8 C. of R. Newsl., No. 7 ISSN 0838-4843 January 1996

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.

DISCLOSURE, THIRD PARTY RECORDS, AND ABUSE OF PROCESS

The Supreme Court of Canada first stated the law with respect to the Crown's duty to disclose in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1, [1991] 3 S.C.R. 326 [*091317026-33pp.]. In that seminal case, Sopinka J. held that the duty that rests upon Crown counsel to disclose to the defence all relevant material that is in its possession, derives from the constitutional right of an accused to make full answer and defence. The court recognized that this right is critical to the integrity of the criminal justice system: "[t]he right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted" (p. 9).

Interestingly, in addition to stating the law and emphasizing the significance of this duty of the Crown, the following statements from the *Stinchcombe* judgment also reflect an optimism that has perhaps not been fully realized (pp. 11, 12):

> The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information.
>
> . . . . .
>
> I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information.

A cursory review of law reports reveals that disputes over disclosure are not infrequent, and the Supreme Court of Canada was again required to tackle this difficult issue in *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225, [1995] 1 S.C.R. 727 [*095065159-27pp.], and recently in *R. v. O'Connor* (unreported, December 14, 1995, S.C.C., Court File No. 24112) [*095352019-163pp.]. In light of the comments of Sopinka J. in *Stinchcombe*, and, more importantly, given the constitutional significance of disclosure, the facts in *O'Connor* are nothing short of disturbing.

The accused was charged with several sexual offences, and subsequent to the preliminary inquiry the defence applied for and obtained an order requiring the disclosure of the complainants' medical, counselling and school records. The basis of the application was that the materials were required to test the credibility of the complainants, as well as being relevant to issues of recent complaint and corroboration. These materials were not in the possession of the Crown at the time the order was made. The following events then transpired with the ultimate result being that Crown counsel did not comply with the order, and the trial judge entered a stay of proceedings:

1. On July 10, 1992, the Crown applied for directions regarding the disclosure order. In the course of the application the Crown advised that it intended to argue that the therapists' notes ought not be disclosed on grounds of public policy.
2. A trial judge was appointed, and on October 16, 1992, the Crown sought directions in respect of the order. Some of the materials were then in the Crown's possession. The trial judge indicated that the order was to be promptly complied with.
3. On November 19, 1992, the Crown again raised objection to some aspects of the order, and the trial judge again ordered that there be immediate compliance.
4. On November 26, 1992, the accused applied for a stay of proceedings on the grounds of non-disclosure. In the course of the application, Crown cousel indicated that the reasons for the non-disclosure included difficulty of communication and organization between two Crown counsel, inadvertence, and she "dreamt" that disclosure of some of the materials had been made. Also, the order itself was called into question on the grounds that it exhibited gender bias. The application for a stay of proceedings was dismissed. However, the trial judge was highly critical of the Crown's conduct.
5. On November 28, 1992, the Crown agreed to permit the defence access to the Crown's file, and to prepare a disclosure file in respect of each complainant.
6. The trial commenced on December 2, 1992. Within a short period of time it was revealed that some disclosure still had not been made. The Crown counsel who had been dealing with the issue of disclosure was not in court to explain, and the Crown counsel who was in court was unable to guarantee disclosure. The defence again applied for a stay of proceed-

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Publications Agreement Number 189480

8 C. of R. Newsl., No. 8 ISSN 0838-4843 February 1996

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.

"STANDING" ON SHAKY GROUND

The law of standing under s. 8 of the Charter has previously been considered at 8 C. of R. Newsl., No.3, and 7 C. of R. Newsl., No.3, and, in summary, the law was found to be in a somewhat unsatisfactory state of affairs. There was little consistency amongst trial court decisions and it was evident that there existed a tension between a formalistic application of appellate decisions, and broader constitutional and democratic concerns. In *R. v. Edwards* (unreported, February 8, 1996, Court File No. 24297) [*096043001-43pp.], the Supreme Court of Canada has now provided some, albeit, somewhat unclear guidance.

