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THE RELATIONSHIP BETWEEN SECTION 15 AND  
OTHER SECTIONS OF THE CANADIAN CHARTER  
OF RIGHTS AND FREEDOMS

Notes for remarks by Mr. Justice D. C. McDonald  
of the Court of Queen's Bench of Alberta,  
to be presented to a Seminar of Judges of  
the Provincial Court of Saskatchewan

Relationship with other substantive sections:

Sec. 15 creates an autonomous right, and also, implicitly, overlies all other substantive sections. That is, the interpretation of all other sections must not violate the imperatives of s. 15.

Here are some possible illustrations of this aspect of s. 15:

1. In deciding whether the police have complied with the s. 10(b) duty to advise a person arrested or detained of his right to retain and instruct counsel without delay, the court may impose a more exacting standard in the case of a person who suffers from an evident mental disability if that disability is in the nature of being of low intelligence. The court may in such a case expect the policeman to use simple language, even to ask the arrestee or detainee to explain what it is he understands by the advice. It may not be good enough in such a case to accept the assurance of the policeman that the person understood.

2. The same reasoning would apply to the s. 10(a) duty to inform the arrestee or detainee promptly of the specific offence with which he is charged. The court may expect the

policeman, once he realizes that he is dealing with a person of seriously sub-normal intelligence, to do his best to explain the charge in terms that the person will understand.

3. Looking again at s. 10(b), the court may expect the police to be of greater assistance to a person of evidently sub-normal intelligence to get in touch with a lawyer, than they may be expected to do in the case of a normal person.

4. The court may consider that it is clearer that an accused of sub-normal intelligence cannot have the "fair hearing" demanded by s. 10(d) if he lacks counsel, than if the accused were not suffering from a mental disability.

The non-enumerated grounds in s. 15:

In applying s. 15 to the interpretation of other substantive sections of the Charter, as in interpreting s. 15 in its autonomous capacity, it will be necessary as appropriate cases arise to decide what the scope of the non-enumerated grounds of discrimination in s. 15 is. Are they unlimited? Is differentiation by legislation, or in the application of legislation, on the ground of a person's wealth, ownership of property, income, level of education, social status, marital status, sexual preference, or location in a particular province or region, proscribed by s. 15(1)? If such grounds of

differentiation are proscribed, what consequences will there be? Will the graduated income tax be impugned? Will inability to pay a fine be a ground for objecting to imprisonment? Will the well-educated accused, on being sentenced, be able to assert successfully that he ought not to be sentenced more severely than a poorly educated accused would be for the same offence? Will an accused be able to assert that in the criminal law there should be no variation of procedures or penalties from one province to another?

It may be argued that to treat the non-enumerated grounds of s. 15 as open-ended and unfettered by some overriding principle cannot be the result of a correct approach to the interpretation of s. 15. In Hunter v. Southam [1984] 2 S.C.R. 145 and Big M Drug Mart Ltd. (April 24, 1985), Dickson C.J.C. has established that the Charter is a "purposive" document and that the proper approach to the interpretation of a section of the Charter is purposive. In the Southam case, at p. 157, in speaking of another section, Dickson C.J.C. said that "it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect."

So, in regard to s. 15, the court must ask itself: What is the purpose underlying s. 15? What is the nature of the interests it is meant to protect?

In Big M Dickson C.J.C. repeated that the meaning of a right or freedom guaranteed by the Charter is "to be ascertained by an analysis of the purpose of such a guarantee" and that the meaning is "to be understood, in other words, in the light of the interests it was meant to protect." He then continued:

"In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161, illustrates, be placed in its proper linguistic, philosophic and historical contexts."

Therefore, in analysing the purpose of the right guaranteed by s. 15(1), the first reference points are "the character and the larger objects of the Charter itself". In Southam, at p. 156, Dickson C.J.C. stated:

"The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action."

The next point of reference is "the language chosen to articulate the specific right or freedom". In the case of s. 15, as many commentators have pointed out, the general language found at the beginning of s. 15(1) was clearly intended to liberate its interpretation from that of s. 2( ) of the Canadian Bill of Rights ("the right of the individual to equality before the law and the protection of the law"). It is generally thought that, in s. 15(1), the guarantee of equality not only "before" but "under the law", and of the right not only to the "protection" but also to the "equal protection" and the "equal benefit" of the law, will be relied upon by the courts as constitutional signals that the analysis found in some of the Supreme Court's decisions under the Bill of Rights will not apply to s. 15(1) of the Charter.

