Canadian Charter of Rights
Decision: new entries

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CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - December 1995

Section 2(d)

Paragraph 19(1)(g) of the **Immigration Act** prohibits the admission to Canada of persons who, **inter alia**, are members of an organization that is likely to engage in acts of violence that would or might endanger the lives or safety of persons in Canada. The nature of the defined organization is irrelevant to the question whether s. 19(1)(g) infringes freedom of association, though it may be a relevant consideration under s. 1 of the Charter. By providing ultimately for deportation of permanent residents who are members of an organization loosely defined, the statute does infringe on the freedom of permanent residents to associate together in organizations. Often such persons, at least those comparatively new to this country, may maintain association or membership with organizations, associated with their homelands, many of which may have had some historic record of violence but which serve a variety of purposes, as the Popular Front for the Liberation of Palestine was found to do in this case. To expose all permanent residents to the possibility of deportation because of their membership in such organizations clearly infringes on their freedom of association: **Al Yamani v. Canada (Attorney General)**, (F.C.T.D., November 7, 1995).

Section 6(1)

In **U.S.A. v. Cotroni, supra**, La Forest J. speaking for the majority on the right of a Canadian citizen facing extradition said: "Of course, the authorities must give due weight to the constitutional right of a citizen to remain in Canada. They must in good faith direct their minds to whether prosecution would be equally effective in Canada, given the existing domestic laws and international co-operative arrangements. They have an obligation flowing from s. 6(1) to assure themselves that prosecution in Canada is not a realistic option." In **Cotroni** the court was dealing with a case in which the Canadian citizen sought to be extradited was allegedly guilty of wrongful conduct committed in Canada for which he could be prosecuted both in Canada and in the United States. That is, the same wrongful conduct constituted the criminal offence in both jurisdictions. **Cotroni** has no application to this case where the appellant is alleged to have been guilty of discrete and separate acts of misconduct in both jurisdictions. If the appellant had been prosecuted in Canada his conviction or acquittal on the single count of possession for trafficking would not have been a bar to his trial on the United States charges which involve misconduct constituting criminal conspiracy and other drug offences actionable only in the United States. That the evidence called in either prosecution might in some way be relevant to the other prosecution is of no significance. The appellant could only be convicted of the particular offences in the jurisdictions where the charges were laid: **U.S.A. v. Leon** (1995), 96 C.C.C. (3d) 568 (Ont. C.A.); leave to appeal granted (S.C.C., October 26, 1995).

Section 7

The general issue in this appeal is whether an inculpatory statement, made without the benefit of counsel by a Canadian citizen to American peace officers, concerning her participation in a criminal offence in Canada, is admissible in evidence by the Crown when the statement, though made in accordance with United States law, would if taken in Canada by Canadian police in similar circumstances violate the accused's right to counsel under s. 10(b) of the Charter. The application of the Charter could only be triggered when the Canadian police began proceedings against the accused on her return to Canada. The appellant does not complain about any improper police action in Canada. Consequently, the only grounds that may be available to the appellant is that the admission of the evidence would violate the appellant's liberty interests in a manner that is not in accordance with the principles of fundamental justice under s. 7, or would violate the guarantee of a fair trial under s. 11(d) of the Charter. In approaching this issue, I do not think one can automatically assume that the evidence was unfairly obtained or that its admission would be unfair simply because it was obtained in a manner that would in this country violate a Charter guarantee. As in other cases involving broad concepts like "fairness" and "principles of fundamental justice", one is not engaged in absolute or immutable requirements; these concepts vary with the context in which they are invoked. We must be mindful that a constitutional rule may be adopted to ensure that our system of obtaining evidence is so devised as to ensure that a guaranteed right is respected as a matter of course. Thus there may well be cases where in an objective sense there may be no unfairness where a second warning is not given to a suspect when an investigation moves to a more serious offence, but by imposing the rule we encourage a type of police practice that ensures the individual's right to counsel is respected. The rule is not geared to the individual case alone, but to ensuring the fairness of the system and general respect for this country's constitutional values. We have no systemic concern of this kind in relation to the actions of foreign police abroad. We are concerned solely with whether the admission of evidence in the particular case will affect the fairness of the trial. The fact that the evidence was obtained in another country in accordance with the law of that country may be a factor in assessing fairness. More specifically, conformity with the law of a country with a legal system similar to our own has even more weight, for we know that a number of different balances between conflicting principles can be fair. But the foreign law is not governing in trials in this country. Simply, what we seek is a fair trial in the specific context, and I am by no means sure this requirement can be satisfied by the rejection of foreign evidence only in the most egregious circumstances. However, this issue does not arise here. While no new warning was given when the interrogation moved to the more serious offence under Canadian law, I do not think this was unfair in the circumstances of this case. In general terms, I have some hesitation in accepting in the abstract that an enquiry conducted in the United States in accordance with the **Miranda** case is automatically unfair in situations that would in this country require a second warning. Our more stringent rule exists for systemic reasons and is not addressed to determining the fairness of a single situation taking place in another country. I would be inclined to think that evidence obtained following a **Miranda** warning should ordinarily be admitted at a trial unless in the light of other circumstances the court has reason to think the admission of the evidence would make the trial unfair. Had the circumstances been such that the admission of the evidence would lead to an unfair trial, I would have had no difficulty rejecting the evidence by virtue of the Charter. I would not take this step under s. 24(2) nor would I rely on s. 24(1). Rather I would reject the evidence on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the Charter, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial: **R. v. Harrer**, (S.C.C., October 19, 1995).

Crown witnesses, even informants, are not the property of the Crown whom the Crown can control and produce for examination by the defence. The obligation of the Crown to disclose does not extend to

producing its witnesses for oral discovery: **R. v. Khela**, (S.C.C., November 16, 1995).

This case raises the issue of whether statutorily required fishing logs and hail reports, stating the size and location of a catch, may be used as evidence in the regulatory prosecution of fishers for overfishing under the **Fisheries Act**. The appellant effectively asks this Court to endorse a broad, abstract principle against self-incrimination as a principle of fundamental justice under s. 7, which would prevent the use of information in all contexts in which it is statutorily compelled. Nowhere in the case law, however, is there support for such a broad, abstract approach to the issue of self-incrimination. The issue in this case has never been squarely raised before this Court. Our task is to determine what principles of fundamental justice require in the context of this appeal, which involves a self-reporting requirement in the regulatory sphere. In **Re B.C. Motor Vehicle Act**, Lamer J. indicated that the principles of fundamental justice "are to be found in the basic tenets of our legal system". To determine the content of these "basic tenets" in any given circumstance, we must have regard to "the applicable principles and policies that have animated legislative and judicial practice in the field". It is important to remember that the legislative and judicial "principles and policies" that have so far defined the protections granted against self-incrimination have, as is true in other areas, sought to achieve a contextual balance between the interests of the individual and those of society. This balancing is crucial in determining whether or not a particular law, or in the present case state action, is inconsistent with the principles of fundamental justice. This is all the more apparent in the instant case, where the appellant challenges a regulatory procedure -- the use of hail reports and fishing logs -- designed (and employed) in the public interest. To suggest that s. 7 of the Charter protects individuals who voluntary participate in this fishery from being "conscripted" against themselves, by having information used against them that they were knowingly required to provide as a condition of obtaining their fishing licences, would in my view be to overshoot the purposes of the Charter. The right against self-incrimination has never yet been extended that far; nor should it be. The Charter was not meant to tie the hands of the regulatory state. The importance of a contextual analysis in considering the principle against self-incrimination has been underlined by the Chief Justice in **R. v. Jones**, [1994] 2 S.C.R. 229. He observed that this principle is "a general organizing principle of criminal law from which particular rules can be derived (for example, rules about non-compellability of the accused and admissibility of confessions)". The rules that flow from the application of this "general organizing principle" will vary with the circumstances. It is therefore important to focus on these circumstances each time a new application of the principle against self-incrimination is considered. There are several reasons why the general principle against self-incrimination, as applied in the regulatory context of the present case, does not require the appellant to be granted immunity against the use by the Crown of his statutorily compelled hail report and fishing logs. First, the information provided in this case was not provided in a proceeding in which the individual and the state are adversaries. Instead, it was provided in response to a reasonable regulatory requirement relating to fishery management. Second, the coercion imposed on the appellant is at best indirect, for it arose only after he had made a conscious choice to participate in a regulated area, with its attendant obligations. This case would seem to present us with a paradigmatic example of a licensing scheme, in that the appellant literally cannot participate in the commercial fishery without a licence. In accepting his licence, he must accept the terms and conditions associated with it, which include the completion of hail reports and fishing logs, and the prosecution of those who overfish. To the extent that the appellant believes himself to be compelled "against his will" to produce hail reports and fishing logs, lest they one day be used against him in a prosecution for overfishing, he is free to resign from the commercial fishery, and thereby to be released from this obligation: **R. v. Fitzpatrick**, (S.C.C., November 16, 1995).

Section 8

In this case, police surveillance of the entrance hall of the building in which the appellant's apartment was located did not constitute a perimeter search within the meaning of **Kokesch**. Unlike the situation in **Kokesch**, the appellant was neither owner nor occupier of the premises observed by the investigators. There was no violation of the private rights of an individual to the exclusive enjoyment of his property or the property he was occupying, nor was there a trespass by the police onto such a property. There was no violation of individual privacy, the essential value protected by s. 8 of the Charter, and as a result there was no infringement of the appellant's reasonable expectation of privacy. The resident of a large building cannot consider as private the lobby that he shares with fifty other tenants and which is openly accessible to delivery persons, postmen and guests of all of the other tenants. The entrance hall of such a building, accessible to everyone without the need of a key and to which no tenant has exclusive rights, cannot be equated with a private property reserved for the exclusive use of the owner of the house erected on it: **R. v. Joyal**, (Que. C.A., September 15, 1995).

Section 11(d)

The independence of the judiciary relates to the freedom of judges to conduct proceedings and arrive at their decisions without interference or influence from any quarter. The fact that a judge may be required to retire at a certain age has no connection with the freedom of that judge to conduct proceedings and make decisions as he or she may see fit during his or her tenure of office. Judge Charles argues that the requirement of approval of the Chief Judge of the Provincial Division for the annual continuation in office of a judge after attaining retirement age under s. 47(4) of the Ontario **Courts of Justice Act** affects judicial independence in that a judge, in conducting proceedings or making decisions, may be concerned about the approval of the Chief Judge of the Provincial Division to his or her continuing in office. He appears to rely for this proposition on **Valente v. The Queen**, [1985] 2 S.C.R. 673. However, the ratio of the decision was based upon the fact that, at that time, the approval of the Attorney General was required for a provincially appointed judge to continue in office. That requirement has been eliminated in s. 47(4) and accordingly any concern as to provincially appointed judges not being independent tribunals as a result of the requirement for approval for continuation in office after attaining a certain age is not applicable where the only approval required is that of the judiciary itself: **Charles v. Canada (Attorney General)**, [1995] O.J. No. 3263 (Ont. Gen. Div.).

Section 24(1)

Section 24 provides a remedy only to the individual whose Charter rights have been violated. Accordingly, in this case, the appellant could not claim a constitutional remedy based upon the alleged violation of the Charter rights of third parties who, at the request of the appellant, had submitted false affidavits to the Law Society in connection with an investigation of the appellant's professional conduct: **R. v. Wijesinha** (1995), 100 C.C.C. (3d) 410 (S.C.C.).

The appellant in this case cannot get around the decision in **Dumas v. Leclerc Institution**, [1986] 2 S.C.R. 459, and establish his status as a proper applicant for **habeas corpus** or for Charter relief to the same effect. The ratio of that case is embodied in the following passage, taken from the reasons of Lamer J.: "The continuation of an initially valid deprivation of liberty can be challenged by way of **habeas**

corpus only if it becomes unlawful. In the context of parole, the continued detention of an inmate will only become unlawful if he has acquired the status of a parolee." The fact that the National Parole Board has not granted the applicant for **habeas corpus** his liberty in one form or another must be given the greatest importance. Parliament has assigned that judgment to the Board with the protection of the public, amongst other factors, in mind. Only in the extreme or unusual case such as **Steele v. Mountain Institution**, [1990] 2 S.C.R. 1385, should the court entertain an application for **habeas corpus** from someone like the appellant who has not yet attained the status of parolee, for to do otherwise would disturb the parole scheme, and as Cory J. said in **Steele**, set up a duplicate procedure for review of Board decisions: **Schemmann v. National Parole Board**, (B.C.C.A., October 18, 1995).

In this case, the plaintiffs claim damages as a remedy for a violation of their s. 8 right to be secure against unreasonable search or seizure. The defendant police officers had obtained a warrant to search the dwelling house in which a suspect resided. However, the information to obtain the warrant was deficient, and as the defendants discovered after entering the dwelling, the suspect only occupied quarters in the basement. Nevertheless, they searched other areas of the house, including the plaintiffs' bedroom. The officer who swore the information acted in good faith in obtaining the warrant, and the search and seizure were conducted in good faith but in the mistaken belief that the warrant was valid. In , [1993] B.C.J. No. 2359 (B.C.S.C.), Spencer J. stated: "In my view damages are not appropriate nor just where a breach is committed in good faith. To hold otherwise would create two separate categories of civil claim. One at common law for the torts of abuse of authority, intimidation and interference with economic and contractual relations would be protected by the defence, but the same acts categorized as breaches of a Charter right would not. But the policy of the common law is to protect public officials from suit where they act in the course of their statutory duties. It should apply equally to a claimed Charter breach." If the learned judge is saying that the defence of good faith should be one of the factors to be taken into account in the claim for damages under s. 24(1), I adopt that view. However if he is saying that damages are not appropriate or just where a breach is committed in good faith, I then disagree. The defendants argue that if the plaintiffs are to be successful they must show malice, and that the defendants were motivated by bad faith. I do not accept that there must be malice, or ill will. If the defendants are reckless in carrying out their search and do not take precautions, to insure for example, that they have the right party, right premises and proper part of the premises, then they must be responsible: **Persaud v. Ottawa (City) Police**, [1995] O.J. No. 2284 (Ont. Gen. Div.).

Section 32(1)

The general issue in this appeal is whether and to what extent evidence obtained by foreign peace officers in a manner that, if obtained by Canadian police in Canada, would be in contravention of the Charter is admissible at the trial of an accused in Canada for an offence committed here. The argument concerning the territorial limits of the Charter is not necessary to the disposition of the case, but I would not wish my remarks to be interpreted as giving credence to the view that the ambit of the Charter is automatically limited to Canadian territory. This is in no way inconsistent with the extradition cases decided in this Court or **Spencer v. The Queen**, [1985] 2 S.C.R. 278. All these cases were concerned either with the application of the Charter to foreign law, or to the activities of agents of a foreign state in performing their functions in their own countries. To apply our law in such situations would truly be giving the Charter impermissible extraterritorial application. Subject to whatever argument may be made to the contrary, it strikes me that the automatic exclusion of Charter application outside Canada might unduly restrict the protection Canadians have a right to expect against the interference with their rights by our governments

or their agents. Consequently, had the interrogation about a Canadian offence been made by Canadian peace officers in the United States in circumstances that would constitute a violation of the Charter had the interrogation taken place in Canada, an entirely different issue would arise. A different issue would also arise if the United States policemen and immigration authorities had been acting as agents of the Canadian police in furthering a criminal prosecution in Canada. What I think is determinative against the argument that the Charter applied to the interrogation in the present case is the simple fact that the United States officials were not acting on behalf of any of the governments of Canada, the provinces or the territories, the state actors to which, by virtue of s. 32(1) the application of the Charter is confined. It follows that the Charter simply has no direct application to the interrogations in the United States because the governments mentioned in s. 32(1) were not implicated in these activities. That being so, the rights flowing under s. 10(b) of the Charter to persons arrested or detained had no application. This, however, does not mean that the manner in which the evidence was obtained is entirely irrelevant in subsequent proceedings for a crime in Canada. The application of the Charter could only be triggered when the Canadian police began proceedings against the accused on her return to Canada. The appellant does not complain about any improper police action in Canada. Consequently, the only grounds that may be available to the appellants is that the admission of the evidence would violate the appellant's liberty interests in a manner that is not in accordance with the principles of fundamental justice under s. 7, or would violate the guarantee of a fair trial under s. 11(d) of the Charter: **R. v. Harrer**, (S.C.C., October 19, 1995).

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Section 1

The **Oakes** test must be applied flexibly, having regard to the factual and social context of each case. Section 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions. However, while the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. Related to context is the degree of deference which the courts should accord to Parliament. It is established that the deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded. Context and deference are related to a third concept in the s. 1 analysis: standard of proof. Proof to the standard required by science is not required. Nor is proof beyond a reasonable doubt on the criminal standard required. As the s. 1 jurisprudence has established, the civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate. Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view. In summary, while context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis, these concepts should be used as they have been used by this Court in previous cases. They must not be attenuated to the point that they relieve the state of the burden the Charter imposes of demonstrating that the limits imposed on our constitutional rights and feedoms are reasonable and justifiable in a free and democratic society: **RJR-MacDonald Inc. v. Canada (Attorney General)**, (S.C.C., September 21, 1995).

The distinction between legislative and adjudicative facts may be harder to maintain in practice than in theory. Suffice it to say that in the context of the s. 1 analysis, more deference may be required to findings based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considered social science and other policy oriented evidence. As a general matter, appellate courts are not as constrained by the trial judge's findings in the context of the s. 1 analysis as they are in the course of non-constitutional litigation, since the impact of the infringement on constitutional rights must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts. At the same time, while appellate courts are not bound by the trial judge's findings in respect of social science evidence, they should remain sensitive to the fact that the trial judge

has had the advantage of hearing competing expert testimony firsthand. The trial judge's findings with respect to the credibility of certain witnesses may be useful when the appeal court reviews the record: **RJR-MacDonald Inc. v. Canada (Attorney General)**, (S.C.C., September 21, 1995).

Section 2(b)

Section 9 of the **Tobacco Products Control Act**, which requires tobacco manufacturers to place an unattributed health warning on tobacco packages, infringes the right of free expression. This Court has previously held that "freedom of expression necessarily entails the right to say nothing or the right not to say certain things": **Slaight Communications Inc. v. Davidson**, [1989] 1 S.C.R. 1038, at p. 1080. Under s. 9(2), tobacco manufacturers are prohibited from displaying on their packages any writing other than the name, brand name, trade mark, and other information required by legislation. The combination of the unattributed health warnings and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views, constitutes an infringement of the right to free expression guaranteed by s. 2(b) of the Charter: **RJR - MacDonald Inc. v. Canada (Attorney General)**, (S.C.C., September 21, 1995).

Section 7

The position of the applicants in this case is that by imposing a cash security deposit requirement, the Peterborough Utilities Commission denied them electrical service and thereby threatened their physical and psychological health and that of their families. Deprivation of electricity results in an absence of heat, light, cooling, refrigeration, hot water and fire alarms and would render their homes uninhabitable. It therefore becomes an issue of a right to housing which should be included within their right to life and security of the person. The security deposit is of course only one of several factors relevant to the issue of affordable housing. Dickson C.J., speaking for the majority in **Irwin Toy Ltd., supra**, ruled that generally economic or property rights do not come within the parameters of s. 7. Neither **Irwin Toy** nor any other authority stands for the proposition urged by the applicants. Their submission goes beyond s. 7's right to life and security of the person to seek a certain level of means and service as a guaranteed right. It is a plea for economic assistance which goes beyond a claim with an economic component to claim utility services as a basic economic and social right devoid of any responsibility to prove oneself to be credit-worthy. This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government, not by courts under the guise of "principles of fundamental justice" under s. 7: **Clark v. Peterborough Utilities Commission** (1995), 24 O.R. (3d) 7 (Ont. Gen. Div.).

From the cases which followed the passage of the Charter, the following can be derived: first, generally speaking, an offence of absolute liability is not likely to offend s. 7 of the Charter unless a prison sanction is provided; secondly, an accused charged with an absolute liability offence cannot avoid liability by demonstrating that he exercised due diligence; thirdly, one of the prime bases for distinguishing a strict liability offence from an absolute liability offence is the availability of the defence of due diligence; fourthly, any provincial regulatory offence providing for a term of imprisonment must make a defence of due diligence available to the accused. In the present case, ss. 92 and 94 of the B.C. **Motor Vehicle Act** create an absolute liability offence since they effectively eliminate the defence of due diligence. Nevertheless, the absolute liability offence does not contravene the Charter. This conclusion flows from

the application of s. 4.1 and of s. 72(1) of the **Offence Act**. These sections respectively indicate that, notwithstanding the provisions of any other Act, no person is liable to imprisonment for an absolute liability offence, and that the non-payment of a fine will not result in imprisonment. Thus, an accused convicted under ss. 92 and 94 of the **Motor Vehicle Act** faces no risk of imprisonment and there is, accordingly, no violation of the right to life, liberty and security of the person under s. 7 of the Charter: **R. v. Pontes**, (S.C.C., September 21, 1995).

Section 15(1)

In this case, the appellants say that the effect of the B.C. **Medical and Health Care Services Act** is to create a distinction between the deaf population and the hearing population, because for the deaf to enjoy equally the benefit of the Act, translation services must be paid for by the government and they are not. There is limited jurisprudential authority available for the proper approach to take in applying an adverse effects analysis to benefit-conferring legislation. However, an approach consistent with the authorities is one which focuses on the impact of the legislation on the disadvantaged group. In establishing the impact of the legislation there must be a distinction drawn between those effects which can be attributed to the legislation and those which exist independently of it. In **Symes v. Canada, supra**, Iacobucci J. said: "We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision". In the absence of the legislation, those deaf people requiring translators would be required to pay their doctors in addition to translators in order to receive what they say are equivalent medical services to the hearing. Hearing people in the absence of legislation would be in the similar position of having the responsibility of making payment to their doctors. The legislation removes the responsibility of both the hearing and the deaf to make payment to their doctors. Therefore, the effect of the legislation is that the deaf remain responsible for the payment of translators in order to receive equivalent medical services as those with hearing, as they would be in the absence of the legislation. This inequality exists independently of the legislation and cannot be said in any way to be an effect of the legislation: **Eldridge v. British Columbia (Attorney General)** (1995), 125 D.L.R. (4th) 323 (B.C.C.A.).

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In undertaking vagueness analysis, a court must first develop the full interpretive context surrounding an impugned provision. This is because the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an "area of risk". This does not necessitate an exercise in strict judicial line-drawing because the question to be resolved is whether the law provides sufficient guidance for legal debate as to the scope of prohibited conduct. In determining whether legal debate is possible, a court must first engage in the interpretive process which is inherent to the "mediating role" of the judiciary. Vagueness must not be considered **in abstracto**, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate. The mediating role of the judiciary is of particular importance in those situations where practical difficulties prevent legislators from framing legislation in precise terms. I would stress, however, that the standard of legal precision required by s. 7 will vary depending on the nature and subject matter of a particular legislative provision. In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives. In the context of environmental protection legislation, a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime. Moreover, the precise codification of environmental hazards in environmental protection legislation may hinder, rather than promote, public understanding of what conduct is prohibited, and may fuel uncertainty about the "area of risk" created by the legislation. The analysis of overbreadth under s. 7, and of cruel and unusual treatment or punishment under s. 12, are quite different from vagueness analysis. Where a party alleges that a law is overbroad, or that punishment is cruel and unusual, a court must engage in proportionality analysis. Proportionality analysis involves an assessment of whether a law, the terms of which are not vague, applies in a proportionate manner to a particular fact situation. Inevitably, courts will be required to compare the law with the facts. In that situation, the use of reasonable hypotheticals will be of assistance, and may be unavoidable. In the context of vagueness, proportionality plays no role in the analysis. There is no need to compare the purpose of the law with its effects (as in overbreadth), or to compare the punishment with the wrongdoing (as with cruel and unusual punishment). A court is required to perform its interpretive function, in order to determine whether an impugned provision provides the basis for legal debate. Given this, I see no role for the consideration of reasonable hypotheticals in vagueness analysis: **Ontario v. Canadian Pacific Ltd.**, (S.C.C., July 20, 1995).

It is too often assumed that a third party, who is not a party to the prosecution, can be compelled to produce records, with the consequential intrusion upon property and privacy interests, simply upon an accused person pleading an interest that something helpful might emerge from examination of the material. The onus is on the party seeking the records to establish, in the first instance, that the documentation is probably material to issues in the prosecution. In the present case, the complainant's school records are not in the custody or possession of the machinery of the prosecution, and accordingly the disclosure

obligations upon the Crown are not triggered. The defence further submits that an accused person has a fundamental right, prior to trial, to seek to have potential witnesses (here, the complainant's teachers) speak, unfettered by limiting directions from their employer or the provincial legislature. In turn, the applicant submits that the court has no role prior to a criminal trial, in determining whether there are privacy or confidentiality interests worthy of protection from disclosure. In other words, the fair trial interests of the accused effectively trump any and all other interests such that no judicial, pre-disclosure balancing of interests is warranted. The accused's submission that the mere pleading of full answer and defence ought to exclude any privilege or confidentiality measures to protect privacy is not only inconsistent with the balancing approach of the recent jurisprudence relating to disclosure of information but also the approach in **C.B.C. v. Dagenais**, [1994] 3 S.C.R. 835 and **R. v. Creighton**, [1993] 3 S.C.R. 3, of avoiding a hierarchical or a "clash of titans" approach to competing rights. When the protected rights or interests of two parties come into conflict, whether Charter-protected or common law, a principled and contextual balancing ought to be undertaken by the court to define the appropriate weight to be accorded the respective interests while attempting to give the fullest respect possible to the values underpinning the rights or interests: **R. v. Keukens** (1995), 23 O.R. (3d) 582 (Ont. Gen. Div.)

Section 8

The issue in this case is whether a warrantless search of garbage which was left on the street for collection adjacent to the appellant's home violated the appellant's right to be secure against unreasonable search or seizure. From the deliberate discarding or abandonment of trash, it is logical to conclude that a person who has discarded or abandoned the items or things making up trash no longer has a subjective expectation of privacy concerning them. We are not concerned in this case with a search which invaded the sanctity of the home. What we are concerned with is whether there is a reasonable expectation of privacy in relation to information that may be gleaned from trash which has been abandoned by a householder to the vagaries of municipal garbage disposal. The trial judge was correct in rejecting the appellant's argument that there had been a violation of his s. 8 Charter rights. Putting material in the garbage signifies that the material is no longer something of value or importance to the person disposing of it, and that there is no reason or need to retain it. When trash is abandoned, there is no longer a reasonable expectation of privacy in respect of it: **R. v. Krist**, (B.C.C.A., July 14, 1995).

In this case, a Revenue Canada auditor who was performing a routine audit of the corporate respondent pursuant to the powers granted by s. 231.1(1) of the **Income Tax Act** formed the suspicion that offences against the Act had been committed. The file was referred to Special Investigations, which requested that a further audit be conducted for the purpose of investigating certain matters that would establish whether there were reasonable and probable grounds for obtaining a search warrant. The further audit was carried out, search warrants were obtained and executed, and charges were laid. While the initial audit was of a regulatory nature and consistent with the Act, that changed after Special Investigations became involved and directed the subsequent work. It was at that point that the respondents were no longer merely being audited but, in fact, were now being investigated for offences. The provisions of s. 231.1(1) were being relied on and employed by Revenue Canada as quasi-criminal legislation thus requiring greater safeguards to the individual. Section 231.1(1) is designed as a regular audit tool to ensure compliance with the Act. It is not designed to gather evidence for the purpose of criminal prosecution. It should not be used to bootstrap the investigators into a position where they can obtain a warrant which would otherwise be unobtainable: **R. v. Norway Insulation Inc.** (1995), 23 O.R. (3d) 432 (Ont. Gen. Div.).

Sections 8 of the **Canadian Charter** and 24.1 of the **Québec Charter** are not directed at the protection of property but rather at an expectation of privacy. The terms "unreasonable", "search" and "seizure" have the same meaning and the same scope in the two provisions. When a building is sold for unpaid taxes, it is a right of property which is at stake and not a right to privacy. In **Becker v. The Queen, supra**, the Alberta Court of Appeal held that the exercise of the power of expropriation did not constitute a "seizure" within the meaning of s. 8. While the analogy is not perfect, it is difficult to see how the sale of a building for taxes could be assimilated with a seizure within the meaning of these provisions: **Scalia v. Conseil Scolaire de l'Île de Montréal**, (Que. S.C., June 27, 1995).

Section 24(1)

The question in this case is whether a labour arbitrator has the power to grant Charter remedies. The remedies claimed are damages and a declaration. The power and duty of arbitrators to apply the law extends to the Charter, an essential part of the law of Canada. In applying the law of the land to the disputes before them, be it the common law, statute law or the Charter, arbitrators may grant such remedies as the Legislature or Parliament has empowered them to grant in the circumstances. For example, a labour arbitrator can consider the Charter, find laws inoperative for conflict with it, and go on to grant remedies in the exercise of his powers under the **Labour Code**. If an arbitrator can find a law violative of the Charter, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the Charter and likewise grant remedies. Assuming for the purposes of argument that the remedy of damages can only be claimed under s. 24(1), the test set out by the majority of this Court in **Mills v. The Queen** determines whether arbitrators are courts of competent jurisdiction for that purpose. The majority, **per** McIntyre J., rejected the view that s. 24(1) created a special class of court which alone could grant Charter remedies: "The Charter has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply in a court which has jurisdiction." The task in determining whether a tribunal is a court of competent jurisdiction is to "fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy". A tribunal will be a court of competent jurisdiction, McIntyre J. concluded, if its constituent legislation gives it power over the parties, the issue in litigation and power to grant the remedy which is sought under the Charter. It is thus Parliament or the Legislature that determines if a court is a court of competent jurisdiction. It follows from **Mills** that statutory tribunals created by Parliament or the Legislatures may be courts of competent jurisdiction to grant Charter remedies, provided they have jurisdiction over the parties and the subject matter of the dispute and are empowered to make the orders sought. Mandatory arbitration clauses such as s. 45(1) of the Ontario **Labour Relations Act** generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The arbitator in this case has jurisdiction over the parties and the dispute. The arbitrator is further empowered by the Act to award the Charter remedies claimed -- damages and a declaration. On the test propounded in **Mills**, he is empowered to consider the Charter questions and grant the appropriate remedies: **Weber v. Ontario Hydro**, (S.C.C., June 29, 1995).

The issue on this appeal is whether, as a matter of principle, the trial judge erred in holding that, by reason of the denial of the right to retain and instruct counsel without delay, the sentence to be imposed upon the respondents should be reduced from that which would ordinarily be imposed, notwithstanding that he had earlier found that the admission into evidence of the finding of the drugs on the persons of the respondents would not bring the administration of justice into disrepute. The only appropriate remedy to consider in

this case was whether evidence should be excluded, and the trial judge erred in appearing to have turned to s. 24(1) of the Charter to provide an alternative remedy after having concluded that the remedy to exclude evidence provided in s. 24(2) was inappropriate. It is axiomatic that the principal purpose of the criminal process is the protection of society, and the imposition of a sentence is to further that purpose. The trial judge erred in concluding that compensation for improper police action should be a factor in determining the appropriate sentence. The breach of s. 10(b) of the Charter did not in any way mitigate the seriousness of the offence, nor constitute in itself a form of punishment. The actions of the police in this case were entirely divorced from the commission of the offence, and ultimately unrelated to the evidence gathering process and to the guilt or innocence of the respondents. It is inappropriate to view sentencing proceedings as an avenue for sending a message to the law enforcement agencies. There have been cases where the courts, by reason of a Charter violation, have apparently imposed a lesser sentence than that which would normally have been imposed. However, in most of those cases the breach has resulted in some form of punishment or added hardship. In this case, the conduct of the police was not a relevant factor for consideration in the sentencing process as it neither mitigated the seriousness of the offence, nor imposed any undue hardship on the offenders and ought not to have been considered as mandating a remedy under s. 24(1) of the Charter by way of mitigation of sentence: **R. v. Glykis**, (Ont. C.A., July 21, 1995).

Generally, a stay of proceedings should be used to prevent an abuse of process or to protect an accused's rights under s. 7 of the Charter only where a less drastic remedy is not available. If I were satisfied the only choice would be a traditional trial where J.N.T. had to be in attendance throughout, I would agree that a stay of proceedings would be an appropriate remedy. However, unlike in **R. v. Grujicic**, [1994] O.J. No. 2280, there is no question as to his competence to instruct counsel. The only issue is the effect the stress of the trial will have upon him. I believe that with the benefit of modern technology the trial process can be adapted to accommodate J.N.T.'s health problems and thereby avoid exposing him to an unacceptable risk. There are measures which J.N.T. could ask the court to implement in order to alleviate or minimize the stress of the proceedings for him. For example, he could request permission, pursuant to s. 650(2)(b) of the **Criminal Code** to be out of court during the whole or part of his trial. Given the state of his health such a request would inevitably be granted. I recognize that in certain cases the courts appear to have accepted that forcing an accused to stand trial where his health will not permit him to be physically present would violate his right to make full answer and defence and make it impossible for him to get a fair trial. However, while the right of an accused to be present at his trial is an important right, it is not an absolute one. J.N.T. has failed to satisfy me that the preliminary inquiry court and the trial court will not be able to put into place measures which will adequately accommodate his right to make full answer and defence if he requests and obtains permission to be out of court during the whole or part of his trial. It is now quite feasible to provide a person who can not be physically present in the court room with the equivalent of "first-hand" knowledge of the proceedings. For example, the proceedings could be broadcast simultaneously on closed circuit television with J.N.T. being allowed to view them from another location in the courthouse, at his home or even in a medical facility. He could be in constant communication with his lawyers. This means risk management measures could be put in place to reduce the risk to his health: **R. v. T. (J.N.)** (1995), 99 Man. R. (2d) 150 (Man. Q.B.).

At the time of the 1988 federal general election, the plaintiff in this case was an inmate serving a sentence of imprisonment. In accordance with legislation then in force, penitentiary officials refused his request to vote in the election. The legislation was later found to be unconstitutional, and the plaintiff brought this action seeking damages for denial of his right to vote. On a motion by the defence to strike out the claim,

the Court concluded that in the absence of malice or bad faith, and in the absence of actual loss to the plaintiff, both of which must be present to create one of those "rare" cases where an award of damages under s. 24(1) of the Charter is appropriate following a subsequent declaration of legislative invalidity, the plaintiff's action had no chance of success and should be struck out: **Shewfelt v. The Queen**, (B.C.S.C., June 30, 1995).

Section 32(1)

In this case, the appellants argue that Casey Hill was an agent of the Crown, acting on behalf of the Attorney General of Ontario, and that the defamatory statements which are the subject of the present action were made in relation to acts undertaken by him in that capacity. They further submit that casey Hill commenced these legal proceedings at the direction and with the financial support of the Attorney General in order to vindicate the damage to the reputation of the Ministry resulting from criticism levelled at the conduct of one of its officials. It is, therefore, contended that this action represents an effort by a government department to use the action of defamation to restrict and infringe the freedom of expression of the appellants in a manner that is contrary to the Charter. In order to establish the requisite government action for Charter scrutiny, the appellants argue that it is easy to distinguish between a janitor working in a government building who is simply an employee and a Crown Attorney who is an agent of the state. It is said that when a person who is clearly an agent of the state acts, he or she is acting for or on behalf of the state. I cannot accept this proposition. There are a significant number of public servants who represent the Crown in any number of ways. While it might be easy to differentiate between the extreme examples set forth by the appellants, the grey area between those extremes is too extensive and the functions of the officials too varied to draw any effective line of distinction. There is no doubt that Crown Attorneys exercise statutory powers as agents of the government. Therefore, they benefit from the protection of any immunity which attaches to their office. However, they may become personally liable when they exceed their statutory powers. By extension, actions taken by Crown Attorneys which are outside the scope of their statutory duties are independent of and distinct from their status as agents for the government. Such was the case here. The appellants impugned the character, competence and integrity of Casey Hill, himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way. Further, the fact that Casey Hill's suit may have been funded by the Ministry of the Attorney General does not alter his constitutional status or cloak his personal action in the mantle of government action. The appellants have not satisfied the government action requirement described in s. 32. Therefore, the Charter cannot be applied directly to scrutinize the common law of defamation in the circumstances of this case: **Hill v. Church of Scientology of Toronto**, (S.C.C., July 20, 1995).

This Court first considered the application of the Charter to the common law in **Dolphin Delivery, supra**. It was held that, pursuant to s. 32(1) of the Charter, a cause of action could only be based upon the Charter when particular government action was impugned. Therefore, the constitutionality of the common law could be scrutinized in those situations where a case involved government action which was authorized or justified on the basis of a common law rule which allegedly infringed a Charter right. However, **Dolphin Delivery** also held that the common law could be subjected to Charter scrutiny in the absence of government action. It is clear from **Dolphin Delivery** that the common law must be interpreted in a manner which is consistent with Charter principles. This obligation is simply a manifestation of the

inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter. When determining how the Charter applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action. When government action is challenged, whether it is based on legislation or the common law, the cause of action is founded upon a Charter right. The claimant alleges that the state has breached its constitutional duty. The state, in turn, must justify that breach. Private parties owe each other no constitutional duties and cannot found their cause of action upon a Charter right. The party challenging the common law cannot allege that the common law violates a Charter right because, quite simply, Charter rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with Charter values. It is very important to draw this distinction between Charter rights and Charter values. Care must be taken not to expand the application of the Charter beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to Charter scrutiny. Therefore, in the context of civil litigation involving only private parties, the Charter will "apply" to the common law only to the extent that the common law is found to be inconsistent with Charter values. When the common law is in conflict with Charter values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the Charter "challenge" in a case involving private litigants does not allege the violation of a Charter right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary. Finally, the division of onus which normally operates in a Charter challenge to government action should not be applicable in a private litigation Charter "challenge" to the common law. Rather, the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified: **Hill v. Church of Scientology of Toronto**, (S.C.C., July 20, 1995).

The fundamental but not absolute presumption of law is against retroactivity (see **Gustavson Drilling (1964) Ltd.**, [1977] 1 S.C.R. 271, per Dickson J. at 279). If our system imposes upon the citizen the duty to comply with the law, the citizen must know what the law is. Going back to the origin of this protracted litigation, in 1989, sexual orientation was not part of s. 3 of the **Canadian Human Rights Act**. That became part of the law on August 6, 1992, when the Ontario Court of Appeal, in **Haig v. Canada** (1992), 9 O.R. (3d) 495, held that it should be "read in" to s. 3. In the sense, therefore, that this new law opens the door to a finding of discrimination in the circumstances of the applicant's case (in which the complaint of discrimination on the ground of sexual orientation was filed in 1989), retroactivity could also open the door to any number of complaints under pre-1992 contracts. The applicant strongly argues that throughout the period from 1989 to the **Haig** decision in 1992, her complaint was on stream, and therefore the body of criminal law doctrine on retroactivity should apply, i.e. an accused may avail himself of any change in the law as criminal proceedings laboriously wind their way to their ultimate final appeal (see **R. v. Thomas**, [1990] 75 C.R. (3d) 352). This Court has grave doubts that case law in criminal matters is applicable in the circumstances or that the presumption against retroactivity should not apply in this case: **Nielsen v. Canada (Employment and Immigration Commission)**, (F.C.T.D., June 20, 1995).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - July 1995

Section 3

It is clear that the "right to vote" must be read broadly to encompass the right to vote in free, genuine, multi-candidate elections. Section 3 must protect more than the bare right to mark a ballot, otherwise it would be a purely formalistic guarantee. It is therefore generally necessary to consider the whole context of the electoral process to determine whether s. 3 has been violated. Taking this expansive approach, P. Boyer in **Political Rights: The Legal Framework of Elections in Canada** argued that s. 3 included the right to have sufficient information about public policies to permit an informed decision. This "right to information" has been endorsed in a number of cases. However, this right is not explicitly found in s. 3. It would be a mistake, therefore, even under a broad and purposive approach, to grant to this implied "right to information" the same scope and standing as the right to vote in democratic elections that is at the core of s. 3's purpose. While the right to information gives substance to the right to vote, it remains ancillary to it. This means that under s. 3, the constitutional question is not directly whether the "right to information" was breached but whether a restriction placed on information has diminished or undermined the right to vote in a genuine election. It is therefore necessary to examine the information restriction challenged in this case in the context of the whole electoral process before finding s. 3 is violated. Looking at the electoral process as a whole, it is true to say that a complete ban on polls would substantially undermine the votes of those who wished to cast them strategically, for the candidate most likely to win or beat out a candidate they particularly dislike. However, the prohibition against dissemination of the results of an opinion survey contained in s. 322.1 of the **Canada Elections Act** does not last for the entire election or a substantial part of it. In fact, the blackout lasts only for approximately 3 days in an electoral campaign that lasts a minimum of 47 days. Granted, the last three days of the campaign may be important ones for the strategic voter if there are still a large number of undecided voters or there is a close race. But it cannot be realistically said that the strategic voter's right to vote is infringed by this short blackout period. Consequently, s. 3 is not violated by s. 322.1: **Thomson Newspapers Co. Ltd. v. A.G. Canada**, (Ont. Gen. Div., May 15, 1995).

Section 8

In this case, the entry by the police, undertaken in order to secure the premises and prevent the destruction of evidence, was a form of search not authorized by law. There is no place on earth where persons can have a greater expectation of privacy than within their "dwelling-house". No matter how good the intentions of the police may have been, their entry into the dwelling-house without a warrant infringed the appellant's rights guaranteed by s. 8 of the Charter. Moreover, there can be no artificial division between the entry into the home by the police and the subsequent search of the premises made pursuant to the warrant. The two actions are so intertwined in time and in their nature that it would be unreasonable to draw an artificial line between them in order to claim that, although the initial entry was improper, the subsequent search was valid: **R. v. Silveira**, (S.C.C., May 18, 1995).

A business establishment that is open to the public with an implied invitation to all members of the public to enter has no reasonable expectation of privacy from having a police officer enter the area of the premises to which the public is impliedly invited. The trial judge in this case erred in his reliance on the passage he cited from the decision in **R v. Rao** (1984), 12 C.C.C. (3d) 97. In that case the premises searched was a private office in business premises; the warrantless search included a search of a file cabinet in which the narcotics were found. The police did not have an implied invitation to enter the private office and rummage through a file cabinet looking for narcotics. If a person controls business premises in which there are illegal gambling devices and the public is impliedly invited into those premises to play the machines, that person cannot be heard to complain if the police, upon becoming aware that such machines are in the place, enter the premises and seize the illegal machines. It is ludicrous to think that such a person has any reasonable expectation of privacy from intrusion by the state into the area where the machines are located: **R. v. Fitt**, (N.S.C.A., February 23, 1995).

Section 10(b)

In the case at bar, there were several ways in which the appellant's right to counsel was denied. First, the police continually questioned him despite his repeated statements that he would say nothing absent consultation with his lawyer. Second, s. 10(b) specifically prohibits the police, as they did in this case, from belittling an accused's lawyer with the express goal or effect of undermining the accused's confidence in and relationship with defence counsel. It makes no sense for s. 10(b) of the Charter to provide for the right to retain and instruct counsel if law enforcement authorities are able to undermine either an accused's confidence in his or her lawyer or the solicitor-client relationship. Third, s. 10(b) was violated when the police pressured the appellant into accepting a plea bargain without first having the opportunity to consult with his lawyer. Section 10(b) mandates the Crown or police, whenever offering a plea bargain, to tender that offer either to accused's counsel or to the accused while in the presence of his or her counsel, unless the accused has expressly waived the right to counsel. It is consequently a constitutional infringement to place such an offer directly to an accused, especially (as in the present appeal) when the police coercively leave it open only for the short period of time during which they know defence counsel to be unavailable. In the case at bar, the police should have negotiated the "deal" with appellant's counsel or, at a minimum, with the appellant while accompanied by his lawyer. I emphasize that, in the case at bar, there was no urgency to the matter. Mere expediency or efficiency is not sufficient to create enough "urgency" to permit a s. 10(b) breach. Neither the precipitous issuing of the plea bargain by the police nor their conscious undermining of the accused's relationship with his counsel can be justified on the basis that such conduct allegedly facilitated the investigatory process: **R. v. Burlingham**, (S.C.C., May 18, 1995).

Section 11(b)

In deciding whether some aspect of delay is an inherent time requirement of the case, it is necessary to look at the conduct which caused that delay, and to determine whether that conduct was necessary, reasonable, meritorious, and undertaken in good faith. Delay caused by conduct having those characteristics will usually be "inherent" in this context but there may be cases where, notwithstanding the best of intentions, and a valid legal position, the Crown might still have to give way in recognition of the requirements of s. 11(b). On the other hand, if the conduct in question can properly be described as unnecessary, unreasonable, without merit, or done without good faith, then the resulting delay cannot be said to be an inherent requirement of the case. In this case, the delay occurred in the disclosure process of a prosecution

which involved many documents. Specifically, the delay resulted from the Crown's attempt to invoke public interest immunity as the basis of non-disclosure, and to use the process available under s. 37 of the **Canada Evidence Act** as a means of reviewing the Provincial Court judge's order for disclosure. The Provincial Court judge found that the Crown acted in "good faith". However, he also found that the Crown's conduct was mistaken and confused. Later in his reasons, he said the Crown had "improperly" invoked s. 37, and that the resulting proceedings were "misguided". The "merits" of the conduct causing delay are not to be determined solely on the eventual outcome of that conduct. There may be cases where an unsuccessful application or argument could be described as "meritorious". In this case, it is enough to say that although the Crown's s. 37 application was undertaken in good faith, it was misconceived and based on a mistaken view of the law. In those circumstances, it cannot be said that the two year delay, attributable to the s. 37 application and appeal, was an inherent time requirement of the case. It was the result of the Crown's conduct: **R. v. Sander**, (B.C.C.A., April 12, 1995).

Section 11(d)

The fact that a trial judge has ruled adversely in a previous case on the credibility of either a defence witness or the accused does not necessarily result in a reasonable apprehension of bias. Something more is required showing a predisposition by the adjudicator with respect to the accused's credibility, such as to amount to pre-judgment of the result of the second hearing. Judges are routinely called upon to disabuse their minds of evidence which they have heard but which, as a matter of law, is not admissible in the trial before them. It is fundamental to their role to decide the case only on the evidence properly admissible in that case. The trial judge gave reasons in the second trial for disbelieving the accused's evidence. There is no suggestion in those reasons that he considered matters arising in the first trial in making his determinations of credibility in the second. The credibility findings he made in the first trial were in relation to an entirely different matter and different Crown witnesses than in the second trial. There is no reason to believe that the trial judge did anything other than evaluate the credibility of the accused in relation to the specific evidence before him in the second trial: **R. v. Novak**, (B.C.C.A., May 11, 1995).

Section 13

The Crown in this case applied pursuant to s. 657 of the **Criminal Code** to file as evidence a transcript of the testimony-in-chief and cross-examination of the accused given at his preliminary inquiry following the provincial court judge's address to the accused pursuant to s. 541(1) of the **Code**. In **R. v. Yakeleya, supra**, the Ontario Court of Appeal held that the accused's trial did not constitute "other proceedings" in relation to his preliminary hearing on the same charge. In **Dubois v. The Queen, supra**, a decision subsequent to **Yakeleya**, the majority of the Supreme Court of Canada held that the use of the accused's testimony from his first trial on his retrial was a violation of s. 13 of the Charter. The majority held that a retrial of the same offence falls within the meaning of the words "any other proceedings" in s. 13, and went on to say that to allow the prosecution to use as part of its case the accused's previous testimony would allow the Crown to do indirectly what it cannot do directly by virtue of s. 11(c) of the Charter and it would permit an indirect violation of the right of the accused to be presumed innocent until proven guilty as guaranteed by s. 11(d) of the Charter. A retrial of the same offence falls within the meaning of the words "any other proceedings" within s. 13. A logical extension of this is that the preliminary inquiry arising from the same offence falls within the meaning of "any other proceedings" under s. 13 of the Charter. The use of an accused's testimony from a preliminary inquiry on his trial for the purpose of incriminating him is a violation of s. 13. To hold otherwise would negate the right given to an accused

under s. 541(1) to say anything in answer to the charge at his preliminary inquiry: **Lucas v. Minister of Justice**, (Sask. Q. B., February 14, 1995).

Section 15(1)

[2] Scope of the Guarantee

In this case, McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring, L'Heureux-Dubé J. concurring in the result) said that the analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection or equal benefit of the law", as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. The enumerated and analogous grounds serve as ready indicators of discrimination because distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics. Nevertheless, in some situations distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory. For example, the distinction may be found not to engage the purpose of the Charter guarantee. Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and politcial context of the claim, it may similarly be found not to violate s. 15. Cases where a distinction made on an enumerated or analogous ground does not amount to discrimination, however, are rare. Faced with a denial of equal benefit based on an enumerated or analogous ground, one would be hard-pressed to show that the distinction is not discriminatory: **Miron v. Trudel**, (S.C.C., May 25, 1995).

In this case, Cory J. (Iacobucci, McLachlin and Sopinka concurring, L'Heureux-Dubé J. concurring in the result) said that in **Andrews, supra**, and **Turpin, supra**, a two-step analysis was formulated to determine whether a s. 15(1) right to equality had been violated. The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics. Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others. It is not simply the fact that a distinction is drawn on the basis of either an enumerated or analogous ground which gives rise to discrimination. Rather, the existence of discrimination is determined by assessing the prejudicial effect of the distinction against s. 15(1)'s fundamental purpose of preventing the infringement of essential human dignity. The legislature's reliance upon stereotypical reasoning may very well be an extremely significant factor in determining whether discrimination exists. Ultimately, it must be remembered that the question as to whether or not there is discrimination should be addressed from the perspective of the person claiming a Charter violation: **Egan v. Canada**, (S.C.C., May 25, 1995).

[4] Similarity of Situation

In this case, Cory J. (Iacobucci, McLachlin and Sopinka concurring, L'Heureux-Dubé J. concurring in the result) said that in **Andrews, supra**, it was recognized that any search for either equality or discrimination requires comparisons to be made between groups of people. It is true that, in that same case, the so-called 'similarly situated test' was rejected on the grounds that its reasoning was unduly formalistic and circular: it uncritically accepted the distinction drawn by the questioned statute and then proceeded to rely upon that same categorization in order to justify the distinction drawn. Nonetheless, any discussion of equality or discrimination requires an element of comparison. The fact that a comparison must be made does not mean that courts will be returning to the similarly situated test, as suggested by the respondent. Rather, making the comparison recognizes that discrimination cannot be identified in a vacuum: **Egan v. Canada**, (S.C.C., May 25, 1995).

