May 30, 1985

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 ony 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

mention, s. 24(1) of the **Charter**. (The same is true of the Court's earlier decisions in **Law Society of Upper Canada** v. **Skapinker** (1984), 11 C.C.C. (3d) 481 (S.C.C.) and **Attorney General of Quebec** v. **Quebec Association of Protestant School Boards** (1984), 10 D.L.R. (4th) 321 (S.C.C.), both of which also involved challenges to constitutional validity.) It was suggested earlier that authority for striking down legislation inconsistent with the **Charter** lies outside s. 24(1) and derives from the same source as that for invalidating an enactment inconsistent with any other part of the Constitution of Canada. This view draws some support from the opening sentences of the Court's judgment in **Southam Inc.**, [1984] 6 W.W.R. 577, at p. 579:

> The Constitution of Canada, which includes the **Canadian Charter of Rights and Freedoms**, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) of the **Constitution Act, 1982** so mandates.

On principle, then, it is not apparent why **Charter** and non-**Charter** attacks on *vires* should be treated differently for procedural purposes and, so far as I am aware, the authorities to date do not require them to be treated differently.

Next, **Southam Inc.** identifies another jurisdictional issue in respect of which **Charter** and non-**Charter** attacks on validity stand on the same ground. This has to do with a challenge to action or conduct of a "federal board, commission or other tribunal" within s. 2(g) of the **Federal Court Act** purporting to be authorized by the impugned provisions of a federal enactment. In **Attorney General of Canada** v. **Law Society of British Columbia**, [1982] 2 S.C.R. 307, 137 D.L.R. (3d) 1, [1982] 5 W.W.R. 289, 37 B.C.L.R. 289, the Supreme Court rejected an argument to the effect that the Federal Court had exclusive jurisdiction so that provincial courts could not entertain an attack on constitutional validity of the relevant federal enactment based on the **Constitution Act, 1867**. In **Southam Inc.**, where the attack on validity was based on the **Charter**, the same issue had been raised on appeal to the Supreme Court but was abandoned when the Court's decision in the **Law Society** case became available: see pp. 582-3 of the Court's reasons in **Southam Inc.**

(b) Enforcement of a Charter-guaranteed right under s. 24(1)

Only minimal guidance is provided by the terms of s. 24(1) on the question of "where" and "when" one may apply for a remedy. Application is to be made to "a court of competent jurisdiction". The person who may apply is one whose **Charter**-guaranteed rights or freedoms "have been infringed or denied", and the use of the past tense, as discussed above, raises a question as to the availability of a remedy for anticipatory breach. The text of the subsection provides no assistance on such questions as interlocutory appeals, review by way of prerogative writs, and so forth. However, a considerable body of authority has already developed on these subjects. Here I can do no more than attempt to identify a few of the major issues and point to some of the leading authorities, with particular reference to decisions of the British Columbia courts. At the time this paper was prepared the Supreme Court of Canada had yet to consider the terms of s. 24(1).

(i) Court of competent jurisdiction.

The initial and key question is whether s. 24(1) adds to the jurisdiction of any court or whether, alternatively, jurisdiction must be found independently of the **Charter**. There appears to be general agreement that the court must be one which, apart from s. 24(1), has jurisdiction over the parties and the subject matter. There has been some debate on the question of whether the particular remedy sought must also be one which lies within the court's usual jurisdiction.

One school of thought contends that s. 24(1) itself confers upon the court authority to grant an appropriate remedy not otherwise within its jurisdiction. This theory has attracted support in some commentaries on the **Charter**: see, e.g., Hogg, **Canada Act 1982 Annotated**, at p. 65; Manning, **Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982**, at pp. 478-80; Gibson, in **Canadian Charter of Rights and Freedoms-Commentary** (Tarnopolsky and Beaudoin eds.), at p. 502.

The opposing view is that the court may grant only such remedy as may be found within its usual jurisdiction, that is to say, independently of the **Charter**. This latter view is the one that has been generally favoured by courts across the country to date. In British Columbia, see: **Re**

Legal Services Society v. **Brahan** (1983), 148 D.L.R. (3d) 692 (B.C.S.C.), followed in **Re Regina and Henyu** (1984), 11 C.C.C. (3d) 404 (B.C.S.C.) and **R.** v. **Quan** (Mar. 9, 1984, Vancouver CC830553, Co. Ct.). (Compare, however, the passage from the recent judgment of the Court of Appeal in **R.** v. **Erickson**, [1984] 5 W.W.R. 577, at p. 583, set out below under heading 6(a), and the dissenting reasons of Matas J.A. in **Blackwoods Beverages Ltd.** v. **The Queen** (Nov. 20/84), unreported (Man. C.A.), at p. 11).

