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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 NEW RIGHT TO SILENCE REGIME

Administrative, regulatory and criminal investigation and prosecution procedures have been revolutionized by the release of the Supreme Court of Canada's decision in *R. v. S. (R.J.)* (unreported, February 2, 1995, S.C.C.) [*095044168-226pp.]. In this decision, a five-judge majority of the court (Iacobucci, Cory, Major, La Forest JJ. with Lamer C.J. concurring) upheld the compulsion provisions of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 5(1) by supplementing the simple use immunity provisions of s. 5(2) with "residual derivative use immunity" under s. 7 of the Charter.

In addition, a second five-judge majority has provided Canadians with further protection under s. 7 of the Charter. This second majority (Sopinka, McLaughlin JJ. with two separate concurring judgments by Lamer C.J. and L'Heureux-Dubé, Gonthier JJ.), held that a court of competent jurisdiction is entitled to grant "compulsion exemption" under s. 24(1) of the Charter where the state seeks to compel the citizen to testify to build or advance a criminal prosecution. With the tacit concurrence of the first majority, they also held that, in some circumstances, criminal charges cannot proceed against a citizen who has been subjected to unfair pretrial statutory compulsion.

The apparent complexity of the ratios of *S. (R.J.)* arises not so much from the individual reasons for judgment, but rather from the multi-faceted interrelationship of the various cross-concurrences. Ultimately, the diversity of views expressed arise because each segment of the court approaches the conflict between statutory compulsion procedures and the right to silence in a different way.

In one set of reasons, four judges, represented by Iacobucci J., held that the exclusion of undiscoverable evidence derived from statutory compulsion procedures will, in most cases, adequately vindicate s. 7 of the Charter. In Iacobucci J.'s view, the issue of "whether the police can be armed with Subpoenas" should be addressed through the abuse of process doctrine and constitutional *ultra vires* considerations.

In contrast, Sopinka and McLachlin JJ., focused on common law compellability rules to craft compulsion exemptions governed by defined criteria. This focus was required because the exclusionary rule embodied by residual derivative use immunity simply cannot remedy certain privacy invasions, particularly where the state acquires strategic advantages through compulsion by obtaining information about the future defences of the accused.

In turn, L'Heureux-Dubé and Gonthier JJ., while essentially concurring with Sopinka J.'s concerns about the limitations and impracticality of the first majority's residual derivative use rules, focused on the state's purpose in seeking compulsion as the defining factor which should inform compulsion exemption claims. In addition, a bright line was required to prohibit unfair and colourable compulsion of citizens/suspects. Accordingly, these judges endorsed emphatic stay of proceedings sanctions where colourable prior compulsion was identified in subsequent criminal proceedings.

In the end, the pivotal judgment of Chief Justice Lamer incorporated elements of each approach to create a new Canadian right to silence regime.

Residual Derivative Use Immunity

The facts of *S. (R.J.)* are simple. The Crown sought to compel M. to testify in separate proceedings against S. who was charged with offences said to have been committed by S. and M. jointly. M. moved to quash a subpoena issued to him. The practice of compelling separately charged substantive co-accuseds to testify against each other has been subject to criticism since *R. v. Crooks* (1982), 2 C.C.C. (3d) 57, 143 D.L.R. (3d) 601 (Ont. H.C.J.), affd 2 C.C.C. (3d) 64, 143 D.L.R. (3d) 608 (Ont. C.A.), leave to appeal to S.C.C. granted 2 C.C.C. (3d) 65*n*, 143 D.L.R. (3d) 608*n*.

The approach adopted by Iacobucci J. on behalf of the first majority focused on the structure and language of the Charter and its framers' original intent as determinative of the content of the supplementary protection required by the right to silence guaranteed by s. 7 of the Charter.

