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CHARTER OF RIGHTS
NEWSLETTER

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

THE PUBLIC INTEREST AND THE CHARTER

Conflicting visions of the role of the judiciary in Canadian society continue to underpin the Supreme Court's constitutional adjudication. The Court's assessment in *R. v. Morales* (1992), 17 W.C.B. (2d) 580 [*092331002 - 72 pp.], of the "public interest" ground for pre-trial detention contained in s. 515(10)(b) of the *Criminal Code*, in light of s. 11(e) of the Charter reasonable bail guarantee, highlighted these differences. How curtailed is the interpretive role of the lower courts? What level of interpretive inconsistency and subjectivity can be tolerated in the name of flexibility?

Morales was charged with cocaine importing, allegedly as a result of his participation in a major network and was detained at first instance on the ground that his detention was in the public interest. On review, a superior court judge, albeit in protest, felt compelled to follow *R. v. Lamothe* (1990), 58 C.C.C. (3d) 530, 77 C.R. (3d) 236 (Que. C.A.) [*090121160 - 25 pp.], which had severely restricted the operation of the public interest component of s. 515(10)(b): if trial appearance was assured and the accused did not constitute a public danger, then release was required regardless of the nature of offence. On Crown appeal, the validity of this detention criteria was in sharp relief. Lamer C.J.C. on behalf of the majority (La Forest, Sopinka, McLachlin, Iacobucci JJ.), drawing heavily on doctrine developed in *R. v. Nova Scotia Pharmaceutical Society* (1992), 93 D.L.R. (4th) 36, 74 C.C.C. (3d) 289 (S.C.C.) [*092196009 - 80 pp.], found that the criterion of public interest as a basis for pre-trial detention under s. 515(10)(b), violated s. 11(d) of the Charter because it authorized detention in terms which were impermissibly vague and imprecise. In *Nova Scotia Pharmaceutical Society*, the Court had held [at p. 57]:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.

As the fair notice criteria was inapplicable to the public interest provision of s. 515 of the Code, the limitation of law enforcement discretion became the Court's primary focus. In the Court's view [at p. 11]:

> In my view the principles of fundamental justice preclude a standardless sweep in any provision which authorizes imprisonment. This is all the more so under a constitutional guarantee not to be denied bail without just cause as set out in s. 11(e). Since pre-trial detention is extraordinary in our system of criminal justice, vagueness in defining the terms of pre-trial detention may be even more invidious than is vagueness in defining an offence.

Intervenant submissions that the doctrine of vagueness was inapplicable because s. 515(10)(b) of the Code did not authorize arbitrary practices by law enforcement officials but merely authorized judicial discretion, were rejected [at p. 12]:

> A standardless sweep does not become acceptable simply because it results from the whims of judges and justices of the peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice.

However, the Court went on to emphasize that legislation was not invalidated simply because it was subject to interpretation. The question, however, was whether a constant and settled meaning could be achieved. As many interpretive judgments defined the phrase "public interest" as conferring a wide, unfettered discretion, the Court concluded that "the term authorizes a standardless sweep, as the Court can order imprisonment whenever it sees fit". Nor could the provision be justified pursuant to the proportionality requirements of s. 1 of the Charter. The vague and overbroad concept of public interest permitted far more pre-trial detention than was required to meet the limited objectives of preventing crime and interferences with justice by those on bail.

Gonthier J. on behalf of the dissenting minority, L'Heureux Dubé J. concurring, was prepared to hold that public interest detention constituted just cause. In the minority view [at p. 3]:

> Public interest is a concept long recognized in our legal system. It is a notion which has traditionally been recognized as affording a means of referring to the special set of considerations which are relevant to those legal determinations concerned with the rela-

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CHARTER OF RIGHTS NEWSLETTER

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DISCRETION AND THE WARRANT PROCESS

The search warrant provisions of the *Income Tax Act* (the "Act"), have been declared unconstitutional for the second time. In one of the first successful Charter challenges, *M.N.R. v. Kruger Inc.* (1984), 13 D.L.R. (4th) 706, [1984] 2 F.C. 535 (C.A.) [*191080849 - 46 pp.], then s. 231(4) of the Act, was declared unconstitutional on the basis that the provision authorized an impermissibly wide search power that allowed the seizure of anything that may afford evidence of the violation of any provision of the Act. Now, in *Baron v. Canada*, [1991] 1 F.C. 688, 122 N.R. 47 (C.A.) [*091015044 - 27 pp.], application to vary allowed in part [1991] 1 F.C. 712, 91 D.T.C. 5134 (C.A.) [*091066001 - 17 pp.], affd 93 D.T.C. 5018 (S.C.C.) [*093035106 - 17 pp.], the Court has ruled that the subsequently enacted s. 231.3 is also unconstitutional on the basis that, read as a whole, the newly enacted provision, by use of the word shall, impermissibly removes the residual discretion of an authorizing judge to refuse to issue a search warrant notwithstanding that the statutory criteria for its issuance have been met. The immediate effect of *Baron*, on the administration of the Act and on cases being prosecuted pursuant to searches conducted through s. 231.3, has yet to be determined. But the long-term implications of *Baron* are clear: judicial officers considering warrant applications are mandated to extra vigilance. In addition, such officers are invited to liberally attach conditions to search procedures so that liberty and privacy interests can be maximized in both the criminal and regulatory contexts.

