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.

CONSTITUTIONAL TORTS

In the United States, a "constitutional wrong" has long been recognized as the basis upon which a civil action may proceed. Indeed, civil actions have been used to litigate a myriad of important constitutional issues such as equality, political and religious freedom, rights with respect to education, prisoner's rights, poverty-related issues such as housing and health-related issues such as compulsory vaccinations or blood transfusions. A survey of recent Charter jurisprudence reveals what is perhaps a trend towards an increase in the number of cases of this sort in Canada.

The possibility of civil action arises from the remedial power which is conferred upon the courts through the wording of s. 24(1) of the Charter.

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The wording of s. 24(1) has been interpreted to give broad jurisdiction to the courts to grant remedy by both academic writers and the judiciary alike. In *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609, [1989] 2 S.C.R. 170 [*089228006 - 68 pp.], Lamer J. wrote that: "When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction is *essential for the vindication of a constitutional wrong*. To create a right without a remedy is antithetical to one of the purposes of the Charter, which surely is to allow courts to fashion remedies when constitutional infringements occur."[Emphasis added.] Similarly, in *Charter Damages Claims* (Toronto, Carswell, 1990), the author, Ken Cooper-Stephenson, noted that "instead of governmental immunity there is constitutional entrenchment of accountability".

In his book, *Constitutional Law of Canada*, 2nd ed. (Toronto, Carswell, 1985), Peter Hogg wrote that both "defensive" remedies, such as enjoining an act or declaring a law to be invalid, and "affirmative" remedies, such as awarding damages, or a mandatory injunction are available. Similarly, in Kent Roach's article, "Section 24(1) of the Charter: Strategy and Structure" (1987), 29 Crim. L.Q. 222 at pp. 250 - 71, Roach identifies the return of evidence, quashing of proceedings for abuse of process, declarations, sentence reduction, damages, costs and injunctions, as all being remedies that are available under s. 24(1).

The basis for the action itself lies, of course, in ss. 2 through 15 of the Charter. The following cases represent examples of how the Charter is being implemented in civil actions. From them it is readily seen that the Charter may be deployed in civil actions to both compliment and supplement already existing common law causes of action, and as a basis upon which to seek remedies which might not otherwise be available, on both procedural and evidentiary matters.

In *Forster v. Macdonald* (1993), 43 A.C.W.S. (3d) 1185 (Alta. Q.B.) [*093334074 - 25 pp.], the plaintiff successfully impugned court martial proceedings which had been taken against her on the grounds that the structure and constitution of the general court martial failed to comply with the requirements of s. 11(d) of the Charter. (See *R. v. Forster* (1992), 88 D.L.R. (4th) 169, 70 C.C.C. (3d) 59 (S.C.C.) [*092055024 - 22 pp.].) The plaintiff then brought an action for assault, wrongful imprisonment, malicious prosecution and abuse of process. Following *Nelles, supra*, where it was held that in many, if not all cases of malicious prosecution, a person's rights as guaranteed by ss. 7 and 11 of the Charter will have been infringed, the court allowed the plaintiff's claim in part and awarded $40,000 in general damages for malicious prosecution, $5,000 for wrongful imprisonment and $500 towards the cost of her legal fees.

In *Mooring v. Canada* (1993), 76 F.T.R. 25 (T.D.) [*093273072 - 18 pp.], the plaintiff was an inmate in a federal institution. During an incident in which prisoners became unruly and destructive, prison staff intervened. The result was that the plaintiff was handcuffed and maced in his face and shoulder area. He was not allowed to decontaminate himself thereafter and suffered some small burns from the mace. The plaintiff pleaded s. 7 of the Charter relating to security of the person as well as s. 12 relating to cruel and unusual punishment.

The court held that "[t]hrough the influence of the *Canadian Charter of Rights and Freedoms* and also by reason of the increasing means for inmates to raise justiciable issues, the cold hand of the law has become increasingly concerned with the preservation of basic human rights". The court further held that

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INFORMATIONAL PRIVACY: THE NEW FRONTIER OF RIGHTS LITIGATION

The Supreme Court of Canada has continued to define the full scope of the Charter s. 8 right to be secure against unreasonable search or seizure. That the rights protected by s. 8 of the Charter unfold exponentially reflects the multi-dimensional character of the section which embraces a broad field of interests revealed in a variety of contexts.

