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...THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS
(Its application to the Association of Ontario Land Surveyors)

The purpose of this paper is to discuss in general terms the Canadian Charter of Rights and Freedoms (the "Charter"), including a brief explanation of its constituent parts, and then to deal briefly with the development of the jurisprudence in the Charter as it has applied or may apply to professionals, including surveyors in the province of Ontario.

By enacting the Canada Act, 1982 (U.K.) C. 11, at the request of the Parliament of Canada, the Parliament of the United Kingdom transformed the constitutional structure of Canada from a system premised on legislative sovereignty to one empowering the Court system (and in particular the Supreme Court of Canada) to evaluate whether the actions of government (being legislative, administrative or execution action) violate the guaranteed rights and freedoms provided in the Charter.

The Charter was given force of law by the British Parliament as Part I of the Constitution Act 1982 and proclaimed on April 17th, 1982. In addition to enacting the Charter as part of our constitutional system, the British Parliament provided Canada with a constitutional amending formula and announced the termination of its power to legislate for Canada in the future.

The full implications of the Charter on Canadian society and in particular on the actions of government, remain to be seen. Nevertheless, it is clear that the Supreme Court of Canada has accepted its role as guardian of the rights and freedoms guaranteed by the Charter.

It is to be noted that the Constitution of Canada, of which the Charter is a part, is the supreme law of Canada and that "any law that is inconsistent with the provisions of the Constitution is, to the extent of that inconsistency, of no force or effect". (Section 52, the Constitution Act 1982).

The idea that the Constitution sets out the ultimate rules for law making by federal or provincial legislatures is not new to Canada. Our courts have traditionally had the responsibility of policing the Constitution's division of legislative powers between the Federal and Provincial Legislatures, and has invalidated laws which a Legislature or Parliament has enacted outside of its own specific jurisdiction. Section 52 therefore, reaffirms this responsibility of the courts, but with the additional responsibility of monitoring the inconsistency of government action in light of the rights and freedoms set out in the Charter itself.

The Supreme Court of Canada has clearly accepted this responsibility, stating as it did in Hunter v. Southam, (1984) 11 D.L.R. (4th) 641, that the function of the Constitution is "to provide a continuing framework for the legitimate exercise of governmental power and when joined by a charter of rights, (to provide) for the unremitting protection of individual rights and liberties".

In order to understand the Charter it is necessary to review some of its specific provisions. Section 1 is the central provision of the Charter and it states as follows:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out and subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and a democratic society."

In comparison with other national and international documents protecting rights, section 1 of the Charter is distinctive because it possesses a double function. First, it guarantees the rights and freedoms set out elsewhere in the Charter. Secondly, it limits the guarantee according to the terms set out in section 1. The provisions of section 1 are the result of numerous attempts to crystallize the idea that the guarantee of constitutional rights in our Constitution is not absolute. The result of the Supreme Court of Canada's interpretation of section 1 has been to determine the criteria by which the Court analyses justifications given for limiting the protection of specific rights and freedoms.

Judicial interpretation of section 1 of the Charter has had the effect of splitting the Charter arguments into three stages which must be kept distinct.

First, the applicant or challenger must establish that he or she is a person who enjoys the right or freedom in question. Second, they must establish what their freedom encompasses, either by defining the scope of the right or freedom at large or by demonstrating that at least it includes the particular value which is alleged to have been infringed. Third, the applicant must establish that an infringement of a protected right or freedom has occurred at the hand of an entity that is subject to the Charter, i.e. a statutory or governmental body.

The respondent on the other hand, may take the position that the Charter does not apply generally, or that it does not apply to itself.

It may be obliged to invoke the provisions of section 1 of the Charter which compel it to justify that albeit there has been a Charter infringement, such infringement is justified in a free and democratic society.

A brief review of the most important provisions of the Charter is in order, to demonstrate the framework of the document and illustrate the context within which basic freedoms are protected.

Section 24 of the Charter

Section 24(1) states as follows:

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

Section 24(1) of the Charter sets out the judicial task and provides that those whose guaranteed rights or freedoms have been infringed or denied may apply to the court for a remedy.

Given the broad discretionary range of relief which the courts provide, the judicial task to interpret the Charter and to remedy the consequences of infringements is firmly entrenched. There can be remedies which range from damages to striking down a section of a statute, which offends the Charter. All the injunctive, declaratory and damage remedies available in normal actions exist in respect of Charter litigation.

Section 32 of the Charter states as follows:

> "The Charter applies to the Parliament and Government of Canada and to the Legislature and Government of each province in respect of all matters within the authority of the Legislature of each province."

The text of section 32 clearly compels the Federal Government and the Provincial Legislatures to enact legislation which conforms with the rights and freedoms afforded by the Charter. By subjecting these institutions and their derivatives to judicial interpretation of the Charter's guarantees, section 32 of the Charter invokes the supremacy of the Constitution over government action. With respect to the references in section 32 to the "Parliament" and the "Legislatures", it is evident that any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will fall outside the power of the enacting body and will thereby be invalid. It follows that any body exercising statutory authority, for example the Association of Ontario Land Surveyors (the "AOLS"), under the Surveyors Act and in particular the disciplinary body of the Association, is thereby bound by the provisions of the Charter.

Neither Parliament nor the provincial legislatures can enact legislation in breach of the Charter, and these limitations on statutory action imposed by the Charter flow down the chain of statutory authority and apply to all action (whether legislative, administrative or judicial)

if such action depends for its validity on statutory authority. (Hogg, Constitutional Law of Canada) (2nd Ed.), 1985 at p. 671.)