Deficiencies of s. 231.3 of the Act

In September, 1989, the court in *Kourtessis v. M.N.R.* (1989), 50 C.C.C. (3d) 201, [1990] 1 W.W.R. 97 (B.C.C.A.) [*089257056 - 52 pp.], leave to appeal to S.C.C. granted 60 C.C.C. (3d) vi, 127 N.R. 239*n*, had upheld s. 231.3 of the Act, on the basis that once the statutory conditions for issuance had been satisfied, the mandatory requirements of the provision impaired the justices' discretion in a merely "administrative aspect" and that conditions as to the manner of execution could be attached pursuant to the court's inherent jurisdiction. Central to the British Columbia Court of Appeal decision was the view that [at p. 230]:

> What the mandatory word does is to deprive the judge of the discretions argued for in *Paroian* — that it was unnecessary to issue the process because the Minister already had enough material. That is not for the court to say . . .

In Quebec, in *Baron*, a parallel attack on the provision in the Federal Court of Appeal was successful on the basis that s. 231.3 violated both ss. 7 and 8 of the Charter in that the existence of a judicial discretion to refuse to issue process is both a constitutional prerequisite to the reasonableness of a search and to fundamental justice. In the result, the *Baron* and *Kourtessis* appeals were heard together in the Supreme Court of Canada.

On behalf of a unanimous Court, upholding the Federal Court of Appeal, Sopinka J. wrote that [at p. 5024]:

> . . . an analysis of the principles on which *Hunter* was based shows that the exercise of a judicial discretion in the decision to grant or withhold authorization for a warrant of search was fundamental to the scheme of prior authorization which Dickson, J. prescribed as an indispensable requirement for compliance with s. 8. in that case.

The Court emphasized that this discretion occupied a central role in the Court's pre-Charter common law assessment of the warrant process, as reflected in its decision in *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385 (S.C.C.), where Lamer J., as he then was, had found that "discretion . . . allows more effective judicial control of the police". In the view of the *Baron* Court, a discretionary regime is also essential to the Court's balancing of individual and state interests as [at p. 5024]:

> The circumstances in which these conflicting interests must be balanced will vary greatly. The strength of the interests will be affected by matters such as the nature of the offence alleged, the nature of the intrusion sought including the place to be searched, the time of the search and the person or persons who are the subjects of the search.

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CHARTER OF RIGHTS NEWSLETTER

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CIVIL RIGHTS AND THE CHARTER

It is undoubted that in the first decade of the development of the jurisprudence of the Charter the focus has been on the criminal and quasi-criminal structure of Canadian law. This seemed a natural evolution as conflicts between the state and the citizen reveal their most abrasive edge in this sphere. And it is in this sphere of sharp relief that the courts responded to fully implement the supremacy of the Charter.

In this wake, a wide variety of civil rights cases are now being prosecuted. Ultimately, perhaps this will become the most fertile area of Charter litigation. A review of some of these recent cases illustrates the range of issues involved.

Freedom of Religion and Education

Predictably, s. 2(*a*) Charter freedom of religion issues have been actively pursued. Sunday observance has involved protracted litigation commencing with *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385 (S.C.C.) [*188316260 - 60 pp.], and continuing through to a multitude of proceedings, particularly in Ontario. Mandatory school attendance laws have been upheld, generally, under s. 1 of the Charter. In light of s. 29 of the Charter, which ensures non-derogation from denominational education rights, a denominational school board has been held to be justified in requiring a teacher, as a condition of employment, to belong to and conform to the religious tenants of the denomination: *NTA v. Newfoundland (Treasury Board)* (1988), 53 D.L.R. (4th) 161, 71 Nfld. & P.E.I.R. 21 (C.A.) [*088257020 - 19 pp.], leave to appeal to S.C.C. refused 56 D.L.R. (4th) vii. School regulations requiring the performance of religious exercises have been struck down throughout Canada: *Zylberberg v. Sudbury Board of Education (Director)* (1988), 52 D.L.R. (4th) 577, 65 O.R. (2d) 641 (C.A.) [*088273075 - 86 pp.], *Russow v. British Columbia (Attorney General)* (1989), 62 D.L.R. (4th) 98, [1989] 4 W.W.R. 186 (B.C.S.C.) [*089026067 - 8 pp.], and most recently in *Manitoba Assn. for Rights and Liberties Inc. v. Manitoba* (1992), 94 D.L.R. (4th) 678, [1992] 5 W.W.R. 749 (Man. Q.B.) [*092239019 - 14 pp.].