These considerations and a discursive review of the history of the rule against self-incrimination in Canada led Iacobucci J. to conclude that the fundamental policy justification for the com-

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THE REASONABLE DOUBT STANDARD OF PROOF

The definition of legal standards is an enterprise which is fraught with difficulty. Indeed, some legal concepts are defined through metaphors alone which offer, at best, uncertain guidance as to meaning. The standard of "reasonable doubt" is one such concept. Reasonable doubt is a state of belief which cannot be measured with mathematical precision, and cannot be described with the degree of accuracy that is at times enjoyed in some scientific fields. Metaphors, and imprecise and equivocal descriptions are, therefore, necessarily resorted to in defining this principle of fundamental justice. Despite such definitional difficulties, jurors are charged with the solemn task of applying constitutionally mandated legal standards, such as reasonable doubt, in the administration of justice. Trial judges, on the other hand, are charged with the task of conveying to the jury in clear, comprehensible, and accurate language what these standards are.

There is, perhaps, no standard more central to criminal justice than "reasonable doubt" and in *R. v. Brydon* (unreported, February 3, 1995, B.C.C.A.)[*095040007-77pp.], the British Columbia Court of Appeal considered the issue of the proper charge to the jury as it relates to this standard.

In *Brydon*, Wood J.A. (dissenting in the result) provided learned, and detailed reasons on this difficult subject matter. Accurate jury instructions on reasonable doubt are an integral element of a constitutionally fair trial (at p. 5):

> The reasonable doubt standard of proof, like the presumption of innocence to which it gives effect, is a principle of fundamental justice and therefore constitutionally mandated as a prerequisite to any sustainable conviction for a criminal offence ... A legally sound instruction on that standard is thus essential to a fair trial. Central to such an instruction is a legally accurate definition of what constitutes a reasonable doubt.

It is interesting to note that though reasonable doubt is a constitutional standard, and one, therefore, which should be consistently and uniformly applied throughout Canada, there exist some regional differences with respect to the words and phrases which appellate courts have approved as adequately conveying that standard. For example, the Ontario Court of Appeal has approved equating the standard of proof beyond a reasonable doubt with moral certainty (*R. v. Sears* (1947), 90 C.C.C. 159, [1948] O.R. 9 (C.A.); *R. v. Campbell* (1977), 38 C.C.C. (2d) 6, 17 O.R. (2d) 673 (C.A.); *R. v. Gordon* (1983), 4 C.C.C. (3d) 492 (C.A.)), however, that formulation has been little used in British Columbia, and it has been the subject of both academic and judicial criticism. (See, for example, "Describing the Indescribable—Evaluating the Standard of Proof in Criminal Cases" (1986), 13 Crim. L.J. 330; *Victor v. Nebraska, Sandoval v. California*, 127 L. Ed. 583 (U.S. Neb. 1994).) Conversely, the instruction which defines reasonable doubt as "a doubt for which, if asked, one could give a reason" is widely used in British Columbia, yet held as being a reversible error by the Ontario Court of Appeal in *R. v. Ford* (1991), 12 W.C.B. (2d) 576 (Ont. C.A.) [*091091084-2pp.].

The following is a summary of Wood J.A.'s analysis in *Brydon, supra*, of the trial judge's charge to the jury on reasonable doubt.

1. It is a doubt based upon reason as opposed to a doubt based upon imagination or speculation.

Two criticisms of this charge were addressed. First, some courts have criticized this phrasing as posing "an insurmountable problem for the so-called inarticulate juror" (p. 20). (See *Smith v. Butler*, 696 F. Supp. 748 (D. Mass. 1988).) Wood J.A. did not, however, share the concern stating (at p. 21), "[t]he inarticulate juror described in these authorities does not conform to my idea of late twentieth century Canadian jurors". Secondly, though some authorities have criticized this charge on the basis that it reverses the onus of proof by requiring an accused to provide reasons for the doubt, Wood J.A. reasoned that when this charge is given along with the the instruction on the presumption of innocence, that jurors would not understand the charge as placing an onus upon the accused.

Having dismissed the criticism, Wood J.A. adopted the charge as accurately defining the constitutional standard of reasonable doubt (at p. 20):

> With respect to those of a contrary view, it is difficult to think of a more accurate statement than that which defines reasonable doubt as a doubt for which one can give a reason, so long as the

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THE RIGHT TO SILENCE: FURTHER DEVELOPMENTS

A. Derivative Use Immunity in the Regulatory Context

On April 13, 1995, the Supreme Court delivered its decisions in the balance of those cases argued at the same time as *R. v. S. (R.J.)* (1995), 21 O.R. (3d) 797*n* (S.C.C.)[*095044168-226pp.] examined in 7 C. of R. Newsl., No. 8. These decisions contain important new substantive rules in the regulatory setting and important procedural directions in the criminal context.