The facts in *Edwards* were relatively simple. The police suspected the appellant of selling drugs out of his car, and they believed that he kept the drugs at his girlfriend's apartment. The appellant was arrested for driving while under suspension, and, in order to follow through with their belief regarding the location of the drugs, the police subsequently attended at the girlfriend's apartment. The police did not at the time believe that they had sufficient evidence upon which to obtain a search warrant for the apartment. In order to gain the cooperation of the girlfriend, that is, in order to gain entry into the apartment, the police told her a series of "lies" and "half-truths", which included that the appellant had told them that there were drugs in the apartment; that if she did not cooperate the police would stay at the apartment until they were able to get a search warrant; and that regardless of what they found in the apartment, neither she nor the appellant would be charged. Upon these representations, the police were admitted into the apartment and she directed them to a quantity of drugs. Later, while at the police station, she told the police that the appellant put the drugs in the apartment.

The appellant and his girlfriend were originally jointly charged but on the morning of trial the charges against his girlfriend were dropped. At trial, and on appeal, the appellant denied that the drugs were his. The appeal was heard by the Supreme Court of Canada as of right.

Cory J. (Lamer C.J.C., Sopinka, McLachlin, Iacobucci, and Major JJ. concurring), wrote the majority decision. He framed the appeal issue as follows: "What rights does an accused person have to challenge the admission of evidence obtained as a result of a search of a third party's premise?" (p. 1, para. 1). In the conclusion, the court held that the accused had no standing to challenge the validity of the search of the apartment. What is of greatest interest, however, is the reason why standing was denied, the disagreement within the court with respect to standing, and the guidelines set out by the majority to guide lower courts in determining the issue of standing in future cases.

The principles which guided the majority decision are as follows. First, on the basis of *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641 (S.C.C.), it was acknowledged that it was not necessary for an individual to have a property interest in order that he or she have a privacy interest. However, it was also acknowledged that s. 8 only protected a reasonable expectation of privacy. Whether an expectation of privacy is reasonable in a particular case is determined through the totality of circumstances in that case (p. 10).

Second, it is not necessary for an accused to establish a possessory interest in order that s. 8 guarantees be invoked: see *R. v. Plant* (1993), 84 C.C.C. (3d) 203, [1993] 3 S.C.R. 281 [*093287058-37pp.]. Third, whether an accused has a reasonable expectation of privacy is distinct from police conduct during the search. Police conduct is relevant to the reasonableness of the search and not to the determination of the existence of a privacy interest (p. 11). Finally, the majority held that, "[i]n any determination of a s. 8 challenge, it is of fundamental importance to remember that the privacy right allegedly infringed must, as a general rule, be that of the accused person who makes the challenge (p. 11, para. 34).

In concluding that the appellant had no standing, the majority approved portions of the reasons of Finlayson J.A. in *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295, 8 O.R. (3d) 259 (C.A.) [*092073020-24pp.]. In particular, the majority affirmed the proposition that "*the appellant must assert a personal privacy right, whatever be the foundation of his assertion*" (emphasis in the original, p. 15).

The majority went on to provide assistance with respect to what might serve as a "foundation" for the assertion of a personal privacy right (pp. 16-17, para. 45):

> A review of the recent decisions of this Court and those of U.S. Supreme Court [*sic*], which I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s.8 right to be secure

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Publications Agreement Number 189480

8 C. of R. Newsl., No. 9 ISSN 0838-4843 March 1996

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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.

PROCEEDS OF CRIME FORFEITURE PROVISIONS AND THE RIGHT TO COUNSEL

Proceeds of crime legislation, as set out in Part XII.2 of the *Criminal Code*, has given rise to new debate concerning the balance that is to be struck between law enforcement initiatives and the constitutional guarantee of the right to counsel. The scope of the legislation is profound in that it potentially affects persons in a manner that no criminal legislation has previously done. The reason for this is that Part XII.2 has as its subject-matter what is in effect the consequences of criminal activity rather than a specific criminal act. More particularly, "proceeds" converts to the "proceeds of crime" as a consequence of an intervening criminal act. The scope of Part XII.2 of the *Criminal Code* is such that individuals might now unwittingly become involved in criminal proceedings because they have either participated in the laundering of the proceeds of crime, or because they have a legal interest in assets that have been seized and for which the Crown has applied for forfeiture.

