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SECTION 20(1): AN OVERVIEW - TWO YEARS LATER

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and
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SECTION 24(1): AN OVERVIEW — TWO YEARS LATER*

INTRODUCTION

The need for appropriate remedies for violations of fundamental rights and freedoms is of obvious necessity to secure the rights of individuals against state abuse. Vague assertions of individual liberty and equality are meaningless if there is no means of enforcing primordial rights. As Professor J. Magnet stated to the Proceedings of the Special Joint Committee on the Constitution of Canada, 32nd Parl., sess. 1 (1980 - 1981), No. 7 at p. 99:

> [T]he Supreme Court of Canada [in Hogan v. The Queen, [1975] 2 S.C.R. 574] recognized the violation of legal rights under the Diefenbaker Bill of Rights. The court said: Well, we see no remedy clause here, we cannot grant a remedy.

Professor Magnet was there exposing a fatal flaw in the Canadian Bill of Rights, S.C. 1960, c. 44. Section 2 of that federal statute merely allowed the Court to "construe and apply" federal legislation so as not to infringe or abridge any of the "guaranteed" rights contained therein. In rare cases, this required that a federal enactment be declared inoperative (R. v. Drybones, [1970] S.C.R. 282) while in others, based on the circumstances of the case, specific sections were merely "read down" (R. v. Shelley (1981), 59 C.C.C. (2d) 292). However, the Court could not

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provide a specific remedy such as the exclusion of evidence (Hogan v. The Queen, [1975] 2 S.C.R. 574) nor presumably could they have granted a stay of proceedings or injunctive relief under the Bill.

After much debate and many amendments and refinements, the Special Joint Committee, ironed out the present s. 24 which became a part of the proposed Charter of Rights. On a rainy Saturday afternoon in Ottawa, on April 17, 1982, Her Majesty Queen Elizabeth II proclaimed our constitution into force. Part I of the Constitution Act, 1982 contains the Canadian Charter of Rights and Freedoms, more commonly referred to as "the Charter". Section 24 of that constitutional instrument reads as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (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 guranteed 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.

Section 24 is the remedy section. It allows the Court to provide, and perhaps even to create, a remedy, when guaranteed rights under the Charter have been infringed or denied.

Other authors on this subject have undertaken a phrase by phrase analysis of s. 24 to flush out the pertinent issues. (McLellan and Elman, "The Enforcement of

the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983), 21 Alta. L.R. 205; Law Society of Upper Canada - Research Facility Memorandum, "Remedies - Section 24(1)," April 12, 1984).

What follows is a similar mode of analysis of the phrases, "may apply", "court of competent jurisdiction" and "appropriate and just in the circumstances" in s. 24(1). However, the authors hope to provide the reader with up to date Charter cases on each of the issues which arise out of an analysis of these phrases.

"MAY APPLY" — THE QUESTION OF NOTICE

Although the section states that anyone may apply for a remedy, no specific procedures are set out. Because of the phrase "may apply", it appears that a Court should not act on its own accord by raising a Charter challenge and then fashioning a remedy (R. v. Boron (1984), 36 C.R. (3d) 329). The challenge must be brought by one of the parties although it is still unclear as to the extent of the formality required.

Various provincial statutes and court rules often contain notice provisions, requiring the applicant to notify both the federal and provincial Attorneys General of any constitutional challenge. In Ontario, s. 35(1) of the Judicature Act provides:

> 35. (1) Where in an action or other proceeding the constitutional validity of any Act or enactment of the Parliament of Canada or of the Legislature is brought in question, it shall not be adjudged to be invalid until after notice has been given to the Attorney General for Canada and to the Attorney General for Ontario.

Section 152 should also be noted.

> 152. Nothing in this Act affects the practice or procedure in criminal matters...

The cases, as to whether the applicable provincial Judicature Act, (whatever it is entitled) applies, have so far, gone both ways.

An interesting approach to the notice requirement was attempted by counsel in R. v. Stanger (1983), 7 C.C.C. (3d) 337 (Alta. C.A.). It was argued that since the Charter is the Supreme Law of Canada, the notice requirement in the Alberta Judicature Act, which sought to preclude the raising of a Charter challenge in the absence of notice, should be declared inoperative. The Alberta Court of Appeal held that the requirement to give notice was unobjectionable. Since it was procedural only, the notice requirement was held to not affect substantive rights as one would not be precluded from ultimately securing relief under the Charter. Counsel also argued that this provincial enactment was ultra vires as it related to criminal procedure - a federal head of power under s. 91 of the Constitution Act, 1867 (formerly the British North America Act). The appeal court simply held that this was not legislation in relation to criminal procedure and further that there was no conflict with the procedural provisions of the Code.

The Alberta Court of Appeal had previously decided in Re Brody et al. and Director of Vital Statistices (1983), 142 D.L.R. (3d) 151 that the Alberta Judicature Act would apply, and notice must be given to the federal and provincial Attorneys General. However in that case the validity of the legislation was not being

challenged per se. The application to the court was merely to "read down" a provision in a statute so that it would become consistent with the Charter. Such reading down, the court determined was also an attack on the validity of the provision. As well, in R. v. Crate (1983), 7 C.C.C. (3d) 127, the Alberta Court of Appeal found, for other reasons, that it was without jurisdiction to consider the appeal. However, the court decided that had it had jurisdiction, it would have granted an adjournment so that the Attorney General of Canada could be notified.

The effect of these appellate court decision appears to have trickled down to the lower courts in Alberta. In R. v. Everand (1983), 8 W.C.B. 506 a provincial court judge held that compliance with the Alberta Judicature Act was required in a criminal proceeding. Similarly, in R. v. Hennessey (1982), 17 M.V.R. 239, McMeekin Prov J., refused to consider a Charter challenge to the Code's breathalyzer provisions in the absence of such notice.

The Ontario Divisional Court has also refused to consider Charter challenges in the absence of notice in a civil case. In Re Butler and Board of Governors of York University et al. (1983), 44 O.R. (2d) 259, that court refused to deal with the argument that parts of the Labour Relations Act violated the Charter as no notice to the Attorneys General had been filed.

There have also been a number of cases deciding that notice has not been required. In R. v. Leggo (1982), 69 C.C.C. (2d) 443, Dinkel Prov. Ct. J., held, at 446, that notice under the Alberta Judicature Act was not required where the application was based only on s. 24(1) of the Charter (as opposed, one presumes, to a declaration of invalidity under s. 52).

Radically different reasons were given for the lack of a notice requirement in R v. Oakes (1982), 38 O.R. (2d) 598 (Ont. Prov. Ct.), aff'd on other grounds (1983), 2 C.C.C. (3d) 399 (Ont.C.A.), leave to appeal to the Supreme Court of Canada granted, 2 C.C.C. (3d) 339 n. In that case, Walker Prov. J., held that s. 35(1) of the Judicature Act only applied to challenges of the "validity" of statutes based on ultra vires grounds, i.e. based on the division of powers set out in the Constitution Act, 1867. The Charter, he held, is not concerned with division of powers questions, and therefore, the Judicature Act is inapplicable. This issue was not addressed on the subsequent appeal.

Similarly reasoning was advanced by Greenberg J., in R. v. Vermette (No. 4) (1982), 1 C.C.C. (3d) 477 (Que. S.C.) at 497. His Lordship held that the Attorney General of Canada need not receive prior notice of the motions brought under s. 24(1) since "the present case does not involve a conflict between the Charter and a federal statute or a statute of Quebec ... Furthermore, the mere fact that someone invokes a right guaranteed to him by the Charter does not in itself require the presence of the Attorney General of Canada in the proceeding".

In R. v. Balian, Gharakhanian et al. (1982), 2 C.R.R. 284 (Ont. Prov. Ct.), Hachborn Prov J. found that notice was not required where the issue was one of the admissibility of evidence under s. 24(2) and not of the constitutional validity of a legislative enactment.

No notice was required under British Columbia's Consitutional Question Act in R. v. B & W Agricultural Services Ltd. et al., 3 C.R.R. 354. There, the

defendants sought a stay of proceedings under s. 24(1) of the Charter arguing that they were being subjected to a second trial for the same offence. Thus, no legislation was being challenged as to inconsistency or validity. The Crown challenged the Provincial Court's jurisdiction in the absence of the required notice. The Court held, at p. 357, that the legislature could not have intended that notice be given to both Attorneys General with respect to a ruling which in no way bears upon the constitutional validity of either a federal or provincial Act or Regulation.

In Morgentaler v. Ackroyd (1983), 42 O.R. (2d) 659 (Ont. H.C.J.), Linden J. held that notice was not required on an application for an interim injunction in as much as such motion is not an "adjudication" on the constitutional validity of the statute. Such adjudication would occur at trial, at which time, according to Linden J., the notice would "certainly" be required.

Section 152 of Ontario's Judicature Act is quoted above and the only decision which has considered the importance of this provision is R. v. Dickson and Corman (1983), 3 C.C.C. (3d) 23 (Ont. Co. Ct.). In that case, Borins Co. Ct. J. found, at p. 35, that by virtue of s. 152 the requirements of s. 35(1) of the Judicature Act do not apply to criminal proceedings where the remedy sought is pursuant to s. 24(1) or s. 24(2) of the Charter - as applications under those section do not rest upon an attack against the "constitutional validity" of any legislation. His Honour based his decision on the assumption that the expression "constitutional validity" in s. 35(1) included both division of powers challenges and challenges under s. 52(1) of the Constitution Act, 1982.