Some commentators have suggested that the words "in particular" justify the enumerated grounds being accorded more weight judicially than any non-enumerated grounds. Even if the

English version is looked at by itself, there may be some question that the draftsman's use of the words "in particular" merit such a connotation. The doubt in that regard is amplified by reference to the French version, in which the word "notamment" is the equivalent. The word "notamment" is frequently used to mean simply "for example", a phrase which less clearly supports giving more weight to the enumerated grounds.

The next reference point is the historical origins of the concepts enshrined in s. 15. In general terms, these origins are found in the "rule of law" to which the preamble to the Charter refers; one of the many meanings of the "rule of law" in Dicey's formulation is the treatment of like persons alike, but the general language of s. 15(1), to which I have already referred, probably demands a broader notion of equality than that. Most of the specifically enumerated prohibited grounds of discrimination find their domestic historical origins in the Canadian Bill of Rights and in federal and provincial human rights legislation enacted since the Second World War.

The international historical origins are found in Article 7 of the Universal Declaration of Human Rights and

Article 26 of the International Convention on Civil and Political Rights. They read as follows:

Universal Declaration, Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

International Covenant, Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

It is the International Covenant which Canada and its provinces undertook in 1976 to see implemented in Canadian law. It does not follow that such implementation must be carried out in the framework of Canada's constitutional law; this point was made by the Court of Appeal of Alberta in the Alberta Public Service Labour Legislation Reference (December, 1984).

In any event, it may be argued that not much guidance in the interpretation of s. 15(1) can be obtained by reference to Article 26 of the International Covenant when one notes the



following: First, it is narrower than s. 15(1) as it speaks only of equality "before the law" and of "the equal protection of the law" and does not mention equality "under the law" or the "equal benefit" of the law. Second, its enumerated grounds are both more numerous than those in s. 15(1) ("language", "social origin", "property", "birth or other status" are itemized in Article 26 but not in s. 15(1)), and less numerous ("ethnic origin" and "mental or physical disability" are itemized in s. 15(1) but not in Article 26).

On the whole, the historical origins, domestic and international, are unlikely to be of much assistance in interpreting s. 15(1).

The last point of reference is "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter". But this is one of those situations to which this point of reference is simply not applicable, in view of the fact that s. 15 stands alone.

It may be argued, therefore, that we are not taken very far in interpreting s. 15(1), especially as to the issue of the non-enumerated grounds, if we seek no further points of

reference than those discussed by Dickson C.J.C. It may be doubted that he intended them to be an exhaustive list.

In the case of s. 15(1), it may be that the purpose of the right guaranteed by it, and the answer to the mystery of the non-enumerated grounds, lie in asking what general purpose is revealed by the prohibition of discrimination on those grounds that are enumerated.

Here I am indebted to Prof. Marc Gold, who in an unpublished paper has pointed out that the enumerated grounds consist of instances of immutable characteristics, except for one instance (religion) which is an instance of a freedom that is guaranteed elsewhere in the Charter. What is the significance of these two categories? The first, it may be argued, demonstrates that the purpose of s. 15 is, in part, to protect individuals from being deprived by government of that protection under the law and benefit of the law which persons without such characteristics would enjoy. More broadly stated, the purpose is to guarantee that a person shall not be discouraged from developing his individuality, by legislative or administrative conduct that is inconsistent with the premise of a tolerant, pluralistic society, and that singles out that person by reason of a characteristic over which his will has no control.

The second category recognizes that, just as a person is guaranteed certain rights and freedoms elsewhere in the Charter, government may not discriminate against him because he chooses to exercise such a constitutionally guaranteed right or freedom. Moreover, all other rights and freedoms guaranteed by the Charter should be interpreted in such a way as to be consistent with the right to equal protection under the law and the equal benefit of the law. The purpose of this category is to contribute to and enhance the protection afforded by the other guaranteed rights and freedoms.

There is a good deal to be said for this analysis, which I hasten to add is in my own words and not those of Professor Gold. I write moreover without his text before me so that what I have written is my own, inspired by what I believe him to have said.