In considering the debate of law enforcement versus the right to counsel, it is important that the context of the debate be properly situated against the contours of the broader social and political landscape. The legislation is viewed by its advocates as a significant piece of ammunition in the war against drugs and organized crime. This is evident in much of the literature dealing with the equivalent American legislation, and the point is clearly made in the opening paragraph of a working paper of the Ministry of the Solicitor General of Canada entitled "Tracing of Illicit Funds: Money Laundering in Canada" (M.E. Beare, S. Schneider, No. 1990-05). The paragraph is as follows:

> As a *result of international and national pressures*, a *new law enforcement philosophy* has emerged in Canada which recognizes that attempts to *combat drug trafficking and other organized criminal activities* must incorporate the means to strip the illicit profits from criminals and thereby reduce their motivation to remain in business. This has been explicitly recognized by the RCMP for most of this decade and has been recently entrenched in the Criminal Code through Bill C-61, the "proceeds of crime" legislation (S.C. 1988, c. 51).

(Emphasis added.)

The process of "strip[ping] the illicit profits from criminals" is accomplished through the restraint and forfeiture provisions of Part XII.2. Under s. 462.33, the Attorney General may apply for an order to restrain property pending an investigation. If, on hearing the application, a judge is "satisfied that there are reasonable grounds to believe that there exists any property in respect of which an order of forfeiture may be made", then he or she may make an order pursuant to s. 462.33(3)(*a*) "prohibiting any person from disposing of, or otherwise dealing with any interest in, the property specified in the order". Under s. 462.37(1), an order of forfeiture may be made in respect of property where an accused has been convicted of an enterprise crime offence, and on application by the Attorney General, the court "is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property".

It is imperative that the objectives of law enforcement, and the means through which those objectives may be realized, be balanced against those principles such as the right to counsel, which serve to regulate and control the exercise of law enforcement within Canadian democracy. Section 10(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees that "[e]veryone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right". This guarantee applies to the wealthy and the indigent alike and the existence of the guarantee is critical, for it enables an accused or suspect to be advised of the legality of the state action that is being brought against him or her, and it affords an individual essential assistance in defending against criminal charges which are being advanced by the state.

In considering the interpretation that is to be given to "the right . . . to retain . . . counsel", it is important to have regard to the

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Publications Agreement Number 189480

8 C. of R. Newsl., No. 10 ISSN 0838-4843 April 1996

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.

FINE-TUNING THE DEFENCE OF DRUNKENNESS

Considerations of *mens rea* have, historically, been somewhat of a thorn in the side of the judiciary and legal scholars alike. This is because of the difficulty that attaches to the clear articulation of the degree to which we require, and standards by which we judge, criminal intent. At the same time, the clear articulation of these ideas is central to fairness within the criminal process. The issue of the constitutional standards of *mens rea* was last covered in 6 C. of R. Newsl., No. 9 and 7 C. of R. Newsl., No. 9. Recently, the Supreme Court of Canada has addressed, and provided much needed clarification to the defence of drunkenness and *mens rea*. In *R. v. Robinson* (unreported, March 21, 1996, S.C.C., Court File No. 24302) [*096085063-70pp.], the appellant was charged and convicted of second degree murder. The appellant testified that he was intoxicated at the time of the killing, and that because of the intoxication, his actions were not guided by the requisite intent. At issue was whether the law on drunkenness, as set out by the *Director of Public Prosecutions v. Beard*, [1920] A.C. 479 (H.L.), and as incorporated into Canadian law through *MacAskill v. The King* (1931), 55 C.C.C. 81, [1931] 3 D.L.R. 166 (S.C.C.), conforms with the requirements of the Charter.

The traditional rule, as set out in *Beard*, was that drunkenness is only relevant to the issue of whether the accused had the *capacity* to form the intent necessary to the offence with which he or she had been charged. Falling short of the state wherein the accused was robbed of his or her capacity, drunkenness was not a defence (pp. 501-2):

> 2. That evidence of drunkenness which renders the accused *incapable of forming the specific intent* essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
>
> 3. That evidence of drunkenness falling short of a *proved incapacity in the accused to form the intent* necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

(Emphasis added.)