Minority Language Education

The Court's recent decision in *Reference re: Public Schools Act (Man.) s. 79(3), (4) and (7)* (unreported, March 4, 1993, S.C.C.) [*093070137 - 42 pp.], further illustrates the extensions to which constitutionally guaranteed civil rights may be taken. Section 23(3)(*b*) of the Charter guarantees the right to have ones children receive instruction "in minority language education facilities". In *Mahe v. Alberta* (1990), 68 D.L.R. (4th) 69, [1990] 1 S.C.R. 342 [*090087002 - 59 pp.], the Court decided that s. 23 of the Charter conferred on minority language parents a right to management and control over the educational facilities in which their children are taught.

Reference re: Public Schools Act (Man.) thus involved the next question: does s. 23(3)(*b*) of the Charter also include the right to have ones children receive such minority language instruction in a distinct physical setting? Prior to the release of *Mahe*, the Manitoba Court of Appeal had ruled that s. 23(3)(*b*) of the Charter did demand a distinct physical setting. In confirming this decision, the Supreme Court extended the right to include distinct facilities from the French language implications of the text of the Charter [at pp. 15-16]:

> In *Mahe*, the Court accepted the proposition that such facilities in fact must "belong" to the linguistic minority, and that a measure of management and control accordingly flows to that minority (at p. 370):
>
> > "The underlined phrase in the French text — which utilizes the possessive '*de la*' — is more strongly suggestive than the English text that the facilities belong to the minority and hence that a measure of management and control should go to the linguistic minority in respect of education facilities." [Emphasis in original.]
>
> .....
>
> Once the threshold of entitlement to minority language education is met, if "minority language education facilities" are, as determined in *Mahe*, to "belong" to s. 23 parents in any meaningful sense as opposed to merely being "for" those parents, it is reasonable that those parents must have some measure of control over the space in which the education takes place. As a space must have defined limits that make it susceptible to control by the minority language education group, an entitlement to facilities that are in a distinct physical setting would seem to follow.

In addition, the *Mahe* Court had recognized that minority schools play a valuable role as cultural centres as well as educational institutions, therefore, the *Reference re: Public Schools Act (Man.)* Court found that "it seems reasonable to infer that some distinctiveness in the physical setting is re-

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CHARTER OF RIGHTS

NEWSLETTER

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FORFEITURE LAW UPDATE

The federal initiatives in the proceeds of crime field (*Criminal Code*, Part XII.2; *Proceeds of Crime (Money Laundering) Act*, S.C. 1991, c. 26) represent a fundamental shift in the philosophy of criminal law enforcement.

This shift from the detection, prosecution and punishment of criminal conduct itself (*malum in se*), to the identification, restraint and forfeiture of the profits of such acts (money and assets) entails enormous consequences. A criminal act itself may be momentary. Possession of proceeds of crime is a new, *continuous* offence.

The dealing with and conversion of such assets, constituting yet another new offence, imposes new due diligence requirements upon a broad range of institutions and professionals. Often, multiple third party interests are also implicated.

As enforcement agencies become more familiar with the operation of these legislative schemes, the number of cases in which they play a role has increased dramatically.

The first of the constitutional challenges has occurred, an evidentiary and procedural quagmire is quickly developing and diverse decisions are only beginning to address the vindication of valid third party interests.

The Division of Powers Challenge

Part XII.2 of the *Criminal Code* creates the offence of possession of and laundering of proceeds of crime. The bulk of the Part however is procedural, addressing methods for pre-trial restraint, evidentiary inferences and standards, the accommodation of exemptions and third party interests and, finally, the circumstances under which forfeiture of property may occur.

Forfeiture of specified property may be ordered by a court sentencing an offender convicted of an enterprise crime offence when the court "is satisfied, on a balance of probabilities, that [the] property is proceeds of crime and that the enterprise crime offence was committed in relation to that property" [s. 462.37(1)]. Although very clumsily drafted, it is generally thought that a s. 462.37(1) forfeiture relates to property that is the proceeds of the enterprise crime of which the accused was convicted, resulting in the sentencing hearing within which the forfeiture proceeding is occurring.

If the court is not satisfied that the enterprise crime offence of which the accused was convicted was committed "in relation to" the specified property sought to be forfeited, then it may only order such unrelated property to be forfeited if satisfied that, beyond a reasonable doubt, such property is proven to have been derived from the commission of some other additional crime [s. 462.37(2)].