The limits of physical search have come to be well defined - *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97 (S.C.C.) and *R. v. Kokesch* (1991), 61 C.C.C. (3d) 207, [1990] 3 S.C.R. 3 [* 090331006 - 49 pp.]. The content of the protection provided by s. 8 of the Charter in circumstances of audio surveillance: *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, [1990] 2 S.C.R. 1421 [*090331004 - 94 pp.]; *R. v. Duarte* (1990), 65 D.L.R. (4th) 240, 53 C.C.C. (3d) 1 (S.C.C.) [*090031102 - 45 pp.], and visual surveillance: *R. v. Wong* (1990), 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36 [*090331008 - 56 pp.] is now clear. A host of procedural questions associated with the assessment of Charter s. 8 rights claims have been answered in the last decade. Yet all of this addressed only the *spatial* protections conferred by s. 8. Because s. 8 of the Charter protects people not places, the Supreme Court has now begun to examine the much more difficult question of how much protection s. 8 of the Charter provides against invasions of informational privacy and how these protections will be vindicated in the various contexts in which such privacy is threatened.

In *R. v. Dersch* (1993), 85 C.C.C. (3d) 1, [1993] 3 S.C.R. 768 [*093308005 - 31 pp.](examined in detail in 6 C of R. Newsl., No. 6, December, 1993) the court excluded evidence derived from oral information obtained by the police from a potential witness contrary to the witnesses' common law duty of confidentiality not to reveal such information. In *R. v. Colarusso* (unreported, January 26, 1994, S.C.C.) [*094049001 - 81 pp.], the court has now examined the emerging and complex question of the limits within which the criminal enforcement arm of the state will be confined when seeking to obtain information from other state actors engaged in the acquisition of information through regulatory and administrative processes. Because state regulatory and administrative agencies obtain vast amounts of information for limited and specific purposes *Colarusso* entails even broader implications than *Dersch*. A body of trial court jurisprudence written by courageous and visionary judges has anticipated these developments. Next month, in *R. v. Jobin* (1993), 78 C.C.C. (3d) vi, 46 W.A.C. 317*n* (S.C.C.), the court will be asked to define these limits as they may be threatened in the curial forum. Ultimately in the terrain of informational privacy the protection against unreasonable search intersects with s. 7 of the Charter and the right to silence. Privacy, freedom from state interference, is at the core of both rights.

Inter Agency Information Transfer

In *Colarusso*, the accused was charged with criminal negligence in the operation of a motor vehicle causing death. He was arrested at the accident scene and ultimately voluntarily provided bodily fluid samples for medical purposes. Pursuant to the Ontario *Coroners Act*, the coroner attended the hospital and requested samples of these fluids for the purpose of carrying out his quasi-judicial, non-criminal investigative functions. The samples were provided by the medical personnel to the coroner who turned them over to the investigating police, again pursuant to the *Coroners Act*, for safekeeping and transport to the Centre of Forensic Sciences. In light of the fact that these fluids had been obtained and would be analyzed, the police did not attempt to independently obtain breath or blood samples pursuant to the *Criminal Code*. At the ac-

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THE CONSTITUTIONAL STANDARDS OF MENS REA (PART I)

Note: This is the first of a two part series dealing with the topic of the Constitutional Standards of Mens Rea

The topic of *mens rea*, as a constitutional standard, was last covered in detail in 3 C. of R. Newsl., No. 5, but the Supreme Court of Canada has since further developed this important, if not elusive, area of law and the subject should, therefore, be re-addressed. In brief, it will be seen that distinctions have emerged between what might be described as negligence-based offences, consequence-based offences, and act-based offences. The Supreme Court of Canada has now clarified what constitutes the constitutionally requisite *mens rea* for each, however, it will be seen that the constitutional standard differs according to the category of offence that is being examined. Part II of this topic will illustrate that the analysis of *mens rea* as it relates to the definition of an offence, also applies to the formulation of some defences that are available to an accused.

