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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.

FREEDOM OF THE PRESS VS. THE RIGHT TO A FAIR TRIAL

Both freedom of the press and the right to a fair trial are guaranteed by the Charter. Both rights are integral to Canadian democracy and their importance is self-evident. In *Edmonton Journal v. Alberta (Attorney General)* (1989), 64 D.L.R. (4th) 577 at p. 607, [1989] 2 S.C.R. 1326 [090004026-65pp.], Cory J. remarked:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

There is no doubt that the courts are but one of the public institutions which ought to be the subject of comment and opinion. Given the significance of the role that courts play within a democratic society and the breadth of power that is exercised by judges, including the power to admit or reject evidence according to the rule of law, to strike down laws as unconstitutional and to deprive an individual of his or her liberty, it is critical that the courts should be the subject of comment in the public media. This is necessary to the proper functioning of the courts within a democracy.

Both the right to a fair trial and the guarantee of freedom of the press are recognized as "paramount value[s] in Canadian society". At the same time, these two rights are not always complimentary of one another. The exercise of the freedom of the press can, in some instances, undermine the right to a fair trial. Unfair or improper reporting can result in a mistrial and may also give rise to either contempt or criminal proceedings. Therefore, insofar as the reporting of criminal trials is concerned, the s. 2(*b*) guarantee of "freedom of the press and other media of communication" must be informed by, and at times yield to, the accused's right to a fair trial as is guaranteed by s. 11(*d*) of the Charter.

This clash of freedoms has also been recognized and addressed in other common law countries, and it is not the fact that Canada has rights and freedoms that are constitutionally entrenched that gives rise to this tension. In England, for example, it has been recognized that although the importance of a fair trial cannot be overestimated, the value of the role of the press in public discussion is also deserving of full recognition. Thus, s. 5 of the *Contempt of Court Act 1981* (U.K.), 1981, c. 49, reads:

> A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

Further, in *American Jurisprudence*, 2nd ed., vol. 17, pp. 476-7:

> If any publication has a tendency to prevent a fair trial or tends to prejudice the public or jurors against an accused person on trial for an offence, such act, conduct, or publication may be punished as contempt . . . But there is authority to the effect that while courts have the power to punish for contempt . . . this . . . does not apply to criticism, however harsh, when said or published elsewhere than in court and when it does not subvert justice.

This tension between the competing values has also been recognized by the Canadian courts in *Fraser v. Canada (Public Service Staff Relations Board)* (1985), 23 D.L.R. (4th) 122 at p. 131, [1985] 2 S.C.R. 455 [*188334409-13pp.], Dickson C.J.C. stated:

> On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial of protecting the privacy of minors or victims of sexual assaults.

Parliament has attempted to arrive at a balance between the right to report and the right to a fair trial through the enactment of provisions within the *Criminal Code*. For example, in a sexual offence case, a judge may make an order under s. 486(3)

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THE NEW RIGHT TO SILENCE RULES APPLIED

The constitutional challenge to the validity of s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, in the criminal context in *R. v. S. (R.J.)* (1995), 96 C.C.C. (3d) 1, 121 D.L.R. (4th) 589 (S.C.C.) [095044168-226pp.], *R. v. Primeau* (1995), 97 C.C.C. (3d) 1, [1995] 2 S.C.R. 60 [095111030-27pp.], *R. v. Jobin* (1995), 97 C.C.C. (3d) 97, [1995] 2 S.C.R. 78 [095111032-30pp.], and in the administrative context in *British Columbia Securities Commission v. Branch* (1995), 97 C.C.C. (3d) 505, 123 D.L.R. (4th) 462 (S.C.C.) [095111031-76pp.], required the Supreme Court of Canada to address one of the most important questions of its second decade of Charter jurisprudence. The content and effect of these decisions were analyzed in 7 C. of R. Newsl., No. 8 and 7 C. of R. Newsl., No. 10. During a recent British Columbia Continuing Legal Education Conference, which focused upon "Commercial Crime", Hill J. described issues associated with the blurring of lines between regulatory and criminal proceedings and how regulatory agencies handle the "hand-off" of information obtained for regulatory purposes to the criminal enforcement apparatus as one of the most "critical" issues law enforcement agencies must confront. How are the new rules being applied? What are the recent developments?

Criminal Context

Many of the pre-*S. (R.J.)* court decisions, which dealt with *ad hoc* s. 24(1) Charter remedy rulings, have been reversed.

In *R. v. Fitzpatrick* (1995), 102 C.C.C. (3d) 144, 129 D.L.R. (4th) 129 (S.C.C.) [095324006-41pp.], the court applied licensing theory to admit into evidence, in a fisheries prosecution, logs that the accused was required by statute and by his licence to create. In effect, the court held that s. 7 was not engaged as the accused had no expectation of privacy in relation to documents created as a result of a reasonable regulatory requirement.

