt such procedures as a standard method for the solution of particular crimes or for conducting generalized crime hunts.

The Supreme Court of Canada has yet to address these issues. In *R. v. Thompson* (1990), 73 D.L.R. (4th) 596, 59 C.C.C. (3d) 225 (S.C.C.) [*090296080 - 102 pp.], the Court found that the failure to include minimization provisions in a wiretap authorization resulted in a breach of s. 8 of the Charter, because [at p. 274]:

> In my view, given the extent of the invasion of privacy authorized in this case, a total absence of any protection for the public created a potential for the carrying out of searches and seizures that were unreasonable.

It would seem that the most fundamental of the fundamental justice guarantees is that evidence be gathered in a lawful manner. It is unseemly that police lawlessness should be permitted anywhere; if it is to be permitted, then what limits are imposed? The abuse of process doctrine is hobbled by the "clearest of cases" caveat, but is itself subsumed within s. 7 of the Charter. If the abuse of process doctrine, s. 7 of the Charter

In This Issue:

Second Class Mail Registration No. 8377

5 C. of R. Newsl., No. 2 ISSN 0838-4843 June/July 1992

CHARTER OF RIGHTS

NEWSLETTER

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

THE RECYCLED PRELIMINARY SHOWING REQUIREMENT

Dersch v. Canada (Attorney General) (1990), 77 D.L.R. (4th) 473, 60 C.C.C. (3d) 132 (S.C.C.) [*090331009 - 23 pp.], firmly established that both the presumption of innocence and full answer and defence requirements do in fact inform the content of procedural law. In addition, *Dersch* established that the rule of law protects both the factually and legally innocent. Demonstrating innocence in this context necessarily implies the ability of the accused to determine fairly both the truth as to guilt or innocence, as well as the lawfulness of the procedures utilized in the investigative process. The Ontario Court of Appeal in *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289, 7 O.R. (3d) 277 [*092066052 - 26 pp.] and *R. v. Durette* (1992), 72 C.C.C. (3d) 421 [*092150015 - 105 pp.], has recently struggled with what procedural limits, if any, curtail the right of the accused to demonstrate legal innocence, with somewhat unsatisfactory results.

In *Kutynec*, Finlayson J.A. (on behalf of Brooke and Doherty JJ.A.) reversed the strict procedural requirements first articulated by Borins J. in the Ontario District Court [57 C.C.C. (3d) 507 [*090194017 - 23 pp.]], stipulating that relief under s. 24(2) of the Charter be sought by pretrial motion accompanied by a preliminary offer of proof consisting of affidavits of potential defence witnesses directed to the establishment of the alleged Charter violation. The procedural regime proposed by Borins J. was rejected as "too rigid and restrictive". The regime was flawed because the notice requirement presupposes full disclosure and constituted an unnecessary interference with the inherent jurisdiction of the trial judge to control the conduct of the trial. In addition, forcing the accused to swear an affidavit in the trial process infringed his common law right to remain silent and his s. 11(c) Charter right not to be compelled to testify against himself.

The new *Kutynec* rules promulgated by the Court of Appeal, in substitution, entail the requirement that counsel for the accused move to exclude evidence pursuant to the Charter before the evidence is received. All that is required is timely objection. Yet in the court's view [at p. 296]:

> In the interests of conducting an orderly trial, the trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible Charter issues either before or at the outset of the trial. All issues of notice to the Crown and the sufficiency of disclosure can be sorted out at that time. Failing timely notice, a trial judge, having taken into account all relevant circumstances, is entitled to refuse to entertain an application to assert a Charter remedy.

In addition, in the Ontario court's view, the trial judge may make a summary determination of the issues [at p. 301]:

> In some cases, when the defence indicates, prior to the calling of evidence, that it intends to advance a Charter application to exclude evidence, the trial judge may call upon the defence to summarize the evidence that it anticipates it would elicit on the application. This kind of procedure is well-known to the criminal process: see *R. v. Sproule* (1975), 26 C.C.C. (2d) 92 at pp. 97-8, 30 C.R.N.S. 56 (Ont. C.A.); *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 at p. 62, [1970] 3 O.R. 725; leave to appeal refused [1970] S.C.R. xi. If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a Charter infringement, or a finding that the evidence in question was obtained in a manner which infringed the Charter, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence.

In the court's view [at pp. 301-2]:

> The requirement that the party bearing the burden of proof outline the basis of his or her application is part of, and in no way inconsistent with, our adversarial process.