In *R. v. Shah* (unreported, November 30, 1992, B.C. Prov. Ct.), Kitchen J. discussed the inevitable division of powers challenge to Part XII.2 on the basis that such federal law, only tenuously linked to the sentencing process, trenches upon the property and civil rights jurisdiction reserved to the provinces by s. 92(13) of the *Constitution Act, 1867*. In upholding the Part, Kitchen J. emphasized that in *R. v. S. (S.)* (1990), 57 C.C.C. (3d) 115, [1990] 2 S.C.R. 254 [*090184080 - 42 pp.], Dickson C.J.C. recognized that the legislative power over criminal law must be sufficiently flexible to recognize new developments and methods of dealing with offenders. This principle had been applied by the Supreme Court in *R. v. Zelensky* (1978), 86 D.L.R. (3d) 179, 41 C.C.C. (2d) 97 (S.C.C.), to uphold the restitution and compensation provisions of the Code. However, the Supreme Court in *Zelensky* also had emphasized that [at p. 193]:

> The constitutional basis of s. 653 must, in my opinion, be held in constant view by a Judge called upon to apply its terms. It would be wrong, therefore, to relax in any way the requirement that the application for compensation be directly associated with the sentence imposed as the public reprobation of the offence.

In addition, the court cautioned [at p. 195]:

> Section 653 does not spell out any procedure for resolving a dispute as to quantum; its process is, *ex facie*, summary but I do not think that it precludes an inquiry by the trial Judge to establish the amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial or into a reference in a civil proceeding. What is important is to contain s. 653 within its valid character as part of the sentencing process and thus avoid the allegation of intrusion into provincial legislative authority in relation to property and civil rights in the Province.

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NEW POLICE POWERS: THE JUDICIAL ROLE

Recent decisions of the Ontario and Manitoba Courts of Appeal vividly demonstrate radically different approaches to the protection of the right to be free from unreasonable search and seizure guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*.

In *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) [*093050042 - 44 pp.], Doherty J.A., on behalf of the court, stitched together a series of dissents to purport to justify an extension of police powers through a new "stop and frisk" rule created pursuant to a so-called "common law ancillary police powers doctrine". In contrast, in *R. v. Lamy* (unreported, April 8, 1993, Man. C.A.) [*093112011 - 19 pp.], Scott C.J.M., on behalf of the Manitoba Court of Appeal, reiterated the centrality of the warrant requirement in non-exigent circumstances, even in the face of the warrantless automobile search provisions of s. 10 of the *Narcotic Control Act* (N.C.A.), thus extending the logic of *R. v. Klimchuk* (1991), 67 C.C.C. (3d) 385 (B.C.C.A.) [*091290041 - 66 pp.]. These cases unearth underlying questions as to the role the "thin red line" should play with respect to the extension of police powers in a democratic society.

Down a Very Slippery Slope

Dickson C.J.C., in dissent, in *R. v. Dedman* (1985), 20 D.L.R. (4th) 321, 20 C.C.C. (3d) 97 (S.C.C.) [*188316329 - 25 pp.], lamented the loss of individual liberty, privacy and personal freedom that the majority's Charter s. 1 acceptance of the R.I.D.E. program represented in that case. In His Lordship's words [at p. 331]:

> With respect, the majority of the court departs firm ground for a slippery slope when they authorize an otherwise unlawful interference with individual liberty by the police, solely on the basis that it is reasonably necessary to carry out general police duties.

Perhaps it is fair to say that, in light of the goal of preventing drunk driving and the consequences of drunk driving, broad public support continues for this abridgment of rights. But the warning of the most distinguished Chief Justice in Canadian history should not be ignored.

R. v. Simpson contains far-reaching implications. Simpson was observed by a police officer leaving a residence which the officer believed to be a crack house based on a report that the officer had read describing an unconfirmed tip. Although the officer knew nothing of Simpson, he stopped the automobile in which Simpson was a passenger for investigative purposes and [at p. 487], "to see what stories they were going to give [him] as to who was coming from where, looking for them to trip themselves up to give [him] more grounds for an arrest". Simpson was questioned and admitted having "been in trouble for theft and a knife". The officer "noticed a bulge" in Simpson's pocket, frisked him and felt a "hard lump". Questioning, a struggle and an arrest ensued. The trial judge found no violation of s. 8 of the Charter on the basis that the police officer was "entitled to embark on the investigative course", to stop the vehicle and to do what was done.

Doherty J.A. held that Simpson was clearly detained and that s. 9 of the Charter was engaged. In His Lordship's view, although an assessment of the lawfulness of the detention was not dispositive (an unlawful detention is not necessarily arbitrary — *R. v. Duguay* (1985), 18 D.L.R. (4th) 32, 18 C.C.C. (3d) 289 (Ont. C.A.) [*188312421- 20 pp.], affd 56 D.L.R. (4th) 46, 46 C.C.C. (3d) 1 (S.C.C.) [*089027040 - 57 pp.]), if the detention was unlawful, such a finding would play a central role in determining whether the detention was also arbitrary. As the lawfulness of the detention depended on the police officer's authority to stop the vehicle, His Lordship undertook a detailed analysis of the statutory and common-law authority underpinning the general police duty to prevent and investigate crime.