This means that members of statutory, self-governing professional bodies have no choice but to familiarize themselves with the basic aspects of the Charter. The paramount provisions of the Charter require that all administrative action, including professional regulation must now conform with the provisions of the Charter, and therefore professional bodies must ensure that the rights and freedoms guaranteed by the Charter are protected by the professional body's procedures in dealing with its members. Inasmuch as the Charter applies only to government action pursuant to section 32, most professional regulatory bodies will readily fall within that domain because these entities act under legislative authority and serve a public function. In the case of Klein and Dvorak v. The Law Society of Upper Canada (1985) 8 O.A.C. 161 (Ont. Div. Ct.), the following passage illustrates the analysis which is adopted in the application of the Charter to government action.

> "The Law Society is a statutory authority exercising its jurisdiction in the public interest and is not, ...a private body whose powers derive from contract or articles of association found in the mists of antiquity. In promulgating rules relating to legal advertising or relations between the press and the Bar, the Law Society is performing a regulatory function on behalf of the 'Legislature and Government' of Ontario within the meaning of section 32 of the Charter. In so doing it is regulating not only the rights of the lawyer to speak, but also the rights of the potential client and the public at large to be informed." (p. 167).

In order for a regulatory body to fall outside the scope of the Charter, it must be a voluntary organization, it must not operate with a legislative mandate, and it must perform what is essentially a private as opposed to a public function. That being the case, the AOLS under the Surveyors Act clearly falls within the provisions of the Charter which means that all of the actions taken by it vis-a-vis its members, whether they be complaints procedures or disciplinary action or criteria for membership, must conform to the Charter. If the provisions of the Surveyors Act do not conform with the provisions of the Charter or the application of the provisions of the Surveyors Act to a fact situation offends the rights guaranteed in the Charter, then the section of the Surveyors Act which offends the Charter can be struck down, ruled inapplicable, or damages can be awarded.

Section 33 of the Charter

Section 33 of the Charter provides a legislative override for some Charter rights, namely the fundamental freedoms found in sections 7 to 14, and the equality rights found in section 15.

Added to the Charter at the last moment, it captures the final political compromise between the Provinces and Federal Government which facilitates the adoption of the Charter. Section 33 re-introduces the paramouncy of the legislative organs of government in situations where democratic majority prevails or should prevail.

Sections 2 to 15: Rights and Freedoms

We next consider the specific rights which are guaranteed by the Charter. Some of these rights can be described as "human rights" in that they are expressions of universal values which extend beyond the Canadian political or social order and are now recognized in other national and international instruments as prerequisites of dignified human life. For example, sections 2 and 12 of the Charter guarantee freedom of religion, freedom of thought, belief, opinion and expression, freedom of assembly, freedom of association and the right not to be subjected to cruel and unusual treatment or punishment.

These rights provide the basis for restraining the government from doing anything that jeopardizes or interferes with these rights.

Sections 3 to 5 of the Charter provide the right to vote and limit Parliament or the Provincial legislatures to terms in office which do not exceed five years' duration. These provisions relate to the democratic nature of our institutions of government and impose duties on government to maintain certain democratic standards.

Sections 7 - 14 of the Charter relate to the interaction between the individual and the legal system. Some of these rights are general and some pertain very specifically to the criminal process. Here

the concern is not that government refrain from interfering with basic human rights or that it maintain the democratic character of government. These rights require that the interaction between the individual and the government in its administrative regulation of criminal or other enforcement comply with standards of fairness.

Section 7

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 8

> "Everyone has the right to be secure against unreasonable search and seizure."

Section 11

> "Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;
>
> (b) to be tried within a reasonable time;
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

Lastly, section 15, the equality section, states as follows.

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The listed grounds of discrimination are not exhaustive. Equality rights are not free standing claims to government action or inaction, or to the democratic or fair functioning of state institutions; they are the basis for demands of similar treatment for persons who are similarly situated.

Introductory Summary

In conclusion, it is important to note that the Charter not only guarantees particular rights, but also provides a complex procedure for the consideration of rights claims. The role of the courts is affirmed in section 24, at the same time that the Legislatures retain a role under section 33. The guarantee of rights is made subject to limitations which can be "demonstrably justified in a free and democratic society" (s. 1) and the ultimate task of the courts is to give a coherent interpretation not only to all of the individual components of the document, but also to the complex design of the Charter as a whole. The task of lawyers who litigate Charter claims is to help the courts to formulate the Charter's intricate meaning on a case by case basis.

Examples of Charter Application

Inasmuch as the Charter has been in force for only six years it has had a significant impact upon both the validity of statutes and actions arising from statutes and to that end has had a specific impact upon statutes that deal with professional regulation.

(i) For example, in British Columbia, legislative provisions restricting membership in the Provincial Bar to Canadian citizens and British subjects was struck down as offending the guarantee of equality rights under section 15. (Andrews v. Law Society of B.C., (1986) 27 D.L.R. (4th) 600 (B.C.C.A.).

This case was appealed to the Supreme Court of Canada which decision was recently released, and will be dealt with later on in detail in this paper because of the impact the decision may have on provisions of the Surveyors Act.

(ii) In Alberta, the Rules of the Law Society which restricted the affiliation of law firms interprovincially have been invalidated on the ground that they are inconsistent with the mobility rights guaranteed in

section 6 of the Charter. (Blaie v. The Law Society of Alberta (1986), 27 D.L.R. (4th) 527 (Alta. C.A.), leave to appeal granted S.C.C.)