As I recall, he then argued that forms of discrimination that may be recognized as non-enumerated grounds under s. 15(1) must be limited to those that are analogous to the two categories represented by the enumerated grounds. If that is so, discrimination on the ground of wealth or poverty, education or any other non-indelible characteristic, would not violate s. 15(1) unless in some way it were held to fetter the exercise of some other constitutionally guaranteed right or freedom.

I think that this is an attractive approach to an extraordinarily difficult problem that the framers of the Charter have handed us. Of course I have no idea whether it is the proper approach to the thorny issue of the non-enumerated grounds, and until the matter is decided in my court or other courts, and ultimately by the Supreme Court of Canada, my mind remains open.

The relationship between s. 15 and s. 1 of the Charter

So far the Supreme Court of Canada has not been obliged to comment on the principles to govern the interpretation of s. 1. The only comment so far in that court is found in the judgment of Wilson J., in the Operation Dismantle case (May 9, 1985). In a judgment that concurred with the result of that of Dickson C.J.C. for the other members of the court, Wilson J. stated:

"Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a 'political question' doctrine and permits the court to deal with what might be called 'prudential' considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review."

Important as this statement is where the court is asked to consider issues of government acts of a kind that American courts might prefer to consider "non-justiciable", it is a statement that does not tell us anything about s. 1 in terms of what the proper approach should be in the ascertainment of "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

I have attempted an analysis of those words, in Re Reich and College of Physicians and Surgeons of Alberta (No. 2), (1984) 8 D.L.R. (4th) 696. I do not intend to reproduce here what I said there, for, although what I said may be of assistance to you if you have a problem in which you are invited to apply s. 1, my judgment is, obviously, far from authoritative.

Let me put the relationship of s. 1 to s. 15 as succinctly as I can. Applying the two-stage approach for which there is now ample appellate authority (e.g. Federal Republic of Germany v. Rauca (1984), Ont. C.A.), the first question is whether a statute, regulation or rule of common law is inconsistent with s. 15. If it is found to be inconsistent, the second question is whether the statute (etc.) is nevertheless a "reasonable limit...as can be demonstrably justified in a free and democratic society". The onus is on

the government to satisfy the court that those elements are present. Otherwise, the statute (etc.) falls. There can be no "reading down" of the statute to permit it to be consistent with s. 15 (see Dickson C.J.C. in Hunter v. Southam).

The protection of s. 1 would not be available at all unless the issue involved a rule that is "prescribed by law". If, for example, some conduct of the police is held to violate s. 15, and that conduct is not expressly authorized by a statute or regulation or the common law of police powers, s. 1 cannot be resorted to.

If, however, the issue is a s. 52 issue, that is the very validity of a statute (etc.), s. 1 can be resorted to.

There is a school of thought that discrimination on any grounds that are enumerated in s. 15, those grounds having been singled out as deserving of constitutional condemnation, ought never to be protected by s. 1. I doubt that this argument holds water, particularly bearing in mind that the Charter expressly, in s. 28, states:

"28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

That section may mean that s. 1 and s. 33 cannot be resorted to, to limit any right or freedom as against women or men. If so, it may be significant that other grounds of discrimination do not receive similar express treatment.

The relationship of s. 28 to s. 15(2) will be considered by another speaker at this Seminar.

The relationship between s. 15, s. 24 and s. 52: Remedies

In the Provincial Court the way in which s. 15 is likely to arise is by way of defence: the accused will contend that a charge laid against him cannot succeed either because the statutory provision creating the offence is on its face inconsistent with s. 15 and therefore of no force or effect pursuant to s. 52, or because as applied to the accused it is inconsistent with s. 15 and therefore to that extent of no force or effect. This is the nullification use of the Charter. It is available in any tribunal as an answer to a criminal or quasi-criminal proceeding or for that matter any other kind of proceeding based on a statute.

However, as the Provincial Court is a court of statutory and therefore limited jurisdiction, s. 52 cannot be the basis of an attack in that Court upon a legislative

provision by way of an action for a declaratory judgment or injunction. In the Provincial Court, s. 52 can be used as a shield but not as a sword.