Lamer C.J.C. (La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. concurring) (L'Heureux-Dubé J. dissenting) wrote that "[t]he important issue raised by this appeal is whether the court should now overrule the *Beard* rules of intoxication incorporated in *MacAskill* and its progeny" (p. 8, para. 16). The Chief Justice held that there are five separate reasons for the court to change the traditional rule.

(a) *Other Judicial Opinions*

The traditional rule of drunkenness as it relates to capacity has not existed without dissension. The first indication of such dissension is found in the dissenting reasons of Laskin J. in *Perrault v. The Queen*, [1970] 5 C.C.C. 217, 12 D.L.R. (3d) 480 (S.C.C.). In these reasons, the former Chief Justice recognized that "the real question was one of intent in fact and that even where the evidence of intoxication did not rise to the level of incapacity, it could still be relevant to intent in fact and therefore should not be rejected" (p. 9, para. 19). Further (*Perrault*, p. 225):

> It is necessary, of course, in cases where drunkenness is raised as a defence, or where on the evidence it may be a defence, to a charge of murder, to avoid confusing the effect of drunkenness on the capacity to form the requisite intent with the question of whether there was such intent in fact. The rejection of one (that is, as a defence) does not automatically result in the establishment of the other.

This distinction between "capacity" and "intent in fact" was also recognized by Dickson J. (in dissent) in *Mulligan v. The Queen* (1976), 28 C.C.C. (2d) 266 at p. 278, 66 D.L.R. (3d) 627 (S.C.C.):

> Mental condition is a relevant, indeed essential, consideration to a determination of *mens rea* if, in conjunction with alcohol, it affects capacity to form an intention. Mental condition as well as the effect of alcohol are relevant to the critical question, not placed before the jury in this case, of whether the accused *had* the necessary intent.

(b) *Developments in Provincial Appellate Courts*

Provincial appellate courts have already seen fit to distance themselves from the *Beard* rules. The cases of *R. v. MacKinlay*

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Publications Agreement Number 189480

9 C. of R. Newsl., No. 1 ISSN 0838-4843 June 1996

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.

EXCLUDING UNRELIABLE EVIDENCE: THE ROLE OF JUDGE AND JURY

The jurisdiction of a judge to exclude evidence under the Charter has yet to be fully defined. Section 24(2) confers this jurisdiction where "it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". Recently, in the decision of *R. v. Harrer* (1995), 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98 (S.C.C.) [*0951293038-44pp.] (see 8 C.of R. Newsl., No.6), the Supreme Court of Canada also recognized a discretion to exclude evidence where the admission of the evidence would render the *trial unfair*. "[T]he evidence is excluded to conform to the constitutional mandate guaranteeing a fair trial, *ie*, to prevent a trial from being unfair at the outset" (p. 206).

The operation of this discretion rests upon a preliminary finding that the admission of the evidence would cause the trial to become unfair. The operation of this discretion also, therefore, rests upon a definition of "fair trial", and it is in the task of providing this definition that the jurisprudence has not yet fully evolved.

In *R. v. Buric* (1996), 106 C.C.C. (3d) 97 (Ont. C.A.) [*096138006-53pp.], the court considered whether evidence which was found by the trial judge, after a *voir dire*, to be unreliable was properly excluded from the jury. The case involved the charge of murder. The complainant was shot to death in 1981 and the resulting investigation failed to identify the person responsible for the killing. The investigation was reopened in 1990, and in 1991, an individual was charged with first degree murder. That individual subsequently pleaded guilty to conspiracy to commit murder and he became the chief Crown witness against the respondents Buric and Parsniak.

