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CHARTER OF RIGHTS

NEWSLETTER

Editors: David J. Martin, LL.B., of the British Columbia and Ontario Bars and Gregory P. DelBigio, M.A., LL.B., of the British Columbia Bar.

SCHOOLS: SEARCHES & REDUCED EXPECTATION OF PRIVACY

There can be no doubt that the extent to which an expectation of privacy will be upheld by the courts will depend on who is asserting the privacy right, the location where the right is to be exercised, and the surrounding circumstances. In *R. v. M. (M.R.)* (1998), 129 C.C.C. (3d) 361, 166 D.L.R. (4th) 261 (S.C.C.) **[098/334/012-55pp.]**, the Supreme Court of Canada considered the application of s. 8 of the *Canadian Charter of Rights and Freedoms* to search and seizure in a school. In a near unanimous decision (Major J. dissenting), it was held that the special circumstances which exist in a school and, in particular, the special duties that teachers and school administrators owe with respect to students, allow for little s. 8 protection with respect to students.

In *M. (M.R.)*, the vice-principal received information from several students that the appellant was selling drugs on school property. He believed this information to be reliable. On the day in question, there was to be a school dance, and one of the informants advised the vice-principal that the appellant would be at the dance carrying drugs. The vice-principal saw the appellant arrive at the dance and called the R.C.M.P., requesting that an officer attend at the school. The vice-principal then approached the appellant and his friend and asked them to accompany him to his office, where he informed them that he was going to search them. The R.C.M.P. officer arrived and was present while the search was conducted. The search consisted of requiring the students to turn out their pockets and asking the appellant to lift up his pant legs. The vice-principal noticed a bulge in the appellant's sock, which proved to be a cellophane bag that the vice-principal removed and gave to the R.C.M.P. officer. The officer identified the contents as marijuana and placed the appellant under arrest.

At issue in this case was whether the appellant's rights as guaranteed by s. 8 of the Charter were violated by the vice-principal's search. Writing for the majority, Cory J. began his judgment as follows (at pp. 367-8):

> Teachers and those in charge of our schools are entrusted with the care and education of our children. It is difficult to imagine a more important trust or duty. To ensure the safety of the students and to provide them with the orderly environment so necessary to encourage learning, reasonable rules of conduct must be in place and enforced at schools. Does the nature of the obligations and duties entrusted to schools justify searches of students? To what extent are students entitled to an expectation of privacy while they are on school premises? These questions must be considered in this appeal.

The nature and extent of the obligation to provide a safe and orderly school environment was found, in part, in the *Education Act*, R.S.N.S. 1989, c. 136 [now 1995-96, c. 1]. Section 54(*b*) and (*g*) [now s. 26(1)(*l*) and (*n*)] of that Act states (cited at p. 370):

> 54. It is the duty of a teacher in a public school to
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> . . . . .
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> (*b*) maintain proper order and discipline in the school or room in his charge . . .
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> . . . . .
>
> (*g*) give constant attention to the health and comfort of the pupils . . .

A teacher is bound by these statutory duties, and the question arises whether searching for drugs is a component of, or incidental to, these duties.

Citing *R. v. Colarusso* (1994), 87 C.C.C. (3d) 193 at p. 214, 110 D.L.R. (4th) 297 (S.C.C.), Cory J. observed (at p. 377) that the need for privacy "can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion". In the circumstances of *M. (M.R.)*, the majority of the Supreme Court found that the appellant did have an expectation of privacy and that his s. 8 rights were therefore engaged by the search (at pp. 377-8):

> Here the appellant was a student at the school, attending a school function held on school property. The search was carried out by

In This Issue:

Schools: Searches & Reduced Expectation of Privacy 1
Use of Similar Fact Evidence and Section 7 of the Charter 3

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CHARTER OF RIGHTS
NEWSLETTER

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ROADSIDE STOPS AND PROACTIVE POLICING

Since *R. v. Ladouceur* (1990), 56 C.C.C. (3d) 22, [1990] 1 S.C.R. 1257 **[*090/156/006-46pp.]**, it has been clear that the police are permitted to stop motor vehicles for the purpose of enforcing highway and safety-related regulations. The importance of highway safety has been held to be the justification for these stops, which are to be brief, relatively unintrusive, and confined to the objectives of highway safety. In *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1, 167 D.L.R. (4th) 672 (Ont. C.A.) **[*098/356/066-47pp.]**, this policing power was extended to provide for greater powers of search and detention.