From the analysis in **Brahan** and authorities to similar effect, it would seem to follow that a "court of competent jurisdiction" is one the jurisdiction of which is defined for all purposes by extra-**Charter** general law, that is, by statute and the common law. There is authority for the proposition that a superior court, such as the Supreme Court of British Columbia, may draw upon its inherent jurisdiction: see, e.g., **Re Global Communications Ltd. and Attorney General for Canada** (1983), 5 C.C.C. (3d) 346 (Ont. H.C.), aff'd. (1984) 10 C.C.C. (3d) 97 (Ont. C.A.).

Appellate courts, as statutory courts, have declined to grant relief not expressly conferred by the governing enactments: see, e.g., the decision of our Court of Appeal in **Re Ritter and the Queen** (1984), 11 C.C.C. (3d) 123, dealing with an interlocutory appeal, where it was held that s. 24(1) does not confer a right of appeal and that the Court's jurisdiction derives from statutory jurisdiction other than the **Charter**. To the same effect, and for a full review of authorities on point, see the recent decision of the Ontario Court of Appeal in **R.** v. **Morgentaler** (1984), 41 C.R. (3d) 262. See also **R.** v. **Lyons (No. 2)**, (1983), 70 C.C.C. (2d) 1 (B.C.C.A.), where Seaton, J.A., in Chambers, dismissed an application by the accused to have counsel appointed for an appeal pending in the Supreme Court of Canada. A submission based on inherent jurisdiction was rejected (at p. 2):

> I have no inherent jurisdiction to deal with a case not now before this court. This is a statutory court; it has no inherent jurisdiction in the sense that the Supreme Court of British Columbia has inherent jurisdiction.

as was the submission related to s. 24(1) of the **Charter** (at p. 3):

> In the cases in the Supreme Court of Canada, as this one now is, and not in this court, I do not see how this court can be described as a court of competent jurisdiction.

The Federal Court, as a statutory court, has also declined to grant relief not available independently of the **Charter**. In **Re Latham and Solicitor-General of Canada** (1984), 12 C.C.C. (3d) 9 (F.C.T.D.), the relief applied for included *habeas corpus*. Strayer, J. stated it to be well settled that, with minor exceptions not there relevant, the Federal Court, Trial Division cannot issue *habeas corpus*, and continued (at p. 22):

> Nor in my view does s. 24 of the Charter alter that situation, as it only allows a 'court of competent jurisdiction' to give remedies it is already empowered to give but to give them on new (Charter) grounds.

As mentioned, the Court of Appeal in **Ritter** was concerned with an interlocutory appeal. That case involved a bail application and an application to stay proceedings based on breach of a **Charter** right. Reference should be made to the reasons for judgment for the full consideration given to the subject of interlocutory appeals. Reference should be made as well to the decision of the Court of Appeal in **R.** v. **Thompson** (1983), 8 C.C.C. (3d) 127, in particular on the question of availability of prerogative writs in the Supreme Court to review a stay of proceedings by a provincial court judge under s. 24(1) of the **Charter** (in that case based on delay and related to s. 11(a) and (b) of the **Charter**). On the question of right of appeal from a stay of proceedings (as opposed to acquittal), see the decision of the Court of Appeal in **R.** v. **Jewitt** (1983), 5 C.C.C. (3d) 234 (leave to appeal to the Supreme Court of Canada granted June 21, 1983).

On the whole question of the exercise of judicial discretion in applications for prerogative relief, careful consideration ought to be given to the decision of the Court of Appeal in **Re Anson and the Queen** (1983), 4 C.C.C. (3d) 119. The question raised on appeal was whether a Supreme Court judge had properly exercised his discretion in refusing to make an order prohibiting a County Court judge from proceeding with a trial under s. 8 of the **Narcotic**

Control Act, where a challenge to constitutional validity of the relevant provision of the Act, based on inconsistency with the Charter, had been rejected by the County Court judge. In the course of his reasons for dismissing the appeal Macfarlane, J.A., delivering the judgment of the Court, stated (at p. 124):

> Policy considerations have played an important part in deciding not to extend the use of the prerogative writ, and to resist the temptation to premature review, especially when other remedies, such as an appeal, will be available.