In His Lordship's view, the Supreme Court of Canada's decision in the "check stop" cases (*R. v. Ladouceur* (1990), 56 C.C.C. (3d) 22 [*090156006 - 46 pp.]; *R. v. Hufsky* (1986), 40

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CHARTER OF RIGHTS

NEWSLETTER

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WARRANTLESS ENTRY

The scope of the police power to enter upon private property and, in the absence of statutory and common law authority, to effectively trespass upon such property, continues to be addressed in a variety of contexts.

Warrantless Arrest

In *Eccles v. Bourque*, [1975] 2 S.C.R. 739, the Supreme Court concluded that, at common law, police are entitled to enter a personal residence for the purpose of executing an arrest warrant subject to the existence of probable cause that the person sought is within the premises and that proper announcement is made prior to entry. In *R. v. Landry* (1986), 26 D.L.R. (4th) 368, [1986] 1 S.C.R. 145 [*086072006 - 33 pp.], the court decided that the power to enter private premises extended to warrantless arrest for an *indictable* offence.

In *R. v. Macooh* (unreported, June 30, 1993, S.C.C.) [*093189142 - 33 pp.], the Supreme Court decided that this power extended to warrantless arrest for *provincial* offences, when police were in hot pursuit or in circumstances where there was a "real continuity between the commission of the offence and the pursuit undertaken by the police". The extension of police powers entailed by this decision was described by the court as strictly conditional upon the underlying offence in question, whether federal or provincial, explicitly carrying with it a power to arrest without warrant. In addition, the court also emphasized that its decision did not address the general question of whether or not the police were entitled to enter private premises to effect a warrantless arrest for a provincial offence in the absence of hot pursuit.

Trespass Issues

Police investigative powers involving entry upon private property also continue to engage the courts, notwithstanding *R. v. Kokesch* (1991), 61 C.C.C. (3d) 207, [1990] 3 S.C.R. 3 [*090331006 - 49 pp.]. For example, in *R. v. Johnson* (unreported, January 20, 1993, B.C.S.C) [*093042114 - 6 pp.], Cowan J. ruled that the police were entitled to enter private property in order to investigate the identity of a person suspected to have operated a motor vehicle while impaired. A citizen observed a motor vehicle driving erratically. The citizen notified the police about these observations and provided the licence plate number of the vehicle. The police determined the address of the registered owner of the vehicle. When the police attended the rural address in a wooded area they were unable to observe either the automobile or the residence. Although acting upon the basis of mere suspicion the officers entered the property. Only as they drew near the residence were they able to observe the automobile in question and its occupants. A demand for a breath sample was refused. The accused was convicted of refusal to take a breath test at trial and appealed on the grounds that the officers' trespass constituted a violation of s. 8 of the Charter. In dismissing the appeal Cowan J. justified the police entry upon the basis of provisions of the British Columbia *Motor Vehicle Act* which authorize a police officer to demand that the owner of a motor vehicle provide information as to the identity of the operator during a relevant period and held [at p. 5]:

> In my view it is implicit from that section that a peace officer has the right to attend at a person's residence to make the necessary inquiry of the owner of the vehicle. In this case that attendance necessitated entry onto the appellant's property to reach the residence concerned.
>
> It happened when that occurred that the appellant was found to have the care and control of the vehicle in question while impaired.
>
> This is not a case where the officers could obtain a search warrant since as Dickson J. (as he then was) stated *Eccles v. Bourque* (1975), 19 C.C.C. (2d) 129 (S.C.C.) [at p. 132]:
>
> > "The *Criminal Code* empowers a Justice, on proper grounds being shown, to issue a warrant authorizing a search for things but there is no power to issue a warrant to search for persons."

Yet the opposite of this view was precisely the point so emphatically emphasized by Dickson C.J.C. in *Kokesch*, when he said that [at p. 218] "This court consistently has held that the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language". As the British Columbia *Motor Vehicle Act* did not clearly grant a power of entry, Cowan J. was forced to find that it was "implicit" that the officer had a right to attend the citizen's residence and that the absence of provisions authorizing a warrant to search for persons reinforced this conclusion.