Moreover, it is not likely that there will be claims in the Provincial Courts under s. 24(1) of the Charter during prosecutions under federal or provincial statutes or municipal bylaws. If a person whose rights or freedoms have allegedly been infringed wishes to seek a remedy (other than the exclusion of evidence under s. 24(2)), he will likely have to start a separate proceeding. Could he seek compensation or damages in the Small Claims Division of the Provincial Court? There would appear to be no reason he could not do so, and thus avoid the delay and expense of proceeding in the Court of Queen's Bench, provided that his claim is not in excess of the statutory monetary limit on the jurisdiction of the Provincial Court. For a thorough review of the principles that may govern the award of damages or compensation, see an article by Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms", (1984) 62 Can. Bar Rev. 527. There have so far been several cases in which damages have been awarded for infringements of a Charter right: two of them are cited in an article by Mr. Justice Kenneth Lysyk, "Enforcement of Rights and Freedoms Guaranteed by the Charter", (1985) The Advocate 165, at p. 176. As that



publication is not likely to be readily available to members of the Provincial Court in Saskatchewan, I am appending a copy of the article to these notes. Incidentally, my decision in R. v. Germain, to which Mr. Justice Lysyk refers at p. 176, is now reported at (1984), 53 A.R. 264. That is a case which is of particular interest to any judge (the judge happened to be a Provincial Court Judge) who is tempted to commit for contempt, but it has nothing to do with s. 15 except to the extent that it contains an attempt to discuss in terms of general principle what s. 24(1) means by a remedy that the court considers "appropriate and just".

If damages are sought in the Small Claims Division of the Provincial Court, the plaintiff may not be able to obtain punitive or exemplary damages as they are beyond the jurisdiction of the Provincial Court. Professor Pilkington points out that in most cases the violation of a constitutional right will not give rise to a basis for awarding more than nominal compensatory damages; an exception would be where imprisonment or other detention has resulted from the violation. In the normal case, exemplary damages would likely be the only way in which the victim could recover any significant amount of money. Such claims will, as I have said, have to be advanced elsewhere than in the Provincial Court.

# Enforcement of Rights and Freedoms Guaranteed by the Charter

By The Honourable Mr. Justice Kenneth Lysyk

## OUTLINE

1. **Introduction: remedies overview and the scope of s. 24**
  - challenge to constitutional validity of legislation: **Constitution Act, 1982, s. 52 (1)** and power of judicial review implicit in the Constitution of Canada;
  - “reading down” and constitutional applicability of legislation;
  - **Charter** remedies obtained under s. 24(1);
2. **Section 24: relationship between subsections (1) and (2)**
  - discretion to exclude evidence under subsection (1)?
3. **Notice to Attorney General — when required**
  - **Constitutional Question Act**
4. **Standing**
  - challenge to constitutional validity;
  - enforcement of **Charter**-guaranteed right under s. 24(1).
5. **Application for remedy: where and when**
  - (a) challenge to constitutional validity;
  - (b) enforcement of **Charter**-guaranteed right under s. 24(1)
    - (i) what is “a court of competent jurisdiction”?
    - (ii) when should the application be made?
6. **Nature of remedies available**
  - (a) remedies within the court’s jurisdiction;
  - (b) remedies “appropriate and just in the circumstances”.
7. **Burden of proof**

### **Charter, s. 24**

Enforcement of guaranteed rights and freedoms

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.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

### **Constitution Act, 1982, s. 52(1) — (the “primacy” or “supremacy” clause).**

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

### 1. Introduction: remedies overview and the scope of s. 24

In these early days under the Canadian Charter of Rights and Freedoms discussion concerning its reach must be somewhat tentative in nature. It will remain so until the law is definitively pronounced by the Supreme Court of Canada. The purpose of this paper is simply to identify some of the central issues relating to enforcement and to note principles and emerging trends of authority bearing upon them. The commentary is intended to be expository, not argumentative.

For purposes of analysis, the subject of enforcement may be divided into three categories: first, challenges to constitutional validity of legislation; second, applications under s. 24(1) for a remedy where a Charter-guaranteed right or freedom has been infringed or denied; and third, applications to exclude evidence under s. 24(2). The last — exclusion of evidence under s. 24(2) — is not addressed in this paper apart from a brief comment under the next heading concerning the relationship between the two subsections of s. 24.