[5] Enumerated and Analogous Grounds

In this case, McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring), with whom L'Heureux-Dubé concurred in the result, said that the enumerated and analogous grounds serve as ready indicators of discrimination because distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics. Nevertheless, in some situations distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory. For example, the distinction may be found not to engage the purpose of the Charter guarantee. Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15. Proof that the enumerated or analogous ground founding a denial of equality is relevant to a legislative goal may assist in showing that the case falls into the class of rare cases where such distinctions do not violate the equality guarantees of s. 15(1), serving as an indicator that the legislator has not made the distinction on stereotypical assumptions about group charateristics. However, relevance is only one factor in determining whether a distinction on an enumerated or analogous ground is discriminatory in the social and political context of each case. A finding that the distinction is relevant to the legislative purpose will not in and of itself support the conclusion that there is no discrimination. The inquiry cannot stop there; it is always necessary to bear in mind that the purpose of s. 15(1) is to prevent the violation of human dignity and freedom through the stereotypical application of presumed group characteristics. If the basis of the distinction on an enumerated or analogous ground is clearly irrelevant to the functional values of the legislation, then the distinction will be discriminatory. However, it does not follow from a finding that a group characteristic is relevant to the legislative aim, that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of s. 15(1). This can be ascertained only by examining the effect or impact of the distinction in the social and economic context of the legislation and the lives of the individuals it touches. In his reasons for judgment, Gonthier J. (Lamer C.J., La Forest and Major JJ. concurring) said that a criterion defined in terms of stereotype based on presumed group characteristics, rather than on the basis of merit, capacity or circumstances, is but an elaboration of the concept of relevance: **Miron v. Trudel**, (S.C.C., May 25, 1995).

In this case, Cory J. (Iacobucci, McLachlin and Sopinka JJ. concurring), with whom L'Heureux-Dubé concurred in the result, said that the reasons in **Andews, supra**, and **Turpin, supra**, indicate that in order to determine whether the basis of distinction is analogous to the enumerated grounds, it is first necessary to identify the group which is affected. It is true that in some cases it may be useful to determine whether

or not the affected group forms a "discrete and insular minority" which is lacking in political power and, thus, vulnerable to having its interests overlooked or its rights to equal concern and respect violated. Yet, that search is not really an end in itself. While historical disadvantage or a group's position as a discrete and insular minority may serve as indicators of an analogous ground, they are not prerequisites for finding an analogous ground. The fundamental consideration underlying the analogous grounds analysis is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant. Since one of the aims of s. 15(1) is to prevent discrimination against groups which suffer from a social or political disadvantage it follows that it may be helpful to see if there is any indication that the group in question has suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political and social prejudice. The respondent argued that sexual orientation should only be considered an analogous ground if the appellants could show that homosexuals suffered a specific form of economic disadvantage which was exacerbated by the legislation in question. This argument cannot succeed. It would fragment our concept of discrimination and would seem to be illogical since discrimination, whether it is based on historical, political or societal disadvantage, will almost always have adverse economic consequences. Conversely, economic discrimination is inherently connected to discriminatory social and political attitudes which have prevailed in the past. Yet, the basic issue to be resolved is whether the challenged Act has made a distinction on the basis of an analogous ground. The resolution of that issue must be made in the context of the place of the group in the entire social, political and legal fabric of our society: **Egan v. Canada**, (S.C.C., May 25, 1995).

[7] "Adverse Effects Discrimination"

Direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a law, rule or practice is facially neutral but has a disproportionate impact on a group because of a particular characteristic of that group. The distinction between direct discrimination and adverse effect discrimination was set out in **Ontario Human Rights Commission v. Simpsons-Sears Ltd.**, [1985] 2 S.C.R. 536: "Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." ... It [adverse effect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force." Although that case dealt with the **Ontario Human Rights Code**, the same definition has been adopted in s. 15(1) cases. The law challenged in this case is, quite simply, not facially neutral. Section 2 of the **Old Age Security Act** defines "spouse"as being "a person of the opposite sex". It thereby draws a clear distinction between opposite-sex couples and same-sex couples. Thus, this case presents a situation of direct discrimination: **Egan v. Canada**, (S.C.C., May 25, 1995).

[8] Marital Status/Sexuel Orientation

In this case, McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring, L'Heureux-Dubé concurring in the result) held that the characteristic of being unmarried -- of not having contracted a marriage in a manner recognized by the state -- constitutes a ground of discrimination within the ambit of s. 15(1). First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms.

Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the Charter. Persons involved in an unmarried relationship constitute an historically disadvantaged group. A third characteristic sometimes associated with analogous grounds -- distinctions founded on personal, immutable characteristics -- is present, albeit in attenuated form. In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints -- these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in **Andrews**: the individual exercises limited but not exclusive control over the designation. It remains to consider, however, the theme underlying the whole of the respondent's submissions -- that marriage is a good and honourable state and hence cannot serve as a ground for discrimination. The argument, simply put, is that marriage is good; the grounds of discrimination evil; therefore marriage cannot be a ground of discrimination. The fallacy in the argument is the assumption that the grounds of discrimination are evil. What is evil is not the ground of discrimination, but its inappropriate use to deny equal protection and benefit to people who are members of the marked groups -- not on the basis of their true abilities or circumstance, but on the basis of the group to which they belong. The argument that marital status cannot be an analogous ground because it is good cannot succeed. The issue is not whether marriage is good, but rather whether it may be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement due to circumstance: **Miron v. Trudel**, (S.C.C., May 25, 1995).

In this case, all nine judges of the Supreme Court of Canada agreed that sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds. A majority of the Court held that the definition of "spouse" in s. 2 of the **Old Age Security Act** as "a person of the opposite sex" contravened s. 15(1). Cory J. (Iacobucci, McLachlin and Sopinka JJ. concurring, L'Heureux-Dubé J. concurring in the result), said while historical disadvantage or a group's position as a discrete and insular minority may serve as indicators of an analogous ground, they are not prerequisites for finding an analogous ground. They may simply be of assistance in determining whether the interest advanced by a claimant is the sort of interest that s. 15(1) was designed to protect. The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner. The Charter protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of "status" and "conduct" and that both should receive protection. Sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected. It is not simply the fact that a distinction is drawn on the basis of either an enumerated or analogous ground which gives rise to discrimination. Rather, the existence of discrimination is determined by assessing the prejudicial effect of the distinction against s. 15(1)'s fundamental purpose of preventing the infringement of essential human dignity. The legislature's reliance upon stereotypical reasoning may very well be an extremely significant factor in determining whether discrimination exists. In the present appeal, looking at the Act from the perspective of the appellants, it can be seen that the legislation denies homosexual

couples equal benefit of the law. The Act does this not on the basis of merit or need, but solely on the basis of sexual orientation. The definition of "spouse" as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as the heterosexual couples. The effect of the impugned provision is clearly contrary to s. 15's aim of protecting human dignity, and therefore the distinction amounts to discrimination on the basis of sexual orientation: **Egan v. Canada**, (S.C.C., May 25, 1995).

[9] Equality Generally

In this case, Cory J. (Iacobucci, McLachlin and Sopinka JJ. concurring, L'Heureux-Dubé concurring in the result) said that in seeking the answer as to whether or not there has been a denial of equal benefit of the law, it is of course appropriate to have regard to the entire statute which has been called into question. Obviously a benefit which is denied in one portion of an Act may be replaced by compensation provided for in another portion of the same Act. It may, as well, be appropriate and indeed necessary to look at other legislation from the same jurisdiction to determine the issue. Clearly a benefit denied in one federal statute may be replaced by compensation or a benefit provided in another federal statute. However, it is inappropriate to look to provincial legislation to correct or rectify the denial of a benefit set out in a federal Act. Provincial legislatures have exclusive control over matters within their jurisdiction. It follows that the benefits which are enacted by those legislatures may well vary from province to province. Thus, it would only be appropriate to have regard to provincial legislation if the federal Act in question explicitly stated that the provincial law was incorporated into its provisions or that the benefits conferred under the federal and provincial statutes were to be coordinated. Most importantly, the question as to how federal and provincial statutes interact should not be considered in a s. 15(1) analysis. It is a question which goes to the possible justification for an act which can only be addressed under s. 1 of the Charter. Postponing this inquiry to s. 1 is appropriate because, if a claimant has established that the challenged legislation has denied an equal benefit of the law, then the government would, under s. 1 of the Charter, bear the onus of demonstrating that the denial was offset and justified by benefits provided under other provincial legislation: **Egan v. Canada**, (S.C.C., May 25, 1995).

The group of single custodial parents receiving child support payments is not placed under a burden by the inclusion/deduction system created by ss. 56(1)(b) and 60(b) of the **Income Tax Act**. Although there may very well be some cases in which the gross-up calculations may shift a portion of the payer's tax liability upon the recipient spouse, one cannot necessarily extrapolate from this that a "burden" has been created, at least not for the purposes of s. 15. Courts should be sensitive to the fact that intrinsic to taxation policy is the creation of distinctions which operate to generate fiscal revenue while equitably reconciling what are often divergent, if not competing, interests. As must any other legislation, the **Income Tax Act** is subject to Charter scrutiny. The <u>scope</u> of the s. 15 right is not dependent upon the nature of the legislation which is being challenged. In the present case, however, in determining whether the distinction has the <u>effect</u> of creating a burden, it is necessary to examine the interaction between ss. 56(1)(b) and 60(b) of the **Income Tax Act** and the family law regime. Unlike the situations presented in **Symes** and in **Egan**, the impugned provisions in this appeal explicitly incorporate and are dependent upon both federal and provincial legislative enactments and do not, by themselves, constitute a complete self-contained code. Therefore the **Income Tax Act** provisions must be looked at in conjunction with the federal and provincial statutes under which child support orders are issued in order to assess the effect upon the claimant. If there is any disproportionate displacement of the tax liability between the former spouses, the responsibility for this lies not in the

Income Tax Act, but in the family law system and the procedures from which the support orders originally flow. This system provides avenues to revisit support orders that may erroneously have failed to take into account the tax consequences of the payments. Therefore, in light of the interaction between the **Income Tax Act** and the family law statutes, it cannot be said that s. 56(1)(b) of the **Income Tax Act** imposes a burden upon the respondent within the meaning of s. 15 jurisprudence. In sum, this is not a case in which this Court is called upon to determine whether the distinction that has been created is actually discriminatory. Simply put, there is no burden: **Thibaudeau v. Canada**, (S.C.C., May 25, 1995).

Section 15(2)

The accused claimed that his rights under s. 15(1) of the Charter were infringed because he was not eligible for a diversion program due to the nature of the offence alleged against him, whereas there was an alternate justice system available for aboriginal offenders regardless of the offence with which they were charged. The Crown contended, **inter alia**, that the program for aboriginal offenders was a valid affirmative action program within s. 15(2). The burden of establishing that an activity comes within the reach of s. 15(2) is on the party who asserts it. It is beyond controversy that aboriginal persons are a disadvantaged group in the criminal justice system. In any program which is designed to ameliorate the conditions of a disadvantaged group, others will be "disadvantaged" as a result of their non-eligibility for participation. What must be avoided is gross unfairness to others. The Charter does not ask that an affirmative action program address at once all individuals or groups who suffer similar disadvantage. There must be some room left to establish and give effect to priorities amongst disadvantaged groups, provided there is no gross unfairness. There is none here: **R. v. Willocks**, (Ont. Gen. Div., February 17, 1995).

Section 24(1)

Criminal proceedings which raise constitutional issues have two aspects. As a consequence, a party to such a proceeding can, in some instances, apply for leave to appeal a ruling on constitutionality to this Court under s. 40 of the **Supreme Court Act**, when there is no appeal route provided by the **Criminal Code**. In **R. v. Laba**, **supra**, the proceedings dealing with constitutionality were separated from the proceedings in regard of culpability. This procedural aspect, however, is not the determinative feature of the dual proceedings approach. Even when the determinations of culpability and constitutionality arise in the same proceeding, the two rulings are separate and distinct. Accordingly, where the highest court of final resort of a province has made a ruling on the constitutionality of a **Criminal Code** provision, either party may seek leave to appeal that ruling to this Court, regardless of whether a finding of culpability accompanied the ruling and, if there was an accompanying finding of culpability, regardless of whether that finding is appealable as of right or on granting of leave. Of course, the party choosing to seek leave to appeal a ruling of constitutionality will be the party whose interests are not served by the ruling of constitutionality below. In the majority of cases, to be sure, an accused who has been acquitted will not be interested in appealing, regardless of the ruling on the constitutionality of the provision he or she was charged under. However, in the rare instance where the interest of an accused in a **Criminal Code** provision extends beyond the question of his or her own culpability, the dual proceedings approach ensures that leave may be sought and this Court, in deciding whether to grant leave or not, will weigh whether the acquitted accused's interest justifies hearing the constitutional arguments: **R. v. Keegstra**, (S.C.C., May 18, 1995).

Section 24(2)

It is appropriate to bear in mind that, in a series of cases, this Court has held that findings of the courts below pertaining to s. 24(2) issues should not be overturned unless there has been "some apparent error as to the applicable principles or rules of law, or .... a finding that is unreasonable": **R. v. Silveira**, (S.C.C., May 18, 1995).

In this case, the appellant argued that the evidence obtained during the search should be ruled inadmissible because the illegal entry of the police into his dwelling-house was analogous to the perimeter search conducted in **R. v. Kokesch, supra**. I cannot accept that submission. It will be remembered that in **R. v. Kokesch**, the police made a perimeter search of the premises without having either an authorization or reasonable and probable grounds for believing evidence would be found on the premises. It was as a result of this improper perimeter search that the police were able to obtain the requisite evidence to apply for the search warrant. This case is very different. No evidence was obtained as a result of the illegal entry onto the premises. The only effect of the illegal police action upon the appellant was that steps could not be taken to destroy or remove the evidence. In these circumstances, the **Kokesch** case should not be blindly applied so as to exclude automatically the evidence obtained in the search. However, this was not a simple perimeter search as in **R. v. Kokesch**, but an entry into the dwelling itself. It is hard to imagine a more serious infringement of an individual's right to privacy. There was a strong and persuasive evidence upon which the trial judge and majority of the Court of Appeal could properly find that there were exigent circumstances which justified the police entry. That is to say that there were other factors which mitigated the seriousness of the Charter violation. Yet, the question remains, how should the police act in a situation where they have a serious and valid concern pertaining to the preservation of evidence while awaiting a search warrant. As a result of this case, police officers will be aware that to enter a dwelling-house without a warrant, even in exigent circumstances, constitutes such a serious breach of Charter rights that it will likely lead to a ruling that the evidence seized is inadmissible. That is not to say that the police forever should be prohibited from entering premises in order to secure and preserve the evidence. Situations may arise when it will be impossible for the police to proceed by means of a search warrant based on earlier observations. In those circumstances, courts will have to determine on a case by case basis whether or not there existed such a situation of emergency and importance that the evidence obtained may be admitted notwithstanding the warrantless search. However, I must emphasize again that after this case it will be rare that the existence of exigent circumstances alone will allow for the admission of evidence obtained in a clear violation of s. 10 of the **Narcotic Control Act** and s. 8 of the Charter. Otherwise, routinely permitting the evidence to be admitted under s. 24(2) of the Charter in cases where exigent circumstances exist would amount to a judicial amendment of s. 10 of the **Narcotic Control Act**: **R. v. Silveira**, (S.C.C., May 18, 1995).

In jurisprudence subsequent to **R. v. Collins**, this Court has consistently shied away from the differential treatment of real evidence. For example, in **R. v. Ross**, [1989] 1 S.C.R. 3, Lamer C.J. emphasized that the admissibiity of evidence under s. 24(2) depended ultimately not on its nature as real or testimonial, but on whether or not it would only have been found with the compelled assistance of the accused: "... the use of <u>any evidence</u> 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 would tend to render the trial process unfair." Further, in **R. v. Colarusso**, La Forest J. noted that the mere fact that impugned

evidence is classified as either real or conscriptive should not in any of itself be determinative. Consideration of what evidence should be excluded should begin with that evidence most proximate to the Charter breach and then work towards evidence arising more remotely from it. More remote evidence might not be admitted if its admission would have the same effect as admitting the proximate evidence. Here, the contested evidence most proximate to the breach was the finding of the gun (the murder weapon) because the gun would not have been found but for the unconstitutional behaviour of the police. The appellant's statement voluntarily made to his girl friend about having directed the police to the location of the gun too was derivative evidence flowing from his confused state of mind stemming from the s. 10(b) violations and the critical decisions made in the absence of counsel. It was not mere windfall evidence for the Crown. Nothing would have been said had the appellant not been improperly conscripted by the police to provide evidence against himself. Evidence lying in close proximity with the Charter breach is excluded because it detracts from the integrity of the trial and thereby infringes both the principles of fairness and of reliability. Here, the Crown sought to introduce the appellant's statement at trial precisely because doing so allowed it to do indirectly what the trial judge had ruled it could not do directly: introduce evidence that the appellant knew where the gun was hidden. Excluding the gun while including the statements effectively eviscerates the Charter of most of its protective value to the accused in this case. Where the impugned evidence flows from a violation of the s. 10(b) right to counsel, the Crown must demonstrate on a balance of probabilities that, regarding the unfairness of the trial component of the test under s. 24(2), the accused would not have consulted counsel even if properly advised. The Crown did not meet this burden here: **R. v. Burlingham**, (S.C.C., May 18, 1995).

Section 52(1)

In this case, having found that the impugned statutory provisions of the **Insurance Act** violate the Charter, the Court is left with the choice between "reading in" appropriate amendments into the provisions, or leaving them as they are with the result that they fall as invalid under s. 52. In the latter case, the Court may consider a declaration of suspension of the invalidity for a period of time sufficient to allow the Legislature to remedy the violation. The remedy of "reading in" is available if the question of how far the benefit should be extended can be answered with "sufficient precision" to justify the Court in doing so, so as to bring the case within the guidelines laid out in **Rocket, supra**, and **Schachter, supra**. An affirmative answer in this case is suggested by the fact that in 1990 the Ontario Legislature amended the eligibility criteria in a way which would include the appellants, thus giving an indication of what it would do if the matter were remitted to it anew. The alternative remedy entails a declaration of invalidity of the 1980 legislation. It also entails consideration of a temporary suspension of that declaration for a period of time during which the Legislature might be expected to amend the 1980 **Insurance Act**, in order to avoid the revocation of benefits payable under that Act. If this were done, it would still leave the appellants and others in their situation without a remedy. It is suggested that the Court could fashion a remedy for the appellants under s. 24(1) of the Charter. In **Rodriguez v. British Columbia (Attorney General), infra**, this Court (per Lamer C.J., dissenting on other grounds) suggested that an order of suspension of invalidity might be coupled with individual relief in the form of a "constitutional exemption" to the applicant who has suffered the Charter violation and has initiated court proceedings to obtain Charter relief. Assuming the Court were inclined to grant the appellants an exemption from the 1980 legislation and insurance policy provisions, the question remains of how it could do so without creating further inequities between the appellants and others in their situation who have been denied benefits. To avoid this, any constitutional exemption would have to be extended to all similar families. This in turn would require

formulation of general criteria of eligibility, thus involving the court in the very activity which would have led it to eschew "reading up" the 1980 statute in conformity with the terms legislated in 1990. Yet to deny such persons a remedy would be to perpetuate the effects of a discrimination which the Court has found to violate the Charter when the obvious remedy -- the payment of the benefits that should have been paid -- remains available. Having considered the available remedies, I am persuaded that this is one of those exceptional cases where retroactively "reading up" a statute may be justified. The 1990 amendments provide the best possible evidence of what the Legislature would have done had it been forced to face the problem the appellants raise. The only claims are monetary and readily calculable and satisfied. Most importantly, the result will be to cure an injustice which might otherwise go unremedied: **Miron v. Trudel**, (S.C.C., May 25, 1995).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - May 1995

Section 2(b)

It was argued in this case that child pornography is not a form of expression which is protected by s. 2(b) because child sexual abuse is an inherently harmful and violent activity. This Court agrees that child sexual abuse is an act of violence. If the child pornography legislation sought to restrict only depictions of actual children involved in sexual activity with adults in circumstances where the activity itself constitutes a crime, then it would prohibit only expression which is conveyed directly via violence, and would not be within the scope of protection of s. 2(b). However, the legislation under scrutiny reaches well beyond the proscription of depictions of actual child sexual abuse (a violent act), to proscribe other depictions which are not directly violent. The Crown submits that the determination of whether the child pornography legislation violates s. 2(b) of the Charter must now be assessed in light of **Young v. Young**, [1993] 4 S.C.R. 3, in which it was unanimously held that restrictions on religious communication between a parent and child do not, if such restrictions are in the best interests of the child, violate s. 2(b) rights. In this Court's view, the decisions of the Supreme Court of Canada in **Young v. Young** and in **B. (R.) v. Children's Aid Society** (1995), 176 N.R. 161, should not be taken as a departure from the well-established principles repeatedly enunciated by the Supreme Court of Canada in decisions such as **Irwin Toy, supra, Keegstra, supra**, and **Butler, supra**. This Court remains bound by the rule as stated by Lamer J. in **Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code**, [1990] 1 S.C.R. 1123: "... a law that makes it an offence to convey a meaning or message, however distasteful or unpopular, through a traditional form of expression like the written or spoken word or art must be viewed as a restriction on freedom of expression, and must be justified, if possible, by s. 1 of the Charter." Accordingly, the statutory definition of child pornography in s. 163.1(1) of the **Criminal Code**, which is referred to in s. 164(1)(b) and (4), violates s. 2(b) of the Charter: **R. v. Paintings, Drawings and Photographic Slides**, (Ont. Gen. Div., April 26, 1995).

It is far from clear that s. 2(b) can be said to guarantee a "freedom of information" or "right to know". The section has to do with intellectual freedom and freedom to communicate with others. The suggestion, moreover, that this section guarantees privileges to "the press and other media of communication" which are not available to other members of the public, has no obvious support in its wording. The section treats freedom of the media in what seems to be a very deliberate way, as an integral part of the freedoms of the intellect and communication guaranteed to "everyone". The suggestion is contrary to the common law concept of "freedom of the press", which accords to newspaper and other publishers and broadcasters only the right to publish to the world that which every private citizen is entitled to say or write, free from administrative or judicial restraint or interference. The "free press" has, at common law, been understood to have neither special legal duties or responsibilities, on the one hand, nor special legal privileges, on the other, although some privileges have been accorded to the media by statute in the field of defamation. A **prima facie** right of representatives of the media, as members of the public, to attend a review board proceeding is clearly recognized by Part XX.1 of the **Criminal Code**, and the right of representatives of the media, in common with all other members of the public, to publish to others whatever they are allowed to hear and observe during such proceedings is, of course, clearly guaranteed by s. 2(b) of the Charter. The board was required to give proper weight to these rights, as part of its consideration of the public

interest in exercising its discretion under s. 672.5(6). As both the board and the judge of the court below recognized, however, the right of attendance could, in proper circumstances, be overriden by the inmate's best interests, and the board was, of course, prepared to so order, should that not be contrary to the public interest, at any stage of the hearing: **Blackman v. British Columbia (Review Board)**, (B.C.C.A., January 24, 1995).

Section 7

It is a corollary of the right to choose to remain silent during the pre-trial investigation that, if exercised, this fact is not to be used against the accused at a subsequent trial on a charge arising out of the investigation and no inference is to be drawn against an accused because he or she exercised the right. The right to pre-trial silence, however, like other Charter rights, is not absolute. Application of Charter values must take into account other interests and in particular other Charter values which may conflict with their unrestricted and literal enforcement. This approach to Charter values is especially apt in this case in that the conflicting rights of the accused and his co-accused are protected under the same section of the Charter. Co-accused persons clearly have the right to cross-examine each other in making full answer and defence. Restrictions that apply to the Crown may not apply to restrict this right of the co-accused. The right to make full answer and defence is not, however, absolute. When the right is asserted by accused persons in a joint trial, regard must be had for the effect of the public interest in joint trials with respect to charges arising out of a common enterprise. Although the trial judge has a discretion to order separate trials, that discretion must be exercised on the basis of principles of law which include the instruction that severance is not to be ordered unless it is established that a joint trial will work an injustice to the accused. The mere fact that a co-accused is waging a "cut-throat" defence is not in itself sufficient. To resolve the competing interests at issue, a balance between the rights of the two co-accused must be struck taking into account the interest of the state in joint trials. An accused who testifies against a co-accused cannot rely on the right to silence to deprive the co-accused of the right to challenge that testimony by a full attack on the former's credibility including reference to his pre-trial silence. The co-accused may thus dispel the evidence which implicates him emanating from his co-accused. He cannot, however, go further and ask the trier of fact to consider the evidence of his co-accused's silence as positive evidence of guilt on which the Crown can rely to convict. The limited use to which the evidence can be put must of course be explained to the jury with some care: **R. v. Crawford**, (S.C.C., March 30, 1995).

The liberty interest is engaged at the point of testimonial compulsion. Once it is engaged, the investigation then becomes whether or not there has been a deprivation of this interest in accordance with the principles of fundamental justice: **British Columbia Securities Commission v. Branch**, (S.C.C., April 13, 1995).

The British Columbia Securities Commission commenced an investigation into a company following a report by the company's auditors disclosing questionable expenditures. The appellants, two of the officers of the company, were served with summonses issued pursuant to s. 128(1) of the *Securities Act* compelling their attendance for examination under oath and requiring them to produce all information and records in their possession relating to the company. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry

is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate the appellants. The proposed testimony thus falls to be governed by the general rule applicable under the Charter, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return: **S. (R.J.), supra**. The appellants are also entitled to claim the protection of subsequent derivative - use immunity. This is a protection that is afforded to witnesses notwithstanding that the source of their evidence may derive from corporate activity. Documentary compulsion may also entail jeopardy in so far as it engages the appellants' liberty interest. We do not believe that a right against self-incrimination can be applied to artificial entities in any meaningful way. It is the self-conscriptive effect of compulsion which the Charter guards against. The appellants, as representatives of the corporation, may receive the benefit of immunity protection in so far as they are personally implicated by their own evidence. At the stage of compellability, like the oral testimony, the documents are compellable subject to a possible claim against their subsequent use under the "but for" test. That test is not applicable to determining their compellability. Moreover, the documents are not sought in a proceeding against the witness. The documents are properly compellable unless they are excluded on the basis of the principles applicable to testimonial compulsion. The rationale both at common law and under s. 7 for these principles is that in certain circumstances compellability would impinge on the right to silence. This right, however, attaches to communications that are brought into existence by the exercise of compulsion by the state and not to documents that contain communications made before such compulsion and independently thereof. If, as in this case, the person subpoenaed is compelled to testify, then all communications including those arising from the production of documents will be compelled. If not compelled, the communications arising from production of documents would also not be admissible. The communicative aspects of the production of documents may, however, be of significance at the derivative evidence stage at which the witness seeks to exclude all evidence which would not have been obtained but for the compelled testimony: **British Columbia Securities Commission v. Branch**, (S.C.C., April 13, 1995).

Section 8

The primary goal of securities legislation is the protection of the investor, but other goals include capital market efficiency and ensuring public confidence in the system. Persons involved in the business of trading securities do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. It is widely known and accepted that the industry is well regulated. Similarly, it is well known why the industry is so regulated. Of equal importance in this case is the nature of the seizure authorized by the B.C. **Securities Act**. The demand for the production of documents contained in the summonses is one of the least intrusive of the possible methods which might be employed to obtain documentary evidence. The importance of this distinction was stressed in **Baron v. Canada**, [1993] 1 S.C.R. 416. The **Securities Act** serves an important social purpose and the social utility of such legislation justifies the minimal intrusion that the appellants may face. The law in question is therefore reasonable: **British Columbia Securities Commission v. Branch**, (S.C.C., April 13, 1995).

In this case, the accused was arrested for murder and was informed by a police officer that he was "required" to provide samples of his hair. Although no force was used, it was clear that the accused did not freely consent to providing the samples. Searches made incidentally to arrest are justified so that the arresting officer can be assured that the person arrested is not armed or dangerous, and seizures are justified to preserve evidence that may go out of existence or be otherwise lost. As neither circumstance existed here, the Crown could not rely on a power that is incidental to an arrest to justify seizure of the hair samples: **R. v. Paul**, (N.B.C.A., December 12, 1994).

In **R. v. Boersma**, [1994] 2 S.C.R. 488, Iacobucci J. said: "The appellants were charged with the possession and cultivation of marihuana on what was Crown land. The plants were being cultivated in plain sight and were observed by police officers walking by on a dirt road. In these circumstances, we agree with Lambert J.A. of the British Columbia Court of Appeal that the appellants had no reasonable expectation of privacy with respect to the area on which marihuana was being cultivated and were thus not entitled to the protection of s. 8 of the Canadian Charter of Rights and Freedoms." The expectation of privacy on privately held woodland is not substantially different from that of Crown land. As with the computer records in **R. v. Plant**, [1993] 3 S.C.R. 281, woodlands in rural areas are in some respects "subject to inspection by members of the public at large". See for example the provisions of the **Angling Act**, R.S.N.S. 1989, c. 14 which allow any resident to cross on foot any uncultivated land in order to access a lake, stream or river for the purpose of fishing. "Uncultivated" is defined as land in its natural wild state and includes land that has been cleared. In **Oliver v. United States**, 104 S.Ct. 1735 (1984), the United States Supreme Court confirmed that the Fourth Amendment protection does not extend to "open fields". After referring to the fact that certain enclaves, most significantly the home, are free from interference Powell J. remarked: "In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be." In the present case, therefore, the respondents did not have a reasonable expectation of privacy in the clearing in the woods where the marijuana plants were growing, and there was no breach of their s. 8 Charter rights: **R. v. Patriquen**, (N.S.C.A., December 20, 1994).

Section 15(1)

This Court is not persuaded that the Charter contemplates that every benefit granted by statute to any class of persons must necessarily be granted also to those who fall within the classes specifically protected against discrimination by s. 15(1), or that benefits must be withheld from other groups unless available also to those within the classes specifically protected by s. 15(1). That would impose a legislative "straightjacket", render the Charter an impediment to progress in dealing with social problems, and serve to discredit the principles on which the Charter is based. The question to be asked in every case is whether the legislation under review can fairly be said to discriminate against a protected group - here, whether the scheme established by Part XX.1 of the **Criminal Code** discriminates against those to whom it applies, and does so on the basis of their mental disability: **Blackman v. British Columbia (Review Board)**, (B.C.C.A., January 24, 1995).

Section 24(1)

In **Dagenais v. C.B.C.**, [1994] 3 S.C.R. 835, the Court traces two separate paths to follow for challenges to orders made in a criminal proceeding: one for the parties to the proceeding, another for third parties. Both the accused and the Crown must apply for relief to the trial judge, or to the level of court having jurisdiction to hear the trial, if known, or otherwise to a superior court judge. An appeal of such a decision must await the end of the trial. The procedure for third parties differs for two reasons. First, a third party, being outside the actual proceedings, cannot apply to the trial judge for relief. Second, an order deciding an issue with respect to a third party is a final order. Such a characterization is important in order to

comply with the general rule barring interlocutory appeals in criminal matters. As a result of these two differences, the procedural route to follow for a third party is determined by the level of court issuing the order. A provincial court order is to be challenged through an application to a superior court judge for the extraordinary remedy of **certiorari**. However, given that this remedy is limited to the quashing of an order, the Court decided that it was necessary, for specific circumstances, to enlarge the remedial scope of **certiorari**: "... it is open to this Court to enlarge the remedial powers of **certiorari** and I do so now for limited circumstances. Given that the common law rule authorizing publication bans must be consistent with Charter principles, I am of the view that the remedies available where a judge errs in applying this rule should be consistent with the remedial powers under the Charter. Therefore, the remedial powers of **certiorari** should be expanded to include the remedies that are available through s. 24(1) of the Charter." By the reasoning of the Court, the advantages of this route lie in its use of established procedures and its consistency with recent decisions of the Court. Moreover, an immediate appeal becomes possible from an order granting or refusing to grant **certiorari** through the operation of s. 784(1) of the **Criminal Code**. A further appeal to this Court is possible where leave to appeal is obtained pursuant to s. 40(1) of the **Supreme Court Act**. A different route is required for the challenging of an order made by a superior court judge, as **certiorari** does not lie against the decision of such a judge. As a result, the Court in **Dagenais** held that such orders should be challenged by seeking leave to appeal directly to this Court pursuant to s. 40(1) of the **Supreme Court Act**. In the present case, the appellant has been subpoenaed to testify at the preliminary inquiry of a co-accused. Despite this fact, the subpoena has not occurred in the context of his own trial, and as such we cannot consider him as a party to the criminal proceedings which generated the order he wishes to challenge. As the order in question has been issued by the Provincial Court, the appellant must challenge it by seeking the extraordinary remedy of **certiorari** from a superior court judge: **R. v. Primeau**, (S.C.C., April 13, 1995).

This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues and the principle applies with even greater emphasis in circumstances in which the foundation upon which the proceedings were launched has ceased to exist. The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. This is a practice that has been generally followed by this Court before and since the Charter. In **Law Society of Upper Canada v. Skapinker**, [1984] 1 S.C.R. 357, Estey J. stated: "The development of the Charter, as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken." This practice applies, **a fortiori**, when the substratum on which the case was based ceases to exist. The Court is then required to opine on a hypothetical situation and not a real controversy. This engages the doctrine of mootness pursuant to which the Court will decline to exercise its discretion to rule on moot questions unless, **inter alia**, there is a pressing issue which will be evasive of review. See **Borowski v. Canada (Attorney General)**, [1989] 1 S.C.R. 342. The practice applies notwithstanding that the appeal has been argued on the basis which has disappeared. Accordingly, in **Tremblay v. Daigle**, [1989] 2 S.C.R. 530, the Court was advised, in the middle of argument, that the appellant, who was appealing an order enjoining her from having an abortion, had proceeded with an abortion. The Court felt constrained to deal with legal issues with respect to the propriety of granting an injunction in the circumstances. It did so because the nature of the issue was such that it would be difficult or impossible for another woman in the same predicament to obtain a decision of this Court in time. The Court, however, declined to deal with the issue of fetal rights under s. 7 of the Charter. In **Borowski**, although the appeal was fully argued on the merits in the Court of Appeal and in this Court, it was dismissed on the ground of mootness. I cannot, therefore, agree with my colleague that the fact that the

case was fully argued in the Nova Scotia Court of Appeal and in this Court is sufficient to warrant deciding difficult Charter issues and laying down guidelines with respect to future public inquiries simply because to do so might be "helpful": **Phillips v. Nova Scotia (Westray Mine Inquiry)**, (S.C.C., May 4, 1995).

If a superior court of criminal jurisdiction did not have inherent jurisdiction to award costs against the Crown, it would not be a "court of competent jurisdiction" to grant a costs remedy for the infringement of a Charter right. However, before the Charter superior courts could award costs against the Crown in a criminal case where there was serious misconduct on the part of the prosecution, and the clear effect of s. 24(1) is to enlarge the grounds on which that jurisdiction can be exercised to include a Charter infringement, along with misconduct by the prosecution. There is no material difference between the situation of the superior court and that of the Provincial Court. The Provincial Court prior to the Charter could award costs against the Crown, albeit in limited circumstances. These circumstances were circumscribed by statute, whereas in the case of the superior court it was circumscribed by common law. In any event, the Provincial Court had jurisdiction to grant the remedy of costs. The Charter has not enlarged this jurisdiction, but rather s. 24(1) has enlarged the grounds on which the jurisdiction may be exercised: **R. v. Pang**, (Alta. C.A., November 29, 1994).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - March 1995

Section 2(a)

In this case, the appellants argued that the Ontario **Child Welfare Act**, which deprives them of the right to refuse medical treatment for their infant on religious grounds, violates their freedom of religion guaranteed by s. 2(a) of the Charter. Like the other provisions of the Charter, s. 2(a) must be given a liberal interpretation with a view to satisfying its purpose. In **R. v. Jones**, [1986] 2 S.C.R. 284, I observed that freedom of religion encompassed the right of parents to educate their children according to their religious beliefs. In **P. (D.) v. S. (C.)**, [1993] 4 S.C.R. 141, a case involving a custody dispute in which one of the parents was a Jehovah's Witness, L'Heureux-Dubé J. stated that custody rights included the right to decide the child's religious education. It seems to me that the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is an equally fundamental aspect of freedom of religion. A simple reading of the Act makes it clear that its purpose is nothing more or less than the protection of children. But if the purpose of the Act does not infringe on the freedom of religion of the appellants, the same cannot be said of its effects. The legislative scheme implemented by the Act, which culminates in a wardship order depriving the parents of the custody of their child, has denied them the right to choose medical treatment for their infant according to their religious beliefs. However, as the Court of Appeal noted, freedom of religion is not absolute. While it is difficult to conceive of any limitations on religious beliefs, the same cannot be said of religious practices, notably when they impact on the fundamental rights and freedoms of others. A more difficult issue is whether the freedom of religion of the appellants is intrinsically limited by the very reasons underlying the state's intervention, namely the protection of the health and well-being of the child, or whether further analysis should be carried out under s. 1 of the Charter. This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the Charter. It appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(a). This is not to say that an elaborate examination of the criteria established in **R. v. Oakes, supra**, will always be necessary. The effect on religious beliefs will often be so insubstantial, having regard to the nature of the legislation that Charter concerns will obviously be overriden. But in this case, it cannot be maintained that the effect on the rights of the appellants was of a minor character: **B.(R.) v. Children's Aid Society**, (S.C.C., January 27, 1995).

Section 3

The root of the problem before the Court in this case is the long history of population shifts from other parts of Alberta to metropolitan areas, particularly Edmonton and Calgary. As a result, the average electoral division in those cities contains 13 per cent more voters than the average of other divisions. The Charter guarantees those urban electors the right not to have the political force of their votes unduly diluted. We simply are unable to say, for lack of an explanation for the present boundaries, whether the dilution that exists today is "undue". There can be many valid reasons for disparity, but they do not

include a fear of the future by electors whose electoral divisions might be subject to surgery to assure other electors their constitutional rights. Constitutional rights must be respected even if to do so is momentarily unpopular. It is one thing to say that the effective representation of a specific community requires an electoral division of a below-average population. That approach invites specific reasons and specific facts. The constitution of Canada is sufficiently flexible to permit disparity to serve geographical and demographic reality. It is quite another to say that **any** electoral division, for no specific reason, may be smaller than average. In this Court's decision in **Reference re Electoral Boundaries Commission Act** (1991), 86 D.L.R. (4th) 447, we affirmed the first, not the second. We affirm again that there is no permissible variation if there is no justification. And the onus to establish justification lies with those who suggest the variation: **Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)**, (Alta. C.A., October 24, 1994).

Section 7

The appellants in this case claim that parents have the right to choose medical treatment for their infant, relying for this contention on s. 7 of the Charter, and more precisely on the liberty interest. They assert that the right enures in the family as an entity, basing this argument on statements made by American courts in the definition of liberty under their Constitution. While American experience may be useful in defining the scope of the liberty interest protected under our Constitution, s. 7 of the Charter does not afford protection to the integrity of the family unit as such. The Charter, and s. 7 in particular, protects individuals. Liberty does not mean unconstrained freedom. Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. However, a majority of the Supreme Court of Canada in this case could not agree on whether the appellants had been deprived of their liberty when the Children's Aid Society was granted wardship of their daughter on the basis that she was a "child in need of protection" within the meaning of the Ontario **Child Welfare Act**: **B. (R.) v. Children's Aid Society**, (S.C.C., January 27, 1995).

There is in Canada a principle against self-incrimination which is part of fundamental justice. The principle, however, is not absolute and may reflect different rules in different contexts. In the present case, a person ("M") separately charged with the same offence as the accused was properly compellable as a witness at the accused's trial. Fundamental justice is satisfied because neither M's testimony, nor a limited class of evidence derived from his testimony, can later be used to incriminate him in other proceedings (save for proceedings in respect of perjury or for the giving of contradictory evidence). The similarity between the structure of ss. 11(c) and 13 of the Charter, and the statutory approach apparent in s. 5 of the **Canada Evidence Act**, demonstrate an obvious attempt to enact in constitutional form the same structural protection against self-incrimination for witnesses which existed historically. The protection envisioned involves a general rule of witness compellability, coupled with an evidentiary immunity. To contend that s. 7 of the Charter demands a testimonial privilege for all witnesses is to suggest that the framers of our Constitution misunderstood the nature of s. 5 of the **Canada Evidence Act** and forgot to include a provision in the Charter comparable to the Fifth Amendment of the American Constitution. Such a proposition is unacceptable. The Charter's structure, however, cannot be invoked to condone all types of inquisition and one must focus on the purpose, or character, of proceedings at which testimony is sought

to be compelled as a way to confine the reach of a general compellability rule. An objection must be lodged against proceedings which are justified by a self-incriminatory purpose. Here, although the accused's trial might be considered an inquiry in relation to M as witness, the inquiry is of the sort permitted by our law. The truth-seeking goal operates to limit effectively the scope of the proceedings in terms of the "inquiry effect". The laws of relevancy would preclude the random examination of individuals within a criminal trial. While in **R. v. Hebert, supra**, the recognition of a residual role for s. 7 gave effect to the Charter as a coherent system, to use s. 7 as the repository for an absolute right to silence or for the common-law witness privilege would do violence to that system since it would become difficult to account for the existence of s. 13 of the Charter. Section 13, however, does not exclusively define the scope of the available evidentiary immunity. The principle against self-incrimination also finds recognition under s. 24(2) of the Charter and a review of the principles developed under that section discloses a need for a partial derivative-use immunity under s. 7 of the Charter. Derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness ought generally to be excluded under s. 7 in the interests of trial fairness. Such evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet. The test for exclusion of derivative evidence involves the question whether the evidence could have been obtained but for the witness's testimony and requires an inquiry into logical probabilities, not mere possibilities. The important consideration is whether the evidence, practically speaking, could have been located. Logic must be applied to the facts of each case, not to the mere fact of independent existence. There should be no automatic rule of exclusion in respect of any derivative evidence. Its exclusion ought to be governed by the trial judge's discretion. The exercise of the trial judge's discretion will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission. The burden is on the accused to demonstrate that the proposed evidence is derivative evidence deserving of a limited immunity protection: **R. v. S. (R.J.)**, (S.C.C., February 2, 1995).

This Court has clearly established that the Crown is under a general duty to disclose <u>all</u> information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged. The Crown obligation to disclose all relevant and non-privileged evidence requires that the Crown exercise the utmost good faith in determining which information must be disclosed and in providing ongoing disclosure. When the Crown alleges that it has discharged its obligation to disclose, an issue may arise as to whether disclosure is complete in two situations: (1) the defence contends that material that has been identified and is in existence ought to have been produced; or (2) the defence contends that that material whose existence is in dispute ought to have been produced. In situations in which the existence of certain information has been identified, then the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged. The trial judge must afford the Crown an opportunity to call evidence to justify such allegation of non-disclosure. Justification of non-disclosure on the grounds of public interest privilege or other privilege may involve certain special procedures such as the procedure referred to in s. 37(2) of the **Canada Evidence Act** to protect the confidentiality of the evidence. In some cases, the existence of material which is alleged to be relevant is disputed by the Crown. Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed

material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce. The obligation case upon the defence can, and in many cases will, be discharged not by leading or pointing to evidence but by oral submissions of counsel without the necessity of a **voir dire** The requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests. In cases involving wiretaps, such as this appeal, this is particularly important. Routine disclosure of the evidence of wiretaps in relation to a particular accused who has been charged, but who is the subject of wiretaps for ongoing criminal investigations in relation to other suspected offences, would impede the ability of the state to investigate a broad array of sophisticated crimes which are otherwise difficult to detect, such as drug-trafficking, extortion, fraud and insider trading. If the defence establishes a basis, the Crown must then justify a continuing refusal to disclose. The obligation of the Crown is the same as its obligation in first instance. Generally, if the matter cannot be resolved without **viva voce** evidence, the Crown must be afforded an opportunity to call relevant evidence: **R. v. Chaplin**, (S.C.C., February 23, 1995).

The Crown can only produce what is in its possession or control. There is no absolute right to have originals produced. If the Crown has the originals of documents which ought to be produced, it should either produce them or allow them to be inspected. If, however, the originals are not available and if they had been in the Crown's possession, then it should explain their absence. If the explanation is satisfactory, the Crown has discharged its obligation unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the Charter: **R. v. Stinchcombe**, (S.C.C., February 23, 1995).

When disclosure is demanded or requested, Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the prosecutor or the police there has been another Crown agency involved in the investigation. Relevancy cannot be left to be determined by the uninitiated. If Crown counsel is denied access to another agency's file, then this should be disclosed to the defence so that the defence may pursue whatever course is deemed to be in the best interests of the accused. This also applies to cases where the accused is unrepresented. Here, not only were representatives of the Ministry of Health and Community Services in court from time to time, they participated in the investigation with the police from the very beginning. In preparation for the trial itself Crown counsel has a duty to the public to be familiar with all aspects of the case, favourable and unfavourable, from all reasonable sources: **R. v. Arsenault**, (N.B.C.A., September 27, 1994).

Section 8

The **Charlton**, **Drapeau** and **Arason** decisions of this Court make it clear that in searching a vehicle as an incident of arrest the police are entitled to at least search the interior of a vehicle as well as the trunk. It could be argued that these cases stand for the proposition that the police are confined to searching areas of the vehicle where they reasonably believe that contraband may be found. In **Charlton** the accused was seen leaning over the trunk, and in **Drapeau** the accused was seen to carry a duffle bag with him into the car. This argument however, cannot be sustained. In **Cloutier v. Langlois**, [1990] 1 S.C.R. 158, L'Heureux-Dubé J. said "... the existence of reasonable and probable grounds (to believe that weapons or evidence will be found) is not a prerequisite to the existence of a police power to search." If the police

are entitled, on arrest, to search for evidence in the accused's "immediate surroundings" there is no logical reason that the entirety of what may be reasonably said to be the surroundings ought not to be searched. In this case, the search of the interior of the accused's automobile for the purpose of obtaining evidence which went no further than an examination of the area beneath the loose panel of the passenger door was reasonable in the circumstances: **Smellie v. R.**, (B.C.C.A., December 14, 1994).

Section 11(c)

Section 11(c) of the Charter gives constitutional recognition to the rule of non-compellability which existed at common law, and which was reaffirmed by Parliament in a 1906 amendment to **The Canada Evidence Act**. It is not surprising, therefore, that this Court has recognized in Charter terms the same policy justification for s. 11(c) which was advanced to account for the common-law rule. In **R. v. Amway Corp., supra**, Sopinka J. stated: "Applying a purposive interpretation to s. 11(c), I am of the opinion that it was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth. Although disagreement exists as to the basis of the principle against self-incrimination, in my view, this factor plays a dominant role." The similarity between the structure of ss. 11(c) and 13 of the Charter, and the statutory approach apparent in s. 5 of the **Canada Evidence Act**, demonstrate an obvious attempt to enact in constitutional form the same structural protection against self-incrimination for witnesses which existed historically. The protection envisioned involves a general rule of witness compellability, coupled with an evidentiary immunity. The Charter's structure, however, cannot be invoked to condone all types of inquisition and one must focus on the purpose, or character, of proceedings at which testimony is sought to be compelled as a way to confine the reach of a general compellability rule. An objection must be lodged against proceedings which are justified by a self-incriminatory purpose. Here, although the accused's trial might be considered an inquiry in relation to his separately charged co-accused, who was called as a Crown witness, the inquiry is of the sort permitted by our law. The seach for truth in a criminal trial against a named accused has an obvious social utility, and the truth-seeking goal operates to limit effectively the scope of the proceedings in terms of the "inquiry effect". The laws of relevancy would preclude the random examination of individuals within a criminal trial: **R. v. S. (R.J.)**, (S.C.C., February 2, 1995).

Section 11(d)

Currently, the salaries for Provincial Court judges in Prince Edward Island are established according to a formula adopted by the Legislature. They are not left to be determined by the Executive Branch as they were in Ontario at the time of **Valente, supra**. Nevertheless, what the Supreme Court of Canada said about the essential conditions for judicial independence within the meaning of s. 11(d) also applies as a limitation on the power of the legislative branch. Therefore, the Legislature of Prince Edward Island does not have an unfettered right to deal with the salary and other benefits of Provincial Court judges. It does, however, have a limited constitutional authority to alter the salary and benefits of the judges of the Provincial Court and could reduce them as part of an overall public economic measure so long as in so doing: (1) it does not remove the basic degree of financial security which is an essential condition for their independence within the meaning of s. 11(d) of the Charter; and (2) there is no indication that the legislation amounts to arbitrary interference with the judiciary in the sense that it is being enacted for an improper or colourable purpose, or that it discriminates against judges vis-à-vis other citizens. A general pay reduction for all who hold public office, including judges, which is enacted by the provincial

Legislature as part of a broad public economic measure and which does not discriminate against judges would not in itself violate the degree of financial security essential for judicial independence within the meaning of s. 11(d). So long as the salaries of the judges, even though reduced as aforesaid, remain established by law and beyond arbitrary interference by the government in a manner that could affect the judicial independence of the individual judge, the reasonable and informed person viewing the matter from an objective standpoint should still perceive the Court as enjoying the essential condition of judicial independence: **Reference re Remuneration of Judges of the Provincial Court (P.E.I.)**, (P.E.I.C.A., December 16, 1994).

Section 11(d) of the Charter provides that only an independent and impartial tribunal may, at the end of a trial, find a person guilty. Here, s. 16 of the New Brunswick **Provincial Offences Procedure Act** provides that once certain procedural requirements have been fulfilled, the judge must find the accused guilty. Not only does this remove the accused's right to a trial, it removes the right to be tried by an independent and impartial tribunal. The finding of guilt becomes a purely administrative act. Previously, the **Summary Conviction Act** provided that the absence of the accused would be taken as a plea of not guilty. The court would then conduct a trial in the absence of the accused, and if the evidence was sufficient, it could make a finding of guilt. The absent accused thus retained the right to a judgment on the facts by an independent and impartial tribunal, which maintained the integrity of the judicial structure. No law may infringe the independence of the judicial power. A law like s. 16 is invalid: **R. v. Richard, Doiron and Lavoie**, (N.B.C.A., February 6, 1995).

Section 11(i)

As this Court construes s. 11(i) of the Charter, "punishment" means or includes the formal sentence of the court (which is the punishment inflicted for the commission of the offence), but in addition, also means or includes any other "severe handling" or "harsh or injurious treatment". The term "punishment" appearing in s. 11(i) of the Charter is not confined to the narrow legal definition that corresponds exclusively to the formal sentence of the court. Punishment may also encompass any coercive or punitive treatment likely to discourage or deter an accused (and sometimes others) from a repetition of criminal activity. The framers of the Charter knew or are presumed to have known that the **Criminal Code** authorizes a sentencing judge, in addition to imposing imprisonment or a fine, or both, to grant various orders or declarations that may qualify as a further punishment. Such orders may or may not be considered part of the formal sentence of the court, but they may comprise an integral part of the punishment levied by the sentencing judge. Section 199(3) "forfeiture"; s. 100(1) or (2) "firearms prohibition"; s. 259(1) or (2) "driving prohibition"; s. 725 "restitution to victim", and s. 737(1) "probation orders", and the like, all are examples of orders made at the time of sentencing that have the potential to be **additional punishment**. Section 741.2 of the **Criminal Code** permits the court to make an order that the accused not be eligible for parole for up to one-half of the sentence where the accused has committed certain offences. Although the intention of Parliament is clear that s. 741.2 applies to all offenders where the offender is sentenced after the coming into force of the section, Charter s. 11(i) grants to any person charged with an offence the benefit of the lesser punishment if the punishment for the offence has been varied between the time of its commission and the time of sentencing. In this case, the offence was committed August 3, 1989. The appellant was sentenced July 25, 1993, the section having been proclaimed previously on November 1, 1992. The order made by the sentencing judge under s. 741.2 constituted a greater punishment (as opposed to a lesser punishment in the absence of the s. 741.2 order)

and is, therefore, a breach or a denial of the appellant's Charter right to the benefit of the lesser punishment: **R. v. Lambert**, (Nfld. C.A., September 26, 1994); leave to appeal refused (S.C.C., February 23, 1995).