As a result of late disclosure, the trial judge ordered a *voir dire* in order to permit the defence an opportunity to obtain further discovery in respect of the newly disclosed information, and in order to determine whether there had been either witness tampering or witness tainting. In the *voir dire* the defence explored the relations which existed between the police and the Crown witness. The trial judge made the following factual findings: the police initiated their discussions with the witness for the purpose of convincing him to testify; the police showed the witness copies of statements that they had obtained from other witnesses, as well as police notes from interviews which contained editorial comments; the police left some of these materials with the witness while he was in prison; the police had not kept proper records of their interviews with the witness; parts of the witnesses' evidence could not be verified because other witnesses had died; there was no record of what the witnesses' knowledge was prior to being given the statements of the other witnesses and it was, therefore, not possible to determine the extent to which his evidence had been tainted from those other statements; and the witness had entered into an agreement with the authorities whereby in exchange for information that he gave in respect of the involvement of the respondents in the murder, he was allowed to plead guilty to a less serious offence.

On the basis of these findings, the trial judge held that the witness's evidence was tainted and that its admissibility would affect the fairness of the trial (pp. 105-6):

> "In my view, the provision of witness statements to Pietrorazio was improper and has tainted his evidence. The degree to which it has been tainted is for the most part incalculable because there was no statement available setting forth his evidence before the tainting took place . . .
>
> "There appears to be no Canadian authority directly on point as to whether such tainting amounts to a Charter violation. The question is whether or not it is an irregularity that can be dealt with by leaving the matter to the jury, with the knowledge that cross-examination is available, as well as an appropriate caution in the judge's charge. Or on the other hand, is it a fundamental breach of the accused's rights to a fair trial in accordance with the principles of natural justice? In my view, it is the latter.
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> . . . . .
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> "In my view, the tainting in this case goes beyond simply a question of weight but rather is of such an extent as to relate to the admissibility of the evidence in the sense of the fairness of the trial.
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> "If on the other hand, the degree of interference in the sense of

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Publications Agreement Number 189480

9 C. of R. Newsl., No. 2 ISSN 0838-4843 July 1996

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.

EXTRATERRITORIAL APPLICATION OF THE CHARTER

The issue of the extraterritorial application of the Charter, that is, the applicability of the Charter to either foreign law or to criminal investigations conducted by a foreign state which are conducted outside of Canada, was first considered by the Supreme Court of Canada in *R. v. Harrer* (1995), 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98 [*095293038-45pp.]. As is somewhat common with initial considerations of an area of law, the decision in *Harrer* provided needed guidance but at the same time raised questions with respect to the future applications of the principles set out therein. The Supreme Court of Canada has now addressed this issue again in *R. v. Terry* (1996), 106 C.C.C. (3d) 508, 30 W.C.B. (2d) 524 [*096152049-24pp.].

The facts in *Terry* are similar to those in *Harrer* and they are easily stated. The appellant had allegedly murdered an individual in Canada. He fled to the United States and was arrested by U.S. police on an extradition warrant. The Canadian authorities were advised of the appellant's arrest and requested that the U.S. police attempt to take a statement from the appellant. Before conducting the interview, the U.S. police provided the appellant with a "*Miranda* warning" in accordance with the requirements of American law. The appellant was not, however, advised of his rights in accordance with Canadian law and the Charter. He indicated to the U.S. police that he understood the warning, he declined the services of a lawyer, and he advised that he was willing to provide a statement. In the course of the statement, the appellant revealed the whereabouts of the murder weapon and this resulted in the weapon being located by the Canadian investigators. At trial, the Crown sought to tender both the statement that the appellant had given to the U.S. police and the weapon. This was contested on the basis that there had been a breach of the appellant's rights as are guaranteed by the Charter as a result of the failure on the part of the American authorities to provide the appellant with his Charter rights prior to when he was asked to decide whether or not he wished to provide a statement.

The appellant argued that the tendering of evidence at trial, in Canada, "triggers" the Charter regardless of "where, when, how, or why that evidence was obtained" (p. 5). The appellant further argued that the Charter applied to the place and manner in which the statement was taken because the U.S. police were acting at the request of, and as agents for, the Canadian police. The appellant did not argue that the admission of the evidence would render the trial unfair and therefore violate his rights as guaranteed by ss. 7 and 11(*d*) of the Charter. These arguments were rejected by a unanimous court.