Let me elaborate on the distinction between the first two categories. The first is where the constitutional validity (or "*vires*") of legislation is attacked on the basis that it lies outside the legislative authority of Parliament or the provincial legislature, as the case may be, by reason of inconsistency with a provision of the Charter. It includes a situation where the legislative body has purported to delegate legislative authority it does not have to a subordinate agency, such as an administrative board or tribunal. For convenience I will sometimes refer to this category, involving a challenge to legislative authority due to inconsistency with a Charter provision, as raising a question of *constitutional validity*. The second category does not involve an attack on legislation but simply alleges that the person applying for a remedy has had a Charter-guaranteed right or freedom infringed or denied. For the sake of brevity, I will sometimes refer to this category as involving an alleged *breach of a Charter right*. The facts of a particular case may, of course, involve both a challenge to constitutional validity and a claim that one or more Charter rights have been breached.

Insofar as a challenge to constitutional validity based on a Charter provision is concerned, it is doubtful whether s. 24 has any relevance at all. In this context some reference has been made to s. 52(1) of the Constitution Act, 1982 (the "primacy" or "supremacy" clause); but perhaps even this is unnecessary, having regard to the fact that the supremacy clause makes no special reference to the Charter and is essentially declaratory in nature. The constitution always has been the supreme law of Canada and the courts, for over a century now, have held any law inconsistent with our federal constitution to be of no force or effect. The Charter places further constraints on the legislative powers of both Parliament and provincial legislatures. But the nature of the inquiry as to extent of legislative authority would seem to be the same. Even without a supremacy clause like s. 52(1), there can be little doubt that the power of judicial review implicit in the Constitution would provide sufficient authority for striking down legislation inconsistent with the Charter in the same way as it has heretofore provided the basis for findings of *ultra vires* under the Constitution Act, 1867, as amended.

I would suggest that a court's power to strike down legislation by reason of inconsistency with the terms of the Charter owes nothing to section 24 and is not governed by the terms of that section. In contrast, an application to obtain a remedy for breach of a Charter right depends upon and is governed by section 24(1). This provision has no counterpart in the Constitution Act, 1867 as amended. Nor is there any equivalent provision in the Canadian Bill of Rights of 1960 (or in the United States Bill of Rights).

Constitutional validity is put in issue not only by a frontal attack on legislation but also where the court is invited to "read down" an enactment, or to find it inapplicable to a particular situation, so as to avoid conflict with the Charter. The "reading down" option was addressed in the recent decision of the Supreme Court of Canada in *Hunter v. Southam Inc.* [1984] 6W.W.R. 577 where Mr. Justice (now Chief Justice) Dickson, delivering judgment for the full court, touched (at p. 585) on the distinction between a question of constitutional validity on the one hand and, on the other, conduct involving breach of a Charter right. In this validity case the court went on to strike down certain search and seizure provisions in s. 10 of the *Combines Investigation Act* as being inconsistent with s. 8 of the Charter. Counsel for Canada submitted that if the impugned provisions of the Act appeared on their face to confer power to conduct an unreasonable search or seizure inconsistent with s. 8 of the Charter, then the court should "read down" those provisions of the Act to the extent necessary to avoid finding them *ultra*

vires. "Reading down" in this context involves reading in by implication any necessary procedural safeguards that would be necessary to satisfy the requirements of the Charter. This Dickson, J. declined to do, and his reasons on this point are of considerable importance. He stated (at pp. 596-97):

#### Reading In and Reading Down

The appellants submit that even if ss. 10(1) and 10(3) do not specify a standard consistent with s. 8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the Charter, but rather that the appropriate standard should be read into these provisions. An analogy is drawn to the case of *MacKay v. The Queen*, [1965] S.C.R. 798, 53 D.L.R. (ad) 532, in which this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended unconstitutionally to encroach on federal competence over elections, and should therefore be "read down" so as not to apply to election signs. In the present case, the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

To the same effect, see *Canadian Newspapers Co. Ltd. v. The Queen* (1983), 1 D.L.R. (4th) 133, 6 C.C.C. (3d) 488, 47 B.C.L.R. 150, at p. 160 (S.C.), where McKay J. declined "to rewrite the statute under attack [the *Juvenile Delinquents Act*] when considering the applicability of the provisions of the Charter" and the offending provision was declared unconstitutional. Compare the quite different approach taken in *R. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont. C.A.) relating to warrantless searches under s. 10(1)(a) of the *Narcotic Control Act*.