In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995), 98 C.C.C. (3d) 20, 124 D.L.R. (4th) 129 (S.C.C.) [095135026-117pp.], the court authorized the Westray Inquiry to proceed, subject to potential s. 11(*d*) Charter conditions, in light of the fact that the accused mine managers would be entitled to derivative use immunity in any subsequent criminal proceedings.

In *Samson v. Canada* (1995), 131 D.L.R. (4th) 360, [1995] 3 F.C. 306 (C.A.) [096004088-24pp.], leave to appeal to S.C.C. refused 65 C.P.R. (3d) vi, 203 N.R. 315*n*, the Federal Court of Appeal ordered that Quebec notaries were indeed subject to compulsion at a s. 10 *Competition Act* inquiry as the s. 45(1)(*c*) *Competition Act* proceedings were "regulatory offences" and not "real crimes".

The determination of what evidence is derivative and the development of discoverability rules is just beginning.

In *R. v. Goldhart* (1996), 107 C.C.C. (3d) 481, 136 D.L.R. (4th) 502 (S.C.C.) [096190004-42pp.], the court examined the requirements that there be some nexus between a Charter violation and otherwise undiscoverable evidence, often arising as a result of a causal or temporal connection, before evidence may be excluded as derivative.

In *R. v. Stillman* (unreported, March 20, 1995, S.C.C., Court File No. 24631) [097083044-162pp.], the court held that the touchstone categorization of evidence obtained in violation of the Charter as either "real" or "self-criminatory" for the purposes of the *Collins* "trial fairness" criteria, required by s. 24(2) of the Charter, should be abandoned. Instead, the court has adopted a conscriptive/non-conscriptive classification system for the purposes of a determinative rule of exclusion.

Evidence that is conscriptive, and its derivatives, whether or not "real", will be excluded if such evidence could not have been obtained from an independent source or would not have been inevitably discovered. The court summarized (p. 51, para. 119):

> "1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the

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THE FINAL WORD ON THE INTERPRETATION OF S. 24(2)?

Section 24(2) of the *Canadian Charter of Rights and Freedoms* governs the circumstances under which evidence may be excluded from proceedings upon a finding that the "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter". The exclusion of evidence is the most important remedy provided for by the Charter (or, at least the remedy that is most frequently relied upon) and this provision has been subject to more judicial attention than any other section of the Charter. At the same time, the interpretation of this provision has also been subject to more uncertainty than any other provision.

Distinctions between "real" and "self-conscriptive" evidence, and the assignment of meaning to phrases such as "but-for" and "discoverability", have proved troublesome for trial and appellate courts alike. This uncertainty derives from the wording of s. 24(2) itself, which states that "evidence shall be excluded if 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".

In *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508 (S.C.C.) [*087119098-16pp.], it was held that factors such as: (1) whether the breach was a technical or an intentional and egregious illegal act on the part of the police; (2) whether, despite the breach, the evidence would have been discovered by the police in any event or whether it was discovered only because of the breach; and (3) whether exclusion of the evidence will result in a dismissal of the charge or whether it is but one component of the case for the Crown, are all to be considered in determining whether the admission of the evidence will bring the administration of justice into disrepute. However, a review of the case law demonstrates that there has been an uncertain balancing of these factors within the context of somewhat ambiguous legal tests. The decision of the Supreme Court of Canada in *R. v. Stillman* (1997), 113 C.C.C. (3d) 321, 144 D.L.R. (4th) 193 (S.C.C.) [*097083044-162pp.], may serve to correct some of these difficulties.

In *Stillman*, the accused was charged with murder. The accused was last seen with the victim on the night of the murder and, at around midnight of that same night, he arrived home cold, wet and with a cut above one eye and grass stains on his pants. The accused offered an explanation for this but his explanation varied over time. The victim had been sexually assaulted and was found to have a bite mark on her abdomen. At the police station, the accused's lawyers advised the police that the accused would not consent to provide any bodily samples, hair or teeth imprints, nor would he provide any statement. Despite this, when the accused's lawyers left, the police officers took hair samples under the threat of force. Teeth impressions were also taken and the police interviewed the accused for one hour in an effort to obtain a statement. The accused cried during the interview and, after being permitted to speak to his lawyer, he used a tissue to blow his nose and discarded the tissue into a wastebasket. The police then seized the tissue.

At trial, counsel for the accused argued that the seizure of the various samples violated the accused's rights as guaranteed by s. 8 of the Charter. The trial judge held that the tissue had been abandoned and that there was, therefore, no reasonable expectation of privacy in the tissue. The seizure of the other samples, on the other hand, were found to be in violation of the accused's right to be free from unreasonable search and seizure, however, it was held that to admit the evidence would not bring the administration of justice into disrepute. The majority of the Court of Appeal held that the trial judge had not made any errors of law and accordingly declined from conducting an independent determination under s. 24(2). On further appeal, Cory J. (Lamer C.J.C., La Forest, Sopinka and Iacobucci JJ. concurring) wrote that two major issues were to be considered (p. 331, para. 1):

> First, what should be the scope and the appropriate limits of the common law power to search which is incidental to an arrest? Second, in what circumstances should evidence obtained as a

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