It is in this regard that the Canadian courts repeatedly fall into error. The absence of a common law or statutory basis for a police investigative step does not mean that the court should "imply" a power where it does not exist. For whatever reason, the

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CONTEMPT OF COURT: INJUNCTIONS AGAINST THE PUBLIC AT LARGE

After yet another summer of unrest in Canada, whether arising in the context of native land claims, abortion opposition, controversy surrounding land and natural resource utilization, or whatever the issue of the day may be, the question that emerges in sharp relief is whether it is appropriate, effective and in the long-term interests of the administration of justice that public order be maintained, by the judiciary, through the grant of an injunction. In this terrain, Charter questions abound. In addition, a procedural quagmire results from the trial of the public in respect of criminal contempt allegations.

The overarching question is, given the division of functions between the executive and judiciary in democratic society, should the judiciary seek to compress the restraint of public wrongs, at the invitation of a private party, into procedures designed to address private civil disputes?

The Availability of Injunctive Relief

The British Columbia Court of Appeal was confronted with this difficult question in 1991 in the context of mass public demonstrations by anti-abortionists. In upholding criminal contempt convictions in *Everywoman's Health Centre v. Bridges Society (1988)* (1990), 78 D.L.R. (4th) 529, 62 C.C.C. (3d) 455 (C.A.)[*091057060 - 38 pp.], leave to appeal to S.C.C. refused 136N.R. 404*n*, 7W.A.C. 23*n*, McEachern C.J.B.C. and Southin J.A. registered a caveat to their judgment in the following terms [at pp. 541-2]:

> Today, the citizenry take to the streets over many social issues. Once upon a time, the citizenry rarely took to the streets save in labour disputes.
>
> . . . . .
>
> I think it is not unfair or unkind to say that by the 1950's, the courts of British Columbia were thought by some to be anti-labour because of the number of injunctions granted in labour disputes. Ultimately, to the relief of most, if not all, judges, the jurisdiction to deal with what is commonly called picketing was, in large measure, placed in the hands of what is now the Industrial Relations Council.
>
> *There is today the grave question of whether public order should be maintained by the granting of an injunction*, which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney-General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the *Criminal Code*.
>
> . . . . .
>
> It is obvious to me that the terms of this order were taken from precedents developed during the course of labour disputes. There is much to be said for the proposition that such precedents should be put permanently away and the court should give, in these cases where the citizens take to the streets and an injunction is sought, a fresh consideration to the extent to which the court should go. *That consideration should, in every case, depend on the precise nature of the dispute, the precise conduct in issue and so on.*

[Emphasis added].

Until the injunction cases of recent times, it was perhaps considered trite that interim injunctive relief in a private law civil action would only bind the parties to the action. This principle has been expressed repeatedly, for example, in *Re Wykeham Terracy*, [1971] 1 Ch. 204 at p. 210: "Justice is done, according to our system, between man and man in proceedings to which they are both parties. Proceedings are not brought and orders are not made in vacuo or in rem." In *Marengo v. Daily Sketch and Sunday Graphic, Limited*, [1948] 1 All E.R. 406, the House of Lords re-emphasized "it was not competent to the court: 'to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause'".

Despite these statements, the two mechanisms by which the current rash of injunctions have come to be applied against the public at large involve extending the terms of an injunction order to "anyone having knowledge of the order" and/or by naming "John Doe and Jane Doe" pursuant to the otherwise recognized practice of proceeding against a known but unidentified defendant. However, this has only been permitted by the courts in some provinces, while courts in other provinces have continued to doubt the propriety of these techniques.

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MANDATORY BAIL REVIEWS AND THE REVIEW OF ILLEGAL DETENTION

In two recent decisions by courts in British Columbia, new judicial light and, perhaps some judicial shadow, has been cast upon s. 525 of the *Criminal Code* which requires the review of the detention of a person after 90 days and, the appropriate remedy that is to follow a finding that the detention of an individual is illegal. The decisions also further the relatively sparse jurisprudence dealing with s. 10(c) of the Charter, which provides that:

> Everyone has the right on arrest or detention to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Though there is relatively little s. 10(c) jurisprudence, the writ of *habeas corpus* is long established as an important means of defending liberty against unlawful intrusion or interference. Indeed, so important is the writ that it is not uncommon to find grandiloquent descriptions of it, such as the following quote from *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559:

> The history of the writ is lost in antiquity... It is intended and well adapted to effect the great object secured in England by magna charta, and made part of our constitution that no person shall be deprived of his liberty "without due process of law". Whenever the virtue of and applicability of the writ has been attacked or impugned, it has been defended, and its vigor and efficiency reasserted, as the great bulwark of liberty.

It is notable that the importance of the writ has been similarly described in recent Canadian jurisprudence. In *R. v. Gamble* (1988), 45 C.C.C. (3d) 204, [1988] 2 S.C.R. 595 [*088355018 - 73 pp.], Wilson J. held that [at pp. 237-8]:

> [a] purposive approach should... be applied to the administration of Charter remedies... and, in particular, should be adopted when *habeas corpus* is the requested remedy since that remedy has traditionally been used and is admirably suited to the protection of the citizen's fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice.