Proof of a culpable state of mind has, of course, long been central to a finding of criminal culpability. Thus, it was stated by Dickson J. in *R. v. Sault Ste. Marie (City)* (1978), 85 D.L.R. (3d) 161 at pp. 165-6, 40 C.C.C. (2d) 353 (S.C.C.) that:

> The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of *true crimes* there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea* . . . Blackstone made the point over two hundred years ago in words still apt: ". . . to constitute a crime against human laws, there must be, first, a *vicious will*; and secondly, an unlawful act consequent upon such vicious will. . .".

(Emphasis added.)

The requirement of a guilty mind corresponds to the belief that the morally innocent ought not be punished. An example of an early application of this "true crime- vicious will" requirement, within the context of a defence, may be found in *Pappajohn v. The Queen* (1980), 111 D.L.R. (3d) 1, 52 C.C.C. (2d) 481 (S.C.C.), where an honest yet mistaken belief with respect to consent was held as being a defence upon which an accused may be properly acquitted of rape. The mistaken belief in consent is inconsistent with there being a vicious will and, therefore, acts which are consequent upon such belief are not criminal. Or, to phrase it in different terms, where there is a mistaken belief there is moral innocence in respect of the act in question.

The decisions in *Sault Ste. Marie* and *Pappajohn*, were pre-Charter, however, subsequent decisions of the Supreme Court of Canada served, of course, to constitutionalize these same principles. In *Reference re: Section 94 (2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536, 23 C.C.C. (3d) 289 (S.C.C.) [*086003002 - 40 pp.], Lamer J. (as he then was) affirmed the revulsion held against punishment of the morally innocent, and held, for that reason, as follows [at p. 561]:

> . . . in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the Charter if, as a result, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest . . . it might only be salvaged for reasons of public interest under s. 1.

Lamer J. again wrote on the subject in *R. v. Vaillancourt* (1987), 47 D.L.R. (4th) 399, 39 C.C.C. (3d) 118 (S.C.C.) [*087344122 - 23 pp.], where the issue of the constitutionality of the constructive murder provision of the *Criminal Code* was before the court. In his decision, the duty of the courts to ensure that legislation conforms to constitutional requirements was made clear. Therefore [at p. 413], whereas "[p]rior to the enactment of the Charter . . . it was always open to Parliament expressly to relieve the prosecution of its obligation to prove any part of the *mens rea*", this was no longer the case. Further, Lamer J. stated [at p. 413], "[u]nder s. 7, if a conviction, given either the stigma attached to

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THE CONSTITUTIONAL STANDARDS OF MENS REA (PART II)

Note: This is the second of a two part series dealing with the topic of the Constitutional Standards of Mens Rea.

Part I of this series traced the development of the constitutional standards of *mens rea*, and concluded with the law as set out by McIntyre J. in the case of *R. v. Tutton* (1989), 48 C.C.C. (3d) 129, [1989] 1 S.C.R. 1392 [*089164001-59 pp.]. The accused in *Tutton* was charged with manslaughter by criminal negligence. In that context, McIntyre J. held that where criminal negligence is at issue, an objective test must be employed in order to determine whether the conduct in question is unlawful and stated [at p. 139], "negligence has become accepted as a factor which may lead to criminal liability...". The objective test, is modified, however, through reference to the existing facts and circumstances, including those facts and circumstances as perceived by the accused. This, however, is itself modified with the proviso that, in cases of negligence, an unreasonable though honest belief would be negligently held, and such belief cannot, therefore, act as a defence to a charge of negligence [p. 142]. The result of this is a "modified objective test" and the test is one which is distinguishable from the *Pappajohn* test (*Pappajohn v. The Queen* (1980), 111 D.L.R. (3d) 1, 52 C.C.C. (2d) 481 (S.C.C.)) which requires that a belief be honest, though not necessarily reasonable.