Section 13

There are two aspects of s. 5(2) of the **Canada Evidence Act** which one might suppose have been constitutionalized in s. 13 of the Charter: first, a general rule of compellability for witnesses; second, a general rule that witnesses will be protected against self-incrimination through immunity protection rather than a privilege. Note that in **Kuldip, supra**, Lamer C.J. stated that "[s]ection 5(2) and s. 13 offer virtually identical protection". Consequently, it would seem to me that those who framed the Charter made an explicit decision to favour a kind of immunity protection, namely, the simple-use immunity formerly available under the **Canada Evidence Act**, and they simultaneously eschewed absolute derivative-use immunity. That not all derivative evidence is worthy of the protection afforded to self-incriminatory testimony is further supported by an examination of this Court's jurisprudence under s. 24(2). At the same time, however, that jurisprudence discloses the need for some protection. Indeed, this examination can show that the development of a residual role for s. 7 can enhance the operation of the Charter as a system, and result in the coherent recognition of a principle against self-incrimination: **R. v. S. (R.J.)**, (S.C.C., February 2, 1995).

Section 24(1)

The order to award costs against an intervening Attorney General, acting as he is statutorily authorized to, in the public interest in favour of a party who raises the constitutionality of a statute, appears highly unusual, and only in very rare cases should this be permitted. Nevertheless, this case appears to have raised special and peculiar problems, and the District Court's exercise of discretion was supported by the Court of Appeal. This Court is loath to interfere with the exercise of their discretion in this case: **B. (R.) v. Children's Aid Society**, (S.C.C., January 27, 1995).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - January 1995

Section 1

The admissibility of legislative debates to determine legislative intent in statutory construction is doubtful. More flexible rules apply in the admission of legislative history in constitutional cases. In those cases the legislative history will not be used to interpret the enactments themselves, but to appreciate their constitutional validity. Legislative history is also admissible in Charter cases to help interpret its provisions: **R. v. Heywood**, (S.C.C., November 24, 1994).

This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the section 1 analysis: **R. v. Heywood**, (S.C.C., November 24, 1994).

There are a variety of possible methods for adducing "constitutional facts". One is by judicial notice which, in the area of legal policy, is said to be much broader than suggested by traditional evidence texts. Another approach is by expert evidence tendered through testimony at trial or by way of affidavit in proceedings initiated by application. However, in either event, the information can be tested by cross-examination. A third approach is the "Brandeis brief", which is intended to inform the court about considerations which bear upon questions of fact underlying the validity of legislation. Material placed before the court in this manner is not in the form of sworn testimony and, therefore, is not subject to cross-examination. The appropriate method of presentation should be influenced by the distinction between adjudicative facts and legislative facts and, as well, by the particular legislative facts on which a party intends to rely. Trial-type procedures are best employed to resolve controversies involving disputes over adjudicative facts, facts pertaining to the parties. In contrast, such truth-seeking procedures are not usually required for the ascertainment of legislative facts. The exception is where specific or concrete legislative facts are critical to a judicial determination. Legislative facts relating more to policy than concrete fact are often not amenable to ascertainment by trial procedures. Cross-examining a social scientist on a particular theory is unlikely to produce a "truth" as understood in the context of adjudicative facts. In the present case, the Attorney General filed an affidavit from the director of the legal branch of the Workers' Compensation Board. The affiant does not describe his involvement in the academic study of the social, economic or industrial relations underpinnings of the legislation at issue. His affidavit does not describe his expertise or his work history in the field of workers' compensation law or policy. Moreover, his "conclusions" appear more in the nature of legal policy submissions. Putting such broad submissions in affidavit form does not enhance their weight and cross-examination would not improve a court's understanding of them. The affiant's analysis of the legislative history is no more helpful than if the Attorney General made these same representations in its factum. The same can be said for the parts of the affidavit which detail his view of the scheme of the statute. Representations such as these are regularly

found in factums and supported by a variety of other extrinsic material contained in a Brandeis brief. None of the material in the affidavit is deserving of a trial type procedure for its adduction before the Court. It may be adduced more informally by way of factum and attachment to case briefs: **Canada Post Corp. v. Smith**, (Ont. Div. Ct., October 5, 1994).

While the third step of the **Oakes** proportionality test has often been expressed in terms of the proportionality of the objective to the deleterious effects, this Court has recognized that in appropriate cases it is necessary to measure the actual salutary effects of impugned legislation against its deleterious effects, rather than merely considering proportionality of the objective itself. For example, in **Reference re ss. 193 and 195.1(1)(c) of the Criminal Code**, [1990] 1 S.C.R. 1123, Dickson C.J. (who characterized the objective of the impugned **Criminal Code** solicitation provisions as the curtailment of the social nuisance caused by the public display of the sale of sex) applied the third step of the proportionality analysis by considering whether "the obtrusiveness linked to the enforcement of the provision, when weighed against the resulting decrease in the social nuisance associated with street solicitation, can be justified in accordance with s. 1". Characterizing the third part of the second branch of the **Oakes** test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the **Oakes** test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures: **Dagenais v. Canadian Broadcasting Corporation**, (S.C.C., December 8, 1994).

There is no general requirement that a presumption be internally rational in order to pass the rational connection phase of the proportionality test. The only relevant consideration at this stage of the analysis is whether the presumption is a logical method of accomplishing the legislative objective. However, s. 394(1)(b) of the **Criminal Code** permits the conviction of a wide range of innocent people and thus constitutes a serious violation of s. 11(d) of the Charter. This flows from the facts that the presumption contained in s. 394(1)(b) lacks any sort of internal rationality (i.e. it is not rational to presume from the fact that one has purchased or sold precious metal ore that the transaction was illegitimate) and that the burden of proof on the balance of probabilities is an onerous one which many innocent people may be unable to meet. I question whether the deterrence sought by s. 394(1)(b) justifies such a significant infringement of the right to be presumed innocent. Even if I were persuaded that the imposition of a legal burden was clearly more effective in achieving Parliament's objective, I would find that it fails the proportionality test because of the excessive invasion of the presumption of innocence having regard to the degree of advancement of Parliament's purpose: **R. v. Laba**, (S.C.C., December 8, 1994).

Section 2(a)

While a religion may entail the active dissemination of religious viewpoints, the concept of "religion" connotes the beliefs of a group. The religious beliefs of the members of a group **as a group** are what informs the religion of those members. In the present case, if the defendant's belief that her anti-abortion

protest activity is required by her religion is not shared by the vast majority of the members of her religion, which is the case, it is difficult to conclude that her conduct constitutes the exercise, practice or manifestation of her religion. This is not to deny that she is motivated by profound moral considerations. Nor is it to deny that protest activity may be sustained by religious values. The civil rights movement in the United States, for example, was led by black clergy. But I am sure many who joined in that movement did so for reasons not based on their religious faith. One does not have to share a religion to be concerned for the just treatment of others. This analysis blends almost imperceptibly into a consideration of freedom of conscience because of the potential subsumation of "religion" by the reference to "conscience" in s. 2(a). A claim based on conscience is potentially more pervasive than that based on religion in that the circle of "activity" motivated by conscience will be much wider. But is "action" motivated by conscience intended to be protected by the Charter in contrast to "protection against invasion" of a sphere of individual intellect and spirit such as protection against officially disciplined uniformity on orthodoxy? I think not. In my view, the defendant is not being conscripted by an interlocutory injunction prohibiting picketing to a cause she fundamentally abhors and that being so, her freedom of conscience will not be adversely affected: **Ontario (Attorney General) v. Dieleman**, (Ont. Gen. Div., August 30, 1994).

Section 2(b)

The pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. The balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights. It is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows: A publication ban should only be ordered when: (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. If the ban fails to meet this standard (which clearly reflects the substance of the **Oakes** test applicable when assessing legislation under s. 1 of the Charter), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful. The publication ban in the case at bar would have passed the first stage of analysis under the common law rule if: (1) the ban was as narrowly circumscribed as possible (while still serving the objectives); and (2) there were no other effective means available to achieve the objectives. However, the initial ban in the case at bar was far too broad. It prohibited broadcast throughout Canada and even banned reporting on the ban itself. In addition, there were other effective means available to achieve the objectives. Possibilities that readily come to mind include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and **voir dires** during jury selection, and providing strong judicial direction to the jury. For this reason, the publication ban imposed in the case at bar cannot be supported under the common law: **Dagenais v. Canadian Broadcasting Corporation**, (S.C.C., December 8, 1994).

It has been held that freedom of expression assumes an ability in the listener **not** to listen but to turn away if that is her wish. The Charter does not guarantee an audience and, thus, a constitutional right to listen must embrace a correlative right **not** to listen. The principle behind a constitutional aversion to "captive audiences" is that forced listening "destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms". Free speech, accordingly, does not include a right to have one's message listened to. In fact, an important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. Where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question. This concern for "captive audiences" is related to the principle that the form of expression must be compatible with the function or intended purpose of the place or forum of the expressive activity. As Chief Justice Lamer in **Committee for the Commonwealth of Canada v. Canada, supra**, stated: "A person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any way invoke his or her freedom of expression so as to interfere with those functions. ... The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others.": **Ontario (Attorney General) v. Dieleman**, (Ont. Gen. Div., August 30, 1994).

Our political process makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media plays a fundamental reporting role. Opposition parties ask questions of the government in the legislature and in committees. Opposition parties are also dedicated to causing a critical public evaluation of the government's performance. Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation: **Ontario (Attorney General) v. Fineberg**, (Ont. Div. Ct., June 16, 1994).

Section 7

Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. The meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective. Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is over broad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate. Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. However, where an independent principle of fundamental justice is violated, such as the requirement of **mens rea** for penal liability, or of the right to natural justice, any balancing of the public interest must take place under s. 1 of the Charter. In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the

legislature. While the courts have a constitutional duty to ensure that legislation conforms with the Charter, legislatures must have the power to make policy choices. Before it can be found that an enactment is so broad that it infringes s. 7 of the Charter, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective. This Court has approved the use of reasonable hypotheses in determining whether legislation violates s. 12 of the Charter. The same process may properly be undertaken in determining the constitutionality of s. 179(1)(b) of the **Criminal Code**. The effect of the section is that it could be applied to a man convicted at age 18 of sexual assault of an adult woman who was known to him in a situation aggravated by his consumption of alcohol. Even if that man never committed another offence, and was not considered to be a danger to children, at the age of 65 he would still be banned from attending, for all but the shortest length of time, a public park anywhere in Canada. The limitation on liberty in s. 179(1)(b) is simply much broader than is necessary to accomplish its laudable objective of protecting children from becoming victims of sexual offences: **R. v. Heywood**, (S.C.C., November 24, 1994).

Section 24(1)

When the constitutionality of a law is challenged in the context of criminal proceedings, there are effectively two proceedings -- the proceedings directed at a determination of culpability and the proceedings directed at a determination of constitutionality. They will usually proceed together but may, on occasion, proceed separately. These two proceedings will usually, but need not always, be governed by the same rules and practices. An appeal against a ruling on the constitutionality of a law is not an appeal from a judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence. Therefore, it is not precluded by s. 40(3) of the **Supreme Court Act**. For an appeal under s. 40(1) of the **Act**, the judgment appealed against must be the final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case. An appeal against a ruling on the constitutionality of a law that cannot be piggybacked onto proceedings set out in the **Criminal Code** is a judgment of the highest court of final resort in a province in which judgment can be had in the particular case for the purposes of s. 40(1). Therefore, this Court has jurisdiction under s. 40(1) to grant leave to appeal against a ruling on the constitutionality of a law that cannot be piggybacked onto proceedings set out in the **Criminal Code**. To find otherwise would be to accept an absurd consequence. First, the constitutionality of a law is left dependent upon the resolution of an issue completely unrelated to constitutionality, i.e., the guilt or innocence of the accused and upon his or her decision to appeal a conviction. Second, a law can be struck down by a Provincial or Superior Court judge and then left to hang there inoperative until some time in the future when another case on point happens to come before another judge and happens to result in a verdict that provides for an avenue of appeal through the **Criminal Code**. Just as an accused is entitled to his or her day in court, so too is the legislature. The legislature does not properly get this day in court if its ability to get to court on the issue of the constitutionality of a law is dependent upon the contingency of a particular finding of guilt or innocence coinciding with a **Criminal Code** avenue of appeal: **R. v. Laba**, (S.C.C., December 8, 1994).

Section 52(1)

In the case at bar, we are dealing with a common law rule which provides judges with the discretion to order a publication ban in certain circumstances. Discretion cannot be open-ended. It cannot be exercised

arbitrarily. More to the point, as I stated in **Slaight Communications Inc. v. Davidson, supra**, in the context of legislative conferrals of discretion: "... it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation of no force or effect, unless it could be justified under s. 1." I would extend this reasoning, and hold that a common law rule conferring discretion cannot confer the power to infringe the Charter. Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding these boundaries results in a reversible error of law. In this case, then, we are dealing with an error of law challenge to a publication ban imposed under a common law discretionary rule: **Dagenais v. Canadian Broadcasting Corporation**, (S.C.C., December 8, 1994).

The trial judge in this case struck out all of s. 394(1)(b) of the **Criminal Code** and stayed the proceedings. The Court of Appeal struck out the words "he establishes that" which create the reverse onus. It found that it was not necessary to strike the whole subsection because "only the reverse onus clause ... is unconstitutional." The Court of Appeal did not consider whether reducing the onus provision to an evidentiary burden was an appropriate remedy. In fashioning a remedy pursuant to s. 52 consequent on a Charter breach, the Court must apply the measures which will best indicate the values expressed in the Charter while refraining from intrusion into the legislative sphere beyond what is necessary. Charter values are fully vindicated by removing from s. 394(1)(b) the words that impose a legal burden. Section 52 requires nothing more than removal of the words that create a legal burden. Substitution of words that reduce the legal burden to an evidentiary burden furthers the legislative objective while fully vindicating Charter values. It follows that, **prima facie**, retention of this provision is less of an intrusion into the legislative sphere than striking it. The case for retention is only **prima facie** because it may appear from all of the circumstances that it would not be safe to conclude that the legislature would have passed the provision in its altered form. The legislature may have preferred some alternative means to achieve its objective. I conclude from all of the circumstances that it is safe to assume that Parliament would have enacted the subsection in question in this appeal but restricted to an evidentiary burden, if the option of a legal burden had not been available. Coupling the remedy of striking down and reading in is not an undue intrusion on the legislative domain. Once the criteria to which I have referred above are satisfied, the technique employed to reach the result of the application of those criteria is more in the nature of mechanics than substance. Although the remedy which I consider appropriate on one view of the matter involves striking down and reading in, the same end result could be achieved by other techniques. The reverse onus provision could be interpreted or read down to restrict it to an evidentiary burden. Indeed the net effect could also be considered as striking down only. Whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result. When the inconsistency between s. 394(1)(b) and the Charter is defined in conceptual terms rather than purely in reference to the wording used by Parliament, it is manifest that the proposed remedy only involves striking down a portion of the subsection: **R. v. Laba**, (S.C.C., December 8, 1994).

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Section 2(b)

The decision in **Haig, supra**, leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression meaningful. Furthermore, in some circumstances where the government does provide such a platform, it must not do so in a discriminatory fashion contrary to the Charter. It is this last proposition upon which the respondents rely in conjunction with s. 28 of the Charter to support their position that their rights under s. 2(b) were violated in that they did not receive an equal platform to express their views. It cannot be said that every time the Government chooses to fund or consult a certain group, thereby providing a platform upon which to convey certain views, that the Government is also required to fund a group purporting to represent the opposite point of view. Otherwise, the implications of this proposition would be untenable. For example, if the Government chooses to fund a women's organization to study the issue of abortion to assist in drafting proposed legislation, can it be argued that the Government is bound by the Constitution to provide equal funding to a group purporting to represent the rights of fathers? If this was the intended scope of s. 2(b), the ramifications on government spending would be far reaching indeed. Although care must be taken when referring to American authority with respect to the First Amendment, the comments of O'Connor J. in *Minnesota State Board for Community Colleges*, 465 U.S. 271 (1984), are apposite: "Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard. ... Absent statutory restrictions, the State must be free to consult or not to consult whomever it pleases." Therefore, while it may be true that the Government cannot provide a particular means of expression that has the effect of discriminating against a group, it cannot be said that merely by consulting an organization, or organizations, purportedly representing a male or female point of view, the Government must automatically consult groups representing the opposite perspective. It will be rare indeed that the provision of a platform or funding to one or several organizations will have the effect of suppressing another's freedom of speech: **NWAC v. Canada**, (S.C.C., October 27, 1994).

Section 7

The conclusion of the majority in **Leary v. R.**, [1978] 1 S.C.R. 29, establishes that, even in a situation where the level of intoxication reached by the accused is sufficient to raise a reasonable doubt as to his capacity to form the minimal mental element required for a general intent offence for which he is being tried, he still cannot be acquitted. In such a situation, self-induced intoxication is substituted for the mental element of the crime. The result of the decision in **Leary**, applied to this case, is that the intentional act of the accused to voluntarily become intoxicated is substituted for the intention to commit the sexual assault or for the recklessness of the accused with regard to the assault. The strict application of the **Leary** rule offends both ss. 7 and 11(d) of the Charter. In this case, the necessary mental element can ordinarily be inferred from the proof that the assault was committed by the accused. However, the substituted **mens rea** of an intention to become drunk cannot establish the **mens rea** to commit the assault.

R. v. Whyte, [1988] 2 S.C.R. 3, dealt with the substitution of proof of one element for proof of an essential element of an offence and emphasized the strict limitations that must be imposed on such substitutions: "Only if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid." The substituted **mens rea** set out in **Leary** does not meet this test. The consumption of alcohol simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime. Rather, the substituted **mens rea** rule has the effect of eliminating the minimal mental element required for sexual assault. Furthermore, **mens rea** for a crime is so well recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice: **R. v. Vaillancourt, supra**. In that same case it was found that s. 11(d) would be infringed in those situations where an accused could be convicted despite the existence of reasonable doubt pertaining to one of the essential elements of the offence. That would be the result if the **Leary** rule was to be strictly applied. For example, an accused in an extreme state of intoxication akin to automatism or mental illness would have to be found guilty although there was reasonable doubt as to the voluntary nature of the act committed by the accused. This would clearly infringe both ss. 7 and 11(d) of the Charter: **R. v. Daviault**, (S.C.C., September 30, 1994).

The appellant in this case contends that anything demanded by the defense must be disclosed, and the court must not go behind defense counsel's demand by looking for live issues, relevance, or reality to the request. The appellant relies on **R. v. Dersch**, [1990] 2 S.C.R. 1505, for the proposition that all that is required for disclosure is a request. In the context of opening the packet in a wiretap case this statement is not surprising. Before taking that position, the Supreme Court concluded that there was a right to challenge the admissibility of the wiretap evidence, that the right could not be exercised without access to the packet, and that the right to full answer and defense requires that the accused be given the opportunity to test the admissibility of evidence. In the present case, **Stinchcombe, supra**, gives the needed guidance. There, Sopinka J. said that the trial judge "...should be guided by the general principle that information ought not to be withheld if there is a reasonable possibiity that the withholding of information will impair the right of the accused to make full answer and defence". He used the terms "relevant" and "relevance" in describing the information to be disclosed, which makes clear that the right to have material is dependant on relevance. Those terms suggest the need for an air of reality, a live issue or a reasonable basis for the request for material. There is no need to use any particular words provided the court considers whether there is a reasonable possibility that the material in question could assist the defence: **R. v. Anutooshkin**, (B.C.C.A., August 19, 1994).

In this case the fugitive, a Canadian citizen, faces the prospect of incarceration in the State of Florida for a minimum of just over six years, or five years if transferred to Canada, in respect of offences for which, if convicted in Canada, he would probably serve less than two years before being eligible for consideration for full parole. It is in this context that we must ask whether the case meets the test laid down in **U.S.A. v. Allard, supra**: "To arrive at the conclusion that the surrender of the respondents would violate the principles of fundamental justice, it would be necessary to establish that the respondents would face a situation which is simply unacceptable." While the acceptability of the penalty in this country is obviously a factor to be considered, the question is not one which can be answered by decidiing whether or not the penalty would be constitutionally valid if prescribed by Canadian law. We do not have any means of contrasting the extent of drug-driven crime in Florida with that in Canada, but we know that trafficking in narcotics on the scale said to be involved in this case is a very serious crime, one for which there can be few, if any, excuses, and that it carries a maximum penalty in this country of imprisonment

for life. It is entirely reasonable that the Florida legislature should regard it as an even greater scourge in that State than we regard it in Canada, and should decide to invoke a substantially more severe sentencing regime for such cases than has as yet been introduced here. We must have in mind that the purposes of the **Extradition Act** and the treaty would be defeated if Canadian citizens who return to Canada after committing drug offences in the United States were to receive privileged treatment, and become favoured operators in the United States drug underworld. The application of the Charter to these cases cannot require that extradition be denied simply because the consequences which await the alleged fugitive in the requesting jurisdiction would not conform with requirements of the Charter if provided for by Canadian law, nor because the alleged fugitive is a Canadian national. It is apparent that more than that must be shown before the appropriate test can be said to have been met: **Ross v. U.S.A.**, (B.C.C.A., October 7, 1994).

Section 8

In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. In the present case, it was incumbent on the police, at a minimum, to make it clear to the respondent that they were treating his consent to the taking of a blood sample as a blanket consent to the use of the sample in relation to other offences in which he might be a suspect. Such a characterization of the facts of this appeal would be artificial. The degree of awareness of the consequences of the waiver of the s. 8 right required of an accused in a given case will depend on its particular facts. Obviously, it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent. However, his or her understanding should include the fact that the police are also planning to use the product of the seizure in a different investigation from the one for which he or she is detained. Such was not the case here. Therefore, the police seized the respondent's blood in relation to the offence forming the subject matter of this charge: **R. v. Borden**, (S.C.C., September 30, 1994).

Section 10(b)

Because the purpose of the right to counsel under s. 10(b) is about providing detainees with meaningful choices, it follows that a detainee should be fully advised of available services before being expected to assert that right, particularly given that subsequent duties on the state are not triggered unless and until a detainee expresses a desire to contact counsel. The purpose of the right to counsel would be defeated if police were only required to advise detainees of the existence and availability of Legal Aid and duty counsel after some triggering assertion of the right by the detainee. **Brydges, supra**, stands for the proposition that police authorities are required to inform detainees about Legal Aid and duty counsel services which are in existence and available in the jurisdiction at the time of detention. Basic information about how to access available services which provide free, preliminary legal advice should be included in the standard s. 10(b) caution. This need consist of no more than telling a detainee in plain language that he or she will be provided with a phone number should he or she wish to contact a lawyer right away. Failure to provide such information is, in the absence of a valid waiver, a breach of s. 10(b) of the Charter. It follows, therefore, that where the informational obligations under s. 10(b) have not been properly complied with by police, questions about whether a particular detainee exercised his or her right to counsel with reasonable diligence and/or whether he or she waived his or her facilitation rights do not properly

arise for consideration. In the present case, at the time when the appellant was arrested and detained, there was in place in Ontario a 24-hour duty counsel service accessible by dialling a toll-free number. This service was known to the police and, indeed, the 1-800 number was printed on their caution cards. Section 10(b) required that the existence and availability of this duty counsel system and how to access it be routinely communicated by police in a timely and comprehensible manner to detainees. The 1-800 number, or at least the existence of a toll-free telephone number, should have been conveyed to the appellant upon his arrest at the roadside even though there were no telephones available. Indeed, the police should have explained to the appellant that, as soon as they reached the police station, he would be permitted to use a telephone for the purpose of calling a lawyer, including duty counsel which was available to give him immediate, free legal advice. In today's highly technological and computerized world, 1-800 numbers are simple and effective means of conveying the sense of immediacy and universal availability of legal assistance which the majority of this Court in **Brydges** said must be conveyed as part of the standard s. 10(b) warning in jurisdictions where such a service exists: **R. v. Bartle**, (S.C.C., September 29, 1994).

Although detainees can waive their s. 10(b) rights, valid waivers of the informational component of s. 10(b) will be rare. As I stated in **Korponay v. Attorney General of Canada**, [1982] 1 S.C.R. 41, the validity of a waiver of a procedural right "... is dependent on it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect...". In the case of s. 10(b)'s informational component, requiring that a person waiving the right have "full knowledge" of it means that he or she must already be fully apprised on the information that he or she has the right to receive. A person who waives the right to be informed of something without knowing what it was that he or she had the right to be informed of can hardly be said to be possessed of "full knowledge" of his or her rights. For this reason, the fact that a detainee indicates that he or she does not wish to hear the information conveyed by the standard police "caution" mandated by s. 10(b) will not, by itself, be enough to constitute a valid waiver of s. 10(b)'s informational component. Situations may occasionally arise in which the authorities' duty to make a reasonable effort to inform the detainee of his or her s. 10(b) rights will be satisfied even if certain elements of the standard caution are omitted. However, this will only be the case if the detainee <u>explicitly</u> waives his or her right to receive the standard caution (for example, by interrupting the police when they begin to read the caution and telling them that they do not have to continue) <u>and</u> if the circumstances reveal <u>a reasonable basis for believing</u> that the detainee in fact knows and has adverted to his rights, and is aware of the means by which these rights can be exercised. The fact that a detainee merely indicates that he knows his rights will not, by itself, provide a reasonable basis for believing that the detainee in fact understands their full extent or the means by which they can be implemented. For example, a detainee who states that she knows that she has the right to consult with counsel and who purports to waive her right to be informed of it, might in fact be unaware both that she has the right to do so without delay, or that "**Brydges** duty counsel" service is available to her. In such a case, the state authorities have an obligation to take reasonable steps to assure themselves that the detainee is aware of <u>all</u> of the information he or she has the right to receive (that is, the information contained in a constitutionally valid standard caution). In most cases, of course, the simplest way in which the authorities can discharge this duty will be simply to read the standard caution: **R. v. Bartle**, (S.C.C., September 29, 1994).

The point of the information component under s. 10(b) is to enable detainees to make informed decisions about services which actually exist. Since **R. v. Brydges** was primarily concerned with the information component of s. 10(b), it should not be read as saying that s. 10(b) guarantees the existence of or requires

the provision of duty counsel services for detainees across the country. It is neither appropriate nor necessary for this Court to find that s. 10(b) of the Charter imposes on governments a substantive obligation to ensure that "**Brydges** duty counsel" is available to detainees, or likewise, that it provides all detainees with a corresponding right to such counsel. If this Court were to hold that there is, under the Charter, an obligation on governments to make available "**Brydges** duty counsel" to all detainees, and that any provincial or territorial government which fails to do so violates the s. 10(b) rights of detainees, the implications would be far-reaching. In effect, this Court would be saying that in order to have the power of arrest and detention, a province must have a duty counsel system in place. In provinces and territories where no duty counsel system exists, the logical implication would be that all arrests and detentions are *prima facie* unconstitutional. There is an alternative solution which avoids the problems and complications associated with finding that s. 10(b) imposes a substantive constitutional obligation on governments to make available "**Brydges** duty counsel" to all detainees, and which sufficiently protects the Charter rights and freedoms of detainees. As the majority indicated in **R. v. Ross**, [1989] 1 S.C.R. 3 at p. 12, once a detainee asserts his or her right to counsel, the police cannot in any way compel him or her to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right. In other words, the police are obliged to "hold off" from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. What constitutes a "reasonable opportunity" will depend on all the surrounding circumstances. These circumstances will include the availability of duty counsel services in the jurisdiction where the detention takes place. As the majority in **Brydges** suggested, the existence of duty counsel services may affect what constitutes "reasonable diligence" of a detainee in pursuing the right to counsel, which will in turn affect the length the period during which the state authorities' s. 10(b) implementational duties will require them to "hold off" from trying to elicit incriminatory evidence from the detainee. The non-existence of such services will also affect the determination of what, under the circumstances, is a "reasonable opportunity" to consult counsel: **R. v. Prosper**, (S.C.C., September 29, 1994).

Section 12

Although imprisonment for non-payment of a fine is not an unusual punishment, this is so, in the ordinary course of things, only where: (i) imprisonment itself is a permitted penalty for the offence; (ii) the offender's means have been taken into account in assessing the amount of the fine; (iii) the court imposing the fine is satisfied that the offender either has the means to pay or is given reasonable time in which to do so, and (iv) the period of imprisonment in default of payment is determined by a judicial officer as proportionate to the crime. Not one of these circumstances is present in the case of a parking offence prosecuted under the Manitoba **Summary Convictions Act**. Imprisonment is used in such a case as a means to coerce payment of a debt, which cannot be tolerated under the Charter: **R. v. Joe**, (Man. C.A., December 21, 1993).

In **R. v. Goltz, supra**, the majority of the Court held that a two-stage test should be employed to evaluate the constitutionality of a legislative sentencing provision under s. 12 of the Charter. The first stage is to view the provision in question from the perspective of the accused, and on the facts of this case, which involved three armed robberies using a shotgun, s. 85 of the **Criminal Code** clearly does not offend s. 12. The second stage involves considering reasonable hypotheticals involving the offence underlying the sentence in the case before the court. Here, the Attorney General limited its defence of s. 85 to the case

which concerns armed robbery as the underlying offence. As such, the hypothetical proposed by the respondent relating to mischief is not a reasonable hypothetical envisioned by **Goltz**. We agree with these submissions and would therefore find no violation of s. 12 of the Charter: **R. v. Brown**, (S.C.C., November 2, 1994).

Section 24(1)

Although it is, by now, well established that the burden of establishing a violation of a Charter right always falls on the applicant, this does not mean that the applicant must formally provide every single fact upon which his or her claim of a violation is based, including one which is not in dispute between the parties and is (or should be) common knowledge amongst members of the criminal bar and those on the bench. The existence of duty counsel services in this case was not a matter which required independent proof by the appellant. Duty counsel and legal aid services are an intrinsic part of the practice of criminal law in this country and, as such, courts are entitled to take judicial notice of the broad parameters of these services, such as their existence and how they are generally accessed. Moreover, as counsel for the appellant pointed out, there was at the time of the appellant's trial at least one reported decision in which a provincial court judge noted the existence in Edmonton, the place of the appellant's arrest, of a system capable of giving telephone advice to detainees. If there were, for some unusual reason, no duty counsel system available at the time of detention in a jurisdiction known to have such a system, perhaps because the bar had just gone on strike as in the case of **R. v. Prosper**, **supra**, then it is up to the party alleging the exceptional circumstance, be it the Crown or the applicant, to prove that the service that was routinely available was in fact not operational at the relevant time and place: **R. v. Cobham**, (S.C.C., September 29, 1994).

There is no doubt that the jurisdiction of the National Parole Board is jurisdiction over the person, the subject matter, and the remedy, in the sense discussed in **Mills v. R.**, **supra**. In that context the remedy is the granting of parole. The test would be circular if the remedy were considered to be the exclusion of the Charter violation evidence at a parole hearing. The governing legislation does not provide a conclusive answer to the question of whether the National Parole Board is a court of competent jurisdiction for the purposes of s. 24 of the Charter. But the practical circumstances lead to a decisive answer to that question. The most significant practical consideration is that there is no appeal from the decision of the National Parole Board except the statutory appeal to the appeal division. The Board's jurisdiction in relation to cancellation of statutory remission is both exclusive and in the Board's absolute discretion. The only review that is accorded is a review for error in jurisdiction or error in law. If the Board is not a court of competent jurisdiction, then when it refuses to consider whether to grant the Charter remedy of exclusion of evidence that is relevant and admissible, because it was obtained in the course of a Charter breach, that refusal cannot be a jurisdictional error or an error in law. Accordingly, on that approach there can be no remedy whatever for a breach of a prisoner's Charter rights leading to a loss of statutory release. The conclusion that the Board is not a court of competent jurisdiction would be contrary to the decisions which establish that the Charter's benefits extend to everyone, including prisoners. The only way to make the Board and its decisions amenable to the Charter is to acknowledge that it is a court of competent jurisdiction, required, when its jurisdiction is invoked, to consider and decide on the admissibility of evidence in the course of a parole hearing, within the context of its work. Only in that way will wrong and unjust decisions of the Board in relation to evidence obtained by a Charter violation be amenable to correction: **Mooring v. National Parole Board**, (B.C.C.A., October 3, 1994).

With the advent of the Charter, the grounds on which the court can exercise its jurisdiction to award costs have been enlarged. An infringement or denial of a Charter right or freedom can, in appropriate circumstances, give rise to the exercise of this special power. In the present case, the Crown infringed the accused's right to fundamental justice by failing to disclose important information until the third day of trial, and a mistrial was therefore declared. The Crown's conduct in failing to disclose the information was more than inadvertence - it was a curious and conscious indifference to the Crown's duty to be fair. It was a clear departure from the normal standards of prosecution. The accused was required to travel from Alberta to Hay River, N.W.T., for his trial. He is responsible for paying his counsel for time spent in preparing for, and attending at, the aborted trial. Justice demands that he be reimbursed for these wasted expenditures. This is one of those clear cases where the court should exercise its discretion to award costs against the Crown. The following factors, in particular, require it: (a) there was a serious interference with the accused's right to fundamental justice; (b) the Crown and police conduct amounted to more than mere inadvertence; (c) the court ought to demonstrate its disapproval of this Crown and police conduct; (d) the accused has a clear compensatory need: **R. v. Dostaler**, (N.W.T.S.C., June 29, 1994).

In this case, the appellant contends that the decision in **R. v. Parks** (1993), 84 C.C.C. (3d) 353 (Ont. C.A.), changed the law governing challenges for cause in this province, and that as his convictions were under appeal at the time **Parks** was released, he is entitled to rely on the "new law" created in **Parks** in advancing his appeal. There are situations in which an appellant may rely on judge-made changes in the law occurring between trial and the final resolution of appeals arising from the trial. In striking the balance between the general principle of finality and the desire to do justice in an individual case the Supreme Court of Canada has held that only those whose convictions are not final, in that they are "still in the judicial system", may seek to take advantage of changes in the law after the time of trial. In addition to being "in the system" the appellant must be able to point to a change in the law that warrants the reversal of the trial judge's decision. Not every development in the law will permit counsel to raise a new issue on appeal. Our law, particularly its common law component, is in constant metamorphosis. One must distinguish between incremental developments in the law which occur on an ongoing basis, usually at the initiative of counsel, as legal principles are applied to particular fact situations, and fundamental restatements of the law which overrule established authority and send the law in a new direction. Only the latter gives cause to make an exception to the general principle that new issues cannot be raised on appeal. In the present case, while the appellant was "still in the judicial system", there is nothing in the language of **Parks** which suggests that it overruled any established authority or created a new basis for a challenge for cause. The principles applied in **Parks** come directly from decisions of this Court and the Supreme Court of Canada. The holding in **Parks** clearly developed the law as it related to challenges for cause based on racial prejudice. It did not however create a new right to challenge for cause on that basis or fundamentally alter the existing law in any other way: **R. v. Rollocks**, (Ont. C.A., June 30, 1994).

Section 24(2)

Just because the applicant bears the ultimate burden of persuasion under s. 24(2) does not mean that he or she will bear this burden on every issue relevant to the inquiry. As a practical matter, the onus on any issue will tend to shift back and forth between the applicant and the Crown, depending on what the particular contested issue is, which party is seeking to rely on it and, of course, the nature of the Charter right which has been violated. One of the issues that tends to arise in cases where there has been a breach of s. 10(b) of the Charter is whether the accused would have acted any differently had there been no violation of his or her right to counsel. The Crown should bear the legal burden (the burden of persuasion)

of establishing, on the evidence, that the s. 24(2) applicant would not have acted any differently, and that, as a consequence, the evidence would have been obtained irrespective of the s. 10(b) breach. There are at least two reasons why the Crown should bear this burden. First, breaches of s. 10(b) tend to impact directly on adjudicative fairness. Indeed, this Court has consistently said that where self-incriminatory (as opposed to real) evidence has been obtained as a result of a s. 10(b) violation, its admission will generally have a negative affect on the fairness of the trial. Second, in light of the many warnings by this Court about the dangers of speculating about what advice might have been given to a detainee by a lawyer had the right to counsel not been infringed, it is only consistent that uncertainty about what an accused would have done had his or her s. 10(b) rights not been violated be resolved in the accused's favour and that, for the purposes of considering the effect of admission of evidence on trial fairness, courts assume that the incriminating evidence would not have been obtained but for the violation. The state bears the responsibility for the breach of the accused constitutional rights. If the state subsequently claims that there was no causal link between this breach and the obtaining of the evidence at issue, it is the state that should bear the burden of proving this assertion. Of course, once there is positive evidence supporting the inference that an accused person would not have acted any differently had his or her s. 10(b) rights been fully respected, a s. 24(2) applicant who fails to provide evidence that he or she would have acted differently (a matter clearly within his or her particular knowledge) runs the risk that the evidence on the record will be sufficient for the Crown to satisfy its legal burden: **R. v. Bartle**, (S.C.C., September 29, 1994).

Section 25

Section 6(2) of the Ontario **Juries Act**, which provides for the random selection from the entire population of a judicial district of the persons to whom jury service notices are sent, would prevent the accused in this case from being tried by a jury of his cultural peers. The array of potential jurors would not be limited to persons randomly selected from the reserve on which the accused resides. While the accused contends that s. 6(2) violates his constitutional rights, s. 25 of the Charter confers no new substantive rights or freedoms upon aboriginal peoples. Section 25 simply means that the rights and freedoms given generally to the people of Canada shall not be construed so as to override aboriginal rights. No aboriginal rights or freedoms are being impaired or overriden in this case: **R. v. Fiddler**, (Ont. Gen. Div., June 15, 1994).

Section 27

The right of Indians to serve on a jury in a particular proportion is not a right encompassed under s. 25 of the Charter. Nor does s. 27 assist the accused in this case. On the contrary, it supports the position of the Crown that every qualified citizen is entitled to be called for jury duty. Any significant shift in the law which holds out the deliberate prospect of uni-racial or uni-cultural juries has great potential to damage the administration of justice in the eyes of the public and is likely to harm, rather than preserve or enhance the diverse heritage of Canada. Courts should pause before they decide to act as instruments of change with respect to cultural rights: **R. v. Fiddler**, (Ont. Gen. Div., June 15, 1994).

Section 32(1)

The appellant in this case was a student residing at the University of Victoria ("UVIC") who had in his room a number of stolen items, some of which belonged to the University. The stolen items were discovered when a UVIC security officer, acting at the request of the residence desk clerk, attended at the appellant's room to inquire about arrears of rent and, upon receiving no answer to his knock, opened the door. The head of UVIC security did not contact the police after this initial observation but instead sent another officer to conduct a search of the room. The police then obtained a search warrant based on the information gathered in both of the searches conducted by security personnel. In these circumstances, this Court cannot find a sufficient link between the police and the security officers such that the latter should be treated for Charter purposes as agents for the former; nor is there anything in the police conduct resembling a finesse of the Charter by having the security personnel do what they could not. UVIC security acted on its own in searching the appellant's room; it was not operating under a specific request from the police or pursuant to a standing arrangement between them regarding such matters. There having been no breach of the Charter by a state agent, the stolen property seized under the warrants was properly admissible: **R. v. Fitch**, (B.C.C.A., September 14, 1994).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - October 1994

Section 2(a)

The s. 2(a) right involves the freedom to pursue one's religion or beliefs without government interference, and the entitlement to live one's life free of state-imposed religions or beliefs. It does not provide an entitlement to state support for the exercise of one's religion. Thus, in order to found a breach, there must be some state coercion that denies or limits the exercise of one's religion. In this case, s. 21 of the Ontario **Education Act** mandates compulsory education, but not compulsory attendance at a public school or a separate school. Accordingly, there was no government action that compelled the appellants to send their children to private, religious-based independent schools. They were free to send their children to secular public schools maintained at public expense. Their decision not to do so was solely a response to their religious beliefs and not a result of any government action. The public schools cannot accomodate the appellants because the religious instruction which they are seeking is not permissible in such institutions. What is really complained of in this case is not government action, but government inaction which, in the circumstances, cannot be the subject of a Charter challenge: **Adler v. Ontario**, (Ont. C.A., July 6, 1994).

Section 2(b)

To attract constitutional protection, the claimant need not establish that his or her message was received and subjectively understood or appreciated by others. It is the conveying or the attempted conveying of the meaning, not its receipt, that triggers the guarantee under s. 2(b). A person protesting in a foreign language or in sign language, though understood by no one in the vicinity, is equally entitled to protection as are those articulately expressing themselves in either official language. Further, in this case, it does not matter whether the Peace Camp and its constituent structures built by the appellant on Parliament Hill successfully conveyed a message of peace, or of general protest, or of specific protest against the policy of the Federal Government in allowing cruise missile testing in Canada. It is enough that the appellant's conduct attempted to convey some meaning, which it clearly did. This brings the appellant's expression **prima facie** within the scope of the expression protected by the Charter: **Weisfeld v. The Queen,** (F.C.A., June 30, 1994).

Section 7

The operating mind test, which is an aspect of the confessions rule, includes a limited mental component which requires that the accused have sufficient cognitive capacity to understand what he or she is saying and what is said. This includes the ability to understand a caution that the evidence can be used against the accused. The same standard applies with respect to the right to silence in determining whether the accused has the mental capacity to make an active choice. In exercising the right to counsel or waiving the right, the accused must possess the limited cognitive capacity that is required for fitness to stand trial. The accused must be capable of communicating with counsel to instruct counsel, and understand the function of counsel and that he or she can dispense with counsel even if this is not in the accused's best

interests. It is not necessary that the accused possess analytical ability. The level of cognitive ability is the same as that required with respect to the confession rule and the right to silence. The accused must have the mental capacity of an operating mind. In the present case, the trial judge found that the statements were voluntary in the traditional sense and that the operating mind test was satisfied. He found, however, that with respect to the waiver of counsel there was an additional awareness of the consequences test which was not satisfied. In this regard, he accepted the evidence of the defence psychiatrist, who testified that the appellant was aware of what he was saying and what was said to him and of the court process. He was fit to instruct counsel but, because of the voices that were telling him to unburden himself, he did not care about the consequences. On the basis of evidence which the trial judge accepted, the appellant's mental condition satisfied the operating mind test, including the subjective element. There was no obligation on the Crown to establish that the appellant possessed a higher degree of cognitive capacity. To the extent that the inner voices prompted the appellant to speak in apparent disregard of the advice of his counsel and to his detriment, because he did not care about the consequences or felt that he could not resist the urging of the voices, they cannot be the basis for exclusion. Inner compulsion, due to conscience or otherwise, cannot displace the finding of an operating mind unless, in combination with conduct of a person in authority, a statement is found to be involuntary: **R. v. Whittle**, (S.C.C., September 1, 1994).

Section 8

In this case a warrant to search residential premises was obtained on an affidavit of a police officer, who deposed that information had been received from a confidential informant who "has provided reliable, accurate information in the past and is a user of cannabis, possessing the knowledge to recognize it". Counsel for the accused, citing **R. v. Debot**, [1989] 2 S.C.R. 1140, contended that the affidavit did not provide sufficient information to satisfy the Justice of the Peace that the deponent had reasonable grounds that evidence would be found and that an offence had been committed. However, **Debot** is the high water mark for specificity. It does not establish a standard of disclosure which must be met in every case. Further, cases such as **Debot** are distinguishable on the basis that they deal with untested tip informants. The distinction was recognized by the trial judge when she said "... this case should be distinguished from the cases where there is no averment in the grounds of belief paragraph that the informant has, in the past, provided reliable and accurate information. That is the averment that is missing from the cases referred to by defence counsel where the courts have held that the police officer swearing the Information had no reasonable grounds based on a bare tip from an informant": **R. v. Hardy**, (B.C.C.A., May 19, 1994).

The case law establishes that not all "things" or property are protected by s. 8 of the Charter. Rather, property is protected under s. 8 only if the seizure of the property intrudes into, or tramples on, the interests and values protected by s. 8. The most important of the protected interests or values is privacy in a law enforcement context. In case after case, the Supreme Court of Canada has stated that s. 8 protects the bodily integrity and privacy of people, not their property, unless the property being searched or seized relates directly to a privacy interest. In all of the major s. 8 cases the emphasis of the judicial inquiry is on whether a person has a reasonable expectation of privacy in the property. In the instant case, street vendors do not have such an expectation with respect to their flowers. The confiscation of the flowers which is permitted by the **City of Toronto Act** does not involve an invasion of a home, office or any private property. Rather, the confiscation occurs on a city street and is carried out by law enforcement officers acting to control the use of city property. The applicant does not assert a privacy interest in the confiscated flowers, but argues that s. 8 protects property **simpliciter**. The problem with this argument

is that if the Supreme Court had wanted to say that property standing alone was protected by s. 8, almost every case it has dealt with provided an opportunity to do so. Yet the Court has always stated that it is the privacy interest of the person that is protected. Accordingly, although the Court has left open the possibility that interests other than privacy may be protected, it has foreclosed the argument that property divorced from privacy considerations is one of the potential "other" interests: **Unishare Investments Ltd. v. R.**, (Ont. Gen. Div., May 17, 1994).

Following the arrest of the accused at the front door of his residence, the police permitted him to go upstairs to his bedroom in order to clothe himself properly before being taken to the police station. An officer accompanied the accused to the bedroom, where he found and seized certain items which appeared to have been used in the commission of the offence. At trial, the Crown did not contend that the accused had consented to the search. Instead, it relied upon **Cloutier v. Langlois**, [1990] 1 S.C.R. 158, as confirming the common law discretionary power to search the arrested person and his or her "immediate surroundings", provided that the search is not abusive and that any physical or psychological force is proportionate to the valid objectives of the search. The meaning of "immediate surroundings" is informed by the legitimate objectives of a search incidental to arrest: to protect the safety of the police, to prevent the escape of the arrestee, and to preserve evidence. It must be emphasized that the power to search incidental to arrest cannot be used improperly so as to circumvent the necessity for a search warrant where one would otherwise be required. Here, however, the search was well within the limits permissible to searches incidental to arrest: **R. v. Concepcion**, (B.C.C.A., September 2, 1994).

Subsection 188(2) of the **Criminal Code**, which permits a designated judge, in a situation of urgency, to issue an authorization to intercept private communications, does not require an applicant for an emergency authorization to file a sworn statement in writing or any document whatsoever. In **R. v. Galbraith** (1989), 49 C.C.C. (3d) 178 (Alta. C.A.), it was suggested that s. 8 of the Charter would require the process relating to pre-authorized searches to include some form of memorializing or recording the gist of sworn allegations made in support of the application: "The judge might use voice recording (as is done under the telewarrant provisions of the **Code**) his or her own notes or the services of a court reporter to record the substance of the sworn testimony". In the present case, however, no documents were filed and none of the proceedings before the judge were recorded. Since the decision of the Supreme Court of Canada in **R. v. Garofoli, supra**, the opening of the sealed packet and the examination of the documents filed in support of the application for authorization to intercept has become a part of our criminal justice system, in order to ensure that the accused may make full answer and defence. Without an affidavit or any other document, this right of the accused to contest the allegations made by the police becomes illusory. Since s. 188(2) fails to provide the necessary guarantee to permit the control of the conduct of the police before the issuing judge, it is inconsistent with both ss. 7 and 8 of the Charter: **R. v. St-Yves**, (Que. S.C., July 25, 1994).

Section 14

The discussion of s. 14 of the Charter which follows relates specifically to the right of an accused in criminal proceedings, and must not be taken as necessarily having any broader application. The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity

to answer it. Second, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. Third, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the Charter. The underlying principle behind all of the interests protected by the right to interpreter assistance under s. 14 is that of linguistic understanding. The centrality of this principle is evident not only from the general jurisprudence dealing with interpreters, but also more directly from the language of s. 14 itself, which refers to "not understand[ing] or speak[ing] the language in which the proceedings are conducted". The level of understanding protected by s. 14 will, therefore, necessarily be high. Indeed, it has been suggested that a party must have the same basic opportunity to understand and be understood as if he or she were conversant in the language of the court. At the same time, however, the principle of linguistic understanding should not be elevated to the point where those with difficulty communicating in or comprehending the language of the proceedings are given or seen to be given unfair advantages over those who are fluent in the court's language. The framework of analysis to determine whether there has in fact been a breach of s. 14 is as follows. First, it must be clear that the accused was actually in need of interpreter assistance -- i.e., that he or she did not understand or speak the language being used in court. Although the ultimate burden of proof in establishing the required level of need rests, of course, on the party asserting that he or she has suffered a violation of his or her s. 14 rights, it is important to appreciate that the right to interpreter assistance is not one which must necessarily have been invoked or asserted in order to be enjoyed. As part of their control over their own proceedings, courts have an independent responsibility to ensure that those who are not conversant in the language being used in court understand and are understood. Accordingly, unless the issue of interpretation is only being raised for the first time on appeal and/or there is some question as to whether the right is being asserted in bad faith, establishing "need" will not normally be an onerous step. Second, the claimant of the right must show, assuming it is not a case of a complete denial of an interpreter but one involving some alleged deficiency in the interpretation actually provided, that there has been a departure from the basic, constitutionally guaranteed standard of interpretation. For the purposes of this appeal, I define this standard as one of continuity, precision, impartiality, competency and contemporaneousness. Third, the claimant must establish that the alleged lapse in interpretation occurred in the course of the proceedings themselves when a vital interest of the accused was involved -- i.e., while the case was being advanced -- rather than at some point or stage which was extrinsic or collateral to the advancement of the case. The onus with respect to these three steps for establishing a breach of s. 14 of the Charter falls on the party asserting the violation and the standard of proof is one of balance of probabilities. Once a court is satisfied that the first three requirements have been met, a violation of s. 14 will have been made out unless the Crown is able to prove, again on a balance of probabilities, that there was a valid and effective waiver of the right which accounts for the lapse in (or lack of) interpretation shown to have occurred: **R. v. Tran**, (S.C.C., September 1, 1994).

Sections 16 and 16.1

It seems unlikely that a person could by means of so-called discrimination based on the use of the official languages obtain more under s. 15(1) of the **Charter** than what he would be entitled to under the language guarantees as defined in ss. 16 to 22: **Gingras v. R.**, (F.C.A., March 10, 1994).

It remains that even if Parliament uses the legislative process mentioned at subs. 16(3) of the **Charter**, the constitutional amendment formula relating to the use of official languages must be complied with: **R.**

v. Société d'électrolyse et de chimie Alcan Limitée et Alcan Aluminium Limitée, (C.Q., February 10, 1994).

Section 19

It must be recognized that the pleadings issuing from courts of Quebec can be written in French or English, in compliance with the rights protected in s. 133 of the **Constitution Act, 1867**. In this particular case, the informant expressed himself in French, using his rights conferred by s. 133. To recognize that the violation of the provisions of subs. 841(3) of the **Criminal Code** triggers the absolute nullity of a unilingual information, would be to undermine the right of the informant to use the language of his choice: **R. v. Société d'électrolyse et de chimie Alcan Limitée et Alcan Aluminium Limitée**, (C.Q., February 10, 1994).

