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CHARTER OF RIGHTS
NEWSLETTER

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CHARTER BASIS FOR EXTRADITION REVIEW

The topic of extradition was last covered in 10 C. of R. Newsl., No. 2. Extradition has again become a topic of interest in the recent case of *Gwynne v. Canada (Minister of Justice)* (unreported, February 4, 1998, B.C.C.A.) [*098/043/099-118pp.], where there was a split of opinion within the British Columbia Court of Appeal on the critical issue of the standard that a court is to use in reviewing a decision of the Minister of Justice to extradite.

The Extradition Treaty Between Canada and the United States of America, 1976 creates reciprocal obligations between Canada and the United States. The treaty itself and the obligations of co-operation and mutual assistance are stated by the treaty in its Preamble to be premised upon the desire "to make more effective the co-operation of the two countries in the repression of crime by making provision for the reciprocal extradition of offenders". Against this presumption of co-operation, and as will be seen in greater detail following, a court may review the Minister's decision to extradite and interfere with that decision on constitutional grounds where the extradition would "sufficiently shock the Canadian conscience". The *Gwynne* decision illustrates just how difficult a concept this is to interpret and apply.

The facts in *Gwynne* are disturbing. The appellant is a Canadian who in 1984 was sentenced in the State of Alabama to serve two 60-year terms of imprisonment consecutively. In 1993 he escaped from custody, and his extradition to Alabama was requested so that he could serve the approximately 110 years remaining on his sentence. The materials which were used in defending against the extradition request included an affidavit from the appellant which detailed the brutal prison conditions in Alabama and a report on prison conditions in Alabama which was consistent with what was stated in the appellant's affidavit.

Because it was the facts of this case which posed a challenge to the application of the constitutional standard for reviewing extradition orders, it is useful to recite the facts in some detail. In reviewing these facts, and when considering the court's decision, it must kept in mind that the appellant's affidavit was uncontradicted. The affidavit spoke of brutality and conditions of absolute squalor which included the following:

(1) One prisoner was told by the guards to get a haircut. When he refused, he was beaten unconscious with clubs, at which point his head was shaved.

(2) Another prisoner was routinely beaten by the guards until he died from injuries sustained.

(3) One prisoner, who suffered from an acute asthmatic condition and whose medication had run out, requested that he be permitted to not work in the field on a day of intense heat and humidity. He was told that he had to either work or go to "the hole". He went to work in the field, collapsed and died.

(4) There was a tremendous amount of interracial tension in the prisons, and, on one occasion, a guard permitted approximately 20 black inmates into an area where there were six white inmates. The guard gave his billy club to one of the 20, and the six were severely beaten.

(5) One prison was so infested with cockroaches that it was common for a prisoner's bed to be crawling with them in the evenings. It was also not uncommon for there to be poisonous snakes and spiders within the prison.

(6) There was no privacy in the sleeping, shower or toilet facilities.

(7) Violence between prisoners, in particular, stabbings and homosexual rapes, were almost a weekly occurrence. This was due, in large part, to insufficient staffing. There was also no psychiatric facility, so very dangerous prisoners lived with the general population.

(8) Many prisoners suffered ill health because of poor nutrition in the prison diet.

(9) The medical and dental facilities were so inadequate that, on one occasion, when the appellant needed to have a tooth

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DEFINING ABORIGINAL RIGHTS

Canadian history has demonstrated a halting progress in the definition and affirmation of aboriginal rights and the resolution of land claims. This has been a source of tremendous concern.

Section 25 of the *Canadian Charter of Rights and Freedoms* and s. 35(1) of the *Constitution Act, 1982* are, of course, both central to any progress to be made with regard to aboriginal rights and land claims. Section 25 of the Charter states:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35(1) of the *Constitution Act, 1982* states:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Cases such as *R. v. Sparrow* (1990), 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385 (S.C.C.) [090/156/007-50pp.]; *R. v. Van der Peet* (1996), 109 C.C.C. (3d) 1, 137 D.L.R. (4th) 289 (S.C.C.) [096/236/089-199pp.]; and *R. v. Gladstone* (1996), 109 C.C.C. (3d) 193, 137 D.L.R. (4th) 648 (S.C.C.) [096/236/087-126pp.] have provided important guidance in relation to these issues. In addition, there is an abundance of academic literature which is far too vast to list in representative detail, but which includes the *Report of the Royal Commission on Aboriginal Peoples*, vol. 1 "Looking Forward and Looking Back" and vol. 2 "Restructuring the Relationship" (Ottawa: The Commission, 1996); Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 McGill L.J. 382; Kent McNeil, "The Meaning of Aboriginal Title" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: U.B.C. Press, 1997); and Brian Slattery, "Understanding Aboriginal Rights" (1987), 64 Can. Bar Rev. 727.