Lamer J. (as he then was) agreed with the reasons of McIntyre J., with the following qualification. When applying the objective test, " 'a generous allowance' for factors which are particular to the accused, such as youth, mental development, [and] education" must be taken into account [p. 143].

Wilson J. (Dickson C.J.C. and La Forest J. concurring) agreed with the results of McIntyre and Lamer JJ., however, the learned Justice disagreed [at p. 144] both with the "conclusion that criminal negligence . . . consists only of conduct in breach of an objective standard and does not require the Crown to prove that the accused had any degree of guilty knowledge" and, with the conclusion that the sentencing process can be effectively used "in order to relieve against the harshness of the objective standard of liability . . .".

The initial premise for Wilson J. is that the principles of penal liability and fundamental justice require that criminal liability not be imposed in the absence of a blameworthy state of mind. As stated by Wilson J. [at p. 147], "This is particularly so in the case of offences carrying a substantial term of imprisonment which by their nature, severity and attendant stigma are true criminal offences aimed at punishing culpable behaviour as opposed to securing the public welfare." In the absence of clear statutory language, the courts should refrain from interpreting legislation in a manner which is contrary to this.

Whereas McIntyre J. emphasized the word "negligence" in arriving at the objective standard, Wilson J. distinguished between "negligence", and "criminal negligence" and held that, in dealing with the latter, the courts should interpret the phrase so as to refer to and include a degree of mental blameworthiness which is consonant with the principles of criminal law. This, in turn, requires that criminal negligence be founded upon nothing less than advertent negligence. Thus, "wanton or reckless disregard for the lives or safety of others will constitute the *actus reus* of the offence under s. 202 and the *prima facie* evidence of the accused's blameworthy state of mind" [p. 152], and proof of the risk creating behaviour is therefore *prima facie* proof that the accused was either aware of, or wilfully blind to, the risk itself. Rather than distinguishing *Pappajohn*, in cases of criminal negligence, through a requirement that beliefs be reasonably held (as did McIntyre J.), Wilson J. held [at p. 158] that *Pappajohn* is distinguished through the degree of guilty knowledge that must be proven. The relevant test in criminal negli-

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DISCLOSURE: PRINCIPLES, IMMUNITIES AND REMEDIES

The substantive and procedural requirements of disclosure confirmed by the Supreme Court of Canada in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1, [1991] 3 S.C.R. 326 [*091317026 - 33 pp.] continue to reverberate throughout the criminal justice system. The creation of a constitutional requirement of full and prompt disclosure has undoubtedly generated enormous efficiency and greater fairness. As the criminal justice system adjusts to this requirement, a wave of interpretative jurisprudence has been produced.

Issues of the timing and completeness of disclosure have occupied the courts. Faced with the duty to make full disclosure, some prosecuting agencies have resorted to public interest immunity claims under s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, one of the last of the statutory secrecy refuges. In addition, the definition of the appropriate remedy where non-disclosure has occurred has been troublesome.

Developing principles

Notwithstanding the clear *Stinchcombe* rules respecting the onus and standards of disclosure, various courts have continued to attempt to dilute these requirements by attempting to re-establish preliminary showing preconditions and by narrowly defining relevancy. This regrettable approach appears to have continued notwithstanding the clarification of the relevancy criteria issued by the Supreme Court in the summer of 1993 in *R. v. Egger* (1993), 103 D.L.R. (4th) 678, 82 C.C.C. (3d) 193 [*093166001 - 43 pp.] that the full disclosure requirement applies with equal vigour to both factual and procedural defences (see *6 C. of R. Newsl., No. 2, p. 3, "Disclosure: What is Relevant?")*.

In *Egger*, the original, negatively-framed *Stinchcombe* requirement (*i.e.*, that disclosure must be made if there is a reasonable possibility that withholding information will impair full answer and defence) was reframed, in positive terms, in this way [at p. 689]:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed: *Stinchcombe*, *supra*, at p. 16. This requires a determination by the reviewing judge that production of the information can *reasonably be used by the accused* either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence . . .

(Emphasis added.)

