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CHARTER OF RIGHTS
NEWSLETTER

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PROTECTING THIRD PARTY PRIVACY INTERESTS

Historically, criminal rules of evidence have resulted in a tension between the search for truth on the one hand, and fairness to the accused and protecting the accused's right to make full answer and defence on the other. The historical model of a trial was premised on litigants being pitted against one another, with the contest in a criminal trial being between an individual and the state. This model gave little recognition to the interests or rights of third parties. This has changed with time, and the decision of the Supreme Court of Canada in *R. v. Mills* (1999), 139 C.C.C. (3d) 332 **[*099/335/020-101pp.]** has turned the historical model on its head, demanding complete recognition and robust protection of third party privacy interests.

In *Mills*, the accused was charged with sexual assault and sexual touching. The accused applied for the disclosure of records in the possession of a psychiatrist and a child and adolescent services association. The trial judge informed the parties that on May 12, 1997, Bill C-46 (S.C. 1997, c. 30) was proclaimed into force and amended the *Criminal Code* to include ss. 278.1 to 278.91 which deal with the production of records in sexual offence proceedings. The accused sought to have Bill C-46 declared unconstitutional and of no force or effect on the grounds that the provisions violated his rights as guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Bill C-46 was enacted following the decision of the Supreme Court of Canada in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235 **[*095/352/019-163pp.]**, which mandated the disclosure of therapeutic records in the Crown's possession and set out a common law procedure for the production and disclosure of records in the possession of third parties. The legislation provides a framework within which to analyze and consider an application for disclosure of a complainant's therapeutic records in sexual offence proceedings. The specific recognition of third party rights is first found in some parts of the extensive Preamble. For example:

> WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;
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> WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all, including those who are accused of, and those who are or may be victims of, sexual violence or abuse;
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> . . . . .
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> AND WHEREAS the Parliament of Canada recognizes that, while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make full answer and defence, that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny;

Against the dictates of the Preamble, the statutory scheme creates an application procedure where the accused must "establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify": s. 278.3(3)(*b*). Section 278.3(4) sets out assertions which may be made by an accused which "are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify". These include:

> (*c*) that the record relates to the incident that is the subject-matter of the proceedings;
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> (*d*) that the record may disclose a prior inconsistent statement of the complainant or witness;
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> (*e*) that the record may relate to the credibility of the complainant or witness;
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> . . . . .
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> (*g*) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

In addition, in determining whether a record should be disclosed, the judge "shall consider the salutary and deleterious

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DNA WARRANTS & THE PRINCIPLE AGAINST SELF-INCRIMINATION

Section 487.05 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that where a provincial court judge is satisfied by information on oath that there are reasonable grounds to believe that the applicable statutory requirements have been met, he or she may authorize a warrant permitting a peace officer to seize a bodily substance for the purpose of DNA analysis. Such a warrant was issued in *R. v. F. (S.)* (unreported, January 19, 2000, Ont. C.A.) **[*000/024/127-17pp.]**, but before it was executed and any sample seized, the accused challenged the constitutional validity of ss. 487.05 to 487.07 of the *Code*. Execution of the warrant was stayed pending determination of the constitutional issue. The basis for the challenge was that the legislation requires a person to participate in the seizure of information which might form part of a prosecution against him or her. Such compelled participation, it was argued, is self-incriminatory and contrary to ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. To that extent, the legislation authorizing the compelled participation should be declared of no force or effect. In rejecting this argument and upholding the validity of the legislation, the Ontario Court of Appeal provided an analysis of the principle against self-incrimination and of the relationship between ss. 7 and 8.