(iii) In Ontario, restrictions on contacts between lawyers and the media have been found to offend the freedom of expression guaranteed in section 2 of the Charter. (Klein and Dvorak v. The Law Society of Upper Canada, (1985) 8 O.A.C. 16 (Ont. Div. Ct.)

It can be seen that the Charter therefore is paramount and that all administrative action, including professional regulation, must now conform with its provisions.

Activity Beyond the Reach of the Charter

Notwithstanding that there have been cases in which statutory enactments of professional bodies have been overturned as offending the Charter, there exist grey areas or areas in which the reach of the Charter does not extend in respect of the statutory enactments of professional bodies.

(iv) For example, the guarantees found in section 11 of the Charter, dealing with such rights as the presumption of innocence when charged with an offence, the rule against self incrimination and the right to be tried within a reasonable time without delay, may not apply to discipline hearings conducted by professional bodies. The jurisprudence

has been reasonably consistent in holding that section 11 does not apply to a disciplinary proceeding. For example in a police disciplinary hearing, the argument that this constituted being charged with an offence was rejected on the following basis.

> "While I do not minimize the seriousness of this consequence (the most serious being the loss of employment) it is a civil consequence and not punishment of a criminal nature." (Re Tremblay and Fleming (1986), 55 O.R. (2d) 570 (C.A.).

While it can be argued that the specific provisions of section 11 may not apply to the disciplining of professionals pursuant to their statutory provisions, it is submitted that section 7 may apply to the legal process itself, and thereby indirectly guarantee certain Charter protection to those that are disciplined by their own professional bodies.

(v) A provision of the Charter which does apply in the disciplinary context is the guarantee provided in section 8 against unreasonable search and seizure, although a number of cases have determined that it does not constitute a search or seizure to request that a member facing disciplinary proceedings bring documents to a hearing (see Zeigler v. Hunter (1983), 8 D.L.R. (4th) 648 (Fed. C.A.) and Reach v. Alberta College of Physicians and Surgeons (1984), 8 D.L.R. (4th) 696 (Alta. Q.B.).

An illustration of a search and seizure in a disciplinary context which was found to be unreasonable was a British Columbia case where the records of 70 patients were removed from a physician's office and taken away for photocopying. (See Bishop v. College of Physicians and Surgeons of British Columbia [1985], 6 W.W.R. 234 (B.C.S.C.)) In the view of the Court, the impact upon the physician was substantial, particularly the breach of the confidence of the doctor/patient relationship, and was not outweighed by the laudable objective of preventing or detecting overbilling. The following were considered in assessing the question of what is a reasonable search:

1. Is the information sought relevant to the inquiry; any arbitrary acquisition of documents will be unreasonable.

2. Does the decision maker have reasonable grounds for believing that conduct requiring discipline has taken place and that the documents in question will assist in the investigation?

3. Is the search or seizure overbearing in terms of the impact upon the person from whom the documents are seized, when that impact is balanced against the necessity of obtaining the documents?

4. Has prior authorization for the search or seizure been obtained; if not, are there public policy reasons for not obtaining authorization?

It is submitted that the provisions of the Charter in respect of illegal search and seizure apply not only to the AOLS in conducting investigations that predate disciplinary or complaints proceedings, but may apply in favour of the membership of the Association when action is taken pursuant to the new Competition Act.

I will deal with the effect of the Charter on the search and seizure rights by the Association and against the Association later in this paper.

Section 7 and Administrative Tribunals

Lastly, the most important provision of the Charter for disciplinary bodies and for administrative decision makers is the guarantee in section 7 that a person will not be deprived of "life, liberty and security of the person" unless it is done in accordance "with the principles of fundamental justice".

The interests protected by section 7 do not include property or economic rights, and the Charter was deliberately designed to exclude such protection. This raises the question as to whether one's interest in

the practice of a profession or in a professional reputation is a matter of "life, liberty or security of the person". Most of the jurisprudence has held that such matters are not within the protection of section 7. (See Wilson and Mackson v. Medical Services Commission of British Columbia (1987), 9 B.C.L.R. (2d) 350 (B.C.S.C.)

On the other hand it has been argued that one's professional standing and reputation constitute such a fundamental element of our personality and our sense of identity and dignity such that deprivations of one's professional standing involves one's "security of the person".

If professional disciplinary matters fall within the section 7 protections, then what is included in the concept of fundamental justice?

For the most part, fundamental justice includes, in constitutional terms, the standards of procedural fairness which are propounded in the common law sense of natural justice and procedural fairness. These include the right to be heard, to know the case against you, to notice of the hearing and to representation by counsel. What is critical to understand in this respect is that before the Charter the legislative text and the common law in respect of procedural fairness prevailed. Now, when the issue is posed in constitutional terms, even statutorily authorized procedures must withstand scrutiny.

It remains to be seen exactly which substantive standards will be considered to come within the section 7 concept of fundamental justice. One which has some potential to effect the disciplinary context is the principle against "vagueness". This means that if one is disciplining a surveyor for professional misconduct, one cannot be overly general in describing what the charge against the individual is; one must be specific. Another lies in the area of "unreasonable delay". The section 7 protection in that regard might prevent a disciplinary body from proceeding with proceedings against one of its members in respect of actions that occurred a considerable time before charges are laid, or alternatively, might prevent a hearing from being heard which has been significantly delayed after a complaint was made. Whereas disciplinary hearings themselves may not be subject to the protection of section 11 of the Charter, such activities may very well be protected indirectly, by the more general provisions of section 7 and the guarantee that proceedings be carried out in accordance with the principles of fundamental justice.