Through a purposive approach and through adopting a "qualitative perspective" in the consideration of the deprivation of liberty, *habeas corpus* evolves into a remedy that is neither [at p. 240] "static, narrow, [nor] formalistic".

This "purposive approach" was adopted and affirmed in *R. v. Idziak* (1992), 97 D.L.R. (4th) 577, 77 C.C.C. (3d) 65 (S.C.C.) [*092331007 - 52 pp.]. The appellant was subject to a warrant of committal which was issued by an extradition court. The respondent argued that *habeas corpus* could not be invoked as a basis upon which to challenge the continued detention. Citing the judgment of Wilson J. in *Gamble*, Cory J. held that [at p. 77] "[the] position taken by the respondent [was] unduly restrictive. The rules dealing with the historic writ of *habeas corpus* should always be given a generous and flexible interpretation." An individual may, therefore, "properly invoke *habeas corpus* as a means of challenging increased or secondary detention even though success would not result in the release of the prisoner from a lawful primary detention." For these reasons, the remedy is available to challenge outstanding warrants of detention.

In the decision of *Burton v. Ronald Painter in his Capacity as the Director of Surrey Pre-Trial Services Centre and the Attorney General of British Columbia* (unreported, August 26, 1993, Vancouver Registry No. CA016528, B.C.C.A.), the court considered facts wherein the appellant had been committed for trial, however, his trial had not yet commenced and he had been in custody for more than 90 days. The appellant applied for an order in the nature of *habeas corpus*.

Section 525 of the *Criminal Code* requires, in summary, that where an accused is being detained in custody pending his or her trial, then the person having custody of the accused shall, within 90 days (in the case of an indictable offence), from when the accused was taken before a justice or ordered to be detained, apply to a judge "to fix a date for a hearing to determine whether or not the accused should be released from custody." On the hearing the judge is to consider whether or not the accused is to be released from custody and, in so doing, the judge may consider whether either of the parties has been responsible for

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CHARTER OF RIGHTS
NEWSLETTER
Editor: David J. Martin, LL.B., of the British Columbia and Ontario Bars. Associate Editor: Gregory P. DelBigio, M.A., LL.B., of the British Columbia Bar.

THE LEGAL METHODS OF MORAL ADJUDICATION

> *"Were the task before me that of taking the pulse of the nation, I too should quail . . ."* McLachlin J., in *Rodriguez v. British Columbia (Attorney General)*, at p. 19.

In both *Rodriguez v. British Columbia (Attorney General)* (unreported, September 30, 1993, S.C.C.)[*093287061 - 159 pp.] and *R. v. Tremblay*, [1993] 2 S.C.R. 932 [*093255092 - 61 pp.], the Supreme Court of Canada has been required yet again to consider both the constitutionality and interpretation of laws governing the "contentious" and "morally laden". In *Rodriguez*, the court's constitutional scrutiny was brought to bear upon assisted suicide, as prohibited by s. 241 of the *Criminal Code* and in *Tremblay*, the court considered the interpretation of s. 193(1) (now s. 210(1)) of the *Criminal Code* which prohibits keeping a bawdy house for the purpose of practicing indecent acts.

The facts in each case are straightforward. The appellant, Rodriguez, is terminally ill and suffers from a disease which, in its progression, causes the loss of the ability to move the body without assistance and, ultimately, a loss of the ability to breathe without a respirator or to eat without a gastrotomy. Because of her condition, the appellant faces the dilemma of wanting to live as long as she is able to enjoy life, but when she is no longer able to enjoy life, she will then be physically incapable of taking her own life without assistance.

In *Tremblay*, the appellants operated a business whereby for a $40 fee, a client would retire to a private room with a dancer and the majority of clients would then masturbate as the dancer undressed and performed an erotic dance.

The decisions in these cases are interesting, not so much because of the particular issues dealt with, or the specific conclusions arrived at, but because of the methods of legal reasoning used in dealing with the issues and in arriving at the conclusions. Issues may be characterized along a spectrum, starting with those that are strictly legal and shifting to those that are moral in nature. What is interesting about the adjudication of morality is that a method of reasoning which has developed primarily within the context of the consideration of legal issues needs to then be applied to a new kind of case.

In *Rodriguez*, McLachlin J. (dissenting), begins her reasons by rejecting the failure of parliament to deal with the issue and the fact that assisted suicide is not widely accepted elsewhere, as being determinative of the issue [at p. 3]:

> Since the advent of the Charter, this court has been called upon to decide many issues which formerly lay fallow. If a law offends the Charter, this court has no choice but to so declare.

