CHARTER CHALLENGES AND THE COURTS: DEFINITION AND ENFORCEMENT OF CHARTER EQUALITY RIGHTS

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Introduction

As reflected in its title, this paper is divided into two parts, one relating to the process of defining equality rights set out in the Canadian Charter of Rights and Freedoms and the other relating to enforcement of those rights. In both, some consideration is given to the question which so often preoccupies lawyers and judges: what are the precedents?

The first decisions taking the measure of equality rights in section 15 of the Charter lie several months in the future. For the time being, discussion of precedents in this context tends to centre on the question of the extent to which decisions rendered under the equality rights clause in the Canadian Bill of Rights[1] can be expected to shape judicial analysis of its Charter counterpart. Of high interest as well, of course, is the equal rights jurisprudence developed under the United States Bill of Rights.

Enforcement of Charter rights and freedoms, discussed in the second part of the paper, is expressly dealt with in section 24 of the Charter. Here the search for guidance in the authorities follows other paths. While section 15 of the Charter has its analogues in the Canadian Bill of Rights and the United States Bill of Rights, there is no counterpart to section 24 in either of those documents. Section 24 has, on the other hand, received a considerable amount of judicial attention in its own right since the coming into force of the Charter, and certain aspects of this jurisprudence will be discussed. Consideration is given as well to enforcement taking the form of an attack on constitutional validity which, it is suggested, is not governed by section 24.

Defining the Charter Right

Precisely what right or rights are the subject of subsection 15(1)? One begins with the text of the constitutional provision itself. The subsection reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The words I have emphasized set out "the right", and the subsection continues on to list certain bases of discrimination which "in particular" are unacceptable. I leave aside the grounds of discrimination for these do not bear, at least directly, on the number or nature of the right or rights guaranteed by the earlier portion of the subsection.

Some commentators have read subsection 15(1) as containing four distinct rights clauses: (1) the right to be equal before the law; (2) the right to be equal under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law. In support of this analysis considerable reliance is placed upon the legislative history of the section, together with the explanation that each of these four elements was designed in response to the impact of certain decisions of the Supreme Court of Canada relating to the equality rights clause in the Canadian Bill of Rights. The latter, subsection 1(b), reads as follows:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> ...
>
> (b) the right of the individual to equality before the law and the protection of the law.

A question which may present itself for determination at an early stage is whether the Charter provision actually does delineate four distinct rights. The structure of subsection 15(1) is somewhat unusual compared with other right-declaring provisions of the Charter. Typically, such a provision begins with a pronoun or noun indicating who is entitled to the right: "everyone", "every citizen", "any person", "a witness", or as the case may be. Section 15 rights are guaranteed to "every individual". Our typical Charter provision, having said something about who may invoke it, moves directly to identify the right it guarantees. For example, by the terms of section 7, everyone "has the right to life, liberty and security of the person and the right not to be deprived thereof...." The structure of subsection 15(1) differs in this respect. It sandwiches in a statement that every individual is equal before and under the law. Only then does the subsection move on to invoke familiar right-declaring phraseology by stating that every such individual "has the right to the equal protection and equal benefit of the law".

In so dissecting section 15 my purpose is not to contend for either a "two-right" or a "four-right" theory. It may be that little, if anything, turns on a choice

between those two possibilities because the phrase "equal protection and equal benefit of the law" could, without straining the language, be considered broad enough to subsume the right to "equality before the law and the protection of the law" declared by subsection 1(b) of the Canadian Bill of Rights. The only point I wish to make at the moment is that the most cursory comparison of section 15 of the Charter and subsection 1(b) of the Canadian Bill of Rights discloses the patently broader sweep of the former. The significance of this, shortly stated, is that the courts in construing section 15 will not be subject to the kind of constraints which operate when the Charter right under examination is cast in terms identical to, or substantially the same as, those employed to describe the equivalent right contained in a Bill of Rights clause and the latter has been the subject of authoritative treatment by the Supreme Court of Canada. In its Charter decisions to date the Supreme Court has not yet been required to address a situation where it is invited to ascribe a meaning to words in the Charter at variance with one it has given to the same language in the Bill of Rights. Its decisions on the Charter have dealt with mobility rights (section 6),[2] unreasonable search or seizure (section 8),[3] minority language educational rights (section 23)[4] and the right to vote (section 3),[5] none of which are treated in the Canadian Bill of Rights.