Let me now deal specifically with some recent Charter decisions that have or may impact on the Association, as a professional body, by way of illustrating how the Charter affects us all, as professionals on the one hand, and as ordinary people, on the other.

ANDREWS V. LAW SOCIETY OF BRITISH COLUMBIA

On February 2nd of this year, the Supreme Court of Canada rendered a decision which may have significant implications for the Association and the validity of certain provisions of the Surveyors Act, 1987 (the "Act"). In the case of Andrews v. Law Society of British Columbia, the Supreme Court of Canada ruled that a statutory provision which excluded non-citizens from the practice of law in B.C. was unconstitutional. More specifically, the court ruled that the provision violated the right to equality under section 15(1) of the Charter.

Section 15(1) of the Charter reads as follows:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The provision being challenged in Andrews was section 42 of the Barristers and Solicitors Act, R.S.B.C. 1976, c. 26 (the "B.S.A."), which reads:

> "The Benchers may call to the Bar of the Province and admit as a solicitor of the Supreme Court
>
> (a) a Canadian citizen with respect to whom they are satisfied that he..."

The B.S.A. is an Act which regulates the legal profession in British Columbia. In this respect it is analogous to the Surveyors Act, 1987, which regulates the surveying profession in Ontario.

The Surveyors Act, 1987 contains two provisions that are similar, but not identical, to the provision challenged in Andrews:

> "s. 3(6) No person shall be elected or appointed to the Council unless he or she is a Canadian citizen.
>
> s. 12(1) The Registrar shall issue a licence to a natural person who applies therefor in accordance with the Regulations and,
>
> (a) is a citizen of Canada or has the status of a permanent resident of Canada...".

The B.S.A. required that members of the profession be Canadian citizens, whereas the Surveyors Act, 1987 requires that members of the profession be Canadian citizens or permanent residents of Canada. The B.S.A. thus excluded permanent residents from membership in the profession. By contrast, the Surveyors Act, 1987 does not exclude permanent residents from membership in the profession. Section 3(6) does, however, exclude such persons from membership in the Council. Further, section 12(1) excludes from membership in the Association those persons who are neither Canadian citizens nor permanent residents. The Surveyors Act, 1987 could therefore be challenged by a person seeking to enter the practice of surveying and who, for example, was waiting to be granted

status as a permanent resident. The Act could also be challenged by a person who is a permanent resident and a member of the Association, and who is seeking nomination to the Council. If and when such a challenge is made, the courts would undoubtedly look to the decision in Andrews for guidance as to:

(a) what constitutes discrimination under section 15(1) of the Charter?

(b) what kinds of discrimination can be justified under section 1 of the Charter?

What Constitutes Discrimination?

In Andrews, the court described discrimination as follows:

> "...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

It is not every distinction which gives rise to a violation of section 15. The distinctions which are forbidden by the section are limited to those which involve prejudice or disadvantage. The purpose of the section is to ensure equality in the formulation and application of the law. A bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.

It is also clear that a practice or statutory provision may be discriminatory even if there was no intent to discriminate. An intention to discriminate is not required, for it is in essence the impact of the discriminatory act or provision upon the person effected which is decisive in considering any complaint.

Based on the foregoing principles, the court unanimously ruled that the citizenship requirement in section 42 of the B.S.A. was discriminatory and thus violated section 15(1) of the Charter. The court found that the impugned section differentiated between citizens and non-citizens with respect to admission to the practice of law. The distinction denied admission to non-citizens who were in all other respects qualified. The citizenship requirement had the effect of requiring permanent residents who were not citizens to wait for a minimum of three years from the date of establishing their permanent residence

before they can be considered for admission to the Bar. The impugned section thus imposed a burden on permanent residents in the form of a delay in obtaining admission to the Bar.

In the course of its reasoning, the court indicated that the categories of discrimination specifically prohibited in section 15(1) were not exhaustive. The various members of the court agreed that non-citizens who are permanently resident in Canada form a kind of "discreet and insular minority". Compared to citizens, non-citizens are a group lacking in political power and as such are vulnerable to having their interests overlooked and their rights to equal concern and respect violated. The purpose of section 15 is to protect such persons. The members of the Bench all concluded that non-citizens fall into a category analogous to those specifically enumerated in section 15. The court also emphasized that the range of "discreet and insular minorities" has changed and will continue to change with changing political and social circumstances. Thus it can be anticipated that the discreet and insular minorities of tomorrow will include groups not recognized as such today.

What Kinds of Discrimination Are Justifiable?

Once the person seeking to challenge a statutory provision has established that the practice or statutory provision violates section 15 of the Charter, the onus then shifts to the person seeking to uphold

the legislation to establish that the infringement constitutes a "reasonable limit" under section 1 of the Charter. Section 1 reads as follows:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The first step in the section 1 inquiry is to assess the importance of the objective underlying the impugned law. The objective must relate to concerns which are "pressing and substantial" in a free and democratic society. The second step in the section 1 inquiry involves the application of a "proportionality test", which requires the court to balance a number of factors: the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the legitimate goal reflected in the legislation.