The decision of *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010 [097/348/003-144pp.] was made against this social, historical and jurisprudential background, and it is perhaps the most important decision to date. Speaking for the majority, Lamer C.J.C. wrote in the introduction to the judgment (at pp. 201-202):

> This appeal is the latest in a series of cases in which it has fallen to this Court to interpret and apply the guarantee of existing aboriginal rights found in s. 35(1) of the *Constitution Act, 1982* . . . this appeal raises a set of interrelated and novel questions which revolve around a single issue - the nature and scope of the constitutional protection afforded by s. 35(1) to common law aboriginal title.
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> . . . . .
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> Since aboriginal title was not being claimed in those earlier appeals, it was unnecessary to say more. This appeal demands, however, that the Court now explore and elucidate the implications of the constitutionalization of aboriginal title.

The Supreme Court decision in *Delgamuukw* is a landmark in importance. The trial, too, was a landmark because of its length and the amount of evidence placed before the trial judge. The trial judge heard 374 days of evidence and argument. Sixty-one witnesses gave evidence at trial, and 15 witnesses gave evidence on commission. The trial evidence amounted to 23,503 pages of transcript. There were also 3,039 pages of commission evidence. Nine thousand two hundred exhibits were filed, and there were 5,977 pages of transcript in relation to argument. The judgment itself is over 400 pages. The Supreme Court found that the trial judge had made reversible errors in relation to critical points of evidence. Therefore, it ordered a new trial and, in addition to addressing issues as related to title, the court discussed and provided guidance with respect to the unique evidentiary issues which are common to this type of litigation.

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JURORS AND PREJUDICE: HOW RELIABLE ARE THEIR VERDICTS?

The jury system has long been regarded as a cornerstone of the guarantee of a fair trial in the criminal justice system. Blackstone suggested, "Trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law. The liberties of England cannot but subsist so long as this palladium remains sacred and inviolate." (*Commentaries on the Laws of England*, vol. II (1849), at p. 280) While some might hold the "glory of English law" in lower regard than Blackstone did, it is widely accepted that a jury gives an accused the opportunity to be judged fairly and honestly by 12 peers from the community. So important is this protection that a jury trial is a constitutional right guaranteed by s. 11(*f*) of the *Canadian Charter of Rights and Freedoms*.

In a jury trial, it is believed, 12 impartial, intelligent persons will attentively consider the evidence presented, understand and apply the law as the trial judge has instructed, and render a just verdict. The stated benefits of a jury over a trial by judge alone are: (1) a judge may be less impartial or open-minded than a jury; (2) a judge "is but one human individual having personal biases and faults, unfiltered and uncorrected by the input of other individuals sharing the joint responsibility for assessing the evidence and deciding the case"; (3) a jury brings "fresh, open minds and straightforward common sense to bear upon resolving the case that is their joint responsibility. Probably the jury will consist of individuals with a variety of experiences, backgrounds and outlooks. These individuals will have the right to thrash out the case in complete secrecy, with collective recall of the evidence, in a group-interactive context, without fear of direct or indirect influence"; (4) a jury will bring "community values to bear on judicial decisions"; and (5) a jury provides protection against arbitrary or oppressive laws or law enforcement. "In trial by jury, the people judge between the State and the accused, and the State has little or no control over the outcome." (C. Granger, *The Criminal Jury Trial in Canada*, 2nd ed. (Scarborough: Carswell, 1996), pp. 7-8)

The ideal is simple to state. It has been affirmed on repeated occasions that the system works and that justice is done. Indeed, it is almost a mantra heard from the appellate courts that the modern day juror is intelligent and presumed to follow the law. The conclusion that "justice is done" or that "the system works" is premised on the assertion that jurors are willing or able to act fairly, honestly, impartially, intelligently and in accordance with law. Regrettably, but perhaps not surprisingly, the assertion that all of these premises are true does not rest comfortably with experience. In fact, experience often reveals that individuals and groups will act on beliefs based on fear, bias, ignorance, capriciousness and prejudice. Common experience challenges the premises on which the value of the jury trial rests.