The issue is squarely raised where the rights clauses in the Canadian Bill of Rights and the Charter are identical or virtually identical and the enactment challenged under the Charter is the same, or substantially the same, as one ruled upon in a Supreme Court decision under the Bill. An example of such a situation is provided

by the appeal argued in March, 1984 in the Supreme Court in R. v. Big M Drug Mart.[6] It involves a challenge to the validity of Sunday-closing provisions in the federal Lord's Day Act,[7] legislation which had withstood attack based on the freedom of religion clause in the Canadian Bill of Rights.[8] In the decision appealed from, the Alberta Court of Appeal held, by a three-to-two majority, that the impugned provisions of the Act offended the Charter's section 2 guarantee of "freedom of conscience and religion". The Supreme Court may, in its disposition of this appeal, provide direction as to applicability of Bill of Rights decisions generally.

It is perhaps worth pausing to consider some lines of reasoning available to support an argument to the effect that a court ought to feel free to move away from Bill of Rights authorities in order to construe counterpart Charter provisions differently. At least three approaches may be followed by the Supreme Court of Canada to achieve a different result; the options open to a lower court are fewer.

First, the Supreme Court has clearly expressed, and acted upon, its willingness in appropriate situations to overrule its own earlier decisions (as well as those rendered by the Privy Council when it was Canada's court of last resort and those of the House of Lords). A recent example of this drawn from the criminal law area is provided by Vetrovic v. The Queen,[9] where the Court swept away a seventy year accretion of authority, including decisions of its own, relating to a judge's charge to a jury about the need for corroboration where the Crown relies upon the evidence of an accomplice. Overly technical doctrine in this area had created unnecessary

problems. Reconsideration of judge-made law on point disclosed that it had outlived its usefulness. This option of simply discarding previously governing decisions of the Supreme Court is, I hasten to add, open only to that Court.

A second option, theoretically open to all courts, is to distinguish Supreme Court authorities developed under the Canadian Bill of Rights on the basis that the Bill lacks constitutional status whereas the Charter is part of the Constitution of Canada as defined by section 52 of the Constitution Act, 1982. Dicta in Supreme Court decisions respecting the Bill have characterized it as "quasi-constitutional"[10] and alluded to its statutory as opposed to constitutional character.[11] Again, in the course of rendering the Court's first Charter decision in Skapinker,[12] Mr. Justice Estey referred to the Bill of Rights as a statute of "extraordinary nature"[13] and elaborated in the following terms:

> The Canadian Bill of Rights is, of course, in form, the same as any other statute of Parliament. It was designed and adopted to perform a more fundamental role than ordinary statutes in this country. It is, however, not a part of the Constitution of the country. It stands, perhaps, somewhere between a statute and a constitutional instrument. Nevertheless, it attracted the principles of interpretation developed by the courts in the constitutional process of interpreting and applying the Constitution itself.[14]

So the Charter stands on a higher constitutional plane than the Bill which, in turn, stands above ordinary (federal) statutes. Does this, in itself, provide a rationale for interpreting differently clauses in the Charter and in the Bill which are identical, or

virtually so? The answer to that question is not self-evident, and the Supreme Court has not yet been required to rule upon it. In delivering the Court's decision in the Southam Inc. case[15], Mr. Justice (now Chief Justice) Dickson contrasted the task of interpreting a constitutional enactment with that of construing a statute [16], but without drawing into this comparison the approach appropriately taken toward the Canadian Bill of Rights. Lower court decisions on the Charter have diverged on this point. One school of thought suggests that the Charter's status as part of the Constitution of Canada warrants a fresh approach, unconstrained by decisions interpreting similar language in the Bill.[17] The competing view, favouring continuity, would treat Supreme Court decisions on the Bill as highly persuasive, if not determinative, for other courts construing equivalent terms in the Charter.[18] In support of the latter approach, several appellate courts have reasoned that the Charter provision must be taken to have been adopted with knowledge of the interpretation ascribed to counterpart language in the Bill, and with the intention of adopting such interpretation along with the borrowed terminology itself. In other words, the intention must have been to adopt the terms of the Bill as authoritatively interpreted by the Supreme Court; otherwise, the argument runs, different terminology would have been employed.[19]