In Andrews, it was up to the Attorney General and the Law Society to convince the court that the impugned legislation was saved by section 1. It was submitted that the legislation sought to attain three objectives:

(1) citizenship ensures a familiarity with Canadian institutions and customs;

(2) citizenship implies a commitment to Canadian society;

(3) lawyers play a fundamental role in the Canadian system of democratic government and as such should be citizens.

The majority of the court found that the citizenship requirement did not appear to relate closely to any of the three objectives. In the majority's view, citizenship does not ensure familiarity with Canadian institutions and customs. Moreover, such familiarity could be better achieved by training and examination, whether the applicant be a Canadian citizen, a British subject, or something else. Nor does citizenship ensure commitment to Canadian society. In respect of the third objective, the majority rejected the argument that lawyers perform a governmental function, and further held that even if they did perform a governmental function, the citizenship requirement would not provide any guarantee that lawyers would honourably and conscientiously carry out their public duties. They would carry out their duties, in the majority's view, because they are good lawyers and not because they are Canadian citizens.

Two of the members of the court dissented with the majority and held that the citizenship requirement was a "reasonable limit" in light of the three objectives submitted by the Attorney General and the Law Society.

Implications For the Surveyors Act, 1987

Section 3(6)

In view of the unanimous ruling in Andrews that a distinction between citizens and non-citizens violates section 15, it is virtually

certain that a court would come to a similar conclusion in respect of the citizenship requirement in section 3(6). It would therefore be up to the *AOLS* and the Attorney General of Ontario to justify the citizenship requirement. In order to do so, the Association would have to distinguish the Andrews case. Section 3(6) of the Surveyors Act, 1987 stipulates a qualification for admission to the Council, not for admission to the practice of surveying. The Council is the governing body of the *AOLS* and the members of the Council are vested with powers not shared with the ordinary members of the AOLS. For example, the Council is empowered to make Regulations, and to pass By-laws. In addition, the Subcommittees of the Council conduct hearings in respect of the issuance and cancellation of licences and complaints in respect of incompetence and misconduct. Thus it could be argued that the Council performs a legislative function analogous to the government, and a "quasi judicial" function analogous to a court of law. It is unclear, however, whether such an argument would satisfy a court that the citizenship requirement is justified in this case. As you may recall, the majority decision indicated that the citizenship requirement did not provide any guarantee that a person would honourably and conscientiously carry out his or her public duties or governmental functions.

Section 12(1)(a)

Section 12(1)(a) is similar to the statutory provision impugned in Andrews in that it imposes the citizenship requirement as a criterion for admission to professional practice. Section 12(1)(a) differs from the legislation in Andrews in that it excludes a narrower or

smaller group of persons than the group excluded by the latter provision. Nevertheless, in my opinion, this section violates section 15(1) of the Charter. Section 12(1)(a) creates a distinction based on personal characteristics attributed to an individual solely on the basis of association with a group, as opposed to the individual's merits and capacities. Persons who are neither citizens nor permanent residents are even more powerless and more vulnerable than the group excluded by the BSA and are as much a "discreet and insular minority" as that group.

Again, it would be up to the ACLS and the Attorney General of Ontario to satisfy the court that section 12(1)(a) is a reasonable limit and is therefore saved by section 1 of the Charter. And again, it is unclear whether the requirements under section 1 could be satisfied in this case. The Honourable Mr. Justice Laforest, who concurred with the majority in Andrews, indicated that familiarity and commitment to Canada could be achieved by restricting admission to those who are Canadian citizens or who permanently reside in Canada. This statement does not, however, necessarily reflect the view of the majority. If a court were to follow the reasoning of the majority in Andrews, it might conclude that the status of permanent residence does not ensure familiarity or commitment any more than the status of citizenship. The objective of familiarity with Canadian institutions and practices might be better achieved by the additional educational requirements which the ACLS is entitled to impose in respect of extra-provincial applicants.

THE POWER OF SEARCH AND SEIZURE AND THE POWER TO DEMAND PRODUCTION OF DOCUMENTS

Any discussion of the impact of the Charter on search and seizures in a regulatory setting must begin with the decision of the Supreme Court of Canada in Hunter v. Southam Inc., (supra).

The Hunter decision is important in this context in three respects:

1. It identifies the interests of the individual sought to be protected by the guarantee in section 8 of the Charter of the right to be secure against unreasonable search and seizure;

2. It determines that the assessment of reasonability for the purposes of section 8 turns on balancing the interests of the individual against the interests advanced by the government in carrying out the search or seizure; and

3. It establishes the requirements that must be met to render a search or seizure reasonable, at least in circumstances where the governmental interest to be balanced against that of the individual is the interest in enforcement of the law.

Mr. Justice Dickson of the Supreme Court of Canada held that at a minimum the guarantee in section 8 protects against governmental intrusions on a person's reasonable expectation of privacy.

In the Hunter v. Southam Inc. case the Supreme Court of Canada struck down section 10 of the old Combines Investigations Act (the "CIA"). In ruling that the provisions of section 10 constituted unreasonable search and seizure, Mr. Justice Dickson laid down a series of requirements with which legislation authorizing search or seizure must comply to satisfy section 8 of the Charter (at least in the criminal or quasi-criminal context).

The legislation he held, must provide for:

(a) a system of prior authorization, by an entirely neutral and independent arbiter who is capable of acting judicially in balancing the interests of the government against those of the individual;

(b) a requirement that the impartial arbiter satisfy himself that the person seeking the authorization has reasonable grounds, established upon oath, to believe that an offence has been committed; and

(c) a requirement that the impartial arbiter satisfy himself that the person seeking the authorization has reasonable grounds to believe that evidence of the particular offence under the investigation will be found.