The policy considerations were elaborated upon as follows (at p. 127):

> Prerogative relief may be granted to prevent jurisdictional error, but the mere fact that error may be jurisdictional in nature does not mean that prerogative relief must be granted. If that were so then there would be no discretion to refuse prerogative relief once jurisdictional error had been established. The writ has always been discretionary, and so it should remain.
>
> An examination of the cases indicates that policy considerations lie at the root of the matter. A balance must be struck in many cases between the intolerable delay and possible fragmentation of a trial which would 'constitute a disastrous interference with the orderly administration of justice' — see **Re Regina and Jones (Nos. 1 and 2)**, *supra*, and the 'subjection to illegal proceedings which involve delays, costs, damaging publicity, fatigue, anguish and which, after having created perhaps a lasting feeling of pique, must be quashed [on appeal] and started anew' (Letourneau, p. 123).
>
> No one test can be formulated to balance those considerations. It is of the essence of discretion that it must be exercised on a case-by-case basis.

Such constitutional issues will normally be addressed by the trial judge whose decision will, of course, be subject to the regular avenues of appeal. Only exceptionally will immediate review in the Supreme Court be required, as discussed in the following passage (at pp. 128-9):

> In the context of this case where the accused submits that part of the procedure under s. 8 of the **Narcotic Control Act** is of no force and effect, as a matter of constitutional law, the court to which he is to address that complaint is the trial court. If the question of law is decided against him then it, like other questions of law, may be dealt with on appeal. There may be cases where the question is such that immediate review is required. If an immediate remedy is needed then the court reviewing the question may make such order as it considers appropriate and just in the circumstances. For instance, if a statute provided that a person be tried for a particular offence without a jury, and if that person fell within the provisions of s. 11(f) of the Charter then it would be essential to determine the question before the proceedings commenced. Otherwise a whole trial might be conducted by a court which did not have any jurisdiction at all. But such cases will be rare. If it were otherwise then every time it was contended that a legislative provision was inconsistent with the Charter the trial would stop while an application was made for prerogative relief, while an appeal was taken to the Court of Appeal and while a further appeal might be taken to the Supreme Court of Canada. It is possible that several such points could arise during the course of one trial, and intolerable delays might result. It is to be remembered that the Charter also provides that any person charged with an offence has the right to be tried within a reasonable time. He has a right to have his trial started and concluded without unreasonable delay.

And at the conclusion of the judgment the following observations are made (at p. 131):

> . . . I think it is of greater importance to make it clear at the outset of questions arising under the **Constitution Act, 1982** (and there will be many of them based on s. 52) that each level of the judiciary should be free to perform its proper function, and that counsel should not be encouraged to seek solutions to legal questions prematurely at the supervisory or appellate level. I repeat, however, that there will be cases where it may be appropriate to grant prerogative relief. Such cases should be few and far between, but it is best to leave the decision in those cases to the fair and proper

> exercise of the discretion of the judge charged with the responsibility for deciding whether immediate review and intervention is justified in the particular case.

The last passage set out above was quoted and adopted by the Ontario Court of Appeal in **Re Krakowski and the Queen** (1983), 4 C.C.C. (3d) 188, at 192, where a s. 24(1) application to the Supreme Court to prohibit a provincial court judge from hearing the charges before him was put forward not on the basis of the Supreme Court's power to grant prerogative relief but on the basis of its inherent jurisdiction. The substantial issue was whether there had been denial of the right to trial within a reasonable time, with reliance placed on s. 7 as well as s. 11(b) of the **Charter**. It was clear that the provincial court was a court of competent jurisdiction within the meaning of s. 24(1) of the **Charter** and the Court of Appeal found it unnecessary to decide whether the Supreme Court was also such a court in view of its inherent jurisdiction. Exercise of inherent jurisdiction was treated as directly analogous, for these purposes, to exercise of jurisdiction to grant prerogative relief. The court stated (at p. 191):

> It is not necessary for the purposes of this appeal to decide whether the Supreme Court was also a court of competent jurisdiction based on its inherent jurisdiction as a court of general jurisdiction. Assuming, without deciding, that it had such jurisdiction in addition to its power to grant prerogative relief, it had a discretion to refuse to exercise such jurisdiction where the provincial court in turn had jurisdiction, and the right could be enforced in that court. If the Supreme Court has inherent jurisdiction, it should only be assumed where a Supreme Court Judge in the exercise of his discretion considered that the special circumstances of a particular case merit it. This is the same approach which should be taken by the Supreme Court in deciding whether to grant prerogative relief. Counsel should be discouraged from seeking to enforce rights under the Charter, such as the right to a trial within a reasonable time, prematurely in the Supreme Court.

(ii) When should the application be made?