In fact, para. 530.1(b) of the **Criminal code** more or less reproduces the provisions of s. 133 of the **Constitution Act, 1867**, s. 23 of the **Manitoba Act, 1870**, and s. 5 of the Yukon **Languages Act**; it should therefore be interpreted in a manner that is analogous to those provisions with respect to pleadings and documentation, one that is in keeping with the Supreme Court cases recognizing the right of every participant in the judicial process to use French or English, without, however, imposing corollary duties on the other participants. It should be noted that ss. 21 and 24 of the **Official Languages Act** belong to Part IV of this Act which concerns services to and communications with the public and which flows directly from subs. 20(1) of the **Canadian Charter of Rights and Freedoms**, as opposed to Part III of this Act which concerns the administration of justice and which is based on subs. 19(1) of the **Canadian Charter of Rights and Freedoms**. These two types of provisions have distinct fields of application, since subs. 19(1) of the **Charter** and Part III of the **Official Languages Act** concern oral and written pleadings of federal institutions in court proceedings, whereas subs. 20(1) of the **Charter** and Part IV [of the **Official Languages Act**] and **Regulations** concern extrajudicial communications. S. 15 of the **Charter** cannot be used to provide a basis for a legal language right favouring the use of one of the two official languages, especially in view of the specific and limited content of s. 19 of the **Charter**, which is specifically addressed to the right that the official languages have in the judicial arena: **R v. Rodrigue**, (Yukon S.C., May 5, 1994).

Section 20

Disclosure in a judicial proceeding is not covered by subs. 20(1) of the **Charter** or by Part IV of the **Official Languages Act** and **Regulations**, because the very structure of ss. 16 to 20 of the **Charter** shows that each of these sections governs a separate and distinct area of Parliamentary, governmental and judicial activities. It would thus be inappropriate to link these provisions. If subs. 20(1) were deemed to apply to communications in a judicial context, the Supreme Court would have come to quite a different decision in **Société des Acadiens**: **Rodrigue v. The Queen**, (Yukon S.C., May 11, 1994).

Subs. 20(1) of the **Charter** and Part IV of the **Official Languages Act** and **Regulations** seek to ensure the availability in French and in English of services and communications (1) from federal institutions and

(2) which are, by their nature, primarily intended for the public (or a member of the public). The documentary evidence that the Crown puts together in preparing for a trial does not generally come from a federal institution, since it often involves documents written or obtained by municipal or provincial police forces or by private citizens. And in cases where the evidence actually does come from a federal institution, such as the Royal Canadian Mounted Police, for example, such documentation is not primarily intended for the public, strictly speaking, since it involves documents prepared and collected for internal use, (that is, to prepare the Crown's case). The fact that the Crown has a duty to disclose that documentation to the accused, under the guidelines in **Stinchcombe**, does not transform it into documents primarily intended for the public, within the meaning of subs. 20(1) of the **Charter**. Thus, by analogy, the documents that the public may obtain through the **Access to Information Act**, S.C., c. A-1, do not have to be made available in both official languages just because they are handed over to the public; here again, these are generally documents prepared for internal use and that are not primarily intended for the public: **Rodrigue v. The Queen**, (Yukon S.C., May 11, 1994).

Section 24(1)

The plaintiff in this case was charged with second degree murder in late 1988 She was arrested and refused bail. After she was committed to stand trial, the charge was withdrawn. She now alleges that her rights under s. 7 of the Charter were infringed by agents and employees of the Crown in the right of the Province. Accordingly, she claims under s. 24 of the Charter that she is entitled to damages from the Province as well as from others. Section 32 of the Charter provides that the Charter applies to the legislatures and government of each province in respect of all matters within the authority of the legislature of each province. Therefore, s. 24 of the Charter would be the appropriate section to invoke when seeking redress for the infringement of a constitutional right. Claimants are not restricted to suing government officials when the government itself is responsible for the constitutional infringement. This being said, the enforcement of the criminal law is one of the most important aspects of the maintenance of law and order in a free society. So long as the carrying out of duties in relation to the investigation and prosecution of persons in pursuit of the aims of the justice system is done within jurisdiction and with an absence of **mala fides**, there can be no recovery. A breach, in order to be actionable, must be carried out in disregard of fundamental justice resulting in, for example, a loss of liberty. In order for the criminal justice system to function effectively, there has to be something more than an allegation of an error in reaching a conclusion or in the making of a decision by law enforcement officers, or the experts upon which they rely for professional advice: **McGillivary v. Province of New Brunswick**, (N.B.C.A., June 22, 1994).

As a general rule, the appropriate remedy under s. 24(1) of the Charter for a breach of s. 14 of the Charter will be the same as it would be under the common law and under statutory guarantees -- namely, a re-hearing of the issue or proceeding in which the violation occurred. For example, where the violation takes place within the trial proper, it will generally be necessary to quash the conviction being appealed from and to order a new trial. Where, on the other hand, the violation takes place in some discrete and severable part of the proceedings, such as in a bail or sentencing hearing, a new hearing of the issue will be usually be the fitting remedy under s. 24(1). However, it is important to recognize that s. 24(1) empowers a court to do what it considers to be "appropriate and just" in the circumstances. The remedial flexibility which is provided for in s. 24(1) may allow a court, in the right circumstances, to grant a remedy which either exceeds or falls short of the remedy I have suggested will normally be appropriate in cases where s. 14 of the Charter has been violated: **R. v. Tran**, (S.C.C., September 1, 1994).

Section 24(2)

In **R. v. Collins, supra,** Lamer J. said that "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone." However, in **R. v. Mellenthin, supra,** the Court seemed to take a different approach. Evidence which was "real evidence" was excluded on the basis that to admit it would impair the fairness of the trial. The facts in **Mellenthin** are worth examining. The accused was stopped in his vehicle in a check stop used by the police to randomly inspect vehicles. For what appeared to be no reason other than curiosity a police officer opened the gym bag which lay on the seat beside Mr. Mellenthin. He discovered cannabis resin inside. But for the breach (the search with no grounds) the evidence would never have been found. The police had no grounds at all to believe that Mr. Mellenthin possessed a narcotic, and, based on the evidence led in that case, they never would. These circumstances compelled the members of the Court to conclude that the accused had essentially been "conscripted against himself" to produce the evidence. **Mellenthin** has been applied by the Ontario Court of Appeal in **R. v. Acciavatti** (1993), 80 C.C.C. (3d) 109, and in **R. v. Zamitt** (1993), 81 C.C.C. (3d) 112. In both of those cases the Court said that **Mellenthin** makes it clear that consideration must be given to whether the search leading to the real evidence should be equated with compelled testimony as violating the basic right of an accused not to unwillingly be conscripted against him-or-herself. In both of those cases police searched the accused's vehicles on little more than a hunch. The courts determined that but for the unreasonable search the evidence would not have been found. The distinguishing feature of these cases is that at the time of the search there was little existing evidence as to the commission of an offence independent of the accused himself. In other words the accused was conscripted against himself to provide that evidence. The present case is not one where the police had no grounds at all or were acting on suspicion alone. Not only did the police have the "suspicions" to which they testified, but the grounds for the search were maturing as they conducted their investigation. These grounds existed independently of the accused. This is therefore not a case where one can say that but for the Charter breach the evidence would not have been discovered: **R. v. Clark et al.,** (B.C.C.A., July 20, 1994).

Section 52(1)

The present case is a clear one for the technique of reading in. The provision in question offends the Charter because it is underinclusive. It was legislation designed to fulfil an important social purpose - to ensure that the property of a deceased intestate would go to his or her family. It failed because it did not extend the entitlement to certain illegitimate children with respect to the father's estate and thus discriminated against them. To strike down the legislation would introduce chaos by depriving other worthy persons - the legitimate children and illegitimate children with respect to the mother's estate - of its benefit. A temporary suspension of the declaration of invalidity might be an approach, but the legislature has done nothing since the Trial Division declared the provision invalid in another case 5 years ago. The desirable approach would be to extend the benefits of the legislation to the disadvantaged class by simply reading in the necessary words: **Tighe (Guardian ad Litem of) v. McGillivray Estate,** (N.S.C.A., February 9, 1994).

Appendix A

This case requires this Court to begin the process of delineating the parameters of the right to interpreter assistance, a right which is framed in very general terms under s. 14 of the Charter. In **R. v. Big M Drug Mart Ltd., supra,** Dickson J. elaborated on how the interests which are intended to be protected by a particular Charter right are to be discovered: "In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter". The interpretive process must, therefore, begin with an examination and review of how an accused's right to the services of an interpreter has historically been interpreted and applied under the common law and statute, how it has been framed in international and European human rights instruments, and the way in which American courts have developed the right inferentially under the United States Constitution. It is only by considering the legal-historical context in which the right has evolved, combined with an examination of the language of s. 14 of the Charter and its relationship to other provisions of the Charter, that the purpose of the right and the interests sought to be protected by it can be discerned and its parameters begin to be defined: **R. v. Tran,** (S.C.C., September 1, 1994).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - July 1994

Section 2(a)

It seems that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently, the appellant in this case is not limited to challenging the oath required by the **Citizenship Act** on the basis of a belief grounded in religion in order to rely on freedom of conscience under s. 2(a) of the Charter. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, "conscience" and "religion" have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by s. 2(b). The appellant has not raised a plausible argument about the imposition of a coercive burden on his conscientiously-held views which bridle at swearing an oath to anyone but a Supreme Being. He is not required to swear an oath to the Queen as he alleges, nor to anyone but a Supreme Being, if he chooses to swear. Moreover, he may decide to affirm rather than to swear, if that is objectionable to him. His real objection is not to the method of oath making, but to its content. His claim regarding freedom of conscience should, therefore, be struck out. Similarly, his allegation that the oath of citizenship restricts his freedom of religion since the Queen is the "Head of the Anglican Church" must be struck out. As the motions judge found, Parliament's purpose in framing the oath or affirmation was to require a statement of loyalty to Canada's head of state and its institutions, not to interfere with religious freedom. There is no mention in our Constitution nor in this oath of the Queen in her capacity as Head of the Church of England: **Roach v. Canada**, (F.C.A., January 20, 1994).

Section 2(b)

This Court's decision in **International Fund for Animal Welfare, supra**, had to do with a regulation whose effect was to deny the media and others access to an open, public, commercial seal hunt carried out in the ice of the Gulf of St. Lawrence. To attempt to read it as creating a general journalistic right of access to anything which may be of interest to the media is to rip it from its context and to confound journalistic interest with public interest. By the same token, there is nothing in any of the differing opinions given in **Committee for the Commonwealth of Canada, supra**, which would turn s. 2(b) of the Charter into a key to open every closed door in every government building and require a s. 1 justification to keep it closed. Before any "right" of access, whose denial would require to be justified under s. 1, can be asserted it is necessary to ask what it is to which access is sought. Where, as here, access is sought to an inquiry or investigation it is proper to look to its function and purposes. That is exactly what the trial judge did here and he was right to conclude that there was no constitutionally protected right for the appellant media representatives to be present at the inquiry convened under s. 45(1) of the **National Defence Act** by the Chief of the Defence Staff: **Travers v. Anderson**, (F.C.A., June 15, 1994).

Section 7

Full s. 7 protection in the pre-trial phase is essential to ensuring that an accused is not found culpable as a result of non-voluntary statements made against himself. That logic cannot easily be transferred to the post-trial phase. As this Court held in **Lyons, supra**, ss. 7 to 14 protection has a more limited scope when applied to the sentencing process. Once guilt has been established, our fundamental principles of justice dictate a focus on the most appropriate sentence for the guilty party. To assume that s. 7 post-trial protection should be identical to pre-trial and trial protection ignores a rather critical intervening fact: The accused has been found guilty of a crime. Having so found, the court places greater emphasis on the interests of society in developing a sentence that is appropriate to the guilty party. Evidence introduced at trial may be used in this assessment. Evidence emerging from the psychiatric evaluation pursuant to s. 537(1)(b) of the **Criminal Code** and relevant to assessing dangerousness should be similarly treated: **R. v. Jones**, (S.C.C., May 12, 1994).

In this case the police found a baseball cap near an abandoned vehicle which contained stolen goods. The appellant was arrested and charged with robbery of the goods. When he was taken to the police station, an officer placed the cap on a counter where it would be seen by the appellant, and the appellant claimed ownership of it. Had this evidence been obtained by deceiving the appellant, or in any way coercing or inducing him, or by offering him any active invitation, a breach of his Charter rights might well have resulted. But, none of those elements is present. The appellant knew he was in the presence of police officers. The hat had been recovered in the course of the investigation, and this was obvious to the appellant. No invitation was extended to him to say anything. No request was made of him. There was neither subterfuge nor pressure of any sort. The "trick" was an entirely passive one, a device of the sort that police officers are certainly expected to employ in the normal course of investigation. The appellant's response amounted to a voluntary waiver of his right to silence. The fact that the cap was put there in the hope that it might be claimed cannot be regarded as a subterfuge of the sort discussed in **R. v. Hebert, supra**, and the evidence was properly admitted by the trial judge: **R. v. Corak**, (B.C.C.A., March 7, 1994).

Section 8

The expectation of privacy in business records is necessarily low. They do not ordinarily contain the type of personal information that lies at the heart of the constitutional protection of privacy. Further, it must be recognized that the state must have the power to regulate business, both for economic reasons and in order to provide protection to the vulnerable individual against private power. It follows that since the search in this case was made pursuant to a regulatory statute in the highly regulated field of restaurants and hotels the expectation of privacy must of necessity be diminished. It has been recognized that there is a significant distinction between searches and seizures effected pursuant to a regulatory statute and searches and seizures made pursuant to the **Criminal Code** or statutes of a quasi-criminal nature. The distinction can properly be based upon both the licensing concept and the need to protect the vulnerable. In today's complex society, individuals are frequently placed in vulnerable situations. An individual often does not and cannot have the requisite knowledge or training to determine what may be safe and what is dangerous. The protection of all, and particularly the vulnerable, by regulation requires that government agencies be authorized to inspect premises and to review books and records. Those who enter a regulated

field must be aware of those regulations. By entering that field they have accepted that their business will be regulated. With all of that stated and accepted, there still remains some measure of privacy in commercial documents. They will inevitably reveal aspects of the business that the operator would rather have kept private. In **Baron v. Canada, supra**, it was recognized that although characterizations such as "regulatory" and "criminal" are useful for purposes of Charter analysis, they do not provide a complete answer. What must always be considered are the values which are at stake on the facts of the particular case. Here, it is true that the search was made pursuant to the provisions of a regulatory statute dealing with the highly regulated business; however, a court must still be concerned with the nature of the physical searches of private premises. Obviously, searches of private property are far more intrusive than a demand for production of documents. The greater the intrusion by the searchers into the business premises and private residences, the greater weight should be attached to the provisions of s. 8 of the Charter. Thus, although the privacy interest of an individual in business documents pertaining to a regulated field is relatively low, there remains a very real and significant privacy interest in maintaining the inviolability of residential premises, and to a lesser extent of business premises: **143471 Canada Inc. v. Quebec (Attorney General)**, (S.C.C., May 26, 1994).

The power to make copies of documents specifically mentioned in the provision challenged in this case comes within the ambit of s. 8 of the Charter. In light of the definition given in **R. v. Dyment**, and restated in **Thomson Newspapers** and **R. v. Colarusso**, it is clear that the Act authorizes a "seizure". This power in analogous to that of requiring documents to be produced, which this Court has so characterized, in particular in **Thomson Newspapers** and **R. v. McKinlay Transport Ltd.**: **Comité Paritaire v. Potash**, (S.C.C., June 23, 1994).

The term "*perquisition*" referred to in the French version of s. 8 of the Charter -- "search" in the English version -- is at least in its ordinary sense reserved for investigations of a criminal nature. In the present case, the visit to the premises, which is the foundation of the other powers set out in the second paragraph of s. 22(e) of the challenged Act, is not fortuitous. The legislature itself has recognized its importance, by enacting a separate paragraph for the production of documents. The evidence shows that in the vast majority of cases the inspectors prefer to visit employers and employees rather than require the production of documents, and for good reason. While the inspectors do not have the option of "searching", they can nevertheless examine the work environment and direct the inspection accordingly. From this standpoint, inspections and searches have a common basis: an active quest for the truth. In **Hunter v. Southam Inc.**, [1984] 2 S.C.R. 145, this Court noted that the purpose of s. 8 was to protect the individual's reasonable expectations of privacy from unjustified state intrusion. Despite its less invasive nature, inspection is unquestionably an "intrusion". An arbitrary demarcation line drawn according to the degree of the intrusion, for purposes of determining whether the powers authorizing the state's actions are within the scope of the constitutional guarantee, is not desirable at this stage. The inspection powers set out in the second paragraph of s. 22(e) of the Act may be assimilated to a search within the meaning of s. 8. Naturally, the scope of the constitutional guarantee may vary depending on whether a search or an inspection is involved: **Comité Paritaire v. Potash**, (S.C.C., June 23, 1994).

The federal and provincial legislatures have, in a number of statutes, included powers of inspection similar to those whose validity is challenged by the respondents in the present case. These statutes deal with areas as diverse as health, safety, the environment, taxation and labour. The common thread is found in their

underlying purpose: harmonizing social relations by requiring observance of standards reflecting the sometimes delicate balance between individual rights and the interests of society. Inspection -- or the threat of it -- especially if it is done without notice, is a practical means of encouraging such observance. This Court has pointed out on several occasions that the scope of a constitutional guarantee, like the balancing of the collective and individual rights underlying it, varies with the context. In a context in which their occupations are extensively regulated by the state, the reasonable expectations of privacy employers may have with respect to documents whose content is specifically provided for by the Act, or the premises where an activity subject to specific standards is conducted, are considerably lower. It is thus impossible, without further qualification, to apply the strict guarantees set out in **Hunter v. Southam Inc.** which were developed in a very different context. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statutes incidentally provide for offences, they are enacted primarily to encourage compliance. It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. The same is true when the enforcement is prompted by a complaint. A complaint system is a practical means not only of checking whether contraventions of the legislation have occurred but also of deterring them. In view of the important purpose of regulatory legislation, the need for powers of inspection, and the lower expectations of privacy, a proper balance between the interests of society and the rights of individuals does not require, in addition to the legislative authority, a system of prior authorization. Of course the particular limits placed on the inspection scheme must, so far as possible, protect the right to privacy of the individuals affected. What matters, in the end, is that the powers of inspection are sufficiently circumscribed to attain their purpose; here they are so circumscribed by the nature of the persons affected: the employer and employee. It is worth mentioning that the Act does not authorize inspectors to force an entry if the employer refuses to admit them. They can only bring proceedings for obstruction: the recalcitrant employer, like the respondents, will then be ordered to pay a fine: **Comité Paritaire v. Potash**, (S.C.C., June 23, 1994).

Section 24(1)

There is no onus on an applicant for an interlocutory stay or impounding order to show that granting the stay or impounding order forwards the public interest. The discussion in **RJR -- Macdonald, supra**, does not hold that in all cases an applicant for a stay must show that granting such an order is in the public interest. As a general rule all an applicant need show is that the public interest is not hurt by the order. What that passage considers is the situation where an applicant argues not only that its own private interest but also the public interest will be hurt by the refusal of a stay. In those circumstances, the private applicant has a higher threshold than the government respondent to establish that the public interest is served by its position: **143471 Canada Inc. v. Quebec (Attorney General)**, (S.C.C., May 26, 1994).

Section 32(1)

In this case the appellants submit that the respondent, as a Crown counsel with the Ministry of the Attorney General, was a governmental actor at all times and that his action to recover damages in respect of defamatory statements made about the discharge of his public duties was therefore governmental action. They argue that a lawsuit brought by a public official to vindicate his or her reputation as a public official has the same purpose and effect as if the action was brought by the government itself. They argue that the

trial judge erred in refusing to permit them to introduce evidence that the Ministry of the Attorney General had agreed to pay the respondent's legal fees for the libel action. Government funding, they suggest, is strong evidence that the respondent's action was governmental action. This Court does not accept these submissions. The Charter does not apply to the facts of this case because the respondent's actions in pursuing litigation were the actions of a private individual that do not constitute legislative or governmental action so as to attract Charter scrutiny. What is at issue in this proceeding is the impact of the defamatory statements upon the respondent's personal reputation, not the reputation of the Ministry of the Attorney General or that of the Government of Ontario. The fact that he was employed by the Attorney General of Ontario and the defamatory statements related to an act he purportedly carried out in the scope of his employment does not change the nature of the redress he sought. Further, the payment of his legal fees by the government does not effect a change in his constitutional status or somehow convert his lawsuit into an act of government. In **McKinney, supra**, the dependency of the universities upon government funding to finance their activities, including, presumably, their legal costs in defending the challenge to their mandatory retirement policies, was viewed as neither relevant nor determinative. The test was whether the universities formed part of the government apparatus and whether they were implementing government policy in establishing mandatory retirement. The respondent's libel action cannot be characterized as an implementation of government policy: **Church of Scientology of Toronto v. Hill**, (Ont. C.A., May 10, 1994).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - May 1994

Section 7

The rule requiring that an accused automatically be given access to the sealed packet is based upon the fact that, as part of the right to make full answer and defence, the accused has the right to be given the opportunity to challenge the admissibility of evidence tendered by the Crown. In order to protect the public interest in law enforcement, and in particular the interest in protecting the identity of informers and the confidentiality of investigative techniques, a judge may edit a wiretap affidavit before providing it to the accused. The interests of law enforcement are adequately served if the judge considers the factors set out in **R. v. Parmar, supra**, and approved of in **Garofoli, supra**, before disclosing the contents of an affidavit to the accused. During the editing process, the judge must strike a balance between the competing interests of law enforcement on the one hand, and the right of the accused to make full answer and defence on the other. Editing is to be kept to a minimum. The present case provides a convenient opportunity to add that the need for editing should not be presumed. When determining whether the contents of wiretap affidavits should be disclosed to an accused, full disclosure should be the rule, subject only to certain exceptions based upon overriding public interests which may justify non-disclosure. The affidavits should only be edited to the extent necessary to protect those overriding public interests. Here, the record clearly shows that the trial judge edited the affidavits before him more extensively than was necessary to protect the public interest. Non-disclosure can only be justified on the basis that disclosure will prejudice the interests of informants, innocent persons or the law enforcement authorities and that such prejudice overbears the interests of the accused. Trial judges must be granted some discretion to determine what editing is required to ensure that the public interest is protected. However, that discretion does not include the power to edit material whose continued confidentiality clearly is not justified by any of the public interest concerns identified in **Parmar**. By showing that the trial judge excised a substantial amount of material whose continued confidentiality could not be justified, the appellants have established, **prima facie**, that their ability to make full answer and defence was prejudiced in that they were denied the opportunity to conduct a full inquiry into the validity of the seven wiretap authorizations challenged before the trial judge. The appellants should not be required to demonstrate the specific use to which they might put information which they have not even seen. The respondent has not been able to satisfy me that no prejudice occurred and an appellate court which does not have the benefit of access to counsel's brief cannot be expected to speculate in these circumstances. The respondent takes the position that there is no need to consider the excised portions of the affidavit if the authorization can be supported exclusively on the basis of the affidavit as edited. However, this submission ignores the fact that the material contained in the excised material may be used to impugn the contents of the portions of the affidavit which have been disclosed. In the absence of overriding policy concerns which justified confidentiality, the appellants were entitled to have the opportunity to use the deleted material in this fashion: **R. v. Durette**, (S.C.C., March 17, 1994).

In this case the respondent argues that s. 7(3.71) and s. 7(3.765) of the **Criminal Code** violate the principle that there must be no crime or punishment except in accordance with fixed, predetermined law.

Specifically, the respondent argues that the state of international law prior to 1944 was such that it could not provide fair notice to the accused of the consequences of breaching the still evolving international law offences. It is not fatal that a particular legislative term is open to varying interpretations by courts. The fact that the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it does not in itself make the legislation vague or uncertain. This material is often helpful in determining the proper interpretations to be given to a statute. Further, the fact that there may be differences of opinion among international law experts does not necessarily make the legislation vague. It is ultimately for the court to determine the interpretation that is to be given to a statute. That questions of law and of fact arise in the interpretation of these provisions and their application in specific circumstances does not render them vague or uncertain: **R. v. Finta**, (S.C.C., March 24, 1994).

There is no statutory or common law rule that supports the proposition that all defences are applicable to all offences. In **R. v. Bernard**, [1988] 2 S.C.R. 833, a majority of this Court agreed that the removal of a particular defence does not violate the principles of fundamental justice in s. 7 of the Charter even when that defence, drunkenness, arguably concerns the existence of **mens rea**. This is particularly the case where the exculpatory defence would undermine the entire purpose of an offence; for example, the defence of drunkenness cannot be used as a defence to impaired driving because it constitutes the very nature of the offence, **R. v. Penno**, [1990] 2 S.C.R. 865. Less controversially, justifications and excuses are commonly restricted in their application, and there is no suggestion that this violates the principles of fundamental justice. For example, s. 14 of the **Code** prevents the operation of the defence of consent in relation to offences of causing death. The whole rationale for limits on individual responsibility for war crimes and crimes against humanity is that there are higher responsibilities than simple observance of national law. That a law of a country authorizes some sort of clearly inhumane conduct cannot be allowed to be a defence: **R. v. Finta**, (S.C.C., March 24, 1994).

If the common law doctrine of abuse of process was properly invoked in this case, the only remedy available to the trial judge was a stay of proceedings. Historically, the focus of that doctrine has been on the integrity of the court's process, rather than on providing a "remedy" to the accused. The focus of the Charter, on the other hand, is on the rights of the individual. While it may be difficult to imagine an abuse of process which would not at the same time involve a breach of one or more of the legal rights guaranteed in ss. 7 through 14 of the Charter, it does not follow that every breach of such a right will necessarily amount to an abuse of process. The right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. It is not itself a constitutionally protected right. What this means is that while the Crown has an obligation to disclose, and the accused has a right to all that which the Crown is obligated to disclose, a simple breach of the accused's right to such disclosure does not, in and of itself, constitute a violation of the Charter such as to entitle a remedy under s. 24(1). This flows from the fact that the non-disclosure of information which ought to have been disclosed because it was relevant, in the sense there was a *reasonable possibility* it could assist the accused in making full answer and defence, will not amount to a violation of the accused's s. 7 right unless the accused establishes that the non-disclosure *has probably* prejudiced or had an adverse effect on his or her ability to make full answer and defence. It follows that mere failure by the Crown to make all relevant disclosure before the trial actually begins is unlikely, in itself, to result in a constitutional remedy. It is only where the non-disclosure, even at that stage in the proceedings, can be shown to be material to the ability of the accused to make full and answer and defence that a remedy will be available under s. 24(1) of the Charter. A

material non-disclosure, without more, can never amount to an abuse of process. Such breaches of s. 7 of the Charter, whether the result of inadvertence or a determined view that the information in question is subject to the discretion not to disclose, will lead to a remedy under s. 24(1). If the resulting interference with the ability of the accused to make full answer and defence is merely transitory in nature - i.e., curable - the remedy will be something short of a stay of proceedings. If, on the other hand, the adverse effect on the ability of the accused to make full answer and defence cannot be remedied, a stay must be ordered under s. 24(1). It is only in those cases in which the interference with the right to make full answer and defence results from a non-disclosure that can be said to be motivated by an intention on the part of the Crown to deprive the accused of a fair trial that an abuse of process arises. Such a motivation may be inferred, in the absence of evidence to the contrary, when there is no arguable case to be made for any discretion to withhold disclosure and the relevance of the information withheld is so readily and obviously apparent as to make its materiality a virtual certainty. When a non-disclosure meets these tests, it then becomes clear that the integrity of the court's process is at risk and the proceedings must be brought to an end: **R. v. O'Connor**, (B.C.C.A., March 30, 1994).

The absence of any reference to a mental element in a **Criminal Code** provision enacting an offence is not a sufficient basis for a declaration of vagueness within the meaning of s. 7 of the Charter. As presently drafted, many **Criminal Code** provisions do not refer explicitly to any or all of the requisite fault elements. The courts, applying established common law principles to the language used by Parliament, must determine appropriate fault requirements. The interpretative contribution of the courts must be taken into account when deciding whether a statutory provision is unconstitutionally vague. Indeed, vagueness is tested by the court's ability to interpret statutory language within the framework of acceptable legal analysis and debate. In the present case, the trial judge did not base her decision solely on the absence of a specified fault requirement in the wording of s. 121(1)(c) of the **Code**. Rather, she relied mostly on the overbreadth of the proscribed conduct, which she viewed as unconstitutionally vague even with the inclusion of the mental element previously identified by this court. The trial judge erred in concluding that s. 121(1)(c) was unconstitutionally vague on that basis. The fact that citizens would be surprised to find how broadly the net has been cast by Parliament in criminalizing corruption in the public service does not mean that the law is broad to the point of vagueness. Overbreadth has no autonomous status under the Charter. In Canadian law, it is merely a component of the doctrine of vagueness, which ranks as a principle of fundamental justice: **R. v. Fisher**, (Ont. C.A., February 24, 1994).

Where the state has undertaken investigations of alleged criminal conduct, the state has a responsibility to ensure that all of its investigative arms having pertinent materials should make those materials available to the accused. Here, the provincial Crown acknowledges that there has been an investigation by the military police and does not deny that the results of the investigation may be essential to the ability of the accused to make full answer and defence to the charges. It merely states that it, the Crown prosecutor, cannot compel the military police to disclose the results of their investigation. However, there is a duty on the Crown to make full disclosure and accordingly the Crown has a duty to obtain from the police - and the police have a corresponding duty to provide to the Crown - all relevant information and material concerning the case. The military police had an obligation to provide to the prosecutor the pertinent information from their investigation or to face the consequences that flow from the lack of such disclosure. The Crown's position that the accused has received everything in Crown counsel's file does not necessarily mean that adequate disclosure has been made. **Stinchcombe** disclosure must be made not only of the

prosecutor's file, but of the state investigative agencies' files. It is the state that has the obligation of disclosure, not the prosecutor: **R. v. Spurgeon**, (Alta. Q.B., February 16, 1994).

This Court has great difficulty with a proposition that would bring a government policy decision concerning the use of nuclear power within the scope of s. 7. The government decided to develop atomic energy for peaceful purposes, one being to generate electricity by the use of nuclear power. The government was well aware of the inherent risks but, in its wisdom, proceeded with fostering the development of nuclear reactors by enacting the **Nuclear Liability Act** to deal with the economic consequences of the known risks to the public. Those policy decisions cannot invoke s. 7 security. Further, the plaintiffs have failed to prove that there is a greater risk to the public of producing electricity by nuclear power than by alternate methods. It is not sufficient for the plaintiffs to allege that there are greater possible consequences to the security of the person because of the **Act**. As Dickson J. stated in **Operation Dismantle**: "Section 7 of the Charter cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action": **Energy Probe v. A.G. Canada**, (Ont. Gen. Div., March 23, 1994).

Section 11(i)

Subsequent to the appellant's conviction and sentencing, the mandatory firearms prohibition provisions of the **Criminal Code** were amended to permit the sentencing judge to exercise a discretion against imposing the prohibition order. The appellant argued that s. 11(i) of the Charter entitled him to the benefit of the new regime. However, s. 11(i) applies only to sentencing at the trial level and has no application to a review of the sentence on appeal. In **R. v. Potvin**, [1993] 2 S.C.R. 880, Sopinka J. expressed the view albeit in **obiter dicta**, that most of the rights provided for in s. 11 of the Charter did not apply to appellate proceedings: **R. v. Luke**, (Ont. C.A., February 4, 1994).

Section 24(1)

As indicated in **Metropolitan Stores, supra**, the three-part **American Cyanamid** test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases. At the first stage, an applicant for interlocutory relief must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the **Metropolitan Stores** test. At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its

magnitude. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm. The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the pubic interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit. As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter: **R.J.R.-Macdonald Inc. v. Canada (Attorney General)**, (S.C.C., March 3, 1994).

The Supreme Court of Canada settled the controversial question of the power of administrative tribunals to consider and pronounce authoritatively on the constitutional validity of a legislative provision enacted by Parliament in **Douglas College**, **Cuddy Chicks Ltd.**, and **Tétreault-Gadoury**. A twofold proposition was adopted and acted upon by the majority of the Court as follows. The power of an administrative tribunal to refuse to apply a law of Parliament on the basis that such law would appear to it to be in violation of the Constitution has to be found in the statute that presided over the creation of that tribunal and determined its mandate; however, the intention of Parliament to confer this special power on the tribunal being set up does not need to be spelled out in express terms, it can be inferred from the extent of the mandate assigned to the tribunal and particularly from a requirement formally made to it that it deals with all questions of law necessary to fulfil its duties. The terms used in the **Canadian Human Rights Act** contain nothing that could even remotely suggest an intention on the part of Parliament of allowing the Human Rights Commission -- whose role is purely administrative -- or the Human Rights tribunals -- which do not have to be presided by people trained in law and whose mandate is strictly "to inquire into the complaint" to dispute the constitutional validity of legislative provisions governing their activity. It can even be said, in the case of the particular provision in question in this case, that the wording of the statute indicates the exact contrary: for the Commission to hold to be discriminatory and subject to its sanction a practice that Parliament has formally declared non-discriminatory and outside the ambit of the mandate given to it, would be for the tribunal to go directly against the will of Parliament. To pretend that Parliament still intended to make its pronouncement subject to some value judgment by the Commission or its tribunal appears totally untenable: **Cooper v. Canadian Human Rights Commission**, (F.C.A., February 25, 1994).

Section 32(1)

In this case the trial judge concluded that the Charter applied to the interrogation of the accused by U.S. Marshals in the United States, and that statements obtained from the accused on that occasion should be excluded from evidence pursuant to s 24(2). However, to apply the Charter to this case would imply that the U.S. law enforcement officers were subject to the authority of one of the branches of the government of Canada when carrying out their duties. Clearly they were not. The writs of Parliament and the provincial legislatures do not extend beyond the borders except where so provided by treaty or nation-to-nation agreement or under generally accepted principles of international law. On its very wording, the Charter is directed towards ensuring to persons within Canada the rights and freedoms therein enshrined. Since the writ of a Canadian court is subject to the same territorial limitation as the writs of Parliament and the legislatures, it follows that the power of the court can only be exercised in favour of persons within Canada. It follows also that, except in the rare instances described by the Supreme Court in **R. v. Finta**, a Canadian court can only apply the law of Canada to an event which occurred in Canada. Nevertheless, there may well be cases where, on the particular facts, a Canadian court would exercise the common law power to exclude evidence obtained in a foreign jurisdiction in conscious disregard of guaranteed Charter rights and freedoms. Where, for example, the evidence was obtained in person by a Canadian law enforcement officer, or by a foreign law enforcement officer acting under the express direction of a Canadian (the agency thesis). It is conceivable that a successful argument might be mounted to the effect that, even though the Charter did not apply, disregard of the Charter requirements at issue constituted egregious conduct. Those are matters which need not be decided in this case but they illustrate that, apart from the Charter, the courts are not powerless to remedy or accused persons to defend: **R. v. Harrer**, (B.C.C.A., April 25, 1994).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - March 1994

Section 4

Alberta legislation allows a matter of business which is before a municipal council prior to an election to survive the holding of a general election. This is in direct contrast to matters which are before the Provincial Legislature or the House of Commons, where matters of business before those two bodies die on the order paper once a general election is called. A second effect of the Alberta legislation is to allow new members of a municipal council to consider matters of business which were before council prior to their election. It is common ground that in this case three of the Aldermen who voted on the challenged by-law were not aldermen at the time the council held the required hearing on the by-law in June 1992. Thus, the effect of the provincial legislation is that the municipal council is a continuing body and is not a body that has a definite life. It is this position that the Applicants allege is contrary to s. 4(1) of the Charter. It is the Applicants' position that the words "legislative assembly" are broad enough to include municipal councils which carry on legislative functions delegated to them by the legislature of each province. However, municipal councils are not "legislative assemblies", but are in fact creatures of provincial legislatures. Further, a municipal corporation by its very nature must be a continuing body notwithstanding that the membership of the council of same may change from time to time. Regardless of that fact, the business of the corporation must be a continuing matter. Accordingly, the attack on the validity of the by-law on the basis of a violation of the Charter is without merit: **Atkins et al. v. City of Calgary**, (Alta. Q.B., January 21, 1994).

Section 6(2)

The right to pursue the gaining of a livelihood in any province is not absolute. It does not mean that one may engage in work for which he or she is not qualified. It must be subject to reasonable legislative restrictions enacted to ensure that certain professions, trades and other activities are engaged in only by those who meet minimum standards of education or proficiency: **O'Neill v. Law Society of New Brunswick**, (N.B.Q.B., October 25, 1993).

Section 7

The accused's rights to a fair trial and to cross-examine are protected by the common law and given constitutional sanctity by ss. 7 and 11(d) of the Charter. However in the context of sexual assault the rights of the complainant cannot be completely overlooked. The provisions of s. 15 and s. 28 of the Charter guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant. It is only right that reasonable limitations be placed upon such cross-examination. A

complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system. Yet a fair balance must be achieved so that the limitations on the cross-examination of complainants in sexual assault cases do not interfere with the right of the accused to a fair trial. The reasons in **Seaboyer** make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper. Here, some 100 pages of medical records were place before the court in order to determine the complainant's reliability to testify under oath. There has been no submission made that the medical records were improperly before the court. Once the medical records were properly admitted, then it was open to the defence to cross-examine upon them in appropriate circumstances. It is true that the privacy of the complainant is an interest that merits protection as does the need for a relationship of confidence between a patient and her psychiatrist. However, that right to privacy must be balanced against the need to provide a fair trial for the accused and to avoid a miscarriage of justice. Once the medical reports were properly admitted, then in order to ensure a fair trial, cross-examination upon them within the guidelines set out earlier should have been permitted: **R. v. Osolin**, (S.C.C., December 16, 1993).

In this case, although disclosure of the information contained in the victim's impact statement ought to have been made earlier, counsel for the accused failed to bring this to the attention of the trial judge at the earliest opportunity as required. In **R. v. Stinchcombe, supra**, in referring to this obligation, we stated: "Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered". The trial judge was still seized of the trial and had the discretion to reopen the trial proceedings or to order a mistrial. Counsel not only did not seek to bring the matter to the attention of the trial judge but made a tactical decision not to have the information disclosed in the sentencing proceedings. In these circumstances, a new trial ought not to have been ordered on this ground: **R. v. McAnespie**, (S.C.C., December 10, 1993).

The present case can be distinguished from **Cruikshanks, supra**. This is not a case where the National Parole Board was purporting to make an order which caused a parolee's Charter rights to be violated. Instead, this case is about the Board's election to rely on evidence which may have been obtained in breach of those rights. In **Cruikshanks** the evidence did not exist prior to the illegal search and in that sense it had a self-incriminatory aspect. However, where physical evidence is in existence prior to any Charter breach, the consideration of that evidence by the Board would not bring the administration of justice into disrepute, notwithstanding that the search that produced the evidence contravened the parolee's rights. This must be especially true in the context of this case where the Board is directed by statute that the protection of society is to be its paramount consideration and that it must consider all available evidence that is relevant to the case: **Mooring v. Canada (National Parole Board)**, (B.C.S.C., June 28, 1993).

The thrust of the reasoning applicable to s. 2(d) of the Charter adopted in earlier decisions of this Court to determine the scope of freedom of association as it related to the right of union members to strike applies as well to the determination of the right to liberty under s. 7 for the same purpose. This approach completely defeats the general argument of the appellant for holding the back-to-work provisions of the **Maintenance of Ports Operations Act, 1986** invalid under s. 7: **International Longshoremen's and Warehousemen's Union et al. v. The Queen**, (S.C.C., January 31, 1994).

A statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the Charter provides that the Charter applies to the legislature and government of each province. The remedy section of the Charter would be emasculated if the provincial government, as one of the very powers the Charter seeks to control, could declare itself immune. Therefore, s. 5(6) of the Ontario **Proceedings Against the Crown Act** must be construed as limited to the causes of action that are permitted against the Crown under s. 5(1) of that **Act**, and cannot infringe upon a s. 24(1) Charter remedy. The next issue to consider is, if absolute immunity from Charter relief cannot be afforded by less that constitutional enactments, can immunity be imposed after a period of time as set out in s. 11 of the **Public Authorities Protection Act**? In the context of the Charter, limitation periods are very different from the rules of procedure which effect a dismissal for failure to meet time requirements. First and foremost, the rules are subject to the discretion of the court, whereas the statute is not. In practice, a meritorious claim will be permitted to proceed, perhaps on terms, despite a breach of the rules. In **M. (K.) v. M. (H.)**, [1992] 3 S.C.R. 6, La Forest J. describes the historic purposes of limitation periods as providing a time when prospective defendants can be secure that they will not be held to account for ancient obligations, foreclosing claims based on stale evidence, permitting destruction of documents, and assuring that plaintiffs do not sleep on their rights. Those purposes are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint. Having found that immunity is not available under the **Proceedings Against the Crown Act** from a claim for Charter remedy, it therefore follows that s. 11 of the **Public Authorities Protection Act** should be read as not applying to relief claimed under s. 24(1) of the Charter: **Prete v. Ontario**, (Ont. C.A., November 25, 1993).

Section 8

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. That physical integrity, including bodily fluids, ranks high among the matters receiving constitutional protection, there is no doubt. Moreover, hospitals have been identified as specific areas of concern in the protection of privacy, given the vulnerability of individuals seeking medical treatment. When a bodily fluid sample ends up being used by the police in a criminal prosecution, even when the sample was initially extracted for medical purposes in the absence of the police, the Court must focus on the actions of the police because s. 8 guarantees protection against the actions of the state or state actors, a protection that is particularly strict in relation to law enforcement activities. The fact that the sample in this case may have initially been properly seized by the coroner is relevant, but this does not necessarily preclude a finding that the police may also have seized the sample or that the subsequent appropriation of the evidence for use in a criminal prosecution may make the seizure unreasonable. The essence of a seizure under s. 8 of the Charter is the taking of something from a person by a public authority without that person's consent. It is clear that the "taking" of a bodily fluid sample need not be directly from the person whose rights are affected (and from whom the sample originated), or even from the medical staff who extracted the sample, in order to constitute a seizure sufficient to invoke the protection of s. 8. The protection of s. 8 necessarily extends to a state seizure where the "taking" is from the immediate possession of another person who is lawfully in possession of the bodily sample. In the present case, it

is apparent that the coroner gave the police physical possession of the blood and urine samples for the purpose of transporting the samples to the lab. It is evident, however, that the officers who transported the blood and urine samples knew of the potential incriminatory nature of the samples and intended to use the results of the analysis for their own purposes at the outset. Given the effective control by the police over the samples held by another agent of the state, I would conclude that the police seized the blood sample from the appellant independently of the coroner's seizure. It is readily apparent that the actions of the police violated the right of the appellant to be secure against unreasonable seizures. I can see no basis for holding that, at least in relation to the use of evidence for criminal law purposes, the reasonable expectation of privacy in one's own bodily fluids guaranteed by s. 8 of the Charter is diminished merely because a coroner chooses to exercise his or her power to seize evidence under s. 16(2) of the **Coroners Act**. As such, the intervention by the coroner does not alter the fact that the police must comply with the **Hunter v. Southam Inc.** requirement of prior judicial authorization before seizing a bodily fluid sample which was initially taken from an impaired driving suspect for medical purposes. There is another way to establish an unreasonable seizure by the state in the present circumstances. If the coroner's power to seize under s. 16(2) of the **Coroners Act** is constitutionally valid, it must be on the basis that the coroner's seizure is "reasonable". The arguments advanced by the Crown seeking to establish the reasonableness of warrantless seizures by a coroner rely on the underlying premise that the coroner fulfils an essential non-criminal role. The state cannot, however, have it both ways; it cannot be argued that the coroner's seizure is reasonable because it is independent of the criminal law enforcement arm of the state while the state is at the same time attempting to introduce into criminal proceedings the very evidence seized by the coroner. It follows logically that a seizure by a coroner will only be reasonable while the evidence is used for the purpose for which it was seized, namely, for determining whether an inquest into the death of the individual is warranted. Once the evidence has been appropriated by the criminal law enforcement arm of the state for use in criminal proceedings, there is no foundation on which to argue that the coroner's seizure continues to be reasonable: **R. v. Colarusso**, (S.C.C., January 26, 1994).

Having regard to the fact that a coroner's inquest fulfils an important non-criminal function, and some measure of investigatory powers is necessary to enable a coroner to fulfil his or her duties adequately, I am prepared to accept that a lower standard than the **Hunter v. Southam Inc.** requirement of prior judicial authorization may be acceptable for seizures undertaken by a coroner for valid purposes. At the same time, however, the right of an accused to be free from unreasonable search and seizure under s. 8 of the Charter should not be forfeited merely because a coroner chooses to exercise his or her discretion to seize bodily fluids obtained from the accused for the purpose of investigating whether an inquest is necessary. In other words, I do not believe that the criminal law enforcement arm of the state should be able to "piggy-back" the coroner's investigation and appropriate evidence obtained by a coroner under s. 16 of the **Coroners Act**. While a coroner may be able to seize evidence without prior judicial authorization, the criminal law enforcement arm of the state must continue to comply with the **Hunter** requirements throughout its investigation. The investigation of the coroner must remain separate from any police investigation, and the legislative scheme must prevent the type of interaction between the coroner and the state that existed in the present case: **R. v. Colarusso**, (S.C.C., January 26, 1994).

Section 10(b)

The determination of whether or not a young person validly waived his or her s. 10(b) Charter right to counsel is not to be based simply on what the police told the young person, but upon the young person's actual awareness of the consequences of his or her actions. The police need not advise an accused as a matter of course of the maximum penalty he or she might face. The phenomenal difference in potential consequences faced by the young person in youth court as opposed to adult court, however, mandates that a young person be aware of the possibility (where it exists) that he or she will be elevated to adult court, and the potential result of this in terms of stigma and penalty. The particular characteristics of young offenders make extra precautions necessary in affording them the full protection of their Charter rights: **R. v. I.(L.R.) and T.(E.)**, (S.C.C., December 16, 1993).

If an accused person makes an utterance to or in the presence of the officer who has informed or is informing such person of his right to counsel under s. 10(b) which indicates to the informing officer that the person does not understand that he has the right to consult counsel in privacy or indicates that he is concerned about whether he has such a right, or that, if he knows that he has such a right, he is concerned about whether privacy will be given to him, then there is an obligation on the instructing officer to advise him of his right to privacy and that privacy will be given to him when consulting a lawyer. The failure to give such advice or explanation constitutes a breach of the rights of a detained or arrested person under s. 10(b). In the case at bar, the telephone and telephone book were offered to the respondent at the desk near which both he and the officer were seated and the officer made no move to indicate he would leave during the telephone call nor did he tell the respondent he would do so. In those circumstances, not only was it reasonable for the respondent to believe that he was not being given the right to consult a lawyer in private, but the arresting officer should reasonably have appreciated that a person in the position of the respondent might reasonably believe that he would not be able to make his telephone call in private. Where the circumstances surrounding the giving of information to an accused person with respect to his rights under s. 10(b) are such as to lead him to reasonably believe that he does not have the right to retain and instruct counsel in private or will not be given such right and where such circumstances are known or ought to be known to the person giving the information and he knows or ought to know the effect such circumstances may reasonably have on the accused, there is a duty on the informing officer to explain to the accused that he has such right to privacy and that it will be given to him. The failure to give such explanation constitutes a breach of the Charter right of the accused: **R. v. Jackson**, (Ont. C.A., October 25, 1993).

Section 11(d)

All criminal defences must meet a threshold requirement of sufficient evidence, or in other words, an air of reality, before the trial judge should leave them with a jury. This does not violate the presumption of innocence. This Court has earlier had occasion to consider whether such a requirement places an unacceptable reverse onus of proof on the accused. For example, in **Perka v. The Queen**, [1984] 2 S.C.R. 232, Dickson J. discussed this issue in relation to the defence of necessity: "Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused

places before the Court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused." The distinction between a burden of proof with regard to an offence or an element of the offence, and an evidentiary burden is critical. It must be remembered that the accused only bears the evidentiary burden of raising the issue of mistake, and in fact, only bears that burden if sufficient evidence has not already been raised by the prosecution's case. Section 265(4) of the **Criminal Code** does not create a statutory presumption. The accused seeking to raise the defence of mistaken belief only bears a tactical evidentiary burden. Section 265(4) leaves the burden on the Crown in regard to all the essential elements of the offence. The prosecution must prove both the **mens rea** and the **actus rea** beyond a reasonable doubt: that the accused engaged in sexual intercourse with a woman who was not consenting, and that he intended to engage in sexual intercourse without the consent of the woman. It is always open to the jury even without the defence of mistake of fact as to consent to find that there was a reasonable doubt as to the accused's **mens rea** and acquit. The mere fact of the air of reality requirement does not displace the presumption of innocence: **R. v. Osolin**, (S.C.C., December 16, 1993).

Section 11(f)

It is a basic tenet of the jury system that the jury decides issues of fact while the judge determines questions of law. Whether there is sufficient evidence to determine if an issue has been properly raised is a question of law, and therefore is properly in the domain of the judge. The requirement that there be an air of reality to the defence of mistaken belief in consent set out in s. 265(4) of the **Criminal Code** is reasonable and entirely valid. It is no more than a reaffirmation of an integral part of the judge's role in supervising a jury trial. The trial judge must determine questions of law such as the relevance and admissibility of evidence and the competence and compellability of witnesses. In doing so the trial judge cannot be accused of usurping the role of the jury or violating the accused's rights. Similarly it is appropriate that the judge determine if there is sufficient evidence to raise the defence of mistaken belief in consent. In considering the evidence giving rise to the air of reality, it must be remembered that the trial judge is not weighing the evidence, but is simply examining it to determine what defences are available. Here, the appellant was provided with a trial jury. The only elements of the trial that were decided by the trial judge were those things properly within his realm, namely those issues pertaining to trial process and questions of law. There is consequently no violation of the appellant's right to a trial by jury: **R. v. Osolin**, (S.C.C., December 16, 1993).

Section 24(1)

The latest authority on hearing Charter challenges for the first time on appeal is **R. v. Brown** (1993), 155 N.R. 225 (S.C.C.). It appears to lay down two hurdles to raising such Charter issues for the first time on appeal. In the first place, the Charter issue must not be an issue which the defence could have raised at trial and chose not to. In **Brown**, it was shown that the law had radically reversed itself after the trial. At the time of the **Brown** trial, there was clear Supreme Court of Canada authority allowing the police to do just what they did. That is far from the case here. The second hurdle in **Brown** is that the necessary evidence to rule on the Charter issue must be before the court. In **Brown**, it was held that there was overwhelming evidence of the police's Charter breach, and that the evidence was unequivocal.

Again, the situation is the opposite here. Therefore this appellant gets over neither of the hurdles in **Brown**. This is a "second shot" and one which the Crown might well have been able to resist at trial, especially with a chance to call evidence: **R. v. Fertal**, (Alta. C.A., October 19, 1993).

This Court is not persuaded that the majority view expressed in **Therens, supra**, as to the interrelationship between ss. 24(1) and 24(2) of the Charter is that exclusion of evidence may only be effected through s. 24(2) of the Charter, and not through s. 24(1). Thus, the remedy of exclusion where the evidence was not obtained through a breach of a Charter right but the use to be made of it may infringe one may, possibly, be available. Shaw J. in **R. v. Spyker** (1990), 63 C.C.C. (3d) 125 (B.C.S.C.) reached the conclusion that he could exclude evidence under s. 24(1) of the Charter and did so. However, it is not necessary to decide this interesting question in this case, since to exclude the evidence would, in all the circumstances, bring the administration of justice into disrepute and would thus not be an appropriate remedy under s. 24(1): **R. v. Letourneau**, (B.C.C.A., February 10, 1994).