The appellants were members of the Paradise Riders Motorcycle Club. The club purchased property in a rural area which it used for recreational purposes and to host weekend parties. The respondent police force was of the opinion that the club was an "outlaw" motorcycle gang whose members were involved in criminal activity. This belief was based on information relating to specific club members as well as on general police intelligence concerning outlaw motorcycle gangs.

The respondent learned that the motorcycle club was planning to hold a weekend party. A "threat assessment" was conducted, and it was concluded on the basis of that assessment that the police should set up checkpoints along the roads leading to the club's property. Similar checkpoints were also set up on subsequent "party" weekends. The checkpoints were significant police operations involving approximately 65 officers from different police forces, including uniformed officers who conducted the stops, heavily armed officers from the tactical unit, and members of various police intelligence units. Anyone believed to be travelling either to or from the club's property, anyone riding a Harley Davidson motorcycle, and anyone wearing the insignia of the Paradise Riders or one of the invited motorcycle clubs was required to stop at the checkpoints. These persons were required to produce their driver's licence, ownership and insurance documentation. They were detained while the information from these documents was entered into the Canadian Police Information Centre (CPIC) computer, and their vehicles and other equipment such as motorcycle helmets were checked for mechanical fitness and compliance with applicable regulations. Each detention was videotaped and the tapes used by various police agencies mainly to determine the identity of those persons who were associated with the various motorcycle clubs. The trial judge found that most of the detentions lasted between three and 20 minutes. Most of the charges which resulted were related to the *Highway Traffic Act*, R.S.O. 1990, c. H.8, but many of those charges were withdrawn because the officers who were to give evidence in support of the charges failed to attend at court.

One of the appellants was stopped on four separate occasions, and two other appellants were detained three times. The appellants sued, claiming that the stops and detentions violated their right to be free from arbitrary detention as guaranteed by s. 9 of the *Canadian Charter of Rights and Freedoms*. As characterized by the Ontario Court of Appeal (at p. 9):

> The appellants brought this lawsuit because they viewed the checkpoints as a form of harassment and wanted them stopped. Their focus was not on the personal harm done to them, but on the propriety of the police use of checkpoints to control or intimidate groups perceived to be outside the social mainstream.

At trial the action was dismissed.

On appeal, the respondent police force continued to rely on s. 216(1) of the *Highway Traffic Act* as providing authority for their actions. That section states (cited at p. 12):

> 216(1) A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

In *Ladouceur*, *supra*, at p. 44 (cited at p. 12; emphasis added), this power was interpreted to provide that: "*Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle.*" In *R. v.*

In This Issue:

Roadside Stops and Proactive Policing.....1

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AERIAL SEARCHES

Whether or not an investigative action by a police officer constitutes a search within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms* depends on whether the individual targeted in the investigation had a reasonable expectation of privacy in the circumstances. While certain actions such as taking a blood sample, entering a residence for the purpose of discovering evidence, or examining the contents of a suitcase clearly constitute searches within the meaning of s. 8, other actions such as a low-level flight over a person's property are less clear. The low-level flight issue was considered in *R. v. Hutchings* (1996), 111 C.C.C. (3d) 215, 136 W.A.C. 25 (B.C.C.A.) **[096/299/080-18pp.]**, leave to appeal to S.C.C. refused 115 C.C.C. (3d) vi, 154 W.A.C. 156*n*, and it was more recently addressed by the New Brunswick Court of Appeal in *R. v. Kelly* (1999), 132 C.C.C. (3d) 122, 169 D.L.R. (4th) 720 **[099/067/094-28pp.]**.