The observations contained in the passage quoted above from *Hunter v. Southam* were made in the context of procedural safeguards. To what extent will the disinclination to "read down" apply to other types of inconsistency with the Charter? Consider, for example, *Reynolds v. Attorney General of British Columbia*, [1984] 5 W.W.R. 270 (B.C.C.A.), where s. 3 of the Charter, which guarantees the right to vote, was applied to a provision of the provincial *Election Act* disqualifying a person convicted of an indictable offence who has not completed his sentence. There the provision was "read down" (although that terminology was not employed) by distinguishing between custodial and non-custodial sentences, and the provision was held to be of no force and effect only to the extent that it purported to apply to probationers.

Similar questions may arise relating to applicability of legislation which is, on its face, constitutionally valid. For a recent striking example, see *R. v. Videoflicks* (September 19, 1984) unreported (Ont. C.A.), where the validity of a Sunday closing provision of Ontario's *Retail Business Holidays Act* was challenged as violating freedom of conscience and religion as guaranteed by s. 2(a) of the Charter. The court sustained the validity of the provision but held it inapplicable to the store of a corporate appellant, *Nortown Foods Ltd.*, because the store in question was owned by two shareholders both of whom were Orthodox Jews whose faith required them not to conduct business on a Saturday (p. 24). The legislation would require the *Nortown* store to close on Sunday as well, or to operate with a reduced work force on that day, placing that store at a disadvantage compared with those closed, or operated with a reduced work force, on Sunday only. Since an economic sanction would be imposed on *Nortown* in these circumstances, it was held that the Act did not apply to this particular store. The court stated (at pp. 45-46) that anyone claiming such an exemption "must be prepared to show that the objection is based upon a sincerely held belief based upon a life-style required by one's conscience or religion", and this "inquiry into sincerity" could be analogous to that pursued under labour relations legislation with respect to conscientious objection to trade union membership.

## 2. Section 24: Relationship between subsections (1) and (2)

The only issue I wish to identify under this heading is whether s. 24(1) confers a discretion upon the court to exclude evidence. If so, such power would supplement the court's mandatory duty under s. 24(2) to exclude evidence where its admission would bring the administration of justice into disrepute.

In *R. v. Therens* (1983), 5 C.C.C. (3d) 409, 33 C.R. (3d) 204, the Saskatchewan Court of Appeal held that s. 24(1) does confer a discretionary power to exclude evidence where a Charter right has been breached, and where such a remedy is "appropriate and just", in circumstances in which admission of the evidence would not bring the administration of justice into disrepute within the meaning of subsection (2). *Therens* has been followed by a number of trial courts: see, e.g., *R. v. Lajoie* (1983), 4 D.L.R. (4th) 491, 8 C.C.C. (3d) 353 (N.W.T. S.C.) and *R. v. Russell* (1983), 11 W.C.B. 29 (B.C. Co. Ct.).

The Ontario Court of Appeal has expressed a contrary view, holding that subsection (2) is the only provision pursuant to which evidence may be excluded under the Charter and that this subsection supplies the exclusive test, namely, the bringing of administration of justice into disrepute: *R. v. Simmons* (1984), 11 C.C.C. (3d) 193, 39 C.R. (3d) 223. A number of trial courts have also explicitly declined to follow *Therens*: see, e.g., *R. v. Gibson* (1984), 37 C.R. (3d) 175 (Ont. H.C.).

Little purpose would be served by reviewing these two opposed lines of authority. The issue was argued before the Supreme Court of Canada last June in *Therens* and presumably we will soon have an authoritative answer to the question of whether or not s. 24(1) of the Charter confers a free-standing discretionary power to exclude evidence when a Charter right has been breached, but in circumstances short of those which would bring the administration of justice into disrepute.

For the proposition that s.24(1) is, in any event, available as a source of authority to exclude evidence in non-criminal matters, see *Reich v. Alberta College of Physicians and Surgeons* (1984), 31 Alta. L.R. (2d) 205, at p. 225.

## 3. Notice to the Attorneys General

This is covered by s. 8 of the Constitutional Question Act, R.S.B.C. 1979, c. 63, with amendments proclaimed into force in 1982 to take account of the Charter. The first two subsections deal with the requirement of notice in terms which are more or less self-explanatory. They read as follows:

8. (1) In this section

"constitutional remedy" means a remedy under section 24(1) of the Canadian Charter of Rights and Freedoms other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

"law" includes an enactment and an enactment within the meaning of the Interpretation Act (Canada).