If the interpretation to be given a fundamental rights clause depends on the constitutional flavour of the enactment, what are the indicia of constitutionality? The Constitution of Canada is the supreme law of Canada[20] and the Charter forms part of it. The Canadian Bill of Rights, though, also enjoys a degree of "supremacy" within its own sphere of federal laws. This much was authoritatively decided by the Supreme Court in Drybones[21] where the fundamental principle was established that

irreconcilable conflict between the Bill and another federal enactment renders the latter inoperative. (To this extent, it might be noted in passing, the Canadian Bill of Rights dominates federal legislation to an extent which is unparalleled among instruments forming part of the Constitution of the United Kingdom.) The Canadian Bill of Rights is subject to being overridden by a federal enactment expressly declaring that it is to operate notwithstanding the Bill, but then much of the Charter is also subject to legislative override: the fundamental freedoms set out in section 2, the legal rights described in sections 7 to 14, and the equality rights contained in section 15.[22]

One difference between the Charter and the Bill is that the former is more difficult to amend; it is, in the jargon of the constitutionalists, "entrenched". Where that takes us, as an aid to interpretation, is less clear. In theory the Bill can be amended as readily as an ordinary statute. The reality is that the Bill has not been amended in the quarter of a century since its enactment and that governments are not disposed to tamper lightly with the terms of an enactment of this nature — entrenched or not. And I suppose the further point could be made that within the Constitution of Canada itself, several degrees of entrenchment are provided for by the various amending procedures. Because some parts of the Constitution of Canada are more difficult to amend than the Charter,[23] is the latter really less "constitutional" in nature? This is, perhaps, a sterile line of inquiry. The only point I wish to make is that relative difficulty of amendment, in itself, provides a conceptually problematic and, in practice, an uncertain guide to selection of appropriate principles of

interpretation (to say nothing of the debate as to whether entrenchment points in the direction of greater or less judicial deference to the legislative branch).

Of greater consequence than the constitutional categorization of an enactment for determining a suitable approach to its interpretation, it may be argued, is the subject matter of that enactment. If, for example, it is protective of human rights or concerns the rights of the citizen as against the state, it will deserve a large and liberal interpretation even if it does not qualify as a "constitutional" instrument. An illustration of this is provided by the recent unanimous decision of the Supreme Court of Canada in British Columbia Development Corp. v. Friedmann[24] concerning the extent of authority conferred on British Columbia's Ombudsman by that province's Ombudsman Act.[25] Mr. Justice Dickson took note of the remedial character of the legislation and examined the scheme of the statute together with the factors that motivated the creation of the Ombudsman's office, all in the course of ascertaining the objects of the legislation and the degree to which it was entitled to receive a large and liberal interpretation. He concluded that it ought to receive a "broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil."[26] The approach, and even the choice of terminology, closely parallels his observations, speaking for the Court, in the Southam Inc. case[27] appropos the task of construing the Charter. Reference might be made as well to the reasons of Mr. Justice Lamer, with which two other members of the Court concurred, in the Heerspink case[28] concerning the approach to be taken in construing the Human Rights Code of British Columbia[29] as "a fundamental law":

> When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.
>
> As a result, the legal proposition generalia specialibus non derogant cannot be applied to such a code. Indeed the Human Rights Code, when in conflict with 'particular and specific legislation', is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.[30]

Without further belabouring the point, the question raised is this. Since the Canadian Bill of Rights and the Charter share a common objective —the protection of fundamental rights and freedoms — ought not equivalent terms in each to attract in equal measure a broad and generous interpretation? If they do, the question becomes one of whether authorities construing a rights clause in the Bill of Rights may be brushed aside as irrelevant simply because the Bill falls short of being fully "constitutional" in nature in one of the more restrictive senses of that word. What I have referred to as the second option as a means of dealing with authorities developed under the Bill is, therefore, not free of difficulty.

The problem just discussed need not be confronted with respect to equality rights, however, because it arises only where the right in question is described in the Bill and the Charter in the same terms. In the case of equality rights, as we have seen, the two enactments contain entirely different formulations of the protected

right(s) and, further, there can be no doubt that the Charter provision is considerably broader in scope. This is the third option available to those who seek to escape the constraints of Bill of Rights jurisprudence, and possibly the most promising one for purposes of submissions relating to section 15 of the Charter, namely, distinguishing authorities on subsection 1(b) of the Bill on the basis of the major differences in text of the two clauses.