The respondents brought this application in the provincial superior court for a declaration that they had been discriminated against by the Attorney General of Canada and the band council of the Indian band of which they were members. The issue relates not to whether the legislation under which the appellants functioned infringed the respondents' Charter rights, but whether the **manner** in which they functioned under that legislation did so. The question is whether in such circumstances this amounts to a constitutional issue over which the superior court has jurisdiction in the face of s. 18 of the **Federal Court Act**. Strong policy considerations exist for answering this question in the negative. The Charter grounds involved in attacking proceedings of a federal tribunal are often closely related to standard administrative law arguments clearly within the jurisdiction of the Federal Court. The activities of federal agencies pursuant to federal law - as distinct from the law itself - are clearly matters which can be scrutinized under the Charter only by a court which is otherwise one of competent jurisdiction within the meaning of s. 24(1) of the Charter. The provincial superior court is not such a court: **Mousseau v. Canada (Attorney General)**, (N.S.C.A., September 29, 1993).

Section 24(2)

If a statement is followed by a further statement which in and of itself involves no Charter breach, its admissibility will be resolved under s. 24(2) of the Charter. This provides that evidence "obtained in a manner that infringed or denied any rights or freedoms guaranteed" by the Charter is inadmissible if its admission would bring the administration of justice into disrepute. This language has been interpreted to apply irrespective of any causal relationship between the breach and the obtaining of the evidence provided that there is a sufficient temporal relationship between the evidence and the breach. While the presence of a causative relationship may be relevant, particularly on the issue of remoteness referred to by Le Dain J. in **Therens** and on the question of whether admission would bring the administration of justice into disrepute, it is not a requirement in order to trigger a s. 24 analysis. In this case, the second statement must be excluded. No only was there a close temporal relationship between the statements, but the second statement was a continuation of the first, and the first statement was a substantial factor leading to the making of the second. The statements were taken less than a day apart by the same officer. There is no evidence that the police in the interval between the two statements had gathered

further evidence tending to incriminate the accused to which the accused might be asked to respond. In essence, the accused, having started a statement, asked to complete it and did: **R. v. I.(L.R.) and T.(E.)**, (S.C.C., December 16, 1993).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - January 1994

Section 1

In this case, the appellant's Charter arguments did not consider the importance of viewing s. 63 of the **Income Tax Act** as a complete response to child care expenses. One effect of this approach is that the appellant's arguments were presented in a curious isolation. We were invited to consider the Charter only with respect to self-employed women, and it was suggested to us that a remedy could be granted, without the need to consider the position of other women, other parents, or the government's overall response to child care needs. Instead of focusing upon the manner in which s. 63 of the **Act** operates as a child care system, the present appeal focused only upon the propriety of an instrumental result. This Court was invited to use the Charter to rectify a disadvantage allegedly suffered by businesswomen **vis à vis** businessmen, and, in the process, this Court was invited to ignore the effect of allowing a complete deduction on the rest of the system. At the s. 1 stage of Charter analysis, however, such an instrumental approach is inappropriate. In order to examine properly the validity of legislative objectives in a case such as the present one, it is important to consider both the operation of the **Income Tax Act** as a whole, and the operation of other government systems relating to child care: **Symes v. Canada**, (S.C.C., December 16, 1993).

The government, of course, bears the burden of proving that a Charter infringement is a reasonable limit, demonstrably justified in a free and democratic society. Although a variety of information was placed before this Court which could be used in a s. 1 analysis (such as the white papers, Hansard, and reports on child care), most of this information was not specifically related to s. 1 of the Charter in any way. Instead, these materials formed a background with respect to the statutory interpretation of the **Income Tax Act**. As noted by this Court in **Schachter v. Canada**, [1992] 2 S.C.R. 679, at p. 695, courts should not be left in a factual vacuum when the legislative objective embodied in an impugned provision falls to be determined: **Symes v. Canada**, (S.C.C., December 16, 1993).

Section 7

At issue in this case is whether the accused's right to a fair trial was infringed by the provisions of s. 486(2.1) of the **Criminal Code**, which allow the testimony of a complainant in certain offences to be given behind a screen. The principles of fundamental justice provided by s. 7 must reflect a diversity of interests, including the rights of an accused, as well as the interests of society. While the objective of the judicial process is the attainment of truth, the principles of fundamental justice require that the criminal process be a fair one. It must enable the trier of fact to get at the truth and properly and fairly dispose of the case while at the same time providing the accused with the opportunity to make a full defence. The main objective pursued by the legislative enactment presently challenged is to better "get at the truth", by recognizing that a young child abuse victim's evidence may, in certain circumstances, be facilitated if the child is able to focus his or her attention on giving testimony, rather than experiencing

difficulties in facing the accused. One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. The recent trend in courts has been to remove barriers to the truth-seeking process. Recent Supreme Court of Canada decisions, by relaxing certain rules of evidence, such as the hearsay rules, the use of videotaped evidence and out of court statements, have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth. Parliament, on the other hand, is free to enact or amend legislation in order to reflect its policies and priorities, taking into account societal values which it considers important at a given time. It is clear that, in enacting s. 486(2.1), Parliament was well aware of the plight of young victims of sexual abuse, as well as the need to curtail such abuse. This is perfectly legitimate: **R. v. Levogiannis**, (S.C.C., November 18, 1993).

The appellant refused, on the advice of counsel, to participate in a traditional police line-up. The police then arranged for the appellant to be videotaped surreptitiously. His three accomplices were also videotaped individually, as were nine other persons who had been recruited for that purpose. Counsel for the appellant objected to the admission of the videotape into evidence. He submitted that once the appellant had refused to participate in a line-up, he could not be conscripted without his knowledge into participating in what was in effect a substitute for the line-up he had rejected. Counsel relied upon **R. v. Leclair**, [1989] 1 S.C.R. 3, for the proposition that there is no legal obligation to participate in a line-up and that where the appellant does so without having had the opportunity to consult with counsel, he is "conscripted against himself since he is used as a means for creating evidence for the purposes of the trial". However, in **R. v. Shortreed** (1990), 54 C.C.C. (3d) 292, this court, after considering **Leclair**, held that the police are not obliged to obtain the consent of the accused before taking his photograph. Facial or bodily features are facts that can be recorded by photographs and the taking of such photographs does not breach the rule against self-incrimination. **R. v. Leclair** is silent on what is to happen in the event that an accused person refuses to cooperate and participate in a line-up. On the authority of **R. v. Marcoux**, [1976] 1 S.C.R. 763, the exhibition of the person of an accused at a line-up for observation by an alleged victim is not itself a violation of the privilege against self-incrimination. Further, the Supreme Court of Canada in **R. v. Hebert, supra**, has confirmed that the privilege against self-incrimination is a limited right which applies only at trial rather than during any pretrial investigation: **R. v. Parsons**, (Ont. C.A., August 26, 1993).

The breach of the right to make full answer and defence arises when the Crown fails to disclose what it knows, not when the Crown calls a witness. On the facts of this case, the breach was self-evident from the material that was disclosed. Just as it is undeniable that the Crown failed to disclose all that it knew, it is equally undeniable that the defence counsel knew of the failure at once. On those facts, the duty then fell upon the accused promptly to secure a judicial review of the Charter breach. The accused can ask for review of a Charter breach within a reasonable time after discovering the apparent breach. He need not wait for the trial. And it seems to us that he **must** exercise his right to judicial review promptly in order to help prepare full answer and defence, which, as was noted in **Stinchcombe**, is the purpose of the right. We conclude that the right and duty of the accused is to exercise his right promptly. Had the accused promptly sought review of the failure to disclose, we think the reviewing judge would merely have ordered disclosure. This would be the correct view where the breach occurred for no reason other than negligence, and no harm was done, and there was no pattern of breach requiring judicial action. That describes this case. We see no reason why the accused, through his delay to mid-trial, can thus get a better remedy later: **R. v. H.(J.S.)**, (Alta. C.A., August 6, 1993).

Where one section of the Charter offers a specific guarantee which addresses directly the constitutional complaint made by a party, the validity of that complaint should be assessed by reference to that specific provision and not the more general language of s. 7. In this case, the appellant complains that because he comes within the subset of fugitives who are subject to the **Extradition Act** and not the **Fugitive Offenders Act**, he does not receive the protection of the law provided by s. 11 of the **Fugitive Offenders Act**. This is exactly the kind of inequality complaint to which s. 15 is directed. The constitutionality of such distinctions should be determined by reference to s. 15. Resort to s. 7, although that section doubtless includes the equality rights created by s. 15, does not alter the required analysis or yield a different concept of equality: **Pacificador v. Philippines (Republic of)**, (Ont. C.A., July 29, 1993).

Section 11(e)

In order to avail himself of s. 11(e), the appellant must establish the threshold requirement that he is a "person charged with an offence." Since this phrase relates to each of the s. 11 protections, it should be interpreted in a manner which harmonizes as much as possible all of the s. 11 subsections. What unites most of the s. 11 guarantees is their anchor in the trial context. In **R. v. Potvin, supra**, the Supreme Court of Canada considered the meaning of "a person charged" in the context of s. 11(b). The majority concluded that the subsection applied to the pre-trial period and trial process, but not to appellate proceedings. Counsel for the appellant submitted that for the purposes of s. 11(e), no principled basis exists upon which to distinguish bail pending appeal from bail pending trial. This submission, however, fails to recognize that the presumption of innocence in favour of the accused before and during trial is extinguished upon conviction by proof beyond reasonable doubt of the accused's guilt. The conviction indicates that the Crown has successfully rebutted the presumption of innocence. In the context of bail pending trial, the accused seeks to preserve the **status quo** of personal liberty. In the context of bail pending appeal, the appellant seeks to reverse the **status quo** by obtaining a reprieve from a court order for his detention following conviction. The nature of bail pending appeal is fundamentally different from that of bail pending trial. This difference is due to the presumption of innocence having been rebutted by proof beyond reasonable doubt of the accused's guilt. Accordingly, nothing in the language or purpose of s. 11(e) exempts it from the general rule of **Potvin, supra**: Section 11(e) therefore does not apply to bail pending appeal, and s. 679(3)(c) of the **Criminal Code** does not violate s. 11(e) of the Charter: **R. v. Branco**, (B.C.C.A., November 8, 1993).

Section 15(1)

It is clear that a law may be discriminatory even if it is not directly or expressly discriminatory. In other words, adverse effects discrimination is comprehended by s. 15(1). The s. 15(1) issue in this case is whether s. 63 of the **Income Tax Act** has an adverse effect upon women in that it unintentionally creates a distinction on the basis of sex. In order to establish such an effect, it is not sufficient for the appellant to show that women disproportionately bear the burden of child care in society. Rather, she must show that women disproportionately pay child care expenses. Only if women disproportionately pay such exprenses can s. 63 have any effect at all, since s. 63's only effect is to limit the tax deduction with respect to such expenses. Proof is lacking on this point. However, if I were convinced that s. 63 has an adverse effect upon <u>some</u> women (for example, in this case, self-employed women), I would not be concerned if the effect was not felt by <u>all</u> women. That an adverse effect felt by a sub-group of women

can still constitute sex-based discrimination appears clear to me from a consideration of past decisions. At issue in **Brooks v. Canada Safeway**, [1989] 1 S.C.R. 1219, was whether a health insurance plan which denied benefits to pregnant women was discriminatory on the basis of sex. Obviously, not all women become pregnant, nor do those women who become pregnant all become pregnant at the same time. Nonetheless, discrimination on the basis of sex was found. Similarly, in **Janzen v. Platy Enterprises**, [1989] 1 S.C.R. 1251, sexual harassment was realized to constitute discrimination on the basis of sex, notwithstanding the reality that a harasser will not uniformly harass all women. If it were possible in another case to prove that s. 63 of the **Act** caused an adverse effect for some sub-group of women, s. 63 would be discriminatory on the basis of sex following both **Brooks, supra**, and **Janzen, supra**. The important thing to realize is that there is a difference between being able to point to individuals negatively affected by a provision, and being able to prove that a group or sub-group is suffering an adverse effect in law by virtue of an impugned provision. Proof of inequality is a comparative process. If a group or sub-group of women could prove the adverse effect required, the proof would come in a comparison with the relevant body of men. Accordingly, although individual men might be negatively affected by an impugned provision, those men would not belong to a group or sub-group of men able to prove the required adverse effect. In other words, only women could make the adverse effects claim, and this is entirely consistent with statements such as that found in **Brooks, supra**, to the effect that "only women have the capacity to become pregnant". Looking at this point a different way, if s. 63 creates an adverse effect upon women (or a sub-group) in comparison with men (or a sub-group), the initial s. 15(1) inquiry would be satisfied: a distinction would have been found based upon the personal characteristic of sex. In the second s. 15(1) inquiry, however, the sex-based distinction could only be discriminatory with respect to either women or men, not both. The claimant would have to establish that the distinction had the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. The burden or benefit could not, as a logical proposition, fall upon both sexes: **Symes v. Canada**, (S.C.C., December 16, 1993).

Section 24(1)

As a matter of law and policy, the members of the Review Panel under the B.C. **Mental Health Act** which upheld the involuntary detention of the plaintiff could not be liable in damages simply because they made a good faith decision according to the statute. Who would undertake such public duties if they bore the risk of being sued for damages when the statute upon which they acted was later declared unconstitutional? The contention is unanswerable. In **Schachter v. Canada, supra**, Lamer C.J.C. said: "An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the **Constitution Act, 1982**". No corrupt motive or **mala fides** is alleged against the Review Panel; the only issue is the validity of the constituent statute. The plaintiff recognizes the need for a transition period if the provisions of the **Act** are struck down and proposes that the Court suspend its order declaring the **Act** unconstitutional for six months. A retroactive remedy in damages is inconsistent with this position: **McCorkell v. Riverview Hospital**, (B.C.S.C., June 17, 1993).

Section 52(1)

One of the underlying reasons for the general rule that laws are presumed valid is that a law should not be declared unconstitutional on an interim application but only after a trial on the issue. In the present application, there has already been a trial on the issue and the validity of subsection (c) of s. 119 of the **Elections Act** has been upheld. It would be a rare case indeed where a reviewing judge would ignore the presumption of validity and the opinion of a trial judge upholding the validity of a statute in order to declare on an interim basis such statute inoperative: **Harvey v. New Brunswick (Attorney General)**, (N.B.C.A., March 22, 1993).

In both **Hills**, [1988] 1 S.C.R. 513, and **Slaight Communications**, [1989] 1 S.C.R. 1038, this Court was confronted with statutory language which was ambiguous. In each case, the values of the Charter were consulted to resolve the ambiguity. However, each case recognizes that to consult the Charter in the absence of such ambiguity is to deprive the Charter of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the Charter even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the Charter. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the Charter, since the interpretive process would preclude one from finding infringements in the first place. Had s. 63 of the **Income Tax Act** not been present, it might be arguable that the equality values in the Charter could have informed the interpretation of ss. 9, 18(1)(a) and 18(1)(h) of the **Act**. However, s. 63 eliminates any question of ambiguity, and by so doing, also eliminates the need for recourse to Charter values in this case: **Symes v. Canada**, (S.C.C., December 16, 1993).

Reading down or severance is available as a remedial option only after it has been determined that the legislation in question cannot be redeemed under s. 1 of the Charter. That makes sense, for although it is by no means a new doctrine, since 1982 the authority to read down (or to sever) in constitutional cases under the Charter has been derived from the words "...to the extent of the inconsistency..." found in s. 52 of the **Constitution Act, 1982**. Reading down, or severance, is quite a different exercise and is governed by quite different rules than statutory interpretation or construction. In any case where legislation has been found to be inconsistent with the Charter, the choice between a remedy under s. 52 or s. 24 will depend upon the nature of the violation and the context of the specific legislation under consideration. Here the nature of the "violation" can best be described as an overly inclusive definition of the persons who can exercise what is otherwise acknowledged to be a constitutionally sufficient power to arbitrarily detain motorists for specified purposes. The reality is that the appellant has suffered no "violation" of his right not to be arbitrarily detained for which he personally has any remedy under the Charter. If the Legislature had confined the definition of "peace officer" in s. 67 of the **Motor Vehicle Act** to a constitutionally permissible group of persons, the same officer who stopped him would still have been authorized to do so. As to the context of the legislation, the importance of s. 67 in the proper regulation of motor vehicle traffic and to safety on our highways is manifest. By reading down s. 67 so as to restrict the power of arbitrary detention which it authorizes to those peace officers whose statutory duties would reasonably require it, in pursuit of the objectives referred to, this Court can minimize its interference with the legitimate role of the Legislature. At the same time it can also recognize the need for effective enforcement of the regulatory, driving, and mechanical standards necessary to ensure safety

on our public highways. In that way the values of the Charter are vindicated and this Court's intrusion into the legislative sphere is minimized: **R. v. Wilson**, (B.C.C.A., November 23, 1993).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - November 1993

Section 1

In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable. This clearly includes related legislation and evidence of the "mischief" at which the legislation is directed. It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in *Reference re Anti-Inflation Act*, wrote, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted. The former exclusionary rule regarding evidence of legislative history has gradually been relaxed but until recently the courts have balked at admitting evidence of legislative debates and speeches. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation: *R. v. Morgentaler*, (S.C.C., September 30, 1993).

Section 2(a)

Freedom of religion is inherently limited by a number of considerations, including the rights and freedoms of others. While parents are free to engage in religious practices themselves, those activities may be curtailed where they interfere with the best interests of the child without thereby infringing the parent's religious freedoms. There is no dispute in the case law as regards this principle, since even where the religious rights of the non-custodial parent in access disputes have been recognized, courts have nonetheless imposed conditions on their exercise where warranted by the interests of the child: *Young v. Young*, (S.C.C., October 21, 1993).

Section 2(b)

In this case the respondent argues that the restrictions on communicating his religious views to his children infringe his rights to expressive freedom. However, it is beyond contention that rights do not exist in a vacuum but are shaped and formed both by the particular context in which they are exercised and the right of others. Dickson C.J. in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at p. 463, after acknowledging the centrality and importance of freedom of expression in our society, observed: "But it is not an absolute value. Probably no values are absolute. All important values must be qualified and balanced against, other important, and often competing, values." In this case, there are other powerful competing interests which must be recognized; not the least of which, in addition to the best interests of the children, are the freedoms of expression and religion of the children themselves. There is cogent, persuasive evidence, found credible by the trial judge, that the children themselves do not want to discuss religion with their father or be subject to his comments about beliefs which are at odds with their own religious upbringing, whether they take the form of indoctrination, instruction or

mere observations. In such circumstances, it is obviously inadequate merely to invoke freedom of religion or expression of an access parent without considering the effect on the children and their inability to assert their own desires and rights. Rather, both the best interests of the children and a respect for their rights may require restrictions on communication, if only so that the larger interest, maintenance and development of the relationship between the access parent and child, is not frustrated by the means by which it is carried out: *Young v. Young*, (S.C.C., October 21, 1993).

Section 7

The appellant argues that, by prohibiting anyone from assisting her to end her life when her illness has rendered her incapable of terminating her life without such assistance, by threat of criminal sanction, s. 241(b) of the *Criminal Code* deprives her of both her liberty and her security of the person. A consideration of these interests cannot be divorced from the sanctity of life, which is one of the three Charter values protected by s. 7. The fact that it is the criminal prohibition in s. 241(b) which has the effect of depriving the appellant of the ability to end her life when she is no longer able to do so without assistance is a sufficient interaction with the justice system to engage the provisions of s. 7: *Rodriguez v. British Columbia (Attorney General)*, (S.C.C., September 30, 1993).

There is no question that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these. The effect of the prohibition in s. 241(b) of the *Criminal Code* is to prevent the appellant from having assistance to commit suicide when she is no longer able to do so on her own. That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. These considerations lead to the conclusion that the prohibition in s. 241(b) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress is a manner which impinges on the security of the person: *Rodriguez v. British Columbia (Attorney General)*, (S.C.C., September 30, 1993).

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also be legal principles. To discern the principles of fundamental justice governing a particular case, it is helpful to review the common law and the legislative history of the offence in question and, in particular, the rationale behind the practice itself (here, the continued criminalization of assisted suicide) and the principles which underlie it. It is also appropriate to consider the state interest. Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual. The respect for human dignity, while one of the underlying

principles upon which our society is based, is not a principle of fundamental justice within the meaning of s. 7. Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose. It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. One cannot conclude that a particular limit is arbitrary because it bears no relation to, or is inconsistent with, the objective that lies behind the legislation without considering the state interest and the societal concerns which it reflects. In the present case, given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it can not be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society: *Rodriguez v. British Columbia (Attorney General)*, (S.C.C., September 30, 1993).

In this case the question whether the nonavailability of the complainant's statements to the police in 1980 and the inability to identify the officers to whom those statements were made were so prejudicial to the accused as to justify the granting of a stay on a pretrial motion was determined by the trial judge on an agreed statement of facts. The trial judge ordered a stay notwithstanding the position of Crown counsel that although the facts in the agreed statement were accurately stated, they were not all the facts relevant to such a determination, and that a decision made at that stage would be premature. The showing of some prejudice is not a sufficient basis for a decision that an accused person's Charter rights under ss. 7 and 11(d) would be infringed if the accused were required to stand trial. What must be demonstrated on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence. The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal. The pretrial motion was premature and the stay should not have been granted when it was: *R. v. Blake*, (Ont. C.A., July 15, 1993).

As Lamer J. points out in *Re ss. 193 and 195.1 of the Criminal Code*, *supra*, the restrictions on liberty that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration. He goes on to state that the rights under s. 7 do not extend to the right to exercise a chosen profession. The trial judge dismissed the statement by Lamer J. because the profession under consideration in that case was prostitution. However, his words apply equally to the accounting or any other profession. Accordingly, this Court must conclude that the restriction in s-s. 14(1) of the *Public Accounting and Auditing Act* limiting the right to practice that profession does not engage s. 7 of the Charter: *Government of P.E.I. v. Walker*, (P.E.I.C.A., September 24, 1993).

Section 8

The United States Supreme Court has limited application of the Fourth Amendment protection afforded by the U.S. Constitution to situations in which the information sought by state authorities is personal and confidential in nature: *United States v. Miller*, 425 U.S. 435 (1976). That case determined that the accused's cheques, subpoenaed for evidence from a commercial bank, were not subject to Fourth Amendment protection. While I do not wish to be taken as adopting the position that commercial

records such as cancelled cheques are not subject to s. 8 protection, I do agree with that aspect of the *Miller* decision which would suggest that in order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence. The nature of the relationship between the appellant and the Utilities Commission cannot be characterized as a relationship of confidence. The Commission prepared the records as part of an ongoing commercial relationship and there is no evidence that it was contractually bound to keep them confidential. This is not to suggest that records prepared in a commercial context can never be subject to the privacy protection afforded by s. 8. If commercial records contain material which meets the "personal and confidential" standard set out above, the commercial nature of the relationship between the parties will not necessarily foreclose a s. 8 claim. In any event, the transaction records which were maintained as a result of the commercial relationship in the case at bar cannot be characterized as confidential communications. It is generally possible for an individual to inquire with respect to the energy consumption at a particular address, so that this information is subject to inspection by members of the public at large. The place and manner in which the information in the case at bar was retrieved also point toward the conclusion that the appellant held no reasonable expectation of privacy with respect to the computerized electricity records. The police were able to obtain the information on-line by agreement of the Commission. Accessing the information did not involve intrusion into places ordinarily considered private. In addition to the fact that the manner and place of the search are indicative of a minimally intrusive search, the seriousness of the offence militates in favour of the conclusion that the requirements of law enforcement outweigh the privacy interest claimed by the appellant. While participation in the illicit trade of marihuana may not be as serious as the trade in other narcotics such as cocaine, it remains an offence which is taken seriously by law enforcement agents. The appellant cannot be said to have held a reasonable expectation of privacy in relation to the computerized electricity records which outweighs the state interest in enforcing the laws relating to narcotics offences. As such, the appellant has failed to bring this search within the parameters of s. 8: *R. v. Plant*, (S.C.C., September 30, 1993).

In the case of *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), the court, in analyzing the right to detain for investigatory purposes, said that "where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some 'articulable cause' for the detention ... no interference with the individual's right to move about could be justified absent articulable cause for that interference." The justification based on articulated cause for instances of detention without arrest is equally applicable to the issue of warrantless searches. This Court is satisfied on all the circumstances of this case that there was ample common law authority based on articulable cause for not only the detention of the accused but also for the warrantless search of his vehicle. The detention of the accused and others stopped in the road-block was reasonably necessary in order for the police to discharge their duty of investigating and apprehending the perpetrators of a most serious crime. The detention was not arbitrary - it was directed specifically at vehicles from a suspect area at a time when there was a reasonable suspicion that any car exiting from that area might contain the armed robbers. The search of the accused's vehicle and the others stopped at the road-block, which was as unobtrusive as the circumstances required, was not an unreasonable interference with the freedom of the

individual and not an unjustifiable use of a power associated with police responsibilities: *R. v. Stephens*, (B.C.S.C., July 7, 1993).

Section 11(d)

The appellant in this case maintains that the absence of any provision permitting defence participation in the creation of the videotaped statement eventually shown to the trier of fact pursuant to s. 715.1 of the *Criminal Code* denies an accused an opportunity to make full answer and defence and thereby renders the trial unfair. To succeed on this point, the appellant is driven to the position that only questioning which is contemporaneous with the making of the videotaped statement will afford an adequate opportunity to challenge the contents of that statement. While there is some support for this in the American case law dealing with provisions like s. 715.1, this Court reads the judgment in *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 297 (S.C.C.), as holding that contemporary cross-examination on a statement made by a deponent who testifies at trial is not a pre-requisite to the admissibility of the statement. That case holds that, although contemporaneous cross-examination is the ideal within the adversarial process, where meaningful cross-examination can be conducted at trial, the absence of contemporaneous cross-examination goes to the weight and not the admissibility of the out-of-court statement. The appellant's reference to the "pre-packaged" nature of the evidence adduced under s. 715.1 is an argument that fairness requires that an accused have some opportunity to participate in the creation of the videotape eventually placed before the trier of fact. However, s. 715.1 is not unique in this respect. Many statutory provisions allow the prosecution to tender evidence prepared prior to trial without any defence participation in that preparation (for example, s. 9 of the *Narcotic Control Act*). In those situations, as with s. 715.1, fairness concerns are addressed by disclosure requirements coupled with adequate provisions giving the accused an opportunity to meaningfully challenge the evidence when it is tendered at trial. Finally, it should be observed that while s. 715.1 does not apply to an accused, it does not limit the trial judge's authority to take whatever measures may be necessary to permit an accused, who testifies, to place his or her full account of the relevant events before the trier of fact: *R. v. Toten*, (Ont. C.A., June 29, 1993).

Section 12

In this case, the appellant alleges that the prohibition on assisted suicide in s. 241(b) of the *Criminal Code* has the effect of imposing upon her cruel and unusual treatment in that the prohibition subjects her to prolonged suffering until her natural death or requires that she end her life at an earlier point while she can still do so without help. The degree to which "treatment" in s. 12 may apply outside the context of penalties imposed to ensure the application and enforcement of the law has not been definitively determined by this Court. For the purposes of the present analysis, I am prepared to assume that "treatment" within the meaning of s. 12 may include that imposed by the state in contexts other than that of a penal or quasi-penal nature. However, it is my view that a mere prohibition by the state on certain action, without more, cannot constitute "treatment" under s. 12. By this I should not be taken as deciding that only positive state actions can be considered to be treatment under s. 12; there may well be situations in which a prohibition on certain types of actions may be "treatment" as was suggested by Dickson J. of the New Brunswick Court of Queen's Bench in *Carlston v. New Brunswick (Solicitor General)* (1989), 43 C.R.R. 105, who was prepared to consider whether a complete ban on smoking in prisons would be "treatment" under s. 12. The distinction between that case and the situation in the

present appeal, however, is that in *Carlston* the individual is in some way within the special administrative control of the state. In the present case, the appellant is simply subject to the edicts of the *Criminal Code*, as are all other individuals in society. The fact that, because of the personal situation in which she finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to "treatment" at the hands of the state. There must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute "treatment" under s. 12: *Rodriguez v. British Columbia (Attorney General)*, (S.C.C., September 30, 1993).

Section 24(2)

In this case the blood sample and blood alcohol test results were the product of improper conduct by the appellant's doctors, since the sample was taken despite the appellant's unequivocal instruction to the contrary. While this conduct is not directly subject to the Charter, in the context of a subsequent Charter breach by police, the doctors' conduct becomes relevant in considering the effects of admitting the evidence. The police violated the appellant's s. 8 rights by obtaining the specific medical information from the doctors without a warrant. The net result of the Charter violation by police, in the particular circumstances of this case, was to take advantage of the improper conduct by his doctors in taking the blood sample contrary to the specific instructions of the patient. When this factor is considered together with the seriousness of the Charter violation by the police and the importance of guarding against a free exchange of information between health care professionals and police, the impugned evidence should be excluded: *R. v. Dersch*, (S.C.C., October 21, 1993).

Section 32(1)

In *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, the majority of this Court concluded, *inter alia*, that the Vancouver General Hospital was not part of government for the purposes of s. 32 of the Charter and its actions were not generally subject to Charter scrutiny. The same reasoning is applicable here to the Cowichan District Hospital. There are some types of circumstances in which a doctor clearly acts as an agent of government in taking a blood sample from a patient. A doctor who takes a blood sample illegally at the request of police is acting as an agent of government and his or her actions are subject to the Charter. Similarly, a doctor involved in taking a blood sample pursuant to s. 254 or s. 256 of the *Criminal Code* would be acting as an agent of government, as mandated by statute, and the doctor's actions would be subject to Charter scrutiny. In this case the first blood sample was not taken pursuant to s. 254 or s. 256 of the *Criminal Code*, nor at the request of the police. The trial judge accepted the evidence of the doctors that the blood sample was taken solely for medical purposes. Therefore, Dr. Gilbert and Dr. Leckie were not acting as agents of government for the purposes of the Charter in taking the first blood sample from the appellant: *R. v. Dersch*, (S.C.C., October 21, 1993).

Section 52(1)

In this case a minority of the Supreme Court of Canada would have declared the *Criminal Code* prohibition against "assisted suicide" to be unconstitutional; would have suspended the declaration of invalidity for a period of one year; and would have granted the appellant a constitutional exemption from

the application of the impugned law during the period of the suspension. Lamer C.J. for the minority reasoned as follows: The scope of the constitutional exemption has been limited by the majority of this Court. An over-broad blanket prohibition should not be tempered by allowing judicially granted exemptions to nullify it, and the criteria on which the exemption would be granted must be external to the Charter. That is, the fact that the application of the legislation to the party challenging it would violate the Charter cannot be the sole ground for deciding to grant the exemption; rather, there must be an identifiable group, defined by non-Charter characteristics, to whom the exemption could be said to apply. I am in agreement with many of the concerns Wilson J. expressed in *Osborne v. Canada*, [1991] 2 S.C.R. 69, about constitutional exemptions, and would address them by holding that constitutional exemptions may only be granted during the period of a suspended declaration of invalidity. In this circumstance, the provision is both struck down and temporarily upheld, making the constitutional exemption peculiarly apt, and limiting its application to situations where it is absolutely necessary. The exemption is only available for a limited time, so that the Court is not put in the position of, in the words of Wilson J., curing "over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books". Nor is the Court put in the position of appearing to save a blanket prohibition in one respect while "dramatically altering it" in another by granting exemptions from that prohibition. The blanket prohibition is saved for reasons only of practical necessity, so granting exemptions where the necessity does not exist avoids the contradiction: *Rodriguez v. British Columbia (Attorney General)*, (S.C.C., September 30, 1993).

A party's ability to attack a legislation's constitutional validity on Charter grounds is more difficult to establish in a civil suit than in a criminal prosecution. The appellants bear the burden to establish their standing to raise Charter issues. The appellants allege the *Retail Business Holidays Act*, R.S.O. 1980, violates both freedom of religion and equality rights but have presented almost no original evidence in support of their claim. The application relies on the evidence filed in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada*, with a few additional affidavits. The very fact that the appellants rely on the *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* evidence suggests there may be a more reasonable and effective matter of bringing this matter before the court. The nature of the *Act* does not assist the appellants in establishing standing. In *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575, standing was first raised on appeal to this Court. However, the nature of the legislation in *Borowski* was such that no party directly affected could reasonably be expected to challenge the legislation. This made up for whatever evidentiary problems there may have been in raising standing so late in the day. In contrast to *Borowski*, the present *Act* does not discourage challenge. Nevertheless, a party seeking to challenge the *Act* must show there is no other reasonable and effective means of bringing the matter before the court. The appellants have failed on this point: *Hy and Zel's Inc. v. Ontario (Attorney General)*, (S.C.C., October 21, 1993).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - July 1993

Section 7

The right of an accused to remain silent at his or her trial has long existed side by side with the compellability of a witness who has been charged with the same offence but who will be tried separately. There is no question that an accused person who is compelled to give evidence concerning the same subject matter as that upon which he or she is subsequently to be tried may expose lines of defence or information leading to the discovery of derivative evidence which might not otherwise come to the attention of the authorities. However, a concession that fundamental justice includes a right to silence in those circumstances would erode the functioning of the centrepiece of the entire justice system -- the trial and the search for a just result. In the present case, the witness is alleged to be an eyewitness, and the societal interest in having the benefit of his evidence is weighty in any balancing process. Surely, attaining a true result on all the available evidence overshadows the marginal area of exposure of the witness that is not protected by s. 13 of the Charter and s. 5 of the *Canada Evidence Act*. Moreover, there is no articulable way that the right of a witness to silence when subpoenaed by the Crown could be distinguished from the right to silence when subpoenaed by the accused. The limit to the right to silence must be the same no matter who issues the subpoena: *R. v. S. (R.J.)*, (Ont. C.A., April 13, 1993).

In this case there is clearly a conflict between the constitutionally protected right of the accused to remain silent and the constitutionally protected right of his co-accused to full answer and defence. Where one accused makes an attack on his co-accused and the attack is relevant to his defence, he cannot be limited by the trial judge from vigorously pursuing that line of defence. If it means that in so doing he infringes on some constitutionally protected right of his co-accused, then the remedy of the co-accused is to ask for a severance. Failing a request for a severance, the trial judge is restricted to instructing the jury that both accused are entitled to exercise their constitutional rights. If counsel for one, in exercising his client's right to full answer and defence, conducts a cross-examination that would not be allowed by Crown counsel (since it focuses on the refusal to make a statement to the police), and if the other counsel does what Crown counsel could not do and comments upon the failure of that accused to testify, then the jury must consider the merits of those comments along with everything else that was said to them during the course of the trial. In exercising his constitutional right to full answer and defence, an accused is entitled to put his best foot forward, and the court is not entitled to inhibit that defence simply because it involves a tactic prohibited to the Crown: *R. v. Creighton and Crawford*, (Ont. C.A., April 6, 1993).

Driving can only be undertaken by those who have a licence. The effect of the licensing requirement is to demonstrate that those who drive are mentally and physically capable of doing so. Moreover, it serves to confirm that those who drive are familiar with the standards of care which must be maintained by all drivers. Licensed drivers choose to engage in the regulated activity of driving. They place themselves in a position of responsibility to other members of the public who use the roads. As a result,

it is unnecessary for a court to establish that the particular accused intended or was aware of the consequences of his or her driving. The minimum standard of physical and mental well-being coupled with the basic knowledge of the standard of care required of licensed drivers obviate that requirement. As a general rule, a consideration of the personal factors, so essential in determining subjective intent, is simply not necessary in light of the fixed standards that must be met by licensed drivers. Secondly, the nature of driving itself is often so routine, so automatic that it is almost impossible to determine a particular state of mind of a driver at any given moment. It would be a denial of common sense for a driver, whose conduct was objectively dangerous, to be acquitted on the ground that he was not thinking of his manner of driving at the time of the accident. Thirdly, the wording of s. 249 of the *Criminal Code*, which refers to the operation of a motor vehicle "in a manner that is dangerous to the public, having regard to all the circumstances", suggests that an objective standard is required. The "manner of driving" can only be compared to a standard of reasonable conduct. That standard can be readily judged and assessed by all who would be members of juries. Thus, it is clear that the basis of liability for dangerous driving is negligence. Fourthly, the statistics which demonstrate that all too many tragic deaths and disabling injuries flow from the operation of motor vehicles indicate the need to control the conduct of drivers. The need is obvious and urgent. It is not only appropriate but essential in the control of dangerous driving that an objective standard be applied. To insist on a subjective mental element in connection with driving offences would be to deny reality: *R. v. Hundal*, (S.C.C., March 11, 1993).

In analyzing the right to silence, McLachlin J. in *Hebert*, *supra*, distinguished between persons in the control of the state and those who were not. In the present case, the four respondents who have been charged with offences under provincial law in connection with the Westray Mine explosion are in need of protection from the greater power of the state because under the *Public Inquiries Act* they can be compelled to testify at the commission of inquiry that has been established. Therefore, they are, in that sense, under the control of the state at a time when their liberty interest is at risk. If convicted of the offences with which they are charged, the respondents face the possibility of being imprisoned. They have a Charter right not to be compelled to speak. The combined effect of the Order in Council establishing the inquiry and the *Public Inquiries Act* purportedly empowers the Commissioner to take that right from them. They cannot be compelled to testify before the Commissioner respecting their involvement in the operation of the Mine in the period leading up to the explosion so long as the charges against them are alive and the criminal investigation is ongoing: *Phillips et al. v. Nova Scotia*, (N.S.C.A., January 19, 1993).

Contrary to the conclusion in *Kodellas*, *supra*, s. 7 of the Charter has no application to proceedings of a non-penal nature under human rights legislation, and no useful purpose can be served in this regard by referring to s. 11, dealing as it does with persons accused of criminal offences. The reasoning of the Supreme Court of Canada in *R. v. Beare* and the *Prostitution Reference* leads this Court to conclude that the view taken in *Kodellas* that the potential "stigma" attached to parties involved in human rights proceedings triggers the application fo s. 7 is no longer tenable. Security of the person is simply not affected in these proceedings: *Nisbett v. Manitoba (Human Rights Commission)*, (Man. C.A., March 30, 1993).

Section 8

In the course of a murder investigation, the police obtained a warrant to search for a knife and certain articles of clothing at the accused's home. While conducting the search, an officer found and seized the accused's diary. The Crown contended that the seizure of the diary came within the "plain view" exception to the requirement for a warrant to search and seize. However, while the first two conditions for the invocation of the doctrine (as set out in *Ruiz, supra*) had been satisfied, it could not be said that it was "immediately apparent" that the diary might be evidence of a crime, contraband or otherwise subject to seizure. In *U.S.A. v. Whitten*, 706 F.2d 1000, the U.S. Court of Appeals concluded that the seizure of a notebook was not permitted under the plain view doctrine. There was nothing facially incriminating about the closed notebook from which drug enforcement agents could reasonably have concluded that it might contain evidence of a crime. On the other hand, a pad of paper opened to a page containing information, the nature of which was readily apparent to be incriminating, was held to be admissible. In the present case, the incriminating character of the diary was not immediately apparent to the police. Further, the incriminatory nature of the entries in the diary would only have been revealed after careful examination of the contents. The third requirement for the application of the plain view doctrine had therefore not been satisfied: *R. v. Doyle*, (N.B.Q.B., June 22, 1992).

Parliament has established administrative means and procedures for the collection of income tax and "social security" taxes. Under certain wage-withholding provisions, an employer is required to collect, account for and remit an employee's income tax and social security taxes to the Receiver General. The *Income Tax Act* impresses the withheld funds with a trust, and if the employer fails to remit the funds s. 224(1.2) of the *Act* entitles the Minister of National Revenue to collect the taxes by garnisheeing funds payable to the delinquent employer -- funds that would not have been available to other creditors if they had been remitted as required by law. It would be impractical to require a government to resort to a court to collect such taxes. Garnishment does not prevent the other creditors of the employer from seeking an adjudication in court on the issue of entitlement to the funds. In this case, the garnishee, when faced with competing claims, paid the money into court so that entitlement to the moneys could be judicially determined. The Minister did not challenge this procedure -- indeed, he brought an application to have the entitlement issue settled. Given the rights and protection afforded by law to the other creditors in terms of the entitlement issue, the alleged "seizure" under s. 224(1.2) is not unreasonable: *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, (Sask. C.A., March 1, 1993).

Section 9

The investigating police officer in this case candidly acknowledged that his decision to stop the motor vehicle had nothing to do with the enforcement of laws relating to the operation of motor vehicles. The stop was made for purely "investigative purposes", in connection with suspected drug offences. The "check stop" decisions of the Supreme Court of Canada decide only that stops made for the purposes of enforcing driving related laws and promoting the safe use of motor vehicles are authorized by provisions like s. 216(1) of the Ontario *Highway Traffic Act*, even where those stops are random. These cases do not declare that all stops which assist the police in the performance of any of their duties are authorized by the *Highway Traffic Act*. Once, as in this case, road safety concerns are removed as a basis for the stop, then powers associated with and predicated upon those particular concerns cannot be relied

on to legitimize the stop. Where the stop and the detention are unrelated to the operation of the vehicle or other road safety matters, the fact that the target of the detention is in an automobile cannot enhance the police power to detain that individual. Thus, the search for a legal authority for the stop and detention in this case must go beyond s. 216(1) of the *Highway Traffic Act*. Under the common law, there is no general power to detain whenever that detention will assist a police officer in the execution of his or her duty. To deny that general power is not, however, to deny the authority to detain short of arrest in all circumstances where the detention has an investigative purpose. The judgment of the majority in *R. v. Dedman*, [1985] 2 S.C.R. 2, constitutes a recognition that the common law police power can, in appropriate circumstances, authorize some forms of detention for investigative purposes. In this Court's opinion, where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some "articulable cause" for the detention. As Professor Young puts it, "In order to avoid an attribution of arbitrary conduct, the state official must be operating under a set of criteria that at minimum, bears some relationship to a reasonable suspicion of crime but not necessarily to a credibly-based probability of crime." However, the presence of an articulable cause does not render any detention for investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances. In this case, there was no articulable cause justifying the detention. It may be that a detention, although unlawful, would not be arbitrary if the officer erroneously believed on reasonable grounds that he had an articulable cause. The officer in this case clearly had no belief that the facts, as he believed them to be, constituted an articulable cause. The detention was therefore both unlawful and arbitrary as that word has been defined in the jurisprudence: *R. v. Simpson*, (Ont. C.A., February 11, 1993).

Section 10(b)

The Supreme Court of Canada in *R. v. Brydges*, [1990] 1 S.C.R. 190, did not declare that the governments of Canada have a constitutional obligation to arrange for lawyers to offer free telephone advice to detainees, everywhere in Canada and at all hours, about what to do in response to police demands during detention. The decision is authority instead for the proposition that, if anybody offers that service, then in the right circumstance the detaining officer must offer the detainee enough information about the service that the detainee can take advantage of it. It is possible that some form of governmental scheme for ready legal advice might be the constitutional right of every detained citizen. But any claim of that sort raises a very complicated issue involving allocation of tax dollars by court order, and which inevitably then would give rise to s. 1 issues. None of that occurred here, or in *Brydges*. It is now trite law that an accused who alleges that he was deprived of his constitutional rights must prove it. In order to prove deprivation of his right to information about existing programs for immediate legal advice, the accused must by evidence show, or the trial judge must take notice of, the existence of such a program. The simple problem in this case is that the accused, at his trial, failed to establish the preliminary fact that a service existed at the time about which the officer should have told him: *R. v. Cobham*, (Alta. C.A., March 22, 1993).

It is now settled law that a transfer of a penitentiary inmate into high maximum security or administrative segregation such as that to which the appellant in this case was subjected amounts to a new and separate detention over and above the detention to which he was already subject by reason of

the sentence of life imprisonment that he was serving. In *R. v. Miller*, [1985] 2 S.C.R. 613, it was held that confinement in administrative segretation involved a significant reduction in the residual liberty of an inmate, which amounted to a new detention. While it is true that *Miller* turned on the definition of detention for the purposes of determining the availability of the writ of *habeas corpus* guaranteed by s. 10(c) of the Charter, there is no valid reason for accepting some different definition for the purposes of determining the limits of the right to counsel guaranteed by s. 10(b). Consequently, in this case the authorities were under a positive duty both to inform the appellant of his right to counsel and to provide him with a reasonable opportunity to exercise that right as soon as they had decided to place him in administrative segregation: *Williams v. Canada (Regional Transfer Board)*, (F.C.A., January 14, 1993).

Section 11(f)

The right to trial by jury includes the right to have a jury panel which is a reasonably representative cross-section of the broad community. Relative thereto a sheriff need not obtain statistics on racial or national origins, religion, age or other factors enumerated in s. 15 of the Charter, provided that the sheriff makes a random selection from a list which is neutral in its considerations of those factors. The list need not include everyone in a judicial district as long as it provides a broad cross-section of the community. To successfully challenge a jury panel presented for selection, on the basis that it is unrepresentative of the broad community, specific proof of lack of representation is necessary. It is not enough to point to the absence of a member of a particular race on a particular jury panel to prove discrimination. A mere assertion is not proof. In other words, it is not the absence of a member of a distinct characteristic which makes the list unrepresentative, but only an erroneous policy or culpable conduct that fails to include any such type of person in the list. A jury panel need not be selected from a list that includes everyone in a judicial district provided that the list is one that is a broad cross-section of the community. Further, no accused is entitled to trial by a jury selected on the basis of racial considerations which would result in the elimination of a representative cross-section of the general population: *R. v. Poucette*, (Alta. Q.B., January 25, 1993).

Section 16

[I]t is obvious that there exists under the *Official Languages Act* a broad picture and a narrower one. The object of the Act is not only to permit the use of our official languages and give citizens the right to deal with federal institutions in the language of their choice. It is more than that. It is to promote the use of both languages or, as expressed in the Act's preamble, "enhancing the vitality and supporting the development of English and French linguistic minority communities". [I]nstitutional policies and commitments must be carried out by public servants. This is when the merit principle requires tender and loving care. To foster bilingualism or to meet its statutory duties, the government, through its Public Service Commission, had to designate any number of positions as bilingual, but in so doing, assure that non-bilingual candidates for appointment would not be prejudiced: *Professional Institute of the Public Service v. The Queen*, (F.C.T.D., January 26, 1993).

A municipal police force such as the Saint John Police Force, is not an office of an institution of the legislature or government of New Brunswick. A municipal corporation has a corporate identity distinct from that of the Province: *R. v. Bastarache*, (N.B.Q.B., August 4, 1992).

I can see no rational connection between the exclusion of RCMP agents from the bilingualism bonus and the objective sought, namely the promotion of bilingualism in the federal public service: *Gingras v. Canada*, (F.C.T.D., January 4, 1990).

Section 18

The Plaintiff submits that, in order to be valid in Manitoba, the *Gaming Acts* of England, 1835, 5 & 6 Wm. IV, ch. 41 must be printed and published in both English and French as mandated by s. 23 of the *Manitoba Act, 1870*. Accordingly, it is argued, the *Gaming Acts* not having been printed or published in French as acts of the Manitoba Legislature, do not apply to Manitoba. Any constitutional consideration of the laws of Manitoba must begin with the premise that Manitoba is deemed to have received English law as part of the law of Manitoba. The combined effect of s. 2 of the *Manitoba Act* of 1870, of s. 129 of the *Constitution Act*. 1867 and of s. 4 of the *Manitoba Supplementary Provisions Act* was the confirmation of the reception of the laws of England in Manitoba. Counsel for the Plaintiff maintains that "incorporation" of the Gaming laws of England into the laws of Manitoba is, in effect, no different than the issues involved in the case of *Attorney General of Quebec v. Collier et al*, a decision of the Quebec Court of Appeal. The Supreme Court of Canada adopted, in rejecting the appeal, the reasons of Paré, J.C.A. It is on the limited basis that the legislation, including the underlying documents, must be in French and in English that the *Collier* case must be understood. Paré, J.C.A. only spoke of the legislation before him and did not direct his mind to a case such as we have before us. A simple and compelling, and in my view, only interpretation of the words "Acts of the Legislature" in the last sentence of s. 23 only relates to those acts prospectively to be considered and enacted by the legislature. Accordingly, the *Gaming Acts* do not have to be translated into French in order to be valid in Manitoba: *Red River Forest Products Inc. v. Ferguson,* (Man. Q.B., November 28, 1990).

Section 133 must be read to apply not only to statutes in the strict sense, but equally to all other instruments of a legislative nature. In the 1992 *Manitoba Language Rights Reference*, we decided that the class of instruments having a legislative character might include certain orders in council and documents incorporated into statutes by reference. More generally, we decided that it is not the form of the instrument, but, rather, the degree of "connection between the legislature and the instrument [which] is indicative of a legislative nature" (p. 233). With respect to the content and effect of an instrument, we decided that the following characteristics are further badges of this legislative character (at p. 233): 1. The instrument embodies a rule of conduct; 2. The instrument has the force of law; and 3. The instrument applies to an undetermined number of persons. The question, therefore, is whether the instruments in question in this appeal possess these characteristics. At the outset, however, and prior to embarking upon an examination of the five instruments here in question, we should point out that, as we said in the 1992 *Manitoba Language Reference*, the courts will not permit the circumvention of s. 133 by means of a disingenuous division of a legislative act into a number of discrete parts -- for instance, a "shell" statute incorporating by reference some other "non-legislative" unilingual document. To do otherwise would be to invite the triumph of form over substance. As we told the Government of Manitoba, if the net effect of a series of discrete acts has a legislative character, then each of these component acts will also be imbued with this same character. Each will be subject to the requirement of mandatory bilingualism imposed by s. 133 of the *Constitution Act, 1867*. In issuing the letters patent,

the Minister was not exercising a mere "non-discretionary power" but was exercising a discretionary power which had a legislative character. More fundamentally, the National Assembly of Quebec has attempted to divide the legislative process into a number of discrete steps, and then to claim that each of these individual steps, considered alone and in isolation, lacks a legislative character. As we have already emphasized, it is not permissible to assess the character of the component parts of the legislative process individually and in isolation in order to determine whether s. 133 of the *Constitution Act, 1867* has been complied with. Rather, it is the character of the whole which determines the nature of the parts. An instrument which creates new local governmental institutions cannot escape the operation of s. 133 of the *Constitution Act, 1867* simply by a circuitous path of enactment: *Sinclair v. Quebec (A.G.)*, (S.C.C., February 27, 1992).

When the Parliament of Canada created Alberta, it clearly gave it the power, under the *Alberta Act*, to repeal s. 110 despite the fact that Canada made it temporarily applicable in the new province. The simple answer, then, is that, even if in some sense s. 110 might fairly be called a law about the constitution of the Northwest Territories, it remained nevertheless a law that Canada could repeal or amend, and, in a light of the express power of amendment granted Alberta in the *Alberta Act*, the same law when made applicable to Alberta could be repealed or varied by Alberta: *The Queen in Right of Alberta v. Lefebvre*, (Alta. C.A., February 10, 1993).