In *Kelly*, the police received a tip that the appellant was growing marijuana on his property. However, the tip did not constitute a sufficient basis to obtain a search warrant. In order to obtain further information, the police used a helicopter to conduct an aerial reconnaissance of the appellant's property, and discovered what were believed to be marijuana plants growing in the garden. At trial, it was held that the appellant had no expectation of privacy in the garden, based on the American "open fields" doctrine which stands for the proposition that there is no expectation of privacy in open spaces.

In considering the validity of the aerial reconnaissance and overturning the findings of the trial court, the Court of Appeal held (at p. 135):

> There is no doubt that [the police officer] conducted a "search" within the meaning of s. 10 of the [*Narcotic Control*] *Act* when he examined Mr. Kelly's property. His examination was neither casual or accidental. Indeed, its purpose was the discovery of a narcotic.
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> . . . . .
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> Since the aerial search was warrantless, its unreasonableness is presumed.

In *Hutchings*, *supra*, the British Columbia Court of Appeal had held that the appellant in that case had no reasonable expectation of privacy in heat emanating from a barn, so the use of a helicopter fitted with a heat-sensing device was found not to have constituted a search. In *Kelly*, the court noted that the opposite result had been reached in *People v. Deutsch*, 52 Cal. Rptr. 2d 366 (1996), and that the court in *Hutchings* had not referred to the "open fields" doctrine.

The "open fields" doctrine is subject to the "curtilage" exception, meaning it does not apply to "the open area inside the curtilage of a dwelling-house" (at p. 137). "Curtilage" is defined in Black's Law Dictionary, 4th ed. (St. Paul, Minn.: West Publishing Co., 1968), p. 137 as "a space, necessary and convenient and habitually used for the family purposes, and the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by a fence". In arriving at the result, the court in *Kelly* held that the area observed during the aerial surveillance formed part of the curtilage of the appellant's residence (at p. 138): "[I]t cannot be said that the observation was made from an area expected to be used by the flying public, or where one would reasonably expect the public to have been". Further and more importantly, the court held (at p. 138):

> It is therefore doubtful that the open fields doctrine, even in its currently expanded form, would apply to the open space, including the garden, in Mr. Kelly's residential property.
>
> Be that as it may, I prefer to rest my decision on a different footing. I do so for two reasons. First, I see the doctrine as the product of the United States' unique constitutional framework. Second, I fear that the doctrine will lead us down a path that is, in my view, already overly inimical to privacy rights.

The case was therefore decided within a Canadian constitutional framework. Citing *R. v. Dyment* (1988), 45 C.C.C. (3d) 244 at p. 254, 55 D.L.R. (4th) 503 (S.C.C.), where it was held that "privacy is at the heart of liberty in a modern state" and "is essential for the well-being of the individual", the court in *Kelly* held (at pp. 139-40):

> [W]e would be wise to chart our own course and to fashion a distinctly Canadian approach to s. 8 rights, at least insofar as open spaces in residential lots are concerned.
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> . . . . .
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> For my part, I reject the suggestion that the application of s. 8 to

In This Issue:

Aerial Searches 1
Justices of the Peace: Are They Judicially Independent? 2

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POLICE CONDUCT & DISCLOSURE OF GUIDING LEGAL OPINIONS

Police agencies are often required to develop new investigative tactics in order to effectively combat the changing face of crime. People who engage in criminal conduct have an obvious interest in avoiding detection and a corresponding incentive to be innovative in their methods. A police agency with static methods will certainly lose ground in the fight against crime. For this reason, police agencies also have an incentive to be innovative in their investigative methods. Given the need for innovation, it is not surprising that police agencies will at times seek legal advice concerning a particular tactic or method of investigation. It is also perhaps not surprising that in an effort to stay ahead of their investigative targets, the police may resort to methods which stretch the boundaries of lawfulness. Police chases which exceed the posted speed limit are a common example of this.