Racism is one way the jury system's integrity may be undermined. Challenging a potential juror for cause on the grounds of an existing prejudice is one means to detect a poisoning influence and to cleanse the jury pool. In *R. v. Williams* (unreported, June 4, 1998, S.C.C.) [098/156/094-41pp.], revg 106 C.C.C. (3d) 215, 134 D.L.R. (4th) 519 (B.C.C.A.) [096/122/109-37pp.], the Supreme Court of Canada gave an important and uncommonly unanimous judgment in which it considered the influence of racial prejudice on the jury system. The appellant, an aboriginal, was charged with robbery and elected to be tried by judge and jury. At his first trial, counsel applied to challenge potential jurors for racial bias and filed materials that provided evidentiary support for the claim that racism against aboriginal people in Canada is widespread. The trial judge granted the application and permitted potential jurors to be asked the following questions:

1. Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is an Indian?
2. Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the person charged is an Indian and the complainant is white?

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INVESTIGATIVE DETENTIONS & WARRANTLESS SEARCHES

Various appellate courts have recognized the lawfulness of "investigative detentions" and the corresponding powers of search: *R. v. Simpson* (1993), 79 C.C.C. (3d) 482, 12 O.R. (3d) 182 (C.A.) **[*093/050/042-44pp.]**; *R. v. Dupuis* (1994), 83 W.A.C. 197, 162 A.R. 197 (C.A.) **[*095/012/116-5pp.]**; *R. v. Lake* (1996), 113 C.C.C. (3d) 208, [1997] 5 W.W.R. 526 (Sask. C.A.) **[*097/042/031-12pp.]**; *R. v. Burke* (1997), 118 C.C.C. (3d) 59, 153 Nfld. & P.E.I.R. 91 (Nfld. C.A.) **[*097/224/007-19pp.]**. The powers to conduct an investigative detention and accompanying warrantless search were most recently affirmed by the British Columbia Court of Appeal in *R. v. Ferris* (unreported, June 15, 1998, B.C.C.A.) **[*098/168/094-35pp.]**. This decision highlights once again the significant concerns surrounding the exercise of these powers due to the potential for abuse.

The facts in *Ferris* are typical of many police occurrences. The respondent was a passenger in a motor vehicle. Two officers were, as a matter of coincidence, following the vehicle in a marked car. They conducted a routine check of the licence plates, which revealed that the plates had been reported stolen. The vehicle pulled into a restaurant parking lot, and the officers pulled in behind it. The driver exited the vehicle and ran from the scene. The respondent, who was still in the vehicle, was directed by one of the officers to get out, and advised that she was "under investigation for possession of stolen property". Her hands were cuffed behind her back; the officer conducted a pat down search; and in response to a question from the officer, the respondent provided her name and said that her identification was in the waist pack she was wearing. The officer removed the waist pack and searched it for the respondent's identification, as well as for "any weapon she may have had in the pouch". The officer discovered a package of cocaine, and the respondent was placed under arrest for possession of a narcotic and advised of her right to counsel.

The respondent challenged the lawfulness of her detention and of the search of her waist pack. In the course of the *voir dire*, the officers gave evidence with respect to their suspicions in relation to the vehicle and its occupants. This evidence was important because it was cited by the appellate court as the justification for both the detention and the search, thus demonstrating how easy it is to justify the use of such invasive powers. The officer testified at trial that he did not immediately place the respondent under arrest because he had no grounds to do so. Instead, she was detained in order to afford the officer an opportunity to investigate further. The officer also stated that, although the respondent had given her name, he none the less wanted to search for her identification because "people identify themselves with fake names all the time". He stated (at p. 7):

> "Your Honour, in my experience vehicles that have stolen licence plates on them are commonly stolen. People steal a licence plate and put it on another vehicle that may possibly be stolen. With that in mind I believed that possibly, and also keeping in mind that people who are passengers and drivers of stolen vehicles are often involved in criminal activity, and with that in mind as well I wanted to identify the occupants of the vehicle."