Section 19

The subject matter of section 530.1 of the *Criminal Code* is, in my opinion, in pith and substance that of language rights and not relating to the right to a fair hearing. Implicit in my reasons given orally in Court is the finding that, applying the Supreme Court judgments from which I quoted above, a Crown prosecutor acting in his said capacity in a criminal case is a "person" within the meaning of that term as it is employed in section 133. Hence, to the extent that section 530.1(e) purports to deny or infringe upon his or her right to use English or French in a "Court of Quebec," at his or her choice, that subsection contradicts and therefore is inconsistent with section 133. More than that, it flies in the face of the constitutionally guaranteed power to use either one of those two languages at the choice of the person speaking. I am therefore unable to "read down" section 530.1(e) in order to conciliate it with section 133. Applying section 52 of the *Constitution Act, 1982*, the Court has no choice and I am inexorably led to declare section 530.1(e) of the *Criminal Code* inoperative in the province of Quebec: *The Queen v. Cross et al.*, (Que. S.C., April 15, 1991).

I am of the view that Article 133 protects the language rights of private individual pleaders who appear before the Courts but does not afford the same protection to the State. Furthermore, Article 133, in my opinion, protects those persons who, because of circumstances, find themselves before the courts because they either have no choice, such as an accused in a criminal or penal matter or a witness who is subpoenaed in either a civil or criminal matter, as well as persons including their counsel. Prosecutors acting on behalf of the State, as opposed to private prosecutors, do not fall into either of those categories. I note that Article 530.1(e) does not require that a private prosecutor speak the language of the accused. Article 530.1(e) is clearly within the legislative competency of the Federal Parliament in virtue of 91 paragraph 27 of the *Constitution Act, 1867*. It is certainly criminal law. Also, as held in the *Jones* decision, it is within the federal legislative competence to impose duties upon provincially

appointed judicial officers, in this instance, the Attorneys General of the Provinces. The Federal Parliament, in enacting Article 530.1(e), has, in my view, enacted legislation which at the same time concerns not only linguistic rights but also legal rights. The fact that it deals with linguistic rights does not preclude it from also dealing with legal rights. The provisions of Article 530.1(e) are intended to help guarantee to an accused the legal and fundamental right to a fair hearing as is now provided for in Section 11(d) of the *Canadian Charter of Rights and Freedoms*. There is nothing in the wording of Article 530.1(e) that indicates that a prosecutor is being forced to use a language contrary to his or her will. Since Article 133 provides the right to choose a language, it is perfectly in order for a prosecutor to agree to choose the language of the accused should he or she wish to do so. Should the prosecutor choose not to speak the language of the accused, he or she obviously could not be forced to act. However, in that case, the State has the duty and responsibility to assign to the case one who is. In this sense I see no conflict between both provisions: *The Queen v. Montour et al.*, (Que. S.C., May 2, 1991).

In the opinion of the court, the Supreme court (in *A.G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, 1030) has expressed clearly and ruled definitely the freedom of the judge to render judgement in the language of his or her choice, whatever the language used by the parties or their counsel, both in their proceedings and in their pleadings before the court, in these terms: "[i]t follows that the guarantee in s. 133 of the use of either French or English 'by any person or in any pleading or process in or issuing from [...] all or any of the courts of Quebec' applies to both ordinary courts and other adjudicative tribunals. Hence, not only is the option to use either language given to any person involved in proceedings before the courts of Quebec or its other adjudicative tribunals (and this covers both written and oral submissions) but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders": *Morand v. A.G. (Québec)*, (Que. S.C., August 19, 1991).

Section 20

The first duty is to assure that the federal institutions are in a position to respond to a citizen's right to communicate with or to be provided services from them in either language. Admittedly, there are variables in the extent or depth of meeting need and availability. These variables are the product of many basic considerations. I need not list them all, but they do include demographic factors, the size of the minority constituency, the exposure of particular federal agencies to citizen relationships, the proper functioning of those agencies to meet their operational requirements, the significant demand for minority language services, as well as the other considerations which are outlined in section 32 and section 33 of the [Official Languages] Act. Policy requires the respondent not only to react or respond to pressures for more or better bilingual services, but to initiate programmes to offer those services where there is a perceived need for them, a need which might not be fully reflected in a statistical analysis of the number of enquiries, the number of files, or the current incidence of French and English cases in any particular public office. A purposive or proactive component in language policies is not only in keeping with statutory obligations, but is conducive to effective practices. In other words, the respondent has to initiate a level of bilingual services and not simply respond to individual or group demands: *Professional Institute of the Public Service v. The Queen*, (F.C.T.D., January 26, 1993).

Police officers in carrying out their duties also have certain responsibilities and the duty to give a meaningful and reasonable language choice to members of the public and the opportunity to use the official language of their choice. Whether the member of the public should ask to be served in the language of his choice first or whether the police officer should offer such a service first is not relevant nor required. The proper criteria, in my opinion, ought to be whether a meaningful language choice is given to the individual along with the right and opportunity to express himself and be served in either official language: *R. v. Bastarache*, (N.B.Q.B., August 4, 1992).

We feel it is important to note that section 22 of the Act essentially reproduces paragraph 20(1)(a) of the *Canadian Charter of Rights and Freedoms*, which suggests that the Court should interpret it in the same way as this provision of the Charter would be interpreted: *St-Onge v. Canada (Commissioner of Official Languages)*, (F.C.A., June 30, 1992).

As the RCMP is a national institution the non-civilian members of which are the most visible and most involved with the public, the exclusion of such members of the bilingualism bonus seems to run completely contrary to the governmental purpose, which is to provide a bilingual face and bilingual services to the people of Canada: *Gingras v. Canada*, (F.C.T.D, January 4, 1990).

But must a police officer make an active offer as to language choice before the officer has made a demand to a member of the public? In *R. v. Robinson* (1992), 127 N.B.R.(2d) 271; 319 A.P.R. 271, Miller, J., stated as follows: "In essence, it is argued that the appellant has been denied a constitutional right because he was not given a choice of language by Constable Parent when the s. 254(2) [ALERT] demand was made. "In simplest terms the appellant's position is that the first thing a police officer must do in an investigation is to enquire as to language choice. "In effect this would mean that every police officer in New Brunswick must be bilingual or accompanied by another officer so that all necessary questions can be asked in either language. In some circumstances a police officer is required by statute to make enquiries and demands 'forthwith'. Surely all that is required is an understanding or comprehension and there is no indication here that the appellant could not or did not understand or comprehend the demand. "I am not of the opinion that either the meaning or the intention of the language provisions of the *Charter* can be stretched to the extent expounded by the appellant": *R. v. Haché*, (N.B.Q.B., July 8, 1992).

Police forces are government institutions serving the public. However, a municipal police force such as the Saint-John Police Force, is not an office of an institution of the legislature or government of New Brunswick. A municipal corporation has a corporate identity distinct from that of the Province: *R. v. Bastarache*, (N.B.Q.B., August 4, 1992

Section 24(1)

The "principles of fundamental justice" in s. 7 of the Charter include the right to make full answer and defence. This must be kept in mind when considering what is an appropriate and just remedy under s.

24 for a breach of s. 7. Surely an award of damages or an order for the indemnification of costs, rather than a new trial, would be of little comfort to a person facing a lengthy term of imprisonment. The use of the word "remedy" and not "relief" is significant. The former word implies a cure for the default, while the latter word implies an alleviation of the consequences of the default. In this case, counsel for the applicant contends that an indemnity should be granted any time that there has been a systemic error to the prejudice of the accused. If his proposition is valid however, every time the court found a breach of the Charter, it would be required to order the Crown to indemnify the accused for his or her legal costs. This innovative proposition is contrary to the manner in which legal costs are dealt with under our existing Criminal Law system. It is also contrary to the manner in which the courts have remedied breaches since the inception of the Charter. It is for Parliament, not the courts, to make sweeping changes of this magnitude that involve far-reaching economic consequences. The non-disclosure in this case was inadvertent. The Crown did not intend to hide potential evidence, to mislead defence counsel or the court, or to deliberately withhold relevant evidence. An indemnity for legal costs is not an appropriate Charter remedy in these circumstances. In any event, the applicant has already obtained his remedy for the non-disclosure when he was previously granted a new trial. If the applicant desired to obtain additional remedies for the non-disclosure breach, including the remedy he now seeks, he should have done so before the same judge who he asked to consider his initial application. Remedies should not be sought on a piece-meal basis. Except in special circumstances, they should be dealt with in one application, not in successive applications: *R. v. Riendeau*, (Sask. Q.B., April 8, 1993).

Section 32(1)

On appeal from his conviction for making indecent, harassing and threatening telephone calls, the appellant contended that Bell Canada's attachment of a digital number recorder to his telephone number, for the purpose of recording the telephone number dialled when an outgoing call was placed, constituted an unreasonable search. The appellant failed to meet the onus of establishing that Bell Canada was a police agent. Bell Canada had a stake in this investigation. It was in a very real sense a victim itself. Its telephone equipment was being used by one of its subscribers as a part of the *modus operandi* for a series of criminal acts against other subscribers. The complaints from victims went to Bell Canada not to the police. The police were not brought into the picture until more than four months had passed following the making of the initial complaints. There is no evidence that Bell Canada was acting at the request of the police to facilitate a criminal investigation. Similarly, in the absence of a police directive to install the recorder, the act of Bell Canada in itself conducting a "search" does not amount to a government function as an agent of the Crown. To consider the actions of Bell Canada in this instance as being subject to Charter limitations would result, to borrow from the language in *R. v. Shafie*, *supra*, "..in the judicialization of private relationships beyond the point that society would tolerate": *R. v. Fegan*, (Ont. C.A., April 5, 1993).

In the absence of appeal court authority, this Court is reluctant to state a rule as to the receipt of evidence obtained by foreign police as broadly as in *Harrer*, *supra*. In the present case, the important issue is the relationship between Canadian police and the Royal Hong Kong Police Force during the investigation of the offences. The question is not whether the accused are entitled in Hong Kong to rights under the Charter. Rather, the issue is the extent to which the Charter applies when the Crown tenders in evidence statements taken on foreign soil by foreign police authorities. Three questions should be asked: (1) Were the statements taken in a manner that, if taken by police in Canada in the same

manner, would give rise to a finding of a breach of the s. 10(b) rights of the accused? (2) Were the Canadian police involved in the foreign investigation to such an extent that they should bear some responsibility for the loss of the accused's s. 10(b) rights? (3) If the answer to the second question is "yes", would admission of the evidence in the trial bring the administration of justice into disrepute under s. 24(2) of the Charter? Whether the second question must be answered affirmatively before moving to the third question need not be addressed in this case. However, there is probably room for adopting the American "egregious misconduct" exception. The answer to the second question obviously depends on the circumstances of the particular case. If the foreign police obtained the evidence before they or the local Canadian police were even aware of the commission of the offence in Canada the answer would likely be negative. If the Canadian police participated in the interview by the foreign police, the answer would likely be affirmative. The circumstances in the present case lie somewhere in between, but much closer to the second scenario than to the first. The rights of the accused under s. 10(b) were therefore infringed: *R. v. Tam et al.*, (B.C.S.C., March 8, 1993).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - May 1993

Section 7

The recent decision of the Ontario Court of Appeal in *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289, albeit a case dealing with s. 24(2) of the Charter, highlights that while ordinarily counsel should give timely notice with particulars, the trial judge nonetheless retains a discretion to determine the sufficiency of notice and the timing of the motion itself. But at the conclusion of evidence in this case, the matter thereafter simply proceeded to argument. There was no *voir dire*. There were no affidavits. There was no evidence tendered specifically on the issue of prejudice to the accused's right to a fair trial. The question, in reality, became simply whether it could be surmised that the accused's right to a fair trial had been breached by the fact that two witnesses, who likely would have had the opportunity to advert to circumstances that might have been favourable to the accused, were not available to testify. The trial judge responded to this issue not as he should have by concluding that the accused had simply not established substantial prejudice to his right to a fair trial, but rather by stating: "However, there is no onus on the applicant to prove that the evidence of those witnesses not called would have been favourable to him." The trial judge erred in so concluding. He failed to address the proper issue, namely, whether the accused had satisfied the onus on the balance of probabilities of demonstrating that the delay so adversely impacted upon the fairness of the trial as to constitute a breach of either ss. 7 or 11(d) of the Charter. In the circumstances of this case, given the evidence before him and applying the proper test, this question could only be answered in the negative. The mere possibility that the two "missing witnesses" might have given evidence favourable to the accused, without more, does not constitute evidence sufficient to justify staying serious charges: *R. v. D. (D.L.),* (Man. C.A., November 10, 1992).

The principles of fundamental justice do not require that a refugee claimant be provided with counsel at the pre-inquiry or pre-hearing stage of the refugee claim determination process. While the right to counsel under s. 7 may apply in other cases besides those which are encompassed by s. 10(b), for example in cases involving the right to counsel at a hearing, it is clear that the secondary examination of the appellant in this case at the port of entry is not analogous to a hearing. Certainly, factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts. However, in an immigration examination for routine information-gathering purposes, the right to counsel does not extend beyond those circumstances of arrest or detention described in s. 10(b). The concern raised by Wilson J. in *Singh, supra,* related to the adequacy of "the opportunity the procedural scheme provides for a refugee claimant to state his case and know the case he has to meet". This concern is met in the present case by the requirement of a subsequent oral hearing: *Dehghani v. Canada (M.E.I.),* (S.C.C., March 25, 1993).

The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally. The first question in this case is whether, from a substantive point of view, the amendment of the *Parole Act* to eliminate automatic release on mandatory supervision strikes the right balance between the accused's interests and the interests of society. The interest of society in being protected against the violence that may be perpetrated as a consequence of the early release of inmates whose sentence has not been fully served needs no elaboration. On the other side of the balance lies the prisoner's interest in an early conditional release. The balance is struck by qualifying the prisoner's expectation regarding the form in which the sentence would be served. The expectation of mandatory release is modified by the amendment permitting a discretion to prevent early release where society's interests are endangered. A change in the form in which a sentence is served, whether it be favourable or unfavourable to the prisoner, is not,

in itself, contrary to any principle of fundamental justice. The prisoner's liberty interest is limited only to the extent that his continued incarceration is shown to be necessary for the protection of the public. It is difficult to dispute that it is just to afford a limited discretion for the review of parole applicants who may commit an offence causing serious harm or death. Substantively, the balance is fairly struck: *Cunningham v. Canada*, (S.C.C., April 27, 1993).

The appellant in this case contends that the 1986 amendment to the *Parole Act* changing the conditions for release on mandatory supervision amount to a denial of his liberty contrary to the principles of fundamental justice. The respondent's argument that because the appellant was sentenced to twelve years' imprisonment there can be no further impeachment of his liberty interest within the twelve-year period runs counter to previous pronouncements, and oversimplifies the concept of liberty. This and other courts have recognized that there are different types of liberty interests in the context of correctional law. In *Dumas v. LeClerc Institute*, [1986] 2 S.C.R. 459, Lamer J. identified three different deprivations of liberty: (1) the initial deprivation of liberty; (2) a substantial change in conditions amounting to a further deprivation of liberty; and (3) a continuation of the deprivation of liberty. In *R. v. Gamble*, [1988] 2 S.C.R. 595, this Court held by a majority that the liberty interest involved in not continuing the period of parole ineligibility may be protected by s. 7 of the Charter. Here, the <u>manner</u> in which the appellant may serve a part of his sentence, the second liberty interest identified in *Dumas*, has been affected. One has "more" liberty, or a better quality of liberty, when one is serving time on mandatory supervision than when one is serving time in prison. The next question is whether the deprivation is sufficiently serious to warrant Charter protection. The Charter does not protect against insignificant or "trivial" limitations of rights. It follows that qualification of a prisoner's expectation of liberty does not necessarily bring the matter within the purview of s. 7. The qualification must be significant enough to warrant constitutional protection. To require that all changes to the manner in which a sentence is served be in accordance with the principles of fundamental justice would trivialize the protections under the Charter. The change in the manner in which the sentence was served in this case meets this test. There is a significant difference between life inside a prison versus the greater liberty enjoyed on the outside under mandatory supervision. However, while the amendment of the *Parole Act* to eliminate automatic release on mandatory supervision restricted the appellant's liberty interest, it did not violate the principles of fundamental justice: *Cunningham v. Canada*, (S.C.C., April 27, 1993).

The position of the appellant in this case is that two sections of the B.C. *Psychologists Act* and the *Medical Practitioners Act* prevent him from earning a livelihood as a psychologist, thus depriving him of "liberty" within the meaning of s. 7 of the Charter. The authority cited for this proposition is *Wilson v. Medical Services Commission, supra*. It is clear that reasonable regulation of matters such as standards of admission and practice relating to professions do not constitute an infringement of s. 7 of the Charter. It cannot be said that the educational and examination requirements of the B.C. Psychological Association are vague and uncertain or leave substantial scope for arbitrary conduct by that association as was the case of the scheme under review by this court in *Wilson*. Also, it must be kept in mind that *Wilson* was concerned with restraints on professionals who were duly qualified to practise medicine in British Columbia. It was not a case concerned with qualifications themselves. When the court in *Wilson* said that the issue was whether there was a "denial of the right of the appellants to practise their chosen profession within British Columbia", it was referring to doctors who were qualified to practise in British Columbia: *R. v. Baig*, (B.C.C.A., December 7, 1992).

<u>Section 10(b)</u>

The question raised by the present case is whether, in the context of immigration and refugee screenings at Canadian ports of entry, the element of state compulsion is sufficient to constitute "detention" for the purposes of s. 10(b). The questioning experienced by the appellant in this case is analogous to the first type of border search described by Dickson C.J. in *Simmons, supra*. It is well-established that the questioning of an individual by an agent of the state does not always give rise to a detention of constitutional import. In *Simmons*, Dickson C.J. rejected the argument that, if a strip search is

considered to be a detention with constitutional consequences, then all travellers passing through customs would be detained and therefore have a right to counsel under s. 10(b). The questioning which occurred in this case is a routine part of the general screening process for persons seeking entry to Canada. As Dickson C.J. observed in *Simmons*, "... travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation. ..." In this case, there was no action on the part of the immigration authorities to indicate that the restriction on the appellant's freedom had gone beyond that required for the processing of his application for entry and had become restraint of liberty such as that contemplated in *Therens*, *supra*. The questioning which occurred in this case was purely for the purpose of processing the appellant's application for entry and determining the appropriate procedures which should be invoked in order to deal with his application for Convention refugee status. Another factor identified in *Simmons* as indicating that no detention of constitutional consequence occurs during routine questioning is the absence of stigma. Clearly, there is no stigma associated with a referral to a secondary examination. For instance, Canadian citizens who are not able to demonstrate their identity are often referred to a secondary examination for confirmation of their citizenship. It would be unreasonable to expect the screening process for all persons seeking entry into Canada to take place in the primary examination line. For those persons who cannot immediately produce documentation indicating their right of entry, the screening process will require more time, and a referral to a secondary examination is therefore required. There is, however, no change in the character of the examination simply because it is necessary for reasons of time and space to continue it at a later time in a different section of the processing area. The examination remains a routine part of the general screening process for persons seeking entry to Canada. Neither the existence of a statutory duty to answer the questions posed by the immigration officer nor the existence of criminal penalties for both the failure to answer questions and knowingly making a false or misleading statement necessitates the conclusion that the appellant was detained within the meaning of s. 10(b). These provisions are both logically and rationally connected to the role of immigration officials in examining those persons seeking to enter the country. Indeed, they are required to ensure that border examinations are taken seriously and are effective. Both of these types of provisions also exist in the *Customs Act*, and this Court held in *Simmons* that it would be absurd to suggest that routine questioning by a customs officer constitutes a detention for the purposes of s. 10(b): *Dehghani v. Canada (M.E.I.)*, (S.C.C., March 25, 1993).

Section 15(1)

The *Old Age Security Act* provides for the payment of a monthly spouse's allowance, at age 60, to the spouse of a pensioner who is in receipt of a guaranteed income supplement. The *Act* recognizes the obligation of a conjugal spouse to support his or her partner financially and treats pensioner and spouse as a couple entitled to benefit on the basis of need. The impact of the definition of the term "spouse" as "a person of the opposite sex" is to deny that benefit to otherwise qualified couples who are not married either pursuant to statute or at common law. Many couples live together in relationships excluded from the definition. Cohabitation by siblings is a commonplace example; persons otherwise related by blood or marriage do so as well and so do persons not related. They do so for countless personal reasons and combinations thereof. Unless subjective pressures are in play, sex, whether same or opposite, need not be a consideration in the choice of a live-in companion. There are those, like the appellants in this case, whose sexual orientation is a determining factor in their choice of partner. The discrimination perceived in the definition is not discrimination directed to homosexuals generally nor to all homosexual couples but only those who have both established a menage and proclaimed their relationship. The appellants' attack is, in substance, on the failure of the definition to comprehend the concept of common law marriage between persons of the same sex. It is precisely and only because Nesbit is similarly situated to the common law spouse of the opposite sex included in the definition that it can be rationally argued that his exclusion by the definition is discriminatory while leaving to another day the exclusion of other non-conjugal couples. To reach the conclusion urged by the appellants, one must distinguish homosexual couples from the general class of non-conjugal couples denied spouse's allowance. The distinction is necessarily made on the basis of an irrelevant personal difference, sexual orientation; there is no other identifiable difference. One then accepts that, because they have maintained their relationship for at least a year and publicly represented themselves as spouses, they are not legitimately to be distinguished from common law spouses of the opposite sex for pension purposes.

That seems to invert the teaching of *Andrews v. Law Society of B.C., supra.* As the definition pertains to the appellants and other homosexual couples who hold themselves out as spouses, the conclusion that the distinction made by the definition is discrimination can only be reached by mechanical application of the similarly situated test. As concluded by the trial judge, "When compared to the unit or group which benefits by the challenged law the plaintiffs fall into the general group of non-spouses and do not benefit because of their non-spousal status rather than because of their sexual orientation.": *Egan and Nesbit v. Canada,* (F.C.A., April 29, 1993).

The personal difference involved in the case at bar is homosexuality, which is a matter of capacity. That characteristic is not irrelevant to the restriction of marriage at common law to unions of persons of opposite sex. One of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced and cared for, a procedure which is necessary for the continuance of the species. That principal purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of opposite sex. The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law. Unions of persons of the same sex are not "marriages", because of the definition of marriage. The applicants are, in effect, seeking to use s. 15 of the Charter to bring about a change in the definition of marriage. The Charter does not have that effect: *Layland and Beaulne v. Ontario,* (Ont. Div. Ct., March 15, 1993).

Section 23(3)

Once the threshold of entitlement to minority language education is met, if "minority language educational facilities" are, as determined in *Mahe, supra,* to "belong" to s. 23 parents in any meaningful sense as opposed to merely being "for" those parents, it is reasonable that those parents must have some measure of control over the space in which the education takes place. As a space must have defined limits that make it susceptible to control by the minority language education group, an entitlement to facilities that are in a distinct physical setting would seem to follow. Such a finding would also be consistent with the recognition that minority schools play a valuable role as cultural centres as well as educational institutions. However, it is not necessary to elaborate at this point what might satisfy this requirement in a given situation. Pedagogical and financial considerations would both play a role in determining what is required. Obviously the financial impact of the provision of specific facilities will vary from region to region. The rights to language education which flow from s. 23 of the Charter will give rise to differing types of government obligations, depending on the number of students involved. While the parties in this reference cite somewhat different figures for the number of students potentially affected in Manitoba, the lowest common denominator is 5,617. Even accepting the most conservative projections, the number of students who will eventually take advantage of the contemplated programme would seem to fall clearly on the high end of the "sliding scale" established in *Mahe.* In some areas of the province, at a minimum, these warrant the establishment of a separate Francophone school board: *Reference re Public Schools Act (Man.),* (S.C.C., March 4, 1993).

Section 24(1)

The Ontario Court of Appeal in *R. v. Durette* (1992), 72 C.C.C. (3d) 421 has re-emphasized the principle that in cases where there is an onus on the accused to demonstrate a Charter breach, counsel is not entitled to proceed immediately to a *voir dire* and cross-examination of Crown witnesses in an attempt to elicit facts in support of a breach. Finlayson J.A., for the Court, stated "... when an accused makes a Charter motion he or she can be asked to stipulate a sufficient foundation for the claim or its constituent issues. If such a foundation cannot be articulated, I think the trial judge may determine that it is not necessary to hear evidence on the issue and he is entitled to dismiss the motion." In Ontario the practice seems to have developed of bringing motions under s. 24(1) at the conclusion of the Crown's

case rather than waiting until the end of the case. It may even be possible to structure the proceedings so that the application can be heard at the outset of the trial and before much if any evidence is called. Since the accused bears the burden of establishing the Charter breach and the initial burden of presenting evidence, there should be no difficulty in the majority of cases in requesting that defence counsel disclose the intention to make an application under s. 24(1) during the pre-trial conference conducted prior to all jury trials and, in Manitoba, in all other criminal cases where it is anticipated that the case will require three or more days to be heard. Whatever the timing of such a motion, counsel for the accused must be prepared to tender specific evidence of prejudice going to the fairness of the trial, rather than relying exclusively on evidence tendered during the trial itself. Here again the trial judge will have considerable latitude as to what form that evidence should take - be it by affidavit, by *voir dire*, or whatever. The important thing is for the motion to proceed in an expeditious fashion and in a way best calculated to interfere as little as possible with the traditional and time-honoured trial process: *R. v. D.(D.L.)*, (Man. C.A., November 10, 1992).

A court does not have jurisdiction to hear an action for damages for the tortious acts of an employer, where those acts are also arbitrable under a collective agreement. The appellant's action, however, was also for a declaration of Charter infringement. The policy considerations for deferring to the labour relations forum do not apply with the same force when individual constitutional rights are involved and there should not be the same curial deference to the specialized labour adjudication system in disputes involving constitutional rights. The appellant's constitutional entitlement to apply to a court of competent jurisdiction for redress must prevail over the legislative or contractual schemes that otherwise curtail access to the court in favour of labour arbitrations. The Ontario Court of Justice (General Division) is a court of competent jurisdiction to entertain an application under s. 24(1). It should, in certain circumstances not relevant here, decline to exercise its jurisdiction in favour, for instance, of the trial court in a criminal case, when the trial court would be equally competent to grant the constitutional remedy sought by the applicant, and better suited to determine what remedy is just and appropriate in the circumstances. Here, however, it is unclear whether the arbitrator would be a court of competent jurisdiction to grant the remedies sought by the appellant in his action commenced in the civil courts. The rights guaranteed by the Charter are individual rights. They entitle an individual to challenge the state's authority to act and even to legislate in violation of the fundamental Canadian consensus expressed in the Constitution. There should be little impediment or restraint to the individual's right to seek constitutional redress in the courts: *Weber v. Ontario Hydro*, (Ont. C.A., November 30, 1992).

By virtue of s. 24(1) of the Charter, there are some proceedings available to an accused in the context of a criminal case in respect to issues that could be the subject of an action for a declaration. The superior courts have jurisdiction to entertain such applications even if the superior court to which the application is made is not the trial court. However, a superior court has a discretion to refuse to do so unless, in the opinion of the superior court, given the nature of the violation and the need for a timely review, it is better suited than the trial court to deal with the matter. The superior court would therefore have jurisdiction to entertain an action for a declaration seeking this kind of relief but subject to the same discretion to refuse to exercise it. The court is justified in refusing to entertain the action if there is another procedure available in which more effective relief can be obtained or the court decides that the legislature intended that the other procedure should be followed. As a general rule, the court should exercise its discretion to refuse to entertain declaratory relief when such relief is sought as a substitute for obtaining a ruling in a criminal case. This will be the apt characterization of any declaration which is sought with respect to relief that could be obtained from a trial court which has been ascertained. The same considerations apply before a trial court has been ascertained if the relief sought will determine some issue in pending criminal proceedings and does not have as a substantial purpose vindication of an independent civil right. In such circumstances, the mere fact that relief was sought in the guise of an action for a declaration would not confer a right of appeal from the refusal to entertain the action: *Kourtessis v. M.N.R.* (S.C.C., April 22, 1993).

The decision in *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, should be distinguished so as not to foreclose an appeal in proceedings relating to (i) a declaration that the statute authorizing a search

warrant violates the Constitution, coupled with (ii) an application to set aside the search warrant. These two remedies can be exercised, in combination, prior to the laying of charges, and the result of such exercise may be appealed. Alternatively, *Knox Contracting* can be distinguished on the basis that the procedure relating to proceedings for declaratory relief on constitutional grounds cannot be characterized as criminal law so as to exclude a right of appeal. In *Knox Contracting* the proceeding taken was a motion to quash. There was no constitutional challenge to legislation in that case. Here, the proceeding taken was not simply to quash the warrant but an action for a declaration that s. 231.3 of the *Income Tax Act* was invalid on constitutional grounds. A motion to quash, when not combined with an action for declaratory relief, may take its character for the purpose of division of powers from the underlying proceeding which it attacked. On the other hand, an action for a declaration as to the constitutional validity of a statute does not necessarily partake of the character of the statute which is attacked. It has a life of its own. An action to declare a statutory provision unconstitutional is not transformed from a civil remedy to a criminal remedy merely because the declaration relates to a criminal statutory provision. However, it cannot be used as a substitute for an application to the trial judge in a criminal case in order to acquire a right of appeal: *Kourtessis v. M.N.R.*, (S.C.C., April 22, 1993).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - March 1993

Section 7

In this case there was a substantial delay between the completion of the evidence and the imposition of sentence. There is nothing in the actions of the prosecution or the conduct of the proceedings, apart from the delay after the evidence was completed, which could possibly be described as oppressive or offensive to the principles of fundamental justice. Where a constitutional complaint rests on delay after the proceedings are commenced and nothing more, the viability of that complaint should be determined by reference to s. 11(b), which specifically protects the right to trial within a reasonable time: *R. v. Bosley*, (Ont. C.A., December 15, 1992).

Section 8

An analysis of the principles on which *Hunter v. Southam Inc.* was based shows that the exercise of a judicial discretion in the decision to grant or withhold authorization for a warrant of search was fundamental to the scheme of prior authorization which Dickson J. prescribed as an indispensable requirement for compliance with s. 8 in that case. The judgment makes very clear that the decision to grant or withhold the warrant requires the balancing of two interests: that of the individual to be free of intrusions of the state and that of the state to intrude on the privacy of the individual for the purpose of law enforcement. The circumstances in which these conflicting interests must be balanced will vary greatly. In order to take account of the various factors affecting the balancing of the two interests, the authorizing judge must be empowered to consider all the circumstances. No set of criteria will always be determinative or sufficient to override the right of the individual to privacy. It is imperative, therefore, that a sufficient degree of flexibility be accorded to the authorizing officer in order that justice be done to the respective interests involved. Not only is the existence of a discretion indispensable to the balancing of interests which *Hunter* envisaged but the requirement that the officer authorizing the seizure be independent and capable of acting judicially is inconsistent with the notion that the state can dictate to him or her the precise circumstances under which the right of the individual can be overborne. Section 231.3(1) of the *Income Tax Act* states that, on an *ex parte* application, a judge "may" issue a warrant for the search of premises. However, s. 231.3(3) provides that a judge "shall" issue the warrant once satisfied that the three statutory conditions set out therein have been satisfied. The presumption that the word "shall" is intended to be mandatory should be followed unless such an interpretation would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless. There is nothing in s. 231.3 which would point to a permissive or discretionary meaning for "shall". Section 231.3(3), by using the words "shall issue", denies the issuing judge the discretion to refuse to issue a warrant where in all the circumstances a search or seizure would be unreasonable. In fact, the subsection makes it possible for a judge to be statutorily bound to authorize an unreasonable search or seizure. For this reason the use of the word "shall" brings s. 231.3(3) into conflict with s. 8 of the *Charter*. However, nothing turns on the omission of the word "probable" from s. 231.3(3). The standard that the subsection sets out is one of credibly based probability, which is the standard required by s. 8. "Reasonableness" comprehends a requirement of probability. Further, the use of the word "may" regarding the use of the thing found as evidence in a prosecution does not detract from the standard of probability of finding the thing sought; rather, it recognizes the nature of the investigative process. The concern in *Hunter* was with the probability of finding the things sought, not with the certitude that the things found will be used as evidence. Therefore, the standard "may afford evidence", when coupled with a requirement of credibly based probability that the things sought are likely to be found, passes constitutional muster: *Baron v. Canada*, (S.C.C., January 21, 1993).

In *McKinlay Transport Ltd., supra*, Wilson J. recognized that relaxation of the *Hunter* standards with respect to the demand provisions of the *Income Tax Act* by reason of the characterization of the statutory provision as regulatory would not validate all forms of searches and seizures under the *Act*. The characterization of certain offences and statutory schemes as "regulatory" or "criminal", although a useful factor, is not the last word for the purpose of *Charter* analysis. Section 231.3 of the *Act* contemplates and authorizes the physical entry and search, against the will of the occupant, of private premises, even those occupied by innocent third parties against whom no allegation of impropriety is levelled. The purpose of the search is to provide evidence to be used in the prosecution of offences. Physical search of private premises (in the sense of private property, regardless of whether the public is permitted to enter the premises to do business) is the greatest intrusion of privacy short of a violation of bodily integrity. It is quite distinct from compelling a person to appear for examination under oath and to bring with them certain documents, under a *subpoena ducus tecum*, or to produce documents on demand. Given the intrusive nature of searches and the corresponding purpose of such a search to gather evidence for the prosecution of a taxpayer, there is no reason for a radical departure from the guidelines and principles expressed in *Hunter, supra*. The effect of any lessened expectation of privacy by reason of the character of the *Income Tax Act* will no doubt affect the exercise of discretion by an authorizing judge but cannot justify elimination of it: *Baron v. Canada*, (S.C.C., January 21, 1993).

Section 11(b)

The Crown argued here that since the appellant did not raise s. 11(b) at trial, and did not seek prerogative writ relief during the 17 month delay between the completion of the evidence and the imposition of sentence, he cannot rely on s. 11(b) on appeal. Alternatively, Crown counsel argues that this court has held, apart from any waiver argument, that it will not routinely address s. 11(b) arguments which have not been raised and litigated at trial: *R. v. Rabba, supra*. The soundness of the principle announced in *Rabba* is beyond dispute. *Rabba* was, however, a case (like most delay cases) where there was no impediment to the raising of the delay issue at trial. The delay related to the passage of time prior to trial. The delay was for a finite period and the relevant factors could be balanced by the trial judge. In addition, the trial judge was in no way implicated in the delay. In this case, the length of the delay never fully crystallized until the proceedings were completed. The defence had no way of knowing how long the trial judge would reserve judgment or how long it would take him to deliver his reasons. The trial judge had repeatedly indicated his reasons for judgment would be available in the very near future. It is hardly surprising that counsel would be very reluctant to ask the trial judge to declare that the trial judge's delay warranted a stay of proceedings. This is not a case where an appellant seeks to take a different position on appeal than was advanced at trial or where he seeks to create an issue where none existed at trial. This is one of those unusual cases where this court should entertain a s. 11(b) argument even though a stay was not sought prior to the completion of the proceedings below. Acquiescence in judge-generated delay does not constitute waiver: *R. v. Bosley*, (Ont. C.A., December 15, 1992).

Excessive delay which causes prolonged uncertainty for the accused but which does not reach constitutional limits can be taken into consideration as a factor in mitigation of sentence. The trial judge here expressly held that the 17 month delay between the completion of the evidence and sentencing served as a mitigating factor in his determination of the appropriate sentence. The sentence he imposed reflected that mitigation: *R. v. Bosley*, (Ont. C.A., December 15, 1992).

Section 32(1)

The question in this case is whether s. 32(1), which makes the Charter applicable to the "Parliament" and government of Canada and the "legislature" and government of each province, means that the Charter does not apply to a legislative assembly, which, it is argued, is but one constituent part of the "legislature". On the one hand, the terms "Parliament" and "legislature" as defined in the *Constitution*

Act, 1867, and in various provincial *Interpretation Acts*, include both the legislative body and the Queen's representative. On the other hand, s. 5 of the Charter can apply only to the legislative bodies. This section uses the word "legislature" to refer to actions which are exclusively those of a legislative body. It therefore supports the view that, by the terms of the Charter itself, the word "legislature" cannot be narrowly defined to cover only those actions for which the legislative body and the Queen's representative are jointly responsible. Sections 17 and 18 of the Charter provide further support for this view. Nor does a purposive interpretation of s. 32(1) lead to the conclusion that the Charter does not apply to a legislative assembly. It is argued that the history of curial deference to legislative bodies means that the Charter can never apply to them. The argument is cast too broadly. The tradition of curial deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities of legislative assemblies, i.e., the so-called privileges of such bodies. It follows that the tradition of curial deference to legislative bodies does not support a blanket rule that the Charter cannot apply to any of the actions of a legislative assembly. Without deciding that the legislative assembly is a government actor for all purposes, suffice it to say that as a public body it might be capable of impinging on individual freedoms in areas not protected by privilege. The legislative assembly could, therefore, fall within the rationale for regarding such bodies as government actors subject to the Charter developed by La Forest J. in *McKinney*, *supra*. In neither *Dolphin Delivery Ltd.*, *supra*, where McIntyre J. stated that "legislation is the only way in which a legislature may infringe a guaranteed right or freedom", nor in *McKinney*, where La Forest J. repeated this dictum, was any consideration given to whether the term "legislature", for the purposes of s. 32(1), could or should be restricted to its technical meaning of the House of Assembly and the Lieutenant Governor. Nor is it reasonable to say that <u>only</u> by legislation can a "government actor" infringe rights. However, absent specific Charter language to the contrary, the long history of curial deference to the independence of the legislative body, and to the rights necessary to the functioning of that body, cannot be lightly set aside, even conceding that our notions of what is permitted to government actors have been significantly altered by the enactment and entrenchment of the Charter. Here, the right of a legislative body to control who attends in its chamber is a right that enjoys constitutional status, and it cannot be abrogated by another part of the Constitution, in this case the Charter: *New Brunswick Broadcasting Co. v. Nova Scotia*, (S.C.C., January 21, 1993).

The decision in *R. v. Spencer*, [1985] 2 S.C.R. 278, is of no assistance or applicability where it is not a witness, but an accused person, who seeks to obtain Charter protection in respect of a statement made in a foreign jurisdiction, which the Crown seeks to adduce in evidence in a Canadian criminal trial proceeding. Indeed, the American decisions upon which the Crown relies (as apparently mirroring the Canadian law) suggest an exception to the general rule, where the conduct of the foreign officials offends the accused person's constitutional rights. For example, in *U.S.A. v. Hensel*, 509 F. Supp. 1364 (1981), the Court said: "The Fourth Amendment exclusionary rule does not apply to arrests and searches made by foreign authorities on their home territory and in the enforcement of foreign law even if the persons arrested and from whom the evidence is seized are American citizens... To this general rule there are two exceptions. First, if the circumstances of the foreign search and seizure are so egregious that they shock the judicial conscience, exclusion of the evidence may be required... Second, if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked." Even though a foreign government may not be acting as an agent for the Canadian government, the Charter ought, nevertheless, to apply to the evidence which is obtained by foreign officials where the Crown seeks to introduce that evidence in a Canadian criminal trial with respect to a crime alleged to have been committed in Canada. This is particularly so where the evidence goes to the very fairness of the trial itself: *R. v. Harrer*, (B.C.S.C., December 21, 1992).

<u>Section 52(1)</u>

Absent a Charter challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law. If there is some ambiguity as to its meaning or scope, then the courts should, using the usual rules of interpretation, seek out the purpose of the legislation and if more than one reasonable interpretation consistent with that

purpose is available, that which is more in conformity with the Charter should prevail. But absent a Charter challenge, the Charter cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have. Of course, if the effect of the legislation is in violation of the Charter, and a challenge of the constitutionality of the law is made before the courts, then the courts are commanded under s. 52 of the *Constitution Act, 1982* to declare the section inoperative or to amend it when permissible along the lines set out in *Schachter*, as did the Ontario Court of Appeal in *Haig, supra*: *Canada (Attorney General) v. Mossop*, (S.C.C., February 25, 1993).

Section 52(2)

It is a basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution. The first part of our written Constitution, the preamble to the *Constitution Act, 1867*, announces the intention of securing to the provinces of Canada, Nova Scotia and New Brunswick, a "Constitution similar in Principle to that of the United Kingdom". There is no question that this preamble constitutionally guarantees the continuance of Parliamentary governance; given Canadian federalism, this guarantee extends to the provincial legislatures in the same manner as to the federal Parliament. The Constitution of the United Kingdom recognized certain privileges in the legislative body. This suggests that the legislative bodies of the new Dominion would possess similar, although not necessarily identical, powers. It seems indisputable that the inherent privileges of Canada's legislative bodies, those "certain very moderate privileges which were necessary for the maintenance of order and discipline during the performance of their duties", fall within the group of principles constitutionalized by virtue of the preamble. This is not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental to the constitutional regime which Canada has adopted in its *Constitution Acts, 1867 to 1982*. Nor are we here treating a mere convention to which the courts have not given legal effect; the authorities indicate that the legal status of inherent privileges has never been in doubt. Additions to the 30 instruments set out in the Schedule to s. 52(2) of the *Constitution Act, 1982* might have grave consequences given the supremacy and entrenchment that is provided for the "Constitution of Canada" in ss. 52(1) and 52(3). However, s. 52(2) is not clearly meant to be exhaustive. That established, this Court should be unwilling to restrict the interpretation of that section in such a way as to preclude giving effect to the intention behind the preamble to the *Constitution Act, 1867*, thereby denying recognition to the minimal, but long recognized and essential, inherent privileges of Canadian legislative bodies. The issue in this case is whether the Nova Scotia House of Assembly has a constitutional power to exclude strangers from its deliberations. If this Court were to rule that the Assembly could not do this, this Court would be taking away a constitutional power possessed by the Assembly. At issue, in other words, is the constitutional "tree" itself, rather than the fruit of the tree. It is therefore no answer to a claim for constitutional privilege to say that it constitutes the mere exercise of a constitutional power: *New Brunswick Broadcasting Co. v. Nova Scotia*, (S.C.C., January 21, 1993).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - December 1992

Section 7

All of the cases in which vagueness has been considered by this Court have involved provisions which define an offence or prohibit certain conduct. Section 515(10)(b) of the *Criminal Code* is somewhat different. It does not define an offence or prohibit conduct, but rather provides grounds on which pre-trial detention is authorized. Nevertheless, the doctrine of vagueness is applicable to s. 515(10)(b). The principles of fundamental justice preclude a "standardless sweep" in any provision which authorizes imprisonment. This is all the more so under a constitutional guarantee not to be denied bail without just cause as set out in s. 11(e). Since pre-trial detention is extraordinary in our system of criminal justice, vagueness in defining the terms of pre-trial detention may be even more invidious than is vagueness in defining an offence. If the doctrine of vagueness aims to ensure that all dispositions are framed in terms which permit meaningful legal debate, then all dispositions are subject to this doctrine regardless of their form. A standardless sweep does not become acceptable simply because it results from the whims of judges and justices of the peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice. A provision does not violate the doctrine of vagueness simply because it is subject to interpretation. To require absolute precision would be to create an impossible constitutional standard. However, the authorities do not establish any "workable meaning" for the term "public interest". On the contrary, the authorities demonstrate the open-ended nature of the term. The term authorizes a standardless sweep, as the court can order imprisonment whenever it sees fit. According to *Nova Scotia Pharmaceutical, supra*, such unfettered discretion violates the doctrine of vagueness: *R. v. Morales*, (S.C.C., November 19, 1992).

The elements of fairness form a minimum standard of s. 7 protection. The extent and nature of that protection, which is based upon the common law notion of procedural fairness, will depend upon the context in which it is claimed. To determine the nature and extent of the procedural safeguards required by s. 7 a court must consider and balance the competing interest of the state and the individual. The appellant contends that a dual role has been allotted to the Minister of Justice by the *Extradition Act*. The *Act* requires the Minister to conduct the prosecution of the extradition hearing at the judicial phase and then to act as adjudicator in the ministerial phase. These roles are said to be mutually incompatible and to raise an apprehension of bias on their face. It is correct that the Minister of Justice has the responsibility to ensure the prosecution of the extradition proceedings and that to do so the Minister must appoint agents to act in the interest of the requesting state. However the decision to issue a warrant of surrender involves completely different considerations from those reached by a court in an extradition hearing. The extradition hearing is clearly judicial in its nature while the actions of the Minister of Justice in considering whether to issue a warrant of surrender are primarily political in nature. This is certainly not a case of a single official acting as both judge and prosecutor in the same case. At the judicial phase the fugitive possesses the full panoply of procedural protection available in a court of law. At the ministerial phase, there is no longer a *lis* in existence. The fugitive has by then been judicially committed for extradition. The *Act* simply grants to the Minister a discretion as to whether to execute the judicially approved extradition by issuing a warrant of surrender. The arrangement could not raise apprehension of bias in a fully informed observer: *Idziak v. Canada (Minister of Justice)*, (S.C.C., November 19, 1992).

Section 11(d) of the Charter sets out the presumption of innocence in the context of its operation at the trial of an accused person. However, the fact that the presumption of innocence comes to be applied in its strict evidentiary sense at trial pursuant to s. 11(d) in no way diminishes the broader principle of fundamental justice that the starting point for any proposed deprivation of life, liberty or security of the

person of anyone charged with or suspected of an offence must be that the person is innocent. This, of course, does not mean that there can be no deprivation of life, liberty or security of the person until guilt is established beyond reasonable doubt by the prosecution at trial. Certain deprivations of liberty and security of the person may be in accordance with the principles of fundamental justice where there are reasonable grounds for doing so, rather than only after guilt has been established beyond a reasonable doubt. While the presumption is pervasive in the criminal process, its particular requirements will vary according to the context in which it comes to be applied. In determining the precise content of the substantive principle in a specific context, the examples given in the Charter itself, ss. 8-14, will be instructive, as will the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions. The interaction of s. 7 and s. 11(d) is nicely illustrated at the sentencing stage of the criminal process. The presumption of innocence as set out in s. 11(d) arguably has no application at the sentencing stage of the trial. However, it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt. While the presumption of innocence as specifically articulated in s. 11(d) may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle in s. 7 almost certainly would. Thus, s. 11(d), while having its specific operation at trial, does not exhaust the broader principle of fundamental justice which is enshrined in s. 7. However in this case, the Charter challenge to s. 515(6)(d) of the *Criminal Code* falls to be determined according to s. 11(e), rather than under s. 7. Section 11(e) offers "a highly specific guarantee" which covers precisely the respondent's complaint. Sections 11(d) and 11(e) are parallel rights. Sections 11(d) and 11(e) define the procedural content of the presumption of innocence at the bail and trial stages of the criminal process, and constitute both the extent and the limit of that presumption at those stages. The substantive right in s. 7 to be presumed innocent is operative at both the bail and trial stages, in the sense that it creates a legal rule that the accused is presumed legally innocent until proven guilty, but it does not contain any procedural content beyond that contained in ss. 11(d) and 11(e). Thus s. 515(6)(d) does not violate s. 7 unless it fails to meet the procedural requirements of s. 11(e): *R. v. Pearson*, (S.C.C., November 19, 1992).

Section 8

The Crown contends that what occurred in this case as part of a random roadside check stop did not constitute a search. First, it was said that a visual inspection of the interior of the vehicle would not in itself constitute a search. Further, it was submitted that the questions posed by the police officers pertaining to a gym bag on the front seat were authorized by the provisions of s. 119 of Alberta's *Highway Traffic Act*. It was argued that the questions came within the ambit of the words "any information respecting the driver or the vehicle that the peace officer requires". There can be no quarrel with the visual inspection of the car by police officers. At night the inspection can only be carried out with the aid of a flashlight and it is necessarily incidental to a check stop program carried out after dark. The inspection is essential for the protection of those on duty in the check stops. Although the safety of the police might make it preferable to use the flashlight at the earliest opportunity, it certainly can be utilized at any time as a necessary incident to the check stop routine. However, the subsequent questions pertaining to the gym bag were improper. At the moment the questions were asked, the officer had not even the slightest suspicion that drugs or alcohol were in the vehicle or in the possession of the appellant. Check stop programs result in the arbitrary detention of motorists. The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search. The police questions pertaining to the appellant's gym bag, the search of the bag and of the appellant's vehicle were all elements of a search. That search was made without the requisite foundation of reasonable and probable grounds. It was therefore an unreasonable search in contravention of s. 8 of the Charter: *R. v. Mellenthin*, (S.C.C., November 19, 1992).

Section 9

There is no question that the bail provisions of s. 515(6)(d) of the *Criminal Code* provide for persons to be "detained" within the meaning of s. 9 of the Charter. The sole issue is to determine whether those persons are detained "arbitrarily". Detention is arbitrary if it is governed by unstructured discretion. Detention under s. 515(6)(d) is not arbitrary in this sense. Section 515(6)(d) sets out a process with fixed standards. This process is in no way discretionary. Specific conditions for bail are set out. The highly structured nature of the criterion in s. 515(6)(d) is in sharp contrast to the completely random nature of the detention which was held to violate s. 9 in *R. v. Hufsky*, [1988] 1 S.C.R. 621, *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, and *R. v. Wilson*, [1990] 1 S.C.R. 1291. Furthermore, the bail process is subject to very exacting procedural guarantees and subject to review by a superior court: *R. v. Pearson*, (S.C.C., November 19, 1992).

Section 11(e)

Section 11(e) contains two distinct elements, namely the right to "reasonable bail" and the right not to be denied bail without "just cause". "Reasonable bail" refers to the terms of bail. Thus the quantum of bail and the restrictions imposed on the accused's liberty while on bail must be "reasonable". "Just cause" refers to the right to obtain bail. Thus bail must not be denied unless there is "just cause" to do so. The "just cause" aspect imposes constitutional standards on the grounds under which bail is granted or denied. The dual aspect of s. 11(e) mandates a broad interpretation of the word "bail" in s. 11(e). If s. 11(e) guarantees the right to obtain "bail" on terms which are reasonable, then "bail" must refer to all forms of what is formally known under the *Criminal Code* as "judicial interim release". In common parlance, "bail" sometimes refers to the money or other valuable security which the accused is required to deposit with the court as a condition of release. Restricting "bail" to this meaning would render s. 11(e) nugatory because most accused are released on less onerous terms. In order to be an effective guarantee, the meaning of "bail" in s. 11(e) must include all forms of judicial interim release. Section 515(6)(d) of the *Criminal Code* is an exception to the basic entitlement to bail contained in s. 11(e). Instead of requiring the prosecution to show that pre-trial detention is justified, it requires the accused to show that pre-trial detention is not justified. The mere fact that there is a departure from the basic entitlement to bail is sufficient to conclude that there is a denial of bail for the purposes of s. 11(e) and that this denial of bail must be with "just cause" in order to be constitutionally justified. The effect of s. 515(6)(d) is to establish a set of special bail rules in circumstances where the normal bail process is incapable of functioning properly. There is just cause for these rules. Section 515(6)(d) applies only to a very small number of offences, all of which involve the distribution of narcotics. The narrow scope of the denial of bail under s. 515(6)(d) is essential to its validity under s. 11(e). The basic entitlement of s. 11(e) cannot be denied in a broad or sweeping exception. The offences which are included under s. 515(6)(d) have specific characteristics which justify differential treatment in the bail process. Trafficking in narcotics occurs systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail. In these circumstances, the normal process of arrest and bail will normally not be effective in bringing an end to criminal behaviour. Another specific feature of the offences is that there is marked danger that an accused charged with these offences will abscond rather than appear for trial. Although concerns about the scope of s. 515(6)(d) are legitimate, they do not lead to a conclusion that s. 515(6)(d) violates s. 11(e). The "small fry" and "generous smoker" will normally have no difficulty justifying their release and obtaining bail. This is not a situation like that in *R. v. Smith*, [1987] 1 S.C.R. 1045, where an overbroad provision did not allow differential treatment based on the seriousness of the offence. Section 515(6)(d) does not mandate denial of bail in all cases and therefore does allow differential treatment based on the seriousness of the offence: *R. v. Pearson*, (S.C.C., November 19, 1992).