For the court, McLachlin J. first addressed the argument that the Charter applies to evidence which is tendered in Canada, regardless of where it is obtained. This argument was rejected on the basis of the sovereignty of each nation to apply and enforce laws of its choosing within its borders, and the corresponding inability of a nation to enforce its own laws beyond its borders (p. 514, para. 14):

> The main difficulty this argument encounters is that s. 24(2) of the Charter applies only if a breach of the Charter is established. In order to find a Charter breach, it is necessary to find that in detaining Terry under the authority of a U.S. warrant, the Santa Rosa police were subject to the Charter. Such a finding would run counter to the settled rule that a state is only competent to enforce its laws within its own territorial boundaries... "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself...".

This principal of law has been previously affirmed by the court in various decisions. For example, in *Singh v. Canada (Minister of Employment and Immigration)* (1985), 17 D.L.R. (4th) 422, [1985] 1 S.C.R. 177 [*188320622-49pp.], the court held that the Charter protection of refugees was confined within the borders of Canada. In *R. v. Finta* (1994), 88 C.C.C. (3d) 417 at p. 492, 112 D.L.R. (4th) 513 (S.C.C.) [*094101001-235pp.], Cory J. held that "a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal, within its own territory". In *R. v. Libman* (1985), 21 C.C.C.

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Publications Agreement Number 189480

9 C. of R. Newsl., No. 3 ISSN 0838-4843 September 1996

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.

SECTION 24(2), CAUSALITY AND PROXIMITY: HOW CLOSE IS CLOSE ENOUGH?

Since the decisions in *R. v. Therens* (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655 [*189002804-31pp.], and *R. v. Strachan* (1988), 46 C.C.C. (3d) 479, 56 D.L.R. (4th) 673 [*089005031-44pp.], the Supreme Court of Canada has held that it is not necessary to apply a strict form of causal analysis in determining whether evidence which has been obtained in a manner that infringed or denied a right guaranteed by the Charter should be excluded. Subsequent judicial consideration of s. 24(2) has resulted in further developments in the jurisprudence generally, such as procedure, including onus and burden that is to apply in respect of a s. 24(2) application, the recognition of a distinction between real and conscriptive evidence, and the recognition of the "but-for" discoverability principle. (For a discussion of these developments see 7 C. of R. Newsl., No.5 and 8 C. of R. Newsl., No.2.) None the less, the ability of the court to clearly articulate the principles of causality and proximity as they apply to an analysis of s. 24(2) has proved somewhat elusive. In *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481, 136 D.L.R. (4th) 502 (S.C.C.) [*096190004-42pp.], the court has once again grappled with this task.

In *Goldhart*, the police received a tip that marijuana was being grown at the appellant's residence and, after conducting some further investigation, a search warrant for the premise was obtained and executed. The identified occupants included the appellant and one Gerald Mayer. Mayer pleaded guilty to the offence of cultivating narcotics. The appellant pleaded not guilty, and at his trial evidence of the seized marijuana plants was excluded because of a finding that the search itself had been unreasonable. Crown then attempted to call *viva voce* evidence from Mayer and the appellant applied for the exclusion of that evidence on the basis that Mayer's evidence itself was derived from an unreasonable search and seizure.

The trial judge excluded Mayer's evidence on the basis of the following reasons (p. 488. para. 17):

> "There is a possibility that the police might have approached Myers [Mayer] without the aid of the search . . . [however] the applicants have satisfied me on the balance of probabilities that there is a causal connection between the seizure of the marijuana plants in violation of the Charter and the evidence obtained from Mr. [Mayer]. I am not able to say that Mr. [Mayer] would have come forward had he not been arrested. The arrest was causally connected with the Charter breach."

Accordingly, the trial judge concluded that the evidence had been "obtained in a manner" that breached the Charter and the provisions of s. 24(2) were, therefore, engaged. On the basis of the findings that the witness, Mayer, was willing to testify on the basis of his own free will and a "sincere desire to co-operate", the application to exclude the evidence of Mayer was denied.