In the decision of *R. v. Shirose* (1999), 41 W.C.B. (2d) 412 (S.C.C.) [***099/117/002-65pp.**], the Supreme Court of Canada considered the disclosure of legal opinions received by police in relation to "reverse stings" or police operations where an undercover officer trafficks in narcotics in order to discover the upper echelon drug dealers. In this case, the RCMP sold a large quantity of hashish to persons believed to be the "executives" of a large drug trafficking organization. The purchasers were then charged with conspiracy to traffic in hashish and to possess hashish for the purpose of trafficking. The accused were convicted. After conviction but before sentencing, the accused applied for a stay of proceedings on the basis that the police conduct was a violation of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 and amounted to an abuse of process.

Prior to the operation in question, a high-ranking member of the RCMP had contacted a senior lawyer at the Department of Justice and sought his opinion with respect to the legality of the reverse sting. After a number of meetings between these two people, senior RCMP officers approved the operation. The accused, to support their application for a stay of proceedings, sought disclosure of the communications between the RCMP and the Department of Justice lawyer. Binnie J. (concurred in by Lamer C.J.C. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.) summarized the main issue in the case as follows (at p. 2):

> We are therefore required to consider in the context of the "war on drugs", the effect of alleged police illegality on the grant of a judicial stay of proceedings, and related issues regarding the solicitor-client privilege invoked by the RCMP and pre-trial disclosure of solicitor-client communications to which privilege has been waived.

Reverse Sting Operations and the Rule of Law

In *Shirose*, the court considered "some implications of the constitutional principle that everyone from the highest officers of the state to the constable on the beat is subject to the ordinary law of the land" (at p. 1). In its analysis of this principle, the court affirmed the observation made in *R. v. Mack*, [1988] 2 S.C.R. 903 at p. 916, 44 C.C.C. (3d) 513 (cited at p. 11) that: "If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police". The reverse sting operation was devised on this basis. However, the Supreme Court observed that while the reverse sting has "proved to be an effective technique", it also "brought the police into conflict with the very law that they were attempting to enforce. Neither the *Narcotic Control Act* nor its regulations authorize the police to *sell* drugs" (at p. 12; emphasis in original).

Within a democracy, the rule of law must be applied uniformly to all persons regardless of position, rank or title. Indeed, it is arguably the case that when the law is no longer uniformly applied, the foundation of democracy is jeopardized. In *Shirose*, Binnie J. wrote (at pp. 13-14):

> It is one of the proud accomplishments of the common law that everybody is subject to the ordinary law of the land regardless of

In This Issue:

Police Conduct & Disclosure of Guiding Legal Opinions.....1

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NEWSLETTER

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RAISING THE DEFENCE OF AUTOMATISM

A person charged with a criminal offence is presumed to be innocent, and it the Crown's duty to prove all the essential elements of the offence. As a general rule, this also entails the Crown disproving any defence which the accused might raise. In the recent decision of *R. v. Stone* (unreported, May 27, 1999, S.C.C.) **[*099/151/031-140pp.]**, the Supreme Court of Canada, in the context of ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, considered the defence of automatism and the burden and standard of proof required by law.

In *Stone*, the accused was charged with second degree murder. In the course of trial, he admitted to stabbing his deceased wife 47 times, but he testified that his acts were done in an automatistic state brought on by his wife's insulting words. In the course of her verbal assault, the accused's perception was that the deceased's voice began to fade, and he was then overcome by a "whoosh" sensation. When his eyes next focused, he was holding a knife, and his wife was dead from stab wounds.

At trial, the accused raised the defences of insane and non-insane automatism, lack of intent and provocation. He relied on psychiatric evidence which stated that the accused's account of events was consistent with a dissociative episode caused by a series of psychological blows. The accused was convicted of manslaughter. In a split decision (reasons for judgment by Bastarache J., concurred in by L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ; dissenting reasons by Binnie J., concurred in by Iacobucci and Major JJ. and Lamer C.J.C.), the Supreme Court considered this defence.

The court first considered *R. v. Rabey*, [1980] 2 S.C.R. 513 at p. 518, 114 D.L.R. (3d) 193, in which Ritchie J. adopted the following definition of automatism set out by the Ontario High Court of Justice in *R. v. K. (K.)* (1970), 3 C.C.C. (2d) 84 at p. 84, [1971] 2 O.R. 401 (H.C.J.) (cited at para. 155):

> "Automatism is a term used to describe unconscious involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done."