The court's long-awaited decision in *British Columbia Securities Commission v. Branch* (unreported, April 13, 1995, S.C.C.) [*095111031-76pp.] entails large numbers of substantive and procedural ramifications for the investigation and conduct of regulatory proceedings.

In *Branch,* the court, composed of seven judges, spoke through a decision authored jointly by Sopinka and Iacobucci JJ. For those analysts of the fragmented *S. (R.J.)* decision, the symbolic unanimity this unique joint judgment represents, authored by the leaders of two of the divergent approaches in *S.(R.J.)*, could not have been more powerful. As if to further underline the significance of the developing common ground in the Supreme Court regarding these vital issues, the new majority began its judgment by emphasizing (at p. 2):

> In *S. (R.J.)*, a majority of this Court held that the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of the *Canadian Charter of Rights and Freedoms,* requires that persons compelled to testify be provided with subsequent "derivative-use immunity" in addition to the "use immunity" guaranteed by s. 13 of the Charter. In addition, a majority of the members of the Court (albeit a different majority) were of the view that courts could, in certain circumstances, grant exemptions from compulsion to testify.
>
> This appeal presents the opportunity to build on the consensus reflected in *S. (R.J.)*, and achieve greater clarity and guidance on the rules to be applied in this area. Specifically, we offer additional comments on derivative-use immunity and the circumstances relating to exemptions from compulsion to testify.

The court continued:

> With respect to derivative-use immunity, it should be remembered that what was discussed by Iacobucci J. on the subject was intended to be comments of general application only and that further refinement will have to await development that can only take place through the consideration of cases as they arise.

The court then commenced the refinement process. The "refinements" offered are these:

1. ***Burden of Proof on the Accused Respecting Derivative Use Immunity***

The court stated (at p. 3):

> ... the general Charter rule would operate, namely, the party claiming a Charter breach must establish it on a balance of probabilities. Iacobucci J. went on to state that as a practical matter the Crown will likely bear the burden of responding because it is the Crown which can be expected to know how evidence was, or would have been, obtained. This means that the accused has the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established, in order to have the evidence admitted, the Crown will have to satisfy the court on a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony.

2. ***Entitlement to Compulsion Exemption***

(at pp. 4-5):

> ... any test to determine compellability must take into account that if the witness is compelled, he or she will be entitled to claim effective subsequent derivative use immunity with respect to the compelled testimony or other appropriate protection ... the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. This test strikes the appropriate balance between the interests of the state in obtaining the evidence for a valid public purpose on the one hand, and the right to silence of the person compelled to testify on the other.

Accordingly, the new majority seems to have adopted the global compulsion exemption approach urged by L'Heureux

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WHO IS AN AGENT OF THE STATE ?

The question of when an individual, through his or her actions or associations becomes an agent of the state is taking on greater importance. Increasingly, the police have come to work in conjunction with, or rely upon information that has been supplied through employees of other agencies such as utilities offices, banks, or other similar institutions which control private information. When such working arrangements are the basis of a criminal investigation, it is important to determine the stage at which the protections of the Charter begin, and when the acts of such individuals become subject to the rights and guarantees of the Charter.

Though courts have addressed this issue on prior occasions, it has not been until recently that a comprehensive analysis of the issue has been forthcoming. One example of an early consideration of the issue of when a citizen becomes an agent of the state, and therefore subject to the Charter, is found in *R. v. Lerke* (1986), 24 C.C.C. (3d) 129, 25 D.L.R. (4th) 403 (Alta. C.A.) [*086051135-23pp.]. After having arrested the accused for "re-entering" the tavern, a tavern employee searched the pockets of the accused and found a small quantity of marijuana. The court held (at pp. 133-4), that "the facts of this case do not raise the issue whether the *Canadian Charter of Rights and Freedoms* applies to the actions of one private citizen to another. In my view, the arrest of a citizen is a governmental function whether the person making the arrest is a peace officer or a private citizen."