The question of whether the notice requirements in the provincial Judicature Acts apply to Charter challenges is an important one. The provinces have no jurisdiction to pass laws relating to criminal procedure by virtue of s. 91 (27) of the Constitution Act, 1867. Presumably, any provincial statute which purported to require notice in a criminal proceeding, whether the challenge was pursuant to s. 24 or s. 52, would theoretically violate the division of powers principle. Yet, in R. v. Stanger, supra, the Alberta Court of Appeal made the blanket statement that the provincial Act did not encroach on criminal procedure. The situation may be different in Ontario, where s. 152 of the Judicature Act clearly takes the provisions of the Act out of criminal proceedings. No similar section exists in the Alberta statute. Still, Borins Co. Ct. J. appears to require notice where a party challenges legislation on division of powers or s. 52 grounds, even if raised in the course of a criminal trial. The principle being that those challenges are not exclusively criminal in nature, but are also "constitutional" in nature.

It is the opinion of the authors that the Provincial notice requirements are inapplicable in a criminal proceeding where the Charter issue is the infringement or denial of rights under s. 24(1) or the exclusion of evidence under s. 24(2). However, where the issue is the validity or vires of legislation on division of powers grounds, or, a challenge to legislation on s. 52 grounds where the desired remedy is a declaration of invalidity, then, even if raised in a criminal matter, the notice requirements would apply. However, where the provincial law is equivocal, it is submitted that a Court should grant an adjournment where notice has not been given to ensure it is given. As the Charter is the supreme law of Canada, mere procedural informalities should not form a bar to its expression, where it can be quickly and conveniently cleared up.

Paramount, throughout all of the notice decisions, is an assumption which has not yet been addressed. Borins Co. Ct. J., and others, have assumed that there are two remedy sections, s. 24 of the Charter and s. 52 of the Constitution Act, 1982. The relationship between these two sections remains somewhat ambiguous, at least in several reported judgments.

There is one school of thought which holds that s. 24(1) is the only section from which a Charter remedy may be obtained. The problem here is the inherent 'standing' requirement in s. 24. A person whose personal Charter rights or freedoms have not been "infringed or denied", would, under this analysis, not be able to apply to the Court to have legislation declared "of no force and effect" under s. 52. For example, the applicant in Minister of Justice v. Borowski, [1981] 2 S.C.R. 575, would not have standing under s. 24 as his rights and freedoms under the Charter cannot be said to "have been" denied or infringed. This "self-contained" theory would contend that a finding that legislation is invalid (under s. 52) is merely included as one of the available remedies for a s. 24 application. But first, one must be able to apply under s. 24.

The notion that a separate s. 52 remedy could be sought was addressed by Dea J., in Re Edmonton Journal and Attorney General for Alberta et al. (1983), 4 C.C.C. (3d) 59 (Alta. Q.B.). After finding that a newspaper publisher did not have the degree of standing required under s. 24(1) to challenge s. 12 of the Juvenile Delinquents Act, His Lordship found, at p. 66, that independent of s. 24(1), the applicant had sufficient standing for bringing a s. 52 declaration for invalidity. (This decision should be contrasted with Re Southam Inc. (No. 1) (1982), 70 C.C.C. (2d) 257, where Smith J., on an identical application, held that the publisher did

have standing under s. 24). DeWeerdt J., of the Northwest Territories Supreme Court in Re Allman and Commissioner of the Northwest Territories (1983), 144 D.L.R. (3d) 467, held, at 470, that the legal standing necessary to apply for a declaratory judgment which had been required prior to the coming into force of the Charter remains (see s. 26 of the Charter). Accordingly, even if a person lacks the requisite standing under s. 24, by virtue of the expanded common law test in Borowski, supra, they would still be able to bring an application under s. 52.

It is the authors' opinion that de Weerdt J., has expressed the correct view. It is moreover supported by R. v. Morgentaler (unreported July 20, 1984, Ont. H.C.J.) where Parker A.C.J.H.C. held that a person charged with an offence per se has standing to challenge legislation under s. 52 of the Charter. If the remedy sought, on the application under s. 52, is a declaration of inconsistency, in that the legislation is of no force and effect, that application can be brought independently of the standing requirements in s. 24. However, the applicant must still meet the liberal standing test in Borowski, supra.

"COURT OF COMPETENT JURISDICTION"

There are several approaches to this difficult phrase, amongst them, a narrow and a broad one. The broad view would require only that the competent court be the one seized with jurisdiction over the subject matter in question and over the parties. The narrow approach includes the additional requirement that the competent court have jurisdiction over the desired remedy as well.

The distinction is clearly one with a difference. The broad view has the potential of giving courts an open-ended power to break away from traditional remedies and fashion new remedies either out of some "inherent" jurisdiction or, more radically, just by virtue of the broad words of s. 24(1). The narrow view, however, could stifle a court from fashioning a "new" and imaginative remedy since its very jurisdiction would be defined by the traditional remedies which it is restricted to.

In practical effect, the broad view would grant inferior courts jurisdiction never previously enjoyed. Support for the broad view has been expressed by various academics. Professor Gibson of the University of Manitoba in Canadian Charter of Rights and Freedoms — Commentary (1982, Beaudoin & Tarnopolsky eds.) supports this open-ended approach.

Professor Gibson notes that s. 24(1) itself deals with the question of which is the "competent court" and what is the appropriate "remedy" separately. First the section directs the applicant to a competent court and then it empowers that court to provide the remedy the Court considers just and appropriate in the circumstances. The writer continues at p. 502:

> Although this could be construed to refer only to remedies within the courts normal competence, it would have been easy for the drafters of the section to say so expressly: they did not. It is therefore open to the courts to find that the term "court of competent jurisdiction" refers only to jurisdiction over subject matter and parties, every court having been given unlimited discretionary competence over remedies by the concluding words of the section. (the emphasis is ours).

Professor Hogg reaches a similar conclusion at p. 65 of his work: Canada Act, 1982 Annotated.

Some assistance may be found in the French version of s. 24(1).

> 24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime covenable et juste eu égard aux circonstances.

The underlined phrase, translated as, "a tribunal competent for awarding the reparation" would seem to support the narrow approach. The court applied to must already have the jurisdiction to make the repairs, or grant redress. (But note, s. 57 of the Constitution Act, 1982 makes both English and French versions of the Charter equally authoritative.)

The true test, however, has been left to the courts. In the two years, since leaving the starting gate, Canadian courts have generally embraced the narrow approach. Courts already having jurisdiction over the remedy sought have declared themselved as the sole "courts of competent jurisdiction" under their interpretation of s. 24.

The clearest expression of the narrow approach, can be found in the decision of the Alberta Court of Appeal in R. v. Crate (1983), 7 C.C.C. (3d) 127. Here, a Charter challenge of an interlocutory order of a Queen's Bench Justice, was brought by way of originating notice of motion directly to the Court of Appeal

instead of by the codified route of appeal following conviction or acquittal. The Court of Appeal stated that it was merely a "statutory" court and its powers to grant relief were strictly circumscribed by the Criminal Code, which did not include the remedy requested. Lieberman J.A. held at p. 129:

> A court of competent jurisdiction is a court empowered to grant the relief sought. This court is not so empowered and therefore, it is not, in these circumstances, a court of competent jurisdiction as contended by counsel for the applicant.

The matter was put another way by Bean Prov. Ct. J. in R v. M (1982), 70 C.C.C. (2d) 124 (Ont. Prov. Ct. [Fam. Div.]), at 126:

> ...[i]n my opinion, in order to be a court of competent jurisdiction, the court must possess either inherently or by statute, a remedy which the court considers appropriate and just in the circumstances, aside from the provision of the Constitution Act, 1982 ... In my view, the Constitution Act, 1982 does not give to any court any jurisdiction which it did not have prior to the enactment of that Act.

In Re Global Communications Ltd. and Attorney General for Canada (1983), 5 C.C.C. (3d) 346 (Ont.H.C.J.), aff'd, (1984), 10 C.C.C. (3d) 97 (Ont.C.A.), Linden J. had considered the issue of whether a superior court justice was a court of competent jurisdiction to review and determine, the constitutional validity of a "gag order" banning the publication of extradition proceedings against Catherine Smith, alleged murderer of John Belushi. Mr. Justice Linden found that in spite of there being no express right of appeal to the Supreme Court of Ontario, no other court had the "statutory" right to review an extradition judge's decision: thus the

provincial superior court through its "inherent" jurisdiction was the "only possible forum for review". As well, since the Supreme Court of Ontario can quash decisions of inferior tribunals by certiorari, it was, in his view, "clearly competent to grant similar relief on applications brought pursuant to s. 24(1)" (our emphasis).

On appeal, Thorson J.A. expressly agreed with Linden J.'s determination of this issue (at p. 100). This is clear judicial authority that in the absence of any other "statutory body" empowered to consider a Charter challenge, a superior court has the "inherent" jurisdiction to consider the matter.