The criterion of "public interest" as a basis for pre-trial detention under s. 515(10)(b) of the *Criminal Code* violates s. 11(e) because it authorizes detention in terms which are vague and imprecise. The principles of fundamental justice preclude a "standardless sweep" in any provision which authorizes

imprisonment. This is all the more so under a constitutional guarantee not to be denied bail without just cause as set out in s. 11(e). Since pre-trial detention is extraordinary in our system of criminal justice, vagueness in defining the terms of pre-trial detention may be even more invidious than is vagueness in defining an offence. The authorities do not establish any "workable meaning" for the term "public interest". On the contrary, the authorities demonstrate the open-ended nature of the term. The term authorizes a standardless sweep, as the court can order imprisonment whenever it sees fit. According to *Nova Scotia Pharmaceutical Society, supra,* such unfettered discretion violates the doctrine of vagueness. On the other hand, the "public safety" component of s. 515(10)(b) provides just cause to deny bail within the criteria identified in *Pearson, supra.* Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary' for public safety. Such grounds are sufficiently narrow to fulfil the first requirement of just cause under s. 11(e). With regard to the second requirement, the "public safety" component is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system. The bail system does not function properly if an accused interferes with the administration of justice while on bail. If an accused is released on bail, it must be on condition that he or she will refrain from tampering with the administration of justice. If there is a substantial likelihood that the accused will not give this cooperation, it furthers the objectives of the bail system to deny bail. The bail system releases individuals who have been accused but not convicted of criminal conduct, but in order to achieve the objective of stopping criminal behaviour, such release must be on condition that the accused will not engage in criminal activity pending trial. In *Pearson*, the reality that persons engaged in drug trafficking tend to continue their criminal behaviour even after an arrest was one basis for concluding that there is just cause to require persons charged with certain narcotics offences to justify bail. Similarly, if there is a substantial likelihood that the accused will engage in criminal activity pending trial, it furthers the objectives of the bail system to deny bail: *R. v. Morales*, (S.C.C., November 19, 1992).

Section 24(1)

The appellant submits that *habeas corpus* is not available in this case because an alternative remedy exists, namely a bail review under s. 520 of the *Criminal Code*. While in general *habeas corpus* is not available as a remedy against a denial of bail, it is available as a remedy in the narrow circumstances of this case. The respondent is seeking two constitutional remedies: a determination that s. 515(6)(d) of the *Criminal Code* violates the Charter and therefore is of no force and effect under s. 52 of the *Constitution Act, 1982*, and a remedy under s. 24(1), namely a new bail hearing in accordance with criteria for determining bail which are constitutionally valid. The emphasis in *Gamble, supra*, is to ensure that Charter claims are adjudicated. Technical legal distinctions which interfere with the court's ability to adjudicate Charter claims are to be rejected. Most challenges to a refusal to grant bail cannot be properly addressed by means of *habeas corpus*. However, where the refusal to grant bail is challenged in a s. 52 claim coupled with an application for a remedy under s. 24(1), *habeas corpus* is an adequate remedy. The constitutional claim can be determined without evidence about the applicant's specific circumstances. If the claim is successful, the court can order a new bail hearing to be held in accordance with constitutionally valid criteria. In these circumstances, to refuse to address the respondent's claim simply because another remedy exists would be to adopt the very type of uncertain, artificial, technical and non-purposive distinction which Wilson J. rejected in *Gamble*. Outside the narrow circumstances of this case, *habeas corpus* is not a remedy for a denial of bail. As Wilson J. noted in *Gamble*, "[u]nder section 24(1) of the Charter courts should not allow *habeas corpus* applications to be used to circumvent the appropriate appeal process". This approach is consistent with McIntyre J.'s holding in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 959, that Charter remedies are subject to normal and established procedures and do not create the right to bring an interlocutory appeal: *R. v. Pearson*, (S.C.C., November 19, 1992).

On a pre-trial motion this court found that the right of the accused to a fair trial had been infringed by the publication of testimony given at a public inquiry investigating an alleged coverup of sexual assaults

at the Mount Cashel Orphanage. Judgment was reserved on the issue of the appropriate remedy and, subsequent to a conviction being entered, the parties made submissions on the question of whether either damages or costs or both should be awarded against the Crown. There is no statutory provision expressly granting this court jurisdiction to award costs or damages in criminal matters. However, this court does possess an inherent jurisdiction, that is, a jurisdiction derived not from any statute or rule of law but from the very nature of the court as a superior court. Inherent jurisdiction is relied on by superior courts to maintain their authority and to prevent their processes from being obstructed or abused. The opinions in *Mills*, *supra*, support the conclusion that, where there may otherwise be no effective remedy, the exercise of a superior court's inherent jurisdiction may authorize the awarding of costs and damages. This is not a case where the Crown will be disadvantaged, if the matter is not referred to a civil court, because of an inability to have issues clearly stated or to have discovery and production of documents. The pleadings on the interlocutory applications for Charter remedies have adequately raised the issues of costs and damages. Opportunity can be provided, prior to the argument on the appropriateness and justness of either costs, or damages, or both as a remedy under s. 24 (1), for issues to be clarified concerning whether additional evidence or discovery or production of documents is necessary. Balanced against any minor inconvenience for the Crown is the reality of there being no effective remedy should the accused be forced to commence a civil action and embark upon a new and lengthy procedural odyssey before arriving at his day in court to seek his Charter remedy: *R. v. Kenny*, (Nfld. S.C., June 25, 1992).

Section 24(2)

It has been held that generally a deferential approach will be adopted when reviewing a decision of a provincial appellate court dealing with the exclusion of evidence pursuant to s. 24(2). However, it is significant that in *R. v. Collins*, *supra*, Lamer J. also cautioned the provincial courts of appeal that they should not too readily interfere with the decision of trial judges on s. 24(2) issues. He said: "In effect, the judge will have met this test if the judges of the Court of Appeal will decline to interfere with his decision, even though they might have decided the matter differently, using the well-known statement that they are of the view that the decision was not unreasonable." Here it does not appear that the trial judge made either an unreasonable finding of fact or an error in law. The Court of Appeal too readily interfered with the findings of the trial judge: *R. v. Mellenthin*, (S.C.C., November 19, 1992).

In *Thompson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425, La Forest J. pointed out that in the case of real evidence, there was a distinction to be drawn between evidence which the accused had been forced to create, and evidence which the accused had been forced to merely locate or to identify. He carefully distinguished between independently existing evidence that could have been found without compelled testimony and independently existing evidence that would have been found without compelled testimony. He said "...there will be situations where derivative evidence is so concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer. For practical purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of the pre-trial compelled testimony. In the case at bar, the trial judge could not be said to have acted unreasonably in concluding that the evidence (the marijuana) would not have been discovered without the compelled testimony (the search) of the appellant. To search a person who is stopped at a check stop, without any reasonable or probable cause, goes far beyond the purpose and aim of those stops and constitutes a very serious Charter breach. Check stops infringe the Charter rights against arbitrary detention. They are permitted as means designed to meet the pressing need to prevent the needless death and injury resulting from the dangerous operation of motor vehicles. The rights granted to police to conduct check stop programs or random stops of motorists should not be extended. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted: *R. v. Mellenthin*, (S.C.C., November 19, 1992).

Section 52(1)

The "public interest" component of s. 515(10)(b) of the *Criminal Code* is constitutionally invalid for vagueness. In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, it was held that a severable portion of a statutory provision can be struck down without having to strike down the entire provision, provided that severance would not defeat a "unitary scheme" envisaged by Parliament. Severance does not usurp Parliament's role, but rather is the approach which best fulfils the terms of s. 52(1) of the *Constitution Act, 1982*, which provides that a law which is inconsistent with the Constitution is of no force and effect "to the extent of the inconsistency". Severance is also least intrusive to the overall statutory scheme. Removing the criterion of "public interest" from s. 515(10)(b) would not defeat a unitary scheme envisaged by Parliament. The courts have generally regarded the criteria of "public interest" and "public safety" in s. 515(10)(b) as disjunctive. If these two criteria are disjunctive, it would not interfere with a unitary scheme to strike down only one of them. The remaining provision will be a functioning whole. Severance would not require the Court to add anything to s. 515(10)(b) to create a viable provision. In this case, severance is the means by which the Court's interference with the legislative function can be minimized: *R. v. Morales*, (S.C.C., November 19, 1992).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - October 1992

Section 1

In determining the objective of a legislative measure for the purposes of s. 1, the Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision. Although the application and interpretation of objectives may vary over time (see, e.g., *Butler*, *supra*), new and altogether different purposes should not be invented. The present case is quite different from the anti-obscenity legislation in *Butler* where the goal historically and to the present day is the same -- combatting the "detrimental impact" of obscene materials on individuals and society -- even though our understanding or conception of that detrimental impact (a "permissible shift in emphasis") may have evolved. The dissenters in this case say that it is a permissible shift in emphasis that the false news provision of the *Criminal Code* was originally focused on the "prevention of deliberate slanderous statements against the great nobles of the realm" and is now said to be concerned with "attacks on religious, racial or ethnic minorities". But this is no shift in emphasis with regard to the purpose of the legislation -- this is an outright redefinition not only of the purpose of the prohibition but also of the nature of the activity prohibited. To convert the provision into one directed at encouraging racial harmony is to go beyond any permissible shift in emphasis and effectively rewrite the section. Justification under s. 1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees: *R. v. Zundel*, (S.C.C., August 27, 1992).

Section 2(b)

The purpose of s. 2(b) is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate". Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of "truth" or "public interest" from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., "cruelty to animals is increasing and must be stopped". This expression

arguably has intrinsic value in fostering political participation and individual self-fulfilment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the example above from the possibility of constitutional protection. This Court cannot accept that such was the intention of the framers of the Constitution: *R. v. Zundel*, (S.C.C., August 27, 1992).

Section 2(d)

Section 36 of the Saskatchewan *Trade Union Act* requires maintenance of union membership for certain employees as a condition of employment. Those persons who are union members at the time s. 36 is invoked are required to maintain their membership and new employees are required to join the union and continue membership. The clause does not compel existing employees to join a union if they elect not to do so. It is clear that those persons who are obliged to maintain membership because they were union members at the time of certification do not have the right to withdraw. In that sense they do not have the right to disassociate. That restriction is not caught by s. 2(d). Freedom not to associate was canvassed by the Supreme Court of Canada in *Lavigne, supra*. The court divided. Three judges who held there was a freedom to disassociate did so because of the facts in that case. This Court does not understand those three judges to be saying there is an absolute negative right. Thus even if there were a freedom not to associate (and that is not settled by the Supreme Court of Canada), freedom not to associate is conditioned by the circumstances. The purpose of s. 36 is to advance the interests of workers by providing for union security. Allowing employees to opt out of membership at any time would create chaos and skew the balancing of interest that has developed over the years in labour relations. New employees are not forced to join or associate except as a condition of obtaining employment. They do not have to associate with others as union members if they do not wish to do so. However, if they take a job, they must join. That does not violate s. 2(d). To argue otherwise would mean that a potential employee could alter his or her conditions of employment by simply objecting to the requirement that he or she become a union member: *Strickland v. Ermel*, (Sask. Q.B., May 6, 1992).

Section 7

The appellant in this case had counsel and with counsel's advice agreed to a psychiatric examination pursuant to s. 537 of the *Criminal Code* to determine whether he was mentally ill and whether he was fit to stand trial. The appellant was aware that what he might say was not protected by confidentiality and might be incorporated in a report to the court. He spoke freely and openly to the doctors. He did not assert his right to silence. There were no tricks of any sort engaged in by the doctors which induced him to speak to them. Unlike the police officer in *Hebert, supra*, the doctors were not undercover agents. Nor did they resort to trickery to persuade the appellant to negate his right not to speak. Even assuming that the doctors were state agents, this Court is unable to find that there was any unfair use by the state, through the doctors, of its superior resources. The "critical balance" referred to in *Hebert* was maintained between the appellant's right to protection against the unfair use by the state of its superior resources and the state's obligation to respect fundamental principles of justice. Nor was there a departure in this case from any of the principles applicable to an accused's fundamental right to silence: *R. v. Jones*, (B.C.C.A., July 29, 1992).

In the particular circumstance of this case, the requirement as a condition of mandatory supervision that the appellant furnish urinalysis samples on demand by a supervisor or peace officer without reasons or probable grounds, was not authorized by any law or regulation and constituted a breach of Charter s. 8. This Court is not saying that a provision for a urinalysis would necessarily always be breach of the Charter. What is prohibited by the Charter is a regime that interferes in such a serious way with the liberty of the subject under circumstances where there are no standards and where the use of the provision interfering with the liberty of the subject can be applied arbitrarily: *Cruikshanks v. National Parole Board*, (B.C.C.A., July 17, 1992).

To be convicted of unlawfully causing bodily harm under s. 269 of the *Criminal Code*, the prosecution must first satisfy the mental element requirement of the underlying offence. In interpreting the ambit of the underlying offences it is important to recognize the abhorrence of the criminal law for offences of absolute liability. While not all underlying offences will have a possibility of imprisonment and despite the fact that s. 269 has a fault requirement in addition to that supplied by the underlying offence, as a matter of statutory interpretation, underlying offences of absolute liability are excluded from forming the basis for a prosecution under s. 269. For the reasons given by this Court in *R. v. Sault Ste. Marie* and *Re B.C. Motor Vehicle Act*, s. 269 should not be interpreted so as to bootstrap underlying offences of absolute liability into the criminal law. The mental element of s. 269 has two separate aspects. The first aspect of the mental element is the requirement that an underlying offence with a constitutionally sufficient mental element has been committed. Additionally, s. 269 requires that the prosecution prove that the bodily harm caused by the underlying unlawful act was objectively foreseeable. As this Court has not indicated that fundamental justice requires fault based on a subjective standard for all offences, the mental element required by s. 269 passes constitutional muster. It has neither the stigma nor criminal sanction to require a more demanding mental element than it already has. The criminal sanction is flexible and thus can be tailored to suit the circumstances of the case. The stigma associated with conviction will generally reflect the degree of opprobrium which the underlying offence attracts. The stigma attached to the underlying offence will in turn influence the minimum mental requirement for that offence. However, the appellant argues that s. 7 of the Charter requires subjective foresight of all consequences which comprise part of the *actus reus* of an offence. In *R. v. Hess*, [1990] 2 S.C.R. 906, the Court concluded that a meaningful mental element was required in regard to a <u>blameworthy</u> element of the *actus reus*. Provided that there is a sufficiently blameworthy element in the *actus reus* to which a culpable mental state is attached, there is no additional requirement that any other element of the *actus reus* be linked to this mental state or a further culpable mental state. Provided that the actor is already engaged in a culpable activity, foresight of consequences is not required in order to hold that actor responsible for the results of his or her unlawful activity. Lamer C.J. stated in *Martineau* that "[i]f Parliament wishes to deter persons from causing bodily harm during certain offences, then it should punish persons for causing the bodily harm". That is exactly what s. 269 attempts to do. In this particular provision the mental element requirement is composed of both the mental element of the underlying unlawful act <u>and</u> the additional requirement of objective foresight of bodily harm. There is, however, no constitutional requirement that intention, either on an objective or a subjective basis, extend to the consequences of unlawful acts in general. Conduct may fortuitously result in more or less serious consequences depending on the circumstances in which the consequences arise. The same act of assault may injure one person but not another. The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused. This is reflected in the creation of higher maximum penalties for

offences with more serious consequences. One is not morally innocent simply because a particular consequence of an unlawful act was unforeseen by that actor. In punishing for unforeseen consequences the law is not punishing the morally innocent but those who cause injury through avoidable unlawful action. Neither basic principles of criminal law, nor the dictates of fundamental justice require, by necessity, intention in relation to the consequences of an otherwise blameworthy act: *R. v. DeSousa*, (S.C.C., September 24, 1992).

Section 7 deals with individual rights, not collective rights such as the right of union members to strike. In the context of the negotiation of a labour agreement, the individual rights of the members of a union are exercised, discussed and expanded in a collective process which, by necessity, is subject to a set of different rules to ensure its proper functioning. The individual members delegate the exercise of their rights to a collective bargaining unit with the possibility, if need be, of resorting to a collective action such as a strike. The trial judge was right in his conclusion that the *Maintenance of Ports Operations Act* did not violate s. 7 by reason that it prohibited the appellants from taking strike action, be it in the form of collectively refusing to resume work pursuant to the cessation of the lockout or going on a strike proper at a later date. In the *B.C. Motor Vehicle Act Reference*, Lamer J. viewed s. 7 as protecting interests "that are properly and have been traditionally within the domain of the judiciary... The common thread that runs throughout s. 7 and ss. 8-14 is the involvement of the judicial branch as guardian of the justice system". The right to strike and the right of Parliament to curtail it in the public interest in appropriate circumstances have never been traditionally within the domain of the judiciary. Here, the back-to-work legislation involved important social, political and economical considerations with national and international ramifications which were never intended to be discussed under the right to individual liberty found in s. 7. The appellants are trying to do under s. 7, i.e., under the cover of the right to liberty, what they cannot do under s. 2(d), i.e., under freedom of association: *I.L.W.U. v. The Queen*, (F.C.A., September 24, 1992).

Section 8

In this case, unlike *Rodney, supra*, the accused had been specifically advised that their telephone conversations might be monitored by the institution's staff. Neither of the accused had a reasonable expectation of privacy when they spoke on the telephones. The taping was not done to aid the police in obtaining evidence. It was done for security purposes within the institution and the tapes were passed to the police only when it was learned that they contained incriminating statements. The intercepted communications were not private communications under s. 189 of the *Criminal Code* and there was no unreasonable search and seizure. Unlike the situation in *Rodney*, the corrections officer undertook an extended risk evaluation and made a reasoned decision that there was a security risk. She was consciously acting in accordance with the applicable provisions of the Correctional Centre Rules and Regulations: *R. v. Napope and Olson*, (B.C.S.C., March 24, 1992).

Section 10(b)

The ratio of *Evans, supra*, is that an accused person is entitled on arrest or detention to be told the nature of the charge upon which he is being held. The police should take reasonable steps to ensure that he understands what he has been told. Accordingly, when an accused is advised of his right to

counsel and is cautioned as to his right to remain silent, he should be in a position to make a meaningful decision about whether to consult counsel or waive that constitutional right. When he waives his right to counsel and submits to questioning by the police, it must be on the implicit understanding that his waiver is with respect to questioning which relates to the circumstances giving rise to the charge upon which he was arrested or detained. The waiver cannot be indefinite as to time nor indeterminate as to subject-matter. It cannot be a waiver of the right to counsel on some matter which is entirely different in character or has significantly more serious consequences. The detainee is entitled to expect that the questioning by the persons in authority will be with respect to the incident giving rise to the charge. Accordingly, where, as in *Evans*, the focus of the questioning changes to a different matter altogether, the police are not entitled to continue their investigation on the assumption that the accused's waiver of the right to counsel is still operative. In this case, the situation was such that the appellant knew from the outset when he was arrested under the *Immigration Act* that the homicide detectives wanted to speak to him about the two murders to which he had been a witness, and about nothing else. This Court does not read *Evans* as stating that a person can never be arrested on one *bona fide* charge and questioned on another. Rather, it stands for the proposition that, when he waives his right to counsel and agrees to answer questions, he must know what subject-matter he is to be questioned on. In other words, the waiver must be an informed one: *R. v. Young*, (Ont. C.A., June 23, 1992).

Section 15(1)

A comparison of the prohibited grounds of discrimination in s. 3(1) of the *Canadian Human Rights Act* with the grounds listed in s. 15(1) of the Charter reveals that all those who have complaints about discrimination on the grounds listed in s. 15(1) of the Charter have the benefit of access to the ameliorating procedures of the *Canadian Human Rights Act*. Homosexual persons, who fall within a ground analogous to the constitutionally protected ground of sex, are, by exclusion, denied access. Because of the omission of that ground of discrimination, the *Canadian Human Rights Act* withholds benefits or advantages available to other persons alleging discrimination on the enumerated grounds from persons who are and, on the evidence, have historically been, the object of discrimination on analogous grounds. The distinction created by the legislation alone, however, is not sufficient to justify a conclusion of discrimination within the meaning of s. 15(1). The larger context, social, political and legal, must also be considered. One need not look beyond the evidence before this Court to find disadvantage that exists apart from and independent of the legal distinction created by the omission of sexual orientation as a prohibited ground of discrimination in s. 3(1) of the *Canadian Human Rights Act*. The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice towards them. It also includes the enlightened evolution of human rights social and legislative policy in Canada, since the end of the Second World War, both provincially and federally. The failure to provide an avenue for redress for prejudicial treatment of homosexual members of society, and the possible inference from the omission that such treatment is acceptable, create the effect of discrimination offending s. 15(1) of the Charter: *Haig v. The Queen*, (Ont. C.A., August 6, 1992).

Section 24(1)

The Manitoba *Social Allowances Act* does not expressly confer upon either the Director of Income Security or the Social Services Advisory Committee power to deal with questions of law. The mandate under the legislation is simply to determine whether an applicant is eligible for an allowance under the

criteria set out in the *Act* and regulations and to calculate the amount of the allowance required. The Director's limited power to apply the law in fulfilling his mandate is not akin to those powers given to the tribunals and the umpire that the Supreme Court of Canada addressed in the trilogy of cases, *supra*. The powers referred to by the Supreme Court allowed the tribunals to apply all laws to the matters before those tribunals. Such is not the case in the matter before this Court. Nor does the *Act* bestow any implied power to apply the law to either the Director or the Committee. Because the legislation provides for a right to apply for leave to appeal to this Court on a question of law, does not lead inevitably to the conclusion that there exists an implied right in the Director or the Committee to consider questions of law and thus Charter issues: *Fernandes v. Director of Social Services*, (Man. C.A., June 10, 1992).

With rare exceptions that do not apply in this case, a trial judge is empowered to reserve on any application until the end of the case. He or she is not obliged, therefore, to rule on a motion to quash for invalidity of the indictment until the end of the case after the evidence has been heard. The decision whether to rule on the application or reserve until the end of the case is a discretionary one to be exercised having regard to two policy considerations. The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own. This policy is the basis of the rule against interlocutory appeals in criminal matters. The second, which relates to constitutional challenges, discourages adjudication of constitutional issues without a factual foundation. Both these policies favour disposition of applications at the end of the case. In exercising the discretion referred to, the trial judge should not depart from these policies unless there is a strong reason for so doing. In some cases the interests of justice necessitate an immediate decision. Examples of such necessitous circumstances include cases in which the trial court itself is implicated in a constitutional violation as in *R. v. Rahey*, [1987] 1 S.C.R. 588, or where substantial on-going constitutional violations require immediate attention as in *R. v. Gamble*, [1988] 2 S.C.R. 595. Moreover, in some cases it will save time to decide constitutional questions before proceeding to trial on the evidence. An apparently meritorious Charter challenge of the law under which the accused is charged which is not dependent on facts to be elicited during the trial may come within this exception to the general rule. This applies with added force when the trial is expected to be of considerable duration. Here, the evidence at trial would not have assisted in the resolution of the constitutional challenge to the validity of s. 269 of the *Criminal Code*, given the nature of the appellant's submissions. The trial judge did not err in disposing of the appellant's motion before hearing evidence: *R. v. DeSousa*, (S.C.C., September 24, 1992).

In the course of the criminal trial in this case before a jury, the presiding judge made four orders closing the court to the public, each for a relatively short period of time. He made three orders banning publication of limited portions of the proceedings. The orders were related to a single purpose: the concealment of the identity of a witness for whose safety the trial judge was concerned. At the conclusion of the trial, the petitioner, a newspaper reporter who had been excluded when the court was closed, unsuccessfully applied under the civil rules of practice to the trial judge for disclosure of the submissions made and the reasons in support of the orders. His subsequent appeal to this Court was based on the premise that the dismissal of his petition was final as against him, and that his appeal was therefore as of right under s. 6(1) of the *Court of Appeal Act*. However, the petitioner is mistaken in his characterization of his hearing before the trial judge. This proceeding is in its nature criminal, and under the *Criminal Code* no appeal lies from the interlocutory orders made. The attempt to invoke a civil procedure was misconceived. The rules of court applicable to civil proceedings have no application

to matters within the exclusive power of Parliament in relation to procedure in criminal matters. What could not be done directly could not be done indirectly by virtue of the means chosen to obtain an audience before the judge who conducted the criminal trial: *Needham v. The Queen*, (B.C.C.A., September 18, 1992).

Section 52(1)

The task of choosing the appropriate remedy for a benefit-conferring, underinclusive statutory provision that violates a Charter right has been made vastly easier by the decision in *Schachter v. Canada, supra.* Given the pivotal role played by s. 3(1) of the *Canadian Human Rights Act* in the scheme of the *Act* as a whole, in practical terms to sever it from the remainder of the *Act* would be to strike down the entire *Act*. Because the defect is the absence of a ground of discrimination (sexual orientation), reading down is an unrealistic option. This Court is thus left with the necessity of choosing among striking down s. 3(1) by declaring it to be of no force or effect, striking down s. 3(1) but temporarily suspending the declaration of invalidity to permit Parliament to repair the defect, and reading into s. 3(1) sexual orientation as a further prohibited ground of discrimination. Striking down alone would provide the respondents with a pyrrhic victory. They would gain no access to legislative machinery intended to be remedial. Moreover, it would deny access to large numbers of other persons already intended by Parliament to have access to the benefit of the *Act*. However, to read into s. 3(1) the words "sexual orientation" would be less intrusive than the total destruction of the objective that would result from striking the provision down. Reading in not only leaves the purpose of the *Act* intact but it enhances it by making it conform to Charter values. Given the evidence of the commitment of successive Ministers of Justice on behalf of their governments to amend the legislation to add sexual orientation to the list of prohibited grounds of discrimination, it is surely safe to assume that Parliament would favour extending the benefit of s. 3(1) of the *Act* to homosexual persons over nullifying the entire legislative scheme: *Haig v. The Queen*, (Ont. C.A., August 6, 1992).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - August 1992

Section 1

Vagueness can be raised under s. 7 of the Charter, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the Charter *in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on Charter rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations. On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of overbreadth. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 *in limine*, and will rather consider the scope of the disposition under the "minimal impairment" test. A notion tied to balancing such as overbreadth finds its proper place in sections of the Charter which involve a balancing process. Consequently, overbreadth is subsumed under the "minimal impairment branch" of the *Oakes* test, under s. 1 of the Charter. However, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the Charter. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the Charter. The threshold for finding a law vague is relatively high. The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness. Fair notice comprises two aspects. First, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. Given that case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not a central concern in a vagueness analysis. Second, there is a substantive aspect to fair notice, which could be described as a notice, an understanding that some conduct comes under the law. The substantive aspect of fair notice is a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society. The weakness or the absence of substantive notice before the enactment can be compensated by bringing to the attention of the public the actual terms of the law, so that substantive notice will be achieved. Merit point and driving license revocation schemes are prime examples of this; through publicity and advertisement these schemes have been "digested" by society. A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague. Legal rules only

provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meantime, conduct is guided by approximation. By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens. No higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Guidance, not direction, of conduct is a more realistic objective. A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate: *R. v. Nova Scotia Pharmaceutical Society*, (S.C.C., July 9, 1992).

Section 7

Although the Supreme Court, in *Chiarelli v. M.E.I.*, *infra*, in deciding the issue on the basis of fundamental justice, left open the question whether deportation for serious offences can be conceptualized as a deprivation of liberty under s. 7, this Court has already decided that it cannot, and is bound by its previous decisions: *Canepa v. M.E.I.*, (F.C.A., June 8, 1992).

The defence complains here that it was denied a proper preliminary hearing in that the Crown withheld crucial evidence capable of changing the character of the Crown's case until after the preliminary hearing. What has now been disclosed on the eve of trial was not subject to the process of discovery. The defence prepared itself to meet a case it encountered at the preliminary hearing only to find that the case has been transformed by new evidence. Counsel submits that *Stinchcombe*, *supra*, stands for the proposition that the Crown is obliged to make full disclosure before the preliminary hearing. However, the discovery feature of the preliminary inquiry is ancillary to the primary purpose, which is to ascertain whether the Crown has a *prima facie* case for trial. This Court concludes therefore that the Charter inquiry must confine itself to the timing of disclosure prior to trial. The Crown has not given the defence timely disclosure and it has not satisfactorily justified the delay in respect of several of those features. What remedy should follow? At common law the Court possesses a staying power if the Crown has abused the criminal law process. However, the defence does not ask for a stay. Nor does it want an adjournment. Counsel argues for an order excluding the evidence. That request is met squarely by the reasons of Le Dain J. in *Therens*, [1985] 1 S.C.R. 613. The defence cannot bring itself within the circumstances under s. 24(2) because the problem does not arise from the obtaining of the evidence. Counsel argues that if only an adjournment exists as a sanction to enforce the Crown's duty to make timely disclosure then *Stinchcombe* has not taken the accused's rights beyond the point already protected at common law. The remedial value of *Stinchcombe* lies in its codification of Crown conduct.

The Supreme Court of Canada has not established a subsidiary set of Charter rights, the breach of which will readily lead to the termination of prosecutions or the exclusion of material evidence. Accused persons can now assert rights to full disclosure. If they get less than that, the Courts are empowered to rectify the problem by ordering disclosure and by granting adjournment where necessary. In particularly egregious cases a stay of proceedings may be appropriate where the prejudice to the accused is severe and otherwise irremediable. That is not this case: *R. v. Letourneau*, (B.C.S.C., April 8, 1992).

The incompetence of trial counsel can afford a ground of appeal. It is, however, one which should be raised only after the most careful consideration. There is a strong presumption that trial counsel perform adequately and the onus rests on the appellant to demonstrate that counsel's conduct fell below the standard of competence. Here, the appellant was not deprived of the "effective assistance of counsel" within the meaning of that phrase as used in *R. v. Silvini, supra*. It cannot be said that trial counsel's performance was "ineffective" or "unprofessional". At most, it can be said that a different approach to the cross-examination of the victim and another Crown witness might have been taken, and that further cross-examination on a prior inconsistent statement might have been conducted. There is no merit to this ground of appeal: *R. v. Kelly*, (Ont. C.A., February 21, 1992).

Section 8

A restraint order issued under s. 462.33 of the *Criminal Code* constitutes an interference with property since the order derogates from the right to dispose of property or deal with it in any manner the property holder may wish. However, a restraint order does not constitute a seizure. The essence of a seizure under s. 8 of the Charter is the "taking" of a thing from a person by or pursuant to public authority without the person's consent. In the first place, a restraint order does not constitute a "taking" of property. At most, a restraint order constitutes a temporary restriction on the full rights of alienation available to property holders. In this regard, Canadian courts have uniformly ruled that even the forfeiture of property does not constitute a seizure of property under s. 8 of the Charter. In the second place, a restraint order in no may interferes with the right of privacy which is the primary value served by s. 8. No private information about the property is obtained by government officials by reason of the order. Government officials do not examine or inspect the property so as to gather information from the property for use against the property holder in later court proceedings. Thus, the property holder is not subject to being incriminated by information gathered from his or her property. At most, the property holder is restricted in the full use of the property, but no privacy interest is affected by the restraint order: *R. v. Serrano*, (Ont. Gen. Div., May 29, 1992).

The trial judge in this case concluded that the police officers were entitled and should have stopped the appellant's vehicle for narcotics. The vehicle was indeed stopped and the appellant arrested and personally searched. A search may occur before or after formal arrest as long as the grounds for the arrest exist prior to the search. A police officer is entitled to make a reasonable search of the person arrested and the place where he is arrested. Specifically, police officers are entitled to search an accused and the car driven by him which is in the immediate surrounding area as an incident of lawful arrest: *R. v. Charlton*, (B.C.C.A., June 22, 1992).

Section 11(b)

While the societal interest recognized in *R. v. Askov*, [1990] 2 S.C.R. 1199, and affirmed in *R. v. Morin*, requires that account be taken of the fact that charges against young offenders be proceeded with promptly, it is merely one of the factors to be balanced with others in the manner set out in *R. v. Morin*. Applying those factors, we agree with the conclusion of the trial judge that the delay complained of was not unreasonable. The time required for an application for transfer to adult court and appeals relating thereto is part of the inherent time requirements of a case under the *Young Offenders Act*. The application for transfer must, however, be made within a reasonable time and pursued meritoriously and in good faith. In this case, the trial judge found that the application could not have reasonably proceeded faster. We see no reason to disturb this finding: *R. v. D. (Stephen)*, (S.C.C., June 4, 1992).

It was argued here that the Crown's decision to split its case against the numerous accused was responsible for unnecessary delay. It had taken the Crown ten months to decide to prefer an indictment, and, upon making that decision, the Crown preferred two separate indictments, one in the Supreme Court and one in the District Court. It elected to proceed on the Supreme Court indictment first and to seek an adjournment of the other until the first trial had been completed. This resulted in a further delay of seventeen months. The Crown conceded that the period of time between arrest and trial invited Charter scrutiny, but submitted, as an explanation for the delay, that the number of accused persons and the complexity of the case warranted splitting the prosecution into two parts. The defence argued that because the explanation could be questioned, the exercise of the Crown's discretion was justiciable, not because it was exercised *mala fides*, but because it could have been exercised differently. On that ground, counsel sought to call those whom they assumed were responsible for giving advice to the Attorney General to question them about their reasons for choosing one course of conduct over another. Absent an attack on the *bona fides* of the Crown's decision, however, the court is restricted to examining the merits of the decision, not the motivation behind it. The trial judge was correct in not permitting the calling of evidence. The Court may inquire into the sufficiency of the Crown's explanation for the delay without hearing further evidence. An evidentiary hearing is not justified by merely pointing out that the discretion of the Crown could have been exercised differently. On a s. 11(b) delay issue, in order for the trial judge to inquire further than the sufficiency of the Crown's explanation and to allow an evidentiary hearing for that purpose, there must be some basis for suspecting the Crown's choice of conduct. In order to ask the court to delve into the circumstances surrounding the exercise of the Crown's discretion, or to inquire into the motivation of the Crown officers responsible for advising the Attorney General, the accused bears the burden of making a tenable allegation of *mala fides* on the part of the Crown. Such an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof. Without such an allegation, the court is entitled to assume what is inherent in the process, that the Crown exercised its discretion properly, and not for improper or arbitrary motives. The defence submitted that since the Supreme Court in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, had declined to follow *Franks v. Delaware*, 438 U.S. 154, there can no longer be a requirement of a threshold showing before addressing this issue. Counsel argued that since it is an issue where the accused bears the burden of adducing evidence, the court cannot question counsel's decision to call whatever witnesses the defence feel could be helpful. In *Garofoli*, however, Sopinka J. did not suggest that it was inappropriate to eliminate any threshold test before exploring the validity of a wiretap authorization, let alone a collateral issue such as the exercise of prosecutorial discretion. *Garofoli* does not have anything to do with this issue. We are dealing at this stage of the appeal with the question of prosecutorial discretion, not whether there was reasonable and probable cause for the issuance of a

search warrant as in *Franks v. Delaware*, or whether there was compliance with the statutory requirements for obtaining an authorization to intercept private communications as in *Garofoli*. With regard to the situation in this case, *Garofoli* does not say anything more than *Franks v. Delaware* imposes too stringent an evidentiary burden upon an accused who wishes to cross-examine on an affidavit in order to assist him in his challenge of a specific judicial process: *R. v. Durette*, (Ont. C.A., May 15, 1992).

The defence argued in this case that the Crown should have severed the substantive counts from the conspiracy counts. To what extent, if any, this would have helped in terms of arranging an earlier trial date, no one said. Nor was any evidence led on this point. The Crown offered a reasonable explanation for its manner of proceeding. Neither defence counsel nor the court have the right to dictate to the Crown its strategy for prosecuting a case. This strategy may be challenged as an abuse of process. But that is not the issue here. If the suggestion is that every time a number of defendants are charged with conspiracy, the Crown should be required to sever charges if and when timing problems arise, the implications for prosecuting these kinds of cases could be profound. Although the right to trial within a reasonable time is an individual right, one cannot ignore the practicalities of what is involved in the Crown's prosecution of a conspiracy case. The mere fact that an accused has been charged with conspiracy does not confer upon him some inherent advantage in asserting a claim for a s. 11(b) breach if and when one of his co-defendants causes a delay in the proceedings. To suggest severance as a simple solution ignores the very real cost to the Crown and the public involved in prosecuting separate actions. In the end, this kind of approach will only serve to contribute to further delays in the administration of justice. There may well be cases where severance is in order. But what is significant in the context of this case is that none of the defence counsel applied for severance on behalf of any of these defendants: *R. v. Koruz*, (Alta. C.A., May 28, 1992).

Section 12

This Court is prepared to assume, for the sake of argument, that the issue as to whether deportation under s. 32(2) of the *Immigration Act* constitutes cruel and unusual treatment under s. 12 is still open notwithstanding the decision in *Chiarelli*, *supra*, and that the question should first be looked at from the perspective of the person subjected to it, as specified by Gonthier J. in *R. v. Goltz*, [1991] 3 S.C.R. 485. If in that perspective this deportation order under s. 32(2) of the *Act* were found to contravene s. 12, and the statutory provisions were not saved by s. 1 of the Charter, presumably the deportation order would receive a "constitutional exemption" or "reading out", leaving s. 32(2) in force, as previously proposed by this Court, although the notion of constitutional exemption was queried by McLachlin J. in *Seaboyer*, [1991] 2 S.C.R. 577. The reasons of the Immigration Appeal Board in this case indicate a careful and balanced examination of the appellant's claim to remain in Canada from an equitable rather than a legal point of view. It is the very kind of inquiry mandated by Gonthier J. in *Goltz*, involving an "assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself with the particular circumstances of the offence and the personal characteristics of the offender". There is nothing "grossly disproportionate as to outrage decency in those real and particular circumstances". The deportation order provided for by s. 32(2) is only an apparent minimum. In fact, the provision for an appeal on equitable grounds renders the order in effect a reversible one, depending precisely upon an assessment of the appellant's personal merits and demerits. That is what the statute mandates, and this is the treatment the appellant received. It is far

from cruel and unusual treatment, and so cannot contravene s. 12: *Canepa v. M.E.I.*, (F.C.A., June 8, 1992).

Section 24(1)

In this case counsel for the appellant advised the Crown several months before trial that he intended to challenge the admissibility of the breathalyzer results, but he did not mention the Charter as a basis for the challenge. When he sought to raise the argument at the outset of the trial, the trial judge, on an objection by the Crown, held that the failure to give notice was fatal. In deciding how to proceed when faced with the Crown's objection, the trial judge had to balance various interests. He had to bear in mind an accused's right to raise constitutional objections to the admissibility of evidence and the Crown's right to have an adequate opportunity to meet Charter arguments made on behalf of an accused. In addition, the trial judge had to be concerned with the effective use of court resources and the expeditious determination of criminal matters. In balancing those interests in this case, the trial judge should have considered the absence of any statutory rule or practice direction requiring notice, the notice that was given to the Crown, the point during the trial proceedings when the appellant's counsel first indicated he intended to seek exclusion under s. 24(2) of the Charter and the extent to which the Crown was prejudiced by the absence of any specific reference to a Charter-based argument in the notice given to the Crown. The trial judge also should have considered the specific nature of the Charter argument which counsel proposed to advance and the impact the application could have on the course of the trial. This particular application would have had no effect on the course of the trial, save adding legal argument. The trial judge did not properly balance the various interests. His ruling sacrificed entirely the appellant's right to advance a Charter-based argument. The other interests engaged did not require the order made by the trial judge. As Crown counsel suggested, there were other alternatives. The trial judge could have heard the entire case except the Crown's legal argument in reply to the Charter argument, and then, if necessary, allowed Crown counsel a brief adjournment to prepare his response to the legal issues flowing from the Charter argument. This procedure would have better served the interests of the effective administration of justice by allowing the appellant to make his Charter argument while, at the same time, allowing the Crown to make an effective response to that argument. The procedure would have resulted in only a minimal, if any, delay in the ultimate disposition of the case and would not have significantly interfered with the orderly operation of the trial court: *R. v. Loveman*, (Ont. C.A., February 24, 1992).

An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken: *Schachter v. Canada*, (S.C.C., July 9, 1992).

It is well-settled that an applicant may not invoke the extraordinary remedies, in this case *habeas corpus*, to circumvent the ordinary appellate procedures for which provision is made in the *Criminal Code*.

While *Gamble*, *supra*, counsels that courts should not bind themselves by overly-rigid rules about the availability of *habeas corpus* where the effect may be to deny a *habeas* applicant access to the courts to obtain Charter relief, it equally instructs that neither should they suffer *habeas* applications to be used to circumvent the appropriate appeal process. To set aside the applicant's plea of guilty, as well quash his conviction in *habeas corpus* proceedings, would appear to permit him to do indirectly what he is barred from doing directly. Under *R. v. Wigman*, [1987] 1 S.C.R. 246, and *R. v. Thomas*, [1990] 1 S.C.R. 713, it is made clear that an appellant can only invoke a decision rendered subsequent to conviction as a basis successfully to impeach his or her conviction where the appellant remains "in the system" at the time the subsequent decision sought to be invoked is rendered. To be "in the judicial system" for such purposes, an appellant must have taken a timely appeal or application for leave to appeal to, or have been granted an extension of time within which to do so by, the relevant appellate court. This applicant, not "in the system" at the relevant time, is barred from invoking the subsequent precedent favourable to his cause in direct impeachment of his conviction. Subsequent judicial consideration of the decision in *Gamble* would appear to favour its confinement to its somewhat singular facts, rather than its extension to analogous circumstances. The singular facts are that an accused/applicant was convicted and sentenced under the wrong law. The applicant here was not convicted and sentenced under the wrong law. He was convicted under a law which was in force at the time of the offence, the commencement of proceedings, the entry of the plea of guilty, the recording of the conviction and the imposition of the sentence. The law was only later declared to be constitutionally inadmissible. It is that subsequent declaration that the applicant seeks to invoke as a basis for a declaration of immediate parole eligibility, without interference with the underlying conviction. It is plain that the applicant is barred from invoking the precedent to set aside the underlying conviction. Neither may he do so indirectly under the rationale in *Gamble*. The statute under which Gamble had been convicted and sentenced was not in force at the time of her conviction. Here, however, all relevant conduct and proceedings took place under a statute only later determined to be constitutionally infirm. It is under that law that the obligations of this applicant arise. The *de facto* doctrine represents as much a bar to the declaratory relief sought here as it does to the setting aside of the antecedent conviction: *R. v. Sarson*, (Ont. Gen. Div., May 26, 1992).

The concerns voiced by this Court in *Martin*, *supra*, must never be ignored in Charter cases. It is preferable for a judge to proceed to hear the relevant evidence, considering the constitutional issue as part of the defence. However, in this case, as in *Martin*, while that is not how the judge chose to proceed, that fact alone is not sufficient reason for this Court to refuse to hear the appeal. It is necessary to inquire further into whether there is any specific reason in this case why the appeal should not proceed. The decisions in *Danson* and *MacKay* do provide for exceptions from the general rule that Charter cases should not proceed in the absence of a full factual context. Since those cases were decided, the Supreme Court has decided three Charter challenges in factual contexts similar to this case. All of the facts relied upon in these three decisions were legislative facts, relating to purpose and history. In each case there was either no or very little evidence before the courts about the particular facts on which the charges were based. More important to the Crown's view, there was no verdict below in any of those cases. Perhaps there is a difference in this case from those, such as *MacKay* and *Danson*, where it is suggested that the court ought *not* to proceed. If the court is concerned with a substantive right, rather than with the application of a s. 1 reasonable limit, adjudicative facts become very important. However, if the main or only concern in a case is with s. 1, as is the present case, then the concern is mainly with legislative facts. These can be submitted by way of affidavits and can be answered by affidavits, and by cross-examination on these. Therefore, there is clear and recent jurisprudence of the Supreme Court of Canada and of this Court indicating that, in certain circumstances, perhaps more

particularly when the focus of a case is on s. 1, it is proper to proceed with a constitutional challenge to a criminal law provision in the absence of adjudicative facts. In light of the Crown's admission that adjudicative facts would not ameliorate the hearing of this appeal, this is a proper case in which one could proceed in their absence: *R. v. Johnson et al.*, (Ont. C.A., June 16, 1992).

Section 52(1)

Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *A.G. Alta. v. A.G. Can.*, [1947] A.C. 503: "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all." The doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion. This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly <u>excludes</u> rather than what it wrongly <u>includes</u>. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. The first step in choosing a remedial course under s. 52 is defining the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 will be critical to this determination. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The extent of the inconsistency should be defined: (a) broadly where the legislation in question fails the first branch of the *Oakes* test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a Charter right or, indeed, if the purpose is itself held to be unconstitutional -- perhaps the legislation in its entirety; (b) more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the *Oakes* test in that the means used to achieve that purpose are held

not to be rationally connected to it -- generally limited to the particular portion which fails the rational connection test; or, (c) flexibly where the legislation fails the second or third element of the proportionality branch of the *Oakes* test. Severance or reading in will be warranted only in the clearest of cases, where each of the following criteria is met: (a) the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down; (b) the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and, (c) severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question: *Schachter v. Canada*, (S.C.C., July 9, 1992).

A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain*, *supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits. A delayed declaration is a serious matter from the point of view of the enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter. Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in, in cases where reading in is appropriate. The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public: *Schachter v. Canada*, (S.C.C., July 9, 1992).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - June 1992

Section 2(a)

The recent case law on s. 2(a) of the Charter indicates that: (i) the freedom of religion that is guaranteed by s. 2(a) relates to the tenets, practices and beliefs that are fundamental to the religion in issue; to attract the Charter guarantee, the conduct impeded by the impugned legislation must be integral to the practice of a person's religion, that is, it must be an essential of the faith; (ii) the court should also distinguish between a "tenet or article of faith" which has Charter protection, and a policy position adopted by a religious group on a secular issue, which has not; (iii) where the assistance of the court is sought by a person who claims the protection of s. 2(a), it is not only proper but is essential that the court inquire into the religious doctrine or practice said to be impeded in order to determine the true basis of the religious claim, and whether it attracts the guarantee; (iv) to attract the s. 2 guarantee there must be a threat by the state to a fundamental tenet or practice or essential of the faith; (v) if the purpose of the statute is valid, its *effect* may nevertherless constitute an infringement of a Charter-protected right or freedom and this must be determined by the court in any event; and (vi) notwithstanding that the impugned statute has some effect on the tenets or practices of the religion, it will not constitute a breach of s. 2(a) if the legislation is not shown to have an impact on the person's religious beliefs and practices that is more than trivial or insubstantial. In this case, the religious tenets and practices of the Salvation Army officers protected by s. 2(a) do not include the requirement that a retirement allowance not be a guaranteed allowance which the officer may claim as of right. Thus, the requirements of the Ontario *Pension Benefits Act* may be fulfilled without infringing s. 2(a): *Salvation Army v. Ontario*, (Ont. Gen. Div., January 21, 1992).

Section 7

The respondent here relies upon *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, for the proposition that s. 11(b) is simply illustrative of a specific s. 7 deprivation, and contends that the scope of the right can therefore be no greater than that of the s. 7 guarantee. In other words, if a corporation cannot rely upon s. 7 pursuant to *Irwin Toy Ltd.*, it stands to reason that it also cannot invoke s. 11(b). It is true that in *Re B.C. Motor Vehicle Act*, Lamer J., on behalf of the majority, was of the view that it would be "incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14" of the Charter. However, the concern over incongruity related to the scope of the principles of fundamental justice, not that of life, liberty and security of the person. Establishing a deprivation of life, liberty or security of the person is not a prerequisite to relying upon the protection afforded through ss. 8 to 14. Section 7 does not define the scope of the rights contained in the provisions that follow it. A clear example of that is the right of a witness to the assistance of an interpreter as provided for in s. 14. It is therefore not inconsistent with *Re B.C. Motor Vehicle Act* to hold that s. 11(b) can encompass interests in addition to those that have been recognized as falling within s. 7: *R. v. CIP Inc.*, (S.C.C., Apr. 9/92).

It is common ground in this case that an accused against whom primary wiretap evidence obtained under judicial authorization is to be tendered in legal proceedings is entitled to contest its admissibility, *inter alia*, under the *Criminal Code*. Admissibility of primary evidence under the *Code* may be contested at the preliminary inquiry, as well as at trial. To facilitate the admissibility challenge, the accused is entitled to disclosure of the affidavit filed in support of the application for judicial authorization. The disclosure given, however, may require editing based on considerations of public interest immunity. Summaries may be provided of portions of the affidavit deleted upon such basis. Under *R. v. Stinchcombe*, *supra*, disclosure is generally to be given prior to election and plea, thereby informing the decision as to each.

The apparent impediment to disclosure of an edited version of the affidavit, at present, in advance of an election of mode of trial, is the insistence in *Garofoli*, [1990] 2 S.C.R. 1421, that editing be done by the *trial judge*. There is, at present, no confirmed sighting of a trial judge, as there has been neither election of mode of trial, nor, *a fortiori*, order to stand trial. However logical and practical it may be to permit a provincial court judge sitting as a justice at a preliminary inquiry to edit the disclosed supportive affidavit, since it plays into the *Code* admissibility question the justice will be required to determine, or to return to the former practice of having the judge who opens the packet perform at least a preliminary editing function, subject to review by the trial judge, it would *not* appear open to follow such course in light of the express command of *Garofoli*. There would not appear any perfect solution to the dilemma created by the disclosure commands of *Stinchcombe*, the editing regime of *Garofoli*, and the undoubted right of the applicant to contest the admissibility of primary evidence under the *Code* at a preliminary inquiry. To deny disclosure on grounds of "jurisdiction" as suggested by Crown counsel, however, would appear to be manifestly unjust. Disclosure of the supportive affidavit should be given before the applicant is required to elect the mode of trial or enter a plea, absent exigent circumstances which are not present here. The mandate of *Stinchcombe* will then be met. The disclosure, however, must not compromise any valid public interest immunity considerations. Such considerations not only circumscribe the extent of disclosure required under the principles of *Stinchcombe*, but equally justify editing under *Garofoli*. Each is subject to review by the *trial* judge. The practical solution in the present case lies in the application of the preliminary prosecutorial editing procedure dictated by *Garofoli*. Such a procedure ensures disclosure without compromise of legitimate public interest immunity concerns. This edited form of disclosure will place the applicant, as nearly as present circumstances permit, in the position that he may well find himself at trial. What is ordered here will permit a *Code* challenge at a preliminary inquiry and facilitate focused cross-examination there to lay a basis for Charter challenge at trial. In an imperfect world, it ensures an accused at least some measure of fundamental justice: *R. v. Aranda*, (Ont. Gen. Div., January 10, 1992).