A second example of an early decision is *R. v. G. (J.M.)* (1986), 29 C.C.C. (3d) 455, 33 D.L.R. (4th) 277 (Ont. C.A.)[*086268056-13pp.], leave to appeal to S.C.C. refused 59 O.R. (2d) 286*n*, 21 O.A.C. 239*n*. There, the court held (at p. 459), that "I am prepared for the purposes of this appeal to assume that the school board directing the affairs of the school and the school itself, including the principal and the other teachers, are subject to the Charter in their actions and dealings with the students under their care".

In *R. v. MacDonald* (1988), 41 C.C.C. (3d) 75, 83 N.S.R. (2d) 210 (S.C.A.D.) [*088047059-9pp.], a medical doctor discovered the accused slumped behind the steering-wheel of a vehicle in a ditch. The doctor was concerned that the accused may have been injured, so he contacted the RCMP in order to have him taken to the hospital. While at the hospital the police officer commenced an impaired driving investigation and requested that the doctor obtain a blood sample from the accused. This was completed and the accused was taken from the hospital by the attending police officer. The court held (at p. 79), that the doctor "was not of course 'an agent of the State' and in my opinion the respondent was not detained ... during the time that he was under the care of [the doctor]".

A final example of an early treatment of the issue is found in *R. v. Shafie* (1989), 47 C.C.C. (3d) 27, 31 O.A.C. 362 (C.A.) [*089037051-13pp.], where the court considered whether a private investigator who elicited incriminating statements from the accused was required to have informed the accused of his right to counsel in accordance with s. 10(*b*) of the Charter. The court found (at p. 34), that this was not a requirement in law. "[A]ctions that, at the hands of the police or other state or governmental agents, would be a detention, do not amount to a detention within the meaning of s.10(*b*) of the Charter when done by private or non-governmental persons." Consequently, the court held that the investigator was not required to inform the accused of his right to counsel.

The Supreme Court of Canada has, so far, offered little guidance in this area of law. In *R. v. Therens* (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655 (S.C.C.), "detention" was defined (at p. 504), as arising when "a police officer or *other agent of the State* assumes control over the movement of a person by a demand or direction which may have significant legal consequences...". (Emphasis added.) Similarly, in *R. v. Colarusso* (1994), 87 C.C.C. (3d) 193, 110 D.L.R. (4th) 297 (S.C.C.) [*094049001-81pp.], La Forest J. stated (at p. 216), that "the court must focus on the actions of the police because s. 8 guarantees protection against the actions *of the state or state actors...*". (Emphasis in original.) La Forest J. also recognized (at p. 217), that concerns arise where there is "unwelcome complicity" between the police and other persons or agencies, and held that where a party, other than the police, conduct a seizure, and where the seized item "ultimately winds up being used against the individual by the criminal law enforcement arm of the state, it is essential that the court go beyond the initial non-police seizure and deter-

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A NEW UNDERSTANDING OF S. 24(2)

Many recent lower court decisions have exhibited a conservative approach to the exclusion of evidence under s. 24(2) of the Charter with the effect that many violations of guaranteed Charter rights have gone without remedy. The two recent Supreme Court of Canada decisions of *R. v. Silveira* (unreported, May 18, 1995, S.C.C.) [*095146002-101pp.] and *R. v. Burlingham* (unreported, May 18, 1995, S.C.C.) [*095146004-116pp.] have, however, affirmed that trial courts are to be scrupulous in the protection of Charter rights, and are to show determination in the crafting of remedy for the violation of those rights.

In *Silveira*, Cory J. (Justices Sopinka, Gonthier, Iacobucci, and Major concurring; concurring reasons by L'Heureux-Dubé J.; La Forest J. dissenting) characterized the issue before the court as follows: "At issue on this appeal is whether the evidence, secured as a result of a search that was conceded to be unreasonable, should be excluded pursuant to the provisions of s. 24(2)." (p.1) The facts of the case were straightforward. Members of the Metropolitan Toronto Police drug squad made various purchases of cocaine from a third party. On each occasion that a purchase was made, the third party was observed to meet with the appellant, the appellant would then attend at his residence and leave a short time later to meet again with the third party, and the third party would then sell cocaine to an undercover police officer.