The backdrop against which the accused advanced his argument was the Supreme Court of Canada decision in *R. v. Jones* (1994), 89 C.C.C. (3d) 353 at p. 367, 114 D.L.R. (4th) 645 (S.C.C.), where Lamer C.J.C. stated:

> Any state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

A DNA warrant is undoubtedly a form of state action which coerces the individual, and DNA is undoubtedly a form of evidence. Initial consideration would therefore prompt the conclusion that a DNA warrant runs afoul of the principle against self-incrimination. Other cases have also found that an accused is not required to participate in, or assist the state with, the collection of evidence. For example, in *R. v. Ross* (1989), 46 C.C.C. (3d) 129 at p. 137, [1989] 1 S.C.R. 3, the Supreme Court excluded the evidence where an individual was compelled to participate in a line-up. The court explained (at pp. 139-40):

> An accused who is told to participate in a line-up before having had a reasonable opportunity to communicate with counsel is conscripted against himself since he is used as a means for creating evidence for the purposes of the trial. Line-up evidence is evidence that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial. In my view, the use of such evidence goes to the fairness of the trial process.

Similarly, in *R. v. Hebert* (1990), 57 C.C.C. (3d) 1, [1990] 2 S.C.R. 151, the right to remain silent was found to be constitutionally protected as "an integral element of our accusatorial and adversarial system of criminal justice" (at p. 10). The principle underlying the right is that of fundamental justice (at p. 11). The purpose of the right is to protect the individual against the powers of the state (at p. 15):

> The right to remain silent, viewed purposively, must arise when the coercive power of the state is brought to bear against the individual — either formally (by arrest or charge) or informally (by detention or accusation) — on the basis that it is at this point that an adversary relationship comes to exist between the state and the individual. The right, from its earliest recognition, was designed to shield an accused from the unequal power of the prosecution, and it is only once the accused is pitted against the prosecution that the right can serve its purpose.

This principle has consistently been affirmed, and more recent examples are found in the decisions of *R. v. Stillman* (1997), 113 C.C.C. (3d) 321, 144 D.L.R. (4th) 193 (S.C.C.), dealing with a warrantless seizure of bodily substances, and

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TERRORISM EXAMINED IN LIGHT OF THE CONSTITUTION

The task of balancing the interests of the state and those of the individual is always a difficult one. Individual interests may be more readily discerned than the interests of the more abstract entity known as the "state". On the other hand, even if the respective interests can be determined with equal ease, the state is, in many ways, more resilient and enduring than the individual so that while acts which run afoul of individual interests may often have immediate and profound consequences, acts which run afoul of the state may simply stretch or cause a run in the fabric of the entity.

The task of defining the content of "the principles of fundamental justice" as the phrase is used in s. 7 of the *Canadian Charter of Rights and Freedoms* is equally vexing. One particularly difficult challenge in defining the concept is determining whether state and individual interests are both to be considered or whether consideration should be given to individual interests alone. If the answer is that the interests of both are to be considered, then a further question arises as to the proper balance to be struck between them. These issues were considered in *Suresh v. Canada (Minister of Citizenship and Immigration)* (unreported, January 18, 2000, F.C.A.) **[*000/033/198-105pp.]**.

The appellant in *Suresh* was recognized as a Convention refugee and applied for permanent residence status on that basis. Prior to determination of the application, the Solicitor General and the Minister of Citizenship and Immigration jointly issued a certificate alleging that the appellant was inadmissible to Canada on the basis that he posed a danger to national security. In particular, the certificate alleged that the appellant was a member of the Liberation Tigers of Tamil Eelam (the "LTTE"), an organization believed to be engaged in terrorist activities. The certificate also alleged that the LTTE operated in Canada under the auspices of the World Tamil Movement (the "WTM") with which the appellant worked while in Canada, and that within Canada the WTM raised funds, produced propaganda and procured materials for the LTTE. The Minister of Citizenship and Immigration sought to have the appellant deported to the country from which he came despite the fact that this could expose him to a serious risk of torture.