Inasmuch as section 10 of the CIA contained no such provisions, it was determined by the Supreme Court of Canada that it violated the right to privacy set out in section 8 of the Charter and therefore the section of the CIA was struck down.

The question that arises is whether the rationale of the Hunter v. Southam Inc. case and its requirements apply equally to searches and seizures under regulatory statutes such as the Surveyors Act and if not, what is the standard to be applied in gauging the reasonability of searches and seizures in the context of the Surveyors Act.

Put another way, what right does the Association have to demand production of documents, including plans of survey, or to attend at the premises of a surveyor's firm and request the production of information for the purposes of "spot checks" or to augment a disciplinary or other investigation.

In the Hunter decision Mr. Justice Dickson stated that the relevant standard might be different where the state's interest was not simply law enforcement, i.e. of a criminal statute.

There have been a number of cases which articulate that a lower expectation of privacy on the part of individuals exists in the regulatory setting and the courts have relied upon a variety of justifications for subjecting searches and seizures in the regulatory context to a less stringent standard of reasonability than that espoused in the Hunter case.

For example, in the Re Belgoma Transportation Ltd. and Director of Employment Standards (1985), 51 O.R., (2d) 509 case, the issue was whether section 45 of the Employment Standards Act whereby an employment standards officer could, without a warrant, enter upon business premises and require the production of documents and remove them for copying, infringed the right to be secure against unreasonable search and seizure.

The court ruled that such search and seizure was not unreasonable.

The court stated at page 512 as follows:

> "The standards to be applied to the reasonableness of a search or seizure and the necessity for a warrant with respect to criminal investigations cannot be the same as those to be applied for search or seizure within an administrative and regulatory context. Under the Employment Standards Act, there is no necessity that the officer have evidence that the Act has been breached. In the course of carrying out administrative duties under the Act, what is commonly called a 'spot audit' may be carried out which helps ensure that the provisions of the Act are being complied with. The search and seizure in the instant case as such it is, is not aimed at detecting criminal activity, but rather...in ensuring and securing compliance with the regulatory provisions of the Act enacted for the purposes of protecting the public interest."

That is precisely what might be argued by the Association in its requirement that in respect of investigations that may lead to discipline proceedings, that information be supplied to the Association on demand. Alternatively, it could be used to justify the Association's current practise of requiring that plans be submitted to the Survey Review Department for inspection on a random basis, to "spot check" the competence of surveyors generally.

The Belgoma case suggests that the Hunter tests may not apply in respect of the regulation of a statute for the protection of the public interest, but the issue is an open one and might, in certain circumstances, be used by surveyors to initially refuse to produce documentation on the grounds that their right of privacy is compromised.

Of the three justifications put forward for a less stringent standard of reasonability (in requiring information without it being perceived to be an invasion of privacy) - the public interest in compliance with regulatory requirements, lower expectations of privacy and implied consent to official intrusions - the former two at least appear to constitute proper considerations for measuring reasonability established by the Supreme Court in Hunter. The balancing exercise required by Hunter should be conducted in any particular situation, and Hunter expressly recognized that governmental interests other than that of criminal law enforcement, should shift the balance. Further, since, according to Hunter, what is sought to be protected by section 8 is not privacy in any absolute sense, but rather a reasonable expectation of privacy, there is also room in the balancing process to take into account, in different situations, the differing levels of expectation regarding varying degrees of official intrusiveness. Surveyors who are asked to produce survey records to the Survey Review Department or pursuant to a complaint from the public may consider this reasonable, whereas if they are asked to produce records for the police, they would consider it to be unreasonable search and seizure in the absence of conformance with the tests set down in the Hunter case.

Where the government (or the Association) can demonstrate that the object of the legislative scheme cannot feasibly be achieved under a system of full prior authorization as contemplated by Hunter, a legitimate justification may exist either for dispensing altogether with

the prior authorization requirement, or for relaxing the standard that the government (or the Association) must meet in order to obtain the authorization.

It is not self-evident that expectations of privacy are necessarily lower in an administrative or regulatory context than in the context of criminal or quasi criminal investigation. The object of the search may not be determinative of the degree of its intrusiveness. Of more significance is whether the search is directed at private papers or private living space, or whether it is confined to places and property that are in view or that otherwise have associated with them no element of personal dignity or privacy.

That is to say, it may be more justifiable for the Association to attend at the business premises of a surveyor or his firm and ask for plans and records than it would be to arrive at the person's home and ask for such information.

Demands for Production

Regulatory statutes commonly confer on those charged with their enforcement, powers to compel the production of documents for investigative purposes. There are a number of provisions in the Surveyors Act which may fall into that category, such as section 7(1). 23 which states that "the Council may make Regulations providing for inspection

programs related to the practice of professional land surveying, including programs for the inspection of records other than financial records of members of the Association and holders of Certificates of Authorization".

In addition, section 22(1)(b) states that the Complaints Committee shall consider and investigate complaints made by the members of the public or members of the Association regarding the conduct or actions of members of the Association, but no action shall be taken by the Committee under subsection (2) unless the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint.

In such a situation the Committee can make a determination in respect of the complaint without holding a hearing.

Similarly, in respect of section 23 of the Act a Complaints Review Counsellor can privately, without the necessity of a hearing, review the activities of the Complaints Committee.