On the basis of this pattern of activity, the investigating police officers believed that they had reasonable and probable grounds to obtain a search warrant for the appellant's residence. However, in order to prevent the removal or destruction of evidence between the time of arrest and the arrival of the search warrant, the police attended at the residence without warrant, entered without invitation, checked the premises for weapons and to locate residents within the house and waited for the arrival of the search warrant. The warrant arrived approximately one hour later, a search was conducted, and the police found approximately 10 ounces of cocaine and $9,535 in cash.

The Crown conceded that this warrantless search of the house constituted a violation of s. 8 of the Charter. Cory J. commented upon the impropriety of the investigative tactics and held that though the unlawful entry into the residence was followed by a search conducted under the authority of a warrant, the search itself was, nevertheless, unlawful (at p. 8):

> [T]here can be no artificial division between the entry into the home by the police and the subsequent search of the premises made pursuant to the warrant. The two actions are so intertwined in time and in their nature that it would be unreasonable to draw an artificial line between them in order to claim that, although the initial entry was improper, the subsequent search was valid.

Thus, an act or course of conduct which results in the violation of a Charter right will not be corrected, nor will the significance of the violation be diminished simply because the unlawful act or conduct is followed by a lawful act or course of conduct. Where the two are "intertwined in time and in their nature" the unlawful conduct taints the lawful conduct.

In his analysis of s. 24(2), Cory J. began by affirming the significance of privacy which citizens expect in their residences (at p. 9):

> The *Narcotic Control Act* itself recognizes the age-old principle of the inviolability of the dwelling-house. It must be the final refuge and safe haven for all Canadians. It is there that the expectation of privacy is at its highest and where there should be freedom from external forces, particularly the actions of agents of the state, unless those actions are duly authorized. This principle is fundamental to a democratic society as Canadians understand that term.

An unlawful violation of the privacy that exists in a dwelling house must, therefore, be regarded as a serious breach of a Charter right (at p. 13):

> It is hard to imagine a more serious infringement of an individual's right to privacy. The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy.

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WEBER v. ONTARIO HYDRO (S.C.C.)

The wording of s. 24(1) of the Charter restricts the enforcement of Charter rights to courts of competent jurisdiction:

> 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.

(Emphasis added.)

Thus, only a court of competent jurisdiction may provide a remedy under s. 24, and the remedies available to such court are only restricted by the phrase "appropriate and just".

The question of what constitutes a court of competent jurisdiction was first considered by the Supreme Court of Canada in *R. v. Mills* (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161 (S.C.C.). By way of preliminary comment, McIntyre J. noted (at p. 491) that in "attacking these problems, that of jurisdiction and that of remedy, the courts are embarking on a novel exercise". He added (at p. 492):

> There is little, if any, assistance to be found in decided cases. The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24 (1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure.

In the result, McIntyre J. held that a provincial court judge, sitting as a preliminary inquiry, derives jurisdiction from the statutory provisions of the *Criminal Code*, and such provisions provide no jurisdiction to acquit, convict, impose a penalty, or grant a remedy. "He is given no jurisdiction which would permit him to hear and determine the question of whether or not a Charter right has been infringed or denied. He is, therefore, not a court of competent jurisdiction under s. 24 (1) of the Charter." (p. 493)

By contrast, it was held that a provincial superior court is a court of competent jurisdiction as it "has generally been given all the historic jurisdiction and power of the High Court in England and in all matters arising between the Crown and subject and subject and subject ... [and the jurisdiction] is derived from the creating statutes and the common law...". (p. 494)

The question of whether a tribunal is a court of competent jurisdiction was considered, but not fully answered by the Supreme Court of Canada in *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94, [1990] 3 S.C.R. 570 [*091002049-72pp.]. At issue was the constitutional validity of the mandatory retirement provision of the collective agreement. In addressing the question, La Forest J. (Dickson C.J.C. and Gonthier J. concurring), recognized a jurisdictional distinction between s. 24 (1), and s. 52 (1) which provides as follows:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The court stated (at pp. 117-18):

> A tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force or effect.