The majority of the Court of Appeal agreed with the findings of the trial judge concerning the causal connection between the violation of s. 8 and the evidence (p. 489, para. 21):

> "The connection was clearly present. Without the illegal search, Mayer would not have been arrested or charged. He would have had no reason to come forward and plead guilty and he would have had no opportunity to give evidence against the appellant."

However, in respect of s. 24(2) and the exclusion of the evidence of Mayer, the majority found the trial judge to have been in error. The evidence was, therefore, excluded and an acquittal was entered.

The dissenting opinion was based upon the remoteness of the evidence of Mayer from the breach. Brooke J.A. held that it was "conceptually difficult" to find that the evidence was discovered or obtained through a violation of the appellant's rights. Indeed, the conceptual difficulty was such that the appellate judge held that there was no causal connection between the breach of s. 8 and the evidence of Mayer (p. 490, para. 25):

> "Testimony is the product of a person's mind and known only if and when that person discloses it. *It cannot be obtained or discovered in any other way.* Testimony which is heard for the first time some months after a search cannot be equated with or analogized to evidence of an inanimate thing found or seized when an illegal search is carried out . . . Clearly, the testimony of Mayer cannot be said to be derivative of the breach . . . There may be *some link* to the evidence of the finding of the marijuana, but

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Publications Agreement Number 189480

9 C. of R. Newsl., No. 4 ISSN 0838-4843 October 1996

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.

NEW RULES OF PROCEDURE: APPLICATIONS FOR EXCLUSION OF EVIDENCE

Where an accused has intended to apply for the exclusion of evidence, it has been commonplace for a *voir dire* to be declared upon the request of the accused, and for evidence in support of the application to then be heard in the *voir dire*. The decision in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.) [*096199086-25pp.] may, however, change this established practice.

In *Vukelich*, the appellant was charged with conspiracy to import, and conspiracy to traffic in cocaine. Search warrants were executed and the Crown intended to lead those seized items as evidence at trial. Counsel on behalf of the appellant applied for a *voir dire* to determine the constitutional validity of the searches which were conducted. The trial judge denied the application on the basis that the defence had failed to show the existence of a factual basis to support the merit of the application (pp. 198-9, para. 12):

> "... there has to be *some basis shown* before the court enters upon inquiries ... and the cases will vary infinitely as to when that may or may not be appropriate. I don't think there is a terribly high onus in any sense on an applicant in that situation, if, on the face of matters ... there has to be *some basis shown* before the court appears there is some reason to believe that there may be some defect in the material.
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> .....
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> I do not think that the law is that as a matter of course one enters into these inquiries just because of the existence of a warrant. You will look at the warrant, you will look at the information underlying it, and you must apply some sort of test to decide whether there are matters that appear to require some inquiry."

(Emphasis added.)

On appeal, the court addressed the procedural issue which was addressed at trial. As a starting point, the court held that "judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kinds of enquiries" (pp. 199-200, para. 17). Procedurally, in determining whether the "threshold for a *voir dire*" (p. 199, para. 15) has been satisfied, the court held that "the conduct of such proceedings, should, if possible, be based and determined upon the statements of counsel. This is the most expeditious way to resolve these problems" (p. 199, para. 17). There may, however, be some instances in which the submissions of defence counsel, alone, and the summary of facts which are relied upon in support of the application are an insufficient basis upon which to convince the trial judge that there should be a *voir dire*. In such cases, "the defence must go further or fail on this issue" (p. 200, para. 20). "Going further" may, in turn, require the filing of an affidavit "verifying the defence position" (p. 200, para. 21). The court summarized its position in this regard as follows (p. 201, para. 23):

> ... counsel's statements, possibly supported by an affidavit, are a useful first step in persuading the judge to order a *voir dire*. If these are found to be insufficient, a more formal approach, involving affidavits and possibly an undertaking to adduce evidence (including calling the deponent as a witness), may be required ... I do not purport to have exhaustively mentioned all possible steps that should, or may, be taken in this flexible approach.