Accordingly, the criteria of "potential merit" is erected; in the court's words [at p. 302]:

> Armed with this information, the trial judge can weed out the applications which have no basis in fact or law, and can decide how and when those with potential merit should be resolved. If, on the other hand, it should appear that the accused has not taken full advantage of all the opportunities available to him to be

In This Issue:

Second Class Mail Registration No. 8377

5 C. of R. Newsl., No. 4 ISSN 0838-4843 September 1992

CHARTER OF RIGHTS

NEWSLETTER

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

A NEW ERA FOR RIGHTS PROMOTION REMEDIES

Human rights and social program equality litigation, the archetypes of the popular vision of rights litigation, was restrained in the early Charter period by the Supreme Court's judgment in *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97, disparaging the judicial techniques of reading in and down as remedies for Charter infringement. If a court could not read in, remedial measures were left to the legislatures, even after a court had made declarations of unconstitutionality. Accordingly, the last decade has seen litigants focus more on rights protection rather than rights promotion. All this has now changed. Perhaps the judiciary and, more importantly, the public, have now accepted and become comfortable with the "political" role of the courts. Notwithstanding its explicit qualifications, the Supreme Court's decision in *Schachter v. Canada* (1992), 92 C.L.L.C. ¶14,036 [*092196010 - 76 pp.], will signal a new age of judicial activism. And perhaps it is time. Too often the Charter has come to be criticized as an essentially defensive shield effectively available only to the rich. Whatever the long-term results, any court's task of choosing the appropriate remedy for a benefit conferring, underinclusive statutory provision that violates a Charter right in a way that cannot be justified, has been enormously simplified by the *Schachter* decision.

Schachter, a natural parent, had been denied "paternity benefits" then available only to adoptive parents under the *Unemployment Insurance Act* in a manner that contravened the equal benefit guarantees of s. 15 of the Charter. The Federal Court — Trial Division had purported to grant declaratory relief pursuant to s. 24(1) of the Charter extending to natural parents those benefits available to adoptive parents, or until such time as the legislation was amended to conform with constitutional equality standards. The Federal Court of Appeal upheld the Trial Division ruling that positive relief for underinclusiveness was available through s. 24. In amending the relief granted, in light of subsequent legislative developments, the Supreme Court of Canada described the applicable principles and options available to the courts to grant relief, primarily pursuant to s. 52 of the *Constitution Act, 1982*.

Severance and Reading In

Where the offending portion of a statute can be defined in a limited manner, it should be declared inoperative only to that limited extent. If provisions closely connected to the offending portion can be safely assumed not to have passed without the offensive provisions, then those should be struck down as well. Reading in should be done when the inconsistency with the Charter is defined as something improperly excluded by the statute. In the words of Lamer C.J.C., speaking for the Court [at p. 12, 227]:

> Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme.

The Court reasoned that any other approach would be to treat inclusively and exclusively worded statutes differently. The important point is that the court is not restricted to dealing with the verbal formula utilized by the legislature. Laws and the regimes they create are assessed, not forms of words.

Reading in permits the court to fashion remedies that respect both the purposes of the legislature and the Charter. The approach permits the courts to act in a manner more consistent with the basic purposes of the Charter; social benefits legislation that is underinclusive is not struck out for underinclusiveness, with negative and often absurd consequences, but rather the law is extended to all constitutionally entitled.

Choice of Options

The Court's judgment summarized the options available when a law is found to be unconstitutional. This summary is set out here in its entirety, because of its importance [at p. 12, 235]:

In This Issue:

Second Class Mail Registration No. 8377

5 C. of R. Newsl., No. 5 ISSN 0838-4843 October 1992

CHARTER OF RIGHTS
NEWSLETTER

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

CHARTER s. 24(1): THE STAY OF PROCEEDINGS REMEDY

It appears clear that the evidence exclusion rule created by s. 24(2) of the Charter is but a particularized component of the general power of a court of competent jurisdiction to grant an "appropriate and just" remedy for rights infringement pursuant to s. 24(1) of the Charter. Typically, evidence is excluded pursuant to s. 24(2) of the Charter as a result of rights violations causally linked to the tendered evidence, but rights violations completely unrelated to evidence accumulation processes often occur. In these circumstances, typically involving arbitrary detention, unreasonable delay and trial fairness, the court is required to consider remedies wholly within s. 24(1) of the Charter. As McIntyre J. stated in *R. v. Mills* (1986), 29 D.L.R. (4th) 161 at p. 181, 26 C.C.C. (3d) 481 (S.C.C.) [*188287269 - 95 pp.]: "It is difficult to imagine language which could give the court a wider and less fettered discretion." Yet, notwithstanding that this ground is so fertile and of such obvious importance, the Supreme Court of Canada has had little opportunity to develop a principled analysis of the scope of the power or the circumstances in which the most complete remedy, a stay of proceedings, should be entered. A significant number of recent trial decisions, however, have identified the core principles.

The Common Law Stay

Before recent developments are reviewed, it is appropriate to clarify the common law origin of the stay power and its relationship to the fairness requirements constitutionally guaranteed by ss. 7 and 11(d) of the Charter.