The significance of this, of course, is that a person ought not to be held criminally liable for an act resulting from unconscious or involuntary behaviour.

It is well recognized that an automatistic state may arise as a result of a variety of causes. In *Stone*, it was said to have been caused by the shocking words of the accused's wife. This has been commonly referred to as "psychological blow" automatism. One problem with this category of automatism which was identified by the majority of the Supreme Court is that the courts have applied different legal tests depending on the context within which the automatism was said to have arisen. Further, some of the case facts have not lent themselves to this categorization. The majority therefore proposed to "develop a general test applicable to all cases involving claims of automatism" (para. 163).

By way of general procedure, a trial judge has two tasks to perform when an accused raises the defence of automatism (para. 164). First, he or she must determine whether the accused has established a proper foundation for the defence before it can be left with the trier of fact. Where a sufficient foundation is proved, the trial judge must then determine whether the automatistic state was caused by a mental or a non-mental disorder.

The distinction between mental and non-mental automatism is highly significant. Where involuntary behaviour does not stem from a disease of the mind, the trier of fact must consider non-insane automatism. If this defence is successful, the accused is entitled to an acquittal. Where, however, the involuntary behaviour stems from a disease of the mind, then the trier of fact must consider insane automatism. If this defence is successful, the accused will be found not criminally responsible on account of mental disorder pursuant to s. 16 of the *Criminal Code*, R.S.C. 1985, c. C-46, which states:

> 16(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

In This Issue:

Raising the Defence of Automatism.....1

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LOW LEVEL FLIGHTS AND THE OPEN FIELDS DOCTRINE

Two recent court decisions have examined the issue of whether individuals can claim privacy rights with respect to open fields. The first decision, *R. v. Kelly* (1999), 132 C.C.C. (3d) 122, 169 D.L.R. (4th) 720 (N.B.C.A.) **[*099/067/094-28pp.]**, was examined in 11 C. of R. Newsl., No. 9. In the second decision, *R. v. Lauda* (unreported, June 17, 1999, Ont. C.A.) **[*099/169/026-28pp.]**, the Ontario Court of Appeal affirmed that an individual may have privacy interests in open fields under s. 8 of the *Canadian Charter of Rights and Freedoms*, and that privacy is not confined to a person's residence and the yard area immediately adjacent to it.

In *Lauda*, the police received a tip that marijuana was being grown in a cornfield. To verify the tip, a police officer was sent to the location (at para. 5):

> Arriving at what he believed to be the correct location, [the constable] found himself confronted with a chained metal gate barring entry to a dirt road leading into the property. With no cornfield in sight, [the constable] climbed over the gate onto the property and walked south along the dirt lane up a hill . . . As he proceeded over the crest of the hill he observed, for the first time, a cornfield surrounded almost entirely by a fence. Upon entering the field a distance of some 50 to 75 yards, he located approximately 100 marijuana plants hidden amongst the corn.

This finding was reported to a senior officer, and a decision was made to return to the field to remove and destroy the plants. When police officers arrived, they saw the appellant cutting some of the plants. The appellant was arrested, and the police used the information from what they saw in the field to obtain a search warrant for the appellant's residence and outbuildings. At trial, the appellant argued that the police entry into the field constituted a warrantless search and was therefore a violation of his rights as guaranteed by s. 8 of the Charter. The appellant further argued that because the lawfulness of the search of his residence and outbuildings was dependent on the search of the field, the subsequent search was also unlawful. This argument was rejected by the trial judge who found that the police conduct was permitted on the basis of the American "open fields" doctrine. On appeal, this doctrine was analyzed and rejected as being inconsistent with Canadian constitutional law.