Some consideration was given to the question of "when" in the foregoing discussion relating to the circumstances in which the jurisdiction of an inferior trial court may be reviewed in the Supreme Court and relating to interlocutory appeals.

A question has arisen as to when a provincial court judge may grant a remedy under s. 24(1) otherwise than as a trial judge. The provincial court is, of course, a statutory court, and in a criminal case its jurisdiction derives from the **Criminal Code**: see **Doyle** v. **The Queen**, [1977] 1 S.C.R. 597, at p. 602, 29 C.C.C. (2d) 177, at p. 181.

Two conflicting decisions in our Court deal with the question of whether an accused charged with an indictable offence entitling him to an election may apply to a provincial court judge for a remedy under s. 24(1) prior to election. The earlier decision answered that question in the affirmative: **Re Randall and the Queen** (Jan. 13, 1983, Vancouver Registry No. CC821775, noted in 10 W.C.B. 426). The second decision is **Re Regina and Henyu** (1984), 11 C.C.C. (3d) 404, where **Randall** was considered together with **Re Regina and Zaluski** (1983), 7 C.C.C. (3d) 251 (Sask. Q.B.); in **Zaluski** the same question had been raised and answered in the negative. **Henyu** followed the reasoning in **Zaluski**, holding that the provincial court judge lacked jurisdiction.

There is also conflicting authority on the question of whether a provincial court judge may grant a remedy under s. 24(1) at a preliminary inquiry. For a relatively early decision in the Supreme Court of British Columbia, see **R.** v. **Baker** (May 2, 1983, Victoria Registry No. 83/1187), unreported (supporting jurisdiction). More recently, in **R.** v. **Thompson** (supra), the point was expressly left open both by the Supreme Court judge hearing the Crown's application for prerogative relief (at C.C.C. 132) and by the Court of Appeal (at C.C.C. 138). See also **The Queen** v. **His Honour Judge Collins et al.** (Oct. 12/84) Vict. Reg. No. 2046/84 (B.C.S.C.) holding that the Provincial Court is not a court of competent jurisdiction to stay proceedings otherwise than at trial. For a recent review and analysis of the conflicting Ontario decisions, see **Re Morrison** (1984), 40 C.R. (3d) 334 (Ont. H.C.) (denying jurisdiction). The issue may soon be resolved by the Supreme Court of Canada. In **Re Mills and the Queen** (1983), 2 C.C.C. (3d) 444 (Ont. H.C.), on an application for prohibition, the conclusion was reached that the provincial court judge had jurisdiction to stay proceedings at a preliminary

inquiry under s. 24(1), but that the circumstances did not disclose breach of a **Charter** right (under s. 11(b)). The Ontario Court of Appeal dismissed the appeal, but expressly left open the question of whether the provincial court judge had such jurisdiction. A further appeal was taken and has been argued in the Supreme Court of Canada, with judgment reserved.

Finally, reference should be made to the recent decision of the Court of Appeal in **R. v. Erickson**, [1984] 5 W.W.R. 577, which has something to say about the questions of "where" and "when" with respect to applications under s. 24(1). It also deals with the range of remedies available and is more conveniently discussed under the next heading.

6. Nature of remedies available

(a) Remedies within the court's jurisdiction

This subject received attention under heading (5)(b)(i) above, where passing reference was made to a passage in the judgment of the Court of Appeal in **Erickson** (supra) touching the question of whether a court is confined to remedies found within its usual jurisdiction, drawn from general law independent of the **Charter**. This was a Crown appeal against an order made by a County Court judge at trial quashing an indictment in reliance upon s. 24(1) and on the basis of arbitrary detention or imprisonment (s. 9 of the **Charter**). The Court of Appeal allowed the appeal and granted a new trial. Esson, J.A., with whose reasons Taggart and Anderson JJ.A. agreed, commented on the range of remedies available under s. 24(1) as follows (at p. 583):

> Next there is the question as to the extent of the power of the court under s. 24(1) to grant remedies which are not otherwise authorized by law. It is clear that the Charter confers some such powers and I think it is clear that, in some cases, the just and appropriate remedy will be to terminate the proceedings by an acquittal or a quashing or a stay. For present purposes, it is unnecessary to decide which is the most appropriate terminology or procedure.

With respect to the specific power to grant a stay of proceedings under s. 24(1) when the rights of the accused under the **Charter** have been infringed, reference may be made to the Court's earlier decision in **R. v. Thompson (supra)**, at p. 140.