(It should be noted that the officer's experience proved to be an unreliable indicator in this case because, as it turned out, the vehicle was not stolen, but was lawfully registered to the driver.) The officer also maintained that if a weapon had been in the waist pack, and if the pack had remained with the respondent, it would have been possible for her to remove the weapon even though her hands were cuffed behind her back. The trial judge excluded the evidence discovered in the respondent's waist pack pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*. He reasoned that, although it was lawful to stop the vehicle, searching the waist pack was not, and the evidence would not have been discovered without the coerced participation of the respondent. In particular, the trial judge found that once the waist pack had been removed,

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SEARCH AND SEIZURE & THE "PLAIN SMELL" RULE

The plain view doctrine is a well established basis upon which a search may be conducted and property seized. In *R. v. Smith* (1998), 126 C.C.C. (3d) 62, 161 D.L.R. (4th) 331 (Alta. C.A.) **[*098/167/050-22pp.]**, the court considered whether there also exists the analogous plain smell rule.

In *Smith*, the police attended at a residence following a 911 call placed by a female occupant. When the police arrived, the accused, who was outside, gave them permission to enter to check on the female caller. As the police were going inside, an officer called as backup arrived and, upon entering the residence, immediately detected the smell of damp marijuana, which was strongest by the basement door. This led him to believe that there was a marijuana grow operation in the basement. He went into the basement and discovered just that. He then left the residence and obtained a search warrant to seize the marijuana. In cross-examination at trial, the officer admitted that he went into the basement to confirm his suspicions that marijuana was being grown there because he did not believe he could have obtained a search warrant on the basis of the smell alone. In other words, the officer intentionally entered the basement to pursue an investigation and gather information upon which to base a search warrant.

At trial, the judge found that the accused's rights under s. 8 of the *Canadian Charter of Rights and Freedoms* had not been violated by the officer's search of the basement. He reasoned that just as the "plain view" doctrine permits police who are lawfully at a location to seize evidence of a crime which is in plain view, the doctrine also permits them to seize evidence which is known to them through "plain smell". The officer in this case detected the odour of marjuana while in an area of the house in which he was lawfully present through invitation. Therefore, his warrantless search and subsequent seizure of the marijuana under a warrant were lawful. The accused appealed.

Because the plain view doctrine assumes that officers are lawfully present in the place where incriminating evidence is discovered, the appeal court in *Smith* first considered whether the officer who detected the smell of marijuana was lawfully inside the appellant's residence. The court held that although the appellant's invitation to enter was extended only to the first officers on the scene, the backup officer did enter legally because it was reasonable to assume that the appellant "consented generally to police entering his home" (at p. 70), and because the backup officer had been called to the scene by the officers who were specifically authorized to enter.

With regard to this issue of consent, it should be pointed out that there is a theoretical basis upon which to restrict the scope of consent, depending on the facts of each individual case. For example, it is certainly true that an individual may specify that consent is limited to specific people, at specific times and places, and for specific purposes, or that there is no consent at all. Therefore, it was theoretically open to the appellant in *Smith* to specify to the first officers that his consent to enter the residence was limited to them, was given specifically for the purpose of investigating the 911 call, and expired when those officers left the scene, that it did not extend to all or any officers, for all or any purposes, at all or any times. This is consistent with the decision in *R. v. Wills* (1992), 70 C.C.C. (3d) 529 at pp. 540-42, 7 O.R. (3d) 337 (C.A.) **[*092/066/042-47pp.]**, where the court held:

> If an individual chooses to give something to a police officer, it is a misuse of the language to say that the police officer seized the thing given. Rather, the officer simply received it.
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> . . . . .
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> Certain underlying values give definition to the concept of consent in the present context. Members of the community are encouraged to co-operate with the police. Co-operative policing will often be less intrusive and more effective than confrontational policing. Co-operation also manifests the joint commitment that the community, and the police, have to the effective enforcement of the laws of the community. Co-operation must, however, be distinguished from mere acquiescence in or compliance with a police request. True co-operation connotes a decision to allow the police to do something which they could not other-

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EXTRATERRITORIAL APPLICATION OF THE CHARTER: ANOTHER LOOK

Prior to the recent decision of *R. v. Cook* (1998), 128 C.C.C. (3d) 1 (S.C.C.) **[*098/275/087-99pp.]**, the Supreme Court of Canada considered the extraterritorial application of the *Canadian Charter of Rights and Freedoms* in *R. v. Harrer* (1995), 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98 (S.C.C.) **[*095/293/038-45pp.]**, *R. v. Terry* (1996), 106 C.C.C. (3d) 508, 135 D.L.R. (4th) 214 (S.C.C.) **[*096/152/049-24pp.]**, and *Schreiber v. Canada (Attorney General)* (1998), 124 C.C.C. (3d) 129, 158 D.L.R. (4th) 577 (S.C.C.) **[*098/152/002-43pp.]**. The decision in *Cook* is important because, relative to the three earlier cases, it extends the application and protections of the Charter to investigations conducted outside Canada.