Both the substantive and procedural requirements of *Stinchcombe* have been reiterated and elaborated by the Supreme Court in *R. v. Durette* (1992), 72 C.C.C. (3d) 421, 9 O.R. (3d) 557 (C.A.) [*092150015 - 105 pp.], revd 88 C.C.C. (3d) 1, 70 O.A.C. 1 (S.C.C.) [*094087121 - 112 pp.]. The Supreme Court's decision in *Durette* reverses controversial opinions expressed by the lower court. In that case, a majority of the appeal court sought to reimpose preliminary showing requirements upon the accused to justify access to the edited contents of wiretap affidavits (see *5 C. of R. Newsl., No. 2, "The Recycled Preliminary Showing Requirement")*. In effect, a majority of the Supreme Court (Lamer C.J.C., Sopinka, Cory and Major JJ.) adopted the dissenting judgment of Doherty J.A. who had found [at p. 465] that:

> An accused, as part of the full answer and defence entitlement developed by the common law and now constitutionally entrenched by ss. 7 and 11(*d*) of the Charter, has the right to challenge the admissibility of evidence tendered by the Crown . . .

Doherty J.A. had held that the imposition of a preliminary showing requirement (of potential prejudice from lack of access to edited material) in effect reinstituted the "Catch-22" proposition rejected in *Dersch v. Canada (Attorney General)* (1990), 77 D.L.R. (4th) 473, 60 C.C.C (3d) 132 (S.C.C.) [*090331009 - 23 pp.]. In adopting this rule, Sopinka J., on behalf of the Supreme Court found [at p. 55] that:

> The Charter guarantee of the right to make full answer and defence requires that, as a general rule, *all* relevant information in the possession of the state be disclosed to an accused. In order to

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THE INTERPRETATION AND APPLICATION OF SECTIONS 7 AND 8 OF THE CHARTER IN THE REGULATORY CONTEXT

It may be generally stated that though some considerable clarity and coherence of judicial method exists in the interpretation and application of ss. 7 and 8 of the Charter in the criminal context, such guidance has not yet been developed in the jurisprudence involving regulatory statutes. Indeed, the distinction between the criminal and regulatory contexts is, itself, not yet clearly defined. In addition to this initial definitional problem, other questions also arise. For example, do actors within the regulatory context have the same range of guarantees and protection of rights as do persons who have been charged with a criminal offence; if actors within the regulatory context enjoy fewer guarantees or protections, or less robust versions of the same guarantees and protections, upon what basis is such a limiting of rights justified; if it is justifiable that rights are limited for a certain purpose within a specific context, do protections exist so that the disadvantage that a person suffers as a result of the limited rights does not spill over into other contexts?

Cases such as *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161, 54 C.C.C. (3d) 417 (S.C.C.) [*090094052 - 181pp.]; *R. v. McKinlay Transport Ltd.* (1990), 68 D.L.R. (4th) 568, 55 C.C.C. (3d) 530 (S.C.C.) [*090094054 - 38pp.]; *R. v. Wholesale Travel Group Inc.* (1991), 84 D.L.R. (4th) 161, 67 C.C.C. (3d) 193 (S.C.C.) [*091301026 - 157pp.] and *Baron v. Canada* (1993), 99 D.L.R. (4th) 350, 78 C.C.C. (3d) 510 (S.C.C.) [*093035106 - 55pp.] have, of course, been of assistance in providing answers to questions such as these, nonetheless, the jurisprudential web is still incomplete. The following cases suggest further answers to these questions. In particular, the cases will deal with two topics: first, the use of the "licensing" theory as a means of interpreting the scope of Charter rights, and, second, statutory compulsion and use immunity.

The Licensing Theory of Rights

The applicability of the licensing theory of rights is illustrated in the recent decision of the Federal Court of Canada in *Francoeur v. Canada* (unreported, May 16, 1994, F.C.T.D) [*094166129 - 57pp.]. In *Francoeur*, the plaintiff companies imported video cassettes from the United States, and the cassettes were then leased to franchisees. The business operations brought the plaintiff within the terms of the *Customs Act*, R.S.C. 1970, c. C-40 [now R.S.C. 1985, c. 1 (2nd Supp.)] which required that fair market value of the goods be declared, made the imported goods subject to forfeiture in the event of the commission of an offence, and, provided that an officer may enter premises, and seize all goods which he has reasonable grounds to believe are subject to forfeiture. As a result of the plaintiff's calculation of the value of the goods, video cassettes and business records were seized.