The content of the constitutional guarantee of fundamental justice embodied in s. 7 of the Charter, the controlling power of abuse of process jurisdiction and the relief provisions of s. 24 of the Charter all engage many of the same basic principles described by Lamer J. in *R. v. Mack* (1988), 44 C.C.C. (3d) 513 at p. 539, [1988] 2 S.C.R. 903 [*089002058 - 97 pp.]:

> As was explained by Estey J. [in *Amato v. The Queen* (1982), 140 D.L.R. (3d) 405, 69 C.C.C. (2d) 31 (S.C.C.)], central to our judicial system is the belief that the integrity of the court must be maintained. This is a basic principle upon which many other principles and rules depend. If the court is unable to preserve its own dignity by upholding values that our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which commands the respect of the community it serves. It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price.

The Charter did not create this jurisdiction. Lord Devlin stated, in *Connelly v. D.P.P.*, [1964] A.C. 1254 at p. 1347: "a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law". Lord Reid said [at p. 1296]: "I think there must always be a residual discretion to prevent anything which savours of abuse of process".

Albeit that doubt was expressed in *R. v. Rourke* (1977), 76 D.L.R. (3d) 193, 35 C.C.C. (2d) 129 (S.C.C.) [*192111800 - 27 pp.], Canadian trial and appellate courts universally pressed and, in appropriate cases applied, the doctrine of abuse of process to curb illegality and oppressive conduct. In *R. v. Young* (1984), 13 C.C.C. (3d) 1, 46 O.R. (2d) 520 [*189223802 - 76 pp.], the Ontario Court of Appeal held that prosecution negligence and delay disentitled the invocation of the court's process. More recently, in *R. v. D. (E.)* (1990), 57 C.C.C. (3d) 151, 73 O.R. (2d) 758 [*090166022 - 27 pp.], the Ontario Court of Appeal reviewed the intervening jurisprudence. The common law abuse of process doctrine has operated in a number of fields to restrain both clear illegality and both intentional and unintentional oppressive conduct.

The doctrine of abuse of process entails the principle that the court is entitled to defend itself from abuse; the court will not lend its hand to illegal and unfair conduct. Section 7 of the

In This Issue:

Second Class Mail Registration No. 8377

5 C. of R. Newsl., No. 6 ISSN 0838-4843 November/December 1992

CHARTER OF RIGHTS
NEWSLETTER

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

THE SUPREME COURT AND MANDATORY RETIREMENT — SANCTIONING THE STATUS QUO

by S.P. Chotalia, B.A., LL.B., LL.M., Commissioner to Alberta Human Rights Commission

In *Etobicoke (Borough) v. Ontario (Human Rights Commission)* (1982), 132 D.L.R. (3d) 14, [1982] 1 S.C.R. 202, McIntyre J. said [at p. 20]:

> We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.

The recent decision of the Supreme Court of Canada in *Dickason v. University of Alberta* (1992), 92 C.L.L.C. ¶17, 033 [*092273109 - 127 pp.], casts a long shadow over these words. In a decision containing profound implications for administrators of human rights legislation, a majority of four justices upheld mandatory retirement at the age of 65 years as being "reasonable and justifiable" discrimination within the meaning of s. 11.1 of the *Individual Rights Protection Act* of Alberta (I.R.P.A.).

The "Flexible" Approach to Private Discrimination

In rendering this decision, the majority of the Court appears to have retracted from its ongoing "broad and liberal" interpretive approach to human rights legislation in a "Charter conscious" era. On behalf of the Court, Cory J. addressed the relationship between the *R. v. Oakes* (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321 (S.C.C.) [*086072007 - 28 pp.], test as it is applied to the assessment of Charter violations to the analogous "reasonable and justifiable" discrimination permitted by the Alberta human rights statute. The Court concluded that the *Oakes* test may be applied by analogy to potentially excuse private defendants seeking exemption pursuant to human rights legislation only if the test "is applied without any trace of deference to a private defendant such as an employer or landlord". Accordingly, in the words of the Court, "no deference should be given to the policy choice of the defendant as would be the case in the s. 1 analysis of a social policy". However, after taking this laudable position, the Court then held that the *Oakes* test is appropriate only to the extent that it is applied with "a large measure of flexibility and due regard to the context . . . [of] the regulation of private relationships". How the *Oakes* test can be applied with "flexibility" and still retain its character has not been answered. The only conceivable effect of the Court's decision that "s. 11.1 should not be rigidly constrained by the formal categories set out in the *Oakes* test", is to diminish the quasi-constitutional nature of human rights legislation by demoting private discrimination to a lower standard of justification than state discrimination. There was no need to come to this result. The very application of the *Oakes* test in the many cases where it has been applied has not occurred in a vacuum, but rather through a careful contextual analysis of the rights and liberties at stake. Further, the Court has on many occasions indicated that the *Oakes* test itself is not to be applied in a rigid and mechanistic fashion. It is my view that a further defining of the *Oakes* test undermines the test itself. To postulate that "other factors may well be relevant when the s. 11.1 test is applied in this regulatory

In This Issue:

Second Class Mail Registration No. 8377