By contrast, Catzman J. in Re Koumoudouros and Municipality of Metropolitan Toronto (1982), 67 C.C.C. (2d) 193 (Ont. H.C.J.) found that the "remedy sought" before him was one that was usually available following judicial review in the Divisional Court and not normally granted by a High Court judge sitting in motions court. Accordingly, he directed that the matter be sent to Divisional Court. Catzman J., at p. 197, propounded a test for determining the relevant court.

> In the absence of specific legislative direction, the determination of the appropriate forum and the requirement of notice will depend in each case upon an assessment of the nature and circumstances of the issues raised by, and of the relief sought upon, the substantive application.

It is submitted that this 'test' was essentially the one used by the Ontario Court of Appeal in Re Seaway Trust Co. (1983), 41 O.R. (2d) 532. Thorson J.A. there agreed with Craig J. in the Divisional Court below, that as that court only

had jurisdiction to deal with part of the relief sought, it was not the court of competent jurisdiction. A single judge of the High Court who had jurisdiction to consider all of the intertwined issues was the proper forum. The Court of Appeal considered "the nature and circumstances" of the complex issue raised, and found, not just the court that could provide a remedy, but the one which could provide all the remedies or the best remedy.

Mr. Justice Eberle in Re Brooks (1982), 1 C.C.C. (3d) 506 (Ont. H.C.J.) stated that "a court of competent jurisdiction" within the meaning of s. 24(1) means a court having jurisdiction "with respect to the matter that is sought to be enforced under s. 24" (at p. 509). Accordingly, an applicant "must look to the general laws of the country to see what court is a court of competent jurisdiction to obtain the remedy appropriate in the circumstances" (at p. 510).

Each of these decisions embraces the view that the proper court is the one which, either by statute or common law, already has the power to grant the remedy sought. As well, even where the court may have the power to grant part of the remedy sought, the Ontario Court of Appeal has directed that the more appropriate court be designated the court of competent jurisdiction.

This was the approach taken by that Court in Re Krakowski and the Queen (1983), 4 C.C.C. (3d) 188 (Ont. C.A.). The accused had brought his Charter challenge to the superior court at first instance and sought prerogative relief, without first seeking the same remedy from the Provincial Court trial judge. Howland C.J.O., after stating that the provincial court was a court of competent

jurisdiction, since it "had jurisdiction to grant the remedy sought", 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 ... 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.

His Lordship concluded at p. 192:

> The provincial court is therefore the court of competent jurisdiction within s. 24(1) of the Charter ...

A few final words should be said about the limited jurisdiction of the appellate courts under s. 24(1). In R. v. Lyons (No. 2) (1982), 70 C.C.C. (2d) 1, the accused, who was appealing her conviction to the Supreme Court of Canada, applied for an order from the British Columbia Court of Appeal to appoint counsel pending her appeal. Seaton J.A. held that the appellate court was not a court of competent jurisdiction since, under the Code, it did not have jurisdiction to consider an appeal that was not before it. Nor did it have any inherent jurisdiction as its powers were defined solely by statute. See also: R. v. Crate, supra.

Of considerable interest is Re Laurendeau and the Queen (1984), 9 C.C.C. (3d) 206 (leave to appeal to the Supreme Court of Canada refused, 9 C.C.C. (3d)

206n) a decision of the Quebec Court of Appeal in which each of the five justices wrote an opinion on the scope of their jurisdiction. The accused had been cited for contempt in the Superior Court. He applied to a judge of that Court for a jury trial on the basis of s. 11(f) of the Charter and was refused. He then applied to the Court of Appeal for a declaration that he was entitled to a jury trial. Owen J.A. and Monet J.A. each stated that the Court of Appeal had no jurisdiction to review the interlocutory judgment of a criminal court of first instance and that s. 24(1) cannot give the Court jurisdiction which it did not posess prior to the coming into force of the Charter. Nor could s. 24(1), in their view, give the court the power to change its jurisdiction. Kaufman J.A. noted that if his court was not competent in these circumstances "no other court is competent either, in effect there may be a right without a remedy — a thought repugnant to the law". To deal with this Turgeon J.A. suggested that the Criminal Code might be amended.

The British Columbia Court of Appeal, in R. v. Ritter (1984), 11 C.C.C. (3d) 123, dealt with its appellate powers and held that s. 24(1) does not confer a right of appeal when none exists by statute. However, the Court considered that a right of appeal might exist in habeas corpus matters under s. 6 of the provincial Court of Appeal Act.

Similar considerations were made by the Alberta Court of Appeal in R. v. Cameron (1982), 3 C.C.C. (3d) 496. The Queen's Bench judge had refused to dismiss a case at trial because of unreasonable delay. The appellate court held that no appeal was provided for by the Criminal Code, and as the Court of Appeal was a creature of statute the only opportunity the accused would have to raise the Charter challenge would be on an appeal from conviction or "perhaps by way of

habeas corpus". (It is noted that habeas corpus is an often used remedy in the United States and England in instances where no other statutory remedy exists.)

However, where an appeal is provided by the Criminal Code, the appellate courts will entertain Charter arguments. In R. v. Langevin, unreported, released April 13, 1984 (Ont. C.A.), Lacourciere J.A. stated at p. 24:

> While I am in agreement with the Crate decision, it has no application to the present appeal which is pursuant to s. 694(1) of the Code. ... This Court has jurisdiction to entertain and is bound to hear an appeal pursuant to s. 694(1) of the Code. In contrast, the matter before the Alberta Court of Appeal was not an appeal, but a motion which that Court had no jurisdiction to entertain. Therefore, this Court is a court of competent jurisdiction to hear Charter arguments in respect of the matter on appeal.

See also: R. v. Petrovic, unreported, released June 20, 1984 (Ont. C.A.).

These decisions should be compared to the reasons of Bouck J., in R. v. S.B. (1983), 1 C.C.C. (3d) 73 (B.C.S.C.). The issue arose as to whether an appeal from an interlocutory order of a provincial court judge could be entertained prior to the completion of trial and a resultant conviction or acquittal. Bouck J., considered s. 24(1) to provide an alternative to prohibition or appeal. He stated at p. 76:

> There is no particular need to pursue any statutory right of appeal, nor invoke the remedy offered by way of the prerogative writs.

As well in R. v. Bird et al. (1984), 12 W.C.B. 163 the Manitoba Court of Appeal rejected the Crown's argument that it did not have jurisdiction to consider an appeal from the interlocutory order of the justice in the court below. The Court implicitly held that s. 24 provided a route of appeal, even though in the absence of that section and of the Charter an appeal would not lie. However, the court noted that the nature of the Charter challenge in this appeal was essentially an evidentiary ruling which would not be determinative of the ultimate issue between the Crown and the accused. Accordingly, this particular appeal was not allowed to go forward until the trial had ended to ensure that the trial process did not become interminable.

The Problem of the Provincial Courts

Re Krakowski, supra, discourages first instance applications to superior courts where a similar remedy may be available in the provincial court. This decision indicates that the preferred forum for bringing the Charter challenge is the provincial court where it is the trial court. This is not the universally accepted view. Part of the problem seems to depend on whether the provincial court judge is a trial judge or acting as a justice at a preliminary inquiry.

According to Doyle v. The Queen, [1977] 1 S.C.R. 597, the justice at the preliminary inquiry may not be a "court" at all but a mere persona designata. Yet, in Minister of Indian Affairs v. Ranville (1982) 139 D.L.R. (3d) 1, Dickson J., as he then was, for the majority, held that the concept of persona designata "could readily be jettisoned without prejudice to legal principal". It is now safe to assume that a justice hearing a preliminary inquiry constitutes a court.

To date, most authorities have agreed that the justice at a preliminary inquiry is a court of competent jurisdiction. In Re Uba and the Queen (1983), 5 C.C.C. (3d) 529 (Ont. H.C.J.), White J. held that a provincial court judge did have jurisdiction to exclude evidence at a preliminary inquiry by virtue of s. 24, if that evidence was obtained in violation of the accused's rights as guaranteed under the Charter. In Re Regina and Shea (1982), 1 C.C.C. (3d) 316 (Ont. H.C.J.), Steele J. held that in excluding evidence at a preliminary inquiry under s. 24(2), the provincial court judge did not err in jurisdiction. O'Driscoll J. in Re Seigel and The Queen (1982), 1 C.C.C. (3d) 253 (Ont. H.C.J.) held, at 256, that a "court of competent jurisdiction" on an application pursuant to s. 24 to exclude evidence allegedly obtained by way of a Charter violation, is either the judge sitting at the preliminary inquiry or the trial judge — depending on the stage of the proceedings.

In a non-s. 24(2) matter, consider the leading case of Re Mills and the Queen (1983), 2 C.C.C. (3d) 444 (Ont. H.C.J) appeal dismissed on other grounds (1983), 43 O.R. (2d) 631 (Ont.C.A.), leave to appeal to the Supreme Court of Canada granted. There, Osborne J., after reviewing a claim of a violation of the right to trial within a reasonable time under s. 11(b) which was raised at the preliminary inquiry, held that the provincial court judge could hear the applicant's claim for relief under s. 24(1). His Lordship followed Re Seigel, supra.