Where, however, a tribunal is asked to determine whether Charter rights have been infringed or to grant a remedy under s. 24 (1), the situation is different. A tribunal's power is that conferred by its statutory mandate.

La Forest J. held that the arbitrator did, therefore, have jurisdiction to consider the question of constitutional validity, and held further that it was not necessary to address whether the arbitrator was a court of competent jurisdiction.

The Supreme Court of Canada has now specifically considered, and answered this question in *Weber v. Ontario Hydro* (1995), 95 C.L.L.C. ¶210-027 (S.C.C.) [*095181032]. The facts were as follows. The appellant was employed by Ontario Hydro and because of back problems, he took an extended leave of absence. The employer came to suspect that the appellant was malingering, and so it hired private investigators. In the course of the investigation the investigators entered upon the appellant's property and, while acting under a pretense of identity, they gained entry into his house. As a result of information obtained by the investigators while in the appellant's house, the employer suspended the appellant for abusing his sick leave benefits.

The appellant filed grievances against the employer, and he also commenced an action based in tort pleading that his rights as guaranteed by ss. 7 and 8 of the Charter had been violated.

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INVESTIGATIVE "INNOVATION" AND THE RULE OF LAW

In *R. v. Catagas* (1977), 38 C.C.C. (2d) 296, 81 D.L.R. (3d) 396, the Manitoba Court of Appeal emphasized that state agencies were subject to the rule of law and that the executive branch of government had no power to exempt police agencies from the general application of the laws. Chief Justice Freedman expressed his frustration that these issues were still arising, in these words (at p. 297):

> These subjects take us back to the 17th century and earlier. They represent a dark chapter in English legal and constitutional history. They were a part of the struggle for sovereignty between the Crown and Parliament, a struggle in which, fortunately, Parliament emerged the victor, as exemplified by the enactment of the *Bill of Rights*, 1688, 1 Will & Mar., c. 2.

In *R. v. Stevenson* (1980), 57 C.C.C. (2d) 526, 19 C.R. (3d) 74, the Ontario Court of Appeal went on to emphasize that laudable law enforcement motives of police officers do not constitute a defence to criminal charges if the officers involved intended to carry out a course of conduct that violated the *Criminal Code*. In the court's words (at p. 533):

> ...we have no doubt that the appellants were well-motivated and sincere in their desire to bring about the apprehension of a person they believed to be a murderer and had no intention of breaching the law. However, good motives do not exculpate from criminal liability if the conduct falls within the legislative prohibition.

Yet, notwithstanding these clear pronouncements, it appears that organized police illegality continues to persist, often sanctioned by the executive, both in Canada and in other Commonwealth countries. Typically, the police will utilize "innovative" investigative techniques involving the importation or trafficking in drugs, often euphemistically described as a "controlled delivery". In a particularly pernicious development in Canada, the police have taken to the selling of drugs or the laundering of money in so-called "reverse stings", the purpose of which is to seize money.

Very recent decisions of the Privy Council, the High Court of Australia, and some Canadian trial courts have again revisited this issue. In light of the disappointing response of some Canadian trial courts, the Supreme Court of Canada may well be required to join the Commonwealth high courts in pronouncing upon this issue.

Commonwealth Developments

In *Yip Chiu-Cheung v. The Queen*, [1995] 1 A.C. 111, a five justice board of the Privy Council, on appeal from the Court of Appeal for Hong Kong, addressed the issue of the materiality of police motive in the context of an appeal from conviction by a citizen who was said to have conspired with an undercover police officer to import heroin from Hong Kong to Australia. The citizen argued that as conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out, no conviction could be registered where the alleged co-conspirator is an undercover agent who has no intention of committing the crime. In dismissing the appeal, Lord Griffiths said (at p. 118):

> Nobody can doubt that Needham was acting courageously and with the best of motives; he was trying to break a drug ring. But equally there can be no doubt that the method he chose and in which the police in Hong Kong acquiesced involved the commission of the criminal offence of trafficking in drugs by exporting heroin from Hong Kong without a licence. Needham intended to commit that offence by carrying the heroin through the customs and on to the aeroplane bound for Australia.
>
> Neither the police, nor customs, nor any other member of the executive have any power to alter the terms of the Ordinance forbidding the export of heroin, and the fact that they may turn a blind eye when the heroin is exported does not prevent it from being a criminal offence.