By way of contrast, Sopinka J. (writing for the majority), states that the conclusion reached by the minority that s. 241 is unconstitutional, raises "serious concerns". The stated concerns are, in part, that the finding of unconstitutionality [at p. 2]: "recognizes a constitutional right to legally assisted suicide beyond that of any country in the western world, beyond any serious proposal for reform in the western world and beyond the claim made in this very case" and, that it [at p. 2] "fails to provide the safeguards which are required either under the Dutch guidelines or the recent proposals for reform in the States of Washington and California which were defeated by voters in those States principally because comparable and even more stringent safeguards were considered inadequate."

Furthermore [at pp. 12 - 13]:

> On the one hand, the *court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of the legislation.* On the other hand, the court has not only the power but the duty to deal with this question if it appears that the Charter has been violated . . .The principles of fundamental leave a great deal of scope for personal judgment and the court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder *only.*

[Emphasis added.]

Sopinka J. further articulates the source from which the principles of fundamental justice derive and the method by which one may come to have knowledge of such principles. It is not sufficient, he wrote, that something be a "mere common law rule" in order that it constitute such a principle. Nor can the principles be founded upon something [at p. 14], "so broad as to

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CHARTER OF RIGHTS NEWSLETTER

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THE COMMON LAW DUTY OF CONFIDENTIALITY AND s. 8 OF THE CHARTER

Privacy issues continued to occupy the Supreme Court of Canada in the fall of 1993. The court's trilogy of decisions: *R. v. Grant* (1993), 20 W.C.B. (2d) 590 [*093287057 - 57 pp.], *R. v. Wiley* (1993), 20 W.C.B. (2d) 592 [*093287056 - 27 pp.], *R. v. Plant* (1993), 20 W.C.B. (2d) 591 [*093287058 - 37 pp.] sent a series of conflicting Charter s. 8 signals. Privacy interests were given enhanced protection by the extension of the warrant requirement to moving conveyances. What might constitute exigent circumstances for permitting a warrantless search was defined. On the other hand, from the law enforcement perspective, some commentators have suggested that, in the trilogy, the court appeared prepared to find the presence of reasonable and probable grounds for granting a warrant to search on the basis of very little information. In *Plant,* the majority of the court appeared relatively unconcerned about warrantless police access to computerized public utility information. Yet despite these developments, the court examined police investigative illegality under s. 24(2) of the Charter that was merely temporally linked to, but not directly involved in, the acquisition of evidence. The true implications of the trilogy cannot be understood, however, without being placed in the context of the court's most recent and, perhaps most important public law decision in 1993, *R. v. Dersch* (unreported, October 21, 1993, S.C.C.)[*093308005 - 31 pp.]. *Dersch* represents the Supreme Court's most comprehensive effort to address issues associated with informational privacy and the developing rule of exclusion of undiscoverable real evidence.

The Impact of Confidentiality Duties

A motor vehicle operated by the appellant *Dersch* was involved in a head-on collision resulting in death. Attending police officers observed that the appellant was lapsing in and out of consciousness and also detected the odour of alcohol. In the hospital emergency room, an attending physician attempted to take blood from the appellant. The appellant objected emphatically to the taking of a blood sample under any circumstances. Notwithstanding this refusal, an assisting physician took a blood sample purely for medical purposes while the appellant was unconscious. This sample was tested for blood alcohol content relevant to the diagnosis of the appellant's condition.

Later, in response to a written request by police, the doctor prepared a medical report, without the consent of the appellant, which included the results of the blood test. Police subsequently obtained a search warrant to seize the blood sample for further analysis. The appellant was charged with criminal negligence causing death and care and control of a motor vehicle while impaired causing death.

The trial judge admitted the blood sample and test results on the basis that ss. 7 and 8 of the Charter were inapplicable and because, in his view, there was no legal privilege in the test results. A majority of the British Columbia Court of Appeal found that neither the doctor nor the hospital were acting as agents of the State within the meaning of s. 32 of the Charter and that ss. 7 and 8 of the Charter had not been violated by the police action. Hutcheon J.A. dissented on the basis that the means by which the police obtained the medical report violated s. 8 of the Charter. In his view, however, the evidence would have been otherwise discoverable and was, therefore, admissible under s. 24(2) of the Charter.

The Supreme Court of Canada unanimously reversed the decision. In the words of Major J. [at p. 9]:

> However, while the conduct of Dr. Gilbert and Dr. Leckie in the circumstances of this case was not in violation of the appellant's Charter rights, it is clear that some of their conduct was wrong. The first blood sample taken despite the appellant's unequivocal instruction to the contrary was improper and is most material in the disposition of this appeal. The provision to the police by Dr. Gilbert of specific medical information about the appellant without his consent violated Dr. Gilbert's common law duty of confidentiality to the appellant: *McInerney v. MacDonald,* [1992] 2 S.C.R. 138 at pp. 149-50.

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