In *Cook*, the appellant, an American citizen, was charged with a murder alleged to have been committed in Canada. He was arrested in the United States and ultimately extradited to Canada to be tried on the charge. The significant facts which gave rise to the appeal are that, two days after Cook's arrest and while he was in custody awaiting extradition, Canadian detectives travelled to the United States to interrogate him. Their objective was to elicit information from Cook which could be used in the Canadian prosecution. They made no effort, prior to interrogating the appellant, to determine whether he had yet had the advice or assistance of counsel. Cook was not advised of his right to counsel until 20 minutes into the interrogation and after he was asked if he had shot the cab driver. Further, he was not told that he was not required to speak to the detectives or that the answers he gave could be used in evidence against him. When he was finally given a s. 10(*b*) Charter warning, he was told that his right to counsel could be exercised by speaking to a religious elder, his mother or a friend, thus rendering the warning, in the Supreme Court's view, "so confusing that it deprived the appellant from forming a decision about whether or not to seek legal advice" (at p. 11). In the result (joint reasons for judgment by Cory and Iacobucci JJ., concurred in by Lamer C.J.C., Major and Binnie JJ.; reasons concurring in the result by Bastarache J., concurred in by Gonthier J.; dissenting reasons by L'Heureux-Dubé J., McLachlin J. concurring), it was held that the Charter governed the actions of the Canadian police officers. The statements were excluded and a new trial was ordered. The issue before the court, as stated by the majority, was whether the Charter applied to "the taking of the appellant's statement by Canadian police in the United States in connection with their investigation of an offence committed in Canada for a criminal prosecution to take place in Canada, and if the *Charter* [did apply], was it breached in the circumstances" (at p. 10). The analysis of this issue necessarily entails the consideration of principles of international law in relation to sovereignty and the territorial application of the law of a sovereign state, as well as s. 32 of the Charter which states:

> 32(1) This Charter applies
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It is well recognized as a general proposition that sovereignty (at p. 17):

> . . . prohibits extraterritorial application of domestic law since, in most instances, the exercise of jurisdiction beyond a state's territorial limits would constitute an interference under international law with the exclusive territorial jurisdiction of another state. The Permanent Court of International Justice in *The case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A., No. 9 at pp. 18-19, articulated this principle as . . . "the first and foremost restriction imposed by international law upon a State".

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CORPORATE MOBILITY AND THE RIGHT TO CONDUCT BUSINESS

Increasingly, business is conducted without regard to borders between provinces, countries or continents. Indeed, the globalization of the economy requires that business be conducted without borders. In *Canadian Egg Marketing Agency v. Richardson* (1995), 129 D.L.R. (4th) 195, [1995] 8 W.W.R. 457 (N.W.T.S.C.), affd 132 D.L.R. (4th) 274, [1996] 3 W.W.R. 153 (N.W.T.C.A.), revd 83 A.C.W.S. (3d) 375 (S.C.C.) **[*098/313/004-117pp.]**, the Supreme Court of Canada considered the extent to which s. 6 of the *Canadian Charter of Rights and Freedoms* protects the right of a corporate entity to conduct business outside its province of origin.

The respondents Richardson, operating as Northern Poultry, and Pineview Poultry Products Ltd. carried on business as egg producers in the Northwest Territories. The eggs were marketed both intraprovincially and interprovincially. The Canadian Egg Marketing Agency regulates interprovincial egg trade in accordance with both federal and provincial legislation. In fulfilling its duties, the agency allocates egg quotas to each province. However, there is no allocation for either territory.

In 1992, the Canadian Egg Marketing Agency sued the respondents for damages arising from illegal interprovincial marketing of eggs produced in the Northwest Territories, and it sought to enjoin the respondents from any further such marketing. In their defence, the respondents argued that the governing legislation and the egg marketing scheme violated their rights as guaranteed by ss. 2(*d*), 6(2)(*b*) and (3), and 15(1) of the Charter.