A contrary view has been expressed in the recent judgment of J. Holland J., in Re Morrison and the Queen, (Ont. H.C.J.), released June 22, 1984, unreported. His Lordship there stated: "The Provincial Court Judge conducting a preliminary inquiry is not a court of competent jurisdiction under s. 24(1) ... that judge is not empowered to try the charge but rather, to carry out the express function set out in Part XV of the Code".

In R. v. Zaluski (1983), 7 C.C.C. (3d) 251, (Sask. Q.B.) the provincial court judge had ordered a stay or proceedings prior to either a preliminary hearing or a trial. On an application to quash this order, Matheson J. relied on Doyle, supra, in stating that there is no inherent jurisdiction in the Provincial Court, being a statutory court, to make a decision "tantamount to an acquittal". His Lordship did not have to consider whether a presiding judge at a preliminary hearing is a court of competent jurisdiction because here the presiding judge had stayed the proceedings before the accused had even elected his mode of trial. Therefore, the court had no jurisdiction to even hear evidence. However, Matheson J. did note that a preliminary inquiry is not a trial during which the guilt or innocence of the accused is determined. In the absence of greatly expanded statutory provisions, he would find it doubtful that by inference or implication that Court could become possessed with the power to effectively acquit the accused.

Indeed, in R. v. Uba, supra, the Court held that a provincial court judge at a preliminary hearing, could deal with the matter of the admissibility of evidence but could not dismiss the charge or order a stay of proceedings. In Re Hislop (1983), 7 C.C.C. (3d) 240 (Ont. C.A.) leave to appeal to the Supreme Court of Canada refused, 7 C.C.C. (3d) 240n, MacKinnon A.C.J.O. stated in obiter at 251, "that the Charter does not alter the role of the provincial judge in a preliminary hearing". Similarly, in Re Legal Services Society and Brahan (1983), 5 C.C.C. (3d) 404 (B.C.S.C.), the Court held that a judge presiding at a preliminary inquiry could not invoke s. 24 to appoint counsel for the accused applicant.

Where a Provincial Court Judge is sitting as a trial judge, his jurisdiction to grant a s. 24 remedy has not often been challenged. In Re Chase (1982), 1 C.C.C.

(3d) 188 (B.C.S.C.) McKay J. held that the superior court and the provincial court both possessed sufficient remedies within their jurisdictional arsenals to "deal with the matter" of whether or not a witness would be compellable in light of the provisions of s. 11(c) of the Charter.

In R. v. Big M. Drug Mart Ltd. (1984), 9 C.C.C. (3d) 310 (Alta. C.A.), leave to appeal to the Supreme Court of Canada granted, 9 C.C.C. (3d) 310n, the court held that a Provincial Court Judge at trial had the power to declare legislation invalid under the Charter. In so doing, that Court, at p. 323, expressly adopted the definition of a "court of competent jurisdiction" put forth by Professor Gibson, supra, as including any court which has the "general jurisdiction to grant a remedy appropriate to enforcement of the Charter".

Similarly, in R. v. Red Hot Video Ltd. (1983), 6 C.C.C. (3d) 311 (B.C. Prov. Ct.) the Provincial Court trial judge held that he had jurisdiction to consider a s. 24(1) application for an order declaring portions of the Criminal Code to be inconsistent with the Charter. That Court also found that the expression "court of competent jurisdiction" related only to the proceedings before the court and not to the remedy sought under s. 24.

However, where the provincial court judge at trial had ordered a stay of proceedings on the basis of a Charter infringement, the superior court on appeal held that there was no statutory authority enabling such an order to be made by the inferior court. See Re Engen (1983), 23 M.V.R. 144 (Alta. Q.B.).

To the same effect is R. v. Century Helicopters Inc. (1983), 51 A.R. 395 (Alta. Q.B.), where Veit J. held that it was unlikely that a provincial court, whose

authority is based on statutory powers, has any inherent jurisdiction to stay proceedings.

"APPROPRIATE AND JUST IN THE CIRCUMSTANCES" - CHOICE OF REMEDIES

To date, the courts have generally considered their power under s. 24 to be restricted to granting a remedy already within their jurisdiction. However, the very open-ended nature of the phrase, "such remedy as the court considers just and appropriate in the circumstances", would seem to allow, if not encourage, a court with inherent jurisdiction, to be creative in fashioning unique remedies to resolve Charter violations. The most frequently cited example is "the civil rights injunction", a judicial weapon often deployed by the U.S. Supreme Court to enforce its desegregation decisions.

General statements of the broad application of the remedy creating powers in s. 24(1) have been made. In R. v. Vermette (No. 4) (1982), 1 C.C.C. (3d) 477 (Que. S.C.), Greenberg J., stated at 495, that a s. 24(1) remedy "in addition to being appropriate and just, must also be effective" and at 505, "the court would be entitled to innovate with respect to the remedy to be ordered" if the "ordinary criminal law does not provide for a remedy the court considers appropriate, just and effective".

To the same effect is the statment of Tallis J.A. in R. v. Therens (1983), 5 C.C.C. (3d) 409 (Sask. C.A.), (leave to appeal to the Supreme Court of Canada granted 5 C.C.C (3d) 409n) at 426-427 that s. 24(1) is "a sincere attempt on the part

of society to provide full and adequate remedies for the violation of fundamental rights and freedoms. To have a right or freedom without an adequate remedy is to have a right or freedom in theory only — a hollow or empty right."

Further in R. v. Owen (1983), 10 W.C.B. 61 the Nova Scotia Court of Appeal stated that although they had grave doubts an appeal was available from an interlocutory decision in a criminal matter, s. 24 would allow them to hear it anyway "as no procedural problem should be permitted to impede access to the court if the rights are seriously infringed or threatened". This right of appeal from interlocutory rulings should, however, be restricted to exceptional circumstances. See: R. v. Bird, supra.

Courts have considered a number of factors before determining whether a remedy is appropriate and just. Generally, they consider the nature and seriousness of the Charter right violated, the extent or duration of the violation, the wilfulness of the authorities in committing the violation and the seriousness of the offence charged. Finally, they have attempted to balance the rights of society and the accused in deciding upon the remedy: R. v. Anderson (1983), 19 M.V.R. 33 (Ont. Co. Ct.).

In considering the applicable burden in seeking a s. 24(1) remedy, in Re Jamieson (1982), 70 C.C.C. (2d) 430, the Quebec Superior Court stated at 436, that to obtain a Charter remedy, an applicant must establish on a balance of probabilities the infringement of a constitutional right. This "civil burden" has been acknowledged in other cases as well. See: Re Southam Inc. (No. 1) (1982), 70 C.C.C. (2d) 257 (Ont. H.C.J.) at 264, aff'd, 3 C.C.C. (3d) 515; R. v. Kunzli (1983), 10

W.C.B. 205 (B.C. Co. Ct.). Where the Crown, however, seeks to justify a reasonable limitation in respect of legislation challenged under s. 52 it must do so on the balance of probabilities. See: Re Federal Republic of Germany and Rauca (1983), 5 C.C.C. (3d) 385 (Ont. C.A.).

From a review of the cases decided, the remedies most often sought are a declaration of invalidity, the invocation of one of the prerogative writs, injunctions, remedies at trial such as a stay of proceedings or a dismissal or quashing of the indictment, the exclusion of evidence, and in some instances costs or damages. A review of these cases follows.

Declarations of Invalidity

Whether couched in the language of s. 52 or brought specifically pursuant to s. 24(1) the courts have been met with many challenges respecting the validity of legislation. As we have seen, the problem which invariably arises in these applications is whether the court is one of competent jurisdiction to grant the declaration.

Thus, in R. v. Murray (1983), 22 M.V.R. 66 (Ont. H.C.J.), McRae J. declined to hear an application to quash a conviction on the ground that portions of the Provincial Offences Act violated the Charter. Because the applicant could bring his argument in a "speedy and efficacious appeal process" to a provincial court appeal judge, His Lordship decided that the directive in R. v. Krakowski, supra, applied and "an adequate remedy" could be obtained in the inferior court. See

also: R v. David M. (1982), 2 C.C.C. (3d) 296 at 300 (Ont. Prov. Ct. [Fam. Div.]); R. v. Banks (1983), 3 C.R.D. 425. 40-02 (F.C.T.D.).

Many courts to date have not let jurisdictional hurdles bar their consideration of these fundamental constitutional questions. In Re Southam Inc. (No. 1) (1982), 70 C.C.C. (3d) 257, (Ont. H.C.J.) aff'd, 3 C.C.C. (3d) 515 (Ont. C.A.), Smith J. declared s. 12(1) of the Juvenile Delinquents Act, which effectively requires in camera trials of juvenile offenders, to be unconstitutional. He found s. 12(1) to conflict with freedom of expression guarantees in the Charter. In that case, a news reporter for the Ottawa Citizen had been denied access to a family court Judge's courtroom. She was seeking to sit in on all of the cases to be heard that day. Rather than bring a motion before that judge the applicant sought a remedy in the superior court. Smith J. stated that he was a court of competent jurisdiction since the applicant was not challenging any particular decision in any given case, nor was there an alleged jurisdictional violation by the family court judge. Accordingly, he felt that no appeal route was otherwise appropriate and it was thus within the competence of the court with inherent jurisdiction to consider the issue.