It is commonly the case that defence counsel will cross-examine the deponent whose affidavit was used in support of the application to obtain a search warrant, *in* the *voir dire*, for the purpose of establishing either a breach of the accused's Charter rights or an entitlement to remedy. At trial, counsel for Vukelich applied to cross-examine the deponent in order to adduce evidence in support of the application *for* a *voir dire*. This was denied and upheld by the Court of Appeal. "While I would not say that might not be a useful thing to do in a proper case, even before a decision is made whether to conduct a *voir dire*, the usual time for such cross-examination is in the course of the *voir dire* itself" (p. 203, para. 28). The "flexible approach" does not, therefore, appear to include cross-examination of the deponent.

In the result, the decision in *Vukelich* restricts the ability of an accused to advance the case for relief under either s. 24(1) or (2) of the Charter. No longer is it a right that a *voir dire* will be declared upon the request of an accused.

The Court of Appeal's review of the *Hamill* decision (14 C.C.C. (3d) 338, 13 D.L.R. (4th) 275 (B.C.C.A.) [*189157343-50pp.], affd 33 C.C.C. (3d) 110, 38 D.L.R. (4th) 611 (S.C.C.)

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Publications Agreement Number 189480

9 C. of R. Newsl., No. 5 ISSN 0838-4843 November 1996

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.

MEDIA AND THE COURTS: THE RIGHT TO REPORT

Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees the freedom of thought, belief, opinion and expression, including freedom of the press and other media communication. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (unreported, October 31, 1996, S.C.C., Court File No. 24305) [*096309006-57pp.], the court considered whether s. 486(1) of the *Criminal Code*, which confers upon a judge a discretion to exclude members of the public from the courtroom, violates s. 2(*b*).

The facts which gave rise to the constitutional challenge are easily stated. The accused pleaded guilty to two charges of sexual assault and two charges of sexual interference. During the sentencing proceedings, the Crown applied for an order, pursuant to s. 486, excluding members of the public, including the media, from the courtroom during those parts of the proceedings which dealt with the specific acts which were committed by the accused. This was consented to by the defence. No evidence was heard in support of the application, although the Crown represented that the order was being sought because of the "very delicate" nature of the information which would be heard in the course of the sentencing proceedings.

The order was granted and remained in effect for approximately 20 minutes. No reasons were given by the judge at the time that the order was granted, however, afterwards, and following a request by the CBC, the trial judge stated that the order was made in the interests of the "proper administration of justice" and in order to avoid "undue hardship to the persons involved, both the victims and the accused". The CBC then challenged the constitutionality of s. 486.

Section 486 requires that criminal proceedings be held in open court subject to limited exceptions:

> 486(1) Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

Given the facts, and given that the court has been reluctant to consider the constitutionality of a legislative provision in the absence of a proper factual background (see *Danson v. Ontario (Attorney General)* (1990), 73 D.L.R. (4th) 686, [1990] 2 S.C.R. 1086 [*090288002-26pp.]), the appeal was confined to the consideration of the power to exclude the public for the maintenance of the proper administration of justice. Whether exclusion of the public on the basis of the "interest of public morals" violates s. 2(*b*), therefore, has yet to be determined. According to La Forest J., writing for the court (pp. 9-10, para. 17):

> This appeal engages two essential issues in relation to s. 2(*b*). The first is integrally linked to the concept of representative democracy and the corresponding importance of public scrutiny of the criminal courts. It involves the scope of public entitlement to have access to these courts and to obtain information pertaining to court proceedings. Any such entitlement raises the further question: the extent to which protection is afforded to listeners in addition to speakers by freedom of expression. The second issue relates to the first, in so far as it recognizes that not all members of the public have the opportunity to attend court proceedings and will, therefore, rely on the media to inform them. Thus, the second issue is whether freedom of the press protects the gathering and dissemination of information about the courts by members of the media. In particular, it involves recognition of the integral role played by the media in the process of informing the public. Both of these issues invoke the democratic function of public criticism of the courts, which depends upon an informed public; in turn, both relate to the principle of openness of the criminal courts.

There is, therefore, an important connection that exists between the criminal courts, the media and a functioning democracy. Within a democracy, it is essential that operations of the state be subject to public scrutiny and criticism. This is particularly so with criminal courts because it is there that the

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