Before leaving the subject of the Canadian Bill of Rights, let me make it clear that I do not wish to be understood as suggesting that authorities relating to subsection 1(b) of the Bill should, or can, be ignored. Certainly attention must be paid to the "valid federal objective" test formulated and applied by the Supreme Court of Canada in a number of its decisions concerning this clause.[31] That this test involved more than legislative competence under the British North America Act, 1867 (as we used to call it) could hardly be doubted. No one, I imagine, supposed that the function of the Bill was simply to remind Parliament that it must respect the limits imposed on its law-making authority by our federal constitution. The "valid federal objective" test clearly encompasses more than that, and the fullest exploration of its contours undertaken in judgments of the Supreme Court to date is found in the reasons of Mr. Justice McIntyre, with which Mr. Justice Dickson concurred, in MacKay v. The Queen.[32] There the test for determining whether an enactment offends the Canadian Bill of Rights clause respecting equality before the law is, at one point, formulated in the following terms:

> The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.[33]

This formulation contains more than one element and, to be sure, the phraseology varies slightly elsewhere in those reasons. (It is perhaps noteworthy, nonetheless, that the phrase "necessary and desirable social objective" is repeated several times in the course of the analysis.) My purpose, however, is not to examine that judgment in detail, much less to presume to enlarge upon it. I simply observe that it will not be surprising if elements drawn from the "valid federal objective" test, as there elaborated upon, resurface--with suitable modifications in nomenclature--when courts approach the task of determining the "reasonable limits" which section 1 of the Charter tells us may be placed upon equality rights guaranteed through section 15.

In concluding this portion of my remarks may I simply touch upon, and leave with you, the question of the extent to which American equality rights constitutional jurisprudence can be directly applied here. That is really the subject for another paper, but let me mention a few considerations that might be borne in mind. There, the groundwork was laid under the Fourteenth Amendment well before the advent of federal and state anti-discrimination legislation and enforcement machinery. In Canada, of course, section 15 comes into force at a time when every jurisdiction, federal and provincial, has in place comprehensive human rights legislation with

established enforcement procedures. Unlike section 15, the relevant clauses in the United States Bill of Rights do not identify proscribed bases of discrimination. Is, therefore, the elaborate superstructure of strict, intermediate, and minimal levels of scrutiny developed by American courts one which is capable of, or suitable for, reshaping to fit the very different mold of the Charter's section 15 (read with the reasonable limits clause in section 1 and, insofar as sex discrimination is concerned, section 28)? For one thing, section 15 includes among the listed bases of discrimination ones which have failed to draw significant protection under the United States Bill of Rights. And those rights which have been the subject of constitutional treatment in that country may not have reached a stage of development that offers a promising point of take-off in Canada. Consider the case of sex discrimination. Even if the Equal Rights Amendment[34] eventually attracts sufficient support to win a place in the United States Constitution, it is certainly arguable that the ambit of the Charter provisions—sections 15 and 28—was intended to provide, and does provide, stronger guarantees. Consider, too, classification on the basis of race. Few examples will be found in Canadian legislation beyond the Indian Act[35]. Because the historical, constitutional and legal framework differs so markedly, I venture to say that Canadian courts will not find American case law to be of great assistance when applying section 15 of the Charter to the provisions of the Indian Act.[36]

In summary, Canadian courts will be faced with the necessity for and the challenge of developing new and distinctive approaches to defining the equality rights guaranteed by the Charter. This, in my view, is not at all a bad thing.

Enforcing the Charter Right

The enforcement section of the Charter, section 24, consists of two subsections. The second subsection concerns itself with the exclusion of evidence obtained in a manner that infringed or denied a Charter right or freedom where admission of the evidence would bring the administration of justice into disrepute. It seems unlikely that this subsection will play a prominent role in equality rights litigation and I do not propose to discuss it. For present purposes the first subsection is the important one, and it reads as follows:

> 24.(1) 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.

This provision has no counterpart in the Canadian Bill of Rights or in the United States Constitution.

The following observations concerning enforcement draw upon early trends in Charter decisions, upon the text of subsection 24(1) itself, and upon more or less well established constitutional principles. For obvious reasons, and in particular the fact that few of these issues have yet been pronounced upon by the Supreme Court of Canada, the life expectancy of the propositions I advance for purposes of discussion may be quite short.