It would however, seem preferable practice that the application be brought initially before the court hearing the case rather than directly to the superior court.

Similar considerations were adopted in R. v. S.B. (1982), 1 C.C.C. (3d) 74 (B.C.S.C.). A juvenile had been charged with offences and faced a potential of nine years of incarceration. Section 11(f) of the Charter guarantees trial by jury where maximum punishment is five years or greater. There is no provisions for a jury

trial in the Juvenile Delinquents Act. The family court judge in an interlocutory order, held that he still had jurisdiction to hear the charges. The applicant challenged this decision by seeking a declaration that the Act was inconsistent with the Charter. Bouck J. grappled with the proper procedural mechanism. His Lordship stated at p. 77:

> [T] he more correct procedure appears to be as follows:
>
> (1) Applications for declaratory relief under s. 24 of the Charter may be taken before any ruling of a lower court by way of petition.
>
> (2) Applications for similar relief where there has been a ruling by the lower court and the motion is in the nature of an appeal should be brought through the machinery of an appeal.
>
> Whether or not relief will be granted under s. 24 when the application is from an interlocutory order of a lower court is a matter of discretion to be decided in the circumstances of each case.

This approach seems to be the one most favoured by the superior courts who have long enjoyed the power to declare statutory provisions unconstitutional or ultra vires: Dyson v. Attorney General, [1911] 1 K.B. 410 (C.A.); Jabour v. Law Society of British Columbia (1982), 137 D.L.R. (3d) 1 (S.C.C.) at 13. The approach of Smith J. and Bouck J. leaves an open-ended discretion to the superior court justice to decide whether to hear the declaration application, or due to all of the circumstances, to pass that task on to a more appropriate court. Whether this approach will find favour with appellate courts is another question.

Section 24(1) refers to anyone whose rights or freedoms have been infringed. But what about a pending violation? Does a victim have to wait for the

government to act before obtaining a remedy? In Re R.L. Crain Inc. (1983), 11 W.C.B. 211, Scheibel J. of the Saskatchewan Queen's Bench held that:

> Section 24(1) is to be given a broad and liberal interpretation to permit a person to have standing to bring an application for an alleged impending violation of his rights.

Some specific examples of declarations of invalidity follow. In R. v. Oakes (1983), 2 C.C.C. (3d) 339 (Ont.C.A.), leave to appeal to the Supreme Court of Canada granted, s. 8 of the Narcotics Control Act, which provides a 'reverse onus' upon an accused found in possession of a narcotic, to then prove that the possession was not for the purposes of trafficking, was declared invalid by reason of s. 11(d) of the Charter. The primary ground relied upon by Martin J.A., for the Court, was the absence of a rational connection between the proven fact of possession and the presumed fact of an intention to traffic.

A similar ruling was made by the Nova Scotia Court of Appeal with respect to a reverse onus section in the bail provisions of the Criminal Code: R. v. Pugsley (1982), 2 C.C.C. (3d) 266. Under s. 457.7(2)(f) an accused has "a very substantial burden" to show that if released his attendance in court is assured and his detention is not necessary for the protection or safety of the public. As s. 11(e) of the Charter provides that any person charged with an offence has the right "not to be denied reasonable bail without just cause" there exists "a glaring inconsistency which by the application of s. 52 of the Constitution Act, 1982 renders the provision contained in the code of no force or effect" (at p. 270). This judgment was not followed by the Ontario Court of Appeal in R. v. Bray (1982) 9 W.C.B. 165.

In Southam Inc. v. Hunter et al. (1983), 3 C.C.C. (3d) 497, the Alberta Court of Appeal held that s. 10(1) and 10(3) of the Combines Investigation Act are of no force and effect since they are inconsistent with s. 8 of the Charter guaranteeing "everyone" the right to be secure against unreasonable search and seizure. The provisions of s. 10 were found to not meet the minimal standards found in the Criminal Code and at common law with respect to searches. To allow a search based merely on the "belief" of a government official was found to be "unreasonable".

In Re Boyle (1983), 5 C.C.C. (2d) 193 (Ont. C.A.), Martin J.A. applied R. v. Oakes, supra, in holding that s. 312(2) of the Code created a mandatory presumption of law which violated the presumption of innocence guarantee in s. 11(d) of the Charter. Section 312(2) provides, in part, that a person found in possession of a motor vehicle which has the serial number wholly or partially obliterated, is deemed, in the absence of evidence to the contrary, to have known that the vehicle was obtained by the commission of an offence. His Lordship found a reasonable nexus existed between the obliterated number and the stolen status of the vehicle, but found that the additional presumption of guilty knowledge was constitutionally invalid. His Lordship pointed out that no legitimate inference could be supported to establish that a person, in possession of property which at some remote time in the past had been stolen, knows of such criminal taint. He concluded at p. 216:

> In my view, no legitimate State interest is served by the creation of legislative presumptions which are arbitrary or capricious with respect to the existence of constituent elements of a crime which are the essence of the offence.

In Reference Re Section 94(2) of the Motor Vehicles Act (1983), 4 C.C.C. (3d) 243, the British Columbia Court of Appeal held that s. 7 of the Charter allowed them to consider not just the procedural fairness of legislation but the substantive content as well. Accordingly, the court found an absolute liability offence of driving under suspension, whether or not the accused had notice or knowledge of the suspension, to be inconsistent with the Charter (at p. 251).

The Ontario Court of Appeal in Re Southam Inc. (1983), 3 C.C.C. (3d) 515 afg 70 C.C.C. (2d) 257, declared that s. 12(1) of the Juvenile Delinquents Act, requiring trials of juveniles in camera, to conflict with s. 2(b) of the Charter. MacKinnon A.C.J.O. found that although it might be reasonable to exclude the public in some cases an absolute ban was not reasonable. See also Re Canadian Newspapers Co. Ltd. (1983), 6 C.C.C. (3d) 488 (B.C.S.C.), to the same effect.

Prerogative Writs

This is a complicated area. The prerogative writs are normally available where the inferior court has made an error going towards its jurisdiction. A refusal by a trial judge to accept a Charter argument to exclude evidence or stay proceedings may be incorrect, but so long as it is made within his jurisdictional competence, it will not be reviewable by prerogative writ.

The question then arises as to whether the broad words of s. 24(1) effectively create a kind of super-added prerogative remedy, wherein the traditional rules barring relief (such as the adage that the trial judge has "the right to be wrong" within his jurisdiction or that no prerogative relief be granted where an appeal is

available) are superseded. To date, the superior courts have said "no" to any broad Charter remedy characterized as "in the nature of" certiorari, mandamus or prohibition which would enlarge the scope of review under these traditional doctrines.

Perhaps the most telling indication of the basis for granting prerogative relief can be found in Re Anson (1983), 4 C.C.C. (3d) 119 (B.C.C.A.). MacFarlane J.A. there referred to G. Létourneau, The Preorgative Writs in Canadian Criminal Law and Procedure (1976) at 342 where the learned author stated that the concept of jurisdiction is a tool which at bottom is a question of policy, not of logic and continued:

> Jurisdiction is a tool to achieve a judicial review where it is deemed expedient that there be an immediate review rather than one at a later stage.

At bottom, the courts use the language of "jurisdictional error" when the decision is ultimately one of expediency. As MacFarlane J.A. admitted, policy considerations are considered on a case by case basis and no general rule can be formulated as to just when an "error" in jurisdiction occurs. He added that the court attempts to strike a balance between intolerable delay or the fragmentation of trials, and the subjection of the accused to costly and lengthy proceedings which may, in the end, be quashed on appeal anyway, and then started anew (at p. 127).

Mandamus

In Re Shea and the Queen (1982), 1 C.C.C. (3d) 316 (Ont. H.C.J.), Steele J. found that a ruling by a Provincial Court Judge at a preliminary inquiry excluding

evidence under the Charter, was erroneous. However, despite this, since such ruling did not constitute a jurisdictional defect, mandamus was therefore not available (at p. 323). The Crown's only recourse was to proceed by direct indictment.

As well, in R. v. Misra (1982) 8 W.C.B. 195 (Sask. Q.B.) a mandamus application to compel a judge presiding at a preliminary hearing to permit cross-examination of a police officer about his informant was disallowed. The superior court held that the judge's ruling did not amount to a jurisdictional error or a breach of natural justice.

An illustrative case is R. v. Holmes (1983), 2 C.C.C. (3d) 573 (Ont. H.C.J.), where Smith J. dismissed an application by the Crown for mandamus to compel a trial judge to hear an indictment which had been quashed. The indictment was initially quashed because the trial judge erroneously held that an applicable reverse onus provision (s. 309, Criminal Code) violated the Charter. His Lordship held that mandamus was designed to require a court to accept its jurisdiction. Here the trial judge had clearly assumed the jurisdiction conferred upon him. Of significance was the fact that an appeal route was available since the quashing amounted to an aquittal and mandamus, a discretionary remedy, should therefore not be granted. The Crown later exercised that right of appeal and was successful (4 C.C.C. (3d) 440).

Smith J. in exercising his discretion not to grant mandamus noted that the issue was essentially one of the validity of legislation, a matter which the Court of Appeal "will become quickly seized of ... and no doubt will want to pass upon it

with reasonable dilligence". He noted however, that had a stay been granted pursuant to alleged violations of other Charter rights, something less than the validity of a statute, such as the right to be tried within a reasonable time, he might have granted mandamus.