(2) Where in a cause, matter or other proceeding

(a) the constitutional validity or constitutional applicability of any law is challenged, or

(b) an application is made for a constitutional remedy,

the law shall not be held to be invalid or inapplicable nor shall the remedy be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of the Province in accordance with this section.

Subsection (3) deals with notice where a regulation is challenged on grounds other than those referred to in subsection 2(a). Subsection (4) states what the notice must contain and subsection (5) requires service of the notice at least 14 days before the day of argument unless the court authorizes a shorter notice. Subsections (5) and (6) provide that where the Attorney General of British Columbia or the Attorney General of Canada appears he is a party and has the same rights as any other party.

In *R. v. Crate* (1983), 1 D.L.R. (4th) 149, 7 C.C.C. (3d) 127, the Alberta Court of Appeal dismissed a motion to declare a section of the Criminal Code unconstitutional by reason of

conflict with a provision of the Charter on the ground that it lacked jurisdiction to grant the relief requested. A similar motion had been rejected by a Queen's Bench judge in Chambers and the Attorney General of Canada, having been served with notice of those proceedings, advised that he did not intend to intervene "at that time". The Attorney General had not, however, been notified of the notice of motion in the Court of Appeal. The Court of Appeal stated (at D.L.R. 152) that if it had had jurisdiction to hear the application it would have required an adjournment to permit the Attorney General of Canada to intervene if he desired since he ought to have been notified of the renewed proceedings.

In *Re Broddy and Director of Vital Statistics* (1982), 142 D.L.R. (3d) 151, [1983] 1 W.W.R. 481 (Alta. C.A.), notice had been served on the Attorney General of Alberta and the Attorney General of Canada, both of whom were represented, concerning a challenge to the constitutional validity of certain provisions of a provincial enactment under the Constitution Act, 1867. The Court refused to deal with a submission based on s. 7 of the Charter because the written notice made no reference to the Charter. It may be noted in passing that the Court regarded the proposal to "read down" the legislation in light of the Charter as an attack on constitutional validity. Similarly, in *Re Butler and Board of Governors of York University* (1983), 3 D.L.R. (4th) 763, 44 O.R. (2d) 259 (Div. Ct.), the court declined to entertain a challenge to constitutional validity of provisions of a provincial enactment due to failure to serve proper notice on the Attorneys General.

Notice requirements laid down by enactments in other provinces corresponding to s. 8 of the B.C. Constitutional Question Act vary considerably, and this must be taken into account in considering the authorities. For example, the counterpart provisions in Ontario — found in s. 35(1) and s. 152 of the Judicature Act — are cast in narrower terms and raise certain problems of interpretation which do not arise here.

In *R. v. Stanger* (1983), 7 C.C.C. (3d) 337 (Alta. C.A.) brief consideration was given to the question of whether the relevant notice provision in Alberta's Judicature Act was invalid to the extent that it required the Attorney General of the Province to be given notice of a challenge to the constitutional validity of certain federal enactments (reverse onus provisions in the Narcotic Control Act and the Food and Drug Act) based on s. 11(c) of the Charter. Stevenson, J.A., delivering the majority judgment, held that the provincial notice requirement was applicable in that it was not legislation in relation to criminal procedure and there was no conflict with the procedural provisions of the Criminal Code. He stated (at p. 362):

I do not construe the section as doing anything more than requiring the giving of notice and it is unobjectionable as procedural only, not affecting substantive rights as no one is precluded from ultimately securing relief under the Charter.

#### 4. Standing

This issue ordinarily arises not in the context of remedies but of status to litigate a particular matter or seek judicial determination of a particular issue. By its terms, however, s. 24(1) of the Charter bears on standing where a remedy is sought in respect of a breach of a Charter right.

To date the question of standing with particular reference to Charter issues has received limited judicial attention. As a framework for discussion I would begin with the distinction drawn earlier between two types of Charter issue: (1) constitutional validity and (2) breach of a Charter right. On the distinction between them see, e.g., *R. v. Morgentaler* (1984), 14 C.C.C. (3d) 257 (Ont. H.C.), at pp. 270-71.