In *Ridgeway v. The Queen*, [1995] 69 A.L.J.R. 484, a seven-justice panel of the High Court of Australia on appeal from the Full Court of the Supreme Court of South Australia, considered the admissibility, at common law, of evidence gathered by way of illegal police operations, again in the context of a "controlled delivery" of heroin, this time into Australia from Malaysia.

Mason C.J.A., on behalf of himself and two others, held (at p. 492):

> ...it should be accepted that a trial judge possesses a discretion to exclude, on public policy grounds, evidence of an offence or of an

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RJR-MacDonald Inc. v. Canada (Attorney General) EMERGING THEMES IN ANALYSIS UNDER S. 1 OF THE CHARTER

In *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200 [*086072007-28pp.], the Supreme Court of Canada articulated what has become the benchmark for s. 1 analysis. The prescribed method for such analysis derives from the wording of s. 1 itself, which is as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The court has been clear that the onus of proving that a limit on a right or freedom is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Further, the court's commitment to the upholding of rights and freedoms has been demonstrated through the burden that is imposed on a party seeking to limit a right. Indeed, in *Oakes*, Dickson C.J.C. (as he then was) affirmed a pronouncement found in *Singh v. Canada (Minister of Employment and Immigration)* (1985), 17 D.L.R. (4th) 422, [1985] 1 S.C.R. 177 [*188320622-49pp.], that "' . . . it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the Charter'" (pp. 345-6).

The commitment to uphold rights and freedoms, in turn, dictates the burden which a party must meet in seeking to justify a limitation. The court held that the standard of proof is the preponderance of probability rigorously applied. The rigorous standard is required to give recognition to the fact that a right which is guaranteed by the supreme law of Canada is being limited (p. 346).

In order that a court be satisfied that a party has met this rigorous burden, evidence will generally be required and "it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit" (p. 347).

In *RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), 57 A.C.W.S. (3d) 578 (S.C.C.) [*095265066-206pp.] (McLachlin J.; Major J. concurring with McLachlin J.; Sopinka J. concurring with Major J.; Lamer C.J.C. concurring with the reasons of Iacobucci J. and the disposition of McLachlin J.; La Forest J. dissenting with L'Heureux-Dubé J., Gonthier J. and Cory J.), the Supreme Court of Canada revisited the topic of s. 1 analysis, this time in the context of determining the constitutionality of prohibitions upon tobacco advertising. The appellant sought a declaration that the *Tobacco Products Control Act*, S.C. 1988, c. 20, constituted an infringement of s. 2(*b*) of the Charter, which was not justified under s. 1. In brief, the Act was aimed at the advertising, promotion, and labelling of tobacco products, and imposed restrictions upon those activities. On appeal, the Attorney General conceded that the restrictions constituted an infringement of the appellant's freedom of expression as guaranteed by s. 2(*b*), and the appeal was, therefore, limited to whether the infringement was justified under s. 1. The consideration of this ground of appeal caused the court to split on some important elements of s. 1 analysis.

The first noteworthy aspect of the decision pertains to the degree to which an appellate court should defer to findings made by a trial judge on the issue of s. 1. La Forest J. held that interference with the findings of the trial judge was warranted on two grounds. The first ground was based upon an error of law, arising out of the wrong test being applied by the trial judge. La Forest J. noted that "[t]hroughout his judgment, Chabot J. referred to the requirements set forth in *Oakes* as a 'test'", and in being bound by the "test" he held the civil burden of proof was applied rigorously. To this, La Forest J. responded as follows (p. 55):

> It is my view that Chabot J.'s approach was not the correct one in the circumstances of these cases, and that he erred in deciding that the civil burden of proof must be "applied rigorously" . . . he adopted the view, unfortunately still held by some commentators, that the proportionality requirements established

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