In R. v. Randall (1983) 10 W.C.B. 426 (B.C.S.C.), the accused had applied, prior to election, to have his trial stayed due to unreasonable delay. The trial judge, however, refused to hear the application. The superior court granted mandamus holding that the trial judge was entitled to consider the matter before the accused's election and his failure to do so constituted a denial of jurisdiction.

The notion that mandamus will not ordinarily issue when another remedy is available was adopted in R. v. Burns (1983), 41 O.R. (2d) 774 (Ont. H.C.J.). Saunders J. relied there on Cheyenne Realty Ltd. v. Thompson, [1975] 1 S.C.R. 87. His Lordship further noted, at p. 777, that a common ground for a mandamus application is when a trial judge refuses to accept jurisdiction. Here, the trial judge had dealt with the case on its merits and performed the task assigned to him.

A clear statement on the availability of mandamus has been provided by the Ontario Court of Appeal in R. v. Beason (1983), 43 O.R. (2d) 65. In that case, a county court judge had quashed an indictment on the grounds that the accused had not been brought to trial within a reasonable time. The Crown was successful in an application to Fitzpatrick J. requiring the county court to continue with the trial. On further appeal the accused contended that mandamus should not have been granted by the High Court as an appeal was available. The Court of Appeal stated that while the preferred route is an appeal it is not an absolutely inflexible rule

that mandamus will not be available. Here, it was unclear at the time of the application to Fitzpatrick J. whether an appeal did lie to the appellate court and accordingly it was within the discretion of the superior court to entertain the application. However, the mandamus order was quashed on other grounds.

Prohibition with Certiorari in aid

Similar entanglements and confusion in defining "jurisdictional error" arise upon applications under this heading. In R. v. Madraga (1983), 10 W.C.B. 206 (Sask. Q.B.) Gerein J. held that even if a trial judge is wrong in quashing an information based on a Charter violation, that decision is not reviewable by prohibition since it does not result in a loss of jurisdiction by the trial judge. In Re Holman (1982), 2 C.C.C. (3d) 19 (B.C.S.C.), the court held that because the appeal remedy was available prohibition would not lie.

One of the major cases on the availability of prohibition is Re Anson (1983), 4 C.C.C. (3d) 119 (B.C.C.A.). The court followed a restrictive trend favouring a judicial disinclination to intervene. The accused had challanged the constitutional validity of s. 8 of the Narcotics Control Act before any evidence was adduced. The trial judge upheld the validity of that section. The Court of Appeal held that even if this decision constituted jurisdictional error the superior court has a discretion to refuse to review by way of prohibition. MacFarlane J.A. stated at 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.

Here, in his view, prohibition would be premature since the accused may not be convicted at all or only of a lesser offence than s. 8. If ultimately convicted the question of law could be dealt with on appeal.

The Ontario Court of Appeal considered whether certiorari and prohibition would lie in R. v. Potma (1983), 2 C.C.C. (3d) 383. Eberle J. of the High Court had held that relief to be unavailable because in his view the trial judge had made a ruling on the admissibility of evidence, something that could not go towards his jurisdiction. The Court of Appeal agreed with the appellant's submission "that the issue of fundamental fairness of process raised by the application, like denial of natural justice, goes to the question of jurisdiction" (at p. 393). They added however:

> ... I would, however, add that it is manifestly undesirable that trials be interrupted to test allegedly wrong evidentiary rulings ... and that cases in which such rulings can amount to jurisdictional error are few and far between (at 394).

In an extradition context consider Re U.S.A. and Smith (1983), 10 C.C.C. (3d) 540 (Ont.C.A.), where Houlden J.A. stated at 563: "certiorari and prohibition being discretionary remedies, a superior court should refuse to issue them where other remedies are available" citing Cheyenne Realty Ltd. v. Thompson, supra in support. Of course, this statement appears to conflict somewhat with the position of the same court in R. v. Beason, supra, where the availability of other remedies as a bar to prerogative relief was held not to be "an absolutely inflexible rule". Houlden J.A. concluded:

> Since there is an adequate remedy available by way of habeas corpus, a superior court should, in my opinion, refuse to hear an application for prohibition with certiorari in aid based on alleged errors in evidentiary rulings by an extradition judge even though those errors go to jurisdiction.

Thus, as in Re Anson, supra, the court chose not to exercise its discretion although a jurisdictional error might have been made. The basis for the decision was one of policy, a balancing of all factors and other available remedies and obviously was not based on a strict rule of law.

These same types of policy considerations were considered by the Alberta Court of Appeal when denying prohibition in Re Kendall and McCaffrey (1982), 2 C.C.C. (3d) 224. The court decided that allegations that various sections of the Code violated the Charter were best dealt with by the trial judge. In that case no special circumstances justified interference such as an allegation that a lengthy and expensive trial might be avoided or that there is a continuing infringement of rights. The Court was of the opinion that if the courts were to intervene "justice might well be delayed and the cost to the parties become more onerous".

In comparison consider Re Genaille (1983), 6 C.C.C. (3d) 440 (Man. Q.B.) where Hamilton J. did grant certiorari and prohibition. The defendant had initially been charged with four counts but only convicted of an included offence of assault causing bodily harm. However that conviction was set aside by the Manitoba Court of Appeal. He was then charged under a different section for exactly the same offence. The trial judge determined that he did have jurisdiction to proceed with the trial on that charge. Hamilton J. stated, at p. 445, that he was unaware of any appeal mechanism whereby a preliminary ruling could be appealed directly to the

Court of Appeal. Therefore, an appropriate manner to review the ruling would be "an application to this court in the nature of certiorari". In that case, a finding that the accused was being tried for the same offence twice, after having been acquitted the first time, something prohibited by s. 11(h) of the Charter, would clearly determine the issue. Hamilton J. decided that no lengthy delay would occur if certiorari were unsuccessful and in fact time and costs would be saved if certiorari were granted. See also: R. v. Bird, supra, (Man. C.A.).

Injunctive Relief

In Re Gittens (1982), 68 C.C.C. (2d) 438 (F.C.T.D.) the applicant sought an injunction to restrain the Government from acting upon a deportation order. Mahoney J. held that the Federal Court would have jurisidiction to grant an injunction if the action of the federal official was ultra vires or illegal. His Lordship reasoned that execution of the deportation order would be illegal if it infringed or denied the applicant's rights under the Charter.

In Southam Inc. v. Hunter (1982), 68 C.C.C. (2d) 356 (Alta. Q.B.), Cavanagh J. refused to grant an injunction on a consideration of the balance of convenience test discussed in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 [H.L.] as clarified in N.W.L. Ltd. v. Woods, [1979] 3 All E.R. 614 [H.L.]. His Lordship noted that granting the injunction might allow for the concealment of documents and the frustration of the search whereas a refusal would still allow the plaintiffs to carry on business as the documents could be copied and would be returned shortly thereafter. If no incriminating evidence were found he was of the view that the plaintiff could bring an action for damages.

An inmate sought an injunction to prohibit proposed double-celling, claiming it constituted cruel and unusual treatment in Collin v. Kaplan (1982), 1 C.C.C. (3d) 309 (F.C.T.D.). Dube J. held that the inmate to be without standing since the procedure was to only affect new prisoners. He added however at p. 314:

> This order does not exclude the possibility of a further application for an injunction, once the double-celling system has been introduced in the cells: the inmates affected will then have to prove that this situation constitutes "cruel and unusual treatment or punishment" of them.

Finally, in Morgentaler v. Ackroyd (1983), 42 O.R. (2d) 659 (Ont. H.C.J.), Linden J. denied an application for an interim injunction to prevent police from investigating the applicant's clinic. However, His Lordship stated at 664:

> I have not been convinced that the police (and other government officials) cannot be enjoined from enforcing laws that are unconstitutional. Rather, in appropriate circumstances, it appears that injunctions may be issued to restrain the enforcement of unconstitutional laws, even before the ultimate decision of validity is made.

His Lordship considered three factors: (1) whether the case was frivilous or whether a substantial issue was to be tried; (2) whether the threatened harm to the applicant could not be compensated in damages; and (3) whether a balance of convenience favours granting the application. Factor (1) was clearly satisfied. However, with respect to factor (2) the applicant had only been able to establish that certain women may suffer harm were the clinic closed down, no evidence indicated that irreparable harm to the applicants themselves would occur. On

factor (3) His Lordship felt that the court should preserve the status quo and not grant orders which would permit the disobeyance of laws which have not yet been declared invalid.

Thus, each of the courts who have been asked to grant injunctions under the Charter have refused while acknowledging the possibility of awarding injunctive relief in appropriate circumstances.

Trial Remedies

There is a great deal of uncertainty as to the kinds of remedies that are available to the trial court. Specifically, some concern has been raised over the jurisdiction of a provincial court judge to quash or dismiss otherwise regularly instituted process (such as an information or indictment) on the grounds of a Charter violation.