Albeit there exist several cases in which powers to compel production have been challenged as infringing section 8 of the Charter, to date all of those challenges have proven unsuccessful because the power to compel production is supposedly not a search or a seizure and does not imply intrusion into a person's home or place of business.

However, Hunter makes it clear that section 8 of the Charter is intended to protect not only against intrusions on property rights, but also against intrusions on reasonable expectations of privacy, and therefore it is difficult to justify excluding demands for production from section 8, so as to preclude any consideration of the balance between the individual and government interest and any assessment of the reasonability of the demand. Section 8 of the Charter protects against unreasonable search or seizure. In compelling disclosure to the government (or to the Association) of private documents, demands to produce significantly intrude upon the individual's interest in privacy. In at least one respect, demands to produce may be even more intrusive than search warrants: unlike search warrants, they in effect require the individual to whom the demand is directed to aid the state in the discovery, production and authentication of evidence.

If it is accepted that the impact of a demand for production on privacy differs little from that of a search and seizure in the traditional sense, it would appear to follow that the requirements of reasonability should also be similar for the two types of investigative tools, and that a Charter argument could be made to resist production of information to aid in an investigation that could lead to disciplinary charges against a surveyor, because it offends against one's reasonable expectation of privacy.

Unreasonable Search and Seizure AGAINST the Association

Not only has the passage of the Charter had an impact on the conduct of the Association as a statutory body, but the Charter has had an impact on the Association itself given the restricted ability of the Federal Government to implement search and seizure practices against the Association or its individual members.

There were a series of incidents prior to 1986 in which various surveying firms were subjected to the search and seizure provisions of section 10 of the Combines Investigations Act with the result that documents were seized, copied and removed from the premises, without warning, pursuant to the rights implemented by the Restrictive Trade Practices Commission of the Combines Investigation Branch.

As has been previously stated, the Supreme Court of Canada struck down the search and seizure provisions of section 10 of the Combines Investigations Act in the Hunter v. Southam, supra, case on the basis that its provisions did not adequately fulfil one of the cardinal purposes of section 8 of the Charter, being the protection of the reasonable expectation of privacy. As a result of the Hunter case the Combines Investigation Act was replaced by the new Competition Act (the "Act"), which clearly represents an attempt pursuant to section 13(1) of that Act to Charter-proof search and seizure provisions. In section 13(1) the Director on an ex parte application may obtain a search warrant from a judge of a Superior, District or Federal Court if there are reasonable grounds to believe that a person has contravened various provisions of the

Act, and where there are reasonable grounds to believe that there exists on the premises a record that will afford evidence of such contravention. The judge may then issue the warrant to enter and search the premises.

The guidelines set out in the Hunter case have been substantially duplicated in section 13 of the new Competition Act. This illustrates how the application of the Charter can impact on a particular piece of legislation that was deemed to violate a provision of the Charter; in this case protection of one's privacy against unreasonable search and seizure, protected by section 8.

The next investigative tool which will undoubtedly undergo Charter scrutiny under the Competition Act is the power to compel a person to produce documents during the course of an investigation. For example if there is an inquiry against a survey firm in respect of an alleged violation of the provisions of the Competition Act, the Director pursuant to the Competition Act, can apply to a judge to compel the person not only to produce documentation, but to attend and be examined under oath by the Director.

Under section 17 of the old Combines Investigations Act one could obtain prior authorization to compel production and attendance without leading evidence about whether an offence had been committed or that documents were likely to contain evidence in that regard. The informant did not even have to disclose the identity of the person whose conduct was being investigated.

Section 9 of the new Competition Act is clearly an improvement on the deficiencies of section 17 of the old Combines Investigations Act because it requires that prior authorization must be obtained from a judge on information under oath, that there must be reasonable and probable grounds to believe that an offence has been committed, and that the evidence sought is on the premises.

It is submitted, however, that there is even an objectionable feature to section 9 of the Competition Act with respect to its requirement of testimonial compulsion.

The testimonial compulsion aspect of section 9 may violate section 7 of the Charter. It is basic to our system of criminal justice that a person should not have to participate in the development of the case against him by answering questions. The police do not even have such power in murder investigations, where society has a greater interest in self protection than in the situation at hand.

It is submitted that section 9 of the Competition Act contains flaws because it requires a suspect to assist in the development of the prosecution without telling him that he is under suspicion. It may be that the Crown will have some difficulty in justifying section 9 of the Competition Act, because its provisions do not conform with the principles of fundamental justice that prevent a person from having to assist in his own prosecution (i.e. the right against self-incrimination).

Nevertheless, the passage of the Competition Act is innovative in that it is a departure from the Combines Investigations Act and that departure lies in the formulation of a Competition Tribunal.

When contrasted with the old Restrictive Trade Practices Commission, which had investigative and reporting functions, the tribunal is strictly an adjudicative body. It has exclusive jurisdiction to hear and determine applications made by the Director in respect of breaches of the provisions of the Competition Act.

The specifics of the Competition Act, which replaces the Combines Investigations Act, are outside the scope of this particular paper, but its provisions point out that since the implementation of the Charter various provisions of the old Combines Investigations Act have been struck down as unconstitutional and new provisions have been substituted under the Competition Act in an effort to make the legislation conform to the basic rights and guarantees afforded to individuals by the Charter.