In considering the application of s. 8 of the Charter, the starting premise for Wetston J. in *Francoeur*, taken from *R. v. Colarusso* (1994), 110 D.L.R. (4th) 297, 87 C.C.C.(3d) 193 (S.C.C.) [*094049001 - 81pp.], was that s. 8 protects people, not places or things. As he stated [at p. 33]: "Section 8 does not protect Mr. Francoeur from intrusions onto private property, but rather from intrusions to a reasonable expectation of privacy." In turn, the scope of the reasonable expectation of privacy is determined through reference to the statute in question, "the purpose of the statutory power and the expectations of privacy regarding those *persons who choose to carry on a particular business activity*" [p.34] (emphasis added). Thus, as a result of choosing to participate in a particular business, acquiescence to the limiting of rights is inferred. As noted by Iacobucci J. in *R. v. Wholesale* [*supra*, at p. 235]:

> Those who choose to participate in regulated activities must be taken to have accepted the consequential responsibilities and their penal enforcement.

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TOWARDS AN UNDERSTANDING OF "STANDING" UNDER SECTION 8 OF THE CHARTER

The issue of standing was last discussed in 5 C. of R. Newsl., No. 1, but the confusing state of the jurisprudence makes the topic worth re-visiting. When a court confers "standing" under s. 8 of the Charter, the court grants to an individual the right to challenge the constitutionality of a search or seizure, and the admissibility of the evidence obtained by the state through that search or seizure. Unfortunately, the Supreme Court of Canada has still not provided clear guidance as to when standing should be granted. The current case law is described as confusing for two reasons. First, the leading cases of *R. v. Arason* (1992), 78 C.C.C. (3d) 1, 37 W.A.C. 20 (B.C.C.A.) [*092345020 - 79pp.], and *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295, 52 O.A.C. 280 (C.A.) [*092073020 - 24pp.] are both premised upon an interpretation of the wording of s. 24(1) as was given by the Supreme Court of Canada in *R. v. Rahey* (1987), 33 C.C.C. (3d) 289, 39 D.L.R. (4th) 481 (S.C.C.) [087146005 - 32pp.]. This interpretation, as a premise in the standing argument, results in a conservative conclusion with respect to the scope of standing. The validity of the conclusion must, however, be questioned because the *Rahey* interpretation runs contrary to many of the other "interpretive principles" that have been put forward by the Supreme Court of Canada. It is, for this reason, not clear that the Supreme Court of Canada will affirm the conservative conclusions of the courts in *Arason* and *Pugliese* when the issue is finally fully argued in that court. A second source of confusion which has come to be described as the "expectation of privacy" theory of standing, is itself vague, and offers little principled guidance with respect to when and why standing either should, or should not be granted. This will be elaborated upon in what follows.

In *Pugliese*, the expectation of privacy theory was formulated as follows. The court held [at p. 301], that when an accused argues that there has been a breach of his or her s. 8 rights, the accused is "asserting a particular right to privacy which may, on occasion, be unrelated to any recognized proprietary or possessory right . . . Accordingly, s. 8 is available to confer standing on an accused person who had a reasonable expectation of privacy *in the premises* where the seizure took place, even though he had no proprietary or possessory interest in the premises or in the articles seized." (Emphasis added.) Thus, the "'true test' of a protected constitutional right under s. 8 of the Charter is whether there is a reasonable expectation of privacy" [p. 302].