Let me begin by distinguishing between two quite different types of claims based on the Charter. The first kind attacks the constitutional validity of legislation on the basis that it is inconsistent with the Charter. The result of a successful challenge to validity is a court finding that the enactment, or some part of it, is of no force or effect to the extent of the inconsistency. In other words, this type of enforcement involves a ruling by the court that the legislative body has purported to exercise authority denied to it by the Constitution of Canada. There is, of course, nothing new about this sort of judicial review. Our courts have routinely struck down legislation on this basis ever since Confederation. Subsection 52(1) of the Constitution Act, 1982, which contains the "primacy" or "supremacy" clause, declares what has always been the case, namely, that the Constitution of Canada is supreme and any law inconsistent with it is of no force or effect. No special reference is made to the Charter and none was called for. Parliament and the provincial legislatures, always confined to the exercise of legislative powers assigned to them respectively under our Constitution, have had their legislative authority further restricted by the Constitution Act, 1982, including the Charter. But the nature of the inquiry remains the same. Does the challenged legislation relate to a matter which is denied by the Constitution to the legislative body which enacted it?

On principle, then, it seems apparent that the power of judicial review inherent in the Constitution, pursuant to which legislation found inconsistent with the Constitution is struck down, would extend naturally to the Charter as part of the Constitution without reliance upon a supremacy clause. That, however, is an academic

point and not the one I wish to make. What I do suggest is that this type of enforcement of a Charter right — that is, an attack on the validity of legislation — is one which in no way depends upon, and is not governed by, subsection 24(1) of the Charter. This conclusion is supported, at least indirectly, by the fact that in the Charter decisions rendered by the Supreme Court of Canada to date involving challenges to the validity of legislation,[37] the Court found it unnecessary to deal with, or even mention, section 24 of the Charter.

The second type of claim based on the Charter does not challenge validity of legislation but alleges that a Charter right has been infringed or denied, and the applicant asks the court to supply a suitable remedy. This type of claim rests upon, and is governed by, the terms of subsection 24(1). Once triggered by showing infringement or denial of a Charter right or freedom, this provision, on its face, places no restriction on the remedial powers of the court beyond stipulating that the remedy be one that is "appropriate and just in the circumstances".

Most of the rest of what I have to say relates to the remedial power conferred by subsection 24(1). Before turning to that, however, let me mention two implications flowing from the distinction between a Charter-based attack on constitutional validity of an enactment on the one hand and, on the other, a claim for a remedy under subsection 24(1).

The first has to do with standing — in other words, the question of who has status to raise a Charter issue in legal proceedings. If I am correct in suggesting that an attack on validity based on inconsistency with the Charter stands on precisely the same ground as one based on inconsistency with any other part of the Constitution of Canada, then the requirements for standing are those laid down by the Supreme Court of Canada in a series of pre-Charter decisions culminating in the Borowski case.[38] A person may have standing to challenge constitutional validity even though not directly affected by the legislation.[39] If, however, the claim is one for a remedy under subsection 24(1), the requirements of that subsection must be met. Standing to claim a remedy for breach of a section 15 right would seem to hinge upon an individual being able to show that he or she, personally, has a Charter-guaranteed right which has been infringed or denied.

The second implication flowing from the two types of Charter enforcement relates to the extent of a particular court's remedial power. Any court may, indeed, is obliged to, entertain and rule upon a challenge to the constitutional validity of an enactment that is determinative of the result in that legal proceeding, whether civil or criminal. The court's decision as to constitutional validity is, of course, subject to ordinary avenues of appeal. But the relief sought, a ruling that the challenged enactment is invalid, is one that any court can provide, so the level of court in which the proceedings are initiated is to that extent of no consequence. When one advances a claim for a remedy under subsection 24(1), however, the level of court in which the proceeding is commenced does take on significance. The subsection tells us that the

application for a remedy must be made to a "court of competent jurisdiction", and there is now a substantial body of case law construing those words. According to the present trend of authority, not every court can grant every type of remedy known to Canadian law. Indeed, the view that has been favoured by courts across the country to date is that a court may grant only such remedy as may be found within its usual jurisdiction, that is to say, jurisdiction which it has by law other than the Charter. In other words, the kind of remedy a particular court can grant under subsection 24(1) is determined by extra-Charter general law: statutory and common law. So, to take one example, if the remedy sought for breach of a Charter right involves prerogative relief or an injunction, one could apply for that remedy in a superior court but not in proceedings before a provincial court judge.[40] Court selection, in such circumstances, becomes a factor.