(b) Remedies "appropriate and just in the circumstances"

Further reference is required to **Erickson** where the Court of Appeal provides guidance for a trial court, being a court of competent jurisdiction, in determining what remedy, if any, to grant where a **Charter** right has been breached (at p. 584):

> That brings me to the issue upon which, in my view, the appeal must succeed. That is the question whether, assuming everything else in favour of the accused, there was any ground in law for making an order under s. 24(1) that the indictment be quashed.
>
> Assuming everything else in favour of the accused, the question is whether the trial judge erred in law on the facts found by him in granting such a remedy. In my view, he clearly did. He granted the most sweeping and drastic remedy in the arsenal of remedies without any factual basis that could possibly permit the conclusion that it would be either just or appropriate to do so. He concluded as a fact that there was no malice or negligence by either the Crown or the police. In the light of that conclusion, the point as to whether the remedy could be granted is really not arguable. The need to impress upon all parties the requirement that the law be obeyed is not enough to justify granting a remedy which is not otherwise just and appropriate. I say that with full recognition of the fundamental nature of the right created by s. 454 [of the **Criminal Code**] and the importance of it being complied with by those who are obligated to do so; but a breach does not in itself justify turning the system on its head.
>
> The source of the error may be the view of the trial judge, which is implicit in his decision, that having found that, in connection with the charges before him there had been a breach of the rights of the accused, he must grant some remedy. I will assume that for every breach of a Charter right there is some remedy. It simply does not follow that every breach must lead to some remedy being granted at trial. The

purpose of the trial is, as it was before the Charter, to decide whether the accused is guilty. Breaches of Charter rights do not become a proper subject of enquiry at trial simply because they occurred in relation to the charge being tried.

For extensive consideration of the whole subject of "appropriate and just" remedies under s. 24(1), see **Germain v. The Queen** (April 6, 1984), noted in 12 W.C.B. 35 (Alta. Q.B.). In two decisions of the Federal Court, Trial Division damages were granted under s. 24(1) for breach of a **Charter** right: **Collin v. Lussier** (1983), 6 C.R.R. 89 (s. 7 of the **Charter**) and **Crossman v. The Queen** (1984), 12 C.C.C. (3d) 547 (s. 10(b) of the **Charter**). [Note: an appeal taken in **Collin** was allowed by the Federal Court of Appeal on December 12, 1984.] With respect to the possible availability of damages under s. 24(1) where there has been an unreasonable search and seizure (s. 8 of the **Charter**), see the comments made *obiter* in the decision of the Manitoba Court of Appeal in **R. v. Esau** (1983), 147 D.L.R. (3d) 561, at p. 567, and in the recent decision of our Court of Appeal in **R. v. Hamill** (1984), 14 C.C.C. (3d) 338, at p. 361. As to invoking s. 24(1) to order return of an article seized in an unreasonable search and seizure, see **Re Chapman and the Queen** (1984), 12 C.C.C. (3d) 1, at pp. 8-9 (Ont. C.A.).

As noted earlier, the United States **Bill of Rights** does not contain a remedies provision equivalent to s. 24(1) of the **Charter**. Nevertheless, damages have been awarded for what the Americans term a "constitutional tort". For a useful introduction to their jurisprudence on that subject, reference may be made to Cosman, "Constitutional Torts: What Court, What Remedy", in a collection of lectures published by the Law Society of Upper Canada, Continuing Legal Education, entitled: **The Charter: The Civil Context** (1983).

7. Burden of proof

This subject can be dealt with very briefly. Prior to invoking s. 24 one must, of course, show that a **Charter**-guaranteed right or freedom has been infringed or denied. The person asserting a proposition normally carries the burden of proving it, and the authorities to date extend that principle to applications under s. 24(1), the standard of proof being a balance of probabilities: see, e.g., **R. v. Collins** (1983), 5 C.C.C. (3d) 141, at pp. 147-48 (per Seaton, J.A.) and **R. v. Barudin** (March 22/83) Vancouver Registry CC821025, unreported (B.C.S.C.). **Collins** dealt with exclusion of evidence under s. 24(2), which raises a further issue concerning burden of proof as to whether the admission of evidence obtained in a manner that breached a **Charter**-guaranteed right or freedom would, having regard to all the circumstances, "bring the administration of justice into disrepute". The latter issue lies outside the scope of this paper.

An earlier version of this paper appeared in **Charter of Rights Criminal Update — 1984**, conference course materials published in November, 1984 by the Continuing Legal Education Society of British Columbia, with whose permission it is reprinted here in revised form. The writer wishes to acknowledge the able research assistance of Tracey Gibb, law clerk to the Supreme Court of British Columbia.