In the pre-Charter case of Amato v. The Queen (1982) 69 C.C.C. (2d) 31 (S.C.C.) Estey J. (in dissent on the facts) decided that where the defence of entrapment is made out, the court is required to stay proceedings only, as "there is no authority in the Criminal Code for a court ... to quash a charge that is complete in form and properly issued under the Code" (at 70). He also stated that it would be inappropriate to dismiss (acquit) the accused on the charge "in that both essential elements of the charge, the wrongful act and the criminal intent,are present in the proof before the court".

By analogy, this reasoning should hold in the face of a Charter violation, (eg. unreasonable delay) that only a stay of proceedings should be granted. In such

situation, the application will be determined by the trial judge before the merits of the case will be considered. However, the ratio in Amato is not clear precedent and has not been uniformly followed, as indicated in the cases below.

Stay of Proceedings

In R. v. Vermette (No. 4) (1982), 1 C.C.C. (3d) 477 (Que. S.C.), Greenberg J. granted a stay on the grounds that the accused's right to a fair trial had been infringed. The Premier of Quebec, in a lengthy "harangue" had made vitriolic remarks about the accused, a R.C.M.P. officer, and various defence witnesses, and these remarks had received widespread publicity. His Lordship carefully considered the three possible remedies canvassed by Estey J. in Amato, supra, i.e. quashing the indictment, acquittal and stay of proceedings, and chose the latter as an appropriate and just remedy provided under the ordinary criminal law.

Stays were also granted in R. v. Stapleton (1983), 10 W.C.B. 70 (N.S.S.C.); R. v. Petahtegoose (1982) 8 W.C.B. 362 (Ont. Prov. Ct.) and R. v. Sjoden (1983), 10 W.C.B. 347 where the accused's right to be tried within a reasonable time under s. 11(b) had been infringed. Section 11(a), the right to be informed without unreasonable delay of the specific offence charged was the basis for granting a stay in R. v. Soulis (1983), 10 W.C.B. 430 (Ont. Prov. Ct.) and R. v. Kramer (1983) 10 W.C.B. 452 (Sask. Prov. Ct.).

These decisions must be contrasted to R. v. Engen (1983), 23 M.V.R. 144 (Alta. Q.B.), aff'd on other grounds 11 W.C.B. 217 (Alta. C.A.). The Queen's Bench found that the provincial court judge had erred in staying proceedings in an "over

80" charge where the accused's s. 10(b) rights had been infringed. The Court held that there is no statutory authority which specifically empowers a Provincial Court judge to stay proceedings even though the Crown can stay proceedings pursuant to s. 508 of the Code.

This position was apparently followed by Overend Prov Ct. J. in R. v. Sismey (1984), 12 W.C.B. 7 (B.C. Prov. Ct.), who held that a provincial court lacked jurisdiction to stay proceedings as this was tantamount to affording prerogative relief to the accused. However, in R. v. Thompson (1983), 8 C.C.C. (3d) 127 (B.C.C.A.), MacFarlane J.A. recognized that there could be a "judicial stay of proceedings" by a provincial court judge but held in the circumstances of that case that one was not justified. See also: R. v. Carter (1983), 36 C.R. (3d) 346 (B.C.C.A.).

The grounds for granting a stay were laid out by Lee Prov. Ct. J. in R. v. Blackstock (1982), 29 C.R. (3d) 249 (Sask. Prov. Ct.), aff'd 32 C.R. (3d) 91 (Q.B.), at 254-255, and include: (1) the act denying or infringing the right was done maliciously and with intent, (2) the accused is now prejudiced in his defence, (3) the exclusion of tainted evidence would be an insufficient remedy, (4) the infringement appears to be scandalous to the public and (5) the offence is of a minor nature. In that regard MacDonald J. of the Alberta Q.B. in Re Germain (1984), 12 W.C.B. 35, suggested where the offence is serious, a stay might be inappropriate where it would foster a sense of injustice in the community.

Of significance is the recent decision of Dubin J.A. in R. v. Young, unreported, released June 27, 1984 (Ont. C.A.). A stay of proceedings, entered by

the trial judge, was upheld. His Lordship, in considering s. 7 of the Charter, wrote at p. 60 of the judgment:

> I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.

One notable are of concern that had arisen is the Crown's right to appeal a stay of proceedings. In R. v. Jewitt (1983), 5 C.C.C. (3d) (B.C.C.A.) leave to appeal to the Supreme Court of Canada granted, the majority stated that the Crown had no right to appeal. Monnin J.A.'s decision in R. v. Belton, (1983), 3 C.C.C. (3d) 477 (Man. C.A.), wherein he held that a stay was tantamount to an acquittal and thus appealable, was politely not followed. (R. v. Vermette (No. 5) (1982), 3 C.C.C. (3d) (Que. C.A.) was also not followed.) We will have to await the Supreme Court of Canada's decision on this matter.

Dismissal of Information

Dismissal of the indictment has been approved as an appropriate s. 24 remedy in R. v. Holmes (1983), 2 C.C.C. (3d) 573 (Ont. H.C.J.), R. v. Beason (1983), 7 C.C.C. (3d) 20 (Ont. C.A.) and R. v. Cameron (1982), 70 C.C.C. (2d) 532 (Alta. Q.B.), aff'd 3 C.C.C. (3d) 496 (Alta. C.A.). In both Cameron and Beason the Courts explicitly held that a dismissal of the charge is the only appropriate remedy where the accused's right to be tried within a reasonable time (s. 11(b)) has been

contravened. Similar results were obtained in Re Rahey (1983), 9 C.C.C. (3d) 385 (N.S.S.C.) (since reversed) where Glube C.J.T.D. held in a situation of "inordinate and unconscionable" delay that it would not be appropriate to order that the trial be expedited and "the only remedy considered appropriate and just was to dismiss the charges." Similarly, in R. v. Lucas (1983), 6 C.C.C. (3d) 147 (N.S.C.A.) the Court upheld a trial judge's remedy of dismissing charges "as the appropriate remedy under s. 24(1) of the Charter" where the accused had not been informed of the specific offence within a reasonable time contrary to s. 11(a).

Each of the decisions runs counter to Estey J.'s remarks in Amato, supra, (which was in the abuse of process context, rather than the Charter), that a dismissal of the indictment is inappropriate where the essential elements of the charge are present in the proof before the court. According to Amato a stay would be more appropriate. Martin J.A. in holding in Beason, supra, that dismissal was the only appropriate remedy cited American authority: Strunk a.k.a. Wagner v. U.S. (1973), 412 U.S. 434.

Whether a stay or dismissal is the appropriate remedy in those situations may be completely academic, if Monnin J.A. is correct when he states in R. v. Belton, supra, at 430:

> ... there seems to be no distinction in law between the remedy of dismissal, quashing of an indictment and judicial stay of prosecution, as the result is the same.
>
> ... In essence what he has done is tantamount to a judgment or verdict of acquittal ...

Quashing Process

In Amato, Estey J., had doubted the power of the court to quash regularly instituted and proper criminal proceedings. However, in the context of the Charter, this has occurred regularly. In R. v. Dennis (1983), 8 C.C.C. (3d) 411, (N.W.T.S.C.) de Weerdt J. refused to merely order that a trial be expedited where he had found unreasonable delay. As the accused had been severly prejudiced in his ability to find certain witnesses, combined with other factors, the court was evidently left with no choice but to quash the indictment. To the same effect is Gerein J.'s decision in Re Gray (1982), 70 C.C.C. (2d) 62 (Sask. Q.B.).

Of interest is the Ontario Court of Appeal's treatment of the quashing of an indictment in R. v. Holmes (1983), 4 C.C.C. (3d) 440. That court implicitly recognized that the county court judge could quash the indictment as an appropriate remedy, but such quashing was tantamount to an acquittal from which the Crown could appeal.

The basis for the quashing in the unreasonable delay cases seems to be premised on the dubious notion that on the date the information or indictment was processed, the accused's right to be tried within a reasonable time had been infringed. Accordingly, the document itself could not be said to have been properly instituted.

Excluding Evidence

The leading case here is R. v. Therens (1983), 5 C.C.C. (3d) 409 (Sask. C.A.) leave to appeal to the Supreme Court of Canada granted. Tallis J.A. held that the

power to exclude evidence did not lie solely under s. 24(2). Bayda C.J.S. was of the view that the phrase "appropriate and just in the circumstances" gives the court an unfettered discretion in granting remedies which includes the right to exclude evidence. Under s. 24(2), on the other hand, the court has no discretion, but a mandatory duty, to exclude evidence where the admission of such would bring the administration of justice into disrepute. Therefore, where the administration of justice is not brought into disrepute the majority decided that the court's discretion to exclude evidence continues, where such a remedy would be appropriate and just. It has however been questioned whether the exclusion of evidence can be a just an appropriate remedy where its admission would not bring the administration of justice into disrepute.

Therens has been followed by a number of lower courts each having taken an expansive approach to the interpretation of s. 24(1) vis-a-vis s. 24(2). See: R. v. Feener and R. v. Chafe (1983), 9 W.C.B. 258, (Ont. Co. Ct.); R. v. Francis (1983), 11 W.C.B. 58 (Sask. Prov. Ct.); R. v. Russell (1983), 11 W.C.B. 29 (B.C. Co. Ct.); R. v. Santa (1984), 6 C.R.R. 244 (Sask. Prov. Ct.) at 253.