The relevant sections of the Charter provide as follows:

> 2. Everyone has the following fundamental freedoms:
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> . . . . .
>
> (*d*) freedom of association.
>
> . . . . .
>
> 6(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
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> . . . . .
>
> (*b*) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
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> (*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence;
>
> . . . . .
>
> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The trial judge found that the egg marketing scheme violated the respondents' rights as guaranteed by these Charter provisions. Because trade, by its essence and nature, requires association, and because the legislation prohibited the respondents from entering into certain trade associations or relationships, the legislation was found to violate s. 2(*d*). A violation of s. 6 was found on the basis that no one who moved to the Northwest Territories would be able to pursue a livelihood by marketing eggs interprovincially. Similar reasoning was used to find a violation of s. 15(1).

The trial decision was upheld on appeal, except that the Court of Appeal found no violation of s. 15(1).

On further appeal, the majority of the Supreme Court (joint reasons by Iacobucci and Bastarache JJ., concurred in by Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory and Binnie JJ.; dissenting reasons by McLachlin J., concurred in by Major J.) stated that the appeal "raises fundamental issues regarding the right to mobility guaranteed by s. 6 and the freedom of association guaranteed by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*" (at p. 1 of the judgment).

STANDING

The appellant argued that the respondents had no standing to challenge the legislative provisions in question because ss. 2(*d*) and 6 of the Charter protect individual rights only, not those of corporate entities. This argument was rejected and

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ADDRESSING THE JURY: WHO GOES FIRST

The conduct of a jury trial is often characterized as both an art and a science, and it is not uncommon for experienced trial lawyers to differ in their views on the various facets and details of this important subject. Some differences of opinion have been more extensively and passionately debated than others. Among the most interesting and difficult debates are those which have arisen out of s. 651 of the *Criminal Code*, R.S.C. 1985, c. C-46, in particular out of subsections (3) and (4) which determine the order of jury address:

> 651(3) Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last.
>
> (4) Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor.

Many have taken the position that this prescribed order of jury address is unfair and unconstitutional in that it requires the accused to anticipate, rather than answer, a critical part of the Crown's case. However, in *R. v. Rose* (1996), 106 C.C.C. (3d) 402, 134 D.L.R. (4th) 628 (Ont. C.A.) **[*096/131/004-53pp.]**, affd 40 W.C.B. (2d) 192 (S.C.C.) **[*098/334/013-91pp.]**, the Supreme Court of Canada considered and upheld the constitutionality of these statutory provisions. Interestingly, though, the court was deeply divided on the issue.

The appellant in the case was charged with the second degree murder of his mother. The Crown theory was that the appellant had struck and then strangled her to death. The appellant testified that he had struck his mother, but that he then became upset and fled the house. Upon his return, he found her dead after apparently having hanged herself. Some forensic evidence referred to the fact that a ligature around the neck causes a bluish skin colour above the ligature which would be apparent to a reasonably skilled observer. Defence counsel made no reference to this evidence in its closing address. Crown counsel did, and asked the jury to draw a negative inference from it. Defence counsel argued that he had not anticipated the Crown's argument and requested that the trial judge review the evidence on this issue with the jury. The judge refused to do so. The appellant was convicted as charged.

On appeal to the Ontario Court of Appeal, Dubin C.J.O. for the majority found that there was no evidence to establish that the order of jury address violates either the right to a fair trial or the principles of fundamental justice. He noted that it is the evidence, and not the closing address, which an accused must meet and answer. He further stated that the divergence of opinion on the order of address supports the finding that s. 651 of the *Criminal Code* does not offend any constitutional rights or principles.

On further appeal (reasons by Cory, Iacobucci and Bastarache JJ., concurred in by Gonthier J.; concurring reasons by L'Heureux-Dubé J.; Binnie, McLachlin and Major JJ. and Lamer C.J.C. dissenting), the finding of the Ontario Court of Appeal was upheld.

As is often done when an accused's constitutional arguments are rejected, the majority of the Supreme Court began its analysis with the observation that the right to full answer and defence entails an entitlement only to rules and procedures which are fair and enable the accused to defend against the Crown's case. It does not entitle the accused to a set of rules and procedures most likely to result in a finding of innocence: *Dersch v. Canada (Attorney General)* (1990), 60 C.C.C. (3d) 132, 77 D.L.R. (4th) 473 (S.C.C.) **[*090/331/009-23pp.]**. Nor does it entitle the accused to "the most favourable procedures that could possibly be imagined": *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 at p. 46, 44 D.L.R. (4th) 193 (S.C.C.). Against this framework, the majority in *Rose* stated (at pp. 15-16 of its reasons):

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