The weight of authority to date, then, supports the view that subsection 24(1) adds nothing to the range or scope of remedies that may be granted by a particular court. Some commentators on the Charter have propounded a competing theory, namely, that subsection 24(1) ought to be construed as itself conferring additional remedial powers on the courts.[41] And, as mentioned, the Supreme Court of Canada has yet to rule upon this important question. Apart from its implications respecting court selection, the manner in which this issue is ultimately resolved may bear upon the degree of "judicial activism" Canadian courts realistically can be expected to display in enforcing Charter-guaranteed rights.

Let me, finally, touch upon two other features of subsection 24(1). First, the subsection tells us that the person who may apply for a remedy is one whose Charter-guaranteed rights or freedoms "have been infringed or denied". The use of the past tense raises a question as to whether a remedy is available for what are variously described as "impending infringements", "future breaches", or "anticipatory breaches". Can one, in other words, obtain a remedy for a threatened breach where no right has, as yet, been infringed or denied? The French version of subsection 24(1) does not resolve the problem. In several cases where this issue was identified it has been held that section 24 does extend to anticipatory breaches.[42]

Secondly, subsection 24(1) imposes no restriction on the range of remedies that a court of competent jurisdiction may grant, save that the remedy be one which the court considers "appropriate and just in the circumstances". Money compensation is one type of remedy that has received early recognition in Charter cases.[43] The language of subsection 24(1) is open-ended, however, and there is no reason to doubt that each and every remedy within the court's panoply is available, as required, to enforce equality rights guaranteed by the Charter.

Conclusion

In defining Charter-guaranteed equality rights, the courts are unlikely to be closely constrained by decisions relating to counterpart provisions in the Canadian Bill of Rights and may not be greatly assisted by American jurisprudence in this area. The Charter's unique constitutional framework and text provide the basis for development of a new and distinctive approach to equality rights in Canada.

Enforcement of Charter-guaranteed rights takes two forms. One, attacking constitutional validity, is familiar to Canadian constitutional law, and principles and procedures relating to this type of enforcement, it is suggested, do not spring from provisions of the Charter. The other form of enforcement is through a remedy obtained under section 24 of the Charter. Certain principles and emerging trends of authority bearing on section 24 may be identified but definitive treatment must, of course, await pronouncements of the Supreme Court of Canada.

Footnotes

1. R.S.C. 1970, Appendix III, s. 1(b).

2. Law Society of Upper Canada v. Skapinker [1984] 1 S.C.R. 357.

3. Director of Investigation and Research of the Combines Investigation Branch v. Southam Inc. (1984) 11 D.L.R. (4th) 641.

4. Attorney General of Quebec v. Quebec Association of Protestant School Boards et al. (1984) 10 D.L.R. (4th) 321.

5. Gould v. Attorney General of Canada (1984) 55 N.R. 394, aff'g (1984) 54 N.R. 232 (F.C.C.A.).

6. [1984] 1 W.W.R. 625 (Alta. C.A.).

7. R.S.C. 1970, c. L-13.

8. Supra, note 1, s. 1(c).

9. [1982] 1 S.C.R. 811.

10. See, e.g., Hogan v. The Queen [1975] 2 S.C.R. 574, at 597, per Laskin J. (as he then was).

11. See, e.g., Curr v. The Queen [1972] S.C.R. 889, at 899, per Laskin J. (as he then was), Abbott, Hall, Spence, Pigeon JJ. concurring.

12. Supra, note 2.

13. Id., at S.C.R. 365.

14. Id., at S.C.R. 366.

15. Supra, note 3.

16. Id., at 649-50.

17. See, e.g. the majority reasons in R. v. Big M. Drug Mart, supra, note 6, at 646-47 and in R. v. Therens (1983) 5 C.C.C. (3d) 409, at 423 (Sask. C.A.). Cf. the dissenting reasons in the former at 659 and in the latter at 417.