Section 8

Given the personal privacy interests which underlie s. 8, there is no reason to differentiate between the taking of a person's breath and the taking of a person's blood or urine, in so far as the applicability of s. 8 is concerned. The state capture, for investigative purposes, of the very breath one breathes constitutes a significant state intrusion into one's personal privacy. Section 8 concerns are clearly engaged by such conduct. However, the taking of a breath sample does not always amount to a seizure. Not every taking by the state is a seizure. 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. As there is no seizure, the reasonableness of the police conduct need not be addressed. Nevertheless, a police officer's erroneous, albeit reasonable, belief that an individual consented to a seizure can no more make that seizure reasonable than could the officer's reasonable belief that a particular statute or other law authorized a certain search or seizure: *R. v. Wills*, (Ont. C.A., February 20, 1992).

The seizure of chattels under the *Income Tax Act* without any notice to the taxpayer of an intention to seize the chattels and without giving the taxpayer reasonable time, following the notice, to discharge the tax debt, in circumstances where there is no reasonable ground for a belief that the taxpayer intends to avoid the payment of the tax debt, may constitute an unreasonable course of conduct and an unreasonable seizure. The same is true of garnishment of wages and recovery by deduction under the enforcement scheme of the Act. The principle in *Lister v. Dunlop*, [1982] 1 S.C.R. 726, that a person from whom a seizure is being made under a security instrument is entitled to receive such notice of the proposed seizure as is reasonable in the circumstances, is a principle that is not confined to security instruments but applies to all seizures under contract and to all seizures under a statutory scheme that does not specifically provide otherwise, unless the person on whose behalf the seizure is made has first obtained a trial judgment under court processes that contemplate the giving of notice of the proceedings to the person from whom the goods are to be seized. A person who is subject to a seizure may well suffer losses far in excess of the amount of the debt that is discharged through the seizure. Those losses may extend beyond the direct value of the goods seized and may extend to injury to reputation and credit. The process of seizure is therefore likely to involve a serious invasion of a reasonable expectation of privacy.

The State should not seize the goods of a subject in circumstances where the subject might well be expected to discharge his debt to the State voluntarily if he knew that if he did not do so within a short period he might be subject to such a seizure. A seizure in those circumstances is likely to be unreasonable: *Royal Bank of Canada v. The Queen*, (B.C.C.A., April 10, 1992).

Three requirements that must be satisfied before the plain view doctrine may be invoked: (i) the police officer must lawfully make an initial intrusion or otherwise properly be in a position from which he can view a particular area; (ii) the officer must discover incriminating evidence inadvertently, which is to say, he may not know in advance the location of certain evidence and intend to seize it, relying on the plain view doctrine only as a pretext; (iii) it must be immediately apparent to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. These requirements having been met, when police officers lawfully engaged in an activity in a particular area perceive a suspicious object, they may seize it immediately: *R. v. Ruiz*, (N.B.C.A., November 29, 1991).

Section 11(b)

In *Irwin Toy Ltd.*, it was not the absence of penal proceedings *per se* that precluded the respondent corporation from invoking s. 7. Rather, the Court focused on the language of the right in combination with the nature of the specific interests embodied therein, and concluded that in that context, s. 7 could not logically apply to corporate entities. That decision does not rule out the possibility of corporations asserting other Charter guarantees. On the contrary, *Irwin Toy Ltd.* went only so far as to establish an appropriate analytical framework: whether or not a corporate entity can invoke a Charter right will depend upon whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision. It should be kept in mind that "person" includes a corporation under the general provisions of the *Interpretation Act*. We must also remember that corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals: a corporation may only act through agents. Extending Charter guarantees to corporations will, in some circumstances, afford a measure of protection to those individuals. In *Askov*, *infra*, Cory J. was of the view that there is a "community or societal interest" in s. 11(b): "All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch." The societal interest applies to corporate offenders as it does to individual accused. To hold otherwise would be to suggest that the community is somehow less interested in seeing the former brought to trial. It would also suggest that the status of an accused can determine whether that accused is to be accorded "fair" and "just" treatment. This Court is not prepared to accept either of those propositions. Accordingly, the phrase "Any person charged with an offence" in the context of s. 11(b) of the Charter includes corporations: *R. v. CIP Inc.*, (S.C.C., Apr. 9/92).

The Crown suggested here that because the appellant was charged with a regulatory offence, the allowable time frame for bringing it to trial should somehow be greater than it would be in other circumstances. This Court is not persuaded by that argument. The right to be tried within a reasonable time is engaged when a person is "charged with an offence". The Charter does not distinguish between types of offences, and to do so for the purposes of assessing the reasonableness of delay would unduly stretch the principles of contextual analysis. The interest of an accused in the availability and reliability of substantiating evidence will exist irrespective of the nature of the offence with which that person is charged. In *Askov*, this Court held that there is a "general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time". This is the key requisite to a successful s. 11(b) application. A court may infer or presume prejudice, or it may be proven. The corporate appellant relies upon that presumption in this case. The respondent contends that it cannot. It submits that the inference of prejudice is linked to the liberty and security interests of an accused, not the fair trial interest. Because a corporate entity does not have the right to liberty and security of the person within the meaning of the Charter, the argument goes that it therefore cannot invoke the presumption referred to in *Askov*. The respondent submits that in order to succeed on its s. 11(b) claim, the appellant must persuade the court that its ability to make full answer and defence has been impaired.

The respondent's argument on this particular issue is persuasive. The most compelling argument which has been mounted for a presumption of prejudice has been with respect to the effects of delay on security of the person. Once concern about that factor is nullified, as it is when dealing with a corporation, the greatest part of the basis for a presumption of prejudice collapses. A corporate accused must be able to establish that its fair trial interest has been irremediably prejudiced. This Court uses the phrase "irremediably prejudiced" because there are some forms of prejudice that a court can remove, notably by making specific orders regarding the conduct of the trial: *R. v. CIP Inc.*, (S.C.C., Apr. 9/92).

Section 11(d)

The decisions of this Court to date have established the following principles: (i) the presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt; (ii) if by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11(d). Such a provision would permit a conviction in spite of a reasonable doubt; (iii) even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence; (iv) legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(d) if it requires the trier of fact to convict in spite of a reasonable doubt; (v) a permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11(d); and (vi) a provision that might have been intended to play a minor role in providing relief from conviction will nonetheless contravene the Charter if the provision (such as the truth of a statement) must be established by the accused. In the present case, the fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on avails. The presumption in s. 212(3) of the *Criminal Code* therefore infringes s. 11(d): *R. v. Downey*, (S.C.C., May 21, 1992).

Section 24(1)

It was contended here that the accused lacked standing to object to the admissibility of the evidence (cocaine and trafficking paraphernalia) resulting from the search of a third party's apartment. The accused argued that, as landlord of the building, he had a proprietary interest, and that, as the target of the search, he had a constitutional right to insist that the search and seizure be carried out according to law. There is an important distinction between an application to quash a judicial process such as a search warrant and an accused's objection at his criminal trial to the admissibility of evidence obtained pursuant to such process. When dealing with an application to quash a search warrant to prevent a search and seizure or to obtain the return of property seized, it is appropriate for the court to confine its concern to applicants who have some identifiable legal interest in the premises searched or in the articles seized. The Charter has introduced different considerations. When an accused asserts at his trial that there has been a breach of his s. 8 Charter right, he is asserting a particular right to privacy which may, on occasion, be unrelated to any recognized proprietary or possessory right. Section 8 of the Charter is directed to the protection of the security of the person, not the protection of his property, and it is the appellant's personal exposure to the consequences of the search and seizure that gives him the right to challenge, not the search warrant itself, but the admission into evidence at his trial of the fact of the search and the account of what was seized. Accordingly, s. 8 is available to confer standing on an accused person who had a reasonable expectation of privacy in the premises where the seizure took place, even though he had no proprietary or possessory interest in the premises or in the articles seized. There is no evidentiary basis for the appellant's contention that he had the right to challenge the validity of the search warrant because of a proprietary or possessory interest in the apartment. The building may have been owned by him, but he had leased the apartment and his right of entry was restricted by law to that of a landlord dealing with a tenant. However, this discussion about the appellant's legal or proprietary rights in the

premises or in the articles seized is beside the point. The true test of a protected constitutional right under s. 8 of the Charter is whether there is a reasonable expectation of privacy. This is so even where it is alleged that the privacy shelters illegal activity. This is not to say that property rights do not confer privacy rights in a given case. They obviously do. But the appellant must assert a personal privacy right, whatever be the foundation of his assertion. And, since this reasonable expectation of privacy is a Charter protected right, the burden of providing an evidentiary basis for any violation rests with the appellant. There is nothing in the record that supports any suggestion that the appellant had a reasonable expectation of privacy in the apartment or in any portion of it where the evidence was seized. The appellant is thus unable to show that he had a constitutionally protected right. The appellant's target theory has never been accepted in this jurisdiction and has been specifically rejected in the United States. There, as here, the emphasis is upon the constitutionally protected personal privacy right of the accused person. A constitutional right to privacy is not created merely by reason of a person becoming the target of a search. An accused person's right to challenge the legality of a search and seizure depends upon whether he has first discharged the burden of satisfying the court that his personal constitutional rights have been violated. The appellant in this case has not satisfied the court as such, because, although he may have been a target of the search, the search and seizure which ensued neither established nor violated any constitutionally protected privacy right with respect to him: *R. v. Pugliese*, (Ont. C.A., Mar. 11/92).

Section 52(1)

In this case the appellant Bank, as judgment creditor of a corporation, is directly affected by the seizure from the corporation which took place under s. 223(2) of the *Income Tax Act*. Under the normal rules, the Bank has standing to challenge the constitutionality of s. 223(2). However, this Court is bound by the approach taken by the majority in *R. v. Goltz*, [1991] 3 S.C.R. 485, and must consider that s. 223(2) was invoked by Revenue Canada as a method of enforcing, by seizure, the debt owed by the corporation to the Crown for tax assessed under Part VIII of the *Act*. Part VIII imposes a tax equal to 50% of the total amounts designated by a corporation in respect of a share or debt obligation issued by it in a year. The tax under Part VIII is only imposed on corporations and it is only imposed after a corporation invites its imposition by making a designation under Part VIII. At that stage the corporation knows, from the amount it has designated, how much the tax is going to be, and that the corporation is required to pay the tax by the last day of the month after it makes its designation. The majority reasons in *Goltz* require that this Court confine its consideration of the constitutionality of s. 223(2) to the precise circumstances of the debtor corporation or to a case that could be said to arise through a similar application of s. 223(2) in "reasonable hypothetical circumstances" to a corporation which had made a designation in respect of a share or debt obligation of the corporation and so had invoked the necessity to pay Part VIII tax. On that narrow application of s. 223(2), that provision is not unconstitutional as being contrary to s. 8 of the Charter. Where the corporation acts to make the designation which results in the assessment, and where the payment must be made in the month after the month in which the designation is made, a seizure for persistent or continuing non-payment must be regarded as being the probable consequence of invoking the Act and then flouting it. Such a seizure cannot be regarded as unreasonable. The situation might well be otherwise where the seizure is founded on a certificate issued under s. 223(2) in circumstances where the taxpayer is an individual who has had no actual notice of the specific possibility of seizure, other than the bare assessment of tax: *Royal Bank of Canada v. The Queen*, (B.C.C.A., April 10, 1992).

Appendix B

The dynamics which operate when a police officer "requests" the assistance of an individual cannot be ignored. The very nature of the policing function and the circumstances which often bring the police in contact with individuals introduce an element of authority, if not compulsion, into a request made by a police officer. This is particularly true where the request is made of someone who is the target of an ongoing investigation. When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise consent becomes a euphemism for failure to object or resist, and an inducement to the police to circumvent established limitations on their investigative powers by reliance on uninformed and sometimes situationally compelled acquiescence in or compliance with police requests. The requirements established by the Supreme Court

of Canada for a valid waiver of a constitutional right are applicable to the determination of whether an effective consent was given to an alleged seizure by the police. The application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that: (i) there was a consent, express or implied; (ii) the giver of the consent had the authority to give the consent in question; (iii) the consent was voluntary and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested; (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent; (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and (vi) the giver of the consent was aware of the potential consequences of giving the consent. The person asked for his or her consent must appreciate in a general way what his or her position is vis-à-vis the ongoing police investigation. Is that person an accused, a suspect, or a target of the investigation, or is he or she regarded merely as an "innocent bystander" whose help is requested by the police? If the person whose consent is requested is an accused, suspect or target, does that person understand in a general way the nature of the charge or potential charge which he or she may face? In addition, at least in cases where the person is an accused, suspect or target of the investigation, the person whose consent is sought must understand that if the consent is given the police may use any material retrieved by them in a subsequent prosecution: *R. v. Wills*, (Ont. C.A., February 20, 1992).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - April 1992

Section 1

The dominant, if not exclusive, purpose of the obscenity provision of s. 163 of the *Criminal Code* was to advance a particular conception of morality. This particular objective is no longer defensible in view of the Charter. The appellant argues that to accept the objective of the provision as being related to the harm associated with obscenity would be to adopt the "shifting purpose" doctrine explicitly rejected in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. This Court concluded in that case that a finding that the *Lord's Day Act* has a secular purpose was not possible given that its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts. The appellant relies on the words of Dickson J.: "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." This Court does not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the "shifting purpose" doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. Second, and more importantly, with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials. A permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test. Community standards as to what is harmful have changed since 1959. In reaching the conclusion that legislation proscribing obscenity is a valid objective which justifies some encroachment of the right to freedom of expression, this Court is persuaded in part that such legislation may be found in most free and democratic societies. The advent of the Charter did not have the effect of dramatically depriving Parliament of a power which it has historically enjoyed. The enactment of the impugned provision is also consistent with Canada's international obligations: *R. v. Butler*, (S.C.C., Feb. 27/92).

Section 2(b)

The subject matter of the pornographic materials in this case is clearly "physical", but this does not mean that the materials do not convey or attempt to convey meaning such that they are without expressive content. An example of the "purely physical" activity alluded to in *Irwin Toy*, [1989] 1 S.C.R. 927, was that of parking a car which, if performed as a day-to-day task, cannot be said to have expressive content. Such purely physical activity may be distinguished from that form of activity which the Court is concerned with in the present appeal which, while indeed "physical", conveys ideas, opinions, or feelings. Further, the form of activity in this case is the medium through which the meaning sought to be conveyed is expressed, namely, the film, magazine, written matter, or sexual gadget. There is nothing inherently violent in the vehicle of expression, and it accordingly does not fall outside the protected sphere of activity. In *Keegstra*, [1990] 3 S.C.R. 697, this Court was unanimous in advocating a generous approach to the protection afforded by s. 2(b) of the Charter. Meaning sought to be expressed need not be "redeeming" in the eyes of the court to merit the protection of s. 2(b), whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure. In this case, both the purpose and effect of the obscenity provisions of s. 163 of the *Criminal Code* is specifically to restrict the communication of certain types of materials based on their content. There is no doubt that s. 163 seeks to prohibit certain types of expressive activity and thereby infringes s. 2(b): *R. v. Butler*, (S.C.C., Feb. 27/92).

It was contended in this case that the provisions of the *Canadian Security Intelligence Service Act* were unconstitutional to the extent that they authorize CSIS to use the intrusive surveillance techniques of electronic bugging, surreptitious search, mail opening, invasion of confidential records and the deployment of covert informants against Canadian citizens and permanent residents, in the course of investigating "activities" that are not unlawful but are defined as "threats to the security of Canada". It was said that the existence of such powers have had a chilling effect on the willingness of Canadian citizens and permanent residents to express their opinions freely by participating in the work of certain groups, and by implication in the processes of Canadian political democracy. The Canadian authorities relied on indicate that where the chilling effect is applied by the Court, it is in relation to the s.1 *Oakes* test, where overbroad or vague legislation has been held not to meet the first step of the proportionality test. The chilling effect has not been applied in Canadian constitutional cases in defining the s.2(b) freedom. Similarly, the American cases cited were not decided on the basis that government action had a deterring effect on the petitioners merely by the existence of the impugned legislation. Rather, it is evident that the United States courts require that the "plaintiffs' claims contain assertions that defendants specifically impinged upon their constitutional rights". The American courts speak of a "subjective chill", and say that such a chill is not justiciable because there must be an objective harm or threatened harm. Applying these findings in the Canadian context, the s.2(b) freedom does not include "the right not to be subjectively chilled" from the mere existence of a system, and any application of such a doctrine should be limited to the s.1 analysis: *Canadian Civil Liberties Assn. v. A.G. Canada*, (Ont. Gen. Div., Mar. 25/92).

Section 7

In the context of this challenge to the independence of the General Court Martial before which the appellant was tried, s. 7 does not offer greater protection than the highly specific guarantee under s. 11(d). This Court does not wish to be understood to suggest by this that the rights guaranteed by ss. 8 to 14 of the Charter are exhaustive of the content of s. 7, or that there will not be circumstances where s. 7 provides a more compendious protection than these sections combined. However, in this case, the appellant has complained of a specific infringement which falls squarely within s. 11(d), and consequently his argument is not strengthened by pleading the more open language of s. 7: *R. v. Généreux*, (S.C.C., Feb. 13/92).

The importance of a contextual approach to the interpretation of s. 7 was emphasized by Cory J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. Similarly in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, McLachlin J. adopted a contextual approach which "takes into account the nature of the decision to be made". Thus in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. The distinction between citizens and non-citizens is recognized in s. 6 of the Charter. Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has been done so in the *Immigration Act*. There is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(d)(ii) of the *Act*. They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1)(d)(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances. Further, s. 7 of the Charter does not mandate the provision of a compassionate appeal from a decision which comports with principles of fundamental justice. There has never been a universally available right of appeal from a deportation order "on all the circumstances of the case". Such an appeal has historically been a purely discretionary matter. If any right of appeal from the deportation order is necessary in order to comply with principles of fundamental justice, a "true" appeal which enables the decision of the first instance to be questioned on factual and legal grounds clearly satisfies such a

requirement. The respondent also alleged that the procedure followed by the Security Intelligence Review Committee in this case violated his s. 7 rights. The scope of principles of fundamental justice will vary with the context and the interests at stake. In assessing whether a procedure accords with fundamental justice, it may be necessary to balance competing interests of the state and the individual. The state has a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources. The need for confidentiality in national security cases was emphasized by Lord Denning in *R. v. Secretary of State, ex parte Hosenball*, [1977] 3 All E.R. 452 (C.A.). Here, although the first day of the hearing was conducted *in camera*, the respondent was provided with a summary of the evidence presented. He was provided with various documents which gave him sufficient information to know the substance of the allegations against him, and to be able to respond. It is not necessary, in order to comply with fundamental justice in this context, that the respondent also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information: *Canada (M.E.I.) v. Chiarelli*, (S.C.C., Mar. 26/92).

Section 8

For the safety and well-being of society, motor vehicles and their drivers are subject to a great many statutory requirements, conditions and regulations. Almost every aspect of the use of a motor vehicle is controlled. For the safety of all, it is essential that drivers be tested before receiving their licence; that RIDE programs be instituted to discourage the drinking driver; that the speed of vehicles be supervised and that the mechanical fitness of vehicles be inspected. These inspections and tests and this supervision do not constitute unreasonable breaches of basic civil liberties. Reasonable surveillance and supervision of vehicles and their drivers are essential. Although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office. Here, the police had a *bona fide* belief that they were protecting the public when the electronic tracking device was installed in the appellant's vehicle. There had been a series of homicides in the rural area in which the appellant lived. He was a suspect in these events. The police were able to satisfy a justice of the peace that there were reasonable and probable grounds to obtain a warrant to search the appellant's home, the outbuildings surrounding his home and his vehicle. It was fairly conceded that the installation of the beeper in the interior of the vehicle constituted a search which breached the provisions of s. 8 of the Charter. Since the beeper monitoring of the appellant's vehicle invaded a reasonable expectation of privacy, this police activity also constituted a search. Absent prior authorization, such a search will be *prima facie* unreasonable and therefore in violation of s. 8. As there was no prior authorization for the installation and use of the beeper device, the monitoring violated the appellant's s. 8 right to be free from unreasonable search. At the same time, however, the lessened privacy interest combined with the use of an unsophisticated device establish that the search was only minimally intrusive. This minimal intrusion and the urgent need to protect the community provide the context in which the s. 24(2) analysis should be made. Furthermore, it seems artificial to distinguish between the installation of the beeper and the subsequent monitoring. The monitoring is the extension of the installation. It is the aim and object of the installation and cannot be divided from the latter. The installation of the device and its subsequent use to monitor the vehicle, together, constituted the unreasonable search: *R. v. Wise*, (S.C.C., Feb. 27/92).

It is reasonable to expect that belongings stored in a hotel room, while the guest is away and has left a "Do Not Disturb" sign on the door, will be treated as private and not open to inspection by anyone, least of all the police. Hotel guests' awareness that cleaning staff will enter their rooms at least daily does not remove the reasonable expectation of privacy . Objects not left in plain view or stored in areas which do not require daily maintenance can be reasonably expected to remain private despite access to the room by hotel staff for cleaning purposes. Privacy would be inadequately protected if the reasonableness of a given expectation of privacy in one's office or hotel room could be displaced by an awareness of the possibility that cleaning staff may rummage through anything that is not locked away. Here, the contention of the Crown is that the law authorizes consensual searches and that the search was validly conducted by the police with the consent of the hotel management. There was no urgency compelling a warrantless search. The purpose of the entry by the police was to verify the hotel manager's suspicion that something illegal had taken place in the room. The Crown conceded that the police could not have

obtained a search warrant because they had insufficient grounds. In such a case, the avenues open to law enforcement authorities are to continue to investigate by methods less intrusive than a search and to seek to obtain a search warrant should the proper grounds upon which to do so materialize. The warrantless and surreptitious search of the hotel room constituted an impermissible intrusion by the state on a legitimate and reasonable expectation of privacy and, therefore, constituted a violation of s. 8 of the Charter: *R. v. Mercer and Kenny*, (Ont. C.A., Oct. 21/91).

Section 11(a)

It is clear that the proceedings of the General Court Martial in this case attract the application of s. 11 of the Charter for both reasons suggested by Wilson J. in *Wigglesworth, supra*. Although the Code of Service Discipline in Parts IV to IX of the *National Defence Act* is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline relate to matters which are of a public nature. Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court. In any event, the appellant faced the possible penalty of imprisonment in this case. Even if the matter dealt with was not of a public nature, therefore, s. 11 of the Charter would nonetheless apply by virtue of the potential imposition of true penal consequences: *R. v. Généreux*, (S.C.C., Feb. 13/92).

Section 11(b)

The development of the jurisprudence relating to s. 11(b) is instructive in that it underscores the importance of avoiding rigidity in the interpretation of new constitutional rights early in the life of a constitutional document. Embarking as this Court did on uncharted waters it is not surprising that the course we steered has required, and may require in the future, some alteration in its direction to accord with experience. While the Court has at times indicated otherwise, it is now accepted that the factors to be considerated in analyzing how long is too long may be listed as follows: (1) the length of the delay; (2) waiver of time periods; (3) the reasons for the delay, including (a) inherent time requirements of the case, (b) action of the accused, (c) actions of the Crown, (d) limits on institutional resources, and (e) other reasons for delay; and (4) prejudice to the accused. An inquiry into unreasonable delay is triggered by an application under s. 24(1) of the Charter. The applicant has the legal burden of establishing a Charter violation. The inquiry, which can be complex, should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the applicant is able to raise the issue of reasonableness of the period by reference to other factors such as prejudice. If, for example, the applicant is in custody, a shorter period of delay will raise the issue. Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b). It was the major source of the delay in *Askov*. This is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. We live in a country with a rapidly growing population in many regions and in which resources are limited. In applying s. 11(b), account must be taken of this fact of life. While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline. This guideline is neither a limitation period nor a fixed ceiling on delay. Such a guideline was suggested in *Askov* and was treated by some courts as a limitation period. The purpose of the suggested period was not that it was to be treated as a limitation period and inflexible. The purpose in expressing a guideline is two-fold. First, it is to recognize that there is a limit to the delay that can be tolerated on account of resource limitations. Second, it is to avoid each application pursuant to s. 11(b) being turned into a trial

of the budgetary policy of the government as it relates to the administration of justice. A guideline is not intended to be applied in a purely mechanical fashion. It must lend itself and yield to other factors. Rapidly changing conditions may place a sudden and temporary strain on resources. Such changing conditions should not result in an amnesty for persons charged in that region. Rather this fact should be taken into account in applying the guideline. On the other hand, when the case load has been constant over a substantial period of time the delay envisaged by the guideline may be regarded as excessive. The application of a guideline will be influenced by the presence or absence of prejudice. If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, the guideline may be applied to reflect this fact. It is appropriate for this Court to suggest a period of institutional delay of between 8 to 10 months as a guide to Provincial Courts. With respect to institutional delay after committal for trial, this Court would not depart from the range of 6 to 8 months that was suggested in *Askov*. In such a case this institutional delay would be in addition to the delay prior to committal. This reflects the fact that after committal the system must cope with a different court with its special resource problems. It is therefore essential to take into account the inevitability of this additional institutional delay. These suggested time periods are intended for the guidance of trial courts generally. These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to time to reflect changing circumstances. The court of appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions and problems of different regions in the province. This Court has decided in several judgments that the right protected by s. 11(b) is not restricted to those who demonstrate that they desire a speedy resolution of their case by asserting the right to a trial within a reasonable time. Implicit in this finding is that prejudice to the accused can be inferred from prolonged delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which the prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined. In taking into account inaction by the accused, the Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay. Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. The degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor. Here, the delay of 14 1/2 months in bringing the case to trial in the Provincial Court can hardly be described as a model of dispatch. A period in the order of 10 months would not be unreasonable. While this Court has suggested that a guideline of 8 to 10 months be used by courts to assess institutional delay in Provincial Courts, deviations of several months in either direction can be justified by the presence or absence of prejudice. While the accused was not <u>required</u> to do anything to expedite her trial, her inaction can be taken into account in assessing prejudice. It can be concluded that the accused was content with the pace with which things were proceeding and that therefore there was little or no prejudice occasioned by the delay. The delay in this case was not unreasonable: *R. v. Morin*, (S.C.C., Mar. 26/92).

A more orderly resolution of these delay cases would take place in future if the following prerequisites were observed. Firstly, the Crown is entitled to notice of any application for s. 11(b) judicial stays, unless the delay complained of is so glaring that it is raised by the court itself. Secondly, the application should be made returnable at least 30 days before the date set for trial. This will make some allowance for the possibility of a reserved judgment on the issue. Thirdly, the history of the case should be presented to the court documented by transcripts (where such transcripts are available), as opposed to counsel's giving their memories (often diverging) of why earlier remands or adjournments were granted. Fourthly, while we hesitate to specify what material would serve to allow assessment of local delays with those existing in comparably-situated Canadian jurisdictions, we do say that it must be in the form of admissible evidence. That is clear from *R. v. Bennett*, *supra*. The evidence may take many forms because it may come from many sources. But that comparison could rarely, if ever, be established by the simple repetition of the regional statistics weighed in Cory, J.'s judgment in *R. v. Askov*. That was what was tendered here: *R. v. Holt*, (Alta. C.A., Oct. 1/91).

Section 11(c)

Accused persons being dealt with in separate informations at the same time should not be any more compellable against each other, especially in light of s. 11(c) of the Charter, than when tried on one single information or indictment. When two or more accused in different informations are charged with the same offence or with different offences if they are proceeded against jointly they will not be compellable one against the other. When the Crown chooses to proceed at the same time, the Crown then waives the right to call one accused against the other, as is the case of proceeding against the two accused on the same document: *R. v. Clunas*, (S.C.C., Feb. 27/92).

Section 11(d)

To assess the impartiality of a tribunal, the appropriate frame of reference is the "state of mind" of the decision-maker. The circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation. The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups. Since s. 11(d) must be applied to a variety of tribunals, it is inappropriate to define strict formal conditions as the constitutional requirement for an independent tribunal. Mechanisms that are suitable and necessary to achieve the independence of the superior courts, for example, may be highly inappropriate in the context of a different tribunal. The Charter was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the Royal Canadian Mounted Police. Any interpretation of s. 11(d) must take place in the context of other Charter provisions. Section 11(f) reveals that the Charter does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law. The s. 11(d) guarantees must therefore be construed with this in mind. However, the *National Defence Act* and regulations fail to protect a judge advocate against the discretionary or arbitrary interference of the executive. The Judge Advocate General, who had the legal authority to appoint a judge advocate at a General Court Martial, is not independent of but is rather a part of the executive. Further, the judge advocate was appointed solely on a case by case basis. As a result, there was no objective guarantee that his or her career as military judge would not be affected by decisions tending in favour of an accused rather than the prosecution. A reasonable person might well have entertained an apprehension that a legal officer's occupation as a military judge would be affected by his or her performance in earlier cases. Any system of military tribunals which does not banish such apprehensions will be defective in terms of s. 11(d). Although a General Court Martial is convened on an *ad hoc* basis, it is not a "specific adjudicative task" within the meaning of *Valente, supra.* The General Court Martial is a recurring affair. Military judges who act periodically as judge advocates must therefore have a tenure that is beyond the interference of the executive for a fixed period of time. There were no formal prohibitions, at the time that the appellant was tried, against evaluating an officer on the basis of his or her performance at a General Court Martial. An officer's performance evaluation could potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial. Consequently, by granting or denying a salary increase or bonus on the basis of a performance evaluation, the executive might effectively reward or punish an officer for his or her performance as a member of a General Court Martial. This interference with the independence of the members of a General Court Martial would be an infringement of s. 11(d). Moreover, certain characteristics of the General Court Martial system would be very likely to cast into doubt the institutional independence of the tribunal in the mind of a reasonable and informed person. The convening authority, an integral part of the military hierarchy and therefore of the executive, decides when a General Court Martial shall take place. The convening authority appoints the president and other members of the General Court Martial and decides how many members there shall be in a particular case. It is not acceptable that the convening authority, i.e. the executive, who is responsible for

appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, where the same representative of the executive, the "convening authority", appoints both the prosecutor and the triers of fact, the requirements of s. 11(d) will not be met: *R. v. Généreux*, (S.C.C., Feb. 13/92).

Section 12

Deportation is not imposed as a punishment. Deportation may, however, come within the scope of a "treatment" in s. 12. The *Concise Oxford Dictionary* (1990) defines treatment as "a process or manner of behaving towards or dealing with a person or thing ..." It is unnecessary, for the purposes of this appeal, to decide this point since this Court is of the view that the deportation authorized by ss. 27(1)(d)(ii) and 32(2) of the *Immigration Act* is not cruel and unusual. The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. On the contrary it would tend to outrage such standards if individuals granted conditional entry into Canada were permitted, without consequence, to violate those conditions deliberately: *Canada (M.E.I.) v. Chiarelli*, (S.C.C., Mar. 26/92).

Section 15(1)

The appellant, in the context of his challenge to the General Court Martial system, cannot claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1). For the purposes of this appeal, the appellant cannot be said to belong to a category of person enumerated in s. 15(1), or one analogous thereto. However, this conclusion is confined to the context of this appeal. This Court does not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the Charter. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and this Court does not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances. However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the Charter: *R. v. Généreux*, (S.C.C., Feb. 13/92)

Section 15(2)

The program set forth in the Manitoba *Pay Equity Act* is not an "affirmative action" program in the sense that it positively discriminates against a traditionally advantaged group for purposes of ameliorating the conditions of a disadvantaged group. Section 7(1) of the *Act* specifically precludes any positive discrimination against persons in the advantaged groups. This legislation permits continuing discrimination against the very group traditionally discriminated against -- persons performing "women's work", who are predominantly women -- albeit in progressively reducing amounts. Accordingly, a finding of discrimination is not precluded by s. 15(2) of the Charter in this case: *Manitoba Council of Health Care Unions v. Bethesda Hospital*, (Man. Q.B., Jan. 6/92).

Section 24(1)

The applicant corporations raised the issue of breach of freedom of association of their employees by the actions of the Manitoba Labour Board in imposing a union upon them without ordering a vote or without investigating whether or not a majority supported the application. The applicants have no standing to raise this argument. The applicants cannot invoke the rights of the employees who were not before the Board nor before the Court to attack the order pronounced: *Derksen Mechanical Services v. Manitoba*, (Man. C.A., Dec. 5/91).

On appeal, and for the first time, the appellant attempted to argue that his Charter rights to be informed of the reasons for his detention and of his right to counsel were violated. He asked this court to fashion an appropriate remedy under s. 24 of the Charter for these alleged violations. No such request was made of the trial judge. This appeal must fail. It was the obligation of trial counsel for the appellant to raise and develop these Charter issues at trial. The appellant bore the burden of persuading the trial judge that his constitutional rights or freedoms had been infringed or denied. He also bore the initial burden of presenting evidence. Where there is no assertion of a Charter violation, the court is entitled to proceed on the basis that one did not occur. Counsel on appeal is not entitled to argue these additional Charter issues on an incomplete record. We can only speculate as to what the evidence might have been if these issues had been explored factually at trial by both the Crown and the appellant. It is not appropriate to raise them after the Crown has closed its case and the appellant has been convicted: *R. v. Ryan*, (Ont. C.A., Feb. 21/92).

As a basic proposition, an accused person asserting a Charter remedy bears both the initial burden of presenting evidence that his or her Charter rights or freedoms have been infringed or denied, and the ultimate burden of persuasion that there has been a Charter violation. If the evidence does not establish whether or not the accused's rights were infringed, the court must conclude that they were not. It is obvious that counsel for the accused is not entitled to sit back, as he did in this instance, and hope that something will emerge from the Crown's case to create a Charter argument or assist him in one he is already prepared to make. The onus is on the accused to demonstrate on a balance of probabilities that he is entitled to a Charter remedy and he must assert that entitlement at the earliest possible point in the trial. Otherwise, the Crown and the court are entitled to proceed on the basis that no Charter issue is involved in the case. The trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible Charter issues either before or at the outset of the trial. All issues of notice to the Crown and the sufficiency of disclosure can be sorted out at that time. Failing timely notice, a trial judge, having taken into account all relevant circumstances, is entitled to refuse to entertain an application to assert a Charter remedy. The great majority of criminal cases in this province are disposed of by judges of the Provincial Court. Mandated pre-trial procedures will do nothing to assist them in carrying out their duties or to ease their case-loads. It is better to leave to these trial judges the discretion to determine the sufficiency of notice and the extent of the offer of proof. A trial court which hears cases that have been through a preliminary inquiry and a detailed pretrial, and that regularly assigns trial judges to cases well before the date of trial, may well use different procedures respecting Charter applications to exclude evidence than a trial court that conducts summary trials without any pretrial or early designation of trial judges. It would be a rare case where the Crown has provided full disclosure, the accused has had an opportunity to have a preliminary inquiry, and the matter has been thoroughly pretried, that the defence would be unable, at the outset of the trial, to outline the nature of the alleged violation and to summarize the nature of the evidence counsel will call on the application. Armed with this information, the trial judge can weed out the applications which have no basis in fact or law, and can decide how and when those with potential merit should be resolved. If, on the other hand, it should appear that the accused has not taken full advantage of all the opportunities available to him to be apprised of the case against him in the light of the defences available to him, then he should expect little sympathy from the trial judge when he asks for permission to explore a Charter remedy: *R. v. Kutynec*, (Ont. C.A., Feb. 24/92).

Section 24(2)

It is not the proper function of this Court, absent some apparent error as to the applicable principles or rules of law, or absent a finding that is unreasonable, to review findings of courts below in respect of s. 24(2) of the Charter and substitute its opinion for that arrived at by the Court of Appeal. In this case, the Court of Appeal found that the movements of the appellant's car, ascertained by means of an electronic tracking device, constituted real evidence. Evidence has been found to be "real" when it referred to tangible items. On the other hand, "conscriptive" evidence usually refers to evidence which

emanates from the accused following a violation of s. 10(b) of the Charter. Agreeing with the Court of Appeal, the movements of the car constituted real evidence. There was no police compulsion or enticement which required the appellant to enter or drive his car. Rather he exercised his own free will. The movement of an object may be transitory but it is real. In *Thomson Newspapers*, [1990] 1 S.C.R. 425, La Forest J. indicated that "created" evidence would affect the fairness of the trial and should not be admitted while "located" evidence would only affect the fairness of the trial if the evidence were virtually undiscoverable without the assistance of the accused. In this case, the use of the beeper merely assisted the police to gather evidence which, to a great extent, they had obtained by visually observing the vehicle. In any event, evidence as to movement of the vehicle was certainly not "undiscoverable": *R. v. Wise*, (S.C.C., Feb. 27/92).

Bad faith has been found in situations where there has been a blatant disregard for the Charter rights of an accused or where more than one Charter right has been violated. Good faith has been established in situations where the violation stemmed from police reliance upon a statute or from the following of a procedure which was later found to infringe the Charter. Here, the police had been successful in obtaining a warrant to search the appellant's home, outbuildings and car. They retained the car and installed an electronic tracking device after the warrant had expired. The officer who installed the device testified that he did not realize the warrant had expired the day before the installation. Although this evidence indicates carelessness on the part of the police, it does not demonstrate bad faith. Of greater concern is the length of time of the surveillance assisted by the beeper. Nonetheless, the police did obtain the evidence as to the location of the vehicle within a 30-day period from the beginning of the electronic monitoring, a time when the police had established grounds for the search. This was not, in the circumstances, an unreasonable length of time to maintain surveillance, particularly in light of the obligation of the police to protect the small community from the suspected serial killer. This case differs from *R. v. Kokesch*, [1990] 3 S.C.R. 3, in which it was determined that where the police have nothing but suspicion and no legal way to obtain other evidence they should leave the suspect alone. Here, the police did have reasonable and probable grounds to search the appellant's vehicle when they installed the beeper. Moreover, there was a real threat of urgency flowing from the two most recent homicides in the community coupled with the telephone threat of further murders which motivated police action. More importantly, the invasion of privacy was not of a home or office but of a motor vehicle: *R. v. Wise*, (S.C.C., Feb. 27/92).

It is self-evident that objections to admissibility of evidence must be made before or when the evidence is proffered. This common sense proposition is equally applicable to Charter applications to exclude evidence. Defence counsel often confuse the issue of admissibility of evidence with the assertion of a Charter right. Admissibility is the problem of the party with the burden of adducing evidence. Where the evidence is directed to the proof of a criminal offence, the onus of showing it is admissible is upon the Crown. Counsel for the accused can wait until the evidence is proffered and make timely objection. Unfortunately, defence counsel have become too comfortable with this format; they have not adjusted to the new reality of the Charter. Under the Charter, the burden of having the court reject evidence that is otherwise admissible passes to the defence. The Crown does not have to anticipate that the defence will seek to exclude Crown evidence on the basis of an alleged Charter breach. The defence must make its application for relief under s. 24(2) before the evidence is admitted, not after it has been accepted. This court does not suggest that a trial judge can never consider, at a later point in the trial, the admissibility of evidence which has been tendered without objection. A trial judge has a discretion to allow counsel to challenge evidence already received and will do so where the interests of justice so warrant. In some cases, when the defence indicates, prior to the calling of evidence, that it intends to advance a Charter application to exclude evidence, the trial judge may call upon the defence to summarize the evidence that it anticipates it would elicit on the application. If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. The trial judge should dismiss the motion without hearing evidence: *R. v. Kutynec*, (Ont. C.A., Feb. 24/92).

CANADIAN CHARTER OF RIGHTS DECISIONS

New Entries - February 1992

Section 2(b)

It cannot be said that a total prohibition of "postering", which is expressive activity, on public property can fail to have the effect of restricting that sort of expressive activity. To the extent that it does so, it offends s. 2(b) of the Charter. This Court reads *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, as holding that, although s. 2(b) does not confer a right to use all government property for expressive purposes, prohibiting expression at, in or on all public property does offend s. 2(b). It is also authority for the proposition that the government's stewardship or even ownership of public property does not entitle the government to prohibit absolutely access to all public property for the purpose of communicating information. Here, there is undoubtedly a rational connection between the prohibition against the placing of posters on public property and the objective of preventing visual blight. However, it cannot be thought that the absolute prohibition with respect to all public property impairs the Charter-protected right of freedom of expression as little as possible. As between a total restriction of this important right and some litter, surely some litter must be tolerated. It would be a very different matter if the by-law purported to regulate where "postering" was permitted and where it was forbidden. But to enjoin a traditional form of expression in such absolute terms can hardly impair the right as little as possible: *Ramsden v. Peterborough (City)*, (Ont. C.A., Oct. 22/91).

Freedom of the press is not the equivalent of a Freedom of Information Act nor does it have the effect of appointing the press as a sort of permanent and roving Royal Commission entitled at its own demand and in every circumstance to any and all information or documentation which might be extant in civil or criminal litigation. The judgment in *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326, does not purport to constitutionalize a right in the press or other media to have access to all documents which have been created or even put into the record where such documents have been legitimately sealed by the court under provincial law. Such laws can live side by side with the Charter and do not infringe or trench upon it: *National Bank v. Melnitzer*, (Ont. Gen. Div., Sept. 13/91).

Section 7

It seems to be clear from cases such as *Kalanj*, *supra*, that there is no formula for determining the amount of delay which the law will not tolerate. It also seems clear from *R. v. L. (W.K.)*, *supra*, that the lapse of time alone will seldom be a sufficient ground upon which to order a stay equivalent to an acquittal. Instead there must be other factors. It is necessary to keep in mind that a delay of the kind involved in this case does not necessarily support an inference that the complainant would have come forward sooner if his complaint were true. This phenomenon of delayed notice is now well recognized in sexual assault cases, although we must be careful to avoid replacing one form of invalid stereotypical thinking for another equally invalid presumption that the evidence of all complainants must be accepted. Here, no evidence has been lost, and it has not been suggested that the accused has been prejudiced, in a legal sense, by the delay which has ensued. It has not been shown by the accused, who carries the onus on this question, that he was deprived by pre or post-charge delay of the opportunity to make full answer and defence: *R. v. Short*, (B.C.C.A., Nov. 28/91).

The question of what liberties are included in s. 7 was most recently broached by Lamer J. in *Reference re Criminal Code (Man.)*, [1990] 1 S.C.R. 1123. The other members of the majority did not find it necessary to deal with the precise question with which Lamer J. dealt extensively. It is a complete theory of s. 7, the only one which has been authoritatively put forth thus far. It attempts to unite the perspectives

of the protected triad of rights ("life, liberty and the security of the person") and of the principles of fundamental justice, since it enunciates "the kind of life, liberty and security of the person sought to be protected through the principles of fundamental justice". It is also in accord with the previous approaches to the issue by the Supreme Court. As well, it avoids the pitfalls of judicial interference in general public policy. It may or may not come to represent the final judicial statement of the meaning of s. 7, but any eventual judicial synthesis will likely be an approximation of Lamer J.'s view. Accordingly, s. 7 is implicated when physical liberty is restricted in any circumstances, when control over mental or physical integrity is exercised, or when the threat of punishment is invoked for non-compliance. There is nothing of that kind, or within striking distance of it, on the facts of the case at bar. The Appellants say only that the filing of a certificate invoking absolute privilege under s. 39 of the *Canada Evidence Act* deprives them of the "liberty" of having an administrative decision reviewed and controlled by the courts. However, the jurisprudence shows that such a right can be precluded entirely except as to jurisdiction, where the executive branch is involved, even when fairness itself is at stake: *Canadian Association of Regulated Importers v. A.G. Canada*, (F.C.A., Dec. 20/91).

It is generally recognized that a lawyer representing more than one accused in a joint criminal trial is potentially in a position of conflict. In general, joint representation may lead the jury to link the co-accused together. In the United States, the general recognition of a potential conflict of interest is based on the Sixth Amendment right to the assistance of counsel, which has been interpreted to mean the effective assistance of counsel. In a case of joint representation of conflicting interests, defence counsel's basic duty of undivided loyalty and effective assistance is jeopardized and his performance may be adversely affected. That is, he may refrain from doing certain things for one client by reason of his concern that his action might adversely affect his other client. Here, trial counsel should have recognized immediately that, as a result of the co-accused's last-minute change of plea to not guilty, a position of conflict had arisen which would undermine the appellant's right to a fair trial. Trial counsel's effectiveness was seriously impaired, since the appellant was prevented from compelling the co-accused to testify, and trial counsel was unable to advise the co-accused whether or not to testify without potentially harming the interests of one of his two clients. The appellant's right to effective assistance of counsel entitled him to the competent advice of counsel unburdened by a conflict of interest. Because of the difficulty of assessing the effect of the conflict of interest on the defence of the appellant, this Court is not prepared to apply the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code*. The appellant has satisfied the burden of showing that the conflict of interest had an adverse effect on the performance of defence counsel at trial. The United States courts have consistently refused to apply the "harmless error" rule to conflict of interest cases. The reasoning is that conflict of interest affecting the adequacy of representation by counsel is a denial of the constitutional right to the effective assistance of counsel, and that, therefore, it is unnecessary to demonstrate prejudice: *R. v. Silvini*, (Ont. C.A., Nov. 1/91).

Section 11(b)

In *R. v. Conway*, [1989] 1 S.C.R. 1659, a majority of the Court considered a question of unreasonable delay on the assumption that the right to be tried within a reasonable time extended to appellate proceedings. The majority was able to proceed on that assumption because it was of the view that the right had not been infringed. However, Sopinka J. actually decided that the right extended to appellate proceedings. Adopting the reasoning of Sopinka J. on that point, this Court is of the opinion that the right at least extends to appellate proceedings where the Crown is the appellant. It is the responsibility of the Crown not only to prosecute a case through trial without unreasonable delay, but also to prosecute any appeal it might take within a reasonable time. Here, the bulk of the delay was attributable to the Crown. The fact that the accused did not assert his s. 11(b) right before the summary conviction appeal court does not mean that the right was waived. At that time, the law relative to this right had not been developed by the Supreme Court of Canada. A development of the law does not entitle a person to reopen a case, but it may explain why a person whose case remains before the courts did not previously raise a point. That is what happened in this case: *R. v. Ushkowski*, (Man. C.A., Oct. 8/91).

Section 15(1)

The Statement of Claim here alleges that the impugned legislation draws a distinction between tobacco products and other products. This is just one of the many product distinctions in any taxing act. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice is fruitless in this case because the comparison is between products and not people. A distinction between different types of products is not discrimination. The plaintiff defined the group that was discriminated against as the tobacco industry which included retailers and major manufacturing concerns, and also argued that even people selling equipment to tobacco farmers could be part of the group who were discriminated against as a result of the taxes. This is not the type of group that is protected under s. 15. Even if the plaintiff defined the group as tobacco farmers in a given area, the plaintiff does not belong to a classification which is being treated differently on the basis of a personal characteristic enumerated in s. 15(1), or on a ground analogous thereto. Neither the plaintiff's occupation as a tobacco farmer, nor his participation in the tobacco industry, can be considered a ground of discrimination analogous to the characteristics listed in s. 15(1). The principle that "occupation" is not a ground of distinction analogous to the grounds enumerated in s. 15(1) has been recently affirmed by the Ontario Courts: *Cosyns v. A.G. Canada*, (Ont. Div. Ct., Jan. 23/92).

Section 24(1)

There are authorities which establish that in exceptional circumstances a court of appeal may allow a defence not raised at trial to be considered. Those exceptional circumstances include a case where the balancing of the interests of justice indicates that an injustice has been done, or where the new defence is based upon an issue of law alone and not on an issue of fact in relation to which it might have been necessary to adduce additional evidence at trial, or on appeal, or on a new trial. In the present case, this Court is not satisfied that if the defence that the appellant was misinformed concerning her Charter rights had been raised at trial, further evidence concerning the alleged misinformation would not have been adduced. Absent exceptional circumstances, a defence not raised at trial should not be considered on appeal: *R. v. Ullrich*, (B.C.C.A., Dec. 18/91).

It was asserted here that the Court of Queen's Bench (and hence this Court on appeal) has the inherent jurisdiction to order the return of documents which have been seized without or in excess of authority. This Court has the authority and jurisdiction to entertain an application for the relief claimed with or without reference to the Charter, but it is a discretionary remedy. It should not ordinarily be granted when there is another route readily available to the party seeking such relief. In this case such a statutory procedure is made available through the operation of ss. 489 and 490 of the *Criminal Code*. These sections provide a process whereby a report (which has already been made) is provided to a justice after which the justice may order the return of the documents to their lawful owner. In effect, counsel invites this Court to engage in the very process contemplated by s. 489(1)(a) even though this procedure is already available. This Court's discretion should be exercised against granting the relief claimed: *Bunn v. R.*, (Man. C.A., Oct. 30/91).

In this case, the adjudicator is given power by s. 92 of the *Public Service Staff Relations Act* to adjudicate grievances, which are defined by s. 2 as brought by "employees", who are in turn defined to exclude persons "employed on a casual or temporary basis" (as are the applicants here). By s. 96(2) an adjudicator is prohibited from rendering a decision the effect of which would be to require the amendment of a collective agreement. Moreover, the adjudicator's jurisdiction over the parties is also circumscribed by the wording of the collective agreement, since, as non-members of the bargaining unit, the applicants are not entitled to the benefits negotiated by it. Not only does the adjudicator lack jurisdiction over the parties, but also, it seems, over the subject matter. Accordingly, he was correct in concluding that he lacked jurisdiction to rule on the applicants' Charter challenge to the definition of the term "employee" in the statute: *Latimer v. The Queen*, (F.C.A., Dec. 5/91).

The procedure set forth in Rule 38 of the B.C. *Supreme Court Rules* for the obtaining of deposition evidence which, by s. 714 of the *Criminal Code* may be applicable to the obtaining of evidence by commission, does not confer a right of appeal. Moreover, the subsumption of the civil rules of British Columbia (particularly Rule 38) by the provisions of s. 714 of the *Code* does not convert the criminal proceedings inherent in the appointment of a commissioner under s. 709 of the *Code* into a civil proceeding. Accordingly, this Court has no jurisdiction to entertain an appeal by the Crown from the interlocutory order made in the course of a pre-hearing conference held under the provisions of s. 625.1(2) of the *Code*: *R. v. Lawrence et al.*, (B.C.C.A., Jan. 3/92).

In this case a pre-trial motion by the accused based upon an alleged infringement of his s. 11(b) rights was unsuccessful, and he subsequently entered a guilty plea. He then sought leave to appeal from the decision on the motion, but an appeal must be from a conviction. As was stated in *Tollett v. Henderson*, 411 U.S. 258 (1973), "...a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea." Accordingly, the accused waived his s. 11(b) rights by entering a plea of guilty in this case: *R. v. Davidson*, (N.S.C.A., Jan. 17/92).

<u>Section 52(1)</u>

The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. However, it should be stressed that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court, primarily in *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575, at 598, need not and should not be expanded. The decision whether to grant status is a discretionary one with all which that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner. Here, the challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the Charter. Many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear concrete factual background upon which the decision of the court could be based. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the appellant must fail: *Canadian Council of Churches v. The Queen*, (S.C.C., Jan. 23/92).