The divergent ways in which the appellant was characterized were noted by the court (at p. 3):

> Counsel for the appellant portray their client as a Convention refugee who fled Sri Lanka and who, because of his involvement in the struggle for Tamil independence through his fund-raising activities here in Canada, is about to be deported to the country in which the torture of Tamil supporters by government authorities is a documented fact. In contrast, counsel for the Minister portrays the appellant as a bogus refugee claimant, who as a member of a Tamil terrorist organization, gained admittance to Canada by deceit for the purpose of raising money for that organization. Within this context it is argued that the Minister was justified in declaring the appellant a danger to the security of Canada.

Section 19(1)(*e*) of the *Immigration Act*, R.S.C. 1985, c. I-2, states that a person shall not be granted admission to Canada where it is believed on reasonable grounds that the person will engage in terrorism or is a member of an organization which will engage in terrorism. Section 19(1)(*f*) states that a person who has engaged in terrorism or who was a member of an organization that engaged in terrorism shall not be admitted into Canada unless that person satisfies the Minister that his or her admission into Canada would not be detrimental to the national interest. Section 53(1) provides, *inter alia*, that no person who has been determined to be a Convention refugee shall be removed from Canada to a country where that person's life or freedom would be threatened unless the person is inadmissible in accordance with s. 19(1)(*e*) or (*f*) and the Minister is of the opinion that the person constitutes a danger to the security of Canada.

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SUCCESSFUL CHARTER CHALLENGE TO NEW EXTRADITION ACT

The drafting of new legislation is not a simple task when one considers the numerous and often competing considerations which must be addressed. In the end, the text frequently represents compromises of various sorts. One primary objective of Canada's extradition laws is to facilitate the country's international obligations with respect to the arrest and transfer of fugitives. However, as is true of the objectives of all Canadian laws, this one must be measured against the *Canadian Charter of Rights and Freedoms* in order to ensure that the legislative provisions designed to advance the objective comply with constitutionally guaranteed rights and values.

The *Extradition Act*, S.C. 1999, c. 18 contains some significant changes from its predecessor and represents a concerted effort by Canada to provide an extradition procedure which does not become delayed because of entanglement in procedural and evidentiary complexities. However, in *Bourgeon v. Canada (Attorney General)* (2000), 46 W.C.B. (2d) 225 (Ont. S.C.J.) **[*000/138/011-16pp.]**, the court found an important provision of the new Act to be unconstitutional.

On the facts of the case, the United States applied for extradition to try the fugitive on sexual assault charges. The fugitive, in turn, sought a declaration that ss. 29(1)(*a*), 32(1)(*a*) and (*b*), and 34 of the *Extradition Act* violate s. 7 of the Charter (at para. 1). These provisions read as follows:

> 29(1) A judge shall order the committal of the person into custody to await surrender if
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> (*a*) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner;
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> . . . . .
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> 32(1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:
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> (*a*) the contents of the documents contained in the record of the case certified under subsection 33(3);
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> (*b*) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and
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> (*c*) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.
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> . . . . .
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> 34. A document is admissible whether or not it is solemnly affirmed or under oath.

The fugitive in this case argued that these provisions violated his rights as guaranteed by s. 7 of the Charter because they amounted to a "statutory abolition of the traditional common law rules of evidence" (at para. 3) such that, in some circumstances, a judge would be required, without being able to exercise discretion, to commit an individual for surrender on the basis of evidence which is otherwise inadmissible under Canadian law. As described by the judge: "Subsection 32(1)(*b*) of the *Extradition Act* . . . now authorizes the reception of otherwise inadmissible evidence at an extradition hearing through the mechanism of an extradition agreement permitting the reception of such evidence" (at para. 6).

The judge began his analysis by looking at the principles governing the admissibility of evidence in Canada (at paras. 9-10):

> Evidence must, generally, be solemnly affirmed or given under oath to be admissible at a Canadian judicial hearing. An exception is the evidence of a young person, or a person having a mental incapacity, which may be admissible even in the absence of a solemn affirmation or oath if the person does not understand the nature of a solemn affirmation or oath, so long as the person is able to communicate the evidence and promises to tell the truth prior to testifying: see s. 16(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.
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> In order to be admissible, evidence must also, generally, be

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