18. See, e.g., the reasons of Esson J.A. at 295 in R. v. Whyte (1983) 10 C.C.C. (3d) 277 (B.C.C.A.), and Re Moore and the Queen (1984) 10 C.C.C. (3d) 306 (Ont. H.C.). In the former decision, cf. Hutcheon J.A. at 293, dissenting.

19. See, R. v. Currie (1983) 147 D.L.R. (3d) 707, at 712-13 (N.S. App. Div.); R. v. Rahn [1984] 2 W.W.R. 577, at 588-89 (Alta. C.A.); and R. v. Simmons (1984) 11 C.C.C. (3d) 193, at 211-12 (Ont. C.A.).

20. Constitution Act, 1982, s.52(1).

21. R. v. Drybones [1970] S.C.R. 282.

22. Charter, s.33.

23. Constitution Act, 1982, s.41.

24. [1985] 1 W.W.R. 193.

25. R.S.B.C. 1970, c.306.

26. Supra, note 24, at 207.

27. Supra, note 3.

28. Insurance Corp. of B.C. v. Heerspink [1982] 2 S.C.R. 145.

29. R.S.B.C. 1979, c. 186, since repealed and replaced by the Human Rights Act, S.B.C. 1984, c.22.

30. Supra, note 28, at 157-58.

31. See The Queen v. Burnshine [1975] 1 S.C.R. 693; Prata v. Minister of Manpower and Immigration [1976] 1 S.C.R. 376; and Bliss v. A.G. Canada [1979] 1 S.C.R. 183.

32. [1980] 2 S.C.R. 370.

33. Id., at 406.

34. The proposed Twenty-Seventh Amendment reads, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. res. No. 208, 92d Cong., 2d. Sess. (1972).

35. R.S.C. 1970, c.I-6. It is arguable whether the Indian Act in fact provides racially based classification because of the definition of "Indian" in s. 2. Another possible example is the Metis Betterment Act, R.S.A. 1980, c.M-14.

36. See, e.g., Santa Clara Pueblo et al. v. Martinez et al. 436 U.S. 49 (1978), concerning loss of tribal membership by a female who marries outside the tribe, and raising issues somewhat similar to those before the Supreme Court of Canada in Attorney General of Canada v. Lavell [1974] S.C.R. 1349 (loss of Indian status by a female through marriage to a non-Indian). In Martinez the same result was arrived at by a quite different route, illustrating the differences referred to in the text supra.

37. Supra, notes 2, 3, 4 and 5.

38. Minister of Justice of Canada v. Borowski [1981] 2 S.C.R. 575.

39. In R. v. Big M. Drug Mart, supra, note 6, Laycraft J.A. put it this way (at 637): "[S]o long as a litigant has a status to bring the matter in question before the court it matters not whether he himself is the victim."

40. See, e.g. Re Legal Services Society and Brahan (1983) 148 D.L.R. (3d) 692 (B.C.S.C.). In Re Latham and Solicitor General of Canada (1984) 12 C.C.C. (3d) 9 (F.C.T.D.) it was stated (at 22) to be well settled that, with minor exceptions not there relevant, the Federal Court, Trial Division, could not issue habeas corpus apart from the Charter and, accordingly, this remedy was not available on an application under s.24.

41. See, e.g., P.W. Hogg, Canada Act Annotated (1982), at 65; M. Manning, Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (1983), at 478-80; D. Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms (Section 24)" in The Canadian Charter of

Rights and Freedoms - Commentary (1982), W.S. Tarnopolsky and G.A. Beaudoin, eds., at 502.

42. Quebec Association of Protestant School Boards v. Attorney General of Quebec No. 2 (1983) 140 D.L.R. (3d) 33, at 41-43 (Que. S.C.); National Citizen's Coalition Inc. v. Attorney General for Canada [1984] 5 W.W.R. 436 (Alta. Q.B.); and Re Allman and Commissioner of the Northwest Territories (1983) 144 D.L.R. (3d) 467 (N.W.T.S.C.).

43. See, e.g. Crossman v. The Queen (1984) 12 C.C.C. (3d) 547 (F.C.T.D.) and R. v. Esau (1983) 147 D.L.R. (3d) 561, at 567 (Man. C.A.). For a full discussion of "appropriate and just" remedies under s.24(1), including compensation, see Germain v. The Queen (April 6, 1984), summarized in 12 W.C.B. 35 (Alta. Q.B.).