The basis for requiring that this be a "personal privacy right" [p. 302] is, in turn, to be found in *Rahey* where Wilson J. held [at p. 308] that "[a]n application for relief under s. 24(1) can only be made by a person whose right . . . has been infringed". And though s. 24(1) is distinct from s. 24(2), and the language of the two sections is different, s. 24(2) does, nonetheless, "have language linking it to s-s.(1) by referring to 'proceedings under subsection (1)'": *R. v. Fraser* (1990), 55 C.C.C. (3d) 551 at p. 554 (B.C.C.A.)[*090088022 - 15pp.]. Therefore, the argument runs, an individual may seek relief under s. 24(2) for a breach of s. 8 rights only when that individual's own s. 8 rights have been breached.

The conclusion of this argument is described as resulting in conservative standing rules because an individual is precluded from using s. 8 as a basis upon which to bring to the court's attention two important pieces of information: first, that the evidence that is serving as the basis of the prosecution was obtained through illegal means against another party and second, that the individual was the target of the search or seizure.

The following cases illustrate this narrow approach to standing:

• *R. v. Johnson* (1984), 14 C.R.R. 227 (B.C. Co. Ct.)

An investigation commenced with respect to the practice of the accused in discounting income tax refunds. Search warrants issued under the *Consumer Protection Act*, R.S.B.C. 1979, c. 65, were executed at the accused's place of business, as well as at a bank at which the accused's businesses had accounts. Banking documents for the accounts were seized.

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THE CONSTITUTIONAL RIGHT TO AN INTERPRETER

In its decision in *R. v. Tran* (unreported,September 1, 1994, S.C.C.) [*094256001-83pp.],the Supreme Court of Canada has finally defined the scope of the important right which is protected by s. 14 of the Charter, and provided a sensitive analysis of the purposes of the protection. Section 14 provides as follows:

> 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

The facts of the case are straightforward. The accused was charged with sexual assault, and he did not understand or speak the language in which the proceedings against him were being conducted. He therefore required the assistance of an interpreter. The interpretation consisted, in part, of only summaries of the evidence which was provided, and for some evidence there was no interpretation provided at all.

The analysis of s. 14 as articulated by Lamer C.J. on behalf of a unanimous court drew from the common law jurisprudence surrounding s. 650(1) of the *Criminal Code*, which provides that an accused "shall be present in court during the whole of his trial". The common law principles were, however, "where necessary, adapted to fit with the dictates of the new Charter era". And because there has been considerable litigation over the extent to which some of the other Charter rights apply outside of the criminal context (see, for example, 7 C. of R. Newsl., No. 2), the prefatory remarks of the court made it "very clear that the discussion of s. 14 of the Charter . . . relates specifically to the right of an *accused* in *criminal proceedings*, and must not be taken as necessarily having any broader application" (p.8). (Emphasis in original.) The phrase "any proceedings" has, therefore, for now, been restricted to refer to criminal proceedings, however, the court left open the possibility that different rules may be developed for the application of s. 14 in other contexts.

Within the common law, "presence of the accused" has been interpreted to mean "actively present" in the sense of understanding the proceedings (*R. v. Lee Kun*, [1916] 1 K.B. 337 (C.C.A.)). The criterion of the ability to understand, in turn, will in some circumstances only be satisfied where an accused is provided with the assistance of an interpreter. An interpreter enables an individual to be meaningfully present, in the sense that he or she is able to understand the proceedings. This requirement of an interpreter was bluntly described by the Ontario Court of Appeal in *R. v. Reale* (1973), 13 C.C.C. (2d) 345, [1973] 3 O.R. 905 (C.A.), affd 22 C.C.C. (2d) 571, 58 D.L.R. (3d) 560 (S.C.C.). Where the accused was deprived of the assistance of an interpreter, the court stated that (at p. 354) "[w]e are of the view that he was no more present than if he were unconscious as the result of a heart attack or a stroke, and was as effectively denied any meaningful presence as if he had been physically removed from the court-room during that part of the proceedings".

In *Negron v. New York*, 434 F. 2d 386 (2nd Cir. 1970), the requirement of meaningful presence in the proceedings was similarly described, in terms of a component of due process. In *Negron*, the court held that this requirement derives from considerations of fairness, and the "integrity of the fact finding process". The accused must have the "ability to consult with his lawyer with a reasonable degree of rational understanding. Otherwise, [t]he adjudication loses its character as a reasoned interaction...and becomes an invective against an insensible object" (p. 389).