In R. v. Lajoie (1983), 8 C.C.C. (3d) 353 (N.W.T.S.C.) de Weerdt J. expressly embraced the decision in R. v. Therens, supra, and paused to consider the most appropriate and just remedy. He formed the opinion that a mere civil remedy in trespass against the police officers who had searched the accused's home would not suffice (In Therens, Tallis J.A. noted that the only other alternative to exclusion would be the far more drastic remedy of a stay of proceedings). The appropriate remedy therefore would be the exclusion of the evidence.

In R. v. Ahearn (1983), 4 C.C.C. (3d) 454 (P.E.I.S.C.), Campbell J. stated that the exclusion of evidence under s. 24(1) "has accorded ... compelling assurance to the respondent that his constitutional guarantees are more than mere words". Similarly in R. v. Wright (1984), 11 W.C.B. 279 (Alta Q.B.), Stratton J. stated that if the court were to decline to exclude the evidence under s. 24(1) it "would effectively deprive the accused of any meaningful remedy and would leave the door open to the police to utilize an improper search warrant as a fishing expedition to be conducted in a person's home".

Therens has not been followed or not referred to in other significant decisions concerned with the exclusion of evidence.

In R. v. Gibson (1984), 37 C.R. (3d) 175 (Ont. H.C.J.), Ewaschuk J. held that s. 24(2) sets out the exclusive test for the exclusion of evidence under the Charter. At p. 186:

> The framers of the Charter obviously thought that the exclusion of evidence was the most drastic but also the most important remedy in criminal proceedings and merited its own specific standard in s. 24(2). Hence a court does not possess an unfettered subjective discretion under s. 24(1) to exclude evidence obtained as a result of a Charter violation, but instead must have resort to the objective standard in s. 24(2).

MacKinnon A.C.J.O. in R. v. Manninen (1984), 37 C.R. (3d) 162 (Ont. C.A.) at 172, in commenting on s. 24(2) only stated "I do not believe there is any area of discretion left to the court under the subsection". Similarly, Seaton J.A. in R. v. Collins (1983), 5 C.C.C. (3d) 141 (B.C.C.A.) at 151 said: "Nothing in s. 24(2) suggests a

discretion". It should be noted that no reference was made by either learned jurist as to whether such discretion to exclude evidence could remain under s. 24(1). It would have been most helpful had these courts referred to, and dealt with, the issue raised in Therens. In that regard the Ontario Court of Appeal did refer to Therens in R. v. Simmons (1982), 11 W.C.B. 463, and declined to adopt its reasoning.

Therens was specifically not followed in R. v. Lambert (1984), 4 C.R.D. 200.30-07 (Alta. Q.B.). Montgomery J. stated that procedural remedies relating to evidence obtained in contravention of the Charter are clearly governed by s. 24(2) only. In R. v. Hatter (1983), 3 C.R.D. 200.30-10 (B.C.Co. Ct.), Murphy Co. Ct. J. noted that his Court of Appeal had not mentioned Therens, and the availability of s. 24(1), in their decision in Collins, supra. Accordingly, he felt, Collins implicitly reinforced the dissenting judgment in Therens and s. 24(2) could only be used to exclude evidence. This view is reinforced by the opening words of s. 24(2) which refer to "proceedings under s. 24(1)". See: R. v. Siegal, supra, (Ont. H.C.J.).

In R. v. Acevedo (1983), 11 W.C.B. 130 (Ont. Co. Ct.) and in R. v. Keaney (1983), 11 W.C.B. 275 (B.C. Co. Ct.) the learned judges did not follow Therens, holding that s. 24(2) provides the only means for the exclusion of evidence.

Clearly the determination as to whether evidence can be excluded under s. 24(1) is another question for which we will have to await the Supreme Court of Canada's resolution.

Crown Disclosure

In R. v. Rosamond (1983), 24 Sask. R. 129 (Sask. Q.B.), Vancise J. ordered a provisional stay of proceedings until the Crown provided full disclosure of witnesses and their statements, documents and the transcripts of a co-accused's preliminary inquiry. He decided that non-compliance with the above requirement violated the accused's right to a fair trial and the remedy was required to minimize the prejudice suffered by her for having been put in an unequal position vis-a-vis one of her co-accused.

Costs and Tortious Damages

In R. v. Crossman (1984), 12 W.C.B. 166, (F.C.T.D.), Walsh J. awarded $500 in damages in a suit brought against the police for denying a citizen his right to legal counsel under the Charter, in a situation where counsel was just outside the interview room but was refused entry until after the police questioned his client. See also R. v. Germain (1983), 12 W.C.B. 35 (Alta. Q.B.).

In R. v. Halpert (1983), 6 C.R.R. 136, Ross Ont. Prov. Ct. J. found that the impugned legislation itself contained such serious Charter infringements that the appropriate remedy, in addition to quashing the informations, was to award costs to the accused against the government.

Of special significance is the decisions of De Cary J. awarding an inmate $18,136 for pecuniary loss, psychological damages, medical care, and exemplary

damages, primarily for the denial of s. 7's guarantee of security of the person: Collin v. Lussier (1983), 6 C.R.R 89 (F.C.T.D.). The applicant was a legal affairs clerk who was involved in inmates' committees and in preparing collective actions on behalf of the inmates. It was clear that the authorities were attempting to transfer him out of the institution in order to eliminate his influence. The damages were awarded in concert with certiorari to quash the transfer order.

By and large most criminal courts have, however, raised the possibility of a damage award being granted but have declined to do so on the basis that the Charter does not grant to them any remedial power that it did not possess prior to April 17, 1982. The criminal courts invariably state that damage awards would have to be sought in a separate civil action. See: R. v. Sybrandy, 9 W.C.B. 328 (Ont. Prov. Ct.), R. v. Coglan (1983), 11 W.C.B. 130 (Man. Prov. Ct.), Lambert v. A.G. Quebec (1982), 31 C.R. (3d) 249 (Que. S.C.). In Lane v. Schmeichel (1983), 20 A.C.W.S. (2d) 547 (Sask. C.A.), the court struck out a pleading in a wrongful dismissal case alleging a deprivation by the employer of the employee's fundamental freedoms. However, leave to amend was granted to plead the Charter as going to the issue of whether the dismissal itself was "unlawful".

Reading Down

The recent decision of R. v. Rao (1984), 12 W.C.B. 118 (Ont. C.A.) involved the warrantless search of the accused's business office based on information which the police had had in their possession 18 hours prior to the search. Martin J.A. found that the search violated the guarantee in s. 8 of the Charter "to be secure

against unreasonable search and seizure", even though the warrantless search was prima facie legal by virtue of s. 10(1)(a) of the Narcotic Control Act. The trial judge had ruled s. 10(1)(a) to be unconstitutional. Martin J.A., on the other hand, found at p. 47 of the decision:

> In my view, the warrantless search powers conferred by s. 10(1)(a) of the Narcotic Control Act are not on their face necessarily unreasonable and do not necessarily collide with the Charter's protection against unreasonable searches and seizures ....
>
> In my opinion, s. 10(1)(a) is inoperative to the extent that it authorizes the search of a person's office without a warrant, in the absence of circumstances which make the obtaining of a warrant impracticable; beyond that it is unnecessary to go in the present case. (emphasis added)

What His Lordship in effect has done is to "read down" s. 10(1)(a) so as to only allow for the search of a place other than a dwelling-house where the condition underlined above has been met. In this way, the provision in the Narcotics Control Act would become consistent with s. 8 of the Charter.

The same court had held in R. v. Oakes, (1983), 2 C.C.C. (3d) 399 that it was not entitled to rewrite the provisions of s. 8 of the same Act or apply it only on a case by case basis. However, His Lordship points out that the presumption in s. 8 was on its face unreasonable, whereas, in this case, it was the manner in which s. 10(1)(a) was practiced or enforced which was unreasonable. Accordingly, this was an appropriate situation to "read down" (or effectively add to) the words of the provision.

Another "reading down" occured in Reynolds v. A.G.B.C. (unreported, released May 25, 1984). In that case the British Columbia Court of Appeal decided, by a 2 to 1 majority, that a provincial statute which prohibited convicted persons who had not completed their sentence from voting in a provincial election, did not apply to persons on probation. However, the legislation continued to apply to convicted persons who had not completed their terms of imprisonment.

CONCLUSION

The remedy provisions of the Constitution Act, 1982 have, by and large, followed expected courses. Section 52 has been frequently used to declare legislation invalid as violative of the Charter and standing has been liberally granted to applicant's not having a direct role in the main litigation.

Section 24 has also followed the expected view that there are such separate and distinct things as criminal and civil remedies awarded only in criminal and civil proceedings with no overlap between them. Furthermore, a court of competent jurisdiction has generally been restricted to a court having initial jurisdiction over the subject matter of the litigation. But courts have been somewhat more creative in expanding their arsenal of criminal as opposed to civil remedies. As well, s. 24(2) has generally been construed as providing the exclusive test for the rejection of evidence.

It remains however, as has often been stated, for the Supreme Court of Canada to clarify the true interrelationship between ss. 52 and 24, and their exact scope and meaning. We await with hopeful expectation, guidance, in that respect, from the highest Court in the land.