The open fields doctrine was affirmed by the United States Supreme Court in *Oliver v. United States*, 104 S. Ct. 1735 (1984). Simply stated, the doctrine asserts that the protection against unreasonable search and seizure as guaranteed by the Fourth Amendment of the United States Constitution does not extend to unoccupied or undeveloped lands beyond the area immediately surrounding a residence (at para. 2). The trial judge held (at para. 24):

> . . . Mr. Lauda did not have a reasonable expectation of privacy in the cornfield where the marijuana was being grown and therefore there was no breach of his s. 8 rights. In rural settings, such as where the marijuana was being grown, it is unrealistic to assume that strands of wire and some "No Trespassing" signs can reasonably be expected to provide privacy. Hunters and hikers, skiers, snowmobilers, to list but a few, are notorious for their disregard of such signs. The very fact that at the time the decision was made to start pulling the marijuana there were hunters noted in the corner of the field supports this proposition.
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> . . . . .
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> Simply put, one cannot entertain the same reasonable expectation of privacy in an open field as one does in a private dwelling. One may take steps to reduce the likelihood of trespassers by fencing and posting notices, as did the accused, but the expectation of privacy is not the reasonable expectation that one would expect in the case of a dwelling house or other similar structure . . .

On appeal, Moldaver J.A. (Rosenberg and Osborne JJ.A. concurring) stated that the "threshold question" was whether the first constable "violated the appellant's s. 8 Charter rights when, without a warrant or probable cause, he entered onto the leasehold property" (at para. 30). At the start of his analysis, Moldaver J.A. looked at whether the open fields doctrine applies in Canada. He stated (at para. 35):

> In practical terms, the doctrine carves out certain "constitutional free zones", such as privately owned farmlands or woodlots,

In This Issue:

Low Level Flights and the Open Fields Doctrine.....1
Roadblocks Used to Investigate the Commission of an Offence.....3

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CHARTER OF RIGHTS
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EFFECT OF POLICE MISCONDUCT ON ADMINISTRATION OF JUSTICE

Canadians may be fortunate in that instances of police misconduct are relatively rare. However, that is not to say they are non-existent. Indeed, there are some well documented cases in which police *and* prosecutorial misconduct has resulted in egregious miscarriages of justice. While misconduct may take many forms and may arise in a variety circumstances, it is in the context of searches that much of the judicial comment on the matter has arisen.

Before considering the various cases discussing police misconduct, it is useful to set out the framework within which alleged misconduct during the course of a search is to be considered. Section 8 of the *Canadian Charter of Rights and Freedoms* guarantees that: "Everyone has the right to be secure against unreasonable search or seizure." This right imposes a corresponding duty on police officers applying for a search warrant to provide full, fair and frank disclosure to the justice reviewing the application: see, for example, *R. v. Gill* (1980), 56 C.C.C. (2d) 169 at p. 175, 118 D.L.R. (3d) 618 (B.C.C.A.). Failure to comply with this duty will result in a violation of s. 8.

However, the constitutional duty on a police officer with regard to a search warrant does not end at the application stage. In the leading case of *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508 (S.C.C.), the majority held (at p. 14) that: "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable." Therefore, even if a search has been lawfully authorized by a valid warrant, it must still be conducted in a reasonable manner. A search conducted in an unreasonable manner may also result in a s. 8 violation.

Any consequences which might flow from a violation of a constitutionally guaranteed right are, of course, determined by s. 24 of the Charter. Exclusion of evidence is the most obvious remedy for a s. 8 violation. The availability of this remedy is determined through the operation of s. 24(2), which states:

> 24(2) Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the 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 *Collins*, *supra*, the issue of misconduct was specifically considered (at pp. 16-17; emphasis in original):

> It is whether *the admission of the evidence* would bring the administration of justice into disrepute that is the applicable test. Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and the purpose of s. 24(2) is to prevent having the administration of justice brought into *further disrepute* by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused for a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.

On the facts in *Collins*, *supra*, where the police placed a choke hold on a person who was suspected of being in possession of a narcotic, the majority of the court found that the police conduct was such that the evidence should be excluded (at pp. 22-3):

> The evidence obtained as a result of the search was real evidence, and, while prejudicial to the accused as evidence tendered by the Crown usually is, there is nothing to suggest that its use at the trial would render the trial unfair. In addition, it is

In This Issue:

Effect of Police Misconduct on Administration of Justice.....1

 Publications Agreement Number 189480