Where the issue raised is one of constitutional invalidity by reason of inconsistency with the Charter, the question is whether the test for standing is any different than when constitutional validity is attacked on the basis of inconsistency with some other part of the Constitution of Canada, notably, the Constitution Act, 1867, as amended. If not, one would simply apply the jurisprudence developed by the Supreme Court of Canada in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376; and *Minister of Justice of Canada et al. v. Borowski et al.*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, 64 C.C.C. (2d) 97. The test laid down in these decisions, culminating in *Borowski*, is a liberal one and, on principle, it is not readily apparent why a different test should be invoked where constitutional validity is attacked pursuant to a Charter provision.

Where, on the other hand, there is no issue of constitutional validity but a remedy is sought for breach of a Charter right under s. 24(1), then the provisions of this subsection must be complied with. Anyone may apply whose Charter rights "have been infringed or denied".

In a criminal case, of course, the standing of the accused to raise a Charter issue ought not to present a problem, whether he challenges the constitutional validity of the enactment under which he is charged or whether he merely seeks a remedy under s. 24(1) as one whose Charter rights or freedoms have been infringed or denied. The issue of standing comes to the fore when someone other than the accused seeks to invoke the Charter with respect to some aspect of the proceedings. This received some attention in two cases involving proceedings against juveniles where newspapers challenged a now-repealed provision of the *Juvenile Delinquents Act* respecting trials *in camera*. In neither was it necessary for the court to distinguish between the standing test for constitutional validity and that for breach of a Charter right since both issues arose in both cases: *Re Southam Inc. and the Queen* (1982), 141 D.L.R. (3d) 341, 70 C.C.C. (2d) 257 (Ont. H.C.) (standing found under either test) and *Re Edmonton Journal et al.* (1983), 146 D.L.R. (3d) 673, 4 C.C.C. (3d) 59 (Alta. Q.B.) (standing found under the constitutional validity test).

With respect to standing in the context of civil proceedings where a declaration is sought that a law is inconsistent with the Charter or that Charter rights have been breached, reference may be made to *National Citizens' 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.).

It should be remembered as well that in addition to the tests for standing discussed above, some provisions of the Charter by their terms define the class of persons upon whom rights are conferred; for example, s. 10 rights arise "on arrest or detention" and s. 11 rights belong to "any person charged with an offence". The latter limitation was noted in *Re Southam Inc. and the Queen (No. 1)* (1983), 146 D.L.R. (3d) 408, 3 C.C.C. (3d) 51 (Ont. C.A.), where, however, the Crown did not press its argument on the status of *Southam Inc.* inasmuch as the issue related to constitutional validity.

Another question relates to what commentators have referred to as "impending infringements" or "future breaches", and it arises from use of the past tense in the words "have been infringed or denied" in s. 24(1). In three cases where this problem was identified it was held that s. 24 extends to anticipatory breaches: see, *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* (supra), at pp. 440-441, and *R.L. Crain v. Couture* (1983), 6 D.L.R. (4th) 478, at pp. 516-18 (Sask Q.B.).

##### 5. Application for remedy: where and when

Once again I will separate, for purposes of discussion, those situations where constitutional validity is in issue from those where it is not.

###### (a) Challenge to constitutional validity

The question here is whether the principles and procedural rules differ as between challenges to validity based on inconsistency with the Charter on the one hand and, on the other, inconsistency with some other part of the Constitution of Canada.

I think it is safe to say that a challenge to constitutional validity based on any part of the Constitution of Canada, including the Charter, can always be taken at trial (assuming standing and that the proper notices have been served). That is where the issue of *intra vires* or *ultra vires* is ordinarily determined in the first instance, and it is of course subject to the normal appeal process. The question therefore becomes whether there is a difference between Charter and non-Charter challenges to constitutional validity in terms of when and where such challenges may be pursued otherwise than at trial: e.g., where relief in the nature of mandamus, prohibition or certiorari or injunctive relief is sought in the Supreme Court.

In *Hunter v. Southam Inc.* (supra) proceedings were initiated by a pre-trial motion for an interim injunction brought in the Alberta Queen's Bench, with subsequent appeals to the Court of Appeal and the Supreme Court of Canada. This, it will be recalled, involved an attack on the constitutional validity of certain provisions of the *Combines Investigation Act* as being inconsistent with s. 8 of the Charter. It may be noted at the outset that the Supreme Court of Canada, in striking down the impugned provisions, found it unnecessary to deal with, or even

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