In interpreting s. 14, Lamer C.J. also noted that the rights that are contained within s. 14 bear a close relationship with s. 7, which guarantees the right to full disclosure and the right to full answer and defence; with s. 11(*d*) which guarantees a fair and public hearing; with s. 15 guaranteeing equality; with s. 25

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CHARTER OF RIGHTS
NEWSLETTER

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THE CONSTITUTION ACT, 1982, S. 52(1): A QUESTION OF REMEDY

As the Supreme Court of Canada continues to reserve and consider its judgment in *R.v. Jobin* (1993), 78 C.C.C. (3d) vi, 141 A.R. 317*n* (S.C.C.), it becomes more and more apparent that this decision will require, in an unprecedented way, that the court resolve broad questions as to its approach to constitutional remedies.

The constitutional challenge to the validity of s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, involved in *Jobin* requires the court to address one of the most important and far-reaching questions that it will decide in the second decade of the Charter. Many analysts are of the view that a majority of the court will conclude that compulsion statutes which force citizens to incriminate themselves must provide both use immunity and *some form* of derivative use immunity in order not to violate the Charter s. 7 rights to privacy and silence. This validity decision itself will have enormous implications beyond the criminal law and will extend into both regulatory and administrative law contexts. Accordingly, the court's approach to remedy, in light of its validity conclusions, will make this case a watershed decision.

Background to the Issues

From 1982 until 1990, Charter challenges to statutory compulsion regimes were dismissed, *inter alia*, upon the basis that s. 7 of the Charter did not provide residual protection against self-incrimination supplementary to the specific protections explicitly conferred by ss. 11(*c*) and 13 of the Charter. This reasoning was primarily based upon the then prevailing judicial view as to the limited scope of the right to remain silent under the Charter and the limited scope of the historical Canadian "privilege" against self-incrimination: *Transpacific Tours Ltd. v. Director of Investigation & Research* (1985), 24 C.C.C. (3d) 103, 25 D.L.R. (4th) 202 (B.C.S.C.); *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.* (1985), 24 D.L.R. (4th) 724, [1986] 2 W.W.R. 289 (B.C.C.A.), leave to appeal to S.C.C. granted 68 N.R. 319*n*; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1986), 30 C.C.C. (3d) 145, 34 D.L.R. (4th) 413 (Ont. C.A.) [*086296049-23pp.], affd 54 C.C.C. (3d) 417, 67 D.L.R. (4th) 161 (S.C.C.) [*090094052-181pp.];*contra*: *R.L. Crain Inc. v. Couture* (1983), 10 C.C.C. (3d) 119, 30 Sask. R. 191 (Q.B.). On March 29, 1990, the interpretation of the scope of the right to silence and the applicability of s. 7 of the Charter, was revolutionized by the Supreme Court of Canada's decision in *Thomson Newspapers*.

Thomson Newspapers involved a Charter s. 7 constitutional challenge to the statutory compulsion of witnesses at a restrictive trade practice inquiry authorized by s. 17 of the *Combines Investigation Act* (R.S.C. 1985, c. C-34, renamed the *Competition Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 19). Regrettably, only five Supreme Court Justices heard the appeal. The present Chief Justice refused to address the Charter s. 7 issue as, in his view, the Constitutional Questions Notice that had been given at commencement of the proceedings was inadequate and because the constitutionality of s. 5 of the *Canada Evidence Act* was, in effect, in issue. As a result, because of the broad implications the court's ruling would entail, the present Chief Justice wanted broader argument and more complete intervention. Two of the remaining four justices (Wilson and Sopinka JJ.) held that s. 17 of the *Combines Investigation Act*, violated s. 7 of the Charter because it subverted the right to silence without guaranteeing derivative use immunity. The other two justices (La Forest and L'Heureux-Dubé JJ.) found no violation, but primarily because La Forest J. was of the view that the inquiry in question involved "regulatory offences" as opposed to proceedings involving allegations of true crime and because exclusion in subsequent criminal

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