SECTION 11 OF THE CHARTER AND ITS APPLICATION TO DISCIPLINE PROCEEDINGS

In 1987 the Supreme Court of Canada in a series of cases, ruled out the application of section 11 of the Charter to discipline and other domestic proceedings. As previously stated, section 11 provides

that any person charged with an offence has the right to be informed without unreasonable delay of the offence, that such person must be tried within a reasonable time and that such person is not to be compelled to be a witness against himself. Lastly, such persons are presumed innocent until proven guilty.

It was determined in the case of Wigglesworth v. R., et al. (1987), 2 S.C.R. 541 that a discipline proceeding was not an "offence" within the meaning of that word found in section 11 of the Charter.

The question is, are there any circumstances in which the provisions of section 11 might apply in a disciplinary context, even though section 11 does not specifically apply? The answer is that section 7 of the Charter may provide protection to surveyors as its provisions may circumvent the case law decisions in respect of section 11. This theory can be demonstrated in the context of civil/criminal proceedings, which have been commenced concurrently with disciplinary action.

Respondents in disciplinary proceedings may find themselves confronting simultaneous civil or criminal proceedings arising from the same facts and there exists nowhere in administrative law any formal mechanism for determining an order of precedence among these various kinds of proceedings, for preventing the abuse of multiplicity of proceedings or for safeguarding the rights of a respondent. A consideration of the attempts to "constitutionalize" administrative law in the area of unreasonable delay where there are competing proceedings may be helpful.

In the Wigglesworth case, the appellant police officer had committed a "common assault" under the Criminal Code and also a "major service offence" under the Royal Canadian Mounted Police Act. The major service offence was dealt with first and subsequently the common assault charge under the Code was initially quashed on the basis that to proceed would be to try the accused twice for the same misconduct contrary to section 11 of the Charter. However, this decision was overturned by the Court of Appeal.

It was overturned on the grounds that the protections afforded by section 11 of the Charter excluded disciplinary matters. Madame Justice Wilson distinguished between criminal proceedings and internal disciplinary proceedings when she stated at page 560 as follows:

> "In my view if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within section 11. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity...Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of 'offence' proceedings to which section 11 is applicable."

However, Madame Justice Wilson expressly reserved the possibility that a person subject to internal discipline may claim procedural protection pursuant to section 7 of the Charter, when she stated at page 562 as follows:

> "I want to emphasize that nothing in the above discussion takes away from the possibility that constitutionally guaranteed procedural protections may be available in a particular case under section 7 of the Charter even though section 11 is not available."

The application of section 7 in the disciplinary context has had its greatest impact in the matter of delay in the institution of proceedings in the face of concurrent criminal actions.

In the case of Misra v. The College of Physicians and Surgeons of Saskatchewan (1988), S.J. 342, (June 7th, 1988), the Saskatchewan Court of Appeal dealt with the appeal of a doctor who was "temporarily" suspended from practice for over five years by the College pending disposition of criminal proceedings against him. The criminal proceedings were ultimately stayed under the Charter because of unreasonable delay contrary to section 11. The College began disciplinary proceedings based on the same facts that had given rise to the criminal charge. The doctor alleged a violation of fundamental justice, natural justice and procedural fairness. The doctor argued section 7 of the Charter, and while no particular disposition in that regard was made the Court of Appeal found in favour of the doctor on the grounds of natural justice.

The Court of Appeal stated that notwithstanding parallel criminal proceedings, the College could not sit back and rely upon criminal charges to establish their case and then hold in reserve the

right to take proceedings for professional misconduct if the criminal proceedings failed.

If the respondent piggybacked on the criminal process it was bound by the results of that criminal process in any subsequent disciplinary proceedings.

In Young, et al. v. The College of Physicians and Surgeons of British Columbia (1986), B.C.J. No. 2138, a number of practitioners sought prohibition against the College arising from an eighteen month delay in bringing disciplinary proceedings after criminal proceedings had been commenced.

Mr. Justice McDonald held that section 7 of the Charter applied to disciplinary proceedings stating that the "right" to practice a profession must be distinguished from a mere economic loss. Although the doctors were no longer charged with a criminal offence His Lordship stated:

> "Unreasonable delay may well amount to an abuse of process and as such be contrary to the principles of natural justice."

The Judge in the end distinguished criminal proceedings in the application of section 7, and determined that the College's policy of awaiting the outcome of criminal charges before proceeding with disciplinary hearings was proper.

A contrary conclusion was arrived at in the case of the Board of Governors of Seneca College v. Bhadauria (1981), 2 S.C.R. 181. However, these cases show a willingness on the Court's part to be adaptable where their instincts about fairness are aroused by the facts. While the cases reflect a difference of opinion about the propriety of a disciplinary body awaiting judicial determinations of guilt in parallel criminal proceedings, no firm determination can be inferred from the divergence of opinions.

Therefore, it appears that while the law is still developing with respect to the application of the Charter to the Association's proceedings and in particular disciplinary matters, the Charter may have an impact on the ability of the Association to investigate prior to disciplinary proceedings and it will have an impact on the speed with which the Association proceeds against a surveyor charged with an offence under the Act. Disciplinary proceedings should be expedited, because if they are stayed pending civil or criminal proceedings it may be argued that the delay deprives the person of the right to a hearing in accordance with the principles of fundamental justice as set out in section 7 of the Charter.

In conclusion, it can be seen that, with the passage of the Charter, its provisions have had an impact on the membership of the Association in the area of search and seizure, and might hamper the

Association's own practices in that regard. It may also impact on the provisions of the Surveyors Act regarding citizenship, and lastly, its provisions may affect the Association's practices regarding investigation and the need to conduct disciplinary proceedings expeditiously.